INSOL INTERNATIONAL

SARIPA

PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE

COURSE NOTES 2022

CONTENTS

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PART A – GENERAL INTRODUCTION

CHAPTER 1 – INTRODUCTION

1.1 History of the Programme in South African Insolvency Law and Practice

The Programme in South African Insolvency Law and Practice, offered by INSOL International in conjunction with the South African Restructuring and Insolvency Practitioners Association (SARIPA), has been designed to provide registered candidates with comprehensive training in South African insolvency law and practice, and covers all aspects of insolvency in South Africa. The course also includes a module on business rescue and compromises. The programme is aimed at providing a sound theoretical understanding of the key principles of South African insolvency law, whilst introducing candidates to the various issues that arise in practice. The programme and its materials have been prepared by experts in practice and academia and reflects a wide pool of specialised expertise. As such, the programme is well suited for inexperienced practitioners or new entrants to the field of insolvency that wish to obtain a sound foundation of the basics of South African insolvency law. Whilst this course is being presented under the co-banner of INSOL International for the first time in 2022, this course was first introduced in 1994 and has seen various iterations since then, first when it was known as the AIPSA course (as SARIPA was then known – the Association of Insolvency Practitioners of South Africa) and now under SARIPA.

Candidates registered for the programme may find this set of notes quite daunting. Accordingly, it is important to take note that candidates are only required to know (and will be examined on) the main text contained in these notes. Candidates will not be examined on the information contained in the footnotes. The additional information provided in the footnotes is for information and further research, for those looking for more detail. The whole idea of the notes is that they will not merely serve as the information required to pass the course, but can also be used as a reference source in practice. The notes should therefore be seen as a practice guide that will stand you in good stead long after the course has been completed.

Because the course is not aimed solely at insolvency practitioners but also at other persons such as members of the legal profession, auditors, employees of credit institutions, bankers and government officials involved in the administration of insolvent estates, the notes will deal with legal rules and principles in so far as they are necessary for an understanding of insolvency administration in practice.

1.2 Objectives / Aims of Course

The aims and outcomes of the course can be set out in generic terms as follows:

Aims

After having completed the course, candidates should have a good understanding of the following:

- The background of the development of insolvency law in South Africa;
- The application of the various pieces of primary and secondary legislation governing insolvency law in South Africa;
- The operation of all primary and secondary legislation as well as case law governing bankruptcy, liquidation, business rescue and compromises in South Africa;
- The drafting of liquidation and distribution accounts in South Africa;
- The rules relating to cross-border insolvency and the recognition of foreign judgments in South Africa.

Objectives

After having completed the course, candidates attending the course should be able to:

- Answer direct and multiple-choice type questions relating to the content of the course;
- Be able to write an essay on any aspect of insolvency law in South Africa;
- Be able to answer questions based on a set of facts relating to insolvency law in South Africa;
- Be able to draft a liquidation and distribution account based on a predetermined set of facts.

1.3 Scope of the course

Insolvency administration is an interesting but also an extremely challenging subject. In a sense the trustee or liquidator steps into the shoes of the insolvent or company in liquidation. Not only is the insolvency practitioner confronted with legal problems experienced by the insolvent or company before sequestration or liquidation, but he or she must also take account of the effect of insolvency or liquidation on the pre-existing position. It is obviously not possible to deal with all the legal problems that may be experienced by an insolvency practitioner in practice. It is also not expected of an insolvency practitioner to deal with all legal problems personally, as a practitioner is entitled to employ attorneys and advocates to deal with the legal problems they encounter.

It should also be understood that this course is not intended as a substitute for, or a duplication of, legal courses on the law of insolvency. The focus of this course is on practical matters that receive scant or inadequate attention in most textbooks and legal courses.

1.4 Recommended textbooks for further reference

Students who require more information on the issues covered in these notes are referred to the textbooks below. Please note that throughout the notes reference is made to these publications. **Students are not required to purchase these books for the purposes of this course**.

- *Meskin, Insolvency Law and its operation in winding-up*, J Kunst, A Boraine; and D Burdette (LexisNexis loose-leaf publication) (referred to as *Meskin* in these notes);
- *Mars, The Law of Insolvency in South Africa*, E Bertelsmann *et al* (Juta, 10th Ed) (referred to as *Mars* in these notes);
- *Henochsberg on the Companies Act 71 of 2008 Vol II*, P Delport and Q Vorster (LexisNexis, loose-leaf publication) (referred to as *Henochsberg* in these notes);
- *Levenstein, South African Business Rescue Procedure,* E Levenstein (LexisNexis loose-leaf publication) (referred to as *Levenstein* in these notes).

However, students are expected to have access to the following statutes (which can be downloaded for free from the Internet):

- Insolvency Act of 1936;
- Chapters 1 and 14 of the Companies Act 1973;
- Chapter 2, part G (sections 79-83) and Chapter 6 of the Companies Act 2008; and
- Section 1 and Part IX of the Close Corporations Act 1984.

1.5 Vocabulary used in lecture notes and short explanation of key concepts

The mode of citation for the recommended textbooks is indicated in paragraph 1.4 above. The following words and phrases are used in the lecture notes with the meaning indicated:

Companies Act

The Companies Act 61 of 1973. This Act was repealed by the Companies Act 71 of 2008, but most of the winding-up provisions in Chapter 14 of the 1973 Act will continue to apply to insolvent companies until the Minister of Trade and Industry determines a date when the Minister is satisfied that alternative legislation has been brought into force adequately

providing for the winding-up and liquidation of insolvent companies.[1] Chapter 14 of the previous Act will also apply to solvent companies, provided that sections 343 (modes of winding-up), 344 (circumstances in which company may be wound up by court), 346 (application for winding-up of company), 348 (commencement of winding-up by court) and 349 to 353 (voluntary winding-up) do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2 of the Companies Act 71 of 2008. Unless the contrary is stated, references to the Companies Act 61 of 1973 in these notes continue to apply despite the repeal of the 1973 Act. The winding-up of solvent companies is dealt with in the Companies Act 71 of 2008, and the provisions of Chapter 6 of the Companies Act 71 of 2008 regulate business rescue proceedings.

Concursus creditorum

In *Walker v Syfret*[2] the court explained the key concept of *concursus creditorum* as follows:

> "The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

This passage and similar remarks by the courts[3] highlight the fundamental purpose of insolvency legislation, which is to secure the realisation of the remaining assets of the insolvent and the distribution of the resulting amounts among creditors in accordance with the order of preference laid down by the law. Although the Master plays a vital role in overseeing the process of winding-up an estate, the process is nonetheless creditor-driven.[4]

The following examples illustrate the application of the principle of *concursus creditorum*. Where no breach of contract has occurred before insolvency, amounts owing by the estate under one contract cannot after insolvency be set off against amounts due to the estate under a separate contract.[5] The trustee or liquidator should take a contract as he finds it. A party to a contract is entitled to rely on a right to cancel a contract that was acquired before insolvency. The *concursus creditorum* does not prevent the solvent party to a contract from raising a defence founded upon the contract upon which it is sued. The trustee or liquidator is not in a better position in relation to enforcement of the contract than the insolvent or company

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1 Continued application of the previous Act to winding-up and liquidation: Item 9, Sch 5, Transitional Arrangements of the Companies Act 71 of 2008.

2 1911 AD 141 at 166. See also *Commissioner, South African Revenue Service v Van der Merwe NO and Others* 2017 (3) SA 34 (SCA), para [9].

3 *Ward v Barrett NO and Another* 1963 (2) SA 546 (A), at 552E-G; *Gainsford and Others NNO v Tanzer Transport (Ply) Ltd* 2014 (3) SA 468 (SCA), para 1.19.

4 *Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* 2017 (3) SA 95 (SCA), para [55].

5 *The Government v Thorne* 1974 (2) SA 1 (A).

would have been in but for the insolvency.[6] A creditor is not entitled to rectification of a contract after insolvency which would increase the preferent claim of the creditor.[7] Although dishonourable conduct by a debtor may not be attributable to a trustee, the estate cannot obtain rights greater than those which the debtor had.[8]

Constitution

The Constitution of the Republic of South Africa, 1996.

Estate or insolvent estate

Includes, unless the contrary is stated, the assets of an insolvent company under liquidation.

Free residue

The portion of the estate that is not subject to the security of secured creditors.

Insolvency Act

The Insolvency Act 24 of 1936.

Master

The Master of the High Court, a public servant who is charged, *inter alia*, with control over the administration of insolvent estates. Section 1 of the Administration of Estates Act 66 of 1965 defines "Master" in relation to any matter, property or estate, as the Master, Deputy Master or Assistant Master of the High Court who has jurisdiction in respect of the matter, property or estate.[9]

Real rights and personal rights

Rights may be classified in accordance with the differing nature of their objects. In view of this classification, the object of a real right is a thing which thing itself is bound to the holder of

6 *Thomas Construction (Pty) Ltd (In Liq) v Grafton Furniture* 1988 (2) SA 546 (A).

7 *Nedbank Ltd v Chance* 2008 (4) SA 209 (D); followed in *Standard Bank of South Africa Ltd v Strydom NO* [2019] JOL 45207(GP), para [84].

8 *Afrisure v Watson* 2009 (2) SA 127 (SCA), para [41].

9 In *Lutchman NO in re Air Mall (Pty) Ltd (in provisional liquidation)*, Case 7728/09 North Gauteng High Court, Pretoria, dated 20 February 2009, it was decided that the Master, Johannesburg, cannot make appointments in an estate administered in the office of the Master, Pretoria, and that the Master, Johannesburg, is entitled to remove a liquidators appointed under these circumstances. *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* (306/2019) [2019] ZASCA 152 (22 November 2019); [2019] JOL 46303 (SCA), para [19], decided that the area of jurisdiction of the Master in Pretoria includes the entire area of jurisdiction of the Master in Johannesburg, in the same way that the former Transvaal Provincial Division exercised concurrent jurisdiction over the entire area of jurisdiction of the former Witwatersrand Local Division. It is open to parties requiring the assistance of the Master to use the office of either where their areas of jurisdiction overlap.

the right. In terms of a personal right, on the other hand, a person (the debtor) becomes bound to the holder of the right (the creditor) to render a particular performance, that is, to do or not to do or to give something, the particular performance being the object of the right.

A person will only be entitled to a real right in a thing when such a right is vested in him, for instance where the ownership of immovable property or a mortgage bond over such thing is registered in the person's favour in a deeds registry the person will become the owner or the mortgagee respectively. Real rights can be classified as rights in your own property (ownership) or rights in the property of another (a limited real right) such as servitudes or real security.[10]

A legal obligation ("a legal tie") between two or more persons gives rise to a personal right (a debt relationship) in terms of which the one can claim performance from the other, who then has a legal duty to perform. Legal obligations are created by means of a contract, a delict or various other juristic facts such as unjustified enrichment, *negotiorum gestio*, or family relationships (for instance the duty of a parent to support his children).

Real rights in immovable property (things) are usually transferred from one person to another (or created) by way of registration of such rights in the deeds registry, whilst real rights in movable things are usually transferred (created) by way of physical delivery (or possession) of the thing.

A personal right, for instance the right of A to claim R500 from B in terms of a loan agreement, can be transferred by way of a cession agreement (cession) to C even without the consent of B. B may transfer his duty to pay the R500 to C by way of delegation, but A must give his consent before delegation can take place. Assignment takes place when a party simultaneously cedes his rights and delegates his duties.

Preferent creditors

Creditors paid from the free residue before ordinary unsecured (concurrent) creditors are paid.

Secured creditor

The holder of a special mortgage bond, landlord's legal hypothec, pledge (including session of book debts, policies, etc), right of retention, or the hypothec of the seller of property in terms of an instalment agreement (instalment sale transaction or hire-purchase).

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10 A usufruct is a personal servitude. An oral agreement that creates a usufruct is of no force and effect. A usufruct created in a written agreement becomes a real right enforceable against the world when it has been registered in the Deeds Office. A liquidator cannot be compelled to register a usufruct after liquidation – *Troskie v Liquidator of RSD Construction CC* (71322/2010) [2015] GP (8 May 2015), paras [23], [25], [33], [34], and [45].

Security

This term carries a broader meaning in terms of the common law as it may encompass personal security where a third party binds himself contractually to a creditor for the performance of an obligation of another, that is suretyship, or real security where a debtor binds some or all his assets as security for the debt. In terms of the Insolvency Act, security entails property of the estate over which a secured creditor has a preferent right, in other words, real security. The various forms of real security in terms of the common law are pledge, mortgage, tacit hypothec of the landlord and liens (rights of retention). The debtor may also cede a personal right to which he is entitled as security to a creditor, which is then treated as a pledge that confers real security over the proceeds of the personal right. All these forms of security are recognised by the Insolvency Act, subject to the limitations set out in the Act.

Real security is preferred to personal security due to the advantages it has for the creditor. In the case of real security a specified thing is separated to secure the performance of the obligation by the debtor in which instance the creditor enjoys priority over other creditors without such security. Personal security (suretyship) entails the risk that the creditor may find that it can neither get performance from the debtor or the surety as the creditor merely acquires an additional personal right against the surety. Both personal and real security are dependent upon the existence of a so-called principal debt or obligation, which entails that the security can only exist in so far and for so long as the principal debt exists. This is referred to as the accessory nature of security.[11]

Winding-up regulations

Regulations in terms of section 15 of the Companies Act 1973 for the Winding-up and Judicial Management of Companies.[12]

1.6 Effect of constitutional law on insolvency Law

The effect of the Constitution on the law in general, and in particular on insolvency law, has been determined by court decisions on the application of the Constitution. Decisions of the courts on constitutional issues that have an effect on insolvency law are discussed in the appropriate places below. These notes do not discuss constitutional law in general or related legislation in the form of the Promotion of Access to Information Act and the Promotion of Administrative Justice Act.

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11 Where a business rescue plan provides for payment to a creditor in full and final settlement, the creditor cannot enforce a related claim against a surety – *ABSA Bank Ltd v Du Toit* (7313/13) [2013] ZAWCHC (13 December 2013).

12 See Government Notice R2490 in *Government Gazette* 4128 of 28 December 1973, as amended.

1.7 An overview of insolvency law

1.7.1 Origins of insolvency law

When dealing with South African law it is important to note that the common law is Roman-Dutch law. English law did however influence South African law, in particular the law of insolvency, negotiable instruments and company law. South Africa also adopted the English system of precedent. Although South African law is not codified, the common law – in so far as legislation has not abolished or altered a particular rule thereof – as well as precedents set by the High Courts, are primary sources of the law. In terms of the Constitution, legislation may be tested by the courts in order to establish its constitutionality, the Constitution being the supreme law of the land.

Leading textbooks on the subject cite the Insolvency Ordinance of Amsterdam of 1777 as the foundation of South African insolvency law.[13] South Africa's first insolvency legislation was introduced in 1829 in the former Cape Colony and it introduced aspects of English bankruptcy law. Currently the law relating to insolvent persons is regulated by Insolvency Act 1936 which came into force on 1 July 1936. A Bill to reform South African insolvency law was approved by Cabinet in 2003 and the latest Unified Insolvency Bill was in the final stages of drafting in late 2015, but neither have been introduced as a Bill in Parliament.

1.7.2 Options available to a debtor unable to pay debts

A debtor who is unable to pay his debts can act in many different ways when his creditors claim payment from him. A few examples are given below.

1.7.2.1 Administration

A debtor could apply for his estate to be administered in terms of section 74 of the Magistrate's Court Act 32 of 1944. Such an application will only be granted where his debts do not exceed R50 000. Where the magistrates court grants such an application the debtor must make payments to the administrator appointed by the court who distributes funds to creditors.

1.7.2.2 Debt review in terms of the National Credit Act 34 of 2005

A "consumer" (a party to a credit agreement to which the National Credit Act applies) may apply to a debt counsellor to have the consumer declared over-indebted. If the counsellor concludes that the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make an order that one or more of the consumer's obligations in terms of a credit agreement be re-arranged by, for example, extending the

13 C Smith, *The Law of Insolvency* (Butterworths, 1988), 6.

period and reducing the amount of payments accordingly, or by postponing the repayment dates.[14]

1.7.2.3 Voluntary surrender

Where the debtor is factually insolvent, he or she can voluntarily surrender his estate if the necessary requirements, contemplated in the Insolvency Act, are met.

1.7.2.4 Compulsory sequestration

The debtor could also conclude an agreement for the exemption from obligations or commitments, or a novation with any or all of his creditors. Where a debtor suggests the conclusion of an agreement for the exemption of obligations or commitments, or where he or she gives written notice to his creditors of the inability to pay debts, he or she commits an act of insolvency. The creditor may then apply for the compulsory sequestration of the debtor on the grounds of the act of insolvency, in the manner contemplated in the Insolvency Act.

1.7.2.5 Debt enforcement

Where a debtor fails to fulfil his contractual obligations or satisfy his liabilities, each and every creditor could, individually, claim performance from the debtor. A creditor could, for example, demand payment by the debtor. Where the debtor fails to respond, the creditor could issue a summons and obtain a civil judgement against him. The creditor could also attach the goods of the debtor if the latter still does not pay the debt. The goods could then be sold in execution at a judicial sale and the creditor would be entitled to claim from the proceeds of such sale. Every creditor has to follow this procedure on its own. It could happen that the debtor's assets are not sufficient to satisfy all claims against the estate. The creditors could jointly apply for the sequestration of the debtor's estate. This activates the collective execution procedure available to the creditors in terms of the insolvency law. The purpose of this procedure is to pay at least a dividend to all the concurrent creditors, instead of satisfying the claims of only a few of the creditors. The main objective of insolvency law is to provide for the orderly distribution of the debtor's assets where the assets are insufficient to satisfy all the creditors' claims.

1.7.3 Brief overview of insolvency proceedings

The law of insolvency is regulated mainly by the Insolvency Act. It is based on two basic principles, namely (i) the right that creditors have to satisfy their claims through the process of the execution of assets and (ii) the concurrency of creditors who do not have a preferent or secured claim. The debtor loses control over his estate as soon as an order for sequestration is issued by the High Court. Control initially vests in the Master and then in the

[14] It was argued that sequestration will not be to the advantage of creditors. This argument was based mainly on the fact that the respondent had been placed under debt review in terms of the National Credit Act 2005.

trustee once appointed by the Master. The trustee realises the assets and distributes the proceeds amongst the creditors as specified in the Act.

The sequestration brings about a *concursus creditorum* as the general interest of the creditors as a group ranks in priority over the interests of the individual creditors. Once sequestration has commenced, one creditor cannot, through the process of execution, receive full payment of its claim at the expense of the claims of other creditors. The creditors cannot attach any other assets obtained by the insolvent after his sequestration. The debtor cannot alienate or burden any property, as his contractual capacity remains limited until the date of his rehabilitation. The Insolvency Act provides for the setting aside of impeachable transactions made before date of sequestration to the detriment of creditors, or which prefers certain creditors above the others. The Act further provides for procedures for the collection of assets and for criminal liability where certain prohibited acts, which constitute crimes in terms of the Act, are committed.

The Minister of Justice may enact regulations which may not be contrary to the Act itself. The Minister may even make a final decision regarding the appointment of a trustee or liquidator. The trustee or liquidator has to fulfil his functions under supervision of the Master, subject to the directions and wishes of the creditors. The creditors can in this way exercise an element of control over the insolvency proceedings. The Sheriff also fulfils an important function by attaching the insolvent's goods after the date of sequestration.

1.7.4 Friendly sequestrations

The debtor is relieved from his status as an insolvent after rehabilitation, at which time the debtor receives a discharge from his pre-sequestration debts.

Although it is not a prime object of our insolvency law to afford the individual debtor a discharge of pre-sequestration debts (also known as a "fresh start"), this is one of the consequences of rehabilitation. As a result of this, debtors sometimes abuse sequestration proceedings in order to obtain a discharge. In practice this is done by what has become known as a "friendly sequestration".[15] In such an instance a friend or family member of the debtor applies for the debtor's compulsory sequestration, instead of the debtor applying himself by way of voluntary surrender. It is accepted that it is less cumbersome to obtain a sequestration order by way of compulsory sequestration than by way of voluntary surrender and this is why this practice has developed under the South African insolvency system.

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15 Although the fact that an application for sequestration may be a friendly one will not in itself preclude the grant of a provisional order, a court should scrutinise such applications with particular care in order to protect the interests of creditors and to be satisfied that the application was not brought primarily for the relief of a harassed debtor – *Econocom 686 CC v Vivienne Edmond Keswell Family Trust* [2009] JOL 24681 (KZD); *Ex parte Dube* [2009] JOL 24731 (KZD); *Ex parte Gumede* [2010] JOL 24744 (KZD). An application can be refused if the application fails to disclose detailed reasons for the insolvency, movable assets and income and expenditure – *Ex parte Bouwer* 2009 (6) SA 382 (GNP). *Cf*, *Ex parte Mark Shmukler-Tshiko and Another and 13 Other Cases* [2013] JOL 29999 (GSJ); *Nedbank Ltd (formerly t/a Nedcor Bank Ltd) and Another v Abrahams and Another* (1318/2012)[2013] ZAECPEHC 11 (26 February 2013), paras [8] to [12]; *Huntrex 337 (Pty) Ltd t/a Huntrex Debt Collection Services v Vosloo and Another* 2014 (1) SA 227 (GNP).

Unfortunately, too many debtors are sequestrated in this fashion, leaving no real advantage to creditors. A statistical survey revealed that concurrent creditors only receive dividends in 28% of sequestration cases, while they have to make a contribution towards the administration costs of insolvent estates in 40% of the cases included in the survey. These statistics signify that a proper alternative "fresh start" procedure outside the ambit of the insolvency procedures is required. The same need exists for debtors who cannot succeed in obtaining a sequestration order due to the stringent requirements for voluntary surrender.[16]

1.7.5 Alternatives to insolvency

South African law provides limited alternative measures to debtors who are pressed by their creditors, but these are not satisfactory in all respects. A magistrate's court may grant an order providing for the administration of a person's estate if the debts of the debtor do not exceed R50,000 and a composition based on consent is also a possibility. In terms of the Agricultural Credit Act 28 of 1966, a farmer may obtain a stay of legal proceedings with a view to reaching a compromise with his creditors.

Unless a company is engaged in business rescue proceedings, the board of the company (or a liquidator of the company being wound up) may, in terms of section 155 of the Companies Act 2008, propose a compromise or arrangement of its financial obligations to all of its creditors, or to all of the members or any class of its creditors, at a meeting convened with notice to the creditors and the Companies and Intellectual Property Commission.[17]

1.7.6 Business rescue for companies

Judicial management, the previous corporate rescue mechanism under the 1973 Companies Act, was not a success in South Africa.[18] Some of the reasons for this were the delays and costs occasioned by two court applications, the lack of an automatic moratorium, reliance by the judiciary on cases decided under the Companies Act of 1926 (which were based on differently worded provisions and substantially different social perceptions regarding corporate rescue and bankruptcy in general), the main emphasis on the protection of the interests of creditors (rather than on the rescue of the company or its business) and the heavy burden of proof on the applicant (who had to prove a reasonable probability – not merely a possibility – that the company would be able to pay its debts or meet its obligations as they fall due and become a successful concern once placed under judicial management.[19]

The Companies Act 71 of 2008 repealed the judicial management provisions under the 1973 Companies Act and Chapter 6 of the 2008 Act makes provision for business rescue

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16 A Boraine and M Roestoff, "Vriendskaplike sekwestrasies - 'n produk van verouderde regsbeginsels?", 1993 *De Jure* 229; 1994 *De Jure* 31.

17 Companies Act 2008, s 155, which repealed ss 311 – 314 of the Companies Act 1973. Section 155 is discussed below.

18 See *Levenstein* 3-5 – 3-11.

19 A Loubser, "Judicial management as a business rescue procedure in South African corporate law", 2004 *SA Merc LJ* 137.

proceedings initiated by the company itself (via a board resolution) or an affected person (such as a creditor or employee) by way of a High Court application. Business rescue proceedings are aimed at facilitating the rehabilitation of a financially distressed company in a manner that balances the rights and interests of all relevant stakeholders. This is achieved by reorganising or restructuring the distressed company's affairs and business in a manner that maximises the likelihood of the company continuing to exist on a solvent basis as a commercially viable entity.[20]

In brief, the business rescue process entails the temporary supervision of the company, and the management of its affairs by a business rescue practitioner. A central feature of business rescue proceedings is the temporary moratorium on the rights of claimants against the company, for the duration of the business rescue proceedings. The general moratorium against claims provides some breathing space for financially distressed companies and provides such companies with the opportunity to restructure their affairs.[21] Another critical element of the business rescue process is the development and implementation, if approved, of a business rescue plan. A business rescue plan may envisage the company continuing in existence on a solvent basis, or if that is not possible, the plan may contemplate providing the company's creditors or shareholders with a better return than would result from the immediate liquidation of the company. The business rescue procedure is discussed in detail in a separate Chapter below.[22]

Self-Assessment Questions

Question 1

Briefly discuss the important concept of *concursus creditorum* and its impact on the claims of individual creditors against a debtor (individual or company). (5)

Question 2

True or False: The primary aim of South African insolvency law is to afford individual debtors a "fresh start" and a discharge of pre-sequestration debts, by way of the sequestration procedure. (1)

For feedback on this self-assessment exercise, see Appendix A

20 See *Levenstein* 7-1 – 7-6.
21 See *Levenstein* 9-3.
22 See Chapter 31 of the programme – Business Rescue and Compromises.

CHAPTER 8 – DATE OF SEQUESTRATION AND COMMENCEMENT OF LIQUIDATION

8.1 Date of sequestration

The Insolvency Act refers to the sequestration of an estate to indicate after which date the provision in question applies. Section 2 of the Act contains the following definition:

> "In this Act unless inconsistent with the context-
> 'sequestration order' means any order of court whereby an estate is sequestrated and includes a provisional order, when it has not been set aside."

In the case of compulsory sequestration, the date of sequestration of an estate is the date of the provisional order; provided, of course, that the order has not been set aside. In the case of voluntary surrender there is no provisional order and the date of the sequestration of the estate is the date of the (final) order that accepts the surrender and sequestrates the estate.

8.2 Date of liquidation / commencement of liquidation

See Chapter XX where the date of liquidation / commencement of liquidation is dealt with in full.

CHAPTER 9 – SETTING ASIDE OF ORDERS, APPEAL AND REVIEW

9.1 Setting aside or rescission of orders

9.1.1 Sequestration orders

In terms of section 149(2) of the Insolvency Act, the court may rescind or vary any order made by it under the provisions of the Act. An application under section 149(2) of the Insolvency Act for a provisional or final sequestration order to be set aside may be brought both where the order should never have been granted because it was incorrectly or fraudulently obtained, and also where it was properly made but supervening factors made its recission or variation necessary or desirable.[23] The court is, however, not empowered to suspend the operation of a provisional sequestration order and thereby prevent the exercise of the powers and the performance of the duties by the provisional trustee.[24]

The filing of an application to rescind a final sequestration order does not suspend the operation of the sequestration order.[25]

9.1.2 Winding-up orders

In terms of section 354(1) of the Companies Act 1973, the court may at any time after the commencement of a winding-up, make an order staying or setting aside the proceedings or the continuance of a voluntary winding-up on the application of a liquidator, creditor or shareholder if it is proved to the satisfaction of the court that all proceedings ought to be stayed or set aside.[26] In *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd*[27] it was held that section 354(1) must be invoked to have the final liquidation order set aside, thereby excluding the common-law grounds. This section is wide enough to cover both the situation where the winding-up order should not have occurred at all and the one where the application for rescission is brought as a result of events that happened after the winding-up was instituted. The question whether the company would have been

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23 *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP); *Nedbank Limited v Spencer* 2015 JDR 0503 (GP).

24 *Mondi Limited v Rhodes* unreported case number 1794/97 in the Durban High Court, discussed in paragraph 5 of AIPSA's July 1997 Newsletter to Members.

25 *Sholto Douglas NO and Others v Gobo Gcora Construction and Project Management CC and Others* [2014] JOL 31988 (ECP); *Hlumisa Technologies (Pty) Ltd and Another v Nedbank Ltd and Oth*ers 2020(4) SA 553 (ECG)..

26 When a court embarks upon reconsideration of an order, it takes into account all matters then before it in the affidavits for reconsideration, including that which might conceivably portray a different set of circumstances to that before the court earlier. In *C and C Restaurant Group (Pty) Ltd and Another v Townsend; In re: Townsend v C and C Restaurant Group (Pty) Ltd* [2019] JOL 46109 (WCC), the court took cognisance of evidence adduced, showing that the respondent had been considering opposing the winding-up application just a couple of days before the hearing but then instructed his attorney not to proceed with the opposition. The matter was heard in default of appearance to oppose and not *ex parte*. The respondent was accordingly not permitted to have a second bite at the cherry and ask for the proceedings to commence *de novo*. He had to accept the *status quo* and consider his position on the return day of the rule *nisi*.

27 1998 (3) SA 175 (SCA).

liquidated by the court without all the issues pertaining to the company's situation having been ventilated, cannot be decided when application is made to rescind the liquidation order. All the court is requested to find is that the company has a *bona fide* defence against the liquidation.[28] The court has a discretion and needs to take into account all surrounding circumstances and the wishes of parties that have an interest in the subject matter.[29] The interests of justice require that applications for rescission of judgments should be brought and heard expeditiously.[30]

A distinction should be drawn between the two situations where an application for setting aside a winding-up order can be made. If the application is made on the basis that the winding-up order should not have been made at all, the order can be granted only in exceptional circumstances. The applicant must provide a *bona fide* defence and explain why the final order was not opposed or appealed.[31]

If the application is based on events that happened after the final winding-up order has been issued, the court may grant the order in any circumstances that have now made it unnecessary or undesirable to continue the winding-up. If only a provisional winding-up order has been issued, the court can simply discharge the rule *nisi*.

An application for the rescission of a final winding-up order does not automatically suspend the operation and execution of the winding-up order.[32] The court may in terms of Rule 45A of the Uniform Rules of Court, suspend the execution of an order as it deems fit.

In practice, the most common cases of the setting aside of orders are the discharge of provisional or final winding-up orders after the sanctioning of a compromise or composition. In *Come What May Properties (Pty) Ltd v Master of the South Gauteng High Court Johannesburg*[33] the court decided that none of the statutory liquidation provisions contained in the Companies Act apply once a liquidation order has been discharged – in this case the confirmation of an account by the Master was not in terms of a statutory provision and the confirmation could not be reviewed. Liquidators must immediately upon the discharge of a company from liquidation, deliver to the company or its directors all its assets. Liquidators' appointments end simultaneously with the discharge and they retain no powers in respect of the company or its assets and have no lien or other form of security over company assets as security for their fees.[34]

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28 *Meso v Matabele Dinare Building Consortium CC* (10370/14) [2014] GP (23 February 2014) para 15.

29 *Ragavan and Another v Kal Tire Mining Services SA (Pty) Ltd and Others* [12 019] JOL 45856 (GP) para [15].

30 *Thompson v Investec Bank Limited* [2014] JOL 31990 (ECP) para [33].

31 *Ward and Another v Smit and Others; In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) para [180].

32 *Hlumisa Technologies and Another v Nedbank Ltd and Others* 2020 (4) SA 553 (ECG) para [20]; *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another* 2016 (6) SA 466 (GJ), para [19].

33 Case No 6414/09, South Gauteng High Court, Johannesburg, dated 12 August 2009.

34 *Recycling and Economic Development Initiative of South Africa NPC v Moodliar and Others and a Related Matter* [2019] 4 All SA 812 (WCC) para [24].

Where the Supreme Court of Appeal substituted the order of the High Court which discharged the provisional order with an order placing the company under final winding-up in *Jung-Fu Tsai v Advocate W Sekete NO*, the order of the Supreme Court of Appeal effectively restored the position to what it was at the time of the granting of the order, including the fact that the two liquidators had been duly appointed by the Master. There was therefore no need for the Master to subsequently make a second appointment of the provisional liquidators.[35]

9.2 Application by Master to set aside sequestration order

At a time when the Master (Pretoria) did not follow the practice of appointing a provisional trustee in almost every estate, he would from time to time give instruction to the State Attorney to apply to court to have the sequestration order set aside in terms of section 54(5) of the Insolvency Act if no trustee was nominated at the first meeting, usually because no creditors had proved claims at the meeting. Few of these applications were successful because it was usually impossible to serve papers on the insolvent. This may be explained by the fact that the insolvent may apply for rehabilitation if creditors do not prove claims within six months after sequestration.[36] Rehabilitation discharges most of the debts of the insolvent,[37] while the setting aside of the sequestration order does not have this effect.

9.3 Appeal against orders

There is no appeal against the granting or refusal of a provisional order of sequestration, or the refusal to accept the voluntary surrender of an estate.[38] The proceedings for the provisional order and the final order are inextricably interlinked. The logical implication of the nullity of the proceedings for the provisional order (for example, because the judge should have recused himself) is that the final order must suffer the same fate. In such a case the consent by the other party to the setting aside of the final order, or leave to appeal against the final order, should be obtained.[39]

9.4 Leave to appeal

Prior to an amendment by Act 129 of 1993, the Appellate Division held that leave to appeal against a sequestration order was not a prerequisite to such an appeal.[40] Section 150 has been amended to the effect that, as for any other appeal, leave to appeal is required in terms of section 20(4) and (5) of the Supreme Court Act 59 of 1959. The Supreme Court Act has been repealed by the Superior Courts Act 10 of 2013. In terms of section 53 of the Superior Courts Act, any reference in any law to the Supreme Court Act 59 of 1959, or a provision of the said Act, must be construed as a reference to Superior Courts Act or a corresponding

35 (17429/2015) [2015] GP (21 July 2015) paras [14] and [15].
36 Section 124(3) of the Insolvency Act.
37 Section 129(1)(b) of the Insolvency Act.
38 Section 150 of the Insolvency Act. See *Gottschalk v Gough* 1997 (4) SA 562 (C) 568D.
39 *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).
40 *Fourie v Drakensberg Koöperasie Bpk* 1988 (3) SA 466 (A).

provision of that Act. Sections 16 to 19 of the Superior Courts Act deal with appeals. Appeals against sequestration orders must be prosecuted with "due expedition".[41]

9.5 Effect of appeal against final order

When an appeal against a final sequestration order has been noted, the administration of the estate continues but no property of the estate may be realised without the written consent of the insolvent.[42]

These provisions apply to a company unable to pay its debts, even where the Master is unaware of these provisions.[43]

9.6 Effect of appeal against winding-up order of a solvent company

In the case of a company able to pay its debts, the provisions of the Insolvency Act cannot be invoked and once leave to appeal has been granted, the winding-up order, both in respect of its operation and its execution, is suspended pending the judgment on appeal. The liquidator's appointment and powers and duties are suspended, subject to possible future reimposition. The suspension of a liquidation order after it has been in force for some time, may be highly disruptive and in some ways undesirable.[44]

In *KNS Construction (Pty) Limited (in liquidation) and Another v Mutual and Federal Insurance Company Limited and Others*[45] the court did not consider whether the company was unable to pay its debts. An appeal was lodged against the winding-up order of the company but the appeal was not yet decided when the company entered into a contract. The court held, with reference to Rule 49(11) of the Uniform Rules,[46] that the company had authority to enter into a contract between the date of commencement of the winding-up and the confirmation of the winding-up order by the Appeal Court. If the company was unable to pay its debts, the provisions of section 150(3) of the Insolvency Act 24 of 1936 would, in terms of section 339 of the Companies Act 1973, apply[47] – the provisions of the Insolvency Act (or similar provisions for a company unable to pay its debts) apply as if no appeal had been noted, provided that no property should be sold without the written consent of the insolvent. Despite the appeal, the company would not have had the authority to enter into a contract.

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41 *Beira v Raphaely-Weiner* 1997 (4) SA 332 (SCA).

42 Section 150(3) of the Insolvency Act. In terms of section 339 of the Companies Act, section 150(3) applies to a company in liquidation unable to pay its debts so that an appeal against the winding-up order does not suspend the operation of the order - see *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 (2) SA 768 (W). See also PA Delport and DA Burdette "The noting of an appeal against a winding-up order: Suspension or continuation?" 2002 *THRHR* 632.

43 *Slabbert, Verster & Malherbe v Die Assistent-Meester en Andere* 1977 (1) SA 107 (NC).

44 *Rentekor v Rheeder* 1988 (4) SA 469 (T).

45 [2015] JOL 32725 (GJ).

46 This rule, which also provided for the suspension of an order pending an application for its rescission, was repealed in May 2015 but an application for leave to appeal or an appeal still suspends the operation and execution of an order pending the decision on the application or appeal (s 18(1) of the Superior Courts Act 2013).

47 Compare *Slabbert, Verster & Malherbe Bpk v Die Assistent-Meester en Andere* 1977 (1) SA 107 (NC).

9.7 Review

Any person aggrieved by any[48] decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors, may bring it under review by the court.[49] A decision by the Master is valid and stands until it is reviewed and set aside.[50] Such a review is of the widest kind and the court is entitled to adjudicate the matter afresh without being limited to the documents or arguments considered by the Master.[51] Note that it is only where the Master has misdirected himself based on the material before him that the court can go further and decide the matter *de novo* (afresh) on evidence that was not before the Master at the time.[52] In *Jung-Fu Tsai v Advocate W Sekete NO*[53] the court held that the applicant who sought to impugn a decision of the Master by reference to a sworn valuation which was not before the Master when he took the decision, was not permitted to introduce the valuation and to argue on the basis thereof that the Master erred or misdirected himself. In terms of section 7(1) of the Promotion of Administrative Justice Act 3 of 2000, any proceedings for judicial review of an administrative action must be instituted without unreasonable delay[54] and not later than 180 days after the date when the applicant became aware of the administrative action.[55] In terms of the Act, the following grounds can be raised to challenge a decision (in this case a decision by the Master):

- failing to apply his mind and closing his eyes to the true facts by ignoring relevant considerations and taking irrelevant considerations into account as contemplated by section 6(2)(e)(iii);

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48 According to the *obiter* decision in *Nedbank Ltd v Mendelow and Another NNO* 2013 (6) SA 130 (SCA) para [25], administrative action entails a decision, or a failure to make a decision, by a functionary and which has a direct legal effect on an individual. A decision must entail some form of choice or evaluation. Thus, while the Master may perform administrative acts in the course of his statutory duties, where the Master has no decision-making function but performs acts that are purely clerical and which the Master is required to do in terms of the statute that so empowers him, the Master is not performing administrative acts within the definition of the PAJA or even under the common law.

49 Section 151 of the Insolvency Act.

50 *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others* 2018 (4) SA 71 (SCA), para [43].

51 *Talacchi v The Master* 1997 (1) SA 702 (T). An appeal against this decision was dismissed on the facts. See *Talacchi v The Master* 1999 (1) SA 959 (SCA).

52 *Al-Kharafi & Sons v Pema NO* 2010 (2) SA 360 (W); *De Montlehu v Mayo NO and Others* 2015 (3) SA 253 (GJ), para [10]; *Van Zyl NO v Master of the High Court of South Africa, Western Cape Division, Cape Town* (7892/2015) [2016] WCC (11 May 2016) para [43].

53 (17429/2015) [2015] GP (21 July 2015) para [45].

54 In *Akoo and Others v Master of the High Court* [2013] JOL 30833 (KZP) dilatoriness in launching the applications to expunge and review was the principal reason for their application failing (para [10]).

55 *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* (308/2011) [2012] ZASCA 45 (29 March 2012) deals with a delay in bringing a review both in terms of the common law and the Promotion of Administrative Justice Act. *Cf Abseq Properties (Pty) Ltd v Maroun Square Shopping Centre (Pty) Ltd* [2012] JOL 28813 (GSJ); *Akoo and Others v Master of the High Court* [2013] JOL 30833 (KZP) para [26]; and *Motala v Master of the North Gauteng High Court and 12 Others* (48748/11) [2017] (GNP) (9 October 2017) paras [32] to [34].

- failure to afford the liquidators an opportunity to respond to new facts which rendered the process procedurally unfair under section 6(2) (c);

- the considerations that the Master took into account when describing the case before him with various epithets of uniqueness are so irrational and devoid of substance that either he is not sufficiently experienced and therefore is acting arbitrarily and capriciously with no insight to make the decisions with which he appears to have been entrusted, or he is actuated by an ulterior purpose or otherwise acting in bad faith as envisaged by section 6(2)(a)(iii),(e)(ii), (e)(v), (e)(vi) or (h).[56]

Administrative action by a person who was biased, or reasonably suspected of bias, can be reviewed in terms of section 6(2)(a)(iii).[57] In terms of section 5, any person who has been adversely affected by administrative action and who has not been provided with the reasons for such action, may request that the person who performed the action furnish written reasons.[58] A decision which no reasonable decision-maker would reach in the circumstances is reviewable in terms of the common law.[59] Unless there are exceptional circumstances, an applicant must exhaust all internal remedies before launching a judicial review in terms of the Promotion of Administrative Justice Act 3 of 2000.[60] The right to review any decision by the Master is subject to the important limitation that the confirmation of a liquidation account is final, save as against a person who has been permitted by the court (before any dividend has been paid under the account), to reopen it.[61] The question of the finality of confirmed liquidation accounts will be discussed under the section dealing with liquidation and distribution accounts.

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56 *Pellow NO v Master of the High Court*, Case No 2010/22522 South Gauteng High Court (30 September 2011); 2012 (2) SA 491 (GSJ) para [26].

57 A bald assertion that the Master was biased, or that there was a reasonable suspicion of bias and that the Master had failed to take into account relevant considerations, was rejected where the applicant did not make an attempt in the papers to show where the Master demonstrated bias or what facts gave rise to a reasonable suspicion of bias on the part of the Master – *Jung-Fu Tsai v Advocate W Sekete NO* (17429/2015) [2015] GP (21 July 2015) para [46].

58 *Cf Jung-Fu Tsai v Advocate W Sekete NO* (17429/2015) [2015] GP (21 July 2015) para [44], where the court indicated that without the Master's reasons for a decision it was not possible to determine whether the Master erred or misdirected himself as regards the materials that served before him when he took the impugned decision.

59 *Pellow NO and Others v Master of the High Court Johannesburg and Others* (21296/11) [2012] ZAGPJHC 270 (9 February 2012) para [15].

60 *Patel v Master of the High Court* (8507/11) [2012] WCHC (16 November 2012) para [12]; s 7(2)(a) and (c) of PAJA.

61 Section 112 of the Insolvency Act and the similar provision of s 408 of the Companies Act.

CHAPTER 15 – IMPEACHABLE DISPOSITIONS AND RELATED REMEDIES

15.1 Introduction

15.1.1 General[62]

A debtor may in principle enter into any valid transaction with another person with the view of *disposing* of his or her rights in property. Such transactions may for instance cause the value of the estate to diminish where the debtor for instance makes a donation, or disposes of property below its value. (This first category of transactions may be viewed as under-value transactions since the value of the estate is usually diminished by them.)

The debtor may also settle a pre-existing debt with a particular creditor, or provide security to a creditor who would have ranked as an unsecured creditor otherwise. This second category of transactions may have the effect that one creditor is preferred above the others in the sense that such a debtor may recieve full payment whilst the others may not be able to get full settlement of their debts after sequestration or liquidation. Such transactions may also take the form of causing the preferred creditor to rank as a secured creditor whilst such creditor would otherwise have ranked as an unsecured creditor.

Such transactions as mentioned above may under normal circumstances cause no concern. However, when they are done under insolvent circumstances, or when the debtor is already factually insolvent at the time of such transactions, they may impact negatively on the *concursus creditorum* should the estate of the debtor be sequestrated, or if winding-up of an entity like a company ensues due to its inability to pay the debt. It must be noted that in this way the insolvency law takes note of certain transactions that transpired even before the *concursus creditorum* commenced.

Over many centuries remedies have therefore developed to assist creditors or the estate representatives of insolvent estates to void certain transactions where they have been entered into under insolvent circumstances of a debtor. To summarise, the purpose of the first category of transactions is to prevent a dissipation of the assets of the estate that would be to the detriment of the creditors, whilst the second category is aimed at preventing some creditors from being preferred above other creditors.

The difference between the two categories of voidable transactions or dispositions has been succintly described in the judgment of *Estate Jager v Whittaker*[63] where the Court stated:

> "the words 'disposition not made for value' mean, in their ordinary signification, a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*. The most obvious example of such a disposition is a donation. **(This would amount to a disposition without value**

[62] See *Meskin* chapter 5 paragraph 31 and *Mars* chapter 13.
[63] 1944 AD 246 250.

> **– own insertion)** If a *lawful* obligation to pay the money in fact exists, then the obvious benefit, which the payer receives in return for such payment, is a discharge from his liability to pay. **(This would amount to a preference – own insertion)** *Such payment decreases his assets, but at the same time it diminishes his liabilities*, and in transactions which are entered into in the ordinary course of business, such a discharge would be value for the payment made." **(own emphasis)**

As far as the sources of In South African debt collection and insolvency law are concerned, the common law remedy in the form of the *actio Pauliana* still applies. In terms of this action, "fraudulent" alienations may be voided as explained below. But the Insolvency Act also provides statutory grounds for prescribed transactions which may be impeached by the trustee or the liquidator following sequestration of the estate of the debtor or its liquidation.

The main types of voidable transactions provided for by the Insolvency Act are based on dispositions that were effected under prescribed conditions, like dipositions without value in terms of section 26 of the Act; voidable and undue preferences provided for in section 29 and 30 respectively; and collusion by section 31. There are also some statutory provisions dealing with related transactions like set-off in terms of section 46 of the Act or where a trader transfers a business without complying with the prescribed publications of notices in terms of section 34.

From a sequestration or (insolvent)liquidation point of view the trustee or liquidator may initiate a legal action to set such transactions aside with the view of reclaiming the disposed property for the benefit of the creditors. But where the trustee or liquidator fails to take action in such instances, individual creditors may do so.

15.1.2 Actio Pauliana

In terms of the common law, any transaction by the debtor aimed at defrauding the creditors by putting them out of pocket through the alienation of assets without receving adequate value in return, can be set aside by the *actio Pauliana*. The transaction must indeed "defraud" the creditors in that the assets of the person alienating the property are diminished by such alienation.[64] Practical examples of such alienations are donations, or under-value transactions where the debtor for instance sells assets below value.

15.1.2.1 What must be proved

The *actio Pauliana* can be instituted by the trustee or liquidator where the debtor is sequestrated or liquidated, as well as where the debtor has not been sequestrated or

[64] *Hockey v Rixom and Smith* 1939 SR 107**;** *Fenhalls v Ebrahim* 1956 (4) SA 723 (D)**;** *Commissioner of Customs and Excise v Bank of Lisbon* 1994 (1) SA 205 (N).

liquidated.[65] These common law principles have not been substituted by provisions of the Insolvency Act.[66] The following elements must however be proved:

(a) the alienation of property must have diminished the debtor's assets;

(b) the recipient must not have received his or her own property – in other words not have received property to which he or she was entitled, for instance in settlement of a due debt;

(c) the debtor-alienator must have had the intention to defraud the creditors, but if he or she received (inadequate) value in return for the alienation, the recipient must have been aware of such an intention to defraud;[67]

(d) the fraud must have caused the detrimental consequences for the creditors, in other words the alienation must have caused a lack of available assets to meet the debt(s).

If these elements are proved, the alienation of the property should be voided and the trustee or liquidator will then be entitled to claim the restitution of the alienated property.

15.1.2.3 The application of the actio Pauliana in- and outside the ambit of sequestration and liquidation

The difference between the *actio Pauliana* and the statutory provisions discussed below, is that sequestration or liquidaion of the debtor who made the alienation is not a requirement for the application of this action. A creditor may thus use the *actio Pauliana* when enforcing a debt outside the ambit of the insolvency law, and a trustee or liquidator may use it after commencement of sequestration or liquidation. It is, however clear, from the fourth requirement for the action that the alienation must have caused a shortfall in the estate,

In *Commissioner of Customs and Excise v Bank of Lisbon* the *actio Pauliana* was for instance applied in a situation where no proof existed that the debtor was in fact insolvent.[68] In *Nedkor Bank Ltd v ABSA Bank*[69] Nugent J stated that he had considerable difficulty reconciling this decision with the principles underlying the *actio Pauliana*. This action is not a remedy for recovery by a claimant of property that he has lost as a result of fraud, it is a remedy to set

65 *Fenhalls v Ebrahim* 1956 (4) SA 723 (D); *Commissioner of Customs and Excise v Bank of Lisbon* 1994 (1) SA 205 (N).

66 *Cornelissen v Universal Caravan Sales* 1971 (3) SA 158 (A); *Coetzer v Coetzer* 1975 (3) SA 931 (EC); *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A).

67 *Scharff's Trustee v Scharff* 1915 TPD 476, and *Trustees Estate Chin v National Bank of South Africa Ltd* 1915 AD 353 at 363. Intention to defraud on the part of the alienator must be proved, even if the alienator did not receive value – *Kommissaris van Binnelandse Inkomste v Willers* 1999 (3) SA 19 (SCA) 29. See also *Pharmaceutical Enterprises (Pty) Ltd and Others v Main Road Centurion 30201 CC t/a Albermarle Pharmacy and Another* [2020] JOL 49266 (GJ), 2021 (5) SA 246 (GJ) at paras 14–25 and 29–29.

68 See also *Nissan South Africa (Pty) Ltd v Marnitz NO* 2005 (1) SA 441 (SCA), para [16], where the court pointed out that interdicts and attachments were not adequate remedies in the event of the insolvency of the debtor.

69 1995 (4) SA (W).

aside a disposition of assets which a debtor has made for the purpose of avoiding the assets falling into his estate on insolvency and thereby becoming available for distribution to his creditors, thereby putting the creditors out of pocket.

15.2 Statutory impeachable dispositions

15.2.1 Definitions

Apart from the above-mentioned common law remedy, the Insolvency Act also makes provision for the setting aside of certain transactions which the insolvent entered into ***before sequestration*** and which prejudiced the creditors or preferred only one or a few of the creditors above the others.[70] In this manner it is attempted, as far as it is practically possible, to maintain equality amongst the creditors retrospectively up to the date of actual insolvency.[71]

As a rule all these different impeachable or voidable dispositions must meet the statutory requirements prescribed for each, and sequestration or liquidation is a precondition for these provisions to apply. It must be noted that they are also in general based on a "disposition" of rights to property as defined in section 2 of the Insolvency Act.

15.2.2 Definition of "disposition"

All the statutory impeachable dispositions deal with "dispositions" of "rights to *property*" within the meaning of the Act. "Disposition" means any transfer or abandonment of rights to property. This includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract providing therefor.[72] A contract of surety, although not specifically mentioned in the definition, is in essence also a contract for payment[73] as well as a contract of sale subject to a suspensive condition –but a disposititon following a court order is excluded and is therefore not a "disposition".[74] A wide meaning must be given to the word "disposition", for very good reasons. It covers not only "any conceivable means of disposing of property", but also the conclusion of "any contract therefore", that is, a contract involving payment, delivery or transfer, for whatever reason, of property.[75] Wherever the term "disposition is used in the Insolvency Act, this definition must as a rule be applied.

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70 Insolvency Act, ss 26 to 33.

71 *Michalow v Premier Milling Co Ltd* 1960 (2) SA 59 (W).

72 See the definitions of "disposition" and "property" in s 2 of the Insolvency Act.

73 *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 (2) SA 597 (A); *Swanee's Boerdery (Edms) Bpk (In Liquidation) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A).

74 *Cronje v Paul Els Investments (Pty) Ltd* 1982 (2) SA 179 (T). *Jackson v Louw NO and Another* [2019] JOL 40769 (ECG) para [33] held that the meaning of "disposition" was wide enough to include the surrender of livestock to lessors to be used for their own benefit and the delivery of equipment in terms of an agreement.

75 *Estate Jager v Whittaker and Another* 1944 AD 246 at 250, quoted with approval in *Nel NO and Others v Bank of Baroda Disposition* [2017] JOL 37751 (KZD) para [7].

15.2.3 Disposal of property of debtor

Take note of the following in regard to the disposal of property by the debtor:

- The property disposed of must, obviously, be property to which the debtor has a right or a provisional right.[76]

- The disposition must have been made to the defendant or reached the defendant, in the sense of being received or the benefit thereof accruing to the defendant.[77]

- It is still a disposition of property if a debtor arranges for a cheque to be drawn by someone in favour of one of the creditors.[78]

- A bank that credits a debtor's overdrawn account with the bank, makes a disposition on the customer's behalf in the Bank's own favour.[79]

- The Supreme Court of Appeal decided in *Wessels NO v De Jager NO*[80] that before acceptance of an inheritance or insurance benefits, the beneficiary had no rights to the benefits that can vest in the insolvent estate, but merely a "competence". It follows that an insolvent's refusal to accept the benefits cannot be set aside as a voidable disposition.

- In the case of the nomination of a beneficiary under an insurance policy where no rights under the policy accrue to the beneficiary prior to the death of the insolvent insured.[81]

15.2.4 Effect of illegality of contract giving rise to a "debt"

The fact that a scheme is an illegal pyramid scheme and amounts to a contravention of various statutes, does not necessarily deprive the liquidators of the insolvent scheme of "debtor" status contemplated by section 29 of the Insolvency Act for purposes of a voidable

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76 *Meyer v Transvaalse Lewendehawe Koöperasie Bpk* 1982 (4) SA 746 (A) and *Jackson v Louw NO and Another* [2019] JOL 40769 (ECG) para [33]. According to *Zamzar Trading (Pty) Ltd (In Liquidation) v Standard Bank of SA Ltd* 2001 (2) SA 508 (W), an unauthorised debit against a banking account is not a "disposition" but an unlawful act which could be rectified or reversed on that ground. No payment on behalf of the insolvent has been proved where there is no allegation that money or the right thereto had come from or been part of the insolvent's estate – *Louw NO v DMA Fishing Enterprises (Pty) Ltd* 2002 (2) SA 163 (SECLD).

77 *Nel NO and Others v Bank of Baroda Disposition* [2017] JOL 37751 (KZD) para [8].

78 *Van Zyl v Turner* 1998 (2) SA 236 (C).

79 *Schmidt and Another NNO v ABSA Bank Ltd* 2002 (6) SA 706 (W) 712H-713A.

80 2000 (4) SA 924 (SCA).

81 *Love and Another v Sanlam Life Insurance Ltd and Another* 2004 (3) SA 445 (SEC). In this case it was held (at 448–449) that the nomination of the applicants as beneficiaries was not a transfer or abandonment of a right vested in the deceased, as the policy stated that no beneficiary would have any rights under the policy before the death of the proposer and the benefits accruing under the policy were not assets in the estate of the deceased prior to his death. The court referred to *Ex Parte MacIntosh NO: In re Estate Barton* 1963 (3) SA 51 (N) at 56B, in which a distinction is drawn between the rights of an insured under a policy during his lifetime and which forms part of his estate, such as the right to surrender it, and the rights of a beneficiary that accrue after the insured's death. See also (unaffected by this case on appeal) *Pieterse v Shrosbree & Others; Shrosbee NO v Love & Others* 2005 (1) SA309 SCA).

preference. It is essential to a proper winding-up that the underlying illegality should be disregarded when interpreting section 29. To do so will, however, not amount to the upholding of an illegal contract.[82]

15.2.5 Compliance with court order an exception

A disposition made in compliance with an order of court is specifically excluded from the definition of "disposition", provided that the insolvent personally effected such disposition in order to comply with the order of court.

The question arises as to whether there should there be any distinction between a court order which originates a disposition; a court order enforcing a *bona fide* settlement agreement; or a court order enforcing a fraudulent settlement agreement.

With reference to *Muller v John Thompson and Another*,[83] *Meskin* opines that the exclusion only deals with a court order originating the disposition. *Mars* states that an order of court made by consent of the parties, is probably not a disposition "in compliance with an order of court".

In *Swadif (Pty) Ltd v Dyke*[84] a mortgage bond was registered as "security" for a non-existing debt which "debt" was confirmed by a court order made by consent. The court decided that the registration of the mortgage bond as such amounted to a disposition without value which could be set aside. It was also decided that in such a case, where the only purpose of obtaining a court order was to enforce the creditor's right, to regard the judgement not as novating it but rather strengthening or reinforcing it.[85]

In *Dabelstein v Lane and Fey NNO*[86] the Supreme Court of Appeal makes it clear that it cannot be accepted that an order does not qualify as an order for purposes of the exclusion merely because it was made in terms of an agreement. (The court left open the question as to whether collusion, or perhaps some other reprehensible conduct in procuring the order, would suffice to take the matter outside the exclusion.)

In the absence of collusion or a tacit agreement, a failure by a debtor to oppose an application for a court order does not mean that the granting of the order amounts to a disposition by the debtor.[87]

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82 *Janse van Rensburg v Botha* (758/10) [2011] ZASCA 72 (25 May 2011); [2012] JOL 29421 (SCA), para [10]. *Cf Janse van Rensburg NO and Another v Griffiths* [2014] JOL 31711 (ECP), para [8] and *Gainsford NO and Others v Rees and Others* [2014] JOL 32457 (GJ), para [56].

83 1982 (2) SA 86 (D).

84 1978 (1) SA 928 (A).

85 See also *Sachstein en Venter v Greyling* 1990 (2) SA 323 (O).

86 2001 (1) SA 1222 (SCA).

87 *Simon v Mitsui and Co Ltd* 1997 (2) SA 475 (W). The relief of rescinding a court order must be claimed expressly and the grounds for rescission stated – *Western Flyer Manufacturing (Pty) Ltd v Dewrance and Others NNO* 2007 (6) SA 459 (B), para [79].

It is common for parties getting divorced to enter in to an agreement for the distribution of assets, which agreement is made an order of court in terms of section 7(1) of the Divorce Act 1979. According to *Corporate Liquidators (Pty) Ltd v Wiggill*[88] the effect of such an order is to distribute the assets and a party is entitled to assets in terms of the order even if the estate of the other party has been sequestrated after the divorce. The court in *Fischer v Ubomi Ushishi Trading and Others*[89] disagreed with the decision in *Corporate Liquidators* and decided that ownership does not pass upon granting of the divorce order; however, on the facts it was decided that the personal right of the divorced spouse to full ownership preceded the creditor's claim and the court dismissed the application by a creditor for an order declaring the property specially executable.

15.3 Dispositions not made for value

Dispositions of property by the debtor without receiving adequate value in return cause a diminishing of the value of the estate with the result that there there will be less assets available to settle the debts. In the context of insolvency such dispositions may cause the insolvency of the debtor, or further increase the debtor's insolvency.

In terms of section 26 of the Insolvency Act any disposition not made for value by the insolvent can therefore be set aside by the court:

- if the *trustee can prove* in instances where the disposition was made *more than two years before date of sequestration*, that immediately after the disposition was made, *the person disposing of the property was insolvent*;[90] but

- if the disposition was *made less than two years prior to sequestration* the court can set it aside if the *person who benefitted* by the disposition *cannot prove that the assets of the insolvent exceeded his liabilities immediately after the disposition was made*.[91]

The person who benefited from a disposition need not be the person to whom the disposition was in fact made.[92] In *Gainsford NO v Rees*[93] the defendant treated trust accounts as if they were his personal accounts and such conduct was manifestly unlawful and fraudulent. The contention that the payments made into the so-called trust account did not constitute dispositions to the defendant was rejected on the facts. The payments were consistent with the abuse of these accounts for purposes of the fraudulent scheme and the payments were, in truth, between the other person and the defendant.

88 *Corporate Liquidators (Pty) Ltd v Wiggill* 2007 (2) SA 520 (T).
89 (1085/2017) [2018] ZASCA 154(19 November 2018).
90 Insolvency Act, s 26(1)(a).
91 *Ibid*, s 26(1)(a) and (b).
92 *Standard Finance Corporation of SA Ltd v Greenstein* 1964 (3) SA 573 (A); *Reynolds and Others NNO v Mercantile Bank Ltd* 2004 (5) SA 220 (SCA).
93 [2014] JOL 32457 (GJ), para [56].

15.3.1 Shortfall after disposition less than value of disposition

Where it is proved that at any time after such a disposition has been made the insolvent's liabilities exceeded his assets by less than the amount of the disposition, the extent to which it can be set aside is limited to the amount of such excess.[94]

Example 1

A disposes property worth R10,000 to B. Directly after the disposition A's liabilities exceeds his assets by R6,000. If the disposition is set aside, B will be obliged to return R6,000 to B's trustee.

15.3.2 Beneficiary cannot compete with other creditors

If the disposition without value has been set aside, or if the insolvent did not complete the disposition (where he for example did not perform in terms of a contract of donation), the beneficiary cannot compete with the creditors of the estate. However, there is an exception in the case of suretyship, guarantee or indemnity: where the disposition has neither been completed nor set aside in terms of section 26(1), provided, however, that it arose by way of suretyship, guarantee or indemnity, the beneficiary concerned can compete for an amount not exceeding the amount with which the insolvent's assets, immediately preceding the disposition, exceeded his liabilities.[95]

Example 2

A binds himself by way of surety to B (the principal creditor) for a debt of R20,000 owed by C (the principal debtor). A is sequestrated. B will be entitled to lodge a claim against A's insolvent estate on strength of the suretyship granted only if:

(a) the disposition was not completed, that is, payment in terms of the surety was not completed;

(b) the disposition was made by way of suretyship, guarantee or indemnity;

(c) the trustee has not yet set the suretyship agreement aside as a disposition without value.

If these requirements are met, B will be entitled to claim but his claim will be limited to an amount not exceeding the amount with which the insolvent's assets immediately preceding the disposition exceeded his liabilities. Thus where A binds himself as surety for R20,000 and his assets exceeded his liabilities by R10,000 directly after the suretyship was concluded, B's claim would be limited to R10,000, provided that the above-mentioned three requirements are met.

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94 Insolvency Act, s 26(1).

95 *Ibid*, s 26(2).

15.3.3 Does conclusion of a suretyship agreement increase liabilities?

It is not altogether clear if the mere conclusion of a suretyship agreement could cause the surety's liabilities to increase. In *Joint Liquidator of Glen Anil v Hill Samuel*[96] it was decided that a conditional liability was not a debt until the condition is fulfilled for the purposes of section 88. In some cases it was decided that the liability of the surety is unconditional once the surety has waived the benefit of excussion.[97] This view would mean that the mere conclusion of a surety agreement could cause the surety's liabilities to exceed his assets. The view also exists that the liability of a surety is always conditional – even if the surety has waived the benefit of excussion. If this approach is followed, the liability of the surety would only become unconditional when the principal debtor fails to pay.

15.3.4 Meaning of "without value"

"Without value" has no technical meaning and should be interpreted in the ordinary sense of the word.[98] In case of a sale of property for a price which is clearly inadequate, such sale amounts to a disposition not for value, but the term "no value" and "inadequate value" must be distinguished. Illusory or nominal value will be taken as no value at all.[99]

"Value" is not necessarily monetary value but could for instance include the financial stability of a group of companies,[100] or a thing of an exactly calculated comparable value received from the person to whom the disposition was made, or another person.[101]

Examples of dispositions not made for value include:

- donations;
- the relinquishment or mortgaging of assets without any legal obligation to do so;[102]

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96 1982 (1) SA 103 (A).

97 See, eg, *Trans-Drakensberg Bank v The Master* 1962 (4) SA 417 (N) 422-423; *Langeberg Koöp v Inverdoorn Farming and Trading Co* 1965 (2) SA 597 (A) 602.

98 *Estate Wege v Strauss* 1932 AD 76.

99 See *De Jongh Ontwikkelings (Pty) Ltd and Another v Kilotech Investments (Pty) Ltd and Others* 2021 (4) SA 492 (GP) at para 6.3.9 where the court stated: "[i]n the case of other dispositions where some value was given, it must be determined whether that value was illusory or nominal. If so, then "no value" was given."

100 *Cf Goode Durrant & Murray v Hewitt & Cornell* 1961 (4) SA 286 (N) and *Swanee's Boerdery v Trust Bank* 1986 (2) SA 850 (A), read with *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 (2) SA 597 (A). See also *Terblanche NO v Baxtrans CC* 1998 (3) SA 912 (C).). See also *De Jongh Ontwikkelings (Pty) Ltd and Another v Kilotech Investments (Pty) Ltd and Others* 2021 (4) SA 492 (GP) at paras 6.3.5 and 6.3.6 where the court distinghuised cases like *Langeberg* and *Swanee's Boerdery* where the dispositions were in the form of a suretyship and the "value" given and received in return was "either intangible or not easily quantifiable" but there was still some benefit, and those which dealt with the question of "no value" at a pleadings and exception stage.

101 *Hurley and Seymore v WH Muller & Co* 1924 NPD 121.

102 *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A).

- payment in terms of an invalid or illegal contract;[103]
- the sale of property for a trifling consideration;[104]
- a surety or a guarantee.[105]

All the circumstances surrounding the transaction should, however, be taken into account. The question should still remain whether the insolvent received an adequate *quid pro quo* under the circumstances.

15.3.5 Exception for benefit under antenuptial contract

An exception to the basic rule in section 26 is that where an *immediate benefit* under a *duly registered antenuptial contract* is *given in good faith*, the disposition *cannot be set aside* if it is *made to the man's wife or to a child born out of their marriage within three months from date of marriage*, and the estate of the husband is not sequestrated within *two years* from date of registration of the antenuptial contract.[106]

Protected life insurance policies are also insulated against claims based on section 26.

15.4 Voidable preferences

15.4.1 Generally

As explained in paragraph 15.1.1 above, preferences deal with dispositions by a debtor in favour of a creditor that would prefer such creditor above other creditors in that the creditor would for instance receive full payment prior to the sequestration or liquidation of the debtor, or that an otherwise unsecured creditor would be elevated to the ranks of a secured creditor. Such transactions would under solvent circumstances be in order since the debtor is merely dealing with pre-existing debts but these will become problematic when done under insolvent circumstances. [107]

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103 A disposition in discharge of an obligation to return an illegal payment is not a disposition without value – *Fourie NO v Edeling NO* [2005] 4 All SA 393 (SCA), para 19.

104 *Bloom's Trustee v Fourie* 1921 TPD 599.

105 *Swanee's Boerdery (Edms) Bpk (In Liquidation) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A).

106 Insolvency Act, s 27. See *Brink v Kitshoff* 1996 (4) SA 197 (CC) for a case where a provision was declared unconstitutional because of discrimination based on gender and marital status.

107 "If a *lawful* obligation to pay the money in fact *exists*, then the obvious benefit, which the payer receives in return for such payment, is a discharge from his liability to pay. **(This would amount to a preference – own insertion.)** *Such payment decreases his assets, but at the same time it diminishes his liabilities*, and in transactions which are entered into in the ordinary course of business, such a discharge would be value for the payment made**." (own emphasis.)** - *Estate Jager v Whittaker* 1944 AD 246 250.

15.4.2 Examples of voidable preferences

Preference law also ensures that a distribution will take place according to the legal order of preference in sequestration or liquidation.[108] It could therefore also amount to a preference if a debtor improves his creditor's position by affording him or her security before his or her estate is sequestrated.

A disposition by a debtor can, in terms of section 29(1),[109] be set aside as a voidable preference if it appears that the debtor, due to his or her dire financial situation, was unable to pay all his creditors in full but nevertheless favoured a particular creditor, for instance by full payment of his or her pre-existing debts.

15.4.3 What the trustee must prove

The trustee must prove the following in order to have a disposition set aside as a voidable preference:

(a) That a *disposition was made by the insolvent*[110] *within six months prior to sequestration or death*. Where the disposition has been made by an agent of the insolvent, the date is the date of disposition and not the date on which authority was granted to the agent to make such a disposition;[111] and

(b) That the *effect of the disposition was to prefer one creditor above the others*. The person who benefitted from the disposition is necessarily always a creditor (which includes a surety or a person in a position analogous to that of a surety in terms of section 30(2)), though not always the person to whom the disposition was made.[112] It is only necessary to prove the effect of the disposition, namely that all creditors were not treated equally in the distribution of the assets (whether the disposition involved one creditor "being

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108 Catherine Smith, *The Law of Insolvency* 125.

109 The Supreme Court of Appeal has found that section 29(1) is constitutional – *Hosking NO v Coetzee NO* Case No 499/04 delivered on 25 November 2005.

110 *Zwarts v Janse van Rensburg NO and Others* [2015] JOL 33678 (SCA), para [9], in a case in which it was ordered that the assets and liabilities of separate entities be dealt with as a single entity, the court held that in contracting with the agents representing the scheme, Mr Zwarts was contracting with the corporate entities operating its business from time to time and not with Ms Prinsloo personally. The debtor who made the disposition was in the circumstances deemed to be the consolidated estate into which each of those entities had been subsumed and the creditor entitled to claim repayment was likewise the consolidated estate in the hands of its liquidators.

111 Insolvency Act, s 29(3). In *Sackstein v Van der Westhuizen* 1996 (2) SA 431 (O) it was held that section 29(3) did not apply when a seller gave a power of attorney to pass transfer of immovable property without giving a power of attorney to sell the property on his behalf. The date of the disposition was the date when the contract of sale was entered into and not the date of the registration of transfer.

112 *Standard Finance Credit Corporation v Greenstein* 1964 (3) SA 573 (A); *Button NO and Others v Akbur and Others* [2016] JOL 34153 (KZD), para [5].

paid proportionately more than the other creditors or being paid in advance of the others")[113]; and

(c) That *immediately after making such disposition the debtor's liabilities exceeded the value of his assets* (that is, the value at date of the disposition).[114] Even though it might be difficult, due to a lack of accurate accounting statements on the date of the disposition, the trustee must prove on a preponderance of probabilities that the above-mentioned situation arose. An objective estimate of the insolvent's liabilities, for which proven claims against the estate can provide a valuable indication, compared with a reasonable assessment of his assets is required.[115]

15.4.4 Statutory defence for the beneficiary to avoid setting aside of the preference

If the trustee succeeds in proving the above-mentioned requirements, then the beneficiary may rely on the statutory defence and may be able to avoid the setting aside of the disposition by proving:

- firstly, that the disposition was made *in the ordinary course of business* and
- secondly, that *it was not intended thereby to prefer one creditor above another*.[116]

15.4.4.1 Ordinary course of business

The test as to whether a disposition is in the ordinary course of business is an objective one, namely whether, having regard to the fact that business methods and customs necessarily differ amongst the different spheres of the business world, the ordinary, honest and solvent businessman would have acted the same in similar circumstances, or would have thought the

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113 *Klerck NO v Kaye* 1989 (3) SA 669 (C) at 675E quoted with approval in *Louw NO and Another v Sobabini CC and Others* [2017] JOL 37791 (ECG), para [67]. See also *Jackson v Louw NO and Another* [2019] JOL 40769 (ECG), para [55] – a creditor has been preferred if the proper distribution of the assets as envisaged by the Insolvency Act 1936 has been disturbed, either because he has benefited more, or he has been paid earlier than would have been the case if he had been paid after the realisation of the assets in accordance with the Act.

114 *Dobrin v Trustees Estate Dobrin* 1932 WLD 195.

115 *Nicholls & Whitelaw v Akoo* 1948 (4) SA 197 (N); *Ensor v New Mayfair Hotel* 1968 (4)SA 462 (N); *Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 (1) SA 578 (A); *Venter v Volkskas Ltd* 1973 (3) SA 175 (T).

116 Insolvency Act, s 29(1). In *Janse van Rensburg NO v Steenkamp* 2010 (1) SA 649 (SCA) the court held in a previous decision on s 30 that the intention to prefer had not been proved. When application was made to set aside dispositions in terms of s 29 a special plea of *res judicata* was entered (matter already decided). For an action in terms of s 29, the liquidators need not deny the previous decision that intention to prefer had not been proved. The beneficiary had to prove the absence of intention to prefer and that the disposition was in the ordinary course of business. The court dismissed the special plea. In *AON South Africa (Pty) Ltd v Van Den Heever NO and Others* 2018 (6) SA 38 (SCA), even though the plaintiffs in two actions were liquidators of two different companies and the defendants were different entities, the special plea of *res judicata* was upheld where there was a complete identity of interests between the two sets of liquidators and a similar identity of interests between the defendants – para [27].

transaction extraordinary.[117] All the surrounding circumstances should be taken into account, including trade usages within the different sectors of the business world as well as the conduct of all the parties to the transaction. The test is a wide one, in which regard must be had to all the circumstances under which the disposition under scrutiny took place.[118] The personal opinions of the parties with regard to what types of transactions fall within the ordinary course of their business and their true intention with the disposition, are not relevant in this regard.[119]

15.4.4.2 Examples of dispositions not in the ordinary course of business

What follows are some examples of dispositions that are not in the ordinary course of business:

- Although payment in terms of a valid contract between solvent persons and in accordance with the terms of the contract is usually viewed to be in the ordinary course of business, a *deviation from the agreed method of payment* can be indicative of the contrary.

- A tripartite arrangement between the insolvent, one of his debtors and a creditor of the insolvent in terms of which the *debtor makes a direct payment to the creditor of the insolvent* (to the detriment of other creditors) can hardly be described as in the ordinary course of business.[120]

- The same applies to the *registration of a mortgage bond, for a previously unsecured debt*, just prior to the sequestration of the mortgagor's estate.[121] But if this occurred in exchange for a postponement by the creditor or in case of a pledge as a counter-performance for an undertaking to serve as surety, then such transactions have been held to be in the ordinary course of business.[122]

- The disposition must be legal and valid to allow for it to be within the ordinary course of business.[123] *Dishonest, if not fraudulent, conduct* cannot possibly be in the ordinary course of business. Dispositions during the operation of a pyramid scheme is illegal and therefore void.[124] (The Court in *Gazit Properties v Botha and Others NNO*[125] held that the tainted nature of the insolvent's business was irrelevant to the fact that such repayment

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117 *Fourie's Trustee v Van Rijn* 1922 OPD 1; *Hendriks v Swanepoel* 1962 (4) SA 388 (A); *Van Zyl v Turner* 1998 (2) SA 236 (C) 245D; *Du Plessis NO v Oosthuizen* 1999 (2) SA 191 (O) 211F; *Janse van Rensburg NO and Another v Griffiths* [2014] JOL 31711 (ECP) para [16].

118 *Janse van Rensburg NO and Another v Griffiths* [2014] JOL 31711 (ECP) para [16].

119 *Van Eeden's Trustee v Pelunsky & Mervis* 1922 OPD 144.

120 *Paterson v Trust Bank of Africa Ltd* 1979 (2) SA 992 (A).

121 *Sperryn's & Dommisses's Trustee v The National Bank of SA* 1923 TPD 166.

122 *Du Plooy v National Industrial Credit Corporation Ltd* 1961 (3) SA 741 (W)**;** *Van Eeden's Trustee v Pelunsky & Mervis* 1922 OPD 144.

123 *Klerck v Kaye* 1989 (3) SA 669 (C); *Da Silva & others v Mullah* [2010] JOL 25091 (GSJ).

124 *Janse van Rensburg NO and Another v Griffiths* [2014] JOL 31711 (ECP), para [20].

125 2012 (2) SA 306 (SCA).

was made in the insolvent's ordinary course of business.[126] The judgment in *Gazit Properties* does not demonstrate a departure from the principles expressed in the judgments of the Supreme Court of Appeal. The *ratio* of the decision in *Gazit Properties* must be limited to a finding that on the agreed facts of that case, and the narrow contentions relied upon, the disposition in question was one in the ordinary course of business.[127]) The need for a lawful disposition is uncontroversial. It is clear that ordinary, solvent people of business do not conclude unlawful agreements, or attempt to obtain unlawful dispositions. But there is no requirement that the disposition must be made in the course of a lawful business.[128]

- The fact that a *disposition was made in a roundabout way* (payment through an account other than the ordinary trading account) supports a conclusion that a disposition was not made in the ordinary course of business.[129]

15.4.4.3 Not intended to prefer one creditor above another

The second part of the defence, namely that the debtor did not intend to prefer one creditor above the others, has to be proved by the beneficiary, independently from the first part of the defence (discussed above). The test applied is a subjective one and is concerned with the subjective intention of the debtor[130] which often, in the absence of direct evidence, has to be inferred from the surrounding circumstances.[131] These circumstances may include situations where the insolvent makes the disposition whilst contemplating sequestration (in other words, whilst sensing that sequestration is inevitable).[132] A mere proposition that the debtor made the disposition with the hope to tide over his financial difficulties is not per se sufficient to discharge this onus of proof.[133] The defendant can, however, convince the court that the dominant motive was not to prefer a creditor but rather to avoid, for example, criminal prosecution, or that the debtor, due to severe pressure, had no other choice but to pay the

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126 The contention that a creditor who violates s 11 of the Banks Act 1990 by accepting or soliciting deposits without being a registered financial institution, cannot enforce a debt which was on the facts of the matter rejected (at paras [10]- [11]). Quoted with approval in *A Melamed Finance (Pty) Ltd (in liquidation) v Harris* (2016/A5028) [2017] GJ (23 June 2017), para [23].

127 *Janse van Rensburg NO and another v Griffiths* [2014] JOL 31711 (ECP), para [30].

128 *Griffiths v Janse van Rensburg* NO 2016 (3) SA 389 (SCA), para [17]). In this matter the payments as part of a pyramid scheme were made under investment agreements, which were void (para [30]). Applying the broad, objective test to the facts of this matter, the court found that the repayments did not take place in the ordinary course of business (para [31]).

129 *Gore and Others NNO v Shell South Africa (Pty) Ltd* 2004 (2)(SA 521 (C).

130 The intention can be present only if the debtor actually applied his mind to the matter – *Gore and others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C).

131 *Michalow v Premier Milling Co Ltd* 1960 (2) SA 59 (W); *Giddy, Giddy & White's Estate v Du Plessis* 1938 EDL 73.

132 *Du Plessis NO v Oosthuizen* 1999 (2) SA 191 (O) 212G; *Gore and others NNO v Shell South Africa (Pty) Ltd* 2004 (2)(SA 521 (C).

133 *Pretorius' Trustee v Van Blommenstein* 1949 (1) SA 267 (O).

debt.[134] It is essential "to weigh up all the relevant facts which prevailed at the time that the disposition was made in order to determine what, on a balance of probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of the debtor for making the disposition".[135] The insolvent, if shown to be a reliable witness, can also testify to the fact that he had no intention of preferring the defendant and, in the absence of any other circumstantial evidence such as friendship or family ties between the insolvent and the defendant, it might be sufficient to prove the absence of such intention.

15.4.5 Undue preference

This is a *disposition of assets to a creditor, made at any time before sequestration and while the liabilities of the debtor exceeded his assets, with the intention of preferring one creditor above others*.[136] The trustee has to prove the above-mentioned, including the subjective intention of the debtor. The intention of the debtor may be proved where it can be shown that the debtor was aware of the debtor's insolvent state or contemplated sequestration but nevertheless made the disposition, or the intention can be inferred from actions or statements made by the debtor.[137]

15.4.6 Collusion

15.4.6.1 Generally

Where the *debtor intentionally colluded with another person* (be it a creditor or any other person) *to prejudice his creditors or to prefer one creditor above the other*, and where the debtor then disposes of his or her assets, such a disposition can be set aside by the court.[138] It is not sufficient that the effect of the transaction is only to occasion such prejudice, there

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134 *Gert de Jager Bpk v Jones & McHardy* 1964 (3) SA 325 (A); *Pretorius v Stock Owners Co-operative Co Ltd* 1959 (4) SA 462 (A); *Giddy, Giddy and White's Estate v Du Plessis* 1938 EDL 73; *S v Ostilly* 1977 (4) SA 699 (D); *Van Zyl v Turner* 1998 (2) SA 236 (C); *Gore and Others NNO v Shell South Africa (Pty) Ltd* 2004 (2)(SA 521 (C). See *Cooper NO v Merchant Trade Finance Limited* 2000 (3) SA 1009 (SCA) where the majority of the Supreme Court of Appeal found that the absence of an intention to prefer was proved when movables were handed to a creditor one day before the date of liquidation of a close corporation in fulfilment of an obligation in terms of a general notarial bond.

135 *Cooper and Another v Merchant Trade Finance Limited* (474/97) [1999] ZASCA 97(1 December 1999), para [4], quoted with approval in *Button NO and Others v Akbur and Others* [2016] JOL 34153 (KZD), para [27]. In the matter of *Button NO* one of the payments made was made to the respondent's own mother in a vague and strange transaction. There was no pressure on the debtor to pay the second respondent, unlike one of the creditors who had made a formal demand. These circumstances, including the payment to an attorney of R1.98 million, showed the intention to prefer the second respondent. The respondent also preferred to pay himself a salary. The court found that there was no other compelling reason than to prefer the respondents to have made these payments at the time when the respondent was fully conversant with the insolvent state of the close corporation which had ceased trading due to its inability to pay its debts.

136 Insolvency Act, s 30(1).

137 *Eliasov v Arenel (Pvt) Ltd* 1979 3 SA 415 (R); *Fourie NO v Edeling NO* [2005] 4 All SA 393 (SCA), paras [14] and [15].

138 Insolvency Act, s 31.

must also be a fraudulent intention by the parties to the transaction to cause it.[139] Intentional collusion is therefore required and both parties must have intended the result.[140]

A collusive disposition in the context of which it is used in section 31(1), means an agreement which had a fraudulent purpose and not merely an agreement which had the consequence that one creditor is preferred above another. "… collusion is a conniving together between two persons – in this case the insolvent and the defendant – to practice a fraud on the creditors. In other words, was it the intention of the insolvent and the defendant, the one to give and the other to obtain an undue preference to the prejudice of the other creditors."[141]

In order to establish collusion, a person need not prove that the intention of the parties to collusion was to defraud the insolvent estate. If the parties to the collusion know that the debtor is insolvent and also know that the disposition will have the effect of prejudicing creditors or of preferring one of the creditors above another, then it follows that the collusion is fraudulent in relation to creditors in the sense that the object thereof is to do them out of their rights.[142] It should be determined whether the disposition had the intended effect at the date of sequestration and that the parties were aware of the effect of prejudicing creditors.[143]

It does not matter how long before sequestration the collusion took place, nor whether the debtor was already insolvent when it happened, nor whether the person the insolvent colluded with actually benefitted from such collusion, nor whether he was a creditor.

15.4.6.2 Effect of collusion

Collusion may have the following effects:

(a) If the person that the insolvent colluded with is a creditor, such creditor is liable for damages suffered by the estate.[144]

(b) The court can also order such person to pay a fine to the estate. However, the court may not impose a fine exceeding the amount by which the person would have benefitted from the disposition, had it not been set aside.[145]

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139 *Gore NO v Shaff* (15766/13) [2013] WCC (13 December 2013), para [20]. Courts have traditionally approached allegations of fraudulent conduct on the basis that such behaviour is not readily attributed and, in a sense, is indeed regarded as inherently improbable (para [21]).

140 *Gert de Jager Bpk v Jones & McHardy* 1964 (3) SA 325 (A); *Meyer v Transvaalse Lewendehawe Koöperasie Bpk* 1982 (4) SA 746 (A).

141 *Jackson v Louw NO and Another* [2019] JOL 40769 (ECG), para [71], with reference to *Finn's Trustees v Prior* 1919 EDL 133 at 137.

142 *Gert de Jager (Edms) Bpk v Jones NO and McHardy* NO 1964 (3) SA 325 (A), quoted with approval in *Louw NO and Another v Sobabini CC and Others* [2017] JOL 37791 (ECG), para [73].

143 *Bagus v Estate Moosa* 1941 AD 62; *Garth NO v Socratous* [2008] JOL 24175 (Tk), paras 54 to 59 and 72 to 73.

144 Insolvency Act, s 31(2) and (3).

145 *Louw NO and Another v Sobabini CC and Others* [2017] JOL 37791 (ECG), para [77] remarked that the use of the word "shall" in this respect, followed close on the heels of the same word used in relation to making

(c) Furthermore, if a creditor, he or she forfeits all his or her claims against the insolvent estate.[146]

15.4.7 Legal proceedings (setting aside of impeachable dispositions)

15.4.7.1 Who can institute proceedings to void statutory dispositions

The trustee, in representative capacity[147] (and who cannot cede this right to action as plaintiff) must institute proceedings to set aside an impeachable disposition. If the trustee fails to do so, any creditor may institute such proceedings, provided the creditor has indemnified the trustee against the legal costs thereof.[148] The indemnity for costs may be given after the action is instituted.[149] The trustee remains the plaintiff. Interim proceedings are not subject to the provisions of section 32(1) and where circumstances require swift action, will be entitled to institute interim proceedings in its own name for the protection of a right.[150] The trustee and not the creditor must make discovery in terms of rule 35(1) of the Uniform Rules of Court since the trustee is the plaintiff.[151]

15.4.7.2 Prescription prevents proceedings

The cause of action (whether in terms of the common law or the Insolvency Act) must be set out clearly in the pleadings.[152] The Supreme Court of Appeal has settled conflicting decisions by deciding that the claim of a trustee who seeks to impeach transactions is a debt or

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good any loss occasioned by the collusion indicate that the imposition of a penalty is not discretionary. The *quantum* of the penalty, however, lies within the discretion of the court but may not exceed the value of the benefit which would have accrued to the person had the disposition not been set aside.

146 Insolvency Act, s 31(2).

147 The proceedings must be instituted in the name of the trustee and not on behalf of the trustee – *Western Flyer Manufacturing (Pty) Ltd v Dewrance and Others NNO* 2007 (6) SA 459 (B), para [60].

148 Insolvency Act, s 32(1). The trustee must be satisfied that the indemnity is adequate for purposes of the proceedings – *Lane v Dabelstein* 1999 (3) SA 150 (C) 165G, discussed by A L Stander in "Ongeoorfloofde Vervreemdings en Artikel 32 van die Insolvensiewet" 2002 *THRHR* 123. The proceedings must be instituted by a creditor and can be set aside if the creditor has ceded his claim to another – *Myburgh v Walters NO* 2001 (2) SA 127 (C). A failure to lodge the indemnity before the action is instituted can be remedied as a formal defect in terms of s 157 of the Insolvency Act – *Western Flyer Manufacturing (Pty) Ltd v Dewrance and Others NNO* 2007 (6) SA 459 (B), para [57]. In *Kaniah v WPC Logistics (Joburg) CC (In Liquidation) and Others* (4973/2014) [2017] ZAFSHC 209 (2 November 2017), para 28, the court authorised a person to proceed with an action on behalf of the liquidator, provided a suitable indemnity for costs was provided.

149 *Hathorn NO v Cowan* [2013] JOL 30202 (WCC). The court allowed an amendment to provide that a creditor instituted the action in the name of the liquidators (as required by the legislation). Confirmed on appeal in *Cowan v Hathorn* [2016] JOL 33589 (SCA).

150 *Ultrapolymers (Pty) Ltd v Maredi* [2012] JOL 28746 (GSJ) [8].

151 *Reynolds NNO v Standard Bank of South Africa Ltd* 2011 (3) SA 660 (W), and see *Baker N.O and Others v Investec Bank Limited and Another* (14748/16) [2021] ZAGPPHC 298 (20 May 2021) at para 26. Where the *Reynolds* case was applied.

152 *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A).

obligation that prescribes in terms of the Prescription Act 68 of 1969. Prescription ordinarily commences to run when the trustee is appointed.[153]

15.4.7.3 The following events do not prevent proceedings

The following events do not prevent proceedings:

- The confirmation of a final liquidation and distribution account does not prevent a trustee from instituting proceedings to set aside impeachable dispositions.[154]

- The trustee is entitled to institute proceedings irrespective of whether the matter was already the subject of an action between the defendant and the insolvent.[155]

15.4.7.4 Liquidator and security for costs

A liquidator could be required to lodge security in terms of section 13 of the former Companies Act 1973, whether he or she was acting on behalf of the company or exercising the special powers of a liquidator in terms of the Companies Act. Although section 13 has been repealed by the Companies Act 2008, security for costs can still be required in terms of the court rules. If a summons was issued before the repeal of section 13 by the Companies Act of 2008, section 13 can be applied in terms of the Interpretation Act.[156] Under the 1973 Companies Act an applicant for security for costs had a fairly low hurdle to cross in persuading the court to grant security. Such party had only to adduce credible testimony that there was reason to believe that the company resisting the furnishing of security would be unable to pay the costs of the opposing party in the event that the latter was unsuccessful, and security would ordinarily then be granted, subject to the exercise of the court's general discretion. Since the repeal of section 13, a court in its discretion should only order the furnishing of security for costs by an *incola* (local) company if it is satisfied that the contemplated main action or application is vexatious or reckless, or otherwise amounts to an abuse. Where a company is in liquidation it is sufficient ground for ordering security to be

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153 *Duet & Magnum Financial Services CC (In Liquidation) v Koster* 2010 (4) SA 499 (SCA) (which followed the decision in *Burley* and not the decision in *Barnard and Lynn*)**.** The court remarked in passing that prescription also applies to claims in terms of s 424 of the Companies Act 1973. *Barnard and Lynn NNO v Schoeman* 2000 (3) SA 168 (N) decided that the claim is not a debt which is subject to prescription. *Cf* Alistair Smith, "When does a debt become due?" 2000 *JBL* Vol 8 Part 3 at 114. However, see the contrary view regarding prescription of the "right" to a remedy in terms of s 64 of the Close Corporations Act in *Burley Appliances Ltd v Grobbelaar NO* 2004 (1) SA 602 (C); *Barnard NO v Bezuidenhout* 2004 (3) SA 274 and *Van Zyl v Nedbank Ltd* [2009] JOL 23067 (T), with reference to voidable dispositions in terms of the Insolvency Act. Also see . *Exotic Fruit Company (Pty) Ltd v Zakharov and Another* (14143/2020) [2021] ZAWCHC 60 at para [9], where the Court held that the debt, following ss 29 and 30 of the Insolvency Act, would only be recoverable under s 23(3) once the the dispositions has been set aside and the court ordered it to be recoverable.

154 *Cook NO v Coetzee Inc* [2010] JOL 25479 (GNP); 2012 (2) SA 616 (GNP).

155 *Shokkos v Lampert* 1963 (3) SA 425 (W); *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A).

156 *Vienings v Paint and Ladders (Pty) Limited* (Case No 12979/2009, High Court Durban, 30 October 2012).

given; and when the company has everything to gain and nothing to lose it would be putting a premium upon vexatious and speculative actions if such practice were not adopted.[157]

15.4.7.5 The order setting aside the disposition

When the court orders the setting aside of a voidable disposition, the court must declare that the trustee is entitled to recover the property itself or the value thereof at the date of disposition or at the date on which the disposition was set aside, whichever is the greater.[158] The court may order payment of interest from the date of the order setting aside the disposition - not from the date of the demand for payment or the date of the disposition.[159] An interdict restraining the person who benefitted from the disposition to part with the property can also be applied for.[160]

With regard to dispositions not made for value, voidable and undue preferences and collusion, the transaction is valid until set aside by the court.

15.4.7.6 Indemnity for person who parted with property

It cannot be expected from a defendant, who has in good faith parted with any property or security in return for the disposition, to restore the subject-matter of the disposition unless the trustee indemnifies him against the consequences of having done so.[161] The person who required indemnification must prove his good faith and extent of counter-performance delivered, while a reciprocity between the disposition and the transfer of property must exist.[162]

Example 3

A abandons a security in exchange for full settlement of his debt one month before his debtor B's sequestration. A would be entitled to claim indemnification from the trustee before he repays to the insolvent estate.

The rights of third parties who in good faith and for value received property from a person other than the insolvent, are also not affected.[163]

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157 *(Pty) Ltd (in liquidation) v Command Holdings Limited and Others* [2017] JOL 36904 (WCC); *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA), para [15]. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the court, must adduce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors – at para [26].

158 Insolvency Act, s 32(3).

159 *Griffiths v Janse van Rensburg NO* 2016 (3) SA 389 (SCA), para [38].

160 *Stern & Ruskin v Appleson* 1951 (3) SA 800 (W).

161 Insolvency Act, s 33(1); *Peterson v Claassen* 2006 (5) SA 191 (C), para [35].

162 *Ruskin v Barclays Bank* 1959 (1) SA 577 (W); *Barclays National Bank Ltd v Umbogintwini Land and Investment Company (Pty) Ltd* 1985 (4) SA 407 (D); *Geyser NO v Telkom SA Ltd* 2004 (3) SA 535 (T); *Consolidated News Agencies v Mobile Telephone Networks* 2010 (3) SA 382 (SCA).

163 Insolvency Act, s 33(2).

Example 4

A donates a Mercedes Benz worth R80,000 to B. B sells it to C for R70,000. C is unaware of the dealings between A and B. The trustee will not be entitled to claim the vehicle from C. He will however be entitled to claim the value of the vehicle at the date of the disposition, or at the date on which the disposition was set aside, whichever is the higher amount.

15.4.7.7 Benefit for creditors who participate in proceedings

Where the trustee or liquidator reuses to take action to impeach a disposition, a creditor or creditors may take such action, The creditor(s) who take(s) such steps must indemnify the trustee or liquidator against a cost order and the proceedings must be instituted in the name of the trustee or liquidator as discussed before. But creditors who participate in the proceedings enjoy a preference above those creditors who did not participate, with regard to the proceeds of the reclaimed property.[164] (Any creditor who, knowing that proceedings have been instituted, delays proving his or her claim until judgment is given in such proceedings, is not entitled to share in the distribution of any proceeds of any property so recovered.[165])

The court is obliged to declare a disposition void, subject to the provisions of section 33 of the Insolvency Act, when the statutory ground to set a disposition aside is proved.

15.4.8 Remedies related to voidable dispositions, etc

15.4.8.1 Voidable transfer of a business (section 34 of the Insolvency Act)

(a) Section 34(1)

If a trader[166] *transfers* in terms of a *contract* his or her business, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of *that* business,[167] or for securing a debt), without proper prior publication of a notice[168] to that

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164 *Ibid*, s 104(3).

165 *Ibid*, s 104(2).

166 The onus is on a person who denies that a person is a trader – *Gavin Cecil Gainsford NO v Tiffski Property Investments (Pty) Ltd* (874/2010) [2011] ZASCA 187 (30 September 2011), reported as *Gainsford NO v Tiffski Property Investments* [2011] JOL 27897 (SCA) and 2012 (3) SA 35 (SCA), para [31]; *Kotze v Axal Properties 2 CC* [2012] JOL 29200 (GSJ); (712/2012) [2013] ZASCA 110 (16 September 2013). *Cf Gore NO v McCarthy Ltd* 2006 (3) SA 229 (C); *McCarthy Ltd v Gore NO* 2007 (6) SA 366 (SCA). See further *K2013046547/07 (South Africa) (Pty) Ltd and Others v Hyde Construction CC and Another* (513/2020) [2021] ZASCA 82 (17 June 2021) at paras [13] and [15] where the SCA emphasised that the facts of each case must be considered on its own set of facts.

167 *Gavin Cecil Gainsford NO v Tiffski Property Investments (Pty) Ltd* (874/2010) [2011] ZASCA 187 (30 September 2011), reported as *Gainsford NO v Tiffski Property Investments* [2011] JOL 27897 (SCA) and 2012 (3) SA 35 (SCA), paras [27] to [30].

168 The notice must be published even if all parties are aware of the transfer – *Gavin Cecil Gainsford NO v Tiffski Property Investments (Pty) Ltd* (874/2010) [2011] ZASCA 187 (30 September 2011), reported as *Gainsford*

effect in the *Government Gazette* and in two issues of both an Afrikaans and English newspaper circulating in the district in which the business is carried on, for a period of at least 30 and not more than 60 days, the ***transfer*** will be deemed to be void against the creditors and trustees of the estate,[169] where the estate is sequestrated within six months from date of such transfer.[170]

A person with a claim against the trader in connection with the business[171] is afforded protection if he or she instituted proceedings against the trader before the transfer.[172]

"Transfer" in this regard means the transfer of ownership, as well as the actual or constructive transfer of possession.[173] It must be proved that the assets formed part of the business at the time of the transfer.[174] It is sufficient if most of an asset was used in the conduct of a business and the application of section 34 cannot be avoided by closing the doors of a business before selling it.[175]

(b) Section 34(2)

As soon as the prescribed notice has been published, every liquidated debt of the trader which would only be payable on a day in the future, becomes immediately payable if the creditor of the debt should claim payment thereof.[176]

NO v Tiffski Property Investments [2011] JOL 27897 (SCA) and 2012 (3) SA 35 (SCA) and 2012 (3) SA 35 (SCA), para [24].

169 In *Galaxie Melodies (Pty) Ltd v Dally NO* 1975 (4) SA 736 (A) at 744–745 stated at 743: "The [disposition] is not declared void in any absolute sense, but only as against the trustee. That means that it is within the discretion of the trustee whether to treat such [a disposition] as void or not. He may . . . waive or determine not to exercise his powers under the section. If he waives his rights, the [disposition] remains standing. If he exercises his powers under the section and treats the [disposition] as void, he in effect avoids or annuls it, and, therefore, sets it aside in that sense"; and see *Pharmaceutical Enterprises (Pty) Ltd and Others v Main Road Centurion 30201 CC t/a Albermarle Pharmacy and Another* [2020] JOL 49266 (GJ), 2021 (5) SA 246 (GJ) at para [16].

170 Insolvency Act, s 34(1). See *Simon v DCU Holdings (Pty) Ltd* 2000(3) SA 202 (T); *Roos v Kevin & Lasia Property Investments BK* 2002 (6) SA 409; *Gavin Cecil Gainsford NO v Tiffski Property Investments (Pty) Ltd* (874/2010) [2011] ZASCA 187 (30 September 2011), reported as *Gainsford NO v Tiffski Property Investments* [2011] JOL 27897 (SCA) and 2012 (3) SA 35 (SCA), para [20].

171 The phrase "in connection with the business", considered in *Kotze v Axal Properties 2 CC* [2012] JOL 29200 (GSJ); (712/2012) [2013] ZASCA 110 (16 September 2013).

172 *Cf Weltmans Custom Office Furniture (In Liquidation) v Whistlers CC* 1999 (3) SA 1116 (SCA).

173 Insolvency Act, s 34(4).

174 *Silverstream Investments (Kranskop) CC v Ronbo Automotive CC* 1997(1) SA 107 (D).

175 *Paterson NO v Kelvin Park Properties CC* 1998 (2) SA 89 (ECD); *Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA); Alistair Smith, "Closing shop is not the end of trading" 2001 *JBL* Vol 9 Part 3 at 123; *Bank of Lisbon International v Western Province Cellars Ltd* 1998 (3) SA 899 (W). *Cf* Alistair Smith "A Global View of Business, Trade and Property Under Section 34(1) of the Insolvency Act 24 of 1936" 2000 *SA Mercantile Law Journal* Vol 12 No 2 at 330.

176 Insolvency Act, s 34(2). This subs does not apply if the notice was not published properly. See *Sanddune CC v Catt* 1998 (2) SA 461 (SECLD).

(c) Effect of non-compliance on contract of sale

Where these statutory provisions are not complied with, only the ***transfer*** of the business is void,[177] but it is suggested that the contract of sale of the business could still remain valid. The effect of section 34 is that where such a transfer is void, the business will still form part of the insolvent estate. The contract, on the other hand, should be dealt with as an uncompleted contract.

(d) Business disposed of by transferee before application of section 34

The value of the business disposed of within the meaning of section 34(1) of the Insolvency Act can be claimed from the transferee with the *actio ad exhibendum* where he alienated it to a third party.[178]

(e) Previous wording of section 34

Section 34 previously applied to the *alienation* of a business by a trader. Due to the decision in *Cronje v Paul Els Investments (Pty) Ltd*[179] the application of the section became rather cumbersome. The term "alienation" was replaced by "disposition",[180] which was again replaced by the term "transfer".[181]

(f) Constitutionality

An attack on the constitutionality of section 34 was rejected by the Supreme Court of Appeal in *Gavin Cecil Gainsford NO v Tiffski Property Investments (Pty) Ltd*.[182]

15.4.8.2 Section 21 of the Insolvency Act

The effect of section 21, which deals with the vesting of the solvent spouse's property in the trustee of the insolvent spouse, places the onus on the solvent spouse to prove that the property claimed is in fact his or her property.

Where the insolvent spouse made a true donation to the solvent spouse before sequestration, the solvent spouse should be able to claim the property so donated from the

177 *Gavin Cecil Gainsford NO v Tiffski Property Investments (Pty) Ltd* (874/2010) [2011] ZASCA 187 (30 September 2011) reported as *Gainsford NO v Tiffski Property Investments* [2011] JOL 27897 (SCA) and 2012 (3) SA 35 (SCA), paras [34] to [39].

178 *Gore v Saficon Industrial (Pty)Ltd* 1994 (4) SA 536 (W).

179 1982 (2) SA 179 (T).

180 See Insolvency Amendment Act 1987. In *Cohen v Saphi (Pty) Ltd* 1996 (1) SA 1190 (A) the court held in respect of a case on the wording of s 34 before the amendment by Act 6 of 1991, referred to in the next footnote, that the date of the disposition was the date of the conclusion of the contract and not the date of delivery in terms of the contract.

181 Insolvency Amendment Act 1991.

182 (874/2010) [2011] ZASCA 187 (30 September 2011) reported as *Gainsford NO v Tiffski Property Investments* [2011] JOL 27897 (SCA) and 2012 (3) SA 35 (SCA), paras [41] to [47].

trustee. But the trustee would then have to prove that such a donation amounted to an impeachable transaction, for instance a disposition without value as discussed above, in order to reclaim such donated property.[183]

15.4.8.3 Section 25 of the Insolvency Act

Immovable property which forms part of the insolvent estate will not necessarily be withdrawn from such estate should an insolvency interdict / caveat expire. Unless all creditors have been paid in full, or the insolvent has obtained a vesting order, it will remain part of the insolvent estate. It is therefore possible for an insolvent to transfer such immovable property after the caveat has lapsed. Section 25(3) provides in such an instance that the act of registration brought about by the insolvent is valid. Section 25(4), however, grants the trustee the right to claim[184] the amount of the value of such property from the insolvent or former insolvent or the person who acquired it with knowledge of the situation. If such a person acquired the property without such knowledge but without (adequate) value, the trustee is entitled to claim the difference between such value and the counter-performance. Sections 32(1) and 104(3) apply *mutatis mutandis* in such a situation.

15.4.8.4 Set-off

(a) Section 46 of the Insolvency Act

If a set-off of mutual debts has taken place and the estate of the insolvent party is sequestrated within six months, the trustee may either abide by or disregard such set-off if it was not effected in the ordinary course of business but with the approval of the Master.

Disregarding set-off enables the trustee to claim the amount the solvent party would have owed but for the set-off.

(b) Ordinary course of business

Where the object of a cession and set-off is to escape the consequences of the *concursus creditorum* and the parties must have known that creditors would be prejudiced, the transaction is in *fraudem creditorum* and cannot be in the ordinary course of business.[185]

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183 *Snyman v Rheeder* 1989 (4) SA 496 (T).

184 The trustee has to, in relation to transfers of real rights in properties, frame a case in terms of s 25(4) – *Motala and Another NNO V Moller and Others* 2014 (6) SA 223 (GJ), para 32.

185 As to the meaning of "ordinary course of business" is concerned see *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W), but *cf MGG Productions (Pty) Ltd v Ramodike NO and* Others(38218/2018) [2020] ZAGPJHC 4; 2021 (4) SA 543 (GJ) (16 January 2020) at paras 24 and 32.3 the court, after drawing certain distinctions between the requirements for voiding a set off in s 46 of the Insolvency Act and the setting aside of a voidable preference in terms of ss 29, the Court found that for the test for "ordinary course of business" the court may draw from various facts to conclude if the set off transpired in circumstances that would render it unbusinesslike.

(c) Time when mutuality required for application of set-off

The mutuality between the parties required before set-off can apply (that is that both debts were payable by and to the same persons in the same capacities) must exist when the debts which one party seeks to set-off were incurred.[186] Set-off cannot take place after sequestration or liquidation.[187]

(d) Period is one year in the case of cession

These provisions also apply where a cedent has ceded his claim against a debtor / insolvent to a cessionary against whom the debtor had a claim at the time of cession, with the effect that the cessionary's claim is set-off against the debtor's claim within one year before the debtor's sequestration.

(e) Approval by the Master

The approval of the Master should be obtained before the trustee may disregard such claim.[188] *Smith* (at page 223) suggests that the Master would be allowed to authorise the trustee to disregard the set-off if it would result in a substantial disturbance of the normal distribution of the proceeds.

15.4.8.5 Protection of participants in financial markets

(a) Protection of transactions on financial markets

The position regarding certain voidable dispositions was influenced by amendments aimed at the protection of participants in the South African financial markets by binding a trustee to netting, or set-off, in respect of any transaction or contract concluded by a market participant prior to his sequestration in terms of the rules and practices of market infrastructure as defined in section 35A of the Insolvency Act. The Act applies to transactions subject to the rules of the exchanges subject to control under the Financial Markets Act 2012.

(b) Protection of "master agreements" on informal markets

Similar rules apply to the informal markets that deal in foreign currency, interest rates, exchange rates, gold, precious metals and other financial instruments. The choice of the trustee of an insolvent estate whether to abide by a contract or terminate it, is removed.

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186 *Van Zyl v Look Good Clothing CC* 1996 (3) SA 523 (SECLD).

187 *Siltek Holdings (ty) Ltd (in liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2008] JOL 22804 (SCA).

188 *Estate Engelbrecht v Engelbrecht* 1957 (3) SA 83(N), at 86.

(c) Nature of protection afforded

Netting or set-off in terms of the rules of an exchange or a "master agreement" on the informal markets, is binding on the trustee of an insolvent estate. The right to set aside transactions is limited to collusive dealings and proceedings in terms of the common law *actio Pauliana* for the setting aside of fraudulent transactions in terms of sections 35A(3), 35B(4) and the proviso to section 46 of the Insolvency Act. In terms of section 46 of the Financial Markets Act 2012, any issuance, deposit, withdrawal, transfer, attachment, pledge cession *in securitatem debiti* or other instruction in respect of securities or an interest in securities that has become effective against third parties, is effective against the insolvency administrator[189] and creditors in any insolvency proceedings.

15.4.8.6 Section 84(2) of the Insolvency Act (return of goods sold in terms of instalment agreement)

Where the insolvent returns goods in terms of an instalment agreement contemplated by the National Credit Act 2005 within one month prior to sequestration, the trustee is entitled to reclaim such goods or the value thereof at the date of return to the creditor, in which case section 84(1) applies. Section 84(2) contemplates an extant instalment sale "transaction" and not a transaction that has already terminated.[190]

15.4.8.7 Section 88 of the Insolvency Act

(a) Mortgage bond to secure previously unsecured debt

A mortgage bond that is registered in order to secure a debt not previously secured and which was incurred more than two months before the lodgement of the bond for registration at the Deeds Office, shall not confer any preference if the estate of the mortgage debtor is sequestrated within six months after such lodgement.[191]

(b) Exceptions and novation

This section does not apply to a *kustingsbrief*, that is, a bond securing the balance of the purchase price of the land purchased. Section 88 is however applicable in respect of a debt incurred in novation of or substitution for the debt. The term "debt" does not include a conditional debt or liability.[192]

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189 Defined in s 1 of the Financial Markets Act as a person authorised to administer an insolvency proceeding by a court or any national legislation, or the laws of a country other than the Republic, including a person authorised on an interim basis.

190 *Firstrand Bank Limited, Wesbank Division v PMG Motors Alberton (Pty) Limited and Others* [2013] JOL 30781 (GSJ); (2012/1307) [2013] ZAGPJHC 203; [2013] 4 All SA 117 (GSJ) 912 August 2013), para [69]; confirmed on appeal in *PMG Motors Kyalami (Pty) Ltd and Another v Firstrand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA).

191 Insolvency Act, s 88.

192 *Joint Liquidators of Glen Anil v Hill Samuel* 1982 (1) SA 103 (A).

15.5 Application to companies

15.5.1 Introduction

The doctrine of impeachable transactions also applies *mutatis mutandis* (with the necessary changes) to a company which is unable to pay its debts.[193] In terms of section 340(2) of the Companies Act 1973, the event (i.e. commencement of sequestration and liquidation) which is be deemed to correspond with the sequestration order as in the case of an individual, is:

"(a) in the case of a winding-up by the court, the presentation of the application, unless that winding-up has superseded a voluntary winding-up, when it shall be the registration in terms of section 200 of the special resolution to wind up the company;

(b) in the case of a voluntary winding-up, the registration in terms of section 200 of the special resolution to wind up the company;

(c) in the case of a winding-up of any company unable to pay its debts by the court superseding a judicial management order, the presentation of the application by the judicial manager to the court in terms of section 433(*l*) or 440."

15.5.2 Disposition of assets of insolvent estate after insolvency

The Insolvency Act does not provide expressly that dispositions after the date of insolvency are void. This is the result of the vesting of the estate firstly in the Master and then the trustee after his appointment.[194] However, section 24(1) protects alienations for valuable consideration of after-acquired property made by the insolvent after sequestration to a person who was unaware of such sequestration.[195]

15.5.3 Disposition of company's assets after commencement of winding-up

However, section 341(2) of the Companies Act 1973 provides that every disposition of its property by a liquidated company which is unable to pay its debt after the commencement of the winding-up, shall be void unless the court directs to the contrary.[196] The subsection does not apply to the payment of salary claims up to the date of the winding-up order.[197] But in *Montic Dairy (Pty) Ltd and Others v Mazars Recovery and Structuring (Pty) Ltd and Others*[198]

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193 Companies Act 1973, s 340(1).

194 Insolvency Act, ss 20 and 23.

195 See also Insolvency Act, s 24(2).

196 *Lotz v Knipe and Others* (3864/2018) [2019] ZAFSHC 135 (1 August 2019), para [20]. In the case of a disposition that is void in terms of s 341(2) of the Companies Act 1973 (a disposition after the commencement of the winding-up) the debt is owed as soon as the disposition is made – *Eravin Construction CC v Bekker NO* (2016 (6) SA 589 (SCA), para [21], and also see *Pride Milling Company (Pty) Ltd v Bekker NO and Another* (393/2020) [2021] ZASCA 127 (30 September 2021) in general regarding s 341(2) of the 1973 Companies Act.

197 *Ngwato v Van der Merwe NO* (2014/28470) [2016] GJ (6 May 2016), para [56].

198 (7523/19) [2021] ZAWCHC 20 at para [37].

section 341(2) of the Companies Act of 1973 was successfully invoked against business rescue practitioners who obtained remuneration for their services as such and after winding-up of the company formerly in recue, commenced.

The court will ordinarily not validate the dispositions unless it was done *bona fide* and without prejudice to the company or its creditors.[199] It is no answer to an application to set aside in terms of section 341(2) that the dispositions were made *bona fide* in the ordinary course of business of the company, or to assert that the dispositions were made by the company's staff in ignorance of the fact that the company had been placed under winding-up.[200] A bank that credits a debtor's overdrawn account with the bank after commencement of the winding-up, makes a disposition on the customer's behalf in the Bank's own favour which is void in terms of the subsection.[201] Cheques paid after commencement of the winding-up can be recovered from the recipient, but not from the bank unless the bank had actual knowledge of the winding-up.[202] The instances in which a court will validate a disposition are limited.[203] *Excellent Petroleum (Pty) Ltd (in liquidation) v Brentoil (Pty) Ltd*[204] sets out a series of applicable guidelines when it comes to the exercise of this discretion by the court. The courts have validated dispositions made between the presentation of the application and the date of the provisional liquidation order, but not dispositions made after the date of the order.[205] If a court finds that the disposition was void and has not, in the exercise of its discretion in terms of section 341 (2) ordered otherwise, it follows that the order for the repayment of the void disposition must be made.[206]

15.6 Application to close corporations

What is stated above in regard to companies, also applies to close corporations in liquidation.[207]

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199 *Rousseau v Malan* 1989 (2) SA 451 (C). See *Lane v Olivier Transport* 1997 (1) SA 383 (C) for guidelines that the court should apply when exercising its discretion to order that the payment is not void.

200 *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA); [2014] JOL 31859 (SCA), paras [27] and [28].

201 *Schmidt and Another NNO v ABSA Bank Ltd* 2002 (6) SA 706 (W) 712H-713A.

202 *Ekosto 1038 Investments (Pty) Ltd v Nedbank Ltd* (Case 26291/2005 Transvaal Provincial Division dated 14 February 2008).

203 *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA); [2014] JOL 31859 (SCA), para [28].

204 [2013] JOL 30839 (GNP).

205 In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (in liquidation)2015 (6) SA 21 (GJ)* the parties agreed that a disposition made by the company between the date when the application was filed with the court and the date upon which the final winding-up order was made was subject to the section. The court decided that dispositions occurring after the final winding-up order were not contemplated by s 341(2) of the Companies Act 1973.

206 *Sass NO v Nenus Investments Corporation and Others* (A488/2016) [2017] ZAWCHC 81 (15 August 2017), para [20]. The obligations could not be discharged on their behalf by the CC. By causing the CC to discharge these obligations, it concluded transactions which were in breach of s 341 (2) of the Companies Act 1973. It is clear that the dispositions made by the CC were exclusively for the benefit of the former members and thus in palpable breach of s 341(2) of the Act. No possible basis for validation was or could be offered by the respondents (para [23]).

207 Close Corporations Act, s 66(1) read with the Companies Act 1973, s 340.

Sections 70(4) and 71(1) of the Close Corporation Act provide that certain payments to members may be set aside by virtue of a certificate issued by the Master indicating that members should repay such amounts. Firstly, the Master must decide whether such payments were *bona fide* and, secondly, whether the member has discharged the burden of proving that the corporation was able to pay its debts.

CHAPTER 24 – SECURED CREDITORS

24.1 Introduction

24.1.1 Meaning of "secured creditor"

One of the central concepts in insolvency law is the distinction between different categories of creditors. The category in which a creditor falls will determine the rights of that creditor and, importantly, how much of the insolvent estate it will receive. The main distinction is between secured and unsecured creditors, while unsecured creditors can be subdivided further into statutory preferent creditors and concurrent creditors. This chapter deals with secured creditors while the next chapter deals with unsecured creditors (both statutory preferent and concurrent). In addition to dividing the estate between the secured and unsecured creditors, certain expenses must also be paid from the estate, such as the Master's fee, the trustee/liquidator's remuneration, the costs of realising the assets and so forth.

To understand the difference between secured and unsecured creditors, one must consider the difference between encumbered and unencumbered assets. Encumbered assets are referred to by the Insolvency Act as "securities" and essentially entail assets of the estate over which specific creditors have security rights. This means that, when such an asset is realised during the course of administering the insolvent estate, the creditor with a security right over that asset will have a preference regarding payment. In effect, after certain costs have been paid, the secured creditor will be paid first from the proceeds. Only if there are any funds remaining will such funds be available for distribution to other creditors. More specifically, the surplus will fall in the "free residue", which is discussed in the next chapter. Therefore, a secured creditor is one who holds a security right over a specific asset in the estate, which means that such creditor's claim will be a secured claim.[208]

Section 2 of the Insolvency Act defines a "security" as follows:

> "'security', in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention".

The above definition should be read alongside the definition of "preference", also in section 2 of the Act:

> "'preference', in relation to any claim against an insolvent estate, means the right to payment of that claim out of the assets of the estate in preference to other claims, and "preferent" has a corresponding meaning".

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208 For more detail on security rights in South African law in general, see R Brits, *Real Security Law* (2016).

When reading the above definitions of "security" and "preference" together, it is evident the Insolvency Act recognises four types of security rights that creditors can hold over certain assets of the estate: a special mortgage, a pledge, a landlord's legal hypothec and a right of retention. A further security right that is not listed in the definition of "security" but is specified in section 84 of the Insolvency Act, is the instalment agreement hypothec. Additional security rights can also be created in other pieces of legislation. Therefore, secured creditors are all creditors who hold any of these recognised security rights over property in the estate.

According to the definition of "preference", a secured creditor is also a preferent creditor (as discussed in the next chapter). However, for the sake of clarity, these notes use "preferent creditors" only when referring to unsecured creditors that qualify as statutory preferent creditors and that are paid from the free residue before ordinary (concurrent) creditors.

24.1.2 Application to companies

Section 342(1) of the Companies Act 1973 provides that, in every winding-up of a company, the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up as closely as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency. Section 366(1)(c) provides that in the winding-up of a company, whether by the court or by a creditor's voluntary winding-up, a secured creditor and the liquidator shall, where the company is unable to pay its debts, have the same right to take over the security as a secured creditor and a trustee would have under the law relating to insolvency. Moreover, section 383(1) provides that the cost of giving security by a person appointed as liquidator shall, subject to section 89(1) of the Insolvency Act, be paid out of the assets of the company as part of the costs of liquidation.

In short, therefore, the position in respect of secured creditors is identical in the winding-up of a company unable to pay its debts and the estate of an insolvent individual.

In what follows, the different kinds of security rights are discussed in greater detail, followed by an explanation of how encumbered assets (securities) are realised and how the proceeds are distributed.

24.2 Mortgage bond over immovable property

The first security right listed in the definition of "security" is the "special mortgage", which is defined in section 2 of the Insolvency Act as follows:

> "'special mortgage' means a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by means of Movable Property Act, 1993 (Act No 57 of 1993), or such a notarial mortgage bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds

(Natal) Act, 1932 (Act No. 18 of 1932), but excludes any other mortgage bond hypothecating movable property".

According to this definition, a special mortgage can relate to either immovable or movable property. The mortgage bond over immovable is discussed here, while the mortgage bond over movable property (called a "notarial bond") is discussed under the next heading.

A mortgage bond over immovable property must be registered in Deeds Office in terms of the Deeds Registries Act 47 of 1937. The purpose of a mortgage bond is to secure the repayment of a debt. A common example is a mortgage bond registered to secure a home loan. Upon registration of the bond, the creditor (mortgagee) will have a security right (mortgage) in the property, which in turn renders the creditor a secured creditor with reference to that property. Importantly, the registration of the bond does not make the creditor the owner of the property but merely creates a limited real right (security right) over that property favour of the creditor. Immovable property entails land and everything permanently attached to land. Certain other assets are also recognised as immovable property by statute, such as sectional title units and registered long-term leases. The registration of a mortgage bond is the only way in which to create a security right over immovable property. In the case of sectional title units, the mortgage bond is known as a "sectional mortgage bond".

The reason why the security right is referred to as a "special" mortgage is because the law also recognises a "general" mortgage. A special mortgage encumbers a specific piece of property while a general mortgage covers all of the debtor's property in general. However, a general mortgage only applies to movable property (as discussed below). With reference to immovable property, only a special mortgage will confer a secured claim on the mortgagee.[209]

More than one mortgage bonds can be registered over the same property. In such a case, the different mortgagees' claims will rank according to the date of the registration of the bonds unless an agreement to subordinate one bond to another has been registered in the Deeds Office. The priority of a mortgage that secures the payment of a future debt also depends on the date of registration of the bond, not the date when the debt comes into being.[210]

Section 88 of the Insolvency Act, in terms of which certain mortgages are invalidated, is dealt with in Chapter XX.

Section 95(2) to (5) of the Insolvency Act provides that the secured dividend of an unproved claim secured by a mortgage over immovable property must be paid into the Master's Guardian's Fund for a period of one year after the confirmation of the account to enable the creditor to apply to the Master for payment of his secured claim.

209 Insolvency Act, s 86.
210 *Ibid*, s 87.

24.3 Mortgage over movable property

As mentioned above, the definition of "special mortgage" includes a mortgage bond of immovable property as well as notarial bond over movable property, which will now be discussed. In order to understand the place of notarial bonds in insolvency law, it is necessary to give some background on the different kinds of notarial bonds, since all such bonds are not treated in the same way in insolvency law.

The Deeds Registries Act 47 of 1937, which regulates the registration of bonds, provides for the registration of both special and general notarial bonds to hypothecate (i.e., to create a security right in) movable property. In what follows, a brief explanation of first general and thereafter special notarial bonds is provided.

24.3.1 General notarial bonds

A general notarial bond is one registered over all of the debtor's movable property in general, thus nothing excluded. This will include both tangible and intangible movable property. For present purposes, it is important to note that the registration of a general bond does not, in and of itself, grant the bondholder a full security right in the movable property of the debtor. Such a creditor is not a secured creditor, as is evident from the fact that a general bond is not included in the definition of "security". Nevertheless, as explained in the next chapter, the holder of a general bond will have a preference to the free residue of the estate and, therefore, is preferred over concurrent creditors.

When a general notarial bond is registered, possession of the movable property remains with the debtor. However, it is possible for the bondholder to strengthen (or upgrade) its rights by taking possession of the movable property under the authority of a court order. This is referred to the perfecting of the security.[211] Perfection of the general bond entails that, if property subject to the bond is delivered to the bondholder after the registration of the bond but before sequestration, the general mortgage is converted into a pledge and the bondholder becomes a fully secured creditor. In this way, the creditor's security is "perfected". (The "pledge", which is included in the definition of "security", is discussed further below.) The property can be delivered voluntarily or attached under the authority of a court order.[212]

The perfecting of a general bond can go as far the bondholder being allowed to take over the debtor's business as a going concern. This is a fairly drastic step that can, if abused, inflict hardship on a debtor. Nevertheless, this is relatively common in practice. The terms of the bond can, for example, set out the powers of the bondholder in this regard, which could include selling the assets of the business and/or restoring the business to profitability and thereafter returning the business to the debtor. In exercising the discretionary powers

211 See Johan Roos, "The Perfecting of Securities Held under a General Notarial Bond" 1995 *SALJ* 169.

212 *Barclays Bank v Natal Fire Extinguishers* 1982 (4) SA 650 (D).

inherent in operating and selling the business and the assets, the creditor is obliged to act reasonably and to exercise reasonable judgment.[213]

The right to delivery of movables in order to perfect the security must be exercised prior to sequestration and the court cannot after sequestration authorise the bondholder to perfect its security.[214] However, if the bondholder obtained possession in terms of a provisional order before sequestration or the commencement of winding-up, the provisional order to take possession should not be discharged and perfection of the security undone merely because sequestration or winding-up occurred before the provisional order to take possession was confirmed.[215] This remains true even if there are prior bondholders but the bondholder who perfected its security was not aware of such bondholders.[216]

24.3.2 Special notarial bonds

Unlike general notarial bonds, which cover all of the debtor's movable assets, special notarial bonds are intended to create a security right in a specifically identified movable object or objects. Although special notarial bonds are mentioned in the definition of "special mortgage", it is also clear from the latter definition that not all special notarial bonds are included. The definition of "special mortgage" specifically limits it to notarial bonds that were registered in compliance with the Security by Means of Movable Property Act 57 of 1993 on or after 7 May 1993 and those registered under the Notarial Bonds (Natal) Act 18 of 1932 before 7 May 1993. Bondholders who do not fall under either of these statutes are not secured creditors but might qualify as general bondholders, in which case they enjoy a statutory preference, as discussed in the next chapter.

In other words, if the (special) notarial bond complies with the requirements set out in the Security by Means of Movable Property Act, such a bond will confer on the creditor a "special mortgage" for purposes of the Insolvency Act. This means that the bondholder will be a secured creditor with a right of preference to the proceeds of the movable property covered by the notarial bond. The Act sets three basic requirements: (1) the bond must be registered in terms of the Deeds Registries Act; (2) the movable property must be corporeal (tangible); and (3) the movable property must be specified and described in the bond in a manner that renders it readily recognisable.

If the above requirements are met, the property will, subject to any encumbrance resting on it on the date of registration[217] and notwithstanding the fact that the property has not been delivered to the bondholder, be deemed to have been pledged to the bondholder as

213 *Pick 'n Pay Retailers (Pty) Limited v Pine Valley Supermarket (Pty) Limited* [2015] JOL 33003 (KZD).

214 *Trisilino v De Vries* 1994 (4) SA 514 (O).

215 Majority judgment in *Development Bank of Southern Africa Ltd v Van Rensburg and Others NNO* 2002 (5) SA 425 (SCA).

216 *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 SCA, which overruled *Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd* 2002 (1) SA 155 (T). A provision in an earlier bond prohibiting the pledging or hypothecating of movables without the bondholder's consent has no effect unless the later bondholder knew about it.

217 For example, an existing right of retention.

effectually as if it had expressly been pledged and delivered to the bondholder.[218] In *Bokomo v Standard Bank van SA Bpk*[219] it was decided that the rights of a bondholder under the Security by Means of Movable Property Act was stronger than the rights of a person who purchased bonded assets after registration of the bond without knowledge of the bond.[220]

The third requirement listed above is the most important one. The phrase "described in the bond in a manner which renders it readily recognisable", means that third parties must be able to determine the identity of each asset without having regard to extrinsic evidence,[221] which is stricter than the test under the Natal Act that allowed description by reference to quantity and kind.

24.3.3 Position where movable property subject to multiple secured rights?

Movable property that, while hypothecated by a notarial bond in terms of the Act, is in the possession of a person other that the mortgagee,[222] or to which an instalment agreement as defined in section 1 of the National Credit Act 2005 relates,[223] is not subject to a landlord's tacit hypothec unless the bond is registered after the landlord's hypothec has been perfected.[224] (The landlord's tacit hypothec and perfection thereof is discussed below.) Section 5 of the Act provides that nothing in the Act affects a mortgage, hypothecation, pledge, tacit hypothec, preference, lien or right of retention acquired by the State and certain publicly funded bodies or associations. It was noted above, with reference to the *Bokomo* case, that the bondholder has a stronger right than a purchaser who bought the property after the registration of the Bond. This includes a purchaser in terms of an instalment agreement as defined in the National Credit Act 2005.

24.4 Pledge

24.4.1 Pledge of corporeal movable property

The best way to secure a debt by means of corporeal movable property is to deliver the property to the creditor as a pledge for the payment of the debt. However, because it rarely makes commercial sense to deliver property to a creditor, pledges of corporeal movable property are not popular. Unlike the case with notarial bonds over movable property, a

218 Security by Means of Movable Property Act, s 1.

219 1996 (4) SA 450 (C).

220 See also *Scheltema Beleggings CC v Commercial Truck & Trailer Sales CC* [2010] JOL 25495 (GNP), paras [25] – [30].

221 *Ikea Trading Und Design AG v BOE Bank Ltd* 2005 (2) SA 7 (SCA), para [10]; *Scheltema Beleggings CC v Commercial Truck & Trailer Sales CC* [2010] JOL 25495 (GNP), paras [10] and [23].

222 For obvious reasons, a mortgagee who has obtained possession of assets subject to his bond should not enjoy protection against his landlord in respect of such assets.

223 *Janse van Rensburg v Mahu Exhaust CC and Another* [2015] JOL 33123 (NCK) decided that movables sold in terms of a contract that provided that the purchase price would be paid in instalments, ownership of the property would remain with the seller until all amounts due in terms of the contract had been paid and that interest payable on instalments not timeously paid were not subject to a landlord's tacit hypothec (although interest was only payable on instalments not timeously paid and not on all outstanding amounts).

224 Security by Means of Movable Property Act 1993, s 2.

pledge does not require registration. Therefore, delivery of the movable property the creditor is required to make that creditor a secured creditor with reference to the property, as long as the creditor remains in possession of the property. As mentioned above, a perfected general notarial bond also creates a pledge in favour of the creditor, since the latter is placed in possession of the relevant movable property.

The law recognises a number of ways in which the property can be delivered to the creditor. Of course, it can be physically handed over to the creditor, but if the object is heavy and bulky, the debtor can point it out to the creditor and allow the latter to remove the property to its premises. Further, if the movable is already in the creditor's possession, but for a different reason, the parties can simply agree that the creditor will henceforth hold it in pledge. It is also possible to deliver the movable via a symbol that represents possession of the object. For example, a key to a warehouse can be handed over as way to deliver the contents of the warehouse. Importantly, however, if the debtor remains in physical possession of the movables but purports to hold it on the creditor's behalf (thus only transferring "legal possession" to the creditor but retaining "physical possession"), no pledge will come into existence.

24.4.2 Pledge of incorporeal movable property (via cession of a personal right)

A personal right (a right of action, which is regarded as incorporeal movable property) can be pledged by ceding (transferring) the rights as security for a claim. This is referred to as a cession *in securitatem debiti*. The cession of debts, shares in a company, instalment sale transactions, insurance policies, etc. as security for claims, is very common in practice. A future debt (a debt not yet in existence) can also be ceded,[225] so to a contingent claim.[226]

2.4.2.1 General principles of cession

Cession is the legal act through which a personal right (such as a contractual right, including a debt) is transferred from one person (the cedent) to another (the cessionary). For example, A owes a sum of money to B. This debt (B's claim against A) is an asset that B can, for example, sell to another. B can also pledge this claim (personal right) to his creditor (C) as security for moneys owed by B to C.

There are no formal requirements for ceding a personal right and all that is necessary is a meeting of minds between B and C. The cession can be concluded verbally unless the instrument that created the personal right requires a cession of such right to be in writing (or comply with any other requirements). The original debtor (A) does not have to be notified that his creditor (B) has ceded the latter's right, but in order for A to pay his debt to the correct creditor, it is practical to notify A that C is now is new creditor. If A is not notified, he can

225 *Headleigh Private Hospital v Soller & Manning Attorneys* 2001 (4) SA 360 (W) 366-369.
226 *First National Bank of SA Ltd v Lynn NO* 1996 (2) SA 339 (A).

validity discharge his debt by paying his original creditor (B).[227] Despite the general rule that A does not have to be notified, such notification can be made a requirement in the instrument that created the original debt, that is, the contract between A and B.

If the debt is evidenced by a document, such as a contract or a bill of exchange, the question is whether such document must also be handed over the cessionary in order for the cession to take effect.[228] In *Botha v Fick*[229] the Appellate Division of High Court (today known as the Supreme Court of Appeal) set out the position as follows:

- A right of action that has been embodied in a document and that cannot exist independently of the document, such as a negotiable instrument, or cases where an Act, or regulation, agreement, etc., prescribes formalities to complete the cession, should be distinguished from other rights of action that are evidenced in a document but that exist independently of the document, such as a share in a company in respect of which a share certificate has been issued;

- Where the latter kind of action is ceded, neither delivery of the document to the cessionary[230] nor compliance by the cedent with the doctrine of "all effort"[231] is a requirement for the validity of the cession;

- Delivery of the document is an important factor, possibly a decisive factor, when the question arises whether or not the cession has been proved.

If the instrument that created the personal right contains any requirements for or restrictions on the cession of the right, such requirements must be followed. It is also possible for A to agree that he will not cede his rights (against B) to anyone. If such an agreement not to cede (*pactum de non cedendo*) is contained in the instrument that created the personal right (such as the insurance policy or loan agreement), the personal right will inherently be incapable of being ceded, meaning that any attempted cession thereof will be invalid, even if C has no knowledge of the restriction. Importantly, the trustee of B's estate is also bound by such an agreement not to cede the personal right. However, if the agreement not to cede was

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227 *Lynn & Main Inc v Brits Community Sandworks CC* (348/2007) [2008] ZASCA 100 (17 September 2008) – also reported as [2008] JOL 22418 (SCA). *Cf* Susan Scott, "Die rol van kennis van sessie aan die skuldenaar" *TSAR* 2007-4.

228 A full bench decision of the Transvaal Provincial Division, *Nezar v Die Meester* 1982 (2) SA 430 (T), decided that when the evidence of the right was contained in a written instrument which recorded it, the right could not be completely ceded unless the instrument was delivered to the cessionary. Documents that may be regarded as evidencing rights are share certificates, written agreements of leases, mortgage bonds (the cession of which must be recorded in the deeds office to be effective against an insolvent cedent's estate – *Lief v Dettmann* 1964 (2) SA 252 (A)), deposit vouchers, insurance policies, negotiable instruments and hire-purchase agreements, but not a construction contract – see *Ex parte Deputy Sheriff, Kempton Park: In re J I Case Ltd v Volkskas Ltd* (1989 (2) SA 646 (T).

229 1995 (2) SA 750 (A).

230 *Firstrand Bank v Western Breeze Trading 213 (Pty) Limited* (49/13) [2014] ZASCA 40 (31 March 2014) confirmed that registration of transfer in the share register or delivery of the share certificate to the cessionary is not necessary for acquisition of the rights of a shareholder.

231 Whether the cedent has done everything in his power to effect the cession of his rights of action.

concluded separately from the instrument that created the personal right, any cession in contravention of the agreement will be valid. In such a case, the only consequence is that the cedent (B), who ceded the personal right in contravention of the agreement, will be in breach of this agreement and liable to pay damages to A.[232]

24.2.2 Legal nature of cession in securitatem debiti

The effect of a cession *in securitatem debiti* (a cession for the purpose of securing a debt) has been the subject of considerable debate over the years. Two main theories have been put forward. The first is the "out-and-out" (outright) cession theory, which entails that the cession fully transfers the personal to the creditor (cessionary). *Dominium* ("ownership") of the asset passes to the creditor and the personal right must then be re-transferred to the debtor once the secured debt has been discharged. For insolvency purposes, the effect of this theory is that, should the cedent/debtor be sequestrated, the ceded claim will form part of the cessionary/creditor's estate, since "ownership" of it had been transferred to such creditor. This situation is not ideal because the trustee of the cedent's estate will not be able to realise the claim for the benefit of the estate as a whole.

Conversely, the second theory (the pledge theory) entails that, after the cession *in securitatem debiti*, the bare *dominium* (ownership) of the right (also called "the reversionary interest") remains vested in the cedent/debtor, while the cession merely has the effect of creating a limited security right (like a pledge) in favour of the cessionary/creditor. No re-transfer of the right will be necessary once the secured debt has been discharged. Instead, the cessionary's right of pledge will merely fall away automatically. According to the pledge theory, should the cedent's estate be sequestrated, the ceded personal right will form part the insolvent estate and the cessionary/creditor will have a preference (pledge) to the proceeds of that right. In other words, the situation is similar to how all other security rights function in insolvency law.

Although the first theory has been regarded as doctrinally more accurate by some, the courts have overwhelmingly favoured the second theory because it is more in line with the purpose of the cession and leads to a practically more equitable outcome, especially upon either party's insolvency.[233] In fact, the position now is that, unless the parties expressly structure their cession according to the out-and-out theory, the default position will be the pledge theory.[234]

The pledge construction has the effect that if a person has ceded a claim, the cessionary cannot carry on litigation or arbitration proceedings in the name of the trustee.[235] In the case of the cession of a policy, even if it is accepted that the surrendering of the policies terminated them, up and until the proceeds of the policies were in fact paid out, the *dominium* of the

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232 *Born Free 364 Investments v First Rand Bank Limited* [2014] JOL 31371 (SCA).

233 See e.g. *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A); *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 435 (SCA).

234 *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA), para [24].

235 *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C).

right to receive payment of the surrender values of the policies remained vested in the debtor and form an asset in the estate.[236]

24.5 Landlord's legal hypothec

In terms of the common law, a lessor of immovable property has a security right, called a tacit hypothec, over movables (*invecta et illata*)[237] brought on to the leased property and over fruit and crops yielded by the property as security for the payment of rent. The hypothec operates for as long as rent is owing. There is some debate regarding whether the hypothec also secures other debts owing to the landlord, such as damages, but for insolvency purposes, the hypothec expressly only secures outstanding rent – according to the wording of section 85 of the Act.

24.5.1 Property subject to the hypothec

Under the common law, the hypothec covers three categories of movable property present on the leased property:

- Movable property belonging to the tenant. This only includes tangible objects.
- Movable property belonging to a subtenant, provided that the tenant's (sublessor) movables are not enough to cover the latter's outstanding rent and only to the extent that the subtenant is also in arrears with his rental obligations to the tenant.
- Movable property belonging to third parties but that are present on the leased premises. However, in terms of section 2(1)(b) of the Security by Means of Movable Property Act 1993, movable property subject to an instalment agreement as defined in section 1 of the National Credit Act 2005 (which property remains the property of the seller) is not subject to a landlord's tacit hypothec. The same is true for property covered by a special notarial bond in terms of section 1 of the Security by Means of Movable Property Act. Furthermore, for third-party property not captured by the exclusion in section 2(1)(b) of the Security by Means of Movable Property Act 1993, such movables will be subject to the hypothec to the extent that the tenant's (and, if there is one, the subtenant's property is not enough to cover the landlord's claim. There are also certain other requirements that must be met before the third-party's property can be subjected to the landlord's hypothec.[238]

For purposes of insolvency law, the hypothec will only cover movables belonging to the tenant (the insolvent debtor) and thus not movables belonging to the subtenant or third parties.[239] The reason for this is that property belonging to persons other than the debtor

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236 *Nedbank Ltd v Cooper NO and Others* 2013 (4) SA 353 (FB), para [28].
237 Meaning "things carried in or brought on to premises".
238 *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.
239 *Kleinsakeontwikkelingskorporasie Bpk v Santambank Bpk* 1988 (3) SA 266 (C).

(tenant) will not form part of his insolvent estate and therefore cannot be administered by the trustee of that estate.

24.5.2 Perfection of the hypothec

Although the hypothec comes into existence the moment when the tenant falls behind with his rent, the hypothec needs to be "perfected" to make it enforceable against third parties. If the hypothec is not perfected, the landlord's security will be defeated if the movables are removed from the leased premises. Perfection is therefore aimed at preventing such removal and can be done in two ways, as provided for in terms of the Magistrates' Courts Act 1944. The first option, in terms of section 31 of the Act, is for the landlord to sue the tenant for payment of the outstanding rent and include in the summons a so-called "automatic rent interdict". From the moment that summons is issued, all persons with knowledge of the summons will be interdicted (prohibited) from removing the movables from the premises. The second option, in terms of section 32 of the Act, is to have the movable property attached. Such attachment will be *in situ*, meaning that the movables will not be removed from the premises, but the sheriff will post a notice at the premises indicating that the movables have been attached. After such attachment, no one may remove the movables, but if they are removed, the landlord is entitled to have them returned.

Despite the above, it is not necessary for insolvency purposes for the hypothec to have been perfected prior to the granting of the sequestration order or the commencement of liquidation. The landlord will instead enjoy an automatic right of preference over all movables (belonging to the tenant and not subject to a special notarial bond) present on the premises at the date of sequestration.

24.5.3 Limitation of tacit hypothec

Section 85 of the Insolvency Act provides that no tacit hypothec or legal hypothec other than the landlord's legal hypothec, or the hypothec of a seller under an instalment agreement in terms of section 84 (see further below), will confer any preferent right against an insolvent estate. The section limits the secured claim by virtue of the landlord's legal hypothec to the following outstanding rental prior to and up to the date of sequestration:

- three months, if rent is payable monthly or at shorter intervals than one month;
- six months, if rental is payable at intervals exceeding one month but not exceeding three months;
- nine months, if rental is payable at intervals exceeding three months but not exceeding six months, and
- fifteen months in any other case.

Therefore, the landlord's claim will only be secured to the degree indicated in the above list. Any claim above the relevant limit will be an unsecured concurrent claim.

24.5.4 Rental after sequestration is cost of administration

Rental for any period after sequestration is a cost of administration to be paid by the trustee without the necessity to prove a claim but subject to the rules for the continuation of leases contained in section 37 of the Insolvency Act.

24.6 Right of retention

If a person in possession of the movable or immovable property of another has incurred expenses with regard to such property by having spent money or labour on it, that person has the right to retain possession of the property until he is remunerated according to the agreement or, in the absence of an agreement, for the actual expenditure or labour, which claim is calculated in terms of the principles of enrichment. The right of such a person in possession of another's property is known as a "right of retention", also known as a "lien". A lien affords the lienholder with a defence against the owner's *rei vindicatio* but not with a cause of action *per se*. Such a creditor in possession of another's property has, by virtue of his right of retention, a security right in that asset and, therefore, will be a secured creditor upon the insolvency of the owner of such property.

24.6.1 Types of liens (rights of retention)

Two kinds of liens are recognised in South African law: debtor-creditor liens and enrichment liens.

- A debtor-creditor lien is where expenses are incurred in terms of a contract between the parties. The creditor has a personal right against the other contacting party, in terms of which the creditor may remain in possession of the property until he is remunerated in terms of the contract. The most common types are probably builder's liens and repairers' liens by garages and others. Accountants, attorneys and hotel and boarding-house keepers may also have a lien.

- Enrichment liens are subdivided into two types: salvage (or storage) liens and improvement liens. A salvage lien is where the expenses incurred prevented the market value of the property from decreasing, while an improvement lien is where the expenses incurred caused the market value of the property to increase. These are known as enrichment liens because both are characterised by the fact that the owner is enriched by the expenditure or efforts of the person in possession of the owner's property, although no contract regarding these expenses existed between the parties.

24.6.2 Limitation enrichment lien

In the case of a salvage or improvement lien without an agreement, the security is limited to the smaller of –

- the amount expended by the creditor; or
- the amount by which the owner has been enriched.

This type of lien covers necessary and useful expenses but not luxurious expenses.[240]

Pre-sequestration interest is only payable if this has been agreed upon or the debtor has been placed *in mora*. Amounts for storage can also not be claimed unless it has been agreed upon.[241]

24.6.3 Lien on insolvent's book or document of accounts

The proviso to section 47 of the Insolvency Act states that a right to retain any book or document of accounts that belong to the insolvent estate, or relates to the insolvent's affairs, shall not afford any security or preference in connection with any claim against the estate.[242]

Legal professional privilege usually prevents disclosure of privileged documents without the consent of the client. However, section 47 of the Insolvency Act does not affect legal privilege, but deals with the question as to whether a person has a secured claim or preference with reference to a book or document of account of the insolvent. An attorney is generally entitled to retain a document prepared for a client, or a document belonging to the client, in respect of which the attorney has rendered services until the client has paid any fee to which the attorney is entitled in respect of services rendered before sequestration. The documents prepared by an attorney would mostly not be a "document of account" subject to the provisions of section 47.

24.6.4 Physical possession a prerequisite

Physical possession by the creditor (lienholder) is a prerequisite for the continued existence of his right of security. Therefore, the right of retention will be lost of the creditor gives up possession of the property. However, in terms of section 47 of the Insolvency Act, the creditor's security is not affected if the secured asset is handed to the trustee as provided for

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240 See *Ethekwini Municipality v Boyce* [2015] JOL 33771 (KZD), paras [22] to [25] for the requirements for an improvement lien.

241 *Trust Bank van Afrika Bpk v Van der Walt NO* 1972 (3) SA 166 (C).

242 Whatever the exact scope of an attorney's lien over documents might be (in or outside insolvency), it extends at most to documents in respect of which the attorney is entitled to charge a fee for work actually done and time and labour actually expended on the documents – *Free State Agriculture & Ecotourism Development (Pty) Ltd v Mthembu & Mahomed* 2002 (5) SA 243 (O).

in the section. The court has the power to order delivery of the property subject to the right of retention to the owner against the provision of adequate security.[243]

24.6.5 Ranking of rights of retention

The Insolvency Act does not draw a distinction between enrichment liens (which are real rights) and debtor-creditor liens (which are personal rights). The Act also does not explain what should happen if, in addition to a lien, another creditor also holds a security right (like a mortgage or pledge) over the same property. The general rule is that security rights rank in the order in which they were created: the first created must be paid first and so forth. However, there is a special rule in the case of liens. The holder of an enrichment lien must always be paid first, even if another security right was created first. On the other hand, the holder of a debtor-creditor lien must always be paid after the holder of another security right. The reason for the latter rule is because a debtor-creditor lien is a personal right, and such rights are always subservient to real rights – regardless of the when the rights were created.[244]

24.7 Instalment agreement hypothec

24.7.1 Section 84 of the Insolvency Act

The instalment agreement hypothec is not listed in the definition of "security" in section 2 of the Insolvency Act but is recognised separately in section 84(1) of the Act in the following terms:

> "If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction which is an instalment agreement contemplated in paragraphs (a) and (b) and (c)(i) of the definition of 'instalment agreement' set out in section 1 of the National Credit Act, 2005, such a transaction shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's insolvent estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding that property as security for his claim and the provisions of section 83 shall apply."

24.7.2 Instalment agreements subject to section 84

The definition of "instalment agreement" referred to in section 84(1) above, reads as follows:

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243 *Standard Bank of South Africa Ltd v D Florention Construction CC* 2008 (5) SA 534 (C).

244 See e.g. *Ninian & Lester (Pty) Ltd v Perry NO and Others* 1991 (1) SA 66 (N); *D Glaser & Sons (Pty) Ltd v The Master and Another NO* 1979 (4) SA 780 (C).

"'instalment agreement' means a sale of movable property in terms of which-

(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; or

(ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and

(d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred".

Section 84(1) applies if an agreement complies with paragraphs (a), (b) and (c)(i) of the above definition of "instalment agreement". When read together, these paragraphs refer to the typical transaction whereby ownership is reserved with the seller of movable property until the full purchase price has been paid. In such a case, section 84(1) will apply to the property upon the debtor's (purchaser's) sequestration.

Paragraph (a) of the definition indicates that section 84 will only apply if the transaction involves the payment of periodic instalments – not, for example, where a lumpsum payment is to be made. Section 84 also does not apply to financial leases, or instalment agreements concerning incorporeal property.[245] Although the definition of "instalment agreement" in the National Credit Act is used to indicate section 84's scope of application, the agreement does not otherwise have fall under the field of application of the National Credit Act; it must just comply with the relevant paragraphs of the definition of "instalment agreement".[246]

24.7.3 Effect of section 84(1)

The effect of section 84 is that, upon sequestration, ownership of the movable property will automatically pass from the seller (creditor) to the purchaser's (debtor's) insolvent estate.[247] In exchange for its loss of ownership, the seller is endowed with a hypothec that serves as security for the payment of the outstanding purchase price owing to the seller. In other words, the seller will be a secured creditor of the estate with reference to the proceeds of the property subject to the instalment agreement. If the creditor does not require the trustee to deliver the property in terms of section 84(1), the property is realised for the benefit of the estate subject to the hypothec in favour of the creditor.[248] If the property is handed over to

245 *A-Team Drankwinkel v Botha* 1994 (1) SA 1 (A).

246 *Potgieter NO v Daewoo Heavy Industries (Edms) Bpk* 2003 (3) SA 98 (SCA); *Van Zyl NO v Bolton* 1994 (4) SA 648 (C).

247 *Morgan v Wessels* 1990 (3) SA 7 (E); *Van der Burgh v Van Dyk* 1993 (3) SA 312 (E); *Van Zyl v Bolton* 1994 (4) SA 648 (C).

248 *Epsom Motors Pty (Ltd) v Estate Winson* 1961 (1) SA 687 (E).

the creditor, the provisions of section 83 will apply.[249] Section 84(1) applies even if the trustee was not in possession of the property,[250] but section 84(1) does not create a hypothec if the creditor under the transaction is not the owner.[251]

24.7.4 Property returned within a month before sequestration

Section 84(2) provides for cases where the debtor returned property within a month before sequestration while the value of the property was substantially more than the outstanding balance. In such a case:

> "the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor, subject to payment to the creditor by the trustee or to deduction from the value (as the case may be) of the difference between the total amount payable under the said transaction and the total amount actually paid thereunder. If the property is delivered to the trustee the provisions of subsection (1) shall apply."

24.7.5 When section 84 not applicable

If a transaction does comply with the above definition of instalment agreement, section 84 will have no effect on it. Such instalment agreement (or similar transaction) will be an incomplete (unexecuted) contract and must be dealt with according to the common law rules applicable to such contracts (as discussed in a previous chapter). For example, if the trustee elects to terminate the agreement in terms of the common law, the trustee will have to return the asset to the seller.[252]

24.8 Special statutory rights

In addition to the four security rights indicated in the definition of "security" (special mortgage, pledge, landlord's legal hypothec and right of retention) and the instalment agreement hypothec provided for in section 84 of the Insolvency Act, it is also possible for other special security rights to be created in other pieces of legislation. Certain statutory provisions also create claims that form part of the costs of realising certain assets of the estate. Although the latter claimants technically do not hold security rights, the effect is that the payment of such costs are secured because they have to be paid as part of the costs associated with realising the property, thus rendering such amounts payable before any other (secured) creditors are paid. The costs of realising the property of the estate are discussed further below in this chapter. In what follows, a brief summary is provided of some statutory security rights that are not part of the costs of realising the property but that have the same status as the other security rights recognised in the Insolvency Act.

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249 Insolvency Act, s 84(1). Section 83 is discussed in 24.9 below.
250 *Venter v Avfin (Pty) Ltd* 1996 (1) SA 826 (A).
251 *Cf Meyer v Catwalk Investments 354 (Pty) Ltd* 2004 (6) SA 107 (T).
252 *A-Team Drankwinkel v Botha* 1994 (1) SA 1 (A) at 17.

24.8.1 Alienation of Land Act

Secured claims in terms of the Alienation of Land Act have been dealt with under a separate Chapter.

24.8.2 Agricultural pledges and charges

Two statutes provide for special statutory security rights in the agricultural context.

24.9 Realisation of securities

24.9.1 Notice creditor that holds movable property as security

A creditor who holds movable property as security for a claim must, before the second meeting of creditors, give written notice of that fact to the Master and to the trustee, if one has been appointed.[253]

24.9.2 Sale by creditor of securities or financial instruments

Section 83(2) of the Insolvency Act[254] provides that if the movable property consists of securities as defined in section 1(1) of the Financial Markets Act 19 of 2012, a bill of exchange or a financial instrument or a foreign financial instrument as defined in section 1(1) of the Financial Sector Regulation Act 9 of 2017, the creditor may, after giving the notice mentioned in subsection (1) and before the second meeting of creditors, realise the property in the manner and on the conditions mentioned in subsection (8).

24.9.3 Sale by creditor of movable property held as security

The creditor may realise such property in the manner and on the conditions following, that is to say:

(a) if it is any property of a class ordinarily sold through an authorised user or an external authorised user, on an exchange or an external exchange, each defined in section 1(1) of the Financial Markets Act 2012 or, where applicable, a person prescribed by the Minister of Finance as a regulated person in terms of section 5 of that Act, the creditor may, subject to the provisions of that Act and applicable standards and rules in terms of that Act, immediately sell it through an authorised user, external authorised user or such regulated person, or if the creditor is an authorised user, external authorised user or regulated person, also to another authorised user, external authorised user or regulated person;

253 Insolvency Act, s 83(1).
254 As amended by the Financial Sector Regulation Act 2017.

(b) if it is a bill of exchange, the creditor may realize it in any manner approved of by the trustee or by the Master;

(c) if it consists of a right of action, the creditor shall not realise it except with the approval of the trustee or of the Master;

(d) if it is any other property, the creditor may sell it by public auction after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as the trustee directed.[255]

24.9.4 Taking over of security by trustee

The procedure where the trustee takes over property that does not consist of securities or a bill of exchange within the period of seven days provided for in terms of section 83(3), is not applied often in practice. A non-statutory procedure is followed where the trustee subsequently takes over the security against payment of the claim. The trustee must ensure that it is made clear that the amount at which the security is taken over includes VAT or else the estate will be liable for VAT. The trustee in effect makes an advance on the secured claim of the amount agreed upon without the necessity (or the possibility) of authority by creditors. It is submitted that the trustee may still dispute whether the creditor is entitled to a secured claim and claim the amount of the claim or the agreed amount from the creditor if it appears that the creditor is not entitled to a secured claim.

24.9.5 Creditor who realised security

A creditor who has realised his security must forthwith pay the net proceeds of the realisation to the trustee or the Master.[256] The creditor must as soon as possible after the realisation prove a claim, attaching a statement of the proceeds of the realisation to his claim.[257] As creditors rarely realise their security in terms of section 83(2) this is not discussed in detail.[258]

24.9.6 Secured creditor must hand over security to trustee

If a creditor has not realised the security before the commencement of the second meeting, the creditor must as soon as possible thereafter deliver the property to the trustee.[259] If the

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255 Insolvency Act, s 83(8), as amended by the Financial Sector Regulation Act 2017.

256 Insolvency Act, s 83(10).

257 *Ibid*, s 83(5).

258 If the creditor fails to pay over the proceeds, the creditor cannot have a preferred claim on the proceeds – *Standard Bank of South Africa Ltd v Townsend* 1997 (3) SA 41 (W) 52. The creditor must comply with this duty to pay over the proceeds even if the provisions of s 83 have not been complied with and the trustee has failed to recover the property earlier. The creditor must pay over the proceeds forthwith and cannot insist that the trustee should tender payment of his claim – *Venter v Avfin (Pty) Ltd* 1996 (1) SA 826 (A).

259 Section 83 does not apply where the creditor is not able to realise the property in the manner and on the conditions mentioned in s 83(8) and where the property does not secure only the claim of the creditor in possession of the assets. In such circumstances the creditor has no right to refuse to deliver the property to

creditor does not do so after a demand by the trustee as provided for in the Act, the Master may direct the sheriff to attach the property and deliver it to the trustee.[260] It is an offence if a person fails (subject to the provisions of section 83) to deliver property that belongs to the estate to, or place it at the disposal of, the trustee.[261]

24.9.7 Creditor does not lose security if secured asset handed to trustee

Section 47 provides that if a creditor who is in possession of any property belonging to the estate to which the creditor has a right of retention, or over which the creditor has a landlord's legal hypothec, delivers that property to the trustee at the latter's request, the creditor does not thereby lose the security afforded if, when delivering the property, the creditor notifies the trustee in writing of its rights and in due course proves a claim. Apparently, such written notices are not common in practice but practitioners nevertheless accept that the rights in terms of, for example, a landlord's legal hypothec, are not lost by handing over the property. The trustee is entitled to the possession of immovable property subject to a right of retention, although section 83 of the Insolvency Act gives an express right to possession in respect of movables only.[262] Section 47 does not refer to a pledge. The reason appears to be that loss of possession is more decisive in respect of a right of retention or a landlord's hypothec. In these cases, loss of possession terminates the security even if the security is handed over involuntarily and the person who obtains possession is aware of the secured rights. A pledge is not terminated if the loss of possession is involuntary or the person who obtains possession is aware of the security. Therefore, the security conferred by a pledge is not lost if the asset is handed to the trustee, especially if the trustee is aware of the security right.

24.9.8 Proof of claim and value security

The secured creditor may prove a claim and value the security.[263]

24.9.8.1 Effect if security valued

If a creditor has valued its security when proving the claim and has not realised the security, the trustee may, in terms of section 83(11) and with the authority of creditors, within three months after the appointment or the proving of the claim, whichever is the later, take over the security of the creditor at the value placed on the security when the claim was proved. This provision applies to movable and immovable property. The subsection creates an option in favour of the creditors to purchase the asset held as security through the trustee.[264]

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the trustee before the second meeting – *Van der Merwe NO and Others v Uti South Africa Proprietary Limited and Others* (11033/2014) [2014] KZD (17 December 2014); [2015] JOL 32903 (KZD), paras [61], [62] and [63].

260 Insolvency Act, s 83(6).

261 *Ibid*, s 142(2).

262 *Roux v Van Rensburg* 1996 (4) SA 271 (A).

263 Insolvency Act, s 83(7).

264 *Kahan v Hydro Holdings* 1980 (3) SA 511 (T).

24.9.8.2 Sale of security by trustee

If the trustee does not take over the property, he must realise it (with the authority of the Master or the creditors) for the benefit of the secured creditor(s).[265]

24.9.8.3 Trustee must account for proceeds of security separately

The trustee must ensure that assets subject to a secured claim or secured claims are sold or accounted for separately. The trustee will not be able to draw up the liquidation and distribution account properly if, for instance, the proceeds of assets subject to the landlord's legal hypothec cannot be determined. If the trustee immediately invests the proceeds of encumbered assets separately, the trustee will avoid the necessity of apportioning interest earned on invested estate funds.

24.9.8.4 Abandonment of security

There appears to be some controversy over the practice of "abandoning" security to a secured creditor in satisfaction of the secured claim. The view is apparently held that if the procedure in terms of section 83(11) of the Insolvency Act for the trustee to take over the security (set out above) has not been followed, the trustee must sell the secured assets. It is submitted that nothing prevents the trustee, with the authority of creditors, to "abandon" the security to the creditor in satisfaction of its secured claim. In effect the trustee sells the property to the creditor for the amount of the secured claim and payment by the creditor of the further amounts agreed upon, such as the costs in terms of section 89(1) (discussed below). The Insolvency Act provides for remuneration of a trustee on the value at which property has been taken over by a secured creditor.[266] *United Building Society Ltd v Du Plessis*[267] is authority for the view that such abandonment is valid even if no written agreement has been entered into between the trustee and the creditor. The terms of such "abandonment" should preferably be clearly set out in a written agreement, *inter alia* to prevent uncertainty regarding the payment of VAT on the transaction and to clarify the position regarding the payment of costs in terms of section 89(1). It is risky to transfer the property to the creditor before the creditor has paid or made suitable arrangements for the payment of the amounts due by the creditor and problems may also be experienced if a dispute arises in respect of the question as to whether the creditor is entitled to a secured claim. A provision in the agreement that transfer of immovable property will only take place after confirmation of the liquidation account may be considered, but the trustee will find himself in an uncomfortable position if, after confirmation of the account, the trustee experiences problems in transferring the property immediately.

265 Insolvency Act, s 83(11).
266 Insolvency Act, Second Sch, Tariff B, item 6.
267 1990 (3) SA 75 (W).

24.10 Disputes in respect of security for a claim

If a secured creditor proves his claim, it may happen that the trustee disagrees with that creditor's allegation that his claim is secured. The trustee's opinion of the status of the creditor's claim will become apparent when the trustee lodges the liquidation and distribution account. Creditors will then be able to object to the account, for example if the trustee did not recognise a creditor as secured.[268] Section 83(10) provides that if the trustee disputes the preference and the security relied upon, the creditor may object to the account or apply to court for an order compelling the trustee to pay the creditor forthwith.

24.11 Proceeds of security: Fruits such as rent, crops and interest

Section 83(10) provides that a secured creditor who has realised security must forthwith pay the "net proceeds of the realisation" to the trustee and "thereafter the creditor shall be entitled to payment, out of such proceeds, of his preferent claim …". Under section 95(1) "the proceeds of any property" subject to a secured claim must be applied in satisfying a secured claim. In reconciling these two sections, the court in *Singer v The Master*[269] held that a secured creditor was entitled to benefits arising from the property such as rent and interest derived from investing the proceeds of the property. The secured creditor is entitled to such "fruits" (and also to dividends and crops arising from the security after sequestration) but fruits gathered or collected before sequestration no longer form part of the security as such.[270] Rent payable for the use and benefit to the tenants from time to time must be apportioned between the seller and purchaser, even if the rent is payable after the sale.[271] It is advisable to immediately invest the purchase price separately as this will avoid the problems associated with apportioning interest derived from estate funds when the trustee drafts the account.

24.12 Distribution of proceeds of security

24.12.1 Encumbered asset account

In order to ensure that the proceeds of securities are awarded correctly, an encumbered asset account must be drawn up to indicate the proceeds of the security, the disbursements payable out of the proceeds of the security and the amount payable to a creditor or creditors out of the remaining proceeds.

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268 *Cf Garvin v Sorec Properties Gardens Ltd* 1996 (1) SA 463 (C), *Callinicos v Burman* 1963 (1) SA 489 (A) at 500; *Bowman v De Souza Rolado* 1988 (4) SA 326 (T) and the case of *Caldeira v The Master* 1996 (1) SA 868 (N).

269 1996 (2) SA 133 (A).

270 *Cf Wille's Law of Mortgage and Pledge in South Africa*, 3rd Ed, by Johan Scott and Susan Scott, 134-135. The pledge holder has an obligation to account for the fruits of pledged property, but this obligation is not imposed on a mortgagee not in possession of the mortgaged property – see *Bisnath NO v Absa Bank Ltd* 2008 (4) SA 92 (SCA).

271 *Cf Garvin v Sorec Properties Gardens Ltd* 1996 (1) SA 463 (C).

24.12.2 Section 89(1) of the Insolvency Act

The cost of maintaining, conserving and realising property must be paid out of the proceeds of the property, if sufficient. If the proceeds are insufficient, and if the property is subject to a special mortgage, landlord's legal hypothec, pledge or right of retention, the deficiency must be paid by the proved secured creditors who would have been entitled (in priority to other persons) to payment if the proceeds had been sufficient to pay the costs. The costs of maintaining, conserving and realising the property include costs such as auction costs, insurance, security guards, etc. The amount payable for the lease of a property is also included if the sole purpose of the continuation of the lease is to store the property in question on the premises.

24.12.3 Claims treated as cost of realisation

In terms of section 89(1), the following costs form part of the "costs of realisation":

- The trustee's remuneration in respect of the property;
- A proportionate share, calculated on the proceeds of the sale, of the costs of the trustee's bond of security;
- A proportionate share of the Master's fees;
- In the case of immovable property, any tax as defined in section 89(5) which is or will become due on the property in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the tax in respect of any such period, shall form part of the costs of realisation. Issues surrounding the payment of property tax is discussed in more detail further below

In addition to the above costs, in certain other instances where an amount of money must be paid in order to effect the transfer of property, such costs will also form part of the costs of realising the property for insolvency purposes. The main examples are as follows:

- Levies in terms of the Sectional Titles Act 1986. In terms of section 15B(3)(a)(i)(aa) of the latter Act, ownership of a sectional title unit may only be transferred in the Deeds Office if the body corporate of the sectional title scheme has certified that "all moneys due to the body corporate" in respect of the unit have been paid or that satisfactory provision for such payment has been made. In other words, also in the case of the sectional owner's insolvency, the trustee must pay all amounts owing to the body corporate in order to sell and transfer the property.[272] This means that such costs will form part of the costs of

[272] See e.g. *Nel v Body Corporate of the Seaways Building* 1995 (1) SA 130 (C); 1996 (1) SA 131 (A) 140B and 140J-141B.

realizing the property for insolvency purposes. These costs do not qualify as a "tax" and therefore it is not limited to an amount for two years prior to sequestration.[273]

- Fees owing to homeowners' associations. Conditions are often registered against title deeds of property that the owner of the property may not transfer the property without a clearance certificate supplied the homeowners' association confirming that all fees payable to the homeowners' association have been paid. Technically, such costs only form part of costs of realising the property under section 89 of the Insolvency Act if there is a statutory provision[274] (similar to the Sectional Titles Act mentioned above) that provides for it. However, In *Willow Waters Homeowners Association (Pty) Limited v Koka NO and Others*[275] the Supreme Court of Appeal decided that a condition in a deed of transfer that provides that the owner of the property or any person who has an interest therein is not entitled to transfer the property or any interest therein without a clearance certificate from the homeowners' association, confers a real right on the Association. The effect of the condition is to secure payment of the claim. The amount paid in order to enable the property sold by a trustee or liquidator to be transferred to the buyer is included in the cost of "maintaining, conserving and realising property" in terms of section 89(1) of the Insolvency Act.

- "Endowments" due to a local authority by a developer. It was decided in *De Wet v Stadsraad van Verwoerdburg*[276] that certain endowments payable by the owner of a township to the local authority constituted "costs of realisation".

24.12.4 Municipal property taxes

24.12.4.1 Tax defined in section 89(5)

Above it was pointed out that tax payable in relation to immovable property for the two-year period prior to sequestration must be paid as part of the costs of realising the property. Therefore, any tax older that two years, will not be paid as part of the realisation costs but will be a concurrent claim. Section 89(5) provides that "tax" in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property.

24.12.4.2 Debts under section 118(1) of the Local Government: Municipal Systems Act 2000

The meaning of "tax" as used in section 89 of the Insolvency Act is particularly relevant in the context of municipal debts relating to immovable property. Such debts comprise of

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273 *Barnard NO v Regspersoon van Aminie* 2000 (1) SA 973 (SCA).

274 Such as section 31 of the Western Cape Planning and Development Act 1999. A further example is section 96 of the Gauteng Town Planning and Townships Ordinance (Ordinance 15 of 1986).

275 2015 (5) SA 304 (SCA).

276 1978 (2) SA 86 (T).

"municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties".

As mentioned earlier, section 118(1) of the Local Government: Municipal Systems Act 2000 provides that the registrar of deeds may not register the transfer of immovable property unless it is supplied with a clearance certificate issued by the municipality. The certificate must indicate that amounts that became due in connection with the property for municipal service fees,[277] surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate, have been fully paid. Therefore, the municipality can embargo (prevent) the transfer of the property until the municipal debts for the preceding two years have been paid, and this power to withhold the certificate effectively functions as a form of security for the municipality that it will receive payment of the relevant amount.

In terms of section 118(2) (in the case of a transfer of property by a trustee of an insolvent estate), the provisions of section 118 are subject to section 89 of the Insolvency Act, discussed above (the provisions regarding the amounts that qualify as costs of realisation). The "two year preceding the date of the application for the certificate" in section 118 will always be less than the "two years immediately preceding the date of sequestration" in section 89(1) of the Insolvency Act, so the shorter period in section 118 will apply to "tax" defined in section 89. When the embargo provision in another law is effectively longer than that provided for in section 89(1), the period in section 89(1) will override the period in the other law.[278] A municipality cannot, by allocating payments to earlier debt, refuse to issue a clearance certificate unless all debts (including debts outside the two year period) have been paid.[279] The municipality cannot insist that the rates be paid for the entire financial year (only for debts that have become due), or that future rates be paid for the current financial year where this period extends beyond the date of application for the certificate.[280] The municipality may insist that the amounts due in terms of section 118 must be paid before a clearance certificate is issued, even if the amounts are more than the proceeds of the property.[281] The municipality is entitled to *mora* interest on amounts due in terms of section 118.[282]

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277 The reference to "municipal service fees" in s 118 includes a reference to water, electricity, sewerage and other like charges payable for services supplied to the property by the local authority, whether to the owner or to the occupier of a property – *Geyser v Msunduzi Municipality* 2003 (5) SA 18 (N).

278 *City of Johannesburg v Kaplan NO* 2006 (5) SA 10 (SCA), para [24]; *City of Tshwane Metropolitan Municipality v Mathabathe and Another* (502/12) [2013] ZASCA 60 (22 May 2013); *The Steve Tshwete Local Munioipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd* (409112)[2013] ZASCA 15 (20 March 2013).

279 *City of Cape Town v Real People Housing* (77/09) [2009] ZASCA 159 (30 November 2009).

280 *Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd* 2017 (4) SA 272 (SCA).

281 *City of Johannesburg v Even Grand 6 CC* 2009 (2) SA 111 SCA. This case decided that the transfer was not in terms of s 118 subject to s 89 of the Insolvency Act in the case of a sale by an executor of a deceased insolvent estate administered without sequestration in terms of section 34 of the Administration of Estates Act 1965. The municipality may settle for a lesser amount in order to allow the transfer to go through.

282 *Fedbond Participation Mortgage Bond Managers (Pty) Ltd v Steve Tshwete Local Municipality* (Case No 45407/2011, Pretoria High Court, dated 30 March 2012 at [49]).

The court in *City of Johannesburg v Kaplan NO*[283]there are conflicting views on whether service charges, basic fees and refuse removal fees are charges "periodically payable" in respect of property and whether the liability to pay them is "an incident of ownership" (using the terminology of section 89(5)).[284] As pointed out in *Barnard NO v Regspersoon van Aminie*,[285] the starting point is to determine whether the claim is for a "tax" in its ordinary sense and, only if the answer is positive, to apply the restrictive provisions of section 89(4) (discussed below). It is clear that property rates are such a tax and that service charges which are a *quid pro quo* for a measured consumption, are probably not.

24.12.4.3 Limitation of the preference for taxes to two years

The taxes referred to in section 89(1) of the Insolvency Act include municipal rates and taxes. The Supreme Court of Appeal has decided that section 89(4) of the Insolvency Act limits the "tax", as defined in section 89(5), that can be claimed from a trustee before transfer of a property is allowed, to such taxes for two years before sequestration and taxes from sequestration to transfer.

24.12.4.4 Debts that are not "tax" not limited to two years

Municipal debts that are not "tax" within the meaning of section 89(5) continue to attract the benefits of section 118(3) of the Local Government: Municipal Systems Act without being affected by section 89 of the Insolvency Act.[286] In relation to all debts that do not qualify as "tax", the period of preference is limited only by prescription.[287]

24.12.5 Example: proportionate share of cost of realisation

The following example illustrates the calculation of the proportionate share of the costs of the Master's fees. A similar calculation must be made in respect of the cost of a bond of security. The trustee's remuneration must also be apportioned if the trustee claims a minimum fee, as such a fee is not calculated on the value of a particular asset.

Gross value of assets in Account 1 = a
Gross value of assets in Account 2 = b
Gross value of assets in Account 3 = c
Total gross value = a + b + c = t
Total costs of Master's fees = m

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283 2006 (5) SA 10 (SCA).

284 *Greater Johannesburg Transitional Metropolitan Council v Galloway NO* 1997 (1) SA 348 (W) and *cf Eastern Metropolitan Substructure of Greater Johannesburg Transitional Council v Venter NO* 2001 (1) SA 360 (SCA) at 368J - 369D and *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) in paras [39] - [42].

285 2001 (3) SA 973 (SCA) at 984B - 984E.

286 *City of Johannesburg v Kaplan NO* 2006 (5) SA 10 (SCA), para [28].

287 *Ibid*.

Master's fees apportioned against Account 1 = m divided by t multiplied by a = m1
Master's fees apportioned against Account 2 = m divided by t multiplied by b = m2
Master's fees apportioned against Account 3 = m divided by t multiplied by c = m3
(Check that m1 + m2 + m3= m)

If the free residue is insufficient to pay preferent claims for funeral and death-bed expenses, the shortfall is paid out of the proceeds of secured assets in proportion to their value.[288]

24.12.6 Arrear interest to date of sequestration

If a debt bears interest, the creditor should include arrear interest to the date of sequestration in its claim. Compound interest may be claimed if an agreement provides for compound interest. Section 89(3) of the Insolvency Act provides that interest due on a secured claim in respect of any period not exceeding two years immediately preceding the date of sequestration is likewise secured as if it were part of the capital sum. Interest for a period for more than two years before sequestration, is not secured (but is still claimable as a concurrent claim).

Mortgage bonds often provide that the bond will secure indebtedness to the bondholder for interest, for future debts and for indebtedness "from whatsoever cause". In respect of interest before and after sequestration, the question arises as to whether a secured claim is limited by a maximum amount specified in the bond, or the "additional sum" in the "costs clause" of such a bond. A secured claim for interest is not limited by the maximum amount in the bond[289] because interest is not a "future debt".[290] In *Kursan v Eastern Province Building Society*,[291] a majority of the Appellate Division held that the secured claim for interest was not limited by the amount of the capital and additional sum stated in the bond.

24.12.7 Interest on secured claim after date of sequestration

Section 95(1) of the Insolvency Act provides that the proceeds of a security, after deduction of the costs mentioned in section 89(1), must be applied in satisfying the claims secured by the property in their order of preference with interest thereon from the date of sequestration to the date of payment.[292] The interest payable on a secured claim after the date of

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288 Insolvency Act, s 96(4).

289 *Lipschitz v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T); *Klagsbruns Inc v Adjunk-balju, Bronkhorstspruit* 1979 (2) SA 169 (T); *Eastern Province Building Society v The Master of the Supreme Court* (unreported) Case No 243/93, Eastern Cape Division; and Roger Green, "When is interest secured under a mortgage bond?" 1992 *De Rebus* 847. *Cf ABSA Bank Ltd v Erasmus* 2007 (2) SA 545 (C).

290 Section 51 of the Deeds Registries Act 1937 provides that no mortgage bond or notarial bond affords security in respect of any debt incurred after the registration of the bond unless it is expressly stipulated in the bond that the bond is intended to secure future debts and a sum is fixed in the bond as an amount beyond which future debts will not be secured by the bond. Costs of preserving and realising the security, costs of fire insurance and costs of notice of bank exchange are not regarded as "future debts" in terms of s 51.

291 1996 (3) SA 17 (A).

292 Where a judgment reinstates a claim expunged by the Master, the creditor is entitled to interest from the date of the proof of the claim – *Intramed v Standard Bank* 2008 (2) SA 466 (SCA).

sequestration, as provided for in section 103(2) read with section 95(1), is simple interest and not compound interest.[293] In terms of section 103(2) the rate of interest is 8% or a higher rate of interest by virtue of a lawful stipulation in writing.

24.12.7.1 Advance payments of secured claims to limit interest

In order to limit the amount of interest payable, trustees often pay advance dividends on secured claims before confirmation of an account reflecting the payment of such dividends. Incorrect payment may be recoverable.[294] It is nevertheless advisable to ensure as far as possible that advance payments are made upon conditions that will avoid problems in recovering amounts should it appear that payment thereof was in fact not due.[295]

24.12.7.2 Interest on concurrent part of secured claim if claim is not paid in full

If the proceeds of the security are sufficient to satisfy the principal debt plus interest, there are no issues. It was for a long time accepted in practice that a secured creditor was not entitled to interest on the concurrent part of the claim unless the concurrent claims had been paid in full. However, in *Singer v The Master*[296] the Appellate Division decided that if the proceeds are insufficient to pay the claim of a secured creditor and interest after sequestration on the full claim, the creditor has a concurrent claim for the shortfall if the creditor did not rely on its security. The secured creditor may in effect receive compound interest if concurrent creditors are paid in full and interest is paid on the concurrent claims. Whenever a trustee must pay interest from the date of sequestration to the date of payment and the secured creditor has not been paid before the account is confirmed, the trustee must estimate the date of payment (usually shortly after confirmation of the account) and make the calculations of interest accordingly.

24.12.8 Creditor relies on security

As mentioned above, section 83(12) of the Insolvency Act provides that a secured creditor is entitled to a concurrent claim for the excess of the claim if the proceeds of the security are not sufficient to pay the secured claim in full. If, however, the creditor stated in the affidavit for the proof of the claim that the creditor relied for the satisfaction of the claim solely on the proceeds of the security, the creditor does not have a concurrent claim. If a creditor relied on security and it later appears that the creditor did not have any security, the creditor has no claim against the estate and is not a concurrent creditor.[297]

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293 *Boland Bank Ltd v The Master* 1991 (3) SA 387 (A).
294 *Bowman, De Wet and Du Plessis v Fidelity Bank Ltd* 1997 (2) SA 35 (A).
295 *Gore NO v Shaff* (15766/13) [2013], WCC (13 December 2013), para [15].
296 1996 (2) SA 133 (A).
297 *Bank of Lisbon and South Africa Ltd v The Master* 1987(1) SA 276 (A) 287E-288C.

24.12.7 Balance to free residue

If a balance is available after the payment of all secured claims with interest, the balance is transferred to the free residue.[298]

REVISION QUESTIONS

1. Explain the difference between secured, statutory preferent and concurrent creditors.
2. What is the difference between special and general notarial bonds? Also explain how they are dealt with in terms of the Insolvency Act.
3. What are the requirements that a special notarial bond must comply with in order for the bondholder to be a secured creditor upon the debtor's insolvency?
4. What is the difference between a mortgage bond and a notarial bond?
5. What does it mean when a creditor relies on his security?
6. How is interest payable on secured claims treated in insolvency law?
7. Regarding each of the following statements, indicate whether or not it is true reflection of the legal position. If it is correct, briefly explain the relevant legal principle or rule. If it is incorrect, briefly explain why it is incorrect and indicate what the correct position is.
   - 7.1. M did work on a motor vehicle belonging to A. Two weeks have passed since A collected his vehicle from M, but A has still not paid M for the work done. M is a secured creditor because he has a right of retention over the vehicle.
   - 7.2. Kate borrowed R1 million from John. As security, Kate pledged her farm to John by giving John possession of the farm. The agreement is that, after Kate has repaid the R1 million, she will be able to re-occupy the farm. Therefore, John is a secured creditor.
   - 7.3. Mary rents an apartment from Philip. Mary's estate was sequestrated and therefore Philip claims to have a hypothec over Mary's movable property present in the apartment. However, because the hypothec has not yet been perfected (for example, through attachment or an interdict), Philip will not be a secured creditor under the Insolvency Act.

[298] Insolvency Act, s 83(12).

7.4. Paul is the holder of a general notarial bond over all the movable property belonging to Jessica. Due to this, Paul will be a secured creditor in the event that Jessica's estate is sequestrated.

7.5. Tonya has a secured claim of R20 000 against the insolvent estate of John. However, because the encumbered property is sold for only R15 000, Tonya will only receive R15 000 and will lose the remaining R5 000.

7.6. Jay concluded an instalment agreement with MM Motors, in terms of which MM Motors will remain owner of the purchased motorcycle until Jay has paid the final instalment. Jay's estate was sequestrated before payment of the final instalment. Because the motorcycle still belongs to MM Motors, the motorcycle does not form part of Jay's insolvent estate.

7.7. Benny took out a home loan and registered a mortgage bond over his house in favour of ABC Bank who gave him the loan. Therefore, until Benny has repaid the loan in full, ABC Bank will be the owner of the house.

7.8. X Bank holds a special notarial bond (which complies with Act 57 of 1993) over a motor vehicle. The vehicle is currently in the possession of a mechanic who did work on it in terms of a contract with John (the owner). John's estate has been sequestrated. The trustee sells the vehicle and decides to pay X Bank first and thereafter to pay the surplus to the mechanic.

7.9. Megan's estate has been sequestrated. As part of the process, the trustee has sold Megan's land for R1 000 000.00. The trustee paid the estate agent a commission of R50 000.00. He also paid R10 000.00 to Peter who painted the house to get it in a good condition before the sale. Furthermore, he paid Jeff R12 000.00 for his services as security guard, since he guarded the house for the two weeks before the sale to protect it against vandals. The local authority also claims R70 000.00 for outstanding rates and taxes for the previous three years. The trustee therefore decides to pay R70 000.00 to the local authority and R50 000 to the estate agent. He subtracts these amounts from the R1 000 000.00 and pays the surplus to ABC Bank who holds a mortgage bond over the land. The trustee decides to treat the amounts owing to Peter and Jeff as concurrent claims.

8. Jessy is in possession of jewellery that was pledged to her by Cady as security for a loan Jessy made to Cady. Before the loan could be repaid and while Jessy was still in possession of the jewellery, Cady's estate was sequestrated. Jessy therefore decides to sell the jewellery as a way to settle the debt owed to her. However, while she is still waiting for a buyer to come forward, the trustee of Cady's estate demands that the jewellery should be handed over to him so that it can be sold as part of the estate. Jessy fears that she will lose her right of security if she hands over the jewellery to the trustee and, therefore, she rather wants to sell it herself or simply keep it as payment of the debt. Advise her about the legal position.

ANSWERS

1. A secured creditor is a creditor how holds a recognised security right in an asset of the estate. A statutory preferent creditor is a creditor who does not hold a security right in a specific but who is granted a special preference in the distribution of the free residue, i.e., before concurrent creditors are paid. A concurrent creditor is a creditor with no security right or special statutory preference.
2. A special notarial bond covers a specific asset or assets, while a general notarial bond covers all of the debtor's movable property in general. According to the definition of "security", the holder of a special notarial bond will be a secured creditor provided that the bond complies with the Security by Means of Movable Property Act 1993 or the Notarial Bond (Natal) Act 1932. The holder of a general bond is not a secured creditor, unless the bond has been perfected, in which case the creditor will have a pledge. The holder of an unperfected general bond, however, is a statutory preferent creditor.
3. According to the Security by Means of Movable Property Act 1993, the bond must be registered in terms of the Deeds Registries Act, it must cover corporeal movable property, and the property must be specified and described in a way that makes it readily recognisable.
4. A mortgage bond is used to create a security right in immovable property, while a notarial bond is used for movable property.
5. If a secured creditor relies on its security, it means that, should there be a shortfall when the proceeds of the security is distributed, the secured creditor will not have a concurrent claim for the shortfall. In effect, the shortfall (the part of the claim not paid from the security) is forfeited.
6. Section 89(3) of the Insolvency Act provides that interest due on a secured claim in respect of any period not exceeding two years immediately preceding the date of sequestration is likewise secured as if it were part of the capital sum. Interest for a period for more than two years before sequestration, is not secured (but is still claimable as a concurrent claim). Section 95(1) of the Insolvency Act provides that the proceeds of a security, after deduction of the costs mentioned in section 89(1), must be applied in satisfying the claims secured by the property in their order of preference with interest thereon from the date of sequestration to the date of payment. The interest payable on a secured claim after the date of sequestration, as provided for in section 103(2) read with section 95(1), is simple interest and not compound interest. In terms of section 103(2) the rate of interest is 8% or a higher rate of interest by virtue of a lawful stipulation in writing.
7.

   7.1. The statement is false. M does not have a right of retention anymore because he is no longer in possession of the property. Possession is a requirement of the existence of a right of retention.

7.2. John is not a secured creditor. The only way to create a security right in immovable property is through the registration of a mortgage bond. Pledging the land to the creditor by giving the creditor possession, does not create an effective security right.

7.3. Philip is a secured creditor even though the hypothec was not perfected prior to insolvency. In non-insolvency law, perfection of the hypothec is required for the landlord to have a security right enforceable against third parties. However, this is not necessary in the case of insolvency. All movables present on the leased premises on the date of sequestration will automatically form part of the landlord's security under the hypothec.

7.4. Paul is not a secured creditor merely by virtue of holding a registered general notarial bond. Only if the bond had been perfected prior to sequestration, would he have been a secured creditor (as pledgee). If not, he is only a statutory preferent creditor.

7.5. Tonya will not necessarily lose the shortfall of R5 000. She will have a concurrent claim for this amount, and thus will likely lose a large portion of it due to only receiving a dividend from the free residue. However, if she had relied on her security, she would effectively would have given up the claim for the R5 000.

7.6. The statement is false. Under section 84 of the Insolvency Act, in the case of an instalment agreement (assuming it complies with the relevant definition in the National Credit Act), the creditor's ownership of the property will automatically pass to the estate. In return, the creditor is granted a hypothec as security for the remaining purchase price.

7.7. The statement is false. The registration of a mortgage bond does not make the creditor the owner of the property in South African law. The creditor merely has a limited real right (security right) in the property until the debt is repaid and the bond cancelled.

7.8. The statement is correct. There are two security rights over the property: the special notarial bond and the right of retention. Since, the right of retention in this case is a debtor-creditor lien, the creditor technically only has a personal right. Therefore, the special bondholder is paid first, after which the lienholder is paid. Note that, if this had been an enrichment lien, the lienholder would have had a real right and thus would have been paid before the special bondholder.

7.9. There are a number of problems with the way that the trustee treated the different claims: Firstly, the municipality is only entitled to outstanding taxes for two years prior to sequestration as part of the costs of realising the property, so it should not receive the full R70 000. Secondly, the claims of Peter and Jeff must also form part of the costs of realising the property and therefore their claims are not concurrent claims but must be paid before anything is paid to the bank.

8. The realisation of movable assets is regulated by section 83 of the Insolvency Act. Firstly, the Jessy (as creditor) may sell the jewellery, but it must be by public auction and after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as

the trustee directed. If Jessy realises the jewellery in this manner, she cannot just keep the proceeds but must forthwith pay the net proceeds to the trustee or the Master. Also, as soon as possible after the realisation, Jessy must prove a claim, attaching a statement of the proceeds of the realisation to his claim.

If Jessy does not realise the jewellery before the commencement of the second meeting of creditors, she must as soon as possible thereafter deliver the property to the trustee. If she does not do so after a demand by the trustee, the Master may direct the sheriff to attach the jewellery and deliver it to the trustee. It is an offence if a person fails to deliver property that belongs to the estate to, or place it at the disposal of, the trustee.

Jessy will not lose her security if she hands over the jewellery to the trustee. As pledgee, she is a secured creditor and will be paid accordingly from the proceeds.

CHAPTER 25 – APPLICATION AND DISTRIBUTION OF THE FREE RESIDUE

25.1 Introduction

The free residue is that portion of the estate that is not subject to a security right held by secured creditors. This includes the balance of the proceeds of a security after the payment of secured claims.[299]

25.1.1 Companies

Section 342(1) of the Companies Act 1973 provides that in every winding-up of a company, the assets shall be applied as closely as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency. Differences, if any, will be pointed out.

25.1.2 Order of preference

Sections 96 to 103 of the Insolvency Act provides for the order of priority in terms of which claims must be paid from the free residue. The free residue is applied in the first instance as directed by section 96, thereafter in terms of section 97, section 98, etc. The Judicial Matters Second Amendment Act 1998 inserted a new section 98A after section 98 in the Insolvency Act and repealed sections 99(1)(f) and 100.[300] The new preferences apply in respect of estates that are sequestrated or provisionally sequestrated on or after 1 September 2000.[301] A trustee or liquidator is not bound by an agreement that subverts the scheme of distribution in the Insolvency Act.[302]

25.2 Section 96 of the Insolvency Act – funeral and death-bed expenses

The free residue is applied in the first instance to pay the funeral expenses of the insolvent if the insolvent died before the submission of the first account to the Master and the expenses of the funeral of the insolvent's wife or minor child if those expenses were incurred within three months immediately preceding the sequestration. The total preference for these expenses is limited to an amount of R300. After the payment of this preference there is a

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299 Insolvency Act, s 83(12).

300 Insolvency Act, s 99(1)(f) dealt with contributions payable by the insolvent in his capacity as an employer to certain funds. Section 100 dealt with the preferential claims of employees for salary or wages and leave or bonus and preferences for certain amounts due to nurses or accountants. Section 98A contains new provisions for the employee's preferential claims for salary, wages, leave or holiday payments, payment in respect of any other form of paid absence, severance or retrenchment pay and the preference for contributions to funds. The preference for amounts due to nurses or accountants has been omitted.

301 These provisions are based on proposals by the National Economic, Development and Labour Council (NEDLAC) who based some of its proposals on the *International Labour Organisation's Convention 173: The Protection of Workers' Claims (Employer's Insolvency) Convention, 1992*.

302 *Commissioner, South African Revenue Service v Stand Two Nine Nought Wynberg (Pty) Ltd* 2005 (5) SA 583 (SCA).

similar preference with a similar limitation of R300 for death-bed expenses[303] of the insolvent and his wife or minor child. The medical doctor and others will enjoy this preference for their claims only if the patient did not survive their treatment.

If the free residue is insufficient to pay these funeral and death-bed expenses, they are paid out of the proceeds of assets subject to secured claims in proportion to the value of the securities.[304]

25.3 Section 97 of the Insolvency Act – costs of sequestration

The sheriff's charges incurred in the sequestration enjoy the highest preference under this section, followed by fees payable to the Master. The other costs in terms of this section rank equally. In practice this stronger preference is not very significant because creditors are liable to pay a contribution in terms of section 106 if the free residue is insufficient to pay the costs of sequestration. Contribution is discussed in the next chapter.

25.3.1 Sheriff's charges

As a rule, the only charges incurred by the sheriff in respect of the sequestration are in connection with the attachment of property and the making of an inventory in terms of section 19. The fees must be taxed by the Master according to Tariff A in the Second Schedule to the Insolvency Act.

25.3.2 Master's fees

The Third Schedule to the Insolvency Act provides for the payment of Master's fees in all insolvent estates under final sequestration on the total gross value of assets according to the trustee's account.

The amount of Master's fees payable has changed as from 1 January 2018.[305] The determining date is when the debtor was placed under final sequestration or liquidation (in the case of voluntary liquidation, the determining date is the date on which the resolution is registered with the Companies and Intellectual Property Commission (CIPC)).

25.3.2.1 Position prior to 1 January 2018

No Master's fee is payable if the gross value of the estate is less than R5,000. If the gross value is more than R5,000 but not more than R15,000, the Master's fee is R100. (Although Annexure CM 103, which applies to companies, contains provisions similar to the Third Schedule, it differs in so far as it provides that the Master's fee is R100 if the gross value of the assets is less than R15 000 and it does not provide that no Master's fee is payable if the value is less

303 In terms of s 96(3) this means expenses incurred for medical attendance, nursing, medicines and medical necessities.

304 Insolvency Act, s 96(4).

305 Government Notice 41224, published in *Government Gazette* dated 3 November 2017.

than R5,000.) For a gross value of more than R15,000, several methods of calculation may be followed. It is suggested that the gross value should be rounded off to the last completed R5,000 and divided by R5,000. Deduct three from this figure, multiply it by R25 and add R100. The maximum fee payable is R25,000.

25.3.2.2 Position as from 1 January 2018

No Master's fee is payable if the gross value of the estate is less than R5,000. If the gross value of the estate is R5,000 or more but less than R50,000, the Master's fee is R250. If the gross value of the estate is R50,000 or more but less than R150,000, the Master's fee is R1,000. If the gross value of the estate is R150,000 or more, R1,000 in Master's fees is payable on the first R150,000 and for each completed R5,000 thereafter a further R275 is payable. The maximum Master's fee payable is R275,000.

Annexure CM 103, which applies to companies, contains provisions identical to the Third Schedule. For a gross value of more than R150,000, it is suggested that the gross value should be rounded off to the last completed R5,000. From this amount deduct R150,000 and divide the balance by R5,000. Multiply the amount obtained by R275 and add the initial R1,000 (payable on the first R150,000). The maximum fee is R275,000.

The Master issues an assessment for his fees, which must be paid at any magistrates' office or into the banking account of the Department of Justice.[306]

A proportionate share of the Master's fees, the cost of the trustee's bond of security (and occasionally the trustee's remuneration) must be debited against the free residue. Any balance transferred from an encumbered asset account must be excluded when a proportionate share payable from the free residue account is calculated.

25.3.3 Improper charges

If the Master is of the opinion that the trustee's account contains any improper charge or that the trustee acted *mala fide* (in bad faith), negligently or unreasonably in incurring any costs included in the account, he may direct the trustee to amend the account. Although the views of creditors regarding charges against the estate are relevant, they cannot decide on whether such costs should be allowed.[307]

25.3.4 Other costs in terms of section 97 of the Insolvency Act

25.3.4.1 Cost of the application

This refers to the costs incurred in connection with the application for sequestration as taxed by the Registrar of the High Court. There is a practice for the applicant to allege the amount of the attorney's costs in the application. These fees are limited to this amount for purposes

306 For details, see Notice No 1478 in *Government Gazette* 32691 of 6 November 2009.
307 Insolvency Act, s 111(2). *Cf* Companies Act, s 407(3). See also Insolvency Act, s 53(1).

of taxation, even if the court order does not provide for such a limitation.[308] No trustee should consent to the taxation of an attorney's bill of costs in applications for sequestration if it appears that the costs to be taxed would be more than the costs relied upon in the particular application. The Master and his personnel are expected to ascertain in each case when a liquidation and distribution account is presented for approval, whether there was indeed compliance with the rule to limit the costs to the amount stated in the application. The "cost of the application" does not include costs of opposition (or an intervening creditor's costs) unless the court directed that they should be included.[309] There may be wasted costs if more than one applicant applied for sequestration. The court can, of course, grant only one of the applications. The trustee should decide whether the wasted costs should be paid as costs of sequestration and submit his decision to a meeting of creditors or the Master. The court can review such a decision, or direct that certain costs should not be paid as costs of sequestration. Section 14(2) provides that the trustee must pay the taxed costs of the sequestrating creditor out of the first funds of the estate available for that purpose under section 97. It is doubtful whether this provision has any effect in practice. The trustee can usually not be sure which funds are available for such costs before confirmation of the account. The trustee can apparently not be forced to pay the costs before other costs are paid.

25.3.4.2 Costs for the completion of the statement of affairs

This refers to costs allowed by the Master for a person who assisted the insolvent or his spouse to prepare the statement of affairs.[310]

25.3.4.3 Remuneration of trustee

The remuneration of the trustee (which includes a provisional trustee or the *curator bonis* in the case of a voluntary surrender) is discussed below.

25.3.4.4 Costs of administration and liquidation

These are the costs of administration and liquidation, including the cost of the trustee's bond of security, in so far as these costs are not payable by secured creditors.[311]

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308 *Ex parte Kelly* 2008 (4) SA 615 (T). See also *Ex parte Swanepoel* (Case number 6483/2009, North Gauteng High Court, Pretoria, 12 March 2009).

309 Even a *bona fide* and reasonable opposition is not enough and special circumstances need to be shown, i.e., real and substantial grounds for opposing and that the opposition assisted the court in arriving at a decision – *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB), para [51].

310 Insolvency Act, s 16(5).

311 The Master, Pretoria, has laid down maximum rates for the premiums charged for bonds of security in Master's Directive No 31 of 2 June 1998, namely 0.5%, with a minimum premium of R200 per bond. The directive points out that banks and other companies cannot be allowed to sign surety for their own nominees. If the estate is devoid of immediate funds to repay reasonable costs of finding security, a loan should be entered into with a bank and the premium plus interest at normal rates should be repaid as soon as possible out of the first available estate funds.

Expenses incurred by the Master or a presiding officer

Expenses incurred by the Master or a presiding officer who presided at a meeting of creditors in the protection of assets of an insolvent estate or carrying out the provisions of the Act are, unless the court otherwise orders, regarded as part of the costs of sequestration of that estate.[312]

The trustee's or liquidator's costs to convene meetings

The trustee or liquidator's costs to convene the second meeting or a general meeting are also included in the costs of sequestration in terms of section 97. However, creditors who proved their claims at a special meeting are liable for all expenses incurred in connection with the meeting. A creditor who proved a late claim may be liable for the costs of redrawing and re-advertising an account to make provision for the claim.

The salary or wages of a person engaged by the trustee or curator bonis

The salary or wages of a person engaged by the trustee or curator *bonis* in connection with the administration of the insolvent estate are treated as costs of sequestration. It is common practice to engage a person to perform the day-to-day administrative work,[313] but the trustee receives remuneration and cannot engage other persons at the expense of the estate to fulfil the ordinary duties of the trustee. The Master will disallow such costs if the trustee employed someone to draft the account, for example.

Cost of completion of a contract and statutory payments

If the trustee for example elects to enforce a construction contract, the other party receives payment as part of the costs of sequestration and need not prove a claim. If the trustee has to pay an amount to a creditor in terms of special legislation before assets will vest in him or may be sold by him, the amount paid by the trustee is regarded as "costs of realisation" and the creditor need not prove a claim.

Postages and petties

The Master allows a charge for postage and petties. According to Chief Master's Directive 4 of 2016, the allowance is R600 plus R25 per proved creditor and R345 in supplementary accounts. It remains within the Master's discretion to allow any additional amount for the abovementioned expenses if acceptable vouchers (i.e. invoices) are submitted.

312 Insolvency Act, s 97(2)(c) read with section 153(2).
313 *Pellow NO v Master of the High Court* 2012 (2) SA 491 (GSJ), para 33.

Cost of attorneys or counsel to perform legal work

Section 73 of the Insolvency Act provides that the trustee of an insolvent estate may, with the prior written authorisation of the creditors, engage the services of any attorney or counsel to perform the legal work specified in the authorisation on behalf of the estate. If the trustee is unable to obtain the prior written authorisation of the creditors due to the urgency of the matter or the number of creditors involved, he or she may obtain the prior written authorisation of the Master. If it is not likely that there will be any surplus after the distribution of the estate (the position in almost all cases), the trustee may at any time before the submission of the accounts obtain written authorisation from the creditors. In most cases it will be impractical to obtain the written consent of all creditors and in practice trustees will probably have to seek the prior authority of the Master. In *Berrange NO v Master of the High Court Natal Provincial Division*,[314] it was decided that a resolution by creditors adopted at the second meeting was sufficient to authorise the performance of the type of legal work specified in the resolution.

All costs incurred by the trustee as set out above and any costs awarded against the estate in legal proceedings instituted on behalf of or against the estate, must be included in the costs of the sequestration of the estate.

Taxation of legal costs

Costs incurred as provided above, except costs awarded against the estate in legal proceedings, are not be subject to taxation by the taxing master of the court if the trustee has entered into a written agreement in terms of which the fees of any attorney or counsel will be determined in accordance with a specific tariff.[315] If the trustee has not entered into such an agreement, or if there is any dispute as to the fees payable in terms of such an agreement, the costs must be taxed by the taxing master of the High Court having jurisdiction, or, where the costs are not subject to taxation by the taxing master, such costs must be assessed by the legal practice council or bar council concerned or, where the counsel concerned is not a member of any bar council, by the body or person designated under section 5(1) of the Contingency Fees Act 1997. No bill of costs based upon such an agreement may be accepted as costs of the sequestration of the estate unless such bill is accompanied by a declaration under oath or affirmation by the trustee, stating:

(a) that he had been duly authorised by either the creditors or the Master, as the case may be, to enter into such an agreement;

(b) that any legal work specified in such a bill has been performed to the best of his knowledge and belief;

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314 Unreported decision in Case No 7520/07, delivered in the Natal Provincial Division of the High Court on 25 September 2008. According to the liquidator an appeal by the Master was dismissed by the Supreme Court of Appeal on 7 November 2011.

315 However, no contingency fees agreement referred to in s 2(1) of the Contingency Fees Act 1997 may be entered into without the express prior written authorisation of the creditors.

(c) that any disbursements specified in such a bill have been made to the best of his knowledge and belief; and

(d) that, to the best of his knowledge and belief, the attorney or counsel concerned has not overreached him.[316]

"Overreach" means the extraction of a fee that is unconscionable, excessive or extortionate to such an extent that the attorney would be guilty of unprofessional conduct.[317]

The Master may disallow any costs incurred under section 73 (including costs taxed by the taxing master) if the Master is of the opinion that any such costs are incorrect or improper or that the trustee acted in bad faith, negligently or unreasonably in incurring such costs.

25.3.4.5 Remuneration of trustee

In terms of section 63 of the Insolvency Act, the trustee is entitled to a reasonable remuneration for his services to be taxed by the Master according to Tariff B in the Second Schedule to the Act.

Unlawful to draw remuneration before confirmation of account

It is unlawful to draw remuneration from an estate until the liquidation account in which the remuneration is reflected, has been confirmed by the Master.[318]

Tariff

The tariff makes provision for the following percentages:

1. On the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income: 10 per cent.

2. On the gross proceeds of immovable property, shares or similar securities sold, life insurance policies and mortgage bonds recovered and the balance recovered in respect of immovable property sold prior to sequestration: 3 per cent.

316 These preconditions in s 73(4) of the Insolvency Act are similar to the conditions set out in *Muller v The Master* 1992 (4) SA 277 (T) before the amendment of s 73.

317 *Muller v The Master* 1992 (4) SA 277 (T) at 284.

318 *Strydom NO v Master of the High Court* [2011] JOL 26650 (GNP), paras [27] – [32]. See also *TLE (Pty) Ltd v Master of the High Court, the South* (Gauteng High Court (Johannesburg), Case No 2011/21387 South Gauteng High Court Johannesburg, 22 November 2011; 2012 (2) SA 502 (GSJ) where it was held that CM101, item 5, was invalid and that remuneration cannot be drawn before the advertisement and confirmation of an account reflecting the remuneration.

3. On –
   (i) money found in the estate;

   (ii) the gross proceeds of cheques and postal orders payable to the insolvent, found in the estate; and
   (iii) the gross proceeds of amounts standing to the credit of the insolvent in current, savings and other accounts and of fixed deposits and other deposits at banking institutions, building societies or other financial institutions: 1 per cent.

4. On sales by the trustee in carrying on the business of the insolvent, or any part thereof, in terms of section 80: 6 per cent.

5. On the amount distributed in terms of a composition, excluding any amount on which remuneration is payable under any other item of this tariff: 2 per cent.

6. On the value at which movable property in respect of which a creditor has a preferent right, has been taken over by such creditor: 5 per cent.[319]

Where the tariff gives no guidance, the Master should fix a fair commission for the particular case.[320] Where an application by a liquidator for payment of money held by a bank is not simply an application for an order requiring the release of the cash, but rather for an order of specific performance against the bank, the tariff is 10% and not 1%.[321]

In *Engelbrecht NO and Others v Master of the High Court, Pretoria*,[322] where a sale of assets of a company in liquidation included immovable property and movable property, the court set aside a directive issued by the Master that the liquidators' fees must be taxed at 3% in accordance with Item 2 of Tariff B of the Insolvency Act (as the gross proceeds of immovable property). The liquidators did not make out a case for an order directing the Master to confirm the account on the basis that the applicants' fees should be taxed at 10% in terms of Item 1 of Tariff B. The fact that it would be a difficult exercise to attach value to the immovable and movable assets, did not mean that the sale assets did not fall into distinct categories in Tariff B. The Master had a discretion in determining a reasonable remuneration and was in this regard *inter alia* guided by the fees prescribed in Tariff B.

Minimum fee

The minimum remuneration payable to the trustee in terms of the tariff is R2,500. Although the minimum fee is "not generous", the Master or the court cannot address limitations in the

319 The tariff for assets sold by a creditor on behalf of the trustee is 10% and not 6%. See *AIPSA News* May, 2000 at 2.
320 *Rennie v The Master* 1980 (2) SA 600 (C).
321 *Gore and Another NNO v The Master* 2002 (2) SA 283 (ECD).
322 (55163/2016) [2017] ZAGPPHC 5 (18 January 2017).

tariff. If the tariff is not realistic, it is in the first instance a matter for the executive (the Minister of Justice) to address.[323]

Remuneration on value added tax

In the case of *Graham and Spendiff v The Master of the Supreme Court*,[324] the court decided that the liquidator was entitled to charge remuneration on that amount of the proceeds of the sale of the assets of a company representing value-added tax charged on the purchase price. However, clause (c) of the order (as amended on 1 August 1995) provided that "to comply with the provisions of section 67(3) of the Value-Added Tax Act, the liquidator's fee is reduced by an amount equal to the amount of VAT chargeable on that portion of the fee which was computed as a percentage of the amount of VAT included in the proceeds on which the fee was determined". In short, the remuneration should be reduced by VAT payable on the remuneration on VAT. One way to calculate the reduction in remuneration is to calculate the remuneration on VAT separately from the remuneration on the selling price and then deduct 15% of the remuneration on VAT. See the following example:

Method 1

Selling price of movables		100,000.00
VAT at 15% on 100,000		15,000.00
10% trustee's fee on 100,000	10,000.00	
10% fee on VAT of 15,000	1,500.00	
	11,500.00	
Less reduction of 15% on 1,500	225.00	
	11,275.00	
	11,275.00	
Plus 15% input VAT on fee of 11,275	1,691.25	
Total fee	12.966.25	

Method 2

The following is another, different method to do the calculation. Select the method that works best for you.

Proceeds of movable assets		100,000,00
VAT @ 15%		15,000,00
Gross proceeds		115,000,00
Fee @ 10%	11,500,00	
Less 15% (15,000)(10%)[325]	225,00	
Fee	11,275,00	
Vat thereon (@ 15%)	1,691,25	

323 *Klopper NO v Master of the High Court* 2009 (3) SA 571 (SCA), para 12.
324 Case No 504/94, Durban and Coast Local Division.
325 That is, less 15% of 10% on the VAT of R15 000,00.

Reduction or increase of remuneration according to tariff by the Master

The Master may, for good cause, reduce or increase the trustee's remuneration (an increased fee is referred to as a "special fee") and may disallow the remuneration wholly or in part on account of failure to or delay by the trustee in the discharge of his duties or the improper performance of his duties. The factors to decide whether there is "good cause" for the Master to depart from the tariff in order to arrive at a reasonable remuneration vary from case to case, but may include:

- the complexity of the estate;
- the degree of difficulties encountered in administering the estate; and
- the time spent by the liquidator in administering the estate.[326]

The appropriate stage to consider a request for a special fee is at the stage when one must determine the fees of the applicants in respect of the work done and which is reflected in the particular account. What has to be determined is the remuneration of the applicants at that specific stage. The Master has no discretion to defer a consideration of a special fee in relation to a determination of the trustee's remuneration to a later and final account.[327] In *Bester NO v The Master Of The High Court, Eastern Cape High Court, Port Elizabeth*,[328] the Master's decision to tax down the liquidators' fees to nil (because no distribution was made to creditors) was set aside.[329] It probably would have been acceptable for the Master to adjust the fee, albeit moderately, in view of the work still remaining to be done in respect of the assets – namely, the lodging of a further account, lodging the account for inspection with the appropriate magistrate, if any, in whose offices the account was to lie open for inspection, giving due notice in the *Government Gazette* of the places at which any such account will lie open for inspection and transmission by post or delivery a similar notice to every creditor who has proved a claim against the company; lodging proof that notice has been given, after confirmation of the account proceeding to distribute the assets in accordance with the account and giving notice of the confirmation of the account in the *Government Gazette*, lodging with the Master the receipts for any dividends paid or other proof of payment thereof and possible further work depending on the circumstances. The question arises as to whether the liquidators in this matter would have been entitled to any further fee for lodging a further account.

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326 *Nel and Another NNO v The Master (ABSA Bank Ltd Intervening)* 2005 (1) SA 276 (SCA), paras [20], [35] and [36]; *Klopper NO v The Master of the High Court* (Cape of Good Hope Provincial Division, Case No 2475/2008, dated 13 June 2008). See *Klopper NO v Master of the High Court* [2010] JOL 25084 (WCC) for the history in this matter. See also *Dorfling NO v Master* (Case No 3396/2011, Port Elizabeth High Court, date delivered: 4 December 2012), at [10].

327 *Warricker NO v Master of the High Court Johannesburg* (28265/15) [2017] GJ (14 March 2017), paras [23] and [24].

328 (17096/2009) [2012] ZAWCHC 199; [2013] 2 All SA 26 (WCC) (28 November 2012).

329 At para [37], item 1.

The tariff does not make provision for travelling allowances or other disbursements and a trustee should apply for an increase in remuneration if there is good cause.[330]

Consideration of time spent

The Master cannot merely admit time-based claims as this would open the door to abuse – the simplicity of a matter may not justify the time spent or the number of people used, some with high qualifications.[331] The time factor cannot be considered in isolation, nor can it be an overriding factor. Other factors, such as simplicity and the ease of liquidating the assets, have to be taken into account as well.[332]

Court slow to interfere with Master's decision

The court should be slow to interfere with the Master's decision and will interfere only if it is clearly wrong.[333]

No authority for principle of "swings and roundabouts"

There is no acceptable authority for the "swings-and-roundabouts" principle based on the premise that an insolvency practitioner may administer a substantial number of small and relatively unprofitable estates and should be compensated in a large and particularly profitable estate for poor returns on "unprofitable" estates. There is no reason why creditors in large estates should, albeit indirectly, fund the administration of smaller, less profitable estates.[334]

Trustee and connected persons entitled to remuneration under the Act only

The trustee, trustee's partner, employer, fellow employee, or a person in the ordinary employment of the trustee is not entitled to any remuneration except the remuneration under the Act.

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330 *Van Zyl NO v The Master* 2000 (3) SA 602 (C).

331 *Klopper NO v The Master of the High Court* (Case Number 13493/06, Transvaal Provincial Division, 27 July 2007). See also *Dorfling NO v Master* (Case No 3396/2011, Port Elizabeth High Court, date delivered: 4 December 2012) where the court upheld a decision by the Master to reduce the remuneration from the taxed amount of R2,295,573.03 to R910,000.00 plus VAT. The Master based this figure on an estimate of time that ought to be allowed (being two hours per day for the period of the liquidation process) at a rate of R1,300 per hour.

332 *Klopper NO v Master of the High Court* 2009 (3) SA 571 (SCA), para 16.

333 At para [25]. See also See also *Dorfling NO v Master* (Case No 3396/2011, Port Elizabeth High Court, date delivered: 4 December 2012) at [13].

334 At para [37]. In this case the court confirmed the reduction of remuneration from about R21 million to R3,250,000 and ordered the liquidators to pay the costs of the application in their personal capacities.

Remuneration of joint trustees

Joint trustees share the remuneration equally unless another basis has been agreed upon.[335] If trustees do not act jointly in applying for a special fee, the application for a special fee is a nullity and liable to be set aside by the court. Each co-trustee should apply his own mind to the question of their respective entitlement to a special fee and the amount thereof. If the trustees disagree on the proportion of the work to be done by each and the payment each should receive, the disagreement should be referred to the Master in terms of section 56(5) of the Insolvency Act.[336] If the only disagreement that arises is with regard to the proportion in which each trustee should share in the remuneration, then it is probably not a matter relating to the estate that can be referred to the Master for a decision.[337] Section 382(2) of the Companies Act 1973 is similar to section 56(2).

Companies

Section 384 of the Companies Act 1973 and Annexure CM 104 to the Winding-up Rules contain similar provisions.

Section 384(3) of the Companies Act provides as follows for the remuneration of a liquidator:

> "No person who employs or is a fellow employee or in the ordinary employment of the liquidator, shall be entitled to receive any remuneration out of assets of the company concerned for services rendered in the winding-up thereof and no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration that he is entitled to receive under this Act."

In *Matsepe NO and Others v Master of the High Court Bloemfontein and Another*,[338] the Master held that the liquidators contravened the provisions of section 384(3) of the Companies Act 1973 and the common law by allowing a firm of attorneys to act as the conveyancers in respect of the transfer of farms registered in the name of the company. Where public policy demands the observance of a statute, the benefit of its provisions cannot be waived by an individual as he is not the only person who has an interest in the liquidation.[339] Even though the fees payable to the conveyancer were not paid out of the assets of the company in liquidation but by the purchaser, the conclusion that the agreement of sale contained certain conditions that were not complied with due to the liquidators' failure to abide by the terms thereof, was unsettling and caused grave misgivings about the degree of care, skill and diligence with which they performed their duties as liquidators. The Master's

335 *Botha v Swanepoel* 2002 (4) SA 577 (T); *Ngcobo v Torre* [2009] JOL 22913 (T), para [13]; *Janse van Rensburg v Knuth* (3892/2010) [2014] ECP (11 March 2014). The *Ngcobo* case at para 12 states that a trustee who has resigned is still entitled to remuneration for work done.

336 *Cooper v The Master* 1996 (1) SA 962 (N).

337 *Cooper B St C v The Master of the Supreme Court* 1998 JDR 0111 (N).

338 [2019] JOL 44812 (FB), para [22].

339 *Matsepe NO and Others v Master of the High Court Bloemfontein and Another* [2019] JOL 44812 (FB), para [33] with reference to *Symington NO v Die Meester* 1960 (4) SA (O) 70.

decision to remove the liquidators from office in these circumstances could not be criticised.[340] On behalf of the Master it was submitted that the liquidators, both being attorneys, had no need to appoint an attorney to assist them with the liquidation process. The Master raised concerns about this practice, stating that the liquidators should and could have dealt with their duties and obligations without the assistance of an attorney. Clearly there was no need to appoint attorneys to consult with the family members and explain their rights to them or to assist with the completion of the claim documents. Those are the functions and duties of the liquidators. As in the case of a trustee, a liquidator may appoint an agent to perform an act of administration on his behalf; but he is not allowed to delegate his statutory powers or obligations generally to another. Any attempt to do so is to be regarded as misconduct that would ordinarily justify the liquidator's removal from office.[341]

A liquidator may not receive his remuneration or part thereof unless the Master or the court permits it and until the account has been confirmed by the Master. The Master concluded that the liquidators should be removed from office *inter alia* due to his finding that the liquidators were no longer suitable to be the liquidators of the company. The court agreed that the appointment of an attorney created a suspicion of partiality or conflict of interest due to the fact that both the liquidators and the attorney were at the time practicing as attorneys at the same firm. The inference that the liquidators did not act independently and that their interests may have caused conflict with their duty as liquidators, was not far-fetched.[342]

25.4 Section 98 – costs of execution

This section allows a preference for the taxed fees of the sheriff or other taxed costs[343] (the last-mentioned limited to the amount of R50) in connection with an execution prior to sequestration and limited to the proceeds of the property under attachment if the property or its proceeds were still in the hands of the sheriff at the time of the sequestration. In spite of an earlier decision to the contrary,[344] the rights of an execution creditor of a company that is subsequently liquidated are limited to this preference allowed in the sequestration of an insolvent estate.[345]

The preference is a relic of the more comprehensive *pignus praetorium* or *judiciale* of the common law, which conferred a preference on the execution creditor for his costs and his claim. Section 98(2) makes it clear that the common law hypothec has been replaced by this limited statutory preference.

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340 *Matsepe NO and Others v Master of the High Court Bloemfontein and Another* (5081/2017) [2019] JOL 44812 (FB), para [42].

341 *Ibid*.

342 *Ibid*, at para [47].

343 For example, an attorney's costs in connection with an attachment before sequestration.

344 *Ex parte Vermaak: In re Klopper v Lavdas* 1980 (2) SA 696 (T).

345 *Strydom v MGN Construction Limited: In re Haljen* 1983 (1) SA 799 (D) 808; *Liquidator Mr Spares (Pty) Ltd v Goldies Motor Supplies (Pty) Ltd* 1982 (4) SA 607 (W). *Cf Shalala v Bowman* 1989 (4) SA 900 (W).

25.5 Section 98A – amounts due to certain employees and funds

Section 98A applies to estates that are sequestrated or provisionally sequestrated on or after 1 September 2000.

25.5.1 Amounts due to employees

In terms of section 98A(1)(a), an employee who was employed by the insolvent is entitled, subject to the maximum amounts determined by the Minister of Justice by notice in the *Government Gazette*[346] from time to time,[347] to a preference for:

(a) any salary or wages, for a period not exceeding three months, due to an employee (up to a maximum of R12,000);

(b) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his employment by the insolvent in the year of insolvency or the previous year, whether or not payment thereof is due at the date of sequestration (up to a maximum of R4,000);

(c) any payment due in respect of any other form of paid absence for a period not exceeding three months prior to the date of sequestration of the estate (up to a maximum of R4,000); and

(d) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract or wage-regulating measure (up to a maximum of R12,000). The Insolvency Amendment Act 2002 expanded this preference to include severance or retrenchment pay as a result of the termination of contracts of service in terms of section 38 of the Insolvency Act.

25.5.1.1 Salary preference has preference above others

The claims in paragraph (a) above have preference above the claims in paragraphs (b) to (d), which rank equally and abate in equal proportions if necessary.[348]

25.5.1.2 Three months before sequestration for salary preference

Paragraph (a) above refers to "a period not exceeding three months" and paragraph (c) to "a period not exceeding three months prior to the date of the sequestration". Several other

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346 Notice No 865, *Government Gazette* No 21519, dated 1 September 2000.

347 Subject to prescribed consultation as provided for in s 98A(2).

348 Insolvency Act, s 98A(4). Although this section states that claims rank equally and abate if necessary only in respect of subss (a)(ii), (iii), (iv) and 1(b), the only sensible conclusion is that claims in terms of subs (a)(i) also rank equally and abate in equal portions if necessary. *Cf* Alastair Smith, "An Omission from Section 98A of the Insolvency Act 1936: Equal Ranking and Proportional Abatement of Salary and Wage Claims" 2001 *SALJ* 661.

sections state that periods are immediately prior to sequestration.[349] It is submitted that the conclusion to be drawn from the difference in wording is that the three months in paragraph (a) may be any three months before sequestration. Even though the wording of paragraph (c) differs somewhat from the several other sections referred to above, it is submitted that the three months in paragraph (c) refers to three months immediately prior to sequestration.

25.5.1.3 Meaning of "salary or wages"

The definition of "salary or wages" includes all cash earnings received by an employee from an employer.[350] It seems that benefits not receivable in cash are not regarded as salary or wages.

25.5.1.4 Meaning of "employee"

In terms of section 98A(5)(a) of the Insolvency Act, an "'employee" in this section means any person, excluding an independent contractor, who works for another person and who:

(i) receives, or is entitled to receive, any salary or wages; or[351]

(ii) in any manner assists in carrying on or in conducting the business of an employer.

An independent contractor is a person who does work for the insolvent and who is not an employee in the legal sense of the word. The presence of a right of supervision and control is one of the most important indications that a particular contract is one of employer-employee.[352] Other factors are whether an employee forms an integral part of the employer's organisation and the extent to which the employee is economically dependent on the employer.[353]

25.5.1.5 No proof of claim required for preferent claim

An employee is entitled to these payments even though such person has not proved a claim in terms of section 44 of the Insolvency Act, but the trustee may require an affidavit in support

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349 See Insolvency Act, ss 44(6), 55(l), 85(2), 89(1) and (3), 96(1), 133 and 134(2).

350 *Ibid*, s 98A(5)(b).

351 The "or" between paragraphs (i) and (ii) is difficult to understand. Does it mean that an employee need not receive or be entitled to salary or wages to qualify for the preference as long as he assists in carrying on or conducting the business of an employee, for instance someone working for commission? Salary or wages must be due to an employee for a claim in terms of s 98A(1)(a)(i). If the intention was to cover commission, why was it not done clearly as was done in section 100(1)(b) before its repeal? The intention may be, although it is difficult to think of an example where this will apply, that a person who assists in carrying on or conducting a business may have a preferent claim for payment in respect of leave, holiday or other paid absence, or severance or retrenchment pay, in terms of paragraph (b), (c) or (d) above even though he does not receive or is not entitled to receive salary or wages.

352 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A); *Rofdo (Pty) Ltd t/a Castle Crane Hire v B & E Quarries (Pty) Ltd* 1999 (3) SA 941 (SECLD); Nicci Whitear-Nel, "The distinction between employees and independent contractors" Vol 7 Part 3 *JBL* 110.

353 *Nehawu v Ramodise* [2009] JOL 24186 (LC) with reference to s 213 of the Labour Relations Act 1995.

of the claim.[354] This concession only applies to the preferential portion of an employee's claim, and therefore, an employee must prove a claim to qualify for a dividend on the part of the claim that is concurrent.

25.5.1.6 Exclusion of certain employees from preference

In terms of section 98(A)(6) of the Insolvency Act, the Minister of Justice may, after prescribed consultation, exclude employees from the preference by reason of the particular nature of the employment relationship between the employer and the employees, or because a guarantee affords employees protection equivalent to the protection in the section. The Minister has excluded a director of a company and a member of a close corporation in the case where the company or close corporation is the insolvent debtor.[355]

25.5.1.7 Salary guarantee fund

Some other countries have government-initiated guarantee funds to pay salaries in the event of insolvency, but there are no such funds in South Africa.

25.5.2 Contributions to funds

After payment of the above claims,[356] section 98A(1)(b) of the Insolvency Act gives a preference for any contributions payable by the insolvent, including contributions payable in respect of any of his employees and which were, immediately prior to the sequestration of the estate, owing by the insolvent in his capacity as employer to any pension, provident, medical aid, sick pay, holiday, unemployment[357] or training scheme or fund, or any similar scheme or fund. The claims by schemes or funds rank equally and abate in equal proportions if necessary.[358]

This preference is similar to the one previously contained in section 99(1)(f) of the Insolvency Act. A training scheme or fund has been added to the new section. The qualification that the contributions must be payable "under the provisions of any law" has been omitted, but the Minister can now from time to time, after prescribed consultations, determine a maximum amount for all payments under paragraph (b) or for payments to any single scheme or fund.[359] The Minister has determined R12,000 as the maximum amount payable to any individual employee in respect of schemes or funds contemplated in section 98A(1)(b).[360] After prescribed consultations, the Minister may also exclude schemes or funds from the

354 Insolvency Act, s 98A(3).
355 Notice No 865 in *Government Gazette* No 21519 of 1 September 2000.
356 Insolvency Act, s 98A(4).
357 In terms of section 98A(5)(c) of the Insolvency Act this does not include the unemployment insurance fund in s 6 of the Unemployment Insurance Act 1966.
358 Insolvency Act, s 98A(4)(c).
359 *Ibid*, s 98A(2).
360 Notice No 865 in *Government Gazette* No 21519 dated 1 September 2000.

preference if a guarantee affords equivalent protection, or if the sequestration of the employer's estate will make it impossible to achieve the objects of the schemes or funds.[361]

25.6 Section 99 – preference with regard to certain statutory obligations

In terms of section 99(2) of the Insolvency Act, the following claims in terms of the paragraphs of section 99(1) rank equally and must abate in equal proportions if necessary.

25.6.1 Paragraph (a) – Workmen's Compensation Act 1941

The Workmen's Compensation Act 1941 has been repealed and replaced with the Compensation for Occupational Injuries and Diseases Act 1993. In terms of section 12(1) of the Interpretation Act 1953, references to the 1941 Act in section 99(a) of the Insolvency Act must (unless the contrary intention appears) be construed as references to the corresponding provisions of the 1993 Act.

The preference granted is:

- firstly, in respect of an assessment and fines in terms of section 83 and fines in terms of section 87 of the 1993 Act; and

- secondly, for compensation claims against "employers individually liable". The State, provinces, certain local authorities and employers who have obtained insurance for these claims[362] or the mutual associations who have issued insurance to an employer, are individually liable for compensation claims. (In respect of other employers, these claims are paid by the Compensation Commissioner.)[363]

25.6.2 Paragraph (b) – taxes deducted in terms of the Income Tax Act

This paragraph refers to taxes deducted by the employer but not paid over to the SARS. The only claim that is common in practice is employee's tax deducted from remuneration payable to employees (PAYE).[364] Ordinary income tax claims have a lower preference under section 101 of the Insolvency Act. Employee claims under section 98A enjoy a preference above PAYE and a trustee is not obliged to withhold any amounts in respect of PAYE when making awards or distributions to former employees in terms of section 98A of the Insolvency Act.[365]

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361 Insolvency Act, s 98A(6). The reasoning is probably that if it is in any case impossible to achieve the objects of the fund, there is no reason why contributions should be paid in preference to other creditors.

362 1993 Act, s 84.

363 *Ibid*, s 29.

364 The others are amounts deducted from royalties payable to foreigners, and deductions by "agents" from pensions, salary, etc. Section 64E and the Sixth Sch of the Income Tax Act have been repealed.

365 *Pieterse v Master of the High Court Cape Town* (4909/15) WCC, confirmed in *Commissioner, South African Revenue Service v Pieters and Others* (1026/17) [2018] ZASCA 128 (27 September 2018).

25.6.3 Paragraph (cA) – Customs and Excise Act 1964

The next claim that must be paid under section 99 is moneys owed to SARS for import taxes under the Customs and Excise Act 1964.

As indicated in the previous chapter, it is possible for SARS to have a lien over certain imported assets, in which case SARS will be a secured creditor. However, if SARS does not have a lien or if the detained assets are insufficient to settle its entire claim, SARS will be preferent creditor under section 99.

The Customs and Excise Act 1964 and Value Added Tax Act 1991 do not preclude SARS and clearing and forwarding agents from releasing assets entered for storage with deferment of customs duty and VAT in a customs and excise storage warehouse to the liquidators until duty and VAT have been paid.[366]

25.6.4 Paragraph (cD) – value-added tax

A claim for value-added tax, interest, a fine or penalty in terms of the Value-Added Tax Act 1991, is also preferent. Paragraph (cC) refers to the predecessor of VAT, namely Sales Tax.

25.6.5 Paragraph (e) – contributions to the Unemployment Insurance Fund

This paragraph refers to contributions due by employers to the UIF in respect of contributions due by themselves and contributions due by employees deducted from their salaries by employers.

25.6.6 Paragraph (f) – contributions to funds in capacity as employer

Section 99(1)(f) of the Insolvency Act applied to estates sequestrated or liquidated before 1 September 2000.

25.6.7 Other paragraphs

Claims in terms of the other paragraphs of section 99(1) of the Insolvency Act are rare and are therefore not dealt with in these notes.[367]

25.7 Section 100 – salaries and certain fees

Section 100 only applies to estates sequestrated or liquidated before 1 September 2000.

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366 *Van der Merwe NO and Others v Uti South Africa Proprietary Limited and Others*(11033/2014) [2014] KZD (17 December 2014); [2015] JOL 32903 (KZD). Confirmed on appeal in *Commissioner, South African Revenue Service v Van der Merwe NO and Others* 2017 (3) SA 34 (SCA).

367 The reference in para (c) to the Pneumoconiosis Compensation Act 1962 should in terms of s 12(1) of the Interpretation Act 1957 be construed as a reference to the Occupational Diseases in Mines and Works Act 1973.

25.8 Section 101 – income tax

Under section 101, income tax payable by the insolvent is the next claim in the list of statutory preferences. If the insolvent failed to lodge his tax return, SARS may issue an estimated assessment. The claim under section 101 should, however, not be confused with the preference discussed under 25.6.2 above, which is for income tax deducted by an employer from employees' salaries (PAYE).

25.9 Section 102 – general mortgage bonds

Section 102 of the Insolvency Act provides that "any balance of the free residue shall be applied in the payment of any claims proved against the estate in question which were secured by a general mortgage bond". As explained in the previous chapter, a general notarial bond only makes the bondholder a secured creditor if the bond had been perfected by placing the bondholder in possession of the movables subject to the bond, in which case the creditor will in the position of a creditor with a right of pledge. On the other hand, an unperfected bond does not make the creditor a secured creditor. However, section 102 confers on the holder of an unperfected bond a preferent claim payable out of the free residue.

The holder of a general mortgage bond over movables does not have a preferent claim in respect of the proceeds of immovable property that fall in the free residue but only to the portion of the claim equivalent to the realised value of the hypothecated movables.[368] Protection is extended to the extent of the preference. The claim of the holder of a general notarial bond can never be greater in amount as a preferent claim in the strict sense (that is, when the bond has not been perfected) than it will be as a secured claim in the strict sense (that is, when the bond has been perfected). In either case, the protection enjoyed by the holder of a general bond is limited to the value of the goods covered by the bond. It thus follows that once an award is made to the holder of a (perfected) general notarial bond as a secured creditor, his preference under section 102 is extinguished to the extent of the net value of his security and he will only recover as a preferent creditor to the extent, if any, of the net value of other movables than those in respect of which he has perfected. The situation will be the same where the bond is both special in relation to specific goods and general. Whether or not there has been perfection in relation to the goods specified in the bond, the claim will be secured pursuant to section 1 of the Security by Means of Movable Property Act 1993 to the extent of the net value of such specified goods. If there has been perfection in relation to other goods, that is those unspecified goods covered by the bond *qua* general bond, the same will apply and the claim will be secured to the extent of the value of such unspecified goods. Where there has not been perfection in relation to such unspecified goods, the claim will not be secured in relation to such goods or their value but will be

368 Section 86 of the Insolvency Act provides that no general mortgage bond registered after 31 December 1916 confers any preference in respect of immovable property – see *Land and Agricultural Development Bank of SA v Master of the North Gauteng High Court and Others* 2013 (5) SA 370 (GNP), para 29; confirmed on appeal in *Firstrand Bank Ltd v The Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA), para [40].

preferent under section 102. In any of these cases, the sum total of the security and preference cannot exceed the net value of the goods covered by the bond. So too in the case of a special bond.[369]

25.9.1 Calculation of "net proceeds" of assets not subject to the bond

If the free residue is sufficient to pay for the claims and costs in terms of sections 96 to 101 in full (and not all the assets in the free residue are covered by a general bond), the "net proceeds" of the assets not subject to the bond should be made available to concurrent creditors. The "net proceeds" are calculated by deducting the following from the proceeds of such assets:

(i) any costs of maintaining, conserving and realising such assets not already debited against proceeds of security in terms of section 89(1); and

(ii) a proportionate share of the cost of sequestration payable in terms of section 97, except the costs of maintaining, conserving and realizing other assets in the free residue; and

(iii) a proportionate share of claims in terms of sections 98A, 98, 99 and 101.

25.9.2 Preference where more than one bond

If more than one bond has been registered, priority is determined by the date of registration of the bonds (unless a previously registered bondholder agrees that a subsequently registered bond will enjoy priority).

25.9.3 Interest on the preferent claim of the bondholder

These bondholders are the only preferent creditors who are entitled to (simple) interest on their claims "in the manner provided for" in section 103(2) of the Insolvency Act. In light of the decision in *Singer v the Master*, the question arises whether these creditors (and the special bondholders below who enjoy the same preference) are entitled to claim interest on their claims from the date of sequestration to the date of payment of their claims if the free residue is insufficient to pay their capital claims in full. It is submitted that these creditors are, in the same way as secured creditors, entitled to include interest after sequestration in their claims even if their claims are not paid in full.[370] Whenever a trustee must pay interest from the date of sequestration to the date of payment, he has to estimate the date of payment (usually shortly after confirmation of the account) and make the calculations accordingly.

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369 *Land and Agricultural Development Bank of SA v Master of the North Gauteng High Court and Others* 2013 (5) SA 370 (GNP), para 26, confirmed on appeal in *Firstrand Bank Ltd v The Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA), para [40].

370 Section 102 of the Insolvency Act itself does not, like s 95 in respect of secured creditors, refer to "interest from the date of sequestration to the date of payment". However, it refers to s 103(2), which in turn refers to the "interest mentioned in" s 103(1).

25.9.4 Preference for special notarial bond registered before 7 May 1993

The long-held belief that special notarial bonds over movables enjoyed a preference in terms of section 102 of the Insolvency Act was ended by the decision of the Appeal Court in *Cooper v Die Meester*,[371] which decided that such bonds enjoyed no preference at all. The legislature overturned the effect of this decision and to a certain extent improved the position of these bondholders. Section 1(3) and (4) of the Security by Means of Movable Property Act 1993 confers the same preference on such a bondholder as that conferred on a mortgagee by a general bond in terms of section 102 of the Insolvency Act in the following circumstances:

(i) a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognisable was registered before 7 May 1993.[372]

(ii) the bond is not a bond contemplated in section 1 of the Notarial Bonds (Natal) Act 1932.

(iii) no part of the free residue was paid out to concurrent creditors before 7 May 1993 in terms of a confirmed account.

25.10 Section 103 – concurrent claims

Any remaining balance of the free residue is paid to concurrent creditors. More than one claim of a creditor is paid proportionately and the creditor is precluded from apportioning the whole dividend to the oldest debt.[373] A secured creditor who did not rely on its security and whose capital claim with interest after sequestration to the date of payment was not paid in full out of the proceeds of its security, has a concurrent claim for the shortfall.

Concurrent creditors are only entitled to interest from the date of sequestration to the date of payment of their claims if their capital claims (including interest up to the date of sequestration) have been paid in full.[374] The interest payable after sequestration is simple interest and not compound interest.[375] In terms of section 103(2) of the Insolvency Act, the rate of interest is 8% or a higher rate of interest by virtue of a lawful stipulation in writing. Whenever a trustee must pay interest from the date of sequestration to the date of payment,[376] he has to estimate the date of payment (usually shortly after confirmation of the account) and make the calculations accordingly.

371 1992 (3) SA 60 (A).
372 The date of commencement of the Security by Means of Movable Property Act 1993.
373 *Douglas Green Bellingham v Green t/a Greens Bottle Recyclers* 1998 (1) SA 367 (SCA).
374 Insolvency Act, s 103(1).
375 *Boland Bank Ltd v The Master* 1991 (3) SA 378 (A).
376 This will also apply to secured creditors and bondholders over movables who are entitled to such interest.

25.11 Surplus after payment of all costs and claims with interest

In the unlikely event that there is such a surplus, it must in terms of section 116 of the Insolvency Act be deposited in the Master's Guardian's Fund. After rehabilitation of the insolvent, the Master must pay the surplus to the insolvent at his request. The insolvent may apply to court for rehabilitation at any time after the confirmation of an account providing for the payment in full of all costs and claims with interest thereon.

In the case of a company, any surplus must, unless the memorandum of articles otherwise provide, be distributed among the shareholders according to their rights and interests in the company. Unless otherwise provided, shareholders share in proportion to the number of ordinary shares held by them.

REVISION QUESTIONS

1. Jacob's estate has been sequestrated. You are instructed to assist the trustee by organising these expenses in the correct sequence in which they must be paid from the free residue:
   a) Income tax owing to SARS.
   b) Customs and excise payable to SARS.
   c) An amount owing to the sheriff for attaching the insolvent's property.
   d) Funeral expenses.
   e) An amount owed to the holder of a special mortgage bond.
   f) The taxed legal fees for bringing the sequestration application.
   g) A contribution payable to the employees' pension fund.
   h) A credit card bill.
   i) The trustee's remuneration.
   j) Outstanding value added tax.
   k) Repair costs with respect to an unencumbered asset.
   l) The Master's fees.
   m) An amount owed to the holder of a general notarial bond.
   n) An amount in severance pay owed to an employee.
2. An insolvent owes outstanding wages of R40 000 each to three of his employees. To one of them, he also owes R20 000 in severance pay. How will you treat these claims in the distribution of the funds available in the free residue?
3. Otto is the holder of a general notarial bond as security for R100 000 owed to him by Jenny, whose estate has been sequestrated. After all secured and other statutory preferent creditors have been paid, there is R80 000 remaining that must be divided between Otto and a number of concurrent creditors. The R80 000 represents the proceeds of both movable and immovable property. R50 000 comes from immovable property and R30 000 from movable property. How will you distribute the R80 000?

ANSWERS

1. Sequence:
   d) Funeral expenses.
   c) An amount owing to the sheriff for attaching the insolvent's property.
   l) The Master's fees.
   f) The taxed legal fees for bringing the sequestration application.
   k) Repair costs with respect to an unencumbered asset.
   i) The trustee's remuneration.
   [f, k and i = rank equally, after c and l]

n) An amount in severance pay owed to an employee.

j) Outstanding value added tax.

b) Customs and excise payable to SARS.

g) A contribution payable to the employees' pension fund.

[j, b and g rank equally]

a) Income tax owing to SARS.

m) An amount owed to the holder of a general notarial bond.

h) A credit card bill. [concurrent creditor]

Not paid from free residue:

e) An amount owed to the holder of a special mortgage bond.

2. Of the R40 000 owed to each employee, only R12 000 for each will enjoy a preferent status. The rest will be a concurrent claim. After R12 000 x 3 is paid from the free residue (ranking equally), the next is the severance pay, of which R12 000 is a preferent claim (the rest concurrent).

   Otto will only receive R30 000 under his general bond preference, since the bond only grants a preference to proceeds in the free residue deriving movable property. The rest of his claim (R70 000) is a concurrent claim. Therefore, the remaining funds (R50 000) must be divided between the concurrent claims, which include the concurrent part of Otto's claim.

CHAPTER 26 – CONTRIBUTION BY CREDITORS

26.1 Introduction

Where there is no free residue, or the free residue is insufficient to meet all the expenses payable out of the free residue in terms of section 97 of the Insolvency Act, certain creditors are liable to pay the deficiency.[377] Subject to the special position of a creditor who applied for the sequestration order, only proved creditors are liable to pay contribution. An employee who did not prove a claim is not liable for contribution. A person who receives payment as part of the costs of sequestration need not prove a claim and is also not liable for contribution. Contribution is also not payable in a deceased insolvent estate.

The trustee must draw up a contribution account if a contribution becomes payable by creditors.[378]

26.2 Companies

The provisions of the law relating to insolvency in respect of contributions by creditors towards costs apply to every winding-up of a company as well,[379] Although the shareholders of a company can also be expected to contribute,[380] this is rare in practice.

26.3 Concurrent creditors

Concurrent creditors are liable for contribution in proportion to the amount of their proved claims.

A secured creditor is liable "in proportion to the amount for which the creditor would have ranked upon the surplus of the free residue, if there had been any".[381] From this it is clear that a secured creditor is only liable for contribution on the concurrent portion of its claim. The secured creditor has a concurrent claim for the balance if the proceeds of the security is insufficient to pay the principal debt plus interest after sequestration and the creditor did not rely on its security when proving the claim.[382] It is submitted that interest should be calculated up to the date estimated by the trustee as the date of confirmation of the account, or shortly thereafter, as this is the date when the creditor would have been entitled to payment out of the free residue if there had been a surplus. A secured creditor who has a concurrent claim is liable for contribution in proportion to the amount of the concurrent claim.

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377 Insolvency Act, s 106.
378 *Ibid*, s 91. See also Companies Act 1973, s 403(1).
379 Companies Act 1973, ss 337 and 342(2).
380 *Ibid*, ss 395-399.
381 Insolvency Act, s 106.
382 See *Ongevallekommissaris v Die Meester* 1989 (4) SA 69 (T) 73I.

26.4 Secured creditors

A secured creditor is liable for the costs of maintaining, conserving and realising the security (encumbered asset) if the proceeds of the security is insufficient to cover these costs. If all the proved creditors are secured creditors without concurrent claims, all of them are liable to contribute to the expenses under section 97 in proportion to the amount of their claims.[383] Secured creditors are liable in terms of this provision only if an unproved creditor who applied for the sequestration order is not liable for contribution or is unable to pay the contribution levied on the creditor.

26.5 Preferent creditors

Preferent creditors are unsecured creditors who enjoy a preference or priority in terms of section 96 or sections 98 to 102 of the Insolvency Act. These creditors are liable for a contribution in proportion to their claims only if all the concurrent creditors have withdrawn their claims and if, after payment of their contributions (and, it is submitted, after payment of contribution by a creditor who applied for the sequestration order), there is still a deficiency.[384]

26.6 Withdrawal of claims

If a creditor has withdrawn a claim by registered letter to the Master and the trustee, the creditor is liable to contribute for the *pro rata* share of the costs incurred by the trustee up to the time when the trustee received the creditor's letter of withdrawal. If a creditor withdraws its claim within five days after the date of any resolution of creditors, the creditor is not liable for the costs of anything done in pursuance of that resolution.[385] Provision is made for the cancellation of the withdrawal of a claim, but this is even rarer in practice than the actual withdrawal of claims.

26.7 Creditor who applied for the sequestration order

The section 14(3) of the Insolvency Act provides that a creditor who successfully applied[386] for the sequestration order (the petitioning creditor), "whether or not he has proved a claim against the estate in terms of section 44, shall be liable to contribute not less than he would have had to contribute if he had proved the claim in his application". If there are no other creditors, or if the only other creditors are secured creditors who relied on their security, the petitioning creditor will be solely liable to contribute even if this creditor did not prove a claim. If there are other creditors liable to contribute, then such creditors and the petitioning creditor must contribute in proportion to the size of their respective claims.[387]

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383 Insolvency Act, s 106(a).

384 Insolvency Act, s 106(c) and *Ongevallekommissaris v Die Meester* 1989 (4) SA 69 (T).

385 *Ibid*, s 106(b) read with s 51.

386 The petition procedure referred to in s 14(3) of the Insolvency Act has been abolished and an application is now made for a sequestration order.

387 *FirstRand Bank Limited v Master of the High Court (Pretoria) and Others* 2021 (4) SA 115 (SCA).

Section 9(3)(a)(iii) provides that the application for the sequestration order must contain the amount, cause and nature of the applicant's claim. The effect of section 89(2) is that a secured creditor who applied for the sequestration order is liable for a contribution as if the creditor did not rely on its security.[388]

The following two calculations should be made in all cases where a creditor who had successfully applied for sequestration has proved a claim. The creditor is liable for contribution on the larger of the following two amounts:

- the amount the creditor would have been liable for according to the rules set out above if the creditor had proved its claim set out in the application without relying on the proceeds of if security, if any (if the creditor did not prove a claim, the creditor is liable for contribution on this amount).

- the amount the creditor would be liable for on the proved claim according to the rules set out above.

26.8 Collection of contribution

Sections 113 and 118 of the Insolvency Act provide for the collection of contributions and special procedures if the contribution (or some of it) cannot be collected. If no creditor is liable for a contribution, the trustee bears the loss of expenses incurred by him. In practice, a trustee may bear the loss without attempting to collect the contribution or utilising the special procedures for the collection of contribution.[389]

REVISION QUESTIONS

With respect to each of the following scenarios, explain how the trustee should approach the contribution to the costs of sequestration payable by creditors:

1. The estate has two creditors:
   - John, who painted the insolvent's house to get it ready for sale.
   - ABC Bank, who proved a claim for an outstanding credit card bill.
2. The estate has three creditors, each of which are secured creditors who relied on their security.
3. The estate has four creditors:
   - A secured creditor who did not rely on his security. His claim was for R50 000 but he only received R40 000 from the proceeds of the security.
   - Three concurrent creditors.
4. The estate has three creditors:
   - A secured creditor who relied on his security.

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388 *Cf* David Burdette, "New problems relating to contribution in insolvent estates" 2000 *THRHR* 458 for a discussion of an applicant who need not prove a claim to be paid a pre-sequestration debt.

389 SARIPA (formerly AIPSA) strongly disapproves of undertakings given by trustees not to collect s 89 costs or other contributions from banks or financial houses – November 2000 *AIPSA News* at 8.

- A creditor who holds a general notarial bond.
- An employee to whom R18 000 is owed but who did not prove a claim.

5. The estate has five creditors:
   - A secured creditor who relied on his security.
   - A creditor who holds a general notarial bond.
   - Three concurrent creditors.
6. The estate has two creditors:
   - The body corporate of the sectional title in which the insolvent's house is situated. This creditor applied for the sequestration order but did not prove a claim for payment of the outstanding amount in levies owed to it and that must be paid as part of the costs of realising the sectional title unit.
   - A creditor with a mortgage bond over the abovementioned sectional title unit. The creditor relied on its security.

ANSWERS

1. John's claim forms part of the costs of sequestration and therefore he does not have to contribute (unless he was the petitioning creditor). ABC is a concurrent creditor and therefore must contribute.
2. Each of the three creditors must contribute in proportion to the size of their claims.
3. All four will contribute, but the secured creditor only for the portion of his claim that is concurrent.
4. The general bondholder will be the sole contributor. The employee with an unproven claim does not have to contribute. The secured creditor relied on its security and thus does not have a concurrent claim. There are no other concurrent creditors liable to contribute. Therefore, the general bondholder (as statutory preferent creditor) must contribute.
5. Only the three concurrent creditors must contribute. The secured creditor who relied on its security does not have to. The statutory preferent creditor also does not have to contribute because there are concurrent creditors who will have to do so.

   Only the body corporate must contribute. Even though it did not prove a claim, the creditor who applied for the sequestration order will have to contribute if the only other creditor is a secured creditor that relied on its security.

CHAPTER 27 – COMPOSITIONS

27.1 Introduction

The term composition (or compromise), in the context of insolvency law, refers to an agreement (or arrangement) in terms of 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 a hundred cents in the Rand. The term composition may also refer to an agreement in terms of which an insolvent obtains a suspension of (or an extension of time within which to pay) the debt owed to his or her creditors.

There are two forms of composition, namely the common law composition and the statutory composition in terms of the Insolvency Act. A common law compromise, as discussed in further detail below, takes place in circumstances not provided for in the Insolvency Act and is rooted in an agreement (contract) and typically requires the approval of all creditors, in order to be of practical value. On the other hand, the statutory compromise operates via statutory mechanisms, as set out in the Insolvency Act. A compromise by the creditors of a close corporation and a compromise with creditors in terms of section 155 of the Companies Act 71 of 2008 are dealt with elsewhere in these notes.

In practice, a composition with creditors is used as a means through which a debtor that is experiencing financial difficulty, or whose estate has been provisionally sequestrated, may avoid insolvency. Alternatively, where a debtor's estate has already been sequestrated, such debtor may make a statutory compromise with his or her creditors to avoid the usual process of liquidation of the estate assets and to truncate the period of his or her insolvency.

27.2 Common law composition

The common law composition is available to an insolvent person whose estate is under provisional sequestration. Typically, the written agreement, that forms the core of the common law composition, is entered into with some or all of the creditors of the insolvent and the provisional trustee (if appointed). The agreement will usually provide that the insolvent will pay certain dividends on creditors' claims, on condition that the insolvent will be released from his or her debts and on the further condition that the provisional order of sequestration be discharged. Where such offer is accepted and the provisional order is discharged, the rights and obligations of the parties to the composition will be regulated in terms of the agreement and the common law.

Accordingly, a composition outside the provisions of the Insolvency Act is possible, but it is important to note that such a composition binds only the creditors who have agreed to it. As such, the decision of the majority of creditors cannot bind the dissenting minority, as is the case with a statutory compromise. It is submitted that in order to be binding and effective, such a composition must be accepted by all creditors for whom it was intended.[390] No liability

[390] *De Wit v Boathavens CC* 1989 (1) SA 606 (C) 611I.

attaches to an individual creditor until all creditors have signed the agreement. However, an individual creditor, by his conduct, may be precluded as against the insolvent from disagreeing to the composition, in instances where such creditor accepts a payment under the composition, pending the establishment thereof.

A common law composition, presents distinct advantages for creditors, as such it may be an attractive alternative to sequestration, both from a timing perspective (as the creditor will usually receive a dividend earlier than a sequestration) and due to a greater return (a higher dividend as a result of the saving of sequestration costs).

27.3 Statutory composition in terms of Insolvency Act

Sections 119 to 123 of the Insolvency Act deal with compositions between the insolvent and his or her creditors. In essence, the purpose of the composition contemplated in the Insolvency Act is to provide the insolvent with a special ground for rehabilitation and a release of his or her debts. The primary advantage of a statutory composition is that it does not depend on the participation of all the insolvent's creditors, on the basis that once the required majority of creditors have approved the composition, the dissenting minority are nevertheless bound to it. However, the disadvantage of the statutory compromise is that it does not result in the discharge of the sequestration order, with the result that the insolvent remains unrehabilitated, albeit with the opportunity to apply for early rehabilitation in certain instances.

27.3.1 Submission of offer to trustee and consideration by trustee

At any time after the first meeting of creditors the insolvent may submit a written offer of composition to the trustee of the estate. The rationale for this is to ensure that there is no composition before all creditors have had an opportunity to prove their claims. If the trustee is of the opinion that the creditors will probably accept the offer, he must as soon as possible post by registered letter or deliver a copy of the offer and the report of the trustee thereon to every creditor who has proved a claim. Although the Act requires notice of an offer of composition to proved creditors only, it makes sense to submit the offer to all known creditors. If the trustee is of opinion that there is no likelihood that the creditors will accept the offer of composition, the trustee must inform the insolvent that the offer is unacceptable and that he does not propose to send a copy thereof to the creditors. The insolvent may appeal to the Master who may, after considering a report by the trustee, direct the trustee to submit the composition to creditors.[391]

27.3.2 Meeting to consider composition

When the trustee sends an offer to creditors, he must simultaneously give notice of a meeting for the purpose of considering the offer. The meeting must be convened on a date not earlier than 14 days and not later than 28 days after the date upon which the notice was posted or

391 Insolvency Act, s 119(1) to (4).

delivered to any creditor. The meeting convened for this purpose is a general meeting.[392] The meeting must be advertised by notice in the *Government Gazette* and in an Afrikaans and English newspaper. The notice must indicate that a composition will be considered at the meeting.[393] Because the trustee must lodge a report within one month after the acceptance of an offer of composition,[394] it is advisable to submit the report at the same meeting where the composition will be considered, if this is possible. It makes sense to provide creditors with all available information before they consider a composition and it reduces costs and work if the second meeting is combined with the general meeting.

The notice requirements set out above are peremptory and must be strictly observed. Failure to do so may invalidate the subsequent acceptance of the offer of composition.

27.3.3 Voting on the composition at the meeting

At the meeting, creditors (who have in good time submitted their claims for proof) must be given the opportunity to prove their claims before the offer of composition is considered.[395] In order for a composition to be binding and validly established, it must be accepted by the requisite percentage of creditors who shall vote at a meeting called for this purpose. Votes are calculated in accordance with the provisions of section 52 of the Insolvency Act. The composition must be accepted by creditors whose votes amount to not less than 75% in value and 75% in number of the votes of all creditors who have proved claims against the estate, and not only creditors who have proved claims at the meeting in question or voted at the meeting. In addition to the creditors' approval of the composition, payment in terms of the composition must be made, or alternatively, security for the payment as specified in the composition must have been given. The insolvent will then be entitled to receive a certificate from the Master that the offer of composition has been accepted.

In calculating the vote of creditors as aforesaid, the claim of a secured creditors is taken into account only in respect of the unsecured balance, if any, of such creditor's claim. It is important to note that there may only be a composition under the Insolvency Act between the insolvent and the concurrent creditors of his estate. As such, a composition between the insolvent and a preferent creditor of the estate, whether secured or unsecured, can only be constituted by means of a separate agreement between the insolvent and such creditor, and not through the statutory mechanism contemplated in the Insolvency Act.

27.3.4 Unacceptable conditions in compositions

An offer of composition may contain any terms that an insolvent wishes to incorporate in it, including terms that result in the insolvent being immediately reinvested with his or her asset or that the insolvent should be released from further liability in relation to his or her debts.

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392 *Ilic v Parginos* 1985 (1) SA 795 (A).
393 *Ibid*.
394 Insolvency Act, s 81(1).
395 *Cf Ilic v Parginos* 1985 (1) SA 795 (A).

However, having said this, the Insolvency Act nevertheless imposes certain restrictions on the terms that may be contained in a composition.

27.3.4.1 Extraordinary benefit to creditor

No offer of composition may be accepted if it contains a condition whereby any creditor would obtain a benefit, as against another creditor, which benefit the creditor would not have been entitled to upon the distribution of the estate in the ordinary way.[396] The offer should apply fully and equally to all concurrent creditors.[397]

27.3.4.2 Offer subject to rehabilitation or consent to rehabilitation

A condition that makes the offer or the fulfilment thereof subject to the rehabilitation of the insolvent, or to the consent of creditors to the rehabilitation, is ineffective.[398] However, it is submitted that such a condition does not invalidate the composition.

27.3.4.3 Benefit to induce acceptance

An undertaking to give a benefit to any person to induce that person or any other person to accept an offer of composition is invalid and the person who accepted such benefit or stipulated for such a benefit is liable to pay by way of penalty for the benefit of creditors a sum equal to the amount of the person's proved claim (if any), the amount or value of the benefit given or promised and the amount paid or to be paid to the person under the composition.[399]

27.3.5 Security for fulfilment of composition

If the offer provides for the giving of security, the nature of that security should be fully specified and if it is to consist of a surety bond or guarantee every surety must be named. It has been held[400] that these provisions in respect of details of security are directory and not peremptory, but failure to comply may disentitle the insolvent to a certificate by the Master referred to below. If there has been substantial compliance with the provisions, creditors have the right to reject the offer or ask for further particulars regarding the security to be furnished.[401]

396 Insolvency Act, s 119(7).
397 *Ilic v Parginos* 1985 (1) SA 795 (A) 802F.
398 Insolvency Act, s 119(7).
399 *Ibid*, s 130.
400 *Blou v Lampert and Chipkin* 1970 (2) SA 185 (T) 210C.
401 *Blou v Lampert & Chipkin* 1973 (1) SA 1 (A) 9H-10A.

27.3.6 Effect of acceptance of offer

27.3.6.1 Rights determined by composition

The effect of an approved composition extends to all concurrent creditors, without exception, and becomes binding on all such creditors, whether proved or unproved. The composition is therefore best described as a statutory novation that discharges the claims of the concurrent creditors whose rights must thereafter be determined by reference to the provisions of the composition itself. In other words, once the composition is accepted, the rights and duties of the insolvent and creditors are determined by the composition itself, and within the framework of the Insolvency Act.

27.3.6.2 Not suspended until insolvent has performed

Unless the composition provides therefore, the operation of the composition is not suspended until the insolvent has performed his obligations in terms of the composition and the trustee has no right to apply to have the composition set aside.[402]

27.3.6.3 Property re-vests if provided in composition

If the composition provides that property of the insolvent estate should be restored to the insolvent, the acceptance of the composition divests the trustee of the property concerned and re-vests the insolvent with the property from the date upon which and subject to the conditions provided for in the composition.[403] No transfer or delivery is necessary as the revesting takes place by operation of law. Estate assets not included within the ambit of the provisions of the composition remain vested in the trustee.

27.3.6.4 Binding on concurrent creditors or consenting preferent and secured creditors

If the offer of composition has been accepted as indicated above, it is binding on all concurrent creditors. The rights of preferent or secured creditors are not prejudiced thereby except in so far as they have waived their preference or secured rights expressly and in writing.[404]

27.3.6.5 Liability of surety not affected

As usual, a surety is in an unfavourable position. A composition does not affect the surety's liability[405] and he remains liable to the concurrent creditors for any shortfall.

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402 *Blouv Lampert and Chipkin* 1970 (2) SA 185 (T) 214.
403 Insolvency Act, s 120(2).
404 *Ibid*, s 120(1).
405 *Ibid*, s 120(3).

27.3.6.6 Separate creditors of spouse not bound

The composition does not bind the separate creditors of the solvent spouse and, on the acceptance of the offer of composition, the property of the solvent spouse which vested in the trustee must be restored to him or her. On the other hand, where any movable property was held as security by a secured creditor of the solvent spouse when the property vested in the trustee, such property must be restored to such creditor who held it, and the proceeds of any security which has been realised must be paid to the person or persons entitled to them, according to their rights.[406]

27.3.6.7 Composition in estate of a partner

A composition in the estate of an insolvent partner does not take effect until the trustee of the partnership estate has had the opportunity to take over the rights and obligations of a partner in terms of the composition.[407]

27.3.7 Payments in terms of the composition

The payment of monies or other acts for the benefit of creditors are done through the trustee who must frame an account as usual. A creditor who failed to prove a claim before the final distribution by the trustee is entitled to recover directly from the insolvent, within six months from the confirmation of the account, any payments that the creditor would have been entitled to under the composition.[408]

27.3.8 Certificate that insolvent may apply for rehabilitation

An insolvent who obtains a certificate from the Master that the composition has been accepted by the requisite majorities and that payment under the composition has been made or security for such payment has been given in terms of the composition, may apply to the High Court for rehabilitation after three weeks' notice in the *Government Gazette* and to the trustee if the composition provides for payment, or the provision of security in respect of payment, of not less than 50 cents in the Rand of every concurrent claim proved against the estate.[409]

27.3.9 Problems the trustee should try to prevent

In the case of *Blou v Lampert & Chipkin*[410] the court referred to "the unhappy and protracted litigation culminating in this appeal". One of the trustees in this case did not miss an opportunity (or what he perceived to be an opportunity) to remind the Master's Office officials that he was held personally liable for the substantial costs of the litigation. In order to avoid

406 *Ibid*, s 122.
407 *Ibid*, s 121.
408 *Ibid*, s 123.
409 *Ibid*, s 124(1).
410 1973 (1) SA 1 (A) 5D.

problems practitioners are advised to ensure, as far as it is within their power to do so,[411] that a composition is not considered by creditors or accepted by creditors unless it clearly provides for certain matters. The most important of these matters appear to be the following:

- What happens if the insolvent or someone else does not comply with their obligations in terms of the composition?
- Do the trustee or creditors have the right to disregard the composition, or to apply to have it set aside?
- When (if at all) do assets re-vest in the insolvent and are there any requirements that must be fulfilled before such re-vesting takes place?
- Is security for compliance with the offer (if any) adequately described in the offer?
- Does the offer apply fully and equally to all concurrent creditors?
- Is the position of preferent and secured creditors clear and compatible with the rule that the composition does not bind them without their written consent?

Self-Assessment Questions

Question 1

Briefly discuss the two forms of composition (or compromise) and list the key features of each. (10)

Question 2

True or False: An offer of composition may not be accepted if it contains a condition whereby any creditor would obtain a benefit, as against another creditor, which benefit the creditor would not have been entitled to upon the distribution of the estate in the ordinary way. (2)

Question 3

Briefly discuss the binding effect of an approved composition and its impact on the claims of creditors. (3)

411 The trustee may refuse to submit an offer of composition to creditors or report on unacceptable provisions in an offer.

CHAPTER 28 – REHABILITATION

28.1 Introduction

28.1.1 Discharge of debts and end disabilities

The rehabilitation of an insolvent person brings the insolvency of such person to an end. The upshot of this is that such person's status as an insolvent is terminated and all the restrictions placed upon him or her are removed. Rehabilitation also results in the release of an insolvent person from his or her pre-sequestration debts. As such, it affords the insolvent the opportunity to make a so-called "fresh start".

Rehabilitation can occur automatically purely by the effluxion of time, or by order of the court pursuant to an application for rehabilitation brought prior to the expiry of the prescribed period. Therefore, in summary, the effect of rehabilitation[412] is to put an end to the sequestration, discharging all debts of the insolvent which were due or the cause of which had arisen before the sequestration and relieving the insolvent of every disability resulting from the sequestration.[413]

28.1.2 Which entities or persons?

The insolvent himself or herself is entitled to apply for his or her own rehabilitation. Rehabilitation in this sense applies to individuals only and not to partnerships,[414] companies or other legal entities. According to remarks made by the High Court in *Conradie v Master of the High Court, Kimberley*[415] a trust can apply to be rehabilitated. The sequestration of the joint estate of spouses married in community of property results in both spouses being declared insolvent for purposes of the Insolvency Act. Therefore, each spouse married in community of property is an "insolvent" who may apply for his or her rehabilitation.[416] There are certain early decisions where it was held that the insolvent estate of a deceased person could be rehabilitated. However, it is submitted that the decisions that support this view are incorrect and that a deceased estate is not entitled to be rehabilitated.

In *Acar v Pierce and Other Like Applications*,[417] Coetzee J stated the relevant principle as follows:

> "Persons are not sequestrated, only their estates are. Those persons who are sequestrated (in ordinary parlance) are termed insolvents. Insolvent estates are not rehabilitated, only insolvents are. Until their rehabilitation, insolvents are subject to an impressive list of duties and disabilities (*onbevoegdhede*)."

412 Subject to qualifications that will be pointed out below.
413 Insolvency Act, s 129(1).
414 *Ibid*, s 128.
415 Case 1260/2006 (Northern Cape Division) dated 13 June 2008.
416 *Ex parte Geeringh* 1980 (2) SA 788 (O).
417 1986 (2) SA 827 (W) at 829I.

This statement underscores the clear provisions of sections 124, 127A and 129 of the Insolvency Act, all of which refer to the rehabilitation of an insolvent and not to the rehabilitation of his or her estate.[418]

These notes deal with matters of direct importance to practitioners and not with a recommendation for early rehabilitation by the Master,[419] the more technical matters usually dealt with by the Master in the Master's report,[420] or technical matters regarding an application to the court.

28.2 Automatic rehabilitation

"Automatic" rehabilitation is provided for in section 127A of the Insolvency Act. Any insolvent not rehabilitated by the court within a period often years from the date of (provisional)[421] sequestration, is deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person orders otherwise before the expiration of the ten years. The effects of automatic rehabilitation are no different from the rehabilitation obtained pursuant to an application to court.

It is respectfully submitted that *Meskin* is correct when he avers[422] that an insolvent who seeks a declaratory order that he or she is entitled to property (discussed below) must give the requisite notice in this regard in the case of automatic rehabilitation. In law, a deceased estate is not entitled to be rehabilitated and the death of an insolvent prior to the effluxion of time contemplated in section 127A of the Insolvency Act is a bar to his rehabilitation.[423]

28.3 Rehabilitation by the court

The Insolvency Act provides for circumstances under which a rehabilitation order can be granted by a court, prior to the expiration of the ten-year period following the provisional sequestration of an insolvent. Since the insolvency of an individual affects a person's status, only the High Court may grant a rehabilitation order. In addition, only the court that granted the initial sequestration order is, in principle, competent to grant a rehabilitation order. It is important to note that even where the provisions of the Insolvency Act have been complied with, the High Court is not obligated to grant a rehabilitation order, as the insolvent is not

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418 *Vengadesan NO v Shaik and Others* 2014 (3) SA 14 (KZD), at 14.

419 See the proviso to s 124(2) of the Insolvency Act, *Kruger v The Master* 1982 (1) SA 754 (W); *Ex parte Porritt* 1991 (3) SA 866 (N); *Ex parte Anderson* 1995 (1) SA 40 (SE); *Greub v The Master* 1999 (1) SA 746 (C).

420 Insolvency Act, s 127(1).

421 *Grevler v Landsdown* 1991 (3) SA 175 (T) 178D.

422 Contrary to the decision in *Ex parte De Villiers* 1973 (3) SA 291 (W). In the matter of *Ex parte Van Der Merwe* 2008 (6) SA 451 (W), unlike in the *De Villiers* matter, the property was acquired prior to the sequestration; the applicant had made no attempt to conceal the asset; it was simply not possible to liquidate the property in question and the only potential creditor that would have suffered because of it, the municipality, had since been paid in full. There could obviously be no prejudice to any of the applicant's creditors, as he had satisfied not only his estate's sole proven creditor but has also taken steps to satisfy the amount owing to the municipality, who failed to respond to the publication of his sequestrated estate. In light of the aforegoing, the court granted the order vesting the property in the applicant.

423 *Vengadesan NO v Shaik and Others* 2014 (3) SA 14 (KZD), para [15].

entitled (i.e. has no right to) rehabilitation. As such, whether a rehabilitation order will ultimately be granted lies within the discretion of the court.

The period after sequestration when an insolvent may apply to court for rehabilitation depends on the circumstances. Provisions are set down for the furnishing of security,[424] facts to be averred in the application[425] and notice in the *Government Gazette*, to the Master and to the trustee.[426]

28.3.1 Time when application can be made:

The ordinary time when an application may be made is four years after sequestration. However, the period within which an insolvent may apply for his or her rehabilitation may differ in certain circumstances, as set out below –

- where the first account in the estate is confirmed by the Master, the insolvent may apply for his or her rehabilitation after a period of 12 months has elapsed following such confirmation;

- where the insolvent's estate has previously been sequestrated, three years from the date of confirmation of the first account must elapse before an application for rehabilitation may be made;

- where the insolvent has been convicted of a fraudulent act in relation to his or her insolvency, or of certain offences, such insolvent may apply for rehabilitation only after five years have elapsed from the date of his or her conviction; and

- where the Master recommends rehabilitation, the insolvent may obtain an order of rehabilitation within four years of the date of sequestration.[427]

In certain cases, the insolvent may apply for rehabilitation much earlier:

- An insolvent may make an application for rehabilitation (after giving six weeks' notice) if no claims were proved against the estate within six months from the sequestration,

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424 Insolvency Act, s 125. In *Ex parte Elliot* 1997(4) SA 292 (W) it was decided that the late furnishing of security was a fatal defect and could not be cured by a postponement of the application. See also *Ex parte Snooke* 2014 (5) SA 426 (FB), para [50].

425 Insolvency Act, s 126.

426 *Ibid*, s 124. In *Ex parte Minnie et Uxor* 1996 (3) SA 97 (SEC) the applicants omitted to state their identity numbers in the notice in the *Government Gazette* as required by reg 5. The notice did state the full names and dates of births of the applicants, the date of sequestration and information in regard to their occupations at the date sequestration. The court condoned the defect and, as the notice would not have caused prejudice to creditors, held that no useful purpose would be served by forcing the applicants to publish another notice. According to the decision in *Ex parte van Zyl* 1997 (2) SA 438 (E), the notice must state where and under what name the applicant was trading at the time of sequestration.

427 Insolvency Act, s 124(2).

provided the insolvent has not been convicted of certain offences and the estate has not been sequestrated previously.[428]

- An insolvent may immediately seek a rehabilitation order (after giving the appropriate notice) provided the Master has issued a certificate regarding a composition in respect of which payment has been made, or security has been given, of not less than 50 cents in the rand for every concurrent claim against the estate whether proved or to be proved (as discussed in the previous Chapter),[429] or after the confirmation of an account providing for the payment in full of all the claims of creditors with interest thereon.[430]

28.3.2 Court's discretion

The court has a discretion to refuse, postpone or grant an application for rehabilitation, either absolutely or conditionally. This discretion must be exercised judicially and not arbitrarily, and must be based on the facts and circumstances placed before the court. The opinions of the Master and trustee weigh heavily in this process and must be properly considered.

The test to be applied by the court is whether the applicant (in light of the facts and taking all relevant considerations into account) is 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 man.[431] The onus is on the applicant to show why the court should exercise its discretion to grant rehabilitation. Frankness and a full disclosure is expected from the applicant.[432] The court may require the insolvent to consent to judgement against him for the payment of any debt which was or could have been proved against his estate.[433] If creditors had to pay a contribution, it is usually expected of the insolvent to repay the contribution (if he or she is able to do so), together with such costs that were not incurred as a result of unwise decisions by creditors. In exercising its discretion, the court must accommodate the interests of not only the insolvent, but also the interests of creditors (whether they have proved claims or not), the state and the commercial public.

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428 *Ibid*, s 124(3).

429 *Ibid*, s 124(1).

430 *Ibid*, s 124(5). *Ex parte Oosthuizen* [2012] JOL 29309 (NWM) decided that if a secured creditor relied on security, it in effect reduced its claim to the value of the security and that was the amount of the claim that has been proved against the estate. If that claim has been paid, the creditor qualifies for rehabilitation in terms of s 124(5) despite a huge "shortfall" on the claim. The judge did not follow the decision in *Ex parte Van Zyl* 1991 (2) SA 313 (C), [1991] 4 All SA 218 (C) where the full amount of the secured claim was taken into account.

431 *Cf Kruger v The Master* 1982 (1) SA 754 (W); *Ex parte Le Roux* 1996 (2) SA 419 (C) 423I-424A; *Greub v The Master* 1999 (1) SA 746 (C); *Ex parte Harris (Fairhaven Country Estate (Pty) Ltd as Intervening Party)* [2016] 1 All SA 764 (WCC); (9357/2015) [2016] ZAWCHC 4; [2016] 1 All SA 764 (WCC) (26 January 2016) para [84]. In *Ex parte Snooke* 2014 (5) SA 426 (FB), para [46], the court noted that it was business as usual for the applicant and his wife; nothing had changed in so far as their situation was concerned, except that the applicant had gotten rid of debts close to R500,000; the court was not convinced that the applicant had learnt the lessons of insolvency, or that he had an appreciation of the hardship his insolvency had caused.

432 *Ex parte Snooke* 2014 (5) SA 426 (FB), para [33]; *Cf Ex parte Fourie* [2008] JOL 22076 (D) where the applicant displayed a "shameful thriftiness with the truth".

433 Insolvency Act, s 127(3).

In *Ex parte Theron*[434] the court criticised the Master for issuing certificates that part of the insolvent's income should be paid to the trustee in terms of section 23(5) and recommending that the court should in terms of section 127(2) make rehabilitation conditional on compliance with the certificate of the Master. Where creditors were not liable to pay contribution the court will not ordinarily make it a condition of granting rehabilitation that the insolvent should pay any further sum, over and above the dividend already received, to a creditor or creditors, but will do so if, upon a consideration of all the relevant circumstances, it appears to it to be just and equitable.[435]

28.4 Report by trustee

A trustee who receives notice of an application must report to the Master any facts which in his opinion would justify the court in refusing, postponing or qualifying rehabilitation.[436]

28.4.1 Matters to be dealt with in the report by the trustee

28.4.1.1 Report must deal with conduct before and after sequestration

It is submitted that the conduct of the insolvent before and after sequestration is relevant. If the insolvent conducted his affairs before sequestration in a negligent manner, or in a manner such as to deceive others, rehabilitation should be withheld or postponed until the insolvent has received a severe lesson as to the necessity of trading honestly. The conduct of the insolvent after insolvency is also relevant in order to indicate whether the insolvent has rehabilitated himself or herself in the sense that he or she understands his or her obligations to society in general and the business world in particular. The trustee should report on all matters before or after sequestration which may influence the court, which include the following considerations:

- did the insolvent furnish an acceptable reason for his insolvency, especially if liabilities exceeded assets by a large amount?;

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434 1994 (4) SA 136 (O).

435 In *Ex parte Linström* [2014] JOL 32526 (FB) the court held that apathy or non-vigilance of creditors is a factor to be taken into account when considering an application for rehabilitation and is a principle that has been reconfirmed in a plethora of cases (para [15]). The argument to the effect that writing the remainder of the debt off displayed a supine attitude by the opposing creditor holds no water, as the Act does not preclude any creditor from opposing an application for rehabilitation. There is nothing untoward in the opposing creditor having written off the remainder of the debt on its books after realising (i) that the amount available for distribution had not even covered the preferent claims and (ii) after the trustees had confirmed that there were no further assets that could be realised. This matter was clearly distinguishable from the cases where the court refused to grant a conditional rehabilitation on account of the supine attitude taken by the trustees or the creditors (para [17]). There is no justification for making an order that will benefit only the opposing creditor to the exclusion of the other creditors (para [25]).

436 Insolvency Act, s 124(4). High Court Rule (Free State) 9.5 provides as follows: In applications for rehabilitation all curators [should be trustees] shall furnish a copy of their reports to both the Master and the court, even if they have nothing to bring to the attention of the Master or the court. In other words, even where they have nothing to report on, they must bring that fact to the attention of the Master or the court.

- did the insolvent commit any offences?;
- did the insolvent comply with legal obligations after sequestration and did he co-operate with his trustee?;
- is there any evidence or indication that the insolvent acted dishonestly or with disregard for his creditors before or after sequestration?

28.4.1.2 Criticism of passive attitude in reports by Master and trustee

In *Ex part Le Roux*[437] Irish AJ was somewhat surprised at the passive attitude adopted by the Master and the trustee in their reports. The debtor had managed to amass assets of some R30,000. The applicant gave no details as to the composition of his family or other income received by members of the family. Some of the monthly expenditure items were startling at face value and no justification was given for such expenditure. Due to the fact that creditors obtained little benefit from the sequestration and there was nothing in the application to suggest that the applicant had learnt the lessons of insolvency or had any genuine appreciation of the possible hardship that his sequestration may have caused, the court was not satisfied that a proper case for rehabilitation had been made out and postponed the application with leave to enrol it again with the papers duly supplemented. *Ex parte Snooke*[438] notes that it is not primarily the responsibility of creditors to oppose applications for rehabilitation.[439] If the trustee of an insolvent estate has properly complied with his functions and reported fully to the Master and creditors in respect of the administration of the insolvent estate, the trustee or the Master would be in a much better position than any creditor to place relevant facts before the court without having to incur legal fees in opposing the application in order for it to exercise its discretion judicially.

28.4.2 Illegal to pay or promise benefits

It is a criminal offence for a person to accept a benefit as consideration for not opposing the rehabilitation of an insolvent. In addition, an undertaking to pay or promise any person a benefit to agree to or not to oppose rehabilitation is void and any person who accepts such a benefit, is liable to pay specified penalties for the benefit of creditors.[440]

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437 1996 (2) SA 419 (C).

438 2014 (5) SA 426 (FB), para [33].

439 An application for leave to intervene is not a prerequisite to a party being heard in opposition to an application for rehabilitation – *Ex parte Harris (Fairhaven Country Estate (Pty) Ltd as Intervening Party)* [2016] 1 All SA 764 (WCC). The court held that the application to intervene in the rehabilitation application was without merit, was not *bona fide* and was an abuse of the process of the court which, in terms of the authorities, had to be stopped dead in its tracks. The application was refused with costs (para [76]).

440 Insolvency Act, s 130.

28.5 Effect of rehabilitation on claims and assets

28.5.1 Effect on claims

The effect of rehabilitation is to discharge debts provable against the insolvent estate unless the debt arose out of fraud on the part of the insolvent.[441] The insolvent remains personally liable for liabilities incurred after sequestration. Any claim for maintenance due after sequestration is probably enforceable against the insolvent personally.[442]

28.5.2 Does not affect penalty, punishment or surety

Rehabilitation does not affect the liability of any person to pay a penalty or suffer any punishment under the provisions of the Insolvency Act.[443] As usual, the law has little sympathy for a surety of the insolvent and the liability of such a surety is not affected by rehabilitation.[444] As such, the surety remains liable notwithstanding the discharge of the insolvent's debts. It must be noted further that where a surety pays a debt after the rehabilitation of an insolvent, such surety has a right of recourse against the former insolvent for any amount paid.

28.5.3 Effect on assets

Any property which vested in the insolvent's trustee prior to rehabilitation remains so vested in the trustee for the benefit of the creditors (for the purposes of realisation and distribution), save where it is specifically provided in a composition that it should re-vest in the insolvent. Any assets excluded from the insolvent estate and not protected against creditors[445] may be excussed to obtain payment of such debts incurred after sequestration. A separate estate built up by an insolvent may be sequestrated. The right of the trustee or creditors to the undistributed part of the insolvent estate is not affected by rehabilitation.[446] However, this provision does not preserve the right to prove a claim or the claim of an unproved creditor.[447]

28.5.4 Re-vesting of assets

If rehabilitation is granted in terms of section 124(3) of the Insolvency Act because no creditors have proved claims within six months after sequestration, the assets re-vest in the insolvent.[448]In addition, if no trustee is elected at the first meeting, the Master may apply to set aside the sequestration, which would be less favourable for the insolvent than rehabilitation because in such a case the insolvent would not be released from his or her debts.

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441 *Ibid*, s 129(1)(b).
442 *Mars*, para 16.1.
443 Insolvency Act, s 129(3)(e).
444 *Ibid*, s 129(3)(d).
445 For example, pension payments.
446 Insolvency Act, s 129(3)(c).
447 *Brown v Oosthuizen* 1980 (2) SA 155 (O).
448 Insolvency Act, s 129(3).

28.5.5 Caveat against property

If immovable property or a mortgage bond is still registered in the name of the insolvent at a time when the insolvent is automatically rehabilitated after ten years, or if such property is discovered after rehabilitation, the trustee should consider having a caveat registered against the property or mortgage bond in terms of section 18B of the Insolvency Act.

28.6 Declaratory orders[449]

Occasionally an insolvent who applies for rehabilitation also applies for an order that property (especially immovable property) is vested in the insolvent, entitling him or her to deal with the property. Such an order may also be applied for after rehabilitation.

A clear distinction must be made between cases where:

(a) property has re-vested in the insolvent[450] or did not vest in the Master and the trustee in the first place; and

(b) cases where property is vested in the trustee.

28.6.1 Property that did not vest in the estate or re-vested in the insolvent

Strictly according to law, a declaratory order is not necessary in cases under (a) above. The court cannot declare which property forms part of an insolvent estate and which does not. Nevertheless, the procedure is followed to bring about certainty and to give the Master, the trustee and creditors the opportunity of considering an insolvent's claim that property vests in him or her and not in his or her insolvent estate.

28.6.2 Property vested in the trustee

In the cases under (b) above, the orders are based on a waiver by the trustee and creditors of their rights. The facts set out in the application must justify the inference that the Master, trustee and creditors have, with full knowledge of the circumstances, waived any rights which they may have had to claim the property. This also applies where property vested in the debtor before sequestration and, although the property was disclosed to the trustee, the trustee after investigating the matter abandoned the asset because it could not be liquidated.[451]

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449 See, e.g., *Ex parte Kriel* 1949 (1) SA 971 (O); *Vorster v Steyn* 1981 (2) SA 831 (O); and *Ex parte Potgieter* 1967 (2) SA 310 (T).

450 In terms of a composition or upon rehabilitation where no claims have been proved. See sections 120(2) and 129(2) of the Insolvency Act.

451 *Ex parte Van der Merwe* 2008 (6) SA 451 (W). In this case the amount owing to the municipality exceeded the value of the property.

28.6.3 Notice of application

Written notice of the application with sufficient details of the property and the manner in which it was obtained must be given to the Master, the trustee and proved and unproved creditors. If some of the creditors cannot be traced, the applicant must indicate the steps taken to trace them. A footnote in the notice in the *Government Gazette* must give full details of the property claimed by the insolvent. In cases under (a) above the court may perhaps accept notice to the Master, the trustee and in the *Government Gazette* without written notice to creditors.

28.7 Transfer of property which vested in the trustee

It should be noted that immovable property which vested in a trustee and which has not re-vested in the insolvent may before or after rehabilitation be transferred only by the trustee and may not after rehabilitation be dealt with by the insolvent until the trustee has transferred the property to the insolvent. If there is no trustee, the Master may pass transfer of the property. If 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.[452]

Self-Assessment Questions

Question 1

Briefly discuss the two ways in which the rehabilitation of an insolvent natural person can occur under South African Insolvency law. (2)

Question 2

True or False: The concept of automatic rehabilitation does not exist under South African Insolvency law. (2)

Question 3

Briefly discuss the effect of rehabilitation and its impact on an insolvent person's pre-sequestration debts. (3)

[452] Deeds Registries Act 1937, s 58.

CHAPTER 29 – PARTNERSHIPS

29.1 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, if necessary the one after the other, for a partnership debt and a partner who has paid a partnership debt will have a claim against other partners for a proportional share of the debt. A chain reaction may ensue until the creditors have all been paid in full, or, in the event of insolvency, equitable dividend levels have been found.[453]

29.2 Insolvency Act

29.2.1 Insolvency of partnership

29.2.1.1 Partnership and partners separate entities

The Insolvency Act has departed from the common law position (as discussed above), and for the most part treats the estates of the partnership and its partners as separate entities. As such, a partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person. The Master follows suit by opening separate files for each estate and making appointments, holding meetings, dealing with accounts,[454] etc in each estate.[455]

29.2.1.2 Partners' estate sequestrated if partnership sequestrated

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 member of the partnership except those partners who are not liable to outsiders for partnership debts or 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.

It is important to note that 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. Where a partnership is wound-up, the partnership assets are divided amongst the

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453 *Cf Michalow v Premier Milling Co Ltd* 1960 (2) SA 59 (W).

454 *Cf* Insolvency Act, s 92(5).

455 Even before sequestration the Rules of Court permit a partnership to be sued and provide that execution for partnership debts must first be levied against partnership assets – Rule 14 of the Uniform Rules of the High Court, r 14 and Magistrate's Courts Rules, rr 40 and 54.

partners in terms of either the partnership contract 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.

29.2.1.3 Partner who is a legal person

A partner who is a legal person, for example a company, can of course not be sequestrated. The question whether the court may sequestrate the partnership estate in such a case is not discussed in these notes.[456] The sequestration of a dissolved partnership is also not discussed here.[457]

29.2.2 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 shall 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.

29.2.3 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 his 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.[458]

29.2.4 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.[459]

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456 *Cf P de V Reklame v Gesamentlike Onderneming van Numismatiese Buro en Vitaware* 1985 (4) SA 876 (C); *Commissioner, SARS, v Hawker Air Services (Pty) Ltd 2006* (4) SA 292 (SCA).

457 *Cf Stellenbosh Farmer's Winery v Pretorius* 1970 (3) SA 234 (SWA) and the cases referred to there.

458 *Barclays Bank (D C & O) v The Master* 1958 (2) SA 119 (O).

459 Insolvency Act, s 49(1).

29.2.5 No 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.

29.3 Insolvency of partner only

As aforementioned, the insolvency of one of the partners of a partnership dissolves the partnership, but it does not cause the partnership estate to be sequestrated.[460] A consequence of the dissolution of the partnership is the winding-up or liquidation of the partnership. The converse of section 13(1), discussed above (individual partners are sequestrated when the partnership itself is sequestrated), is therefore not provided for. A creditor of a partner might not even be aware of the fact that a debtor is a member of a partnership or the partnership estate might not be insolvent. 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. Because 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. 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 accounts.

29.4 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.[461] *Meskin* submits that a sequestrated partnership cannot make a composition with its creditors since sequestration results in its dissolution.

Since a partnership is *ipso facto* terminated on the sequestration of its estate, a partnership whose estate has been sequestrated "shall not be rehabilitated".[462] 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 his or her private debts, but also from his or her liability for the partnership debts.

Section 143 of the Insolvency Act contains special rules in respect of the criminal liability of partners.

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460 *Cf* De Wet & Yeats, *Kontraktereg en Handelsreg*, 4th Ed, at 527.

461 Insolvency Act, s 121.

462 *Ibid*, s 128.

Self-Assessment Questions

Question 1

Briefly discuss the way in which a partnership and its partners are treated in terms of the Insolvency Act, 1936. (2)

Question 2

True or False: The effect of the sequestration of one partner's estate is that the partnership itself will terminate, and such partnership will be wound-up. (2)

Question 3

Briefly discuss the proof of claims in the context of an insolvent partner/partnership, with reference to the relevant provision(s) of the Insolvency Act, 1936. (2)

CHAPTER 30 – LIQUIDATION OF COMPANIES AND CLOSE CORPORATIONS

30.1 Introduction

This course concentrates on the administration of insolvent estates. As it is impossible to deal with the administration of insolvent estates without some knowledge of winding-up procedures, these procedures are set out below.

Since a juristic person such as a company or close corporation is a separate legal entity, its existence can only be terminated by its dissolution. Liquidation is the process that precedes the dissolution[463] of a corporate entity. The affairs of the company or close corporation are finalised or otherwise administered by tracing and taking control of assets, realising the assets and applying the proceeds firstly for the payment of creditors of the company or close corporation according to the ranking of their preferences and thereafter the distribution of the residue (if any) amongst the shareholders of the company or members of the close corporation according to their rights. Liquidation should not be confused with deregistration although deregistration also automatically results in the dissolution of the company or close corporation.[464]

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463 The dissolution of a company is not dealt with in these notes. See ss 82 and 83 of the Companies Act 2008; *Cronje NO v Hillcrest Village (Pty) Ltd* 2009 (6) SA 12 (SCA), para [22]; *Motala v Master of the High Court North Gauteng* (Case No 07419/2011, High Court Johannesburg); *Motala and Others v Master of the High Court (North Gauteng) and Others* [2014] JOL 31381 (SCA); *De Villiers v GJN Trust* (756/2017) [2018] ZASCA 80 (31 May 2018) for the setting aside of dissolution.

464 See ss 82 and 83 of the Companies Act 2008 for removal from the register. See *Nafcoc Investment Holding Co Ltd v Miller* (Case 08/27442, Southern Gauteng Divisio, dated 8 December), para [17], for the reversal of the deregistration of a company. The final deregistration of a close corporation does not discharge a surety of the close corporation who is liable jointly and severally for the debts of the close corporation – *ABSA Bank Limited v Hlathini Safaris CC* [2012] JOL 29520 (GSJ). A variety of decisions dealt with the effect of re-instatement of a company on acts between deregistration and a re-instatement – *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 (1) SA 570 (GSJ); *Noble Crest CC v Kadoma Trading 15 (Pty) Limited* [2012] JOL 29278 (WCC), paras [20] and [23] (dealing with s 26 of the Close Corporations Act 1984); *ABSA Bank Limited v Companies and Intellectual Property Commission of South Africa* 2013 (4) SA 194 (WCC); *Missouri Trading CC and Another v Absa Bank Ltd and Others* 2014 (4) SA 55 (KZD); *CA Focus CC v Village Freezer t/a Ashmel Spar* 2013 (6) SA 549 (SCA) (dealing with s 26 of the Close Corporations Act, set aside on appeal in *CA Focus CC v Village Freezer t/a Ashmel Spar* [2016] JOL 33583 (SCA)). *Cf Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA)); *Peninsula Eye Clinic (Pty) Limited v Newlands Surgical Clinic and Others* 2014 (1) SA 381 (WCC); [2014] JOL 31215 (WCC); and *Gainsford NO v Introdeals 159 (Pty) Ltd (in liquidation)* (44974/2013) [2014] GP (17 October 2014) para [14]. The Supreme Court of Appeal has now held in *Newlands Surgical Clinic v Peninsula Eye Clinic* 2015 (4) SA 34 (SCA), para [29] that the only acceptable meaning for the wording of section 82(4) of the Companies Act 71 of 2008 was that re-instatement of a deregistered company had automatic retrospective effect, not only in re-vesting the company with its property but also in validating its corporate activities during the period of its deregistration – followed in *Reddy v Absa Bank Ltd and Others* (20096/2014) [2015] ZASCA 83 (28 May 2015) and *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2016 (6) SA 121 (SCA). In *Palala Resources* the court held that deregistration of a company which was the holder of a mineral prospecting right did not result in that company irretrievably losing that right – subsequent restoration of company's registration had the legal effect of retrospectively reviving the lapsed prospecting right. Section 83(4) of the Companies Act 2008, which provides for an application to declare the dissolution of a company void and an order that is just and equitable in the circumstances, is available even where the company has already been

Liquidation takes place under the control of the Master of the High Court. The jurisdiction of the Master depends on the method of liquidation used.

A trust is not covered by the definition of a company under the 2008 Act for it is not a juristic person incorporated in terms of the Act and cannot be wound up in terms of the Act.[465]

A trust is not covered by the definition of a company under the 2008 Act for it is not a juristic person incorporated in terms of the Act and cannot be wound up in terms of the Act.[466]

30.2 Solvent and insolvent liquidations

Before the Companies Act 71 of 2008 came into operation on 1 May 2011, all company liquidations were regulated by Chapter XIV of the Companies Act 61 of 1973, irrespective of whether a company was wound up because it was unable to pay its debts (in other words commercially insolvent), or because of other grounds on which a solvent company could be wound up such as deadlock among shareholders or directors, or where the main object for which the company was formed could no longer be achieved or had been achieved and the company no longer served any purpose. However, a few sections were specifically applicable only to companies that were being wound up because they could not pay their debts.

The Companies Act of 2008 changed this situation and now makes a clear distinction between solvent and insolvent liquidations. The Companies Act 2008 provides[467] that despite the repeal of the previous Companies Act 1973, until the date determined by the Minister responsible for companies, Chapter XIV of the previous Act continues to apply with respect to the winding-up and liquidation of companies under the Companies Act 2008, as if the previous Act had not been repealed. However, in terms of item 9(2) of Schedule 5 to the Companies Act 2008, the following sections of the Companies Act 1973 do not apply to the winding-up of a solvent company except to the extent necessary to give full effect to the provisions of Part G of Chapter 2 (sections 79 to 83) of the Companies Act 2008 that have now replaced them in respect of solvent companies:

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administratively reinstated in terms of the subs (*Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), paras 43-44). There is no support in the wording of the subs for a contrary interpretation (para [34]). *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* [2014] JOL 32109 (SCA) decided that during its winding-up a company remains in existence, albeit in liquidation, and cannot be deregistered. *MF Barter and Trading (Pty) Ltd v Asbury* (Case No 7058/07, High Court Cape Town, 25 October 2012) decided, under s 26 of the Close Corporations Act 1984 before amendment by the Companies Act 2008, that in the case of failure by the Registrar to give proper notice of deregistration there is no deregistration or liability of members. Deregistration is incompetent in circumstances where a company has already been wound up. *Eurocoal (Pty) Limited (In Liquidation) and Others v Hendricks NO and Others* [2018] JOL 39943 (GP), para [11].

465 *Melville v Busane* 2012 (1) SA 233 (ECP), para [16].

466 *Ibid*.

467 Continued application of the 1973 Act to winding-up and liquidation, item 9 of Sch 5 *Transitional Arrangements* of the Companies Act 2008.

- Section 343 (modes of winding-up),
- Section 344 (circumstances in which company may be wound up by court),
- Section 346 (application to court for winding-up of company),
- Section 348 (commencement of winding-up by court) and
- Sections 349 to 353 (voluntary winding-up)
- If there is a conflict between a provision of the previous Act that continues to apply and a provision of Part G of Chapter 2 of the Companies Act 2008 with respect to a solvent company, the provision of the 2008 Act prevails.

It is important to note that Chapter XIV is applied as if the previous Act had not been repealed, not as if Chapter XIV had not been repealed. Relevant provisions outside Chapter XIV, for example definitions and rules regarding jurisdiction, must be applied despite the repeal of the 1973 Act.

In terms of section 79(2) of the Companies Act 2008, the procedures for liquidation of a solvent company are governed by sections 79 to 83 of this Act and, to the extent applicable, the provisions contained in Chapter XIV of the Companies Act 1973. Section 79(3) of the Companies Act 2008 therefore stipulates that if a company is being wound up as a solvent company but it is found that the company is or may be insolvent, a court may, on application by any interested person, order that the company be wound up as an insolvent company in terms of the Companies Act 1973.

From the above it is clear that the first step in the winding-up of a company is to establish whether the company is solvent or insolvent because that will determine whether the process should be governed by the Companies Act 2008 or the Companies Act 1973. The Companies Act 2008 does not definite the terms "solvent" or "insolvent" and initially there was some uncertainty whether a company would be regarded as insolvent if it was unable to pay its debts (commercial insolvency), or if its liabilities exceeded the value of its assets (factual or balance-sheet insolvency), or both.

After some conflicting judgments on the matter, the issue was eventually resolved by the Supreme Court of Appeal in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*[468] where it was held that a solvent company is one that is commercially solvent, in other words, able to pay its debts when due. The court explained the situation as follows:

- For decades South African law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in

468 2014 (2) SA 518 (SCA) para [21].

which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities);[469]

- It must be presumed that the legislature deliberately refrained from defining "solvency". It must have done so with a view to ensuring that the well-oiled machinery of the courts in matters of company liquidations should not stall. The legislature must have been content that prevailing judicial interpretations of solvency and insolvency respectively should continue to have effect.[470]

- Section 345 was retained in subitem 9(1) of Schedule 5 in 2008 Act to enable a determination to be made in terms of section 79(3) of the 2008 Act whether a company "is or may be insolvent" – even though the application was made in terms of either section 80 or 81 for its winding-up as a so-called "solvent" company. The deeming provisions concerning the inability to pay its debts, contained in section 345 of the 1973 Act, may be used to establish the insolvency of a company.[471]

- Factual solvency in itself is not a bar to an application to wind-up a company in terms of the 1973 Act on the ground that it is commercially insolvent. A commercially solvent company (whether factually solvent or insolvent) may[472] be wound up in terms of the 2008 Act only.

This was confirmed in *Murray NO and Others v African Global Holdings (Pty) Ltd*[473] where the Supreme Court of Appeal held that a company that was unable to pay its debts because its banking facilities had been terminated and it could therefore not access its liquid assets, was commercially insolvent and therefore had to be wound-up under the Companies Act 1973. It was irrelevant that its assets possibly exceeded its liabilities.

30.3 The application of the Insolvency Act to solvent and insolvent liquidations

Although the legislation now distinguishes between the liquidation of solvent and insolvent companies, some provisions of the Insolvency Act still apply to both solvent and insolvent liquidations, because several sections in Chapter XIV of the Companies Act 1973 provide that the law relating to insolvency law should be applied. Some of them apply only if the company is unable to pay its debts (in other words, in an insolvent liquidation), while others apply to all liquidations as indicated below:

- Section 340 - voidable and undue preferences (insolvent liquidations);

- Section 341(2) – dispositions after winding-up are void (insolvent liquidations);

469 At para [16].
470 At para [19].
471 At para [20]; *Standard Bank of South Africa Limited v R-Bay Logistics CC* 2013 (2) SA 295 (KZD), para [29].
472 *Standard Bank of South Africa Limited v R-Bay Logistics CC* 2013 (2) SA 295 (KZD), para [32].
473 2020 (2) SA 93 (SCA) para [23].

- Section 342 - application of assets and costs of winding-up (insolvent liquidations);
- Section 360 – application to court by a member or creditor of the company for authority to inspect the books and records of the company (insolvent liquidations);[474]
- Section 364(2) - convening and holding of the first meeting of creditors (solvent and insolvent liquidations);
- Section 365(2) - voting, the manner of voting, voting by an agent and the rights of a cessionary (solvent and insolvent liquidations);
- Section 366(1) - proof of claims and the position of a secured creditor (solvent and insolvent liquidations except section 366(1)(c) – the right of a secured creditor to take over security);
- Section 383(1) - apportionment of the costs of security (solvent and insolvent liquidations);
- Section 386(4)(g) - exercise of powers conferred on a trustee by sections 35 (uncompleted acquisition of immovable property before sequestration) and 37 (effect of sequestration upon a lease) of the Insolvency Act (section 35 only applies to insolvent liquidations, section 37 to solvent and insolvent liquidations);
- Section 412 - convening and holding of meetings of creditors and the application of section 52 of the Insolvency Act regarding the right of a creditor to vote at a meeting (solvent and insolvent liquidations);
- Section 414(1) – the duty of directors and officers to attend meetings (insolvent liquidations);
- Section 415(1) – examination of directors and others at meetings (insolvent liquidation);
- Section 416 - application of sections 65, 66, 67 and 68 of the Insolvency Act (production of book or document or interrogation, enforcing summonses and giving of evidence, steps to be taken on suspicion of an offence and presumption as to record of proceedings and validity of acts at meetings of creditors) (insolvent liquidations);
- Section 417 – confidential examination by Master or the court (insolvent liquidation);
- Section 421 – register of directors of dissolved companies (insolvent liquidation);

474 See *Ram Transport (Pty) Ltd v Replication Technology Group (Pty) Ltd (In Liquidation)* 2011 (1) SA 223 (GSJ) for a decision regarding s 360.

- Section 425 - application of criminal provisions of the law relating to insolvency (insolvent liquidations).

- Sections 386(4)(d) and 389(1) apply only if the company is able to pay its debts.

30.4 General application of insolvency law to insolvent liquidations only

As far as insolvent liquidations are concerned, section 339 of the Companies Act 1973 is of vital importance. It reads as follows:

> "In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act."

It should be noted that the section applies only if a company is "unable to pay its debts", in other words, in an insolvent liquidation.

Mutatis mutandis means "with the necessary changes". A reference to the insolvent or his estate should therefore be read as a reference to the company or its assets, a reference to sequestration as a reference to winding-up, and a reference to the trustee as a reference to the liquidator, etc.

In order to decide whether a specific provision of the Insolvency Act applies to the winding-up of a company, a three-part test should be employed:

30.4.1 Can the section apply to a winding-up?

The first step is to determine whether the provision is capable of application in a winding-up. Provisions such as those dealing with rehabilitation and the exclusion of assets from an insolvent estate, can never apply to a company in winding-up.

30.4.2 Is the matter specially provided for by the Companies Act?

The next step is to determine whether the matter is specially provided for by the Companies Act (see section 339 quoted above). An example of a situation where there was a difference of opinion on the application of this rule, was the provisions relating to the late proof of claims. The proviso to section 44 of the Insolvency Act states that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting, except with the leave of the court or the Master. Section 366(2) of the Companies Act provides that the Master may, on the application of the liquidator, fix a time within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved. Some presiding officers were of opinion that section 44 of the Insolvency Act applied to companies and that the leave of the Master was required for the proof of claims

later than three months after the second meeting had concluded (even though the Companies Act refers to a general meeting and not to a second meeting). Some Master's Office officials were of the opinion that section 44 did not apply and refused to give permission for the late proof of claims, resulting in a stalemate. In *Townsend v Barlows Tractor Co (Pty)Ltd*[475] Cloete J held that since the Companies Act section 366(2) deals with the consequences of the late proof of claims, there is no room for the proviso in section 104 of the Insolvency Act to be incorporated under the general provisions of section 339 of the Companies Act. In *De Montlehu v Mayo NO and Others*[476] the Supreme Court of Appeal confirmed that the three-month period stipulated in section 44(1) of the Insolvency Act relating to the proof of claims applied to both sequestrations and liquidations. Apart from consent for the proof of the claim, the Master has to fix costs for a late claim and there must be payment in respect thereof in order for such a late claim against a company in liquidation to be valid. The provisions of section 44(1), which provides for the time period, the fixing of costs, the payment of costs by a creditor that submitted a claim after the three-month period had expired, and the proviso dealing with the proof of a late claim with the leave of the court or the Master, applies also to liquidations.[477]

30.4.3 Does the provision apply to the mode of liquidation in question?

If the Companies Act does not specially provide for the matter in question and the company is unable to pay its debts, the provisions of the Insolvency Act (or the common law regarding insolvent individuals) applies with the necessary changes.

30.5 Winding-up of a solvent company

Section 79(1) of the Companies Act 2008 provides that a solvent company may be dissolved by a voluntary winding-up initiated by the company in terms of section 80, or winding-up and liquidation by court order in terms of section 81.[478] Where the Companies Act 2008 does not contain any relevant provisions, the Companies Act 1973 must be applied.

30.5.1 Voluntary winding-up of a solvent company

The voluntary winding-up of a solvent company requires a resolution by shareholders (or members in the case of a non-profit company) that must comply with the following:[479]

It must be clear from the resolution that it was:

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475 1995 (1) SA 159 (W) 165D.

476 *Mayo NO v De Montlehu* 2016 (1) SA 36 (SCA), para [26].

477 *Wishart NO and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd and Others* 2017 (4) SA 152 (SCA), paras [13] and [16].

478 The words "winding-up" and "liquidation" are normally used interchangeably as synonyms, and it is not at all clear why both are used here.

479 *Cf Botha NO v Van den Heever NO* (Case No 40406/2012, High Court Pretoria, 23 July 2012).

- a special resolution which provides for the winding-up to be by the company; and
- adopted by the shareholders (or members) of the company; and
- provides for the voluntary winding-up of a solvent company.

There may be various reasons for the use of this method of liquidation, for example that the purpose for which the company had been incorporated has been fulfilled, or the shareholders responsible for the management of the company are no longer on friendly terms.

The whole process is controlled by the shareholders and is therefore much simpler and cheaper than any other process available. Since the creditors have no interest in the estate, no meetings of creditors are held.

In terms of section 79(1)*(a)*, a voluntary winding-up may be conducted either by the company or by the company's creditors as determined by the resolution of the company. This is echoed by section 80(1) that a solvent company may be wound up voluntarily if the company has adopted a special resolution which may provide for the winding-up to be by the company or by its creditors.

The inclusion of a winding-up by creditors is nonsensical and clearly a drafting error, since a voluntary winding-up by creditors is used when a company cannot pay its debts or provide security for payment of its debts within the next 12 months: in other words, an insolvent company.[480] The creditors of a solvent company will not have any interest in its voluntary winding-up and there is no reason for them to be involved. This part of the provision will therefore be ignored.

The following documents must be filed[481] with the Companies and Intellectual Property Commission (CIPC), together with the prescribed filing fee:[482]

- Form CoR 40.1;
- The special resolution passed by the shareholders;
- JM12 (see the next paragraph);

480 In terms of s 351 of the Companies Act 1973.

481 The Companies Act 2008 provides for the filing of the resolution and does not provide for registration of the resolution as was provided for in the 1973 Act.

482 Practice note 3 of 2012 issued by the CIPC (Notice number 202 in *Government Gazette* 36225 dated 15 March 2013) and s 80(1) and (2) of the Companies Act 2008. A special resolution must be adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as allowed by the company's Memorandum of Incorporation in terms of s 65(10).

- Certified copies of the ID of the directors who signed the CoR40.1.[483]

Form JM12 security for debts

If a resolution provides for a winding-up by the company, before the resolution and notice are filed the company must-

(a) arrange for security, satisfactory to the Master, for the payment of the company's debts within no more than 12 months after the start of the winding-up of the company; or

(b) obtain the consent of the Master to dispense with security, which the Master may do only if the company has submitted to the Master –

- a sworn statement by a director authorised by the board of the company, stating that the company has no debts; and

- a certificate by the company's auditor, or if it does not have an auditor, a person who meets the requirements for appointment as an auditor and appointed for that purpose, stating that to the best of the auditor's knowledge and belief and according to the financial records of the company, the company appears to have no debts.

Any costs incurred in furnishing the security for debts may be paid by the company.[484]

The voluntary winding-up of a company begins when the resolution of the company has been filed with the Commission.[485] When a resolution has been filed, the Commission must promptly deliver a copy of it to the Master.[486] The resolution must also be accompanied by a copy of the resolution nominating the liquidator. The Master normally appoints the nominated person. The meeting of shareholders may determine the remuneration of the liquidator.

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483 As per notice 27 November 2013, from 2 December 2013 the CIPC no longer posts confirmation letters and certificates to customers for liquidation (forms CoR40.1 and CM16 – should be CM26?). Such confirmation letters and certificates are e-mailed to the e-mail address as per the customer profile of the customer who filed it and may be reprinted by the customer from the CIPC website (www.cipc.co.za). As per the notice of 30 August 2013, the CIPC no longer stamps documents at the CIPC office (from 1 September 2013) and customers are required to keep copies of all documents submitted to the CIPC. Therefore, as from 2 December 2013, the CIPC also no longer provides a stamped copy of any filed CoR40.1, CM26 (liquidation) application to customers. The confirmation letter and certificate constitute sufficient proof that a particular application was submitted and filed with the CIPC for a specific entity and should be attached to the copy of the submitted application kept by the customer or customer's client. If the CoR40.1 or CM26 (liquidation) application is required by the Master of the High Court, the Master may request a copy of the application from the CIPC by e-mailing a request to liquidations@cipc.co.za.

484 Companies Act 2008, s 80(8).

485 *Ibid*, s 80(6).

486 *Ibid*, s 80(7).

The company must give notice of the voluntary winding-up in the *Government Gazette*.[487] A copy of the resolution must also be sent to various sheriffs and registrars.[488]

The liquidator must give notice of his appointment in the *Government Gazette*. A liquidator appointed in a voluntary winding-up by the company may exercise all powers conferred by the Companies Act 2008 or Chapter XIV of the Companies Act 1973 on a liquidator in a winding-up by the court, without requiring a specific order or sanction of the court and subject to any directions given by the shareholders of the company in a general meeting.[489]

Despite any provision to the contrary in a company's Memorandum of Incorporation, the company remains a juristic person and retains all its powers as such while it is being wound up voluntarily. However, from the beginning of the company's winding-up it must stop carrying on its business except to the extent required for the beneficial winding-up of the company and all the powers of the company's directors cease, except to the extent specifically authorised by the liquidator or the shareholders in a general meeting.[490]

30.5.2 Winding-up of a solvent company by court order

Section 81 of the Companies Act of 2008 provides for the winding-up of solvent companies by court order. As was mentioned earlier, section 345 of the Companies Act 1973 is not excluded from application to a solvent company. It may therefore be used to determine whether a company is solvent or insolvent.

The application placing a company in liquidation must be brought in the division of the High Court in whose jurisdiction the registered office is. [491]

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487 Companies Act 1973, s 356(2)(b).

488 *Ibid*, s 357.

489 Companies Act 2008, s 80(5).

490 *Ibid*, s 80(8).

491 Unlike s 12 of the Companies Act 1973, the Companies Act 2008 does not define the court that has jurisdiction for a particular company in terms of the Act. It was decided in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) that a company can in terms of the Companies Act of 2008 "reside" only at the place of its registered office and that the single court where the company has its registered office has jurisdiction in respect of winding-up or business rescue matters – followed in *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others* [2014] JOL 32101 (WCC), para [19]. In *Wild & Marr (Pty) Ltd v Intratek Properties (Pty) Ltd* 2019 (5) SA 310 (GJ)the court fund that there was no precedent that binds the Gauteng Division of the High Court to the proposition that a court with jurisdiction over the registered address of a company has sole jurisdiction over its winding-up and that the winding-up application can therefore only be served at that address. For liquidation-related matters, the dual-jurisdiction regime provided for in s 12(1) of the Companies Act 1973 still stands. As a result, liquidation proceedings may be launched also from the court with jurisdiction over the company's principal place of business and the decision in the *Sibakhulu* case does not apply once a company is liquidated. In the absence of any provisions in the Companies Act 2008 Act and chapter XIV of the Companies Act 1973, jurisdiction in respect of proceedings against the liquidators fall to be determined on common law grounds. In *Firstrand Bank Limited, Wesbank Division v PMG Motors Alberton (Pty) Limited and others* [2013] JOL 30781 (GSJ); (2012/1307) [2013] ZAGPJHC 203; [2013] 4 All SA 117 (GSJ) 912 August 2013), para [46] the court stated that to say that a company resides at its principal

30.5.2.1 Who may apply and grounds on which the application to court may be made

In contrast to the Companies Act 1973 where the persons who may apply for the liquidation of an insolvent company and the grounds on which an application may be made are contained in separate sections, they are combined in section 81 of the Companies Act 2008. This means that the grounds on which an application for the liquidation of a solvent company may be made, depend on who the applicant is.

A court may order a solvent company to be wound up if[492] –

(a) ***the company*** has resolved, by special resolution, that it be wound up by the court; or applied to the court to have its voluntary winding-up continued by the court;

(b) ***the business rescue practitioner*** of a company appointed during business rescue proceedings has applied for liquidation on the grounds that there is no reasonable prospect of the company being rescued;[493] or

(c) ***one or more of the company's creditors*** have applied to the court for an order to wind up the company on the grounds that
  (i) the company's business rescue proceedings have ended in the manner contemplated in section 132(2)(b) or (c)(i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or
  (ii) it is otherwise just and equitable for the company to be wound up;[494]

(d) ***the company, one or more directors or one or more shareholders***[495] have applied to the court for an order to wind up the company on the grounds that –
  (i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and
    - irreparable injury to the company is resulting, or may result, from the deadlock; or

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place of business is simply a convenient way of ensuring that the nerve center of the operations of a company founds jurisdiction in proceedings taken against it. Although s 12 of the Companies Act 2008 refers to "the main place of business", this amounts to the same thing for jurisdictional purposes. In *PMG Motors Kyalami (Pty) Ltd and Another v Firstrand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA), para [13], the court found that the jurisdiction of a court arising from the location of the principal place of business of a company is unaffected by its liquidation. *Cf* Practice Note 2 of the CIPC which deals with the *Sibakhulu* decision. *Solidarity in re Van Wyk v Atlantis Forge (Pty) Ltd* (case 779/2009, Free State Provincial Division, dated 19 March 2009) is a case where the court ordered the transfer of an application to another court and issued a punitive cost order because of a questionable attempt to change the registered office to an address with no real connection to the company.

492 Companies Act 2008, s 81(1).

493 This provision does not really make sense since the reason why there is no reasonable prospect of a successful rescue would surely be because the company is insolvent, in which case it should be wound up under the Companies Act 1973.

494 These are the only grounds for winding-up by the court on the application of a creditor – *Kruger v Set-Mak Civils* (Case No 5495/2011, High Court Bloemfontein, 22 March 2012 [14]).

495 Shareholders not disqualified in terms of section 81(2) of the 2008 Companies Act.

- the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive annual general meeting dates to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up (see the discussion below);

(e) ***a shareholder***[496] has applied, with leave of the court, for an order to wind up the company on the grounds that

(i) the directors, prescribed officers, or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) the company's assets are being misapplied or wasted;[497]

(f) the ***Commission or Takeover Regulation Panel***[498] has applied to the court[499] for an order to wind up the company on the grounds that-

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act 1984 were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.

In *Budge NO v Midnight Storm Investments 256 (Pty) Ltd*[500] it was held that the legal basis for winding-up as "just and equitable" in terms of s 81(1)(d)(iii) of the Companies Act 2008 is the same as that under s 344(h) of the Companies Act 1973, except for directors' deadlock in management (which was replaced by s 81(1)((d)(i)) and shareholders' deadlock in voting power (which was replaced by section 81(1)(d)(i)). The only possible change in attitude might be the fact that there is a greater emphasis in the 2008 Act on the rescuing of companies than in terms of the 1973 Act.[501] A domestic company or quasi-partnership, or a company akin to partnership, may be liquidated due to a complete breakdown in the relationship of

496 A shareholder not disqualified in terms of s 81(2) of the Companies Act 2008.

497 Subject to s 81(3). The court need not make a definite finding regarding the grounds that are required in terms of s 81(1)(e). All that is required is that the court be satisfied that there is prima facie evidence that supports the allegations. The discretion to be exercised in terms of s 81 is a very broad discretion and the onus of satisfying the court that the directors acted fraudulently or illegally is an evidential onus that requires an applicant to place sufficient evidence before a court that the grounds exist. Reading the section it appears that prima facie proof would suffice in showing the existence of the grounds listed – *Pinfold and Others v Edge to Edge Global Investments Ltd 2014 (1) SA 206 (KZD)*.

498 Companies or Intellectual Property Commission, or Panel, as defined in the 2008 Act.

499 Subject to s 81(3) of the Companies Act 2008.

500 2012 (2) SA 28 (GSJ), para [12]. See para [5] for the five broad categories of "just and equitable".

501 *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB), para [23].

reasonableness, good faith, trust, honesty, and mutual confidence which should exist between the directors and/or shareholders thereof.[502] An applicant who relies on the just-and-equitable ground must come to court with clean hands. He must not himself have been wrongfully responsible for, or have connived at bringing about, the state of affairs which he relies upon for the winding-up of the company.[503] In *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others*[504] the court declared a provision in the shareholders' agreement that deadlock would not constitute a ground for winding-up as *pro non scripto* (where the relationship between directors was akin to a partnership).

In *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd*[505] the Supreme Court of Appeal clarified the meaning of "just and equitable" in section 81(1)(d)(iii) as follows:

- The conclusion that the just and equitable ground in s 81(1)(d)(iii) should not be interpreted to include only matters similar to the other grounds stated in s 81(1), is clearly correct. The examples of "deadlock" given in s 81(1)(d)(i) and (ii), that is, where either the board or the shareholders are deadlocked are examples only, are not exhaustive and do not limit s 81(1)(d)(iii). The use of the word "otherwise" in the subsection does not limit what is meant by "just and equitable". On the contrary, it extends the grounds of winding-up to include other cases of deadlock. It is conceivable that it may be just and equitable to liquidate even if the shareholders have been unable to elect successors to directors for less than the stipulated period that includes two consecutive annual general meeting dates, as s 81(1)(d)(ii) requires.

- There is no fixed category of circumstances that provide a basis for a winding-up on the just and equitable ground in terms of s 344(h) of the Companies Act 1973. Some of the categories that have been identified are the disappearance of a company's substratum; illegality of the objects of the company and fraud connected in relation to it; a deadlock; oppression; and grounds similar to the dissolution of a partnership. A "deadlock" which, because of a divided voting power at both the board and general meeting, affected the management of the company could also found a liquidation order on this ground. No doubt these categories remain under the 2008 Act and may be extended.

- If the breakdown in the relationship is due to an applicant's misconduct, it cannot insist on the company being wound up. However, lack of clean hands is not an absolute bar. A court should assess the respective contributions to the breakdown in order to determine whether it is just and equitable to liquidate.

502 *Ibid*, para [24].
503 *Ibid*, para [27].
504 [2014] JOL 32101 (WCC), para [22].
505 2014 (5) SA 1 (SCA), para [14 to 16].

30.5.2.2 Limitations on the rights of some applicants to apply

In addition to restricting the right of a shareholder to apply for the winding-up of a solvent company to the two grounds listed in (d) and (e) above, section 81(2) contains a further limitation: a shareholder may not apply to court for such an order unless the shareholder –

(a) has been a shareholder continuously for at least six months immediately before the date of the application; or

(b) became a shareholder as a result of –

- acquiring another shareholder (for example through a take-over or merger); or
- the distribution of the estate of a former shareholder,

and the present shareholder, and other or former shareholder, in aggregate, satisfied the requirements of paragraph (a).

Section 81(3) contains yet another limitation by providing that a court may not make an order for the winding-up of a solvent company if the application was made by a shareholder or the Commission or Panel on the grounds listed in (e) and (f) above, if, before the conclusion of the court proceedings –

- any of the directors have resigned or have been removed in terms of section 71 (by ordinary resolution of shareholders or, if applicable, a board resolution) and the court believes that the remaining directors were not materially implicated in the conduct on which the application was based; or
- one or more shareholders have applied to court to have the directors responsible for the alleged misconduct declared delinquent and the court is satisfied that the removal of those directors would bring the misconduct to an end.

30.5.2.3 Extended standing to apply for winding-up of a solvent company

Section 157 of the Companies Act 2008 provides for the right of additional persons to apply to court or the Companies Tribunal for remedies in terms of the Act. These are a person acting on behalf of a person who cannot act in his or her own name; acting as a member of, or in the interest of a group or class of persons; or acting in the public interest with leave of the court.

It is clear that section 81 does not directly grant a Cabinet Minister the necessary standing to bring an application for the winding-up of a solvent company. In *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC, Minister of*

Environmental Affairs v Recycling and Kusaga Taka Consulting (Proprietary) Limited[506] the High Court held that the persons or categories of persons as mentioned in section 157(1) of the Companies Act 2008, may bring an application for the winding-up of a solvent company before a court on the ground that it was just and equitable and a Cabinet Minister may bring such an application in terms of the provisions of section 157(1)*(d)* if it was "in the public interest" to do so. However, the Supreme Court of Appeal[507] pointed out that the 2008 Companies Act defines "a person" as including a juristic person. This suggests that only natural and juristic persons have standing in terms of section 157(1)*(d)*, not ministers on behalf of the government. The Interpretation Act 1957 also does not include the Government in its definition of "person". The Supreme Court of Appeal thus ruled[508] that both applications by the Minister should have failed at the *ex parte* stage of the proceedings because the Minister had not established the right to obtain this remedy – the provisional liquidation order – in the public interest.

30.5.2.4 Commencement of winding-up of a solvent company by court order

Section 81(4) provides that the winding-up of a company by a court begins when-

(a) an application has been made to the court in terms of subsection (1)*(a)* or *(b)*. This is where the company has resolved, by special resolution, that it be wound up by the court, or has applied to the court to have its voluntary winding-up continued by the court; or where the business rescue practitioner has applied because there is no reasonable prospect of the company being rescued;

(b) the court has made an order applied for in terms of subsection (1)*(c)*, *(d)*, *(e)* or *(f)*. These are all the cases where the court can make a winding-up order other than those mentioned under (a).

30.5.2.5 Other formalities and procedural requirements for solvent liquidations by court order

Part G of Chapter 2 contains no further provisions regarding the procedural aspects of winding-up by the court as discussed below in part 30.6. in respect of an insolvent winding-up by the court in terms of the Companies Act 1973. The same requirements and procedures must therefore be complied with when application is made in terms of the Companies Act 2008 as stipulated by section 79(2) and item 9 of Schedule 5 to the Act except if they have been excluded by the Companies Act 2008 or only apply to a company unable to pay its debts.

506 2018 (3) SA 604 (WCC), para [178] and [218].

507 Majority decision in *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA), para [130].

508 At para [136].

30.6 Winding-up of an insolvent company

An insolvent company may in terms of section 343(1) of the Companies Act 1973 be wound up by the Court or voluntarily. Although section 343(2) provides for a creditors' voluntary winding-up or a members' voluntary winding-up, a members' winding-up is no longer possible under the Companies Act 1973 because it does not apply to a company that cannot pay its debts and section 343 is one of the sections expressly excluded from application to a solvent company by item 9 of Schedule 5 to the Companies Act 2008. Any voluntary winding-up of an insolvent company will therefore be a creditors' voluntary winding-up regulated by the Companies Act 1973.

30.6.1 Voluntary winding-up by the company's creditors

The voluntary winding-up of an insolvent company requires a resolution by shareholders (or members in the case of a non-profit company) that must comply with the provisions of the 1973 Companies Act and not the 2008 Companies Act.[509]

It must be clear from the resolution that it was:

- a special resolution
- adopted by the shareholders (or members) of the company; and
- which provides for the winding-up to be a creditors' winding-up of an insolvent company

The following must be filed with the CIPC within 30 days of the passing of the resolution:[510]

- Form CM26 under the 1973 Act;
- The prescribed fee of R80 (R150 for late lodgement);
- The special resolution stating the section of the Act or paragraph of the memorandum or articles in terms of which the resolution has been passed;
- Copy of the notice convening the meeting; or consent to waive the period of notice of the meeting (form CM 25); or consent to propose and pass special resolution at meeting of which notice has not been given (form CM25A);

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509 *Botha NO v Van den Heever NO* (Case No 40406/2012, High Court Pretoria, 23 July 2012); *C Pro Construction PTY v Caliber Devco CC and Others* (63054/15) [2018] ZAGPPHC 663 (3 September 2018), para [27]. *Cf* Practice note 3 of 2012, issued by the CIPC (Notice number 202 in *Government Gazette* 36225 dated 15 March 2013).

510 *Cf* Practice note 3 issued by the CIPC (Notice number 202 in *Government Gazette* 36225 dated 15 March 2013). A lack of compliance with s 363(I) – considering the resolution in a creditor's voluntary winding-up and form CM100 with the representations with regard to the insolvency of the company – renders the voluntary liquidation proceedings null and void – *C Pro Construction PTY v Caliber Devco CC and Others* (63054/15) [2018] ZAGPPHC 663 (3 September 2018), para [14].

- Form CM 100;

- Certified copies of the ID of the director who signed the CM26.[511]

The name of the process is misleading, as the process is put in motion by a special resolution passed by the shareholders (also referred to as members in the 1973 Act). Before the general meeting at which the resolution is tabled, the directors must give an account of the affairs of the company in the prescribed form.[512] This is then tabled at the general meeting which must decide about the liquidation of the company. The liquidation ensues once the special resolution is filed. A certified copy of the resolution must be lodged with the Master within 28 days of filing together with a CM 100 Statement of Affairs. The special resolution usually also nominates a person to act as liquidator, as such a person is nominated by the shareholders (or members).

The company must give notice of the voluntary winding-up in the *Government Gazette* and a copy of the resolution must also be sent to certain sheriffs and registrars. After registration of the special resolution the procedure is the same as it is for a winding-up by the court.

All the powers of the directors cease upon liquidation. The directors are also less prone to prosecution as in the case with a winding-up by the court. The reason for this is that section 425 of the Companies Act 1973, which determines that the criminal sanctions of the Insolvency Act are applicable to current and former directors of a company, only applies in the case of a winding-up by the court.

It is important to note that some of the provisions of the Companies Act 1973 do not apply to a creditors' voluntary winding-up and that some apply only to such a winding-up.

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511 As per notice 27 November 2013, CIPS will no longer post confirmation letters and certificates to customers for liquidation (forms CoR40.1 and CM16 –should be CM26?)) applications submitted from 2 December 2013. Such confirmation letters and certificates will be e-mailed to the e-mail address as per the customer profile of the customer who filed it and may be reprinted by the customer from the CIPC website www.cipc.co.za. As per notice 30 Augus12013, CIPC no longer stamps documents at the CIPC office from 1 September 2013 and customers are required to keep copies of all documents submitted to the CIPC. Therefore, as from 2 December 2013, CIPC will also no longer provide a stamped copy of *any* filed CoR40.1, CM26 (liquidation) application to customers. The confirmation letter and certificate constitutes sufficient proof that a particular application was submitted and filed with the CIPC for a specific entity and should be attached to the copy of the submitted application kept by the customer or customer's client. In the event, that the CoR40.1 or CM26 (liquidation) application is required by the Master of the High Court, the Master may request a copy of the application from CIPC bye-mailing a request to liquidations@cipc.co.za.

512 Form CM 100.

It should be noted that the application of sections 344 to 348, 356(1), 357(1), 358, 361, 363(2) and (3), 386(5),[513] 387,[514] 422(1)(a) and 425 is limited to a liquidation by the court. *South African Philips (Pty) Ltd v The Master*[515] held that an enquiry in terms of section 417 cannot be held in the case of a creditors' voluntary winding-up, unless in terms of section 346(1)(e) the Master or a creditor[516] or shareholder applies to have the company wound up by the court. Section 361 is the important section that provides for the passing of custody and control to the Master and the liquidator. However, section 353 contains provisions in respect of the continuation of a business and the powers of directors in cases of (an insolvent) voluntary liquidation. Section 425 applies the criminal provisions of the law relating to insolvency.

In the case of an insolvent company being wound up voluntarily, the Master or any creditor or shareholder of the company may apply to the court for the winding-up of the company.[517]

30.6.2 Winding-up of an insolvent company by court order[518]

30.6.2.1 Who may apply for the winding-up of an insolvent company in terms of the Companies Act 1973

In terms of section 346 an application for the winding-up of an insolvent company may be made by the following applicants:

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513 Section 388 of the Companies Act 1973 contains a similar section for a company being wound up voluntarily. Where application was made for leave to convene an enquiry in terms of ss 417 and 418 of the Companies Act 1973, having stated the company had been wound up voluntarily and that they were creditors of the company, it was difficult to imagine, in the circumstances of this case, that the application meant to achieve something other than an application contemplated in terms of s 388 of the Companies Act 1973. Failure to expressly refer to s 388 was not fatal to the application – *Swart v Heine and Others* (192/2015) [2016] ZASCA 16 (14 March 2016), para [8]. The powers of the court in terms of s 388(1) are confined to the situation in which it was not possible for the liquidators to have obtained consent from the creditors of the liquidated company to bring the application – *Gainsford And Others NNO v Tanzer Transport (Pty) Ltd* 2013 (4) SA 394 (GSJ) [21]. The failure to appreciate that s 386(5) did not apply to a voluntary winding-up led to an order against the liquidator to pay the costs *de bonis propriis* on the scale as between attorney and client.

514 See section 353 of the Companies Act 1973 for voluntary liquidations.

515 2000 (2) SA 841 (N). An enquiry in terms of s 417 cannot be held in the case of a voluntary winding-up because the section requires a winding-up order by the court – *Janse van Rensburg v The Master* 2001 (3) SA 519 (W), confirmed in *Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg* 2002 (5) SA 239 (SCA).

516 Once a creditor has been paid, the creditor has no right to proceed with a liquidation in terms of s 346(1)(e) – *Corigrain Trading SA v Resora (Pty) Ltd* 2004 (2) SA 348 (W).

517 Companies Act 1973, s 346(1)(e). See also s 347(4).

518 The joinder of more than one company as respondents in an application for their liquidation cannot be allowed, except possibly with the consent of all interested persons or in a case where there is a complete identity of interests – *Brack v Front Runner Racks 2000 (Pty) Ltd* [2011] JOL 27201 (GSJ). See also *Maree and Another v Bobroff and Others* [2018] JOL 39863 (GJ). Two provisional liquidation orders cannot run together – *Ex Parte Standard Bank of South Africa Ltd, In re Integrated Pipeline Solutions (Pty) Ltd v Bankuna Engineering & Construction (Pty) Ltd* (18406/2016) [2017] ZAGPJHC 52 (7 March 2017), para [9].

(a) The company itself.

In terms of section 81(1)(a)(i) of the Companies Act 2008 a special resolution is required for an application by a solvent company. Under the 1973 Act there is a difference of opinion as to whether the company must be authorised by a special resolution taken by shareholders, or whether a resolution taken by the directors is sufficient.

In *Ex Parte Tangent Sheeting (Pty) Limited*[519] the court decided that the directors can validly decide to bring the application. In *Ex Parte Russlyn Construction (Pty) Limited*[520] and *Ex Parte Screen Media Ltd*[521] the court decided that it was the function of the directors to manage the company and not to take decisions regarding the ending of the management of the company. The view that the board of directors did not have the power to bring the application without a resolution approved by a general meeting was held in *Ex parte New Seasons Auto Holdings (Pty) Ltd*.[522]

Hockley is of the opinion that the *Tangent Sheeting* decision is preferable insofar as the convening of a general meeting may be too expensive for the company to afford and may cause a delay which in the case of a large company may lead to detriment of the creditors and may also lead to trading in insolvent circumstances. *Hockley* regards the *Russlyn* viewpoint as being outdated.

(b) One or more of its creditors (including contingent or prospective creditors).

A surety having bound himself as surety and co-principal debtor for a company has a contingent claim against the company, which gives him standing to apply for liquidation of the company.[523] The South African Revenue Services is also included as a creditor for a tax debt.[524]

(c) A shareholder.[525]

A shareholder's capacity to bring an application for winding-up in terms of the Companies Act 1973 is in two instances limited by section 346(2):

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519 1993 (3) SA 488 (W). *Cf Belmont House (Pty) Ltd v Gore and Another NNO* 2011(6) SA 173 (WCC), para [21].

520 1987 (1) SA 33 (D).

521 1991 (3) SA 462 (W).

522 2008 (4) SA 341 (W).

523 *Wilde v Wadolf Investments (Pty) Ltd* 2005 (1) SA 354 (W).

524 The words "the proceedings may only be instituted with the leave of the court before which the proceedings are brought" in s 177(3) of the Tax Administration Act 2011 mean that the disputed tax debt is not recoverable under the "pay now, argue later" rule during winding-up proceedings, unless the court before which those proceedings serve, permits it – *Commissioner for the South African Revenue Services v Miles Plant Hire (Pty) Ltd* 2014 (3) SA 143 (GP); [2014] JOL 31160 (GNP).

525 Companies Act 1973, s 346(1)(c). *Cf Choice Holdings Ltd v Yabeng Investment Holdings Co Ltd* 2001 (2) SA 768 (W); *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C) 116C.

- the shareholder must have been registered in the securities register for at least six months immediately before the date of the application, or the shares that he holds must have been transferred to him as the result of the death of a previous member. It is submitted that an executor has the *locus standi* to bring the application in so far as his name is entered into the register.

- a shareholder may not make application on the grounds of a special resolution, the inability of the company to pay its debts or the dissolution of an overseas company.

(d) Jointly by any or all of the parties in (a), (b) or (c).

(e) The Master, or any creditor or shareholder of a company being wound up voluntarily.

(f) Section 346(1)*(f)* provides for an application by a provisional judicial manager where a provisional judicial management order has been discharged. Since the provisions regulating judicial management have been repealed and judicial management replaced by business rescue that is regulated by the Companies Act 2008, this subsection is no longer applicable.

30.6.2.2 The grounds for winding-up of insolvent companies by the court in terms of the Companies Act 1973

Section 344 of the Companies Act 1973 sets out eight circumstances in which a company may be wound up by the court. Only the following still apply to an insolvent company:[526]

- The company has by special resolution resolved that it be wound up by the court;

- The company has not commenced its business within a year from its incorporation or has suspended its business for a whole year;

- Seventy-five percent of the issued share capital of the company has been lost or has become useless for the business of the company;

- The company is unable to pay its debts as described in section 345;[527]

- The company is an external company that has been dissolved in its country of incorporation, or has ceased to carry on business or is only carrying on business to wind-up its affairs;

- It appears to the court that it is just and equitable that the company should be wound up.

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526 As a result of changes brought about by the Companies Act 2008 that are not directly related to winding-up.

527 A company is able to pay its debts if it can obtain external finance to pay the debts – see *Helderberg Laboratories CC v Sola Technologies (Pty) Ltd* 2008 (2) SA 627 (C).

Inability of the company to pay its debts as described in section 345[528] is by far the circumstance relied upon most often in practice[529] and this may increase even further with the requirement that solvent companies cannot be wound up by the court in terms of the Companies Act 1973.[530] The only other circumstance relied upon in a significant number of cases is where it appears to the court that it is just and equitable that the company be wound up.[531]

In terms of section 345 of the 1973 Act a company is deemed to be unable to pay its debts (commercial insolvent) if –

- a demand to pay its indebtedness is served on the company[532] by a creditor to whom the company owes at least R100 and it fails to pay the debt, or to secure or compound it to the reasonable satisfaction of the creditor, within three weeks (an example of commercial insolvency); or

- if a return of service by the sheriff or messenger of the court reports that he has not found sufficient disposable property to satisfy a judgment (*nulla bona* return); or

- if it is proved to the satisfaction of the court that the company is unable to pay its debts.

The test to be applied in ascertaining whether a company is unable to pay its debts is whether it is commercially insolvent in the sense that it is unable to meet its day-to-day liabilities in the ordinary course of business. A debtor can meet its liabilities as they fall due, even if those

528 Companies Act 1973, s 344(g).

529 Of a sample of 176 company files opened in the office of the Master, Pretoria during 1985, this ground was relied on in 57,4% of the cases and relied on in the alternative in a further 12,8% of the cases. *Cf Terblanche v Offshore Design Co (Pty) Ltd* 2001 (1) SA 824 (C).

530 *Budge NO v Midnight Storm Investments 256 (Pty) Ltd* (2011/27316) [2011] ZAGPJHC 167 (15 November 2011); 2012 (2) SA 28 (GSJ), para [2].

531 In the sample of 176 files this circumstance was relied upon in 26,7% of the cases and relied upon in the alternative in 12,8% of the cases. *Ravinksy v Gossel* [2012] JOL 29166 (GSJ) dealt with an application on the ground of "just and equitable" in terms of s 344(h) of the Companies Act 1973. In *Trade First 2124 CC v ENM Trading CC* (3133/2019) [2019] ZAFSHC 201 (31 October 2019), para [14], the court declined a liquidation order, although the company was unable to pay its debts in terms of s 344(f) because the court did not regard it as just and equitable to grant the order. It is submitted that this was incorrect because the question of just and equitable does not arise if the company is unable to pay its debts. The court has a discretion to refuse a liquidation order even though the applicant may make out a case that it would be just and equitable to do so. There is no burden on the respondent to establish on a balance of probabilities that the applicant for liquidation had another remedy available and was unreasonable in seeking the liquidation of the company rather than pursuing that other remedy – *Rich NO and others v Rich Properties (Pty Ltd) and Others* [2017] JOL 38592 (GP). *Cf Zukiswa v Ilifu Trading 330 CC* (Case NO 1259/11, High Court East London, 5 April 2012) which dealt with "just and equitable" in s 68(d) of the Close Corporations Act 1984, before the repeal of the section by the Companies Act 2008.

532 The requirement of service of the notice by leaving it at the registered office is peremptory even if there is an admission that a fax was received by the company or its attorney – *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N). According to *Fraser NO and Others v Amalgamated Brokers CC* [2013] JOL 30969 (KZP), para [2], it is sufficient compliance with the requirement of service in terms of s 345(1)(a)(ii) of the Companies Act 1973 if the respondent received the letter of demand**.** See also *Green v Amalgamated Brokers CC* [2013] JOL 30837 (KZP); (70/2011) ZAKZPHC 44 (26 June 2012).

liabilities are being paid on its behalf by its sole shareholder. The debtor must remain "buoyant" after having met those obligations.[533] It need not be shown that it is "just and equitable" to wind up an insolvent company.[534] The Supreme Court of Appeal has reiterated in *Boschpoort*[535] that there are good grounds to wind up a commercially insolvent company.

In *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and Another*[536] it was decided that an applicant may, in terms of section 9 of Schedule 5 of the 2008 Act, approach the court for the liquidation of a respondent company (or close corporation) on the ground of its inability to pay its debts in terms of section 344(f) and that section 345 (and section 69 of the Close Corporations Act) is still a deeming provision – such an applicant need not prove that the respondent company is insolvent in order to rely on Chapter XIV of the 1973 Act.

It is permissible to take into account the contingent[537] and conditional debts of the company. It is sufficient to prove commercial insolvency – it is not necessary to prove balance sheet insolvency (that the liabilities exceed the assets). Applications on the grounds of commercial insolvency are often opposed because the company is factually solvent. If the creditor proves that the company cannot pay its debts, the court traditionally only had a limited discretion[538] to refuse the application. *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another*[539] stated the following: after the enactment of the 2008 Companies Act it now seems to be incorrect to speak of an "entitlement" to a winding-up order simply because the applicant is an unpaid creditor; The rights of creditors no longer have pride of place and have been levelled with those of shareholders, employees and the public interest; it must be asked if liquidation in a particular case can reasonably be avoided, a question that is independent of the prospect of a business rescue option.[540]

The decision in *Taylor and Steyn v Koekemoer*[541] is important in this regard: Even though a company is placed under a compulsory winding-up order, or resolves to be wound up voluntarily, for a reason or ground other than an inability to pay its debts, sections such as

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533 *Dippenaar NO v Business Venture Investments No 134 (Pty) Limited* [2014] JOL 31374 (WCC), paras [28] and [39].

534 *ABSA Bank Limited v Africa's Best Minerals 146 Limited (Sekhukhune NO v ABSA Bank Limited Intervening)* [2015] JOL 32782 (GJ), para [33].

535 *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA); [2014] JOL 31202 (SCA).

536 2013 (2) SA 439 (FB).

537 In *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA), para [9], the court held that a creditor with a subordinated claim is a contingent creditor.

538 *ABSA Bank v Openscor Twenty Three CC* [2013] JOL 30542 (ECP); *Nedbank Ltd v Zonnekus Mansions (Pty) Ltd* (A378/2012) [2013] ZAWCHC 6 (7 February 2013), para [64].

539 (45670/2011, 28615/2012) [2012] ZAGPJHC 144; [2013] 3 All SA 146 (GSJ) (18 August 2012); [2013] JOL 30344 (GSJ), paras [31] and [33]. *Compare Dippenaar NO v Business Venture Investments No 134 (Pty) Limited* [2014] JOL 31374 (WCC), para [45].

540 (45670/2011, 28615/2012) [2012] ZAGPJHC 144; [2013] 3 All SA 146 (GSJ) (18 August 2012); [2013] JOL 30344 (GSJ), paras [31] and [33]. *Cf Dippenaar NO v Business Venture Investments No 134 (Pty) Limited* [2014] JOL 31374 (WCC), para [45].

541 1982 (1) SA 374 (T). *Cf*, *ABSA Bank Ltd v Cooper NO* 2001 (4) SA 876 (T) 881; *Vize v Wilmans NO* 2001 (4) SA 1114 (NCD) 1119C -1120H; *Hudson v The Master* 2002 (2) SA 862 (T) 868C-869A.

section 415(1)[542] of the Companies Act would none the less apply if the company is in fact unable to pay its debts.[543] The ability of the company to pay its debts must be determined at the time when a section is invoked by the liquidator or a proved creditor.[544]

Unliquidated claims should be taken into account in determining whether the company is unable to pay its debts. Although the court in the Taylor and Steyn case did not find it necessary to decide whether contingent or prospective liabilities should be included, it appears that such liabilities should also be taken into account depending on the facts in each case. For example, the liquidator may be faced with a huge claim which is certain to fail, or which is worth only a nominal amount. A contingent claim may be worth only a fraction of its face value, or worth nothing, because of the remoteness of the contingency.[545]

It is not only the court who can decide whether or not the company is able to pay its debts. It may in the case of a complicated dispute of law or fact be desirable to have the issues resolved by the court. Under section 415(1) of the Companies Act the Master or presiding officer may rule on this question.[546]

In *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd*[547] the Supreme Court of Appeal stated that notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court *a quo* did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt.[548] Different considerations may apply where business rescue proceedings are being considered in terms of Part A of Chapter 6 of the 2008 Companies Act, but those considerations are not relevant to winding-up proceedings. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies for it is a "very narrow one" that is rarely exercised, and then only in special or unusual circumstances. It was also stated that if one or more creditors oppose the liquidation, a narrow approach to the court's discretion is inappropriate; the court's discretion allows it to take into account the interests of creditors as a whole and what would be to their best advantage, though naturally the court is not bound to refuse a liquidation merely because the majority of creditors by number or value oppose it and of course the court must consider not merely that the majority of creditors oppose the winding-up, but also the reasons for the opposition. Another circumstance that would favour an exercise of the court's discretion against winding-up is where, despite the deemed inability to pay debts created by section 345(1)(a) of the Companies Act 1973, the evidence showed that the company was not in fact commercially insolvent. It may also be relevant that the company's failure to pay is attributable to a genuine

542 The position is the same for s 417(1) of the Companies Act - *Hudson v The Master* 2002 (2) SA 862 (T) 874B.
543 *Taylor and Steyn* case, at 376F-G.
544 *Ibid*, at 379A-B.
545 *Ibid*, at 380H-382B.
546 *Ibid*, at 382B-382H.
547 (542/16) [2017] ZASCA 24 (24 March 2017), para [12].
548 *FirstRand Bank Ltd t/a Wesbank v Enroute Traders 30 CC* [2018] JOL 39500 (ECG), para [27] and *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* [1993 (4) SA 436 at 440F.

dispute concerning the claim, even if the court in the event considers that the grounds of dispute are ill-founded.[549]

It does not matter that the company's assets, fairly valued, far exceed its liabilities: once the court finds that the company cannot meet current demands on it and remain buoyant, it follows that the court is entitled to, and should, hold that the company is unable to pay its debts within the meaning of section 345(1)(c) as read with s 344(f) of the Companies Act 1973 and is accordingly liable to be wound up.[550] If the company is in fact solvent, in the sense that its assets exceed its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances that should particularly be taken into consideration against the making of an order are such that show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.[551] The court has a discretion to refuse a winding-up order in these circumstances but it is one that is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, *ex debito justitiae*, to a winding-up order.[552]

In *ABSA Bank Ltd v Rhebokskloof (Pty) Limited and Others*[553] the respondent company owned a farm to the value of R25,000,000 and had claims against it to the value of R5,000,000. The farm was not easily realisable and had been in the market for some months without interest being shown. The company was not capable of repaying the applicant for its overdraft facility of R3,500,000 and the court found that the company was commercially insolvent and could be liquidated under section 345(c) of the 1973 Companies Act. In *Hammel v Radiocity Contact Centre CC*,[554] by the time the application was heard the respondent had paid the applicant. The court held that applicant was justified in launching the application for winding-up and was therefore entitled to its costs. The mere fact that a debtor pays debts with borrowed money does not render the debtor unable to pay its debts[555] or justify the inference that a debtor is unable to pay its debts. However, the source of payment may be as important as the fact of payment. A debtor's ability to raise a loan from a third party may indeed be a demonstration of its creditworthiness. On the other hand, it could conceivably demonstrate the exact opposite, where it for example amounts to no more than "borrowing from Peter to pay Paul". No inferences favourable to the debtor's creditworthiness or its ability to raise arm's

549 *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* (18414/14) [2015] ZAWCHC 71 (28 May 2015);[2015] JOL 33669 (WCC), paras [20] and [21].

550 *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* [1993 (4) SA 436 at 440F.

551 *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 59 7E-F, quoted in the *Rhebokskloof* case at 440F.

552 *FirstRand Bank Ltd t/a Wesbank v Enroute Traders 30 CC* [2018] JOL 39500 (ECG), para [8], with reference to *Rhebokskloof* at 440F where the court referred to *Henochsberg on the Companies Act*, 4th Ed, Vol 2 at 586; and *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662F.

553 1993 (4) SA 436 (C). See also *Munnik Basson Dagama Inc v Traffic Environment Services & Technologies (Pty) Ltd* [2009] JOL 23838 (WCC), para [20] and *Dolphin Ridge Body Corporate v Express Model Trading 289 CC* [2015] JOL 32744 (WCC), paras [31] and [32]. In *Standard Bank of South Africa Ltd v Van Zyl* [2009] JOL 24499 (WCC) it was stated that valuations must not be on a "forced sale" basis.

554 [2009] JOL 22982 (C).

555 *Nepgen v Autoactiva (Pty) Ltd* (Case No 25366/11, South Gauteng High Court, dated 24 February 2012).

length funding can be drawn where assistance was obtained from corporate entities who enjoyed a fraternal relationship with the debtor.[556]

The Companies Act 1973 contains special provisions that are applicable in the case of a company being unable to pay its debts. These sections also find application if the company was wound up for another reason and it later appears that the company was unable to pay its debts.

30.6.2.3 Commencement of winding-up of an insolvent company by the court

Section 348 provides that the winding-up of a company by the court shall be deemed to commence at the time of presentation to the court of the application for the winding-up. This section has been specifically excluded from solvent liquidations in terms of the Companies Act 2008 and thus applies only to an insolvent winding-up.

In *Nel & others NNO v The Master & others*[557] it was held that an application is presented to court at the exact time when the papers are lodged with the Registrar of the court. If, as is usual, an order is made that places the company under provisional winding-up, the winding-up is deemed to commence at the time when the application for the provisional winding-up is presented to the court. "Presentation to the court" refers to the time[558] when the application is filed with the Registrar of the Court and not the time when it is heard by the judge.[559] This will usually be a few days before the date of the provisional order. If a provisional order is set aside and a new final order is issued on the same day, the commencement of liquidation is determined with reference to the provisional order.[560] (Section 358 of the Companies Act provides for an application between the presentation of an application and the winding-up order for an order to stay other actions or proceedings.)

The importance of the provisions of section 348 can be illustrated by the following real example from practice (please note that the law in respect of special bonds over movables has since changed as discussed elsewhere in these notes).

An account was lodged with the Master, reflecting a creditor holding a notarial bond over movables as a secured creditor. The Master enquired as to the reason for this as such a bondholder was regarded as a preferent creditor at that stage and not a secured creditor. The attorney acting for the creditor replied that the creditor had "perfected its security" and reported the exact date when the creditor took possession of the assets subject to the bond. It appeared that the date when the creditor took possession of its security was before the

556 *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA), para [16].

557 2002 (3) SA 354 (SCA).

558 This refers to a specific point in time and not the date of the presentation to the court - *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) 431G.

559 See *Venter v Farley* 1991 (1) SA 316 (W) 319H-320F; *The MV Mamtai Princess* 1997 (2) SA 580 (D).

560 *Nel and Others NNO v The Master* 2000 (2) SA 728 (W), overruled in *Nel and Others NNO v The Master* 2002 (3) SA 354 (SCA). See *Reebib Rentals (Pty) Ltd v Lets Trade 1163 CC* 2009 (3) SA 396 (D) where the liquidation order against a close corporation was discharged and a new order issued. The court decided that it did not have the discretion to rule that liquidation did not commence when the original application was lodged.

date of the provisional winding-up order, but after the date when the application was presented to the Registrar of the Court. In this particular estate substantial claims with preferences under sections 99 to 101 of the Insolvency Act were lodged. The result was that the holder of the notarial bond received nothing or very little on its claim instead of the proceeds of the movables subject to the bond after the deduction of certain costs.

If a liquidation order is granted the effect would be to invalidate and void an earlier voluntary winding-up.[561]

30.7 Formalities and procedural requirements applicable to winding-up by the court of insolvent and solvent companies

Although these provisions are contained in the Companies Act 1973 there are no equivalent provisions in the Companies Act 2008 and it must therefore be assumed that they also apply to solvent liquidations by a court in order to give effect to sections 79 to 81 of the Companies Act 2008.

30.7.1 Steps to be taken before application made

30.7.1.1 Security for costs

Security must be lodged[562] for the costs until the appointment of a provisional liquidator, or to discharge the company from liquidation if a liquidator is not appointed. The application must be accompanied by a certificate from the Master which was issued not more than 10 days before the date of the application, and which confirms that security has been lodged.[563]

30.7.1.2 Master's report

The applicant must serve a copy of the application on the Master.[564] The Master may make a report to the court about facts that would justify the refusal or extension of the order.[565]

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561 *The Furniture Bargaining Council v AXZS Industries (Pty) Ltd Trading as Donelly Enterprises* [2019] JOL 46383 (GJ), para [49].

562 The security must be lodged before the order is granted and need not be lodged before the matter is heard – *Sphandile Trading Enterprise (Pty) Ltd and Another v Hwibidu Security Services CC and Others* 2014 (3) SA 231 (GJ), para [10].

563 Companies Act 1973, s 346(3). See *Reebib Rentals (Pty) Ltd v Lets Trade 1163 CC* 2009 (3) SA 396 (D) for the effect on the bond of security where the liquidation order against a close corporation was discharged and a new order issued.

564 *Ibid*, s 346(4)(a).

565 *Ibid*, s 346(4)(b).

30.7.1.3 Notice of application

The applicant must furnish a copy of the application to registered unions, employees (in the prescribed manner), and to the South African Revenue Service.[566] A union whose members

[566] Companies Act 1973, s 346(4A). *Cf Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) where it was decided that compliance with the similar requirements in s 9(4A) are peremptory. The question whether the provisions of section 9(4A) were peremptory was left open by the Supreme Court of Appeal in *Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another* 2012 (6) SA 537 (SCA) [42]. In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA), n 46 at para 17, the Supreme Court of Appeal dealt with s 346(4A) of the Companies Act 1973 – a section almost identical to s 9(4A) of the Insolvency Act. It held that compliance with s 346(4A) is peremptory whilst the method in which a creditor furnishes the application to the employees is directory. The word "furnish" in s 9(4A) requires that petitions "must be made available in a manner reasonably likely to make them accessible to the employees" (n 46 at para 14). In *Stratford and Others v Investee Bank Limited and Others* [2014] ZACC 38; 2015 (3) SA 1 (CC), paras [39] and [40], the Constitutional Court agreed with this decision. Failure to furnish the employees with the petition may not be relied upon by the debtor for opposing sequestration when the question to be decided is whether sequestration is to the advantage of creditors. The Supreme Court of Appeal stated that the purpose is not to provide a "technical defence to the employer, invoked to avoid or postpone the evil hour when a winding-up or sequestration order is made" – *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA), para 8. There may be instances where a provisional order should be granted to avoid the concealing of assets or for other urgent reasons in circumstances where a delay would substantially prejudice the creditors. Thus, non-compliance will not always render the granting of an order fatal, but this should be in exceptional circumstances – *Stratford and Others v Investee Bank Limited and Others* [2014] ZACC 38; 2015 (3) SA 1 (CC), para [42]. In *Moodliar NO v Hendricks NO* [2009] JOL 25406 (WCC); 2011 (2) SA 199 (WCC), para [29], it was decided that the court cannot condone non-compliance with s 346(4A) but may determine whether there had been substantial compliance. Where there are no longer any employees to be found at the principal place of business, timeous and effective personal notification of the employees who previously worked at those premises constitutes compliance with s 346 (4A)(ii). If there is no front door of any other premises from which the debtor conducted any business at the time of the application, literal compliance with the provisions would not be achieved by affixing a copy of the application to the front gate of those premises or to the notice board inside such premises, for provision is made only for service in one particular manner in those circumstances – *Hendricks NO v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC), paras [47] to [49]. It is not peremptory, when furnishing the application papers to the respondent's employees, that this be done in any of the ways specified in s 346(4A)(a)(ii). If those modes of service are impossible or ineffectual, another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section. If the applicant is unable to furnish the application papers to employees in one of the methods specified in the section, or those methods are ineffective to achieve that purpose and it has not devised some other effective manner, the court should be approached to give directions as to the manner in which this is to be done. Throughout the emphasis must be on achieving the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees – *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA), para [23]. In *Ast Africa Trading 501 CC v Ecotech Book Binders (Pty) Limited* [2014] JOL 31408 (GSJ) it was held that where an application for winding-up was served on three of the senior employees of the respondent, it constituted proper service. See also *Business Partners Ltd v Quick Leap Investments 221 (Pty) Ltd* [2010] JOL 26509 (KZD) and *Hanover Reinsurance Group Africa (Pty) Ltd v Gungudoo* [2011] JOL 27602 (GSJ) [38] for cases where the debtor did not have any employees. In *Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another* 2012 (6) SA 537 (SCA) [41] the Supreme Court of Appeal held that the obligation to give notice to employees in terms of the similar provision of s 9(4A) of the Insolvency Act was limited to employees employed in a business operation. In *Stratford and Others v Investee Bank Limited and Others* [2014] ZACC 38; 2015 (3) SA 1 (CC) the Constitutional Court held that s 9(4A) included not only employees of an insolvent's business, but also domestic employees. Furnishing of a copy of the application to SARS is peremptory and proof of such

are employees of the company has standing to intervene in the proceedings.[567] In terms of section 197B of the Labour Relations Act 1995, an employer that applies for winding-up, or receives an application for winding-up, must provide a consulting party in terms of section 189(1) of that Act with a copy of the application. An employer that is facing financial difficulties that may reasonably result in winding-up must advise a consulting party.

30.7.2 Provisional and final order

The court has the power to make a winding-up order immediately[568] but in practice a provisional winding-up order is usually issued[569] in the form of a rule *nisi*.[570] Interested parties are invited to appear on the return date and advance reasons why a final winding-up order should not be issued. Unless such grounds are advanced, or the applicant does not wish to proceed with the application, the court will make a final winding-up order on the return date. It is submitted that this will remain to be the position despite the enactment of the Companies Act 2008. Occasionally an offer of compromise in terms of section 311 of the Companies Act 1973 was accepted before the return date or the extended return date and the provisional winding-up order would then be discharged and would not be made final. After the repeal of section 311 by the Companies Act 2008, unless a company is engaged in business rescue proceedings in terms of Chapter 6 of the 2008 Act, a similar result can be achieved with a compromise in terms of section 155 of the 2008 Act.

It is not necessary to have a voluntary winding-up set aside before an application for compulsory winding-up can be launched.[571]

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furnishing by means of an affidavit is also peremptory – *Corporate Money Managers (Pty) Ltd and Others v Panamo Properties 49 (Pty) Ltd* 2013 (1) SA 522 (GNP).

567 *Solidarity In re Van Wyk v Atlantis Forge (Pty) Ltd* (case 779/2009, Free State Provincial Division, dated 19 March 2009).

568 Companies Ac 1973, s 347. See *Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA), para [31]. Although the practice in the Free State Division is to first grant a provisional order of liquidation, in *Firstrand Bank v Western Breeze Trading 213 (Pty) Limited* (49/13) [2014] ZASCA 40 (31 March 2014), paras [36] and [37], the court decided that the circumstances of the case warranted the granting of a final order.

569 As to the extent to which the courts will incline to taking the precaution of first granting a provisional order of liquidation, rather than a final one, it would seem that there is some degree of regional variance and that the matter is perhaps even affected by the individual preferences among judges – see *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA), para 9. In this case the passage of time since the original hearing of the matter before the court and the full ventilation of the issues that since took place rendered it inappropriate for the court to substitute the order of the High Court with a provisional order. The appellant had satisfied the requirements for the grant of a final order of liquidation, which was the relief that it had sought in the first instance – following *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA), para 9 (see also *Kalil v Decotex* 1988 (1) SA 943 (A) at 976A-B), the court found it appropriate to direct the issue of a final order – *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017), para [19].

570 An applicant for a provisional order of liquidation need only make out a *prima facie* case – *Heyns NO v Stars Away Investments 102 (Pty) Ltd (Dale Feasey Family Trust Intervening)* [2011] JOL 27751 (KZP), para [26].

571 *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd* 1998 (4) SA 1240 (D).

30.7.3 The consequences of liquidation

Once a liquidation order is granted the company is no longer under the control of the directors. The control[572] of the company vests in the Master and then in the liquidator. The company is not divested of its assets. The directors retain the residual power to oppose the final liquidation order[573] and this power goes as far as to nominate an alternative director to do that.

Other important consequences are:

- the transfer of shares after liquidation are void;
- the change of status of the company or of the shareholders without the approval of the liquidator, is void;
- current and partly executed contracts – the duties of the liquidator in this regard are detailed in section 386;
- the disposition of property, including claims, after the commencement of liquidation is void unless the court directs otherwise;[574]
- legal processes are suspended until the appointment of a final liquidator;
- an attachment or execution sale after the commencement of liquidation is void and the proceeds of the execution sale must be paid to the liquidator, subject to the R50 preference in section 98 of the Insolvency Act.[575]

30.8 Liquidation of close corporations

Chapter XIV of the Companies Act 1973, read with the changes required by the context, apply to the liquidation of a close corporation in respect of any matter not specifically provided for in Part 9 (winding-up) or in any other provision of the Close Corporations Act 1984.[576] Section 339 of the Companies Act applies to the winding-up of close corporations. Section 78(2) of the Close Corporations Act provides that the provisions of the law relating to insolvency in respect of voting, the manner of voting, voting by an agent and voting by a cessionary (subject to a proviso) applies *mutatis mutandis* to the first meeting of creditors of a close

572 Take note that only the control of the assets passes to the Master and thereafter to the liquidator. This is different to the case of an insolvent individual, where the assets vest in the Master and then in the liquidator.

573 *Praetor and Another v Aqua Earth Consulting CC* (162/2016) [2017] ZAWCHC 8 (15 February 2017).

574 In *Pride Milling Company (Pty) Ltd v Bekker NO* (393/2020) [2021] ZASCA 127 (30 September 2021) the SCA held that only dispositions made after commencement but before a provisional order was issued may be validated because the *concursus creditorum* would otherwise be undermined.

575 *Liquidator Mr Spares (Pty) Limited v Goldies Motor Supplies (Pty) Limited* 1982 (4) SA 607 (W).

576 Close Corporations Act, s 66(1). See the discussion below for the meaning of "solvent". *Standard Bank of South Africa Limited v R-Bay Logistics CC* 2013 (2) SA 295 (KZD) held that a close corporation which is commercially insolvent must be liquidated in terms of Chapter 14 of the 1973 Act.

corporation. Section 82 contains a similar provision in respect of penalties for offences under the provisions of the Companies Act and Insolvency Act made applicable to a close corporation by the Close Corporation Act. Section 72 applies certain provisions of the Insolvency Act in respect of compositions to the winding-up of close corporations. The process to determine whether the insolvency law applies to the winding-up of close corporations contains an additional step to determine whether the Close Corporation Act specifically provides for the matter.

Section 66 of the Close Corporations Act 1984 (as amended by the Companies Act 2008) provides as follows:

"**66. Application of Companies Act, 1973**
(1) The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act. …
(2) For the purposes of subsection (1) - …
(b) a reference to a special resolution -
(i) referred to in sections 340 (2), 350 (1), 351 (1),352, 356 (2), 357 (3) and (4), 359 (1), 362 (1) and 363 (1) of the Companies Act, shall be construed as a reference to a written resolution for the voluntary winding-up of a corporation in terms of section 67 of this Act; …"

Section 67 (as amended by the Companies Act 2008) provides as follows:

"**67. Dissolution of corporations**
(1) Part G of Chapter 2 of the Companies Act, read with the changes required by the context, applies to a solvent corporation.
(2) This Part of this Act must be administered in accordance with the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act."

The reference to a resolution in terms of section 67 is an error because after amendment of the Close Corporations Act by the Companies Act 2008, section 67 does not deal with a resolution for winding-up. Section 67 now provides that Part G of Chapter 2 of the Companies Act 2008 applies to a solvent corporation and Part 9 of the Close Corporations Act dealing with winding-up must be administered in accordance with the laws contemplated in item 9 Schedule 5 of the Companies Act, meaning the provisions applicable to insolvent companies. Form CK6 for the registration of a resolution for the winding-up of a close corporation has in effect been repealed and the two Companies Acts forms must be used – form CM26 for an insolvent corporation and form CoR40.1 for a solvent corporation – with the necessary changes to refer to a resolution by members of the close corporation.

The repeal of section 68(c) of the Close Corporations Act 1984, which provided for the winding-up by order of court of a close corporation unable to pay its debts, does not mean

that this ground is no longer available. Section 69, which describes the circumstances under which a corporation is deemed unable to pay its debts, has remained in force. If any of the statutory elements are satisfied, for example the non-payment after being duly served with a demand in terms of section 345 of the Companies Act 1973, the close corporation is deemed to be unable to pay its debts and the corporation may, as under the previous disposition, be wound up solely on this ground.[577]

Section 69 of the Close Corporations Act is similar to section 345 of the Companies Act 1973.

30.9 Winding-up of a company and a close corporation distinguished

30.9.1 Liquidator

No provisional liquidator is appointed in the case of a close corporation.[578] The Master appoints a natural person as the liquidator and, in the case of a voluntary winding-up by members, he will consider the views of the members when making such appointment.[579] The liquidator must convene the first meeting within one month of the liquidation order or after voluntary winding-up.[580] The meeting must be advertised in the *Government Gazette*. The majority of creditors in value decide whether a co-liquidator should be appointed and, if so, creditors in value and number nominate a person for appointment.[581]

30.9.2 Abuse of separate juristic personality of close corporation

Whenever a court, on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the court may give such further order or orders as it may deem fit in order to give effect to such declaration.[582]

30.9.3 Repayments by the members[583]

Payments to a member due to his membership that were made within two years of date of liquidation of a close corporation, are repayable unless such member can prove that –

(a) after such payment was made, the corporation's assets, fairly valued, exceeded all its liabilities; and

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577 *Body Corporate Santa Fe Sectional Title Scheme No 61/1994 v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ).
578 Close Corporations Act 1984, s 74.
579 *Ibid*, s 74(3).
580 *Ibid*, s 78(1)(a).
581 *Cf Spence v the Master* 2000 (2) SA 717 (T).
582 Close Corporations Act 1984, s 65.
583 *Ibid*, s 70 of the Close Corporations Act.

(b) such payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and

(c) such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of its business.

Instead of employing section 70 of the Close Corporations Act, payment of monies due to a close corporation in an account controlled by another person amounts to misappropriation of funds due to the close corporation and a summary judgment can be obtained for repayment of the money.[584]

A certificate from the Master that the monies must be repaid has the effect of a civil judgement as soon as it has been registered by the clerk of the court.[585]

30.10 Statutory composition of a close corporation

Any person may at any time after the commencement of the liquidation of a corporation which is unable to pay its debts, submit a written offer of composition to the liquidator,[586] which must be sent to creditors together with his report if he is of the opinion that the offer will be accepted.[587]

The composition is binding if it has been accepted by creditors whose votes amount to not less than two-thirds in value and two-thirds in number of all the votes of all the creditors who proved claims against the corporation. If an accepted offer of composition so provides, the offeror may apply to the court for the setting aside of the winding-up of the corporation. The rest of the provisions of section 72 of the Close Corporation Act are similar to sections 119, 120 and 123 of the Insolvency Act.

584 *Schroeder NO and Another v Mahlati and Another* [2017] JOL 38480 (ECEL), paras [8] and [9].
585 Close Corporations Act 1984, s 70(4).
586 *Ibid*, s 72(1).
587 *Ibid*, s 72(2).

CHAPTER 31 - BUSINESS RESCUE AND COMPROMISES

31.1 Introduction

The restructuring of companies in financial distress is on the increase globally. The worldwide trend is to attempt to rehabilitate distressed companies, instead of simply liquidating them. In line with this global trend, Chapter 6 of the Companies Act 71 of 2008 (the "2008 Companies Act") has introduced business rescue to the South African legal landscape. Business rescue is a new process of restructuring companies in financial distress, which fundamentally rewrites South African company law from a restructuring perspective and has far-reaching effects on the rescue of companies.[588] South African companies that are financially distressed now have an opportunity to reorganise and restructure, which accords with the "corporate rescue culture" and other international standards of corporate rescue that exist in established restructuring regimes in several overseas jurisdictions, such as Chapter 11 of the US Bankruptcy Code, administration under the Insolvency Act 1986 (England and Wales) and voluntary administration under the Australian Corporations Act 2001.[589]

Business rescue proceedings are proceedings that are aimed at facilitating the rehabilitation of a company that is financially distressed by providing for (i) the temporary supervision of the company and the management of its affairs by a business rescue practitioner, (ii) a temporary moratorium (stay) on the rights of claimants against the company and (iii) the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring, amongst other things its business, property and debt.

The business rescue process is essentially aimed at restructuring the affairs of a financially distressed company in a way that either maximises the likelihood of such company continuing in existence on a solvent basis or alternatively, results in a better return for creditors, or shareholders of the company than would ordinarily result from the immediate liquidation of the company.

Prior to the introduction of business rescue on 1 May 2011, judicial management, as provided for in Chapter 15 of the Companies Act 61 of 1973 (the "1973 Companies Act"), was the sole means by which companies experiencing financial difficulties could avoid being wound-up. However, for several reasons, judicial management was never generally accepted as an effective corporate restructuring mechanism. Additionally, judicial management did not establish itself as a viable alternative to liquidation. For these reasons, judicial management was by and large regarded as a "dismal failure".[590]

Business rescue has now replaced judicial management, as Chapter 15 of the 1973 Companies Act, which dealt with judicial management, was repealed by the 2008 Companies

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588 See *Levenstein* 7-1 – 7-6. See also *Henochsberg* 449-450.

589 *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd (24850/11) [2011] ZAWCHC 464 (9 December 2011); [2012] JOL 29024 (WCC); 2012 (2) SA 378 (WCC), para 13.* See also *Levenstein* 6-10.

590 See *Levenstein* 3-5 – 3-11.

Act.[591] At the outset it must be emphasised that business rescue is materially different from the old judicial management procedure. The general philosophy permeating through the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name "business rescue" and not "company rescue". This is in line with the modern trend in rescue regimes.

Business rescue attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors' interests to a broader range of interests.[592] The rationale is to preserve the business, coupled with the experience and skill of its employees, which may in the end prove to be a better option for creditors in securing the full recovery of the debt.[593] It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with the attendant destruction of wealth along the value-chain.[594] Therefore, the focus is now on saving companies rather than destroying them. This has, amongst others, the effect of (i) maximising returns for creditors, (ii) avoiding the piece meal sale of assets at "fire-sale" values, and (iii) retaining and preserving the goodwill of the business of the company.

It goes without saying that where the business rescue proposal reveals that employees will be paid in full and that there will be a better return for creditors than if liquidation supervened, there is no reason why a winding-up should be preferred. It is submitted that a successful business rescue may ultimately contribute to job creation, and this result meets one of the primary objectives of the 2008 Companies Act, namely promoting economic development.[595]

Traditionally, South African insolvency law could be regarded as a "pro-creditor" regime. However, in contrast, the business rescue process is characterised by an emphasis on the balancing of the rights and interests of all relevant stakeholders, in a manner that promotes value preservation, and avoids the negative consequences of liquidation. As such, liquidation should be avoided where reasonably possible.

Business rescue is also geared at saving significant costs, thus enabling financially distressed small (and big) companies to opt for it as a viable alternative to "last resort" liquidation.[596] In

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591 *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013 at para 12; *MFV "Polaris": Southern African Shipyards (Pty) Ltd v MFV "Polaris" and Others* [2018] 3 All SA 2019 (WCC).

592 *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited* (Case No 6418/2011, High Court Pretoria, 8 May 2012 at [9]).

593 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) [12].

594 *Collard v Jatara Connect (Pty) Ltd* 2018 (5) SA (WCC) at para [16]. *Van Niekerk v Seriso 321 CC* (Case Number 2011135199, High Court Johannesburg, 20 March 2012). *Cardinet (Proprietary) Limited v Wedgewood Golf and Country Estate (Pty) Limited (in liquidation)* (Case No 19599/2012) WCHCC (30 January 2013) at [53].

595 See *Levenstein* 7-3

596 *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013), para [3].

this way, business rescue has cemented itself as an attractive and viable option for financially distressed companies that are able to successfully trade their way out of financial distress. However, having said this, not all companies are suitable for business rescue and much will depend on the specific cause of the company's financial distress.[597] Nevertheless, it is submitted that, for the most part, South Africans have embraced the business rescue process, which is firmly entrenched into the South African restructuring landscape.

Since the introduction of 2008 Companies Act, the business rescue process has become more and more prevalent. As a result, business rescue and its application and interpretation are a continuously evolving concept, as reflected in the numerous judgements handed down by South African courts on the subject.[598]

This chapter will examine the (pertinent) provisions of Chapter 6, the practical implementation of the business rescue process, the challenges and pitfalls of implementing Chapter 6 and the various rulings and judgements by our courts in respect of business rescue. Having some knowledge of the new restructuring dispensation is essential as most companies may be exposed to business rescue at various levels.

31.2 Selected definitions in section 128(1) of the Companies Act 71 of 2008

Chapter 6 of the 2008 Companies Act specifically constitutes a set of carefully crafted rules to provide for the efficient rescue of financially distressed companies. In order to fully comprehend the business rescue procedure, it is necessary to understand the terminology used by the legislature. As such, the following definitions are important in the context of understanding how the business rescue procedure works.

"Court", depending on the context, means either-

(a) the High Court that has jurisdiction over the matter; or

(b) either-

(i) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of section 128(3) of the 2008 Companies Act; or[599]

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597 See *Levenstein* 7-3.

598 See *Levenstein* 7-3 – 7-4.

599 See the *Commercial Court Practice Directive* for the Gauteng and Gauteng Local Divisions of the High Court issued by the Judge President of the Gauteng Divisions of the High Court of South Africa on 03 October 2018. If a case is allocated as a Commercial Court case, the Judge President or Deputy Judge President allocates a judge or two judges to case manage the matter. The "Commercial Court aims to promote efficient conduct of litigation in the High Court and resolve disputes quickly, cheaply, fairly and with legal acuity".

(ii) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of section 128(3) of the 2008 Companies Act.

The definition of "court" makes clear that the supervision of business rescue proceedings falls within the jurisdiction of the High Court. Business rescue proceedings affect the rights of several stakeholders and creditors. The High Court is therefore best placed to balance the rights and interests of all the relevant parties. It is submitted that the role of courts and their involvement in business rescue matters is an important and key rescue theme.[600]

31.2.1 Business Rescue

"Business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for–

(a) the temporary supervision of the company, and of the management of its affairs, business and property;

(b) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(c) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. [601]

The definition of "business rescue" envisages two goals of business rescue, the first is the development and implementation of a plan to rescue the company, which plan has the aim of allowing the company to continue in existence on a solvent basis. This is referred to as the first part of the business rescue definition. The alternative to this is what is known as a "quasi-liquidation" or controlled wind-down whereby the assets or business of the company are sold, and in terms of which a better return (dividend) for creditors results, in comparison to that which they would have received from the immediate liquidation of the company. Thus, the definition of business rescue contemplates two objects or goals: a primary goal which is to facilitate the continued existence of the company in a state of solvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal does not prove to be viable, namely, to facilitate a better return for creditors or shareholders than would result from immediate liquidation.[602]

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600 See *Levenstein* 7-18.

601 *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), para [80].

602 See *Levenstein* 7-8 – 7-15. See also *Henochsberg* 450-451.

The words "or, if it is not possible for the company to so continue in existence" qualify when the alternate objective of providing a better return may be relied upon. If the second ground for business rescue is not a qualified alternative to the first, the interests of employees will be ignored. The reason is that, if unqualified, the second ground is only concerned with determining whether creditors and shareholders will receive a better return. Such a result would be inimical to one of the fundamental paradigm shifts provided for in the 2008 Companies Act, namely the recognition of the rights and interests of employees alongside those historically accorded to shareholders, directors and creditors.[603] It is difficult to understand the reason behind the disjunctive reference to creditors or shareholders and the absence of a reference to employees.[604]

31.2.2 Financially Distressed

"Financially distressed", in reference to a particular company at any particular time, means that –

(a) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(b) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

The test for financial distress is, accordingly, forward-looking and is intended to allow directors of companies to look into the future to determine whether the company is reasonably likely to run into cash-flow problems in the immediate ensuing six-month period. This six-month period was determined to be a sufficient period of time to allow directors to consider business rescue before it is too late. In *Antonie Welman v Marcelle Props 193 CC*,[605] it was held that business rescue proceedings are not for terminally ill corporations, but are rather for ailing entities, which if given time, may be rescued, and become solvent.

The definition of "financial distress" envisages both a cash-flow and a balance sheet test to determine whether a company is financially distressed. Accordingly, in order to determine the eligibility of a company to enter into business rescue, one must consider whether a company will be either (i) factually insolvent (that its liabilities will exceed its assets), or (ii) commercially insolvent (unable to pay its debts as they become due and payable) in the next six-month period. It must be noted that there is a clear distinction between "insolvent" and "financial distress". Only companies which are financially distressed should be allowed to file for business rescue.[606]

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603 See *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2013 (4) SA539 (SCA) at 26.

604 *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ), para 12.

605 2012 JDR 0408 (GSJ) 12, para 28. See also *Levenstein* 7-9.

606 See *Levenstein* 7-26 – 7-27. See also *Henochsberg* 457.

It is important to note that in the context of Chapter 6, the word "company" must be interpreted in accordance with the definition given to it in section 1 of the 2008 Companies Act. Accordingly, the term "company" includes a close corporation but does not include an "external company". This was confirmed by the High Court in *CMC Di Ravenna SC and others v Companies and Intellectual Property Commission and others*,[607] and upheld by the Supreme Court of Appeal in *CMC v CIPC and others*.[608] In these judgements, the courts confirmed, *inter alia*, that business rescue proceedings are only available to a "company" as defined in section 1 of the 2008 Companies Act, and in view of the fact that the definition of a "company" excludes external companies, an external company cannot make use of the business rescue provisions contained in Chapter 6.

31.3 Commencement of business rescue proceedings by the board

Most companies with debt issues will consider business rescue for the benefit of the moratorium on claims. However, companies without a realistic hope of survival will inevitably end up in liquidation. There is therefore no merit in placing such companies into business rescue. A reasoned and factual basis for the belief that a company can be rescued is required - vague and speculative averments are not sufficient.[609]

There are two entry routes into the business rescue process. The first route is a company resolution (voluntary commencement) and the second is a formal court application by an affected person (compulsory commencement). Once business rescue proceedings have commenced, whether by a company resolution or court application, the commencement process leads to the appointment of a business rescue practitioner. The business rescue practitioner supervises the company during business rescue proceedings.[610]

In terms of section 129(1) of the 2008 Companies Act, a company's board of directors can pass a resolution in terms of which the company resolves to commence the business rescue process, and pursuant to which a business rescue practitioner (who satisfies the requirements of the 2008 Companies Act) will be appointed.

It is important to note that the resolution for the commencement of business rescue must be passed with the support of a majority of directors (simple majority), subject to any higher percentage requirement imposed on the board for the passing of such a resolution, which may be imposed by a company's memorandum of incorporation.[611] This resolution must also be filed with the Companies and Intellectual Property Commission (the "CIPC") in order for such resolution to be of force and effect.

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607 2020 (2) SA 109 (GP); See also *Levenstein* 8-22. See also *Henochsberg* 445.

608 [2020] ZASCA 151 (20 November 2020). See also *Levenstein* 8-22. See also *Henochsberg* 445.

609 *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and another; Investec Bank Ltd v Aslo Holdings (Pty) Ltd* (25051/11, 18112/2011) [2012] ZAWCHC 110 (22 February 2012).

610 See *Levenstein* 8-1. See also *Henochsberg* 462.

611 See *Levenstein* 8-1 – 8-2. See also *Henochsberg* 463.

In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and others,*[612] the court held that where only one of the two directors passed the resolution (whereas the 2008 Companies Act requires a majority of directors to have done so) this brought the matter within the ambit of a failure to satisfy the procedural requirements of section 129 of the 2008 Companies Act, and therefore the resolution to commence business rescue was not valid.

The court in *Panamo Properties (Pty) Ltd v Nel and Another NNO* held that this decision was incorrect.[613] The consequence of the board not having been properly constituted would be that the resolution was not a resolution of the board of directors. As such it was a nullity and ineffective for the purpose of commencing business rescue proceedings. Equally, in the absence of such a resolution, there was nothing to set aside in terms of section 130(1)(a)(iii) of the 2008 Companies Act (discussed further below).

In order for a company to commence business rescue proceedings on a voluntary basis, the board must have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company.[614] Chapter 6 does not provide any definitive guidance on what is meant by a reasonable prospect of rescuing the company. It is submitted that the directors of the company will have to consider the company's specific circumstances at the time of their deliberation. There is accordingly a subjective element (relating to the personal view of the directors) and an objective element (relating to the view of the reasonable director) as to whether a company's board has reasonable grounds to believe that the company is financially distressed, and that there appears to be a reasonable prospect of rescuing the company.[615]

Regulation 123 of the Companies Regulations, 2011 prescribes the form that the notice to commence business rescue proceedings must take and sets out the manner in which such notice should be filed and published. It is important to note that such a resolution cannot be adopted if liquidation proceedings have already been initiated by or against the company.[616] The purpose behind this restriction is to prevent boards of companies from thwarting *bona fide* liquidation applications by adopting resolutions to commence business rescue in bad faith. A second restriction, imposed by section 129(2)(b), is that a resolution to commence business rescue is of no force and effect until it has been filed with the CIPC. These two important restrictions on the commencement of voluntary business rescue proceedings must always be kept in mind by a company's board of directors.

In relation to the first restriction, an important question is what actions will constitute the initiation of liquidation proceedings. In *Tjeka Training Matters (Pty) Ltd v KPPM Construction*

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612 2014 (1) SA 103 (KZP), para [16]. See also *Levenstein* 8-27. See also *Henochsberg* 463.

613 (35/2014) 2015 ZASCA 76 (27 May 2015). See also *Levenstein* 8-27 – 8-28. See also *Henochsberg* 463.

614 The board of a company may file a resolution with the CIPC that the company begin business rescue proceedings and must appoint a business rescue practitioner who satisfies the requirements of the Act. The board must have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company.

615 See *Levenstein* 8-3. See also *Henochsberg* 467.

616 *Ibid*, s 129(2)(a). An application to court by an interested person in terms of s 131 is possible.

(Pty) Ltd and others,[617] the court considered this question, in circumstances where a resolution to commence business rescue was adopted by a company, whilst a liquidation application had already been issued and filed in court by the company's creditor, but which had not yet been served on the company. The court analysed the wording used in the 2008 Companies Act and was of the view that "initiated" must be understood to be "by or against the company". Accordingly, liquidation proceedings which are initiated must be cognisable by reference to its "effect" upon the company. Therefore, the issuing of an application, without the company being aware of its existence (i.e., without service of the application) cannot be said to be proceedings "initiated" against the company. Accordingly, the court held that the liquidation application must be served on the company, and not merely issued and filed at court.

The court in *Mouton v Park 2000 Development 11 (Pty) Ltd and Others*[618] disagreed and held that the ordinary, grammatical meaning of the verb to "initiate" is to cause a process or action to begin, and refers to a preceding act or conduct which sets a process in motion. Accordingly, the court held that the word "initiated" in section 129(2)(a) is intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion and what that act or conduct may be will depend on the facts of each matter. The court held that in most instances, it will be the adoption of the necessary resolution of the creditor to launch such liquidation proceedings.

In *Pan African Shopfitters (Pty) Limited v Edcon Limited and others*,[619] the meaning of the word "initiated" was again considered by the court. The court had regard to both the *Tjeka Training Matters* and *Mouton* decisions and found that the conclusion in the *Tjeka Training Matters* was correct, i.e. that liquidation proceedings contemplated in section 129(2)(c) of the 2008 Companies Act are initiated once a liquidation application is issued and served on the company. The court held that this conclusion is in line with the inherent policy choice that a litigant remains unaffected in law until made formally aware of the steps being taken against such litigant.

Provision is made for business rescue for pension funds,[620] long-term insurers,[621] short-term insurers,[622] financial services providers in terms of the Financial Advisory and Intermediary Services Act 2002[623] and associations and managers in terms of the Collective Investment Schemes Control Act 45 of 2002.[624]

In terms of section 129(3), within five business days after a company has adopted and filed a resolution to commence business rescue proceedings, or such longer time as the CIPC, on application by the company, may allow, the company must –

617 2019 (6) SA 185 (GJ). See also *Levenstein* 8-8 – 8-9. See also *Henochsberg* 466,468(2)-(3).
618 2019 (6) SA 105 (WCC). See also *Levenstein* 8-9 – 8-13. See also *Henochsberg* 468(3).
619 (10652/2020) [2020] ZAGPJHC 158 (10 July 2020). See also *Levenstein* 8-13. See also *Henochsberg* 468(3).
620 Pensions Funds Act, s 18A.
621 Long-Term Insurance Act 1998, s 91.
622 Short-Term Insurance Act 1998, s 40.
623 Section 38A of the Act.
624 Sections 36 and 111A of the Act.

(a) publish a notice of the resolution and its effective date in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138 and who has consented in writing to accept the appointment.[625]

In terms of *The Commissioner for the South African Revenue Service v The Business Zone 983 CC*,[626] where an entity fails to display a copy of the notices, contemplated in section 129(3)(a), at the principal places where the entity conducted its businesses, the resolution to commence business rescue is a nullity in terms of the provisions of section 129(5)(a). In *Griessel and Another v Lizemore and Others*, the applicants produced proof that they had given notice of the application to all affected persons including the union and shareholders, save that in the case of creditors, the applicants could only give notice to those whose names they were able to procure. Notice was given to a substantial number, including the main creditors. The court was satisfied that there had been compliance with the requirements of notice to the unions, employees and shareholders and that there had been substantial compliance, in all the circumstances, with notice to creditors by number and certainly by value and importance.[627]

In terms of section 129(4), after appointing a practitioner as required by subsection (3)(b), a company must-

(a) file a notice of the appointment of a practitioner[628] within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

The purpose of section 129(3) and (4) is to protect the rights of affected persons by ensuring that they are informed of the business rescue resolution and thereby enabling them to exercise their rights, including the right to have the appointment of the business rescue practitioner set aside. It must be noted that the CIPC can extend the period within which the company must appoint a business rescue practitioner and publish a notice of the resolution to commence business rescue proceedings in terms of section 129(3), but not in relation to

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625 In respect of the income of a company in the event of such company being placed under business rescue, the business rescue practitioner is a representative taxpayer of the company – see the definition of "representative taxpayer" in s 1(a) of the Income Tax Act 1962, as amended by the Tax Administration Laws Amendment Act 2014.

626 (9673/2015) [2015] WCC (7 September 2015); [2017] JOL 37888 (WCC), para [32]. See also *Levenstein* 8-30(1). See also *Henochsberg* 474.

627 2016 (6) SA 236 (GJ), paras [96] and [98]. See also *Henochsberg* 474.

628 In *Shiva Uranium (Pty) Limited (In Business Rescue) v The Companies and Intellectual Property Commission* (CT0120CT2018) [2018] Companies Tribunal (27 November 2018), para [42], the refusal by the CIPC to accept the filing of a notice of appointment was set aside, as the reason for refusal was not provided for as a ground for refusal.

either publishing a copy of the notice of appointment of the practitioner to each affected person or to the filing of a notice of the practitioner's appointment in terms of section 129(4).[629]

Section 129(5) provides that if a company fails to comply with any provision of section 129(3) or (4) -

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

(b) the company may not file a further resolution (to commence business rescue) contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution.

A number of decisions of the various divisions of the High Court held that the effect of non-compliance with the provisions of subsections (3) and (4) of section 129 was that the resolution commencing business rescue lapsed and became a nullity, thereby bringing the business rescue proceedings to an end.

In *Panamo Properties (Pty)Ltd v Nel and Others NNO*,[630] the Supreme Court of Appeal held that when a court grants an order in terms of section 130(5)(a), the effect of that order is not merely to set the resolution to commence business rescue aside, but to terminate the business rescue proceedings. It follows that until that has occurred, even if the business rescue resolution has lapsed and become a nullity in terms of section 129(5)(a), the business rescue proceedings that commenced pursuant to such resolution has not terminated. Business rescue will only be terminated when the court sets the resolution aside.[631] As long as the resolution to commence business rescue has not been set aside, the standing of the business rescue practitioner appointed on the strength of that resolution cannot be challenged on the ground of non-compliance with the procedural requirements set out in section 129. This applies also where the person who challenges the standing of the business rescue practitioner is an "innocent party" and not an "affected person" as defined in section 128.[632] Therefore, in summary, any party seeking an order setting aside the resolution that commenced business rescue proceedings must bring an application to court in terms of section 130 (discussed further below). Non-compliance with time periods will not result in the

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629 *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), paras [106] to [109].

630 2015 (5) SA 63 (SCA), para [28]. In *Swanepoel and Another v Master Trucking (Pty) Ltd (In Provisional Liquidation)* (M196/2016) [2016] NWM (12 May 2016) the court, without reference to the *Panamo* or other decisions, declined to grant a declaratory order that a resolution to commence business rescue proceedings was a nullity due to non-compliance with s 129(3) and (4), amongst other reasons because the provisions "are clearly defined". See also *Levenstein* 8-27. See also *Henochsberg* 468(9), 473-474.

631 Applied in *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), paras 29 and 34.

632 *Newton Global Trading (Pty) Limited (Under Business Rescue) v Da Corte* [2015] JOL 34899 (SCA) (20785/2014)[2016], para [9].

termination of business rescue proceedings: the court will in its discretion determine whether business rescue proceedings must be terminated.

As in the case of section 344(h) of the 1973 Companies Act, the conclusion that termination of the business rescue would be just and equitable in terms of section 130(5)(a)(ii) of the 2008 Companies Act involves the exercise, not of a discretion, but of a judgment on the relevant facts. Once that conclusion has been reached, the making of an order to set aside the resolution and terminate the business rescue does involve the exercise of a discretion.[633] Because business rescue, once validly initiated, remains operative until set aside by a court – even if affected persons have not been notified as required in section 129 – there should not be a blanket rule that the setting aside of a section 129 resolution and termination of business rescue operates retrospectively with effect from the date of the section 129 resolution.[634] The rationale for the wide discretion conferred on the court in section 130(5)(c) to grant "any further necessary and appropriate order" is to equip the court to deal equitably with the various circumstances that may arise and require regulation following the setting aside of a section 129 resolution and the termination of business rescue. The discretion must be exercised judicially and the only limit on the further order that may be made is that it must be both necessary and appropriate.[635]

Section 129(7) deals with the publication of a written notice of financial distress to all affected persons if the board decides not to adopt a resolution commencing business rescue, despite the board of the company having reasonable grounds to believe that the company is financially distressed (i.e. impending commercial or balance sheet insolvency). The section 129(7) notice has certainly focused the minds of many directors on the issue of determining financial distress. When this notice is sent out, the company will be informing all its creditors that it is financially distressed, with the effect that creditors who continue to deal with it do so at their own risk. Potentially, a creditor receiving such a notice may apply to court for an urgent winding-up order in terms of the provisions of section 345(1)(c) of the 1973 Companies Act.[636]

Another issue for directors to consider are the consequences of failing to send out a section 129(7) notice, in circumstances where there are reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution to commence business rescue. It is submitted that such failure may, potentially, expose such directors to personal liability, as contemplated in section 22(1) of the 2008 Companies Act, on the basis that the company's business was carried on recklessly and with intent to defraud creditors.

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633 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), para 47, with reference to *Henochsberg on the Companies Act*, commentary on section 344(h) of the 1973 Act.

634 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), paras 51 and 52.

635 At para 54. The court did not accept the submission that the sale in execution was a nullity that had to be set aside. It was both necessary and appropriate, in all the circumstances of the case, to make an order confirming the validity of the sale in execution of the property and to authorise the finalisation of transfer of the property in terms thereof (paras 56 and 57).

636 See *Levenstein* 8-17 – 8-20. See also *Henochsberg* 468(9)-(10).

31.4 Requirements for appointment as business rescue practitioner

During a company's business rescue proceedings, the business rescue practitioner, in addition to any other powers and duties set out in Chapter 6, has full management control of the company in substitution for its board and pre-existing management. In *Ragavan and Others v Klopper NO and Others*,[637] the court granted an order in favour of the rescue practitioners to regain access to premises and to direct the directors to co-operate with the rescue practitioners in the execution of their duties. The court stated that to deny the rescue practitioners unrestricted access to the premises was to subvert the very essence of business rescue which is for the rescue practitioners to have "full management control of the company". Business rescue practitioners have the right to demand compliance by a director with section 142 of the Companies Act, which is the duty to co-operate with and assist the practitioners, and to deliver books and records and a statement of affairs of the company under business rescue. They have the right not to be obstructed in the exercise of their duties. Should they be obstructed in the proper performance of their functions, they have the right to relief to allow them to perform their functions and prevent obstruction.

In *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another*,[638] the court described it as a matter for great concern that the former directors of the company appeared to be pulling the strings, as it were, in regard to the whole business rescue process. Accordingly, the business rescue practitioner plays an important role in the business rescue process, and from the moment he or she is appointed, the practitioner is obligated to supervise the company in accordance with the provisions of the Companies Act.

Importantly, the business rescue practitioner is, in terms of section 140(3)(a) of the 2008 Companies Act, an officer of the court for the duration of a company's business rescue proceedings, and must report to the court in accordance with any applicable rules of, or orders made, by the court.

In terms of section 140(3)(b), a practitioner also has the same responsibilities, duties and liabilities of a director of the company, as contemplated in sections 75 to 77 of the Companies Act. Section 140(3)(c)(ii) further provides that a business rescue practitioner may be held liable in accordance with any relevant law for the consequences of any act of omission amounting to gross negligence in the exercise of the powers and performance of the functions of a practitioner. With the above in mind, business rescue practitioners must ensure that they guard against falling foul of the aforementioned provisions, and act with the requisite degree of care and skill, in the execution of their duties.

In terms of section 140(1), during a company's business rescue proceedings, the business rescue practitioner, in addition to any other powers and duties set out in Chapter 6 of the 2008 Companies Act, has full management control of the company in substitution for its

637 See also *Levenstein* 9-36(9). See also *Henochsberg* 484.
638 2017 (4) SA 51 (WCC), para [70].

board and pre-existing management. Business rescue practitioners, accordingly, enjoy significant and wide-ranging management powers during business rescue proceedings. In *Ragavan and Others v Klopper NO and Others*,[639] the court granted an order in favour of the business rescue practitioners to regain access to premises and to direct the directors to co-operate with the rescue practitioners in the execution of their duties. The court stated that to deny the rescue practitioners unrestricted access to the premises was to subvert the very essence of business rescue which is for the rescue practitioners to have "full management control of the company".

In addition, business rescue practitioners have the right to demand compliance by a director with section 142 of the 2008 Companies Act, which places a duty upon the directors of the company to co-operate with and assist the practitioners, and to deliver books and records and a statement of affairs of the company under business rescue. Business rescue practitioners also have the right not to be obstructed in the exercise of their duties. Should they be obstructed in the proper performance of their functions, they have the right to obtain appropriate relief to allow them to perform their functions and prevent obstruction including an order for the removal of a director from office on the grounds that the director has failed to comply with a requirement of Chapter 6, or by act of omission has impeded, or is impeding, *inter alia*, the management of the company by the practitioner.[640]

Given the important role played by business rescue practitioners during the business rescue process, Chapter 6 of the 2008 Companies Act sets out various specific requirements that must be satisfied before a practitioner may be appointed to act as such during business rescue proceedings. In terms of section 138, the practitioner must be a member in good standing of a legal, accounting or business management profession accredited by the CIPC or[641] the practitioner must be licensed as such by the CIPC. The CIPC may license any qualified person to practice in terms of Chapter 6 and may suspend or withdraw any such licence in the prescribed manner.[642] Only individuals who are members in good standing of legal, accounting or business management professions will be licensed as business rescue practitioners and the licenses of those who have been licensed and are not members of professional bodies, will come to an end by effluxion of time as indicated in their licenses, or

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639 (12897/2018) [2018] ZAGPPHC 230 (3 May 2018). See also *Levenstein* 9-36(9). See also *Henochsberg* 484.

640 *Cross-med Health Centre (Pty) Ltd and Others v Crossmed Mthatha Private Hospital (Pty) Ltd and Another* (357/2018) [2018] ZAECGHC 24 (29 March 2018), para [41]; In *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC), para [70], the court described it as a matter for great concern that the former directors of the company appeared to be pulling the strings, as it were, in regard to the whole process.

641 The Act refers to "and" but it is accepted that incorrect changes were made after adoption of the Bill by Parliament and that the provision should refer to "or" between paras (a) and (b) of s 138(2)(1).

642 2008 Companies Act, s 138(2). When an accredited business management profession makes a finding following a disciplinary hearing into one of its members, it is carrying out a function that entails public accountability. It is exercising a public power. In this regard its decision amounts to administrative action, and is subject to review under the Promotion of Administrative Justice Act 2000 – *Samons v Turnaround Management Association Southern Africa and Another* (4939/2018] [2018] GSJ (15 October 2018)), para [20]. The decision by a business management profession to expel a person from its membership was set aside due to the fact that the procedure followed was unfair and against the rules of natural justice (para [28]).

they can affiliate to any of the accredited bodies with the purpose of possibility of renewing their licenses.[643]

Section 138(1)(d) provides that a person may be appointed as the business rescue practitioner of a company only if the person would not be disqualified from acting as a director of the company. In addition, section 138(1)(e) provides that a person may be appointed as the business rescue practitioner of a company only if the person does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship.[644]

In *Mouton v Park 2000 Development 11 (Pty) Ltd and Others*[645] the business rescue practitioner was an active participant in a creditor's application to have the resolution to commence the business rescue proceedings of the company set aside and was not, as one would have expected to be the case, under the specific circumstances, a mere spectator from the side-lines. This showed a lack of impartiality and objectivity.

In *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd*,[646] the primary contention (in an application to remove the business rescue practitioners of the company from office) was that the appointment of the same business rescue practitioners in respect of companies in a single group was, as a general principle inappropriate, on the basis that it would lead to conflicts of interest due to the existence of inter-company loans and claims. Alternatively, that there was a real conflict of interest as the business rescue practitioners could not at the same time advance the claims of one group company yet dispute the claim of another. The court agreed[647] that the principles of *Standard Bank v Master of the High Court*[648] would in general apply to a business rescue practitioner but that the specific facts of every matter would determine whether the business rescue practitioners were conflicted. The applicant demonstrated the alleged conflict by way of a sketch in which it was shown that two of the business rescue practitioners were appointed in entities in the group that had a creditor/debtor relationship. However, the court decided that in every instance the two co-appointed business rescue practitioners in the various entities had acted as a safety net when and if necessary and had catered for sufficient checks and balances to provide for the efficient rescue and recovery of the group in a manner that balanced the rights and interests of all relevant stakeholders. With reference to the group structure and the inter-company loan

643 Practice Note no 01 of 2018, *Qualifications of Practitioners in terms of section 138(1)*, Notice 1095 in *Government Gazette* No 41970 dated 12 October 2018.

644 Compare *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another* 2014 (6) SA 214 (LP), para [24] where the court found that nowhere in their answering affidavits did the respondents allege or show the factual basis on which it could be said that the practitioner's integrity, impartiality or objectivity was compromised by the mere fact that he acted as attorney of record for the applicant prior to the commencement of the business rescue proceedings. In any event, the respondents never raised any objection to the appointment at any of the three creditors' meeting already held.

645 2019 (6) SA 105(WCC), paras 110 and 111.

646 (83344/18) [2019] GSP (30 August 2019). See also *Levenstein* 9-36(6). See also *Henochsberg* 526(46).

647 At para [63].

648 [2010] 3 All SA 135 (SCA).

accounts, the court agreed with *Pellow NO and Others v The Master of the High Court and Others*[649] that the common practice of appointing a single liquidator to oversee the winding-up of companies in the same group is a salutary one that has distinct advantages, including a broad understanding of the inter-relationship between associate companies and the justification for inter-group transactions.

In an application for leave to appeal, the Supreme Court of Appeal in *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others*,[650] found that the applicant's complaints, in respect of the business rescue practitioners, were not established, instead nothing more than the possibility of a conflict (in some unlikely circumstances) was shown. Accordingly, no immediate conflict of interest had arisen and therefore, in the circumstances, there was no reason to believe that the issues could not be resolved in due course as the business rescue of the two group companies proceeded. On this basis, the Supreme Court of Appeal held that there was no reasonable possibility of an appeal succeeding and the application for leave to appeal was dismissed.

Nevertheless, it is worth noting that this is not to say that where an inter-company conflict arises, a business rescue practitioner will not be required to resign or be removed from office, particularly where the conflict prevents the practitioner from performing, or results in his or her failure to perform his or her duties. Ultimately, the issue regarding whether there is a conflict of interest will turn on the specific facts and circumstances.

In *Knoop NO and Another v Gupta and Another*,[651] the Supreme Court of Appeal confirmed that the fact that one company in the group of companies may be indebted to another does not normally present a problem in the context of business rescue. However, where there is a genuine dispute about the claim, this may give rise to a problem, but in the ordinary course that should not be the case. On the issue as to whether there was anything untoward in appointing the same business rescue practitioners in respect of companies within the same group, the Supreme Court of Appeal confirmed that there is an obvious advantage for creditors, in relation to investigations into the affairs of the companies under business rescue, as such investigations would be undertaken by someone having access to the books and records of the group companies. The court's view was that this was by far the best way in which to untangle the web of inter-company loans. Ultimately, the Supreme Court of Appeal held that appointing the same business rescue practitioner in two companies in the same group, where there was a debtor-creditor relationship between the two, did not inevitably give rise to a conflict of interest on the part of the practitioner. In addition, the potential for a conflict of interest to arise is, in itself, insufficient to warrant the removal of a business rescue practitioner. The existence of a conflict of interest must be determined on the facts of a particular case, and what is required is an actual conflict of interest and not a notional one.

The CIPC must, when considering an application for accreditation of a profession, have due regard to the qualifications and experience that are set as conditions for membership of any

649 2012 (2) SA 491 (GSJ).
650 (1274/2019) [2021] ZASCA 59 (21 May 2021).
651 2021 (3) SA 88 (SCA) at para 141. See also *Levenstein* 9-36(5). See also *Henochsberg* 526(47)-(49).

such profession and the ability of such profession to discipline its members – the CIPC may revoke any such accreditation if it has reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members.[652]

The CIPC may issue a business rescue practitioner's licence to an applicant if it is satisfied that the applicant is of good character and integrity, and that the applicant's education and experience are sufficient to equip the applicant to perform the functions of a business rescue practitioner.[653] The applicant must apply on the prescribed form and pay the prescribed fee. The applicant must attach a resumé of his history and experience of engaging in business turnaround practice (if any, and as defined in Regulation 127(2) of the Companies Regulations 2011) and a resumé of his relevant education, experience and professional affiliations.[654]

Regulation 127 of the Companies Regulations 2011 defines "business turnaround practice" as "activities of a professional nature engaged in before the effective date (1 May 2011), that are comparable to the functions of a business rescue practitioner in terms of the Act". The Regulation provides definitions that classify companies as large, medium or small and practitioners as "senior" (at least 10 years' experience in a business turnaround practice or as a business rescue practitioner in terms of the 2008 Companies Act), "experienced" (at least 5 years' experience in a business turnaround practice or as a business rescue practitioner in terms of the 2008 Companies Act) or "junior" (no experience, or less than 5 years' experience in a business turnaround practice or as a business rescue practitioner in terms of the 2008 Companies Act). A junior practitioner may be appointed in a small company or another company as an assistant to a senior or experienced practitioner, an experienced practitioner in a small or medium company, or in a large or state-owned company as an assistant to a senior practitioner and a senior practitioner may be appointed for any company.

In an instance where, due to the resignation of a senior practitioner of a company, a junior practitioner remains as the only practitioner, his or her appointment will not be unlawful and he or she is competent to remain as the company's business rescue practitioner. However, the company or the creditors, as the case may be, who appointed the practitioner that resigned must take all necessary steps to ensure that a senior practitioner is appointed to fill the vacant post.[655] The outgoing business rescue practitioner will not be required to approve of the appointment of the incoming practitioner.

A business rescue practitioner may be removed by an order of court in terms of section 130 or section 139 of the 2008 Companies Act. In this regard, section 139(2) and (3) provide as follows:

652 Companies Regulations 2011, reg 126(1)(a).
653 *Ibid*, reg 126(4).
654 Form CoR 126.1.
655 *Tayob and Another v Shiva Uranium (In Business Rescue) and Others* (86673/2018) [2018] GNP (21 December 2018), para 45. See also *Tayob and Another v Shiva Uranium* (Case no. 336/2019) [2020] ZASCA 162 (8 December 2020).

"(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

(a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
(b) failure to exercise the proper degree of care in the performance of the practitioner's functions;
(c) engaging in illegal acts or conduct;
(d) if the practitioner no longer satisfies the requirements set out in section 138(1);
(e) conflict of interest or lack of independence; or
(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

(3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130(1)(b) to set aside that new appointment."

In *Gupta v Knoop NO and Others*[656] it was noted that a court may remove a business rescue practitioner based only on any one of the listed grounds. The court further held that business rescue practitioners are under an uncompromising obligation to execute their duties in good faith, with utmost trust, confidence and loyalty, for the benefit of all stakeholders in the business rescue process. After assessing the conduct of the practitioners in question, the court found that a case had been made for the removal of the respondents as business rescue practitioners on several grounds, namely: a failure to perform the duties of a business rescue practitioner in terms of section 139(2)(a) and the presence of a conflict of interest or lack of independence in terms of section 139(2)(e). Using section 129(3)(b) as a guide, the court ordered the companies under business rescue to appoint new business rescue practitioners within 10 business days, failing which the business rescue proceeding would be terminated.[657]

The Supreme Court of Appeal in *Knoop and Another NNO v Gupta* set aside this order of the High Court. [658] The Supreme Court of Appeal did so after concluding that the allegations made against the practitioners, with one exception, were not proved. Furthermore, the court was of the view that the allegations themselves did not provide grounds for the removal of the business rescue practitioners.

656 (Case No 84095/2018) [2019] GP (13 December 2019). See also *Levenstein* 9-36(4). See also *Henochsberg* 526(47)-(49).
657 At para [37].
658 (116/2020) [2020] ZASCA 163. See also *Levenstein* 9-36(5). See also *Henochsberg* 526(47)-(49).

31.5 Setting aside of resolution or appointment of practitioner

The commencement of business rescue proceedings must not be an abuse of process and should be brought in good faith and for a proper purpose, i.e. for the "rescue" of the company and not for an ulterior motive such as to suspend liquidation or for a personal benefit.[659]

However, in view of the fact that the initiation of voluntary business rescue proceedings is open to potential abuse, affected persons are afforded certain protections, in appropriate circumstances. In terms of section 130(1) at any time after the adoption of a resolution commencing business rescue, and until the adoption of a business rescue plan, an affected person[660] may (after notice to other affected persons) apply to court for an order –

(a) setting aside the resolution, on the grounds that –

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company;[661] or

(iii) the company has failed to satisfy the procedural requirements set out in section 129;

(b) setting aside the appointment of the practitioner,[662] on the grounds that the practitioner-

(i) does not satisfy the requirements of section 138 (discussed above);

(ii) is not independent of the company or its management;[663] or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

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659 *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), para [82]; *Loots v Nongoma Medical Centre CC and Another* (5639/2016) [2016] ZAWCHC 76 (24 June 2016), para [28].

660 A person who is not an employee, shareholder or creditor of the company does not have standing to apply for business rescue – *Van der Merwe and Others v Zonnekus Mansion (Pty) Limited (In Liquidation) and Another (Commissioner for the South African Revenue Service and Another as Intervening Parties)* [2017] JOL 39477 (WCC), paras [48] and]49].

661 The meaning of "reasonable prospect" is similar to the meaning in section 131 – *The Commissioner for the South African Revenue Service v The Business Zone 983 CC* (9673/2015) [2015] WCC (7 September 2015) [2017] JOL 37888 (WCC), para [36]. *Cf Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP), paras [58] to [64].

662 *Van Niekerk v Seriso 321 CC* (Case Number: 2011135199, High Court Johannesburg, 20 March 2012 [35]) noted that a creditor would be entitled to raise any concerns regarding the interim practitioner at the first meeting, there being nothing to suggest that the practitioner nominated did not meet the requirements of section 138.

663 The practitioner is expected to act objectively and impartially in the conduct of the business rescue proceedings. So too when it comes to the institution of legal proceedings, an objective and impartial attitude is to be expected – *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA), para [38]. See also *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC), para [70].

(c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.[664]

In terms of section 130(4), affected persons have an automatic right to participate in the section 130 proceedings without the need for an order authorising them to do so. It is noteworthy that section 130(1)(a) only provides an affected person (seeking to approach a court to set aside a resolution) three grounds, or causes of action, on which to base the application. In contrast to this, section 130(5)(a)(ii) empowers a court hearing an application brought under section 130(1)(a) to set aside a resolution on those three grounds but also, in addition, to do so "if having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so".

In *DH Brothers Industries (Pty) Ltd v Gribnitz NO*,[665] the court suggested that the effect of the inclusion of subparagraph (ii) in section 130(5)(a) is to introduce a fourth ground for setting aside a resolution to commence business rescue in addition to the three set out in section 130(1)(a). However, the Supreme Court of Appeal held in *Panamo Properties (Pty) Ltd v Nel and Another NNO*,[666] that this is incorrect. The wording of section 130(5)(a)(i) appears to be yet another case in a long line in which the legislation uses the disjunctive word "or", where the provisions are to be read conjunctively and the word "and" would have been more appropriate. Where to give the word "or" a disjunctive meaning would lead to inconsistency between the two subsections, it is appropriate to read it conjunctively as if it were "and". This has the effect of reconciling section 130(1)(a) and section 130(5)(a) and limiting the grounds upon which an application to set aside a resolution can be brought, whilst conferring on the court in all instances a discretion, to be exercised on the grounds of justice and equity in the light of all the evidence, as to whether the resolution should be set aside.

The discretion under section 130(5)*(a)*(ii) is a so-called "discretion in the loose sense", thus a value judgment, and appealable without any misdirection first required, as is the case with a "discretion in the strict sense".[667] An application in terms of section 130 is made to court and the applicant must not only establish the statutory grounds, but also satisfy the court that it is just and equitable that the resolution be set aside. If the court grants such an order, that brings the business rescue to an end. A further point in favour of this approach is that it largely precludes litigants, whether shareholders and directors of the company or creditors, from exploiting technical issues in order to subvert the business rescue process or turn it to their

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664 When a court makes an order setting aside a resolution in terms of section 129(1) and placing the company under liquidation and that order is under appeal, the business rescue process ends immediately upon the issue of the order and not only when the appeal process is finally exhausted and the appeal or appeals adjudicated – *Ex parte Nell and Others NNO* 2014 (6) SA 545 (GP), para 56.

665 2014 (1) SA 103 (KZP), paras [17] and [18]. See also *Levenstein* 8-27. See also *Henochsberg* 478.

666 (35/2014) 2015 ZASCA 76 (27 May 2015), para [31]. See also *Levenstein* 8-27 – 8-28. See also *Henochsberg* 479.

667 *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), para [71], applied the decision by Brand JA in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) ([2013] ZASCA 68), para 29ff, regarding the discretion under s 134(4) to the powers under s 130(5)*(a)*(ii).

own advantage. Once it is recognised that the resolution may be set aside and the business rescue terminated if that is just and equitable,[668] the scope for raising technical grounds to avoid business rescue will be markedly restricted even if it does not vanish altogether.[669]

In *The Commissioner for the South African Revenue Service v The Business Zone 983 CC* the court held that it was just and equitable to set aside the resolution to commence business rescue in terms of section 130(5)(a) where the business rescue process was abused and did not entail a genuine attempt to achieve the efficient rescue and recovery of a financially distressed company in a manner that balanced the rights and interests of all relevant stakeholders.[670]

In terms of section 130(5), the court may when considering an application to set aside the resolution commencing business rescue either (i) set aside the resolution on any of the grounds set out in section 130(1) if the court considers that it is otherwise just and equitable to do so; or (ii) afford the practitioner sufficient time to form an opinion whether or not the company appears to be financially distressed, or whether or not there is a reasonable prospect of rescuing the company. The court when making an order setting aside the resolution may also make any further necessary and appropriate order including an order placing the company into liquidation.

Section 130(5)(c)(ii) further provides that when the court considers the setting aside of the resolution to commence business rescue and if the court has found that there are no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, the court will order costs against a director unless satisfied that the director acted in good faith and on the basis of information he was entitled to rely upon in terms of section 76(4) and (5).[671] Accordingly, directors need to be aware that the legislature goes so far as to punish directors who supported a business rescue resolution when there was clearly no merit in doing so.

In terms of section 130(2) an affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129, may not apply to a court in terms of section 130(1)(a) to set aside that resolution unless such person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.[672]

After the adoption of the business rescue plan, an affected person is not entitled to apply to court for an order setting aside the board resolution commencing business rescue

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668 See *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), paras [122], [123] and [130], where the resolution was set aside on the ground that it was just and equitable to do so.

669 At paras [33] and [34].

670 (9673/2015) [2015] WCC (7 September 2015); [2017] JOL 37888 (WCC), paras [90] and [91].

671 *Cf Griessel and another v Lizemore and others* 2016 (6) SA 236 (GJ), paras [138] and [139].

672 It is an open question whether s 130(2) permits directors to do so by making a trust the applicant rather than themselves – *Panamo Properties (Pty) Ltd v Nel and Another NNO* (35/2014) 2015 ZASCA 76 (27 May 2015), para [15].

proceedings or an order setting aside the appointment of the practitioner. Whatever flaws may have been present before that time become of purely historical importance thereafter.[673]

It is a heavy burden for a creditor to apply to court with notice to all the affected persons. It may also be very difficult for creditors to show that the company is not financially distressed, without access to the financial statements of the company. However, creditors will most likely be able to attack the board resolution if it appears that there is no reasonable prospect of rescuing the company.

31.6 Commencement of business rescue proceedings by an affected person

31.6.1 Court order to begin business rescue proceedings

Compulsory business rescue begins with an affected person (creditor, shareholder, registered trade union, employee or employee representative) applying to the High Court to place the company concerned in business rescue. Section 131 provides that unless a company has adopted a resolution to begin business rescue proceedings, an affected person may apply to a court at any time with notice to each affected party "in the prescribed manner" for an order placing a company under supervision and commencing business rescue proceedings. It is important to note that a company and its directors (in their capacities as such) are not authorised to apply for a business rescue order under section 131. Furthermore, an applicant seeking an order commencing business rescue must nominate a business rescue practitioner for appointment in its application. If the court subsequently makes an order placing the company into business rescue, the court may make a further order appointing as interim practitioner, the person so nominated. It must be noted, however, that this appointment is subject to ratification by a majority of the independent creditors at the first meeting of creditors, as contemplated in section 147.

In order to succeed with an application in terms of section 131, any one of the following jurisdictional requirements must be demonstrated, namely: (i) that the company is financially distressed; or (ii) the company has failed to pay over any amount in respect of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or (iii) it is otherwise just and equitable to do so for financial reasons. Regardless of which jurisdictional requirement is present, in each instance there must also be a reasonable prospect for rescuing the company.

Unfortunately, the legislature has deemed it fit to prescribe motion proceedings in matters where an order is sought for the commencement of business rescue proceeding in respect of a company. Despite that being the case, litigants and their legal representatives must count the costs of bringing matters to court on motion where disputes are to be expected. The motion proceedings required for an application for business rescue are not geared toward the decision of factual disputes. The matter can only be decided on the respondent's version

673 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP), para [62]; *Panamo Properties (Pty) Ltd v Nel and Another NNO* (35/2014) 2015 ZASCA 76 (27 May 2015), para [13].

of the disputed facts. It must be noted that business rescue proceedings for more than one company cannot be sought in a single application unless there is a complete identity of interests.

31.6.2 Court with jurisdiction

A company can "reside" only at the place of its registered office and that one single court has jurisdiction in respect of winding-up or business rescue matters.[674]

31.6.3 Notice of application

Regulation 124 of the Companies Regulations 2011, read with regulation 7, prescribes how notice must be given. Proof is required that the application was served on the CIPC and the company by the sheriff.[675] The applicant must also satisfy the court that all reasonable steps have been taken to notify all "affected persons" known to the applicant by delivering a copy of the court application to them in accordance with regulation 7. Where compliance with regulation 7 proves impossible, an applicant may apply to the High Court for an order of substituted service.[676] It is advisable for an applicant to apply in advance for substituted service, but in an urgent matter and taking into consideration the harm that those affected by the company's future might have suffered if stricter adherence to the notification requirements and the regulations were insisted upon, the court may condone departure from the strict requirements of the regulations. Examples of substituted service are, in the case of a listed company, a notice to shareholders via the Securities Exchange News Service (SENS) and an e-mail to shareholders whose e-mail addresses are known to the applicant; e-mail of a notice of the application and not the full application to affected parties; publication in an English daily national newspaper and in one other official language in another national daily newspaper; and to the employees of the company by way of attaching a copy to the company's notice board, alternatively a prominent and visible place at the offices of the company situated at its principal place of business.[677]

Regulation 124 requires delivery of a copy of the application in accordance with regulation 7 to all affected persons known to the applicant. Regulation 7 specifically refers to section 6(11) of the 2008 Companies Act which, in terms of section 6(11)(b)(ii), allows for a summary of the contents of the application to be delivered by email where the whole application cannot be printed conveniently by the recipient, for example because it is too voluminous to be printed quickly and cheaply. Regulation 7(1) permits delivery in any manner referred to in Table CR 3, which provides for a number of delivery options and includes any method of delivery authorised by the High Court. The scope of regulation 124 is limited to affected persons known to the applicant and, accordingly, delivery in accordance with one of the methods

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674 *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC), paras [8] and [23].

675 *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 596 (GSJ), para [18].

676 See reg 7(3) and *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ), para [24].

677 *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC), paras [16] to [20].

sanctioned in section 6(11) or Table CR 3, read with regulation 7(1), is what is required.[678] The court cannot grant an order in terms of section 130(5) until it is satisfied that the CIPC has been duly served with a copy of the application and that it has waived its right to be joined as a party to the proceedings.[679]

31.6.4 Preconditions for order to commence business rescue proceedings

Unlike the 1973 Companies Act where judicial management was granted instead of a liquidation order only in exceptional circumstances, the approach in the 2008 Companies Act is the opposite and business rescue is the preferred alternative to liquidation.[680] The difficulty in practice is that one is often not simply dealing with a case where the choice between the one or the other is evenly balanced. When business rescue will probably not rescue the company, it would be manifestly wrong to perpetuate the state of affairs by engaging in a prolonged business rescue.[681] In exercising its discretion, the court should give due weight to the legislative preference for rescuing ailing companies, but only if such a course is reasonably possible.[682] The applicant must place before the court[683] a cogent evidential foundation to support the existence of a "reasonable prospect" that the desired object of business rescue can be achieved, through either the continued existence of the company on a solvent basis or a better return than would result from the immediate liquidation of the company.[684]

It is not for the other affected persons to demonstrate that business rescue would not result in a better return for creditors and shareholders, rather it is up to the applicant for business

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678 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), para 74.

679 *Ibid*, para 76.

680 *Cf* the contrary approach in *Swart v Beagles Run Investments 25 (Pty) Ltd* (2011 (5) SA 422 (GNP)) [2011] ZAGPPHC 103; 26597/2011 (30 May 2011); [2012] JOL 28486 (GNP), para 23 *et seq* where the judge expressed the view that s 427 of the 1973 Companies Act can be of assistance when interpreting the provisions for the new innovation of business rescue.

680 Not "reasonably probable" that the company was viable and capable of ultimate solvency as was required under the judicial management provisions.

681 *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), para [79].

682 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* (15155/2011) [2011] ZAWCHC 442 (25 November 2011); 2012 (2) SA 423 (WCC), paras 21-22; *Cardinet (Proprietary) Limited v Wedgewood Golf and Country Estate (Pty) Limited (In Liquidation)* (Case No19599/2012) WCHCC (30 January 2013), para [53]; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para [33].

683 *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013), para [24It seems unnecessary and impossible to require it in respect of (ii) – see the comments in *Henochsberg on the Companies Act 71 of 2008* in this regard. It remains to be seen how the absence of a "reasonable prospect for rescuing the company" will derail an application for business rescue based on jurisdictional requirement (ii) – *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013), para 8.

684 *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd* (24850/11) [2011] ZAWCHC 464 (9 December 2011); 2012 (2) SA 378 (WCC), para [17]; *Slippers v Ingogo Wildlife Studio and Taxidermy CC and Another (Standard Bank of South Africa Limited Intervening) and Related Matters* [2019] JOL 44877 (GP).

rescue to demonstrate that business rescue would result in a better return. Section 131(4) does not afford the court a discretion in the strict sense. The court's discretion is bound up with the question whether there is a reasonable prospect for rescuing the company. If the court is not persuaded that "there is a reasonable prospect of rescuing the company", it will dismiss the application and make any further order that is necessary and appropriate, including an order to placing the company into liquidation.

The other pertinent requirement in section 131(4), namely, that the company must be financially distressed, seems to turn on a question of fact. As to whether there is a reasonable prospect of rescuing the company, it can hardly be said that it involves a range of choices that the court can legitimately make and of which none can be described as wrong. On the contrary the answer to the question whether there is such a reasonable prospect can only be "yes" or "no". If a court of higher instance should disagree with the conclusion of a court of a lower instance, the higher court is bound to interfere.[685] Depending on the circumstances, there may be cases where liquidation may have advantages above business rescue.[686] The phrase "reasonable prospect'" indicates that "something less is required than that the recovery should be a reasonable probability", as was required under judicial management.[687] Rather, there must be a "reasonable possibility".[688] The concept of a "prospect" is not

685 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para [21], quoted with approval in *Newcity Group v Allan David Pellow NO* (577/2013) [2014] ZASCA 162 (1 October 2014), para [15].

686 See the list set out in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) [49]. For example, a litany of court cases that a liquidator is better placed to deal with; business rescue may entail several court applications to obtain extensions; liquidation would be more appropriate in the case of a deadlock; there is no provision for the taxation of the fees of a business rescue practitioner; ss 26-31 of the Insolvency Act is available to a liquidator but not to a business rescue practitioner. In *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) [58] the court referred to generalised claims and allegations not substantiated in any way at all but apparently based upon "well known" perceptions of winding-up procedures in general. The court decided that the applicants failed to demonstrate why business rescue is the preferred option over liquidation. The court added (at para [62]) that disputed claims would remain unresolved under business rescue and in such circumstances winding-up would undoubtedly be the preferred option.

687 *MFV "Polaris": Southern African Shipyards (Pty) Ltd v MFV "Polaris" and Others* [2018] 3 All SA 2019 (WCC), para [60]: the application fell substantially short of the prescribed mark. There was no basis upon which the court could exercise its discretion in putting the company into business rescue. There was an element of disingenuity and vexatiousness in the manner in which the application had been launched. Accordingly, it was correct that costs be awarded on a punitive scale (para [16]). Since the Legislature did not intend to repeat the mistakes of the past with judicial management, the pertinent question was whether the appellants had established a reasonable prospect of achieving any one of the two goals of business rescue – *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para [28].

688 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) [18]; *Eveleigh v Dowmont Snacks (Pty) Ltd and Others* [2014] JOL 31954 (KZP), para [24]; *Welman v Marcelle Props 193 CC (Investec Bank Limited Intervening)* [2013] JOL 30620 (GSJ) [15]; *Zoneska Investments v Midnight Storm Investments 386 Ltd* (High Court Cape Town, Case No : 9831/2011 28 August 2012 [40]); *Cardinet (Proprietary) Limited v Wedgewood Golf and Country Estate (Pty) Limited (In Liquidation)* (Case No 19599/2012) WCHCC (30 January 2013), para [43]; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB), para [8]; *Mtolo and Others Guilder Investments 10 (Pty) Ltd and Others* (8706/2016) [2017] ZAKZDHC 6 (2 March 2017), paras [21], [24], and [27]; *Siyahlanza Engineering CC v Hornet Properties Pty Ltd (in liquidation) and another* [2018] JOL 40055 (GJ), para [10].

something that is certain. By its very nature a prospect is future-looking and dependent upon a number of variables and includes a level of risk to the extent that the future is hardly capable of accurate prediction. What is required is not certainty but a determination on the facts and on the evidence presented that the future prospects of rescuing the business appear to be reasonable.[689]

Something more than a *prima facie* case or arguable possibility is needed. Naturally projections involve an element of speculation but they should not be so divorced from a factual foundation that they do not provide a basis on which the court can assess the company's return to solvency.[690] A court should not set the bar at such a height that the applicant for business rescue has little chance of clearing it and persuading the court to exercise its discretion to grant supervision.[691] One can envisage that in some instances the amount of evidence required will be less than in others, such as where the application is brought by somebody without in-depth knowledge of the affairs of the company. The test should therefore be flexible and the circumstances of each case will determine whether the available facts give rise to a reasonable prospect or not. It will be neither practical nor prudent to be prescriptive about the way in which the appellant must show a reasonable prospect in every case.[692]

Accordingly, there cannot be a checklist approach to business rescue applications – the relevant considerations in deciding whether a particular proposal meets the test may differ from case to case. Whilst every case must be considered on its own merits,[693] it has been stated that it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business and offers a remedy that has a reasonable prospect of being sustainable. It is axiomatic that business rescue

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689 *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited* (Case No 6418/2011 High Court Pretoria 8 May 2012 [34]). A prospect here means an expectation, which in turn signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable (per Van der Merwe J in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para [12] as quoted with approval in *Lidino Trading 580 CC v Cross Point Trading (Pty) Limited In Re: Mabe v Cross Point Trading 215 (Pty) Limited* [2012] JOL 29305 (FB) [18].

690 *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)* 2017 (3) SA 74 (WCC), para [70]. See also *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), para [71].

691 *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) [38]; *Cardinet (Proprietary) Limited v Wedgewood Golf and Country Estate (Pty) Limited (In Liquidation)* (Case No 19599/2012) WCHCC (30 January 2013), para [42]. *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013), para 14; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB), para [13]. *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013), para [14]. *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para [30].

692 See *Levenstein* 8-43.

693 *Zoneska Investments v Midnight Storm Investments 386 Ltd* (High Court Cape Town, Case No 9831/2011 28 August 2012 [53]).

proceedings, by their very nature, must be conducted with the maximum possible expedition.[694] Where the applicant failed to deal in the founding affidavit with the circumstances leading to the downfall of the company and substantial creditors of the company indicated that they would not vote in favour of the business rescue proposal put forward by the applicant, the application for business rescue could not succeed. In such a case the application would be ill-conceived – the company would have failed to place cogent evidence before court to support the existence of a reasonable prospect of business rescue, instead having relied purely on conjecture and speculation.[695] Accordingly, business rescue is not simply there for the taking. A proper consideration of the application to commence business rescue is required.

Business rescue proceedings should effectively take no longer than three months. However, it is submitted that this three-month period is relatively short when one considers the nature and exigencies of corporate rescue. It is very unlikely that a successful business rescue will be completed within three months. Accordingly, there can obviously not be an inflexible rule as to how long it should be before a rescue can be said to have been successful.[696] However, it is clear that the Legislature intended by its use of the word "temporary" that any rescue plan should not be of indeterminable duration. The fact that section 132(3) of the 2008 Companies Act requires reports on progress to be filed if the rescue proceedings are not complete within a period of three months, is a strong indication of the legislature's intention that the implementation of a plan should be of short duration.[697] Creditors cannot be left in a state of flux for an indefinite period.[698] A situation where an extraordinary amount of time is taken to achieve business rescue would be at the expense of the rights of creditors. The balancing of these rights should always be paramount in the ambit of fairness.[699] Business rescue proceedings cannot go on indefinitely. It was not the intention of the legislature that creditors

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694 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* (15155/2011 [2011] ZAWCHC 442 (25 November 2011); 2012 (2) SA 423 (WCC), para [21]; *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd* (24850/11) [2011] ZAWCHC 464 (9 December 2011) ; [2012] JOL 29024 (WCC); 2012 (2) SA 378 (WCC), para [10]; *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ), para 29. This does not mean that an application for business rescue is there for the asking. The rights and interests of all stakeholders must be balanced – *Welman v Marcelle Props 193 CC (Investec Bank Limited Intervening)* [2013] JOL 30620 (GSJ), para [25]; *Cardinet (Proprietary) Limited v Wedgewood Golf and Country Estate (Pty) Limited (In Liquidation)*(Case No19599/2012) WCHCC (30 January 2013), para [44].

695 *C Rock (Pty) v HC Van Wyk Diamonds Ltd and Others* (2355/2018Â) [2018] ZANCHC 91 (7 December 2018), paras 76, 78 and 79.

696 See *Levenstein* 8-73.

697 *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd and Others* (4653/2015B) [2016] ZAWCHC 11 (18 February 2016), para [39].

698 *Gormley v West City Precinct Properties (Pty) Ltd* (Case No: 19075/11 High Court Cape Town 18 April 2012 [11]); *Ex parte Target Shelf 284 CC (In Business Rescue); Commissioner, South African Revenue Service and Another v Cawood NO and Others* [2017] JOL 37690 (GP), para [23]; *Van der Merwe and Others v Zonnekus Mansion (Pty) Limited (In Liquidation) and Another (Commissioner for the South African Revenue Service and Another as Intervening Parties)*[2017] JOL 39477 (WCC), para [41].

699 *South African Bank of Athens Limited and another v Zennies Fresh Fruit CC* 2018 (3) SA 278 (WCC), para [38]. In this matter the court held at para [43] that the delay in the finalisation of the business rescue proceedings was unreasonable in the circumstances and an order was justified terminating the proceedings.

be held to ransom and prevented from exercising their normal contractual rights for an extraordinarily long period of time.

It was stated by the Supreme Court of Appeal in *Newcity Group v Allan David Pellow NO*[700] that it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect of rescuing a company. It also seems that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability and unjustifiably limits the availability of business rescue proceedings.

The applicant is not required to set out a detailed plan but must establish grounds for the reasonable prospect of achieving one or two of the goals in section 128(1)(b). A business rescue plan that is unlikely to achieve anything more than to prolong the agony, that is by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice.[701] Business rescue proceedings cannot apply to companies conducting an unlawful business, for example where it was proposed that repayment of interest and investments of earlier investors would be made from later investments in a typical Ponzi scheme.[702] Business rescue proceedings are not for terminally ill companies or close corporations. Nor are they for the chronically ill. It has been stated that a business rescue plan cannot be invoked where a company is already insolvent – this is one of the aspects differentiating business rescue from judicial management. Proceedings can be started six months in advance when the tell-tale signs of distress start to appear.[703]

Although affected parties are entitled to be heard in relation to a business rescue application, and although their attitude is relevant to the exercise of the court's discretion, the existence of a reasonable prospect of rescuing the company is a factual question, albeit involving a value judgment. If the court concludes that reasonable grounds for believing that the business can be rescued have not been established, the court cannot grant the application,

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700 (577/2013) [2014] ZASCA 162 (1 October 2014), para [16], quoted in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), paras 29 to 31, with approval. See also *Al Maya International Limited (BVI) v Valley of the Kings Thaba Motswere Proprietary Limited and Others* (EL926/2016, 2226/16) [2016] ZAECELLC 5 (23 August 2016), para [23]. See also *Henochsberg* 493.

701 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* (15155/2011 [2011] ZAWCHC 442 (25 November 2011); 2012 (2) SA 423 (WCC), para [24]; *Lidino Trading 580 CC v Cross Point Trading (Pty) Limited In Re: Mabe v Cross Point Trading 215 (Pty) Limited* [2012] JOL 29305 (FB) [24].

702 *Registrar of Banks v Dafel and Others* [2015] JOL 32711 (GP), para [43].

703 This is one of the aspects differentiating business rescue from judicial management. Proceedings can be started six months in advance when the tell-tale signs of distress start to appear – *Redpath Mining South Africa (Pty) Ltd v Marsden No and Others* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013), para [47]; *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013), para [8].

even though many affected parties may support business rescue.[704] *ABSA Bank Limited v Newcity Group (Pty) Limited; Cohen v Newcity Group (Pty) Limited and Another*[705] cautions against the possible abuse of the business rescue procedure, for example by rendering the company temporarily immune to legal proceedings against it. In this case ulterior purpose was branded an abuse and the order was refused. The court stated that close scrutiny of the factual platform presented and the rationale mounted on that platform is required in order to decide if the threshold standard has been met. Such an assessment must be made on solid information presented to the court, not upon conjecture.[706]

31.6.5 Rescue plan as precondition for order

It has now been settled by the Supreme Court of Appeal that an applicant is not required to set out a detailed plan in the business rescue application in order to satisfy the requirement that there is a reasonable prospect of rescuing the company.[707] To suggest that a rescue plan should be a prerequisite in meeting the requirements of reasonable prospects would not only be unduly onerous to an affected person who is an applicant in business rescue proceedings, but would have the effect of importing a requirement that the legislature did not envisage, regard being had to the architecture of the 2008 Companies Act as a whole.[708] It should be left to the business rescue practitioner to formulate the rescue package once he has had an opportunity to properly assess the company, its prospects going forward and, most importantly, the reasons for its commercial and financial distress.[709] The future rescue plan and its alternative objective are certainly factors that must be borne in mind when the rescue order is under consideration. For example, if an achievable draft rescue plan that has substantial support is provided at the time of the court application for the rescue order, that will improve the prospects of the application. But the absence of a final plan at the court application phase will not necessarily be fatal to the application.[710]

If a proposed plan is unfair, this would at least be relevant to the exercise of the court's discretion in deciding whether to place the company in business rescue.[711] The applicant should base the application for business rescue upon a strategy that has a reasonable prospect of achieving one of the two objectives stated in section 128(1)(b)(iii), that is, it will

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704 *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)* 2017 (3) SA 74 (WCC), para [76].

705 [2013] JOL 30344 (GSJ), paras 20.4 and 28. See also *Levenstein* 8-41. See also *Henochsberg* 454.

706 At para 20.3, quoted with approval in *Registrar of Banks v Dafel and Others* [2015] JOL 32711 (GP), para [42].

707 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para [33].

708 *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited* (Case No 6418/2011 High Court Pretoria 8 May 2012 [19]).

709 *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) [40].

710 *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ), para 13.

711 *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)* 2017 (3) SA 74 (WCC), para [37]. Similarly placed creditors could be differentially, even unfairly, treated in terms of the proposed plan.

maximise the likelihood of the company continuing in existence on a solvent basis, or, if it is not possible to continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. If such a strategy is not advanced in the application for business rescue, a court will hardly be satisfied that a reasonable prospect for rescuing the company exists.[712] The philosophy underlining the grant of a business rescue order contemplates that the court cannot "second-guess" the rescue plan that will ultimately be approved by the creditors' meetings.[713]

In *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited*[714] the court could not imagine that it could be contended that it was a foregone conclusion that a major creditor would vote against the business plan even before one had been developed.[715] By virtue of section 132(2)(c)(i) read with section 152 of the 2008 Companies Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell for the proceedings. It is true that such a rejection can be revisited by the court in terms of section 153 but that would take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable.[716]

31.6.6 Preconditions if aim to continue on a solvent basis

If the aim is to continue trading on a solvent basis, one would expect to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of –

- the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

- the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

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712 *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013), para [13].

713 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ).

714 Case No 6418/2011, High Court Pretoria, 8 May 2012 [37]. See also *Levenstein* 8-38. See also *Henochsberg* 503.

715 In *Zoneska Investments v Midnight Storm Investments 386 Ltd* (High Court Cape Town, Case No : 9831/2011 28 August 2012 [67]) the court stated that the fact that the major creditors had indicated that they would not approve any sale of the property on the proposed conditions would not always be a weighty consideration. Although s 152(2)(a) requires the support of 75% of the creditors' voting interests for a business rescue plan, s 153 provides for certain further steps that can be taken in the event of such support not being forthcoming. This would however require a further application to court should the business practitioner wish to proceed and bring about further delays and costs, which is ultimately not in the creditors' best interests.

716 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty)Ltd and Others* 2013 (4) SA 539 (SCA), para [38].

- the availability of any other necessary resource, such as raw materials and human capital;

- the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.[717]

31.6.7 Preconditions if the aim is to procure a better return than liquidation

In relation to the alternative aim[718] of business rescue referred to in section 128(b)(iii) of the 2008 Companies Act, being to procure a better return for the company's creditors and shareholders than would result from the immediate liquidation of the company, one would expect an applicant for business rescue to provide concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available. In *The Commissioner, South African Revenue Service v Beginsel NO and Others*, "better return" was held to mean more money distributed overall to creditors than in liquidation.[719] It is difficult to see how, without such details, a court will be able to compare the scenario sketched in an application with that which would obtain in an immediate liquidation of the company. Mere speculative suggestions are unlikely to suffice.[720]

In *Gormley v West City Precinct Properties (Pty) Ltd*, [721] the application was refused as there was no plan put forward at all. When the papers were analysed it became apparent that the application boiled down to nothing more than the winding-down of company in a manner that disregarded the rights of creditors. The court in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others*,[722] noted that there is no reasonable prospect of rescuing a company where it is clearly hopelessly insolvent and effectively dormant in that it had not traded for years and had no business contracts in place.

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717 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* (15155/2011 [2011] ZAWCHC 442 (25 November 2011); 2012 (2) SA 423 (WCC), para [24], quoted with approval in *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd* (24850/11) [2011] ZAWCHC 464 (9 December 2011); [2012] JOL 29024 (WCC); 2012 (2) SA 378 (WCC), para [16].

718 *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ), para 12, remarked as follows: "The creation of the alternative object will probably give rise to more litigation. It is, for example, strange to create an object for a new remedy in a definition section."

719 2013 (1) SA 307 (WCC) [58]. See also *Henochsberg* 498.

720 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para [34]; *Eveleigh v Dowmont Snacks (Pty) Ltd and Others* [2014] JOL 31954 (KZP), para [24]; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB), para [26]; *Al Maya International Limited (BVI) v Valley of the Kings Thaba Motswere Proprietary Limited and Others* (EL926/2016, 2226/16) [2016] ZAECELLC 5 (23 August 2016), para [23]. In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* (15155/2011 [2011] ZAWCHC 442 (25 November 2011); 2012 (2) SA 423 (WCC), para [25] the following was pointed out: not a single fact was placed before the court as to why creditors could expect a larger dividend at the end of the moratorium; only generalisations were put forward. See also *The Commissioner for the South African Revenue Service v The Business Zone 983 CC* (9673/2015) [2015] WCC (7 September 2015); [2017] JOL 37888 (WCC), para [79].

721 (Case No: 19075/11 High Court Cape Town 18 April 2012, para [12]). See also *Levenstein* 7-10. See also *Henochsberg* 494.

722 2015 (5) SA 192 (SCA), paras [28] and [55]. See also *Henochsberg* 494.

The applicant, as the master of the suit (*dominus litis*), must satisfy the court that there are reasonable prospects of achieving a better return for creditors than would result from immediate liquidation.[723] In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*,[724] on the respondents' version, the company had been stripped of all its income and virtually all its assets while under the management of the company. The court stated that these are the very circumstances at which the investigative powers of the liquidator – under sections 417 and 418 of the 1973 Companies Act,[725] and the machinery for the setting aside of improper dispositions of the company's assets provided for in the Insolvency Act 24 of 1936 – are aimed.[726] In light of this there was a very real possibility that liquidation would in fact be more advantageous to creditors and shareholders than the proposed informal winding-up of the company through business rescue proceedings.[727]

According to *Griessel and Another v Lizemore and Others*,[728] a person who wishes to place a company under business rescue on the alternative ground that it would result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company, must satisfy three criteria:

(a) that the company is financially distressed as required under section 129(1)(a) of the 2008 Companies Act;

(b) that it is not reasonably likely (or perhaps possible) for the company to be rehabilitated and continue in existence on a solvent basis as contemplated in section 128(1)(b)(iii); and

(c) that the development and implementation of a plan to rescue the company would result in a better return for creditors or shareholders than would occur from its immediate liquidation.

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723 *Ex parte Target Shelf 284 CC (In Business Rescue); Commissioner, South African Revenue Service and Another v Cawood NO and Others* [2017] JOL 37690 (GP), para [51].

724 2013 (4) SA 539 (SCA), para [35]. See also *Levenstein* 7-13.

725 In terms of s 424 of the 1973 Companies Act any creditor of the company can bring proceedings under that section and at any time, whether the company is under winding-up or not – also in the event of business rescue. See *Collard v Jatara Connect (Pty) Ltd* 2018 (5) SA 238(WCC), para [25].

726 See also *The Commissioner for the South African Revenue Service v The Business Zone 983 CC* (9673/2015) [2015] WCC (7 September 2015), para [96]; *Burmeister v Spitskop Village Properties Limited* (76408/2013) [2015] GP (16 September 2015), para [41] and *Van der Merwe and Others v Zonnekus Mansion (Pty) Limited (In Liquidation) and Another (Commissioner for the South African Revenue Service and Another as Intervening Parties)*[2017] JOL 39477 (WCC), para [79].

727 *Newcity Group v Allan David Pellow NO* (577/2013) [2014] ZASCA 162 (1 October 2014), para [21] stated the following: "But, as was pointed out in *Oakdene Square Properties*, [*Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para 33] the "mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions [can] hardly justify the separate institution of business rescue". See also *Pouroullis v Market Pro Investments 106 (Pty) Ltd (South African Bank of Athens Ltd and Absa Bank Ltd* (20370/2015) [2016] ZAGPJHC 12 (12 February 2016), para [24].

728 2016 (6) SA 236 (GJ), para [79]. See also *Levenstein* 7-14(2). See also *Henochsberg* 495.

31.6.8 Application for business rescue suspends liquidation proceedings

If liquidation proceedings have already been commenced by or against the company at the time an application is made to begin business rescue proceedings in terms of section 131(1), the application will suspend those liquidation proceedings until the court has adjudicated upon the application,[729] or the business rescue proceedings end, if the court makes the order applied for.[730] Any steps taken by a liquidator in liquidation proceedings after an application is made for business rescue proceedings are futile and of no legal consequence. Such steps may be ratified by the liquidator at the end of the suspension period contemplated by section 131(6)*(a)* and *(b)* of the 2008 Companies Act, or possibly by the appointed business rescue practitioner where liquidation proceedings were converted into business rescue proceedings.

31.6.9 When can application be made for business rescue?

There is case law that decided that the meaning of the words "liquidation proceedings" in section 131(6) of the 2008 Companies Act was confined to the actual process of winding-up a company consequent upon an order of winding-up having been issued by a court and was the actual process followed in winding-up overseen by the liquidators and the Master.[731] Accordingly, the words "liquidation proceedings" did not, according to these decisions, include legal proceedings taken by a creditor for the purpose of obtaining an order that a company be wound-up[732] and, therefore, that an application in terms of section 130 does not suspend the application for a winding-up order. This was confirmed by the Supreme Court

729 It is submitted that this adjudication refers to a decision on the application for business rescue, in particular the refusal of the application (granting of the application is dealt with in the following paragraph of the section). *Cf Firstrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) (Case No 12910/2011 9 Dec 2011 [21]).

730 2008 Companies Act, section 131(6). In *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC) paras [30] and [31] the court found that the provision that a mere application for business rescue suspends liquidation proceedings can lead to abuse. It would also be disruptive that the suspension of the liquidation proceedings comes to an end when the business rescue proceeding end, which may be long after the suspension of the proceedings. The court stated that there is a difference of opinion as to whether the time when the application is made means the time when the application is filed with the Registrar of the court or the time when an order is made placing the company under supervision, commencing the business rescue proceedings, provided that such order may operate retrospectively as does an order for the liquidation of a company, in other words back to the date of the filing of the application. Applying a functional approach to section 131(6), the court found that it is obvious that in this case the lodging of the application with the registrar for the issue thereof constituted the "making" of the application and the commencement of proceedings to place the company under business rescue (as opposed to the commencement of business rescue *per se*). The court further stated that to suggest that the application for business rescue only commences when it is called some day in open court will lead to impractical and even absurd consequences. It would mean that the court seized with the winding-up application could continue with its work and notionally even grant a final order of liquidation before the business rescue application is heard.

731 (901-2017) [2018] ZASCA 178 (3 December 2018) discussed below.

732 *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 (GNP), para 18.1; *ABSA Bank Ltd v Makuna Farm CC* 2014 (3) SA 86 (GJ), para [7]; *Van Zyl v Engelbrecht NO* 2014 (5)SA 312 (FB), para [10].

of Appeal in *GCC Engineering (Pty) Ltd and Others v Maroos and Others*, as discussed further below.[733]

According to *ABSA Bank Ltd v Summer Lodge (Pty) Ltd*[734] and *ABSA Bank Ltd v Makuna Farm CC*[735] it is not the intention of section 131(6) to render a liquidation order to be set aside or to be discharged by the issue of the business rescue application, but rather to suspend the order so as to delay its implementation. It can also not have the effect that the company can proceed with carrying on business. The company remains finally or provisionally liquidated, as the case may be, until such time as the business rescue proceedings have been finalised.[736] In *Jansen van Rensburg NO and Another v Cardio-Fitness Properties (Pty) Limited and Others*, the court decided that despite an application for business rescue in terms of section 131 of the 2008 Companies Act, assets of a company in liquidation remain in the custody and under the control of a provisional liquidator until a business rescue practitioner or a final liquidator has been appointed.[737]

In *Standard Bank of South Africa v A-Team Trading CC*[738] the court disagreed, stating that the notion that a business rescue application should not have the effect of suspending an application for the winding-up of a company because the persons who run the company should be stopped in their tracks, is not consonant with the idea of business rescue.
In *Richter v Absa Bank Ltd*[739] Dambuza AJA said:

> "[Business rescue] is meant to be a flexible, effective process of extending the life span of companies and businesses. A necessary consequence thereof is limitation, to some extent, on the power of creditors to single-handedly curtail the life of a company."

It was further stated that regard should also be had to section 134(1), which provides for a limitation on the disposal of the company's property during business rescue proceedings, which, in terms of section 132(1)*(b)*, begin when an affected person applies to the court for an order placing the company under supervision. This provides some comfort in regard to the company's property while the liquidations proceedings are suspended.

In Maroos v GCC Engineering (Pty) Ltd[740] the court argued that it should be remembered that the business rescue plan in section 128(1)(b)(iii) contemplates two objects or goals, a primary goal, which is to facilitate the continued existence of the company in a state of solvency, and

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733 (901-2017) [2018] ZASCA 178 (3 December 2018). See also *Levenstein* 8-56. See also *Henochsberg* 512.
734 2014 (3) SA 90 (GP), para [20]. See also *Levenstein* 8-53. See also *Henochsberg* 507.
735 2014 (3) SA 86 (GJ), para [8]. See also *Levenstein* 8-65. See also *Henochsberg* 507.
736 *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP), para [20]; *ABSA Bank Ltd v Makuna Farm CC* 2014 (3) SA 86 (GJ), para [8]; *Ex parte Nell and Others NNO* 2014 (6) SA 545 (GP), para [13].
737 *Jansen van Rensburg NO and Another v Cardio-Fitness Properties (Pty) Limited and Others* [2014] JOL 31979 (GSJ) [58]; *Knipe and Another v Noordman NO and Others* 2015 (4) SA 338 (NCK), para [23]. *Cf ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP), para [22].
738 2016 (1) SA 503 (KZP), para [14] and [15]. See also *Levenstein* 8-53.
739 2015 (5) SA 57 (SCA), para 13.
740 (36777/2017) [2017] GP (15 June 2017). See also *Levenstein* 8-54. See also *Henochsberg* 512.

a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely to facilitate a better return for the creditors or shareholders of the company that would result from immediate liquidation.[741]

In *Richter v Absa Bank Limited*[742] the Supreme Court of Appeal held that an application in terms of section 131 of the 2008 Companies Act to place a company under business rescue can be made after the final liquidation order, stating that the reasoning of the court *a quo* was motivated by an erroneous premise that upon liquidation a company ceased to exist and that it was "stripped of its original legal status". The court went on to say that the correct position is that upon the final order of liquidation being granted, the company continues to exist but control of its affairs is transferred from the directors to the liquidator, who exercises his authority on behalf of the company.[743] In terms section 136(4) of the Act, if liquidation proceedings have been converted into business rescue proceedings the liquidator is regarded as a creditor of the company to the extent of any outstanding amounts owing to him for any remuneration due for work performed, or compensation for expenses incurred, before the commencement of business rescue proceedings. Consequently, the conversion of liquidation to business rescue, even after a final liquidation order has been granted, was clearly envisaged by section 136(4).[744] A liberal interpretation of section 131(1) may have negative results for the liquidation process. These would include repetitive disruptions and uncertainty that may result from various affected parties making applications for business rescue at different times during the winding-up process, reversion of business control to the same directors who may have been the cause of the financial distress experienced by the company, and the capacity of a company under final liquidation to conduct effective business, including concluding contracts, during the implementation of the rescue plan. The implementation of the 2008 Companies Act may produce some seemingly awkward results in the initial stages;[745] however, that does not justify an unduly restrictive approach in the interpretation of the provisions of the 2008 Companies Act. The fact of the matter is that a court can dismiss any application for business rescue that is not genuine and *bona fide* or that does not establish that the benefits of a successful business rescue will be achieved.[746]

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741 *Oakdene Square Properties v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 SCA at 549.

742 2015 (5) SA 57 (SCA). In *Van der Merwe v Zonnekus Mansion (Pty) Ltd (in liquidation)* (4653/2015) [2015] WCC (10 June 2015); [2015] JOL 33379 (WCC) the judge disagreed with the decision by the Supreme Court of Appeal, but was bound by it. See also *Levenstein* 8-47.

743 At para [10].

744 At para [12]. Section 131(7) read with s 135(4) contemplates the conversion of a liquidation into rescue proceedings, no matter how far the liquidation and winding-up proceedings might have progressed – the liquidation proceedings are only concluded when the final account is confirmed by the Master – *Van Staden v Angel Ozone Products CC (In Liquidation) and Others* 2013 (4) SA 630 (GNP), paras [26] and [30].

745 The practice of applying for business rescue in the face of an existing liquidation process or proceedings may be susceptible to abuse – *Jansen van Rensburg NO and Another v Cardio-Fitness Properties (Pty) Limited and Others* [2014] JOL 31979 (GSJ), para [34].

746 At para [16]. See also *Newcity Group (Ply) Ud v Pellow NO and Others, China Construction Bank Corporation and Others (Newcity Group (Pty) Ltd v Pellow NO and Others; China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437,16566/12) [2013J ZAGPJHC 54 (28 March 2013)), para (25).

The fact that a considerable period of time has elapsed since the company was placed in liquidation means that far-reaching steps that may have been taken by the liquidator in the winding-up process, cannot be undone without undesirable consequences.[747] A factor that is relevant in deciding whether there is a reasonable prospect for rescue is if the company has been in liquidation for a considerable period of time. In a case where an application was launched four months after the final liquidation order was made – and came to be heard almost two years after liquidation proceedings commenced, the passage of so much time, during which the company had been financially paralysed and lacking in management and leadership, did not enhance the prospects of there being a successful business rescue.[748]

It is permissible for a court to grant a final winding-up order after an application for business rescue has been made in terms of section 131(1).[749] Business rescue proceedings instituted in a court without jurisdiction does not suspend liquidation proceedings in terms of section 131(6).[750]

In *Richter v ABSA Bank* it was also decided that "liquidation proceedings" include court proceedings as well as the complete process of winding-up or liquidation of a company. The complete process is suspended by the relevant application for business rescue proceedings in accordance with the provisions of section 131(6). This would mean that the powers of the liquidators are suspended. The control of the assets fall under the Master of the High Court in accordance with the provisions of section 361(2) of the 1973 Companies Act. If the particular company trades, such as is envisaged by *PMG Motors Kyalami (Pty) Ltd* and the powers of the liquidators are suspended, the Master cannot assume the powers and obligations of the previous directors and the powers in this context are re-vested with the particular directors to control and manage the company pending the determination of the pending business rescue application, so as to promote the objects of the Act. The court did not agree with the reasoning of the court in *Jansen van Rensburg NO* and *Knipe*. In its view, these decisions were wrongly decided and ought not to be followed as they do not achieve the purpose of the Act. Also, if there is a *lacuna* in an Act, it must be interpreted so as to achieve its stated purpose, and restrictively.[751]

Counsel for respondents averred that the court's interpretation would in future lead to an abuse of proceedings in as much as interested parties dissatisfied with the liquidation order would connive to launch business rescue proceedings with the aim of avoiding the consequences of liquidation proceedings. The court noted that, unfortunately, there was an

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747 *Burmeister v Spitskop Village Properties Limited* (76408/2013) [2015] GP (16 September 2015), para [44]; *Newcity Group (Ply) Ud v Pellow NO and Others, China Construction Bank Corporation and Others (Newcity Group (Pty) Ltd v Pellow NO and Others; China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437,16566/12) [2013J ZAGPJHC 54 (28 March 2013), para (25).

748 *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd and Others* (4653/2015B) [2016] ZAWCHC 11 (18 February 2016), para [44].

749 *ABSA Bank Limited v Cardio Fitness Properties* (2012/2008) ZAGPJHC (28 November 2013), para [18].

750 *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC), para [27].

751 At para [15].

opportunity for deceit and dishonesty wherever one looked, but was convinced that the courts would be alert to such an approach and would carefully examine all the relevant facts and circumstances. A purposeful interpretation of a statute should not be defeated by the possibility of possible deceitful conduct in the future.[752] The court appointed a manager for the company with the powers and capacity of a director to manage its business affairs from date of the order until date of finalisation of the business rescue application. The manager was to provide security to the satisfaction of the Master of the High Court for the proper performance of his duties. The manager was barred from disposing of any assets of the first respondent without the written consent of the Master or the consent of the court. The manager was ordered to provide the court hearing the business rescue application with a full report of his management of the company and with specific detail as to the possibility of the company being rescued as a result of business rescue proceedings.

In *GCC Engineering (Pty) Ltd and Others v Maroos and Others*[753] the Supreme Court of Appeal noted that the Master is a creature of statute and may perform only those duties and functions empowered by the enabling legislation. The Master exercises control and supervision over the winding-up, liquidation and sequestration processes, including rehabilitation of the insolvent and the deregistration of the company. The Master has no powers to deal with a "manager" appointed by the court or the business rescue practitioner and found that such appointment falls outside the scope of the winding-up, liquidation and sequestration processes. There is no statutory provision that permits the appointment of a "manager" in these circumstances.

In *Van der Merwe and Others v Zonnekus Mansion (Pty) Limited (in liquidation) and Another (Commissioner for the South African Revenue Service and Another as Intervening Parties)*[754] the court pointed out that the decision in *Richter* is consonant with the position contemplated by the Legislature in section 132(1)(c), namely that if a company is already in liquidation, business rescue only commences when a court places the company under the supervision of the business rescue practitioner. However, in terms of section 131(6)(a), the mere launching of the application for business rescue has the effect of suspending the liquidation proceedings. This does not mean that the liquidators are deprived of their statutory powers, just that they are precluded from exercising them. As the facts of this case demonstrated, this can result in an undesirable state of affairs should an unscrupulous individual seek to exploit the legal *lacuna* which the Act occasions in relation to day-to-day control of the liquidated company. In view of the abuse of process in this case,[755] the court issued an order that pending the finalisation of any application for leave to appeal or subsequent appeals against the dismissal of the application:

(a) the liquidation proceedings were not suspended; and

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752 At para 16. It is not clear if the court would be able to avoid an abuse of proceedings in the time between the filing of the application and the hearing of the application by the court.

753 (901-2017) [2018] ZASCA 178 (3 December 2018***),*** para [23]. See also *Levenstein* 8-56.

754 [2017] JOL 39477 (WCC), para [112]. See also *Levenstein* 8-74. See also *Henochsberg* 448(1), 449.

755 At para [104].

(b) the liquidators were directed to take control of the company assets in accordance with the provisions of the 1973 Companies Act, read with the provisions of the Insolvency Act.

(c) the applicant, in his personal capacity and representative capacity as a trustee, and other parties were interdicted from launching further applications to place the company under supervision and business rescue proceedings to commence, as envisaged in section 131 of the 2008 Companies Act, without the prior written authorisation of the Senior Duty Judge of the Division.

In *The Standard Bank of South Africa Limited v Gas2Liquids (Pty) Limited*,[756] Satchwell J dismissed the contention that applications for liquidation could not proceed as they were suspended in terms of section 131(6) of the 2008 Companies Act where the requirement in respect of service by the Sheriff on the respondent, or the CIPC, or notice to all affected persons, in particular the shareholder, as is provided for in section 131, was not complied with. *Standard Bank of South Africa Limited v Midnight Feast Properties 4 (Pty) Limited*[757] agreed with this decision. *Engen Petroleum Limited v Multi Waste (Pty) Limited and Others*,[758] held that an applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them in accordance with regulation 7. In this case the requirements of section 131 had not been complied with. However, the route of business rescue remains possible despite a final winding-up order having been granted[759]

In *GCC Engineering (Pty) Ltd and Others v Maroos and Others*[760] the Supreme Court of Appeal stated that section 131(6) of the 2008 Companies Act does not change the status of the company in liquidation, nor does it suspend the court order that placed the company under liquidation. The appointed provisional joint liquidators had to proceed with their duties and functions to protect the assets of the company for the benefit of all the creditors of the company.[761] The court found that the appointment, office and powers of the provisional liquidators were not suspended. In section 131(6) the legislature used the word "suspend", which does not mean termination of the office of liquidator. The term "liquidation proceeding" refers only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation in order to bring about its dissolution. What is suspended is the process of winding-up and not the legal consequences of a winding-up order.[762] On the granting of the winding-up order, the directors of the company cease to function as directors and the property of the company falls under the control of the Master or the appointed liquidators. The directors of the company in liquidation are stripped of their control and management of the company placed in winding-up by the court. There is no legal provision,

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756 Case No. 45543 / 2012, unreported. See also *Levenstein* 8-53.

757 [2017] JOL 39365 (GJ), para [9].

758 2012 (5) SA 596 (GSJ), at paras [15]–[24].

759 At para [11] with reference to *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA), para [15].

760 *GCC Engineering (Pty) Ltd and Others v Maroos and Others* (901-2017) [2018] ZASCA 178 (3 December 2018**)**. See also *Levenstein* 8-56. See also *Henochsberg* 526(36).

761 At para [15].

762 At para [19].

either statutory or at common law, that sanctions the re-vesting of control and management of the company in liquidation to the directors of the company.[763]

Liquidators are entitled to oppose an application for business rescue and a punitive cost order was granted where an application for business rescue was an abuse of the process of the court.[764] Although the liquidators do not fall within any of the categories of affected persons as defined in the 2008 Companies Act , if they are cited as parties they are entitled to participate in the proceedings as respondents and have the right to oppose the application if they so choose.[765]

When a court makes an order setting aside a resolution in terms of section 129(1) (commencing a business rescue procedure) and places the company under liquidation and that order is under appeal, the business rescue process ends immediately upon the issue of the order and not only when the appeal process is finally exhausted and the appeal or appeals adjudicated.[766]

The purpose of the notification required by section 131(2)(b) is to facilitate participation in terms of section 131(3) by affected persons in the hearing of the business rescue application. Creditors, being affected persons in the business rescue application, also have a material interest in the liquidation proceedings. A business rescue application is only to be regarded as having been made once the application has been lodged with the Registrar, duly issued, a copy thereof served on the CIPC, and each affected person has been property notified of the application.[767] It cannot be that mere lodgement of papers and the issue of a case number is sufficient to trigger a suspension of liquidation proceedings.

31.6.10 Costs

The court's inherent jurisdiction in regard to costs applies to proceedings under section 131 and the court may order that the applicant's costs, taxed on the scale between attorney and client, must be paid by the company.[768]

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763 At para [21].

764 *Van Staden NO And Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA). The court stated that is was difficult to see on what basis the judge in the court below reached the conclusion that there was no reasonable prospect of another court coming to a different conclusion; as it happened, another court did when the SCA overturned the decision of the court *a quo* in *GCC Engineering (Pty) Ltd and Others v Maroos and Others* [2018] ZASCA 178, paras 17 and 19.

765 *C Rock (Pty) v H C Van Wyk Diamonds Ltd and Others* (2355/2018Â) [2018] ZANCHC 91 (7 December 2018), para 28.

766 *Ex parte Nell and Others NNO* 2014 (6) SA 545 (GP), para [56].

767 *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others* 2013 (6) SA 141 (KZP), para [11].. If that were the case, a provisional liquidator may be acting without authority (and perhaps unlawfully) in a multiplicity of respects – *The Standard Bank of South Africa Limited v Gas 2 Liquids (Pty) Limited* 2017 (2) SA 56 (GJ), para [25].

768 *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC), paras 2 and 3.

31.7 Conversion of liquidation to business rescue

In terms of section 131(7) of the 2008 Companies Act, a court may *mero motu* place a company into business rescue at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.[769]

The courts have therefore been given a wide discretion to place a company under business rescue while they are considering either liquidation proceedings, or proceedings to enforce any security against the company.

In terms of section 141(2), of the 2008 Companies Act, if at any time during business rescue proceedings, the business rescue practitioner concludes that there is no reasonable prospect for the company to be rescued, the practitioner must so inform the court, the company and all affected persons, in the prescribed manner, and apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation.

In *The Commissioner of South African Revenue Service v Primrose Gold Mines (Pty) Ltd and 2 Others*[770] the judge took a view that the business rescue practitioner was the person suited to apply to court for the discontinuance of the business rescue proceedings. However, in *Ex parte Target Shelf 284 CC (In Business Rescue); Commissioner, South African Revenue Service and Another v Cawood NO and Others*[771] the judge concluded that on a proper reading of section 132(2)*(a)* it was not specifically stated who should apply to have the business rescue proceedings set aside or converted to liquidation proceedings. In the circumstances of the matter, the creditors were entitled to apply for conversion of the business rescue proceedings.

31.8 Report on progress of business rescue proceedings

If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must–

(a) prepare a report on the progress of the business rescue proceedings and update it at the end of each subsequent month until the end of those proceedings; and

(b) deliver the report and each update in the prescribed manner to each affected person and to the court, if the proceedings have been the subject of a court order, or the Commission in any other case.

These reporting requirements are very onerous. Therefore, business rescue practitioners will often endeavour to complete the business rescue process as quickly as possible.

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769 *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd* (24850/11) [2011] ZAWCHC 464 (9 December 2011) ; [2012] JOL 29024 (WCC); 2012 (2) SA 378 (WCC), para [8].

770 (56581/2014) [2014] 26 ZAGPPHC (12 September 2014). See also *Levenstein* 9-144.

771 [2017] JOL 37690 (GP) at [74].

31.9 Moratorium

A primary aim of business rescue proceedings is to offer a distressed company some breathing space to allow its affairs to be restructured in such a way as to allow it to continue to operate as a going concern. This is achieved through a general moratorium on claims. The moratorium on claims is a fundamental aspect of any successful rescue mechanism, aimed at the restructuring of the debt of a company that is financially distressed.[772] In *SA Airlink (Pty) Ltd and South African Airways (SOC) Limited and others*,[773] the court held that the intention of the moratorium is to cast the net as wide as possible to include any conceivable type of action, and further held that the moratorium is necessary for the effectiveness of the business rescue procedure.

Section 133 of the 2008 Companies Act provides that during business rescue proceedings,[774] no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable.

It is noteworthy that section 133 of the 2008 Companies Act requires that the property in question must either be the property of the company or in the lawful possession of the company. This means, for example, that where agreements are cancelled and a company in business rescue is ordered to return the property that forms the subject matter of such agreement, it cannot be said that the company in business rescue is in lawful possession of such property such that it should be able to rely on the moratorium. Similarly, a vehicle that is the subject of a finance agreement which has been cancelled will not be lawfully in the possession of the company in business rescue, as a result of which section 133(1) will not be an obstruction to the recovery of the vehicle. The ambit of the general moratorium under section 133(1) will also not encompass legal proceedings for ejectment where a lease has been validly cancelled and the company in business rescue is an unlawful occupier. In such a case the leave of the court to institute proceedings is unnecessary.[775]

In *National Union of Metalworkers of South Africa (NUMSA) obo Members and Others v South African Airways (SOC) Ltd and Others*,[776] the Labour Court, with reference to the decision in *Marques and Others v Group Five Construction (Pty) Ltd and Others*,[777] confirmed that the weight of authority was against the Labour Court assuming the role of the High Court in uplifting the moratorium on legal proceedings, imposed by section 133 of the 2008

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772 See *Levenstein* 9-3 – 9-29. See also *Henochsberg* 522.

773 [2020] ZASCA 156 (30 November 2020).

774 In *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC), para 12, the court left open the question as to whether the business rescue proceedings commence on the launching of the application or only retrospectively after the making of a court order.

775 *Madodza (Pty) Ltd (In Business Rescue) v Absa Bank Limited* (High Court Pretoria, Case No: 38906/2012 dated 15 August 2012). *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448. *Kythera Court v Le Rendez-vous Cafe CC and Another* 2016 (6) SA 63 (GJ), para [16].

776 2021 (4) SA 575 (LC) (8 February 2021). See also *Levenstein* 9-76(1).

777 (2020) 41 ILJ 677 (LC). See also *Levenstein* 9-21.

Companies Act. The Labour Court further held that the High Court has exclusive jurisdiction over business rescue matters, and as such, a party seeking to initiate proceedings, including those that concern an employment-related claim, against a company in business rescue, must secure the written consent of the business rescue practitioner or obtain the leave of the High Court to institute those proceedings.

Chapter 6 of the Companies Act makes clear that the supervision of business rescue proceedings falls within the jurisdiction of the High Court. This is on the basis that business rescue proceedings affect the rights of a number of parties beyond the employment relationship, and in particular shareholders and other creditors. Accordingly, the High Court is best placed to balance the rights and interests of all relevant parties. The High Court or designated specialist or assigned judge of the High Court (definition of "court" in section 128(1)(e)), has exclusive jurisdiction. The words "leave of the court" cannot mean a simple matter that can be advanced from the bar. A court must receive a well-motivated application so that it can apply its mind to the facts and the law and then be in a position to make a ruling in accordance with any terms it may consider suitable in the circumstances.

In *Lockstock Investments (Pty) Ltd and others v Peter van den Steen N.O. and others*,[778] the court confirmed that where an application is brought against a company in business rescue, the applicant in such circumstances, must first seek leave from the High Court to commence legal proceedings before the main application can proceed and before the appointed business rescue practitioners will be required to deliver answering affidavits. The court came to this finding on the basis that the company in business rescue and its appointed business rescue practitioners would be immensely prejudiced if they were to be expected to file answering affidavits, and incur costs and expenses in the process, in circumstances where the applicants might not even be given leave to proceed with the main application. Accordingly, a company in business rescue and its appointed practitioners are not required to file answering affidavits, until such time as the moratorium is lifted, which in this case was such time when the applicant is granted leave from the court to commence legal proceedings as contemplated in section 133(1)(b). The court also held that a company in business rescue and its appointed business rescue practitioners will not be expected to deliver answering affidavits in circumstances where the relevant affected parties have not yet been served with the main application.

As aforementioned, a company that is not the legal owner or in legal possession of property of a company under business rescue, cannot rely on the moratorium under section 133(1) as a defence to a claim.[779] In *Afrimat Iron Ore Proprietary Limited v Timasani Proprietary Limited (In Business Rescue) and Another*,[780] the court confirmed that the moratorium does not apply to property not in the lawful possession of the company or to proceedings concerning any property or right over which a company exercises the powers of a trustee. This finding was confirmed on appeal in *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore*

778 Gauteng Local Division, Johannesburg (Case no. 2020/12079) Ali AJ (10 August 2021).
779 *Southern Value Consortium v Tresso Trading 102 (Pty) Limited NO* 2016 (6) SA 501 (WCC), para [31]..
780 [2019] JOL 41473 (GP), para [19]. See also *Henochsberg* 526(3).

(Pty) Ltd,[781] where the Supreme Court of Appeal held that no purpose connected to the business rescue process warrants the company under business rescue being protected against proceedings to recover property that it neither owns, nor lawfully possesses. Accordingly, the moratorium is not applicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue, or property unlawfully possessed by said company.

Section 10 of the Admiralty Jurisdiction Regulation Act 1983 (AJRA) provides that any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11(13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property. According to *MFV "Polaris": Southern African Shipyards (Pty) Ltd v MFV "Polaris" and Others*[782] the court found that it was sensible to hold that the reference to "judicial manager" in section 10 of the AJRA should be interpreted to have been replaced by a "business rescue practitioner" and "judicial management" by "business rescue proceedings". In terms of section 10 of AJRA, once maritime property has been arrested it is ring-fenced. It falls under the jurisdiction of AJRA and must be dealt with in accordance with that statute. That ring-fencing cannot be undone by subsequent proceedings, as mentioned in section 10.[783] When business rescue proceedings commence, property is placed under the control of a business rescue practitioner and out of the reach of any other persons including creditors and business rescue places a moratorium on all legal proceedings. That should exclude property that has already been isolated and made a subject of another jurisdiction.[784]

Section 10 of AJRA applies to a business rescue practitioner and business rescue proceedings in the same extent, with the necessary changes, as it did to a judicial manager and judicial management.[785] The court confirmed an order that permitted the sale of a motor fishing vessel, her equipment, furniture, bunkers and her cargo in terms of section 9 of AJRA.

Payment in accordance with a writ of execution issued before a company is placed under business rescue proceedings and made while a company is under business rescue proceedings, is in contravention of the moratorium contemplated in section 133(1).[786]

Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others[787] held that leave of the court to institute legal proceedings against a

781 (91/2020) [2021] ZASCA 43 (13 April 2021) at para 29. See also *Henochsberg* 526(4).
782 [2018] 3 ALL SA 219 (WCC), para [62]. See also *Levenstein* 9-27. See also *Henochsberg* 522.
783 At para [67].
784 At para [68]).
785 At para [81].
786 *Cawood NO and Others v Reaan Swanepoel t/a Reaan Swanepoel Attorneys and Others* [2015] JOL 34283 (GP).
787 *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others* 2015 (4) SA 485 (KZD). See also *Msunduzi Municipality v Uphill Trading 14 (Pty) Ltd & Others* [2014] ZAKZPHC 64. See also *Levenstein* 9-7. See also *Henochsberg* 526(9).

company under business rescue must be obtained prior to the commencement of the principal proceedings and cannot be sought as part of the relief sought in those proceedings. In *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd*[788] the court held that it was legally competent for an applicant for the winding-up of a company to request the leave of the court to continue with the already commenced legal proceedings during those proceedings itself, when faced with a subsequent application to commence business rescue proceedings and the moratorium imposed by section 133(1). See the similar decision in *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another*.[789] In *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others*[790] the court could not agree that in every case where a court is asked for leave to proceed against a company under business rescue, a formal application was required, stating that there was no such requirement in section 133. The court stated further that under section 173 of the Constitution the High Courts had the inherent power to protect and regulate their own process.

The court that granted an order for business rescue has jurisdiction in terms of section 133(1) to grant leave to commence or to proceed with legal proceedings, even if the registered office of the company is not within the area of jurisdiction of the court.[791]

As aforementioned on any interpretation and application of the definition of "court" in section 128(e), the Labour Court is not included in the reference to "court" in section 133(1)(b). This makes sense, as it is the High Court that has jurisdiction over the supervision of business recue proceedings, and is the court that can properly determine whether or not it is appropriate to grant leave to proceed with legal proceedings against the company.[792] Unfair dismissal proceedings in the Labour Court are stayed and cannot be proceeded with except with the written consent of the business rescue practitioner; or with the leave of the High Court in accordance with any terms that court considers appropriate.[793] The moratorium placed on legal proceedings against a company under business rescue proceedings in terms of section 133 does not prevent a Bargaining Council from arbitrating a dispute over which it would otherwise have jurisdiction, but the business rescue practitioner must be cited as a party in the proceedings.[794] Arbitration proceedings are legal proceedings for which the written

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788 2016 (3) SA 209 GP. See also *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013(6) SA 471 (GNP), para [7].

789 2017 (4) SA 51 (WCC), paras [56] to [61]. See also *Levenstein* 9-12.

790 (A513/2013) [2015] ZAGPPHC 78 (26 February 2015), paras 27 and 28. See also *Levenstein* 9-8. See also *Henochsberg* 483, 526(2).

791 *Lanarco Home Owners Association v Prospect SA Investments 42 (Proprietary) Limited (in Business Rescue) and Others* [2014] JOL 32483 (KZD).

792 *Burba v Integcom (Proprietary) Limited* (JS539/12) [2013] Labour Court Johannesburg (29 November 2013), para [16].

793 *Ibid*, para [17].

794 *NUMSA obo 4 Members v Motheo Steel Engineering CC* (METS3334) [2014] Metal and Engineering Industries Bargaining Council Centre For Dispute Resolution, Pretoria (5 May 2014). This decision concurs with the judgment of the Labour Court in *National Union of Metal Workers of South Africa obo Members and Motheo Steel Engineering CC* (J271/2014) [2014] Labour Court, Johannesburg (7 February 2014) that s 133 of the 2008 Companies Act does not expressly amend the provisions of the Labour Relations 1995; the provisions of the Labour Relations Act and not s 133 of the 2008 Companies Act, apply.

consent of the business rescue practitioner or the leave of the court is required in terms of section 133.[795]

Mere cancellation of a master instalment sale agreement does not amount to "legal proceedings including enforcement action" which is subject to a moratorium in terms of section 133 and that requires the written consent of the practitioner or leave of the court.[796]

The grammatical and ordinary meaning of the words in section 133(1), that enforcement action would only be affected by this section if it concerns or occurs at a place or meeting where a public discussion is held (that is, a forum), means that the section envisages actual steps taken before a court of law or some other tribunal or actual place.[797] In *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank*[798] it was stated in passing that the inclusion of the term "enforcement action" under the generic phrase "legal proceeding" seemed to indicate that "enforcement action" was considered to be a species of "legal proceeding", or was meant to have its origin in legal proceedings. The court stated that this conclusion was strengthened by the fact that section 133(1) provides that no legal proceeding, including enforcement action, "may be commenced or proceeded with*in any forum*"; a "forum" is normally defined as a court or tribunal and its application in section 133(1) conveys the notion that "enforcement action" relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment. In *Investec Bank Ltd v Bruyns*,[799] the court, *inter alia*, held that section 133(1) operated as a personal defence (defence *in personam*) in favour of the company undergoing business rescue proceedings and could not be raised by a surety as a defence to a claim based on suretyship. The court held that if the legislature had intended for creditors to be prohibited from enforcing their claims against sureties of companies under business rescue, it would have done so expressly.

The moratorium on legal proceedings in section 133 finds no application in legal proceedings against a company's business rescue practitioner in connection with the business rescue plan including its interpretation, adoption or implementation. Consequently,

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795 *Chetty v Hart* (20323/14) [2015] ZASCA 112 (4 September 2015); [2015] JOL 33852 (SCA), para [29], which reversed the decision in *Chetty t/a Nationwide Electrical v Hart NO and another* [2015]JOL 32738 (KZD), para [13].

796 *Murray NO v First Rand Bank Ltd T/A Wesbank* 37554/2013 GP (undated), p 39; *Cloete Murray NO and Another v FirstRand Bank Ltd* [2015] ZASCA 39 (26 March 2015); *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA). In *Finlayson NO v Master Movers Cape CC (In Business Rescue)*(10589/160) [2016] WCC (2 August 2016), para [41], the court held that the fact that a close corporation was under business rescue did not have any effect on the right to cancel a lease agreement; s 133(1) did not apply to the cancellation of the lease.

797 *Murray NO v First Rand Bank Ltd T/A Wesbank* 37554/2013 GP (undated) at p 24.

798 2015 (3) SA 438 (SCA), para [32]. In *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), para 35, the court agreed with this view. See also *Levenstein* 9-11. See also *Henochsberg* 522, 526(1).

799 2012 (5) SA 430 (WCC). See also *Levenstein* 9-17. See also *Henochsberg* 523.

there is no need for affected parties to seek leave from the business rescue practitioner, or the court when instituting proceedings relating to the business rescue plan.[800]

Section 133(1) has been enacted exclusively for the benefit of the company and the practitioner appointed to oversee its affairs, and is not available as a defence for a creditor. Only the practitioner may seek its protection and only the practitioner may waive or consent to dispensing with its compliance.[801] The moratorium is intended to protect the company from claims or the recovery of assets against it. It does not in its terms deal with orders that seek to protect or recover company property for its own benefit.[802]In *Cheetah Chrome South Africa (Pty) Ltd v Dilo Chrome Mine (Pty) Ltd (in business rescue) and Others*,[803] the court confirmed that, as a general principle in respect of the lifting of the moratorium as contemplated in section 133 of the 2008 Companies Act, exceptional circumstances are not required.

The moratorium envisaged by section 133 is in place for the duration of the business rescue proceedings. Business rescue proceedings clearly extend beyond the adoption of a business rescue plan and for as long as the moratorium is in place, section133(1)(b) permits a court to grant leave to a person to institute legal proceedings.[804]

An applicant seeking to obtain leave under section 133 must as a minimum requirement establish a *prima facie* case against the company in business rescue. It is sufficient if it can be shown that the averments made, if unchallenged, establish a cause of action or demonstrate the existence of a triable issue.[805] What needs to be fully set out in any application are the reasons why legal proceedings against the company in business rescue are necessary and appropriate. The court has a wide discretion that must be dictated by the interests of justice. Some of the relevant considerations would be:

(a) the effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders;

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800 *Moodley v On Digital Media (Pty) Ltd and Others* 2014 (6) SA 279 (GJ), para [10]. In *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC), para [57], the court considered the contrary finding in *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* 18486/2013 14 June 2013 (GSJ) to be clearly wrong and declined to follow it. The *Redpath* decision elicited the following comment from the authors of *Henochsberg on the Companies Act 71 of 2008* (Vol 1 at 478(5)) "It is respectfully doubted that s 133 is intended to operate also in this category as opposition to a business plan is not legal proceedings against the company or property belonging to the company or lawfully in its possession." Followed in *Hlumisa Investment Holdings (RF) Limited and Another v Van der Merwe NO and Others* [2016] JOL 34326 (GP), para [17]. Similar decisions in *DH Bros Industries v Gribnitz NO* 2014 (1) SA 103 (KZP); *LA Sport 4X4 Outdoors CC and Ano v Broadsword t/a 20 (Pty) Ltd and Others* [2015] ZAGPPHC 78; *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and Others* [2015] ZAKZPHC 21; *ABSA Bank Ltd v Golden Dividend 339 (Pty) Ltd* 2015 (5) SA 272 (GP); *Griessel and Ano v Lizemore and Others* 2016 (6) SCA 236 (GJ); *Cordeiro Holdings CC and Ors v Market Demand Trading 254 (Pty) Ltd and Others* [2016] ZAGPJHC 284.

801 *Chetty v Hart* (20323/14) [2015] ZASCA 112 (4 September 2015); [2015] JOL 33852 (SCA), para [43].

802 *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), para [103].

803 (45259/2020) [2020] ZAGPPHC 642 (19 October 2020).

804 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP), para [5].

805 *Arendse v Van der Merwe NO* 2016 (6) SA 490 (GJ), paras [16] and [27].

(b) the impact that the proposed legal proceedings would have on the well-being of the company and its ability to regain its financial health; and

(c) whether the granting of leave would be inimical to the object and purpose or business rescue proceedings as set out in sections 7(k) and 128(b) of the 2008 Companies Act.[806]

The *bona fides* of the initiator of proceedings is an important consideration when leave is sought to lift the moratorium in terms of section 133. In order for the court to exercise its discretion judiciously in considering the leave sought, it is incumbent upon an applicant who seeks such leave to take the court into his confidence and disclose to the court the legal proceedings that he intends initiating.[807]

In *Arendse v Van der Merwe NO*[808] the court disagreed with the statement that the court may only in exceptional circumstances permit litigation against a business rescue plan or issues related thereto.[809]

Set-off is allowed against any claim made by the company in legal proceedings before or after commencement of the business rescue proceedings.[810] Proceedings by a regulatory authority in the execution of its duties are allowed after written notification to the business rescue practitioner.[811]

During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.[812] Section 133(2) explicitly refers to the stay of a suretyship undertaken by the company under business rescue, and not to a suretyship undertaken by a third person for the indebtedness of the company.[813] In *Investec Bank Ltd v Bruyns,*[814] the court held that only the court and not the business rescue practitioner is empowered to consent to the enforcement against the company of claims based on guarantees and suretyships.

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806 *Ibid*, para [28].

807 *2001 Management Services (Pty) Limited and Another v Anappa* (88079/14) [2016] ZAGPPHC 353 (20 May 2016).

808 2016 (6) SA 490 (GJ), para [29].

809 *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013), para [71].

810 2008 Companies Act, s 133(1)(c).

811 *Ibid*, s 133(1)(f).

812 *Ibid*, s 133(2). Only the court and not the business rescue practitioner is empowered to consent to the enforcement against the company of claims based on guarantees and suretyships – *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC), para 16. Bouwer van Niekerk and Shani du Plooy, "The cedent, the cessionary and the moratorium – *quo vadis*?**"** *De Rebus* August 2016, submit that the cessionary of book debts may collect the debts without first obtaining permission in terms of s 133.

813 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP), para [70].

814 2012 (5) SA 430 (WCC).

31.10 Post-commencement finance

Post-commencement finance is the life-blood of the company while it is undergoing its restructuring process under business rescue. Post-commencement finance is funding that is provided to the company after the date of commencement of business rescue proceedings. In view of the importance of securing some level of ongoing finance in order to continue functioning in the marketplace, the 2008 Companies Act provides statutory protection and elevates the status of such funding above the claims of the company's pre-business rescue creditors. It is submitted that without such preference being conferred, very few, if any, lenders would be prepared to continue to finance a company in circumstances where it is financially distressed and has been placed under business rescue. [815]

During business rescue proceedings the company may obtain finance secured by the unencumbered assets of the company but payable after costs related to the proceedings and claims related to employment arising during the rescue proceedings in the order of preference indicated in section 135 of the 2008 Companies Act.

The order of preference in section 135 is as follows and will be explained in further detail below:[816]

- the business rescue practitioner, for remuneration and expenses and other persons (including legal and other professionals) for the costs of business rescue proceedings;
- employees for any remuneration that became due and payable after business rescue proceedings began;
- secured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. for post-commencement finance;
- unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. post-commencement finance;
- secured lenders or other creditors for any loan or supply made before business rescue proceedings began;
- employees for any remuneration that became due and payable before business rescue proceedings began; and
- unsecured lenders or other creditors for any loan or supply made before business rescue proceedings commenced.

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815 See *Levenstein* 9-88 – 9-92.

816 *Obiter dicta* in *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013), para [60] and *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013), para [21].

31.10.1 Practitioner's remuneration in section 143

Section 143 deals with the business rescue practitioner's remuneration. Section 135(3) of the 2008 Companies Act specifically provides that the first expenses to be paid in a business rescue proceeding are those of the business rescue practitioner and the expenses arising from the business rescue proceedings itself.

31.10.1.1 Section 143(1)

The business rescue practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of section 143(6). In addition, in terms of section 143(2), the practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in section 143(1), to be calculated on the basis of a contingency related to - (a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or (b) the attainment of any particular result or combination of results relating to the business rescue proceedings.

Section 143(3) specifically requires an agreement for further remuneration to be approved "at a meeting called for the purpose of considering the proposed agreement". Without the approval at a meeting called for the purpose to approve the agreement, such a fee is invalid. The Minister may make regulations prescribing a tariff of fees and expenses for the purposes of section 143(1). Regulation 128 prescribes the tariff of fees for practitioners. It has been submitted that it would not be right for a business rescue practitioner, who although nominally in control was not truly in control of the affairs of the company, to charge the company for remuneration as business rescue practitioner.[817]

In *Montic Diary (Pty) Ltd (in liquidation) and Others v Mazars Recovery & Restructuring (Pty) Ltd and Others*,[818] the High Court held that once a business rescue practitioner applies to court for an order discontinuing the business rescue proceedings and pacing the company into liquidation, in the manner contemplated in section 141(2)(a) of the 2008 Companies Act, any payment towards the fees or disbursements of a business rescue practitioner made subsequent to such application will be considered to be a void disposition in terms of section 341(2) of the 1973 Companies Act. The position, therefore, is that once an application for winding-up is presented to court, the company is precluded from making payments to third parties, including the business rescue practitioner. Any disposition made in such circumstances will be void, unless a court otherwise orders.

In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,[819] the Supreme Court of Appeal was tasked with determining whether remuneration agreements, or so-called "success fee" agreements, concluded between business rescue practitioners and third parties (including

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817 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), paras 48.2 and 84.

818 2021 (3) SA 527 (WCC) (10 February 2021).

819 2020 (5) SA 35 (SCA). See also *Levenstein* 9-50(8). See also *Henochsberg* 526(63).

creditors), outside the ambit of section 143, were prohibited, void for illegality, or otherwise contrary to public policy. The Supreme Court of Appeal held that section 143 only applies to the remuneration of business rescue practitioners by the company under business rescue and does not deal with fee arrangements concluded between practitioners and third parties. The court further held that there is nothing in section 143 that suggests that an agreement not falling within its ambit is void. Furthermore, the court noted that the 2008 Companies Act does not penalise the conclusion of remuneration agreements with third parties, and does not contain language entitling a court to draw an inference that the legislature intended to invalidate such fee agreements. Accordingly, the Supreme Court of Appeal held that remuneration agreements, or co-called success fee or special fee agreements, concluded between business rescue practitioners and third-parties (including creditors), outside the ambit of section 143 are neither prohibited, illegal, nor contrary to public policy.

31.10.1.2 Section 143(5)

To the extent that the practitioner's remuneration and expenses are not fully paid, during the course of business rescue proceedings, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors. The remuneration and expenses are not payable from the proceeds of a secured asset in terms of section 89(1) of the Insolvency Act or as cost of liquidation in terms of section 97 of the Insolvency Act. Section 135(4) of the 2008 Companies Act provides that if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation. The subsection must be read with section 97 of the Insolvency Act. That being the case, and as confirmed by the High Court in *Diener NO v Minister of Justice*,[820] the remuneration of the business rescue practitioner and the expenses incurred during business rescue proceedings, to the extent that it has not been paid during business rescue proceedings and during liquidation, can only be paid after the costs set out in section 97 have been paid. In *Diener NO v Minister of Justice And Correctional Services And Others*,[821] the Constitutional Court held that if business rescue proceedings are superseded by liquidation proceedings, the preferences created in terms of section 135 remain in force and will only be subordinate to the costs of liquidation arising out of the liquidation proceedings. The court further held that section 135(4), whether taken individually or in conjunction with section 143(5) does not create a "super preference" in liquidation and that the "super preference" interpretation contended by the appellant Diener undoubtedly favours practitioners and does not achieve a balance of the rights of all interested parties.

Section 135(4) provides to the business rescue practitioner, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his remuneration to claim against the free residue after the costs of liquidation (but before claims of employees for post-commencement wages and claims), and ahead of those who have provided other post-commencement finance, whether those claims were secured or not, and

820 (30123/2015) [2016] GP, para [60]. See also *Henochsberg* 526(25).

821 2019 (4) SA 374 (CC). See also *Levenstein* chapter 9 for a full discussion of the *Diener* judgments. See also *Henochsberg* 526(25).

of any other unsecured creditors.[822] Those who render services in connection with the sequestration proceedings and the administration of the insolvent estate are identified in section 97 of the Insolvency Act. A business rescue practitioner is not included in this list. He or she could not be included because of the distinction between business rescue proceedings and liquidation proceedings. As a result, a business rescue practitioner is a creditor of the insolvent estate and in respect of his remuneration and expenses he is required to prove his claim in terms of section 44 of the Insolvency Act.[823] The effective date of liquidation for this purpose is the day the liquidation application was filed and not the date when the company filed its resolution to commence business rescue.[824]

The rights of property owners during business rescue proceedings are dealt with in section 134 of the 2008 Companies Act. Section 134 (discussed in further detail below) is geared at protecting the company's property once business rescue commences. Importantly, the rights of creditors that may hold security over the company's assets ought not to be interfered with without their consent.

31.10.1.3 Regulation 128(1)

The basic remuneration of a business rescue practitioner, as contemplated in section 143(1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed:

(a) R1,250 per hour, to a maximum of R15,625 per day, (inclusive of VAT) in the case of a small company; or

(b) R1,500 per hour, to a maximum of R18,750 per day, (inclusive of VAT) in the case of a medium company; or

(c) R2,000 per hour, to a maximum of R25,000 per day, (inclusive of VAT) in the case of a large company, or a state owned company.

(d) In addition to the remuneration determined in accordance with section 143(1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the

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822 In *Panamo Properties (Pty) Ltd v Nel* [2015] ZASCA 7; 2015 (5) SA 63 (SCA) the SCA remarked that the "commendable goals [of business rescue] are unfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted". For criticism of the *Diener* decisions, see Lézelle Jacobs and David Burdette, "Queue Politely! South African Business Rescue Practitioners and Their Fees in Liquidation. *Diener NO v Minister of Justice and Correctional Services and Others* [2017] ZASCA 180, [2018] 1 All SA 317 (SCA), 2018 (2) SA 399 (SCA)", (2019) 2 *Wolverhampton Law Journal*.

823 *Ibid*, paras [61] and [62].

824 *Ibid*, para [56], confirmed by the Constitutional Court decision in the previous footnote.

extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.[825]

31.10.2 Creditors secured before business rescue proceedings

In general terms, the provisions of section 134 provide for the disposal of property only when it is required for the normal operation of the business of the company or as part of the business rescue plan. In particular, section 134 regulates the position when property disposed of by a company is held by a creditor as security for its claim and aims to protect such secured creditor from any potential prejudice that may flow from the actions taken by the company or the business rescue practitioner, during the course of the business rescue proceedings.

Agreements for the disposal of property have to comply with the prerequisites set out in section 134, namely:

(1) the property must be disposed of in the ordinary course of the company's business;

(2) the disposal must be in terms of a *bona fide* transaction at arm's length, for fair value, and must be approved in advance and in writing by the practitioner; or

(3) alternatively, the disposal must occur in terms of a transaction contemplated within and undertaken as part of the implementation of an approved business rescue plan.

825 In *Murgatroyd v Van den Heever and Others NNO* 2015 (2) SA 514 (GJ)) the court stated that the very nature of a practitioner's powers implies that he may in appropriate circumstances appoint advisors, valuators, auctioneers, forensic accountants, lawyers and other experts or persons to assist him in the carrying out of his functions. A forensic audit or the undertaking of other forms of work or services which fall within the ambit of a practitioner's functions and duties may well be required of the advisor in order for him to give advice to the practitioner or to the company. To distinguish between advice *per se* and the undertaking of any other service seems to be unduly artificial in this context. Furthermore, in addition to his own remuneration, s 143(1) entitles a practitioner to charge an amount for his expenses. Regulation 128(3) expressly provides for the recovery of disbursements and expenses (para [17]). There is no reason why a practitioner cannot accept the services that were rendered prior to his appointment and assume responsibility for payment. Expenses incurred and disbursements made after a conclusion that there is no reasonable prospect for the company to be rescued and before the business rescue proceedings ended may or may not, depending on the facts of a given case, be proved to have been reasonably necessary as contemplated in Regulation 128(3). A practitioner cannot simply abandon ship before the business rescue proceedings are ended and he may conceivably still require assistance during that time (para [20]). The test for a business rescue practitioner's entitlement to reimbursement for expenses and disbursements is whether they were reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings. The question is a factual one that must be assessed on the facts and circumstances of each case with reference to factors such as the size of the company, the functionality of its management, the accuracy and currency of its financial and accounting data, the complexities involved and the scope of the work required to be undertaken by the business rescue practitioner. It is also implicit in the reasonableness requirement of reg 128(3) that a business rescue practitioner is not entitled to reimbursement to the extent to which the charges of the service providers are not market-related (para [21]). The business rescue practitioner cannot claim for services in connection with the preparation of a business rescue plan after it had been concluded that there was no reasonable prospect for the company to be rescued and services after the business rescue proceedings had ended (para [22]).

In *Van den Heever NO and Others v Van Tonder*,[826] the court with reference to the judgements in *Kritzinger & Another v Standard Bank of South Africa*[827] and *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd*[828] confirmed that a cession of book debts constitutes property for purposes of section 134 of the 2008 Companies Act. It must be noted that financing during business rescue may be secured only by assets not otherwise encumbered.

31.10.2.1 Section 134(3)

If during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must-

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(b) promptly –

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.[829]

Accordingly, there must be prompt payment by the company of the proceeds of the disposition to the holder of the security and the payment must fully discharge the indebtedness of the company to that creditor. The utilisation by the business rescue practitioner of rental income in order to make periodic payments to the secured creditor in reduction of the indebtedness with the ultimate goal of discharging such indebtedness, does not satisfy the requirement that the prompt payment of the proceeds of the disposition must fully discharge the indebtedness. The business rescue practitioner may not utilise the rental income of the secured asset without the consent of the creditor, even if such rental income may eventually be sufficient to discharge the indebtedness of the creditor.[830]

826 (A5076/2018) [2021] ZAGPJHC 7 (20 April 2021).
827 (3034/2013)[2013] ZAFSHC 215 (19 September 2013).
828 2016 JDR2258 (GJ).
829 In *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others*(18486/2013) [2013] ZAGPJHC 148 (14 June 2013) the court stated that in a business rescue secured creditors stand on the same footing during its subsistence as the other creditors. The common purpose, desire and objective is that each creditor ultimately receives everything owing to it, unlike in a liquidation or under the previous judicial management system. Should the business rescue plan run into difficulties and the liquidation of assets become necessary, s 134(3) serves as a safeguard and assurance that the interests of secured creditors especially, are protected.
830 *Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd And Others* 2019 (3) SA 97 (SCA), paras [23] and [24].

31.10.3 Employee remuneration

31.10.3.1 Section 135(1)

Section 135(1) deals with remuneration, reimbursement for expenses or other amounts of money relating to employment that become due and payable by a company to an employee during the company's business rescue proceedings. These amounts are regarded as post-commencement financing and paid in the order of preference set out in subsection (3)(a).

31.10.3.2 Section 135(3)(a)

The claims mentioned in section 135(1) are treated equally, but have preference over-

(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(ii) all unsecured claims against the company.

31.10.3.3 Section 144(2)

In terms of section 144(2) of the 2008 Companies Act, to the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of Chapter 6.

The preference afforded to employees under section 144(2) may not be compromised in a business rescue plan, even if such plan is properly voted on and adopted. In other words, a section 144(2) preference enjoyed by employees in respect of pre-business rescue employment related claims cannot be overridden by the adoption of a business rescue plan. Should a business rescue plan contemplate the negation of the section 144(2) statutory preference, such business rescue plan or the relevant provisions thereof will be *ultra vires* and invalid.

31.10.4 Claims for financing obtained during business rescue

31.10.4.1 Section 135(2)

During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1) of section 135, and any such financing-

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in the order of preference set out in subsection (3)(b).

In *South African Property Owners Association v Minister of Trade & Industry*,[831] the High Court dealt with what qualifies as "post-commencement financing" and "costs arising out of the costs of the business rescue proceedings", in terms of section 135 of the 2008 Companies Act. In respect of the meaning of post-commencement financing, the court, *inter alia*, held that the financing contemplated in section 135(2) relates to the obtaining of financing in order to assist in managing the company out of its financial distress. The court held that the term financing could not be interpreted to encompass all existing obligations of the company as post-commencement finance.

Based on this judgment, any cost or liability that arises out of an agreement that was concluded prior to business rescue proceedings, and which costs were incurred during business rescue proceedings, will not constitute "post-commencement financing" or "costs arising out of the business rescue proceedings". Such costs or liabilities, unless already secured, will merely form the subject of an unsecured claim against the company and will not enjoy any preference. Any conclusion to the contrary would defeat the purpose of business rescue, as it would amount to giving an obligation that existed pre-business recue a preference over the claims of other creditors, which is not provided for or contemplated by section 135 of the 2008 Companies Act.

31.10.4.2 Section 135(3)(b)

All claims contemplated in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company. In addition, in terms of *South African Property Owners Association v Minister of Trade and Industry and Others*, any rental and other amounts payable in respect of occupation of immovable property are not preferent as "financing" or "costs of business recue proceedings".[832]

31.10.6 Preference provided for in the business rescue plan proposals

31.10.6.1 Section 150(2)(b)(v)

The proposals in the business rescue plan must provide for the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted. It is submitted that the legislature contemplated that certain claims would of necessity be required to be paid in preference to other claims. However, as discussed above, the statutory preference afforded to employees under section 144(2) of the 2008 Companies Act cannot be overridden by an approved business rescue plan. It is noteworthy that the Commissioner for Inland Revenue and other creditors who enjoy a preference in terms of

831 [2018] JOL 39915 (GP). See also *Levenstein* 9-111. See also *Henochsberg* 526(22).
832 2018 (2) SA 523 (GP), para [25].

sections 98 to 102 of the Insolvency Act, do not enjoy a preference under business rescue proceedings.[833]

31.11 Effect of business rescue on contracts

Business rescue practitioners, once appointed, must identify which agreements to which the company is a party are "prejudicial" or "detrimental" to the ongoing viability or solvency of the company. Should a business rescue practitioner be contemplating a plan in terms of the first part of the definition, it is often necessary to consider variations of certain agreements to make the restructuring of the company possible. Typically, lease agreements with high rentals, loan agreements with excessive interest payment terms, or supply agreements with unfair pricing arrangements are potential subjects of suspension during the course of business rescue. [834]

In this regard, section 136 of the 2008 Companies Act determines that despite any provision of an agreement to the contrary, during business rescue proceedings the practitioner may-

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

In *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank*, the court held that by invoking the provisions of section 136, a practitioner can prevent a creditor from instituting an action and repossessing or attaching property in the company's possession.[835] In *Tayob v Multi Furn Wholesalers and Retailers (Pty) Ltd*, [836] the court dismissed an application in terms of section 136(2)(b), where disputes of fact could not be resolved on the papers. Generally speaking, where obligations owed by contracting parties to each other are reciprocal in nature, it is not open to the party that is unable or unwilling to perform, to insist that the other party must perform. This common law principle is not overruled by section 136 of the 2008 Companies Act. Accordingly, care should therefore be taken in each case to determine on the specific facts, whether the obligations in question are in fact truly reciprocal, or are merely contained in the same agreement.

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833 *The Commissioner, South African Revenue Service v Beginsel NO and Others* 2013 (1) SA 307 (WCC) [24]-[35].

834 See *Levenstein* 9-83 – 9-88. See also *Henochsberg* 526(29).

835 2015 (3) SA 438 (SCA), para [35].

836 (32604 / 2017) [2018] ZAGPPHC 548 (6 August 2018).

In the case of *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and others*,[837] the court held that it must be accepted that a creditor maintains its common law contractual remedies for the non-performance by a distressed company which is under business rescue proceedings. In other words, a creditor in respect of an agreement which a practitioner has suspended maintains its common law right to withhold continued (reciprocal) performance (the *exceptio non adimpleti contractus* remedy) or alternatively to cancel the agreement.

The above applies subject to provisions regarding employment contracts set out below and provisions dealing with agreements on a securities exchange or in accordance with standard terms published by the International Swaps and Derivatives Association, the International Securities Lenders Association, the Bond Market Association or the International Securities Market Association, or any similar agreement which would have applied in the case of insolvency.

The mere fact that there are business rescue proceedings does not impact on the cancellation of a contract.[838]

Rentals due by a company under business rescue for the months after the business rescue proceedings commenced cannot be claimed, but a claim for rental due when the business rescue proceedings commenced is unaffected by the business rescue and can be claimed. It is competent for the landlord to cancel a lease during business rescue and seek the ejectment of the tenant.

The position of the business rescue practitioner *vis-à-vis* the contract is similar to that of a liquidator of a company in liquidation, or a trustee in insolvency. The lease survives the *concursus creditorum* and the rights and obligations of both parties to the contract remain in existence and, in so far as the obligations of the insolvent in terms of the contract are concerned, the trustee steps into the insolvent's shoes. The trustee is obliged to perform whatever is required of the insolvent in terms of the contract, including unfulfilled past obligations of the insolvent. The contract is neither terminated nor modified, nor in any way altered by the insolvency of one of the parties, except in one respect and that is because of the supervening *concursus* the trustee cannot be compelled by the other party to perform the contract.

The so-called suspension of a lease under section 136(2) cannot amount to anything more than the business rescue practitioner's right not to be compelled to perform in terms of the contract.[839] Suspension of all the obligations of a company by a business rescue practitioner in terms of section 136(2) entitles the other party to a contract to withhold compliance with reciprocal obligations or cancel the contract, provided the appropriate notices are given. However, the other party may not simply ignore the suspension and insist on performance.[840] Obligations of a company arising from the cession of book debts are not capable of being

837 2017 (4) SA 592 (GJ) (25 November 2016). See also *Levenstein* 9-84, 9-116. See also *Henochsberg* 526(30).
838 *Schickerling NO and Another v Chickenland (Pty) Ltd trading as Nando's* [2017] JOL 39263 (GP), para [30].
839 *178 Stanfordhill CC v Velvet Star Entertainment* (1506/15) [2015] KZD (1 April 2015), para [20], [21] and [25].
840 *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), para [39]).

suspended, certainly not as regards the right of the cessionary to enforce the debts, even if they arise from sales during business rescue. The book debts belong to the cessionary and they may not be "disposed of" without the consent of the cessionary, as provided in section 134(3)(a).[841]

In terms of section 136(3), any party to an agreement that has been suspended or cancelled may assert a (concurrent) claim against the company only for damages.

It is important to note that, during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, and employment agreements can only be amended to the extent that changes occur in the ordinary course of attrition; or where the employees and the company, in accordance with applicable labour laws, agree different terms and conditions. While a company is under business rescue the responsibility for terminating services of managerial employees vests in appointed business rescue practitioner.[842]

31.11.1 Protection of employees

Employees are dealt with specifically in business rescue proceedings. Not only do they rank as super-priority creditors in the ranking of claims, they are also entitled to participate in the business rescue proceedings.[843] The goal of business rescue is primarily directed at the prevention of unnecessary liquidations of companies and the consequent loss of its employees' employment. The interest of employees is prominently featured as an object of business rescue proceedings.[844] Employees stand to gain substantial benefits from business rescue proceedings when compared with a liquidation. A company is obliged to retain the services of the employees and their salaries, that become due and payable by the company during the business rescue proceedings, are regarded as post-commencement finance and thus have preferential status.

The favourable position of employees, in contrast to the situation in a liquidation, is confirmed by the fact that section 144 of the 2008 Companies Act deals in great detail with the rights of employees during a company's business rescue proceedings. Part of the philosophy of business rescue is to try and prevent the negative social consequences following upon companies in distress having to lay off or retrench its employees.[845] Without suggesting that different tests should be applied when employees are involved in establishing whether the threshold of reasonable prospects has been met, if the 2008 Companies Act is to be

841 *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), para [47].

842 2008 Companies Act, section 140(1)(c)(i); *Clarke / EH Walton Packaging* [2014] JOL 31234 (CCMA), para [101].

843 See *Levenstein* 9-73. See also *Henochsberg* 526(68).

844 *Lidino Trading 580 CC v Cross Point Trading (Pty) Limited In Re: Mabe v Cross Point Trading 215 (Pty) Limited* [2012] JOL 29305 (FB) [19].

845 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) [15]. *Cf Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC), para [65].

implemented in a manner that does not disadvantage an employee as an affected party, then regard must be had both in assessing whether there are reasonable prospects and in exercising of the balance of competing rights to the different positions of the parties in relation to the company.[846]

31.12 Protection of property interests

If during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must obtain the prior consent of that other person unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest. In addition, the practitioner must promptly pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness, or provide security for the amount of those proceeds to the reasonable satisfaction of that other person. The term "title interest" in the subsection includes a reservation of ownership clause in a lease agreement.[847] Section 134(3) allows a company under business rescue to dispose of property that is subject to security or a reservation of ownership clause without the consent of the creditor concerned only if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by the security.

Section 134(1)(c) provides that despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing. The key concept in section 134(1)(c) is the lawful possession of the company. In *Southern Value Consortium v Tresso Trading 102 (Pty) Limited NO*, it was found that a company was no longer in lawful possession of property after the cancellation of a lease, and as such, the court held that in such a case section 134(1)(c) did not apply, as the company was not in the lawful possession of the property.[848]

31.13 Investigation of the affairs of the company

Chapter 6 of the 2008 Companies Act affords business rescue practitioners significant and wide-ranging management powers. As discussed above, during the course of business rescue proceedings, business rescue practitioners have free reign to adopt any management, oversight and control functions that they deem appropriate. This is because, in terms of section 140(1)(a), a business rescue practitioner has full management control of the company, in substitution for the board and pre-existing management, for the duration of the business rescue proceedings.

In terms of section 137(5) of the 2008 Companies Act, the practitioner may apply to court at any time during the business rescue proceedings for an order removing a director from office

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846 *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited* (Case No 6418/2011, High Court Pretoria, 8 May 2012 [18]).

847 *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd and Others* 2017 (3) SA 539 (GJ), para [16].

848 2016 (6) SA 501 (WCC), para [32]. See also *Levenstein* 9-22.

on the grounds that the director has failed to comply with a requirement of Chapter 6, or, by any act or omission has impeded, or is impeding, the practitioner in the performance of his powers and duties, the management of the company by the practitioner; or the development or implementation of a business rescue plan. In *Cross-med Health Centre (Pty) Ltd and Others v Crossmed Mthatha Private Hospital (Pty) Ltd and Another*, an order for the removal of a director by the court in terms of this provision was granted in circumstances where evidence disclosed that such director, in a dishonest and clandestine manner, impeded the business rescue practitioners in the performance of their powers and functions and in their management of the company.[849]

In addition to the above, in terms of section 141 of the 2008 Companies Act, the business rescue practitioner is required to investigate the affairs, business, property and financial situation of the company. In this regard, section 141(2) provides as follows:

If, at any time during business rescue proceedings, the practitioner concludes that –

(a) there is no reasonable prospect for the company to be rescued, the practitioner must –

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;[850]

(b) there are no longer reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and –

(i) if the business rescue process was confirmed by a court order, or initiated by an application to the court, apply to a court for an order terminating the business rescue proceedings; or

(ii) otherwise, file a notice of termination of the business rescue proceedings.

Section 141(2) does not apply if a better return is received by creditors compared to the dividend to be received by creditors upon the immediate liquidation of the company.[851]

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849 (357/2018) [2018] ZAECGHC 24 (29 March 2018). See also *Levenstein* 9-50(4). See also *Henochsberg* 526(36)-(37).

850 In *Western Crown Properties 61 (Pty) Ltd v Able Walling Solutions (Pty) Ltd* (8073/16) [2017] WCC (13 November 2017), para [21], the court found that if business rescue proceedings ended in terms of s 132(2), when the business rescue practitioner gave notice of such termination the practitioner was thereafter under no obligation under s 141(2)(a)(ii) to apply for the liquidation of the company since business rescue proceedings no longer continued.

851 *Carroll v Michael Carroll CC In re: In the application for the Liquidation of Michael Carroll CC (Under Supervision)* 2018/22808) [2019] ZAGPPHC 74 (15 March 2019), para [29].

In terms of section 141(2)(c), if there is evidence in the dealings of the company before the business rescue proceedings began of –

(a) voidable transactions, or the failure by the company or any director to perform any material obligation relating to the company, the practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps;

(b) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must –

(i) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

(ii) direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.

In relation to section 141(2)(c)(i), it is worth noting that no definition of "voidable dispositions" appears in the 2008 Companies Act and the use of the word "voidable" does not necessarily translate to "voidable dispositions" as set out in the Insolvency Act, 1936. It is also unclear whether "voidable" is a reference to what would be "voidable" in terms of the common law or the law of contract. It is submitted, however, that voidable transactions should be interpreted as referring to actions taken by the company, and which fall to be set aside owing to prejudice or potential liability or financial exposure of the company and which could be dealt with by the practitioner in the business rescue plan.[852]

In addition to the above, it is submitted that the provisions of section 141(2) do not make much sense; it is not clear why matters should be referred to the members of management for further action when they are the persons who entered into the questionable transactions in the first place. It is to be noted that the insolvency provisions for voidable transactions, and the machinery to gather information or evidence in this regard, are not made applicable to business rescue proceedings. In *Stalcor (Pty) Ltd v Kritzinger NO*, the court declined an invitation to develop the common law by extending the scope of section 141(2)(c). The court stated that before a judge can embark upon such an exercise, a party calling upon the court to do so has to demonstrate there are *facta nova* and *lacuna* in the existing law. [853]

31.14 First meeting

Within ten business days after being appointed, the practitioner must convene and preside over a first meeting of creditors at which the practitioner must inform the creditors whether he believes that there is a reasonable prospect of rescuing the company. The practitioner may also receive proof of claims by creditors at this meeting. At the first meeting, the creditors may determine whether or not a committee of creditors should be appointed and, if so, may

852 See *Levenstein* 9-47. See also *Henochsberg* 526(56).
853 (1841/2012) [2016] FB (21 January 2016); [2017] JOL 37785 (FB).

appoint the members of the committee. At any meeting except where the proposed rescue plan is considered (see below), a simple majority carries the day.

31.15 Consideration of business rescue plan

The practitioner, after consulting the creditors, other affected persons, and the management of the company, is obligated to prepare a business rescue plan for consideration and possible adoption at a meeting convened for this purpose. In *Hlumisa Investment Holdings (RF) Limited and Another v Van der Merwe NO and Others*,[854] the court stated that it was clear from a simple reading of section 150(1) that shareholders, as "affected persons", must be consulted on a proposed business rescue plan. The court further stated that there is a clear distinction between "informing" and "consulting". At a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice. It is submitted that the consideration of the business rescue plan is the most significant part of the business rescue process, as the business rescue plan will ultimately, if voted in and approved, give the company a chance to be rescued.

At a meeting convened in terms of section 151, the practitioner must –

(a) introduce the proposed business rescue plan for consideration by the creditors and, if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees' representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to-

  (i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests,[855] and satisfactory to the practitioner; or

  (ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).[856]

It is evident from section 152 that a formal meeting is required where various stakeholders, namely employees and known creditors, will have an opportunity to address the meeting,

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854 (77351/2015) [2015] ZAGPPHC 1055 (14 October 2015). See also *Henochsberg* 534.

855 If an amended plan has not been seconded by holders of creditors voting interests, it cannot be validly amended in terms of s 152(1)*(d)*(i) – *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP), para [50].

856 2008 Companies Act, s 152(1)(e).

exercise their rights to vote or request an adjournment of the meeting so that a revised plan may be presented, if needed. All of the aforesaid requires detailed minutes to show statutory compliance.[857]

Section 150 contains detailed provisions of the information that must be contained in a proposed plan. In *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)*,[858] the court rejected the argument that a business rescue plan may not permissibly incorporate a compromise with creditors. Section 150(2) requires that the proposals in a business rescue plan must include the extent to which the company is to be released from the payment of its debts. This provision read with section 154(1) makes it clear that a business plan may incorporate elements of a compromise with creditors.

The proposal and implementation of the plan is the most important aspect of the process. The legislature has not been prescriptive as to what a business rescue plan must contain in regard to how the business should be rescued. However, the detailed information required in terms of section 150 is to ensure that sufficient information is placed before the creditors and other stakeholders in order that they may make an informed decision regarding the adoption (or not) of the plan. Chapter 6 has merely created a framework within which a rescue plan can be developed.[859] Substantial compliance with the provisions of the Act is sufficient for this purpose.[860]

The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by the court on application by the company, or the holders of a majority of the creditors' voting interests.[861]

A rescue plan is adopted by creditors (subject to approval by holders of securities if their interests are affected) if it is supported by 75% of voting interests and 50% of independent

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857 *Vengadesan NO and Another v Standard Bank Limited* (7415/2017) [2018] ZAKZDHC 59 (30 November 2018), para [11].

858 2017 (3) SA 74 (WCC), para [35]. See also *Levenstein* 8-44. See also *Henochsberg* 535.

859 *Gormley V West City Precinct Properties (Pty) Ltd* (Case No: 19075/11, High Court Cape Town, 18 April 2012, para 7).

860 *Commissioner, South African Revenue Service v Beginsel NO and Others* 2013 (1) SA 307 (WCC) [38]. See *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP), paras [45] to [46], for a decision where an adopted plan fell short of the minimum requirements set out in s 150(2).

861 2008 Companies Act, s 150. In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP), para [32], the court remarked *obiter* that a meeting must be convened and a vote taken in order for it to be said that a majority of creditors "allowed" an extension of time. If this is not done the business rescue proceedings come to an end after the 25 day period lapses as s 150(5) requires that the plan be published within 25 business days after the appointment of the business rescue practitioner. If this is not the case, the application to set aside the business rescue resolution can and should bring them to an end by setting aside the resolution on the just and equitable ground. The court in *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP) [38] disagreed with the *DH Brothers* decision and stated that s 150(5)(b) does not expressly require a meeting to be held. The court stated there is no formality other than that the extension be allowed by "the holders of a majority of the creditors" voting interests.

creditors' voting interest. The whole scheme of the provisions of section 150 to 153 of the 2008 Companies Act is such that there is no room for a business rescue practitioner to reserve himself the right to amend a business rescue plan. By doing so, he would effectively circumvent the procedure set out in the 2008 Companies Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force. A right to amend the plan can at best only be a right to amend the *proposed* plan (that is, the draft plan) prior to its adoption by the creditors at a meeting and not thereafter.[862]

In *Arqomanzi (Pty) Ltd v Vantage Goldfields (Pty) Ltd and others*,[863] the court held that a business rescue practitioner may not unilaterally (and without the involvement of creditors) make substantial amendments to an adopted business rescue plan. The court further held that the legislative framework requiring the adoption and consideration by creditors and other affected parties of a proposed plan may not be subverted.

A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of the 2008 Companies Act. The court has no power to cram down a plan on creditors which they have not discussed and voted on at such a meeting.[864]

A secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company. There are intricate rules to determine the voting interest of a concurrent creditor who would be subordinated in liquidation proceedings. This is dealt with in section 145(5) of the 2008 Companies Act. In *Commissioner, South African Revenue Service v Beginsel NO and Others*, the court stated that the creditors referred to in section 145(4)(b) is not a reference to all the concurrent creditors, only to those who subordinated their claims in liquidation in terms of a subordination or back-ranking agreement.[865]

The practitioner must determine whether a creditor is independent by applying the rules set out in section 145(5).

There are special provisions for the rights of employees. To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings (and had not been paid to that employee immediately before the beginning of those proceedings), the employee is a "preferred unsecured creditor". The term "preferred unsecured creditor" is not defined in the 2008 Companies Act.

An adopted plan is binding on the company in business rescue, and all the creditors and holders of the company's securities. Once adopted or approved in terms of section 152, a business rescue plan forms the foundation of the business rescue proceedings to which all

862 *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC), para [67].
863 (Case no. 549/2021) ZAMPMBHC, Legodi JP (31 May 2021).
864 *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five* (624/2016) [2017] ZASCA 131 2017 (3) SA 539 (GJ), para [18].
865 2013 (1) SA 307 (WCC), para [30].

the affected persons are bound. It is binding on the company, on each creditor and on every holder of securities of the company whether or not that person was present at the meeting, voted in favour of adoption of the plan or in the case of creditors, had proven their claims against the company.[866] Dissenting creditors are forced to accept a business rescue plan, even against their wishes, thereby enabling the business rescue to proceed despite their opposition to the plan. It is with this object in mind that the legislature saw fit not to provide a disgruntled party with a judicial remedy to seek to set aside the adoption of a business rescue plan.[867] It is therefore not open to any "affected person" to seek to set aside a plan after it has been adopted.[868] It is also not permissible for an "affected person" to seek to set aside the proceedings of the second meeting of creditors in terms of which a business plan was adopted.[869]

In terms of section 154(1), a business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it. Accordingly, a company's debt may be discharged once a business rescue plan is implemented.

In *Van Zyl v Auto Commodities (Pty) Ltd*,[870] the Supreme Court of Appeal held that where a provision contemplating a discharge of debt is contained in the business rescue plan and a creditor "accedes" to such discharge, the debt will cease to exist and the creditor who has acceded to the proposal will not only lose the right to enforce the debt owed to them by the company in business rescue, but the debt itself is discharged. The court further held that although it is unclear as to what is required for a creditor to "accede" to the discharge of the debt, the most obvious way would be by voting in favour of the business rescue plan that provides for such discharge.

In terms of section 154(2), if a business rescue plan has been approved and implemented in accordance with Chapter 6, a creditor that is owed a debt immediately before the beginning of the business rescue process is not entitled to enforce any debt owed to it by the company, except to the extent provided in the business rescue plan.[871] In terms of section 132(1),

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866 In *Stalcor (Pty) Ltd v Kritzinger NO* (1841/2012) [2016] FB (21 January 2016); [2017] JOL 37785 (FB), para [39], the court found that it was no one's fault but the creditor's if its debt was only partially provided for in the business rescue plan. Because part of the debt was excluded, the creditor was precluded by s 154(2) from enforcing, directly or indirectly, any part of the debt not provided for in the business rescue plan.

867 *Cf Stalcor (Pty) Ltd v Kritzinger NO* (1841/2012) [2016] FB (21 January 2016); [2017] JOL 37785 (FB), para [44], where the court held that in an application for the setting aside of a business rescue plan every creditor of the company in financial distress had a direct and substantial interest in the matter and should therefore be joined. Failing to do so was a fatal defect that could not be cured by mere notice in terms of s 130.

868 *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC), para [74].

869 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP), para [59].

870 (279/2020) [2021] ZASCA 67.

871 In the case of a disposition that is void in terms of s 341(2) of the 1973 Companies Act (a disposition after the commencement of the winding-up) the debt is owed as soon as the disposition is made – *Eravin Construction CC v Bekker NO* (2016 (6) SA 589 (SCA), para [21].

business rescue proceedings begin when (i) the company files a resolution to place itself under supervision in terms of section 129(3); or (ii) applies to the court for consent to file a resolution in terms of section 129(5)(b); or (iii) an affected person applies to the court for an order placing the company under supervision in terms of section 131(1); or (iv) a court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 131(7).

31.16 The position of sureties

There has been some measure of confusion concerning the impact of an approved and implemented business rescue plan on the position of sureties. Although, the judgments in *Tuning Fork (Pty) Limited t/a Balanced Audio v Greeff and Another*[872] and *New Port Finance Company (Pty) Limited and another v Nedbank Limited*,[873] were often referred to as the main authorities on this issue, the perceived differences between the two decisions led to some uncertainty. In view of this, the Supreme Court of Appeal in *Van Zyl v Auto Commodities (Pty) Ltd*,[874] set out to finally determine the point.

In *Van Zyl*, the Supreme Court of Appeal confirmed that, in view of the accessory nature of a suretyship, the liability of a surety is dependent on the existence of the obligations of a principal debtor. The result of this is that if a principal debtor's obligations (or debt) is discharged whether by payment or release, the surety's obligations under the suretyship would likewise be discharged. This is, of course, subject to any terms of the deed of suretyship that may preserve the surety's liability notwithstanding the release or discharge of the principal debtor.

Based on the court's findings in respect of sections 154(1) and (2), as discussed in detail above, the court held that whilst a creditor cannot enforce the debt that the company owed to it when business rescue commenced (due to the operation of section 154(2)), this did not necessarily mean that the amount is no longer owning to the creditor. The inability to enforce a debt does not equate to a discharge of the debt. This is in contrast with the position under section 154(1), which contemplates a complete discharge of the debt, by virtue of the creditor "acceding" to such discharge. On this basis, the court held that section 154(2) does no more than render the debt unenforceable, to some extent, against the company (as principal debtor), but leaves the suretyship and the obligations of the surety untouched. Accordingly, section 154(2) does not affect or extinguish the liability of a surety for a debt of the company.

31.17 Failure to adopt the business rescue plan

If a business rescue plan has been rejected (not approved) the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that

872 [2014] JOL 31949 (WCC); 2014 (4) SA 521 (WCC), paras [85] and [86].
873 2016 (5) SA 503 (SCA), para [14].
874 (279/2020) [2021] ZASCA 67.

such vote was "inappropriate". This process will of course attract additional costs and could lead to the practitioner becoming embroiled in on-going litigation rather than the primary goal of rescuing the company.[875] Nevertheless, if the practitioner does not take such action, any affected person present at the meeting may call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan, or apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was "inappropriate".

In *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another*,[876] a dissenting creditor's vote against the adoption of the business plan was set aside as irrational where the creditor voted against the business rescue plan, notwithstanding the fact that in the absence of such a plan it would not receive a larger dividend in liquidation. In *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC*,[877] the court disagreed with the *Copper Sunset* decision. The court stated that the enquiry into inappropriateness as a ground to set aside a vote on a business rescue plan should be viewed purely from the perspective of the persons who voted against the plan. Considerations such as the loss of jobs by employees was not one of the factors a court should take into account, at least not directly, in the evaluation of an application in terms of section 153. The court did not think that the purpose of the 2008 Companies Act would be advanced by vesting in the courts a power to impose upon business people financial risks which they, on honest reflection, judged ill advised.

In *Ex parte: Target Shelf 284 CC (In Business Rescue); Commissioner, South African Revenue Service and Another v Cawood NO and Others*[878] the court was of the opinion that a court was enjoined to consider whether it was reasonable and just to set the vote aside even where it made a finding that the vote is appropriate. The court also pointed out that Chapter 6 of the Act makes it clear that creditors have the strongest right to consultation regarding the development of a business rescue plan. They have the biggest financial interest in the outcome of the proposed business rescue. As such practitioner(s) must prepare a business plan after consultation with the creditors.The court held that, in the circumstances, the creditor's requirements for the business rescue plan were not unreasonable. The concerns were raised in order to safeguard the creditor's interests. The practitioners were given time to amend the business rescue plan but failed to address the creditor's concerns in the amended plan. Despite being clearly apprised of the creditor's position, the practitioners proceeded in formulating a plan contrary to the concerns raised. As such it was not surprising that even though the creditor had participated in the development of the plan from its inception, in the end it voted against the adoption of the amended plan. It was evident that the creditor voted in good faith and in its best interest under the circumstances.[879]

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875 *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) [56].

876 2014 (6) SA 214 (LP). See also *Levenstein* 9-36(3). See also *Henochsberg* 550(2).

877 (47327/2014) [2015] GP (9 March 2015), paras 38, 44. See also *Levenstein* 9-134(21). See also *Henochsberg* 550(3).

878 [2017] JOL 37690 (GP), para [33].

879 *Ibid.* at paras [36] and [44].

In terms of section 153(1)(b)(ii), any affected person (or combination of affected persons) may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan at a value independently and expertly determined,[880] on the request of the practitioner, to be a fair and reasonable estimate of the return to that person (or those persons) if the company were to be liquidated.

The "binding offer" principle contemplated in section 153(1)(b)(ii) is a novel concept in South African law. The aim of section 153(1)(b)(ii) is to ensure that those affected persons who wish to vote in favour of a plan that has not been approved are given an opportunity to buy out voting interests in order to get to the required threshold of 75 per cent as set out in section 152(2). In this way, this provision prevents deadlocks and forces dissenting or holdout creditors to sell out at negligible value. All creditors who oppose the adoption of the plan by voting it down are therefore at risk, as they can be bought out at liquidation value, if they dissent on the vote. Liquidation value refers to a fair and reasonable estimate, independently and expertly determined, of what the holder of a voting interest would receive if the company were to be liquidated.[881]

In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*[882] (after several disagreements with the decision in *African Banking Corporation*),[883] the court stated the following in passing: The "binding offer" of section 153(1)(b)(ii) is an offer that cannot be withdrawn by the offeror; it is open to acceptance or rejection by the opposing creditors to whom it is made; if accepted it gives rise to an agreement of purchase and sale for cash; the acceptance or rejection need only take place once the value has been finally determined; the independent expert is therefore obliged to reach a determination by the date of the adjourned meeting; the voting interests are transferred on payment of the determined sum; once this has taken place, the voting interests are settled and the vote on the plan can take place.[884]

In *African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others*[885] the Supreme Court of Appeal agreed with the decision in *DH Brothers* and set aside the decision of the court *a quo*. A binding offer in terms of section 153(1)(b)(iii) of the Companies 2008, to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, is binding on the person who made the offer, not on the person to whom the offer is made without acceptance of the offer. In other words, once a binding offer is made to purchase a voting interest, the holder of the voting interest is not summarily divested of it without being able to determine the affordability of the offer on the part of the

880 Where the expert categorically stated that he had not independently valued the assets and liabilities but had taken these values from others, the determination of the value did not pass muster as complying with the provisions of s 153(1)(b)(ii). The offer made by the opposing creditors was therefore not an offer as envisaged in that section and the offeror did not acquire the voting interests of the opposing creditors – *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP), para [61].

881 See *Levenstein* 9-134(25) – 9-135.

882 2014 (1) SA 103 (KZP), para [60]. See also *Henochsberg* 550(5).

883 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP).

884 See *Levenstein* 9-140.

885 2015 (5) SA 192 (SCA), paras [19] and [21]. See also *Levenstein* 9-139. See also *Henochsberg* 550(6).

offeror. As such, the offeree is therefore not in the position to force the offeree to accept the offer. It is submitted that this judgment waters down the ability to cram-down the business rescue plan on dissenting creditors in that it puts the offeree in a position to determine whether the offer to buy out its voting interest is acceptable or falls to be rejected.

In terms of section 153(7), on application by the practitioner or an affected person a court may order that the vote on a business rescue plan be set aside[886] if the court is satisfied that it is reasonable and just to do so, having regard to –

(a) the interests represented by the person or persons who voted against the proposed business rescue plan;

(b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and

(c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

Courts will have to deal with applications to set aside votes on the grounds that such dissenting votes were inappropriate, on a case-by-case basis, granting relief where the facts of the case support the setting aside of a vote.

According to *FirstRand Bank Ltd v KJ Foods CC (In Business Rescue)*[887] it is clear that section 153(1)(a)(ii) and section 153(1)(b)(i)(bb) are inextricably linked to section 153(7). On an application to set aside the result of a vote in terms of any of these subsections, the court is enjoined by section 153(7) to determine only whether it is reasonable and just to set aside the particular vote, taking into account the factors set out in section 153(7)(a) to (c) and all circumstances relevant to the case, including the purpose of business rescue in terms of the 2008 Companies Act. The vote would be set aside on application on the grounds that its result was inappropriate, if it is reasonable and just to do so in terms of section 153(7). The court disagreed with the view that a two-pronged approach is necessary to determine whether the result of a vote should be set aside (first determine whether the vote was inappropriate and only if it finds that the vote was inappropriate, can the court proceed to consider whether, taking this into account, it would be reasonable and just to set the vote

886 2008 Companies Act, s 153(7). It has been held that creditors must be joined in an application to set aside a business rescue plan as invalid - notice in terms of section 130 is not sufficient – *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA), followed in *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five* (624/2016) [2017] ZASCA 131 2017 (3) SA 539 (GJ), para [16]. In *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP) [14] to [31] it was decided that it was not necessary to join creditors in an application to declare a business rescue plan invalid. This order was set aside in *Golden Dividend v Absa Bank* (569/2015) [2016] ZASCA 78 (30 May 2016); [2016] JOL 36032 (SCA).

887 2017 (5) SA 40 (SCA), para [80]. See also *Levenstein* 9-134(22), 9-134(24). See also *Henochsberg* 550(9), 550(12).

aside).[888] The argument that the subjective view of a creditor in voting against the business rescue plan determines whether the vote was inappropriate, is unsustainable in light of the wording of section 153(1).[889] The court further held that once it has found that the vote against the plan was inappropriate and fell to be set aside, there is no need or requirement for the vote to be retaken at the resumption of the proposed meeting. As such, once a vote is set aside, it follows by operation of law that the business rescue plan would be considered to have been adopted, with no further voting envisaged.

In *Ferrostaal GMBH and Another v Transnet Soc Ltd and Others*,[890] in light of the circumstances and competing interests and notwithstanding the uncertainty that would result from a liquidation, it was not possible to find that the result of the vote was inappropriate or that it was reasonable and just to set it aside. If the court sets aside the vote, it follows by operation of law that the business rescue plan would be considered to have been adopted for no further voting is envisaged. At the resumption of the meeting of creditors that had been adjourned in terms of section153(2)(b), it would only be necessary for the business rescue practitioner to report on the outcome of the application to court.[891]

If no person takes any of these actions the practitioner must promptly file[892] a notice of the termination of the business rescue proceedings in terms of section 153(5). In *The Commissioner of the South African Revenue Services: In re the Ex Parte Application of Primrose Gold Mines (Pty) Ltd*,[893] the court held that the filing of a notice of termination of business rescue proceedings by a practitioner in terms of section 132(2)(b) can only occur where a company is no longer in distress. In other words, it was held that if a company is still financially distressed, the filing of the notice of termination by the practitioners is invalid and the practitioner remains in office.

On appeal in *Commissioner for the South African Revenue Service v Primrose Gold Mines (Pty) Ltd and Others*,[894] the court held that the interpretation of the 2008 Companies Act by the court a *quo* was untenable and unduly restrictive. It would mean that all business rescue proceedings ended either in liquidation at the instance of the business rescue practitioner or when the company was no longer financially distressed. That was not the correct legal position. The proposition ignores the effect of section 153, namely that where a business

888 At para [72]. *Cf Collard v Jatara Connect (Pty) Ltd* 2018 (5) SA 238 (WCC), para [20] where the court set aside a vote where the only inference that could be drawn from the vote against the adoption of the business rescue plan was the intention of frustrating arbitration proceedings against the creditor. Approval of the business rescue plan would in all probability have provided creditors with a better return than winding-up.

889 At para [79].

890 2019 (6) SA 490 (WCC), para [55]. See also *Levenstein* 9-134(24). See also *Henochsberg* 550(12).

891 At paras [88] and [89]; this finding was confirmed on appeal in *Ferrostaal GmbH and Another v Transnet Soc Ltd t/a Transnet National Ports Authority and Another* (1194/2019) [2021] ZASCA 62 (25 May 2021).

892 There is no regulation that prescribes the form of the notice of termination contemplated in s 153 or the manner of delivery. If a notice of termination is filed it *ipso facto* becomes effective. The CIPC has no adjudicative function in this regard, its role is simply to receive and deposit documents required to be filed in terms of the Act – *Commissioner for the South African Revenue Service v Primrose Gold Mines (Pty) Ltd and Others* (A932/14) [2016] ZAGPPHC 737 (23 August 2016), para [17].

893 (56581/2014) [2014] GP (12 September 2014), para [19].

894 (A932/14) [2016] ZAGPPHC 737 (23 August 2016).

rescue plan has been rejected, affected persons, including the creditors and not only the business rescue practitioners, should be allowed to pursue their rights against the company. It did not axiomatically follow from the failure to adopt a particular business rescue plan that there was no reasonable prospect for the company to be rescued. Nonetheless, it was held that once the practitioner filed the notice of termination in terms of section 153(5), the business rescue proceedings ended in accordance with the general provisions of section 132(2)(b). Accordingly, in this case, the business rescue proceedings ended when a notice of termination was filed in terms of section 153(5).

Once a finding has been made that there was a failure on the part of the business rescue practitioner to comply with the Act, it follows that the business rescue proceedings have to come to an end (see section 153(1)(*a*) of the Act which regulates the proceedings when a business rescue plan has not been adopted). In light of this finding the court may direct the business rescue practitioner to file a notice of the termination of the business rescue proceedings in respect of the company forthwith.[895]

Section 153 does not apply if there was no vote on the plan.[896] The business rescue practitioner becomes *functus officio* after the business rescue proceedings have ended in terms of section 132(2)(c)(i), namely after the business rescue plan has been proposed and rejected and any subsequent decisions purportedly taken on behalf of the business rescue practitioner are null and void.[897]

31.18 Compromise with creditors (section 155, 2008 Companies Act)

Sections 311 to 313 of the 1973 Companies Act, which dealt with compromises and arrangements, were repealed when the 2008 Companies Act came into operation on 1 May 2011. Section 155 of the 2008 Companies Act replaces sections 311 to 313.

A company may find it necessary to negotiate with creditors[898] and shareholders having claims against the company in order to reach a situation that is more beneficial to the company. Due to the fact that such claims normally vest in a large group, it is not always possible to deal with each creditor individually.

The need for a procedure thus arose through which it would be possible for a company to deal with the group of claimants as a whole and to which the whole group would be bound by the decision of the majority. The 1973 Companies Act created a mechanism in terms of sections 311 to 313 for the conclusion of such an enforceable arrangement.

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895 *Vengadesan NO and Another v Standard Bank Limited* (7415/2017) [2018] ZAKZDHC 59 (30 November 2018), para [20].

896 *South African Bank of Athens Limited and another v Zennies Fresh Fruit CC* 2018 (3) SA 278 (WCC), para [33].

897 *Landosec (Pty) Ltd t/a Lasertech v Mclaren* (2231/2015) [2015] ECP (3 November 2015).

898 The South African Revenue Service does not have the power to compromise its statutory duty to collect taxes, provided that if it is clear that it would in any event not receive a greater dividend in the liquidation of the taxpayer, nothing prevented such claim form being compromised to the recoverable extent, whether by the creditor's actual consent or by sanction of the scheme by the court – *Commissioner for the South African Revenue Service v Logikal Consulting (Pty) Ltd and Others* 2019 (6) SA 472 (GP), para [16].

Unless a company is engaged in business rescue proceedings, the board of the company or a liquidator of the company being wound up may propose an arrangement or compromise of its financial obligations to all of its creditors, or to all of the members or any class of its creditors, at a meeting convened with notice to the creditors and the CIPC.[899]

The 2008 Companies Act contains detailed provisions regarding the contents of the proposal.[900] A proposal is adopted by the creditors of the company, or a class of creditors, if it is supported by a majority in number, representing at least 75% in value of the creditors or class present and voting in person or by proxy, at a meeting called for that purpose.[901] The class to which creditors belongs is based primarily on the similarity of rights against the company.[902] There are usually three classes of creditors following the ranking under the Insolvency Act – that is, secured, preferent and concurrent creditors, but where necessary this division can also be narrowed or expanded.

If a proposal is adopted, the company may apply to court[903] for an order approving the proposal. The court may sanction the compromise as set out in the adopted proposal if it considers it just and equitable to do so, having regard to i) the number of creditors of any affected class of creditors who were present or represented at the meeting and who voted in favour of the proposal and ii) in the case of a compromise in respect of a company being wound up, the report of the Master on suspected contraventions or offences and whether or not any director or officer or past director or officer of the company is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company.[904]

A proposal sanctioned by the court is final and binding on all of the company's creditors or all of members of the relevant class of creditors, as the case may be, as of the date on which the court order is filed with the CIPC.[905]

899 See *Henochsberg* 553, 560(5).
900 See *Henochsberg* 554.
901 See *Henochsberg* 560(2D).
902 In *Commissioner for the South African Revenue Service v Logikal Consulting (Pty) Ltd* (96768/2016) [2018] GNP (29 March 2018), paras [58] and [60], the court held that the rights of the employees and the rights of SARS were not the same. The employees enjoyed a preference above SARS and the grouping together of these creditors into one class did not comply with the requirements of s 155(2). See also *Henochsberg* 560-560(2A).
903 *Ibid*, para [68]. The court held that on the facts of the case SARS ought to have been joined as a party to the application to sanction the compromise.
904 See *Henochsberg* 560(2D)-560(3).
905 See *Henochsberg* 560(5)-560(9).

Self-Assessment Questions

Question 1

Briefly discuss the two ways in which business rescue proceedings may commence (that is, the two entry routes into the business rescue process), and list the individual requirements that must be satisfied for each. (8)

Question2

Briefly discuss the general moratorium on legal proceedings, as contemplated in section 133 of the Companies Act, 2008. (2)

Question 3

Briefly discuss the requirements for the adoption (or approval) of a business rescue plan in terms of section 152 of the Companies Act, 2008. (2)

Question 4

True or False: An application to commence business rescue proceedings suspends liquidation proceedings that have already been commenced by or against the company. (1)

Question 5

Briefly discuss post-commencement finance, and its significance to the business rescue process. (6)

Question 6

True or False: A business rescue practitioner may not suspend a contractual obligation of the company, during business rescue proceedings. (1)

For feedback on these self-assessment questions, see Appendix A

CHAPTER 35 – CROSS-BORDER INSOLVENCIES

35.1 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. In recent years there has been an increasing number of instances where the assets of an insolvent person have been located in more than one country. In addition, there have been many cases where the business activities of an insolvent entity have been international. Particular problems have emerged through the insolvency of the multinational form of enterprise. In part, the initial and often theoretical consideration of the position concerning an insolvent natural person with assets located in two or more countries has been overtaken by intense contemporary concentration on the insolvency of an enterprise which has cross-border effects and a search for an appropriate practical means of dealing with the problem.[906]

South African courts will, in terms of *Jones v Krok*,[907] enforce a foreign judgment if certain requirements, based largely on the Roman Dutch common law, are met, namely-

(1) the foreign court must have had international competence as determined by South African law;

(2) the judgment must be final and conclusive and must not have become superannuated;

(3) the enforcement of the judgment must not be contrary to South African public policy (which includes the rules of natural justice);

(4) the judgment must not have been obtained by fraudulent means;

(5) the judgment must not involve the enforcement of a penal or revenue law of the foreign state; and

(6) enforcement must not be precluded by the Protection of Businesses Act 99 of 1978.

However, these requirements are not the only requirements relevant for enforcement in South Africa of foreign collective insolvency proceedings. In this regard, UNCITRAL (the United Nations Commission on International Trade Law) completed Model Legislative Provisions on Cross-Border Insolvency at its 30th session held in Vienna during May 1997. 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-

906 Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies, Expert Committee's Report on Cross-Border Insolvency Access and Recognition, Draft 1 March 1995, para 4.1 at 4.

907 1995(1) SA 677(A).

border insolvency and give favourable consideration to UNCITRAL's Model Law on Cross-Border Insolvency.[908] South Africa has enacted the Cross-Border Insolvency Act 42 of 2000 which is based on UNCITRAL's Model Law (see below).

On 1 July 2009, UNCITRAL adopted the UNCITRAL Practice Guide on Cross-border Insolvency Co-operation[909] with detailed guidelines to judges on court-to-court co-operation and information on protocols.

35.1.1 Inbound Recognition - Cross-Border Insolvency Act 42 of 2000

The stated purposes of the UNCITRAL Model Law 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 maximisation 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. 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. However, the Model Law was amended in the Cross-Border Insolvency 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) imminent.[910]

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908 The *Model Law with Guide to Enactment* (Guide) is available on the UNCITRAL website (go to "Adopted Texts" and then to "Cross-Border Insolvency").

909 Available on the UNCITRAL website.

910 In *Ex parte van Straten* (22678/14) [2014] WCC (19 December 2014) the court granted an order for the recognition of foreign proceedings by which the applicant was appointed a liquidator upon an application contemplated by the Cross-Border Insolvency Act 42 of 2000**.** All the sections referred to by the applicant apply to a "foreign proceeding" which is defined in section 1(g) as "collective judicial or administrative proceedings *in a foreign State*". "Foreign state" is defined in s 1(i) as "a State designated under section 2 (2)". As stated by the applicant in para 7 of the Notice of Motion, the Minister of Justice and Constitutional Development had not designated Namibia in terms of s 2(2). It is submitted that the Cross-Border Insolvency

35.1.2 Inbound Recognition - Common Law

Nevertheless, 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, an order was granted in 2012 where the High Court of South Africa, Kwazulu-Natal Division in Durban, recognised reorganisation 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 recognise foreign liquidators or administrators and to give them certain powers in South Africa. This order now sets the precedent for the recognition of foreign bankruptcy proceedings.

As a consequence of the OSG case, a similar outcome was achieved in a subsequent application to the Durban High Court on behalf of Korean Line Corporation, pursuant to which the court recognised a rehabilitation order granted by the Seoul Central District Court, Bankruptcy (Fourth Division) in terms of the Korean Debtor Rehabilitation and Bankruptcy Act. I have regrettably been unable to obtain a copy of this order.

35.1.3 Outbound Recognition – US Bankruptcy Code

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.

South African business rescue proceedings have been recognised under Chapter 15 abroad, in the United State of America by the United States Bankruptcy Court, Southern District of New York in respect of Comair Limited.

But, even before the business rescue proceedings of Comair Limited was recognised as aforesaid, in *In re Edcon Holdings Ltd,*[911] the US Bankruptcy Court entered an order summarily recognising a South Africa compromise proceeding under section 155 of the

Act 42 of 2000 should not have been applied to this matter and that it is not applicable to any matter until the Minister has designated States in terms of s 2(2).

911 Order Granting Petition for (i) Recognition as Foreign Main Proceedings, (ii) Recognition of Foreign Representative, and (iii) Related Relief under Chapter 15 of the Bankruptcy Code [Dkt. No. 21], In re Edcon Holdings Ltd., No. 16-13475(SCC) (Bankr. S.D.N.Y. Jan. 19, 2017)

Companies Act 71 of 2008 ("Companies Act") as a foreign main proceedings pursuant to 11 USC article 1517 under Chapter 15 of the US Bankruptcy Act and recognising and rendering enforceable Edcon's compromise (and related orders and documents) upon its effective date. Further, in *In re Cell C Proprietary Ltd*,[912] the US Bankruptcy Court entered an order under Chapter 15 of the US Bankruptcy Act recognising as a foreign main proceeding a South African case approving Cell C's scheme of arrangement, and subsequently entered an order recognising and enforcing the arrangement itself.

The fact that foreign jurisdictions are willing to recognise South African proceedings are relevant when a South African Court considers the principle of comity.

35.1.4 Outbound Recognition - OHADA (the Organisation pour l'Harmonisation en Afrique du Droit des Affaires)

A Uniform Act Organizing Collective Proceedings for Wiping Off Debts dated 10 September 2015 (the "Uniform Act") entered into force on 24 December 2015.

OHADA is the French acronym for "the Organisation for the Harmonisation of Business Law in Africa", which was founded on 17 October 1993 with the Port Louis (Mauritius) Treaty and now comprises 17 sub-Saharan states. These states have established a cross-border regime of uniform laws regulating most areas of business law, which are immediately applicable in the 17 member states and prevail over national laws in case of conflict. OHADA law, which is inspired by French law, has therefore been a key body of rules for companies operating in West Africa.

The Uniform Act includes a cross-border insolvency regime based on the UNCITRAL Model Law (Art. 246 et seq.).

35.1.5 Outbound Recognition - European Union Regulation

The Council of the European Union has 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 centre of main interest (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.[913] Proceedings do not affect rights in rem and may be ignored if they are contrary to the public policy of another country.

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912 *In re Cell C Proprietary Ltd*, 571 BR 542, 544-45 (Bankr SDNY 2017).

913 Note, however, *Connock & Anor v Fantozzi, Re Alitalia Linee Aeree Italiane SPA* [2011] EWHC 15 (Ch) where it was decided that assets within the scope of secondary proceedings must be disposed of in accordance with the domestic law of the secondary proceeding.

35.3 Common law

35.3.1 Change when Cross-Border Insolvency Act becomes effective

The position set out below will change for States designated in terms of the Cross-Border Insolvency Act. 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.

35.3.2 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[914] and convenience play an important role in the exercise of the discretion of the court to recognise a foreign trustee or liquidator[915], 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.

That is, a foreign Court will be far less likely to recognise and enforce collective insolvency orders of a South African Court, if it can be shown that South African Courts do not recognise and enforce collective insolvency orders of foreign courts.

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.

Moreover, 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.

35.3.3 External Companies

In 1973, when the previous Companies Act 61 of 1973 was enacted, and well before the Constitution, South Africa was isolated internationally. So it could not assume reciprocity would be available to it in cross border insolvency situations and as a result the 1973 Companies Act provided for the unilateral liquidation of external companies by South African Courts. Nevertheless, even under previous dispensation, in terms of the provisions of section 427 of the 1973 Companies Act, as read with sections 346 and 337 of the 1973 Companies

914 Trusting to receive reciprocal recognition of local orders and appointments in foreign courts.

915 In *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC), para [38], the court stated that principles of international comity would lean towards the hearsay evidence complained of being admitted into the body of evidence, for it would be in the interests of justice to do so. On appeal in *Lagoon Beach Hotel v Lehane* (235/2015) [2015] ZASCA 210 (21 December 2015), para [15], the Supreme Court of Appeal noted that as the veracity of the evidence was at that stage of the process not the primary question but only whether there was evidence that might reasonably be believed and which might reasonably support an interim preservation order, a formal ruling in terms of s 3 of the Law of Evidence Amendment Act 1988 as to the admissibility of every piece of hearsay evidence was not required.

Act, 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. 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.[916]

In this regard, SCA has noted in *Cooperativa Muratori Cementisti - CMC Di Ravenna and Others v Companies and Intellectual Property Commission*[917] (the CMC Judgment), an 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 2008 Companies Act. Indeed, the SCA described this express exclusion of external companies as the "final nail in the coffin for [the] argument" that business rescue provisions of the 2008 Companies Act applied to foreign companies operating in South Africa.

Therefore, external companies are excluded from the provisions of Chapter 6 of the 2008 Companies Act 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 recognised in South Africa.

35.3.3 Territoriality, unity and universality

The territoriality principle implies that a country does not recognise the legitimacy of foreign insolvency proceedings and asserts the sovereignty of domestic law, at least in respect of domestic assets.[918] The view has been expressed that South African insolvency legislation is not intended to have extra-territorial operation.[919] The unity principle has as its object a single "common" insolvency regime with the result that there could only ever be one administration of 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

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916 In the High Court of the Republic of South African, Western Cape Division, Cape Town in the matter of AJVH Holdings (Pty) Ltd & Others v SIHNV and Intervening Parties under case number 7978/2021, before Slingers J – currently under appeal.

917 2021 (3) SA 393 (SCA) para 12.

918 In *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC), paras [49] and [50], it was remarked that no matter what the US Bankruptcy Code provided as regards its extra-territorial application, that in itself was no basis for a conclusion that it had binding force in the Republic. To conclude otherwise would countenance the violation of the territorial sovereignty of the Republic of South Africa. Even if it were to be accepted that the provisions of s 362 of the US Bankruptcy Code did apply extra-territorially and were thus of force in the Republic of South Africa, the worldwide stay contemplated in the US domestic legislation was intended to prevent the institution of a fraudulent transfer action against the estate of a bankrupt person and not an anti-dissipation order in respect of the sale of shares.

919 *Viljoen v Venter* 1981 (2) SA 152 (W) 154H. *Cf Ex parte Steyn* 1979 (2) SA 309 (O) 311E.

insolvency proceeding with the possible support of an ancillary proceeding, or through two or more concurrent proceedings.[920]

35.3.4 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.[921]

35.3.5 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[922] but the principal place of business may afford jurisdiction even if the place of the registered office is elsewhere.[923]

35.3.6 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.[924]

35.3.7 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.[925] In practice, therefore, a foreign trustee or liquidator cannot deal with movable or immovable property in South Africa until he has been recognised by a South African court.

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920 Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies, *Expert Committee's Report on Cross-Border Insolvency Access and Recognition*, Draft 1 March 1995, para 5.1 at 7.

921 *Sackstein NO v Proudfoot SA (Pty) Ltd* 2003(4) SA 348 (SCA). *Cf Viljoen v Venter* 1981 (2) SA 152 (W) 154F.

922 *Cf Ex parte Palmer: In re Hahn* 1993 (3) SA 359 (C) 364E.

923 *Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Ltd intervening)* [2010] JOL 24783 (WCC); 2011 (3) SA 164 (WCC) A 2011 (3) SA, p164.

924 *Deutsche Bank AG v Moser* 1999 (4) SA 216 (C) 219J.

925 *Cf Ex parte Palmer: In re Hahn* 1993 (3) SA 359 (C) 362E; *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA) 179D.

35.3.8 Recognition of provisional judgement or appointment

In *Bekker v Kotzé*[926] 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*[927] 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.

35.4 A South African trustee and foreign assets

35.4.1 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.

35.4.2 Letters of request[928]

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[929] 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. In Gardener v Walters[930] 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.[931]

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926 1996 (4) SA 1287 (Nm).

927 1996 (4) SA 1293 (Nm).

928 This is a request by the local court to a foreign court to assist the South African trustee. See *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC), para [5], for a request by a foreign court for assistance of an Irish representative.

929 1996 (2) SA 677 (O).

930 2002 (5) SA 796 (C) 810H.

931 *Cf Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Ltd Intervening)* [2010] JOL 24783 (WCC); 2011 (3) SA 164 (WCC) A 2011 (3) SA, p164, where the court, while dealing with a request to recognise a foreign representative, decided that the court was not called upon to decide whether the claim which the foreign representative wished to pursue was indeed a valid claim, as long as the representative acted in *bona fide* pursuit of his responsibilities.

35.4.3 Powers of a South African liquidator (foreign dispositions)

In *Sackstein NO v Proudfoot SA (Pty) Ltd*[932] a Namibian company was registered in South Africa as an external company.[933] The company was liquidated and a liquidator appointed first in Namibia and later in South Africa. The South African liquidator applied to have payments from the Namibian estate to a creditor resident in South Africa set aside in terms of sections 29 and 30 of the Insolvency Act, read with section 340 of the Companies Act 1973.[934] The court pointed out that there were two distinct steps in the setting aside of dispositions: firstly, the impeaching of the transaction and, secondly, the recovery of assets. The invalidation was purely an administrative process that did not present jurisdictional problems in this case where the High Court issued the winding-up order, the liquidator was duly and lawfully appointed and the defendant was domiciled within the jurisdiction of the court. The court held that the South African liquidator had a choice either to apply for recognition in Namibia and to prosecute the impeachment and recovery process in that country, or to proceed under section 391 of the Companies Act 1973 to recover and reduce into possession all the assets and property of the company (wherever situate). The liquidator in this case was entitled to act under section 391. If the liquidator succeeded in impeaching the transaction and if the property was outside South Africa, the liquidator had to seek recognition of the court order obtained in South Africa setting the transaction aside, in the foreign country.[935]

35.4.4 Need to consult foreign experts

The trustee should consult experts on the foreign law. These may be experts in the foreign country or local attorneys who have experience in dealing with such matters.[936]

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932 2003(4) SA 348 (SCA).

933 In terms of s 323 of the Companies Act 1973 (repealed by the Companies Act 2008). The company was liquidated and a liquidator appointed first in Namibia and later in South Africa. The Namibian liquidator did not apply for recognition in South Africa. The Namibian court sanctioned a scheme of arrangement and discharged the Namibian liquidator from office.

934 The court pointed out that there was only one legal person, despite independent liquidation proceedings in Namibia and South Africa. The court noted that there might be seemingly irreconcilable conflicts between two liquidators and that a principle of demarcation would have to be developed. In this case there was no conflict because of the discharge of the Namibian liquidator.

935 After the decision of the Supreme Court of Appeal the liquidator applied unsuccessfully in the Witwatersrand Local Division to have the disposition set aside in *Sackstein NO v Proudfoot SA (Pty) Ltd* (Case No 00/8678 decision handed down on 4 February 2005).The court decided that the company was not under winding-up and "unable to pay its debts" – a precondition for the application of the provisions to set aside the disposition in terms of s 340 of the Companies Act 1973. Because of the scheme of arrangement in Namibia, the company in Namibia was no longer under winding-up and could pay its debts. The company in Namibia was the contracting party and made the payments the plaintiff was attempting to impeach. The Supreme Court of Appeal in *Sackstein NO v Proudfoot SA (Pty) Ltd* 2006 (6) SA 358 (SCA) confirmed this decision on the narrow ground that the company was, as a result of the scheme of arrangement, not "unable to pay all its debts" at the time when the impeachment proceedings were brought.

936 In para 6.2 of AIPSA's newsletter to its members dated 23 November 1995, it is mentioned that AIPSA (now SARIPA) is acquainted with most of the experienced insolvency attorneys and insolvency practitioners in most of the overseas countries. In the event of members becoming involved in cross-border insolvencies

35.4.5 Assistance by laws of other countries

35.4.5.1 Laws based on the UNCITRAL Model Law

In countries where the UNCITRAL Model Law on Cross-border Insolvency has in essence been adopted and implemented, assistance will be afforded to foreign representatives. Chapter III deals with the recognition of foreign proceedings and Chapter IV with co-operation with foreign courts and foreign representatives.

35.4.5.2 Section 426(5) of the UK Insolvency Act 1986

Section 426 provides that the United Kingdom Courts "shall assist the courts having the corresponding jurisdiction in ... any relevant country". The expression "relevant country" includes any country designated for that purpose. South Africa was designated as a relevant country with effect from 1 March 1996.[937] Such recognition will greatly assist South African trustees who wish to deal with assets situated in the United Kingdom. The United Kingdom has also enacted a version of the UNCITRAL Model Law.[938] Legislation similar to section 426 of the United Kingdom Insolvency Act has been enacted, inter alia, in Australia and the Republic of Ireland. South Africa has not been designated as a relevant country in terms of the legislation in Australia or the Republic of Ireland.

35.4.5.3 Section 135 of the New Zealand Insolvency Act 1967

Section 135 provides that the High Court shall, in all matters of bankruptcy, act in aid of and be auxiliary to any court of any Commonwealth country other than New Zealand, being a court having jurisdiction in bankruptcy, and an order of that court requesting aid shall be sufficient to enable the High Court to exercise in regard to the matter specified in the order such powers as the High Court might exercise in respect of the matter if it had arisen within its own jurisdiction. South Africa is a Commonwealth country.

35.5 Recognition in South Africa of a foreign trustee

35.5.1 Foreign proceeding allowed to deal with South African assets

Contrary to the practice in many foreign jurisdictions, the foreign representative is recognised in South Africa and generally not the foreign insolvency proceeding.[939] In general, a foreign

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and not being aware of the names and addresses of these overseas experts, the names and addresses may be obtained from SARIPA.

937 Statutory Instrument 1996/253 dated 8 February 1996.

938 Cross-Border Insolvency Regulations 2006, issued in terms of s 14 of the Insolvency Act 2000 and which came into force on 4 April 2006.

939 But see "US bankruptcy law gets SA recognition", *Legalbrief Today*, 15 January 2013, which refers to a successful application to recognise a US bankruptcy in South Africa and to apply with full effect the automatic stay provided for in s 362 of the US Bankruptcy Code in relation to a company and its subsidiaries and assets. "The order made new law in SA. Previously our courts have, on a cross-border insolvency basis, only been prepared to recognise foreign liquidators or administrators and to give them certain powers in SA."

bankruptcy order has no influence on proceedings in South Africa. However, it is generally considered desirable that there should be a single insolvency proceeding. The court has on the application of a foreign liquidator set aside a local winding-up order granted ex parte where the local applicant failed to disclose that it was incorporated in a foreign country where it had already been placed in voluntary liquidation.[940] Section 149 of the Insolvency Act provides that when it appears to the court to be equitable and convenient that the estate of a person domiciled in a State which has not been designated in terms of section 2 of the Cross-Border Insolvency Act should be sequestrated by a court outside the Republic, the court may refuse or postpone the issue of a sequestration order.

35.5.2 Factors to persuade the court to recognise foreign proceedings

35.5.2.1 Equitable and convenient if insolvent resident outside South Africa

The court would more readily exercise its discretion to refuse to grant a sequestration order on the ground that it would be equitable or convenient for the estate to be sequestrated elsewhere if the respondent was not found to have been resident within the jurisdiction of the court.[941]

35.5.2.2 Preference for single proceeding directed by court of domicile

It is most convenient that a matter be adjudicated upon by a South African court if a debtor has virtually no assets outside South Africa and his only asset in South Africa is immovable property, where a trustee has not been appointed in a foreign country and application has not been made for recognition in South Africa.[942] Several cases have expressed a preference for a single forum of administration. The general rule is that the court of the domicile[943] should direct the main sequestration and that all other decrees should be ancillary or subsidiary.[944] A winding-up order has been refused where a single liquidation order would be more convenient and the interests of local creditors would be as well protected in the foreign proceedings as if a local winding-up order had been granted.[945] In Ward v Smit: In re Gurr v Zambia Airways Corp Ltd[946] the court expressed a preference for a single concursus creditorum but refused recognition because application was not made timeously.[947] It was decided in terms of the Companies Act 1973 that a South African court had jurisdiction in terms of section 344(g) of the Companies Act 1973 to grant a winding-up order in respect of

940 *In re Leydsdorp & Pietersburg Estates Ltd (in liquidation)* 1903 TS 254.
941 *Nahrungsmittel Gmbh v Otto* 1991 (4) SA 414 (C).
942 *Deutsche Bank AG v Moser* 1999 (4) SA 216 (C) 219H-220C.
943 In *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC), paras [55] and [56], the court noted that domicile of the insolvent in a country was not an absolute requirement for recognition.
944 *Re Estate Morris* 1907 TS 657 at 668.
945 *Donaldson v British South African Asphalt and Manufacturing Co Ltd* 1905 TS 753 and the *Leydsdorp* case referred to above.
946 1998 (3) SA 175 (SCA) 179G.
947 See the discussion of the *Sackstein NO v Proudfoot* case.

an external company notwithstanding that it was the subject of a voluntary or compulsory winding-up in the country of its incorporation.[948]

However, the Companies Act 1973 was repealed by the Companies Act 2008. The Companies Act 2008, as part of transitional arrangements, retained as operative certain provisions of the Companies Act 1973. The provisions that were retained which are relevant can be found in Schedule 5, Item 9 of the Companies Act 2008 which provides the following:

> "**9 Continued application of previous Act to winding-up and liquidation**:
>
> (1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).
> (2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
> (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.
> (4) The Minister, by notice in the Gazette, may
> (a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and
> (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation
> contemplated in paragraph (a)."

The 2008 Act defines "company" as follows:

"**company** means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date
(a) was registered in terms of the-
(i) Companies Act, 1973 (Act 61 of 1973), other than as an external company as defined in
(ii) that Act; or
(iii) Close Corporations Act, 1984 (Act 69 of 1984), if it has subsequently been converted
(iv) in terms of Schedule 2;

948 At 183H.

(b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act 61 of 1973); or
(c) was deregistered in terms of the Companies Act, 1973 (Act 61 of 1973), and has subsequently been re-registered in terms of this Act"

The Companies Act 2008 defines an external company to mean a foreign company that is carrying on business, or non-profit activities, as the case maybe, within the Republic, subject to section 23 (2).

Section 23 of the 2008 Act provides inter alia the following:

"**Registration of external companies and registered office**

(1) An external company must register with the Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic-

(a) as an external non-profit company if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a non-profit company incorporated under this Act; or
(b) as an external profit company, in any other case."

What is immediately apparent from the provisions that we have dealt with above is that Schedule 5, Item 9 of the 2008 Act retains Chapter 14 of the Companies Act 1973 Act as operative but only "...with respect to the winding up and liquidation of companies under [the 2008] Act...". "This Act" is a reference to the Companies Act. Further, an external company does not fall within the definition of a company under the Companies Act 2008. An external company is not incorporated in the Republic, rather it is registered as such. It does not fall within the definition of company for the purposes of the 2008 Act. It also does not qualify therefore as a company to which the winding-up provisions of the Companies Act 1973 should apply.

35.5.2.3 Assets in South Africa not a prerequisite for recognition

In *Moolman v Builders & Developers (Pty) Ltd*[949] the foreign trustee or liquidator was authorised to hold an enquiry into the affairs of the insolvent or company in terms of South African law even if the insolvent or company did not have any assets in South Africa.

949 1990 (1) SA 954 (A).

35.5.2.4 Formality if granted by court of domicile and movables only, discretion if immovable property

The question whether the bankruptcy order was granted by the debtor's court of domicile is an important consideration. If under such circumstances only movables of the debtor are situated in South Africa, the recognition order may be a mere formality. However, a discretion is exercised if immovable property of the debtor is located in South Africa. There must be exceptional circumstances and considerations of convenience before foreign proceedings will be recognised if the foreign order was not granted by the court of domicile.[950]

35.5.2.5 Recognition does not apply foreign legal position in full

A foreign bankruptcy order or the recognition of a foreign liquidator by a South African court does not make the debtor an insolvent in South Africa.[951] The qualifications of a liquidator or trustee are decided according to the law of the country where he was appointed and not according to the law of the country where his appointment is recognised.[952]

35.5.2.6 Application of South African insolvency law upon recognition

An example of the type of order that the court will grant when a foreign representative applies for recognition is to be found in *Moolman v Builders & Developers (Pty) Ltd*.[953] The rights defined by South African insolvency law (and, if applicable, company law) in favour of the Master, a creditor and an insolvent or company being wound up, in regard to:

- meetings of creditors;
- proof, admission and rejection of claims;
- sale of assets;
- plans of distribution of proceeds; and
- the rights and duties of a trustee or liquidator concerning those matters,

exist in relation to the administration as if the law applied thereto pursuant to a sequestration or winding-up order granted on the date of the recognition order. It is usually provided that the applicant provide security for the proper performance of the administration, that the order of recognition is subject to amendment by the court, that the applicant should comply

950 *Ex parte Palmer: In re Hahn* 1993 (3) SA 359 (C); *Lagoon Beach Hotel v Lehane* (235/2015) [2015] ZASCA 210 (21 December 2015), para [31]

951 *Herman v Tebb* 1929 CPD 65 at 76; *Chaplin v Gregory* 1950 (3) SA 555 (C) 562A-B.

952 *Ex parte Robinson's Trustee* 1910 TPD 25.

953 1990 (1) SA 954 (A).

with the provisions for the opening and operation of banking accounts and that funds may be transferred out of South Africa with the written permission of the Master.[954]

35.5.2.7 Foreign creditors: proof of claims and position of preferent creditors

The trustee appointed in another country cannot prove a collective claim on behalf of all proved creditors and such creditors must prove their claims individually.[955] Creditors will probably enjoy priority, whether as a secured creditor or otherwise, only if priority is recognised by the *lex fori* (local law).[956]

35.5.2.8 Position of foreign concurrent creditors

The orders granted create the impression that local concurrent creditors are preferred above non-local creditors, as it is usually stated that funds may only be transferred out of the country after the payment of "all amounts due in respect of ... (local) proved claims". The matter has not been decided authoritatively and the position may still be as it was set out in early Colonial legislation of the turn of the century before being repealed.[957] For example, section 9 of the Foreign Trustees and Liquidators Recognition Act 1907 (Transvaal) provided that the balance after payment of local preferent creditors was available for distribution among the general body of creditors, including the local concurrent creditors, provided that the balance had to remain in the Colony until the dividend of local concurrent creditors had been paid in so far as the balance allowed such payment. In other words, local concurrent creditors must not be paid in full before money is released for foreign creditors, but local concurrent creditors must be paid their dividend based on the amount available globally for concurrent creditors inside and outside South Africa.

35.5.2.9 Effect of rehabilitation of debtor

If a debtor has been rehabilitated and the rehabilitation extinguished debts in the country where the rehabilitation has been granted, all debts regulated by the law of that country cannot be enforced in any other court.[958] A foreign debt is discharged in South Africa by rehabilitation of the debtor in South Africa.[959]

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954 Compare *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC), para [7], for another example where the following powers were granted. The foreign representative was empowered, after providing security to the satisfaction of the Master: i) to administer the estate of Mr Dunne in respect of all his assets which were or may have been found or were situated within the Republic of South Africa; and ii) granting him all rights under the Insolvency Act 1936, including ss 64, 65, 66, 69 and 82; and iii) entitling him to administer the estate of Mr Dunne as if a sequestration order had been granted against him by a South African court. The sections in para 2 dealt with the following: s 64 - Insolvent and others to attend meetings of creditors; s 65 - Interrogation of insolvent and other witnesses; s 66 - Enforcing summonses and giving of evidence; s 69 - Trustee must take charge of property of estate; and s 82 - Sale of property after second meeting and manner of sale.

955 *Mars* at 340.

956 *Cf Ex parte Steyn* 1979 (2) SA 309 (O) 311B-D.

957 *Ibid*.

958 *Cf Cape of Good Hope Bank (In Liquidation) v Mellé* 10 SC (1893) 280; *Dyer v Carlis* 4 Official Reports (1897) 67.

959 *North American Bank Ltd (In liquidation) v Grant* 1998 (3) SA 557 (W).

Self-Assessment Questions

Question 1

Briefly discuss the aims of the Cross-Border Insolvency Act 42 of 2000, as well as its current status. (3)

Question 2

True or False: The common law relating to cross-border insolvency is no longer relevant in South Africa following the introduction of the Cross-Border Insolvency Act 42 of 2000. (2)

APPENDIX A: FEEDBACK ON SELF-ASSESSMENT QUESTIONS

CHAPTER 1

Self-Assessment Questions

Question 1

Briefly discuss the important concept of concursus creditorum and its impact on the claims of individual creditors against a debtor (individual or company). (5)

Answer:
Any of the following (or similar):

Walker v Syfret 1911 AD 141;
Sequestration/liquidation order crystallises the insolvent's position and the hand of the law is laid upon the estate;
the rights of the general body of creditors must be taken into consideration;
the general interest of the creditors as a group ranks in priority over the interests of the individual creditor;
the realisation of the insolvent's assets and the distribution of the realisation amounts among creditors must be carried out in accordance with the order of preference laid down by the law of insolvency;
once sequestration/liquidation has commenced, one creditor cannot, through the process of execution, receive full payment of its claim at the expense of the claims of other creditors.

Question 2

True or False: The primary aim of South African insolvency law is to afford individual debtors a "fresh start" and a discharge of pre-sequestration debts, by way of the sequestration procedure. (1)

Answer:
False. It is not a prime object of our insolvency law to afford an individual debtor a discharge of pre-sequestration debts. It is merely one of the consequences of rehabilitation. South African insolvency law is largely creditor orientated, and the sequestration procedure is by and large for the benefit of creditors.

CHAPTER 27

Self-Assessment Questions

Question 1

Briefly discuss the two forms of composition (or compromise) and list the key features of each. (10)

Common law composition;
Statutory composition in terms of the Insolvency Act, 1936;

Common law composition –
- takes place in circumstances not provided for in the Insolvency Act and is rooted in an agreement (contract) and typically requires the approval of all creditors;
- the agreement will usually provide that the insolvent will pay certain dividends on creditors' claims, on condition that the insolvent will be released from his or her debts and on the further condition that the provisional order of sequestration be discharged; and
- a common law composition binds only the creditors who have agreed to it.

Statutory composition –
- operates via statutory mechanisms, as set out in the Insolvency Act;
- the purpose of the composition contemplated in the Insolvency Act is to provide the insolvent with a special ground for rehabilitation and a release of his or her debts;
- does not depend on the participation of all the insolvent's creditors, as once the required majority of creditors have approved the composition, the dissenting minority are bound to it; and
- does not result in the discharge of the sequestration order, with the result that the insolvent remains unrehabilitated, albeit with the opportunity to apply for early rehabilitation in certain instances.

Question 2

True or False: An offer of composition may not be accepted if it contains a condition whereby any creditor would obtain a benefit, as against another creditor, which benefit the creditor would not have been entitled to upon the distribution of the estate in the ordinary way. (2)

True. See section 119(7) of the Insolvency Act, 1936.

Question 3

Briefly discuss the binding effect of an approved composition and its impact on the claims of creditors. (3)

- The effect of an approved composition extends to all concurrent creditors, without exception, and becomes binding on all such creditors, whether proved or unproved;
- A composition is therefore best described as a statutory novation that discharges the claims of the concurrent creditors whose rights must thereafter be determined by reference to the provisions of the composition itself; and
- Once the composition is accepted, the rights and duties of the insolvent and creditors are determined by the composition itself, within the framework of the Insolvency Act.

CHAPTER 28

Self-Assessment Questions

Question 1

Briefly discuss the two ways in which the rehabilitation of an insolvent natural person can occur under South African Insolvency law. (2)

- Rehabilitation can occur automatically purely by the effluxion of time; or
- By order of the court pursuant to an application for rehabilitation brought prior to the expiry of the prescribed period (10 years).

Question 2

True or False: The concept of automatic rehabilitation does not exist under South African Insolvency law. (2)

False. "Automatic" rehabilitation is provided for in section 127A of the Insolvency Act. Any insolvent not rehabilitated by the court within a period of ten years from the date of (provisional) sequestration, is deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person orders otherwise before the expiration of the ten years.

Question 3

Briefly discuss the effect of rehabilitation and its impact on an insolvent person's pre-sequestration debts. (3)

- The rehabilitation of an insolvent person brings the insolvency of such person to an end;
- The sequestrated person's status as an insolvent is terminated and all the restrictions placed upon him or her are removed; and
- Rehabilitation results in the release of an insolvent person from his or her pre-sequestration debts.

CHAPTER 29

Self-Assessment Questions

Question 1

Briefly discuss the way in which a partnership and its partners are treated in terms of the Insolvency Act, 1936. (2)

- The Insolvency Act, for the most part, treats the estates of the partnership and its partners as separate entities;
- Accordingly, a partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person.

Question 2

True or False: The effect of the sequestration of one partner's estate is that the partnership itself will terminate, and such partnership will be wound-up. (2)

True. The insolvency of one of the partners of a partnership dissolves the partnership, but it does not cause the partnership estate to be sequestrated.

Question 3

Briefly discuss the proof of claims in the context of an insolvent partner/partnership, with reference to the relevant provision(s) of the Insolvency Act, 1936. (2)

- 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, whilst the personal creditors of a partner must prove claims against the personal estate of such a partner;
- The rationale behind this 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 shall be used for the payment of separate estate debts.

CHAPTER 31

Self-Assessment Questions

Question 1

Briefly discuss the two ways in which business rescue proceedings may commence (that is, the two entry routes into the business rescue process), and list the individual requirements that must be satisfied for each. (8)

Section 129 of the Companies Act – voluntary commencement via company resolution;
Section 131 of the Companies Act – compulsory commencement via formal court application by an affected person;
Voluntary commencement – the board has reasonable grounds to believe that –

- the company is financially distressed, and
- there appears to be a reasonable prospect of rescuing the company;

Compulsory commencement –

- that the company is financially distressed; or
- the company has failed to pay over any amount in respect of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
- it is otherwise just and equitable to do so for financial reasons; and
- there is a reasonable prospect for rescuing the company;

Question2

Briefly discuss the general moratorium on legal proceedings, as contemplated in section 133 of the Companies Act, 2008. (2)

Any two of the following points (or similar):

- the general moratorium offers a distressed company some breathing space to allow its affairs to be restructured;
- section 133 – during business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with, *inter alia*, the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable;
- the moratorium is necessary for the effectiveness of the business rescue procedure;
- the moratorium does not apply to property not in the lawful possession of the company;
- the moratorium envisaged by section 133 is in place for the duration of the business rescue proceedings.

Question 3

Briefly discuss the requirements for the adoption (or approval) of a business rescue plan in terms of section 152 of the Companies Act, 2008. (2)

A business rescue plan is adopted by creditors (subject to approval by holders of securities if their interests are affected) if –

- it is supported by the holders of more than 75% of the creditors' voting interests that were voted; and
- the votes in support of the proposed plan included at least 50% of the independent creditors' voting interest, if any, that were voted.

Question 4

True or False: An application to commence business rescue proceedings suspends liquidation proceedings that have already been commenced by or against the company. (1)

True.

Question 5

Briefly discuss post-commencement finance, and its significance to the business rescue process. (6)

- Post-commencement finance is the life-blood of the company while it is undergoing its restructuring process under business rescue;
- post-commencement finance is funding that is provided to the company after the date of commencement of business rescue proceedings;
- the Companies Act 2008 provides statutory protection and elevates the status of such funding above the claims of the company's pre-business rescue creditors;
- the ranking of claims is set out in terms of section 135;
- employment related post-commencement finance – any remuneration, reimbursement for expenses or other amount of money relating to employment that became due and payable after business rescue proceedings began, but that is not paid to the employee;
- post-commencement finance – financing obtained by the company during its business rescue proceedings.

Question 6

True or False: A business rescue practitioner may not suspend a contractual obligation of the company, during business rescue proceedings. (1)

False.

CHAPTER 35

Self-Assessment Questions

Question 1

Briefly discuss the aims of the Cross-Border Insolvency Act 42 of 2000, as well as its current status. (3)

- 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;
- 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 Cross-Border Insolvency Act is in force, but will only become effective once foreign states, in respect of which the Act will apply, have been designated by the Minister of Justice (which has not yet occurred).

Question 2

True or False: The common law relating to cross-border insolvency is no longer relevant in South Africa following the introduction of the Cross-Border Insolvency Act 42 of 2000. (2)

False. Whilst the relevance of the common law relating to cross-border insolvency may change with respect to foreign states designated in terms of the Cross-Border Insolvency Act, the common law will continue to be of relevance and will apply in respect of states that have not been so designated (in terms of section 2 of the Act) and will also apply to matters not dealt with in the Act.

APPENDIX B

THE DRAFTING OF LIQUIDATION AND DISTRIBUTION ACCOUNTS

1. INTRODUCTION

A trustee's (or liquidator's) estate account is an account of his administration of the estate he is administering. It does not only serve as a report to the Master of his administration of the estate but is also an important document in which third parties, especially creditors, have an interest.

One of the main aims of insolvency law is the realisation of assets for the equal distribution of the proceeds between creditors. For the purposes of drafting estate accounts, it is important to distinguish between costs that are incurred to administer the estate and the distribution of the proceeds of assets thereafter. In other words, the proceeds of assets are first applied in payment of the administration expenses. Thereafter the remaining funds are applied in satisfying the claims of creditors, in their order of preference.

These notes use the drafting of an estate account in terms of the Insolvency Act as a basis. Where the position in respect of companies and close corporations differs, these differences are pointed out.

The notes in this annexure should be studied alongside chapters 24 to 26 of the main study notes, where the theory surrounding secured and preferent creditors as well as contribution by creditors, is set out in more detail. This annexure represents the practical application of the theory, and some aspects of the theory are repeated for the sake of convenience.

2. IMPORTANT PREPARATORY KNOWLEDGE

Since secured creditors enjoy stronger protection under the insolvency law than other creditors, it is important to have a sound knowledge of certain definitions contained in the Insolvency Act. It is also important to take note of the sections in the Insolvency Act that regulate the form and content of estate accounts. Other than the case with companies and close corporations,[960] the Insolvency Act does not contain a separate regulation or annexure in which the form requirements are set out. Instead, the sections in the Insolvency Act that determine the form and content of estate accounts are interspersed.

2.1 Definitions

The following definitions are important for drafting the liquidation and distribution accounts:

[960] See Companies Act 1973, Ann CM 101, which sets out the form requirements for an estate account.

2.1.1 Free residue

"free residue", in relation to an insolvent estate, means that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention

2.1.2 Security

"security", in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention

2.1.3 Preference

"preference", in relation to any claim against an insolvent estate, means the right to payment of that claim out of the assets of the estate in preference to other claims; and "preferent" has a corresponding meaning

2.1.4 Special mortgage

"special mortgage" means a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act No 57 of 1993), or such a notarial mortgage bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act No 18 of 1932), but excludes any other mortgage bond hypothecating movable property.

2.2 Other important concepts

Candidates must also take note of the following important concepts:

2.2.1 Preferences and securities

Sections 85 to 90 of the Insolvency Act contain important provisions in this regard. These provisions are discussed in greater detail below.

2.2.2 Application of the proceeds of securities

Section 95 of the Insolvency Act is important in this regard. After the administration expenses relating to a security have been paid,[961] the remaining funds are applied in a certain way, as explained in this annexure.

[961] See s 89(1) in this regard.

2.2.3 Application of the free residue

Sections 96 to 103 of the Insolvency Act are important in this regard. The free residue-account is the general administration account and most of the administration expenses are paid from this account alone. Sections 98 to 102 set out the (statutory) preferent creditors of the estate and the sequence in which they must be paid from the free residue.

2.3 Classes of creditors

There are three classes (or types) of creditors in insolvency law, namely secured, (statutory) preferent and concurrent creditors. Secured creditors are creditors who, as a result of the existence of a recognised form of security, are entitled to preferent payment out of the proceeds of the property to which the security right relates. Assets held as security are reflected in encumbered asset accounts and a creditor who holds an asset as security is therefore paid out of the encumbered asset account.

Preferent creditors are creditors who are entitled to a preferent right of payment as a result of some or other statutory provision.[962] Preferent creditors are paid out of the free residue of the estate.[963]

Concurrent creditors are neither secured nor preferent. These creditors rank last in respect of payment and are paid from the balance of the free residue, after the claims of preferent creditors have been satisfied. A secured creditor can also be a concurrent creditor. Where the proceeds of a security are insufficient to pay a secured creditor's claim in full, the balance of the creditor's claim will be concurrent unless the secured creditor relies on the proceeds of his security in terms of section 89(2).[964] In the latter instance, the secured creditor will have no claim for the balance. A preferent creditor can also be partially preferent and partially concurrent.

2.3.1 Secured creditors

From the definitions of "preference", "security" and "special mortgage", it is clear that only the following security rights are recognised in South African insolvency law: pledge, special mortgage, rights of retention (liens), the landlord's legal hypothec and the hypothec created in terms of section 84 of the Insolvency Act. Certain creditors also enjoy special rights in terms of other legislation, for instance the Customs and Excise Act.

2.3.1.1 Special mortgage

According to the definition of "special mortgage", it includes bonds over immovable property as well as certain bonds over movable property. Bonds over movable property however only create a secured claims if they comply with the requirements set out in the definition.

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962 For example, Insolvency Act, ss 96 to 102.
963 See the wording of ss 96 to 102.
964 See s 83(12).

Bond over immovable property

Only special mortgage bonds over immovable property which have been registered at the Deeds Office grants a creditor a secured claim.[965] Bonds rank according to the date of registration of the bonds, unless an agreement to allow one bond preference over the other has been registered at the Deeds Office. The preference in terms of a bond that secures the payment of future debts is also determined by the date of registration, not the date on which the debt is incurred.[966]

Where a creditor's claim is secured by a mortgage bond and the relevant creditor does not prove his claim, the Insolvency Act provides[967] that the secured dividend must be paid into the Guardian's Fund for a period of one year after the confirmation of the account, in order to allow the creditor an opportunity of applying to the Master for the payment of his secured claim.

Bond over movable property

In order to determine whether a creditor holds security in terms of a special notarial bond over movables, one must distinguish between special notarial bonds registered before and after 7 May 1993.

Before 7 May 1993, a special bondholder over movables only obtained a secured right over such property in Natal.[968] The position after 7 May 1993 has changed as a result of the promulgation of the Security by Means of Movable Property Act,[969] and the position is now uniform throughout the country. See paragraph 26.8 to 26.10 of the prescribed notes above where the Security by Means of Movable Property Act is dealt with in more detail.

2.3.1.2 Pledge

A pledge is a security right created over movable property by delivering the object to the creditor as security for the payment of a debt. The idea is that possession of the movable will remain with the creditor until the debt has been paid. In the case of tangible movable objects, this form of security is not very popular because it rarely makes commercial sense for a debtor to give up possession of the property that he needs to generate the income needed to pay the debt.

These days, the pledge is more common with intangible movable property, such as debts, shares in companies, insurance policies, etc. Since such assets comprise of personal rights, the pledge is created by ceding the personal right to the creditor as security for the debt. This device is known as "cession *in securitatem debiti*" and it has the effect of pledging the

[965] Insolvency Act, s 86.
[966] *Ibid*, s 87.
[967] *Ibid*, s 95(2) to (5).
[968] In terms of the Notarial Bonds Act (Natal).
[969] Act 57 of 1993.

asset to the creditor. In practice, one might encounter such a cession that does not create a pledge but instead entails a so-called "out-and-out" cession. In the latter case, the ceded personal right will no longer be in the debtor's estate and thus will not be administered by the trustee. (See chapter XX for more detail in this regard.) However, the out-and-out cession is rare and therefore most cessions *in securitatem debiti* will be treated according to the principles of pledge in insolvency.

2.3.1.3 Rights of retention (liens)

A creditor may have a right of retention (also known as a lien) over the movable and/or immoveable property of the insolvent. This will be the case where the creditor is in physical possession of property belonging to the insolvent and on which the creditor has done work or spent money. The principle is that the creditor can then retain such possession until he is paid for the work done or money spent. In insolvency, such a creditor will be a secured creditor. The liens that are encountered most often are the builder's lien and liens for repair work by garages and panelbeaters.

Interest (prior to sequestration) is only payable if the parties had so agreed, or if the debtor was placed in mora (default). Storage costs can also only be claimed if there was an agreement to this effect.[970]

In the proviso to section 47, it is provided that any right to a book or document which belongs to the insolvent estate and which relates to the affairs of the insolvent, does not grant any security or preference in respect of any claim against the estate.

2.3.1.4 Landlord's legal hypothec

In terms of the common law, the lessor (landlord) of immovable property has a tacit (or legal) hypothec over the movable property (*invecta et illata*) belonging to the lessee (tenant) and present on the leased premises at the date of sequestration. Under the common law, the hypothec can under certain circumstances cover movables belonging to third parties as well, but for insolvency purposes, the hypothec only covers property belonging to the tenant.

No tacit or legal hypothec, except the landlord's hypothec and the hypothec conferred in terms of section 84, confers any right of preference against an insolvent estate.[971] The secured claim of a landlord (lessor) is limited by section 85. Only the following arrear rent that was outstanding up to and until sequestration can be claimed by the lessor as a secured claim (the excess will be a concurrent claim):

[970] *Trust Bank van Afrika Bpk v Van der Walt* 1972 (3) SA 166 (C).
[971] Insolvency Act, s 85.

- three months' rent if the rent was payable monthly or for less than a month;
- six months' rent if the rent was payable for more than one month but not more than three months;
- nine months' rent if the rent was payable for more than three months but not more than six months; and
- fifteen months in any other case.

Rent for the period after sequestration until the termination of the lease agreement is payable as part of the cost of sequestration, subject to the rules set out in section 37 (and section 89(1)) of the Insolvency Act.

2.3.1.5 Hypothec created in terms of section 84

Section 84 deals with the case where the estate of a purchaser under a transaction that is an instalment agreement contemplated in paragraphs (a) and (b) and (c)(i) of the definition of "instalment agreement" set out in section 1 of the National Credit Act, 2005 is sequestrated. Such a transaction shall be regarded, on the sequestration of the debtor's estate, as creating in favour of the other party to the transaction (i.e., the creditor/seller) a hypothec over that property. This hypothec secures the claim for the amount still due to him under the transaction.

The original rights of the parties to the agreement thus changes upon insolvency: ownership (originally reserved with the creditor/seller) is vested in the trustee of the insolvent estate, while in exchange, the creditor receives a security right (the hypothec). This hypothec then secures the outstanding purchase price under the instalment agreement. When the property is sold by the trustee, the proceeds must be applied first in the payment of the creditor's claim and thereafter to the benefit of the general body of creditors.

However, if required by the creditor, the trustee of the debtor's insolvent estate must deliver the property to the creditor, after which the creditor shall be deemed to be holding that property as security for his claim and the provisions of section 83 shall apply.

2.3.2 Preferent creditors

Preferent creditors are creditors that are entitled to a preferent right of payment out of the free residue of the estate as per sections 96 to 102 of the Insolvency Act. The different types of preferent creditors are dealt with further below.

2.3.3 Concurrent creditors

Concurrent creditors are creditors that are neither secured nor concurrent. They rank last when it comes to the payment of claims. Concurrent creditors are also paid from the free residue of the estate, after

the preferent creditors in terms of sections 96 to 102 have been paid in full. The calculation of concurrent dividends is dealt with further below.

2.4 "Free residue account" and "encumbered asset account(s)"

In light of the definitions of "free residue", "preference" and "security", it should be clear that certain assets have to be reflected separately, since a specific creditor is entitled to a preferent right of payment out of the proceeds of such property. These assets are held by a secured creditor as security and do not therefore form part of the free residue of the estate. Such assets are reflected in a separate account, known as an encumbered asset account (the assets are encumbered by the security, for example a bond over immovable property). However, the concurrent creditors cannot alone be held responsible for the payment of all the administration expenses. Section 89(1) therefore provides that certain of the administration expenses must also be set off against the proceeds of securities. Assets that are not subject to a secured right are reflected in the free residue account.

3. MASTER'S FEES, TRUSTEE'S FEE AND BOND OF SECURITY PREMIUMS

3.1 Introduction

Certain statutory fees and expenses are found in all estates. The most important of these are the Master's fees, the trustee's fees and the bond of security premium.

3.2 Master's fees

Master's fees are payable in terms of section 153 of the Insolvency Act, read with the Third Schedule to the Act. According to the Third Schedule, the Master's fee is calculated as follows:

3.2.1 Prior to 1 January 2018

Sequestrated estates

- R Nil to R5,000: No Master's fees payable.
- R5,000 to R15,000: R100.
- Plus: R25 for each completed R5,000 above R15,000, with a maximum fee of R25,000.

Companies in liquidation

In the case of a company or close corporation in liquidation, Master's fees are calculated in terms of section 15(g) of the Companies Act read with Annexure CM 103. In terms of this Annexure, Master's fees are calculated as follows:

- R Nil to R15,000: R100,00.
- Plus: R25 for each completed R5,000 above R15,000, with a maximum fee of R25,000,00.

3.2.2 After 1 January 2018

Sequestrated estates

- Estate less than R5,000: No Master's fees payable.
- Estate more than R5,000 but less than R50,000: R250 Master's fees payable.
- Estate more than R50,000 but less than R150,000: R1,000 Master's fees payable.
- Estate more than R150,000: R1,000 payable on the first R150,000 and R275 for each completed R5,000 thereafter, with a maximum fee of R275,000.

Companies and close corporations in liquidation

In the case of a company or close corporation in liquidation, Master's fees are calculated in terms of section 15(g) of the Companies Act read with Annexure CM 103. In terms of this Annexure, Master's fees are calculated the same as for sequestrated estates in the previous paragraph.

3.3 Trustee's fee

The trustee's fee is determined in accordance with section 63, read with Tariff B of the Second Schedule to the Insolvency Act. The trustee's fee is determined by the type of assets found in the estate. The tariff is as follows:

- On movable property, promissory notes, book debts, rent, interest and other income: 10%
- On immoveable property, shares, stock, policies and mortgage bonds: 3%
- On cash, cheques, postal orders, current, savings and other accounts, fixed and other deposits: 1%
- Business sales: 6%
- Compromise: 2%

- Movable assets taken over: 5%
- Minimum fee: R2 500,00[972]

The prescribed tariff is only a guide and the Master must still tax the fee in accordance with section 63. In terms of section 63, the Master may reduce or increase the fee if good reason exists for doing so. The Master's attitude seems to be that trustees and liquidators must take the good with the bad, and he will not merely increase a fee due to the fact that the work done cannot be equated with the fee earned.

A trustee may also claim value added tax (VAT) on his fee if he is a registered VAT vendor. There has been uncertainty as to whether a trustee is entitled to a fee on the VAT portion of the proceeds of an asset. Until recently, the Master's attitude was that the VAT must first be deducted before the fee on a specific asset is calculated. In *Graham and Spendiff v The Master of the Supreme Court*,[973] the court held that the calculation of the trustee's remuneration on the proceeds of an asset plus VAT was done correctly. However, the remuneration must not be increased due to the taking of a percentage on VAT that forms part of the proceeds, in order to give effect to the provisions of section 67(3) of the Value-Added Tax Act.[974] It was stated as follows in the order (as amended): "to comply with the provisions of section 67(3) of the Value-Added Tax Act, the liquidator's fee is reduced by an amount equal to the amount of VAT chargeable on that portion of the fee which was computed as a percentage of the amount of VAT included in the proceeds on which the fee was determined."

An example of how the calculation must be made:

Proceeds of movable assets	100,000.00
VAT @ 15%	15,000.00
Gross proceeds	115,000.00
Fee @ 10%	11,500.00
Less 15% (15,000)(10%)[975]	210.00
Fee	11,290.00
VAT thereon	1,693.50

However, it occurs frequently that the VAT amount is included in the purchase price, without being reflected separately. In order to determine the VAT portion of a purchase price, the

[972] See Government Notice No 323 in Government Gazette No 16293 of 10 March 1995.
[973] (Unreported), case number 504/94. Judgment was only given on 21 July 1995.
[974] Act 89 of 1991.
[975] That is, less 15% of 10% on the VAT of R15,000.00.

calculation is relatively simple. Assume that the purchase price is R115 000.00 and the amount of VAT must be determined. The calculation is as follows:
115,000.00 x 15/115 = 100,000.00

The above calculation can then be made to reduce the fee in accordance with the *Graham and Spendiff* decision.

Where the prescribed tariff does not provide a guideline, the Master must determine a reasonable fee for that specific case.[976] The trustee, his partner, his employer, his co-employee or a person in his normal service, is not entitled to any remuneration except the remuneration provided for in the Act. Co-trustees share the remuneration equally, or on another basis as agreed between them.[977]

Where the minimum remuneration is payable, it must be divided pro rata between the free residue account and the encumbered asset account(s), if any. In such a case, the remuneration cannot be divided on the basis of the tariff remuneration, since the minimum fee is not coupled with a specific type of asset.

Liquidators are entitled to the same remuneration as trustees.[978]

3.4 Bond of security premium

The costs of the provision of security by the trustee (or liquidator) are costs of sequestration (see section 97 of the Insolvency Act) and are set-off against the estate as administration costs. Where there are also encumbered assets in the estate, a pro rata portion is set-off against such account.

3.5 Pro rata apportionment of Master's fees and bond of security premium

Where there are free residue as well as encumbered assets, the Master's fee and bond of security premium must be divided amongst them on a pro rata basis.[979] For example, assume that the following assets were realised in an insolvent estate:

- Property subject to a bond, sold for R150,000.00;
- Surrender value of a policy ceded, R2,367.00;
- Movable assets (unencumbered), sold for R12,500.00.

Master's fees must now be calculated on the total gross value of the estate and apportioned amongst the different accounts. The following calculations can thus be made:

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[976] *Rennie v The Master* 1980 (2) SA 600 (C).
[977] *Cf Janse van Rensburg v Knuth* (3892/2010) [2014] ECP (11 March 2014).
[978] Companies Act 1973, s 384 read with Ann CM 104.
[979] Insolvency Act, s 89(1).

Gross value of assets in encumbered asset account 1 = Ra

Gross value of assets in encumbered asset account 2 = Rb

Gross value of assets in free residue account = Rc[980]

Total gross estate = R(a+b+c) = Rt

Total cost of bond of security or Master's fee = Rd

Costs pro rata against encumbered asset account 1 = a divided by t x d = d1

Costs pro rata against encumbered asset account 2 = b divided by t x d = d2

Costs pro rata against free residue account = c divided by t x d = d3

(Ensure that d1 + d2 + d3 = Rd). These calculations will take the following form in the account and are usually reflected in a separate schedule:

SCHEDULE "A"

Account	Gross Proceeds	Master's Fees	Security Bond
Enc. asset 1	150,000.00	750.61	773.35
Enc. asset 2	2,367.00	11.84	12.20
Free residue	12,500.00	62.55	64.45
TOTALS	**164,867.00**	**825.00**	**(SAY) 850.00**

The *pro rata* portions are now debited against the different accounts as administration costs.

4. FORM REQUIREMENTS IN RESPECT OF LIQUIDATION AND DISTRIBUTION ACCOUNTS

There are no regulations in terms of the Insolvency Act which prescribe the form requirements of an estate account in an insolvent estate. In the case of companies, the form requirements are prescribed by Annexure CM 101.[981]

[980] Excluding balances, if any, transferred from the encumbered asset account(s).

[981] *Nedbank Ltd v Zonnekus Mansions (Pty) Ltd* (A378/2012) [2013] ZAWCHC 6 (7 February 2013) par [49] decided that the reference to the date of the winding-up order in form CM 101 should be interpreted to mean the deemed date as provided for in s 348. In other words, the account must be drawn up as at the date when the application was filed with the registrar of the court.

There are however a number of sections in the Insolvency Act from which the form requirements are evident. Some of the form requirements are not found in the Act but their use and existence have arisen from Annexure CM 101 as well as usages in practice.

An insolvent estate account may consist of the following sections:

- Heading (always): no form requirements;
- Free residue account (always): sections 92 and 96 to 102;
- Encumbered asset account(s): sections 89, 92 and 95;
- Trading account: section 93;
- Distribution account: section 94;
- Contribution account: sections 105 and 106;
- (Bank) reconciliation statement (always): no form requirements;
- Trustee's affidavit (always): section 107.

5. CONTENTS OF INSOLVENT ESTATE ACCOUNTS

5.1 Heading

There are no form requirements for the heading of an insolvent estate account. The heading should however contain at least the following information:

5.1.1 Full description of estate

For example, the description must contain the name of the insolvent, or, where it is a communal estate, the names of both insolvent persons. Some practitioners also state the identity number(s) and address(es) of the insolvent(s). This is a sound practice, although not necessary.

5.1.2 Estate reference number

This is the Master's reference number and must be indicated on all estate accounts.

5.1.3 Title and description of account

For example, the title can be "The first and final liquidation and distribution account", or "The first and final liquidation, distribution and contribution account", or "The second and final liquidation and distribution account", or "The amended first and final liquidation and

distribution account", etc. An account is not termed "amended" unless the previous account was advertised. If further accounts remain to be dealt with, the account is not described as a "final" account. If further assets are discovered after a final account has been lodged, a "supplementary" account is lodged.

5.1.4 Date(s) of sequestration order(s)

In the case of a voluntary surrender, there will only be one order. In the case of compulsory sequestration, the dates of both the provisional and final orders must be mentioned.

5.1.5 Some examples to illustrate

"The first and final liquidation and distribution account in the insolvent estate of PIET STEENKAMP, identity number 340224 8675 88 0, whose estate was provisionally sequestrated on 4 September 1994, and which order was made final on 15 October 1994. Master's reference number: T3456/94."

or

"The third and final liquidation, distribution and contribution account in the insolvent estate of JOHANNA STEENKAMP, identity number ..... , whose estate was voluntarily sequestrated on 31 January 1995. Master's reference number: T23/95."

5.2 Encumbered asset accounts

5.2.1 General

Secured creditors are entitled to the preferent payment of their claims out of the proceeds of their securities. In order to ensure that a secured creditor receives that to which he is entitled, "encumbered assets", i.e., assets held by creditors as security, must be reflected in separate accounts. Secured creditors also carry a portion of the administration expenses. Section 89(1) of the Insolvency Act provides that certain costs have to be borne by the secured creditors.

What follows is an exposition of firstly the form and form requirements of the encumbered asset accounts, and secondly the contents thereof. As stated already, the proceeds of securities are first applied in the payment of administration costs. Thereafter the proceeds are applied in the payment of the claims secured by such assets.

5.2.2 Form requirements

Section 92 provides that the account must contain certain information pertaining to the amounts received and paid by the trustee. Encumbered asset accounts can therefore take the following form:

ENCUMBERED ASSET ACCOUNT NO .... Short description of asset, identification of the type of security to which the asset is subject, and which creditor(s) claim(s) are secured thereby				
Date	**Details**	**V**	**Debit**	**Credit**
Date on which amount is received	<u>Receipts</u> Full description of asset for identification; person by whom sold; method of sale	Voucher no		Gross proceeds
Date on which payment is made	<u>Payments</u> To whom paid; reason for payment	Voucher no	Amount of payment	

5.2.3 Receipts in encumbered asset accounts

The proceeds of all encumbered assets must be reflected in encumbered asset accounts. Preferably each encumbered asset must be reflected in a separate encumbered asset account. This includes "fruits" such as interest, rental, etc. The reason for this is that if a specific creditor is entitled to a "preference" from the proceeds of an asset, the relevant asset must be kept separate in order to ascertain what the proceeds is and how the proceeds will be applied. Below it will be explained which costs can be set-off against the proceeds of securities. If the same creditor holds more than one asset as security, it is possible to reflect all those assets in one encumbered asset account. This will however depend on the circumstances, e.g., if more than one creditor is entitled to a "preference" in respect of a specific asset, etc.

The proceeds of the following possible securities (encumbered assets) will be reflected on the receipts side (credit) of the encumbered asset account:

- Immovable property subject to a mortgage bond;
- Movable assets subject to a special notarial bond registered after 7 May 1993 in terms of the Security by Means of Movable Property Act, and movable assets subject to a special notarial bond registered before 7 May 1993 in terms of the Notarial Bonds (Natal) Act;
- Assets subject to rights of retention (liens);
- Movable assets held as pledge, including claims ceded *in securitatem debiti*;
- Movable assets on leased premises;

- Movable assets subject to instalment sale transactions;
- Value of movable assets handed to creditor (abandoned);[982] and
- Income, interest earned and/or occupational rent on the above assets.[983]

5.2.4 Payments in encumbered asset accounts (application of the proceeds of securities)

The proceeds of securities (encumbered assets) are firstly applied in the payment of the administration costs that must be set-off against them. These administration costs are listed in section 89(1) of the Insolvency Act. Thereafter, the balance is applied in the payment of the claims secured thereby, in terms of section 95(1) of the Insolvency Act. These two types of payments are dealt with separately below.

5.2.4.1 Administration costs (section 89(1) costs)

Although the free residue account is the general administration account, it would be unfair to expect the preferent and concurrent creditors (the creditors who are paid from the free residue) to carry all the administration expenses. The Act therefore makes provision that the proceeds of securities (the encumbered assets) must also carry a portion of the administration expenses. The costs that must be set-off against the proceeds of securities are the following:

Costs of maintaining, conserving and realising the property

Section 89(1) provides that any costs incurred to conserve, maintain or realise an asset, must be set-off against the proceeds of such asset. The costs of maintaining an asset include, for example, the service of a motor vehicle to obtain a better price, painting a house, the maintenance of a garden or the repair of pipes by a plumber. As long as the cost incurred is reasonable and necessary, it will be allowed as a maintenance cost. The cost incurred in conserving an asset includes the hiring of security guards to protect the property, insurance premiums in respect of short-term insurance, storage costs,[984] etc. Realisation costs are the costs incurred to realise (i.e., sell) the asset. For example, where property is sold by public auction, the auctioneer's commission, advertisement costs, storage costs, etc. will form part

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[982] The Insolvency Act does not make provision for the "taking over" of assets by a creditor. Tariff B, which sets out the trustee's remuneration, does however provide for this eventuality. It often happens in practice that the creditor under (especially) an instalment sale transaction, takes over the asset in full and final settlement of its claim. The value of the asset is then reflected as the proceeds and the s 89(1) costs are then collected by the trustee. Also, where the creditor sells the asset itself, without paying the proceeds to the trustee in terms of s 83(10), the asset will be reflected in the account in this way. More about this below. However, see *Standard Bank of South Africa Ltd v Townsend* 1997 (3) SA 41 (W) 52 where it was held that the creditor cannot have a preferred claim on the proceeds if he does not pay it over to the trustee.

[983] *Singer v The Master* 1996 (2) SA 133 (A).

[984] Where a lease agreement in respect of, for example, premises is continued by the trustee in order to store assets there, and the assets which are stored are encumbered assets, the rent will be set-off against the proceeds of the security as storage costs, and not as a section 37 cost against the free residue. If the assets so stored are reflected in more than one encumbered asset account, or such account and the free residue account, the storage costs (rent) must be apportioned *pro rata* between the respective accounts.

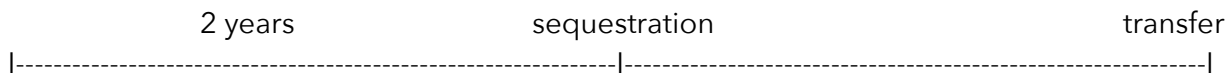
of the realisation costs. The realisation costs are normally deducted from the deposit or gross proceeds by the seller (e.g., the auctioneer) before the balance is paid to the trustee. The gross proceeds of the asset must nevertheless be reflected in the account. The realisation costs are then debited as payments in the account. The test to determine whether or not a payment is a realisation cost, is to ask whether the asset could have been realised without the payment of the expense in question.

Trustee's remuneration and the pro rata portion of the Master's fees and bond of security premium

In terms of section 89(1), the trustee's fee, a *pro rata* portion of the Master's fees and bond of security premium form part of the realisation costs. This aspect is explained in paragraph 3.5 above. The Master's fee and bond of security premium must be apportioned on a pro rata basis.

Taxes on immovable property

Section 89(1) also provides that where the security consists of immovable property, the arrear taxes for the two years preceding sequestration up until the transfer of the property out of the insolvent estate, forms part of the costs of realisation:



The local authority (municipality) does not have to prove a claim for arrear property rates and taxes for a period of two years before sequestration up and until transfer of the property. If the taxes are in arrears for a period of more than two years, the amount owing for the period prior to the two-year period will be a concurrent claim. A claim will therefore have to be proved in respect of this amount.

Interest and penalties on the arrear taxes form part of the realisation costs for the same period. The question however arises as to what is meant by the term "tax" as used in section 89(1). Sub-section (5) of section 89 defines this term as any amount payable periodically to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law, if that liability is an incident of the ownership of that property. Normally rates and taxes on immoveable property are payable to the local authority. In the case of sectional title schemes, where a levy is charged in terms of the Sectional Titles Act, the question arises as to whether these levies fall within the definition of "tax". The Supreme Court of Appeal has decided that "tax" is payable to public authorities and that the levies (which include legal fees) do not qualify as "tax" in terms of section 89(5) of the Insolvency Act. The levies payable as part of the realisation costs are therefore not limited to the amount for two years before sequestration.[985] The levies must be paid by the trustee in terms of

[985] *Barnard v Die Regspersoon van Aminie* 2001 (3) SA 973 (SCA).

section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 before a unit can be transferred and therefore forms part of the cost of realisation without a time limit.

Sometimes it is unclear whether costs such as sewerage, refuse removal, the provision of electricity, the provision of water, etc. also fall within the definition of "tax". If the obligation to pay stems from ownership of the property, it will form part of the tax and be paid as part of the administration costs.[986] However, if it is paid in exchange for a service, it does not qualify as tax.

Funeral and death-bed expenses

If the proceeds of the free residue assets are insufficient to pay the preferent portion of a claim for funeral and death-bed expenses, the shortfall must be paid pro rata out of the proceeds of the secured assets.[987]

5.2.4.2 Payment of secured claims

The amount that remains after the section 89(1) costs have been paid, is applied in the payment of the claims secured by the relevant property, in the order of their preference. For example, where immoveable property (the security) is subject to two mortgage bonds (the security rights), the proceeds will first be applied in the payment of the section 89(1) costs. The surplus will then be applied in the payment of the first bondholder's claim, plus interest (see below), and then in the payment of the second bondholder's claim (plus interest, if there are sufficient funds).

Where a debt is interest-bearing, the creditor should include arrear interest up to the date of sequestration in his claim (if the agreement provides for compound interest, the creditor is entitled to include the compound interest to date of sequestration in his claim). However, section 89(3) provides that only arrear interest for two years preceding sequestration will be secured by the proceeds of the security, as if it formed part of the capital sum. If interest is in arrears for a period exceeding two years, such interest will be a concurrent claim.

Section 95(1) provides that a secured creditor is entitled to payment of interest on his claim from the date of sequestration to the date of the payment of his claim. This post-sequestration interest is simple interest and not compound interest.[988] Where the proceeds of an asset is sufficient to pay the full claim of a creditor plus post-sequestration interest, there is no problem. But what is the position where the security does not realise enough to pay the full capital claim plus post-sequestration interest? In terms of the Appellate Division decision in *Singer v The Master*,[989] such a creditor is entitled to rank as an unsecured creditor (i.e., concurrent) for the balance of his claim (i.e., the shortfall on the capital and the post-sequestration interest). This conclusion is based on the following arguments: in respect of

[986] Insolvency Act, s 89(5).
[987] *Ibid*, s 96(4).
[988] *Boland Bank Ltd v The Master* 1991 (3) SA 387 (A) read with s 103(2) of the Insolvency Act.
[989] 1996 (2) SA 133 (A).

unsecured creditors, section 103(1) clearly provides that the common law rule (that payment must first be written off against interest and thereafter capital) must be reversed and that the capital debt is paid first before interest. No such rule exists in respect of secured claims. Section 83(12) provides that if the claim of a secured creditor[990] exceeds the amount payable to him in respect of his security, he is entitled to rank against the estate in respect of the shortfall on his claim (unless the creditor relied on his security). Section 83(12) does not provide that the shortfall on his claim must retain the character of capital or interest and deals with a single claim that includes components of interest and capital. The shortfall on his claim falls within the provisions of section 103(1)(a) as a concurrent (capital) claim. This amounts to the fact that if the proceeds of a security are not sufficient to pay the secured claim plus interest, the creditor has a concurrent claim for the shortfall.

If the secured creditor stated in his affidavit for the proof of his claim that he relies on the proceeds of his security, this problem will not arise. The reason for this is that the creditor is then not entitled to share in the free residue of the estate in terms of section 83(12). Where a creditor relied on his security and it later appears that he had no security, he has no claim against the estate and is not a concurrent creditor.[991]

If a surplus remains after payment in full of all the creditors whose claims are secured by the property, the surplus is carried over to the free residue account, since the surplus is no longer subject to a preferent right of payment by a secured creditor.[992]

5.3 The free residue account

5.3.1 General

The free residue account is the general administration account. All costs that cannot be set-off against the proceeds of a security in terms of section 89(1), are included in this account. Assets reflected in the free residue account are those assets not subject to a right of preference by reason of a special mortgage, legal hypothec, pledge or right of retention.[993] This includes the surplus from the proceeds of a security.[994]

The position in respect of a company in liquidation is the same as the position in the case of sequestrations.[995] Where there are differences, these will be pointed out.

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[990] The court stated it thus: "It is clear that the 'claim of a secured creditor' to which the provision refers, includes his entitlement to post-sequestration interest."

[991] *Bank of Lisbon and South Africa v The Master* 1987 (1) SA 276 (A) 287E-288C.

[992] See the definition of free residue and the provisions of s 83(12).

[993] See the definition of "free residue" in s 2 of the Insolvency Act.

[994] Insolvency Act, s 83(12).

[995] Companies Act 1973, s 342(1).

5.3.2 Form requirements

Section 92 provides that the account must contain certain information in respect of amounts received and paid by the trustee. The free residue account must therefore contain the following information:

FREE RESIDUE ACCOUNT				
Date	**Details**	**V**	**Debit**	**Credit**
	Receipts			
Date on which amount is received	Full description of asset for identification; person by whom sold; method of sale	Voucher no		Gross proceeds
	Payments			
Date when payment made	To whom paid; reason for payment	Voucher no	Amount of payment	

5.3.3 Receipts in the free residue account

The following will be reflected on the receipts side of the free residue account:

- The proceeds of all unencumbered assets;
- Sales in terms of the trading account (discussed below);
- Contributions by the insolvent (section 23(5));
- Balance from the Land Bank (unless still encumbered by the claims of other secured creditors);
- Interest on funds invested (pro rata) and income on the above-mentioned assets; and
- Balances transferred from encumbered asset account(s) (if any).

The proceeds of the free residue assets are applied in the order of preference as prescribed by sections 96 to 103 of the Insolvency Act.

5.3.4 Payments in the free residue account

Because the free residue account is the general administration account, there are normally more payments than is the case in the encumbered asset accounts. Payments in the free residue account will be discussed under the following headings:

5.3.4.1 Costs of maintaining, conserving and realising the assets

What has been said above with regard to the maintenance, conservation and realisation of securities, is also applicable to free residue assets. This means that all costs incurred in maintaining, conserving or realising free residue assets, will be set-off against the proceeds of such property and thus recorded in the free residue account.

5.3.4.2 Section 96 - funeral and death-bed expenses

The proceeds of the free residue assets are applied in the first place in the payment of the funeral expenses of the insolvent, if he died before the lodging of the first account with the Master, and the costs of the insolvent's wife or minor child if such expenses were incurred within three months immediately prior to sequestration. The total preference in respect of these expenses is limited to R300.00. After the payment of this preference, there is a similar preference, with a similar limitation of R300.00, for death-bed expenses[996] of the insolvent, his wife or minor child. If the free residue is not sufficient to cover these amounts, these preferent claims are paid from the proceeds of the securities (encumbered assets), in proportion to the value of the securities.

5.3.4.3 Section 97 - costs of sequestration

The costs that enjoy first preference under this section are the sheriff's costs. This is followed by the fees payable to the Master. The rest of the costs under this section rank equally. In practice, these costs will always be paid because, if there are not enough funds in the free residue, certain creditors will have to contribute to the payment of these costs.

The only costs incurred by the sheriff in regard to the sequestration of the estate is in respect of the attachment of property and the drawing-up of his inventory in terms of section 19. His fees must be taxed by the Master in terms of Tariff A in the Second Schedule of the Insolvency Act.

A pro rata portion of the Master's fees, bond of security premium and sometimes the trustee's (minimum) remuneration must also be debited against the free residue account. Any surplus carried over from an encumbered asset account must not be taken into account when determining the free residue account's pro rata portion.

[996] In terms of s 96(3) this means expenses incurred for medical assistance, nursing, medicines and medical necessities.

If the Master is of the opinion that the trustee's account contains any unjustified costs, or that he acted mala fide, negligently or unreasonably in incurring any of the costs included in his account, the Master may direct the trustee to amend the account. Although the opinions of creditors with regard to the costs against the estate are relevant, they cannot decide whether or not the costs should be allowed.[997]

Other costs in terms of section 97 are the following:

- *The costs incurred in respect of the application for sequestration as taxed by the Registrar of the High Court*. Where there are wasted costs in respect of a sequestration application, for example more than one application for sequestration is brought against the insolvent, the trustee must decide whether such costs must be paid by the estate. His decision must be presented to a meeting of creditors or the Master. The court may review such a decision or determine that certain costs should not be paid as costs of sequestration.

- *Costs allowed by the Master in respect of a person who assisted the insolvent or his spouse with the completion of the statement of affairs.*[998]

- *The trustee's remuneration* (which includes the remuneration of a provisional trustee or *curator bonis* in the case of voluntary surrender).

- *The costs of administration and liquidation*, including the bond of security premium, insofar as these costs are not payable by the secured creditors. The following costs are included here:
  - Advertisement costs: There are various statutory notices that must be placed by the trustee. The notice for the second meeting of creditors, the inspection of the estate account, confirmation of the account and the destruction of books and records, may all be included as costs of the administration of the estate. In the case of a sequestrated estate, the second meeting and inspection of the account is advertised in both an English and Afrikaans newspaper, as well as the Government Gazette. The amounts charged by the newspapers and the Government Gazette change from time to time. The confirmation of the account and the destruction of books and records are only advertised in the Government Gazette. In the case of a company or close corporation in liquidation, only the second meeting is advertised in an English and Afrikaans newspaper. The inspection, confirmation and destruction of books and records advertisements are only advertised in the Government Gazette;
  - Bank charges: Bank charges are normally charged on the bank account of the insolvent estate. When drafting the estate account, the actual amount of the bank charges debited against the account must be included. Provision must however also be made for bank charges that will be debited against the account in the future. As long as the amount provided for is realistic, the Master will not query it. An amount of between R100 and R150 is normally sufficient provision for future bank charges.

[997] Insolvency Act, s 111(2). *Cf* Companies Act, s 407(3). See also s 53(1) of the Insolvency Act.
[998] Insolvency Act, s 16(5).

Where the interest earned on the estate bank account is apportioned between the free residue account and the encumbered asset account(s), the bank charges should be apportioned in the same manner.

- *Costs incurred by the Master or a presiding officer* who presided at a meeting of creditors in the protection of assets or to give effect to the provisions of the Act, are part of the costs of sequestration.[999]

- *Salaries or wages of a person employed by the trustee in regard to the administration of the insolvent estate*. These expenses are not always allowable.

- *Enforcement of a contract by the trustee*. Where the trustee elects to enforce a contract, for example a building contract or an instalment sale transaction, the other party does not have to prove a claim but will receive payment as part of the costs of sequestration. A word of caution however: these costs could sometimes be costs of realisation and belong in an encumbered asset account. All the circumstances in respect of the completion of the contract must be borne in mind.

- *Postage and petties*. In terms of Chief Master's Directive 4 of 2016, a minimum amount of R600.00 plus R25.00 per proved creditor is allowed, as well as an amount of R345.00 in supplementary accounts. Where the postage and petties amounted to more than this amount, it may be claimed by the trustee if he is able to lodge vouchers in support thereof.

- *Legal costs*. In terms of section 73 of the Insolvency Act, a trustee may obtain legal advice if the creditors or the Master authorizes him to do so. These costs must be taxed. If these costs are not taxed by the taxing officer of the court, the Master must tax such costs. The Master may reject any costs if in his opinion the trustee acted mala fide, negligently or unreasonably in incurring such costs. Where the trustee and attorney agree that fees must be paid on the basis of "attorney and own client" costs, the taxing officer is bound thereby.[1000] The Master is probably also bound by such an agreement where he must tax the bill of costs in terms of his own tariff. Liquidation regulation 22 determines that no bill of costs for legal expenses incurred in a liquidation by the court or a voluntary winding-up by creditors, may be paid by the liquidator unless it has been taxed.

- *Rent*. Section 37(3) determines that any rent payable in terms of section 37 forms part of the costs of sequestration of the estate. However, if the rent is incurred to maintain or conserve an asset, it will be a section 89(1) cost, which must be set-off against the proceeds of the particular asset or assets.

[999] Insolvency Act, s 97(2)(c) read with s 153(2).
[1000] *Muller v Die Meester* 1992 (4) SA 277 (T).

- *Trading account: purchases and daily expenses*. Any purchases relating to the running of a business, as well as the daily expenses incurred in running the business, are debited against the free residue account. This aspect is dealt with in more detail further below.

5.3.4.4 Section 98 - 100

See paragraphs 27.23 to 27.38 of the main text.

5.3.4.5 Section 101 - income tax

This preference is for any outstanding personal income tax of the insolvent. If the insolvent failed to lodge income tax returns, SARS may issue an estimated assessment.

5.3.4.6 Section 102 - general bonds

This subject has been dealt with in detail in paragraphs 27.40 to 27.42 of the main text and will not be repeated here.

NB: RANKING OF PREFERENT CLAIMS. Claims in terms of sections 96 to 102 must be paid in their order of preference. Creditors who qualify for a preference in terms of the same section, rank equally in terms of that section. For example, all section 99 creditors rank equally, but all section 99 creditors must be paid in full before section 100 creditors qualify for payment. For example, if there are insufficient funds to pay all the section 99 creditors, all the available funds must be divided pro rata amongst the relevant section 99 creditors (this is known as a preferent dividend and is expressed as cents in the Rand).

5.3.4.7 Section 103 - concurrent creditors

If there is a surplus after the payment of all the expenses and claims set out in sections 96 to 102, such surplus is applied in the payment of the concurrent creditors.[1001] A secured creditor who did not rely on his security and whose capital claim plus interest thereon, calculated from date of sequestration to date of payment, is not paid in full from the proceeds of the security, has a concurrent claim for the shortfall.[1002] Concurrent creditors are only entitled to interest from the date of sequestration to the date of payment if their capital claims (with interest to date of sequestration) are paid in full.[1003] The interest payable after sequestration is simple interest and not compound interest.[1004] In terms of section 103(2), the interest rate is 8% unless there is a lawful stipulation in writing in terms of which a higher interest rate is prescribed. When the trustee calculates the interest payable from the date of sequestration to the date of payment, he must estimate the date of payment (normally shortly after confirmation of the account) and calculate the interest accordingly.

[1001] Insolvency Act, s 103.
[1002] *Ibid*, s 83(12) and *Singer v The Master*, *supra*.
[1003] *Ibid*, s 103(1).
[1004] *Boland Bank v The Master* 1991 (3) SA 378 (A).

Concurrent creditors are normally not paid in full, and it is usually necessary to divide the balance available for distribution amongst the concurrent creditors on a pro rata basis. This partial payment is known as a "dividend". The calculation of a dividend is done in the same way as the other pro rata calculations dealt with thus far. However, it is necessary to first determine the total amount of all the concurrent claims against the estate. Because certain creditors are both secured and concurrent or both preferent and concurrent, it is desirable to first enter all the relevant information regarding creditors in the distribution account (see further below). As soon as all the relevant information has been entered into the distribution account, it will be clear what the total amount owing to all the concurrent creditors is. The total reflected in the concurrent column as the total of all concurrent claims against the estate, is then used to calculate the concurrent dividend. In order to calculate the cent in the Rand (the dividend), the following simple calculation can be made:

$$\frac{\text{Total amount available for distribution}}{\text{Total amount of concurrent claims}} \times 100 = \text{cent in the Rand}$$

It is not necessary to reflect the exact amount payable to each concurrent creditor in the free residue account. The balance can simply be reflected as follows:
Balance applied as follows:

Concurrent creditors @ 12.3690 cent in the Rand 3,586.22

However, it is desirable to reflect the amounts awarded to the preferent creditors.

Please bear in mind that the awards to creditors are not made in the free residue or encumbered asset accounts. The information reflected in these accounts merely reflects how the proceeds will be applied. The actual award is made in the distribution account.

What follows is an example of how the balance available for distribution (after payment of the costs of administration, etc) will be applied (see next page):

FREE RESIDUE ACCOUNT				
Date	**Details**	**V**	**Debit**	**Credit**
	Brought forward		XXXXX	XXXXX
	Total payments		XXXXX	
	Balance applied as follows:			
	Preferent creditors:			
	Receiver of Revenue, creditor 3 (s 99)		XXXXX	
	M B Barry, creditor 7 (s 100)		XXXXX	
	C G Roux, creditor 12 (s 100)		XXXXX	
	Concurrent creditors:			
	Dividend of 12.3690 cents in the Rand		XXXXX	
			XXXXX	XXXXX

5.3.5 Surplus after payment of all costs and claims with interest

Any surplus that remains after the finalisation of the estate must be paid into the Master's Guardian's Fund. The insolvent can claim this amount after he has been rehabilitated.

5.4 The trading account

5.4.1 General

It may be necessary or desirable for the insolvent or company's business to be continued. The continuation of business normally occurs in respect of companies and close corporations in liquidation but may also occur in the case of a sequestrated estate. Section 80 of the Insolvency Act and Annexure CM 101 of the Companies Act (especially paragraph 3 thereof) contain certain provisions relating to trading accounts. See also section 93 of the Insolvency Act, which determines the content of the trading account. A provisional trustee or trustee may only continue with the business with the permission of the creditors or the Master and, unless the creditors have directed otherwise, may only make purchases for cash from the income of the business.[1005] Before the business is continued, the information that must be reflected in the trading account must be borne in mind, i.e., the value of the initial stock as at the date of

[1005] Insolvency Act, s 80.

sequestration (or liquidation, as the case may be), the value of the stock at the end of the period during which the business was continued, and the daily totals of the receipts and payments. If this information is not available, it will make the task of drafting a trading account virtually impossible.

5.4.2 Form requirements

Section 93 of the Insolvency Act and Annexure CM 101 of the Companies Act prescribe the contents of the trading account. The trading account itself is merely a summary of the business conducted and reflects whether a nett profit or loss has been made. The information summarised in the trading account is obtained from the annexures, which reflect the daily sales, daily purchases and daily expenses.

5.4.3 The trading account itself

The trading account will take the following form:

TRADING ACCOUNT

Details	Amount	Amount
Value of initial stock	X	
Daily purchases (As per annexure)	X	
Daily expenses (As per annexure)	X	
Daily sales (As per annexure)		Y
Value of end stock		Y
Profit / loss	(Profit: Y-X)	(Loss: X-Y)
Totals		

5.4.3.1 The Annexures

The annexures from which the above information is obtained could take the following form:

ANNEXURE "A"
DAILY SALES (RECEIPTS)

Daily Sales		**Amount**
1. 2. 3. 4. Etc.		
Total Daily Receipts		

ANNEXURE "B"
DAILY PAYMENTS

Daily Payments			
Date	**Details**		**Amount**
	Total Daily Expenses		

Examples of the daily payments that may be made are the following:

- Purchases
- Rent
- Salaries and/or wages
- Employees tax
- Tax deductions
- VAT
- Personnel expenses
- Transport costs (petrol, services, etc.)

5.4.3.2 Transfer of information contained in trading account

The aim of the trading account is to reflect the details pertaining to the continuation of the business and to reflect whether a nett profit or loss has been made. However, the actual amounts either received or paid must still be brought into account, since the estate account is essentially a statement of receipts and payments. Thus, the total sales as per the trading account will be reflected on the receipts side of the free residue account and the daily purchases and payments on the payments side. The stock that remains after business has been discontinued, will have to be sold and the proceeds reflected in the appropriate place in the estate account.

5.5 The distribution account

5.5.1 General

The awards to creditors are recorded in the distribution account and not in the free residue or encumbered asset account(s). Section 94 of the Insolvency Act and Annexure CM 101 determine the form requirements of a distribution account. From the wording of section 94, it is clear that the distribution must be in the form reflected further below.

5.5.2 Contents of the distribution account

The distribution account consists of various columns that must contain certain information. The information it must contain is the following:

5.5.2.1 Claim number

The claim number that must be reflected in this column is the number of the claim as proved at a meeting of creditors. The presiding officer will normally number the claims in the order they are received. A problem that could arise is where claims are lodged for proof at more than one meeting. Say for example four claims are lodged for proof at the first meeting of creditors and the presiding officer numbers them 1 to 4. Say that another two claims are lodged for proof at the second meeting of creditors. The presiding officer is supposed to number these claims 5 and 6. Instead of doing this he numbers the claims 1 and 2. Now there are two number 1 claims and two number 2 claims. In such a case, claims 5 and 6 must be numbered as claims 1(a) and 2(a).

5.5.2.2 Name and address of creditor

This column is self-explanatory. The name and address of the creditor is reflected on the claim form and must be reflected in this column. Where the claim has been ceded to somebody else after the proof of the claim, the cessionary's name is entered here. However, a copy of the cession form should be attached to the claim in order to make the situation clear to the Master, as he will not be aware of the cession of the claim.

Many practitioners prefer including a column in which the nature of the claim is also included in the distribution account. There is nothing preventing a trustee or liquidator from including this column but is not compulsory to do so. If the information reflected in this column is correct, it can be of assistance to the Master when he examines the estate account. A hint to facilitate the arduous task of making payments once the account has been confirmed: include the reference number of the creditor just beneath his name and address. When payments are eventually made, all the information relating to the creditor is available in one place and it is not necessary to page around in cumbersome files looking for the information.

If a claim has been rejected at a meeting of creditors but the claim has been compromised by the trustee in terms of section 78(3), the following words must be entered underneath the name and address of the creditor (as well as on the claim form):

"[Allowed in terms of section 78(3)]"

This conduct will obviate the need for the Master to query why the claim has been included in the account when the minutes clearly show that the claim has been rejected. If a claim has been rejected and has not been allowed in terms of section 78(3), the following words must be reflected in this column in the place of the creditor's name and address:

"Claim rejected"

If a claim has been reduced or expunged, similar commentary may be included in this column:

"Claim expunged / scrapped"

or

"Claim reduced"

5.5.2.3 Total claim

The total claim is normally the total amount of the claim as proved at the meeting of creditors. However, where the claim has been reduced, the reduced amount is included here. Where secured creditors do not rely on their security, or the proceeds of the security is sufficient to also pay interest where they have relied on their security, then the "total claim" will be the capital claim as proved as well as the interest from the date of sequestration to the date of payment. This also applies to the claims of concurrent creditors. This can be reflected as follows (remember that the interest calculations will already have been made in the relevant encumbered asset account(s)):

137,851.92
(Capital)

12,427.55
(Interest)

In this way, the claim as proved and the interest are reflected separately, thus facilitating the Master's task when examining the estate account. Avoid reflecting the capital claim plus interest as one amount in this column.

5.5.2.4 Secured claim

The amount reflected in this column represents the secured portion of the claim (if any). Where a secured creditor's claim is only partially satisfied, the amount of the secured award(s) as reflected in the encumbered asset account(s) will be reflected here. The balance of the claim (if the creditor did not rely on his security) is then reflected in the concurrent claim column.

A problem that could arise in the completion of this column is where an interim account (an account that is not a final account) is lodged and a secured creditor's security has not yet been realised. At the time when the interim account is drawn, it is not known which portion of the claim is secured, since it may not have been realised yet. In such a case, the trustee must reflect the full amount of the claim as being secured. The correct (or actual) situation can then be set out in the next account once the relevant security has been realised.

5.5.2.5 Preferent claim

The preferent portion of a preferent creditor's claim is reflected in this column. It is also desirable to indicate the order of preference of the claim, for example:

1,322.00
(Section 99)

Where a preferent creditor proves one claim that consists of different orders of preference, it is preferable that these preferences are also reflected separately, for example:

1,322.00
(Section 99)

6,723.98
(Section 101)

5.5.2.6 Concurrent claim

In this column, only the concurrent portion of a creditor's claim is reflected. Where the creditors' total claims are concurrent only, there is no problem and the full amount of the claim is reflected. The balance of secured creditors' claims who did not rely on their security,

is also reflected in this column. Where a secured creditor has relied on his security, the words "relies" is reflected in this column.

5.5.2.7 Previous awards

This column will only be used in second and later accounts, since any previous awards to creditors must be reflected in this column. It is not necessary to reflect from which account the previous award was made or what the previous award was for.

5.5.2.8 Equalizing dividend

Although there are no form requirements set down in this regard, it may be necessary to include this column in a distribution account. Assume a dividend of 10 cents in the Rand was paid to concurrent creditors in a first account. A creditor proves a late claim and is authorized to share in the previous distribution. Instead of the trustee having to amend his account (unless of course it is already a final account), he awards an equalizing dividend (of 10 cents in the Rand) to the creditor in the next account, before awarding a further dividend to all concurrent creditors.

5.5.2.9 Secured / preferent awards

The amounts of the secured and preferent awards are obtained from the encumbered asset account(s) and the free residue account. These accounts already reflect how the proceeds of the various assets have been applied and all that is required is to transfer this information to the distribution account.

It is desirable to identify the origin of the amount, for example:

124,671.99
(Encumbered asset a/c 1)

or

8,932.41
(Free residue)

5.5.2.10 Concurrent awards

The only origin of the concurrent awards is the free residue account and it is thus unnecessary to identify the origin of the amount. The amount reflected here is the concurrent dividend (if any) awarded to concurrent creditors.

5.5.2.11 Shortfall

The balance on the claim after all awards have been deducted from the amount in the "total claim" column, is reflected in this column. This amount represents the shortfall on the creditor's claim after all awards (and contribution, if any) have been taken into account.

5.6 The contribution account

5.6.1 General

Contribution is discussed in Chapter 26 of the prescribed notes. The contribution account is used to record the contribution(s) payable in terms of section 106 of the Insolvency Act. It deals with the case where there are insufficient funds to defray the expenses reflected in the free residue account.

In terms of section 91 of the Insolvency Act, the trustee must draw up a contribution account.[1006] The provisions of the Insolvency Act are also applicable to the winding-up of companies.[1007] Contribution by the members of a company is a rarity in practice.[1008]

5.6.2 Form requirements and contents

Section 105 of the Insolvency Act[1009] prescribes the content and form requirements of a contribution account. In practice, it often happens that there is both a distribution and a contribution, for example where there are secured creditors who receive a secured award as well as a shortfall in the free residue that necessitates a contribution. In such a case, the distribution and contribution account can be combined - see example 1 below. In the case where there is only a contribution that must be levied and no distribution is made, example 2 below can be used. Most practitioners use example 1 in all cases, since it is in a standard form and need not ever be adapted and makes provision for all the information required by section 105. The only column in the contribution account which may be problematic is the "amount on which contribution payable" column. When a secured creditor is liable for contribution on the concurrent portion of his claim, the amount inserted here is the concurrent portion of his claim. However, when a secured creditor is liable for contribution in terms of section 106(a) of the Insolvency Act, he is liable on the full amount of his claim. In terms of section 14(3), a creditor may be liable for contribution on an amount greater than his concurrent claim.

[1006] See also Companies Act 1973, s 403(1).
[1007] See Companies Act 1973, ss 337 and 342(2).
[1008] *Ibid*, ss 395-399.
[1009] Annexure CM 101 in the case of a company in liquidation.

EXAMPLE OF DISTRIBUTION ACCOUNT

Claim Number	Creditor Name and Address	Total Claim	Secured Claim	Preferent Claim	Concurrent Claim	Previous Awards	Secured / Preferent Awards	Concurrent Awards	Shortfall
	Totals								

EXAMPLE 1 CONTRIBUTION ACCOUNT

Claim No	Creditor Name and Address	Total Claim	Secured / Preferent Claim	Concurrent Claim	Secured Award	Amount on which Contribution Payable	Amount of Contribution Payable	Shortfall
	Totals							

EXAMPLE 2 CONTRIBUTION ACCOUNT

Claim No	Creditor Name and Address (Only Contributories)	Amount on which Contribution Payable	Amount Contribution Payable	Shortfall

5.7 The trustee's affidavit

5.7.1 General

Although this is the last part of the liquidation, distribution and/or contribution account, many practitioners prefer to make this the first part of their account. It makes no material difference where this affidavit is reflected.

5.7.2 Contents

Section 107 prescribes the information that the affidavit must contain.[1010] If the account is not a final account, the trustee must set out the following information in his account: (i) all property not yet realized, (ii) all outstanding debts owing to the estate and (iii) the reason why the property has not yet been realized or why the debts have not yet been collected.[1011] This information is normally included in the trustee's affidavit.

Section 107 requires the following:

- complete and proper account;
- to date of account;
- to his knowledge, all assets;
- signed by the trustee personally;
- independently sworn to.

The following is an example of the trustee's affidavit (see next page):

[1010] Annexure CM 101 in the case of a company.
[1011] See s 92(4)(a)-(c). In the case of a company in liquidation, see Ann CM 101.

INSOLVENT ESTATE: SABIR AHMED CHUNARA
MASTER'S REFERENCE: T2816/95
AFFIDAVIT

I the undersigned,

W H O EVER

of P O BOX 1600, CRAIGHALL, 2045, the TRUSTEE in the above-mentioned estate, declare under oath that the account attached hereto is a complete and proper account of my administration of the estate up to the date of this declaration, and that to the best of my knowledge there are no further assets to be accounted for.

_____
W H O EVER
TRUSTEE

Signed at _____ on this _____ day of _____20_, before me:

_____
COMMISSIONER OF OATHS

NAME:
CAPACITY:
AREA OF APPOINTMENT:
ADDRESS:

5.8 The bank reconciliation statement

5.8.1 General

The Insolvency Act contains no provisions regarding the inclusion of a bank reconciliation statement, although the Companies Act does.[1012] The bank reconciliation statement is especially important for the Master, since he can determine which amounts have not yet been collected and which amounts still have to paid. It is also important for the trustee, since the receipts and payments should cancel each other out. Errors in settlement statements are often identified in this way.

[1012] See Ann CM 101.

5.8.2 Content and form requirements

Because the available funds and the payments should cancel each other out,[1013] the bank reconciliation statement is an account of all available funds on hand and amounts that must still be collected (for example section 89(1) costs or the balance of a purchase price that has been received but not yet reflected on the bank statement), as well as an account of all amounts that must still be paid (for example Master's fees, provision for bond of security premium, trustee's fee, etc.). When all the payments (including awards) are deducted from the available funds, there should be a NIL balance.

All entries in the bank reconciliation statement (except for the bank balances) must be capable of reconciliation with the estate account. Outstanding deposits will prevent confirmation of the account (except for contributions that must be collected). If amounts have already been received but do not yet appear on the bank statement, the deposit slips must be lodged with the Master as proof that the amounts have already been received. If the Master is satisfied that the amounts have in fact been received, he will confirm the account. The following is an example of a bank reconciliation statement (see next page):

[1013] If this is not the case, there is an error somewhere.

BANK RECONCILIATION STATEMENT			
1.	Bank balance on estate current account as per last statement		X
2.	Bank balance on investment or call account as per last statement		X
3.	Outstanding deposits (prevents confirmation!)		X
4.	Contribution to be levied (if applicable)		X
	Payments still to be made:		
a)	Master's fees	Y	
b)	Trustee's remuneration (less wasted costs if applicable)	Y	
c)	Receiver - VAT on remuneration	Y	
d)	Provisions (e.g., bank charges, bond premiums, advertisements, etc.)	Y	
e)	Postage and petties	Y	
f)	Administration costs not yet paid	Y	
	Awards still to be made:		
i)	Secured creditors out of the relevant encumbered asset accounts (less advances made, if applicable)	Y	
ii)	Preferent creditors out of the free residue account	Y	
iii)	Concurrent creditors out of the free residue account	Y	
		SUM Y's =	SUM X's=

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