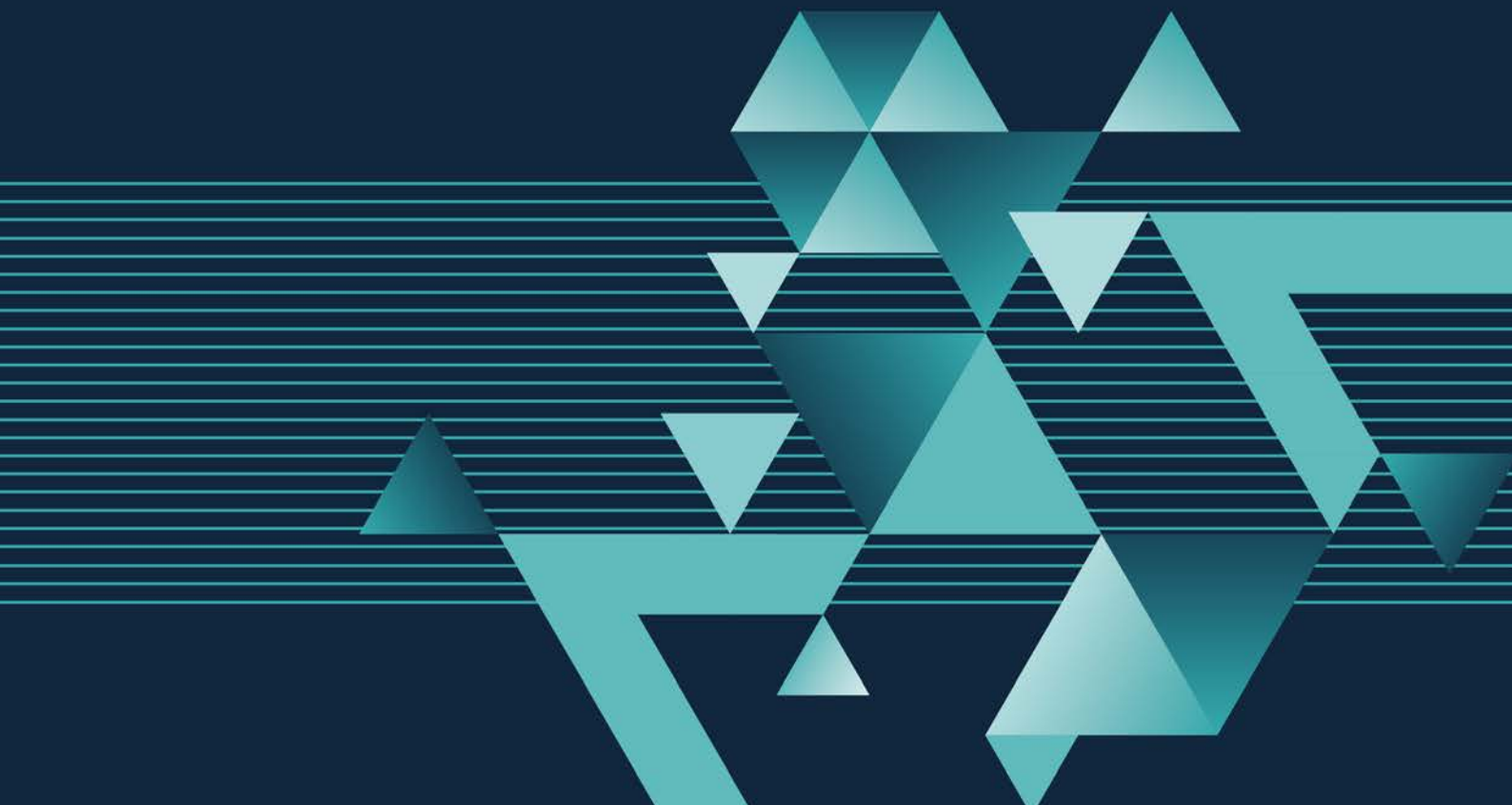
INSOL INTERNATIONAL

SARIPA

PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE

COURSE NOTES 2022



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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 the 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 they find 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 (Pty) 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 liquidator 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 them, 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 their 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 their rights and delegates their 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 themself 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 their 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 they are 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 under the appropriate chapters below. These notes do not discuss constitutional law in general nor related legislation in the form of the Promotion of Access to Information Act and the Promotion of Administrative Justice Act, except insofar as an understanding of these aspects is required.

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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 to date.

1.7.2 Options available to a debtor unable to pay debts

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

1.7.2.1 Administration

A debtor could apply for their 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 the debts do not exceed R50,000. Where the Magistrate's Court grants such an application, the debtor must make payments to the administrator appointed by the court who then distributes funds to the 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 (hereinafter referred to as Smith, *Law of Insolvency*).

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, they can voluntarily surrender their 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 their creditors. Where a debtor suggests the conclusion of an agreement for the exemption of obligations or commitments, or where they give written notice to their creditors of the inability to pay debts, they commit 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 their 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 them. 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 their 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 their sequestration. The debtor cannot alienate or burden any property, as their contractual capacity remains limited until the date of their 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 their status as an insolvent after rehabilitation, at which time the debtor receives a discharge from their 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 themself 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 their 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 Companies Act 1973, 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 2008 repealed the judicial management provisions under the Companies Act 1973 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 in Ch 28 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 the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

20 See Levenstein 7-1 – 7-6.
21 See Levenstein 9-3.
22 See Ch 28 of these notes, Business Rescue and Compromises.

PART B – SEQUESTRATION AND WINDING-UP PROCEDURES

CHAPTER 2 – WINDING-UP AND SEQUESTRATION

These notes primarily focus on the administration of insolvent estates, although an overview of business rescue is also provided. The process of insolvency only formally commences once the estate of an individual has been sequestrated or a legal entity has been placed under winding-up (liquidation).

In order to properly deal with and understand the administration of insolvent estates, it is imperative that you have some knowledge of the preceding sequestration and winding-up procedures.

A brief overview of the sequestration procedure can be found in **Chapter 3** below. The winding-up or liquidation procedure for companies and close corporations is set out in **Chapter 27** below.

CHAPTER 3 – SEQUESTRATION

3.1 Estates that can be sequestrated

A debtor as defined in section 2 of the Act may apply for his own sequestration by way of voluntary surrender, or he may be sequestrated by a creditor by way of compulsory sequestration. In terms of section 2 of the Act a debtor includes a person or partnership or the estate of a person or partnership that is a debtor in the usual meaning of the word. However, a body corporate or a company or other association of persons, which may be placed in liquidation under the law relating to companies, is excluded. This exception applies to a company that may be wound up in terms of the Companies Act 61 of 1973 or the Companies Act 71 of 2008, or a close corporation that may be liquidated in terms of the Close Corporations Act 69 of 1984. Other bodies corporate, for instance the body corporate of a sectional title scheme, are also excluded from the definition of "debtor" in section 2 and cannot be sequestrated.[23] A deceased estate, as well as the estate of persons who are incapable of managing their own affairs, fall within the definition of section 2. The estate of any other debtor, including a trust, a club, or a juristic person that cannot be liquidated in terms of the Companies Act 61 of 1973, the Companies Act 71 of 2008[24] or any other Act, can be sequestrated in terms of the Insolvency Act. The Companies Act 1973 incorporates many of the Insolvency Act's provisions regarding the effects of sequestration and administration in respect of companies that are liquidated due to their inability to pay their debts. Although insolvent deceased estates may be sequestrated in terms of the Act, it may also be administered as insolvent in terms of section 34 of the Administration of Estates Act 1965, without a sequestration order.[25]

3.2 Jurisdiction

Only the High Court can make sequestration and rehabilitation orders because these orders influence a person's status. A Local or Provincial Division of the High Court has jurisdiction to sequestrate an estate if the debtor, on date of application:

(a) is domiciled[26] within the area of jurisdiction of the court; or

(b) owns or is entitled to property located within the area of jurisdiction of the court; or

(c) at any time during the 12 months preceding the date of application, ordinarily resided, or carried on business within the area of jurisdiction of the court.

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23 The body corporate of a sectional title scheme cannot be liquidated in terms of the Companies Act 1973 either – *Reddy v Body Corporate of Croftdene Mall* 2002 (5) SA 640 (D) 646; *Ex parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA). However, see Meskin par 2.1 for an opposite view.

24 A trust is not covered by the definition of a company under the Companies Act 2008 for it is not a juristic person incorporated in terms of the Act. Therefore, the Companies Act 2008 cannot be applied to wind up or liquidate a trust – *Melville v Busane* 2012 (1) SA 233 (ECP), para [16].

25 See *Standard Bank van SA Bpk v Van Zyl NO* 1999 (2) SA 221 (O); *Fairleigh NO v Whitehead* 2001 (2) SA 1197 (SCA).

26 Domicile is a technical legal term, which indicates where a person's permanent residence is.

An application for rehabilitation must, in principle, be brought in the same division where the debtor was sequestrated in the first place.[27]

A Magistrate's Court has jurisdiction regarding other aspects that normally fall within its jurisdiction, for example hearing a criminal matter, the impeachment of voidable transactions or actions in terms of sections 72(2), 73(1), 76, or 78(3).

Any division of the High Court can review decisions by the Master (except in relation to the appointment of a trustee) or by the chairperson of the meetings of creditors.[28]

3.3 Voluntary surrender

3.3.1 Applicant

The debtor, the debtor's representative by special authority, the *curator bonis* of a person who is incapable of handling their own estate, or the executor of a deceased estate, may apply for voluntary surrender. Where the Matrimonial Property Act 1984 applies, both spouses married in community of property must apply for the surrender of their joint estate as co-applicants.[29] Ordinary partners[30] living in the Republic of South Africa, must apply jointly for the voluntary surrender of the partnership estate. At the same time, each partner must individually apply for the voluntary surrender of his personal estate.[31] The joinder of two respondents in one application for sequestration is only justified if there is a complete identity of interests between the respondents, or at least a similarity of interests such as to justify a joinder.[32]

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27 Insolvency Act, s 149. If an applicant in a voluntary surrender has misled the court with reference to their domicile, they cannot rely on lack of jurisdiction and apply to set aside the sequestration order – *Rutherford v Ferguson (Standard Bank van SA Bpk Toetredend)* 1998 (4) SA 90 (O). The 12 months referred to in s 149, determining the jurisdiction of the court in sequestration proceedings for the lodging of the petition, can only be calculated with reference to when the application was served on the respondent. See also *Stander v Van den Berg* (60296/2013) [2016] ZAGPPHC 7 (21 January 2016), paras [20] and [22]. Further as to s 149, *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) provides that the section applies to matters pertaining to jurisdiction over the insolvent and their estate and that it does not relate to other aspects, for instance impeachable dispositions.

28 Insolvency Act, s 151.

29 Matrimonial Property Act 1984, s 17(4). See also *Ratilal v Dos Santos* 1995 (4) SA 117 (W); *ABSA Bank Ltd t/a Trust Bank v Goosen* 1998 (2) SA 550 (W).

30 "… every member of that partnership other than a partner *en commandite* or a special partner as defined in the Special Partnerships' Limited Liability Act, 1861 (Act 24 of 1861) of the Cape of Good Hope or in Law 1 of 1865 of Natal, who has not held himself out as an ordinary or general partner of the partnership in question" – s 13(1). A partner *en commandite* does not act for the partnership and is afforded protection against third parties from personal liability for the partnership debts. This partner shares the risk of the partnership and remains liable to its co-partners for its *pro rata* share of the debts of the partnership limited to an agreed amount, on condition it receives a fixed share of the profits.

31 Insolvency Act, s 3(1) and (2).

32 *Strutfast (Pty) Limited v Uys* 2017 (6) SA 491 (GJ), para [33].

3.3.2 Formal requirements

Before anyone can apply for the voluntary surrender of their estate, the following formalities must first be met:

3.3.2.1 Notice in Government Gazette and newspaper

The applicant must, no more than 30 days[33] and no less than 14 days before date of application, publish a notice of surrender in the *Government Gazette* and in a newspaper circulating in the magisterial district where they reside, or where they are a trader, in the district where their principal business is located.[34] The notice must correspond with Form A of the First Schedule of the Act, and must be signed by the debtor or their attorney. Such a notice may later be revoked, but only with the Master's consent, by publishing a notice to that effect in the *Government Gazette* and in the local newspaper. Also, the notice may expire if the court rejects the application or if the debtor does not continue with the surrender. If the debtor does not continue with the application, fails to lodge a statement of affairs, or lodges an incomplete or incorrect statement, publication of the notice of surrender constitutes an act of insolvency, which enables creditors to apply for the compulsory sequestration of the estate.[35] Creditors could bring such an application within 14 days from the date of application for voluntary surrender.

Publication of the notice of surrender also has the following consequences:

Stay of sales in execution

All sales in execution (not attachments) are stayed.[36] The sheriff may not pay any proceeds from such sales to judgment creditors. Where the estate is sequestrated, the sheriff must hand over all goods (or the proceeds from sales) to the trustee. However, transfer of a property sold before the publication of the notice is not stayed.[37] Under certain

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33 See *Ex parte Harmse* 2005 (1) SA 323 (N) for the effect of publication more than 30 days before the date of the application.

34 Insolvency Act, s 4(1). *Cf Ex parte Viviers et uxor (Sattar Intervening)* 2001 (3) SA 240 (T), which deals with an application for surrender after a previously aborted application.

35 *Ibid*, s 8(f).

36 Insolvency Act, s 5. In *First Rand Bank Ltd v Consumer Guardian Service (Pty) Limited* (10978/2012) [2014] WCC (4 March 2014), a firm was interdicted from canvassing, in any manner, business from any execution debtor entailing the publication of notices of surrender in terms of s 4(1) of the Insolvency Act for the purposes of stopping or delaying sales in execution of property in circumstances in which the predominant object of the publication of the notice was to frustrate the sale rather than to achieve the voluntary sequestration of the execution debtor's estate. In *Nedbank Limited v Malan; In re: Ex parte application of Malan* [2015] JOL 33458 (GP), the court granted an interdict against a debtor who published notices of surrender with no intention of bringing the application or pursuing it to its final determination. The debtor was interdicted and restrained for a period of 12 months from publishing any notice of surrender of his estate as contemplated in s 5(1) of the Insolvency Act, without first having obtained leave of the court to do so.

37 *De Jager NO v Balju van die Hooggeregshof, Bloemfontein-Wes* (407/210) [2010] ZAFSHC 90 (4 June 2010); *Fourie NO v Edkins* 2013 (6) SA 576 (SCA) para [12].

circumstances, the Master (where the value of the goods is less than R5,000), or the court (where the value of the goods exceeds R5,000) may authorise the sheriff to continue with the sale in execution.

Appointment of a *curator bonis*

The Master may appoint a *curator bonis* to temporarily control the estate. The Master has a discretion whether to appoint a *curator bonis* and to decide on the person whom the Master will appoint. If creditors are of the opinion that such an appointment should be made, they should approach the Master stating the reasons why an appointment is deemed advisable. Although no explicit provision requires a candidate to lodge security before their appointment as *curator bonis*, the Master in practice insists on security. Section 70 of the Insolvency Act applies to the *curator bonis* who must open a banking account on receipt of funds and may invest funds not immediately required for the payment of any claim against the estate in a savings account or in an interest-bearing deposit with a building society or bank.[38] Other than sales in the ordinary course of a business, there is no provision for the sale of assets. Once the court has issued an order sequestrating the estate, a provisional trustee may be appointed and, if there are urgent reasons for the sale of assets, the provisional trustee may sell assets with the consent of the Master or the court.[39]

3.3.2.2 Notice to creditors, workers, unions and SARS

The debtor must send a copy of the notice of surrender to all the known addresses of possible creditors within seven days from date of publication.[40] Also, the debtor must within the seven-day period furnish a copy of the notice to registered trade unions which, to the applicant's knowledge, represents any of the debtor's employees, the employees themselves (in the prescribed manner)[41] and the South African Revenue Service.[42] In terms of section 197B of

38 Insolvency Act, s 5(2).

39 *Ibid*, s 18(3).

40 *Ibid*, s 4(1). See *Ex parte Dube* [2009] JOL 24731 (KZD), where the court refused an application because of lack of proof that a notice was sent to the bondholder by registered post.

41 Insolvency Act, s 4(2)(b)(ii). *Gungudoo v Hannover Reinsurance Group Africa (Pty) Ltd* 2012 (6) SA 537 (SCA), para [41], decided that the notice requirement is limited to employees employed in a business operation. However, in *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC) the Constitutional Court held that s 9(4A) includes not only employees of an insolvent's business, but also domestic employees. *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA) held that it was not peremptory, when furnishing application papers to the respondent's employees, that this be done in the manners specified in s 346(4A)(a)(ii) of the Companies Act 1973 (which section is similar to s 4(2)(b)(ii)). 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.

42 Insolvency Act, s 4(2)(b). *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. In *Gungudoo v Hannover Reinsurance Group Africa (Pty) Ltd* 2012 (6) SA 537 (SCA), at para [42], the Supreme Court of Appeal left the question of whether the provisions are peremptory, open. In *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA), at para [17] n 46, 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

the Labour Relations Act 1995, an employer that is facing financial difficulties that may reasonably result in sequestration must advise a consulting party in terms of section 189(1) of that Act.

3.3.2.3 Statement of affairs

The debtor must prepare a statement of affairs in accordance with Form B in the First Schedule to the Act. All assets and liabilities must be listed. Two copies must be sent to the Master's office in the district where the debtor resides or does business. Where no local Master's office exists, two copies must be sent to the provincial Master's office and one to the magistrate's office of that specific district.[43]

The statement of affairs must be drawn up shortly before the application is brought, must confirm the assets and liabilities of the debtor according to Form B, must be confirmed by a sworn statement and must lie open for inspection for 14 days, from the date of the notice of surrender, at the Master's office or local magistrate's offices.

3.3.3 Condonation of formal defects

The purpose of the formal procedures is to notify the creditors that an application will be brought, to enable creditors to object to the application if they so wish. The formalities for a voluntary surrender application must be strictly complied with. However, the court may condone a mistake in terms of section 157(1), where the mistake constitutes a formal defect. Where the mistake prejudices the creditors and the prejudice cannot be corrected through an order of court, it may not be condoned. A premature or late publication of a notice of surrender is hardly ever condoned. Also, the court rarely condones the mistake that the statement of affairs did not lie open for inspection, as required by section 4(3), or that creditors were not notified personally.

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" (at para [14] n 46). In *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC), paras [39] and [40], the Constitutional Court agreed with this decision. The debtor may not rely on failure to furnish employees with the petition 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), at para [8]. There may be instances where a provisional order should be granted to avoid the concealing of assets or for other urgent reasons 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 – see *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC), para [42].

43 Insolvency Act, s 4(3).

3.3.4 *Application for voluntary surrender*

Voluntary surrender applications seem to be the basis of a minor "cottage industry".[44] In the majority of such applications, the applicants are represented by one of a small number of firms of attorneys that appear to do this type of work.[45] The application is brought by way of notice of motion supported by one or more affidavits.[46] Thus, the court's decision is based on merit according to the strength of the documentary evidence and the applicant and the opposing creditors (if any) must state all the relevant facts in affidavits brought before court. Full disclosure is required to satisfy the court.

There is a greater risk of abuse than in "friendly" sequestrations and a higher level of disclosure is required. The court must be satisfied, on a balance of probabilities, that the preconditions have been met for an application of voluntary surrender. The test is more

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44 In *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP), Gorven J referred to these applications as "a fledgling cottage industry". Suffice it to state that the unacceptable features and abuse referred to in earlier judgments have not disappeared and if anything the "fledgling cottage industry" has grown into a profitable one – *Ex parte Fuls and Three Similar Matters* 2016 (6) SA 128 (GP), para [2].

45 "That exactly the same dividend was estimated in each of five matters reflects, in the context of the circumstances, a coincidence that raises a strong suspicion that the values used were falsely determined to support a predetermined result" – *Crafford v Crafford* (19421/13, 19422/13) [2014] ZAWCHC 14 (13 February 2014), para [16]. See also *Ex parte Bezuidenhout* (1858/2014) [2014] ECP (19 August 2014). In *Ex parte Concato* 2016 (3) SA 549 (WCC) the court did not consider that the five applications for voluntary surrender were in good faith or that the orders of voluntary surrender would be to the advantage of creditors. The conclusion that the applications were not in good faith was informed by the various shortcomings identified in the applications as a whole, including, but not limited to, the superficiality of the applications, the similarity in the averments made and the uncanny coincidence of the projected dividend being either 16 or 17 cents in the rand. Apart from these fatal defects, when regard was had to the *lacunae* (gaps) in the individual applications, the applicants had either not made full and proper disclosure of their affairs or had not employed, or properly utilised, alternative statutory measures (for instance the National Credit Act 2005) to reach an agreement with their creditors. Therefore, the court was ultimately unpersuaded that it would be to the advantage of creditors that orders of voluntary surrender be granted. The court remarked (para [38]) that the interests served by such voluntary surrender orders are those of the professional persons involved, namely the attorneys, the valuator, and the trustee, besides, of course, those of the insolvents themselves. The former earn fees and the latter are able to retain all their assets and then purchase them back, generally over time, at the forced-sale valuation. This they achieve without being pestered by their creditors and / or without having to undergo the rigours of paying their creditors by way of an arrangement or rescheduling in terms of the National Credit Act 2005. In *Ex parte: Connoway and Four Others* (5873/2016, 6168/2016, 6167/2016, 6166/2016, 6002/2016) [2016] ZAWCHC 62 (24 May 2016); [2017] JOL 38031 (WCC), the court found for the same general reasons as set out in *Ex parte Concato*, that the applications were fatally flawed.

46 The High Court Rules for the Free State contain specific requirements:
"**9. Sequestrations**
9.1 All cash amounts paid by or on behalf of the respondent in an application for compulsory sequestration or by an applicant for voluntary surrender must be paid into the Guardian's Fund and the Master's report must state whether that has in fact been done. …
9.4.1 All applications for provisional sequestration and voluntary surrender will be approached by this Court on the basis that the costs of sequestration and administration will amount to R20,000. (This amount may be adjusted from time to time.)
9.4.2 If the applicant is of the opinion that those costs will be less in a particular matter, an estimate thereof must be attached to the application papers and that estimate must be placed before the Master, who shall provide comments thereanent to the Court. …"

strictly framed than in compulsory sequestration (for example, in compulsory sequestration, the test for provisional sequestration is "*prima facie*" and for final sequestration "reason to believe").[47]

The applicant must lodge these documents at least two court days before the date of the application. Creditors can also object to an incorrect statement of affairs. Where this happens, the Master or magistrate must certify that objections were lodged against the statement and notify the court of these objections. The applicant (or his advocate) appears in court to move for the acceptance of the surrender of the estate.

3.3.5 What the applicant must prove

In terms of section 6 of the Insolvency Act, the applicant must prove the following on a balance of probabilities:

3.3.5.1 Formalities complied with

Documentary proof must be provided to show that the preliminary formalities were complied with.

3.3.5.2 Applicant actually insolvent

Where the statement of affairs shows a credit balance, the applicant will have to prove that they are nonetheless in fact insolvent.

3.3.5.3 Sufficient free residue to cover sequestration costs

The free residue (assets not subject to a pledge, special mortgage, tacit hypothec or lien) must be sufficient to pay the costs of the sequestration. These costs include the Master's fees, costs of the application, trustee's fees and other liquidation costs.

3.3.5.4 Sequestration to advantage of creditors

The applicant must prove that the sequestration is to the advantage of creditors as a group.[48] It is ultimately for the court to decide whether sequestration is to the benefit of the creditors; the *ipse dixit* of a sole creditor could not be decisive.[49] For instance, the presence of a mortgage bond over a unit subject to a body corporate is not a factor in favour of sequestration;[50] although the body corporate may gain a ranking preference to the

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47 *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP); *Ex parte Erasmus* 2015 (1) SA 540 (GP), para [7].

48 See *Ex parte Erasmus* 2015 (1) SA 540 (GP) for a full discussion of judgments dealing with the requirement of advantage of creditors.

49 *Investec Bank Ltd v Lambrechts NO* 2019 (5) SA 179 (WCC) paras [57] and [58].

50 There is no basis to distinguish between bodies corporate and other creditors – *Body Corporate of Empire Gardens v Sithole* 2017 (4) SA 161 (SCA), para [13].

bondholder, this fact does not constitute an advantage to the general body of creditors, which includes the bondholder.[51] The correct test to be applied is whether the facts placed before the court show that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some not negligible pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Where there are none, but there are reasons to believe that because of enquiry under the Insolvency Act some may be revealed or recovered for the benefit of creditors, that is sufficient to show advantage.[52] It seems that creditors must receive a dividend,[53] the size of which depends on the facts and circumstances of each case,[54] as well as the attitude of the creditors. However, the Constitutional Court in *Stratford v Investec Bank Limited*[55] cautioned that the concept "advantage" is broad and should not be rigidified by for instance subscribing to the nebulous "not-negligible" pecuniary benefit. The court reasoned that the correct approach to determining advantage to creditors is to be guided by the *dicta* in *Meskin & Co v Friedman*,[56] by for example determining whether sequestration will result in some payment to the general body of creditors; whether there is a substantial estate, which could result in payment to creditors, other than by means of sequestration; or whether some pecuniary benefit will redound to the creditors.

A formal rule of practice has been issued in the Gauteng Division of the High Court in Pretoria, that a valuator in applications for voluntary surrender must confirm under oath that they personally inspected the assets that are referred to in the valuation.[57] A debtor cannot waive

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51 *Body Corporate of Redberry Park v Sukude NO* [2015] JOL 33408 (KZD). It is unnecessary to grant an order for the sequestration of the insolvent estate of the erstwhile sectional title holder when there is no apparent reason why the property cannot be sold in execution (para [11]). There is no information disclosed by the administrator as to the relative costs of recovering the debt via a sequestration process, as opposed to levying execution against the sectional unit in the normal course (para [12]).

52 *Epstein v Epstein*1987 (4) SA 606 (C), at 609, quoted with approval in *Seaways (Pty) Ltd t/a South African Express Line v Rubin (Investec Bank as Intervening Party)* [2014] JOL 31127 (GSJ), para [11]; and *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC), paras [44] and [45]; *Business Partners Limited v Tsakiroglou* [2017] JOL 37687 (WCC), para [49]; *Hollard Life Assurance Company Limited t/a Hollard Life v Chetty* (757/2016) [2017] ZAKZDHC 8 (3 March 2017), paras [29] to [31]; *Oro Africa (Pty) Limited v Currin* [2017] JOL 39170 (WCC), p 44 line 20; *Treif Distributors (Pty) Ltd t/a Sacks Butchery v Benade* (5797/17) [2018] ZAWCHC 50 (20 April 2018); *Nutrigrun (Pty) Ltd v Odendaal* (5603/2017) [2018] ZAFSHC 52 (3 May 2018); *Firstrand Bank Limited v Pratt* [2019] JOL 45407 (GP).

53 *Ex parte Kelly* 2008 (4) SA 615 (T); *Pure Capital Property Holdings CC v Von Maltzan* Case 11133/2009 (Western Cape High Court, Cape Town) dated 10 November 2009; *Body Corporate of Empire Gardens v Sithole* 2017 (4) SA 161 (SCA), para [10].

54 The practice differs from time to time and payment of 10% or even 20% of concurrent claims may be required. *Smit v ABSA Bank Ltd* [2011] JOL 27973 (GNP) and *Ex parte Erasmus* 2015 (1) SA 540 (GP), paras [4] and [5], refer to 20c in the Rand. *Ex parte Arntzen* 2013 (1) SA 49 (KZP), para [23], submits that the KwaZulu Natal provisional division should follow the guidelines in North Gauteng where the court has laid down that "advantage to creditors" requires a dividend of at least 20 cents in the Rand.

55 2015 (3) SA 1 (CC) paras [44] to [46].

56 1948 (2) SA 555 (W).

57 In such affidavit the date upon which and the time and locality at which the assets were inspected must be set out and the applicant or his proxy must confirm in his affidavit that he was present when the assets were viewed and that he pointed out the assets to the valuator – *Ex parte Erasmus* 2015 (1) SA 540 (GP), para [13]. See *Ex parte Bouwer* 2009 (6) SA 382 (GNP), *Ex parte Ogunlaja* [2011] JOL 27029 (GNP) and *Smit v ABSA*

the rights provided in section 82(6) (assets excluded from the sale of movable property) to prove an advantage to creditors.[58]

There is a practice for the applicant to allege the amount of the attorney's costs in the application. The attorney's fees are limited to this amount for purposes of taxation, even if the court order does not provide for such a limitation.[59] Other aspects are also considered, such as whether the debtor retains their employment or might lose their job due to the sequestration. The debtor might earn more than is needed for the maintenance of their family; the surplus can potentially be claimed by the trustee in terms of section 23(5), distributing the surplus among the creditors. It is possible to take control and administer the estate after the date of sequestration for the advantage of the creditors (if, of course, something remains that can be administered). The fact that an irresponsible debtor loses control over their estate after date of sequestration will also be to some benefit to the creditors. There may be reasons for thinking that because of enquiry under the Insolvency Act, some assets may be revealed or recovered, for the benefit of creditors.[60] A not too remote prospect that assets might be unearthed that will benefit creditors may satisfy the court that there will be an advantage for creditors.[61] Where the above factors place the creditors in a better position than before sequestration, the sequestration is deemed to be to their advantage.

In *Ex parte Mark Shmukler-Tshiko and Emma Shmukler-Tshiko*,[62] Satchwell J remarked that dishonesty in (and abuse of) insolvency proceedings places a burden on creditors, their

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Bank Ltd [2011] JOL 27973 (GNP), where valuations were rejected. See also *Ex parte Fuls and Three Similar Matters* 2016 (6) SA 128 (GP), para [3]. *Business Partners Ltd v Quick Leap Investments 221 (Pty) Ltd* [2010] JOL 26509 (KZD), para [25], refers to para F4.2 of the Gauteng High Court Practice Directives Manual, which provides that if the existence of adequate advantage to creditors depends on the extent to which a specific asset will contribute to the free residue, evidence of a person with appropriate skill must prove what price can be expected on an expeditious sale, which is not delayed, to obtain a satisfactory negotiated price. See also *Nedbank Ltd (formerly t/a Nedcor Bank Ltd) v Abrahams* (1318/2012) [2013] ZAECPEHC 11 (26 February 2013), para [16] *et seq*. Professionals, like valuators, who choose to become involved in voluntary surrender applications should be aware of the provisions of s 3(3) of the Insolvency Act 1936 and that they may be required to attend court to answer any questions that the judge seized of the application may wish to direct to them. Their liability to attend such examinations does not depend on how far their places of business might be from the seat of the court – *Crafford v Crafford* (19421/13, 19422/13) [2014] ZAWCHC 14 (13 February 2014), para [9]. See also *Ex parte Bezuidenhout* (1858/2014) [2014] ECP (19 August 2014).

58 *Ex parte Kroese* 2015 (1) SA 405 (NWM).

59 *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 and *Ex parte Ogunlaja* [2011] JOL 27029 (GNP).

60 *First Rand Bank Ltd t/a First National Bank v Naidoo; SA Bank of Athens v Naidoo* [2011] JOL 26812 (KZD), paras [4], [7] and [18]; *Seaways (Pty) Ltd t/a South African Express Line v Rubin (Investec Bank as Intervening Party)* [2014] JOL 31127 (GSJ), para [21] *et seq*; *ABSA Bank Limited v Nyaumwe* [2014] JOL 32467 (ECP), para [4]. It may be to the advantage of creditors if an enquiry into the financial affairs of entities is conducted, because there may be a prospect of undisclosed assets being brought to light – *Registrar of Banks v Dafel* [2015] JOL 32711 (GP), para [45].

61 *Commissioner, SARS, v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA), para [29]; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N); *Corney v Esterhuizen* [2009] JOL 23776 (ECP); *Maxwell v Holderness* [2009] JOL 23740 (KZN); *Nedbank v Thorpe* [2009] JOL 24292 (KZP); *BP Southern Africa (Pty) Ltd v Gaskell* [2010] JOL 25515 (KZP), paras [27] – [30].

62 [2013] JOL 29999 (GSJ).

shareholders, taxpayers and the general South African economy. Also, where legal representatives realise that collusive or unfounded applications may be dismissed, they should still appear in court and the applications will be dealt with on the merits. Furthermore, where the costs of sequestration are in amounts that exceed the alleged shortfall between the assets and the liabilities, such costs simply increase the quantum of insolvency to no useful purpose, reduce the amount available for distribution amongst creditors and benefit administrators rather than creditors.

In *Botha v Botha*,[63] the court quotes extensively from decisions dealing with the requirement of advantage of creditors and states that it is time that the allegations of applicants in friendly sequestrations and voluntary surrender applications are considered carefully, specifically in respect of the calculations to show what dividends might be paid to concurrent creditors; the personnel of the Master's office are *au fait* with administration and sequestration costs because they have to consider liquidation and distribution accounts in insolvent estates on a daily basis; the Master should assist the courts in each and every application for sequestration (especially friendly sequestrations and voluntary surrender applications); before an application for a provisional sequestration order is presented to court, the courts (in the Free State) have always insisted on a Master's report, at least before a final order is granted; in applications for voluntary surrender, legislation empowers the Master to direct the applicant to cause their property to be valued by a sworn appraiser and the Master always files reports in these applications.[64]

3.3.6 Discretion of court and the National Credit Act

Where all four of the above aspects are proven, the court still has a discretion not to sequestrate the estate. The court will refuse the order if the application constitutes an abuse

63 (4457/2016) (2016) FB (17 November 2016).

64 See *Eksteen v Van der Merwe* [2018] JOL 40301 (FB) where the court repeated that it was time that applicants' allegations in friendly sequestrations and voluntary surrender applications be considered carefully, specifically in respect of the calculations to show what dividends might be paid to concurrent creditors. The court notes that more detailed and helpful Masters' reports have been forthcoming since the *Botha* judgment (para [9]). The court stated that it is time that the figure of R30,000 for costs of sequestration and administration (Practice Directives; Free State Practice Directives and particularly Directive 9.4.1) should be increased to R45,000 as a reasonable average for one firm of attorneys' sequestration costs in an unopposed sequestration application, para [18].

of the process.[65] In *Ex parte Ford*[66] the judge reasoned that some of the debts may have amounted to the reckless granting of credit. Thus, the court refused to exercise its discretion due to the fact that the machinery under section 85[67] of the National Credit Act 2005 could have been more appropriate than sequestration.[68] According to *Ex parte Fuls*[69] it is incumbent on an applicant in an application for voluntary surrender, where it is required to illustrate advantage to creditors and on the face of it the applicant has entered into credit agreements that fall under the provisions of the National Credit Act 2005, to make a full disclosure of at least the following:

- Whether or not the applicant availed themself of the procedures afforded in the National Credit Act for debt review prior to the application being proceeded with and, if not, full reasons for such failure.

- A comprehensive report of the debt counsellor involved, explaining what procedures were followed and whether the applicant complied with any debt restructuring arrangements.

Where an application of this nature lacks the averments as set out above, it does not comply with the requirement that the applicant should satisfy the court that it is in the interest of creditors that the estate should be surrendered and should accordingly be dismissed.[70]

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65 The granting of an order declaring proceedings as being vexatious and frivolous and thus amounting to an abuse of the court's procedure, is discretionary. The discretion must be exercised on judicial grounds – see *Werksmans Incorporated v Praxley Corporate Solutions (Pty) Limited* [2016] JOL 34039 (GJ), at para [80]. In *Gobel v Gobel* (6935/13) [2013] ZAWCHC 91 (28 June 2013), the applicant's objective in launching the application was not a *bona fide* attempt to bring about a sequestration of the respondent's estate, but a tactical manoeuvre aimed at pressuring the respondent into settling the divorce on her terms. Therefore, the application was brought for an ulterior motive and was dismissed as an abuse of process (at para [54]). Even if the respondent had established on a balance of probabilities that the appellant was unable to pay their debts, the court still has discretion to grant a winding-up order. In this case the winding-up proceedings were resorted to primarily to enforce a debt, the existence of which was *bona fide* disputed on reasonable grounds. The application for the winding-up of the appellant was an abuse of the process of the court and should have been regarded as such – see *World Focus 754 CC v Business Partners Limited* [2013] JOL 30095 (KZP) para [42].

66 2009 (3) SA 376 (WCC). See also *Avantech Ltd v Fryer* (70750/14) [2016] ZAGPPHC 49 (5 February 2016), at para [19]. The undesirability of accepting the voluntary surrender of insolvent estates when the interests of creditors who had been "responsible credit grantors" could be better served if the applicants sought debt relief in terms of the National Credit Act 2005, appeared to weigh in the balance against acceding to the applications – *Crafford v Crafford* (19421/13, 19422/13) [2014] ZAWCHC 14 (13 February 2014), paras [4] and [17]. *Cf Ex parte Concato* 2016 (3) SA 549 (WCC), para [15]. See C van Heerden and A Boraine "The Interaction between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law" *PER / PELJ* 2009 (12) 3.

67 Alleviation of over-indebtedness through a process of debt relief in the form of debt restructuring.

68 See *Desert Star Trading v No 11 Flamboyant Edleen* 2011 (2) SA 266 (SCA), where an application for liquidation was refused because of a reasonable and *bona fide* dispute about claims based on reckless credit and entering into a credit agreement while not registered as a credit provider in terms of the National Credit Act.

69 2016 (6) SA 128 (GP), para [7].

70 At para [8] of the judgment.

In *Firstrand Bank Ltd v Evans*,[71] which was an application for compulsory sequestration, the court stated that the existence of a debt rearrangement order that provided for the payment of the debtor's debts within a reasonable time and in an orderly fashion, in conjunction with proof that the debtor was complying with the terms of the order, was a powerful reason for the court to exercise its discretion in favour of the opposing debtor when an application was brought for the sequestration of their estate. However, it is not decisive and is even less decisive when the existence and validity of any such order are debatable.[72] Where a proposal for debt restructuring will significantly extend the period of the debtor's indebtedness and is dependent for its effectiveness upon a speculative assumption regarding increases in income and payments, the weight to be attached to the possibility of such an order is diminished in exercising the court's discretion whether to grant a sequestration order.[73]

In *V v V*,[74] the respondent argued that sequestration would 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. The respondent seemed to suggest that he should first be allowed to pay and settle his debt in terms of the debt review arrangements. Only once this had been done, would he start to make monthly payments towards what he owed the applicant in terms of the maintenance order, which was not included in the debt review arrangements. Although he was not able to state how long it would take to settle his debts in terms of the debt review order, it was clear that such an exercise would take years.[75] The judge reiterated that the court has a discretion to grant a sequestration order, which has to be exercised judicially taking into account all the facts as well as the general history and circumstances of the case.[76] The court was satisfied that there were no special circumstances and / or considerations why the relief should not be granted and ordered the estate to be placed under provisional sequestration.[77]

The question as to whether the National Credit Act 2005 prohibits sequestration proceedings under certain circumstances is discussed under the section dealing with compulsory sequestration below.

3.3.7 Court date and thereafter

The court has the authority to postpone or refuse the application. However, once the court has issued the sequestration order, the administration of the estate proceeds in the same way as a compulsory sequestration upon the final sequestration order. In the few instances where it is necessary to distinguish between voluntary surrender and compulsory sequestration, these notes will specifically deal with the voluntary surrender of an estate.

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71 2011 (4) SA 597 (KZD).
72 At para [36] of the judgment.
73 At para [39] of the judgment.
74 (7833/2016) [2018] ZAGPPHC 505 (6 July 2018).
75 At paras [5.1], [5.2] and [5.3] of the judgment.
76 At paras [6.1] and [6.2] of the judgment.
77 At para [6.3] of the judgment.

3.4 Compulsory sequestration

3.4.1 Application

The creditor(s) of an estate (including SARS, for a tax debt)[78] can apply for the compulsory sequestration of the estate. As is the case with voluntary surrender, the application is brought by way of a notice of motion supported by one or more affidavits. It is important to note Uniform Rule of Court 41A, operative as of March 2020, which is concerned with compulsory procedures pertaining to the mediation of disputes in general.

In *Plumb on Plumbers v Lauderdale*,[79] given the similarities between some of the allegations in affidavits pertaining to compulsory applications dealt with by the same attorney, the court had no confidence that the allegations were entirely accurate. As a result, the *rule nisi* for sequestration was not confirmed and the matter was referred to the Law Society and Society of Advocates (as these institutions were once named) for further action. The Free State High Court Rules contain specific requirements for applications for sequestration.[80]

Compulsory sequestration is a form of final execution, seen from the creditor's viewpoint. However, the Supreme Court of Appeal has held that section 130 of the National Credit Act 2005 does not bar sequestration proceedings until the pre-enforcement procedure provided

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78 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).

79 2013 (1) SA 60 (KZD).

80 "9.1 All cash amounts paid by or on behalf of the respondent in an application for compulsory sequestration or by an applicant for voluntary surrender must be paid into the Guardian's Fund and the Master's report must state whether that has in fact been done.
9.2 No application for a final sequestration order will be heard unless the Master's report which shall be obtained specifically for such application, has been placed before the court.
Note: The Master insists that the provisions of section 19(1) of the Insolvency Act regarding an inventory be properly complied with by Sheriffs and such inventory must therefore be furnished to the Master as soon as possible. The Master will not issue a report before such inventory has been provided to him. If the absence of such inventory has the effect that the rule *nisi* is not confirmed, an explanation for the absence will have to be provided and a suitable costs order can be considered.
9.3 Every rule *nisi* in a compulsory sequestration application shall be returnable after four weeks, unless the court otherwise directs.
9.4.1 All applications for provisional sequestration and voluntary surrender will be approached by this Court on the basis that the costs of sequestration and administration will amount to R30 000. (This amount may be adjusted from time to time.)
[Rule 9.4.1 replaced by GN 414 of 14 June 2013 (wef 1 June 2013).]
9.4.2 If the applicant is of the opinion that those costs will be less in a particular matter, an estimate thereof must be attached to the application papers and that estimate must be placed before the Master, who shall provide comments thereanent to the Court.
9.5 In applications for rehabilitation all curators 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."

for in section 129(1)(a) of the Act has been complied with. Thus, an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim, and a sequestration order is not an "order to enforce a credit agreement".[81] Compare *Desert Star Trading v No 11 Flamboyant Edleen*[82] where an application for liquidation was refused because of a reasonable and *bona fide* dispute[83] about claims based on reckless credit and entering into a credit agreement while not registered as a credit provider in terms of the

81 *Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA), which agreed with the decision in *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ), paras [27]–[31]. An application for the sequestration of a consumer's estate is not precluded by the prohibition on the institution of proceedings envisaged in s 88(3) of the National Credit Act 2005 – *Firstrand Bank Ltd v Kona* 2015 (5) SA 237 (SCA). See C van Heerden and A Boraine "The Interaction between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law" *PER / PELJ* 2009 (12) 3. See further *Osborne v Cockin NO*, unreported case (549/2017) [2018] ZASCA 58 (17 May 2018), para [20], in that the objectives of a sequestration order is to achieve sequestration. It is not to resolve a dispute over debt.

82 2011 (2) SA 266 (SCA).

83 The *Badenhorst*-principle is less of a principle than a sensible rule of practice. It provides that if you want to claim a debt you know is disputed, you should not bring liquidation proceedings to claim it. You should claim the debt by way of action – and only once your claim has been established may you, if necessary, seek to liquidate or sequestrate. However, the principle does not preclude a court from deciding a straightforward legal issue based on common cause facts – *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC), paras [88] and [93]. In regard to *bona fide* disputes, see *Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV v Honig* [2011] JOL 27924 (SCA); *Firstrand Bank Ltd v Seriso 321 CC* [2011] JOL 28004 (WCC), para [27]; *Firstrand Bank Ltd v Ronson Trading (Pty) Ltd* [2011] JOL 26797 (GNP), para [7]; *Garlick and Bousfield v Palm Stationery Manufacturers (Pty) Ltd* [2011] JOL 27169 (KZP), para [46]; *Hanover Reinsurance Group Africa (Pty) Ltd v Gungudoo* [2011] JOL 27602 (GSJ), paras [44] to [46]; *Gungudoo v Hannover Reinsurance Group Africa (Pty) Ltd* 2012 (6) SA 537 (SCA), para [18]; *Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freighting CC*, Case No A5024/2012 High Court Johannesburg, 30 October 2012; *World Focus 754 CC v Business Partners Limited* [2013] JOL 30095 (KZP); (8275/2009, AR: 513/11) ZAKZPHC 10 (25 January 2013), para [42]; *Jorpe Turnkey Projects CC v HCI Khusela Coal (Pty) Limited* [2013] JOL 29885 (GNP); *Mota-Engil South Africa (Pty) Ltd v Barnard* (04725/13) [2013] ZAGPJHC 153 (30 April 2013), para [14]; *Nedbank Ltd v Zonnekus Mansions (Pty) Ltd* (A378/2012) [2013] ZAWCHC 6 (7 February 2013); *Business Partners Limited v Tsakiroglou* [2017] JOL 37687 (WCC), para [33]; *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC), para [8]; *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd* 2015 (4) SA 623 (WCC), para [6]; *Werksmans Incorporated v Praxley Corporate Solutions (Pty) Limited* [2016] JOL 34039 (GJ), para [81]; *Gap Merchant Recycling CC v Goal Reach Trading 55 CC* 2016 (1) SA 261 (WCC); *Avantech Ltd v Fryer* (70750/14) [2016] ZAGPPHC 49 (5 February 2016), paras [17] and [18]; *Engen Petroleum Limited v Plastic Brown Containers (Pty) Limited* [2016] JOL 35922 (KZD), para [8]; and *Arabella Investments (Pty) Ltd v Cowbow (Pty) Ltd* (4956/17) [2017] WCC (28 June 2017), paras [37] and [38]. An unliquidated claim for damages cannot found a claim for sequestration and sequestration is not the appropriate remedy for resolving a dispute regarding a debt – *Osborne v Cockin NO* (549/2017) [2018] ZASCA 58 (17 May 2018), para [20]. An application for liquidation should not be resorted to in order to enforce a claim that is *bona fide* disputed by a respondent company – *Ithala Development Finance Corporation Ltd v Concrescore Vehicle Repair Specialists (Pty) Ltd* [2013] JOL 30708 (KZD); *Cruzn Motors (Pty) Ltd v Hussen Family Partnership* 10250/2017P) [2018] ZAKZPHC 15 (15 May 2018), at para [8]; *Body Corporate of the Grove Sectional Title Scheme No 16/1983 v Sehri Trading (Pty) Limited* [2017] JOL 37796 (GP), para [33]; *ASA Metals (Pty) Ltd v Vardocap (Pty) Ltd* (5630/2017) [2018] ZALMPPHC 12 (17 April 2018); *Western Crown Properties 61 (Pty) Ltd v Able Walling Solutions (Pty) Ltd* (8073/16) [2017] WCC (13 November 2017), paras [18] to [20]; *VBS Mutual Bank (In Liquidation) v Madzonga* (25057/2018) [2019] ZAGPJHC 273 (23 August 2019), para [38]; *JJP Propco (Pty) Ltd v Jacaranda Haven (Pty) Ltd* [2019] JOL 45017 (GP) (failed to prove that disputed on *bona fide* grounds); *Rajah v Graven Motorsport* (1184/2018) [2019] ZANCHC 27 (7 June 2019).

National Credit Act. *Opperman v Boonzaaier*[84] declared section 89(5)(c) of the National Credit Act unconstitutional – this provision provides that all rights to recover money or goods under an "unlawful" credit agreement (for instance at the time of the agreement the credit provider was unregistered) are either cancelled or forfeited to the state. See above for a discussion of the discretion of the court and the National Credit Act 2005.

3.4.2 Formalities

The applicant must provide security to the Master to defray all sequestration costs until a trustee is appointed.[85] He must obtain a certificate issued by the Master, confirming that security has been given not more than 10 days before the application for sequestration. The certificate must be filed together with the application for sequestration.[86]

There is a peremptory requirement,[87] when an application is presented to court, to furnish a copy of the application to registered trade unions, to employees[88] in the prescribed manner,[89] to the South African Revenue Service,[90] and to the debtor, unless the court

84 (24887/2010) [2012] ZAWCHC 27 (17 April 2012).

85 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 is discharged and a new order issued.

86 Insolvency Act, ss 9(3), (4), (5) and 14(1).

87 *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) decided that compliance with the requirements of s 9(4A) is peremptory. The question whether the provisions are peremptory was left open by the Supreme Court of Appeal in *Gungudoo v Hannover Reinsurance Group Africa (Pty) Ltd* 2012 (6) SA 537 (SCA) [42]. In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA), note 46 at para [17], the Supreme Court of Appeal dealt with s 346(4A) of the Companies Act 61 of 1973 – a provision almost identical to s 9(4A) of the Insolvency Act. The court 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" (note 46 at para [14]). In *Stratford v Investec Bank Limited* 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 v Investec Bank Limited* 2015 (3) SA 1 (CC), para [42].

88 It was sufficient service of the sequestration application on a domestic employee to leave the "petition" on the kitchen table of the respondent. The High Court held that the petition needed to be furnished only to those employees of the debtor who are involved in the debtor's business concern and not a debtor's domestic employees – *Investec Bank Limited v Stratford* (10394/2012)WCHC (14 August 2013), para [42]. However, in *Stratford v Investec Bank Limited* 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.

89 Insolvency Act, s 9(4A)(a)(ii).

90 See *Chiliza v Govender* 2016 (4) SA 397 (SCA) which confirms that it is peremptory to furnish a copy of the application to SARS. See *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* 2013 (1) SA 522 (GNP) on the similar provisions of s 346(4A)*(a)*(iii) of the Companies Act 1973. Proof of such furnishing by means of an affidavit is also peremptory – *Sphandile Trading Enterprise (Pty) Ltd v Hwibidu Security*

dispenses with notice to the debtor,[91] and to file an affidavit by the person who furnished a copy of the application, which sets out the manner in which copies were furnished.[92]

3.4.3 Contents of affidavit

The applicant must include a sworn statement, disclosing the following information: that they are a creditor of the insolvent; details of the applicant creditor themself and of the respondent debtor; details indicating the court's jurisdiction; the amount and nature of the applicant's claim, as well as the basis for, amount and nature of security given (if any); an allegation that the debtor is actually insolvent and reasons for this statement, or that the debtor has committed an act of insolvency; that there is reason to believe that the sequestration is to the advantage of the creditors (as a group); that security for payment of the costs of sequestration has been set; compliance with the notification prescriptions to interested parties; and all other relevant facts and circumstances.

3.4.4 Provisional sequestration

Where compulsory sequestration is applied for, the court will usually initially place the estate under provisional sequestration. Interested parties are entitled to object to the application and can attempt, on the return date, to persuade the court that the order should not be made final. Objecting creditors (or the debtor) must substantiate their objection by lodging affidavits containing all the facts and circumstances on which they rely. Where the case for provisional sequestration is marginal (marginal excess of liabilities over assets coupled with, at best, a modest benefit to creditors), an exercise of the court's discretion against sequestration is justified.[93]

3.4.5 Applicant's burden of proof

The applicant creditor must, in terms of section 10 of the Insolvency Act, *prima facie* prove that:

Services CC 2014 (3) SA 231 (GJ) found that whilst the furnishing of a copy of the application to SARS and proof of such furnishing by way of affidavit are peremptory, s 346(4A)*(a)*(iii) does not require the furnishing of the copy to SARS to occur at any particular time; the purpose of the section is met if such furnishing takes place within a reasonable period of time prior to the hearing of the application and the affidavit is filed before or during the hearing.

91 *Berrange NO v Hassan* 2009 (2) SA 339 (N); *Hassan v Berrange NO* 2012 (6) SA 329 (SCA), paras [13] and [51]. A creditor would necessarily have to make out a case in the founding affidavit to dispense with the furnishing of the application. Factors that could properly be considered include the urgency of the matter and the conduct of the debtor in relation to the debtor's assets. In general, the court will weigh the interests of the creditor and the debtor and, more particularly, the prejudice that may be suffered by such creditor if the applicant gives notice and the application is heard in due course. The factors that could be considered are not exhaustive. Each case will depend on its own circumstances – *Smith v National Urban Reconstruction and Housing Agency and Others* [2017] JOL 36905 (KZD), para [13].

92 Insolvency Act, s 9(4A).

93 *Investec Bank Ltd v Lambrechts NO* 2019 (5) SA 179 (WCC), para [61].

(a) they qualify as a creditor who may bring such application – only a creditor who has a liquidated claim of at least R100,[94] or where two or more creditors apply jointly, where the total of their claims in aggregate is not less than R200, may bring such an application to court;[95]

(b) the debtor is factually insolvent or has committed an act of insolvency; and

(c) there is reason to believe that sequestration would be to the advantage of creditors.

3.4.6 Liquidated claim

A liquidated claim is a certain and determined claim resulting from an order of court, agreement (for example, a contract or compromise) or any other reason.[96] A claim for the delivery of goods, or to do or to refrain from doing something, cannot be a liquidated claim. The claim must be legal and valid and must not have prescribed. Where the quantum of the applicant's claim is undecided pending the outcome of an application for the variation of a maintenance order, the applicant will have failed to establish a liquidated claim as contemplated in section 9(1) of the Divorce Act.[97] A claim is not a liquidated claim where its existence depends on the fulfilment of a condition, but it is a liquidated claim where the condition relates only to the date for payment, which is not due as at the date of the hearing of the application for sequestration.[98]

3.4.7 Acts of insolvency

Practical problems often exist where a creditor has to prove that the debtor is in fact insolvent.[99] The applicant could, as an alternative to factual insolvency, base the

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94 Where it was conceded that an amount of at least R100 was due to an applicant for a winding-up order, the applicant had proved that it was a creditor for an amount of not less than R100, which was due and payable (in other words proved a liquid debt of not less than R100) – *Lamprecht v Klipeiland (Pty) Limited* [2014] JOL 32350 (SCA), para [16]. Although claims for damages (delictual or contractual) are generally in the nature of unliquidated claims, this is so only when (as is usually the case) the monetary value thereof is not already determined, or likely to be capable of determination with ease and expedition – *Kleinhans v van der Westhuizen NO* 1970 (2) SA 742 (A) at 745 quoted with approval in *Avantech Ltd v Fryer and Another* (70750/14) [2016] ZAGPPHC 49 (5 February 2016), at para [13], where the court was satisfied that, although the investigation into the company's financial affairs was still ongoing, the claim was capable of easy determination and was therefore a liquidated claim despite the fact that the claim was basically a claim for damages (para [14]). See also *Engen Petroleum Limited v Plastic Brown Containers (Pty) Limited* [2016] JOL 35922 (KZD), para [10].

95 A creditor does not lose its *locus standi* due to payment of the original debt by a third party, where a body corporate as creditor and a debtor in relation to a recurrent debt in the form of monthly levies and charges are involved – *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA), para [14].

96 *Hassan v Berrange NO* 2012 (6) SA 329 (SCA), para [35].

97 *Gobel v Gobel* (6935/13) [2013] ZAWCHC 91 (28 June 2013).

98 *Oro Africa (Pty) Limited v Currin* [2017] JOL 39170 (WCC), p 5 line 6.

99 It is insufficient for the applicant, who seeks sequestration of the respondent's estate on the basis of factual insolvency, to only in the replying affidavit rely on factual insolvency. This is the case even if it appears from

application[100] on an act of insolvency committed by the debtor.[101] The following are all acts of insolvency – (note that the *nulla bona* return in (b) and the written notice of inability to pay debts in (g) are the acts of insolvency which are relied on most in practice):

(a) Where the debtor leaves the Republic or, being out of the Republic, remains absent from it, or departs from his dwelling or otherwise absents himself, with intent to evade or delay payment of his debts. The applicant must prove the debtor's intention.[102] Meskin *Insolvency Law and its operation in winding-up* states the following, at 2-65, regarding this section:[103]

> "The essence of each of these acts of insolvency is that by the particular conduct the debtor has intended to evade or delay the payment of his debts. The test in relation to the debtor's intention is a subjective one but such intention is established 'by a process of inferential reasoning and is not dependent on the mere *ipse dixit* of the debtor'. Thus, while his leaving the Republic or leaving his dwelling gives rise to an inference that such intention was present, it is insufficient in itself to justify a conclusion, even *prima facie* that an act of insolvency has been established since there may be other explanations for such conduct. But the other circumstances in a particular case, eg, that the debtor owes numerous creditors substantial amounts and has departed without any prior reference to them or any attempt to provide for satisfaction of their claims, may justify an inference that the debtor acted with the requisite intent. In determining whether the requisite intention existed the Court must 'weigh up all the relevant facts and circumstances 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'."

(b) Where judgement is given against the debtor, and

(i) he fails, upon demand of the officer whose duty it is to execute the judgement, to satisfy it or to indicate to the officer disposable property sufficient to satisfy the debt; or

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the respondent's affidavits that he is factually insolvent. The creditor who wishes to rely on the debtor's actual insolvency should allege and show this in the founding affidavit – *Mia v Deacon* [2015] JOL 33358 (GJ), para [10]. To determine factual insolvency, the relevant value of immovable property is its open-market value rather than its forced sale value – *Investec Bank Ltd v Lambrechts NO* 2019 (5) SA 179 (WCC), para [30].

100 The claim may be based on information of which the creditor only becomes aware after the proceedings have been launched – *Berrange NO v Hassan* 2009 (2) SA 339 (N); *Hassan v Berrange NO* 2012 (6) SA 329 (SCA), para [41].

101 Insolvency Act, s 8.

102 In *Berrange NO v Hassan* 2009 (2) SA 339 (N) the debtor committed the act of insolvency because he left the Republic with the intention of delaying repayment of an amount misappropriated from the company of which he was a director. Where the Sheriff attempted to serve the writ on three occasions, but there was never anyone at the respondent's premises, the court decided in the circumstances of the case that the applicant had not established sufficient facts to rely on an act of insolvency as defined by s 8(a) – *Mia v Deacon* [2015] JOL 33358 (GJ), para [2].

103 Quoted with approval in *Oro Africa (Pty) Limited v Currin* [2017] JOL 39170 (WCC), p 25 line 15.

(ii) it appears from the return made by the officer that he has not found sufficient disposable property[104] to satisfy judgement (where the officer makes a *nulla bona* return).[105]

What happens, is that the execution process after judgement fails. Where the officer who must execute judgement[106] finds the debtor and the debtor personally tells the officer that no goods for a sale in execution exist, the officer does not have to continue his search. The act of insolvency has already been committed.[107] The officer must clearly show the value of any assets found. Where there is doubt as to whether the assets are sufficient to satisfy judgement, the creditor can sell the assets. Where the officer cannot find the debtor, the officer must search for any of the debtor's assets. The act of insolvency is only committed when the officer does not find enough assets to sell in execution to satisfy the judgement. The amount of the judgement is irrelevant.[108] It has been held that where a *nulla bona* return was furnished over a year prior to the sequestration proceedings, an applicant who relies on the return as an act of insolvency in terms of section 8(b) is obliged to set out allegations supported by facts that the debtor's position is unchanged.[109] It has also been held that a *nulla bona* return, whether recent or not, is sufficient to establish an act of insolvency in terms of section 8(b). However, where the *nulla bona* relied on is not a recent one, the failure to indicate that the debtor's circumstances have not improved in the interim may be a significant factor in the exercise of the court's discretion to grant a sequestration order.[110] The act of insolvency is fixed when the writ was executed. Payment of the debt on which the writ is

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104 A *nulla bona* return in respect of movable property only, is not sufficient for the purposes of s 8(b) – *Schäfers NO v Mouton NO* 2013 JDR 1289 (GNP) 2013 JDR 1289, p 1.

105 Section 8(b) of the Insolvency Act 1936 refers to two acts of insolvency. The first is committed when the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it; and the second when the sheriff fails to find sufficient property to satisfy the judgment. Immovable property held by the judgment debtor is disposable at the instance of the judgment creditor, being the first mortgagee, for purposes of s 8(b) regardless of the fact that the property had not been declared specially executable. A sheriff's return is *prima facie* proof of its contents by virtue of s 43 of the Superior Courts Act 2013 – *Absa Bank Ltd v Collier* 2015 (4) SA 364 (WCC), paras [9], [34] and [36]. A bald denial by the debtor, that he said what was recorded in the return, is not enough. Clear and satisfactory evidence is required to impeach a return of service – *Sussman & Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (O) at 96D – H; *Senwes Limited v Kruger NO (Afrikaanse Protestantse Kerk (Hoopstad) Intervening)* [2016] JOL 36332 (FB). Where the *nulla bona* relied on is not a recent one, the failure to indicate that the debtor's circumstances have not improved in the interim may be a significant factor in the exercise of the court's discretion to grant a sequestration order – *Seaways (Pty) Ltd t/a South African Express Line v Rubin (Investec Bank as Intervening Party)* [2014] JOL 31127 (GSJ), at para [8].

106 A *nulla bona* return cannot be relied on as an act of insolvency if the judgment was not served on the debtor by a Sheriff or a Deputy Sheriff – *Absa Bank Ltd v Van Zyl NO* (35976/2015) [2016] ZAGPPHC 247 (22 April 2016).

107 *Senwes Limited v Kruger NO (Afrikaanse Protestantse Kerk (Hoopstad) Intervening)* [2016] JOL 36332 (FB), para [5].

108 In *Mota-Engil South Africa (Pty) Ltd v Barnard* (04725/13) [2013] ZAGPJHC 153 (30 April 2013), para [19.4], the court held that the *nulla bona* return could be relied on even though the debt was paid by someone other than the debtor after institution of the proceedings.

109 *Mia v Deacon* [2015] JOL 33358 (GJ), para [3].

110 *Seaways (Pty) Ltd t/a South African Express Line v Rubin (Investec Bank as Intervening Party)* [2014] JOL 31127 (GSJ), para [8].

issued precludes further reliance on section 8(b), and only the interest accrued up to that point forms part of the debt.[111] Where there was personal service of the application for provisional sequestration on the respondent – and where his defence on the facts is that he has no assets at all – there appears to be no role for the potential staleness of the *nulla bona* return. The respondent, for the rule to have any role, would have to argue that the applicant ought to have placed more recent evidence before the court to show that the respondent's position had not changed from him having no assets. But in this specific case the respondent had raised the defence that he had no assets at all.[112]

(c) If the debtor makes, or attempts to make, any disposition of any of his property which has, or would have, the effect of prejudicing his creditors or of preferring one creditor above another.

(d) If the debtor removes, or attempts to remove, any of his property with intent to prejudice his creditors or to prefer one creditor above another.[113]

(e) If the debtor makes, or attempts to make, any arrangement with any of his creditors to release him wholly or in part from his debts.[114]

(f) If, after having published a notice of surrender of the estate, which has not lapsed or been withdrawn in terms of sections 6 or 7, the debtor fails to comply with the requirements of section 4(3), or lodges, in terms of section 4(3), a statement which is incorrect or incomplete in any material respect, or fails to apply for the acceptance of the surrender of the estate on the date mentioned in the notice of surrender as the date on which the application is to be made. (The incorrect statement can prejudice the creditors in their decision to oppose the application or not.)

(g) If the debtor gives notice in writing to any of his creditors that he is unable to pay any of his debts.[115] *Firstrand Bank Ltd v Evans*[116] held on the facts of the case that the debtor

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111 *Lundy v Beck* 2019 (5) SA 503 (GJ), paras [26] – [29]. The costs of the sequestration proceedings could never form part of the debt on which the insolvency was founded – see paras [21] and [32].

112 *Investec Bank Limited v Le Roux* (575/2014) [2016] ZAGPJHC 11 (11 February 2016), para [33].

113 The debtor committed this act of insolvency where he attempted to transfer a sum with the intent to prejudice his South African creditors – *Hassan v Berrange NO* 2012 (6) SA 329 (SCA), para [41] and that which follows. In a minority judgement the view was held (at para [56]) that s 8(d) applies to corporeal and incorporeal property.

114 The Legislature could not have intended that negotiations for the settlement of a dispute in a normal commercial context to "get a better or more satisfactory deal" on a transaction constitutes an act of insolvency. There is no indication that a party entering such negotiations is doing so because he is unable to pay his debts – see *Standard Bank of South Africa Limited v McCrae* [2018] JOL 39438 (GJ), para [13].

115 See *Standard Bank of South Africa Ltd v Van Zyl* [2009] JOL 24499 (WCC). Public policy dictates that an admission of insolvency is admissible in sequestration proceedings, even though made on a privileged occasion – *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N); *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA), para [13] (quoted with approval in *Standard Bank of South Africa Limited v McCrae* [2018] JOL 39438 (GJ), para [16]); *Hollard Life Assurance Company Limited t/a Hollard Life v Chetty* (757/2016) [2017] ZAKZDHC 8 (3 March 2017), para [24]; *Cf One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd* 2015 (4) SA 623 (WCC), para [15].

116 [2011] JOL 26941 (KZD), para [13].

who informed his creditor that he had applied for, or was under, debt review was necessarily informing the creditor that he was over-indebted and unable to pay his debts. The Schedule to the National Credit Amendment Act 2014 added section 8A to the Insolvency Act. Section 8A provides that a debtor who has applied for a debt review must not be regarded as having committed an act of insolvency.[117] A statement in an affidavit deposed to in support of an application for the variation of an interim maintenance order does not qualify as an act of insolvency in terms of section 8(g) of the Insolvency Act. The section contemplates an obligation which is both final and undisputed.[118] The requirements of section 8(g) are satisfied when the notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his debts. The debtor's willingness to attempt to pay the debts in the future is not relevant.[119]

(h) If, being a trader, the debtor gives notice in the *Government Gazette* in terms of section 34(1) of the intention to transfer the debtor's business and is thereafter unable to pay all the debts.

3.4.8 Advantage for creditors

Sequestration must be to the advantage of the general body of creditors. The same requirements must be met as discussed under voluntary surrender above. However, the burden of proof differs in applications for compulsory sequestration. Here, only a reasonable prospect that sequestration will be to the advantage of creditors is required, whereas positive proof of advantage is required in voluntary surrender applications.[120] There is no principle that a debtor should not be sequestrated if it has only one creditor, but in such circumstances the potential advantages are inherently less and a case for insolvency correspondingly weaker.[121] It is not an advantage to the general body of creditors that a body corporate may gain a preference above the bondholder if the estate is sequestrated – the application must deal with the relative costs of recovering the debt via a sequestration process as opposed to levying execution against the sectional unit in the normal course.[122] Also, the fact that a body corporate has a duty to protect the interest of all of its members does not necessitate a deviation from the rule that advantage for the general body of creditors must be proved.[123]

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117 See *ABSA Bank Limited v Murray* (4188/2015) [2016] ECG (23 August 2016), paras [14] to [16]. *De Klerk v Griekwaland Wes Korporatief Bpk* [2014] JOL 32601 (CC), para [20], noted that the insertion of s 8A in the Insolvency Act seemed to be aimed at resolving the perceived tension between the National Credit Act 2005 and the Insolvency Act and that there would be little benefit in attempting to clarify the issue comprehensively in this case.

118 *Gobel v Gobel* (6935/13) [2013] ZAWCHC 91 (28 June 2013), para [27].

119 *Firstrand Bank Ltd v Evans* [2011] JOL 26941 (KZD), para [19]. See also *Evans v Smith* 2011 (4) SA 472 (WCC) 2011 (4) SA, para [27] *et seq*.

120 Compare s 6(1) with ss 10(c) and 12(1)(c). See also *Amod v Khan* 1947 (2) SA 432 (N) 438.

121 *Lynn & Main Inc v Mitha NO* 2006 (5) SA 380 (N).

122 *Body Corporate of Redberry Park v Sukude NO* [2015] JOL 33408 (KZD).

123 *Body Corporate of Empire Gardens v Sithole* 2017 (4) SA 161 (SCA).

3.4.9 Provisional sequestration order

Where the applicant *prima facie*[124] proves all the above-mentioned requirements, the court has a discretion to provisionally sequestrate the estate of the debtor.

In *Fourie NO v Smith*[125] Dewrance AJ referred to the following passage in Smith, *Law of Insolvency*, 3rd edition, at 65:

> "If the court, in the case of a provisional order, is *prima facie* of the opinion *and in the case of a final order*, is satisfied that there are three *facta probanda*, and enumerated in sections 10 and 12 respectively of the Act, have been established, it is empowered but not obliged to provide either a provisional *or final order* of sequestration as the case may be. The court has an overriding discretion to be exercised judicially upon consideration of all the facts and circumstances of the particular case. The discretion has been referred to as 'large' or 'wide' but be that as it may, the discretion is not to be exercised lightly. Accordingly, to paraphrase the words of Broom J, *when a sequestrating creditor has proved an act of insolvency and there is reason to believe that the sequestration will be to the advantage of the creditors, very special considerations are necessary to disentitle him to his order*" (emphasis added).

In terms of section 11 of the Insolvency Act the order of court is served upon the debtor, registered trade unions, employees, and the South African Revenue Service.[126] In terms of section 197B of the Labour Relations Act 1995, an employer facing financial difficulties that may reasonably result in its sequestration, must inform a consulting party contemplated in section 189(1). Furthermore, an employer that applies for its own sequestration or who receives an application for its sequestration must furnish such a consulting party with a copy

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124 *Cf Lindhaven Meat Market CC v Reyneke* 2001 (1) SA 454 (W), which deals with an application based on a disputed claim. Sequestration is not an appropriate procedure to enforce a disputed claim – *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C), at 116C. *Cf Nel NO v Bothma* [2014] JOL 32537 (KZD). In terms of s 10 of the Insolvency Act, the validity of the claim and the insolvency of the debtor must be established on a *prima facie* basis. Where the application for a provisional sequestration order is opposed, the necessary *prima facie* case is established only when the applicant can show that, on a consideration of all the affidavits, a case for sequestration has been established on a balance of probabilities. A distinction must be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding other disputes, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. With reference to the disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by the respondent on reasonable and *bona fide* grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities – *Payslip Investments Holdings CC v Y2K TEC Ltd* 2001 (4) SA 781 (C). *Cf Business Partners Limited v Tsakiroglou* [2017] JOL 37687 (WCC), para [41].

125 2015 JDR 1223 (GP) [76], quoted with approval in *Fourie NO v Smith* [2017] JOL 38868 (GP), paras [54] and [57].

126 The failure to serve a provisional sequestration order on SARS in terms of s 11(2A)*(c)* of the Insolvency Act 1936 was an absolute bar to the granting of a final order of sequestration – *Chiliza v Govender* 2016 (4) SA 397 (SCA).

of the application. The Master is also notified of the order, and he then publishes a notice of sequestration in the *Government Gazette*.[127]

3.4.10 Final order

Should the applicant prove on the return date on a balance of probabilities[128] that the applicant has a liquidated claim,[129] the debtor is insolvent or committed an act of insolvency, and there is reason to believe that the sequestration would be to the advantage of the creditors, the court may grant a final sequestration order.[130] The standard of proof required for the granting of a final winding-up order is more stringent than that required for the granting of a provisional order. In an application for the granting of a provisional winding-up order, a mere *prima facie* case must be established, whereas a final winding-up order requires proof on a balance of probabilities that the provisional order should be confirmed.[131]

Self-Assessment Questions

Study the basic principles pertaining to estates that can be sequestrated, jurisdiction, voluntary surrender, and compulsory sequestration.

Question 1
State whether the following statement is true or false and provide a reason for your answer.
A debtor may apply for his own sequestration by way of a compulsory sequestration. (2)

Question 2
State whether the following statement is true or false and provide a reason for your answer.
A body corporate of a sectional title scheme is included in the definition of "debtor" in section 2 of the Insolvency Act and can therefore be sequestrated. (2)

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127 Insolvency Act, s 17.

128 Applicants have to establish their case on a balance of probabilities; the matter has to be decided, essentially, on the respondent's version of the facts, except where that version contains denials that do not raise real, genuine or *bona fide* disputes of fact, or allegations or denials which are so far-fetched or clearly untenable that they can be rejected merely on the papers – *Corporate Money Managers (Pty) Ltd v Kufa Trading Enterprise CC* (457/2011) [2012] ZASCA 100 (1 June 2012), para [42].

129 Where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the court will refuse a sequestration order – *BP Southern Africa (Pty) Ltd v Gaskell* [2010] JOL 25515 (KZP), para [9]. See also *Freshvest Investments (Pty) Limited v Marabeng (Pty) Limited* [2015] JOL 33662 (FB).

130 Insolvency Act, s 12. The court has a discretion in the strict or narrow sense to decide whether to allow further proof – *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

131 *World Focus 754 CC v Business Partners Limited* [2013] JOL 30095 (KZP); (8275/2009, AR: 513/11) ZAKZPHC 10 (25 January 2013), para [28]; *Knipe v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB), para [21]; *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd* (18414/14) [2015] ZAWCHC 71 (28 May 2015); 2015 (4) SA 449 (WCC), paras [9] and [11]; *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd* 2015 (4) SA 623 (WCC), para [5].

Question 3
State whether the following statement is true or false and provide a reason for your answer. Insolvent deceased estates may be sequestrated in terms of the Insolvency Act but may also be administered as insolvent in terms of the Administration of Estates Act 1965. (2)

Question 4
State which court has jurisdiction to make sequestration and rehabilitation orders and explain why. (2)

Question 5
Explain which division of a court has jurisdiction to sequestrate an estate. (3)

Question 6
Describe the instances in which a magistrate's court has jurisdiction in matters pertaining to the sequestration of insolvent estates. (2)

Question 7
Explain the consequences of the publication of a notice of surrender to a client. (3)

Question 8
You act on behalf of Dagny Taggart, an insolvent debtor, who duly published a notice of surrender in the *Government Gazette* and in a newspaper circulating in the magisterial district where she resides. However, Dagny failed to notify all her creditors. Advise Dagny as to whether this omission can be condoned. (4)

Question 9
Compare and distinguish between the formal and substantive requirements pertaining to applications for voluntary surrender and compulsory sequestration. (20)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 4 – WINDING-UP OF OTHER ENTITIES

Not all legal entities are capable of being wound up – there are special provisions that apply to the winding-up of certain legal entities such as pension funds, banks, building societies, medical funds, insurance companies and co-operatives.[132] Special provisions regarding settlements by farmers who are unable to pay their debts have been repealed.[133] Section 34 of the Administration of Estates Act 1965 provides for the administration of insolvent deceased estates. Although an insolvency practitioner should be aware that there are special provisions applicable to certain entities, these provisions are not dealt with on this course.

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132 Pt VI of the Long-Term Insurance Act 1998; Pt VI of the Short-Term Insurance Act 1998; ss 28 to 30 of the Pension Funds Act 1956 (s 29A provides for the winding-up or sequestration of unregistered pension funds); ss 33 to 37 of the Friendly Societies Act 1956; ss 51 to 53 of the Medical Schemes Act 1998; ss 35 to 37 of the Collective Investment Schemes Control Act 2002, Ch IX of the Co-Operatives Act 2005 (*Van Tonder v Master of the High Court, Pretoria Application of Companies Act to Cooperative* (4766/16) [2016] GP (19 September 2016) confirmed that the Master does not have the power to appoint liquidators in the event of the winding-up of a co-operative registered under the Co-operatives Act 2005) – see also cl 79 of the Co-operatives Amendment Act 2013; ss 100 and 103 of the Financial Markets Act 2012 apply to the liquidation of a regulated person as defined in s 1 of that Act; s 68 of the Banks Act 1990; Ch VIII of the Mutual Banks Act 1993; s 30 of the Co-operatives Banks Act 2007; and ss 59 and 60 of the Labour Relations Act 1995. Application may be made for the sequestration or liquidation of a provider in terms of s 38B of the Financial Advisory and Intermediary Services Act 2002, whether or not the provider is solvent. Special provisions for insurance companies are discussed in *Van der Merwe v Minister of State Expenditure* 1999 (4) SA 532 (T). Sections 30-32 of the Insurance Act 1943 apply to the winding-up of an insurance business and not of the company – *Commissioner for Inland Revenue v Van der Merwe NO* 2001 (3) SA 1 (SCA) 6-7. *Registrar of Banks v Regal Treasury Private Bank Ltd (Under Curatorship) (Regal Treasury Bank Holdings Ltd Intervening)* 2004 (3) SA 560 (W) dealt with opposition to an application by the Registrar for the liquidation of a bank under curatorship. See *Executive Officer, Financial Services Board v Ovation Global Investment Services (Pty) Ltd* 2008 (3) SA 69 (C) for the appointment of a curator to take control of the assets of a financial institution in terms of s 5(1) of the Financial Institutions (Protection of Funds) Act 2001 and *Barnard and others v The Registrar of Medical* Schemes 2015 (3) SA 204 (SCA) for the appointment of a curator for a medical scheme. *Registrar of Medical Schemes v Solvita Medical Scheme* [2009] JOL 24156 (W) deals with the liquidation of a medical scheme. *Registrar of Medical Schemes and Another v Genesis Medical Scheme* 2016 (6) SA 472 (SCA) decided that the personal medical savings accounts funds of a member of a medical scheme did not form part of the insolvent estate of the scheme (*Fuhri v Geyser NO and Another* 1979 (1) SA 747 (N) at [44] is irrelevant and finds no application as it dealt with an attorney's trust account and not "trust property" as defined in the definition section and ss 4(4) and 4(5) of the Financial Institutions (Protection of Funds) Act 2001). This decision was set aside by the Constitutional Court in *Genesis Medical Aid Scheme v Registrar, Medical Schemes And Another* 2017 (6) SA 1 (CC) which decided that the funds must be treated as liabilities of the scheme, not as trust property. *Executive Officer of the Financial Services Board v Dynamic Wealth Limited* [2012] JOL 29508 (SCA) deals with the appointment of a curator in terms of s 5 of the Financial Institutions (Protection of Funds) Act. *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* (1121/2015) [2016] ZASCA 163 (10 November 2016); [2017] JOL 36820 (SCA) decided that once an order of sequestration was granted, the powers of the trustees, upon appointment, took precedence over those of the repayment administrator appointed in terms of s 84(1) of the Banks Act 1990.

133 The Agricultural Credit Act 1966 was repealed by the Agricultural Debt Management Act 2001, which was in turn repealed by the Agricultural Debt Management Repeal Act 2008.

CHAPTER 5 – DATE OF SEQUESTRATION

5.1 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.

The date of liquidation / winding-up in the case of a company or close corporation is dealt with in **Chapter 27** of these notes.

CHAPTER 6 – SETTING ASIDE OF ORDERS, APPEAL AND REVIEW

6.1 Setting aside or rescission of orders

6.1.1 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.[134] 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.[135]

The filing of an application to rescind a final sequestration order does not suspend the operation of the sequestration order.[136]

6.1.2 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.[137] In *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd*[138] 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 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 liquidated by the court without all the issues pertaining to the company's situation having been

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

135 *Mondi Limited v Rhodes* (unreported, case number 1794/97 in the Durban High Court).

136 *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 Others* 2020(4) SA 553 (ECG).

137 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*.

138 1998 (3) SA 175 (SCA).

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.[139] 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.[140] The interests of justice require that applications for rescission of judgments should be brought and heard expeditiously.[141]

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.[142]

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.[143] 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*[144] 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.[145]

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

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

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

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

143 *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].

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

145 *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.[146]

6.2 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.[147] Rehabilitation discharges most of the debts of the insolvent,[148] while the setting aside of the sequestration order does not have this effect.

6.3 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.[149] 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.[150]

6.4 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.[151] 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 1959. The Supreme Court Act has been repealed by the Superior Courts Act 2013. In terms of section 53 of the Superior Courts Act, any reference in any law to the Supreme Court Act 1959, or a provision of the said Act, must be construed as a reference to Superior Courts Act or a corresponding provision of that Act.

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146 (17429/2015) [2015] GP (21 July 2015) paras [14] and [15].
147 Insolvency Act, s 124(3).
148 *Ibid*, s 129(1)(b).
149 *Ibid*, s 150. See *Gottschalk v Gough* 1997 (4) SA 562 (C) 568D.
150 *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).
151 *Fourie v Drakensberg Koöperasie Bpk* 1988 (3) SA 466 (A).

Sections 16 to 19 of the Superior Courts Act deal with appeals. Appeals against sequestration orders must be prosecuted with "due expedition".[152]

6.5 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.[153]

These provisions apply to a company unable to pay its debts, even where the Master is unaware of these provisions.[154]

6.6 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 an application for leave to appeal has been made, 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.[155]

In *KNS Construction (Pty) Limited (In Liquidation) and Another v Mutual and Federal Insurance Company Limited and Others*[156] 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,[157] 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 1936 would, in terms of section 339 of the Companies Act 1973, apply[158] – 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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152 *Beira v Raphaely-Weiner* 1997 (4) SA 332 (SCA).

153 Insolvency Act, s 150(3). In terms of s 339 of the Companies Act, s 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.

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

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

156 [2015] JOL 32725 (GJ).

157 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 (Superior Courts Act 2013, s 18(1)).

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

6.7 Review

Any person aggrieved by any[159] 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.[160] A decision by the Master is valid and stands until it is reviewed and set aside.[161] 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.[162] 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.[163] In *Jung-Fu Tsai v Advocate W Sekete NO*[164] 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 2000, any proceedings for judicial review of an administrative action must be instituted without unreasonable delay[165] and not later than 180 days after the date when the applicant became aware of the administrative action.[166] 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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159 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.

160 Insolvency Act, s 151.

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

162 *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).

163 *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].

164 (17429/2015) [2015] GP (21 July 2015) para [45].

165 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]).

166 *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).[167]

Administrative action by a person who was biased, or reasonably suspected of bias, can be reviewed in terms of section 6(2)(a)(iii).[168] 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.[169] A decision which no reasonable decision-maker would reach in the circumstances is reviewable in terms of the common law.[170] 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 2000.[171] 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.[172] The question of the finality of confirmed liquidation accounts will be discussed under the section dealing with liquidation and distribution accounts (see Chapter 30 below).

Self-Assessment Questions

Question 1
List three differences between the setting aside and the appeal of a sequestration order.

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167 *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].

168 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].

169 *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.

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

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

172 Insolvency Act, s 112 and the similar provision of the Companies Act 1973, s 408.

Question 2

ABC (Pty) Ltd was placed in winding-up because it was unable to pay its debts. This was due to the fact that most of its work was done for government departments who failed to pay the company within a reasonable time.

Shortly after a final liquidation order was issued, two government departments unexpectedly paid their substantial debts to the company. Although the company would still not be able to pay all its debts in full, the directors believe that the company now has enough money and contracts to continue its business. How can this be achieved?

Question 3

When a winding-up order is appealed, does it make any difference whether the winding-up order was made because the company was unable to pay its debts (i.e., an insolvent winding-up) or whether it was a solvent winding-up?

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

PART C – EFFECTS OF SEQUESTRATION AND WINDING-UP

CHAPTER 7 – VESTING OF THE ESTATE AND EXCLUDED ASSETS

7.1 Custody and control of company assets

Section 361 of the Companies Act 1973 provides that in any winding-up by the court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. At all times while the office of liquidator is vacant, or the liquidator is unable to perform his duties, the property of the company is deemed to be under the control of the Master. There is a clear implication that the custody and control of the property pass to the final liquidator upon appointment, irrespective of whether a provisional liquidator has been appointed.

7.2 Vesting of company assets

If for any reason it appears expedient, the court may in the winding-up order, or by any subsequent order, direct that property belonging to the company shall vest in the liquidator in his official capacity. Applications in terms of section 361(3) that the court should order property of a company to vest in the liquidator in his official capacity occur rarely, if ever. Such an application may be necessary because no legal proceedings on behalf of the company may be instituted or defended until the appointment of a final liquidator, or until the liquidator has obtained authority from creditors or the Master. If a liquidator obtains a vesting order, he or she is able to institute legal proceedings in his official capacity (not in the name of the company) and thereby recover assets or resist any attempt to dispossess the company.

7.3 Vesting of assets of insolvent debtor

After sequestration the debtor's estate vests in the Master of the High Court until a trustee is appointed. The estate then vests in the trustee.[173]

7.4 Practical effect of vesting in Master

The provisions that the estate of an insolvent, or custody and control of a company's property, pass to the Master does not result in practice in the Master performing any acts in respect of the property. A provisional trustee or provisional liquidator is usually appointed at an early stage of proceedings to manage the estate.

[173] Insolvency Act, s 20(1)(a).

7.5 Duty of insolvent upon issue of sequestration order

The debtor receives notice of the final sequestration order and the debtor (as well as the debtor's spouse if they are married out of community of property) has to lodge a statement of affairs with the Master within seven days of service, if this has not already been done.[174] The debtor must also hand over all documents and records pertaining to the debtor's affairs and which have not yet been taken into the custody of the sheriff in terms of section 19 of the Insolvency Act.[175]

7.6 Copies of sequestration order

The registrar of the court granting a sequestration order must without delay send a copy of the order to every sheriff of every district in which the insolvent seems to reside or carries on business, every registrar of titles of immovable property in the Republic (Registrar of Deeds), every officer having charge of an official register of ships and every official who holds any of the debtor's property under attachment.[176] Every officer concerned must register the order and note the day and hour of receipt. An officer having charge of an official register of ships or a Registrar of Deeds must enter a *caveat* against any transfer of ownership by the insolvent or the cession or cancellation of any mortgage registered in his name or belonging to him or his spouse.[177]

7.7 Expiry of *caveats*

A *caveat* that was entered in terms of section 17 by the registrar charged with the registration of titles of immovable property, expires 10 years after the date on which such a sequestration order was made.[178] In terms of section 25(3), each act of registration regarding the insolvent's property executed after a *caveat* entered in terms of sections 17(3), 18B or 127A has lapsed, is valid even though that property still forms part of the insolvent estate.[179]

7.8 Further registration of *caveats*

Such a *caveat* not only has to be entered by the registrars as soon as they receive a copy of the sequestration order from the registrar of the court, but it also has to be entered if requested by the trustee.[180] Where a court order in terms of section 127A(1) has been obtained, causing the insolvent not to be automatically rehabilitated after 10 years from date of sequestration, the registrar of court also has to send a copy of such an order to the registrars for a *caveat* to be entered and which will remain in force until the insolvent's rehabilitation.[181]

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174 *Ibid*, s 16(2).
175 *Ibid*.
176 *Ibid*, s 17(1)(b).
177 *Ibid*, s 17(3).
178 *Ibid*, s 17(3)(b).
179 *Ibid*, s 25(3).
180 *Ibid*, s 17(3) read with s 18B.
181 *Ibid*, s 127A(2) and (3).

7.9 Recovery of immovable property unlawfully disposed of

Where someone who is or was insolvent unlawfully disposes of immovable property, or a right to such property which still forms part of their insolvent estate, section 25(4) entitles the trustee to a right of recourse irrespective of the provisions of section 25(3) which provides that the act of registration is valid. This provides the trustee with the right to recover the value of the property or rights which were disposed of by the insolvent or former insolvent; from any person obtaining the property or right from the insolvent or former insolvent while knowing that it forms part of the insolvent estate; or from any person who obtained the property from the insolvent or former insolvent without giving sufficient value in return, in which case the amount that can be claimed is the difference between the value of the property or right and the value given in return.[182] Where the trustee omits to act, the creditor(s) can institute the action on behalf of the trustee, in which case the successful creditor obtains a preferent claim regarding the payment of his claim and costs of the suit.[183]

7.10 Attachment by sheriff

Upon receipt of the sequestration order, the sheriff is required to attach and make an inventory of the movable property of the estate which is in the sheriff's district and which is not in the possession of a person who claims to be entitled to retain it under a right of pledge or a right of retention.[184] The sheriff must send any cash that he collects to the Master and must make arrangements for the safekeeping of the movable property at a suitable place, or appoint some suitable person to hold the property. Such a person receives a copy of the inventory with a notice that the property has been attached by virtue of a sequestration order and that it is an offence to remove, to conceal or otherwise defeat the attachment of the property.[185] Immediately after making the attachment, the sheriff must report, in writing, to the Master that the attachment has been completed. The sheriff is compensated according to Tariff A in the Second Schedule.[186]

7.11 Reports by the sheriff

The sheriff must also report any property which to his knowledge is in the lawful possession of a pledgee or a person who is entitled to retain it under a right of retention. The sheriff must also send a copy of the inventory to the Master.[187] Officers who have already attached property of the estate (for example, in execution) must supply the Master and the trustee, after his appointment, with an inventory.[188]

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182 *Ibid*, s 25(4).
183 *Ibid*, s 32 read with s 104(3).
184 *Ibid*, s 19(1).
185 *Ibid*.
186 *Ibid*, s 19(5).
187 *Ibid*, s 19(3)(a) and (b).
188 *Ibid*, s 19(4).

7.12 *Curator bonis* is accountable

If a *curator bonis* has been appointed by the Master after publication of a notice of intention to surrender, the *curator bonis* is replaced by the Master or provisional trustee and later by the (final) trustee. Apart from the fact that the *curator bonis* is accountable to the Master, the trustee after appointment may also demand an account from the *curator bonis* of the safekeeping of the estate.

7.13 Interest of insolvent debtor in assets

The insolvent's assets vest in the Master and, after appointment, in the trustee.[189] However, the insolvent still has an interest in the estate and may, for instance, litigate in order to enhance the value of the estate where the trustees decided not to take steps in the litigation and stated that they would abide by the decision of the court.[190] After his rehabilitation the insolvent, where the debtor was not actually insolvent or in cases where the assets increase in value, is entitled to any residue of the estate after all debts have been paid.[191] In terms of a composition with creditors it is possible for the insolvent to regain control of a part or the whole of the estate from the date determined in the composition.[192] Where a sequestration order has been set aside, the insolvent will also regain control of the estate.[193] In all other circumstances the estate, for purposes of the realisation of assets and the distribution of proceeds between the creditors, remains under the control of the trustee until rehabilitation takes place, or until a composition is agreed upon.[194] Assets that have not been realised immediately before rehabilitation will remain vested in the trustee after rehabilitation for the purposes of realisation and distribution.[195]

7.14 Vesting upon removal of trustee or vacation of office

If the only trustee vacates office, is removed from office, or dies, the estate will again vest in the Master until a new trustee is appointed.[196]

7.15 Property of the insolvent estate

7.15.1 Estate property

"Property" includes all movable and immovable property wherever situated in the Republic, but the contingent right of a fideicommissary heir or legatee is excluded.[197] Consequently,

189 *Ibid*, s 20(1)(a).
190 *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] 3 All SA 520 (SCA).
191 Insolvency Act, ss 116, 124(3) and (5) and 129(2).
192 *Ibid*, s 120(2) and see also s 123(1) and (2).
193 *Mahommed v Lockhat Bros & Co Ltd* 944 AD 241.
194 Insolvency Act, s 25(1).
195 *Ibid*.
196 *Ibid*, s 25(2).
197 See the definition of "property" in s 2 of the Insolvency Act.

all the estate assets of the insolvent in the Republic, except for the categories of exempt or excluded property discussed below, vest in the trustee.[198]

7.15.1.1 Money in a banking account

The trustee is not entitled to money in a banking account of the insolvent which was obtained through theft or fraud or erroneously credited to an account of the insolvent.[199] Where an investment transaction, though tainted by fraud, nevertheless constituted the reason for the payment, the investor merely has a concurrent claim and cannot recover the payment from the insolvent estate.[200] If money in a bank account is earmarked for a person other than the account holder and the bank is aware of this arrangement, that other person is entitled to the money[201] due to the fact that there is no contractual restriction on such payments on any of these accounts. When funds are transferred by electronic fund transfer into the accounts of a person with a bank and the bank has no knowledge of the theft of the funds, the bank is entitled to appropriate the funds transferred to extinguish the debts on the accounts.[202] Funds in an insolvent's bank accounts which have been suspected of being used for illegal

198 In respect of divorce settlement orders regarding immovable property, see *Fischer v Ubomi Ushishi CC and Others* 2019 2 SA 117 (SCA), where the court overruled the decision in *Corporate Liquidators (Pty) Ltd and Another v Wiggill and Others* 2007 2 SA 520 (T). In *Fischer* the SCA held that a half-share in immovable property to which a former spouse is entitled to in terms of a divorce settlement order will vest in the former spouse only when it has been registered in the former spouse's name and not on the date of making the divorce order.

199 *Nissan South Africa (Pty) Ltd v Marnitz NO* 2005 (1)(SA 441 (SCA); *Gainsford NO v Gulliver's Travel (Bruma) Pty Ltd* case 07/5121 Witwatersrand Local Division. In *Muller NO v Community Medical Aid Scheme* (901/2010) [2011] ZASCA 228 (30 November 2011); 2012 (2) SA 286 (SCA), reliance on the decision in *Nissan* was rejected because the payment was not made in error, nor into an earmarked account and did not amount to trust funds. It did not matter that the one company undertook to pay over amounts to the other. The money was, however, vested in the other company by operation of law in terms of s 63 of the Medical Schemes Act 1998.

200 *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA) paras [23] and [24]. In *Absa v Moore* 2016 (3) SA 97 (SCA) a sale giving rise to the transfer of immovable property was induced by fraudulent misrepresentation, such that the owner did not intend to transfer ownership. It was held that registration of the transfer was of no force and effect as a person who was not the owner of the immovable property could not grant a valid mortgage bond over it. This decision was confirmed in *Absa Bank Limited v Moore and Another* 2017 (1) SA 255 (CC). The question arose whether fraud unravelled the cancellation of the mortgage bonds. The answer was "no". The bonds were accessory to the main debt owed to the Bank. The main obligation was validly cancelled. It followed with logical inevitability that the accessory obligation of the mortgage bond was discharged too - para [40]. One induced to contract by fraud must choose between upholding the contract and rescinding it – and must do so within a reasonable time after knowledge of the deception - para [50].

201 *Joint Stock Co Varvarinskoye v Absa Bank Ltd* 2008 (4) SA 287 (SCA); *Gainsford NO v Gulliver's Travel (Bruma) Pty Ltd* (case 07/5121 Witwatersrand Local Division); *ABSA Bank v Intensive Air* (31/2010) [2010] ZASCA 171(1 December 2010) reported as *ABSA Bank Ltd v Intensive Air (Pty) Ltd (In Liquidation)* [2010] JOL 26545 (SCA) and 2011 (2) SA 275 (SCA); and see *Eds South Africa (Pty) Ltd v Nationwide Airlines (Pty) Ltd* 2011 (5) SA 158 (SCA) 2011 (5) SA 158.

202 Thus, an employee who steals money and deposits it for his own benefit in various accounts that are in debit, effectually extinguishes those debts, although the amounts that remain in credit can be recovered by the victim – *ABSA Bank Limited v Lombard Insurance Company Limited (and Another Related Matter)* [2012] JOL 29558 (SCA); *Absa Bank Limited v Moore and Another* 2017 (1) SA 255 (CC), para [35].

purposes and accordingly blocked in terms of exchange control regulations,[203] will not vest in the trustees of the insolvent estate. The purpose of such blocking order is to secure assets which may be liable for forfeiture in terms of the relevant regulations. Such a blocking order will therefore not be terminated by the grant of a subsequent sequestration order as the remedy of forfeiture, a sanction of public law imposed to protect the currency and the economy, would be lost by the operation of the law of insolvency, an absurdity which could not have been contemplated by the legislature. The blocking order will therefore temporarily delay a determination whether the funds in the account vest in the trustees.[204]

7.15.1.2 Debts payable to the insolvent

Debts payable to the insolvent are forthwith payable to the trustee.[205] If payment is made to the insolvent, the obligation is not terminated unless the debtor involved can prove that he was *bona fide* and had no knowledge of the sequestration.[206] See below for a discussion of the right to an inheritance.

7.15.2 Foreign assets

7.15.2.1 Movable property

Movable property of the insolvent in a foreign country will, according to the common law, vest in the insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled.[207]

7.15.2.2 Immovable property

If a debtor's estate includes immovable property over which the trustee wants to gain control and which is situated in a foreign country, the trustee cannot gain such control unless and until the trustee obtains recognition of the appointment as trustee from the foreign court.[208] If the trustee fails to obtain this recognition, the immovable property remains vested in the insolvent.[209]

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203 See regs 22A and / or 22C of the regulations promulgated under the Currency and Exchange Act, 1933, s 9.

204 *South African Reserve Bank v Leathern NO and Others* 2021 (5) SA 543 (SCA) paras [36] – [39].

205 A refund of a fine paid on behalf of the insolvent is not an asset in the insolvent estate - *Besselaar v Registrar, Durban and Coast Local Division* 2002 (1) SA 191 (D).

206 Insolvency Act, s 22.

207 *Viljoen v Venter* 1981 (2) SA 152 (W).

208 See Ch 32 below, dealing with cross-border insolvency.

209 *Mavromati v Union Exploration Import (Pty) Ltd* 1947 (4) SA 198 (A); *Hymore Agencies Durban v Gin Nih Weaving Factory* 1959 (1) SA 180 (N).

7.15.2.3 Recognition of foreign trustee

A trustee appointed in a foreign country can apply to the High Court for recognition of the appointment in the Republic.[210] Contrary to the situation with movable property where such recognition is a mere formality, the recognition in the case of immovable property is a necessity and the courts have an absolute discretion to reject or approve such an application.[211] When recognition has been obtained the trustee may deal with the immovable property like any other trustee. However, when the court recognises a foreign trustee the court may impose conditions on the trustee in order to safeguard the rights and interests of local creditors. If recognition is refused by a court, or not applied for, the creditors of the insolvent estate can apply for the sequestration of the estate in that foreign country.

7.15.3 Wearing apparel, bedding, household furniture, tools and essential means of subsistence

Section 82(6) of the Insolvency Act provides as follows:

> "From the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain for his own use any property so excepted from the sale."[212]

7.15.3.1 What is wearing apparel and bedding?

The exclusion of wearing apparel and bedding is absolute in the sense that creditors or the Master do not have any say. It may, however, be argued that luxurious clothing items, such as

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210 *Priestley v Clegg* 1985 (3) SA 955 (T). A foreign trustee applying for recognition in South Africa must normally establish that the insolvent was domiciled within the jurisdiction of the foreign court that appointed him. However, the requirement of domicile will not be insisted on in exceptional circumstances – see *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA) paras [31] – [32].

211 *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (K).

212 There are conflicting decisions on the issue whether a debtor may waive the protection provided in s 82(6). In *Ex parte Anthony* 2000 (4) SA 116 (C) 125 paras [19] – [20] the court was of the opinion that the debtor may waive the protection under s 82(6) as the latter provision benefits the debtor who may renounce the benefit thereof. However, in *Ex parte Kroese and Another* 2015 (1) SA 405 (NWM), where the applicants attempted to waive the protection in s 82(6) in order to increase the value of the realisable assets and thereby prove an advantage to creditors, the court held that such waiver was impermissible. The court ruled that the protection was intended not only for the benefit of the debtor but also for the benefit of the public. The court pointed out that it would not be in the state's interest that citizens should renounce their assets and become a burden on society – *Kroese* para [56]. See also M Ndou, "Waiver of rights in insolvency - *Kroese and Kroese (NWM)* (unreported case no 145/ 13, 18-4-2013) (Landman J) and *Hattingh and Hattingh (NWM)* (unreported case no 144/ 13, 18-4-2013) (Landman J)", *De Rebus* April 2014 at 45. Relying on the decision in *Kroese*, the court in *Ex parte Van Dyk* held that an undertaking by the insolvent to make a contribution from his salary into the insolvent estate with a view to establishing an advantage to creditors, was equally impermissible. Referring to *Anthony* the court in *Ex parte Concato and Similar Cases* 2016 (3) SA 549 (WCC), para [18], supported the view that a debtor may renounce the protection in favour of his creditors in order to establish advantage to creditors.

a fur coat or golden cuff-links, should not be regarded as wearing apparel. This argument may be countered by the dictionary meaning of "apparel", which includes the notion of something that adorns. It can be argued that "bedding" means just that, namely, bedclothes, sometimes considered together with a mattress. This will clearly not include luxuries such as fancy beds or antique furniture.

7.15.3.2 Motor vehicle released as part of tools and essential means

Under appropriate circumstances it may be argued that a motor vehicle falls under "tools and other essential means of subsistence", but this exception is subject to the determination of creditors or the Master. Instead of releasing property to the insolvent unconditionally, it may be agreed with the debtor (with the consent of the Master) that property be handed to the debtor as an allowance in return for assistance in collecting, taking charge of and realising property.[213]

7.15.4 Contingent interest of fideicommissary heir

A fideicommissary's contingent interest in property does not vest in the insolvent estate[214] unless the actual right accrues to the insolvent before his rehabilitation. If A bequeaths his farm to B, subject to the condition that the farm must pass to C after B's death, C is a fideicommissary heir and C's interest in the farm will fall outside C's insolvent estate if C's estate was sequestrated whilst B was still alive. As it is possible that the condition set by the testator can be met before the rehabilitation of the insolvent, C's alienation of this right would clearly have a negative effect on the insolvent estate and the interests of the creditors. C will therefore not be entitled to alienate this right without the written consent of creditors.

7.15.4.1 Insolvency of fiduciary

If the fiduciary (B) is sequestrated, the property will vest in the insolvent estate. The trustee is entitled to realise the asset for the benefit of the creditors of the insolvent estate but the realisation should be subject to the fideicommissary burden.

7.15.4.2 Fiduciary property subject to mortgage

If a mortgage bond is registered over the property with the consent of the court, or with consent of the *fiduciarius* and *fideicommissarius* in terms of section 69*bis*(3) of the Deeds Registries Act 1937, in favour of a creditor of B, then the trustee is entitled to sell the mortgaged property for the benefit of the mortgagee if the fideicommissary (C) is unable to fulfil the mortgage obligations.

213 Insolvency Act, s 23(12).
214 See the definition of "property" in s 2 of the Insolvency Act.

7.15.4.3 Other types of contingent rights

Other types of contingent rights are, however, included in the definition of "property" and will therefore form part of the insolvent estate.[215] A person does not have a contingent right to property if another person has the option to grant them such right.[216]

7.15.5 Trust property

Section 12 of the Trust Property Control Act 1988 provides that trust property does not form part of a trustee's personal estate, save as far as the trustee is also a trust beneficiary. This section only applies to trusts established by a written trust document.

Trust money held in the trust account of any trust account practice does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or any advocate. However, any excess remaining after all claims against the trust account have been paid, will form part of the assets of the trust account practice. Trust property which is registered in the name of a trust account practice, or jointly in the name of an attorney or trust account practice and any other person in his or her capacity as administrator, trustee, curator or agent, does not form part of the assets of that attorney, trust account practice or other person.[217]

Trust property which is held by a financial institution in its capacity as trustee also does not form part of the assets of that institution.[218]

7.15.6 Property mortgaged to the Land Bank

The trustee of an insolvent estate may not sell property mortgaged to the Land and Agricultural Development Bank, trading as the Land Bank, to secure advances by the Bank, unless the Bank agrees in writing to that sale or has failed to sell that mortgaged property within three months after receipt of a written notice from the trustee requesting the Bank to sell that property.[219]

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215 Insolvency Act, s 2.

216 *Stern & Ruskin NO v Appleson* 1951 3 SA 800 (W).

217 Legal Practice Act 2014, s 88.

218 Financial Institutions Act (Protection of Funds) 2001, s 4(5). However, for s 4(5) to apply, the property must qualify as "trust property", ie it must be held in terms of a trust or fiduciary relationship – *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC). In *Louw NO and Others v Coetzee and Others* 2003 (3) SA 329 (SCA) it was held that money in an attorney's trust account with a financial institution forms part of the institution's assets.

219 Land and Agricultural Development Bank Act 2002, s 33(11).

7.15.7 Life insurance policies

7.15.7.1 Policy benefits not part of insolvent estate

Section 63 of the Long-Term Insurance Act 1998 affords policyholder protection to policy benefits under certain long-term insurance policies.

Until the Financial Services General Amendment Act of 2013 came into operation on 28 February 2014, the protection under section 63 was limited to an aggregate amount of R50,000. The amended section 63 removed this limit, and now protects the full value of the policy benefit.

The policy benefits provided or to be provided to a person (ie, the so-called "protected person"[220]) under one or more,

(a) in respect of a registered insurer, assistance, life, disability or health policies; or

(b) in the case of a licensed insurer, policies written under the risk, fund risk, credit life, funeral, life annuities, individual investment or income drawdown class of life insurance business as set out in Table 1 of Schedule 2 of the Insurance Act,

in which that person or the spouse of that person is the life insured and which has been in force for at least three years, shall, other than for the payment of a debt secured by the policy, be protected in terms of section 63 as follows:

(i) The said policy benefits will not form part of his or her insolvent estate during that person's *lifetime*;[221] or

(ii) upon his or her *death,* if he or she is survived by a spouse child, stepchild or parent, not be available for the purpose of payment of his or her debts.[222]

The above-mentioned protection applies to policy benefits and assets acquired solely with the policy benefits for a period of five years from the date when the policy benefits were provided.[223]

The policy benefits in terms of section 63(1)(ii) are only protected if they *devolve* upon the spouse, child, stepchild or parent of the person referred to in section 63(1) in the event of that person's death.[224] A person claiming protection in terms of section 63(1) must

220 *Cf* Meskin para 5.3.2.1.
221 Long-Term Insurance Act, s 63(1)(i)
222 *Ibid*, s 63(1)(ii)
223 *Ibid*, s 63(2).
224 *Ibid*, s 63(3)(a). According to Meskin para 5.3.2.1, the intention of section 63(1)(ii) read with section 63(3)(a) is to only provide protection to certain close family members of the deceased, and only in respect of policy

furthermore be able to prove, on a balance of probabilities, that the protection is afforded to him or her under this section.[225]

Policy benefits will not be protected as indicated above if it can be shown that the policy in question was taken out with the intention to defraud creditors.[226]

7.15.7.2 Determination of policies or amounts which are protected

If only a part of the aggregate realisable value of more than one policy is protected, the trustee determines which policy or policies should be realised wholly or partially.[227] Section 65 of the Long-term Insurance Act contains practical arrangements for the partial realisation of protected policies.

7.15.7.3 Nominated beneficiary not trustee entitled to policy

Where policy benefits are payable to any of the persons mentioned in section 63(1)(ii) (ie, the spouse, child stepchild or parent of the deceased protected person) as a nominated beneficiary in terms of the relevant policy, section 63(1)(ii) of the Long-Term Insurance Act 1998 does not apply.[228] The Supreme Court of Appeal in *Pieterse v Shrosbee NO & Others; Shrosbree NO v Love and Others*[229] decided that section 63 of the Long-Term Insurance Act does not regulate the payment of the proceeds of the insurance policies *in casu*, since the appointment of a beneficiary has the effect that payment of the proceeds will be made to the beneficiary and not to the estate of the deceased. The proceeds of the policies will thus go directly to the nominated beneficiary and the trustee of the deceased policy holder's insolvent estate would not have any claim to those policy proceeds. According to the court,

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benefits which in fact fall into the person's deceased estate and thus *devolve* upon any of such family members. However, where the policy benefits do not *devolve* upon any of them (ie, become payable to them as heirs or beneficiaries of the deceased estate), but are payable to them as nominated beneficiaries, s 63(1)(ii) does not apply. In such an instance the policy benefits will not be "provided or to be provided" to the deceased protected person and the beneficiary will therefore be entitled, upon acceptance of the benefit, to receive the full benefit of the policy from the insurer – see *Pieterse v Shosbree and Others; Shosbree NO v Love and Others* 2005 (1) SA 309 (SCA).

225 Long-Term Insurance Act of 1998, s 63(3)(b). It should be noted that s 63(3) still, incorrectly, refers to subs (1)(a) and (b), ie, the previous version of subs (1), instead of subs (1)(i) and (ii), ie, the latest amended version of subs (1). The latter subs was substituted by the Insurance Act 2017, s 72(1). However, the legislator failed to amend subs (3) in accordance with the latest amendments in respect of subs (1). This is clearly an oversight.

226 *Ibid*, s 63(4).

227 *Ibid*, s 64.

228 Meskin para 5.3.2.1.

229 2005 (1) SA 309 (SCA). *Pieterse v Shosbree* was an appeal in which the conflicting decisions in *Shosbree and Others NNO v Van Rooyen and Others* 2004 (1) SA 226 (SE) (hereafter referred to as the *Pieterse*-matter) and *Love and Another v Santam Life Insurance Ltd and Another* 2004 (3) SA 445 (SE) (hereafter referred to as the *Love*-matter) were heard on the same day.

section 63 does not purport to divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of a deceased policy holder.[230]

The effect of this decision is that all benefits under policies can be protected against creditors of an insolvent deceased estate by nominating beneficiaries under the policies. However, where the estate of the holder of a policy is sequestrated before acceptance of the policy benefits, the decision of the Supreme Court of Appeal in *Pieterse v Shosbree* does not apply. In *Malcolm Wentzel v Discovery Life Limited and Others: In Re Botha and Others NNO v Wentzel*[231] the appellant, Malcolm Wentzel, was married in community of property to Lizane Wentzel in August 2007. In January 2012 Mr Wentzel concluded a contract of insurance with the first respondent, in terms of which the life of Mrs Wentzel was insured. Mr Wentzel was appointed beneficiary of the proceeds payable upon her death. However, in terms of the same policy, Mr Wentzel's life was also insured and in the event of his death, Mrs Wentzel was appointed as the beneficiary. Approximately five and a half years later, in April 2017, Mrs Wentzel passed away. In April 2012, (ie, before her death), the couple's joint estate was finally sequestrated. The issue before the Supreme Court of Appeal was whether an unrehabilitated insolvent, who is the nominated beneficiary in terms of a life insurance policy, is entitled, to the exclusion of the trustees of the joint insolvent estate, to the proceeds of the policy. The question was therefore whether the proceeds of the policy was an asset that vests in the trustees for the purposes of realisation and distribution for the benefit of the creditors of the joint insolvent estate. Although the court did not refer to section 63 of the Long-Term Insurance Act, it would appear that the court was of the opinion that section 63(1)(ii) applied and that the policy benefits were not protected in terms of section 63(3)(a) as they did not *devolve* upon Mr Wentzel, but was payable to him as the nominated beneficiary. Consequently, section 20(2) and 23 of the Insolvency Act applied and the proceeds of the policy fell into his insolvent estate for the benefit of his creditors.[232] The court pointed out that pursuant to the sequestration of the couple's joint estate they both became insolvent debtors for the purposes of the Insolvency Act and that Mr Wentzel, upon Mrs Wentzel's passing, did not cease to be an insolvent. According to the court he maintained that status until his rehabilitation.[233] The court in *Wentzel* distinguished the facts in *Pieterse v Shosbree* from those in *Wentzel*[234] and held that the proceeds of the policy vested in the trustees, despite the fact that the first and final liquidation and distribution account was already filed and confirmed by the Master.[235]

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230 2005 (1) SA 309 (SCA). *Cf Oshry NO v Feldman* 2010 (6) SA 19 (SCA), paras [42] – [49]. A risk-only policy is not an asset in the estate of the deceased and can never be an asset in the joint estate – *Naidoo v Discovery Life Limited and Others* [2018] JOL 39960 (SCA), para [12].

231 Case no 1001/19 [2020] ZASCA 121 (2 October 2020).

232 *Wentzel* paras [15] – [17].

233 *Wentzel* paras [19] – [20].

234 The court explained as follows (para [22]): "The facts in *Love* are entirely distinguishable from those in this case. In *Pieterse* the appellant, an unrehabilitated insolvent had been married out of community of property to the deceased policyholder who had nominated him as beneficiary in a life insurance policy. When she died her estate was hopelessly insolvent and was subsequently sequestrated. *Pieterse* had accepted the benefits under the policy. However, the trustees in the insolvent estate claimed that they were entitled to the proceeds of the policy. This court held that the proceeds accrue to the trustee of *Pieterse's* insolvent estate. In doing so it merely gave effect to s 20(2) and 23 of the Insolvency Act".

235 *Wentzel* para [30].

It is submitted that the Supreme Court of Appeal in *Wentzel* failed to consider the application of section 63(1)(i) on the facts *in casu*. It is submitted that the policy benefits *in casu* was in terms of section 63(1) "provided or to be provided to a person" (ie, Mr Wentzel who was the appointed beneficiary in the event of Mrs Wentzel's death) "in which that person or the spouse of that person is the life insured" (*in casu* the life of both Mr and Mrs Wentzel was insured). It is submitted that Mr Wentzel, who was the policyholder,[236] was the "protected person" who was entitled to the policyholder protection[237] as envisaged in the Long-Term Insurance Act. Accordingly, it is submitted that section 63(1)(ii) read with section 63(3)(a) did not apply *in casu*. The policy *in casu* was furthermore in force for at least three years[238] and did not serve as security for any debts of the policyholder. Consequently, it is submitted that the provisions of section 63(1)(i) kicked in and the policy benefits were protected in Mr Wentzel's hands and should, during his lifetime, not form part of his insolvent estate.

7.15.7.4 No provision for order of repayment

There is no provision in the 1998 Act (similar to the provision in section 47 of the old 1943 Act) that the court may order the owner of a policy to repay premiums paid with intent to benefit a person at the expense of a creditor of the person making the payments to the person to whose detriment the premiums were paid, or the insolvent estate of such a person.

7.15.8 Property of third parties

Section 20 of the Insolvency Act only applies to property which, at the date of sequestration, vests in the insolvent and does not apply to property in possession of the debtor which is the property of third parties. Such property could include property loaned to the insolvent, leased to him, property sold to the insolvent but not yet delivered, property purchased through a cash sale and delivered to the insolvent but not yet paid for by the insolvent, as well as any property which the insolvent acquired as agent for a principal.

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236 See the definition of "policyholder" (s 1 of the Long-Term Insurance Act), which in respect of a registered insurer "means the person entitled to be provided with the policy benefits under a long-term policy".

237 *Cf* the heading "Policyholder protection" (ss 62-65) in the Long-Term Insurance Act.

238 The facts in *Wentzel* should therefore be distinguished from the facts in *Pieterse* and *Love*. In *Pieterse* the protection afforded in terms of s 63 did not kick in as the relevant policies were in existence for less than three years at the time of the deceased death. In the *Love*-matter, although the relevant policy was in force for a period in excess of three years, the nominated beneficiaries were not the "protected persons" in terms of s 63(1) as was the case in *Wentzel*. Consequently s 63(1)(i) did not come in to play. Section 63(1)(ii) also did not come into play as the policy benefits did not *devolve* upon the beneficiaries in terms of s 63(3)(a), but was payable to them as the nominated beneficiaries. Furthermore, because the nominated beneficiaries accepted the benefits before the sequestration of the policy holder's deceased estate, the policy benefits did not form part of the deceased insolvent estate. However, if, sequestration occurred before acceptance of the benefits, it is submitted that the policy benefits in *Love* would indeed fall into the insolvent deceased estate of the policy holder and the benefits would not have been protected in the hands of the nominated beneficiaries.

7.15.8.1 Section 65(3) of the Consumer Protection Act 2008

When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier must not treat that property as being the property of the supplier.[239] A person who assumes control of a supplier's property as administrator, executor or liquidator[240] of an estate has a duty to the consumer to diligently investigate the circumstances of the supplier's business to ascertain the existence of any money or other property belonging to the consumer and in the possession of the supplier, and to ensure that any such money or property is dealt with for the consumer's benefit in accordance with section 65; the liquidator (or trustee) is liable to the consumer for any loss, unless the liquidator (or trustee) has acted in good faith and without knowledge of the existence of the consumer's interest.[241]

7.15.8.2 Property sold subject to suspensive condition

If property was sold to the insolvent in terms of a contract subject to a suspensive condition and the purchaser's estate was sequestrated before the condition was met, the seller may reclaim the property. There is an obligation on the owner of such property to notify the *curator bonis* or the provisional trustee (if any) or the trustee or the Master in writing that he is the rightful owner of such property and that he or she is reclaiming it.[242] If the trustee has already sold the property in good faith, the owner may claim the net proceeds of the sale before the confirmation of the trustee's final account.[243] The owner may only claim the property from the purchaser if the owner gave the proper aforementioned notice, but the owner forfeits such right to do so if he or she claims the net proceeds.[244]

7.15.9 Property subject to a restraint order (Prevention of Organised Crime Act)

In terms of sections 35 and 36 of the Prevention of Organised Crime Act 1998, property subject to a restraint order in terms of the Act does not form part of the assets of an insolvent estate or a company under winding-up.[245]

7.15.10 Family home

South African law does not afford protection of the family home against the insolvency of a debtor. However, depending on the relevant circumstances, the insolvent and / or his or her dependants may be protected under the Prevention of Illegal Eviction from and Unlawful

239 Consumer Protection Act, s 65(2).
240 It is submitted that this includes the trustee of an insolvent estate.
241 Consumer Protection Act, s 65(3).
242 Insolvency Act, s 36(5).
243 *Ibid*, ss 36(6) and 112.
244 *Ibid*, s 36(6).
245 A liquidator is entitled to assets if the restraint order was issued after the filing of a winding-up application - *Bester NO v National Director of Public Prosecutions* (198/11) [2011] ZASCA 234 (30 November 2011).

Occupation of Land Act.[246] In *Mayekiso and Another v Patel and Others*[247] the court dismissed an appeal against an eviction. The court held that the presence of the minor children on the property did not necessarily trump the right of the owner to seek the eviction of their parents. According to the court the claim of imminent homelessness was contradicted by the occupants' wealthy lifestyle and ability to afford drawn-out and costly litigation. The court thus held that it was just and equitable in the circumstances to grant an order of eviction.

Self-Assessment Questions

Question 1
Explain the difference between the consequences of winding-up of a company and sequestration of the estate of a natural person "debtor" in respect of the property of the company and the natural debtor respectively. (2)

Question 2
In terms of the Insolvency Act 24 of 1936, what is regarded to be "property" of the insolvent estate? (2)

Question 3
Indicate whether the following remarks are TRUE or FALSE:

"In case of a natural person debtor, the estate assets vest in the Master and, after his or her appointment, in the trustee of the insolvent estate. Consequently the insolvent debtor loses all interest in the estate." (2)

Question 4
Indicate whether the following statement is TRUE or FALSE:

"The trustee of an insolvent estate will not be able to gain control over movable property of the insolvent situated in a foreign country, unless the trustee obtains recognition of his or her appointment as trustee from the foreign court." (4)

Question 5
Indicate whether the following statement is TRUE or FALSE:

"Section 12 of the Trust Property Control Act 57 of 1998 provides that trust property forms part of the trustee's insolvent estate." (2)

246 See the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998, s 4(7).
247 2019 (2) SA 522 (WCC) paras [60]; [69], [70] and [74]. See also *Botha NO and Others v Kies and Others* unreported case number 40111 of 2012 (GP).

Question 6
Indicate whether the following statement is TRUE or FALSE:

"Debts which were due to an insolvent debtor before his or her sequestration, will, after his or her sequestration, be payable to the insolvent personally." (2)

Question 7
Explain the legal position in respect of the protection of policy benefits under a life-insurance policy where the protected person's estate is sequestrated:

Question 7.1
while he or she is still alive; and

Question 7.2
after his or her death. (10)

Question 8
Mr S was married out of community of property to Mrs S in 2017. On 1 October 2021 Mr S's estate was finally sequestrated. Mr S is the owner of a business which manufactures and sells window blinds. The couple has two minor children. You are the trustee of the insolvent estate. The following assets, amongst others, were listed in the statement of affairs:
- Immovable property situated in London, United Kingdom. (2)
- The married couple's family home situated in Johannesburg, South Africa. (2)
- A life-insurance policy in terms of which Mr S is the life insured. The surrender value of the policy is R30 000 and the policy has been in force from 1 January 2021. (2)
- Antique furniture to the value of R300 000. (2)
- The delivery vehicle used in Mr S's business. (3)
- A farm in Mpumalanga, South Africa. The farm has been bequeathed to Mr S, subject to the condition that it must pass to C, Mr S's son, after Mr S's death.

Explain which of the above-mentioned assets will or will not fall into the insolvent estate of Mr S. (2)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 8 – PROPERTY IN POSSESSION OF INSOLVENT AFTER SEQUESTRATION

8.1 General rule regarding after-acquired property

Apart from the exceptions discussed below, property acquired after the sequestration order also forms part of the insolvent estate.[248] The trustee may recover such property with a writ of execution issued by the registrar of the court upon receipt of a certificate by the Master that declares the property claimable.[249]

8.2 Remuneration

In terms of section 20(2)(b) of the Insolvency Act all property that the insolvent may acquire, or which may accrue to him during the sequestration (except as otherwise provided in section 23) forms part of the insolvent estate.[250] In terms of section 23(9) the insolvent is entitled to recover for his own benefit any remuneration or reward for work done or for professional services rendered by him after the sequestration of his estate. If an insolvent receives a salary (in the words of section 23(5) of the Insolvency Act "moneys received or to be received … in the course of his profession, occupation or other employment") which is more than is necessary for the support of the insolvent and his dependents, the trustee is entitled to the surplus once the Master has certified that there is such a surplus. Salary does not vest in the insolvent estate until the Master has considered the matter.[251] It is not clear to what extent trustees make use of these powers in practice to recover surplus income earned by insolvents; suffice to state that this is quite rare in practice.

According to case law, an insolvent's available surplus income cannot establish advantage to creditors as envisaged in section 6(1) of the Insolvency Act.[252]

8.3 Funds obtained fraudulently

In *Singer v Weiss*[253] an insolvent fraudulently obtained funds after his sequestration.[254] The court held that section 23 refers to assets acquired lawfully and that the trustee of the

248 Insolvency Act, ss 20(2)(b), 23(1) and 24(2).
249 *Ibid*, s 23(11).
250 See also Insolvency Act, s 23(1).
251 *S v Moll* 1988 (3) SA 236 (T) 241; *Mervis Brothers (Pty) Ltd v Hanekom* 1963 (2) SA 125 (T) at 127.
252 *Ex parte van Dyk* (1869/2015 ZAGPPHC 154 (26 March 2015). The court concluded that the undertaking to make a contribution from the applicant's salary was impermissible, not only in light of the risks associated with policing the order and delays in finalising the administration of the estate, but also in light of the constitutional challenges that may arise should the applicant at any stage in future require that amount for the basic needs of his family – see further M Roestoff "The income of an insolvent and sequestration under the Insolvency Act 24 of 1936" 2017 *SA Merc LJ* 478.
253 1992 (4) SA 362 (T).
254 The insolvent obtained finance for the sale of motor vehicles, although no vehicle or purchaser existed.

insolvent's estate and not the insolvent was entitled to deal with the gains of the insolvent's fraud.[255]

8.4 Property in possession of insolvent deemed to belong to estate

Any property in the possession of the insolvent after his sequestration is deemed to belong to the estate until the contrary is proved.[256] A person who has, for example, delivered his assets to the insolvent for repairs before sequestration, will have to prove ownership to claim back the assets. Assets may be subject to the rights of secured creditors.

8.5 Possession by person who became creditor after sequestration

If a person who became a creditor after the sequestration alleges that such property does not belong to the estate and claims any right thereto, the property is deemed not to belong to the estate, unless the contrary is proved.[257]

8.6 Related matters dealt with elsewhere in the notes

The following two matters are discussed elsewhere in these notes:

- the landlord's legal hypothec may apply to property which does not belong to the insolvent; and
- special rules apply to property delivered to a person under an instalment sale transaction.

8.7 The right to an inheritance

8.7.1 Inheritance that accrues before rehabilitation

If a right of inheritance accrues before the rehabilitation of the insolvent, such right immediately vests in the trustee of the insolvent estate.[258] If a will merely directs that a bequest shall not form part of an insolvent estate without further direction that on the beneficiary's insolvency the bequest shall pass to some other person, the direction (known as a *nudum praeceptum*) is of no effect in law. In *Vorster v Steyn*[259] the will provided that if the son, to whom the entire estate had been bequeathed, should at the time of his death happen to be

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255 Although this decision cannot be faulted on legal grounds, it may lead to anomalies. For example, a person defrauded by the insolvent after the sequestration of the person's estate would not have a claim against the estate due to the fact that the cause of the claim arose after sequestration - s 44(1) of the Insolvency Act. The person would have to claim against the insolvent personally or against a second insolvent estate built up by the insolvent, but the gains of the fraud forms part of the first insolvent estate.

256 Insolvency Act, s 24(2).

257 *Ibid*. For example, a person sells property to the insolvent under an instalment sale transaction after sequestration.

258 *Brown v Oosthuizen* 1980 2 SA 155 (O).

259 1981 (2) SA 831 (O).

an insolvent, the proceeds of the estate should go into a trust until such time as the said son is rehabilitated. The court held that this provision was a *nudum praeceptum* and that the inheritance vested in the insolvent estate.

8.7.2 Alternative or exclusive bequests

A testator is capable of including a direction in his will stipulating that in the event of the heir being an unrehabilitated insolvent at the death of the testator, the bequest shall pass to some other person, or that the executors of the estate may in their discretion divert it to some other person. The effect of such a direction is that the trustee will have no right to the inheritance. However, a testator is not capable of bequeathing an inheritance in such a manner that the inheritance will accrue exclusively to the insolvent and that creditors and the trustee of the insolvent estate are denied any rights to the inheritance.[260]

8.7.3 Property bequeathed as the "separate property" of a spouse

A trustee is in principle bound by any conditions or directions attached to a bequest which would usually have bound the insolvent heir. Differing court decisions exist regarding the question of whether so-called "separate assets" of a woman married in community of property will be exclusively hers and therefore not form part of the joint insolvent estate.[261] In *Badenhorst v Bekker NO*[262] McLaren J pointed out that the sequestration of the joint estate of spouses married in community of property results in the insolvency of both spouses and that assets excluded from the community of property and the marital power of the husband ("excluded assets") clearly fell within the ambit of section 20(1)(a) and 20(2)(b) of the Insolvency Act.[263] The court also concluded that section 21 of the Insolvency Act applies only to spouses married out of community of property.[264] The court held that, as a spouse married in community of property was clearly a co-debtor of the creditors of the insolvent joint estate, the "excluded assets" could also be utilised to satisfy the claims against the joint estate.[265] In *Du Plessis v Pienaar NO*[266] the Supreme Court of Appeal agreed with the *Badenhorst* decision.

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260 *Pritchard's Trustee v Pritchard's Estate* 1912 CPD 87; *Vorster v Steyn NO* 1981 2 SA 831 (O).

261 In *Ex parte Geeringh* 1980 2 SA 788 (O) it was for example decided that a woman married in community of property could have separate assets which do not form part of the joint estate. Mars says that in principle a bequest to a wife married in community of property should pass to her husband's trustee unless there is a bequest over of the property to a third person. Mars adds, however, that there is authority for stating that even without any such gift-over, property may be bequeathed to a wife so as not to pass over to her husband's trustee.

262 1994 (2) SA 155 (N).

263 At 159I-160F.

264 At 160I.

265 At 172A.

266 2003 (1) SA 664 (SCA).

8.7.4 Refusal by an insolvent debtor to accept a bequest

It has been held that a refusal by an insolvent debtor to adiate (accept) a bequest would constitute a disposition of property not for value which may be set aside.[267] Other decisions disagreed with this approach.[268] The matter was eventually settled by the decision of the Supreme Court of Appeal in *Wessels NO v De Jager NO*.[269] The court held that prior to the acceptance of an inheritance or insurance benefits, the beneficiary had no rights to the benefits but merely a "competence" to inherit. It follows that an insolvent's refusal to accept the benefits cannot be set aside as a voidable disposition.

8.8 Compensation, pension and other benefits excluded from the insolvent estate

8.8.1 Compensation and damages

An insolvent is entitled to retain for their own account any benefits in terms of the Unemployment Insurance Act 1971, the Compensation for Occupational Injuries and Diseases Act 1993 or the Occupational Diseases in Mines and Works Act 1973, as well as damages for any defamation or personal injury suffered by them in which their estate was not involved.[270] This includes the right to damages for medical expenses and loss of earnings as well as compensation for pain and suffering arising from personal injury suffered by the insolvent. An insolvent may also retain damages arising from adultery between the defendant and the spouse of the insolvent,[271] but is not entitled to compensation for damages suffered in business activities prior to sequestration.[272] Recovery in terms of this subsection is not limited to compensation by means of legal process and includes awards made prior to sequestration.[273] In *Malcolm Wentzel v Discovery Life Limited and Others: In Re Botha and Others NNO v Wentzel*[274] the Supreme Court of Appeal declined a late reliance on section 23(8) that the benefits in terms of a life insurance policy was protected against the appellant's insolvency and thus became payable to the appellant personally. The appellant argued that the policy *in casu* was a pure risk policy for the provision of an indemnity in the event of a future risk, namely, his spouse's death. According to the appellant, the policy therefore became payable as a result of his spouse's death and thus provided indemnity for the spouse's death, inclusive of the loss of *consortium* suffered by the appellant. The court referred to the decision of the Constitutional Court in *DE v RH*,[275] that in relation to the traditional field of claims of *contumelia* associated with loss of *consortium*, namely, adultery, that liability should not attach. According to the court in *Wentzel*, if one were to assume that a claim for loss of *consortium* was notionally viable in other circumstances, it should be kept

267 *Boland Bank v Du Plessis* 1995 (4) SA 113 (T).
268 *Kellerman v Van Vuuren* 1994 (4) SA 336 (T); *Klerck and Schärges v Lee* 1995 (3) SA 340 (SE); *Durandt NO v Pienaar NO* 2000 (4) SA 869 (C).
269 2000 (4) SA 924 (SCA).
270 Insolvency Act, s 23(8).
271 *De Wet NO v Jurgens* 1970 3 SA 38(A).
272 *Argus Printing & Publishing Co v Anastassiades* 1954 1 SA 72 (W).
273 *Santam Ltd v Norman* 1996 (3) SA 502 (C).
274 Case no 1001/19 [2020] ZASCA 121 (2 October 2020).
275 2015 (5) SA 83 (CC).

in mind that a claim for the loss of *contumelia* is a claim for damages. The obvious problem for the appellant was therefore to identify a wrongdoer in relation to such claim.[276]

8.8.2 Pension benefits

In terms of section 23(7) of the Insolvency Act the insolvent may for their own benefit recover any pension to which they may be entitled *for services rendered*. In terms of section 3 of the General Pensions Act 1979, any benefit received under any pension law by any person whose estate is sequestrated does not form part of the assets in the insolvent estate. However, a benefit received before sequestration forms part of the insolvent estate.[277] Section 37B of the Pension Funds Act 1965 provides, *inter alia*, that if the estate of any person *entitled to a benefit* payable in terms of the rules of a registered fund (including an annuity purchased by the said fund from an insurer for that person) is sequestrated or surrendered, such benefit shall not be deemed to form part of the assets of the insolvent estate of that person.[278] The definition of pension fund in section 1 includes the provision of annuities.

8.9 Indemnity

If an insurer is obliged to indemnify a third person in respect of any liability incurred by the insured (insolvent) against such third party, the third party may claim damages directly from the insurer on sequestration of the insurer's estate.[279]

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276 *Ibid*, paras [24] – [28].

277 *Foit v Firstrand Bank Bpk* 2002 (5) SA 148 (T).

278 In *M and Another v Murray NO and Others* 2020 (6) SA 55 (SCA) paras [15] – [17], the SCA found that s 37B established an exception to the provisions of s 20(1)(a) of the Insolvency Act. Therefore, while in the hands of a pension fund, an insolvent's pension interest cannot be attached by his or her trustee on the basis that it formed part of the assets of his or her insolvent estate. However, s 37B only applies in respect of pension benefits of a person whose estate was already under sequestration when he or she received the benefit. As soon as the benefit was paid, the beneficiary ceased to be a "member" of the pension fund and the money ceased to be a "benefit" in terms of the Act. The court accordingly found that a benefit paid out before sequestration of an insolvent's estate did not enjoy protection in terms of s 37B.

279 Insolvency Act, s 156. The insurance contract must stipulate that it indemnifies the insured against a third party – *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 (1) SA 410 (A);. The insurer is entitled to rely on the same defences against the third party which he may have against the insurer – *Przybylak v Santam Insurance Ltd* 1992 (1) SA 588 (K); *Canadian Superior Oil Ltd v Concord Insurance Co Ltd* 1992 (4) SA 263 (W). See also *Gypsum Industries Ltd v Standard General Insurance Co Ltd* 1991 (1) SA 718 (W); *Vrywaringsversekeringsfonds vir Prokureurs v Coetzee* 2001 (4) SA 1273 (O); *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 SCA; *Hollard Insurance Company Ltd v Unitrans Fuel and Chemical (Pty) Ltd* (Case No A5052/2010 High Court Johannesburg). Section 156 applies to indemnity insurance and not in respect of an indemnity provided in terms of any other indemnification agreement – *Venfin Investments (Pty) Ltd v KZN Resins (Pty) Ltd t/a KZN Resins* [2011] 4 All SA 369 (SCA). A claim against an insurance company in terms of s 156 of the Insolvency Act is extinguished by prescription three years after the date of sequestration or liquidation. Section 156 does not transfer to or vest the existing rights of an insolvent estate in the third party. For that reason too, an acknowledgement of liability by the insurer to its insured does not avail the third party. There was, therefore, no interruption of prescription once it started running – the claim prescribed – *Van Reenen v Santam Ltd* 2013 (5) SA 595 (SCA).

8.10 New estate

It is important to note that assets excluded from an insolvent estate constitute a separate estate which may be sequestrated by a creditor of the "new" estate. The first estate consists of the assets that vested in the trustee. The other estate is a new estate consisting of assets of the insolvent acquired after sequestration or rehabilitation and which do not form part of the first insolvent estate.[280]

Self-Assessment Questions

Question 1
Explain the general rule in respect of property acquired by the insolvent after sequestration of his or her estate. (1)

Question 2
Indicate whether the following statement is TRUE or FALSE:

"If a will merely directs that a bequest shall not form part of an insolvent estate without further direction that on the beneficiary's insolvency the bequest shall pass to some other person, the direction is of no effect in law."

Question 3
Indicate whether the following statement is TRUE or FALSE:

"If an insurer is obliged to indemnify a third person in respect of any liability incurred by the insured against such third party, the third party may claim damages directly from the insurer on sequestration of the insurer's estate."

Question 4
Mr A was married in of community of property to Mrs A in 1980. On 1 February 2021 the married couple's joint estate was finally sequestrated. On the date of sequestration Mr A was an employee of ABC Bank and earned R50,000 per month. Mrs A was an employee of the University of South Africa and earned R30,000 per month. On 1 March 2021 Mrs A inherited R1 million from her father, which inheritance she accepted on 1 June 2021. She also took early retirement and became entitled to an amount of R1 million as pension in return for the services she provided to the University. You are the trustee of the insolvent estate. Answer the following questions:

280 *Muller v Kaplan NO* [2011] JOL 27338 (GSJ), para [89].

- Will the salaries of Mr and Mrs A vest in the insolvent estate? (3)
- Will the R 1 million which Mrs A inherited, vest in the insolvent estate? (4)
- Explain what the legal position would have been if Mrs A decided to repudiate the inheritance. (3)
- Explain whether the pension which Mrs A became entitled to will fall into the joint insolvent estate. (2)
- What would the position in the previous question have been if the pension benefit paid out before sequestration of the joint estate? (6)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 9 – EFFECT OF SEQUESTRATION ON INSOLVENT'S SPOUSE

9.1 Marriages in community of property

When the joint estate of parties married in community of property is sequestrated, each of the spouses is an "insolvent" for the purposes of insolvency.[281] If spouses married in community of property are divorced before sequestration, the spouse who incurred the debt is liable for the full amount of the debt and the other spouse is liable for half the amount without the necessity for the first spouse to be excussed. A *nulla bona* return obtained while the parties are still married gives rise to an act of insolvency against both spouses. The insolvency of one spouse after divorce does not extinguish the liability of the solvent spouse for debts of the joint estate. The preferred view, however, is that the spouse who did not incur the debt should not be held liable for more than a half-share. [282]

In *Samsudin v Berrange NO*[283] the court ordered a provisional trustee to pay a contribution of R450,000 towards a spouse's costs in connection with an application to declare that her marriage was not one in community of property, as part of her opposition to the granting of a final sequestration order in connection with the estate alleged to be an estate of parties married in community of property.

9.2 Application of section 21 where parties not married out of community

In *Badenhorst v Bekker*[284] it was decided that assets excluded from the community of property and the marital power of the husband vest in the trustee of the insolvent estate. It was also concluded that section 21 of the Insolvency Act applies only to spouses married out of community of property and not to a spouse married in community of property who holds assets that are excluded from the community of property and the marital power. In *Janit v Van den Heever NO*[285] it was decided that section 21 does not apply to the estate of a surviving spouse where the marriage between the solvent and insolvent spouses was terminated by death before the deceased insolvent spouse's estate was sequestrated.

9.3 Vesting of assets of spouse in terms of section 21

The position in respect of a marriage out of community of property is dealt with in section 21 of the Insolvency Act. It provides that the additional effect of the sequestration of the separate estate of one of two spouses shall be to vest in the Master, and upon appointment in the trustee, all the property of the spouse whose estate has not been sequestrated (the "solvent

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281 *Cf Malcolm Wentzel v Discovery Life Limited and Others: In Re Botha and Others NNO v Wentzel* Case no 1001/19 [2020] ZASCA 121 (2 October 2020) para [19]; *De Wet NO v Jurgens* 1970 (3) SA 38 (A).

282 *BP Southern Africa (Pty) Ltd v Viljoen* 2002 (5) SA 630 (O).

283 2005 (3) SA 529 (N).

284 1994 (2) SA 155 (N).

285 No 1, 2001(1) SA 731 (W) and No 2 2001 (1) SA 1062 (W). See also *Shrosbree and Others NNO v Van Rooyen NO* 2004 (1) SA 226 (SECLD).

spouse") as if it were property of the sequestrated estate.[286] The term "spouse" has an extended meaning and includes a wife or husband married according to any law or custom, and also persons living together as husband and wife, though not legally married.[287] The Civil Union Act legalised civil unions between same-sex partners which now has the same legal consequences as any marriage in any other law, including the common law.[288] The term "spouse" therefore includes a "civil union partner" in terms of the Civil Union Act.[289]

In *Harksen v Lane*[290] the Constitutional Court, in a majority decision, held that section 21 does not violate the equality clause in section 8(2) of the Interim Constitution 200 of 1993. The court further held, unanimously, that the section does not violate the property clause in terms of section 28(3) of the Interim Constitution.[291]

9.4 Trustee needs warrant to take possession of property of solvent spouse

A trustee cannot simply dispossess a solvent spouse of their property. The trustee must, in terms of section 69(1), take into possession all movable property "belonging to the estate", but not before the sheriff has made an inventory in terms of section 19. The trustee must make use of the provisions of section 69(3) and obtain a warrant from a magistrate in order to take possession of the property of the spouse.[292]

9.5 Sale of property of solvent spouse

Section 21(3) of the Insolvency Act provides that if the solvent spouse is in the Republic and the trustee is able to ascertain the insolvent's address, the trustee shall not, except with the leave of the court, realise property which ostensibly (apparently) belonged to the solvent spouse, until the expiry of six weeks' written notice to the spouse. This notice must also be published in the *Gazette* and a newspaper and must invite all separate creditors for value of that spouse to prove their claims as provided in section 21(5).[293]

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286 Insolvency Act, s 21(1). See *Motala and Another NNO v Moller and Others* 2014 (6) SA 223 (GSJ) para [24]. In *Motala* para [17] a sale of property by the solvent spouse after sequestration of the estate of the insolvent spouse was held to be voidable.

287 Insolvency Act, s 21(13)

288 Civil Union Act 2006, s 1.

289 *Ibid*, s 13(2). From the wording of s 21(13) (ie, the mention of "a woman living with a man as his wife or a man living with a woman as her husband, although not married to each other") it would appear that same-sex partners who are living together, but are not parties to a civil union concluded in terms of the Act, will not be regarded as a "spouse" in terms of s 21(13). This differentiation may possibly be held to be inconsistent with the Constitution – see Meskin para 5.30.1.1.

290 1998 (1) SA 300 (CC).

291 See, further, R Evans 1998 *Stell LR* 359.

292 *Cothill et Uxor v Cornelius* 2000 (4) SA 163 (T).

293 See *Stand 382 Saxonwold CC v Kruger* 1990 (4) SA 317 (T) for the sale in execution of the property of the solvent spouse. The court decided that subs 21(3) and (5) did not apply because it was not the trustee who realised the property but the sheriff at the instance of the bondholder. The court held that sequestration did not have the effect that the execution of a judgment against the property of the solvent spouse is stayed in terms of s 20(1)(c), as such a judgment was not given against an insolvent and it was not in respect of property owned by the insolvent. The Appellate Division has since, in *De Villiers v Delta Cables (Pty) Ltd* 1992 (1) SA

9.6 Creditors of the solvent spouse

Creditors of the solvent spouse must prove their claims. They are paid according to the ordinary priorities from the proceeds of the assets of the solvent spouse that have not been released in terms of section 21(2) after the deduction of a proportionate share of the costs. The creditors should first endeavour to obtain payment from released assets (other than protected assets such as insurance). The creditors of the spouse do not have to pay contribution (if there is any payable) and do not vote at meetings or share in the separate assets of the insolvent estate, but they may apply to the court if their rights are infringed. The balance of the assets of the solvent spouse are distributed as part of the insolvent estate.[294]

9.7 Proof that spouse is entitled to release of property

The burden of proving that he or she is entitled to their property in terms of section 21(2) is on the solvent spouse. The inclusion of an asset in a statement in terms of section 6 of the Matrimonial Property Act 1984 does not serve as proof of any right of any person to claim the release of assets in terms of section 21(2)[295] of the Insolvency Act. In terms of section 21(2), the trustee shall release property to the solvent spouse if it is proved:

(a) that is was the property of the spouse before the marriage;[296]

(b) that it is property acquired under a marriage settlement;[297]

(c) that it was property acquired during the marriage by a title valid against creditors;[298]

(d) that it is property protected under the Long Term Insurance Act 52 of 1998;[299]

(e) that it was acquired with property under (a) - (d) above or the income or proceeds thereof.

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9 (A) 16G, without expressing any opinion on the decision in the *Stand 382* case, rejected the view that the trustee had not become the owner of the solvent spouse's property. According to N L Joubert 1992 *TSAR* 699, the decision in *De Villiers v Delta Cables*, that s 21 brought about a *concursus creditorum* in respect of the unreleased assets of the solvent spouse, has drastic implications for the insolvent's spouse and their creditors. This necessitates the application of the rules of insolvency law regarding uncompleted contracts to the solvent spouse. Section 38 will apply to service contracts entered into by the spouse before the sequestration of the insolvent.

294 Insolvency Act, s 21(5)-(9).

295 Not s 21(1) as stated in s 21(2)(e) of the Matrimonial Property Act.

296 As was pointed out above, a statement filed with an antenuptial contract that assets belonged to one spouse does not constitute proof of this. It is to be noted that the transitional provision regarding assets acquired before 1 October 1926 is no longer of practical significance.

297 See the discussion of s 27 below.

298 See below.

299 This is how the reference to s 28 of the Insolvency Act and the Insurance Act 1923 should be read. See s 12(1) of the Interpretation Act 1953.

In *Hawkins v Cohen*[300] it was held that an application to a trustee under section 21(2) of the Insolvency Act for the release of assets and the trustee's refusal to release assets, are not prerequisites for an application to court for the release of assets. It nevertheless appears to be risky to by-pass the trustee and apply to the court. The trustee may not refuse to release property because he intends to challenge a transaction. If the trustee has released property he is not barred thereby from proving that it belongs to the insolvent estate.[301]

9.8 Benefit under antenuptial contract

According to section 27 of the Insolvency Act, no immediate benefit (a benefit transferred, delivered, etc, before three months after the marriage) under a *duly registered antenuptial contract* given in good faith by a *man to his wife* or to a child to be born of the marriage, shall be set aside as a disposition without value, unless the husband's estate was sequestrated within two years of the registration of the antenuptial contract. If the contract is not duly registered in the deed's office (usually before the marriage) it is binding on the husband or wife only and not on their creditors, heirs, etc. The limitation of this section to gifts by a man to his wife is clearly discriminatory.[302]

9.9 Property acquired by a title valid against creditors

Before the Matrimonial Property Act 1984, the decision of the Appellate Division in *Kilburn v Estate Kilburn*[303] was the *locus classicus* – if property had been obtained during the marriage from a spouse (say the husband) as a donation, or if it had been obtained from money provided by the husband, ostensibly for the wife but in reality for her husband's estate, or even for the benefit of both spouses, then the property formed part of the husband's insolvent estate after sequestration and the wife did not acquire it by a title valid against creditors of the husband's estate. Section 22 of the Matrimonial Property Act now provides that, subject to the provisions of the Insolvency Act, no transaction effected before or after the commencement of that Act is void or voidable merely because it amounts to a donation between spouses. Although common sense still dictates that the valid title of the solvent spouse should be proved thoroughly in the light of the applicant's exclusive knowledge of the relevant particulars and the understandable temptation to obscure the transaction, a donation may now provide such valid title. However, the requirement of good faith remains and unlike a real donation a simulated donation does not provide a valid title.[304] The onus is on the solvent spouse to prove the true transaction and that it is a valid one such as may

300 1994 (4) SA 23 (W).

301 Insolvency Act, s 21(12).

302 *Cf Brink v Kitshoff* 1996 (4) SA 197 (CC) where ss 44(1) and (2) of the Insurance Act 1943 were declared unconstitutional due to discrimination on the grounds of gender and marital status.

303 1931 AD 501.

304 *Snyman v Rheeder* 1989 (4) SA 496 (T) 505I; *Jooste v De Witt NO* 1999 (2) SA 355 (T); *Davies v Van Den Heever NO* 2019 JDR 0536 (GJ) – see further M Roestoff "Effect of Sequestration on the Property of the Solvent Spouse: Section 21 of the Insolvency Act – *Davies v Van Den Heever NO* (16865/2017) [2019] ZAGPJHC (1 March 2019))" 2020 *THRHR* 430.

confer a valid title.[305] A real donation or any other transaction between spouses may be challenged in terms of sections 26, 30 or 31 of the Insolvency Act, or in terms of the *actio Pauliana*, provided that the invalidity of donations between spouses is not relied upon.

9.10 Sequestration of separate estates of spouses

Although it is possible to sequestrate the separate estates of both spouses married out of community of property in one application,[306] this is not common.[307] If the estates of the two spouses are sequestrated one after the other, the position is as follows. At the time of the first sequestration, all the property of the solvent spouse vests in the Master and upon appointment in the trustee. Upon the sequestration of the estate of the "solvent spouse", all assets acquired by the "solvent spouse" after the first sequestration, including assets released or the right to claim assets in terms of section 21, vest in the Master and upon appointment in the trustee of the second estate. In *De Hart v Kleynhans*[308] the husband's estate was sequestrated, thereafter the estate of his wife was sequestrated and, finally, the husband's estate was sequestrated for the second time. Before the sequestration of her estate the wife had transferred assets to her husband. The court held, with reference to section 32 of the Insolvency Act, that the trustee of the wife's estate merely had a concurrent claim against the husband's second insolvent estate. It is not clear why it was not argued that the husband's second insolvent estate vested in the trustee of the wife's estate in terms of section 21.

9.11 Marriage subject to accrual system[309]

If the estate of one of the spouses of a marriage subject to the accrual system is insolvent at the time of dissolution of the marriage, it follows that the estate did not show any accrual and there cannot be a claim against the estate for accrual. It may, for example, happen that a divorced spouse's financial position deteriorates after the claim for accrual against the spouse

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305 *Beddy NO v Van der Westhuizen* 1999 (3) SA 913 (SCA) 917D; *Banks v Josephs NO* [2009] JOL 23923 (C); *Sali-Ameen v Smit NO* [2009] JOL 24727 (GSJ).

306 *Main Industries (Pty) Ltd v Serfontein* 1991 (2) SA 604 (N) 608B.

307 It was decided in *Huntrex 337 (Pty) Ltd t/a Huntrex Debt Collection Services v Vosloo and Another* 2014 (1) SA 227 (GNP) that two persons with separate estates cannot be sequestrated in the same application.

308 1970 (4) SA 383 (O).

309 The following provisions of the Matrimonial Property Act 1984 relate to the accrual system. Every marriage out of community of property by virtue of a duly registered antenuptial contract entered into after 1 November 1984 is subject to the accrual system except in so far as that system is expressly excluded by the antenuptial contract (s 2). At the dissolution of such a marriage by divorce or the death of one of the parties, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse acquires a claim for a half of the difference between the accrual of the respective estates (s 3). (A marriage is not dissolved by the sequestration of the estate of one of the parties.) The parties may declare the net value of each participant's estate at the commencement of the marriage in the antenuptial contract or a statement filed with the antenuptial contract (s 6). If the court is satisfied that a spouse's right to share in accrual is being or will probably be seriously prejudiced by the conduct of the other party *and the court is satisfied that other persons (such as creditors) will not be prejudiced thereby*, the court may order the immediate division of the accrual (s 8). The court may, if it is satisfied, *inter alia*, that sufficient notice of the proposed change has been given to creditors, allow parties to change the matrimonial property system applicable to their marriage – there is also provision to change to the accrual system within a specified period by registration of a notarial contract to that effect (s 21). *Cf Ex parte Mdikiza et Uxor* 1995 (4) SA 429 (Tk).

becomes due. If the estate of the spouse is sequestrated the accrual claim would apparently compete with the concurrent claims of other creditors. In terms of section 3(2) of the Matrimonial Property Act 1984, "the right of a spouse to share ... in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not from part of the insolvent estate of a spouse".

Self-Assessment Questions

Question 1
What is the effect of sequestration of the estate of an insolvent debtor on his or her spouse to whom he or she is married out of community of property? (2)

Question 2
Explain the meaning of "spouse" for the purposes of section 21 of the Insolvency Act. (3)

Question 3
Indicate the grounds on which the solvent spouse may in terms of section 21 of the Insolvency Act, claim a release of assets. (5)

Question 4
Indicate whether the following statement is TRUE or FALSE:

"The Constitutional Court, held that section 21 violates the equality clause of the Interim Constitution 200 of 1993 but does not violate the property clause in terms the Interim Constitution." (1)

Question 5
Mr B was married out of community of property to Mrs B in 1980. On 1 March 1990, Mr B donated certain immovable property to Mrs B. Soon thereafter, the property was registered in Mrs B's name in the Deeds Office. On 1 February 2021 Mr B's estate was finally sequestrated. One month before his sequestration, Mr B donated his silver Porsche motor vehicle to Mrs B. After sequestration Mrs B claimed release of the immovable property as well as the silver Porsche motor vehicle from you, the trustee of Mr B's insolvent estate. Will you release the said assets? Motivate your answer. (7)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 10 – EFFECT OF SEQUESTRATION ON INSOLVENT PERSONALLY

10.1 Disqualifications due to insolvency

There are more than 90 provisions in various Acts that disqualify an insolvent person from membership of statutory boards, committees and commissions. The Constitution provides that an unrehabilitated insolvent is disqualified from being a member of the National Assembly, the provincial legislative or a municipal council.[310] An unrehabilitated insolvent is also disqualified from being a director of a company[311] or several other legal persons and may not take part in the management of the business of a close corporation.[312] An insolvent may be removed from fiduciary appointments such as trustee, liquidator, executor, tutor, etc. An insolvent may, for example, be prohibited from practising as a quantity surveyor, accountant or estate agent . If a legal practitioner becomes insolvent, the High Court may, on application made by the Council or Board established in terms of the Legal Practice Act or by any person having an interest in the trust account of that legal practitioner or trust account practice, appoint a *curator bonis* to control and administer that account.[313]

In terms of a number of Acts, a person may be guilty of misconduct if their estate is sequestrated. These Acts apply to civil servants, teachers, sheriffs, etc. An unrehabilitated insolvent does not qualify for a liquor license.[314] The provision in section 23(2) of the Insolvency Act that an insolvent may follow any profession or occupation or enter into any employment, should be read subject to the above-mentioned and other similar restrictions.[315]

10.2 Employment of insolvent

An insolvent may not during his insolvency carry on or be employed in any capacity or have any direct or indirect interest in the business of a trader (as defined) who is a general dealer or manufacturer, unless the written consent of the trustee is obtained. The insolvent or a creditor of the estate may appeal to the Master if the trustee gives or refuses his consent.[316]

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310 Constitution of the Republic of South Africa 1996, ss 47(1)(c), 106(1)(c) and 158(1)(c).

311 Companies Act 2008, s 69(8)(b)(i) (subject to exemption by a court). The disqualification does not automatically result in the invalidity of the appointment of an insolvent director, or in a person ceasing to be a director upon sequestration – *Freedom Property Fund Limited and Another v Stavridis and Others* [2018] JOL 30034 (ECG) para [27].

312 Close Corporation Act 1984, s 47.

313 Legal Practice Act 2014, s 90(1)(b).

314 Liquor Act 1989, s 25.

315 See further, M Roestoff "Insolvency Restrictions, Disabilities and Disqualifications in South African Consumer Insolvency Law: A Legal Comparative Perspective" 2018 *THRHR* 393.

316 Insolvency Act, s 23(3).

10.3 Contracts entered into by insolvent

In terms of section 23(2) of the Insolvency Act, an insolvent may conclude any contract except:

- a contract by which the insolvent purports to dispose of any property of their estate;
- a contract by which the insolvent's estate is, or is likely to be, adversely affected, unless it is concluded it with the written consent of the trustee;[317] and
- a contract by which any contribution to the estate which the insolvent is obliged to make[318] is, or is likely to be, adversely affected unless it is concluded with such consent.

10.4 Validity of contracts entered into by insolvent

A contract within the above-mentioned exceptions is not void but only voidable at the option of the trustee. Where the trustee elects to avoid it, there must be a restoration to the other party of the benefits deriving from the contract.[319] If, however, an insolvent purports to alienate, for valuable consideration, without the consent of the trustee any property acquired after the sequestration of the estate (and which by virtue of such acquisition became part of his sequestrated estate) or any right to such property to a person who proves that they were not aware and had no reason to suspect that the estate of the insolvent was under sequestration, the alienation is nevertheless valid.[320]

Where the trustee has given their written consent, the contract is valid and enforceable by either party without the intervention of the trustee. Where the trustee does not avoid a voidable contract, or where they stand by without avoiding it, the contract is valid and both parties acquire rights and become subject to liabilities as if the trustee had actually given their written consent.

10.5 Vesting of property acquired in terms of contract by insolvent

When does the property acquired in terms of a contract vest in the trustee and when does it vest in the insolvent's separate (new) estate? Section 20(1)(a) of the Insolvency Act read with section 20(2)(b) provides that all property acquired by an insolvent or which accrues to the insolvent during the sequestration, except as otherwise provided in section 23, forms part of the insolvent estate. Section 23(1) also provides that subject to the provisions of section 23 all property acquired by an insolvent shall belong to the insolvent estate. Assets acquired under a contract will become the insolvent's own personal property only if the insolvent's

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317 This provision may well be superfluous as any contracts which may adversely affect the estate are included as contracts that dispose of property of the estate, or contracts which may adversely affect a contribution which the insolvent is obliged to make.

318 The obligation to make a contribution arises only once the Master has fixed an amount in terms of s 23(5). See *Mervis Brothers (Pty) Ltd v Hanekom* 1963 (2) SA 125 (T) at 127; *S v Moll* 1988 (3) SA 236 (T) 241.

319 *Estate Louw v Credit Corporation of SA Ltd* 1956 (3) SA 303 (C); *Ponammal v Taylor* 1963 (2) SA 656 (N) at 663; *Mackay v Fey NO* 2006 (3) SA 182 (SCA) para [10].

320 Insolvency Act, s 24(1).

counter-performance consists of assets or money which the insolvent may recover for their own benefit in terms of section 23 or other provisions such as section 63 of the Long-Term Insurance Act 1998. These contracts do not require the trustee's consent and should the trustee consent, the acquired assets will nevertheless become the insolvent's own personal property.

10.6 Trustee's consent to carry on a trade

Where a trustee has given consent to an insolvent to enter into a contract or to carry on a trade, the trustee must forward a copy of the consent to the Master and the trustee commits an offence if there is a failure to do so.[321]

10.7 Obligations of an insolvent

Meskin does not list the obligations of an insolvent. Mars enumerates the following in Chapter 15:

- Keep trustee informed of residential and postal addresses;
- Deliver business records;
- Lodge statement of affairs;
- Attend first and second meetings;
- Deliver assets to trustee;
- Assist trustee in collecting, taking charge of and realising property against payment of an allowance in money or goods.[322]

The insolvent must also keep a detailed record and vouchers of all assets received and disbursements made.[323] In terms of section 137(a) of the Insolvency Act, it is an offence for any person to obtain credit of more than R20 during sequestration without previously informing the credit provider that they are insolvent, unless the person can prove that such person knew of the insolvency.

321 Insolvency Act, s 23(3)*bis*.
322 *Ibid*, s 23(12).
323 *Ibid*, s 23(4).

Self-Assessment Questions

Question 1
Explain the legal position in respect of an unrehabilitated insolvent's capacity to conclude valid contracts. (3)

Question 2
Briefly explain the legal position in respect of an unrehabilitated insolvent's ability to hold certain positions and to be employed. (4)

Question 3
Name six obligations of the insolvent during insolvency. (6)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 11 – EFFECT OF INSOLVENCY ON THE EXECUTION OF JUDGMENTS AND OTHER CIVIL PROCEEDINGS

11.1 Effect on attachments and sales in execution

11.1.1 Notice to sheriff and messenger

The Registrar of the High Court must transmit a copy of the liquidation or sequestration order to every sheriff and messenger who holds property of the insolvent estate under attachment.[324]

11.1.2 Preference for execution creditor

According to the common law an attachment in execution created a judicial lien. Custody of goods attached passed from the judgment creditor to the officer of the court and did not pass to the trustee of the debtor in the event of debtor's subsequent sequestration. The debtor, however, retained ownership until the property was sold and delivered or transferred.[325] In terms of our current law attachment does not confer any preference after sequestration.[326] The provision in the Insolvency Act that attachment confers a small preference for costs only, applies to a company as well.[327]

11.1.3 Attached property vests in trustee

In terms of section 20 of the Insolvency Act, the estate of the insolvent, including property under attachment, vests in the trustee.[328] This changed the common law explained in the previous paragraph. In *Edkins v The Registrar of Deeds, Johannesburg*,[329] where the purchaser at a sale in execution had complied with all his obligations, the court decided that section 20 could not nullify a valid sale in execution that occurred before an insolvent surrendered his estate.[330] This decision was overturned on appeal in *Fourie and Another NNO v Edkins*.[331] The court held that the purchaser should, instead of relying on section 5(1), have approached the court in terms of section 20(1)(c) to seek an order to direct that the transfer into his name should be proceeded with, notwithstanding the supervening voluntary surrender of the insolvent estate. However, the purchaser did not show that it would be in the interests of the general body of creditors to do anything other than ordering a stay of the sale

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324 Insolvency Act, s 17(1)(b)(iii); Companies Act 1973, s 357(1)(c).

325 *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558-559, read with *Simpson v Klein* 1987 (1) SA 405 (W) 411C. *Cf Shalala v Bowman* 1989 (4) SA 900 (W) 905.

326 Insolvency Act, s 98(2).

327 *Ibid*, s 98; Companies Act 1973, s 342.

328 See *Van den Heever v Ucko-Stein NO* [2009] JOL 23335 (GNP) for a case where the property subject to the attachment was sold and paid for but still vested in the trustee because it was not transferred before the sequestration of the debtor's estate.

329 2012 (6) SA 278 (GSJ).

330 The court distinguished the decision in *Simpson v Klein* 1987 (1) SA 405 (W) 412, referred to below, due to the fact that in the present case the purchaser had complied with all his obligations.

331 2013 (6) SA 576 (SCA).

in execution.[332] In *Kalianjee NO and Another v Ramlotan and Others* the court set aside the transfer of a property sold by the sheriff, although the sheriff did not receive notice of the sequestration. The court held that the *concursus* took precedence, there was evidence regarding the value of the insolvent's property, and the trustees should be given the opportunity of having the sale set aside in order to try and resell the property.[333]

The publication of a notice of surrender can effectively stop a sale in execution that has not taken place, but not the transfer of the property after the sale had taken place.[334]

11.1.4 Attachment of property of a company

Section 20 does not apply to the liquidation of a company because ownership of the property of the company does not vest in the liquidator. All the property is deemed to be in the custody and under the control of the liquidator[335] but the company remains the owner. In light of this fundamental distinction between sequestration and liquidation, Philips AJ held in *Ex parte Vermaak: In re Klopper v Lavdas*[336] that the custody of and control over assets subject to attachment did not pass to the liquidator and that the question of preference under the Insolvency Act did not even arise. This decision is incorrect,[337] as confirmed by the Supreme Court of Appeal in *Legh v Nungu Trading 353 (Pty) Ltd*.[338] The court pointed out that the purpose of section 342(1) of the Companies Act 1973, that the assets of the company must be applied in payment of the costs, charges and expenses incurred in the winding-up and claims of creditors, could hardly be achieved if the property subject to attachment had been transferred out of the company. The liquidator must recover the property and reduce it into possession.[339]

11.1.5 If sale not yet concluded trustee entitled to property or proceeds

If the execution debtor is sequestrated or liquidated before the sheriff has sold movable property subject to attachment, or transferred immovable property and paid over the proceeds, the trustee or liquidator is entitled to the property or its proceeds.[340]

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332 Paras [16] and [17].

333 (22478/2013) [2017] GJ (7 March 2017) para [24]. Confirmed on appeal in *Ramlotan v Kalianujee* (Appeal Case Number: A5024/2018 GJ, Case Number: A22478/2013 [2019] GSJ, 7 June 2019).

334 See also *De Jager NO Balju van die Hooggeregshof, Bloemfontein-Wes* (407/210) [2010] ZAFSHC 90 (4 June 2010); *Fourie and Another NNO v Edkins* 2013 (6) SA 576 (SCA) para [12].

335 Companies Act 1973, s 361.

336 1980 (2) SA 696 (T) 700.

337 See, eg, *Liquidator, Mr Spares v Goldies Supplies* 1982 (4) SA 607 (W): *Strydom v MGN Construction Ltd: In re Haljen (in liq)* 1983 (1) SA 799 (D); *Shalala v Bowman* 1989 (4) SA 900 (W); *Syfrets Bank Limited v The Sheriff of the Supreme Court, Durban Central* 1997 (1) SA 764 (D). Michael Blackman, 1980 *SALJ* 379: C Rosenthal, 1982 *SALJ* 209.

338 2008 (2) SA 1 (SCA) para [15].

339 Companies Act 1973, s 391.

340 *Simpson v Klein* 1987 (1) SA 405 (W) 412; *Shalala v Bowman* 1989 (4) SA 900 (W) 905; *Fourie and Another NNO v Edkins* 2013 (6) SA 576 (SCA) para [20].

11.2 Trustee not entitled to money paid over on behalf of creditors

Where a sheriff has delivered an "interpleader notice" because of adverse claims and has paid the proceeds to the registrar[341] before liquidation, the registrar holds the money on behalf of creditors and the liquidator of a company being wound up cannot claim it.[342] Despite the differences between the position of a company and an insolvent, it is submitted that the same principle applies in the case of the sequestration of an individual's estate. The trustee cannot claim money held by the registrar on behalf of creditors.

11.3 Execution against property of insolvent stayed

Section 20(1)(c) of the Insolvency Act provides that the execution of a judgment is stayed as soon as the sheriff concerned becomes aware of the sequestration, unless the court directs otherwise. The trustee does not step into the shoes of the sheriff and the trustee cannot sue a person who signed as surety in favour of the sheriff.[343]

11.4 Continuation of execution by order of court

The court may order that execution be continued if this is expedient and necessary and the general body of creditors will not be prejudiced, but the proceeds must be paid to the Master or the trustee.[344] Cases may occur where it is in the interest of all the parties that the sale in execution should proceed, for instance where an auction has already been arranged and the advertisements placed. Assuming that a fair price is obtained at the auction, it would be in the interests of everyone for the auction to proceed. The provisions to authorise the continuation of execution are not frequently used. In the case of sequestration the cost of a court application discourages the continuation of proceedings. In the case of a company a few months usually pass before a final liquidator is appointed and such a liquidator can be given three weeks' notice.

11.5 Attachment and execution after winding-up order is void

Section 359(1)(a) of the Companies Act provides that the making of a winding-up order suspends all civil proceedings until the appointment of a liquidator. Section 359(1)(b) states that any attachment or execution [345] *put in force after the commencement of the winding-up*[346] is void.

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341 Uniform Rules of Court, r 58.

342 *Wichman v The Master* 1980 (4) SA 395 (SWA) 398A. The same applies where money has been paid to a judgment creditor's attorney prior to insolvency in terms of a garnishee order – *Richard Keay Pollock NO v North Copper Wire (Pty) Ltd* 2002 1 ALL SA 244 (T).

343 *Warricker NO v Senekal* 2009 (1) SA 509 (W). See A Boraine and A West, "Unexecuted Contract or Merely a Stay of Execution? *Warricker NO v Senekal*", *SA Merc Law Journal* Vol 20 No 4 2008 at 544.

344 *Ibid*.

345 Including an arrest to found an action *in rem* in an admiralty case – *The MV Nantai Princess* 1997 (2) SA 580 (D).

346 The presentation of an application that is subsequently granted.

11.6 Execution of company's assets is put into force by attachment

In *Syfrets Bank Ltd v The Sheriff of the Supreme Court, Durban Central*,[347] Combrink J held that execution was "put into force" when the Sheriff attached the property. If a company is liquidated before the property has been transferred, the liquidator has to decide, in the light of the interests of the general body of creditors, whether to abide by or abandon the sale in execution. Should the liquidator decide to abandon the contract, the other party is precluded by the *concursus creditorum* from enforcing specific performance against the liquidator. In *LL Mining Corporation Ltd v Namco (Pty) Ltd (In Liquidation)*[348] the court agreed that execution is "put into force" within the meaning of section 359(1)(b) once and for all when, in pursuance of a writ of execution, the sheriff or messenger of the court entered into possession of the property. It can clearly not be put into force every time a further step is taken in the process of execution.[349] The court also held that the wording of the section indicated in the application of this section that the critical date was the actual date of the provisional winding-up order, as opposed to the lodging of the application.[350]

11.7 Sale by public auction completed upon the fall of the hammer

A sale by public auction without reserve is completed upon "the fall of the hammer" and a valid verbal sale results without the need for writing – a fact expressly recognised by section 3(1) of the Alienation of Land Act 1981. In *Shurrie v Sheriff for the Supreme Court, Wynberg*[351] the property was attached on 22 October 1993. On 1 June 1994 there was a flurry of activity. At approximately 09:30 an application for provisional liquidation was filed. Within minutes of 12 noon and probably before 12:10, the property was knocked down at a sale in execution. At approximately 12:10 a provisional liquidation order was granted. The conditions of sale were signed at approximately 12:30. The court held that the sale in execution occurred when the property was knocked down and not when the conditions of sale were signed. The court held, further, that although winding-up is deemed to commence at the time of the presentation of the application to the court, there is no winding-up until the winding-up order is made. The sale therefore took place before the winding-up and was valid.

But the sale in the *Shurrie* case was not binding on the liquidator. *Syfrets Bank Ltd v The Sheriff of the Supreme Court, Durban Central*[352] states (regarding the valid sale in the *Shurrie* case above) that the Court was not required to, nor did it endeavour to deal with, the question as to whether the liquidators were entitled to repudiate the sale in that case. The liquidators did not repudiate the sale but, acting under the misapprehension that an auction sale of immovable property is concluded when the conditions of sale are signed as opposed to the moment the final bid is accepted, contended that, as the conditions had been signed after

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347 1997 (1) SA 764 (D).

348 2004 (3) SA 407 (C). This case dealt with the confirmation of a rule *nisi* in terms of which equipment was deemed to have been pledged.

349 See also the *Syfret's Bank* case at 779I.

350 See also *Shurrie v Sheriff for the Supreme Court, Wynberg* 1995 (4) SA 709 (C) 715E-716B.

351 1995 (4) SA 709 (C) 715E-716B.

352 1997 (1) SA 764 (D) at 783G.

the liquidation order had been made, the sale in that case was void in terms of section 359(1)(b) of the Companies Act 1973.

11.8 Proceedings by liquidator or trustee

The liquidator or trustee may institute or defend proceedings only with authority to do so.[353]

11.9 Effect of sequestration on civil proceedings

Section 20(1)(b) of the Insolvency Act provides that the effect of sequestration of the estate of an insolvent is to stay any civil proceedings instituted by or against the insolvent, except such proceedings as may in terms of section 23 be instituted by the insolvent for their own benefit or as may be instituted against the insolvent.[354] The exceptions refer to proceedings that do not affect the insolvent estate, such as proceedings relating to status or assets that do not form part of the insolvent estate. In *Engler Earthworks (Pty) Ltd v Marais*[355] the court held that section 23 did not contain an exhaustive list of cases where an insolvent had standing to litigate and that an insolvent had standing to apply for an order to recover possession of assets (spoliation order). The English version of the Act provides for a stay of proceedings "until the appointment of a trustee". There is no equivalent to these words in the Afrikaans version, which is the signed one, and it is submitted that these words should be ignored.

11.10 Claim for costs in connection with proceedings

In terms of the proviso to section 20(1)(b), if a claim in respect of which proceedings were stayed is subsequently proved against the estate or is compromised by the trustee after being tendered for proof, the claimant may also prove a claim for their taxed costs incurred in connection with those proceedings before sequestration.

11.11 Lapsing of proceedings against insolvent debtor

Section 75 of the Insolvency Act provides that any civil legal proceedings instituted before sequestration shall lapse three weeks after the first meeting, unless the person who instituted those proceedings has given notice within that period to the trustee (Meskin submits that this refers to the final trustee) or, if no trustee has been appointed, to the Master, that they intend to continue the proceedings and after three weeks from the notice "prosecutes those

353 Insolvency Act, s 73.

354 In the absence of any irregularity, an insolvent does not have a right to litigate in respect of their estate – *Muller v De Wet NO* 1999 (2) 1024 (W). In *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) it was decided that an insolvent was entitled to institute proceedings in their own name for an infringement of copyright where the trustee declined to institute proceedings. In *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* ([2017] 3 All SA 520 (SCA), where the trustees formally stated that they would abide the decision of the court in two appeals, the insolvents were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate or reducing the liabilities in the estate. The insolvents were entitled to intervene in both matters.

355 1998 (2) SA 450 (ECD).

proceedings with reasonable expedition". The court may permit the continuation of the proceedings on such conditions as it may think fit if notice has not been given, but the court found that there was a reasonable excuse for such failure.

11.12 Stay of proceedings after presentation of winding-up application

In terms of section 358 of the Companies Act 1973, a company or a creditor or member thereof may, between the presentation of an application for the company's winding-up and the granting of the winding-up order, apply to the court concerned to stay any action or proceeding by or against the company, or may apply to the court to which the application for winding-up has been presented to restrain further proceedings in any action or proceeding being or about to be instituted. The court may stay or restrain the proceedings on such terms as it thinks fit.

11.13 Continuation of suspended proceedings after liquidation order

Section 359(1) of the Companies Act 1973 provides that the making of the liquidation order (usually the provisional order) suspends all civil proceedings by or against the company until the appointment of a liquidator. Any person who intends to continue legal proceedings should[356] within four weeks after the appointment of the final liquidator give the liquidator three weeks' notice of an intention to proceed.[357] If notice is not so given, the proceedings are considered to be abandoned unless the court otherwise directs.[358] In *Umbogintwini Land & Investment Co v Barclays National Bank Ltd*[359] Viljoen JA held that section 359 applies only if the creditor institutes proceedings to prove its claim forthwith and not if it has attempted to prove its claim at a meeting first. Where a creditor withdraws its claim it is not deprived of its right to enforce its claim by legal proceedings, even though the claim has not been rejected in terms of section 44(3) of the Insolvency Act.[360] According to *King Pie Holdings (Pty) Ltd v*

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356 The section is couched in peremptory terms in requiring the giving of the written notice to the appointed liquidators. Should such notice not be given to the liquidator within four weeks of such liquidator's appointment, proceedings are considered to be abandoned unless the court directs otherwise – *Direct Channel KwaZulu-Natal (Pty) Ltd v Naidu and Others* (D879/10) [2015] ZALCD 51 (28 August 2015) para [11].

357 Companies Act 1973, s 359(2)(a) and *Strydom v MGN Construction Ltd: In re Haljen (in liq)* 1983 (1) SA 799 (D) 807C where it was held that "liquidator" in s 359 refers to a final liquidator. This was confirmed in *Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd (In Liquidation)* 2010 (2) SA 517 (SCA).

358 Companies Act 1973, s 359(2)(b); *Tshepega Civil Engineering (Pty) Limited v Member of the Executive Council, Free State Provincial Department of Police, Roads and Transport and Others* [2014] JOL 31876 (FB). The legislature intended to give the court an unfettered discretion to decide whether or not to direct that proceedings should not be considered to be abandoned. In exercising this discretion, a court should naturally have regard to the interests of all interested parties, being the creditors, liquidator and members – *Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd (In Liquidation)* 2010 (2) SA 517 (SCA) para [11]. In *Eskom Holdings Limited v Transdeco Gtmh (Pty) Ltd (In Liquidation)* (16364/2013) GJ it was held (i) that s 359(2)(a) did not confer authority on the liquidator to waive the defence of raising the applicant's non-compliance with the provisions of the section (para [3]); (ii) the knowledge of the liquidator, from the pending arbitration proceedings, that the applicant was still pursuing its claim, rendered the liquidator's opposition to this application vexatious (para [4]); and (iii) the right to launch the application cannot be said to be a debt and is not subject to prescription (para [5]).

359 1987 (4) SA 894 (A) at 910.

360 *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 (2) SA 869 (A).

King Pie (Pinetown) (Pty) Ltd[361] section 359 (1) does not suspend applications for compulsory winding-up from the date of a voluntary winding-up.

11.14 Continuation of proceedings by debtor

No provision is made in the Insolvency Act or the Companies Act 1973 for the continuation by the debtor of legal proceedings stayed by insolvency. The trustee or liquidator should take steps to have themself substituted for the debtor in terms of rule 15(3) of the Uniform Rules of Court.[362] In the case of a company it is customary to merely add "(In Liquidation)" after the name of the company.

11.15 Institution of legal proceedings against company after liquidation

Section 359(2)(a) of the Companies Act 1973 provides that every person who (after liquidation) intends to institute legal proceedings to enforce a claim which arose before liquidation, should[363] also within four weeks after the appointment of the liquidator give at least three weeks' notice in writing.[364]

11.15.1 Institution of legal proceedings by the liquidator after liquidation

The liquidator of a company in a winding-up by the court, with the authority granted by meetings of creditors and members or contributories, or on the directions of the Master given under section 387 (in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors) have the power to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature[365] and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts. The matter of whether the liquidator has authority is relevant only in relation to liability as between the liquidator and the company, for the costs of the proceedings. The existence of the authority is not something which the other party to the proceedings is able to competently challenge.[366] It has been held that the proceedings must be brought or defended in the name and on behalf

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361 1998 (4) SA 1240 (D).

362 *Cf Spendiff v J A J Distributors (Pty) Ltd* 1989 (4) SA 126 (C) 128E; *Krige v Wallace* 1990 (3) SA 727 (C).

363 The section is couched in peremptory terms in requiring the giving of the written notice to the appointed liquidators. Should such notice not be given to the liquidator within four weeks of such liquidator's appointment, proceedings are considered to be abandoned, unless the court directs otherwise – *Direct Channel KwaZulu-Natal (Pty) Ltd v Naidu and Others* (D879/10) [2015] ZALCD 51 (28 August 2015) para [11].

364 Non-compliance with this provision is available as a defence only to the liquidator and not to other defendants – *Nedcor Bank Ltd v Samuel* 2005 (2) SA 439 (W).

365 In *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA); [2014] JOL 31859 (SCA) the resolution granted the liquidators the authority to recover "any outstanding debts". The court held that the terminology of the resolution was broad enough to encompass any debt due to the company, including a debt arising by virtue of a voidable disposition, although the resolution did not make specific reference to voidable dispositions (para [19]).

366 *Auby v Pellow NO and Another: In re : Pellow NO and Another v Auby* [2014] JOL 31536 (GSJ) para [20].

of the company and not in the name of the liquidator.[367] The balance of authority favours the view that the liquidator has standing to institute or defend proceedings.[368] The Supreme Court of Appeal has noted that a distinction between the *locus standi* accorded to the company in liquidation and that of its liquidators acting in their representative capacity, is pedantic or illusory; liquidators acting in representative capacities as duly appointed liquidators of a company have standing to bring or defend any action or legal proceedings on behalf of the company.[369]

11.15.2 Institution of legal proceedings against insolvent after sequestration

Section 75(1) of the Insolvency Act does not apply to legal proceedings instituted after sequestration. Section 44(3) provides that the rejection of a claim at a meeting does not debar the claimant from establishing a claim by an action at law "but subject to the provisions of section 75". In terms of section 75(2), no person may after the confirmation of any trustee's account institute legal proceedings in respect of any liability, which arose before sequestration, unless the court finds that there was a reasonable excuse for the delay. (The Companies Act 1973 does not contain a similar provision.) The court may order the reopening of a confirmed account but not if any dividend has been paid under the account.[370] Before or after a claim has been proved by a judgment, it must be tendered for proof at a meeting.[371]

11.16 Arbitration proceedings

The rules regarding the effect of insolvency on civil proceedings apply to arbitration proceedings. Unless the agreement provides otherwise, an arbitration agreement or the appointment of an arbitrator or umpire thereunder is not terminated by sequestration or liquidation.[372]

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367 *Fey NO v Lala Govan Exporters (Pty) Ltd* 2011 (6) SA 181 (W) para [20] *et seq*. Followed in *Gainsford And Others NNO v Tanzer Transport (Pty) Ltd* 2013 (4) SA 394 (GSJ [31] and *Venter v Matsepe and Others* [2019] JOL 41716 (FB) [27].

368 *Barnard and Others NNO v Imperial Bank Limited and Another* 2012 (5) SA 542 (GSJ) [28]. This case was confirmed on appeal with the court stating that the amendment sought and granted by the court below did not have the effect of substituting a different plaintiff. It merely corrected a misnomer in the first paragraph of the particulars of claim, where it was not made clear that the respondents were not acting in their personal but in their representative capacities – *Imperial Bank Limited v Hendrick Barnard NO* 2013 (5) SA 612 (SCA); [2013] JOL 30943 (SCA) para [18].

369 *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA); [2014] JOL 31859 (SCA) paras [14] and [15].

370 Insolvency Act, s 112; Companies Act 1973, s 408.

371 Insolvency Act, ss 44(1) and 78(3); *Cachalia v De Klerk and Benjamin* 1952 (4) SA 672 (T).

372 Arbitration Act 1965, s 5.

Self-Assessment Questions

Question 1
Indicate whether the following statement is TRUE or FALSE:

"In terms of the Insolvency Act attachment in execution of any judgment does not confer any preference after sequestration except for costs on those proceedings."

Question 2
Is a liquidator or trustee entitled to institute or defend proceedings on behalf of or against the insolvent estate or company? (1)

Question 3
Briefly explain what the effect of sequestration is on the execution of judgments. (2)

Question 4

Question 4.1
Briefly explain the effect of sequestration on pending civil legal proceedings. (4)

Question 4.2
What is the effect of a winding-up order on civil proceedings? (1)

Question 5
Indicate whether the following statement is TRUE or FALSE:

"The rules regarding the effect of insolvency on civil proceedings apply to arbitration proceedings."

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 12 – IMPEACHABLE DISPOSITIONS AND RELATED REMEDIES

12.1 Introduction

12.1.1 General[373]

A debtor may in principle enter into any valid transaction with another person with a view to *disposing* of his or her rights in property. Such transactions may cause the value of the estate to diminish where the debtor for instance makes a donation, or disposes of property below its market value. (This first category of transaction 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 otherwise have ranked as an unsecured creditor. 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 receive full payment whilst the others may not be able to obtain 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.

Transactions such as those mentioned above may under normal circumstances cause no concern. However, when they are entered into under insolvent circumstances, or when the debtor is already factually insolvent at the time of such transaction, they may impact negatively on the *concursus creditorum* should the estate of the debtor be sequestrated, or if the winding-up of an entity such as a company ensues due to its inability to pay the debt. It must be noted that in this way insolvency law takes note of certain transactions that took place 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 the 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 succinctly described in the judgment of *Estate Jager v Whittaker*[374] 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**

[373] See Meskin Ch 5 para 31 and Mars Ch 13.
[374] 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 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, such as dispositions without value in terms of section 26 of the Act; voidable and undue preferences provided for in section 29 and 30 respectively; and collusion, provided for by section 31. There are also some statutory provisions dealing with related transactions such as 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 a view to reclaiming the disposed property for the benefit of the creditors. However, where the trustee or liquidator fails to take action in such instances, individual creditors may do so (as discussed further below).

12.1.2 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 receiving 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.[375] Practical examples of such alienations are donations, or under-value transactions where the debtor for instance sells assets below their market value.

12.1.2.1 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

[375] *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.[376] These common law principles have not been substituted by provisions of the Insolvency Act.[377] 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;[378]

(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) of the debtor.

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

12.1.2.3 *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 liquidation 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.[379] In *Nedkor Bank Ltd v ABSA Bank*[380] 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

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

377 *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).

378 *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.

379 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.

380 1995 (4) SA (W).

recovery by a claimant of property that he has lost as a result of fraud, it is a remedy to set 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.

12.2 Statutory impeachable dispositions

12.2.1 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.[381] 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.[382]

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.

12.2.2 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.[383] A contract of surety, although not specifically mentioned in the definition, is in essence also a contract for payment[384] as well as a contract of sale subject to a suspensive condition – but a disposition following a court order is excluded and is therefore not a "disposition".[385] 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.[386] Wherever the term "disposition is used in the Insolvency Act, this definition must as a rule be applied.

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381 Insolvency Act, ss 26 to 33.

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

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

384 *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).

385 *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.

386 *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].

12.2.3 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;[387]
- 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;[388]
- 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;[389]
- 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;[390]
- the Supreme Court of Appeal decided in *Wessels NO v De Jager NO*[391] that before acceptance of an inheritance or insurance benefits, the beneficiary has 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.[392]

12.2.4 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 the purposes of a voidable

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387 *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).

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

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

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

391 2000 (4) SA 924 (SCA).

392 *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.[393]

12.2.5 Compliance with court order – 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*,[394] 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*[395] a mortgage bond was registered as "security" for a non-existent 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.[396]

In *Dabelstein v Lane and Fey NNO*[397] 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.[398]

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393 *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].

394 1982 (2) SA 86 (D).

395 1978 (1) SA 928 (A).

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

397 2001 (1) SA 1222 (SCA).

398 *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*[399] 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*[400] 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.

12.3 Dispositions not made for value

Dispositions of property by the debtor without receiving adequate value in return, causes a diminishing of the value of the estate with the result that there will be less assets available to settle the debts of the debtor. 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*;[401] 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*.[402]

The person who benefited from a disposition need not be the person to whom the disposition was in fact made.[403] In *Gainsford NO v Rees*[404] 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 of the case. 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.

399 *Corporate Liquidators (Pty) Ltd v Wiggill* 2007 (2) SA 520 (T).
400 (1085/2017) [2018] ZASCA 154 (19 November 2018).
401 Insolvency Act, s 26(1)(a).
402 *Ibid*, s 26(1)(a) and (b).
403 *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).
404 [2014] JOL 32457 (GJ), para [56].

12.3.1 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.[405]

Example 1

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

12.3.2 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.[406]

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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405 Insolvency Act, s 26(1).

406 *Ibid*, s 26(2).

12.3.3 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*[407] 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.[408] 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.

12.3.4 Meaning of "without value"

"Without value" has no technical meaning and should be interpreted in the ordinary sense of the word.[409] In the case of a sale of property for a price that 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.[410]

"Value" is not necessarily monetary value but could for instance include the financial stability of a group of companies,[411] or a thing of an exactly calculated comparable value received from the person to whom the disposition was made, or another person.[412]

Examples of dispositions not made for value include:

- donations;
- the relinquishment or mortgaging of assets without any legal obligation to do so;[413]

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407 1982 (1) SA 103 (A).

408 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.

409 *Estate Wege v Strauss* 1932 AD 76.

410 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."

411 *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 distinguished cases such as *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.

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

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

- payment in terms of an invalid or illegal contract;[414]
- the sale of property for a trifling consideration;[415]
- a surety or a guarantee.[416]

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.

12.3.5 Exception regarding 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.[417]

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

12.4 Voidable preferences

12.4.1 Generally

As explained in paragraph 12.1.1 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. [418]

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414 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.

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

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

417 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.

418 "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.

12.4.2 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.[419] It could therefore also amount to a preference if a debtor improves a creditor's position by affording the creditor security before his or her estate is sequestrated.

A disposition by a debtor can, in terms of section 29(1),[420] be set aside as a voidable preference if it appears that the debtor, due to their dire financial situation, was unable to pay all their creditors in full but nevertheless favoured a particular creditor, for instance by full payment of their pre-existing debts.

12.4.3 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*[421] *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;[422] 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.[423] 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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419 Smith, *Law of Insolvency* at 125.

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

421 *Zwarts v Janse van Rensburg NO and Others* [2015] JOL 33678 (SCA), para [9], is 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.

422 Insolvency Act, s 29(3). In *Sackstein v Van der Westhuizen* 1996 (2) SA 431 (O) it was held that s 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 their 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.

423 *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")[424]; 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).[425] 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.[426]

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

If the trustee succeeds in proving the above-mentioned requirements, 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*.[427]

12.4.4.1 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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424 *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.

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

426 *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).

427 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.[428] 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.[429] 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.[430]

12.4.4.2 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.[431]

- 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.[432] 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.[433]

- The disposition must be legal and valid to allow for it to be within the ordinary course of business.[434] *Dishonest, if not fraudulent, conduct* cannot possibly be in the ordinary course of business. Dispositions during the operation of a pyramid scheme are illegal and therefore void.[435] (The Court in *Gazit Properties v Botha and Others NNO*[436] held that the tainted nature of the insolvent's business was irrelevant to the fact that such

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428 *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].

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

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

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

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

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

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

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

436 2012 (2) SA 306 (SCA).

repayment was made in the insolvent's ordinary course of business.[437] 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.[438]) 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.[439]

- 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.[440]

12.4.4.3 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[441] which often, in the absence of direct evidence, has to be inferred from the surrounding circumstances.[442] These circumstances may include situations where the insolvent makes the disposition whilst contemplating sequestration (in other words, whilst sensing that sequestration is inevitable).[443] 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.[444] 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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437 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].

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

439 *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]).

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

441 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).

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

443 *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).

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

debt.[445] 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".[446] 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.

12.4.5 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*.[447] 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.[448]

12.4.6 Collusion

12.4.6.1 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.[449] It is not sufficient that the effect of the transaction is only to occasion such prejudice, there

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445 *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.

446 *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.

447 Insolvency Act, s 30(1).

448 *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].

449 Insolvency Act, s 31.

must also be a fraudulent intention by the parties to the transaction to cause it.[450] Intentional collusion is therefore required and both parties must have intended the result.[451]

A collusive disposition in the context of which it is used in section 31(1), means an agreement that 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."[452]

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.[453] 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.[454]

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.

12.4.6.2 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.[455]

(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.[456]

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450 *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]).

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

452 *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.

453 *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].

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

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

456 *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.[457]

12.4.7 Legal proceedings (setting aside of impeachable dispositions)

12.4.7.1 Who can institute proceedings to void statutory dispositions

The trustee, in a representative capacity[458] (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.[459] The indemnity for costs may be given after the action is instituted.[460] 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.[461] 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.[462]

12.4.7.2 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.[463] 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.

457 Insolvency Act, s 31(2).

458 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].

459 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 its 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.

460 *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).

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

462 *Reynolds NNO v Standard Bank of South Africa Ltd* 2011 (3) SA 660 (W) and see *Baker NO 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.

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

obligation that prescribes in terms of the Prescription Act 68 of 1969. Prescription ordinarily starts to run when the trustee is appointed.[464]

12.4.7.3 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.[465]

- 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.[466]

12.4.7.4 Liquidator and security for costs

A liquidator could be required to lodge security in terms of section 13 of the Companies Act 1973, whether they were acting on behalf of the company or exercising the special powers of a liquidator in terms of the Companies Act. Although section 13 of the Companies Act 1973 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.[467] Under the Companies Act 1973 an applicant for security for costs faced a fairly low hurdle 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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464 *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* A 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 disposition has been set aside and the court ordered it to be recoverable.

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

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

467 *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.[468]

12.4.7.5 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.[469] 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.[470] An interdict restraining the person who benefitted from the disposition to part with the property, can also be applied for.[471]

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

12.4.7.6 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 them against the consequences of having done so.[472] The person who required indemnification must prove their good faith and extent of counter-performance delivered, while a reciprocity between the disposition and the transfer of property must exist.[473]

Example 3

A abandons a security in exchange for full settlement of its debt one month before its debtor B's sequestration. A would be entitled to claim indemnification from the trustee before repayment 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.[474]

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468 *Maigret (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].

469 Insolvency Act, s 32(3).

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

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

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

473 *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).

474 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. The trustee 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.

12.4.7.7 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 above). 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.[475] (Any creditor who, knowing that proceedings have been instituted, delays proving their claim until judgment is given in such proceedings, is not entitled to share in the distribution of any proceeds of any property so recovered.[476])

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.

12.4.8 Remedies related to voidable dispositions, etc

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

Section 34(1)

If a trader[477] *transfers* in terms of a *contract* their business, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of *that* business,[478] or for securing a debt), without proper prior publication of a notice[479] to that

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475 *Ibid*, s 104(3).

476 *Ibid*, s 104(2).

477 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.

478 *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].

479 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,[480] where the estate is sequestrated within six months from date of such transfer.[481]

A person with a claim against the trader in connection with the business[482] is afforded protection if they instituted proceedings against the trader before the transfer.[483]

"Transfer" in this regard means the transfer of ownership, as well as the actual or constructive transfer of possession.[484] It must be proved that the assets formed part of the business at the time of the transfer.[485] 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.[486]

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.[487]

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

480 In *Galaxie Melodies (Pty) Ltd v Dally NO* 1975 (4) SA 736 (A) at 744–745 the court 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].

481 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].

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

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

484 Insolvency Act, s 34(4).

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

486 *Paterson NO v Kelvin Park Properties CC* 1998 (2) SA 89 (ECD); *Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA); A 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* A Smith, "A Global View of Business, Trade and Property Under Section 34(1) of the Insolvency Act 24 of 1936" 2000 *SA Merc Law Journal* Vol 12 No 2 at 330.

487 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).

Effect of non-compliance on contract of sale

Where these statutory provisions are not complied with, only the ***transfer*** of the business is void,[488] 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 (as to which, see the next Chapter of these notes).

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.[489]

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*[490] the application of the section became rather cumbersome. The term "alienation" was replaced by "disposition",[491] which was again replaced by the term "transfer".[492]

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*.[493]

12.4.8.2 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

488 *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].

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

490 1982 (2) SA 179 (T).

491 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.

492 Insolvency Amendment Act 1991.

493 (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.[494]

12.4.8.3 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[495] 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* (with the necessary changes) in such a situation.

12.4.8.4 Set-off

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.

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.[496]

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

495 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.

496 As to the meaning of "ordinary course of business", 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 s 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.

Time when mutuality required for application of set-off

The mutuality between the parties required before set-off (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.[497] Set-off cannot take place after sequestration or liquidation.[498]

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.

Approval by the Master

The approval of the Master should be obtained before the trustee may disregard such claim.[499] Smith[500] 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.

12.4.8.5 Protection of participants in financial markets

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 their 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.

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.

497 *Van Zyl v Look Good Clothing CC* 1996 (3) SA 523 (SECLD).
498 *Siltek Holdings (ty) Ltd (In Liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2008] JOL 22804 (SCA).
499 *Estate Engelbrecht v Engelbrecht* 1957 (3) SA 83(N), at 86.
500 Smith, *Law of Insolvency* at 223.

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[501] and creditors in any insolvency proceedings.

12.4.8.6 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.[502]

12.4.8.7 Section 88 of the Insolvency Act

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, does not confer any preference if the estate of the mortgage debtor is sequestrated within six months after such lodgement.[503]

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.[504]

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501 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.

502 *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).

503 Insolvency Act, s 88.

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

12.5 Application to companies

12.5.1 Introduction

The doctrine of impeachable transactions also applies *mutatis mutandis* (with the necessary changes) to a company which is unable to pay its debts.[505] In terms of section 340(2) of the Companies Act 1973, the event (that is, 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."

12.5.2 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 their appointment.[506] 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.[507]

12.5.3 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.[508] The subsection

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505 Companies Act 1973, s 340(1).

506 Insolvency Act, ss 20 and 23.

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

508 *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 Companies Act 1973.

does not apply to the payment of salary claims up to the date of the winding-up order.[509] But in *Montic Dairy (Pty) Ltd and Others v Mazars Recovery and Structuring (Pty) Ltd and Others*[510] 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 the winding-up of the company formerly in rescue, had commenced.

The court will ordinarily not validate the dispositions unless it was done *bona fide* and without prejudice to the company or its creditors.[511] 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.[512] 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.[513] 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.[514] The instances in which a court will validate a disposition are limited.[515] *Excellent Petroleum (Pty) Ltd (In Liquidation) v Brentoil (Pty) Ltd*[516] 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.[517] 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.[518]

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

510 (7523/19) [2021] ZAWCHC 20 at para [37].

511 *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.

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

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

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

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

516 [2013] JOL 30839 (GNP).

517 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.

518 *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]).

12.6 Application to close corporations

What is stated above in regard to companies, also applies to close corporations in liquidation.[519]

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.

Self-Assessment Exercise 1

Study the basic principles dealt with in this Chapter.

Question 1
What are the main legal sources for setting impeachable transactions / dispositions aside under South African insolvency law? (2)

Question 2
Indicate the main difference between the *actio Pauliana* and the statutory voidable dispositions provided for by the Insolvency Act 24 of 1936. (2)

Question 3
How is the term "disposition" defined in the Insolvency Act 24 of 1936? (4)

Question 4
Name the main voidable dispositions provided for in the Insolvency Act 24 of 1936. (4)

Question 5
Indicate two remedies / provisions in the Insolvency Act that are related to voidable dispositions. (2)

Question 6
How and under what conditions may a creditor institute a proceeding to void a disposition in terms of the insolvency Act 24 of 1936? (3)

Question 7
What is the main difference in principle between a disposition without value and a preferential disposition of property by a debtor? (3)

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

Question 8
In what respect does collusion as a voidable disposition differ from dispositions without value and preferences as to their respective consequences, if set aside by the court? (2)

Question 9
Under what conditions may the Master of the High Court order the setting aside of set-off that occurred between the insolvent and another person prior to the sequestration of the insolvent's estate? (2)

Question 10
Does the Companies Act 61 of 1973 or the Companies Act 71 of 2008 have its own provisions to deal with voidable dispositions following the liquidation of a company that is unable to pay its debts? (2)

Self-Assessment Exercise 2

Question 1 (20)
A sells his Porsche to B for R100,000. At the time of the sale the car is valued at R700,000. Since A owes money to various creditors, it seems he sold the car to B in order to obtain some cash to pay creditor C who exerted severe pressure on A to settle a debt of R100,000 owing by A to C.

Answer the following questions:

Question 1.1
A's estate is sequestrated five months after A sold and transferred the Porsche to B. (At the time of sequestration A could not meet his debts as they became due since he already experienced severe cash flow problems at that time.)

Advise A's trustee if she has grounds to try and impeach the sale of the Porsche. (If so indicate clearly what requirements she has to meet.) (3)

How would your answer to the question above differ if the sale took place 26 months prior to the sequestration of A's estate? (3)

Question 1.2
For the purposes of this question accept that A has settled his debt of R100,000 towards C about three months prior to the sequestration of A's estate. Advise the trustee as to her chances to set the settlement of the debt aside. (3)

Assume that the trustee has firm grounds to impeach the payment of R100,000 to C. Indicate if C will have any statutory defence to raise in such circumstances and also indicate the elements of the defence. (2)

Question 1.3
Briefly indicate whether the *actio Pauliana* will be an appropriate action to institute against B and / or C in view of the facts as set out above. (5)

Question 1.4
It now turns out that A, B and C co-operated in the sale of the car to B with a view to settling the debt with C. (The three of them are in fact friends.) Advise the trustee as to her remedy in relation to the sale of the car and the settlement of the debt with C. (4)

Question 2 (10)
A is a trader in second-hand motor vehicles. She runs her business on a sole proprietor basis. The business used to be quite profitable but due to the downturn in the economy she battles to keep the sales up and decides to take early retirement in spite of the fact that she has a number of outstanding debts. She advertises the business for sale and B offers her R2 million for the business. She accepts his offer and transfers the business to him. However, her estate is sequestrated upon application by one of her trade creditors three months after she has transferred the business to B. It now turns out that due to an oversight by her attorney, the notice regarding the transfer of the business did not take place within the prescribed time period. The trustee now claims the business from B.

Question 2.1
Advise the trustee of B as to his legal position under the circumstances. (5)

Question 2.2
For the purposes of this question, accept that A owed R500,000 to one of her trade creditors, C. C was also one of her friends when he made the loan to her on 15 January 2020. Two months prior to her sequestration she agreed to register a mortgage bond to secure the loan over her seaside property in the Western Cape. C started to pressurise her to get the mortgage bond registered in the deeds registry when he sensed that A may experience cash flow problems. In the end, the documentation to register the mortgage bond was lodged at the deeds office on 1 October 2021 and it was registered three weeks after it was so lodged for registration, on 21 October 2021. Unfortunately, A' s estate was sequestrated three months after the bond was lodged for registration. Advise the trustee as to the legal position of B in relation to the registered mortgage bond as well as to his claim against A's estate. (5)

For feedback on the above self-assessment exercises, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 13 – EFFECT OF SEQUESTRATION ON UNCOMPLETED CONTRACTS

13.1 Introduction

13.1.1 Breach of contract

Breach of contract occurs when one (or both) of the parties to a contract fail to honour their contractual obligations. The law of contract recognises the following forms of breach of contract, namely:

- where parties do not perform or accept performance timeously (delay by the debtor or creditor - *mora debitoris* or *creditoris*);
- do not make proper performance (positive malperformance);
- *refuse to continue with their contractual obligations (repudiation)*;
- or render performance impossible.

In the event of breach of a contract, the injured party is in principle entitled to one or more of the following remedies:

- a claim for specific performance of the contract; or
- cancellation of the contract; and in both cases
- a claim for damages.

Example 1

A sells a stand (being erf 123, Brooklyn) for R100,000 to B. Before registration or payment takes place, B repudiates the contract. A is now entitled to exercise the above-mentioned contractual remedies. A must, however, first acquire the right to cancel the contract as provided for by the law of contract before he or she is entitled to do so. (The right to cancel the contract should not be confused with cancellation of the contract as such.)

13.2 Common law: General rule when a party to a contract is sequestrated

13.2.1 Introduction

Uncompleted contracts (or unexecuted contracts, as they are also termed) are neither terminated nor modified nor in any way altered by the insolvency of one of the parties to such contract, except in one respect and that is due to the supervening *concursus* the trustee cannot in principle be compelled to perform the contract. There is in general nothing that excuses the trustee from performing the insolvent's obligations which fall due to be

performed between the date of sequestration and the date upon which the trustee makes his or her election to abide by the contract, or to repudiate it.[520]

13.2.2 Trustee has a right of election

The trustee may (under direction of the creditors) elect whether or not to perform in terms of the contract[521] and should act in the best interest of the general body of creditors in doing so.[522] The trustee must elect what course of action they are going to adopt within a reasonable time and must give clear notice thereof to the solvent party. The question as to whether or not a liquidator has elected to abide by a particular executory contract is a question of fact. If the liquidator does not make their decision known within a reasonable time, it may be assumed that they are not going to perform in terms of the contract.[523]

In earlier cases, such as *Bryant & Flannagan (Pty) Ltd v Muller & Another*,[524] it was said that the trustee may elect to "terminate" the contract. It was later decided that where the trustee elects not to perform in terms of the contract, it constitutes a breach of contract in the form of *repudiation*, in which case the solvent party in general loses its right to claim specific performance.[525]

13.2.3 Options of solvent party

The solvent party is then either entitled to accept or reject such repudiation of the contract. If the solvent party *accepts the repudiation* he or she is entitled to recover any property handed over *and of which he or she still retains ownership*. In respect of payments made by him or her and damages suffered as a result of such breach, he or she merely has an unliquidated concurrent claim.[526]

However, should the *solvent party reject the repudiation*, he or she has a concurrent claim for damages *in lieu* of performance, but will remain liable for its own counter-performance.[527]

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520 *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA); [2014] JOL 31793(SCA), para [12].

521 The question has been raised whether reg 44 under the Consumer Protection Act 2008 affects the rights of a trustee or liquidator to elect to terminate an agreement. Regulation 44 lists contract terms that are likely to be considered to be unfair and unreasonable. For example, allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer; and enabling the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a serious breach of agreement. It should be noted, however, that the election of the trustee is in terms of the common law and not in terms of a contract. It is also not clear under which provision of the Consumer Protection Act the election by the trustee can be attacked.

522 *Consolidated Agencies v Agjee* 1948 (4) SA 179 (N). The trustee is however precluded from exercising this right of election in respect of certain prescribed transactions or contracts concluded by participants in the South African financial markets or informal markets which deal with agreements regarding foreign currency, interest rates, etc.

523 *Troskie v Liquidator of RSD Construction CC* (71322/2010) [2015] GP (8 May 2015), para [61].

524 1978 (2) SA 807(A).

525 *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A). See also *De Wet NO v Uys* 1998 (4) SA 694 (T).

526 *Leviton & Son v De Klerk's Trustee* 1914 CPD 685.

527 Mars para 12.1.

13.2.4 Trustee who demands performance must perform

However, when the trustee abides by the contract they can demand specific performance from the other party in terms of the contract, *provided that the trustee tenders complete performance*.[528] The trustee may, however, avail themself of certain defences which the insolvent did not have, for instance that the contract is an impeachable disposition in terms of the Insolvency Act. The other party in principle has the same rights against the trustee as it would have had against the insolvent.[529] The cost of performing the uncompleted contract becomes an administrative expense as part of the costs of sequestration of the insolvent estate.[530]

Trustees and liquidators should take care when electing to enforce a contract, as they could be held personally liable for negligence in doing so when it causes loss to others. In *Kerbels Flooring & Carpeting (Pty) Ltd v Shrosbree*,[531] the liquidators of a company decided to enforce an uncompleted contract and were held personally liable as they were unable to perform due to a lack of funds in the insolvent estate.

13.2.5 Trustee or liquidator not liable if liability is not reciprocal[532]

In this paragraph a number of examples from case law are provided to illustrate the principle.

In the decision in *Dyson T/A Dyson Real Estate v Maritz*[533] the liquidator of a company which sold a property before liquidation elected to implement the sale. The deed of sale contained a stipulation for the benefit of the estate agent (and accepted by him) that commission should be paid by the seller. The court concluded that the provision creating liability to pay the commission was separate and distinct from the agreement of sale, even though it was contained in the same document. The concept of the liquidator stepping into the shoes of the insolvent comprised no more than being bound to fulfil obligations reciprocal between the liquidator and the purchaser. There was no question of reciprocity between the purchaser and the seller in respect of the liability to pay the commission. The effect of the decision was that the liquidator was not bound to perform their obligation to pay the commission and that the estate agent merely had a concurrent claim for the commission.

In the similar case of *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd*[534] immovable property had been registered and movable delivered in terms of a contract prior to insolvency. There was no reciprocal obligation on the liquidator to pay the amount outstanding on the contract and this amount was not payable as expenses incurred in the administration of the estate.

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528 *Goodricke & Son v Auto Protection Insurance Co* 1968 (1) SA 717 (A).
529 *Frank v Premier Hangers CC* 2008 (3) SA 69 (C).
530 *Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd* 1969 (2) SA 546 (A).
531 1994 (1) SA 655 (E).
532 *Demetriades v Perivoliotis* [2012] JOL 28616 (SCA).
533 [2007] JOL 20950 SE.
534 2003 (5) SA 193 (SCA).

In the case of *Du Plessis v Rolfes Ltd*[535] the liquidators of a construction company elected to abide by the main executory construction contract, but elected not to abide by an executory sub-contract. Notwithstanding references to one another in each of the two contracts, the court decided that the two contracts were not inextricably bound up so as to make them one contract. In electing to abide by the main contract the liquidators had not also exercised an election to abide by the sub-contract. Similarly, it does not necessarily follow from the election to complete the principal contract that a trustee has elected to complete linked agency contracts as well.[536]

13.2.6 Rights acquired before sequestration retained

Since contracts, as a general rule, are not terminated by the sequestration of the estate of one of the parties, this means that any right already acquired by the other party in terms of the contract, such as the right to cancel the contract, is retained after sequestration.[537]

13.2.7 Statutory exceptions to the general rule concerning uncompleted contracts

The principles discussed above are those found in our common law. The instances where these principles are not applicable, or where they are supplemented by statutory provisions, will be discussed below.

13.3 Contracts of sale of immovable property

13.3.1 Seller of immovable property sequestrated

13.3.1.1 General

Common law position

The purchaser of immovable property is in a detrimental position where the seller of the property (or an intermediary who bought the property from the seller and sold it to the remote purchaser) is sequestrated before registration of the transfer in the name of the purchaser. In terms of the common law, the trustee (on the creditors' instructions) has the

535 1997 (2) SA 354 (A).

536 *Gore v Roma Agencies CC* 1998 (2) SA 518 (C).

537 *Mitchell v Sotiralis' Trustee* 1936 TPD 252; *Smith v Parton* 1980 (3) SA 724 (D); *Porteous v Strydom* 1984 (2) SA 489 (D). *Smith v Parton* and *Porteus v Strydom* were confirmed by the Supreme Court of Appeal in *Ellerine Bros v McCarthy Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA); [2014] JOL 31793 (SCA), para [15]. *Smith v Parton* was followed in *De Wet NO v Uys* 1998 (4) SA 694 (T) at 706D where it was decided that where a party wished to enforce a *lex commissoria*, the conditions for its implementation had to be strictly complied with. (A *lex commissoria* is a provision in a contract that entitles a party to cancel the contract in the event of default after expiry of an agreed period of time.) The *Porteous* decision was not followed in *Roering and Others NNO v Nedbank Ltd* 2013 (3) SA 160 (GSJ), where it was decided that a right of cancellation only becomes complete upon non-performance by the purchasers or the trustee within the stipulated time and thus only after the *concursus*. The sellers right of cancellation at the occurrence of *concursus* is incomplete and it accordingly does not survive the *concursus*.

right to elect to transfer the property or not. The purchaser would not be entitled to claim transfer even though they had already paid the full purchase price. The purchaser would only have a concurrent claim against the insolvent estate for the repayment of the purchase price, or a portion thereof, already paid.[538]

Example 2

A sells a stand, being erf 123 Brooklyn, held by by deed of transfer no T3450/1994, to B for R100,000. The standard contract usually stipulates that payment and registration takes place simultaneously (the same day) in order to afford the maximum protection to both parties. (Ownership of immovable property passes on registration.) Should A be sequestrated before these performances have been rendered, the general rule will apply. Should the trustee elect to repudiate the contract, B would be entitled to cancel the agreement and claim damages as a concurrent creditor. If B paid any part of the purchase price before registration took place, they would be in an even worse position as they would have a concurrent claim in respect of these payments too.

Statutory protection of purchaser of immovable property

The legislator has, however, granted certain purchasers in particular instances some relief in terms of the Alienation of Land Act 1981.

Right to claim transfer

Preconditions for protection: A purchaser is protected against the insolvency of the seller where:

- they concluded a "contract" for the sale of "land";
- in instalments, where the purchase price is paid;
    - in two or more instalments;
    - over a period of more than one year;
- the land is used or appropriated for residential purposes; and
- must be registrable in the Deeds Office.

The Constitutional Court has also ruled[539] that the Alienation of Land Act 1981 should be read so that a purchaser of residential immovable property who runs the risk of being rendered

538 *Laniyan v Negota SSH (Gauteng) Incorporated and Others* [2013] JOL 30146 (GSJ).
539 *Sarrahwitz v Maritz NO and Another* 2015 (4) SA 491 (CC).

homeless by a seller's insolvency and who paid the purchase price in full within one year of the contract, is also entitled to transfer of the property from the insolvent estate.

A purchaser who has paid the purchase price in full must still make arrangements for the payment of all costs in connection with the transfer, the sequestration and administration costs contemplated in section 89(1)of the Insolvency Act 24 of 1936 as they relate to the land; any amount payable in respect of any endowment, betterment or enhancement levy, a development contribution or any similar imposition in terms of any law in relation to the land; and if the land is encumbered by a mortgage bond and subject to the provisions of the Insolvency Act 1936, the amounts required by the mortgagee in accordance with the provisions of section 9(3) of the Alienation of Land Act, including interest to date of transfer.[540]

Definitions

Meaning of "insolvent": For the purposes of these provisions an "insolvent" includes an insolvent in terms of the Insolvency Act; an insolvent deceased estate in terms of section 34(5) of the Administration of Estates Act 1966; and any juristic person in liquidation which is unable to pay its debts.[541]

Meaning of "land": "Land" includes a sectional title unit, the right to claim transfer of land as well as an undivided share in the land.[542]

Protection provided

Mainly sections 18 to 22 of the Alienation of Land Act 1981 provide for this relief .[543]

Right to claim transfer
The trustee and creditors lose their right to elect to repudiate the contract. The trustee is obliged to allow the purchaser (or an intermediary) to take transfer of the land, provided that the transferee makes provision for:

- the signing of all documents;
- the payment of all costs in connection with the transfer; and
- an amount equal to whichever of the two amounts in (a) or (b) below is the larger:

  (a) all amounts owing under the deed of alienation in terms of which the owner alienated the land; or

540 Alienation of Land Act 1981, s 22(1).
541 *Ibid*, s 1.
542 *Ibid*.
543 In such an instance the contract will usually entitle the purchaser to claim transfer after full settlement of the purchase price.

(b) the sum of-

(i) the costs of attachment or, in the case of an insolvent, such sequestration and administration costs contemplated in section 89(1) of the Insolvency Act 1936;

(ii) any amount payable in respect of any endowment, betterment or enhancement levy, a development contribution or any similar imposition in terms of any law in relation to the land;

(iii) if the land is encumbered by a mortgage bond and, in the case of an insolvent subject to the provisions of the Insolvency Act 24 of 1936, the amounts required by the mortgagee in accordance with section 9(3) of the Alienation of Land Act 68 of 1981, including interest to the date of transfer.[544]

Duties of mortgagee (bondholder)

The mortgagee is obliged to hand to the purchaser a certificate that states the discharge amount required by such mortgagee when so requested. This amount will be used in order to determine (iii) above. Should the mortgage bond encumber more than one piece of land, for instance 100 erven in a newly developed township, only a proportionate share of the bond needs to be paid in redemption of the mortgage bond.[545]

Any mortgagee of the land has a statutory obligation to inform the trustee within 10 days after they receive notice of the insolvency of the mortgagor, of the name and address of any purchaser who notified such mortgagee that they had purchased the land in terms of an instalment sales agreement.[546]

Time limit for arrangements and appeal to Master

These acquisition arrangements must be made within such period which the trustee may allow (but not within less than 30 days) and to their satisfaction. The purchaser may appeal to the Master, whose decision is final, should the trustee refuse or fail to accept the offer in respect of such arrangements.[547]

Concurrent claim by purchaser

Where the purchaser has paid more than the amounts owed in terms of the instalment sale agreement, the purchaser has a concurrent claim against the estate of the owner.[548]

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544 Alienation of Land Act 1981, s 22(1).
545 *Ibid*, s 9(3) and (4) read with s 7.
546 *Ibid*, s 21(2)(a)(ii) read with s 9(1). Failure to comply with these requirements is an offence – s 21(5).
547 *Ibid*, ss 22(20)(a)(ii) and 22(2)(b).
548 *Ibid*, s 22(6). See also ss 11(2) and 18(3).

Trustee must notify purchasers

The trustee must notify every person, whom they has reason to believe purchased the land in terms of such an instalment sale agreement, of the right to take transfer of the land; provided the land is registrable. Such notice should be delivered to the purchaser or sent by registered post. This right to take transfer is, however, in the case of intermediate purchasers, subject to the principle that preference must be assigned to the purchaser to whom the land was first alienated.[549]

Property not transferred to purchaser: Preferential claim where property not transferred to purchaser

Where the land is realised the purchaser obtains a preferential claim in respect of repayment of the amounts already paid by them, provided that the contract is *recorded* in the Deeds Office against the title deed of the land.[550]

Realisation of property if not transferred to purchaser

Otto[551] opines that the land *should* be realised, subject to the preferential right in section 20(5), if the purchaser fails to make arrangements for its transfer. This is in view of section 22(7) of the Alienation of Land Act 1981 which states that if no satisfactory arrangements are made in terms of section 22(1), the land and its proceeds must be dealt with in accordance with the rules relating to sales in execution or insolvency, as the case may be.

The view also exists that the trustee has the right to abandon or enforce the contract against the purchaser should the latter fail to take transfer, thus applying the general common law principle.[552] If this view is correct and should the trustee elect to enforce the contract, the trustee would not be able to force the purchaser to take transfer before they becomes liable to do so in terms of the contract. This view could lead to an unwarranted delay in the winding-up of the insolvent estate.[553]

These repayments have to be paid out of the balance available after the mortgage bond(s) over the property, registered before the recording of the contract, have been cancelled and paid. The amount that may be recovered is limited to the amount mentioned in section 28(1) in the event of termination of the contract.[554]

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549 *Ibid*, ss 22(1)(b), 21(3) and 22(3).
550 *Ibid*, s 20(5).
551 In Van Jaarsveld, *Suid-Afrikaanse Handelsreg*, 3rd ed (1987) 481.
552 See Smith, *Law of Insolvency*, 157; Van Rensburg and Treisman, *The Practitioner's Guide to the Alienation of Land Act,* 234.
553 See Smith, *Law of Insolvency*, 158.
554 Alienation of Land Act 1981, s 20(5).

Fifty percent rule

Any purchaser who has in terms of a deed of alienation undertaken to pay the purchase price in instalments and who has paid at least 50% of the purchase price, can also claim transfer of the property and obtain ownership in this way, provided that the purchaser registers a first mortgage bond over the property to secure payment of the balance of the purchase price. The property has to be registrable.[555] It is submitted that the trustee may elect to refuse transfer and leave the purchaser with a concurrent claim.[556]

Unregistrable land

Where in terms of an instalment sale the purchaser buys unregistrable land or an unregistrable sectional title unit, for example a stand which is still in the process of being subdivided or a flat (sectional title unit) and is thus not yet registrable in the Deeds Office, the protection or relief discussed above will not apply as the contract cannot be endorsed against the title deed of such property in the Deeds Office.

But section 26 of the Alienation of Land Act 1981 provides the purchaser with some further relief in such instance.

The alienator of the property may not receive any compensation for the alienation until the stand or sectional title unit is registrable and the contract is recorded against the title deed of the property.

Certain exceptions regarding the receipt of consideration exist. An attorney or estate agent, who has a trust account, would be entitled to receive payments in trust. A person who obtains an irrevocable and unconditional guarantee from a bank or insurer in favour of the purchaser, may also receive payment from such a purchaser as soon as the latter receives the guarantee. On the strength of such guarantee, the bank or insurer has to repay to the purchaser any amounts already paid by them when the alienator becomes an insolvent before the property becomes registrable.

Other legislation contains provisions dealing with the protection of consumers in the event of insolvency of a developer or seller.[557]

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555 *Ibid*, s 27.

556 Mars para 12.2

557 Estate Agency Affairs Act 1976; the Share Blocks Control Act 1980; the Property Timesharing Control Act 1984; and the Housing Development Schemes for Retired Persons Act 1988. In *Starbuck NO v Estate Agency Control Board* Appeal (Case No A360/2009, Pretoria High Court, 6 December 2011), the reference to a trust account in terms of s 32 of the Estate Agency Affairs Act 1976 fell away and the account was converted into a normal bank account. Under South African law, money held by virtue of a fiduciary relationship in which the holder stands to another, is not deemed to be earmarked and they are not charged with the fiduciary obligation.

13.3.2 Purchaser of immovable property sequestrated

Where a purchaser acquired immovable property and the estate of the purchaser is sequestrated before registration of transfer of such property in the name of the purchaser, the trustee still has the right to elect to continue with, or to terminate, the contract of sale. The seller may request the trustee in writing to exercise the right of election within a reasonable time. Where the trustee still fails to exercise such right within six weeks, the seller can bring an application to court asking for the contract to be cancelled.[558]

Where immovable property including a business, stock in trade, etc is sold as a going concern, the courts differ as to whether such a contract would constitute a contract for the acquisition of immovable property as required by section 35. One view is that section 35 would still apply.[559] (The cases where the seller relies on section 35 of the Insolvency Act are rare and are not discussed as such.[560])

13.4 Sale of movable property

13.4.1 Cash sale of movable property: purchaser sequestrated

In the case of a cash sale, ownership passes on delivery of the thing sold and payment of the purchase price. If there is uncertainty as to whether a purchaser bought goods for cash or on credit, a presumption exists that the sale was a cash sale.[561]

Example 3

A sells a TV to B for R2,000 cash. A delivers the TV to B and B pays A by way of a cheque. Five days later B's bank informs A that there are no funds available in B's bank account. In principle A will remain the owner of the TV and would thus be entitled to reclaim it from B after exercising their contractual rights. Section 36(1) of the Insolvency Act will now apply - even if B is not yet sequestrated. (It must be noted that cheques are being phased out as modes of payment but such payments were prevalent in the past and gave rise to these types of facts.)

13.4.1.1 Conditions for application of section 36

If the purchaser of movable property receives delivery of such property before paying the purchase price and the purchaser's estate is subsequently sequestrated, the seller will be able to reclaim such property only if they notify the purchaser, or the trustee, or the Master, within 10 days after date of delivery of the property that the seller is reclaiming it, irrespective

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558 Insolvency Act, ss 35 and 81(1)(g) read with s 81(3).

559 See *Kuming v Paterson* 1954 (2) SA 130 (E); *Consolidated Caterers Ltd v Patterson* 1960 (4) SA 194 (E). *Cf Tangey v Zive's Trustee* 1961(1) SA 449 (W) for a different view, namely that s 35 only applies to an ordinary sale of immovable property.

560 In *De Wet NO v Uys* (1998 (4) SA 694 (T). A *lex commissorium* (a provision in a contract which entitles a party to cancel the contract in the event of default after expiry of an agreed period of time) enforced before sequestration, would be a sound reason (705E-G).

561 Insolvency Act, s 36(2).

of whether sequestration takes place within those 10 days or later and provided that the seller returns any part of the purchase price already received.[562]

Delivery in this sense means delivery for the purpose of passing ownership against payment.[563] If the trustee tenders the full purchase price instead of the goods, the seller must accept the purchase price.

13.4.1.2 Trustee disputes right

If the trustee, after receiving notice of the seller's right to restitution, disputes such right, the seller must, within 14 days upon receipt of the notice of dispute, institute action to prove their ownership.[564] Thus, the seller gives notice to prevent the loss of ownership and the seller is not entitled to reclaim the goods other than by adhering to this provision.[565]

13.4.1.3 Sale of property by trustee

If the seller failed to give notice and the trustee sold the goods in good faith, the seller will merely have a concurrent claim for payment of the purchase price and will be prevented from claiming the goods from the person to whom the trustee sold them in good faith.[566]

13.4.2 Credit sales and instalment sales: purchaser sequestrated

13.4.2.1 Credit sale transactions

Where the purchaser in terms of a credit sale (in other words a sale where ownership of the goods sold is usually transferred to the purchaser on delivery even though payment of the purchase price is postponed for a substantial period of time after delivery) is sequestrated after delivery of the goods sold but before payment of the purchase price, the common law position as discussed above, applies. The seller will not be able to reclaim such goods in terms of section 36, as is the case with a cash sale. It must be noted that it must be determined if such a sale was intended in each instance.[567]

Example 4

A sells his TV to B for R2,000 by way of a credit sale. B is obliged to pay a deposit of R200 on delivery of the TV and the balance by way of monthly instalments of R200 each. As a general rule, ownership will pass to B on the date of delivery of the TV. Should the estate of B be sequestrated before B had paid the full purchase price, A will not be entitled to reclaim the TV but will have a concurrent claim for the balance of the purchase price.

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562 *Ibid*, s 36(1) and (3).
563 *Allan & David (Pty) Ltd v Ingram* 1989 3 SA 333 (C) 340-341.
564 Insolvency Act, s 36(1).
565 *Ibid*, s 36(4).
566 *Ibid*, s 36(5).
567 *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (AD).

Can reclaim goods if owner

In light of section 36(4) of the Act, the seller will not be able to reclaim the goods *only* because of the purchaser's failure to pay. However, the seller will have a right to reclaim the goods if they could prove that they are still the owner of the goods, where the contract is for instance subject to a reservation of ownership clause.[568]

13.4.2.2 Instalment agreements in terms of credit legislation

Position before the National Credit Act

Section 84 of the Insolvency Act previously applied to hire-purchase contracts and subsequently to instalment sale transactions as referred to in section 1 (paragraphs (a) and (b) of the definition of "instalment sale transaction") of the Credit Agreements Act 1980, that is, where:

- the purchase price is payable on a determined or determinable future date;
- in whole or in instalments; and
- the purchaser does not become owner of the goods merely by delivery.

The contract usually states that ownership will pass on payment of the last instalment. Section 84 could apply to a contract even if the Credit Agreements Act did not apply, as long as the contract was an instalment sale transaction as referred to in paragraphs (a) and (b) of the definition.[569] Where a creditor sold its right to claim against a close corporation in liquidation, both sections 83 and 84 are irrelevant and of no application (not movable property).[570]

Position in terms of the National Credit Act

With reference to agreements entered into after 1 June 2006, section 84 applies to an "instalment agreement contemplated in paragraph (a), (b), and (c)(i) of the definition in section 1 of the National Credit Act" 2005. This requires an agreement in terms of which:

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568 See *Cornelissen v Universal Caravan Sales* 1971 (3) SA 158 (A); *Eriksen Motors v Protea Motors* 1973 (3) SA 685 (A). For an unsuccessful reliance on a reservation of ownership clause by the seller, see *SV Trading CC Virtual Production v Suliman and Another* (19614/2021) [2021] ZAGPPHC 228 (10 May 2021) paras 12 to 13 where the Court, in ordering the liquidator to return property to a purchaser in terms of a credit agreement, found on the facts that the contract of the sale on credit was not subject to a reservation of ownership provision. Amongst others and based on the sources referred to, the Court in para 12 stated that "[t]wo requirements must be satisfied for the transfer of ownership. In the first place, the parties must intend for the ownership to pass and secondly they must effect delivery."

569 *Potgieter NO v Daewoo Heavy Industries (Pty) Ltd* (Case number 466/2001 of the Supreme Court of Appeal, delivered on 29 November 2002).

570 *Senwes Limited v Michael Francois van der Merwe* (241/12) [2012] ZASCA 192 (30 November 2012), para [20].

- all or part of the price is deferred to be paid by periodic payments;
- possession and use of the property is transferred to the purchaser; and
- ownership of the property passes only when the agreement has been fully complied with.

Ownership replaced by secured claim upon sequestration

If the purchaser's estate is sequestrated before the purchaser becomes owner of the goods so sold, the seller acquires a hypothec over such goods whereby their claim is secured.[571] As no one can have a hypothec over their own goods, sequestration thus causes ownership to pass to the purchaser. Section 84(1) puts an end to the rights of the parties to enforce the terms of the contract, or to cancel for breach thereof.[572] Section 84(1) presupposes an agreement that is in force.[573] The seller can reclaim the goods,[574] whereafter they may sell the goods as secured creditor in terms of section 83 of the Act. Section 83 *inter alia* grants certain secured creditors the right to realise the property held as security before the second meeting of creditors. Where the property was at the stage of sequestration already in the possession of the seller, the seller is not obliged under the circumstances to hand over the motor vehicles to the debtor and then follow the procedure as envisaged in section 83(3). Section 84(1) finds no operation because at the stage of instituting the application for sequestration, the property will already have been sold and transferred to third parties.[575]

Example 5

A sells her TV to B for R2,000 by way of an instalment agreement discussed above. B still owes A R1,000 when B is sequestrated. A is now a secured creditor for this outstanding amount and she can reclaim possession of the TV in order to exercise her rights in terms of section 83 of the Act.

Possession of the goods

Usually the trustee will be in possession of the goods and the seller is entitled to claim it from the trustee or, if the insolvent is still in possession of the goods and refuses to release it, the seller can claim it from the insolvent provided that the transaction is valid and enforceable. Though the trustee is compelled by section 69(1) of the Act to collect all of the insolvent's

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571 Insolvency Act, s 84(1).

572 *Standard Bank of South Africa Ltd v Townsend* 1997 (3) SA 41 (W) 50D.

573 *ABSA Bank Ltd v Cooper NO* 2001 (4) SA 876 (T) 881 I; *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). Confirmed on appeal in *PMG Motors Kyalami (Pty) Ltd and Another v Firstrand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA).

574 A litigant in an application for the return of property in terms of s 84 of the Insolvency Act must prove ownership of the property at the date of sequestration and that the property was delivered to the insolvent estate. In the case of replaceable property, such as cattle, the necessary identification to confirm ownership must be indicated – *Human Boerdery BK v Smith NO en Andere* [2013] JOL 31057 (FB).

575 *Sekgothe NO v Wesbank Limited* [2017] JOL 36754 (GJ), para [14].

property in the possession of other persons, the seller should still be able to exert the seller's competencies in terms of section 84 if the trustee did not gain possession of the goods after sequestration.[576]

This section does not apply to the sale of a business.[577]

Incomplete right of cancellation

A right of cancellation only becomes complete upon non-performance by the purchasers or the trustee within the stipulated time, and thus only after the *concursus*. The seller's right of cancellation at the occurrence of *concursus* is incomplete and it accordingly does not survive the *concursus*.[578]

Surrender of goods within a month before sequestration

If the purchaser surrendered the goods to the seller within one month before sequestration, for instance because an instalment was in arrear, the trustee may demand the delivery of the goods, or the value thereof, as on the day of its surrender to the seller. The trustee must, however, simultaneously pay the outstanding balance of the purchase price under the original transaction or deduct it from the value of the goods (as the case may be).[579]

Example 6

A sells her TV to B for R2,000 by way of an instalment agreement. B still owes R1,000. Due to B's dire financial situation he surrenders the TV to A 20 days before he is sequestrated. In terms of section 84(2) the trustee now has a statutory right to reclaim the TV. The trustee should exercise this right if the insolvent estate will benefit. Say for instance the market value of the TV has since increased to R5,000, the trustee would be in a position to gain an asset worth R5,000 by paying R1,000. The trustee will be entitled to claim the market value of the TV as on the date of its surrender where A for instance resold the TV to C under the same conditions as in the previous case.

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576 *Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of "The Village"* 1981 (3) SA 97 (D); *Morgan v Wessels* 1990 (3) SA 57 (O); *Van Zyl v Bolton* 1994 (4) SA 648 (C). *Cf* on the other hand *UDC Bank Ltd v Seacat Leasing and Finance Co(Pty) Ltd* 1979 4 SA 682 (T) for an opinion to the contrary. In *Venter v Avfin (Pty) Ltd* 1996 (1) SA 826 (A), quoted with approval in *Louw NO and Another v Sobabini CC and Others* [2017] JOL 37791 (ECG), para [57], the appeal court supported the view in the first group of cases that s 84(1) applied even if the creditor did not give notice of the secured claim and the trustee was not in possession of the property. *Avfin Industrial Finance (Pty) Ltd v Interjet Maintenance (Pty) Ltd* 1997 (1) SA 807 (T) reports, without a footnote by the editors regarding the Appeal Court case of *Venter v Avfin*, a case decided in December 1994, where the court regarded itself bound by the full bench decision in the *UDC Bank* case.

577 *A-Team Drankwinkel BK v Botha* 1994 (1) SA (A) 15-17.

578 *Roering and Others NNO v Nedbank Ltd* 2013 (3) SA 160 (GSJ).

579 Insolvency Act, s 84(2). See *Maswanganyi v First National Western Bank Ltd* 2002 (3) 365 (W) for the right to reclaim assets outside the provisions of the Insolvency Act.

13.4.3 Credit sale transactions: seller of movable property sequestrated

13.4.3.1 Credit sale transactions

Where ownership of the goods sold has passed to the purchaser before full payment of the purchase price, the trustee has to collect the outstanding purchase price together with all other outstanding debts as they fall due.[580]

13.4.3.2 Instalment agreements

Various views exist regarding the rights of the hire purchaser, the instalment sale purchaser and the instalment agreement purchaser, in cases where such purchaser has not yet become the owner in terms of an instalment sale agreement, but a portion of the purchase price remains outstanding. The Act does not refer to the purchaser's position, the courts have not yet reached a satisfying decision and writers are at odds about the extent of the parties' rights. Two different opinions exist.

Opinion one – the purchaser can become owner by continuing payments

Some arguments in favour of this opinion are the following: There is no principle or authority in terms of which the trustee can take away the purchaser's possession (for example by court order) and the purchaser is entitled to continue with payments as the purchaser has more than a mere personal subjective right, namely a contingent real right to the property, which right becomes unconditional when the last payment is made by the purchaser. The fulfilment of the condition completely depends on the purchaser. The reservation of ownership is therefore merely a form of security for the seller.

Opinion 2 – ownership cannot be passed to the purchaser after sequestration

The purchaser as a mere concurrent creditor has no security for the claim and does not become the owner of the property sold. The purchaser cannot force the seller's trustee to transfer ownership and is thus not entitled to any preferential treatment. This viewpoint corresponds with the basic underlying principle of the insolvency law that all creditors within a certain category should be treated equally. This view also conforms to the general principle.

580 Insolvency Act, s 77.

13.5 Leases

13.5.1 General principle

Leases are not automatically terminated by the sequestration of either of the parties' estates.[581] The term "lease" in this context includes a lease of movable or immovable property, or any other agreement having the effect of such a contract.[582]

13.5.2 Sequestration of the lessor (owner) – common law

The effect of the insolvency of a lessor on the contract of lease is not dealt with in the Insolvency Act.

13.5.2.1 Sale of immovable property subject to lease

If immovable property was leased, the sale of the property by the trustee will be subject to such lease if the principle of *huur gaat voor koop* applies. The purchaser of such property is then bound by all the stipulations in the contract of lease, including any option to renew the lease, and the lessee is entitled to claim compensation for improvements from the purchaser.[583]

13.5.2.2 Mortgage registered prior to lease

However, if a mortgage bond is also registered on the leased property prior to the lease, then the rights of the lessee are subordinate to those of the mortgagee, unless the mortgagee has waived the rights. The leased property will only be sold free of the lease if the offer received for the property is inadequate to satisfy the mortgagee's claim in full and a better offer can be obtained if the property were to be sold free of the lease. If the property is sold free of the lease, the lessee then has an unliquidated concurrent claim for damages for breach of contract against the estate.[584]

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581 In *Zitonix v K201250042* (290/2017) [2018] ZASCA 63 (21 May 2018) it was held on the facts that ignorance of a term of a lease entitling the lessor to cancel in the event of a surety's sequestration, was not a *justus error* on the facts.

582 *Montelido Compania Naviera SA v Bank of Lisbon and SA Ltd* 1969 (2) SA 127 (W) 130-135. An agricultural partiarian agreement as well as a sub-lease is also included in the term – see respectively *Noord-Westelike Koöperatiewe Landboumaatskappy Bpk v Die Meester* 1982 (4) SA 486 (NC) 491-492 and *Alli v Premier Timber Co* 1952 (1) SA 689 (N). Section 386(2) of the Companies Act 1973 refers to movable and immovable property.

583 *Uys v Sam Friedman Ltd* 1935 AD 165; *Scrooby v Gordon & Co* 1904 TS 937.

584 *Becker's Trustee v Laruffa* 1921 TPD 457.

13.5.2.3 Mortgage after lease

Where the lessee's rights vested before that of the mortgagee, for example where a long term lease was registered on the title deed of the property[585] before the mortgage bond, the property will be sold subject to the lease.

13.5.3 Sequestration of the lessee

If the estate of a lessee of movable or immovable property is sequestrated, the trustee may summarily cancel the contract through a written notice, but then the lessor has an unliquidated concurrent claim against the estate for damages for breach of contract.[586] The trustee in this situation acts on the instructions of the creditors.[587] Due to the cancellation, the estate loses the right to claim compensation for improvements to the leased property, unless the lessor agreed to such improvements.[588] If the trustee does not terminate the contract, the lease will in any event automatically be terminated three months after the appointment of the trustee unless the trustee notifies the lessor within those three months that they intend to continue with the contract.[589]

13.5.4 Liquidation of lessee

In the case of a company, the discussion in the previous paragraph must be read subject to the following provision in section 386(2) of the Companies Act 1973:

> "Subject to the consent of the Master, a liquidator may, at any time before a general meeting is convened for the first time, terminate any lease in terms of which the company is the lessee of movable or immovable property."

13.5.5 Continuation of lease agreement

If the trustee wishes to continue with the lease, the trustee is bound to all conditions pertaining to a prohibition on the transfer of the lessee's rights in terms of the lease. Any stipulation in a lease that the lease will terminate or be varied upon the sequestration of either party to the lease is null and void in terms of section 37(5), although the lease can still expire in terms of a termination clause linked to the effluxion of time, for example.[590] In terms of section 37(5), a provision that restricts or prohibits the transfer of any rights under a lease, is binding on the trustee. (In general a stipulation in a contract that rights cannot be ceded, or

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585 The definition of "immovable property" in s 102 of the Deeds Registries Act 1937 includes a lease for a period of not less than 10 years, or the natural life of the lessee.

586 Insolvency Act, s 37(1).

587 *Ibid*, s 81(1)(h).

588 *Ibid*, s 37(4).

589 *Ibid*, s 37(2).

590 No statutory provision similar to s 37(5) of the Insolvency Act exists in respect of other types of contracts. It is submitted that a such a provision would bind the trustee and the contract terminates upon the insolvency of one of the parties, for example a construction contract, if the contract stipulates accordingly.

cannot be ceded without permission, is binding on a trustee if the prohibition existed when the rights were created and were not stipulated later.)[591]

13.5.6 Secured and preferent claim of lessor

The lessor obtains a tacit hypothec over the *invecta et illata* (movable property) which the lessee brought onto the property. This hypothec serves to secure the lessor's claim for rent in arrears which was due before date of sequestration.[592] Rent that became due after sequestration enjoys a preference as part of the sequestration costs.[593] The lessor's tacit hypothec does not include movable property which, before such a hypothec has vested, was mortgaged under a pre-registered special notarial bond and also does not include property for which an instalment sale contract in terms of the National Credit Act of 2005 applies.[594]

Example 8

A lets his flat to B for R1,000 a month. The contract is due to expire on 31 December 2021. B is two months in arrear when he is sequestrated on 1 July 2021. He still occupies the flat for two months after his sequestration, on which date his trustee delivers a notice of cancellation to A.

A will have a secured claim in respect of the rent in arrear (subject to the limitations in section 85 of the Act); a "statutory" preferential claim in respect of rent due for the two-month period of occupation after sequestration, being part of the sequestration costs; and a concurrent claim for damages suffered due to the premature termination of the lease.

13.6 Contracts of service (employment)

13.6.1 Sequestration of estate of employee (worker)

Apart from the limitations pertaining to certain professions, trades, etc, sequestration of an employee's estate has no effect on the contract of service with the employer.[595]

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591 *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (C).

592 Insolvency Act, s 85(1) and (2).

593 *Ibid*, s 37(3).

594 Security by Means of Movable Property Act 1993, s 2. Section 85 of the Insolvency Act also limits the secured portion of the lessor's claim.

595 See S Lombard and A Boraine, "Insolvency and Employees: An Overview of Statutory Provisions" 1999 *De Jure* 300; and M Roestoff, "Insolvency restrictions, disabilities and disqualifications in South African insolvency law: A legal comparative perspective" 2018 *THRHR* 393.

13.6.2 Sequestration of estate of employer

13.6.2.1 General

However, where the estate of the employer is sequestrated, all contracts of service with its employees are suspended.[596] In the case of a company, the contracts are suspended from the date of the winding-up order and not from the date of presentment of the application for winding-up.[597] Such employees then have an unliquidated concurrent claim against the estate for damages due to breach of contract. Insolvency suspends the contracts of service and no longer terminates the contracts. During the suspension of contracts, employees are not required to tender their services and are not entitled to remuneration or employment benefits in terms of the suspended contract of service;[598] but they are entitled to unemployment benefits in terms of the Unemployment Insurance Act 1966, subject to the provisions of that Act.

13.6.2.2 Termination of contracts

The final trustee or liquidator of a company, or the liquidator of a close corporation, who remains in office and a co-liquidator, if any, may terminate the employment contracts after consultation with:

- a person designated in terms of a collective agreement;
- a workplace forum;
- a registered trade union; or
- a representative of the employees,

whichever may be applicable, on measures to save or rescue the business or a part thereof.[599]

If the trustee or liquidator and an employee have not agreed to continued employment, all suspended contracts are terminated 45 days after the appointment of a final trustee or liquidator of a company, or after the date of appointment of a co-liquidator in terms of section 74 of the Close Corporations Act 1984; or, if a co-liquidator is not appointed, the date of conclusion of the first meeting.

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596 Insolvency Act, s 38. It must be noted that s 38 of the Insolvency Act prior to amendments to it in fact caused the termination of contracts of service on sequestration of the estate of the employer – see A Boraine and S Van Eck, "The New Insolvency and Labour Law Legislation Package: How successful was the Integration?" (2003) *ILJ* 1840.

597 *Ngwato v Van der Merwe NO* (2014/28470) [2016] GJ (6 May 2016).

598 Insolvency Act, s 38(2).

599 *Ibid*, s 38(5) and (6).

13.6.2.3 Short-term contracts with trustee

It is submitted that the trustee or liquidator is still entitled to enter into short-term employment contracts with all or some of the employees and pay their salaries as "the salary or wages of any person who was engaged" by the trustee or liquidator.[600]

13.6.2.4 Claim by employee for severance benefits and damages

An employee whose contract of service has been terminated has a preferent claim[601] for severance benefits in accordance with section 41 of the Basic Conditions of Employment Act 1997[602] and, in terms of section 38(10) of the Insolvency Act, an employee whose contract of service has been suspended or terminated has an unliquidated concurrent claim for damages due to the suspension or termination of the contract of service prior to its expiration.

13.6.2.5 Claim by employee for salary

Employees also have preferential claims:

- up to a maximum of R12,000 for salary or wages not exceeding three months' salary or wages due and owing prior to the date of sequestration;
- payment in respect of any period of leave or holiday due to the employee which has accrued as a result of employment in the year of insolvency or the previous year, provided that not more than R4,000 shall be paid out;
- payment in respect of any other form of absence for a period not exceeding three months prior to sequestration and not exceeding R4,000; and
- severance or retrenchment pay not exceeding R12,000.

Claims exceeding these limits are concurrent.[603] The preferential claim ranks immediately after any funeral and death bed expenses and costs for sequestration (administration) and execution.

Example 9

A is employed by B as an electrician and A earns R5,000 per month. B is sequestrated at a time when he owes A four months' salary, thus an amount of R20,000. A has a "statutory" preferential claim for R 12,000; a concurrent claim for the balance, being R8,000; as well as a concurrent claim in so far as he might have suffered damages due to the premature termination of the contract of service in terms of section 38 of the Act. A will also have a

600 *Ibid*, s 97(2)(c).
601 *Ibid*, s 98A(1)(a)(iv).
602 One week's remuneration, calculated according to s 35, for each completed year of continuous service.
603 Insolvency Act, s 98A.

concurrent claim for damages as a result of suspension of the contract of service and a preferent claim for severance benefits.[604]

13.6.2.6 Transfer of employment contracts if business is transferred as a going concern

Section 197A of the Labour Relations Act 1995 provides that:

- if an employer is insolvent;[605]
- or a scheme of arrangement or compromise is entered into to avoid sequestration or winding-up for reasons of insolvency,[606]

and a transfer of the business of the employer takes place, then unless otherwise agreed in writing between the old employer, the new employer, or both of them jointly on the one hand, and the "appropriate person or body" referred to in section 189(1) of the Labour Relations Act on the other-

(i) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;[607]

(ii) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;

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604 One week's pay for each completed year of service.

605 What is meant by the phrase "employer is insolvent"? It cannot be argued with conviction that it was intended to refer to sequestration or winding-up for reasons of insolvency, because then surely this would have been stated as is done in the rest of the sentence. The phrase therefore refers to insufficient assets to meet debts and liabilities. It seems to follow that whoever relies on this section may have to prove that the employer was insolvent at the date of the transfer (compare *Taylor and Steyn NNO v Koekemoer* 1982 (1) SA 374 (T)). This seems to be impractical. It is also odd to refer to "sequestration for reasons of insolvency" in paragraph (b), because in terms of the law sequestration is always for reasons of insolvency.

606 Paragraph 2.54 of the Memorandum on the objects of the preceding Bill refers to *and* instead of *or* emphasised above, but this can surely not influence the meaning of the clear wording of the provision.

607 The reference to provisional winding-up or sequestration here and in s 197A(4) of the Labour Relations Act leaves us in the dark in cases where there is no provisional winding-up or sequestration. This may occur where there is a final order without a provisional order (for instance a voluntary surrender) or where there is a resolution for the winding-up of the company. According to s 197A(1)(b) of the Labour Relations Act, the section applies if a scheme of arrangement or compromise is entered into to avoid winding-up or sequestration, in which case there may also not be a provisional winding-up or sequestration. The only sensible interpretation would be to regard the time of sequestration or liquidation without a provisional order, or the date of a scheme of arrangement or compromise to avoid winding-up or sequestration, as the appropriate time for purposes of s 197(2)(a) or (4), even though there is no provisional winding-up of sequestration.

(iii) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;[608] and

(iv) the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.

The transfer of employees from one employer to another can only be lawfully done where the old employer transfers its employees to the new employer consequent to the transfer of the business as a going concern, or if it is done with the consent of the employees.[609]

The "appropriate person or body" referred to in section 189(1) is:

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation –

(i) a workplace forum, if any; and

(ii) any registered trade unions whose members are likely to be affected;

(c) if there is no workplace forum, any registered trade union whose members are likely to be affected;

(d) if there is no such trade union, the employees likely to be affected or their representatives nominated for that purpose.

Section 197(1) provides that also in section 197A, "business" includes the whole or a part of any business, trade, undertaking or service; and "transfer" means the transfer of a business by one employer to another as a going concern.

13.6.2.7 Will section 197 and 197A benefit employees in practice?

All the good intentions with the amended provisions may come to nothing because of practical considerations. If a business of an insolvent estate is to be sold as a going concern, the sale must take place urgently and cannot wait until 45 days after the final appointment, which may be several months after sequestration or winding-up. Despite the better prices often obtained for sales as a going concern, trustees or liquidators may opt to rather obtain

608 The Afrikaans text has *nuwe werkgewer*, which is the opposite of the English and certainly gives rise to a conflict between the two texts. The English text, read on its own, does not make sense – it means nothing to say anything done by the old employer is considered to have been done by the old employer (except perhaps by way of contrast to s 197(2)). However, the English is the signed text in the original Act of 1995 and the Amendment Act 12 of 2002. Therefore the signed English text prevails in case of a conflict – *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), para [44].

609 *Chemical Energy, Paper, Printing and Allied Workers Union v Sambana Powder Coaters CC* [2013] JOL 30724 (LC), para [20].

permission to urgently sell the assets piecemeal. The cost of taking over all contracts of employment in terms of section 197A may persuade purchasers to rather buy the assets piecemeal, despite the financial sense of selling a business as a going concern. **It must be noted that sections 197 and 197A contain further detailed provisions as referred to in the footnote.**[610]

13.6.2.8 Problems with the interpretation of sections 197 and 197A of the Labour Relations Act

Before the amendment of section 197 of the Labour Relations Act by the insertion of a new section 197A, there were problems with the interpretation and practical application of sections 197 of the Labour Relations Act and section 38 of the Insolvency Act.[611]

Their concern that it was not clear what was meant with a transfer "as a going concern" has been ameliorated somewhat by the explanation of the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town*,[612] that the business remains the same but in different hands; a question of fact to be determined with regard to the substance and not the form of the transaction. A vital consideration is[613] whether the effect is to put the transferee in possession of a going concern, the activities of which could be carried on without interruption; another indication would be whether the operation was actually continued *or resumed* by the new employer, with the same or similar activities.[614] The

610 Section 197A(3) provides that s 197(3), (4), (5) and (10) applies to the transfers in terms of the section. Section 197(3) provides that if none of the conditions of employment are determined by a collective agreement, that the new employer complies with subs (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer. Section 197(4) provides that subs (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund, if the criteria in s 14(1)(c) of the Pension Funds Act 1956 are satisfied. Section 197A(4) provides that s 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration. Section 197(5)(b) explains which arbitration awards and collective agreements are binding on the new employer, unless otherwise agreed in terms of subs (6). Section 197(10) states that the section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence. Subsections 197A(3) and (5) tell us which subsections of s 197 apply or do not apply to transfers in terms of s 197A, but are silent on the application of s 197(1), (2) and (6). Section 197(1) reveals that it applies also in the case of s 197A. It is submitted that subs 197(2) does not apply because s 197A(2) contains directly comparable but different provisions. Section 197A(3) tells us that any reference to an agreement in s 197 must be read as a reference to an agreement contemplated in s 197(6). It therefore seems that s 197(6) applies in the case of s 197A. It is submitted that in the case of sequestration or winding-up of an employer, the trustee or liquidator will step into the shoes of the "old employer" because it would be absurd to allow an unrehabilitated insolvent or a company under liquidation to enter into the agreements contemplated in s 197(6).

611 See, eg, E C Schlemmer and A N Oelofse "Konflik tussen die Wet op Arbeidsverhoudinge en die Insolveniewet" 1996 *TSAR* 559.

612 Case No CCT 2/02 decided on 6 December 2002, para [56]. See also *Mokhele v Schmidt NO* (JS564/11) [2016] ZALCJHB 196 (19 May 2016), para [16] to [18]; and *CEPPWAWU v Cordero* [2008] JOL 21095 (LC) where it was added that s 197A applies if employees retrenched before the winding-up had obtained a reinstatement order at the time of the winding-up.

613 See fn 65 of the case.

614 The fact that the business has been discontinued for a while is not conclusive.

absence of an agreement to transfer the workforce or part of it, does not prevent a finding that a transfer was a transfer of a business as a going concern.[615]

The authors complained that it would be uncertain and extremely undesirable if contracts that had been terminated were retrospectively transferred to a new employer if the business was sold as a going concern at a later stage. There can be little doubt that this is the position under the new provisions. Although a trustee or liquidator who wishes to sell a business as a going concern will in most cases attempt to reach agreement according to section 197(7) of the Labour Relations Act so that the position set out in paragraphs 197A(2)(a) to (d) (or parts thereof) should not apply,[616] it is possible that a business will be sold as a going concern after the termination of the contracts of service in terms of section 38 of the Insolvency Act and without agreement in terms of section 197(7) of the Labour Relations Act about the substitution of the purchaser as employer in all contracts of employment[617] and about the continuity of employment.[618] Section 197A(2) applies, "despite the Insolvency Act". In other words, despite the termination of contracts in terms of the Insolvency Act, the new employer will be automatically substituted in the place of the old employer in all contracts in existence immediately before "the old employer's provisional winding-up or sequestration"[619] and the transfer will not interrupt continuity of employment.[620] The implication seems clear that workers will be entitled to wages for the period after sequestration or liquidation, even if they did not work and even if they have found new employment. Although this seems to be unacceptable, it is the only possible interpretation of the provisions.

Consider also the case of a business with several divisions. One of the divisions is sold as a going concern by the trustee or liquidator without any agreement in terms of section 197(7). The conclusion seems inevitable that because of the transfer of a part of a business, trade, undertaking or service as a going concern,[621] the purchaser will automatically be substituted in the place of the old employer in all contracts of employment in existence immediately before provisional winding-up or sequestration,[622] also in respect of the parts of the business not transferred to the purchaser and in respect of which contracts of service may have been terminated in terms of section 38 of the Insolvency Act.

The following case law serves as examples of the application of these principles:

- In *Aviation Union of SA v SA Airways (Pty) Ltd*[623] it was decided that section 197 was capable of application when, at the end of a contract, services were transferred back to a previous owner or a new contractor.

615 At para [71].
616 It is accepted, as argued above, that the trustee or liquidator can enter into these agreements as the "old employer".
617 Labour Relations Act, s 197A(2)(a).
618 *Ibid*, s 197A(2)(d).
619 *Ibid*, s 197A(2)(a).
620 *Ibid*, s 197A(2)(d).
621 *Ibid*, s 197(1)(a).
622 *Ibid*, s 197A(2).
623 [2009] JOL 24395 (LAC).

- In *Ndima v Waverley Blankets Limited*[624] a scheme of arrangement in terms of section 311 of the Companies Act 1973 (repealed by the Companies Act 71 of 2008) was sanctioned for a company and the provisional liquidation order discharged. The essence of the scheme of arrangement was that another company brought shares in the company in question. Judge Zondo held that the transfer of the shares and of possession and control of a business did not bring the case within the ambit of section 197 as the transfer of a business.

- According to *National Union of Leather Workers v Barnard and Perry NNO*[625] the position is entirely different in the case of a voluntary winding-up, where the decision to pass the special resolution causes the contracts of employment to be terminated and constitutes a dismissal as contemplated in section 186(a) read with section 213 of the Labour Relations Act.

13.7 Other contractual obligations terminated by sequestration

13.7.1 Partnerships

Apart from contracts of service which are terminated by the sequestration of the employer's estate, the sequestration of the estate of a partnership (as well as the inevitable sequestration of the partners' private estates and the liquidation of the partnership enterprise which follows), for all practical purposes cause the partnership relationship to be terminated.

The sequestration of the individual estates of the partners leads to the withdrawal of their contributions which likewise dissolves the partnership relationship.

13.7.2 Mandate

A contract of mandate is terminated by the sequestration of the estate of the mandator.[626]

13.8 Companies and close corporations

The principles applicable to uncompleted contracts in insolvency also apply to the winding-up of a company which is unable to pay its debts.[627] The liquidator of a company may invoke section 35 of the Insolvency Act if the company is unable to pay its debts and section 37 of the Insolvency Act even if the company is able to pay its debts – provided that the meeting of creditors, members or contributories grant their authority, or on directions of the Master in the case of a winding-up by the court. In the case of a voluntary winding-up by creditors or

624 (1999) 20 ILJ 1563 (LC).
625 2001 (4) SA 1261 (LAC), paras [25] and [26]. See S Van Eck and A Boraine, "Voluntary Winding-up of a Company and 'dismissals' in terms of the Labour Relations Act" 2002 *THRHR* 610.
626 *Goodricke & Son v Auto Protection Insurance Co Ltd* 1968 (1) SA 717 (A).
627 Companies Act 1973, s 339.

members respectively, the liquidator may likewise act on the authority of the creditors granted at a meeting of creditors, or the members granted at a meeting of members.[628]

The same principles apply *mutatis mutandis* in the case of a close corporation as provided in section 66(1) of the Close Corporations Act 1984.

13.9 Transactions on an exchange

Within the realm of transactions on an exchange as contemplated in section 35A(1) of the Insolvency Act, section 35A, amongst others, insulates certain transactions on an exchange from the normal right of election of the trustee or liquidator as discussed above that would normally have applied to unexecuted contracts in insolvency in the event of insolvency of a market participant. Section 35B of the Insolvency Act terminates all unperformed obligations arising out of one or more master agreement upon the sequestration of a party to such a master agreement.

Self-Assessment Exercise 1

Study the basic principles dealt with in this chapter.

Question 1
What is the general rule regarding the treatment of uncompleted contracts after sequestration of one of the parties to the contract? (3)

Question 2
What is the general effect of repudiation by the trustee of an uncompleted contract? (5)

Question 3
What statutory duty must the seller of goods, sold on a cash basis, comply with in order to reclaim such goods if the purchaser did not pay the purchase price at delivery? (2)

Question 4
What is the legal position concerning the ownership of goods sold and delivered by means of an instalment sales agreement in terms of the National Credit Act on sequestration of the estate of the purchaser (the consumer)? (4)

Question 5
Under what circumstances will the purchaser of land on instalments be entitled to claim transfer of the land where the seller has been sequestrated or liquidated? (4)

628 *Ibid*, s 386(4)(g) read with s 386(3).

Question 6
How does the Alienation of Land Act of 1981 purport to protect the purchaser of unregistered land in the case of sequestration or liquidation of the seller? (2)

Question 7
What is the legal position of a lessee who rents an apartment for three years in the case of sequestration of the estate of the lessor ? (2)

Question 8
May the trustee or liquidator continue with a contract of lease entered into between the lessor and the now insolvent lessee after the sequestration of the lessee's estate? (3)

Question 9
Explain the general rule pertaining to the effect of the sequestration or liquidation of the employer on contracts of employment with his or her employees? (3)

Question 10
What type of clams will the employees have against the insolvent estate of their employer regarding salaries in arrears? (2)

Self-Assessment Exercise 2

Question 1
On 1 May 2021 Alex agrees to sell his motor vehicle to his neighbour, Bernd, for an amount of R150,000. Bernd does not have all the cash available, and promises to pay Alex the full purchase price on 5 June 2021 when he expected to have received a performance bonus for his employer. Alex agrees, delivers the vehicle to Bernd and hands Bernd the keys of the motor vehicle. (These were the full terms of the agreement.)

Question 1.1
Before Bernd can make any payment to Alex, his (Bernd's) estate is sequestrated by an urgent court order of the High Court. (Alex was totally unaware of this application, the application being issued on 3 May 2021.) Advise Alex regarding this transaction in view of the intervening sequestration of Bernd's estate. (5)

Question 1.2
How would your answer to the previous question have differed if the motor vehicle had been sold to Bernd under an instalment agreement in terms of the National Credit Act? (4)

Question 2
Alain Ahmed signs a contract of sale for the purchase of an immovable property in Cape Town for R750,000,00 - the full purchase price to be secured by a mortgage bond against registration in the Deeds Registry. However, before the transaction could be registered in the Deeds Registry, Alain's estate is sequestrated by an order of the High Court. Discuss the position of the seller and the trustee in respect of this transaction. (6)

Question 3

Question 3.1
Your client, Mrs Ndlovu, bought a vacant stand from her uncle, Mr Sithole, by way of a written instalment sale agreement. The stand is situated in a small village in the Drakensberg. The uncle had a 4-hectare property in the Drakensberg which he informally "divided" into four portions of one hectare each, and sold it to his two cousins and two nieces. Mrs Ndlovu, one of the nieces, bought one of these "sub-divided" stands and she has been paying the purchase price by way of three-monthly instalments of R5,000 every third month. (The total price for the stand is R50,000.)

Mrs Ndlovu also bought a house from Mr Sithole on a similar instalment-based agreement, and the property is registered in Mr Sithole's name. She paid the purchase price in monthly instalments of R5,000 per month. (The total purchase price for the house was R150, 000. Currently she still owes Mr Sithole R50,000 and she now wants to claim registration although the contract states that she is only entitled to registration after she has paid the full purchase price.)

Advise Mrs. Ndlovu as to her prospects in recovering her instalments already paid over to Mr Sithole, or claiming ownership of the stand and the house respectively, in the event of the estate of Mr Sithole being sequestrated. (10)

Question 3.2
Mr Andrews sold a stand with a hotel on it, including all movable assets such as furniture, to Ms Bass. In terms of the contract of sale Ms Bass had to pay a R500,000 deposit immediately on signing the contract and registered a mortgage bond over the immovable property to secure the payment of the balance of the purchase price. Since they were good friends, Mr Andrews transferred the property to Ms Bass before the mortgage bond had been registered. Shortly thereafter, Ms Bass's estate was placed under sequestration. Explain the legal position to the trustee. (3)

Question 4

Question 4.1
On 4 January 2021 Joe lets his farm to Jane for a period of 10 years at an annual rental of R120,000. Jane occupies the land immediately and the lease is registered in the Deeds Office. However, on 12 July 2020 a mortgage bond was registered over the property in favour of the B Bank. Discuss the legal position if the estate of Joe is sequestrated on 1 October 2021. (13)

Question 4.2
Accept for the purposes of this question that the estate of Jane was sequestrated. Advise the trustee if the termination of the contract of lease is possible. (2)

Question 5
Aircraft Spares (Pty) Ltd, a company that manufactures spare parts for small aircraft, is placed in liquidation by an order of the High Court on 3 June 2021. One of the company's employees, Benny Bosielo, approaches you for advice on the effect that the liquidation of the company will have on his contract of employment. Benny has not been paid since the end of April 2021, his salary being an amount of R10,000 per month. In addition, he has R3,500 leave pay owing to him. Advise Benny regarding the following questions directed at you:

Question 5.1
What effect will the liquidation of the company have on Benny's contract of employment? (5)

Question 5.2
What amounts will Benny be able to claim from the estate in terms of salary and leave pay if his contract is not terminated? He also wants to know what the nature of these claims will be. (8)

Question 5.3
If his contract of employment is terminated, what additional amounts, if any, will he be able to recover from the estate? (2)

For feedback on the above self-assessment exercises, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

PART D – ADMINISTRATION

CHAPTER 14 – PROVISIONAL TRUSTEE AND LIQUIDATOR

14.1 Appointment of provisional trustee

14.1.1 Master's discretion to appoint provisional trustee

The Master has statutory authority to appoint a provisional trustee.[629] No judge of the High Court of South Africa has the authority or jurisdiction to effect any appointment of any person as provisional trustee, nor to make any recommendations to the Master in respect of any appointment of a provisional trustee.[630] Any order by the court that appoints a provisional trustee is a nullity and does not have to be set aside.[631] The doctrine of *functus officio* dictates that the decisions of officials are deemed to be final and binding once made and was recently considered in the case of *De Wet v Khammissa*.[632] The court confirmed that the decision of the Master, as an officer of the court, is deemed to be final and binding once it is published, announced or otherwise conveyed to those affected by it.

14.1.2 Voluntary surrender

As pointed out in Chapter 3 of these notes, the Master has a discretion to appoint a *curator bonis* after publication in the *Gazette* of a notice of the intention to apply for a voluntary surrender, but there is no provision for the sale of assets by the *curator bonis* other than in the ordinary course of business. However, after the court has ordered the sequestration of the estate, but before the first meeting at which a trustee is elected, the Master may appoint a provisional trustee and authorise them to sell assets urgently.[633]

14.1.3 Policy for provisional appointments

Provision is made in section 158(2) of the Insolvency Act, section 14(1A)(a) of the Companies Act 1973[634] and section 10(1A)(1) of the Close Corporations Act for the policy by the Minister of Justice and Constitutional Development to be applied when appointing trustees or

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629 Where the Registrar of Banks has appointed a manager because a person carried on business as a bank without being registered as a bank, the Master must appoint the person nominated by the Registrar as liquidator or trustee in the case of the insolvency of the person - Banks Act 1990, s 84(1A)(d).

630 *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP). See *also City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) at para [32] as well as *Ex parte Knoop* [2019] ZAKZDHC 25 where the Court held that only the Master has the authority to validly appoint a trustee.

631 *Master of the High Court NGP v Motala* (172/11); [2012] JOL 28554 (SCA)**;** [2011] ZASCA 238 (1 December 2011); 2012 (3) SA 325 (SCA), para [14].

632 (358/2020) [2021] ZASCA 70 (4 June 2021).

633 It is respectfully submitted that the *obiter* remark by Gautschi AJ in *Storti v Nugent* 2001 (3) SA 783 (W) 787F-G, that the Master cannot make a provisional appointment when a final order has been issued without a provisional order, is incorrect.

634 Section 14 of the Companies Act 1973 has been repealed by the Companies Act 71 of 2008, but it is submitted that policy determined in terms of the Insolvency Act will apply.

liquidators by the Master "in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination". The Master must make appointments in accordance with the policy in specified cases where the Master has a discretion to make an appointment. Such a statutory policy will justify the limitation of the Master's discretion. The Minister published a Policy during February 2014 and published amendments to the Policy in October 2014.[635] The High Court declared the published Policy invalid.[636] The decision that the policy was invalid was confirmed by the Supreme Court of Appeal[637] and the Constitutional Court dismissed an appeal against the SCA decision.[638]

The question arises whether the limitation of the Master's discretion by the informal policy is legal, especially in view of the statutory provision for a ministerial policy. In the unreported decision in *Prosch v Standard Bank of South Africa Limited*[639] Roux J stated that he simply could not accept that the Master applied a practice to appoint the person recommended by

635 *Government Gazette* No 37287 dated 7 February 2014 with paras 6 and 7 substituted by notice 798 in *Government Gazette* 38088 dated 17 October 2014.

636 *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development* 2015 (2) SA 430 (WCC). The decision was based on the fact that the Policy was an unlawful fettering of the Master's discretion and that here was no reasonable likelihood of the Policy solving problems of corruption or fronting, nor of advancing the transformative agenda required by the Constitution.

637 *Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* 2017 (3) SA 95 (SCA). Remedial measures must operate in a progressive manner assisting those who, in the past, were deprived, in one way or another, of the opportunity to practice in the insolvency profession. Such remedial measures must not, however, encroach, in an unjustifiable manner, upon the human dignity of those affected by them. In particular when dealing with remedial measures, it is not sufficient that they may work to the benefit of the previously disadvantaged. They must not be arbitrary, capricious or display naked preference. If they do they can hardly be said to achieve the constitutionally-authorised end. One form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota (para [32]).

638 *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC). While the policy targets persons who were disadvantaged by unfair discrimination, it does not appear from the information on record that the policy is likely to transform the insolvency industry. In light of the paucity of information on the implementation of the policy, it cannot be said that the policy is likely to achieve the goal of equality (para [40]). The implementation of category D is unlikely to achieve equality in the future. This is because appointing one practitioner in alphabetical order from this category entrenches the *status quo*. Since white males are in the majority, most appointments would go to them (para [41]). Moreover, the category impermissibly discriminates against other races on the ground that they became citizens on or after 27 April 1994 (para [41]). The failure by the Minister to provide reasons justifying why disadvantaged people should be treated differently, on account of the date on which they became citizens, establishes the arbitrariness of the policy (para [54]). See Burdette and Calitz "4:3:2:1... Fair Distribution of Appointments or Countdown to Catastrophe? South Africa's Ministerial Policy for the Appointment of Liquidators under the Spotlight" (2015) 3 *NIBLeJ* 24 for a detailed discussion.

639 Case Number 14279/90, Witwatersrand Local Division.

the majority in value of creditors if such a person was a suitable person, as this was at odds with the Master's "unfettered discretion"[640] to appoint a suitable person.[641]

The Master does not have an unfettered discretion to make appointments. That may have been the case in the past before the amendments to the Insolvency Act brought about in 2003,[642] but it is no longer the case. The Master's discretion is now to make appointments in accordance with the prescribed Policy. The existence of the Policy cannot be taken as unduly fettering the Master's discretion, since the Master only has a discretion to exercise in accordance with the Policy.[643]The Supreme Court of Appeal pointed out that previous policies and directives issued by the Minister, during 1998 and 2001, were not policies promulgated in terms of any specific provision of the Insolvency Act.[644] It is clear that a valid policy should be promulgated as soon as possible in terms of the legislation as several provisions in legislation[645] refer to appointments "in accordance with policy determined by the Minister" and promulgated in terms of the legislation.

The court stated that the purpose of the Insolvency Act, and the provisions in the Companies Act dealing with the liquidation of companies, are designed to be driven by creditors in their own interests. That necessarily affects the basis upon which trustees and liquidators are to be appointed. The primary consideration must be the interests of the creditors and serving those interests.[646] The fact that there is nothing in the relevant statutes that expressly obliges the Master to pay heed to creditors' wishes when making provisional appointments is beside the point. The statutes make it clear that they exist to serve the interests of creditors. Nothing in the statutes empowers the Master to disregard the interests of creditors and to appoint on a roster basis persons who, in terms of the Policy, the Master may regard, either because of the complexity of the estate or because they are unsuitable, as unqualified for such appointment. In other words, it is not open to the Master to act in a manner that disregards, or is in conflict with, the interests of creditors.[647] In their legitimate desire to address past discrimination and disadvantage, the Minister and the Chief Master have overlooked the fundamental purpose of the legislation that governs the sequestration of estates and the winding-up of companies

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640 Even if the Master has a discretion, he is in terms of s 5 of the Promotion of Administrative Justice Act 2000 obliged to give reasons for the exercise of his discretion and in terms of s 6 the reasons must be rational and the action must, amongst other things, not be taken arbitrarily or taking into account irrelevant considerations.)

641 It was further held, assuming that such a practice existed, that a creditor who overstated its claim in a requisition, or failed to disclose that it was disqualified from voting in terms of s 365(2)(a) of the Companies Act, could not be held liable for damages by persons who alleged that they should have been appointed as provisional liquidator. Such persons' loss resulted from not being selected by the Master and their remedy was to review the decision by the Master to appoint another person.

642 *Hartley v The Master* 1921 AD 403 at 412; *Lipschitz v Wattrus* 1980 (1) SA 662 (T) at 671G.

643 *Minister of Justice v The SA Restructuring and Insolvency Practitioners Association* 2017 (3) SA 95 (SCA), para [44].

644 *Ibid*, para [6].

645 Insolvency Act, ss 5(2), 18(1), 54(5), 57(9), 57(5), 62(2) and 96(4) and Companies Act 1973, ss 368, 370(3)(b), 374 and 377(3).

646 *Minister of Justice v The SA Restructuring and Insolvency Practitioners Association* 2017 (3) SA 95 (SCA), para [57].

647 At para [59].

and close corporations, which is to serve the interests of creditors as conceived by the creditors themselves. The Policy that has been promulgated is not directed at that purpose and disavows the need for the process of appointment that it governs to have regard to the views or interests of creditors. That is an exercise of power for a purpose other than any for which it was bestowed. It should not be difficult for the Minister and the Chief Master to devise a Policy that serves both purposes instead of trying to serve one at the expense of the other.[648] The court did not decide the point whether the practice to appoint the person recommended by the majority in value of creditors was invalid. The court did point out, as indicated above, that the process must be driven by creditors in their own interest and that the primary consideration when making appointments must be the interests of the creditors and serving those interests.

14.1.4 Security and affidavit of non-interest

Once the Master has decided on the appointment of a particular person (or persons) as provisional trustee, that person will be called upon by the Master to lodge security and "an affidavit of non-interest", the form of which may differ from one Master's Office to another (see the discussion of disqualifications below). The Master may call for security for the full amount of the assets, or for a specific amount (determined by the Master). It is usually required from the provisional trustee to investigate the value of the assets after their appointment, to report it to the Master and to lodge additional security if appropriate. The bond of security must be countersigned by a bank or insurance company acceptable to and on record with the Master.

If the Master has refused to appoint the provisional trustee nominated by creditors and refuses to give reasons for their decision, the question arises as to whether creditors are entitled to reasons for their decision and on what grounds, if any, the decision not to appoint the person nominated by creditors can be reviewed.[649]

14.2 Disqualification and vacation of office

Some of the disqualifications are general and some apply to particular cases due to an interest in or connection with the matter.

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[648] At para [65].

[649] See *Lipschitz v Wattrus* 1980 (1) SA 662 (T); Constitution of the Republic of South Africa Act 1993, s 24, sections of the Promotion of Administrative Justice Act 2000 and *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T); *Moletsane v Premier of the Free State* 1996 (2) SA 95 (O); *Parekh v Minister of Home Affairs* 1996 (2) SA 710 (D); *Foulds v Minister of Home Affairs* 1996 (4) SA 137 (W); *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W). The court can order an administrative authority to exercise its discretion properly, but will only in exceptional circumstances substitute its own decision for that of the functionary. *Cf UWC v MEC for Health and Social Services* 1998 (3) SA 124 (C) 130F; *Tettey v Minister of Home Affairs* 1999 (3) SA 715 (D) 727.

14.2.1 General disqualifications

Almost all the disqualifications in section 55 of the Insolvency Act are repeated in section 372 of the Companies Act 71 of 1973, which also applies to close corporations. The following persons are disqualified from being elected or appointed as trustee in terms of section 55:

(a) any insolvent (section 372(a));

(b) a minor or any other person under legal disability (372(b));

(c) any person who does not reside in the Republic (section 372(h));

(d) a former trustee disqualified under section 72 (section 72(3) provides that a person whose estate is sequestrated while they are in terms or subsection (1) indebted to an estate of which they were trustee for any sum of money which they misappropriated from the estate, are forever incapable of holding the office of trustee, provisional trustee, liquidator, curator dative, tutor dative, *curator bonis*, or executor dative; (section 394(7)(a) of the Companies Act is similar to section 72 of the Insolvency Act referred to in section 55(f) of the Insolvency Act and section 55(f) applies to the liquidator of a company unable to pay its debts);[650]

(e) any person declared under section 59 to be incapacitated for election as trustee, while any such incapacity lasts (section 372(c) with reference to section 373), or any person removed by the court on account of misconduct from an office of trust (section 372(d));

(f) a corporate body (section 372(e));

(g) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery, uttering a forged document, or perjury and has been sentenced to imprisonment without the option of a fine, or to a fine exceeding R2,000 (section 372(f) with reference to a fine exceeding R20);

(h) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby they undertook that they would, when performing the functions of a trustee or assignee, grant or endeavour to grant to, or obtain or endeavour to obtain, for any debtor or creditor any benefit not provided for by law (section 372 does not contain a provision similar to section 55(j));

(i) any person who has, by means of any misrepresentation or any reward or offer of any reward, whether directly or indirectly, induced or attempted to induce any person to vote for them as trustee or to effect or assist in effecting their election as trustee of any insolvent estate (section 372(g)).

650 Companies Act 1973, s 339.

14.2.2 Affidavit of non-interest

The "affidavit of non-interest" declares that a person is not disqualified from being appointed. The phrase "non-interest" refers in particular to the requirements of section 55(b) (that the candidate is not related to the insolvent within the specified degree), section 55(e) (that the candidate has no interest opposed to the general interest of the insolvent estate; see also "Independence and impartiality of trustee" below) and section 55(l) (that the candidate has not during the 12 months preceding sequestration acted as bookkeeper, accountant or auditor of the insolvent).

14.2.3 Affidavit of non-interest for company

The provisions of sections 372 of the Companies Act, in respect of the disqualification of a liquidator, are almost identical to the provisions of section 55 of the Insolvency Act. Section 372(i) disqualifies any person who, at any time during a period of 12 months immediately preceding the winding-up of a company, acted as a director, officer or auditor of that company, but this disqualification does not apply to an auditor in the case of a members' voluntary liquidation in terms of section 350 of the Companies Act, 1973, or by virtue of section 12(1) of the Interpretation Act 33 of 1957, the voluntary winding-up of a solvent company by the company in terms of section 80 of the Companies Act 71 of 2008. Section 55(b) of the Insolvency Act (relationship to the insolvent) is clearly not relevant to a company and section 372(i) is similar to section 55(l) (has not during the 12 months preceding sequestration acted as bookkeeper, accountant or auditor of the insolvent).

Although section 372 of the Companies Act 1973 does not contain an equivalent of section 55(e) of the Insolvency Act (has no interest opposed to the general interest of the insolvent estate) the liquidator must be a "suitable" person. Section 18 of the Insolvency Act differs from sections 368 of the Companies Act 1973 and section 74(1) of the Close Corporations Act due to the fact that it does not refer to a "suitable" person. Despite this difference in wording, it is clear that in all matters the Master should appoint a "suitable" person. This entails that a liquidator must be independent and able to discharge their responsibilities impartially. The following was stated in *Theron v Natal Markagente*:[651]

> "Nobody should be appointed as a judicial manager, provisional or otherwise, unless he is disinterested and free to act independently and impartially. Such have frequently been held to be the essential attributes of a liquidator or provisional liquidator, despite the legislation's silence on the point."

A liquidator may be removed from office if there is sufficient suspicion of partiality or conflict of interest, since a liquidator must be and appear to be independent and impartial. They must be seen to be independent since their duties as liquidator may require them to investigate.[652]

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651 1978 (4) SA 898 at 900D.

652 *Hudson v Wilkins* 2003 (6) SA 234 (T), para [13].

Section 140(4) of the Companies Act 71 of 2008 provides that where a business rescue procedure concludes with a liquidation, "any person who has acted as [business rescue] practitioner during the business rescue process may not be appointed as liquidator".[653]

14.2.4 Removal of trustee or liquidator from office by the Master

The Master may remove a trustee from office if, *inter alia*, the trustee or liquidator was not qualified for appointment, or has become disqualified from appointment, or has acted on authority of a power of attorney to vote on behalf of a creditor, or has failed to perform satisfactorily any duty imposed upon them by the Act, or to comply with a lawful demand of the Master, or if in the opinion of the Master the trustee or liquidator is no longer suitable to be the trustee of the estate concerned.[654] In *Motala v Master of the North Gauteng High Court*[655] the court decided that the refusal by a liquidator to answer questions regarding the merits of the administration of the insolvent estate was sufficient to warrant their removal as liquidator in terms of section 379(1)(b) or (e) of the Companies Act without any further notice. A party need not necessarily be afforded an audience to make representations in every case in answer to prejudicial administrative action that may be taken.[656]

14.2.5 Independence and impartiality of trustee

According to the decision in *James v The Magistrate, Wynberg*,[657] care should be taken by trustees when performing their important functions; they must both be and appear to be independent and impartial. It is wrong for them, for example, to appear to be acting as the mouthpiece of a particular creditor, especially if an acrimonious dispute exists between one interested party and another. It may according to this decision be regarded as improper to use the same attorney who acted for the sequestrating creditor to act on behalf of the trustee. See, however, *Receiver of Revenue, Port Elizabeth v Jeeva; Klerck v Jeeva*[658] where the appeal court overturned the decision of the full bench in another decision[659] and in effect overruled

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653 *Fisher v Vusela Construction (Pty) Ltd (In Liquidation)* (8079/14) [2014] (WCC) (12 September 2014), para [11] to [13], decided that the fact that the business rescue practitioner and another person were members of the same firm did not disqualify the other person from appointment as liquidator.

654 Insolvency Act, s 60 and Companies Act 1973, s 379(1). It is not a ground for removal by the Master that removal would be "in the interest of justice and equity" – *Pellow v Master of the High Court Pellow v Master of the High Court* 2012 (2) SA 491 (GSJ), para [26].

655 (48748/11) [2017] (GNP) (9 October 2017), para [29].

656 *Motala v Master of the North Gauteng High Court and 12 Others* (48748/11) [2017] (GNP), (9 October 2017), para [29].

657 1995 (1) SA 1 (C).

658 1996 (2) SA 573 (A).

659 *The Receiver of Revenue v Jeeva* Case No CA 584/94 in the Eastern Cape Division discussed the decision in *James v The Magistrate, Wynberg*. Zietsman JP found that a reasonable perception of bias was all that was required to be proved and that there was no need to prove actual bias. Prior to the liquidation of the company, considerable investigation work had been done by the Receiver of Revenue's legal department. It was common cause that the Receiver had discussed the investigations of its legal team with the liquidators and persuaded them that an enquiry in terms of s 417 of the Companies Act 1973 should be held. Jones J in the court below found that the real purpose of the enquiry was to assist the Receiver in its endeavour to recover monies due to the fiscus and that by making use of the same legal team as the Receiver the

the decision in the *James* case. Harms JA stated that the fact that a liquidator has fiduciary duties towards, say, creditors, does not mean that the liquidator can always be even-handed in their approach.[660] The liquidator is obliged, should the occasion arise, to dispute a creditor's claim or to impeach a transaction.

The mere possibility that there will be a conflict of interests does not disqualify someone if that possibility is so remote that for all practical purposes it can be disregarded. The possibility that the appointment of a person would lead to bias must be weighed against the convenience and advantages of the same person dealing with all related matters.[661] There are decided cases where the appointment of a person with an interest in a matter was approved, or removal refused, due to the circumstances of the case.

The following are examples of cases where it was held that a person should not be disqualified:

(a) *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO*[662] – a director and salaried employee of a firm in which the attorneys acting for an interested party had a 50% shareholding;

(b) *Hobson NO v Abib*[663] – attorney acting for the only creditor;

(c) *SA Neckwear (Pty) Ltd v Dagbreek Kontant Winkel (Edms) Bpk*[664] – a joint trustee of the insolvent estates of shareholders of the company under judicial management;

(d) *Bankorp Trust v Pienaar*[665] – a creditor (whose claim was not disputed) and the executor were subsidiaries of the same company;

(e) *Allandale Planters CC v Master of the high Court Transvaal Provincial Division*[666] – the liquidator was employed by a wholly owned subsidiary of a major creditor;

liquidators had created the perception that they were advancing the case of the Receiver and had relinquished their exclusive and independent control over the enquiry proceedings. This decision was upheld by Zietsman JP.

660 See also *Lategan v Lategan* 2003 (6) SA 611 (D&CLD) 629G and *Geduldt v The Master* 2005 (4) SA 460 (C).

661 *SA Neckwear (Pty) Ltd v Dagbreek Kontant Winkel* 1952 (3) SA 697 (O) 702.

662 1997 (1) SA 547 (C).

663 1981(1) SA 556 (N).

664 1952 (3) SA 697 (O).

665 1993(4) SA 98 (A) 109A.

666 (20663/98) Transvaal Provincial Division (25 April 2000).

(f) *Pellow NO v Master of the High Court Pellow NO v Master of the High Court*[667] – the liquidator was a director of a company which in turn was a subsidiary of a major creditor;[668]

(g) *Fisher v Vusela Construction (Pty) Ltd (In Liquidation)*[669] – attorneys for the liquidators initially acted for the liquidators and for the company under business rescue, acted for the business rescue practitioner, and were the attorneys of record in the liquidation application. One of the joint provisional liquidators was a co-director in the same company as the business rescue practitioner, both of whom had been recommended by the attorneys. Where the business rescue practitioner and another person are members of the same firm, it does not disqualify the other person from appointment as liquidator.

The following decisions are examples of where it was decided that the person was disqualified due to an interest in the matter:

(a) *Jordaan v Richter*[670] – an attorney who acted for the creditors of the insolvent;

(b) *Krum v The Master*[671] – an employee of a subsidiary of a creditor (not followed in the *Allandale Planters* decision above);

(c) *Theron v Natal Markagente*[672] – a partner in the firm of attorneys acting for a director of a company under provisional judicial management.

(d) *Standard Bank v Master of the High Court*[673] – in respect of a claim the liquidators lost all objectivity and, in relation to a fee sharing arrangement, they found themselves in a conflict.

14.2.6 Removal of trustee or liquidator by the court

In *Fey v Serfontein*[674] it was decided that it was clear that at common law the Supreme Court had the power to remove the trustee of an insolvent estate on the ground of his misconduct as a trustee and this power had not been displaced by the Insolvency Act.

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667 2012 (2) SA 491 (GSJ), para [37]. See also *Pellow v Master of the High Court Johannesburg* (21296/11) [2012] ZAGPJHC 270 (9 February 2012), paras [9] and [10].

668 The court rejected an attempt by the Master to distinguish the decision in *Allandale Planters*. The test is whether the relationship between the liquidator, the company of which the liquidator is a director and which is in turn a subsidiary of a major creditor, resulted in the exertion of undue influence to the prejudice or potential prejudice of a particular creditor on the clear basis that any particular creditors interests are aligned to receiving the highest dividend possible for it and not for any ulterior motive.

669 (8079/14) [2014] (WCC) (12 September 2014), paras [11] to [13].

670 1979 (3) SA 1213 (O).

671 1989 (3) SA 944 (N).

672 1978 (4) SA 898 (N).

673 2010 (4) SA 405 (SCA).

674 1993 (2) SA 605 (A).

Section 379(2) of the Companies Act 1973 provides that the court may, on application by the Master or any interested person,[675] remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection 379 (1), or for any other good cause.

Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell[676] confirms that it is not sufficient to show that there is an apprehension or perception of bias, partiality, lack of independence or unfairness. It will also not suffice to establish that the liquidator has not performed satisfactorily, has made questionable decisions, or committed errors of judgment. The court must be satisfied that removal of the liquidator is to the general advantage and benefit of all persons concerned. A court would be less inclined to remove a liquidator at a late stage in the winding-up process.

In *Van der Merwe v Moodliar and Related Matters*[677] various grounds were set out in support of an application for removal of the liquidators. However, the court found that no basis whatsoever had been established for the removal of the liquidators. The removal application was also brought at an advanced stage of the liquidation and it would not have been in the interests of the general body of creditors (none of whom had lodged any complaints about the liquidators' conduct) to order a removal and reappointment of new liquidators at that stage. The application was dismissed.

In *Fisher v Vusela Construction (Pty) Ltd (In Liquidation)*[678] the court noted that there is nothing inherently untoward about liquidators engaging as their attorneys, the same attorneys who acted for the applicant (typically a petitioning creditor) in the liquidation. Indeed, there are often advantages to the same set of attorneys acting. The court noted that a liquidator may, of course, be removed from office where partiality or a conflict of interest can be demonstrated, for example where it appears that the liquidator, through some relationship with the company or its management, is in a position of actual or apparent conflict of interest,[679] or where the liquidator is connected with a particular claimant against the company, giving rise to a concern that that claimant's interests will be preferred to those of the other claimants.[680]

The advantage of utilising the attorneys involved in the major litigation that might have preceded the winding-up, is self-evident. That there would have been animosity with the representatives of that company cannot be ruled out as a familiar occurrence if attempts were made to avoid paying the debt by dilatory tactics, which are not uncommon. The attorneys representing the liquidators are meant to look after the best interests of the general body of creditors. They are not expected to make friends with the directors, shareholders and office

675 The shareholders of a company in liquidation have standing to apply for the removal of the liquidators – *Eurocoal (Pty) Limited (In Liquidation) v Hendricks* [2018] JOL 39943 (GP).

676 1997 (1) SA 547 (C). See also *ABSA Bank Ltd v Hoberman* 1998 (2) SA 781 (C) 801; *Hudson v Wilkins* 2003(6) SA 234 (T); *Standard Bank of South Africa v The Master of the High Court* 2009 (5) SA 13 (E) (overruled by the majority in *Standard Bank of South Africa v The Master of the High Court* 2010 (4) SA 405 (SCA), para [25]).

677 [2019] JOL 46350 (WCC).

678 (8079/14) [2014] (WCC) (12 September 2014), para [23].

679 *Hudson v Wilkins* 2003 (6) SA 234 (T), para [13].

680 *Ibid*, paras [19] and [22].

bearers of the company in liquidation. On the contrary, they are expected to interrogate them if there is a belief that assets are being dissipated or concealed from the general body of creditors.[681]

In *Standard Bank v Master of the High Court*[682] the court removed liquidators even though a long period of time had passed and much work had been done, due to the following considerations:

- the liquidators played a major role in the delay by way of costly, protracted and unnecessary litigation;
- in respect of a claim the liquidators lost all objectivity;
- the behaviour of the liquidators in relation to the cost of a review application became increasingly worse and they were obstructive, evasive and unrepentant to the end;
- in relation to a fee sharing arrangement, they failed to appreciate the conflict in which they found themselves;

Taking into account what can rightly be demanded of liquidators, the liquidators were deprived of 5% of their fee. The majority decision of the court noted that removal is an extreme step, but that liquidators must realise that they perform important functions. The Master, creditors and, importantly, courts rely on them. In the liquidation process they are expected to act impeccably. The profession must be under no illusion that courts, when called upon to do so, will act to ensure the integrity of the winding-up process in appropriate circumstances.[683]

14.3 Duties and powers of provisional trustee

14.3.1 Powers of a provisional trustee

In *De Beer v Dundee*[684] the court established that in terms of the Companies Act or the Insolvency Act a person can only act as a provisional trustee or liquidator once appointed by the Master and will only have to powers to act once in possession of the appointment certificate. A provisional trustee has the powers and duties of a trustee, except that the

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681 *Pellow v Master of the High Court Pellow v Master of the High Court* 2012 (2) SA 491 (GSJ), para [34].

682 2010 (4) SA 405 (SCA).

683 A court will also consider if the removal application was brought at an advanced stage of the liquidation as it would not be in the interests of the general body of creditors to order a removal and reappointment new liquidators at a late stage of the administration process – see *Van der Merwe v Moodliar* [2020] 1 All SA 558 (WCC). In *James v Van Der Westhuizen* [2020] JOL 47699 (GP) the application to remove the liquidators also failed as the court indicated that the application was a "knee jerk" reaction by parties to avoid attendance at inquiry embarked upon by the liquidators.

684 (5148/2020P) [2020] ZAKZPHC 70 (19 November 2020).

provisional trustee may not without the authority of the court bring or defend legal proceedings or sell property of the estate without the authority of the Master or the court.[685]

14.3.2 Extension of powers by the court or the Master

The provisional trustee must satisfy the court that a departure from the normal course of events is warranted; and, where the institution of proceedings to enforce a claim is contemplated, that some degree of urgency exists, that the cause of action is *prima facie* enforceable; and that the interests of creditors will not be prejudiced by the earlier institution of proceedings.[686] Subject to the above, the Master may before the first meeting give such directions to the provisional trustee as could be given to a trustee by creditors at a meeting.[687] Powers which may be exercised by a final trustee only if authorised by creditors, may be exercised by a provisional trustee only before the first meeting of creditors and with the consent of the Master. Certain powers may only be exercised with the consent of the Master.

14.3.3 Functions of the provisional trustee

The functions of a provisional trustee are essentially to take physical control or supervise the property and affairs of the estate until a final trustee is appointed. The provisional trustee has no power to convene meetings of creditors. When an important decision has to be taken, it is a matter of practice to call an informal meeting of creditors for their guidance. The actions of a trustee can be ratified retroactively by directions given at a formal meeting of creditors.[688] However, in *SAI Investments v Van der Schyff*[689] Nicholson J decided that a sale by a provisional trustee without the *prior* consent of the Master was a nullity which cannot be ratified by subsequent consent.

14.3.4 Duties of provisional trustee

The provisional trustee should interview the insolvent if possible. Section 18A of the Insolvency Act, inserted by the Insolvency Amendment Act 1993, added a further duty to be discharged by trustees, in particular provisional trustees. The provisional trustee must determine whether the names and date of birth of the debtor, identity number, marital status and, if married, the names, date of birth and identity number of the spouse are correctly reflected in the sequestration order. If such particulars are not reflected, or are incorrectly reflected, the provisional trustee must forthwith take all reasonable steps to obtain the correct particulars and transmit a certificate containing such particulars (and a copy of the sequestration order and his appointment as trustee) to every Deeds Office in South Africa. If

685 Insolvency Act, s 18(3). See *Klein v Levick; In Re Levick v Master of the High Court, Johannesburg* [2020] ZAGPJHC 306 (23 November 2020) for a discussion of the purpose of s 18(3).

686 *Warricker v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (W) 276G; *Van Zyl v Kaye* 2014 (4) SA 452 (WCC), para [47].

687 Insolvency Act, s 18(2).

688 *De Wet NO v Venter* 1998 (4) SA 694 (T).

689 1993 (3) SA 340 (N).

no provisional trustee has been appointed, or if the provisional trustee has failed to perform this duty, the final trustee must comply with these requirements.

14.4 Appointment, duties and powers of provisional liquidator

The appointment of a provisional liquidator is similar to the appointment of a provisional trustee discussed above. Like a provisional trustee, the functions of a provisional liquidator are essentially to take physical control and supervise the property and affairs of the company until the appointment of a final liquidator.

14.4.1 Powers of provisional liquidator

In practice the Master limits the provisional liquidator's powers to those set out in section 386(1)(a), (b), (c), (e) and (4)(f) of the Companies Act 1973.

The powers that may be exercised in terms of paragraphs (a) and (b) and without the leave of the court in terms of paragraph (c), are routine matters such as the signing of documents and the proof of claims.

Paragraph (e) provides that subject to the provisions of subsections (3),(4) and (5), the provisional liquidator has the power to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of their duties and without the authority of a resolution of creditors. As already indicated, many powers may not be exercised by a trustee without the authority of creditors.

14.4.2 Directions by the creditors or the Master

Subsection (3) provides that a liquidator in a winding-up by the court, with the authority granted by a meeting of creditors and members or contributories, or on the directions of the Master given under section 387, has the powers mentioned in subsection (4). Such directions by the Master arise only once the general meeting of creditors has been held and in practice the Master does not give a provisional liquidator the power in terms of subsection 1(d) to convene such a meeting. In practice creditors or the Master can therefore not give a provisional liquidator the powers in subsection (4). Included in these powers[690] is the exercise *mutatis mutandis* of the same powers conferred upon a trustee by section 35 (uncompleted acquisition of immovable property) and section 37 (effect of sequestration upon a lease), provided that the powers conferred by section 35 may not be exercised unless the company is unable to pay its debts. The actions of a liquidator can be ratified retroactively by directions given at a meeting of creditors.[691]

690 In subs (4)(g).
691 *De Wet v Venter* 1998 (4) SA 694 (T).

14.4.3 Directions by the court

In a winding-up by the court,[692] the court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned, or to do any other thing which the court may consider necessary for winding-up the affairs of the company and the distribution of its assets.[693]

14.4.4 Carrying on the business of the company

In terms of the proviso to subsection (4)(f) the liquidator may, if it is considered necessary,[694] without any authority carry on or discontinue any part of the business of the company, but the liquidator is not entitled to include the cost of any goods purchased in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business and there are funds available for payment of the cost of such goods after providing for the costs of winding-up. A liquidator should therefore limit purchases without authority to necessary purchases, and only if cash from the business is available to pay for the purchases. It is also advisable to consult informally with the majority of creditors in value before deciding on the continuation of a business and the purchase of goods.

14.4.5 Termination of leases and sale of property

The Master may, before the start of the general meeting, consent to the termination of any lease in terms of which the company is the lessee, or authorise the sale of property on such conditions as the Master may determine subject to the consent of secured creditors.[695] At any time before the general meeting the liquidator must, if satisfied that movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating the reasons for the recommendation.[696] A shareholder or director of a company under winding-up does not in general have the right to be heard prior to the Master taking a decision to authorise a sale in terms of section 386(2B).[697] If the authority to sell is

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692 See Companies Act 1973, s 351(2) and *Ex parte van den Berg: In re Riviera International* 2003 (6) SA 727 (W) for the powers of a liquidator in a creditors' voluntary winding-up.

693 Companies Act 1973, s 386(5). In *Van der Merwe v Moodliar and Related Matters* [2019] JOL 46350 (WCC) application was made for the reconsideration of an order granted more than four years earlier, extending the powers of the liquidators under s 386(5). The court held that the order extending the powers of the liquidators was followed by a series of acts by the liquidators, which could not now be easily undone. The court was of the view that not only had no basis for reconsideration been established, but that the application was an abuse of process on the part of those interests. The application was dismissed with a punitive costs order.

694 Henochsberg s 386, under subs 4(f), submits that this also means "necessary for the beneficial winding-up of the company".

695 Companies Act 1973, s 386(2) and (2B).

696 *Ibid*, s 386(2A).

697 *Jung-Fu Tsai v Advocate W Sekete* (17429/2015) [2015] GP (21 July 2015); If it is accepted in light of *Friedland v The Master* 1992 (2) SA 370 (W)) that at the very least the directors had a right to be heard before a decision was taken in light of the fact that the process came to the directors' attention prior to the decision having been taken, the question arises what the prospects of success were to successfully review the decision of the Master.

sought prior to the confirmation of the provisional liquidation order, the written consent of the shareholders and directors of the company must be filed with the Master and, if the property is subject to a secured claim, such as a mortgage bond, the written consent of the secured creditor must also be filed. The granting of an order by the court that issues the provisional winding-up order to an as yet unappointed and unidentified provisional liquidator, authorising them to dispose of assets, is invalid and such an order has no effect. Only the Master can grant permission in terms of section 386(2A) and (2B) of the Companies Act 1973 to sell property before the general meeting. If the Master refuses permission, the Master can vest the provisional liquidator with the power in terms of section 386(5) to approach the court for the necessary authority,[698] failing which the court cannot entertain an application for extension of powers.[699]

14.5 Accounting by and remuneration of provisional trustee or liquidator

14.5.1 Accounting by provisional trustee or liquidator

As a rule, the provisional trustee or liquidator is appointed as (final) trustee or liquidator after the first meeting. In such cases the liquidation and distribution accounts of the trustee or liquidator deal with their administration as provisional and final trustee or liquidator.

If the provisional appointee is not appointed finally, there is a practice that the provisional appointee should account to the final appointee. In order to have the security bond reduced to nil,[700] the provisional appointee would in the past lodge a certificate by the final appointee with the Master that the provisional appointee has accounted to the final appointee to the latter's satisfaction. In contrast to this practice, the High Court recently decided that a provisional appointee must advertise the account to lie for inspection and the Master must confirm the account like any other account.[701]

14.5.2 Order not made final or set aside

If the provisional order is not made final, or the final order is set aside, the provisional appointee must account to the debtor or the company and to the Master in order to have the security bond reduced to nil. The provisional appointee will lodge an acknowledgement by the debtor (or the directors of the company) that the assets have been handed over and an affidavit that the costs have been paid.[702]

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698 Before the court will extend powers it must be necessary, as opposed to merely useful, to exercise these powers before creditors can give directions – *Moodliar NO v Hendricks* [2009] JOL 25406 (WCC) or 2011 (2) SA 199 (WCC), paras [35] to [36].

699 *Turnover Holdings (Pty) Ltd v SAPHI (Pty) Ltd* 1997(1) SA 263 (T).

700 In order to hold the guarantor liable for past indiscretions by the provisional appointee, the security bond will not be cancelled.

701 *Strydom v Master of the High Court* [2011] JOL 26650 (GNP), paras [28] to [31].

702 In *Ansafon (Pty) Ltd v The Master, Northern Cape Division* (513/2013) [2014] ZASCA 170 (14 November 2014), the applicant for an order to set aside the liquidation order was directed, prior to the return day of a rule *nisi*, to provide security in a format acceptable to the Registrar of the Court "in respect of the fair and

14.5.3 Remuneration of provisional appointee

If the provisional appointee is appointed finally, they charge remuneration for the administration as a whole when the liquidation and distribution accounts are lodged. If the provisional appointee is not appointed finally (whether another person is appointed or the provisional or final order is set aside) the provisional appointee is entitled to reasonable remuneration determined by the Master, but must not exceed the rate of remuneration of a final appointee. According to a decision of the High Court, the provisional appointee is not entitled to draw remuneration until the account that reflects the remuneration has been advertised and confirmed.[703] The remuneration of the final trustee is discussed elsewhere in the notes.[704]

14.5.4 Master's fees

Master's fees are payable only if a final sequestration order or liquidation order has been made and a liquidation and distribution account has been lodged by the trustee or liquidator.[705]

14.6 Provisional trustee's powers regarding uncompleted contracts

In principle the provisional trustee has the same powers as a trustee, including the right of election to abandon or to continue with a pre-sequestration contract entered into by the insolvent. The provisional trustee has no power to convene meetings of creditors. When an important decision has to be taken, for instance relating to the enforcement or abandonment of an uncompleted contract, it is a matter of practice to call an informal meeting of creditors for their guidance in that regard. This should enable the provisional trustee to make recommendations to the Master, who may give directions. Although a provisional trustee in principle has the same rights and duties as a trustee, they are not entitled to sell any property belonging to the estate without the authority of the court or the Master.[706] In *Botha v Van Reiche*[707] it was decided that a provisional trustee may exercise their own discretion where the Master fails to give any directions.[708] The court therefore applied this principle in the case of an election in terms of section 35 of the Insolvency Act (insolvency of purchaser of immovable property).

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reasonable administration fees and expenses of the joint liquidators relating to the administration of the first respondent as determined by the Master of this court". The court ruled that a determination still had to be made by the Master.

703 *Strydom v Master of the High Court* [2011] JOL 26650 (GNP), paras [27] – [32]. See also *Warricker v Master of the High Court Johannesburg* (28265/15) [2017] GJ (14 March 2017), para [19].

704 See Ch 21 of these notes.

705 Insolvency Act, Third Sch and Regulations for the Winding-up and Judicial Management of Companies, Ann CM 103.

706 Insolvency Act, s 18(3).

707 1962 (1) SA 863 (T).

708 Note should however be taken of the words of Wessels J in *Shapiro's Trustee v Livingstone* 1907 TS 957, at 959: "Provisional trustees have of course the powers of finally appointed trustees, but their powers should be exercised with a certain amount of circumspection, because they are binding creditors without their knowledge and without their consent."

Self-Assessment Questions

Question 1
"It would be fair to state that the appointment of insolvency practitioners in insolvent estates in South Africa is a controversial subject to deal with. This is not due to the complexity of the legislative provisions or their practical application, but due to the continuous allegations of the irregularities that accompany such appointments."

Assume that you have been appointed to investigate the possible amendment of the manner in which practitioners have been appointed in order to ensure that the appointment methods are constitutionally sound. Briefly set out what your findings would be. (In your answer you should also refer to the current legislative provisions; recent legal developments in this field as well as all relevant case law). [15]

Question 2
In terms of section 55 of the Insolvency Act, the Act declares when a person is disqualified from being appointed as a trustee. Critically discuss the purpose of this provision as well as mention and explain four such disqualifications. [8]

Question 3
Critically discuss the power of the Master of the High Court to remove a trustee or liquidator from office. [8]

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 15 – APPOINTMENT AND POWERS OF FINAL TRUSTEE

15.1 General

The trustee (and liquidator) is appointed by the Master after the first meeting.[709] The final trustee has wide powers.

The trustee may not exercise some of the powers without the consent of the Master. They include –

- the entering of a *caveat* in the Deeds Office;[710]
- application to set aside directions by creditors;[711]
- resignation or absence from the Republic for a period longer than 60 days;[712]
- payment of an allowance to the insolvent and the family of the insolvent before the second meeting,[713]
- the sale of property before the second meeting;[714] and
- the destruction of documents.[715]

The following provisions of the Insolvency Act expressly provide that the powers in question may be exercised only with the authority of creditors (obtained at a meeting), or the Master:

- obtaining legal advice;[716]
- the compromise of debts of more than R1,000 due to the estate;
- submission to arbitration;

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709 See the discussion below in Ch 18 dealing with meetings. No judge of the High Court has authority to appoint a trustee or liquidator or recommend the appointment of a person as trustee or liquidator – *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP). Any such appointment is a nullity and need not be set aside – *Master of the High Court NGP v Motala* (172/11) [2011] ZASCA 238 (1 December 2011); [2012] JOL 28554 (SCA); 2012 (3) SA 325 (SCA), para [14]. Where the court ordered companies to be treated as a single entity, the court is not entitled to appoint a liquidator for the single entity – *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 (SCA), paras [38] and [39].

710 Insolvency Act, s 18 B(1).

711 *Ibid*, s 53(4). A creditor can also apply to set directions aside and this includes an unproved creditor with a "contingent" claim – *Pine Village Home Owners Association Ltd v The Master* 2001 (2) SA 576 (SECLD).

712 Insolvency Act, s 61.

713 *Ibid*, s 79.

714 *Ibid*, s 80*bis*.

715 *Ibid*, s 155.

716 *Ibid*, s 73.

- admission of claims;[717] and
- the continuation of a business.[718]

Creditors may prescribe the manner of and the conditions for the sale of property after the second meeting[719] and must consent if the trustee takes over security at the value placed thereon by the creditor when proving its claim.[720]

15.2 Directions by the Master

If creditors have given no directions at the second meeting, the Master may give directions.[721] Subject to directions given by the Master, only a direction given by creditors at a meeting will be binding on a trustee.[722]

15.3 Directions to make election regarding acquisition of immovable property

It is not clear whether directions by creditors are necessary for the exercise of the following powers. Meskin submits that the trustee may make the election in terms of section 35 (uncompleted acquisition of immovable property) or section 37 (determination of leases) only upon a direction by creditors or the Master in terms of section 81(3), or one given by the court. However, when Meskin discusses the common law election by the trustee in respect of other contracts, it is not stated clearly whether directions by the Master or creditors are required. Section 81(3) provides that creditors *may* give directions on matters reported to them under section 81(1)(e), (f), (g), (h) or (i). Paragraph (e) refers to any allowance made to the insolvent in terms of section 79, paragraph (f) to any business carried on, on behalf of the estate, paragraph (g) to legal proceedings instituted by or against the insolvent or which may be pending or threatened against the estate, paragraph (h) to any matters mentioned in section 35 or 37 (see above), and paragraph (i) to any matter regarding the administration or realisation of the estate requiring the direction of creditors. It appears to be prudent to obtain the directions by creditors on any of these matters, if possible.

717 *Ibid*, s 78.
718 *Ibid*, s 80.
719 *Ibid*, s 82.
720 *Ibid*, s 83(11).
721 *Ibid*, s 81(3).
722 Insolvency Act, s 53(3).

Self-Assessment Question

Question 1
Mention four powers a trustee may not exercise without the consent of the Master. (4)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 16 – POWERS OF FINAL LIQUIDATOR

16.1 General

The liquidator has the powers of a provisional liquidator with the important difference that the final liquidator can convene a general meeting to obtain directions by creditors on the wide powers referred to in section 386(4) of the Companies Act. Before the general meeting, the final liquidator has the same limited powers as a provisional liquidator.

Section 351(2) of the Companies Act 1973 provides that, unless otherwise provided, in a creditors' voluntary winding-up the liquidator may without the sanction of the court exercise all powers by the Act given to the liquidator in a winding-up by the court, subject to such directions as may be given by the creditors.

In terms of section 81(4) of the Companies Act 2008, a liquidator appointed in a voluntary winding-up may exercise all powers given by the Act, or a law contemplated in Chapter 14 of the Companies Act 1973, to a liquidator in a winding-up by the court –

(a) without requiring a specific order or sanction by the court; and

(b) subject to any directions given by-

(i) the shareholders of the company in a general meeting, in the case of a winding-up by the company; or

(ii) the creditors, in the case of a winding-up by creditors.

16.2 Directions by creditors and the Master

The liquidator must, subject to the provisions of the Companies Act, have regard to any directions given by resolution of the creditors or members or contributories.

In terms of section 387(4) "any person aggrieved by any act or decision of the liquidator may apply to the court after notice to the liquidator and thereupon the court may make such order as it thinks just".

The words "the court may make such order as it thinks just" in section 387(4), give the courts an unfettered judicial discretion. In the absence of fraud or a failure to act in good faith, the court will not interfere in the day-to-day administration of the company's estate unless the liquidator has acted in a way in which no reasonable liquidator would have acted, or it is shown that the liquidator, though acting in good faith, did "something so utterly unreasonable and absurd that no reasonable man would have done it". The test is an objective one, the question being how a reasonable liquidator would have acted in the

circumstances prevailing at the time.[723] The question arose as to whether a party will have standing to bring an application in terms of the section if there is no other provision or avenue open to bring a dispute to the attention of the court other than an application in terms of section 387(4). Having regard to the language used in the crafting of section 387(4), the context in which the provision appears and the apparent purpose to which it is directed, namely an effective process of winding-up, the court found that an interpretation to the effect that a party is non-suited would violate section 34 of the Constitution.[724]

The question to be decided in *Kaniah v WPC Logistics (Joburg) CC (In Liquidation)*[725] was whether the liquidators, by following the resolution taken at the meeting of creditors and members, acted in a way that no reasonable liquidator could have acted, requiring interference by the court. The court had to consider what was or was not reasonable in any given circumstance. That meant "considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide".[726] The court found that the liquidators acted *bona fide* throughout; a reasonable liquidator should not only consider the interests of members but also of creditors; the conduct of the liquidators could not be said to be *mala fide* or that they acted in a way in which no reasonable liquidator would have acted.

If resolutions have been submitted by the liquidator for directions at a general meeting but no directions have been given by creditors and members, or there is a difference between the directions of creditors and members or contributories, the liquidator may apply to the Master for directions. In practice, members or contributories do not appear at the meetings of companies liquidated by the court. Where the Master refuses to give directions, or in regard to any other matter arising under the winding-up, the liquidator may apply to the court for directions.[727] Section 387(3) of the Companies Act provides that where the Master has refused to give directions, or in regard to any other particular matter arising under the winding-up, the liquidator may apply to the court for directions. Under such an application, the views of the Master and creditors should be taken into account. Liquidators should obviously be slow to have recourse to this option, but it is justified where there is potential conflict as to a decision to be made – for instance which of two offers to purchase should be accepted.[728]

723 *Firstrand Bank Ltd v Cowin* 2018 (3) SA 322 (GP), para [47].
724 At para [56].
725 (4973/2014) [2017] ZAFSHC 209 (2 November 2017), para [27].
726 Quoted from the judgment of Watermeyer CJ in *Vanderbijl Park Health Committee v Wilson* 1950 (1) SA 447 (AD), at p 458.
727 Companies Act 1973, s 387.
728 *Christensen v Tata Steel Limited* [2016] JOL 36219 (KZD), para [9].

Self-Assessment Question

Question 1

In terms of section 387(4) "any person aggrieved by any act or decision of the liquidator may apply to the court after notice to the liquidator and thereupon the court may make such order as it thinks just". What factors do you consider might influence the willingness of the court to remove the trustee from office? (6)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 17 – GENERAL DUTIES OF TRUSTEE OR LIQUIDATOR

17.1 Introduction

The duty of the provisional trustee and trustee to determine whether the particulars on the sequestration order are correct and to inform the Deeds Offices of their findings, has already been dealt with. Further duties will be discussed in subsequent Chapters of these notes (for example, the duty to convene meetings, to report to creditors, examine claims, to report on rehabilitation, to lodge accounts, etc).

No attempt will be made to deal fully with all the duties of a trustee or liquidator in these notes. This chapter deals with important duties not dealt with elsewhere in these notes. The position described in respect of trustees also applies to liquidators, unless the contrary is indicated.

17.2 Taking charge of property

17.2.1 General

Section 69(1) of the Insolvency Act provides that the trustee (which includes a provisional trustee) must, as soon as possible after appointment but not before the sheriff has made its inventory, take into their possession or under their control all movable property, books and documents belonging to the estate and furnish the Master with a valuation of the movable property made by an appraiser appointed by the Minister of Justice in terms of section 6 of the Administration of Estates Act 1965, or a person approved by the Master for that purpose.

17.2.2 Take possession before sheriff has made an inventory

The provision that the trustee must not take possession before the sheriff has made an inventory is usually ignored in practice. It is imperative that the trustee take possession of the assets as soon as possible. Sheriffs frequently fail to prepare an inventory, or take too long before they do so. Many sheriffs apparently consider that an attachment should be made only after the final sequestration order has been issued. A considerable time elapses before the deputy sheriff receives the documents.

17.2.3 Trustees make inventory soon after appointment

In practice trustees make an inventory of the property of the insolvent's estate as soon as possible after their appointment. From time to time there are complaints that not all the movable assets have been realised for the benefit of the insolvent estate. As a rule it is not possible to investigate such complaints properly, or for the trustee to avoid arousing suspicion if only the trustee or representative of the trustee and the debtor or employees of the debtor were involved. Trustees are also faced with the problem that they have not complied with the clear provisions of section 69. Meskin submits that the trustee should obtain a court order to force the sheriff to comply with its duties but this may be too costly

and /or time-consuming in practice. If it is feasible, the trustee should endeavour to arrange for the sheriff to be present when the trustee takes possession of movable assets.[729]

17.2.4 Interested persons may be present and insolvent must give explanation

Section 19(2) of the Insolvency Act provides that any person interested in the insolvent estate or a representative of such a person may be present when the sheriff makes the inventory. Section 19(1) provides that if the insolvent is present the insolvent's explanation, if any, in respect of the list of all books and records should be endorsed on the list by the sheriff. If it is not acceptable to wait until the sheriff has made an inventory, the trustee should consider inviting major creditors to be present and endorse the insolvent's comments, if any, on the list of books and the inventory prepared by the trustee or trustee's representative.

17.2.5 Liquidator must take possession of assets

Section 361 of the Companies Act provides that the liquidator must forthwith recover and reduce into possession all the assets and property of the company. Winding-up Regulation 2 provides that the sheriff must attach movable assets of a company under liquidation if the Master so directs.

17.2.6 Custody of books until disposed of

17.2.6.1 Insolvency Act

Section 155 of the Insolvency Act provides that the trustee may after six months have elapsed since the confirmation of the final account, with consent by the Master in writing, destroy all books and documents in his possession relating to the estate.

17.2.6.2 Companies Act 1973

Section 422 of the Companies Act provides that when a company has been wound up and is about to be dissolved, the books and papers may in the case of a winding-up by the court be disposed of by the liquidator in such way as the Master may direct. After five years from the date of the dissolution of the company, no responsibility rests on the liquidator by reason of the books and papers not being available.

The procedure to dissolve a company is put into motion by the Master after confirmation of the final account.[730]

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729 Meskin para 5.17.

730 Companies Act 1973, s 419. *Pieters v The Master* 2004 (3) SA 593 (C) dealt with the setting aside of the dissolution of a company. Confirmed on appeal in *Pieters v The Master* (979/2018) [2019] ZASCA 118 (23 September 2019). The Master lacks the power to reinstate the liquidator after discharge.

17.2.6.3 Notice in Government Gazette of destruction of records

Although the Insolvency Act does not provide for a notice in the *Government Gazette*, the regulations prescribe a form in this regard.[731]

17.2.7 Claim by trustee where insolvent has acquired possession of property

In terms of section 24(2) of the Insolvency Act, whenever an insolvent has acquired the possession of property, such property is, if claimed by the trustee, deemed to belong to the estate unless the contrary is proved. However, if a person who became the creditor of the insolvent after sequestration alleges that such property does not belong to the estate and claims a right thereto, the property is deemed not to belong to the estate unless the contrary is proved.

17.2.8 Search warrant in terms of section 69

17.2.8.1 General

While a search warrant under section 25(1) of the Criminal Procedure Act 1977 may be issued only to a police official, a search warrant under s 69(3) of the Insolvency Act may be issued collectively to the trustees of an estate under sequestration, the Sheriff and to the police.[732] As section 69(4) only requires a warrant to be executed and not issued "in a like manner as a warrant to search for stolen property", the provisions relating to the issue of warrants in criminal proceedings are of no relevance to a section 69 warrant. Section 69 search warrants must specify the name of the sheriff and the names of the police officers who will execute the warrant and the persons identified in the warrant must take responsibility and account for the proper execution of the warrant. [733] The trustee or provisional trustee, who has reason to believe that any movable property, book or document belonging to the estate is being concealed or otherwise unlawfully withheld, may apply in terms of section 69 for a search warrant to a magistrate with jurisdiction.[734] The purpose of this provision is to enable the trustee to obtain the speedy possession of goods which the trustee believes on reasonable grounds to be assets of the estate.[735] Documents on the hard drive of a computer can be included in such a warrant.[736]

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731 See Form 7.

732 *Naidoo v Kalianjee* 2013 (5) SA 591 (GNP). Confirmed in *Naidoo v Kalianjee* 2016 (2) SA 451 (SCA).

733 *De Beer v Dundee* (5148/2020P) [2020] ZAKZPHC 70 (19 November 2020) para [29] - [31].

734 Where assets were attached in terms of s 69(3) and (4) and kept in possession by the trustees, an applicant for *mandament van spolie* did not have possession for the purpose of the *mandament* (spoliation is the wrongful deprivation of another's right of possession) – *Herselman v Matsepe* (4973/2014) [2017] ZAFSHC 209 (2 November 2017).

735 See *Fey v Van der Westhuizen* 2005 (2) SA 236 (C) for a case where a trustee was granted an interdict preventing the dissipation of assets held by a trustee for a trust pending proceedings for delivery of assets from the trust to the insolvent estate.

736 *Le Roux v Viana* 2008 (2) SA 173 (SCA).

17.2.8.2 Trustee need not prove prima facie *case*

The trustee need not prove a *prima facie* case. If the trustee can prove this, he may obtain a court order in terms of the normal procedures. The magistrate's decision to issue the warrant is not dispositive of any ownership rights. If assets seized in execution of the warrant are shown not to have been the property the debtor they are liable to be returned, but that is no reason to invalidate a warrant that relates to assets of the debtor.[737] Although it is a salutary practice for trustees to go upon oath to support their applications for warrants, the statement under oath required in section 69(3) need not be that of the trustee.[738] The onus of proving ownership is on the person who wishes to reclaim the assets. The trustee is entitled to the order if after an objective investigation there are reasonable grounds to suspect that the property belongs to the estate and the trustee satisfies the magistrate that such grounds exist.[739]

17.2.8.3 Property held openly and hearing of other party

Putter v Minister of Law and Order[740] held that when a person holds property openly, that person must be heard before the magistrate makes an order.[741]

In *Philips Business Services CC v De Villiers*[742] it was held that the other party need not be heard, as the section was not a method of deciding actual entitlements.

The decision in *Kerbyn 178 (Pty) Ltd v Van den Heever*[743] confirmed the following:

(a) section 69(3) of the Insolvency Act applies equally to the winding-up of a company;

(b) the section is not a means to decide entitlement to property and a warrant cannot be set aside as invalid because property does not belong to the insolvent estate;

(c) the warrant does not confer authority on the trustee or liquidator to remain in possession of the attached property, but an interdict can be issued that prohibits dealing with

737 *Naidoo v Kalianjee* 2016 (2) SA 451 (SCA), paras [15] and [17].
738 *Snyman v Simon* 2001 (2) SA 998 (W).
739 *Bruwil Konstruksie v Whitson* 1980 (4) SA 703 (T) 711A; *Naidoo v Kalianjee* 2016 (2) SA 451 (SCA), para [13]. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* CCT1/2000, dated 25 August 2000, the Constitutional Court held that a provision that judicial officers may grant a warrant of search and seizure where there are reasonable grounds that an offence, which might be a specified offence, has been committed, is constitutional. *Cf Deutschmann v Commissioner for the SARS: Shelton v Commissioner for the SARS* 2000 (2) SA 106 (ECD) at 124; *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596 (Tk).
740 1988 (2) SA 259 (T). *Cf*, *FNB of SA Ltd v Cooper* 1998 (3) SA 894 (W).
741 At 261D.
742 1991 (3) SA 552 (W) 556G-557E.
743 2000 (4) SA 804 (W).

assets[744] pending the final determination of an action for recovery of assets, for example because of fraud (*actio Pauliana*);

(d) the legislature must have intended to exclude a right by the affected person to be heard before the warrant is issued, as such a right would, in many cases, defeat the very purpose of the section;

(e) there is no authority that recognises a "business" as a discrete form of property separate from its component parts.

In *Cooper v First National Bank of SA Ltd*[745] the Supreme Court of Appeal decided that having regard to the known facts in each case when the warrant was applied for, the question was whether the legislature necessarily intended that the affected person should not be heard.

Factors that indicate that notice should be given are if items are openly held under a *bona fide* and reasonable claim of right to own or lawfully possess assets, or cases where there is no danger of loss resulting from the possession of an item pending determination of any dispute concerning rights thereto.

Factors that indicate that notice could be dispensed with are when the object and purpose of section 69(1) would be defeated by giving notice, or where assets are concealed,[746] or the identity of the affected person is not known or cannot reasonably be ascertained.

17.2.8.4 Does section 69 apply to companies?

Putter v Minister of Law and Order[747] held that the liquidator of a company is not allowed to use section 69 of the Insolvency Act but should institute an ordinary action or other legal proceedings.[748] It is submitted that Meskin is correct when stating that no reason comes to mind as to why the Legislature should not have intended the machinery under section 69(2), (3) and (4) of the Insolvency Act to be available in a winding-up to assist the liquidator to discharge his duty in terms of section 391 of the Companies Act to obtain possession of the assets and property of the company. The *Kerbyn* case, discussed above, agreed with this view.

17.2.9 Recovery of property in terms of section 23

Section 23(11) of the Insolvency Act provides that any property claimable by the trustee from the insolvent under section 23 may be recovered from the insolvent by writ of execution

744 See *Carmel Trading Co Ltd v Commissioner, South African Revenue Service* 2008 (2) SA 433 (SCA) and *Gainsford v Scharrighuisen* Case No 20862/2011, High Court Cape Town, 24 August 2012 regarding preservation and anti-dissipation orders.

745 2000 (4) All SA 597 (SCA); 2001 (3) SA 705 (SCA). This case overruled cases such as *Philips Business Services CC*, discussed above, and *Advance Mining Hydraulics (Pty) Ltd v Botes* 2000 (1) SA 815 (T).

746 *Naidoo v Kalianjee* 2016 (2) SA 451 (SCA), para [9].

747 1988 (2) SA 259 (T). *Cf*, *FNB of SA Ltd v Cooper* 1998 (3) SA 894 (W).

748 At 261H. The *Bruwil Konstruksie* case above at 711A described the provision as "draconian".

issued by the registrar upon the production of a certificate by the Master that the property is so claimable. In *De Hart v Klopper and Botha*[749] it was stated that this "drastic and extraordinary" procedure was designed for simple, straightforward cases and was not intended to be used in cases where there were difficult or substantial disputes of fact concerning the trustee's claim to the property or moneys. It is submitted that this subsection applies also to property claimable by a provisional trustee.

17.2.10 Interrogation by trustee

The trustee may interrogate any person "who is known or upon reasonable ground believed to be or to have been in possession of any property which belonged to the insolvent", or any person who in the opinion of the presiding officer may be able to give material information concerning property of the estate. Any such evidence given is admissible in any proceedings against the person who gave the evidence.[750] There is no special cautionary rule about testimony garnered at a section 417 enquiry.[751] Interrogations are discussed elsewhere in the notes.[752]

17.2.11 Insurance for estate assets

In *Macadamia Finance Ltd v De Wet*[753] it was decided that a liquidator may be held liable if the company under the liquidator's control should suffer damages as a result of their failure to insure assets. When the case went on appeal, the Appeal Court did not give a decision on the question whether a liquidator had a duty to insure assets, but confirmed the decision of the court *a quo* that a liquidator had no authority to use the assets of a company to insure the assets of another company of which they were not the liquidator.[754] The court said that it could be argued that the liquidators had a duty to protect the value of the shares in the company by insuring the underlying assets, namely the macadamia plantations. There is no duty on the liquidator of a company to insure assets of a wholly owned subsidiary of the company.[755] It is advisable for a trustee to determine whether there is adequate insurance cover for assets and to arrange cover where necessary.

17.3 Administration of assets

17.3.1 Book with record of all receipts

Section 71 of the Insolvency Act provides that immediately after appointment the trustee (or provisional trustee) must open a book wherein the trustee enters as soon as possible a

749 1969 (2) SA 91 (T).

750 Insolvency Act, ss 64 and 65. *Cf* Companies Act 1973, ss 414 and 415.

751 *A Melamed Finance (Pty) Ltd (In Liquidation) v Harris* (2016/A5028) [2017] GJ (23 June 2017), para 5.1. The absence of other corroborating documentation does not dent the effect of the acknowledgement of a claim at the enquiry. That acknowledgement is sufficient proof of the claim (at paras [12] and [14]).

752 See Ch 20 below.

753 1991 (4) SA 273 (T) 279J-280A.

754 *Macadamia Finance BK v De Wet* 1993 (2) SA 743 (A).

755 *Cilliers v Steenkamp* [2016] JOL 34781 (WCC), para [33].

statement of all moneys, goods, books, accounts and other documents received on behalf of the estate. The Master may at any time direct the trustee in writing to produce the book (or books) for inspection and any creditor who has proved a claim or (if the Master so orders) any creditor or a surety for the trustee, may inspect the book at all reasonable times. Section 393(2) and (3) of the Companies Act 1973 contains similar provisions but state that a creditor or contributory may, subject to the control of the Master, inspect the book or other record.

17.3.2 Banking account

17.3.2.1 General

Section 70 of the Insolvency Act provides that the trustee must open a cheque account in the name of the estate and deposit therein all amounts received on behalf of the estate. Moneys not immediately required for the payment of any claim may be transferred to a savings account or placed on interest-bearing deposit. The trustee should, of course, select deposits that can be withdrawn as needed for the administration of the estate. It is submitted that the trustee should transfer funds from the savings account or interest bearing deposits to the cheque account and that all payments should be made from the cheque account. All cheques or orders drawn upon any such account must contain the name of the payee, the reason for the payment and must be drawn to order. Provision is made for supervision by the Master and the Master may, after notice to the trustee, order that a balance and further receipts in an account should be paid over to the Master's Guardian's Fund. A trustee who without lawful cause retains money exceeding R40 belonging to the estate, or knowingly permits their co-trustee to retain such a sum longer than the earliest day after its receipt on which it was possible for the trustee or co-trustee to pay that money into a bank, or who uses or knowingly permits a co-trustee to use any property of the estate except for the benefit of the estate is, in addition to any other penalty, liable to pay into the estate an amount equal to double the amount so retained or the value of the property so used.[756] Section 394 of the Companies Act contains similar provisions.[757]

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[756] *Matsepe v Master of the High Court Bloemfontein* [2019] JOL 44812 (FB), para [64], stated that failure to comply with the provisions of s 394(7) of the Companies Act 1973 [any liquidator who without lawful excuse, retains or knowingly permits his co liquidator to retain any sum of money exceeding forty rand belonging to the company concerned longer than the earliest day after its receipt on which it was possible for him or his co-liquidator to pay the money into the bank], may *per se* justify the removal of a liquidator by the Master under s 379(1) of the Act.

[757] In *Standard Bank of South Africa Limited v Master of the High Court, Eastern Cape, Port Elizabeth* [2018] 4 All SA 871 (ECP), PW Harvey invested, as part of its business, funds placed with it on behalf of its clients, in this case the liquidator of a company, with certain financial institutions and earned a commission on the investments. Part of this commission was paid to the son of the liquidator. It was held that what PW Harvey did with its agency fees was its own business. Giving a portion thereof to the son of the liquidator was not unlawful and did not taint the conduct of the liquidator with any degree of illegality.

17.3.2.2 Electronic fund transfer

There is no doubt that electronic fund transfers (EFT) are more convenient and secure than payments by cheque[758] and some practitioners use EFT to make payments. However, sections 70 and 394 do not make provision for EFTs.

17.3.2.3 Is it legal for a trustee to pay creditors by electronic fund transfer?

In view of the provision in section 70(4) that all cheques or orders drawn upon an account must contain the name of the payee and the cause of payment and must be drawn to order and be signed by every trustee or duly authorised agent, it is argued that electronic fund transfers are not allowed. It is submitted that section 70(4) deals with payment by cheque and does not prohibit electronic fund transfers. The Chief Master has issued a directive which contains the following:[759]

Payment by an estate representative (defined to include a trustee and a liquidator) other than by cheque (for instance EFT), is accepted subject to the following:

- the estate representative is responsible for ensuring that all payments made are lawful;
- every payment must contain the name of the payee, the cause of payment and other requirements specific to that payment, for example the reference number and the name of the Master's Office in respect of Master's Fees;
- payments may only be made to a bank account designated by the payee;
- an affidavit contemplated by section 35(12) of the Administration of Estates Act 1965 by the estate representative, in which they declare that a creditor was paid or that an heir received their share, may be accepted by the Master *in lieu* of a receipt by the beneficiary.

17.3.3 Legal advice on legal problems experienced by trustees

As already stated in these notes, the trustee or liquidator, in a certain sense, steps into the shoes of the insolvent or company.[760] It is impossible to deal with all the legal problems that an insolvency practitioner may experience. A trustee is entitled in terms of section 73(1) of the Insolvency Act to obtain legal advice and employ lawyers to institute or defend legal proceedings if the trustee has been authorised to do so by the Master or creditors. This

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758 However, EFT payments involve risks that need to be managed. *Cf* S K Myemane "Are you losing money through EFTs?" June 2014 *De Rebus*.

759 Chief Master's Directive 5 of 2012, para 3.2.

760 A trustee or liquidator has to take the debtor's rights and obligations as he or she finds them. It follows that the trustee or liquidator's ability to enforce a debtor's rights is subject to any defence that is available against the debtor before its sequestration or liquidation – *MEC for Local Government and Traditional Affairs, Kwazulu-Natal v Botha* 2015 (2) SA 405 (SCA), para [20].

section applies to a liquidator of a company as well. (Problems in respect of the allowance and taxation of legal fees will be discussed when administration costs are dealt with later in these notes.)

17.3.4 Liability for negligence

Trustees or liquidators can be held personally liable for negligence causing loss to others arising out of the performance of their duties.[761]

17.3.5 Continuation of employment by trustee or liquidator

A trustee or liquidator who wishes to continue the employment of the employees of the insolvent or company in liquidation must act with care. It should be made clear to employees that their employment is on a monthly or other temporary basis and no expectation should be created that they are entitled to regular employment.[762] The effect of sequestration on employment contracts is discussed in Chapter 13 of these notes.

17.4 Recovery of debts

17.4.1 Notice to debtors to pay debts

The notice of the second meeting in the *Government Gazette* simultaneously gives notice in terms of section 77 of the Insolvency Act that all persons indebted to the estate must pay their debts forthwith to the trustee. If the person fails to do so, the debts may be recovered by the trustee, if need be by legal proceedings. The authority needed to bring legal proceedings has been discussed earlier in these notes.

17.4.2 Acceptance of offer of part payment or extension

Section 78(1) of the Insolvency Act provides that the trustee may accept from a debtor who is unable to pay a debt in full, any reasonable part of the debt in discharge of the whole debt, or grant the debtor an extension of time in so far as this is compatible with the trustee's duty to lodge liquidation and distribution accounts with the Master. However, if the debt exceeds R1,000 the trustee may not accept a part of the debt in discharge of the whole debt unless the trustee has been authorised to do so by the creditors or the Master. It has been held that creditors or the Master must consider each debtor individually and that a general authority to settle debts is invalid.[763]

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761 *Kerbels Flooring and Carpeting (Pty) Ltd v Shrosbree* 1994 (1) SA 655 (SEC).

762 *Cf Administrator, Natal v Sibiya* 1992 (4) SA 532 (A).

763 *George Hartman & Kie v Reitz* 1958 (4) SA 514 (O), *Cohen v Lawrence*, unreported decision 2187/91, Witwatersrand Local Division, at p 39.

17.5 Continuation of business

17.5.1 Continuation by liquidator

The power of a provisional liquidator or liquidator to carry on the business of the company without the authority of creditors, has been dealt with above. The provisional liquidator should continually monitor the position to ensure that only necessary purchases are made and that cash from the business is available to pay for such purchases.

17.5.2 Continuation by trustee

A provisional trustee or trustee may only continue a business with the authority of creditors or the Master and, unless creditors have otherwise directed, the trustee must purchase for cash only out of the takings of the business.[764] The particulars that must eventually be reflected in the trading account should be kept in mind, namely the value of the stock-in-hand at the date of insolvency, the value on the date when the account is made up and the daily totals of receipts and payments.[765]

17.6 Sale of assets

17.6.1 Sale by provisional trustee

A provisional trustee may not without the authority of the Master sell property of the estate.[766] An offer subject to a suspensive condition that the sale must be approved by Master becomes a valid sale agreement once approved by the Master.[767] The Master may at any time before the second meeting of creditors authorise the sale of property on such conditions and in such manner as the Master may direct.[768] If the Master is approached, section 18(3) must be read with section 80*bis* and if the Court is approached in terms of s18(3) for the sale of property of the insolvent estate, "such sale shall furthermore be after such notices and subject to such conditions as the Master may direct." The two sections are not in conflict with each other. [769]

The authorisation by the Master in terms of section 80*bis* is an administrative act within the meaning of the Promotion of Administrative Justice Act 2000. As a result, even if the Master's authorisation is unlawful, it remains valid and binding as it continues to have legally valid consequences until it is set aside.[770] Master's Directive No 28 (Pretoria) contains directives in respect of public auctions held on the conditions and in the manner directed by the Master.

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764 Insolvency Act, s 80.

765 *Ibid*, s 93 and Winding-up Regulations, para 3. See also Appendix A to these notes where the trading account is dealt with in detail, including examples.

766 Insolvency Act, s 18(3).

767 *Swart v Starbuck* 2016 (5) SA 372 (SCA), para [66].

768 Insolvency Act, s 80*bis* and Companies Act 1973, s 386(2A) and (2B).

769 *Van Dyk v Donnovan Theodore Majiedt Inc* (4070/2021) [2021] ZAFSHC 246 (22 October 2021) para [25].

770 *Swart v Starbuck* 2017 (5) SA 370 (CC), para [33].

17.6.2 Prescripts for sale of assets by trustee

Section 82 of the Insolvency Act provides that, subject to the provisions of section 83 (realisation of securities for claims) and section 90 (rights of the Land Bank),[771] the trustee must, as soon as they are authorised to do so at the second meeting, sell all the property of the estate in such manner and upon such conditions as creditors may direct.

Trustees take the estate as they find it and convert it into cash which they then distribute to the creditors. It is not the function of the trustee to speculate with the assets in the hope of improving their value, whether by delaying realisation or by expending money upon them.[772]

A deed of sale signed by some of the trustees but not by all of them is invalid, unless the sale is ratified or authorised by the remaining trustee or trustees.[773]

Section 82(1) is not applicable if the Master authorises a sale before the second meeting (or the general meeting in the case of a company).[774] The section[775] further provides that if creditors have not at the second meeting given any directions, the trustee must sell the property by public auction or public tender after notice in the *Government Gazette*[776] and after such other notices as the Master may direct and upon such conditions as the Master may direct.

17.6.3 Certain persons may not purchase without the permission of the court

Section 82(7) provides that the trustee or an auctioneer employed to sell property of the estate in question, or the trustee's or auctioneer's spouse, partner, employer, employee or agent, shall not acquire any property of the estate unless the acquisition is confirmed by an order of court.

17.6.4 Purchasers in good faith protected but others may be liable

Section 82(8) provides that if any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to the person in contravention of section 82, or if any person in good faith and for value acquired from a

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771 According to *Janse van Rensburg v Land- en Landboubank van SA* 2003 (5) SA 228 (T) 237F s 90 of the Insolvency Act applies to companies in terms of s 339 of the Companies Act 1973.

772 *Liu v Roering* (25713/2016) [2016] ZAGPPHC 205 (15 April 2016), para [17].

773 In *Shanmugam v Peter* (11638/2015) [2016] ZAKZDHC 16 (20 April 2016) it was held, with reference to the Alienation of Land Act 1981, s 2(1), that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto, or by their agents acting on their written authority, finds no application to a sale by liquidators as the liquidators are not agents as contemplated in the section.

774 *Cronje NO v Hillcrest Village (Pty) Ltd* 2009 (6) SA 12 (SCA), para [22]; *Swart v Starbuck* (48444/2008) NGHCP (3 December 2013), para 72; *Swart v Starbuck* 2016 (5) SA 372 (SCA). The Constitutional Court refused leave to appeal this decision in *Swart v Starbuck* 2017 (5) SA 370 (CC).

775 *Cronje NO v Hillcrest Village (Pty) Ltd* 2009 (6) SA 12 (SCA), para [22].

776 *Muller v De Wet NO* 2001 (2) SA 489 (W) decided that notice of a public auction must be given in the *Government Gazette*, whether the creditors have given directions as to the manner of the sale or not.

person mentioned in subsection (7) any property which the last-mentioned person acquired from an insolvent estate in contravention of that subsection, the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of section 82. Section 82 applies to companies.[777] Section 82(8) does not apply if the Master authorised the sale in terms of section 80*bis*.[778] Where property is sold without a resolution by members, the agreement is not an administrative action as the liquidator does not take a decision but is granted authority by the creditors to sell and PAJA is therefore not applicable. In such a case in practice, the court declared the sale valid.[779]

17.6.5 Sale invalid if provisions not complied with

Conradie J discussed the provisions of section 82(7) and (8) in *Mookrey v Smith*.[780] Either the creditors or the Master must give directions – in the absence of such directions a sale is invalid.[781] A sale contrary to the authority given by creditors is also invalid.[782] The burden of proving that a person had been *bona fide* in purchasing property in contravention of section 82 rests on the purchaser. Even if a purchaser acted honestly without any intention to prejudice creditors, the sale is invalid if the purchaser knew that the trustee was exceeding their authority.[783]

17.6.6 Direction by creditors to employ particular attorney or auctioneer

Section 53(5) provides that the majority of creditors reckoned in number and in value may direct the trustee to employ or not to employ a particular attorney or auctioneer in connection with the administration of the estate. The trustee may refer the matter to the Master for a final decision if the trustee has reason to believe that it will not be in the interest of the estate to carry out such direction by the creditors. In the absence of directions by creditors the trustee should carefully select an auctioneer, bearing in mind that the trustee remains responsible for ensuring that the auction is held properly.

17.6.7 Seller's liability for defects

In terms of the common law a seller is liable for defects in the property sold, but this liability is usually excluded in a *voetstoots* clause (which provides that property is sold "as is") or other clause that excludes liability for defects or representations made to the buyer. Exclusionary clauses cannot exclude liability in the case where a party intentionally withholds information,

777 *Charter Developments (Pty) Ltd (In Liquidation) v Waterkloof Marina Estates (Pty) Ltd* 2015 (5) SA 138 (SCA).
778 *Swart v Starbuck* 2017 (5) SA 370 (CC), para [26].
779 *Waterkloof Marina Estates (Pty) Ltd v Charter Development (Pty) Ltd (In Liquidation)* 2013 (6) SA 185 (GNP), para [22]. On appeal in *Charter Developments (Pty) Ltd (In Liquidation) v Waterkloof Marina Estates (Pty) Ltd* 2015 (5) SA 138 (SCA) the court also declared the sale valid.
780 1989 (2) SA 707 (C). See *Muller v De Wet* NO 2001 (2) SA 489 (W) for a discussion of s 82(8).
781 At 710D.
782 At 711E.
783 At 715A.

or negligently omits to disclose information under circumstances that required the party to do so.[784] It does not avail a party to a contract, who stands accused of fraud, to contend that the purchaser had been foolish or negligent in relying on the misrepresentation. In conducting an auction while aware of the fact that the property that is about to be auctioned off differs materially from the advertisements that enticed prospective bidders to attend the auction, the auctioneer will have deliberately misrepresented the true facts to the bidders who attend the auction and cannot rely on the exclusionary clauses.[785]

17.6.8 Auction sales subject to confirmation

The view has been held that the practice of making auction sales subject to confirmation within a period of time that varies from one day to 30 days or more, leads to irregularities and results in persons, such as bondholders and other persons wishing to obtain the property, staying away from the auction and thereafter during the confirmation period bidding against each other for the property in an informal and uncontrolled manner.[786] At auctions for the sale of properties in execution there are no confirmation periods and all interested buyers, including bondholders, must bid against each other. It may of course happen that an extremely low price is obtained at an auction sale on the fall of the hammer and which is not subject to confirmation.

17.6.9 Secured creditors must consent in writing

Section 80*bis* of the Insolvency Act provides that a bondholder or other secured creditor must consent to an urgent sale of the property in writing, or the trustee must guarantee that person against loss by such a sale. Section 386(2B) of the Companies Act contains a similar provision.

17.6.10 Sale of immovable property subject to a lease

Where immovable property is subject to a lease entered into before the registration of a mortgage bond over that property, the property must be sold subject to the lease. If the lease was entered into after the registration of a mortgage bond, the bondholder may insist that the property be sold free from the lease if a sale subject to the lease realised an insufficient amount to pay the bondholder's secured claim. In practice such a property is offered for sale subject to the lease and, if this does not realise a sufficient amount to pay the bondholder, the property is sold free of the lease. If the property is sold without reference to a lease concluded after the registration of a mortgage bond, the sale is valid even if the sale did not realise enough to pay the mortgage bond in full.[787]

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784 *Gailey and Another v May* [2014] JOL 31553 (GSJ), para [27].
785 *Auction Alliance (Pty) Ltd v Netluk Boerdery CC* [2011] JOL 27452 (GSJ).
786 The trustee should at least allow the successful bidder at the auction to match any subsequent offers.
787 *Velcich v Land and Agricultural Bank of South Africa* 1996 (1) SA 17 (A) 20H-21D.

17.6.11 Exception for lease

An exception is made in section 37(5) of the Insolvency Act. It provides that a stipulation that a lease shall terminate or be varied upon sequestration is null and void, but a stipulation in a lease that restricts or prohibits the transfer of any right under the lease, or which provides for the termination or cancellation of the lease by reason of the death of the lessee or of his successor in title, binds the trustee as if the trustee were the lessee.

17.6.12 Statutory limitations on sale or transfer of property

There are many statutory limitations on the sale of property that bind the trustee or liquidator of an insolvent estate or company. Occasionally the State or other entities enjoy a right of retention or other special protection. The most notorious of these provisions are probably sections 34 and 55 of the Land Bank Act 1944,[788] substituted by sections 33 and 34[789] of the Land and Agricultural Development Bank Act 2002, section 114 of the Customs and Excise Act 1964[790] and section 173 of the Co-operatives Act 1981. It is impossible to deal with all these provisions in these notes. All claims that are not specifically made preferent must be accepted as being concurrent claims.[791] Insolvency practitioners who are confronted with such a provision should acquaint themselves with the contents of the statutory provisions and ensure that it is an absolute prohibition on the sale of property, or is intended to bind a trustee or liquidator.[792]

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788 The Land Bank's rights in terms of ss 34 and 35 cannot be ceded – *Land and Agricultural Development Bank of South Africa v Du Preez*, Case No 1373/04, Northern Cape High Court (25 November 2011), para [36]. Section 38(2) of the North West Agricultural Bank Act 1981, which authorises the seizure and sale of a defaulting debtor's property by the bank without recourse to a court, was found to be unconstitutional and invalid in *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC). In *First National Bank of South Africa Ltd v Land and Agricultural Bank* 2000 (6) BCLR 586 (O); 2000 (3) SA 626 (CC), parts of ss 34 and 55 of the Land Bank Act 1944 were declared invalid. Section 33(4)(d) of Act 2000 provides for an application to court for authority to attach and sell property. *Cf* M Kelly "Constitutionality of executions by agricultural banks without debtors having recourse to a court" 2000 *JBL* Vol 8 Part 4, at 167.

789 The remedies afforded in terms of ss 33 and 34 are not applicable to advances made under the repealed 1944 Act – *Land & Agricultural Development Bank of SA and Master of the High Court*, Case no 352/05 Supreme Court of Appeal dated 30 May 2006. M Kelly-Louw, "Leveling the playing field between the Land Bank and commercial banks" *JBL* Vol 15 Part 1, at 11.

790 Section 114 has been declared to be constitutionally invalid to the extent that it provides that goods owned by persons other than the person liable to the State for the debts are subject to a lien, detention and sale – *First National Bank of SA Ltd t/a Westbank v The Commissioner for the South African Revenue Services*, Case CCT 19/01of the Constitutional Court, decided on 16 May 2002.

791 *Nel v Body Corporate of the Seaways Building* 1995 (1) SA 130 (C). *Cf Nel v Body Corporate of the Seaways Building* 1996 (1) SA 131 (A); *SALR Commissioner, South African Revenue Service v Van der Merwe* 2017 (3) SA 34 (SCA), para [9].

792 The South African Law Commission published a working paper on statutory provisions that benefit creditors – Working Paper 61. The recommendations in this working paper were not implemented.

Self-Assessment Questions

Question 1
Write a brief note on the purpose of a search warrant in terms of section 69 of the Insolvency Act. (5)

Question 2
Critically discuss whether it is legal for a trustee to pay creditors by electronic fund transfer (EFT). (6)

Question 3
On 1 August 2020 J Smith receives a letter of appointment as provisional trustee in the estate of Goodmeat Butchery. He realises that he urgently needs to sell the meat as it might get spoiled if not sold within the next few days. Discuss the procedure the provisional trustee must follow to sell the property of the estate. (5)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 18 – MEETINGS

18.1 Introduction

The aims of meetings in an insolvent estate are to –

- prove claims;
- nominate a trustee;
- receive the report by the trustee;
- give directions to the trustee;
- interrogate the insolvent and other persons; and
- consider an offer of composition by the insolvent.

18.1.1 Company meetings

In general, the provisions of the Insolvency Act or similar provisions of the Companies Act 1973 or Winding-up Regulations[793] apply to meetings held during the winding-up of companies. The importance of a meeting by members appears from the discussion below. Section 412 of the Companies Act provides that in any winding-up of a company, meetings of creditors shall (save as otherwise provided in the Companies Act 1973) be convened and held as nearly as may be in the manner prescribed for the holding of meetings of creditors under the law relating to insolvency. In terms of section 413(b) of the Companies Act 1973 the court may direct meetings of the creditors, members or contributories to be held and conducted in such manner as it directs and may appoint a person to act as chairman and report to the court.[794]

18.1.2 Four types of meetings

There are four types of meetings – the first and second meetings which are held in each estate (unless the sequestration order is set aside) and special and general meetings which are held when necessary. The company meeting which is similar to the second meeting is a "general meeting". If an insolvent individual submits an offer of composition, it is considered at a meeting which is convened in a manner similar to a general meeting. Claims can be proved[795]

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793 Winding-up Regulations, regs 7 to 15.

794 In the discussion below substantial differences between meetings in the winding-up of companies and insolvency and the applicable provisions of the Companies Act 1973 or Winding-up Regulations will be noted in the text or footnotes.

795 Insolvency Act, s 44(3). See also s 366 of the Companies Act 1973.

and interrogations can be held[796] at any meeting. Interrogations and the proof of claims are discussed below in Chapters 20 and 19 respectively.

18.1.3 Place of meetings

In a district where the Master has an office the meetings are held before the Master[797] or a public servant designated by the Master. In a district where the Master does not have an office, meetings are held before the magistrate or a public servant designated by the magistrate.[798] Section 39(1) of the Insolvency Act provides that the Master must convene any meeting at such place as the Master considers to be most convenient for all parties concerned.[799] The Master usually convenes the first meeting in the district where the insolvent resided or had his main place of business.

18.1.4 Place of meetings after first meeting – convened by trustee

The trustee should convene all subsequent meetings at the same venue where the first meeting was held or get the permission of the Master to convene a meeting elsewhere, especially if the first meeting was not held before the Master.[800] Lists are available of the day of the week and the time when the Master or magistrates hold meetings. A trustee should keep these lists in mind when convening a meeting. If an interrogation is envisaged, the dates when interrogations will actually take place should be discussed with the presiding officer.

18.1.5 Meetings open and accessible to the public

The place where a meeting of creditors is held must be accessible to the public and any statement made at such a meeting shall be privileged to the same extent as is the publication of a statement made in a court of law.[801]

18.1.6 Notice to registered creditors

If a creditor has registered in terms of section 43 of the Insolvency Act, it must be given notice of all meetings. Meskin submits that section 43 also applies in the winding-up of a company. This submission appears to be correct if the company in question is unable to pay its debts.[802]

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796 *Ibid*, s 65(1). See also Companies Act 1973, s 415.

797 There is no statutory basis for an order that a meeting be held before someone independent of the offices of the relevant Master – *Steelnet (Zimbabwe) Ltd v Master of the High Court, Jhb* [2008] JOL 21948 (W) at p 19.

798 Insolvency Act, s 39(2). See also Winding-up Regulations, reg 7(2).

799 Winding-up Regulations, reg 9.

800 See Insolvency Act, s 39(2).

801 *Ibid*, s 39(6).

802 Companies Act 1973, s 339.

18.2 Voting at meetings

18.2.1 General

The voting rights of a conditional creditor (something not found very often in practice) are set out in section 48 of the Insolvency Act.

The basic rules are set out in section 52 of the Insolvency Act which in terms of section 412(2) of the Companies Act 1973 apply *mutatis mutandis* to the right of a creditor to vote at a meeting of creditors in the winding-up of a company:

- only proved creditors can vote;
- a creditor cannot vote on a claim that was ceded to the creditor after the commencement of the proceedings by which the estate was sequestrated;
- the votes are reckoned according to the value of claims except for the four cases listed below where the number of votes are also taken into account;
- the vote of a creditor is never reckoned in number unless its claim is at least R100 in value.

In the following four cases votes are reckoned in terms of both number and value:

(a) The majority in number and in value of *the votes of the creditors entitled to vote, who voted* at the first meeting, decides the election of the trustee (as set out below).

(b) The majority of creditors reckoned in number and value may direct the trustee to employ or not to employ a particular attorney or auctioneer, subject to representations to the Master by the trustee.[803]

(c) The majority reckoned in number and in value *of creditors entitled to vote at a meeting* may request the Master in writing to remove a trustee from office.[804]

(d) Creditors whose votes amount to not less than three-fourths in value and three-fourths in number *of the votes of all creditors who proved claims against the estate* may accept an offer of compromise by an insolvent individual.[805]

Note the different ways in which the calculation of votes are expressed. The provision in item (a) refers to the votes of creditors who voted at the meeting. Due to the fact that only proved creditors can vote, the provisions in items (b) to (d) amount to the same thing, namely that the prescribed percentage of all the proved creditors and not only those who voted at a meeting, must be obtained. (Item (c) does not relate to a meeting but to a written request by

803 Insolvency Act, s 53(5).
804 *Ibid*, s 60(d). See also s 379(d) of the Companies Act 1973.
805 *Ibid*, s 119(7).

creditors.) Votes are reckoned according to value for the decision, in terms of section 78(1)(a)(iii) of the Close Corporations Act 1984, whether a co-liquidator should be appointed.[806]

18.2.2 Calculation of votes in all other cases

Section 52 does not provide how the votes should be calculated in all the other cases where a majority in value is required. It is generally accepted that the ordinary rule for meetings apply and that the majority in value of creditors who voted at a meeting decides an issue.[807]

18.2.3 Matters on which creditors may vote

In terms of section 53(1) of the Insolvency Act creditors may vote at a meeting of creditors upon all matters relating to the administration of the estate, but may not vote about matters relating to the distribution of the assets of the estate, except for the purposes of directing the trustee to contest, compromise or admit any claim against the estate.[808]

Section 52(6) of the Insolvency Act provides that a creditor may not vote on the question as to whether steps should be taken to contest its claim or preference.

18.2.4 Voting by secured creditors

A creditor holding security for a claim is, except in the election of a trustee and upon any matter affecting that creditor's security, entitled to vote only in respect of the amount by which the claim exceeds the amount at which the creditor valued the security when proving its claim, or if the creditor did not value the security, in respect of the amount by which the claim exceeds the amount of the proceeds of the realisation of the security in terms of section 83.[809]

18.3 Voting with or without a power of attorney

18.3.1 General

Section 53(2) of the Insolvency Act provides that every creditor may vote either personally or by an agent specially authorised thereto or acting under a general power of attorney. If the

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806 *Spence v The Master* 2000 (2) SA 717 (T).

807 See Winding-up Regulations, reg 13 for the majority in value at a meeting of members.

808 A resolution of creditors passed with an ulterior motive (not *bona fide*) or containing a direction to the trustee which, if obeyed, would result in a breach of the letter or spirit of the Insolvency Act, is not binding on the trustee and may be set aside by the court; eg, if creditors pass a resolution that property valued at R5 million to R6 million should be sold to the creditors who passed the resolution, for R3.4 million. See *Morrison v Vaughn* [2008] JOL 21946 (W), para [27].

809 Section 83(2) of the Insolvency Act provides for the realisation of its security by a secured creditor under certain circumstances. In terms of s 83(11) the trustee, if authorised by creditors, may, unless the creditor has realised its security, within a prescribed period take over the security at the value placed thereon by the creditor when it proved its claim, or, if the trustee does not take over the security, the trustee must realise it for the benefit of the secured creditors – see s 366(1) of the Companies Act 1973.

creditor is a company or other legal person, a resolution or some other proof that the person in question had authority to sign the power of attorney or other document should be attached. In *African Diamond Distributors (Pty) Ltd v Van der Westhuizen*[810] Eloff J stated that some proof of proxy might possibly, for reasons of good order, be required, but that the comment by Mars that writing is a requirement should perhaps have to be reconsidered in light of the amendment of the legislation since the decisions referred to by Mars. In the unreported case of *Cohen v Lawrence*[811] Claassen J was of the opinion, after reconsidering the statement by Mars, that some kind of written authority, such as a letter, telegram, articles of association, or even a piece of paper, was necessary to avoid unnecessary disputes and irregularities. (Although these statements were *obiter*, the judge considered the question in detail.)

18.3.2 Trustee or connected person may not vote as agent

The proviso to section 53(2) of the Insolvency Act provides that no creditor shall vote by any agent being the trustee or a person nominated for election in the estate in question, the employer, or employee of such trustee or person, a person directly or indirectly having a pecuniary interest in the remuneration of the trustee or such a nominee, etc. Section 55(m) of the Insolvency Act provides that any agent authorised to vote for a creditor at a meeting and acting or purporting to act under such authority, is disqualified from being elected or appointed as trustee.

18.3.3 Blank power of attorneys

The Appeal Court judgement in *Sutter v Scheepers*[812] pointed out the danger of signing a blank power of attorney but stated that there was no reason why this could not be done.[813] If the trust in the person to whom the blank power of attorney was handed was not justified, the person who signed the power of attorney should bear the consequences.

18.3.4 Power of attorney for company meeting

Winding-up Regulation 12(2) provides that a power of attorney intended to be used at any meeting of members or creditors must be lodged with the presiding officer not later than 24 hours before the advertised time of the meeting and in default thereof it shall for the purpose of voting at the meeting be deemed to be invalid.

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810 1988 (4) SA 726 (T).
811 2187/91, Witwatersrand Local Division, dated 25 March 1991.
812 1932 AD 165 at 171.
813 *Patel v Master of the High Court* (8507/11) [2012] WCHC (16 November 2012), para [8].

18.4 First meeting

18.4.1 General

The first meeting is convened by the Master upon receipt of the final order of sequestration.[814] A notice of the meeting must appear in the *Government Gazette* not less than 10 days before the date scheduled for the meeting.[815]

The main business at the first meeting is the proof of claims and the election of a trustee. An interrogation can also be held at the first meeting.[816]

18.4.2 Election of trustee

Creditors who have proved their claims at the first meeting "may elect one or two trustees".[817] Section 365(2) of the Companies Act 1973 provides that a director or former director of a company has no vote for a liquidator on the ground of certain claims.[818] One creditor may not nominate two trustees,[819] but according to the applicable rules two trustees may be elected. The rules are as follows:[820]

(a) The person who has obtained the majority of votes in number and the majority in value at the meeting is elected sole trustee.

(b) The person who has obtained a majority of votes in number when no other person has obtained a majority in value, or who has obtained a majority in value when no other person has obtained a majority in number, is elected sole trustee.

(c) If one person has obtained a majority in number and another a majority in value, both persons are elected trustees and if one declines a joint trusteeship the other shall be deemed to be elected sole trustee.

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814 The meeting is invalid if it is convened before receipt by the Master of the final order, even if the meeting takes place after the making of the final order – *Industrial Development Corporation of SA v Master of the High Court, JHB* [2009] JOL 21425 (W).

815 Insolvency Act, s 40. See s 364(2) of the Companies Act 1973. According to *Nedcor Bank Ltd v The Master* 2002 (1) SA 390 (SCA), the 10 days are calculated according to s 4 of the Interpretation Act 1957 (exclusive of the first day and inclusive of the last day, unless the last day is a Sunday or public holiday) and the 10 days must be counted backwards from the date of the meeting. In *Bricknell v The Master of the High Court*, Case 35384/08, Witwatersrand Local Division, dated 3 February 2009, it was decided that where the Master convened two first meetings at different times and places, both meetings were invalid.

816 See *Ex parte: Master of the High Court of South Africa (North Gauteng)* (2011 (5) SA 311 (GNP)) [2011] ZAGPPHC 105; 28042/11 (27 June 2011) for a detailed discussion of the legal framework regarding the appointment of a trustee.

817 Insolvency Act, s 54(1). See ss 364(2) and 369 of the Companies Act 1973.

818 Loan account, arrear salary, travelling expenses or allowances or amounts paid on behalf of the company.

819 *Sabie Mediese Sentrum (Edms) Bpk v Die Meester* 1977 (4) SA 389 (T). Meskin disagrees.

820 Insolvency Act, s 54(2) and (3).

A secured creditor can (contrary to the usual rule) vote on the full amount of its claim when a liquidator is elected.[821]

When a person has been elected trustee the Master must appoint them as trustee,[822] unless that person:[823]

(a) was not properly elected; or

(b) is disqualified under section 55 of the Insolvency Act from being elected or appointed as trustee; or

(c) has failed to give security within seven days or within such further period as the Master may allow;[824] or

(d) in the opinion of the Master should not be appointed as trustee.

18.4.3 Master declines appointment of elected person

If the Master declines to appoint the elected person as trustee for one of the above reasons, the Master must give that person notice in writing of the Master's refusal and the reason therefore. If the reason is that the Master is of the opinion that the person should not be appointed, the Master need not, in terms of section 57(1),[825] give further particulars.[826]

18.4.4 Appeal to Minister for persons aggrieved by Master's decision

There is a special procedure for persons aggrieved by the appointment of a trustee by the Master, or the Master's refusal to appoint a person as trustee, to appeal to the Minister of Justice and provision is made for a further meeting to elect a trustee.[827] This procedure does not apply to appointments outside the nomination process at meetings, such as provisional appointments[828] or joint appointments in the exercise of the Master's discretion.[829] No new claims can be submitted for proof at this meeting.[830]

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821 *Ibid*, s 52(5).

822 *Ibid*, s 56(2). See also s 375 of the Companies Act 1973.

823 *Ibid*, s 57(1). See also s 370 of the Companies Act 1973.

824 A person who has given security as provisional trustee need not lodge security or an "affidavit of non-interest".

825 See Companies Act 1973, s 370.

826 It is submitted that it would be impractical to apply s 5 of the Promotion of Administrative Justice Act 2000, which entitles a person whose rights have been materially affected by administrative action to request reasons, which must be given within 90 days. There is a special procedure for persons who object to the Master's decision, which is discussed below.

827 Insolvency Act, s 57 and Companies Act 1973, ss 370 and 371.

828 *Minister of Justice v Firstrand Bank Ltd* 2003 (6) SA 636 (SCA).

829 *Janse Van Rensburg v The Master* 2004 (5) SA 173 (T), para [13].

830 In terms of s 57(3) of the Insolvency Act and s 370(2)(d) of the Companies Act 1973, this meeting is deemed to be the continuation of a first meeting held after an adjournment thereof. In terms of s 44(3) of the

18.4.5 Master may appoint joint trustee

Whenever considered desirable, the Master may appoint a person not disqualified from holding office as trustee who has given security to be a co-trustee.[831] There is a clear implication in section 56(4) of the Insolvency Act that the Master can appoint one additional trustee only and that there may not be more than three trustees. The corresponding provision in section 382 of the Companies Act 1973 does not contain such a limitation. Where an act is done by some and not all the liquidators it does not bind the company in liquidation, but the act in question may be ratified by all the liquidators.[832] In *Venditor Asset Management (Pty) Ltd v The Master of the High Court, Pretoria*[833] it was held that section 382 of the Companies Act 1973 (liquidators must act jointly) was enacted to protect the interests of the body of creditors by, *inter alia*, preventing the haphazard disposal of assets. A sale is not ratified by all the liquidators where the proceeds are reflected in the liquidation and distribution account.

18.4.6 Provisional trustee appointed as final

Section 18(4) of the Insolvency Act provides that the Master must appoint the provisional trustee as final trustee if no trustee has been elected at the first meeting.

18.5 Second meeting

18.5.1 General meeting for companies

The Companies Act refers to the meeting corresponding to the second meeting of an individual as a "general meeting", but for the sake of convenience it is referred to here as a second meeting.

18.5.2 Purpose of meeting

The purpose of the meeting is to receive the report of the trustee and to give the trustee directions in connection with the administration of the estate.[834] As indicated above, claims can be proved and interrogations held at the second meeting.

Insolvency Act creditors must submit their claims 24 hours or more before the time advertised for the commencement of the meeting.

831 Insolvency Act, s 57(5); Companies Act 1973, s 374.

832 In *Lynn NO v Coreejes* 2011 (6) SA 507 (SCA), para [15], two of the three liquidators authorised the institution of an action. The non-consenting third liquidator then resigned and his resignation was accepted. The remaining two liquidators were then appointed by the Master as the only joint liquidators in the estate. They jointly pursued the litigation, as such ratifying their procedural act taken initially. See also *Auby v Pellow: In re: Pellow v Auby* [2014] JOL 31536 (GSJ), para [29]. *Venter v Matsepe* [2019] JOL 41716 (FB) referred to *Powell v Leech; Leech and Others v Powell* [1997] JOL 1474 (W), where the court held that joint liquidators must act jointly and that observance of the provisions of s 382 is peremptory.

833 (38885/2017) [2018] ZAGPPHC 332 (10 May 2018).

834 Insolvency Act, s 40(3); Companies Act 1973, ss 387 and 402.

18.5.3 Meeting convened by trustee

The provision in section 40(3)(a) that "the Master shall appoint a second meeting" has little practical significance.[835] The meeting is convened by the trustee.

18.5.4 Notice of the meeting

The trustee convenes the meeting by notice in the *Government Gazette* and a notice that is published simultaneously in an Afrikaans and an English newspaper that circulate in the district in which the insolvent resides or has a principal place of business.[836] The same provisions apply to the second meeting in respect of a company, except that the place of the registered office is substituted for the residence.[837] The annexure to the regulations promulgated under section 158 of the Insolvency Act contains an example of the notice to be placed in the *Government Gazette*. This form simultaneously gives notice in terms of section 56 (or the similar provisions of section 375(5) of the Companies Act 1973) of the appointment of the trustee and that persons indebted to the estate should pay their debts to the trustee (and not to the insolvent).[838] The cut-off times for the placing of notices in the *Government Gazette* should be noted.[839] The wording of the notices in the relevant newspapers should be similar to the wording of the notice in the *Government Gazette*.

18.5.5 Meeting must be convened as soon as possible after appointment

It is sometimes said that trustees must convene the second meeting within three months from the date of their appointment. This is due to the fact that creditors may prove claims freely until three months after the closing of the second meeting[840] and trustees must lodge their account within six months from the date of their appointment. It is clear that this is not a hard and fast rule, but it is advisable to hold the second meeting as soon as possible and three months appears to be the limit of the period that would under ordinary circumstances be acceptable. (Section 402 of the Companies Act 1973 provides that liquidators must, except with the consent of the Master, submit their report to a general meeting not later than three months after the date of appointment.) If an offer of composition has been accepted in an insolvent estate in terms of section 119 of the Insolvency Act, the report must be submitted to creditors within one month after acceptance.[841]

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835 Mars states that the meaning of this phrase is that the Master fixes the time and place when meetings may be held, but that the trustee decides on the specific date on which the second meeting is to be held.

836 Insolvency Act, s 40(3)(b) and (c). A bilingual notice may be placed in a newspaper that appears in both languages. In *Leisher v Motala NO* [2012] JOL 28610 (KZD), para [30], the court regarded the meeting as valid although the notices referred to meetings of creditors and not members as well, because members received notice of the meeting and attended or should have attended as members.

837 Companies Act 1973, ss 339 and 412(a).

838 Insolvency Act, s 77.

839 The *Government Gazette* usually appears on Fridays. The closing time is 15:00 on the preceding Friday. Other closing times are published in the *Gazette* from time to time for weeks when there are public holidays.

840 Insolvency Act, s 44(1).

841 *Ibid*, s 81(1).

18.5.6 Period of notice and documents to be sent out and submitted

Mars suggests that 10 days' notice should be given, but there is no legal requirement in this regard. However, in terms of section 81(1)*bis* of the Insolvency Act the trustee must, at least 14 days before the date advertised for the meeting, send a copy of the following documents by registered post to each creditor whose name and address is known to them –

- the trustee's report;
- the report and inventory submitted to the trustee by the sheriff in terms of section 19 (in the unlikely event that this has been received in time);
- a valuation furnished by the trustee to the Master in terms of section 69 (in the unlikely event that this has been done); and
- the resolutions and directions which in the opinion of the trustee should be passed or given at the second meeting.

At least 24 hours before the time advertised for the commencement of the meeting, the trustee must submit to the presiding officer an affidavit with the names and addresses of the creditors to whom copies of the documents have been sent. It is a good idea to at the same time state the date of the notice in the *Government Gazette*[842] and furnish proof of the advertisement in the newspaper or newspapers and the postal services slip as proof that a letter has been sent to creditors by registered post. If the affidavit is not lodged in time no meeting can be held as the presiding officer has no authority to waive compliance with this legal requirement.[843]

18.5.7 Posting of report and resolutions before company meeting

There is no provision in the Companies Act 1973 that the report or resolutions must be posted to creditors. The provisions of section 81(1)*bis* of the Insolvency Act, discussed in the previous paragraph, do not apply to companies but in practice[844] a copy of the report and recommended resolutions are sent to creditors. The court has in the particular circumstances of a case set aside resolutions where notice was not given to a creditor with a particular interest in the matter.[845]

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842 By this time the presiding officer would most probably have seen the notice in the *Government Gazette*.

843 In the case of the late lodging of a claim form, it may be considered at the meeting if the presiding officer is of the opinion that through no fault of the creditor it has been unable to deliver its affidavit in time. In terms of s 157 of the Insolvency Act the court may sometimes ignore a formal defect or irregularity.

844 See *Grace Heaven Industries (Pty) Ltd and 25 Others v During Pressings (Pty) Ltd (In Liquidation)* (10005/2016) [2016] GJ (23 September 2016), paras [27], [28], [31] and [32].

845 *Grace Heaven Industries (Pty) Ltd and 25 Others v During Pressings (Pty) Ltd (In Liquidation)* (10005/2016) [2016] GJ (23 September 2016), paras [48] and [61]. Having regard to the nature of the resolutions and the timing thereof and the fact that by that stage the liquidators were aware of the application that was to be launched for an enquiry to be held, the court was unable to hold that the resolutions were passed in the

18.5.8 Requirements for report

The matters to be dealt with by trustees in their reports are listed in section 81(1) of the Insolvency Act. (In the case of a company, the matters to be reported on are listed in section 402 of the Companies Act 1973.) In terms of Regulation 2, the report must be lodged with the presiding officer in triplicate.[846] For the purpose of this report the trustee has access to the insolvent's returns filed with the South African Revenue Service, contrary to the ordinary rules of confidentiality in this regard.[847] One of the matters to be reported on by the trustee is the question whether the insolvent appears to have contravened the Insolvency Act, or to have committed any other offence.[848] (Section 400(2) of the Companies Act 1973 provides for a confidential report on contraventions.) If contraventions are reported, the Master refers the report to the Attorney General[849] in duplicate who refers it to the Commercial Branch of the South African Police Service. The investigating officer usually calls for an affidavit by the trustee and asks whether the trustee has been hampered by contraventions allegedly committed by the insolvent, for example failure to attend meetings or to lodge a statement of affairs.

18.5.9 Objections to reports by trustees

In the past there have been many complaints that the reports by trustees are useless because they do not give creditors the information they require to decide on the further administration of the estate and do not reflect whether the insolvent is receiving sufficient remuneration to justify a certificate by the Master in terms of section 23(5) (that a part of the remuneration should be paid to the estate). In *Ex parte Snooke*[850] the trustees' report technically complied with section 81 of the Act, but the court criticised the report as it did nothing to appeal to creditors to lodge claims; creditors were not informed that there was no possibility of any contributions being payable should they file claims; the standard type of report, merely regurgitating the wording of the Act, was not in the interest of creditors; it was reported that the insolvent did not keep any books or records; it was astonishing that this was not investigated any further and reported to creditors as the insolvent's failure might even have been a transgression of section 134, or even section 132, of the Act.

Section 40(3)(c)[851] mentions that the report must be received at the second meeting, but it is not stated expressly that creditors must accept the report. It is submitted that creditors are

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honest belief that they were in the interests of the estate and set aside the resolutions in terms of s 53(4) of the Insolvency Act.

846 The effect of Winding-up Regulation 16 is similar. The reason is probably to facilitate the reporting of contraventions to the Attorney General.

847 Insolvency Act, s 81(2).

848 *Ibid*, s 81(1)(d).

849 Companies Act 1973, s 400(3).

850 2014 (5) SA 426 (FB), para [29]. Daffue J (para [25]) expressed approval for the view in Mars that it is a *lacuna* in our present legislation that no provision is made for judicial oversight of the actual results of the liquidation process. This case was quoted with approval in *Ex parte Concato and Similar Cases* 2016 (3) SA 549 (WCC), para [27].

851 Companies Act 1973, s 402.

entitled to direct the trustee to investigate the matters of the insolvent further and report to them on the results of this investigations at an adjourned meeting.[852]

18.5.10 Contents of recommended resolutions

Most insolvency practitioners have a standard set of resolutions which they suggest to creditors at every meeting. Occasionally these draft resolutions are supplemented to provide for particular matters. The main thrust of the draft resolutions is usually that the trustee can do whatever he wants at the expense of the estate and that the further administration of the estate is left entirely in the hands of the trustee and confirmed in advance. Because of a lack of real interest by creditors, the draft resolutions are usually accepted without limiting the wide and sometimes totally unnecessary powers given to the trustee.

18.5.11 Meeting of members of company

The long-held view that meetings of members of a company can mostly be ignored, was dispelled by the unreported decision in *Die Trustees van die M M Kirsten Trust v Rousseau*[853] and confirmed by the decision in *Born Free Investments v Firstrand Bank Limited*.[854] Failure to comply with these provisions leave the trustee without authority to Act. It is surprising that the clear wording of section 386(3) of the Companies Act 1973 has for so long been ignored by so many people.[855] (The prescribed form for notice of the general meeting in the *Government Gazette* does not even provide for a separate meeting by members.) The section provides that the liquidator a winding-up by court has the wide powers set out in subsection (4) with the authority granted by meetings of creditors *and* members or contributories, or on the directions of the Master given under section 387. If members have not given directions at a general (second) meeting, the liquidator cannot exercise the powers in subsection (3) (for example, to sell property) without first obtaining directions from the Master or applying to court under section 386(5).[856]

18.5.12 No directions adopted at second meeting

If no directions have been given by creditors at the second meeting, any resolution alleged to have been recommended to creditors and which could lawfully have been passed by the creditors will, if the Master approves, be deemed to have been passed or given by creditors

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852 Insolvency Act, s 81(3)(a); Companies Act 1973, s 387(1).

853 Case No 5748/94 in the Cape of Good Hope Provincial Division (unreported).

854 (39068/2009) [2012] ZAGPJHC 139 (21 August 2012). See also *Griffin and Others v The Master and Another (Commins and Another Intervening)* 2006 (1) SA 187 (SCA) – a case involving a close corporation – and *Leisher v Motala NO* [2012] JOL 28610 (KZD), para [23].

855 A possible explanation for the widespread practice to ignore the wishes of members is that it is mostly logical to ignore members. If the company is clearly insolvent the members have no real interest in the winding-up. It is accordingly hard to accept that members can influence the administration of the estate by not appearing or not voting at a meeting.

856 See *Born Free Investments v First Rand Bank Limited* (39068/2009) [2012] ZAGPJHC 139 (21 August 2012), para [21].

at the meeting.[857] In practice the Master is not keen to rubber-stamp the wide resolutions usually recommended to creditors. It is expected of trustees to justify the recommendations they really require. Sales are often dealt with in terms of the provisions of section 82 of the Insolvency Act (the trustee must sell the property by public auction after such notices and upon such conditions as the Master may direct). The Master is usually prepared to authorise the trustee to compromise or admit claims that have been tendered for proof at a meeting[858] in order to allow the trustee to admit unliquidated claims, or claims rejected for technical reasons.

18.6 General meeting

18.6.1 Purpose and notice of general meeting

The purpose of a general meeting is to give a trustee directions concerning any matter relating to the administration of the estate and the notice of the meeting must state the matters to be dealt with at the meeting. A general meeting cannot be convened for the sole purpose of holding an interrogation or proving claims. Once a general meeting has been validly convened (for instance to get directions by creditors whether an interrogation should be held), an interrogation may be held and claims proved at the meeting.[859]

The meeting is, like a second meeting, convened by notice in the *Government Gazette* and a notice in an Afrikaans and English newspaper.

18.6.2 When a general meeting is convened

The trustee may at any time convene a general meeting and must convene it if required to do so by the Master or creditors representing at least a quarter of the proved claims in value.[860] The Regulations prescribe a form for the notice of the meeting (and the special meeting).[861]

General meetings are not convened frequently due to the fact that wide directions are usually given at the second meeting.

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857 Insolvency Act, s 81(3)(b); Companies Act 1973, s 387(2).

858 Insolvency Act, s 78(3).

859 *Essop v The Master* 1983 (1) SA 926 (C); *Marques v De Villiers* 1990 (4) SA 415 (W).

860 Insolvency Act, s 41; Companies Act 1973, ss 386(1)(d) and 412; Winding-up Regulations, reg 10. Winding-up Regulation 11 contains provision for the payment of the costs of the meeting.

861 Insolvency Regulations, reg 5(1), Form No 2.

18.7 Special meeting

18.7.1 Purpose of special meeting

The proof of claims and interrogations are the only business that can be conducted at a special meeting. The purpose of a special meeting is usually to allow creditors who have not yet proved their claims, to do so.

18.7.2 Notice of special meeting

A special meeting is convened by the trustee by notice in the prescribed form[862] in the *Government Gazette* which may appear at any date before the date for which the meeting is scheduled.

18.7.3 When special meeting is convened

The trustee must convene a special meeting for the proof of claims if after the second meeting the trustee is requested to do so by an interested person who tenders payment of all expenses to be incurred in connection with the meeting.[863] The expenses in question are the cost of the advertisement in the *Government Gazette*.[864]

Since the amendment of section 42 of the Insolvency Act in 1987, the trustee may at any time (and must if required to do so by a proved creditor) convene by notice in the *Government Gazette* a special meeting of creditors for the purpose of interrogating an insolvent, provided that the Master consents thereto. It is submitted that an interrogation of any person can be held at a special meeting validly convened to prove claims.[865]

18.7.4 Time limit for proof of claims

No claim may be proved after the expiry of three months after the closing of the second meeting, except with the leave of the court or the Master.[866] In the unreported case of *Stone & Stewart v Master of the Supreme Court*[867] Flemming J held that this limitation did not apply to companies – see section 366(2) of the Companies Act 1973. *De Montlehu v Mayo*[868] held that the decision in *Stone & Stewart* was wrong and that the proviso to section 44(1) of the Insolvency Act applied to companies as well. In *Wishart v BHP Billiton Energy Coal South Africa Limited*[869] the court disagreed with the decision in *De Montlehu* and followed the decision in *Stone & Stewart* – the intention of the legislature was that the proviso to section

862 *Ibid*.
863 Insolvency Act, s 43; Companies Act 1973, s 412; Winding-up Regulations, reg 11.
864 Insolvency Act, s 42(1); Companies Act 1973, s 412.
865 Insolvency Act, s 65(1). Note the case of *Bernard v Klein* 1990 (2) SA 306 (W) where it was pointed out that only the insolvent can be interrogated at a meeting convened in terms of s 42(2).
866 Insolvency Act, s 44(1).
867 Case No 8828/87, Transvaal Provincial Division.
868 [2014] JOL 32508 (GJ).
869 (48137/12) [2015] GJ (30 July 2015), para [13].

44(1) of the Insolvency Act would not apply to companies, but that section 366(2) would apply; unless determined otherwise by the Master there is no fixed time period within which creditors of a company in liquidation have to prove claims against the company.

On appeal in the *De Montehu* matter, 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 had 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.[870] 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.[871]

Self-Assessment Questions

Question 1
For various reasons, the second meeting of creditors is probably the most important meeting to be held in an insolvent estate. Give a detailed exposition of the following aspects of the second meeting:

Question 1.1
Explain who convenes the second meeting as well as how it is convened. (3)

Question 2.2
Explain what documents must be provided to creditors on the one hand, and the presiding officer on the other, before a second meeting can validly take place. (5)

Question 2
At the first meeting of creditors Credit Bank proves the only claim against the estate and votes for the appointment of J Smith as final trustee. The Master declines to appoint J Smith as trustee and appoints D Beckham with immediate effect. What advice would you give to Credit Bank with regard to the conduct of the Master? (8)

Question 3
Jason Smith has been appointed as the final trustee of an insolvent estate. He urgently needs to sell the assets in the insolvent estate, claiming that the sale cannot wait until he receives instructions from the creditors at the second meeting. Explain to Jason the steps he needs to take in order to sell the assets prior to the second meeting of creditors. Support your answer by referring to the necessary statutory provisions. (4)

870 *Mayo v De Montlehu* 2016 (1) SA 36 (SCA), para [26].
871 *Wishart v BHP Billiton Energy Coal South Africa (Pty) Ltd* 2017 (4) SA 152 (SCA), paras [13] and [16].

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 19 – PROOF OF CLAIMS

19.1 General

As a rule, creditors of an insolvent estate have no right to share in the distribution of the assets, or have *locus standi* to vote on matters concerning the administration of the estate, or challenge any of the trustee's actions, unless they has proved a claim against the estate at a meeting of creditors.

19.1.1 Form for proof of claim

Section 44 of the Insolvency Act deals with the proof of claims. Subsection (4) prescribes the form to be used - Form D for a claim based on a promissory note or other bill of exchange (these claims are rare) and Form C for all other claims. Insolvency practitioners make the forms available to creditors. Section 44(6) provides that no claim for payment of the purchase price of goods sold and delivered on an open account shall be admitted for proof unless a statement is submitted showing the monthly total as well as a brief description of the purchases and payments for the lesser of the full period of trading or 12 months.

19.1.2 Claims proved at meetings

Section 44(3) of the Insolvency Act provides that a claim must be proved at a meeting of creditors. There is a clear implication that claims can be proved at any meeting of creditors. Proof of claims is the first matter dealt with at any meeting if claims have been submitted for proof. Section 44 of the Insolvency Act sets out the procedure in terms of which all claims against an insolvent estate are to be proved. Notwithstanding that section 44 purports to set out the procedure according to which all claims are to be proved, following the amendment of section 83(5) of the Insolvency Act the provisions of section 44 of the Insolvency Act are rendered inapplicable to a creditor who realises its security for a claim arising out of a master agreement defined in section 35B(2) of the Insolvency Act,[872] and such a creditor is required to follow the procedure set out in section 83(10A)(*a*) in relation to "proof" of its secured claim.[873]

Meskin explains as follows:

> "In terms of the amendment to section 83(5), a creditor who realises security, other than property held for a claim in terms of a Master Agreement, must lodge a claim in terms of section 44 of the Insolvency Act, but no such obligation is placed on a creditor who realises security held for a claim in terms of a Master Agreement (which obligation was excluded without any concomitant amendment to section 44). Based on the wording of the amended section 83(5), it appears (although it is not entirely clear) that the

872 Including eligible collateral in terms of the applicable standards made under the Financial Sector Regulation Act 9 of 2017, or the Financial Markets Act 19 of 2012.

873 See s 1(a) of the Financial Matters Amendment Act 18 of 2019, GG 42482, 23 May 2019.

> intention is that a secured creditor who realises security held for a claim in terms of a Master Agreement is obliged instead to follow the procedure set out in section 83(10A) in relation to 'proof' of its secured claim (as opposed to that in section 44) and that compliance with such procedure constitutes, or is deemed to constitute, "proof" of such creditor's claim."

In this regard, section 83(10A)(*a*)(i) provides that the relevant creditor must, as soon as possible after realisation of the relevant security, give notice of such realisation to the trustee (or the Master if no trustee has been appointed), and submit to the trustee (or Master, as the case may be), the documentation mentioned therein "as proof of the secured claim". In these circumstances it is submitted that for the purposes of section 13(1)(*g*) of the Prescription Act, such a claim must be considered to have been "filed" and hence the running of prescription interrupted, when the provisions of section 83(10A) (*a*)(i) are complied with. Section 83(10B) (*h*) also makes reference to such a creditor having "proved a claim" against the estate in terms of s 83(10A) (*a*)(i)." [874]

19.1.3 Objections and defences

Any objections to or defences against a claim that existed before insolvency can be raised against a claim when proof is tendered at a meeting. The objections and defences that are common and those peculiar to insolvency are dealt with below.

19.2 Companies

Section 366(1) of the Companies Act 1973 provides that in the winding-up of a company by the court and by a creditor's voluntary winding-up, claims must be proved *mutatis mutandis* (with the necessary changes) in accordance with the provisions relating to proof of claims against an insolvent estate.

19.3 Lodging of claims

A "proved claim" within the context of insolvency proceedings could only mean the submission of an affidavit as intended in section 44(4) of the Insolvency Act. An affidavit is a document as intended in Rule 35(12) and it is therefore subject to disclosure under that rule.[875] The affidavit, claim form and documents submitted in support of the claim must be delivered at the office of the presiding officer not later that 24 hours *before the advertised time of the meeting*, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of the opinion that through no fault of the creditor it has been unable to deliver the documentation within the prescribed period.[876] The late lodgement of documents cannot be overcome by lodging the claims more than 24 hours before an adjourned meeting. In *Sieradzki v Brummer*[877] it was pointed out that the provision should

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874 Meskin para 9.1.3.
875 *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP).
876 Insolvency Act, s 44(4).
877 1930 TPD 23.

not be treated as a section which could be evaded simply because a creditor has had a little bit of bad luck in the matter of trains and posts. The decision by a magistrate not to condone late delivery was confirmed where it appeared that the creditor and the agent of the creditor allowed themselves a margin of not more than five minutes and an objection was taken to the late delivery at the meeting. In *Slabbert, Verster & Malherbe v Die Assistent-Meester*[878] the Assistant Master held the erroneous view that a meeting could not proceed as a result of an appeal against the sequestration order and advised the creditor accordingly. The Assistant Master discovered his mistake and the meeting proceeded. The court confirmed the decision by the Master to condone the late delivery of the claim.

19.4 Proof required, suspicious and disputed claims

19.4.1 Proof required

A long line of decisions indicate that the presiding officer may admit a claim upon *prima facie* proof. This means proof on the face of (believing what is stated in) the documents. The functions of the presiding officer at meetings constitute "administrative action" in terms of the Promotion of Administrative Justice Act 2000 which can be reviewed if, for instance the functions are exercised irrationally or without properly applying the *audi alterem partem* rule.[879]

In *Ben Rossouw Motors v Druker*[880] Coetzee J stated that the magistrate was not required to examine the claim too critically, or to require more than *prima facie* proof.[881] All that a creditor need do, in submitting a claim to proof, is to provide proof on a *prima facie* basis that it has a valid claim. The admission of a claim by the presiding officer is in a sense only provisional, since under section 45(3) of the Insolvency Act the trustee may dispute the claim notwithstanding its admission by the presiding officer.[882] The proper approach is to decide whether the claimant has disclosed sufficiently the essential particulars of the claim being advanced. Technical objections are not lightly upheld.[883]

The other side of the coin was explained as follows in *Chappel v The Master*:[884]

> "Before dealing with the facts of the case I would like to say that my view is that when claims are submitted for proof to the Master and there are reasonable grounds for suspicion that the claims are not genuine claims, the

878 1977 (1) SA 107 (NC).

879 *Steelnet (Zimbabwe) Ltd v Master of the High Court, Johannesburg* [2008] JOL 21948 (W) at p 18.

880 1975 (1) SA 816 (T).

881 See *Cachalia v De Klerk* 1952 (4) SA 672 (T) at 675.

882 *Papadogianis v Master of the High Court, Johannesburg* (2016/23003) [2017] ZAGPJHC 4 (3 February 2017); [2017] JOL 39361 (GJ), para [23].

883 *Sechaba Medical Solutions and Others v Sekete* (216/2014) [2015] ZASCA 8 (11 March 2015), para [10]. The court decided that a hospital or other health care provider has a claim against a medical scheme for services authorised by a medical scheme and rendered to a member of the medical scheme.

884 1928 CPD 289 at 291. See also *Steelnet (Zimbabwe) Ltd v Master of the High Court, Johannesburg* [2008] JOL 21948 (W) at pp 5–6.

> Master ought to disallow them and leave the parties who are putting forward these claims to apply to Court to establish their claims by way of action. If this principle is not followed, then once claims are admitted, the *onus* of disproving their existence, which may amount to proving a negative, is thrown upon a trustee, or some creditor who may object to these claims, and I do not think that that is fair. That principle would apply especially in cases where the interest of the insolvent coincides with the interests of the person putting forward these claims, and especially to cases where claims are proved by the insolvent on behalf of children or relatives."

19.4.2 Claims open for inspection

The claims and supporting documents are open for inspection free of charge by any creditor,[885] the trustee (which includes a provisional trustee) or the insolvent, or the representative of any of them.[886]

19.4.3 Interrogation of creditors

The presiding officer, the trustee (or provisional trustee) or the trustee's agent, or a creditor who has proved a claim, or the creditor's agent, may in terms of section 44(7) interrogate under oath any person present at the meeting who wishes to prove a claim or has proved a claim.[887] If the person is not present the person may be summoned to appear.[888] If a creditor fails without reasonable excuse to appear, to be interrogated under oath or answer fully and satisfactorily any lawful question put to the creditor, the creditor's claim, if already proved, may be expunged by the Master and, if not yet proved, may be rejected at the meeting.[889] It is not possible to seek to revisit a proved claim without invoking section 45(3) of the Insolvency Act (trustee disputes claim). Convening a meeting purely for the purpose of conducting an interrogation after the relevant claim has been proved would constitute an abuse of the process envisaged in sections 44 and 45.[890]

19.4.4 Only oral evidence of creditor taken into account

Documentation may be submitted by persons who object to a claim, but a creditor who has submitted a claim is entitled to have the claim considered without the consideration of any oral evidence except the creditor's own under section 44(7).[891] The presiding officer should admit a claim if it can be proved against the estate according to the claim form and any

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885 It is submitted that this means any creditor who has proved a claim or intends to prove a claim. See the difference between the wording of s 44(5) and 44(7).

886 Insolvency Act, s 44(5).

887 *Ibid*, s 44(7).

888 *Ibid*, s 44(8).

889 *Ibid*, s 44(9).

890 *Eastern Cape Development Corporation v Master of the High Court, Port Elizabeth*(3203/2016) [2017] ECP (28 March 2017), para [22].

891 *Aircondi Refrigeration (Pty) Ltd v Ruskin* 1981 (1) SA 799 (W); *Peach v Stewart* 1929 WLD 228.

documentation lodged in connection with the claim by the creditor or someone else and the oral evidence of the creditor.

19.5 Person who may prove a claim

Section 44(4) provides that the (compulsory) affidavit in support of a claim may be made by the creditor, or any person fully cognisant of the claim, who should set forth in the affidavit the facts upon which their knowledge of the claim is based.

In *Hassim Moti & Co v Insolvent Estate M Joosub & Co*[892] the court stated that to make the claim formally correct, there should have been an allegation that the person in question was trading as a partnership or was a member of the firm. However, claims are not to be examined too critically for the purpose of finding technical objections and it is sufficient if vouchers indicate that the signatory has means of knowledge, for example, they are a member of the firm.

19.5.1 Fully cognisant of the claim

Section 44(4) of the Insolvency Act does not mean that the deponent must have personal knowledge of each transaction. No firm employing hundreds of employees could ever prove a claim if a director, secretary or manager could not make the affidavit from the information contained in the books.[893]

In *Ben Rossouw Motors v Druker*[894] the deponent stated that he was the liquidator of the creditor and that all the facts and allegations contained therein were within his personal knowledge. The judge rejected an objection that the creditor did not state the facts upon which his knowledge was based, because the fact that he was the liquidator himself and not some menial employee constituted precisely the fact "upon which his knowledge of the claim" was based. In *A Melamed Finance (Pty) Ltd (In Liquidation) v Harris*[895] a preliminary argument was made that the deponent to the founding affidavit was a liquidator who had no personal knowledge of the underlying transactions. Obviously the liquidator could not have had such knowledge and nor did she purport to say so. What the deponent had done was to marshal the facts assembled in the liquidation process, which were facts with which she was required to acquaint herself and which included the admissions, under oath, by the respondent. The contention was, under such circumstances, misdirected.

19.5.2 Attend in person or by agent

Although there is an established practice that a creditor desiring to prove a claim should attend the meeting in person or by agent, the Insolvency Act does not directly turn this into

892 1927 TPD 778.
893 *R v Verachia* 1958 (4) SA 529 (T).
894 1975 (1) SA 821 (T).
895 (2016/A5028) [2017] GJ (23 June 2017), para [17].

a pre-requisite for the proof of a claim. The position might be different if the authority of the creditor to prove the claim is actually challenged, or the creditor casts a vote.

19.6 Liquidated claim

19.6.1 Proof of unliquidated claims

Section 44 of the Insolvency Act deals with the proof of liquidated claims. The Insolvency Act does not expressly state how unliquidated claims should be proved. According to case law, an unliquidated claim may be submitted for proof at a meeting but it is not admitted until the trustee has with the authority of creditors or the Master compromised or admitted the claim against the estate, or it has been settled by a judgment by a court.[896]

19.6.2 Admission or compromise of claims

The authority of creditors or the Master to allow the trustee to admit or compromise claims applies to both liquidated and unliquidated claims. The provision is often used to compromise or admit unliquidated claims and also liquidated claims rejected at a meeting for technical reasons. Any claim submitted for proof at a meeting is deemed to have been proved and admitted if it has been compromised or admitted by the trustee, or settled by a judgment of a court, unless the creditor informs the trustee within seven days of the compromise, admission or judgment that it abandons its claim. No ordinary claim,[897] not even a claim settled by a judgment of a court, can be admitted unless it has been submitted for proof at a meeting.

19.6.3 Liquidated claim

A liquidated claim is a claim for an amount that is determined or certain, whether the determination is the result of an agreement, a judgment of a court or otherwise. Where the quantum of the applicant's claim is undecided pending the outcome of an application for the variation of a maintenance order, the applicant has failed to establish a liquidated claim as contemplated in section 9(1) of the Act.[898]

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896 See, eg, *Proksch v Die Meester* 1969 (4) SA 576 (A) 589 and s 78(3) of the Insolvency Act. *Klein v Kolosus Holdings Ltd* 2003 (6) SA 198 (T) 208-211 discusses the view that it is not beyond the competence of a presiding officer to admit an unliquidated claim. *Pio v Essel* (15353/18) [2019] ZAWCHC 48 (3 May 2019), para [63], set aside the decision of a presiding officer to admit an unliquidated claim.

897 There are exceptions for certain salary claims and other claims regarded as costs of sequestration.

898 *Gobel v Gobel* (6935/13) [2013] ZAWCHC 91 (28 June 2013).

19.6.4 Examples of unliquidated claims

Damages

The most common type of unliquidated claim is a claim for damages. Examples of damages claims are claims resulting from the cancellation of a contract, fraud, or delicts such as the causing of a motor vehicle accident.

Financial leases

Claims for the outstanding amount in terms of financial leases are usually unliquidated due to the fact that the value of the insolvent's interest in the leased property is not determined or certain. The part of the claim for arrear instalments is liquidated and may be admitted at a meeting.

Penalty clause

A penalty clause in a contract that purports to predetermine the amount of damages (for example, all payments made for the purchase of an asset shall upon cancellation of the contract be retained by the seller as liquidated damages) does not give rise to a liquidated claim since the "penalty" may be reduced by the court if it is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in conflict with the contractual obligation.[899]

Attorneys' fees and fees for other services

Although taxation of an attorney and client account for costs is not a prerequisite for liability,[900] the claim is not liquidated before it has been taxed unless the amount of the fees has been agreed upon.[901] It will depend on the circumstances of a case whether the amount of a claim for fair and reasonable expenses for services rendered is ascertainable with ease and is therefore a liquidated claim.[902] A person cannot be compelled to tax bills of cost that have already been paid.[903]

19.7 Cause arose before sequestration

Only claims, the cause of which arose before sequestration,[904] may be proved, although a claim for money which became due after sequestration may occasionally be allowed as costs

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899 Conventional Penalties Act 1962, s 3. See *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) for a *mero motu* application of the section by the court. See also *Leisher v Motala NO* [2012] JOL 28610 (KZD) [50] and *Syrex (Pty) Ltd v Ramfolo* [2015] JOL 32907 (LC).

900 *Benson v Walters* 1984 (1) SA 73 (A).

901 *Cf Deeb v Pinter Shane & Stoler v Munro-Scott t/a House of Bernadi* 1984 (2) SA 507 (W).

902 *Quality Machine Builder v M I Thermocouples (Pty) Ltd* 1982 (4) SA 591 (W).

903 *Werksmans Incorporated v Praxley Corporate Solutions (Pty) Limited* [2016] JOL 34039 (GJ), para [61].

904 Insolvency Act, s 44(1).

of sequestration. *Nedbank Ltd v Cooper*[905] held that the words on the prescribed claim forms that read "was at the date of sequestration" indebted to the relevant creditor, should in the case of claims against a company wound up by court order, be interpreted to mean and refer to the deemed date of winding-up contemplated in section 348 of the Companies Act 1973.

19.8 Interest on claims

If a debt bears interest, the creditor may include arrear interest to the date of sequestration in the claim.[906] Only interest and costs that are recoverable in terms of the National Credit Act may be claimed against an insolvent estate if the Act applies to the agreement.[907] A creditor should not include interest in the claim for the period after the date of insolvency. Post-sequestration interest to which ordinary and secured creditors are entitled, is discussed in a Chapter 21 below.

19.9 Debts payable after sequestration

If an interest-bearing debt incurred before sequestration becomes payable after sequestration, the creditor may claim the full amount of the debt as if it were payable on the date of sequestration.[908]

19.9.1 Interest on instalment agreement

The rule that full interest may be claimed is too generous in certain cases. To take an example, all instalments (which include interest for the full term) of an instalment agreement are included in the opening balance under such a contract. The creditor is entitled to claim all the instalments which include interest, although they may only be due after sequestration. If the value of the security (the asset sold on instalments) is sufficient, the creditor is entitled to claim and receive the full amount of the claim before all the amounts become due without any deduction for amounts that had been received by the creditor before they were due.[909] Such a creditor is even allowed to claim further interest on instalments not paid timeously before sequestration.

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905 2013 (4) SA 353 (FB), para [44].

906 Insolvency Act, s 50(1). Unless the parties have agreed otherwise, a debtor who is *in mora* in respect of a contractual obligation to pay interest is liable for the payment of *mora* interest on the unpaid interest calculated at the prescribed rate – *Land and Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd* 2013 (6) SA 319 (SCA), para [23].

907 National Credit Act 2005, s 105 read with regs 40 and 42 of R489 in *Government Gazette* 28864 dated 31 May 2006. See *Slip Knot Investments 777 (Pty) Limited v Project Law Prop (Pty) Limited* (36018/2009) [2011] ZAGPJHC 21 (1 April 2011), paras [11] and [12] if the National Credit Act does not apply. Sureties for agreements that fall outside of the National Credit Act cannot invoke the provisions of the Act as a defence – paras [9] and [10]. The borrower was not justified in refusing to pay on the ground that a usurious rate of interest had been "stipulated for" – paras [11] and [12]. A provision regarding a higher interest rate after default is not a penalty in terms of the Conventional Penalties Act 1962 and, even if it was, it would only be disallowed if the penalty was out of proportion to the prejudice suffered – paras [14] to [17].

908 Insolvency Act, s 50(2), which also contains provision for debts that do not bear interest.

909 See D Burdette, "Insolvencies: proof of claims by credit grantors under instalment sale transactions" 1992 *De Rebus* 410. See also "Insolvensies: Burdette se artikel aangeval en verdedig" 1992 *De Rebus* 589.

19.10 Secured claims

If a creditor holds security for a claim the creditor must set out the nature and particulars of the security and, usually,[910] the amount at which the creditor values the security.[911] The voting rights of a secured creditor have been set out above.

19.10.1 Rely on security

If a secured creditor (other than a secured creditor upon whose request the estate was sequestrated) states in the affidavit in support of the claim that the creditor relies solely on the proceeds of the claim for satisfaction of the claim, the creditor is usually not liable for a contribution towards the costs of sequestration payable out of the free residue.[912] A secured creditor who relies solely on its security is not entitled to a concurrent claim. In *Eastern Free State Co-Operative Ltd v The Master*[913] this view was confirmed and it was also pointed out that the creditor cannot correct the claim in terms of the proviso to section 44(4) of the Insolvency Act since there is nothing incorrect in the claim. This case also decided that a statement in the claim that the creditor relied on the security fell short of a statement that the creditor would for the satisfaction of the claim look solely to the proceeds of the security. It is submitted that this part of the decision is incorrect. The view expressed by the Master in the Master's report to the court that the omission of the word "solely" is not material, is correct. The statement by the creditor was clearly made for purposes of the provisions of the Insolvency Act that the creditor would not share in the free residue or be liable for contribution.

If a creditor relies on its security for payment of a claim against a principal debtor, the surety is not released from liability.[914]

19.11 Prescribed claims and prescription of claims by the estate

19.11.1 Prescribed claims must be allowed

A presiding officer's refusal to admit a claim that appears to have become prescribed may be met with the explanation that prescription has been interrupted. The debt is *prima facie* due and the claim should be provisionally admitted by the presiding officer if it is otherwise *prima facie* in order.[915]

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910 Unless the creditor has realised the security in terms of s 83.

911 Insolvency Act, s 44(4).

912 *Ibid*, s 89(2). Contribution by creditors is discussed in Ch 23 below.

913 1997 (3) SA 899 (ECD).

914 *BOE Bank Ltd v Bassage* 2006 (6) SA 33 (SCA), para [14].

915 *Breda NO v The Master of the High Court, Kimberley* (20537/2014) [2015] ZASCA 166 (26 November 2015), para [23]. It is submitted that the remark to the contrary in *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 61, is incorrect.

19.11.2 Suretyship

Principle debt prescribed

If a principal debt has become prescribed, such prescription will also apply to the obligation of the surety.[916] An interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of the surety.[917] If a debt against the principal debtor prescribes after 30 years, the debt against a surety for the debt also prescribes after 30 years,[918] also for interest on the claim.[919]

Co-principal debtor

Where a debtor has bound himself as surety and co-principal debtor, prescription commences to run as soon as the main debt becomes due, for example where an overdraft is called up.[920] However, the filing of a claim against the estate of a principal debtor[921] does not delay prescription against the surety.[922]

Time periods

The ordinary period for the prescription of debts is three years.[923] The period is 30 years in respect of a debt secured by a mortgage bond,[924] a judgment debt, a debt in respect of taxation, etc.[925] For a debt arising from a bill of exchange or other negotiable instrument (for

916 *Leipsig v Bankkorp Ltd* 1994 (2) SA 128 (A) 132J; *ABSA Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA); *De Jager v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) 537. The last-mentioned case decided that an undertaking not to invoke prescription given after prescription has already been completed, is binding.

917 *Jans v Nedcor Bank Ltd* 2003 (6) SA 646.

918 *KH Eley v Lynn & Main Inc* [2007] SCA 142 (RSA).

919 *ABSA Bank Ltd v Erasmus* 2007 (2) SA 545 (C), para [26].

920 *Nedcor Bank Ltd v Sutherland* 1998 (4) SA 32 (N).

921 Prescription Act 1969, s 13(1)(g).

922 *ABSA Bank Bpk v De Villiers* 1998 (3) SA 920 (O). However, see the opposite view in the *Nedcor* case above.

923 Prescription Act 1969, s 11(d).

924 *Land and Agricultural Development Bank of South Africa v Factaprops 1052 CC and Another* [2015] JOL 33317 (GP); 2016 (2) SA 477 (GP), following *Absa Bank Ltd v Hammerle Group (Pty) Ltd* Case No 7457/ 2013 ZAGPPHC 402 and not following *Land and Agricultural Development Bank of South Africa v A Boeke and Another* (unreported Case No 12506/2007) delivered on 17 February 2011, which decided that a debt secured by a special notarial bond, registered under the provisions of the Security by Means of Movable Property Act 1993, prescribed after three years and not 30 years. The SCA decided that the period of prescription applicable to a debt secured by a special notarial bond was thirty years – see *Factaprops v The Land Bank* (353/2016) [2017] ZASCA 45 (30 March 2017), para [27]. In the appeal in the *ABSA Bank* case, the court held that an admission of the claim interrupted prescription and that the claim was not prescribed – *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA), para [15]. The cancellation of a mortgage bond following the sale of the property by the trustees had no bearing on the period of prescription that was fixed at 30 years in terms of section 11*(a)*(i) of the Act at the time the debt became due – *Botha v Standard Bank of South Africa Ltd* (445/2018) [2019] ZASCA 108 (6 September 2019), para [34].

925 Prescription Act 1969, s 11(a).

instance a cheque) or a notarial contract, the period is six years.[926] Prescription usually commences to run as soon as a debt becomes due.[927]

Impeachable transactions

The claim of a trustee who seeks to impeach transactions is a debt that prescribes in terms of the Prescription Act. In *Von Wielligh Bester v Gouws*[928] the court held that an election by trustees to prioritise pursuing entities to which a trust might have diverted funds and their election to attend to brokers' claims well after October 2012 could not be a defence to the special plea of prescription, especially where the evidence pointed to their having the requisite knowledge as prescribed in section 12(3) of the Prescription Act by 23 August 2012. Counsel for the plaintiffs submitted that, in the context of winding-up, one could prioritise, as in this case where the plaintiffs had their hands full in carrying out their obligations from day one and this was not a defence against prescription. The Prescription Act (and indeed section 12(3)) does not entertain such a defence. The plain reading of the section was that, without qualification or exception, prescription commenced from the time of such knowledge and the fact that the plaintiffs were busy with other investigations and legal challenges was no defence to the special plea. They could and should have appointed more people to assist them if required. The evidence was that the investigations were done very quickly when required and could have been done much sooner if they had decided to do so.

Delay and interruption of prescription

The completion of prescription is delayed by several circumstances,[929] for example, if a claim has been duly presented for proof at a meeting of an insolvent estate, a company in liquidation[930] or a close corporation,[931] the period of prescription is not completed before one year has elapsed after the confirmation of the final account.[932] Persons with rights of

926 *Ibid*, s 11(c).
927 *Ibid*, s 12.
928 [2019] JOL 41730 (WCC), paras [60] and [61].
929 Prescription Act 1969, s 13.
930 *Ibid*, s 13(1)(g) and *Regering van die RSA v SA Eagle Versekeringsmpy* 1985 (2) SA 42 (O) 53. It is submitted that the interpretation of the provision in *Thrupp Investment Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (W), para [22], that proof of the claim is required, is incorrect. A claim has been filed against the company in liquidation for the purpose of suspending prescription when the presiding officer at the meeting of creditors admits the claim for purposes of proof in the sense of allowing the claim to go forward to the meeting of creditors so as to determine whether the claim should be admitted or rejected – *Betterbridge (Pty) Ltd v Masilo* 2015 (2) SA 396 (GP), para [24]; *Masilo v Betterbridge (Pty) Limited* (37/2015) [2016] ZASCA 73 (25 May 2016).
931 *Van Deventer v Nedbank Ltd* 2016 (3) SA 622 (WCC).
932 Prescription Act 1969, s 13(1)(g) and *Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A); *ABSA Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA); *Nedcor Bank Limited v Rundle* 2008 (1) SA 415 (SCA). *Shackleton Credit Management (Pty) Ltd v Scholtz* [2012] JOL 28476 (WCC) decided that s 13(1)(g) does not apply to close corporations. Section 13 contains the following wording:
"**13. Completion of prescription delayed in certain circumstances**
(1) If-

action against a company under winding-up are prevented by the operation of section 359 (1)(a) of the Companies Act 1973 from interrupting prescription and consequently completion of prescription is delayed. Prior to compliance with section 359(2) of the Companies Act 1973 (notice to the liquidator of continuing proceedings), prescription is delayed until compliance with section 359(2) after the date of their final appointment.[933]

Prescription is interrupted and commences to run afresh by an express or tacit acknowledgement of liability by the debtor,[934] or by the service of any process whereby the creditor claims payment of the debt (for example, a summons).[935] An application for sequestration is not a process whereby the creditor claims payment of a debt and the service of such an application does not interrupt prescription.[936] Where a creditor has ceded his rights to a debt he is no longer a creditor and a summons instituted by the creditor does not interrupt prescription.[937]

Prescription of a claim by a company under winding-up or insolvent estate

Between the time when a winding-up order has been granted and the appointment of a liquidator, the company is prevented by "superior force", within the meaning of section 13(1)(a) of the Prescription Act, from interrupting prescription. The appointment of a liquidator is the responsibility of the Master and the company as such is powerless to interrupt prescription or even to take action to ensure that a liquidator is appointed. The period of prescription is therefore not completed until a year has elapsed after the appointment of a liquidator.[938] In the same way, subject to what is stated in the next paragraph about cases where the insolvent has *locus standi*, prescription against an insolvent is not completed until a year after the appointment of a trustee.

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or ...
(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No. 28 of 1966); or ...;
... and
(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), ... (g) or (h) has ceased to exist,
the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

933 *C Pro Construction PTY v Caliber Devco CC* (63054/15) [2018] ZAGPPHC 663 (3 September 2018), para [11].

934 *Standard Bank of South Africa Limited v Botha* (54753/16) [2018] ZAGPPHC 35 (7 March 2018) declined to follow *Consolidated Textile Mills Ltd v Weiniger* 1961 3 SA 335O and decided that payments by the trustees in the insolvent estate interrupted prescription.

935 Interpretation Act 1969, ss 14 and 15. A summons served on a company after the date of liquidation interrupted the running of prescription where the liquidators had waived their right to receive notice of the continuation of the legal proceedings in terms of s 359 of the Companies Act 1973 – *Moto Health Care Medical Scheme v Muller NO and Others* [2015] JOL 34042 (GP).

936 *WP Koöperatief Bpk v Louw* 1995 (4) SA (C).

937 *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd* 1996 (1) SA 382 (W).

938 *Mattioda Construction (SA) (Pty) Ltd v Everite Ltd* 1980 (3) SA 157 (W).

Prescription and claims by an insolvent

In principle an insolvent's *locus standi* is not affected by sequestration. In terms of section 23(6) of the Insolvency Act the insolvent may sue or may be sued in own name without reference to the trustee of the estate in any matter relating to status or any right in so far as it does not affect the estate, or in respect of any claim due to or against the insolvent in terms of section 23.[939] Insolvents can, for example, institute a claim against their trustee for damages as a result of the mismanagement of the estate.[940] In such a case the insolvent is not a person under curatorship or a person who is prevented by superior force from interrupting the running of prescription.[941]

19.12 Suretyship

Suretyship is not dealt with in detail in these notes.[942] It is common for creditors to insist on suretyship as a form of protection against the non-payment of a debt. In a suretyship agreement a person (the surety) undertakes to a creditor that the obligation of another person (the principal debtor) will be discharged and, if not, that the surety will perform or will indemnify the creditor.[943] Suretyship is an accessory obligation. This means that for there to be a valid suretyship there has to be a valid obligation between the principal debtor and the creditor.[944] An irrevocable letter of credit is not accessory to the underlying contract and is distinguishable in law from a suretyship which is accessory to the principal obligation.[945] 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.[946]

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939 In terms of s 23(7) of the Insolvency Act the insolvent can for own benefit recover any pension to which the insolvent may be entitled for services rendered by the insolvent. In terms of s 23(8) the insolvent may for own benefit recover any compensation for loss or damage by reason of defamation or personal injury and in terms of s 23(9) the insolvent may, subject to s 23(5), recover for own benefit the remuneration or reward for work done or professional services rendered by or on behalf of the insolvent after sequestration.

940 *Stalcor (Pty) Ltd v Kritzinger NO* (1841/2012) [2016] FB (21 January 2016); [2017] JOL 37785 (FB), para [13].

941 *Grevler v Landsdown* 1991 (3) SA 175 (T).

942 Prejudice caused to a surety can only release the surety if the prejudice is the result of a breach of some or other legal duty or obligation. If the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer – *Business Partners Limited v Tsakiroglou* [2017] JOL 37687 (WCC), para [32].

943 If rental is not paid on time as a result of a lessee's insolvency, the lessor is entitled to turn to a surety for prompt payment of the rent – *Boshoff v South African Mutual Life Assurance Society* 200 (3) SA 597 (C).

944 A surety can raise the defence that the claim has been subordinated and is not yet due – *Cape Produce Co (PE) (Pty) Ltd v Dal Maso* 2001 (2) SA (W) 182. (In *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA), para [9], it was held that a subordinated claim was conditional and that it was incorrect to hold that the claim was not due.) *Cf Maccelari v Help U Build Project Management CC* 2001 (4) SA 1282 (C) where the claims of members of a close corporation were subordinated because this was declared in financial statements signed by the members. If a suretyship provides for cession of rights and such a cession is not possible, performance in terms of the suretyship agreement would be impossible, rendering the agreement void *ab origine* and releasing the sureties – *Land and Agricultural Development Bank of South Africa v Du Preez* Case No 1373/04 Northern Cape High Court (25 November 2011), para [39].

945 *Casey and Another v FirstRand Bank Ltd* [2016] JOL 33584 (SCA), para [12].

946 *ABSA Bank Ltd v Du Toit* (7313/13) [2013] ZAWCHC (13 December 2013).

19.12.1 In practice the surety is usually also the co-principal debtor

In practice, suretyship agreements are professional documents that favour the creditor. The surety usually binds itself as co-principal debtor and renounces all the common law benefits, such as the benefit of excussion (*beneficium ordinis seu excussionis*) and the benefit of division amongst co-sureties. In these cases the position is as follows:

- The creditor can prove an unconditional claim against the debtor and the surety;[947]
- The creditor is entitled to full payment from both the debtor and the surety and to receive dividends from both upon the full amount of the claim, unless the creditor has received payment from the principal debtor before proving against the estate of the surety;
- However, the creditor may not recover more than the total amount owing to the creditor;[948]
- If the surety has made payment to the creditor (or the creditor has lost the right to prove a claim) the surety has an unconditional claim against the debtor's estate, but if the creditor has proved a claim the surety cannot prove a claim against the debtor's estate.[949]

19.12.2 Effect of other circumstances on surety

Rehabilitation

The rehabilitation of the debtor does not release a surety for the debtor.[950]

Setting aside of disposition against principal debtor

It has been held (contrary to earlier decisions) that the setting aside of a disposition under section 29 of the Insolvency Act against the principal debtor does not extinguish the obligation which can still be claimed against a surety.[951]

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947 *Trans-Drakensberg Bank Ltd v The Master* 1962 (4) SA 417 (N).

948 *De Wet Bros v The Master* 1934 CPD 427.

949 *Rossouw and Rossouw v Hodgson* 1925 AD 97; *Taylor and Thorne v The Master* 1965 (1) SA 658 (N); *Proksch v Die Meester* 1969 (4) SA 567 (A); *ABSA Bank Ltd v Scharrighuisen* 2000 (2) SA 998 (C) at 1006.

950 Insolvency Act, s 129(3).

951 *Millman and Stein v Kamfer* 1993 (1) SA 305 (C). *Cf Standard Bank Financial Nominees (Pty) Ltd v Bamburger* 1993 (4) SA 84 (W) 90. *Cf* A Boraine "Vernietigbare vervreemdings in die insolvensiereg as verwere vir 'n borg" *TSAR* 2007-3.

Creditor relies on security

In *BOE Bank v Bassage*[952] the Supreme Court of Appeal held that the surety is not released if a creditor relies on security for payment of a debt against the principal debtor.

Release of surety where prejudice caused

Prejudice caused to a surety can only release the surety if the prejudice is the result of a breach of some or other legal duty or obligation. If the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer.[953]

Subordination of claim

A creditor who subordinated its claim against principal debtor A in favour of other creditors of A can still claim from a surety of A if A has no other creditors.[954]

19.13 Technical objections

Technical defects of claims are not decisive.[955] The presiding officer should consider an adjournment to enable creditors to correct their claims.[956]

19.13.1 Certain defects in affidavit not vital

Certain defects in the affidavit do not make it invalid.[957] Failure to comply with Regulations 1, 2, 3 and 4 of the Regulations governing the Administering of an Oath of Affirmation[958] (for example, stating the manner, place and date of taking the declaration, stating the designation and area of the commissioner of oaths, etc) are not peremptory but merely directory and the affidavit can be accepted if there has been substantial compliance.[959]

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952 2006 (6) SA 33 (SCA), para [14]. This decision in effect overruled the decision in the unreported case of *Santam Bank Beperk v Brink* (Case Nr 14727/77 in the Witwatersrand Local Division). The creditor indicated on its claim form lodged against the principal debtor that it relied on its security in full and final satisfaction of its claim against the principal debtor. The court decided that the creditor had abandoned its claim against the principal debtor as a result of taking over the security and that it therefore had also abandoned its claim against the surety for the principal debt.

953 *Business Partners Limited v Tsakiroglou* [2017] JOL 37687 (WCC), para [32].

954 *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso* 2002 (3) SA 752 (SCA).

955 *Cf Brits v Magistrate of Wolmaransstad* 1950 (4) SA 162 (T); *R v Verachia* 1958 (4) SA 529 (T); *Trans-Drakensberg Bank Ltd v The Master* 1962 (4) SA 417 (N) 424.

956 *Caledon Trust & Fire Assurance Company Ltd v Magistrate Riversdale* 1937 CPD 349; *Trust Bank van Afrika Bpk v Van der Walt* 1972 (3) SA 166 (C) and a number of other cases.

957 Before the repeal of the Stamp Duties Act, if a document had not been stamped the creditor could have the document properly stamped, pay the penalties and so remove any disability to use the document with retroactive effect – *Buyers Guide (Pty) Ltd v Dada Motors (Mafikeng) Pty Ltd* 1990 (4) SA 55 (B) and ss 12 and 13 of the Stamp Duties Act 1968.

958 Government Notice R1258 in *Government Gazette* 3619 of 21 July 1972.

959 *Cf*, eg, *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (NC).

19.13.2 Defects in affidavit that are fatal

The failure to attest an affidavit is not a mere technicality,[960] neither is the taking of an oath by someone with an interest in the matter.[961] If there is no affidavit or only an invalid affidavit when the meeting starts, the presiding officer has no discretion to admit the claim.[962] A colleague of the deponent who is not an attorney is not prohibited from administering the oath.[963] An affidavit commissioned by an attorney with an interest in the matter furnished in a proof of claim to a presiding officer in terms of section 44(4) of the Insolvency Act (after the amendment of the Schedule in the regulation)[964] is valid since it is furnished to "an officer in the service of the State" and accordingly does not fall within the prohibition contained in regulation 7(1) issued in terms of the Justices of the Peace and Commissioners of Oaths Act 1963.[965]

19.14 Late proof of claims

19.14.1 Individuals

For individual insolvents section 44(1) of the Insolvency Act provides that no claim may be proved after the expiration of three months from the conclusion of the second meeting, except with the leave of the court or the Master and payment of the cost occasioned by the late proof of the claim. The costs are the creditor's share of the cost of the meeting and, if the account must be redrawn and re-advertised, also the cost thereof.

19.14.2 Proof of claim against individual after lodging of account

A creditor[966] who has not proved a claim before the date when the trustee lodged an account is not entitled to share in the distribution under that account unless the Master, before the confirmation of the account, is satisfied that the creditor had a reasonable excuse for the delay in proving its claim and permits the creditor to share in the distribution under the account.[967] A creditor who has not been permitted to share in an account lodged before the proof of the creditor's claim is entitled to an equalising dividend under a further account if sufficient funds are available and the Master is satisfied that the creditor had a reasonable excuse for delaying the proof its claim. However, a creditor is not entitled to share in money

960 *Derby Shirt Manufacturers (Pty) Ltd v Nel* 1964 (2) SA 599 (D).

961 Regulation 7. The Schedule, as amended by R1425 in *Government Gazette* 7119 of 11 July 1980 exempts, *inter alia*, a declaration taken by someone who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty. The requirement of independence is lacking on the face of it where one attorney attests an affidavit for another attorney practising in association with him – *Radue Weir Holdings Ltd v Galleus Investments CC* 1998 (3) SA 677 (ECD).

962 *Noordkaaplandse Ko-op Lewendehawe v Van Rooyen* 1977 (1) SA 403 (NC).

963 *Bruwil Konstruksie (Edms) Bpk v Whitson* 1980 (4) SA 703 (T).

964 By Government Notice R1428 in *Government Gazette* 7119, of 11 July 1980.

965 *Breda v The Master of the High Court, Kimberley* (20537/2014) [2015] ZASCA 166 (26 November 2015), para [41].

966 Except certain salary claims (s 98A(3) of the Insolvency Act) and a creditor whose claim is secured by a mortgage bond over immovable property (section 95 of the Insolvency Act).

967 Insolvency Act, s 104(1).

recovered in respect of voidable dispositions if the creditor delayed proving a claim until the court had given judgement in proceedings to recover the money or assets.[968] A creditor is not prevented from proving a late claim merely because distribution has taken place in terms of an account described as a "final" account.[969]

19.14.3 Companies

In the unreported case of *Stone & Stewart v Master of the Supreme Court*[970] Flemming J held that section 366(2) of the Companies Act 1973 and not the provisions of section 44(1),[971] or section 104(1), of the Insolvency Act[972] applied to companies. *De Montlehu v Mayo*[973] held that the decision in *Stone & Stewart* was wrong and that the proviso to section 44(1) of the Insolvency Act applied also to companies. In *Wishart NO v BHP Billiton Energy Coal South Africa Limited*[974] the court disagreed with the decision in *De Montlehu* and followed the decision in *Stone & Stewart* stating that the intention of the legislature was that the proviso to section 44(1) would not apply to companies, but that section 366(2) of the Companies Act 1973 would apply; unless determined otherwise by the Master, there is no fixed time period within which creditors of a company in liquidation have to prove claims against the company. On appeal in the *De Montlehu* matter, 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 had 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.[975] 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 to liquidations.[976] It is submitted, that section 104(2) of the Insolvency Act (consent by Master for equalising dividend for a creditor who did not share under an earlier account) does not apply to companies. The liquidator may apply to the Master to fix a time or times within which creditors are to prove their claims in order to participate in a distribution under an account lodged with the Master before such proof. In practice the Master may insist that the liquidator must give notice in the *Government Gazette* of the proposed fixing of times for the proof of claims. Once an account has been lodged, claims proved after the fixed dates are excluded from the distribution under such account, unless the Master extends the date. If sufficient money is available under a subsequent account the creditor is entitled to the dividend which the creditor would have received under previous accounts (called an "equalising dividend") before any distribution is made to other creditors who rank with this creditor.

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968 *Ibid*, s 104(2).
969 *Cools v The Master* 1998 (4) SA 212 (C).
970 Case No 8828/87, Transvaal Provincial Division.
971 Meskin disagrees.
972 *Townsend v Barlows Tractor Co (Pty) Ltd* 1995 (1) SA 159 (W).
973 [2014] JOL 32508 (GJ).
974 (48137/12) [2015] GJ (30 July 2015), para [13].
975 *Mayo v De Montlehu* 2016 (1) SA 36 (SCA), para [26].
976 *Wishart and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd* 2017 (4) SA 152 (SCA), paras [13] and [16].

19.15 Further consideration of claims after the meeting

19.15.1 Rejection at meeting no bar to later proof

The rejection of a claim at a meeting does not bar the creditor from proving a claim at a subsequent meeting, or from establishing the claim by legal action before the time for such action has expired in terms of section 75.[977]

19.15.2 Review of decision of presiding officer

The decision by the presiding officer to reject or admit a claim can be reviewed in terms of section 151 of the Insolvency Act by any person aggrieved by the decision, provided that the court shall not re-open a confirmed account otherwise than provided for in section 112.[978] It is not necessary to wait with the review of a decision by a presiding officer to admit a claim until the liquidator has examined the claim, has in terms of section 45(3) decided to dispute the claim, or until the Master has decided to confirm the claim.[979] However, the power to expunge a claim or to reduce it is conferred on the Master alone. Only when the Master has made a decision in this regard may an interested person approach a court to review it.[980] A person does not have *locus standi* to review the proof of a creditor's claim merely because the person does not wish to be interrogated by the creditor.[981] The court may take into account evidence that was not available to the presiding officer at the meeting.[982]

19.15.3 Amendment of claim after proof

If a creditor has proved an incorrect claim the creditor may, with the consent in writing of the Master given after consultation with the trustee, submit a fresh corrected claim on such conditions as the Master may think fit to impose.[983] A creditor who relied on its security is not entitled to amend its claim to change this. If the creditor did not prove the whole of the claim initially, it might be easier for the creditor to merely prove a further claim.

19.15.4 Insolvent must inform of false claims

The insolvent is guilty of an offence if they know or suspect that a person has proved or intends to prove a false claim against the estate and fails to inform the Master and the trustee in writing of that knowledge or suspicion within seven days from the date upon which the insolvent acquired that knowledge, or when the suspicion was aroused.[984]

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977 Insolvency Act, s 44(3).
978 Section 112 is discussed in Ch 30.
979 *Steelnet (Zimbabwe) Ltd v Master of the High Court, Johannesburg* [2008] JOL 21948 (W), at p 17.
980 *Wishart v BHP Billiton Energy Coal South Africa (Pty) Ltd* 2017 (4) SA 152 (SCA), para [27].
981 *Jeeva v Tuck* 1998 (1) SA 785 (SECLD).
982 *Marendaz v Smuts* 1966 (3) SA 637 (T).
983 Insolvency Act, s 44(4).
984 *Ibid*, s 136(a).

19.15.5 Interrogation of proved creditor

The presiding officer, or trustee or another proved creditor, may interrogate a proved creditor about the creditor's claim and the Master may expunge the claim if the creditor fails without a reasonable excuse to submit to the interrogation and answer any lawful question fully and satisfactorily.[985]

19.15.6 Examination of claims by trustee

After the conclusion of a meeting the presiding officer must hand all proved claims to the trustee or liquidator.[986] In practice the rejected claims are also handed to the trustee. As pointed out above, the trustee or liquidator may admit or compromise claims submitted for proof at a meeting if the trustee or liquidator has been authorised to do so by creditors. The trustee must examine all available books and documents to ascertain whether the estate in fact owes the claimant the amount claimed.[987] The trustee is not bound by acceptance of the applicant's claim in sequestration or liquidation proceedings.[988]

19.15.7 Validity of security disputed

If a trustee disputes the validity of security held by the creditor, section 45(3) of the Insolvency Act should not be used – the trustee should draft the account reflecting the claim as a concurrent claim and leave it to the creditor to object if so minded.

19.15.8 Procedure if trustee disputes claim

If the trustee disputes a claim, they must report it to the Master stating the reasons for disputing it.[989] The trustee must furnish the creditor with a copy of the reasons and notify the creditor that they have 14 days, or such longer period allowed by the Master, to furnish reasons why the claim should not be disallowed or reduced. The trustee must certify that they have complied with this requirement and the creditor must furnish the trustee or liquidator with a copy of documents submitted to the Master. The trustee must then submit their remarks on the reasons submitted by the creditor to the Master.[990] Winding-up Regulation 18 contains provisions similar to Regulation 3 of the Insolvency Regulations for companies, but not the sensible provision in regulation 3 that the creditor should furnish a copy of its submission to the trustee. There is also no provision that the liquidator must submit remarks on the reasons submitted by the creditor to the Master. *Constantia Insurance Company Limited v Master of the High Court, Johannesburg*[991] decided that the Master has no power to consider a reply by a liquidator to a creditor's substantiation of its claim. The court went on

985 *Ibid*, s 44(7)-(9).
986 *Ibid*, s 45(1).
987 *Ibid*, s 45(2).
988 *Smith v Porritt* 2008 (6) SA 303 (SCA), para [11].
989 Insolvency Act, s 45(3).
990 Insolvency Regulations, reg 3.
991 2016 (6) SA 386 (GJ) SALJ.

to state that the liquidators' report comes after section 45(2), in terms of which liquidators are obliged, after the meeting of creditors at which the contested claim will have been proved, to examine "all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed." One is entitled to accept then that when liquidators submit their written report to the Master under section 45(3), they will be fully equipped to make out their case for disallowance of the claims.[992] It is also relevant to bear in mind that the report to the Master under section 45(3) would conceivably have been preceded by an examination of the creditor under section 44(7) of the Insolvency Act. This is an opportunity designed to interrogate the creditor about the legitimacy of the claim. At such an opportunity the liquidator would be able to obtain relevant information which they could place before the Master in their report under section 45(l).[993] Section 45(3) of itself envisages a procedure that is procedurally fair. In this case no facts or circumstances were disclosed that rendered the procedure procedurally unfair, given what in fact unfolded in that case.[994]

The power to expunge a claim or to reduce it is conferred on the Master alone. Only when the Master has made a decision in this regard may an interested person approach a court to review it.[995]

19.15.9 Reduction or disallowance of claims

The case of *Caldeira v The Master of the Supreme Court*[996] deals with the reduction or disallowance of claims in terms of section 45(3) of the Insolvency Act. Mere suspicion about a claim is not sufficient to have a claim reduced or disallowed by the Master. The trustee must have a reasonable belief based on facts ascertained by them that the insolvent estate is not in fact indebted to the creditor in the amount of the proved claim.[997] This belief would generally arise after examination of the books and records but could also, for example, arise from an examination of the creditor. The claim cannot be expunged simply on the request of the trustee. The Master should apply his mind to the reasons given by the trustee. The court in *PG Bison v Johannesburg Glassworks (Pty) Ltd*[998] made the remark[999] that a claim could be expunged by the Master because of a belief or suspicion that the claim constitutes a voidable disposition. Although a voidable disposition remains valid until set aside by the court, it could

992 At paras [36] and [37].
993 At para [38].
994 At para [45].
995 *Wishart v BHP Billiton Energy Coal South Africa (Pty) Ltd* 2017 (4) SA 152 (SCA), para [27].
996 1996 (1) SA 868 (N).
997 *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 [37].
998 2006 (4) SA 535 (W).
999 The application was rejected on the sole ground that there was dilatoriness and unreasonable delay in approaching the court for the review, referring to the 180 days in terms of s 7(1)(a) and (b) of the Promotion of Administrative Justice Act 2000. See para 12.7 of the decision on appeal in *PG Bison Ltd v Johannesburg Glassworks (Pty) Ltd (In Liquidation)* (Case No A5050/06 in the Witwatersrand Local Division dated 16 November 2007). The decision was confirmed on appeal and an application to the SCA for special leave to appeal was dismissed with costs.

be seen as part of the function of the Master to investigate claims in their entirety.[1000] A claim by a creditor against an insolvent estate cannot be rejected for the sole reason that it is based upon a transaction requiring Treasury approval, but which approval has at the relevant time neither been obtained nor refused.[1001]

19.15.10 Further steps if claim is disputed

The Master may confirm the claim, or reduce or disallow it, and must inform the creditor accordingly. Such a reduction or disallowance does not bar the creditor from establishing its claim by an action at law, subject to the provisions of section 75 of the Insolvency Act.[1002] Instead of establishing its claim by an action, the creditor may ask the court in terms of section 151 of the Insolvency Act to review the decision of the Master to reject the claim. 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.[1003] 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* on evidence that was not available to the Master.[1004] The trustee is a "person aggrieved" who may bring a review and the courts power to deal with an action at law is not excluded by the review procedure.[1005]

19.15.11 Claim for assessment of income tax

In *Van Zyl v The Master*[1006] the court held that the only way to question an assessment for income tax was to lodge an objection against the assessment and an appeal to the Special Income Tax Court in terms of the Income Tax Act 1962. Other courts or the Master (in terms of section 45 of the Insolvency Act) cannot decide on such an assessment. The Master may reject the claim if the Master is of opinion that there is no assessment, or if there is some patent error in the calculation of the claim, or something of that nature.

19.15.12 Withdrawal of claims

Section 51 of the Insolvency Act provides for the withdrawal of proved claims. The purpose of this procedure is to limit the liability of the creditor for contribution and it should not be used to have an incorrect claim reduced or disallowed.

1000 The argument that the Master merely executed its administrative duty and that disallowing the claim in terms of s 45(3) was not tantamount to setting aside the disposition, may be questioned. The effect of disallowing the claim on the sole ground that it constituted a voidable disposition is identical to the setting aside of the disposition.

1001 *Van Zyl v Master of the High Court of South Africa Western Cape High Court, Cape Town r* 2013 (5) SA 71 (WCC).

1002 Insolvency Act, s 45(3).

1003 *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).

1004 *Al-Kharafi & Sons v Pema* 2010 (2) SA 360 (W).

1005 *Millman v Pieterse* 1997 (1) SA 784 (C).

1006 1991 (1) SA 874 (E).

Some questions relating to the proof of claims

(a) Three claims are submitted for proof at a meeting. After the first claim has been proved the creditor insists on interrogating the other two creditors before their claims are considered. Is the creditor entitled to do this?[1007]

(b) What is the effect if a secured creditor does not value security when proving a secured claim?[1008]

(c) A secured creditor proves a secured claim and states that he relies on the security for the satisfaction of the claim "if a contribution is payable by concurrent creditors", or words to that effect. Will the secured creditor be regarded as a concurrent creditor if the security does not yield a sufficient amount to pay the claim?[1009]

(d) A creditor asks permission for the late proof of a claim due to the fact that the creditor waited to see whether a contribution was payable. Is this an acceptable reason?

Self-Assessment Questions

Question 1
Study the basic aspects of the proof of claims in an insolvent estate. You are required to write a brief essay on the process on how to lodge a claim and explain the difficulties in attempting to do so during COVID. (10)

Question 2
Briefly explain the concept of a "liquidated claim". (3)

Question 3
Briefly state what the outcome would be if a secured creditor (other than a secured creditor upon whose request the estate was sequestrated) states in his affidavit in support of his claim that he relies solely on the proceeds of his claim for satisfaction of his claim. (5)

Question 4
In terms of section 45(3) of the Insolvency Act a trustee can dispute a claim after it has been proved. Briefly discuss such mentioned legal proceedings. (4)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

1007 *Cf Peach v Stewart* 1929 WLD 228.
1008 See, eg, s 83(11) of the Insolvency Act.
1009 See s 89(2) of the Insolvency Act.

CHAPTER 20 – INTERROGATIONS

20.1 Introduction

Economic growth[1010] can only take place in a jurisdiction when the following can be identified:

- enterprise development;
- promoting investment;
- making companies more efficient;
- encouraging transparency;
- high standards of governance.

These principles must form the basis and guidelines for determining the need for an enquiry. Megarry J in the *Re Rolls Razor*[1011] case stated the following:

> "…The process is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of the company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of misconduct or impropriety which is of relevance to the liquidation…The examinees are not in the ordinary sense witnesses and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up."

Interrogations[1012] are a useful tool for insolvency practitioners to investigate the trade, dealings, affairs, and property of insolvent estates. The scope of an interrogation is wide and the only requirements are that questions must be relevant and must not prolong the proceedings unnecessarily.

Interrogations are divided into two categories, namely:

- public interrogations; and
- confidential interrogations.

1010 *ABSA Bank Ltd & Others v Wolpe and Others* ZAWCHC 31 August 2016.
1011 *Re Rolls Razor Ltd (2)* [1970] 1 Ch 576 [1969] 3 All ER 1386.
1012 The term "interrogation" is used interchangeably with the terms "enquiry" or "examination".

20.1.1 Public Interrogations

These interrogations take place at a postponed meeting of creditors. In practice, the second[1013] meeting of creditors is the meeting of choice to postpone for the purpose of an interrogation. A special[1014] meeting of creditors can also be postponed for the purpose of an interrogation; however, only the insolvent, director of a company or the member of a close corporation can be interrogated at this postponed meeting.

A general[1015] meeting of creditors can also be postponed for the purpose of an interrogation of a witness; however, the advertisement of this meeting must clearly state that the purpose of this postponed meeting is to interrogate witnesses.

A meeting of creditors is open to the public and it therefore follows that the interrogation that takes place at a postponed meeting of creditors is also open to the public – hence the name.

The applicable sections in the Insolvency Act are sections 64 – 66 and sections 414 to 416 of the Companies Act 1973 are applied *mutatis mutandis*.

20.1.2 Confidential interrogations

The procedure to obtain consent for the holding of a confidential interrogation in a company or a close corporation is by way of an application to the Master of the High Court, or to the High Court in terms of sections 417 and 418 of the Companies Act 1973.

An application for a confidential interrogation in an insolvent estate of a natural person or a trust is in terms of section 152 of the Insolvency Act.

20.2 Purpose of interrogations

The main purposes of interrogations are:

- to seek out and recover assets;
- to determine whether the insolvent (or company) was a party to any impeachable transactions that can be set aside;
- to determine whether any claims can be instituted against directors and officials of a company in terms of section 77 of the Companies Act 2008;
- to determine liability (in the case of companies in liquidation) in terms of sections 423 and 424 of the Companies Act 1973; sections 163 and 218 of the Companies Act 2008, or the similar provisions of section 64 and 65 of the Close Corporations Act 1984;

1013 Insolvency Act, s 40.
1014 *Ibid*, s 42.
1015 *Ibid*, s 41.

- to determine whether the estate or company in liquidation has other civil claims against any other parties; and

- to determine the validity and enforceability of any claims which third parties make against the estate.

An interrogation in terms of section 423 of the Companies Act 1973 can be held to expose misdemeanours and / or the liability of directors. Difficult questions may arise in respect of legal professional privilege or other privileges of witnesses.

20.3 Interrogations and the Constitution

20.3.1 Introduction

Interrogations in terms of the Companies Act 1973 and Insolvency Act have in general survived constitutional challenges on several grounds:[1016]

- the right to equality in section 9;

- the right to freedom and security of the person in section 12 (including the right not to be detained without trial);

- the right to privacy in section 14;

- the right to just administrative action in section 33; and

- the right to a fair trial in section 35(3).

The reasons for finding the provisions constitutional include the following:

- the mechanisms embodied in sections 417 and 418 further very important public policy objects, such as the honest conduct of the affairs of a company;

- the obligation to honour a subpoena is a civic duty recognised in all open and democratic societies and it is not an invasion of freedom;

- imprisonment for failing to comply with a subpoena does not infringe upon the freedom related to the right not to be detained without trial;

- if answering a question would unjustifiably infringe or threaten to infringe any of the examinee's rights in Chapter 3 of the Constitution (for example, the right to privacy and

1016 *Ferreira v Levin, Vryenhoek v Powell* 1996 (1) SA 984 (CC); *Bernstein v Bester* 1996 (2) SA 751 (CC); *Parbhoo v Getz* 1997 (4) SA 1095 (CC); *De Lange v Smuts NO* 1998(3) SA 785 (CC). See also *Swart and Others v Fourie and Others* (2488/2017) [2017] ZAWCHC 58 (22 May 2017), paras [24] to [26].

not to be subject to seizure of private possessions) it would constitute "sufficient cause" for refusing to answer questions or produce documents;

- it is difficult to see how there could be an infringement of the right to privacy. The benefits of limited liability bring with them corresponding obligations of disclosure and accountability;

- nothing in the challenged provisions is inconsistent with procedural fairness;

- the right to equality is not infringed; in fact, the sections are designed to place the company in liquidation on an equal footing with directors, officers, debtors, and others against whom the company might be obliged to litigate in order to recover its property and not to secure an unfair advantage;

- the public interest is no less compelling in the case of an insolvent individual than in the case of the winding-up of a company and it is likewise in the interest of the general body of creditors that all the assets of the insolvent be established, recovered and collusive dealings as well as impeachable transactions with creditors, be exposed. To this end it is vital to ensure that insolvents and other persons who can give important information, do not evade supplying it.

In *Mondi Ltd v The Master*[1017] it was pointed out that a witness who was properly subpoenaed was obliged to attend and should raise objections to the enquiry with the presiding officer. It is premature to approach the court before the presiding officer has given a ruling. *Swart and Others v Fourie and Others*[1018] concluded that the applicants in that case had misconceived their remedy; they had not taken up the issue of any abuse of the process with the presiding officer; they had also not shown that the presiding officer would not appropriately acquit himself of his responsibilities should they do so.

20.3.2 Committal of a witness to prison

Section 66(3) of the Insolvency Act authorises the officer presiding at a meeting to commit a summoned person to prison if the person fails to produce a book or document or fails to answer a question lawfully put to the person or to answer it fully and satisfactorily. In *De Lange v Smuts NO*[1019] the majority of the Constitutional Court held that the committal provision of section 66(3) read with section 39(2) infringes section 12(1)(b) of the Constitution Act 1996 only to the extent that a person who is not a magistrate is authorised to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65 of the Insolvency Act.

1017 Reported twice under 1997 (1) SA 641 (N) and 1997 (2) SA 450 (N).
1018 (2488/2017) [2017] ZAWCHC 58 (22 May 2017), para [42].
1019 1998(3) SA 785 (CC).

The question whether the admission of such evidence would infringe in any way the applicant's right to a fair trial is a matter to be decided by the trial judge on the facts and circumstances established at the trial.[1020]

20.3.3 Access to information

Section 32 of the Constitution and the Promotion of Access to Information Act 2000 provides for access to information. *Jeeva v Receiver of Revenue, Port Elizabeth*[1021] held that a proper interpretation of section 23 of the Interim Constitution of the Republic of South Africa 1993 gives a person the right of access to information whether that information is the subject of a legal professional privilege and whether it is information covered by the legislative provisions which preserves the secrecy of information held by the Receiver of Revenue. The court upheld the legal professional privilege in terms of section 33(1) of the Interim Constitution because it is part of the common law which is a limiting law of general application; it does not negate the essential content of the section 23 right of access to information; and because it is reasonable and justifiable in an open and democratic society based on freedom and equality. The court exercised its discretion to order the disclosure of information held by the Receiver of Revenue (which the Receiver was not otherwise at liberty to disclose) where there was no realistic possibility of that information coming to the knowledge of third parties, or that it might have been used by third parties to the prejudice of the taxpayer. (The applicants were persons associated with the insolvent in his business who asked to have access to the documents in the possession of the Receiver of Revenue to prepare for an examination.)

Fairness does not dictate that in general the questioner in terms of section 418 of the Companies Act 1973 (or section 64 or 65 of the Insolvency Act)[1022] should disclose to witnesses all information which is in the questioner's possession. If circumstances arise in which a witness required an opportunity to consider an aspect more fully, that matter should be decided by the commissioner. Documents in possession of a creditor who wishes to participate in an enquiry are not documents in possession of the State to which access can be requested in terms of section 32 of the Constitution.[1023]

In *Stadler v Wessels NO*[1024] it was held that, because the presiding officer was not statutorily or otherwise obliged to keep a record or make notes, such officer could not be under any obligation to disclose any casual or informal record to any person. The court added that it could never have been the intention of the legislature in section 23 of the interim Constitution to characterise as "information ... held by the State" the incomplete evidence already given by a person in such a case.

1020 *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC); *S v Lottering* 1999 (12) BCLR 1478 (N); *S v Dube* 2000 (1) SACR 53 (N); *Lotter v Arlow* 2002 (6) SA 60 (T); *S v Tandwa* [2007] SCA 34 (RSA).

1021 1995 (2) SA 433 (SE).

1022 *Pitsiladi v Van Rensburg and Others NNO* 2002 (2) SA 160 (SECLD) 162I-J.

1023 *Leech v Farber NO* 1999 (9) BCLR 971 (W); 2000 (2) SA 444.

1024 2000 (4) SA 544 (O).

20.3.4 Right to fair administrative action – does this apply to interrogations?

In *Roux v Die Meester*[1025] the applicant requested an order that the Master should, *inter alia*, considering section 24 of the Interim Constitution (right to lawful and procedurally fair administrative action) allow the applicant to be present during a Master's examination in terms of section 152, to interrogate witnesses, to be represented by a legal representative and to submit evidence in rebuttal. The court rejected reliance on section 24 because the investigation was purely investigative in nature and did not affect the insolvent's right to procedurally fair administrative action.[1026]

In *Strauss v The Master*[1027] Mynhardt J agreed with the decision in *Podlas v Cohen and Bryden NNO*[1028] that an enquiry in terms of section 152 is purely investigative and that the presiding officer makes no findings that can detrimentally affect a person's rights. Mynhardt J added[1029] that it cannot be held that the decision to hold an enquiry under section 152 (or sections 417 and 418 of the Companies Act 1973) amounts to administrative action – the applicants cannot rely upon section 32, read with item 23 of Schedule 6, of the Constitution.

20.3.5 Promotion of Access to Information Act 2000 and the Promotion of Administrative Justice Act 2000

The position as set out in the decisions discussed above is affected by the coming into operation of the Promotion of Access to Information Act 2000[1030] and the Promotion of Administrative Justice Act 2000. There are conflicting decisions on the question whether the Promotion of Administrative Justice Act applies to the decision to hold an enquiry under section 417 of the Companies Act 1973. *Nedbank Ltd v Master of the High Court, Witwatersrand Local Division*[1031] decided that the Promotion of Administrative Justice Act 3 of 2000 did not apply to section 417 and remarked in passing that it did not apply to section 152 of the Insolvency Act.[1032] *Nafcoc Investment Holding Co Ltd v Miller*[1033] decided (without reference to earlier decisions) that the decision to authorise a section 417 enquiry was subject to the Promotion of Administrative Justice Act 2000. *FirstRand Bank Ltd t/a Rand Merchant Bank and Another v Master of the High Court, Cape Town, and Others*[1034] decided that the

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1025 1997 (1) SA 815 (T).

1026 *Cf Van der Merwe v Slabber NO* 1998 (3) SA 613 (N); *Strydom v Additional Magistrate, Kempton Park* [2010] JOL 25497 (GNP).

1027 2001 (1) SA 649 (T).

1028 1994 (4) SA 662 (T). See also *Roux v Die Meester* 1997 (1) SA 815 (T); *Strydom v Additional Magistrate, Kempton Park* [2010] JOL 25497 (GNP).

1029 665F-666E.

1030 The Manual by the Department of Justice in terms of s 14 of the Act was published in Government Gazette No 35497 dated 5 July 2012.

1031 2009 (3) SA 403 (W).

1032 *Cf Akoo and Others v Master of the High Court* [2013] JOL30833 (KZP), para [17].

1033 Case 08/27442 (Southern Gauteng Division) dated 8 December 2008.

1034 2014 (2) SA 527 (WCC); [2013] JOL 31014 (WCC). The Master's decision offended against at least three aspects of the legality principle. The first was fairness. The question of the unfair procedural treatment with respect to the provisions of s 3 of PAJA. The Master's treatment of the applicants' attorney was, however,

Master's decision to authorise an enquiry in terms of sections 417 and 418 is subject to review in terms of the Promotion of Administrative Justice Act 2000:

> "From an overview of the cases cited by counsel it thus appears that the existence of a right to review the Master's decision to authorise an enquiry, was in principle recognised in the decisions of Friedland [*Friedland and Others v The Master and Others* 1992 (2) SA 370 (WLD)], [*Ex parte Liquidators Ismail Solomon & Co (Pty) Ltd* 1941 WLD 33] and [*Strauss and Others v The Master and Others* 2001 (1) SA 649 (T)]. The Nedbank judgment [*Nedbank Ltd v Master of the High Court, Witwatersrand Local Division and Others* 2009 (3) SA 403 (WLD)], was influenced by the dicta of Ackermann J in the Bernstein [*Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC)] judgment. The Bernstein judgment must, however, be read in context. It was handed down before the enactment of PAJA and it was based on an interpretation of the term 'administrative action' in section 24 of the interim Constitution without any statutory definition thereof."

According to the wording of section 381(1), (2) and (3) of the Companies Act 1973, it appears that the purpose of a section 381 enquiry is to enquire into and investigate matters in relation to a winding-up. The operative words indicating this are to "enquire into the matter" (subsection (1)), "to answer any enquiry" (subsection (2)) and "to investigate" (subsection (3)). According to the wording of these subsections the overall purpose appears to be investigative and not that of a procedure that adversely affects the rights and impacts directly and immediately on individuals. The court therefore had difficulty in seeing how the enquiry in question could be characterised as administrative action.[1035]

20.4 The different types of interrogation

20.4.1 Section 65(1) of the Insolvency Act

Section 65(1) provides that the presiding officer, the trustee, and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person called and sworn concerning-

- all matters relating to the insolvent or the insolvent's business or affairs, whether before or after the sequestration of the estate, and

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procedurally unfair. It was also substantively unfair in so far as the Master invited an attorney of the one party to a personal consultation with the purpose of granting the application for the holding of the enquiry. The other party's attorney was deliberately excluded from this process. The Master also breached the principle of rationality. By excluding the applicants' attorney from the decision-making process, the Master inevitably impaired the quality thereof. Rationality is one of the aspects of the legality principle. The Master's conduct also offended against the principle of transparency. *Cf Akoo and Others v Master of the High Court* [2013] JOL 30833 (KZP), para [30] *et seq*.

1035 *Motala v Master of the North Gauteng High Court and 12 Others* (48748/11) [2017] (GNP) (9 October 2017), para [55] – *cf Nedbank Ltd v Master of the High Court, Witwatersrand Local Division* 2009 (3) SA 403 (W), para 96 *et seq* regarding s 417 of the Companies Act 1973.

- any property belonging to the estate, and concerning the business, affairs or property of the insolvent or the spouse of the insolvent.

20.4.1.1 Procedure

Sections 66 to 68 of the Insolvency Act provide for the enforcing of summonses, steps to be taken on suspicion of an offence and presumptions in respect of the record of proceedings and the validity of acts at meetings.

20.4.1.2 Similar provisions for companies and close corporations

Sections 414 and 415 of the Companies Act 1973 are applicable to a company unable to pay its debts. Subject to effective controls against their abusive use, the far-reaching effects of the provisions are justified in the public interest and, accordingly, must be borne with stoicism by those upon whom they are properly brought to bear.[1036] A proportionate approach is indicated; the more obvious and important the need for investigation, the more rigorously the provisions can fairly and legitimately be applied. It is unlikely to be an abuse if it is apparent that the examination is being used for the purposes contemplated by the statutory provisions.[1037]

20.4.1.3 Committal of a recalcitrant witness to prison

Section 66(3) of the Insolvency Act authorises the presiding officer at a postponed meeting of creditors to commit a summoned person to prison if the person fails to produce a book or document or fails to answer a question lawfully put or to answer it fully and satisfactorily. In *De Lange v Smuts NO*[1038] the majority of the Constitutional Court held that the committal provision of section 66(3) read with section 39(2) infringes section 12(1)(b) of the Constitution Act 1996 only to the extent that a person who is not a magistrate is authorised to issue a warrant committing to prison an examinee at a creditors' meeting held in terms of section 65 of the Insolvency Act.

20.4.2 Section 152 of the Insolvency Act

Section 152 provides that the Master may summon the insolvent, the trustee or any other person who is able to give any information concerning the insolvent, his estate or the administration of the estate or any claim or demand made against the estate to appear before the Master, a magistrate, or an officer in the public service mentioned in the Master's notice.

20.4.2.1 Summons to appear

The Master and not the magistrate or other officer must issue the initial summons. The time to object to a subpoena is before appearance – the witness cannot object after the

1036 *Swart and Others v Fourie and Others* (2488/2017) [2017] ZAWCHC 58 (22 May 2017), para [24].
1037 *Ibid*, para [25].
1038 1998(3) SA 785 (CC).

appearance of the witness when the incorrect issue of the subpoena is a formal defect or irregularity which does not taint the legality of proceedings already held.[1039]

20.4.2.2 Section 381 interrogations

Section 381(2) of the Companies Act 1973 provides that the Master may at any time in relation to any winding-up examine the liquidator or any other person on oath concerning the winding-up. In terms of section 381(3) to (5) the Master may appoint a person to investigate the books and vouchers of a liquidator. The expenses are paid as costs of the winding-up unless the court orders the liquidator to pay the costs from personal funds. Subsection (1) imposes a duty on the Master to enquire into the matter if the Master has reason to believe that a liquidator is not faithfully performing their duties.[1040] Subsection (2) empowers the Master to require any liquidator at any time to answer any enquiry in relation to any winding-up in which such liquidator is engaged. The effect of this subsection is twofold: first, it empowers the Master to conduct an enquiry and, second, it puts the liquidator under an obligation to answer any such enquiry. The Master's right and the liquidator's obligation are to be inferred from the words "may at any time require ... to answer". Any other interpretation, negating this right and obligation, would render this subsection without any force and meaning.[1041]

Motala v Master of the North Gauteng High Court and 12 Others[1042] concluded that there was no doubt that the Master was entitled to enquire in terms of section 381 about the liquidator's previous convictions. A conviction of theft or fraud may have a bearing on the suitability of a person to act as a liquidator, or to continue to act in that capacity, not only for the present, but also in future. It may also be relevant to the question whether a liquidator should remain on the Master's panel of approved liquidators and trustees. The various requests by the Master to obtain the necessary information in this regard should have been regarded as an attempt by the Master to exercise control over the applicant as a liquidator. The issue regarding the applicant's previous convictions was directly linked to both their ability to faithfully perform their duties as well as their perceived ability to do so. Therefore, the reason for having conducted a formal enquiry in terms of section 381 was justified, as the previous informal enquiry by means of correspondence proved to be unsuccessful.

20.4.3 Sections 417 and 418 of the Companies Act

Section 417 of the Companies Act provides for an examination by the Master or the court in any winding-up of a company unable to pay its debts and section 418 provides for examination by commissioners appointed by the Master or the court. It has been held that

1039 *Strydom v Additional Magistrate, Kempton Park* [2010] JOL 25497 (GNP).

1040 *Motala v Master of the North Gauteng High Court and 12 Others* (48748/11) [2017] (GNP) (9 October 2017), para [25]. Considering the alleged removal of valuable equipment from the mines and the conditions regarding employees of the mines, the court had no doubt that the Master was not only entitled, but also obliged, to conduct an enquiry in terms of s 381.

1041 *Motala v Master of the North Gauteng High Court and 12 Others* (48748/11) [2017] (GNP) (9 October 2017), para [25].

1042 (48748/11) [2017] (GNP) (9 October 2017), para [63].

the powers and functions under section 417 are judicial and the Master does not act administratively when giving effect to the section; the Promotion of Administrative Justice Act 2000 does not apply and a person has no right to an audience before the Master makes a decision to institute a section 417 enquiry.[1043] As indicated above, *FirstRand Bank Ltd t/a Rand Merchant Bank and Another v Master of the High Court, Cape Town and Others*[1044] decided that the Master's decision to authorise an enquiry in terms of sections 417 and 418 is subject to review. Where the Master has decided to convene an enquiry and has appointed a commissioner to conduct it, the position may be that such a decision may only be challenged by way of judicial review. The nature of an enquiry is inquisitorial. In *South African Philips (Pty) Ltd v The Master*[1045] it was 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 or member applies to have the company wound up by the court.[1046]

One of the purposes of sections 417 and 418 is to investigate the validity of claims by the company and to determine whether they should be pursued. It is "obviously in the interest of creditors that doubtful claims which the company may have against outsiders be properly investigated before being pursued".[1047] There is no limitation upon the matters about which there can be an interrogation, provided that those contemplated concern the trade, dealings, affairs, or property of the company. The scope of the investigation is no less extensive than that of one under section 415. The judicial *dicta* regarding section 415 apply *mutatis mutandis* in relation to section 417.[1048] Enquiries have many objectives; they are aimed at achieving the primary goal of liquidators to determine what the assets and liabilities of the company are and to recover assets and pay the liabilities in the way that would best serve the interests of creditors.[1049]

Can a person be required to be subjected to questioning without first being given access to all the documents and information that has been made be available to the examiner? Considerations of fairness do not demand that, as a rule, all such information must be made available to the witness in advance. Circumstances may arise during an inquiry that require that a witness be permitted to study a particular document, or be given an opportunity to consider information, before being subjected to examination in relation thereto. That is a matter upon which the commissioner will be required to decide from time to time if it arises.[1050]

1043 *Nedbank Ltd v Master of the High Court (Witwatersrand Local Division)* 2009 (3) SA 403 (W).

1044 2014 (2) SA 527 (WCC); [2013] JOL 31014 (WCC). *Cf Akoo and Others v Master of the High Court* [2013] JOL 30833 (KZP), para [30] *et seq*.

1045 2000 (2) SA 841 (N).

1046 An enquiry in terms of s 417 cannot be held in the case of a voluntary winding-up as 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).

1047 *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 455 (SCA), para [23].

1048 *ABSA Bank Limited v Jooste NO* (3521/2012) [2013] ZAECPEHC 58 (19 November 2013), paras [22] and [39].

1049 *Bernstein v Bester* 1996 (2) SA 751 (CC), para [16].

1050 *Kawie v Master of the High Court* (Case No 21353/2011, High Court Cape Town, 3 November 2011). Quotation from *Leech v Faber* 2000 (2) SA 444 (W)).

20.4.3.1 Cross-examination and legal representation

Cross-examination as to credibility is in some circumstances permissible and the sole purpose of determining whether offences have been committed, is legitimate.[1051] Section 418(1)(c) of the Companies Act 1973 is not applicable to an examination before the Master or court in terms of section 417 and the liquidator or creditors can be represented and participate in the examination.[1052]

20.4.3.2 Appointment as a commissioner

The commissioner is usually a retired judge, a senior advocate or a senior attorney experienced in the law of insolvency. Commissioners should conduct enquiries in such a way that they not only demonstrate their impartiality and lack of bias, but also avoid a "perception of bias, objectively assessed on reasonable grounds".[1053] If there is to be a challenge to the conduct of an enquiry in terms of section 417 or 418, that must either be a review in terms of The Promotion of Administrative Justice Act 2000 or a residual category of review derived from the common law. In either event, the proper way in which to challenge the summoning of a witness is by way of review proceedings and the decision that falls to be attacked is that of the commissioner, not the liquidators. Any attack on the commissioner's decision to summon a witness must give weight to the considered view of the commissioner as to the necessity for that individual to be summoned.[1054]

20.4.4 Enquiries in terms of section 423

Section 423 of the Companies Act 1973 provides that the court may enquire into the conduct of a promoter, director or officer of a company if, in the course of the winding-up of a company, it appears that any person who has taken part in the management of the company, or any past or present director or officer of the company has become liable or accountable for any money or property of the company, or has been guilty of any breach of faith or trust in relation to the company. An enquiry contemplated in section 423 can be delegated to a commissioner in terms of section 418.[1055]

20.5 Relevant factors to decide on the type of interrogation

An insolvency practitioner or creditor must consider the factors mentioned before deciding whether to proceed with a public interrogation or a confidential interrogation.

1051 *Kebble v Gainsford NO* 2010 (1) SA 561 (GSJ), paras [61] and [63].
1052 *Swart v Master of the High Court Pretoria* Case No 35392/2010 (NGHCP) 23 November 2010; 2012 (4) SA 219 (GNP).
1053 *ABSA Bank v Hoberman* 1998 (2) SA 781 (C) 796G and 799B.
1054 *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 455 (SCA), para [52].
1055 *Huang v Bester NO* 2012 (5) SA 551 (GSJ).

20.5.1 Urgency

The urgency of the interrogation is a factor; it may be necessary to hold an interrogation without delay because of the probability of assets being removed or evidence being destroyed.

The public interrogation is undesirable as the time periods are laborious in practice. A confidential interrogation can be held at any time after the provisional order.[1056] Henochsberg submits that a provisional liquidator requires the leave of the court in terms of section 386(5) of the Companies Act 1973, read with section 387(3), to apply for a confidential interrogation, if, (as would ordinarily be the case) the authority in terms of section 386(4)(i) has been withheld. A creditor may apply and the application may be made at any time after a winding-up order has been made.[1057] According to the definition of "winding-up order" in section 1, it includes a provisional order. Although the Companies Act of 2008 has repealed[1058] the Companies Act of 1973, it is submitted that the definition in section 1 of the Companies Act 1973 is still applicable.

20.5.2 Secrecy and legal representation

20.5.2.1 Public interrogations

Section 39(6) of the Insolvency Act provides that the place where a meeting of creditors is held must be accessible to the public. Section 65(2A) of the Insolvency Act provides that, notwithstanding the provisions of section 39(6), the presiding officer must order that the part of the proceedings where a witness may incriminate himself or give evidence that may prejudice him at a criminal trial, must be held *in camera* and that no information regarding such questions and answers may be published in any manner whatsoever. In terms of section 65(6) of the Insolvency Act, any witness may be assisted at the interrogation by counsel, an attorney or agent. The proceedings may be set aside if not in accordance with the fundamental principles of justice, for example, if unrepresented witnesses are not informed of their right to legal representation.[1059] Unfortunately witnesses may be in attendance and listen to other witnesses give evidence.

20.5.2.2 Confidential interrogations in terms of section 152 of the Insolvency Act

In *Van der Westhuizen v Roodt*[1060] it was decided that this interrogation is confidential and that the only persons entitled to interrogate the witnesses or to be present are the Master, the insolvency practitioner and the witness. The witness is entitled to be represented by an attorney with or without counsel.

1056 *Cf Appleson v The Master* 1951 (3) SA 141 (T).

1057 Companies Act 1973, s 417(1). Enquiries in terms of both ss 415 and 417 may be held at any time up to the date of the dissolution of the company – *Standard Bank of South Africa Ltd v The Master* 1997 (3) SA 178 (C).

1058 Chapter 14 remains applicable in terms of Item 9 read with Sch 5

1059 *Advance Mining Hydraulics (Pty) Ltd v Botes NO* 2000 (1) SA 815 (T); 2000 (2) BCLR 119 (T).

1060 1986 (1) SA 693 (N) 699F.

20.5.2.3 Appointment of a commissioner

Interrogations in terms of sections 417 and 418 and the application therefore are private and confidential unless the court or the Master otherwise directs.[1061] In *Merchant Shippers SA v Millman*[1062] the court stated that there was good reason for the preservation of secrecy, not only regarding the examination, but also the application for the enquiry. If the reasons why the interrogation was necessary and the matters which were to be inquired into were to be made public or to be disclosed to the very people who were to be called to testify, it could stultify not only the liquidators' task but the interrogation itself. The usual and salutary rule is that witnesses should not have sight of the application papers in the absence of special circumstances.[1063] In *HMI Healthcare Corporation (Pty) Ltd v Medshield Medical Scheme*[1064] it was held that a creditor has a right to inspect and copy the application papers. There may be cases in which the need for confidentiality will trump the right to ensure that the order was correctly obtained, but in this case, it was not shown that the enquiry would be compromised if the applicant saw the *ex parte* papers. In *Friedland v The Master*[1065] it was stated that a witness has the right to be heard on the question of whether the witness should be interrogated only if the witness learns of the application in time to enable them to make representations before the order is made, regarding questions of jurisdiction, oppression, or hardship and possibly unusual, special, or exceptional circumstances in which it may seem appropriate to entertain. In *Trust Bank van Afrika Bpk v Van der Westhuizen*[1066] it was decided that a creditor of a company in liquidation, in respect of which an interrogation was held in terms of the provisions of sections 417 and 418, was entitled to be present at such enquiry, to be legally represented by an attorney with or without counsel, the latter being entitled to ask questions of any witness.

20.5.2.4 Questions by legal representatives

The legal representative of a witness is entitled to re – examine their own witness once the evidence in chief has been finalised. Questions which a representative may ask their own witnesses are limited to questions to clear up aspects of the witness's testimony during their examination.

20.5.3 Costs

Confidential interrogations tend to be more costly as the fee of a commissioner is included. The person who applies for an interrogation in terms of sections 417 or 418 is liable for the costs and expenses unless the Master or the court directs that the whole or any part thereof should be paid out of the assets of the company.[1067]

1061 Companies Act 1973, s 417(7).
1062 1986 1 SA 413 (C).
1063 *Siyanda Resources (Pty) Ltd v Moloto NO* [2010] JOL 25232 (GSJ), para [52].
1064 Case No 17480/2012, High Court Pretoria, 15 May 2012.
1065 1992 (2) SA 370 (W).
1066 1991 (1) SA 867 (W) 876D.
1067 Companies Act 1973, s 417(6).

20.5.3.1 Public interrogations

Section 73(1A) of the Insolvency Act provides that when an insolvency practitioner, with the prior approval of the Master, instructs an attorney with or without counsel to lead evidence at an interrogation, the costs incurred in connection with such instruction must be included in the costs of administration of the estate. A creditor who wishes to hold an interrogation usually accepts responsibility for the costs of the interrogation; the interrogation can remain under the auspices of the insolvency practitioner.[1068] Section 97(2)(c) read with section 153(2) of the Insolvency Act provides that all costs incurred by the Master or presiding officer at a meeting of creditors in carrying out any provision of the Act, is regarded as part of the costs of administration of the estate unless the court orders otherwise.

20.5.4 Recalcitrant witnesses

In *De Lange v Smuts NO*[1069] the Constitutional Court held that the committal provision of section 66(3), read with section 39(2) of the Insolvency Act, infringes upon section 12(1)(b) of the Constitution 1996 only to the extent that a person who is not a magistrate is authorised to issue a warrant committing to prison a witness at an interrogation. The presiding officer who is a magistrate can only order detention if he or she is of the opinion that a particular question has not been answered fully and satisfactorily.[1070]

Prior arrangements should be made with the presiding officer to arrange a suitable date or dates for the interrogation.

20.6 Preparation of summonses[1071]

The summonses for witnesses are usually prepared by the insolvency practitioner or legal representative and submitted to the presiding officer for signature. If the proposed witness is the insolvent or spouse of the insolvent, or an officer or director of the company, the need for their interrogation is obvious. For all other witnesses a proper submission regarding the relevance of their evidence is required to enable the presiding officer to consider the matter properly.[1072] The summons must conform to Form 24 prescribed in Annexure 1 of the rules issued in terms of the Magistrates' Court Act.

Reference should be made to the provisions of sections 64 of the Insolvency Act and section 414(2) of the Companies Act 1973 for the category of persons who may be summoned to appear or produce books or documents.[1073] If a person is summoned to produce books or

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1068 *Cf Bernhard v Klein* 1990 (2) SA 306 (W) 308G-J.

1069 1998(3) SA 785 (CC).

1070 *Nieuwoudt v Faught* 1987 (4) SA 101 (C).

1071 The words "summons" and "subpoena" are used interchangeably in these notes.

1072 *Cf ABSA Bank Limited v Jooste NO* (3521/2012) [2013] ZAECPEHC 58 (19 November 2013), para [32].

1073 An applicant under s 414(2) of the Companies Act 1973 for the examination of a witness must satisfy the presiding officer that there is fair ground for suspicion of a misfeasance or actionable conduct and that the person proposed to be examined can probably give information about what is suspected – *Cooper v SA Mutual Life Assurance Society* 2001 (1) SA 967 (SCA).

documents, the books or documents should be specified with reasonable clarity and should be limited to books and documents that can be of assistance in determining the relevant issues.[1074] The mere fact that a variety of documents are required to be produced does not constitute a ground for the setting aside thereof. Such difficulties should be raised beforehand and dealt with by the commissioner.[1075] The presiding officer must be informed or have knowledge that a person has custody or control over documents before a summons may be issued to produce the documents.[1076] In *Swart and Others v Fourie and Others*[1077] subpoenas were set aside because there was nothing to indicate that the presiding officer could have been satisfied that production of the information, which on the face of it was extremely wide, was of relevance to the enquiry.

A summons must be issued circumspectly after proper consideration of the need to interrogate the person.[1078] A person must not be called to an interrogation on matters extraneous to the insolvent estate.[1079] Elaborate and complicated structures will not assist a witness to evade the public duty to provide the necessary information.[1080] The Court will not decide whether, for example, the Master has improperly exercised a discretion in this regard, but will interfere if the discretion is exercised improperly.

The bare assertion that documents are confidential does not entitle persons summoned for an enquiry in terms of section 417 or 418 of the Companies Act 1973 to withhold them. If there is reason to believe that the documents requested will cast light on the affairs of a company before the winding-up, their relevance will in general outweigh the right to privacy.[1081]

A witness may not insist to be told in advance what questions will be asked.[1082]

There is a statutory obligation on an insolvent to attend the first and second meetings of creditors, including further meetings if required to do so in writing by the insolvency practitioner.[1083] There is a similar obligation on directors or officers to attend meetings of a company unable to pay its debts.[1084]

1074 *Cf Beinash v Wixley* 1997 (3) SA 721 (SCA) 721.

1075 *Nyathi and Others v Cloete NO and Others* 2012 (6) SA 631 (GSJ), para [8].

1076 *Mason v Master of the High Court*, judgment by Roux J handed down in the Transvaal Provincial Division Case No 32737/2001 on 28 January 2002, as noted in August 2002 *Master's Newsletter* 7.

1077 (2488/2017) [2017] ZAWCHC 58 (22 May 2017), para [46].

1078 *Cf Akoo and Others v Master of the High Court* [2013] JOL 30833 (KZP), para [21].

1079 *Foot v The Master of the Supreme Court*, unreported, Case No 14797/92 in the Cape of Good Hope Provincial Division, referred to in AIPSA's newsletter of 18 July 1994; *Laskarides v German Tyre Centre (Pty) Ltd (In Liquidation)* 2010 (1) SA 390 (W); *Nafcoc Investment Holding Co Ltd v Miller*, Case 08/27442 (Southern Gauteng Division) dated 8 December 2008.

1080 *Pitsiladi v Van Rensburg and Others NNO* 2002 (2) SA 160 (SECLD) 162F.

1081 *Gumede v Subel NO* 2006 (3) SA 498 (SCA); *ABSA Bank Limited v Jooste NO* (3521/2012) [2013] ZAECPEHC 58 (19 November 2013), para [35]; *Akoo and Others v Master of the High Court* [2013] JOL 30833 (KZP), para [18].

1082 See *Leech v Farber* 2000 (2) SA 444 (W) 449D

1083 Insolvency Act, s 64(1).

1084 Companies Act 1973, s 414(1).

All witnesses are not obliged to attend an interrogation and cannot be arrested for failure to do so unless the fees and allowances prescribed under the Magistrates' Courts Act 1944 for attendance as a witness in civil proceedings,[1085] have been prepaid.[1086] Travelling expenses and accommodation for out-of-town witnesses[1087] must accompany the subpoena as a matter of common sense. At the interrogation the witnesses can record the difficulties they encountered in fully complying with a summons.[1088] Witness fees must be properly quantified before they are claimable. Once the fees have been properly quantified, they will become part of the costs of administration of the insolvent estate, which may be paid before finalisation of the matter if the trustee is confident that money is available and is sufficient to do so without in due course contravening any of the injunctions in the Insolvency Act as to which claimants are entitled to what amounts from what source.[1089]

Summonses must be served in the manner as provided for service of a subpoena issued by the Magistrate's Court in a civil case (that is, by the sheriff of the court) or by the insolvency practitioner or his clerk by personal delivery. The manner of service must be set out by the sheriff in the return of service, or by the insolvency practitioner or their clerk in an affidavit.[1090] Similar rules apply to companies.[1091]

1085 See R965 Government Gazette 6 September 2017.

1086 *Cf* Insolvency Act, ss 65(7) and 152(7) and Companies Act 1973, s 415(7) and see *Swart v Cronje* 1991 (4) SA 296 (T) where an insufficient amount was tendered; and *Voster v De Klerk NO en Andere* 1993(1) SA 596(0) where the subpoena denied entitlement to traveling expenses. This includes the costs and expenses which a witness must incur, material costs such as copies and time expended to prepare for the examination – *Laskarides v German Tyre Centre (Pty) Ltd (In Liquidation)* 2010 (1) SA 390 (W), para [21]. Section 381 of the Companies Act 1973 does not contain a provision similar to s 152(7) of the Insolvency Act.

1087 It was stated in *Goulden and Lister v Master of the Supreme Court Cape Town* (1462/2002) [2002] WCC 10 June 2002 that it could not be reasonably expected that a witness should be forced to travel from Durban to Cape Town and back in a second-class railway compartment with a R10 (the amount in a previous regulation) contribution towards his food for approximately five days and with no money for payment of his accommodation in Cape Town. The court agreed with the following remarks In *Mattheys and Another v Coetzee and Another NNO* [1997] 3 All SA 675 (W) where Satchwell J, dealing with a similar application, concluded as follows: "Furthermore, there may frequently be the situation that the party who issues the subpoena tenders to make payment of reasonable expenses, but the witness is not himself in a financial position to personally expend the moneys in advance of the reimbursement which he will receive once he comes to court. I would not be surprised if this were often the case. In all fairness, should it be expected of a witness, who is not a party to the litigation, to financially embarrass himself to attend at court, and only once he is at court be able to claim a refund? There may be many witnesses who cannot beg, borrow, or steal the wherewithal to pay the taxi, catch the train, purchase the air ticket, or make a hotel reservation. Accordingly, there should at the very least be a tender of payment so that the witness can respond to the party who has made the offer by saying that payment in advance is required before the travelling arrangements can either be made or purchased. Alternatively, the witness can ask the party responsible for the subpoena and who has tendered the costs to personally make the arrangements and to make payment of all moneys in respect of such arrangement." In this matter no effort was made by the trustee to tender the price of an air ticket and the cost of hotel accommodation.

1088 *ABSA Bank Limited v Jooste NO* (3521/2012) [2013] ZAECPEHC 58 (19 November 2013), para [36].

1089 *Scheibert v Jones NO* (4892/97) [1998] WCC (25 September 1998).

1090 Insolvency Regulations, reg 4. In the absence of any challenge to the contents of a return of service, the court had to accept it as proof that the sheriff carried out service in the manner described therein – *Interturbo (Pty) Limited (In Liquidation) and Others v ABSA Bank Limited and Others* [2017] JOL 329296 (GJ).

1091 Winding-up Regulations, reg 4.

20.7 Pending criminal trial

Section 35(1)(c) of the Constitution 1996 gives every person arrested on suspicion of an offence the right not to be compelled to make any confession or admission that could be used in evidence against that person. Section 35(3)((j) gives every accused person the right to a fair trial, which includes the right not to give self-incriminating evidence.

Section 65(2A)(a) of the Insolvency Act provides that where any person gives evidence in terms of the section and is obliged to answer any question which may incriminate them , or may prejudice them at a pending criminal trial, the presiding officer must order that such part of the proceedings be held *in camera* and that no information regarding such questions and answers may be published in any manner whatsoever. Section 65(2A)(b) of the Insolvency Act provides that no evidence regarding such questions and answers is admissible in any criminal proceedings, except with respect to charges relating to the giving of false evidence, failure to give evidence, and similar charges. Section 65(2) of the Insolvency Act provides that a witness interrogated under subsection (1) is not entitled to refuse to answer a question that may tend to incriminate them or prejudice them at a criminal trial.[1092]

After the decisions in *Ferreira v Levin*[1093] and *Pharboo v Getz*,[1094] sections 415(3) and (5) and 417(2)(b) and (2)(c) of the Companies Act 1973 were amended to provide as follows:

(a) Any person being interrogated may be required to answer any question put to them at the examination, notwithstanding that the answer might tend to incriminate them and shall, if they do so refuse on that ground, be obliged to so answer at the instance of the Master provided that the Master may only oblige the person to so answer after the Master has consulted with the Director of Public Prosecutions who has jurisdiction.

(b) Any incriminating answer or information directly obtained, or incriminating evidence directly[1095] derived from an examination, shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned, or the body corporate of which they are or were an officer, except in criminal proceedings where the person concerned is charged with an offence relating to:

- the administering or taking of an oath, or the administering or making of an affirmation; or
- the giving of false evidence; or

1092 Section 35(1)(c) of the Constitution 1996 gives every person arrested on suspicion of an offence the right not to be compelled to make any confession or admission that could be used in evidence against that person. Section 35(3) ((j) of the Constitution 1996 gives every accused person the right to a fair trial which includes the right not to give self-incriminating evidence.

1093 1996 (1) SA 984 (CC).

1094 1997 (4) SA 1095 (CC).

1095 *Mitchell and Another v Hodes NO & Others* ZAWCHC 71 (13 December 2002).

- the making of a false statement; or
- a failure to answer lawful questions fully and satisfactorily.

Section 417(3) of the Companies Act 1973 provides that the Master or the court may require any person who may be summoned in terms of subsection (1) to produce any books or papers in the person's custody or under the person's control relating to the company. The effect is that (unlike section 417(2)) there is no use immunity in section 417(3) and persons summoned in terms of the subsection are obliged to produce books or papers, however confidential or incriminating they may be. There can be no objection to the use of such documents at the examination. Any objection to their use on the ground that they infringe or threaten the constitutional right against self-incrimination, may only be raised in criminal proceedings against the person concerned. Incriminating answers given during a section 417 examination in relation to the documents produced or directly derived therefrom, will be subject to the use immunity in s 417(2)(c).[1096]

20.8 Pending civil proceedings

20.8.1 Can evidence given in camera *be used in subsequent civil proceedings?*

According to *Du Plessis v Oosthuizen*[1097] section 65(2A) of the Insolvency Act[1098] does not apply to a company. The judgement delivered by Hattingh J answers hypothetical questions regarding the meaning of the section. The section does not prevent admission of the evidence at the interrogation in subsequent civil proceedings against the person who gave the evidence. The evidence is not "published" when it is used in civil proceedings. Evidence given during the interrogation is admissible even if it was given *in camera*. Hattingh J disagreed with the decision in *Shell SA (Edms) Bpk v Voorsitter, Dorperaad van die OVS*[1099] that the court has a discretion in respect of civil proceedings to disallow evidence obtained in an improper manner. Evidence given at the interrogation is not admissible on the basis that it serves as proof of the facts testified on during the interrogation, but it is admissible as evidence against the person who gave it. The evidential value must be determined by the court and the evidence may be used to test the credibility of the witness.

Evidence adduced at an interrogation in terms of section 417 of the Companies Act 1973 is amenable to being introduced in terms of section 3(1)*(c)* of the Evidence Amendment Act 1988 (subject to the requirements of that provision being satisfied) in proceedings against a person other than the person who gave the evidence.[1100]

1096 *Saloojee and Another v Khammissa and Others NNO* 2015 (5) SA 554 (GJ), para [39].

1097 1995 (3) SA 604 (O).

1098 The section provides that the part of proceedings where a witness may incriminate themself must be held *in camera* and no information regarding questions and answers may be published in any manner whatsoever.

1099 1992 (1) SA 906 (O).

1100 *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC), para [44].

20.8.2 Stay of final sequestration order pending criminal proceedings

In *Gilfillan t/a Grahamstown Veterinary Clinic v Bowker*[1101] an application to stay the sequestration proceedings was refused because the respondent was protected against self-incrimination during sequestration proceedings by the safeguards contained in section 65(2A)(b) of the Insolvency Act. Even though exceptional circumstances could still have warranted a stay of proceedings, the respondent had been unable show any in this case. A finding that the applicant had established the requisites for a final sequestration order could not absolve the prosecution in the criminal proceedings of the duty to prove all the elements of the alleged offence, and accordingly the present court's findings had no bearing on findings that the criminal court would have to make on the evidence before it.

20.8.3 Discretion of court to stay interrogations pending civil proceedings

Roering NO and Another v Mahlangu and Others[1102] noted the following: the fact that the individual concerned was a potential witness in other civil litigation, actual or contemplated, is neutral in determining whether the summons is an abuse; something more must be identified as constituting the abuse; it is inherent in the process of such an enquiry that there is a possibility that the examination of the witness will be advantageous in future litigation; it may generate information that proves valuable in that litigation or helpful lines of enquiry; it may demonstrate that a witness is a poor witness who is unlikely to withstand cross-examination; admissions may be made that are of assistance; the inability of a witness to provide a credible explanation for a transaction may be extremely helpful; as any experienced practitioner knows, what is often important is not what the witness can say, but what they are unable to say; provided the underlying purpose remains the proper one of assessing the merits of a claim or a defence on an informed basis, if these advantages accrue to the liquidator along the way they are not illegitimate."

Self-Assessment Questions

Question 1
You have just been appointed as the provisional Insolvency Practitioner in Fairmax (Pty) Ltd (In Liquidation). Creditors are phoning you every five minutes with information that suggests that the assets of the insolvent estate have been moved to another entity shortly before liquidation. Advise the creditors on the two types of enquiries available and the pros and cons they each attract.

Question 2
Give a short summary of the clauses of the Constitution that were attacked in *Bernstein v Bester*.

1101 2012 (4) SA 465 (ECG).
1102 2016 (5) SA 455 (SCA), para [38].

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 21 – SECURED CREDITORS

21.1 Introduction

21.1.1 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.[1103]

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".

[1103] 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.

21.1.2 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.

21.2 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 property 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 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 in 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.[1104]

More than one mortgage bond 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.[1105]

Section 88 of the Insolvency Act, in terms of which certain mortgages are invalidated, is dealt with in Chapter 12.

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 its secured claim.

1104 Insolvency Act, s 86.
1105 *Ibid*, s 87.

21.3 Mortgage over movable property

As mentioned above, the definition of "special mortgage" includes a mortgage bond of immovable property as well as a 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 (that is, to create a security right in) movable property. In what follows, a brief explanation of first general and thereafter special notarial bonds is provided.

21.3.1 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 as the perfecting of the security.[1106] 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.[1107]

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

1106 See J Roos, "The Perfecting of Securities Held under a General Notarial Bond" 1995 *SALJ* 169.
1107 *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.[1108]

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.[1109] 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.[1110] This remains true even if there are prior bondholders but the bondholder who perfected its security was not aware of such bondholders.[1111]

21.3.2 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[1112] and notwithstanding the fact that the property has not been delivered to the bondholder, be deemed to have been pledged to the bondholder as

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1108 *Pick 'n Pay Retailers (Pty) Limited v Pine Valley Supermarket (Pty) Limited* [2015] JOL 33003 (KZD).

1109 *Trisilino v De Vries* 1994 (4) SA 514 (O).

1110 Majority judgment in *Development Bank of Southern Africa Ltd v Van Rensburg and Others NNO* 2002 (5) SA 425 (SCA).

1111 *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.

1112 For example, an existing right of retention.

effectually as if it had expressly been pledged and delivered to the bondholder.[1113] In *Bokomo v Standard Bank van SA Bpk*[1114] 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.[1115]

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,[1116] which is stricter than the test under the Natal Act that allowed description by reference to quantity and kind.

21.3.3 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,[1117] or to which an instalment agreement as defined in section 1 of the National Credit Act 2005 relates,[1118] is not subject to a landlord's tacit hypothec unless the bond is registered after the landlord's hypothec has been perfected.[1119] (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.

21.4 Pledge

21.4.1 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

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1113 Security by Means of Movable Property Act, s 1.

1114 1996 (4) SA 450 (C).

1115 See also *Scheltema Beleggings CC v Commercial Truck & Trailer Sales CC* [2010] JOL 25495 (GNP), paras [25] – [30].

1116 *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].

1117 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.

1118 *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).

1119 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.

21.4.2 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,[1120] so too a contingent claim.[1121]

21.4.2.1 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 its 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 their creditor (B) has ceded the latter's right, but in order for A to pay their debt to the correct creditor, it is practical to notify A that C is now is new creditor. If A is not notified, they

1120 *Headleigh Private Hospital v Soller & Manning Attorneys* 2001 (4) SA 360 (W) 366-369.
1121 *First National Bank of SA Ltd v Lynn NO* 1996 (2) SA 339 (A).

can validity discharge his debt by paying the original creditor (B).[1122] 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.[1123] In *Botha v Fick*[1124] the Appellate Division of the 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[1125] nor compliance by the cedent with the doctrine of "all effort"[1126] 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 they will not cede their 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

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1122 *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.

1123 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).

1124 1995 (2) SA 750 (A).

1125 *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.

1126 Whether the cedent has done everything in his power to effect the cession of his rights of action.

was 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.[1127]

21.4.2.2 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.[1128] 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.[1129]

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.[1130] 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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1127 *Born Free 364 Investments v First Rand Bank Limited* [2014] JOL 31371 (SCA).

1128 See, eg, *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).

1129 *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA), para [24].

1130 *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.[1131]

21.5 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*)[1132] 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.

21.5.1 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 sufficient to cover the latter's outstanding rent and only to the extent that the subtenant is also in arrears with their 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 sufficient 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.[1133]

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.[1134] The reason for this is that property belonging to persons other than the debtor

1131 *Nedbank Ltd v Cooper NO and Others* 2013 (4) SA 353 (FB), para [28].
1132 Meaning "things carried in or brought on to premises".
1133 *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.
1134 *Kleinsakeontwikkelingskorporasie Bpk v Santambank Bpk* 1988 (3) SA 266 (C).

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

21.5.2 Perfection of the hypothec

Although the hypothec comes into existence the moment when the tenant falls behind with their 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.

21.5.3 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. This 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
- 15 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.

21.5.4 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.

21.6 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 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 their 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.

21.6.1 Types of liens (rights of retention)

Two types 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 remunerated in terms of the contract. The most common types are probably builders' 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.

21.6.2 Limitation on 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.[1135]

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.[1136]

21.6.3 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.[1137]

Legal professional privilege usually prevents the 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.

21.6.4 Physical possession a prerequisite

Physical possession by the creditor (lienholder) is a prerequisite for the continued existence of its 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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1135 See *Ethekwini Municipality v Boyce* [2015] JOL 33771 (KZD), paras [22] to [25] for the requirements for an improvement lien.

1136 *Trust Bank van Afrika Bpk v Van der Walt NO* 1972 (3) SA 166 (C).

1137 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.[1138]

21.6.5 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 (such as 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.[1139]

21.7 Instalment agreement hypothec

21.7.1 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."

1138 *Standard Bank of South Africa Ltd v D Florention Construction CC* 2008 (5) SA 534 (C).

1139 See, eg, *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).

21.7.2 Instalment agreements subject to section 84

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

> "'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.[1140] 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 to 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".[1141]

21.7.3 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.[1142] 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

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1140 *A-Team Drankwinkel v Botha* 1994 (1) SA 1 (A).

1141 *Potgieter NO v Daewoo Heavy Industries (Edms) Bpk* 2003 (3) SA 98 (SCA); *Van Zyl NO v Bolton* 1994 (4) SA 648 (C).

1142 *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).

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.[1143] If the property is handed over to the creditor, the provisions of section 83 will apply.[1144] Section 84(1) applies even if the trustee was not in possession of the property,[1145] but section 84(1) does not create a hypothec if the creditor under the transaction is not the owner.[1146]

21.7.4 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."

21.7.5 When section 84 not applicable

If a transaction does not 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 Chapter 13). 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.[1147]

21.8 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

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1143 *Epsom Motors Pty (Ltd) v Estate Winson* 1961 (1) SA 687 (E).
1144 Insolvency Act, s 84(1). Section 83 is discussed in para 21.9 below.
1145 *Venter v Avfin (Pty) Ltd* 1996 (1) SA 826 (A).
1146 *Cf Meyer v Catwalk Investments 354 (Pty) Ltd* 2004 (6) SA 107 (T).
1147 *A-Team Drankwinkel v Botha* 1994 (1) SA 1 (A) at 17.

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.

21.8.1 Alienation of Land Act

Secured claims in terms of the Alienation of Land Act have been dealt with under Chapter 13.

21.8.2 Agricultural pledges and charges

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

The Land and Agricultural Development Bank Act 2002 provides two special forms of security for the Land Bank when it provides financing to farmers. Although the Land Bank can also use the normal security rights (such as mortgage and notarial bond), these statutory rights make the Land Bank a secured creditor without having to comply with all the requirements of normal security rights. Firstly, in terms of section 30 of the Act, the Land Bank has, as security for financing provided to a farmer, a statutory pledge over the following goods purchased with or produced from the funding provided: (i) all agricultural produce, (ii) all products manufactured from any such produce, (iii) any agricultural produce purchased and (iv) any produce held in terms of a silo certificate. None of these assets have to be placed in the Land Bank's possession and, in fact, other than with the normal pledge discussed earlier, this statutory pledge vests while the debtor remains in possession.

Secondly, in terms of section 31 of the Act, if the Land Bank advances any funds to a farmer which is used to erect certain structures (like dams, fencing, boreholes, silos etc), the Land Bank can vest a so-called "charge" over the land as security for repayment of the amounts advanced. The charge vests when the Land Bank notifies the registrar of deeds that such funds have been advanced, and the registrar then endorses the deeds records of that land – that is, makes a note on the deed that the Land Bank has a charge over the land. This charge places the Land Bank in a position similar to the holder of a mortgage bond and the Land Bank can also prevent the sale of the property until it is paid.

It should also be noted that the Land Bank's rights are not subject to the Insolvency Act.[1148] Therefore, although the Land Bank can choose to participate in the sequestration process and thus be paid as one of the secured creditors, it is entitled to enforce its rights in the normal course without paying any heed to the formal insolvency process.

The second statute that creates a special security right in the agricultural context is the Co-operatives Act 2005. Schedule 1, Part 4, Item 4(2) of the Act provides that, if an agricultural co-operative provides financial assistance to a farmer, the co-operative will have a pledge over all products produced or acquired with such financing. The pledge will vest in the co-operative even though possession of the assets is not passed to the co-operative – therefore, similar to the abovementioned pledge of the Land Bank, but different from the normal

[1148] Insolvency Act 1936, s 90.

pledge that requires the creditor to be placed in possession. Also note that, unlike the Land Bank, co-operatives are not excluded from the operation of the Insolvency Act. Therefore, should a farmer be sequestrated, the co-operative must participate in the process and, if it holds a statutory pledge in terms of the Co-operatives Act, it will be a secured creditor with reference to such assets.

21.8.3 Customs and Excise lien

Section 114 of the Customs and Excise Act 1964 provides a special security right for SARS to secure the payment of certain import taxes (customs and excise duties). The security right is referred to as a "lien" in the Act, but it operates similar to a statutory pledge. In terms of section 114, SARS can detain the imported property to which the import tax relates, and upon such detention of the property, SARS will vest a "lien" over the property until the debt is paid. Such detention of the property can take place by "sealing, marking, locking, fastening or otherwise securing or impounding it on the premises where it is found or by removing it to a place of security".[1149] SARS will then be a secured creditor with reference to such detained assets. Importantly, SARS's lien cannot vest over property not belonging to the customs debtor, which used to be possible (for instance, if the property was on the customs debtor's premises) before the Constitutional Court declared it unconstitutional.[1150]

As indicated in the next chapter, SARS also has a place in the list of statutory preferent creditors and will be paid from the free residue of the estate. Therefore, if SARS did not vest a lien before sequestration or the assets detained do not cover its full claim, SARS will not be a concurrent creditor but will be paid as statutory preferent creditor from the free residue.

21.8.4 Municipal charge and embargo power

Section 118 of the Local Government: Municipal Systems Act 2000 provides two mechanisms to help secure the payment of outstanding "municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties" (municipal debts) related to land owned by the taxpayer. As will become clear further below, some of the municipal debts relate to taxes while others relate to fees for services rendered to the property.

Section 118(1) of the Act contains a so-called "embargo power" in terms of which the municipality can prevent the transfer of the land if a certain portion of the municipal debt is outstanding. According to the subsection, the Registrar of Deeds may only register the transfer of ownership of land if it is supplied with a certificate issued by the municipality, which certificate should indicate that the municipal debts for the two years preceding the application for such certificate are fully paid up. In other words, this two-year municipal debt must be paid before the property can be transferred to a purchaser. This is true in insolvency

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1149 Customs and Excise Act 91 of 1964, s 114(2)(a). See also *Secretary for Customs and Excise v Millman NO* 1975 (3) SA 544 (A); *Rand Bank Bpk v Regering van die Republiek van Suid-Afrika en Andere* 1974 (4) SA 764 (T).

1150 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

as well, meaning that the trustee must pay this amount in the course or selling the property. Therefore, this amount will, with some qualification, form part of the costs of realising the property, which is discussed in closer detail further below.

The second mechanism, contained in section 118(3) of the Act, provides that the outstanding municipal debts (not limited in time period) form a "charge upon the property" and that this charge, as security right, "enjoys a preference over any mortgage bond registered against the property". This charge creates a security right for the municipality, similar to a mortgage, but importantly, the municipality's claim ranks higher than claims secured by normal mortgage bonds. Therefore, the municipality will be a secured creditor upon the sequestration of the landowner and will have a very strong claim (in preference to other mortgagees) when the proceeds of the property are distributed. Although the amount of the municipality's claim under section 118(3) is not limited by the two years mentioned in section 118(1), it is limited by section 89 of the Insolvency Act, which is discussed in more detail further bellow. In essence, to the extent that the municipality's claim includes taxes, the amount of the preference is limited the amount for two years prior to sequestration. On the other hand, no such restriction applies to non-tax debts.

Practically speaking, when the trustee sells land out of the estate, he must pay – as part of the costs of realising the property – all tax debts owing to the municipality for the two years prior to sequestration. Then, all non-tax debts (with no time limit) will be covered by the municipality's charge and will be treated as a secured claim that will be settled before any other mortgagees are paid. Any other tax debts (that is, not paid as part of the costs of realising the property) will be a concurrent claim.

21.9 Realisation of securities

21.9.1 Notice by 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.[1151]

21.9.2 Sale by creditor of securities or financial instruments

Section 83(2) of the Insolvency Act[1152] 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).

1151 Insolvency Act, s 83(1).

1152 As amended by the Financial Sector Regulation Act 2017.

21.9.3 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;

(b) if it is a bill of exchange, the creditor may realise 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.[1153]

21.9.4 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.

21.9.5 Creditor who realised security

A creditor who has realised its security must forthwith pay the net proceeds of the realisation to the trustee or the Master.[1154] The creditor must as soon as possible after the realisation

[1153] Insolvency Act, s 83(8), as amended by the Financial Sector Regulation Act 2017.
[1154] Insolvency Act, s 83(10).

prove a claim, attaching a statement of the proceeds of the realisation to his claim.[1155] As creditors rarely realise their security in terms of section 83(2) this is not discussed in detail in these notes.[1156]

21.9.6 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.[1157] If the 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.[1158] 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.[1159]

21.9.7 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.[1160] 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.

1155 *Ibid*, s 83(5).

1156 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).

1157 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 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].

1158 Insolvency Act, s 83(6).

1159 *Ibid*, s 142(2).

1160 *Roux v Van Rensburg* 1996 (4) SA 271 (A).

21.9.8 Proof of claim and value of security

The secured creditor may prove a claim and value the security.[1161]

21.9.8.1 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.[1162]

21.9.8.2 Sale of security by trustee

If the trustee does not take over the property, the trustee must realise it (with the authority of the Master or the creditors) for the benefit of the secured creditor(s).[1163]

21.9.8.3 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.

21.9.8.4 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 the remuneration of a trustee on the value at which property has been taken over by a secured creditor.[1164] *United Building Society Ltd v Du Plessis*[1165] is authority for the view that such abandonment is valid even if no written

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1161 Insolvency Act, s 83(7).
1162 *Kahan v Hydro Holdings* 1980 (3) SA 511 (T).
1163 Insolvency Act, s 83(11).
1164 Insolvency Act, Second Sch, Tariff B, item 6.
1165 1990 (3) SA 75 (W).

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 themself in an uncomfortable position if, after confirmation of the account, the trustee experiences problems in transferring the property immediately.

21.10 Disputes in respect of security for a claim

If a secured creditor proves its claim, it may happen that the trustee disagrees with that creditor's allegation that its 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.[1166] 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.

21.11 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*[1167] 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.[1168] 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.[1169] 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.

1166 *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).

1167 1996 (2) SA 133 (A).

1168 *Cf Wille's Law of Mortgage and Pledge in South Africa*, 3rd Ed, by J Scott and S 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).

1169 *Cf Garvin v Sorec Properties Gardens Ltd* 1996 (1) SA 463 (C).

21.12 Distribution of proceeds of security

21.12.1 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.

21.12.2 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.

21.12.3 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 this 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.[1170] This means that such costs will form part of the costs of realising 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.[1171]

- 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[1172] (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*[1173] 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*[1174] that certain endowments payable by the owner of a township to the local authority constituted "costs of realisation".

21.12.4 Municipal property taxes

21.12.4.1 Tax defined in section 89(5)

It was pointed out above 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

1170 See, eg, *Nel v Body Corporate of the Seaways Building* 1995 (1) SA 130 (C); 1996 (1) SA 131 (A) 140B and 140J-141B.

1171 *Barnard NO v Regspersoon van Aminie* 2000 (1) SA 973 (SCA).

1172 Such as s 31 of the Western Cape Planning and Development Act 1999. A further example is s 96 of the Gauteng Town Planning and Townships Ordinance (Ordinance 15 of 1986).

1173 2015 (5) SA 304 (SCA).

1174 1978 (2) SA 86 (T).

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.

21.12.4.2 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 "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,[1175] 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 years 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.[1176] 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.[1177] 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.[1178] The municipality may insist that the amounts due in terms of section 118 must be paid before a clearance certificate

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1175 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).

1176 *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).

1177 *City of Cape Town v Real People Housing* (77/09) [2009] ZASCA 159 (30 November 2009).

1178 *Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd* 2017 (4) SA 272 (SCA).

is issued, even if the amounts are more than the proceeds of the property.[1179] The municipality is entitled to *mora* interest on amounts due in terms of section 118.[1180]

The court in *City of Johannesburg v Kaplan NO*[1181] dealt with the 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)).[1182] As pointed out in *Barnard NO v Regspersoon van Aminie*,[1183] 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 that are a *quid pro quo* for a measured consumption, are probably not.

21.12.4.3 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.

21.12.4.4 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.[1184] In relation to all debts that do not qualify as "tax", the period of preference is limited only by prescription.[1185]

21.12.5 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.

1179 *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.

1180 *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]).

1181 2006 (5) SA 10 (SCA).

1182 *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].

1183 2001 (3) SA 973 (SCA) at 984B - 984E.

1184 *City of Johannesburg v Kaplan NO* 2006 (5) SA 10 (SCA), para [28].

1185 *Ibid*.

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

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.[1186]

21.12.6 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[1187] because interest is not a "future debt".[1188] In *Kursan v Eastern Province Building Society*[1189] 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.

1186 Insolvency Act, s 96(4).

1187 *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 R Green, "When is interest secured under a mortgage bond?" 1992 *De Rebus* 847. *Cf ABSA Bank Ltd v Erasmus* 2007 (2) SA 545 (C).

1188 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.

1189 1996 (3) SA 17 (A).

21.12.7 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.[1190] 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.[1191] 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.

21.12.7.1 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.[1192] 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.[1193]

21.12.7.2 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*[1194] 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.

21.12.8 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

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1190 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).

1191 *Boland Bank Ltd v The Master* 1991 (3) SA 387 (A).

1192 *Bowman, De Wet and Du Plessis v Fidelity Bank Ltd* 1997 (2) SA 35 (A).

1193 *Gore NO v Shaff* (15766/13) [2013], WCC (13 December 2013), para [15].

1194 1996 (2) SA 133 (A).

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.[1195]

21.12.7 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.[1196]

Self-Assessment Questions

Question 1
Explain the difference between secured, statutory preferent and concurrent creditors.

Question 2
What is the difference between special and general notarial bonds? Also explain how they are dealt with in terms of the Insolvency Act.

Question 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?

Question 4
What is the difference between a mortgage bond and a notarial bond?

Question 5
What does it mean when a creditor relies on his security?

Question 6
How is interest payable on secured claims treated in insolvency law?

Question 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.

1195 *Bank of Lisbon and South Africa Ltd v The Master* 1987(1) SA 276 (A) 287E-288C.
1196 Insolvency Act, s 83(12).

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.

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.

Question 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.

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 22 – APPLICATION AND DISTRIBUTION OF THE FREE RESIDUE

22.1 Introduction

The free residue is that portion of the insolvent 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.[1197]

22.1.1 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.

22.1.2 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.[1198] The new preferences apply in respect of estates that are sequestrated or provisionally sequestrated on or after 1 September 2000.[1199] A trustee or liquidator is not bound by an agreement that subverts the scheme of distribution in the Insolvency Act.[1200]

22.2 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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1197 Insolvency Act, s 83(12).

1198 Insolvency Act, s 99(1)(f) dealt with contributions payable by the insolvent in their 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.

1199 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*.

1200 *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[1201] 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.[1202]

22.3 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 (Chapter 23).

22.3.1 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.

22.3.2 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.[1203] 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)).

22.3.2.1 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

1201 In terms of s 96(3) this means expenses incurred for medical attendance, nursing, medicines and medical necessities.

1202 Insolvency Act, s 96(4).

1203 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.

22.3.2.2 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.[1204]

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.

22.3.3 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.[1205]

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

22.3.4.1 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

1204 For details, see Notice No 1478 in *Government Gazette* 32691 of 6 November 2009.
1205 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.[1206] 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 is 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.[1207] 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 their 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.

22.3.4.2 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 the insolvent's spouse to prepare the statement of affairs.[1208]

22.3.4.3 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.

22.3.4.4 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.[1209]

1206 *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).

1207 Even a *bona fide* and reasonable opposition is not enough and special circumstances need to be shown, ie, 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].

1208 Insolvency Act, s 16(5).

1209 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.[1210]

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,[1211] 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 the trustee or may be sold by the trustee, 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 (that is, invoices) are submitted.

1210 Insolvency Act, s 97(2)(c) read with section 153(2).

1211 *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, the trustee 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*[1212] 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 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.[1213] 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 the trustee 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 the trustee's knowledge and belief;

1212 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.

1213 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 the trustee's knowledge and belief; and

(d) that, to the best of the trustee's knowledge and belief, the attorney or counsel concerned has not overreached.[1214]

"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.[1215]

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.

22.3.4.5 Remuneration of trustee

In terms of section 63 of the Insolvency Act, the trustee is entitled to a reasonable remuneration for their services to be taxed by the Master according to Tariff B in the Second Schedule to the Act. The fee structure is percentage-based according to the tariff.

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.[1216]

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%**.

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%**.

1214 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.

1215 *Muller v The Master* 1992 (4) SA 277 (T) at 284.

1216 *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%**.

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

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%**.

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%**.[1217]

Where the tariff gives no guidance, the Master should fix a fair commission for the particular case.[1218] 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%.[1219]

In *Engelbrecht NO and Others v Master of the High Court, Pretoria*,[1220] where a sale of assets of a company in liquidation included immovable 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

1217 The tariff for assets sold by a creditor on behalf of the trustee is 10% and not 6%.
1218 *Rennie v The Master* 1980 (2) SA 600 (C).
1219 *Gore and Another NNO v The Master* 2002 (2) SA 283 (ECD).
1220 (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.[1221]

Remuneration on value added tax

In the case of *Graham and Spendiff v The Master of the Supreme Court*,[1222] 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%)[1223]	225.00	
Fee	11,275.00	
Vat thereon (@ 15%)	1,691.25	

1221 *Klopper NO v Master of the High Court* 2009 (3) SA 571 (SCA), para 12.
1222 Case No 504/94, Durban and Coast Local Division.
1223 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 their duties or the improper performance of their 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.[1224]

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.[1225] In *Bester NO v The Master Of The High Court, Eastern Cape High Court, Port Elizabeth*,[1226] the Master's decision to tax down the liquidators' fees to nil (because no distribution was made to creditors) was set aside.[1227] 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.

1224 *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].

1225 *Warricker NO v Master of the High Court Johannesburg* (28265/15) [2017] GJ (14 March 2017), paras [23] and [24].

1226 (17096/2009) [2012] ZAWCHC 199; [2013] 2 All SA 26 (WCC) (28 November 2012).

1227 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.[1228]

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.[1229] 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.[1230]

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.[1231]

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.[1232]

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.

1228 *Van Zyl NO v The Master* 2000 (3) SA 602 (C).

1229 *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.

1230 *Klopper NO v Master of the High Court* 2009 (3) SA 571 (SCA), para 16.

1231 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].

1232 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.[1233] 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 their 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.[1234] 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.[1235] 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*,[1236] 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 they are not the only person who has an interest in the liquidation.[1237] 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

1233 *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.

1234 *Cooper v The Master* 1996 (1) SA 962 (N).

1235 *Cooper B St C v The Master of the Supreme Court* 1998 JDR 0111 (N).

1236 [2019] JOL 44812 (FB), para [22].

1237 *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.[1238] 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 their behalf; but they are not allowed to delegate their 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.[1239]

A liquidator may not receive their 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 the Master's 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.[1240]

22.4 Section 98 – costs of execution

This section allows a preference for the taxed fees of the sheriff or other taxed costs[1241] (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,[1242] 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.[1243]

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 its costs and its claim. Section 98(2) makes it clear that the common law hypothec has been replaced by this limited statutory preference.

1238 *Matsepe NO and Others v Master of the High Court Bloemfontein and Another* (5081/2017) [2019] JOL 44812 (FB), para [42].

1239 *Ibid*.

1240 *Ibid*, at para [47].

1241 For example, an attorney's costs in connection with an attachment before sequestration.

1242 *Ex parte Vermaak: In re Klopper v Lavdas* 1980 (2) SA 696 (T).

1243 *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).

22.5 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.

22.5.1 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*[1244] from time to time,[1245] 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.

22.5.1.1 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.[1246]

22.5.1.2 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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1244 Notice No 865, *Government Gazette* No 21519, dated 1 September 2000.

1245 Subject to prescribed consultation as provided for in s 98A(2).

1246 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* A 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.[1247] 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.

22.5.1.3 Meaning of "salary or wages"

The definition of "salary or wages" includes all cash earnings received by an employee from an employer.[1248] It seems that benefits not receivable in cash are not regarded as salary or wages.

22.5.1.4 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[1249]

(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.[1250] 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.[1251]

22.5.1.5 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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1247 See Insolvency Act, ss 44(6), 55(l), 85(2), 89(1) and (3), 96(1), 133 and 134(2).

1248 *Ibid*, s 98A(5)(b).

1249 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 they assist 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 they do not receive, or are not entitled to receive, salary or wages.

1250 *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); N Whitear-Nel, "The distinction between employees and independent contractors" Vol 7 Part 3 *JBL* 110.

1251 *Nehawu v Ramodise* [2009] JOL 24186 (LC) with reference to s 213 of the Labour Relations Act 1995.

of the claim.[1252] 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.

22.5.1.6 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.[1253]

22.5.1.7 Salary guarantee fund

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

22.5.2 Contributions to funds

After payment of the above claims,[1254] 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 the insolvent's employees and which were, immediately prior to the sequestration of the estate, owing by the insolvent in their capacity as employer to any pension, provident, medical aid, sick pay, holiday, unemployment[1255] 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.[1256]

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.[1257] 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).[1258] After prescribed consultations, the Minister may also exclude schemes or funds from the

1252 Insolvency Act, s 98A(3).
1253 Notice No 865 in *Government Gazette* No 21519 of 1 September 2000.
1254 Insolvency Act, s 98A(4).
1255 In terms of s 98A(5)(c) of the Insolvency Act this does not include the unemployment insurance fund in s 6 of the Unemployment Insurance Act 1966.
1256 Insolvency Act, s 98A(4)(c).
1257 *Ibid*, s 98A(2).
1258 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.[1259]

22.6 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.

22.6.1 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,[1260] 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.)[1261]

22.6.2 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 South African Revenue Service (SARS). The only claim that is common in practice is employees' tax deducted from remuneration payable to employees (PAYE).[1262] 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.[1263]

1259 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.

1260 1993 Act, s 84.

1261 *Ibid*, s 29.

1262 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.

1263 *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).

22.6.3 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.[1264]

22.6.4 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.

22.6.5 Paragraph (e) – contributions to the Unemployment Insurance Fund (UIF)

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.

22.6.6 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.

22.6.7 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.[1265]

22.7 Section 100 – salaries and certain fees

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

1264 *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).

1265 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.

22.8 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 a tax return, SARS may issue an estimated assessment. The claim under section 101 should, however, not be confused with the preference discussed under 22.6.2 above, which is for income tax deducted by an employer from employees' salaries (PAYE).

22.9 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 prior to sequestration 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.[1266] 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, its preference under section 102 is extinguished to the extent of the net value of its security and it 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 it 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

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1266 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.[1267]

22.9.1 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 realising other assets in the free residue; and

(iii) a proportionate share of claims in terms of sections 98A, 98, 99 and 101.

22.9.2 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).

22.9.3 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.[1268] Whenever a trustee must pay interest from the date of sequestration to the date of payment, the trsutee has to estimate the date of payment (usually shortly after confirmation of the account) and make the calculations accordingly.

1267 *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].

1268 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).

22.9.4 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*,[1269] 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.[1270]

(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.

22.10 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.[1271] 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.[1272] The interest payable after sequestration is simple interest and not compound interest.[1273] 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,[1274] the trsutee has to estimate the date of payment (usually shortly after confirmation of the account) and make the calculations accordingly.

1269 1992 (3) SA 60 (A).
1270 The date of commencement of the Security by Means of Movable Property Act 1993.
1271 *Douglas Green Bellingham v Green t/a Greens Bottle Recyclers* 1998 (1) SA 367 (SCA).
1272 Insolvency Act, s 103(1).
1273 *Boland Bank Ltd v The Master* 1991 (3) SA 378 (A).
1274 This will also apply to secured creditors and bondholders over movables who are entitled to such interest.

22.11 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 the imsolvent's 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.

Self-Assessment Questions

Question 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.

Question 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?

Question 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?

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 23 – CONTRIBUTION BY CREDITORS

23.1 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.[1275] 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.[1276]

23.2 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.[1277] Although the shareholders of a company can also be expected to contribute,[1278] this is rare in practice.

23.3 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".[1279] 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.[1280] 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.

1275 Insolvency Act, s 106.
1276 *Ibid*, s 91. See also Companies Act 1973, s 403(1).
1277 Companies Act 1973, ss 337 and 342(2).
1278 *Ibid*, ss 395-399.
1279 Insolvency Act, s 106.
1280 See *Ongevallekommissaris v Die Meester* 1989 (4) SA 69 (T) 73I.

23.4 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.[1281] 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.

23.5 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 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.[1282]

23.6 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.[1283] 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.

23.7 Creditor who applied for the sequestration order

The section 14(3) of the Insolvency Act provides that a creditor who successfully applied[1284] 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.[1285]

1281 Insolvency Act, s 106(a).

1282 Insolvency Act, s 106(c) and *Ongevallekommissaris v Die Meester* 1989 (4) SA 69 (T).

1283 *Ibid*, s 106(b) read with s 51.

1284 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.

1285 *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.[1286]

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.

23.8 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. In practice, a trustee may bear the loss without attempting to collect the contribution or utilising the special procedures for the collection of contribution.

Self-Assessment Questions

In regard to each of the following scenarios, explain how the trustee should approach the contribution to the costs of sequestration payable by creditors:

Question 1
The estate has two creditors: a) John, who painted the insolvent's house to get it ready for sale; and b) ABC Bank, which proved a claim for an outstanding credit card bill.

Question 2
The estate has three creditors, each of which are secured creditors who relied on their security.

[1286] *Cf* D 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.

Question 3
The estate has four creditors: a) a secured creditor who did not rely on its security (its claim was for R50,000 but it only received R40,000 from the proceeds of the security); and b) three concurrent creditors.

Question 4
The estate has three creditors: a) a secured creditor who relied on its security; b) a creditor who holds a general notarial bond; and c) an employee to whom R18,000 is owed but who did not prove a claim.

Question 5
The estate has five creditors: a) a secured creditor who relied on its security; b) a creditor who holds a general notarial bond; and c) three concurrent creditors.

Question 6
The estate has two creditors: a) 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; and b) a creditor with a mortgage bond over the abovementioned sectional title unit. This creditor relied on its security.

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 24 – COMPOSITIONS

24.1 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 100 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 in Chapter 28 below.

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 their insolvency.

24.2 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 their 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.[1287] No

[1287] *De Wit v Boathavens CC* 1989 (1) SA 606 (C) 611I.

liability attaches to an individual creditor until all creditors have signed the agreement. However, an individual creditor, by its 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 and 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 in a sequestration) and due to a greater return (a higher dividend as a result of the saving of sequestration costs).

24.3 Statutory composition in terms of Insolvency Act

Sections 119 to 123 of the Insolvency Act deal with compositions between the insolvent and the insolvent's 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 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.

24.3.1 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, the trustee 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 the trustee 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.[1288]

24.3.2 Meeting to consider composition

When the trustee sends an offer to creditors, the trustee 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

[1288] Insolvency Act, s 119(1) to (4).

posted or delivered to any creditor. The meeting convened for this purpose is a general meeting.[1289] 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.[1290] Because the trustee must lodge a report within one month after the acceptance of an offer of composition,[1291] 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.

24.3.3 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.[1292] In order for a composition to be binding and validly established, it must be accepted by the requisite percentage of creditors who 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 portion, 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 the 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.

24.3.4 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 revested with their assets or that the insolvent should be released from further liability in relation to their debts. However,

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1289 *Ilic v Parginos* 1985 (1) SA 795 (A).
1290 *Ibid*.
1291 Insolvency Act, s 81(1).
1292 *Cf Ilic v Parginos* 1985 (1) SA 795 (A).

having said this, the Insolvency Act nevertheless imposes certain restrictions on the terms that may be contained in a composition.

24.3.4.1 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.[1293] The offer should apply fully and equally to all concurrent creditors.[1294]

24.3.4.2 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.[1295] However, it is submitted that such a condition does not invalidate the composition.

24.3.4.3 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.[1296]

24.3.5 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[1297] 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.[1298]

1293 Insolvency Act, s 119(7).
1294 *Ilic v Parginos* 1985 (1) SA 795 (A) 802F.
1295 Insolvency Act, s 119(7).
1296 *Ibid*, s 130.
1297 *Blou v Lampert and Chipkin* 1970 (2) SA 185 (T) 210C.
1298 *Blou v Lampert & Chipkin* 1973 (1) SA 1 (A) 9H-10A.

24.3.6 Effect of acceptance of offer

24.3.6.1 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.

24.3.6.2 Not suspended until insolvent has performed

Unless the composition provides therefore, the operation of the composition is not suspended until the insolvent has performed their obligations in terms of the composition and the trustee has no right to apply to have the composition set aside.[1299]

24.3.6.3 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.[1300] 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.

24.3.6.4 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.[1301]

24.3.6.5 Liability of surety not affected

As usual, a surety is in an unfavourable position. A composition does not affect the surety's liability[1302] and the surety remains liable to the concurrent creditors for any shortfall.

1299 *Blou v Lampert and Chipkin* 1970 (2) SA 185 (T) 214.
1300 Insolvency Act, s 120(2).
1301 *Ibid*, s 120(1).
1302 *Ibid*, s 120(3).

24.3.6.6 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.[1303]

24.3.6.7 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.[1304]

24.3.7 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.[1305]

24.3.8 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.[1306]

24.3.9 Problems the trustee should try to prevent

In the case of *Blou v Lampert & Chipkin*[1307] 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

1303 *Ibid*, s 122.
1304 *Ibid*, s 121.
1305 *Ibid*, s 123.
1306 *Ibid*, s 124(1).
1307 1973 (1) SA 1 (A) 5D.

problems practitioners are advised to ensure, as far as it is within their power to do so,[1308] 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)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

[1308] The trustee may refuse to submit an offer of composition to creditors or report on unacceptable provisions in an offer.

CHAPTER 25 – REHABILITATION

25.1 Introduction

25.1.1 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 them are removed. Rehabilitation also results in the release of an insolvent person from their 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[1309] 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.[1310]

25.1.2 Which entities or persons?

The insolvent is entitled to apply for their own rehabilitation. Rehabilitation in this sense applies to individuals only and not to partnerships,[1311] companies or other legal entities. According to remarks made by the High Court in *Conradie v Master of the High Court, Kimberley*[1312] 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 their rehabilitation.[1313] 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*[1314] 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*)."

1309 Subject to qualifications that will be pointed out below.
1310 Insolvency Act, s 129(1).
1311 *Ibid*, s 128.
1312 Case 1260/2006 (Northern Cape Division) dated 13 June 2008.
1313 *Ex parte Geeringh* 1980 (2) SA 788 (O).
1314 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 the estate.[1315]

These notes deal with matters of direct importance to practitioners and not with a recommendation for early rehabilitation by the Master,[1316] the more technical matters usually dealt with by the Master in the Master's report,[1317] or technical matters regarding an application to the court.

25.2 Automatic rehabilitation

"Automatic" rehabilitation is provided for in section 127A of the Insolvency Act. Any insolvent not rehabilitated by the court within a period of 10 years from the date of (provisional)[1318] 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 10 years. The effects of automatic rehabilitation are no different from rehabilitation obtained pursuant to an application to court.

It is respectfully submitted that Meskin is correct when averring[1319] that an insolvent who seeks a declaratory order that they are 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.[1320]

25.3 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 10-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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1315 *Vengadesan NO v Shaik and Others* 2014 (3) SA 14 (KZD), at 14.

1316 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).

1317 Insolvency Act, s 127(1).

1318 *Grevler v Landsdown* 1991 (3) SA 175 (T) 178D.

1319 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 this, the court granted the order vesting the property in the applicant.

1320 *Vengadesan NO v Shaik and Others* 2014 (3) SA 14 (KZD), para [15].

entitled to (that is, 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,[1321] facts to be averred in the application[1322] and notice in the *Government Gazette*, to the Master and to the trustee.[1323]

25.3.1 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 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 their insolvency, or of certain offences, such insolvent may apply for rehabilitation only after five years have elapsed from the date of conviction; and

- Where the Master recommends rehabilitation, the insolvent may obtain an order of rehabilitation within four years of the date of sequestration.[1324]

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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1321 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].

1322 Insolvency Act, s 126.

1323 *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.

1324 Insolvency Act, s 124(2).

provided the insolvent has not been convicted of certain offences and the estate has not been sequestrated previously.[1325]

- 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),[1326] or after the confirmation of an account providing for the payment in full of all the claims of creditors with interest thereon.[1327]

25.3.2 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 person.[1328] 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.[1329] The court may require the insolvent to consent to judgement against them for the payment of any debt which was or could have been proved against their estate.[1330] If creditors had to pay a contribution, it is usually expected of the insolvent to repay the contribution (if 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.

1325 *Ibid*, s 124(3).

1326 *Ibid*, s 124(1).

1327 *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.

1328 *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.

1329 *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".

1330 Insolvency Act, s 127(3).

In *Ex parte Theron*[1331] the court criticised the Master for issuing certificates to the effect 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.[1332]

25.4 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.[1333]

25.4.1 Matters to be dealt with in the report by the trustee

25.4.1.1 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 their 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 themself in the sense that they understand their 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 their insolvency, especially if liabilities exceeded assets by a large amount?;
- Did the insolvent commit any offences?;

1331 1994 (4) SA 136 (O).

1332 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]).

1333 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 comply with legal obligations after sequestration and co-operate with the trustee?;

- Is there any evidence or indication that the insolvent acted dishonestly or with disregard for the creditors before or after sequestration?

25.4.1.2 Criticism of passive attitude in reports by Master and trustee

In *Ex part Le Roux*[1334] 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*[1335] notes that it is not primarily the responsibility of creditors to oppose applications for rehabilitation.[1336] If the trustee of an insolvent estate has properly complied with their 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.

25.4.2 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.[1337]

1334 1996 (2) SA 419 (C).

1335 2014 (5) SA 426 (FB), para [33].

1336 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]).

1337 Insolvency Act, s 130.

25.5 Effect of rehabilitation on claims and assets

25.5.1 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.[1338] The insolvent remains personally liable for liabilities incurred after sequestration. Any claim for maintenance due after sequestration is probably enforceable against the insolvent personally.[1339]

25.5.2 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.[1340] 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.[1341] 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.

25.5.3 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[1342] 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.[1343] However, this provision does not preserve the right to prove a claim or the claim of an unproved creditor.[1344]

25.5.4 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.[1345] 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 their debts.

1338 *Ibid*, s 129(1)(b).
1339 Mars, para 16.1.
1340 Insolvency Act, s 129(3)(e).
1341 *Ibid*, s 129(3)(d).
1342 For example, pension payments.
1343 Insolvency Act, s 129(3)(c).
1344 *Brown v Oosthuizen* 1980 (2) SA 155 (O).
1345 Insolvency Act, s 129(3).

25.5.5 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 10 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.

25.6 Declaratory orders[1346]

Occasionally an insolvent who applies for rehabilitation also applies for an order that property (especially immovable property) is vested in the insolvent, entitling the insolvent 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[1347] or did not vest in the Master and the trustee in the first place; and

(b) cases where property is vested in the trustee.

25.6.1 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 them and not in their insolvent estate.

25.6.2 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.[1348]

1346 See, eg, *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).

1347 In terms of a composition or upon rehabilitation where no claims have been proved. See ss 120(2) and 129(2) of the Insolvency Act.

1348 *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.

25.6.3 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.

25.7 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.[1349]

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)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

[1349] Deeds Registries Act 1937, s 58.

CHAPTER 26 – PARTNERSHIPS

26.1 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.[1350]

26.2 Insolvency Act

26.2.1 Insolvency of partnership

26.2.1.1 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,[1351] etc in each estate.[1352]

26.2.1.2 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-

1350 *Cf Michalow v Premier Milling Co Ltd* 1960 (2) SA 59 (W).

1351 *Cf* Insolvency Act, s 92(5).

1352 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.

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

26.2.1.3 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.[1353] The sequestration of a dissolved partnership is also not discussed here.[1354]

26.2.2 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 must be used for the payment of separate estate debts. Accordingly, section 49(1) of the Insolvency Act provides that when the estate of a partnership and the estates of the partners are under sequestration simultaneously, the creditors of the partnership must prove their claims against the estate of the partnership only and the personal creditors of a partner against the personal estate of such a partner.

26.2.3 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 their property to secure a debt of a partnership, the bondholder is entitled to prove a claim for the amount due to it by the partnership against the estate of the partner and against the estate of the partnership.[1355]

26.2.4 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.[1356]

1353 *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).

1354 *Cf Stellenbosh Farmer's Winery v Pretorius* 1970 (3) SA 234 (SWA) and the cases referred to there.

1355 *Barclays Bank (D C & O) v The Master* 1958 (2) SA 119 (O).

1356 Insolvency Act, s 49(1).

26.2.5 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.

26.3 Insolvency of partner only

As already mentioned, the insolvency of one of the partners of a partnership dissolves the partnership but it does not cause the partnership estate to be sequestrated.[1357] 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 debts.

26.4 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.[1358] 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".[1359] However, an individual partner whose separate estate has been sequestrated may apply for rehabilitation as an ordinary debtor. The effect of rehabilitation is the insolvent partner's release from all liability, not only for their private debts, but also from their liability for the partnership debts.

Section 143 of the Insolvency Act contains special rules in respect of the criminal liability of partners.

1357 *Cf* De Wet and Yeats, *Kontraktereg en Handelsreg*, 4th ed, at 527.

1358 Insolvency Act, s 121.

1359 *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)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 27 – LIQUIDATION OF COMPANIES AND CLOSE CORPORATIONS

27.1 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[1360] 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.[1361]

1360 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.

1361 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 Division, 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 deal with the effect of the 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 s 82(4) of the Companies Act 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.[1362]

27.2 Solvent and insolvent liquidations

Before the Companies Act 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[1363] 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:

- 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),

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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].

1362 *Melville v Busane* 2012 (1) SA 233 (ECP), para [16].

1363 Continued application of the 1973 Act to winding-up and liquidation, item 9 of Sch 5 *Transitional Arrangements* of the Companies Act 2008.

- 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*[1364] 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 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);[1365]

- 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

1364 2014 (2) SA 518 (SCA) para [21].
1365 At para [16].

content that prevailing judicial interpretations of solvency and insolvency respectively, should continue to have effect.[1366]

- 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.[1367]

- 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[1368] be wound up in terms of the 2008 Act only.

This was confirmed in *Murray NO and Others v African Global Holdings (Pty) Ltd*[1369] 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.

27.3 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, due to the fact that 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);

- 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);[1370]

1366 At para [19].
1367 At para [20]; *Standard Bank of South Africa Limited v R-Bay Logistics CC* 2013 (2) SA 295 (KZD), para [29].
1368 *Standard Bank of South Africa Limited v R-Bay Logistics CC* 2013 (2) SA 295 (KZD), para [32].
1369 2020 (2) SA 93 (SCA) para [23].
1370 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 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);

- 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.

27.4 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 the insolvent's 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, as discussed below:

27.4.1 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.

27.4.2 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*[1371] 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

[1371] 1995 (1) SA 159 (W) 165D.

Companies Act. In *De Montlehu v Mayo NO and Others*[1372] 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.[1373]

27.4.3 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.

27.5 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.[1374] Where the Companies Act 2008 does not contain any relevant provisions, the Companies Act 1973 must be applied.

27.5.1 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:[1375]

It must be clear from the resolution that it was:

- a special resolution that 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

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1372 *Mayo NO v De Montlehu* 2016 (1) SA 36 (SCA), para [26].

1373 *Wishart NO and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd and Others* 2017 (4) SA 152 (SCA), paras [13] and [16].

1374 The words "winding-up" and "liquidation" are normally used interchangeably as synonyms, and it is not at all clear why both are used here.

1375 *Cf Botha NO v Van den Heever NO* (Case No 40406/2012, High Court Pretoria, 23 July 2012).

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 (as it is solvent), 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.[1376] 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[1377] with the Companies and Intellectual Property Commission (CIPC), together with the prescribed filing fee:[1378]

- Form CoR 40.1;
- The special resolution passed by the shareholders;
- JM12 (see the next paragraph);
- Certified copies of the ID of the directors who signed the CoR40.1.[1379]

1376 In terms of s 351 of the Companies Act 1973.

1377 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.

1378 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).

1379 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

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.[1380]

The voluntary winding-up of a company begins when the resolution of the company has been filed with the Commission.[1381] When a resolution has been filed, the Commission must promptly deliver a copy of it to the Master.[1382] 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.

The company must give notice of the voluntary winding-up in the *Government Gazette*.[1383] A copy of the resolution must also be sent to various sheriffs and registrars.[1384]

Liquidators must give notice of their 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.[1385]

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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.

1380 Companies Act 2008, s 80(8).

1381 *Ibid*, s 80(6).

1382 *Ibid*, s 80(7).

1383 Companies Act 1973, s 356(2)(b).

1384 *Ibid*, s 357.

1385 Companies Act 2008, s 80(5).

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.[1386]

27.5.2 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. [1387]

1386 *Ibid*, s 80(8).

1387 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 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.

27.5.2.1 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[1388] –

(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;[1389] 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;[1390]

(d) **the company, one or more directors or one or more shareholders**[1391] 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

- the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

1388 Companies Act 2008, s 81(1).

1389 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.

1390 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]).

1391 Shareholders not disqualified in terms of section 81(2) of the 2008 Companies Act.

(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**[1392] 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;[1393]

(f) the **Commission or Takeover Regulation Panel**[1394] has applied to the court[1395] 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*[1396] 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

1392 A shareholder not disqualified in terms of s 81(2) of the Companies Act 2008.

1393 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).

1394 Companies or Intellectual Property Commission, or Panel, as defined in the 2008 Act.

1395 Subject to s 81(3) of the Companies Act 2008.

1396 2012 (2) SA 28 (GSJ), para [12]. See para [5] for the five broad categories of "just and equitable".

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.[1397] A domestic company or quasi-partnership, or a company akin to partnership, may be liquidated due to a complete breakdown in the relationship of reasonableness, good faith, trust, honesty, and mutual confidence which should exist between the directors and / or shareholders thereof.[1398] An applicant who relies on the just and equitable ground must come to court with clean hands. The applicant must not themself have been wrongfully responsible for, or have connived at bringing about, the state of affairs which they rely upon for the winding-up of the company.[1399] In *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others*[1400] 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*[1401] 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 section 81(1)(d)(iii) should not be interpreted to include only matters similar to the other grounds stated in section 81(1), is clearly correct. The examples of "deadlock" given in section 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 section 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 section 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 section 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

1397 *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB), para [23].
1398 *Ibid*, para [24].
1399 *Ibid*, para [27].
1400 [2014] JOL 32101 (WCC), para [22].
1401 2014 (5) SA 1 (SCA), para [14 to 16].

court should assess the respective contributions to the breakdown in order to determine whether it is just and equitable to liquidate.

27.5.2.2 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.

27.5.2.3 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 persons who cannot act in their 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[1402] 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[1403] pointed out that the Companies Act 2008 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[1404] 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.

27.5.2.4 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).

27.5.2.5 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 paragraph 27.6 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.

1402 2018 (3) SA 604 (WCC), para [178] and [218].

1403 Majority decision in *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA), para [130].

1404 At para [136].

27.6 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.

27.6.1 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 Companies Act 1973 and not the Companies Act 2008.[1405]

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:[1406]

- 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);

1405 *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).

1406 *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.[1407]

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.[1408] 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.

1407 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.

1408 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),[1409] 387,[1410] 422(1)(a) and 425 is limited to a liquidation by the court. *South African Philips (Pty) Ltd v The Master*[1411] 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[1412] 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.[1413]

27.6.2 Winding-up of an insolvent company by court order[1414]

27.6.2.1 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:

1409 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.

1410 See s 353 of the Companies Act 1973 for voluntary liquidations.

1411 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).

1412 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).

1413 Companies Act 1973, s 346(1)(e). See also s 347(4).

1414 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*[1415] the court decided that the directors can validly decide to bring the application. In *Ex Parte Russlyn Construction (Pty) Limited*[1416] and *Ex Parte Screen Media Ltd*[1417] 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*.[1418]

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 themself as surety and co-principal debtor for a company has a contingent claim against the company, which gives them standing to apply for liquidation of the company. [1419] The South African Revenue Services is also included as a creditor for a tax debt.[1420]

(c) A shareholder.[1421]

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):

1415 1993 (3) SA 488 (W). *Cf Belmont House (Pty) Ltd v Gore and Another NNO* 2011(6) SA 173 (WCC), para [21].

1416 1987 (1) SA 33 (D).

1417 1991 (3) SA 462 (W).

1418 2008 (4) SA 341 (W).

1419 *Wilde v Wadolf Investments (Pty) Ltd* 2005 (1) SA 354 (W).

1420 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).

1421 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 the shareholder holds must have been transferred 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 the executor's 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.

27.6.2.2 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:[1422]

- 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;

- 75 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;[1423]

- 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.

[1422] As a result of changes brought about by the Companies Act 2008 that are not directly related to winding-up.

[1423] 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[1424] is by far the circumstance relied upon most often in practice[1425] 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.[1426] 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.[1427]

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[1428] 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

- a return of service by the sheriff or messenger of the court reports that they have not found sufficient disposable property to satisfy a judgment (*nulla bona* return); or

- 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

1424 Companies Act 1973, s 344(g).

1425 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).

1426 *Budge NO v Midnight Storm Investments 256 (Pty) Ltd* (2011/27316) [2011] ZAGPJHC 167 (15 November 2011); 2012 (2) SA 28 (GSJ), para [2].

1427 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.

1428 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.[1429] It need not be shown that it is "just and equitable" to wind up an insolvent company.[1430] The Supreme Court of Appeal has reiterated in *Boschpoort*[1431] 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*[1432] 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[1433] 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[1434] to refuse the application. *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another*[1435] stated the following: after the enactment of the Companies Act 2008 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.[1436]

The decision in *Taylor and Steyn v Koekemoer*[1437] 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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1429 *Dippenaar NO v Business Venture Investments No 134 (Pty) Limited* [2014] JOL 31374 (WCC), paras [28] and [39].

1430 *ABSA Bank Limited v Africa's Best Minerals 146 Limited (Sekhukhune NO v ABSA Bank Limited Intervening)* [2015] JOL 32782 (GJ), para [33].

1431 *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA); [2014] JOL 31202 (SCA).

1432 2013 (2) SA 439 (FB).

1433 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.

1434 *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].

1435 (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].

1436 (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].

1437 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)[1438] of the Companies Act would nonetheless apply if the company is in fact unable to pay its debts.[1439] 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.[1440]

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.[1441]

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.[1442]

In *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd*[1443] 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.[1444] Different considerations may apply where business rescue proceedings are being considered in terms of Part A of Chapter 6 of the Companies Act 2008, 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

1438 The position is the same for s 417(1) of the Companies Act - *Hudson v The Master* 2002 (2) SA 862 (T) 874B.
1439 *Taylor and Steyn* case, at 376F-G.
1440 *Ibid*, at 379A-B.
1441 *Ibid*, at 380H-382B.
1442 *Ibid*, at 382B-382H.
1443 (542/16) [2017] ZASCA 24 (24 March 2017), para [12].
1444 *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.[1445]

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.[1446] 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.[1447] 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.[1448]

In *ABSA Bank Ltd v Rhebokskloof (Pty) Limited and Others*[1449] 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 Companies Act 1973. In *Hammel v Radiocity Contact Centre CC*,[1450] 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[1451] 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

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1445 *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].

1446 *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* [1993 (4) SA 436 at 440F.

1447 *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.

1448 *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.

1449 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.

1450 [2009] JOL 22982 (C).

1451 *Nepgen v Autoactiva (Pty) Ltd* (Case No 25366/11, South Gauteng High Court, dated 24 February 2012).

creditworthiness or its ability to raise arm's length funding can be drawn where assistance was obtained from corporate entities who enjoyed a fraternal relationship with the debtor.[1452]

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 and Others NNO v The Master and Others*[1453] 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[1454] when the application is filed with the Registrar of the Court and not the time when it is heard by the judge.[1455] 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.[1456] (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

1452 *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA), para [16].

1453 2002 (3) SA 354 (SCA).

1454 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.

1455 See *Venter v Farley* 1991 (1) SA 316 (W) 319H-320F; *The MV Mamtai Princess* 1997 (2) SA 580 (D).

1456 *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.[1457]

27.7 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.

27.7.1 Steps to be taken before application made

27.7.1.1 Security for costs

Security must be lodged[1458] 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.[1459]

27.7.1.2 Master's report

The applicant must serve a copy of the application on the Master.[1460] The Master may make a report to the court about facts that would justify the refusal or extension of the order.[1461]

1457 *The Furniture Bargaining Council v AXZS Industries (Pty) Ltd Trading as Donelly Enterprises* [2019] JOL 46383 (GJ), para [49].

1458 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].

1459 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.

1460 *Ibid*, s 346(4)(a).

1461 *Ibid*, s 346(4)(b).

27.7.1.3 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.[1462] A union whose members

[1462] 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 s 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.[1463] 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.

27.7.2 Provisional and final order

The court has the power to make a winding-up order immediately[1464] but in practice a provisional winding-up order is usually issued[1465] in the form of a rule *nisi*.[1466] 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.[1467]

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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).

1463 *Solidarity In re Van Wyk v Atlantis Forge (Pty) Ltd* (case 779/2009, Free State Provincial Division, dated 19 March 2009).

1464 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.

1465 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].

1466 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].

1467 *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd* 1998 (4) SA 1240 (D).

27.7.3 The consequences of liquidation

Once a liquidation order is granted, the company is no longer under the control of the directors. The control[1468] 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[1469] 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;[1470]
- 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 provided for in section 98 of the Insolvency Act.[1471]

27.8 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.[1472] 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

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1468 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.

1469 *Praetor and Another v Aqua Earth Consulting CC* (162/2016) [2017] ZAWCHC 8 (15 February 2017).

1470 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.

1471 *Liquidator Mr Spares (Pty) Limited v Goldies Motor Supplies (Pty) Limited* 1982 (4) SA 607 (W).

1472 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.

a close 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 Corporations 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 Corporations 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.[1473]

Section 69 of the Close Corporations Act is similar to section 345 of the Companies Act 1973.

27.9 Winding-up of a company and a close corporation distinguished

27.9.1 Liquidator

No provisional liquidator is appointed in the case of a close corporation.[1474] The Master appoints a natural person as the liquidator and, in the case of a voluntary winding-up by members, will consider the views of the members when making such appointment.[1475] The liquidator must convene the first meeting within one month of the liquidation order or after voluntary winding-up.[1476] 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.[1477]

27.9.2 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.[1478]

27.9.3 Repayments by the members[1479]

Payments to a member due to their membership that were made within two years of date of liquidation of a close corporation, are repayable unless such member can prove that –

1473 *Body Corporate Santa Fe Sectional Title Scheme No 61/1994 v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ).
1474 Close Corporations Act 1984, s 74.
1475 *Ibid*, s 74(3).
1476 *Ibid*, s 78(1)(a).
1477 *Cf Spence v the Master* 2000 (2) SA 717 (T).
1478 Close Corporations Act 1984, s 65.
1479 *Ibid*, s 70.

(a) after such payment was made, the corporation's assets, fairly valued, exceeded all its liabilities; and

(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.[1480]

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.[1481]

27.10 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,[1482] which must be sent to creditors together with the liquidator's report if the liquidator is of the opinion that the offer will be accepted.[1483]

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.

Self-Assessment Questions

Question 1
Explain the differences in respect of the moment of commencement between winding-up by the court of a solvent and an insolvent company.

1480 *Schroeder NO and Another v Mahlati and Another* [2017] JOL 38480 (ECEL), paras [8] and [9].
1481 Close Corporations Act 1984, s 70(4).
1482 *Ibid*, s 72(1).
1483 *Ibid*, s 72(2).

Question 2
ABC (Pty) Ltd was placed in business rescue by a resolution of its board. After investigation of the company's affairs, the business rescue practitioner has reached the conclusion that there is no reasonable prospect for the company to be rescued because there is no longer a market for its products, and it has a lot of debts but owns very few assets of any value. He suspects that the directors decided on business rescue to hide the fact that they have been selling company assets and misappropriating company funds for their own benefit. Should the practitioner apply to court for the liquidation of the company in terms of the Companies Act 2008 or the Companies Act 1973?

Question 3
Discuss, with reference to judgments of our courts, how it should be determined whether a company must be wound up as a solvent company or as an insolvent one.

Question 4
The Companies Act 2008 does not contain any provisions regarding the procedures and requirements that must be followed after commencement of winding-up and therefore the Companies Act 1973 applies. Explain whether it makes any difference after commencement whether it is an insolvent or solvent winding-up.

Question 5
An application for the winding-up of XYZ (Pty) Ltd was filed at the High Court on 30 August 2021. A provisional liquidation order was granted on 14 September 2021 and a final winding-up order was issued by the Court on 26 October 2021.

On 2 September XYZ (Pty) Ltd paid R1 million to one of its creditors and on 2 October XYZ (Pty) Ltd paid this creditor the balance of the debt it owed him, namely R750,000.

The creditor is not sure whether the winding-up order was issued in terms of the Companies Act 1973 or the Companies Act 2008 and wants to know whether he will be allowed to keep these payments or whether he will have to return the money to XYZ (Pty) Ltd. Explain his legal position depending on whether it was a solvent or insolvent winding-up.

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 28 - BUSINESS RESCUE AND COMPROMISES

28.1 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 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.[1484] 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.[1485]

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 XV of the Companies Act 1973, 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".[1486]

Business rescue has now replaced judicial management, as Chapter XV of the Companies Act 1973, which dealt with judicial management, was repealed by the Companies Act

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1484 See Levenstein 7-1 – 7-6. See also Henochsberg 449-450.

1485 *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.

1486 See Levenstein 3-5 – 3-11.

2008.[1487] 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.[1488] 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.[1489] 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.[1490] 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 piecemeal 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 Companies Act 2008, namely promoting economic development.[1491]

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.[1492] In

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1487 *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).

1488 *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]).

1489 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) [12].

1490 *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].

1491 See Levenstein 7-3

1492 *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.[1493] Nevertheless, it is submitted that, for the most part, South Africans have embraced the business rescue process, which is now firmly entrenched into the South African restructuring landscape.

Since the introduction of the Companies Act 2008, the business rescue process has become more and more prevalent. As a result, business rescue and its application and interpretation is a continuously evolving concept, as reflected in the numerous judgements handed down by South African courts on the subject.[1494]

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.

28.2 Selected definitions in section 128(1) of the Companies Act 71 of 2008

Chapter 6 of the Companies Act 2008 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[1495]
> (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."

1493 See Levenstein 7-3.
1494 *Ibid*, 7-3 – 7-4.
1495 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".

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.[1496]

28.2.1 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." [1497]

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.[1498]

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 Companies

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1496 See Levenstein 7-18.
1497 *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), para [80].
1498 See Levenstein 7-8 – 7-15; Henochsberg 450-451.

Act 2008, namely the recognition of the rights and interests of employees alongside those historically accorded to shareholders, directors and creditors.[1499] It is difficult to understand the reason behind the disjunctive reference to creditors or shareholders and the absence of a reference to employees.[1500]

28.2.2 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*[1501] 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 that are financially distressed should be allowed to file for business rescue.[1502]

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 Companies Act 2008. 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*,[1503] and upheld by the

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1499 See *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA539 (SCA) at 26.

1500 *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.

1501 2012 JDR 0408 (GSJ) 12, para 28. See also Levenstein 7-9.

1502 See Levenstein 7-26 – 7-27; Henochsberg 457.

1503 2020 (2) SA 109 (GP); See also Levenstein 8-22; Henochsberg 445.

Supreme Court of Appeal in *CMC v CIPC and Others*.[1504] 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 Companies Act 2008 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.

28.3 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.[1505]

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.[1506]

In terms of section 129(1) of the Companies Act 2008, 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 Companies Act 2008) 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.[1507] 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.

In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others,*[1508] the court held that where only one of the two directors passed the resolution (whereas the Companies Act 2008 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 Companies Act 2008 and therefore the resolution to commence business rescue was not valid.

1504 [2020] ZASCA 151 (20 November 2020). See also Levenstein 8-22; Henochsberg 445.

1505 *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).

1506 See Levenstein 8-1; Henochsberg 462.

1507 See Levenstein 8-1 – 8-2; Henochsberg 463.

1508 2014 (1) SA 103 (KZP), para [16]. See also Levenstein 8-27; Henochsberg 463.

The court in *Panamo Properties (Pty) Ltd v Nel and Another NNO* held that this decision was incorrect.[1509] 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 Companies Act 2008 (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.[1510] 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.[1511]

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.[1512] 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 (Pty) Ltd and Others*[1513] 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 Companies Act 2008 and was of the view that "initiated" must be understood to be "by or against the company". Accordingly, liquidation proceedings that are initiated must be

1509 (35/2014) 2015 ZASCA 76 (27 May 2015). See also Levenstein 8-27 – 8-28; Henochsberg 463.

1510 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.

1511 See Levenstein 8-3; Henochsberg 467.

1512 Companies Act 2008, s 129(2)(a). An application to court by an interested person in terms of s 131 is possible.

1513 2019 (6) SA 185 (GJ). See also Levenstein 8-8 – 8-9; Henochsberg 466,468(2)-(3).

cognisable by reference to its "effect" upon the company. Therefore, the issuing of an application, without the company being aware of its existence (that is, 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*[1514] 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*,[1515] 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, that is, that liquidation proceedings contemplated in section 129(2)(c) of the Companies Act 2008 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,[1516] long-term insurers,[1517] short-term insurers,[1518] financial services providers in terms of the Financial Advisory and Intermediary Services Act 2002[1519] and associations and managers in terms of the Collective Investment Schemes Control Act 45 of 2002.[1520]

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 –

(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

1514 2019 (6) SA 105 (WCC). See also Levenstein 8-9 – 8-13; Henochsberg 468(3).
1515 (10652/2020) [2020] ZAGPJHC 158 (10 July 2020). See also Levenstein 8-13; Henochsberg 468(3).
1516 Pensions Funds Act, s 18A.
1517 Long-Term Insurance Act 1998, s 91.
1518 Short-Term Insurance Act 1998, s 40.
1519 Section 38A of the Act.
1520 Sections 36 and 111A of the Act.

(b) appoint a business rescue practitioner who satisfies the requirements of section 138 and who has consented in writing to accept the appointment.[1521]

In terms of *The Commissioner for the South African Revenue Service v The Business Zone 983 CC*,[1522] 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*,[1523] 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.[1524]

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[1525] 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 either publishing a copy of the notice of appointment of the practitioner to each affected

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1521 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.

1522 (9673/2015) [2015] WCC (7 September 2015); [2017] JOL 37888 (WCC), para [32]. See also Levenstein 8-30(1); Henochsberg 474.

1523 2016 (6) SA 236 (GJ).

1524 *Ibid*, paras [96] and [98]. See also Henochsberg 474.

1525 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.

person or to the filing of a notice of the practitioner's appointment in terms of section 129(4).[1526]

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*[1527] 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.[1528] 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.[1529] 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 termination of business rescue proceedings: the court will in its discretion determine whether business rescue proceedings must be terminated.

1526 *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), paras [106] to [109].

1527 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; Henochsberg 468(9), 473-474.

1528 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.

1529 *Newton Global Trading (Pty) Limited (Under Business Rescue) v Da Corte* [2015] JOL 34899 (SCA) (20785/2014)[2016], para [9].

As in the case of section 344(h) of the Companies Act 1973, the conclusion that termination of the business rescue would be just and equitable in terms of section 130(5)(a)(ii) of the Companies Act 2008 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.[1530] 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.[1531] 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.[1532]

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 (that is, 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 Companies Act 1973.[1533]

Another issue for directors to consider is the consequence 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 Companies Act 2008, on the basis that the company's business was carried on recklessly and with intent to defraud creditors.

1530 *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, commentary on s 344(h) of the Companies Act 1973.

1531 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), paras 51 and 52.

1532 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).

1533 See Levenstein 8-17 – 8-20; Henochsberg 468(9)-(10).

28.4 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*[1534] 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*,[1535] 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 of appointment 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 Companies Act 2008, 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 Companies Act 2008, has full management control of the company in substitution for its

1534 See also Levenstein 9-36(9); Henochsberg 484.
1535 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 addition, business rescue practitioners have the right to demand compliance by a director with section 142 of the Companies Act 2008, 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.[1536]

Given the important role played by business rescue practitioners during the business rescue process, Chapter 6 of the Companies Act 2008 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[1537] 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.[1538] 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 they can affiliate to any of the accredited bodies with the purpose of possibility of renewing their licenses.[1539]

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

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1536 *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.

1537 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).

1538 Companies Act 2008, 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]).

1539 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.

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.[1540]

In *Mouton v Park 2000 Development 11 (Pty) Ltd and Others*[1541] 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 sidelines. This showed a lack of impartiality and objectivity.

In *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd*[1542] 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[1543] that the principles of *Standard Bank v Master of the High Court*[1544] would in general apply to a business rescue practitioner, but stated 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 accounts, the court agreed with *Pellow NO and Others v The Master of the High Court and Others*[1545] 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.

1540 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.

1541 2019 (6) SA 105(WCC), paras 110 and 111.

1542 (83344/18) [2019] GSP (30 August 2019). See also Levenstein 9-36(6); Henochsberg 526(46).

1543 At para [63].

1544 [2010] 3 All SA 135 (SCA).

1545 2012 (2) SA 491 (GSJ).

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*[1546] 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.

It is nevertheless 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 a failure to perform their 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*[1547] 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 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.[1548]

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

1546 (1274/2019) [2021] ZASCA 59 (21 May 2021).
1547 2021 (3) SA 88 (SCA) at para 141. See also Levenstein 9-36(5); Henochsberg 526(47)-(49).
1548 Companies Regulations 2011, reg 126(1)(a).

experience are sufficient to equip the applicant to perform the functions of a business rescue practitioner.[1549] The applicant must apply on the prescribed form and pay the prescribed fee. Applicants must attach a resumé of their 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 their relevant education, experience and professional affiliations.[1550]

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 Companies Act2008), "experienced" (at least five years' experience in a business turnaround practice or as a business rescue practitioner in terms of the Companies Act 2008) or "junior" (no experience, or less than five years' experience in a business turnaround practice or as a business rescue practitioner in terms of the Companies Act 2008). 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 the practitioner 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.[1551] 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 Companies Act 2008. In this regard, section 139(2) and (3) provide as follows:

> "(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;

1549 *Ibid*, reg 126(4).

1550 Form CoR 126.1.

1551 *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).

(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*[1552] 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.[1553]

The Supreme Court of Appeal in *Knoop and Another NNO v Gupta* set aside this order of the High Court.[1554] 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.

28.5 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, that is, for the "rescue" of the company and not for an ulterior motive such as to suspend liquidation or for a personal benefit.[1555]

1552 (Case No 84095/2018) [2019] GP (13 December 2019). See also Levenstein 9-36(4); Henochsberg 526(47)-(49).
1553 At para [37].
1554 (116/2020) [2020] ZASCA 163. See also Levenstein 9-36(5); Henochsberg 526(47)-(49).
1555 *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].

However, in view of the fact that the initiation of voluntary business rescue proceedings is open to potential abuse, affected persons are afforded protection 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[1556] 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;[1557] or

(iii) the company has failed to satisfy the procedural requirements set out in section 129;

(b) setting aside the appointment of the practitioner,[1558] 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;[1559] or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

(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.[1560]

1556 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].

1557 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].

1558 *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 s 138.

1559 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].

1560 When a court makes an order setting aside a resolution in terms of s 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.

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*[1561] 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*[1562] 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".[1563] 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 own advantage. Once it is recognised that the resolution may be set aside and the business rescue terminated if that is just and equitable,[1564] the scope for raising technical grounds to avoid business rescue will be markedly restricted, even if it does not vanish altogether.[1565]

1561 2014 (1) SA 103 (KZP), paras [17] and [18]. See also Levenstein 8-27; Henochsberg 478.

1562 (35/2014) 2015 ZASCA 76 (27 May 2015), para [31]. See also Levenstein 8-27 – 8-28; Henochsberg 479.

1563 *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).

1564 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.

1565 At paras [33] and [34].

In *The Commissioner for the South African Revenue Service v The Business Zone 983 CC*[1566] 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.

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).[1567] 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.[1568]

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 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.[1569]

1566 (9673/2015) [2015] WCC (7 September 2015); [2017] JOL 37888 (WCC), paras [90] and [91].

1567 *Cf Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), paras [138] and [139].

1568 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].

1569 *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].

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.

28.6 Commencement of business rescue proceedings by an affected person

28.6.1 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 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.

28.6.2 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.[1570]

28.6.3 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.[1571] 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.[1572] 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.[1573]

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 Companies Act 2008 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 sanctioned in section 6(11) or Table CR 3, read with Regulation 7(1), is what is required.[1574] The court cannot grant an order in terms of section 130(5) until it is satisfied that

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1570 *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC), paras [8] and [23].

1571 *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 596 (GSJ), para [18].

1572 See reg 7(3) and *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ), para [24].

1573 *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].

1574 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), para 74.

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.[1575]

28.6.4 Preconditions for order to commence business rescue proceedings

Unlike the Companies Act 1973 where judicial management was granted instead of a liquidation order only in exceptional circumstances, the approach in the Companies Act 2008 is the opposite and business rescue is the preferred alternative to liquidation.[1576] 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.[1577] 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.[1578] The applicant must place before the court[1579] 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.[1580]

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 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

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1575 *Ibid*, para 76.

1576 *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 Companies Act 1973 can be of assistance when interpreting the provisions for the new innovation of business rescue.

1576 Not "reasonably probable" that the company was viable and capable of ultimate solvency as was required under the judicial management provisions.

1577 *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), para [79].

1578 *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].

1579 *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 [24]. It seems unnecessary and impossible to require it in respect of (ii) – see the comments in Henochsberg 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, supra*.

1580 *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).

dismiss the application and make any further order that is necessary and appropriate, including an order placing the company in 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.[1581] Depending on the circumstances, there may be cases where liquidation may have advantages above business rescue.[1582] 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.[1583] Rather, there must be a "reasonable possibility".[1584] The concept of a "prospect" is not 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

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1581 *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].

1582 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 are 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.

1583 *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].

1584 *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].

on the facts and on the evidence presented that the future prospects of rescuing the business appear to be reasonable.[1585]

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.[1586] 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.[1587] 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.[1588]

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,[1589] 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 proceedings, by their very nature, must be conducted with the maximum possible

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1585 *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].

1586 *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].

1587 *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].

1588 See Levenstein 8-43.

1589 *Zoneska Investments v Midnight Storm Investments 386 Ltd* (High Court Cape Town, Case No 9831/2011 28 August 2012 [53]).

expedition.[1590] 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.[1591] 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.[1592] 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 Companies Act 2008 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.[1593] Creditors cannot be left in a state of flux for an indefinite period.[1594] 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.[1595] Business rescue proceedings cannot go on indefinitely. It was not the intention of the legislature that creditors be held to ransom and prevented from exercising their normal contractual rights for an extraordinarily long period of time.

1590 *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].

1591 *C Rock (Pty) v HC Van Wyk Diamonds Ltd and Others* (2355/2018Â) [2018] ZANCHC 91 (7 December 2018), paras 76, 78 and 79.

1592 See Levenstein 8-73.

1593 *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd and Others* (4653/2015B) [2016] ZAWCHC 11 (18 February 2016), para [39].

1594 *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].

1595 *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.

It was stated by the Supreme Court of Appeal in *Newcity Group v Allan David Pellow NO*[1596] 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.[1597] 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.[1598] 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.[1599]

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, even though many affected parties may support business rescue.[1600] *ABSA Bank Limited v*

1596 (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.

1597 *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].

1598 *Registrar of Banks v Dafel and Others* [2015] JOL 32711 (GP), para [43].

1599 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].

1600 *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)* 2017 (3) SA 74 (WCC), para [76].

Newcity Group (Pty) Limited; Cohen v Newcity Group (Pty) Limited and Another[1601] 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.[1602]

28.6.5 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.[1603] 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 Companies Act 2008 as a whole.[1604] 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.[1605] 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.[1606]

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.[1607] 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 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

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1601 [2013] JOL 30344 (GSJ), paras 20.4 and 28. See also Levenstein 8-41; Henochsberg 454.

1602 At para 20.3, quoted with approval in *Registrar of Banks v Dafel and Others* [2015] JOL 32711 (GP), para [42].

1603 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), para [33].

1604 *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited* (Case No 6418/2011 High Court Pretoria 8 May 2012 [19]).

1605 *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) [40].

1606 *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.

1607 *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.

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.[1608] 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.[1609]

In *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited*[1610] 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.[1611] By virtue of section 132(2)(c)(i), read with section 152 of the Companies Act 2008, 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.[1612]

28.6.6 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;

- the availability of any other necessary resource, such as raw materials and human capital;

1608 *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].

1609 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ).

1610 Case No 6418/2011, High Court Pretoria, 8 May 2012 [37]. See also Levenstein 8-38; Henochsberg 503.

1611 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.

1612 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty)Ltd and Others* 2013 (4) SA 539 (SCA), para [38].

- the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.[1613]

28.6.7 Preconditions if the aim is to procure a better return than liquidation

In relation to the alternative aim[1614] of business rescue referred to in section 128(b)(iii) of the Companies Act 2008, 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*[1615] "better return" was held to mean more money distributed overall to creditors than in liquidation.[1616] 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.[1617]

In *Gormley v West City Precinct Properties (Pty) Ltd* [1618] 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*[1619] 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.

1613 *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].

1614 *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."

1615 2013 (1) SA 307 (WCC) [58].

1616 See also Henochsberg 498.

1617 *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].

1618 (Case No: 19075/11 High Court Cape Town 18 April 2012, para [12]). See also Levenstein 7-10; Henochsberg 494.

1619 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.[1620] In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*,[1621] 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 Companies Act 1973[1622] 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.[1623] 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.[1624]

According to *Griessel and Another v Lizemore and Others*,[1625] 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 Companies Act 2008;

(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.

1620 *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].

1621 2013 (4) SA 539 (SCA), para [35]. See also Levenstein 7-13.

1622 In terms of s 424 of the Companies Act 1973 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].

1623 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].

1624 *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].

1625 2016 (6) SA 236 (GJ), para [79]. See also Levenstein 7-14(2); Henochsberg 495.

28.6.8 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,[1626] or the business rescue proceedings end, if the court makes the order applied for.[1627] 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 Companies Act 2008, or possibly by the appointed business rescue practitioner where liquidation proceedings were converted into business rescue proceedings.

28.6.9 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 Companies Act 2008 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.[1628] 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[1629] 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

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1626 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]).

1627 Companies Act 2008, s 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 s 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.

1628 (901-2017) [2018] ZASCA 178 (3 December 2018) discussed below.

1629 *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].

Court of Appeal in *GCC Engineering (Pty) Ltd and Others v Maroos and Others*, as discussed further below.[1630]

According to *ABSA Bank Ltd v Summer Lodge (Pty) Ltd*[1631] and *ABSA Bank Ltd v Makuna Farm CC*[1632] 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.[1633] 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 Companies Act 2008, 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.[1634]

In *Standard Bank of South Africa v A-Team Trading CC*[1635] 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*[1636] 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[1637] 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

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1630 (901-2017) [2018] ZASCA 178 (3 December 2018). See also Levenstein 8-56; Henochsberg 512.
1631 2014 (3) SA 90 (GP), para [20]. See also Levenstein 8-53; Henochsberg 507.
1632 2014 (3) SA 86 (GJ), para [8]. See also Levenstein 8-65; Henochsberg 507.
1633 *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].
1634 *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].
1635 2016 (1) SA 503 (KZP), para [14] and [15]. See also Levenstein 8-53.
1636 2015 (5) SA 57 (SCA), para 13.
1637 (36777/2017) [2017] GP (15 June 2017). See also Levenstein 8-54; Henochsberg 512.

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 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.[1638]

In *Richter v Absa Bank Limited*[1639] the Supreme Court of Appeal held that an application in terms of section 131 of the Companies Act 2008 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.[1640] In terms section 136(4) of the Companies Act 2008, 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).[1641] 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 Companies Act 2008 may produce some seemingly awkward results in the initial stages;[1642] however, that does not justify an unduly restrictive approach in the interpretation of the provisions of the Companies Act 2008. 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.[1643]

1638 *Oakdene Square Properties v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 SCA at 549.

1639 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.

1640 At para [10].

1641 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].

1642 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].

1643 At para [16]. See also *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation and Others (Newcity Group (Pty) Ltd v Pellow NO and Others; China Construction Bank Corporation*

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.[1644] 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.[1645]

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).[1646] Business rescue proceedings instituted in a court without jurisdiction does not suspend liquidation proceedings in terms of section 131(6).[1647]

In *Richter v ABSA Bank*[1648] 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 Companies Act 1973. 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.[1649]

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

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Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others (12/45437,16566/12) [2013J ZAGPJHC 54 (28 March 2013)), para (25).

1644 *Burmeister v Spitskop Village Properties Limited* (76408/2013) [2015] GP (16 September 2015), para [44]; *Newcity Group (Pty) Ltd 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).

1645 *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd and Others* (4653/2015B) [2016] ZAWCHC 11 (18 February 2016), para [44].

1646 *ABSA Bank Limited v Cardio Fitness Properties* (2012/2008) ZAGPJHC (28 November 2013), para [18].

1647 *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC), para [27].

1648 2015 (5) SA 57 (SCA).

1649 At para [15].

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 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.[1650] 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*[1651] 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)*[1652] 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,[1653] 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:

1650 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.

1651 (901-2017) [2018] ZASCA 178 (3 December 2018), para [23]. See also Levenstein 8-56.

1652 [2017] JOL 39477 (WCC), para [112]. See also Levenstein 8-74; Henochsberg 448(1), 449.

1653 At para [104].

(a) the liquidation proceedings were not suspended; and

(b) the liquidators were directed to take control of the company assets in accordance with the provisions of the Companies Act 1973, 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 Companies Act 2008, 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*[1654] Satchwell J dismissed the contention that applications for liquidation could not proceed as they were suspended in terms of section 131(6) of the Companies Act 2008 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*[1655] agreed with this decision. *Engen Petroleum Limited v Multi Waste (Pty) Limited and Others*[1656] 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[1657]

In *GCC Engineering (Pty) Ltd and Others v Maroos and Others*[1658] the Supreme Court of Appeal stated that section 131(6) of the Companies Act 2008 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.[1659] 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.[1660] 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

1654 Case No. 45543 / 2012, unreported. See also Levenstein 8-53.
1655 [2017] JOL 39365 (GJ), para [9].
1656 2012 (5) SA 596 (GSJ), at paras [15]–[24].
1657 At para [11] with reference to *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA), para [15].
1658 *GCC Engineering (Pty) Ltd and Others v Maroos and Others* (901-2017) [2018] ZASCA 178 (3 December 2018). See also Levenstein 8-56; Henochsberg 526(36).
1659 At para [15].
1660 At para [19].

management of the company placed in winding-up by the court. There is no legal provision, 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.[1661]

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.[1662] Although the liquidators do not fall within any of the categories of affected persons as defined in the Companies Act 2008, 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.[1663]

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.[1664]

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.[1665] It cannot be that mere lodgement of papers and the issue of a case number is sufficient to trigger a suspension of liquidation proceedings.

28.6.10 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.[1666]

1661 At para [21].

1662 *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.

1663 *C Rock (Pty) v H C Van Wyk Diamonds Ltd and Others* (2355/2018Â) [2018] ZANCHC 91 (7 December 2018), para 28.

1664 *Ex parte Nell and Others NNO* 2014 (6) SA 545 (GP), para [56].

1665 *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].

1666 *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.

28.7 Conversion of liquidation to business rescue

In terms of section 131(7) of the Companies Act 2008, 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.[1667]

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 Companies Act 2008, 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*[1668] 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*[1669] 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.

28.8 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.

1667 *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].

1668 (56581/2014) [2014] 26 ZAGPPHC (12 September 2014). See also Levenstein 9-144.

1669 [2017] JOL 37690 (GP) at [74].

28.9 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.[1670] In *SA Airlink (Pty) Ltd and South African Airways (SOC) Limited and Others*[1671] 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 Companies Act 2008 provides that during business rescue proceedings[1672] 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 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.[1673]

In *National Union of Metalworkers of South Africa (NUMSA) obo Members and Others v South African Airways (SOC) Ltd and Others*,[1674] the Labour Court, with reference to the decision in *Marques and Others v Group Five Construction (Pty) Ltd and Others*,[1675] confirmed that the weight of authority was against the Labour Court assuming the role of the High Court in

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1670 See Levenstein 9-3 – 9-29; Henochsberg 522.

1671 [2020] ZASCA 156 (30 November 2020).

1672 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.

1673 *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].

1674 2021 (4) SA 575 (LC) (8 February 2021). See also Levenstein 9-76(1).

1675 (2020) 41 ILJ 677 (LC). See also Levenstein 9-21.

uplifting the moratorium on legal proceedings, imposed by section 133 of the Companies Act 2008. 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 2008 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 NO and Others*,[1676] 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.[1677] In *Afrimat Iron Ore Proprietary Limited v Timasani Proprietary Limited (in business rescue) and Another*[1678] 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*

1676 Gauteng Local Division, Johannesburg (Case no. 2020/12079) Ali AJ (10 August 2021).
1677 *Southern Value Consortium v Tresso Trading 102 (Pty) Limited NO* 2016 (6) SA 501 (WCC), para [31].
1678 [2019] JOL 41473 (GP), para [19]. See also Henochsberg 526(3).

(Pty) Ltd[1679] 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*[1680] 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.[1681] 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.[1682]

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.[1683] 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).[1684]

Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others[1685] held that leave of the court to institute legal proceedings against a

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1679 (91/2020) [2021] ZASCA 43 (13 April 2021) at para 29. See also Henochsberg 526(4).
1680 [2018] 3 ALL SA 219 (WCC), para [62]. See also Levenstein 9-27; Henochsberg 522.
1681 At para [67].
1682 At para [68]).
1683 At para [81].
1684 *Cawood NO and Others v Reaan Swanepoel t/a Reaan Swanepoel Attorneys and Others* [2015] JOL 34283 (GP).
1685 *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 and Others* [2014] ZAKZPHC 64. See also Levenstein 9-7; 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*[1686] 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*.[1687] In *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others*[1688] 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.[1689]

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.[1690] 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.[1691] 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.[1692] Arbitration proceedings are legal

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1686 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].

1687 2017 (4) SA 51 (WCC), paras [56] to [61]. See also Levenstein 9-12.

1688 (A513/2013) [2015] ZAGPPHC 78 (26 February 2015), paras 27 and 28. See also Levenstein 9-8; Henochsberg 483, 526(2).

1689 *Lanarco Home Owners Association v Prospect SA Investments 42 (Proprietary) Limited (in business rescue) and Others* [2014] JOL 32483 (KZD).

1690 *Burba v Integcom (Proprietary) Limited* (JS539/12) [2013] Labour Court Johannesburg (29 November 2013), para [16].

1691 *Ibid*, para [17].

1692 *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 Companies Act 2008 does not expressly amend the provisions of the Labour Relations 1995; the provisions of the Labour Relations Act and not s 133 of the Companies Act 2008, apply.

proceedings for which the written consent of the business rescue practitioner or the leave of the court is required in terms of section 133.[1693]

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.[1694]

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.[1695] In *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank*[1696] 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 *within 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*[1697] 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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1693 *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].

1694 *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.

1695 *Murray NO v First Rand Bank Ltd T/A Wesbank* 37554/2013 GP (undated) at p 24.

1696 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; Henochsberg 522, 526(1).

1697 2012 (5) SA 430 (WCC). See also Levenstein 9-17; 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.[1698]

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.[1699] 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.[1700] In *Cheetah Chrome South Africa (Pty) Ltd v Dilo Chrome Mine (Pty) Ltd (In Business Rescue) and Others*,[1701] the court confirmed that, as a general principle in respect of the lifting of the moratorium as contemplated in section 133 of the Companies Act 2008, 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.[1702]

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.[1703] 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:

- the effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders;

1698 *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 (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.

1699 *Chetty v Hart* (20323/14) [2015] ZASCA 112 (4 September 2015); [2015] JOL 33852 (SCA), para [43].

1700 *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ), para [103].

1701 (45259/2020) [2020] ZAGPPHC 642 (19 October 2020).

1702 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP), para [5].

1703 *Arendse v Van der Merwe NO* 2016 (6) SA 490 (GJ), paras [16] and [27].

- 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

- 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 Companies Act 2008.[1704]

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 its confidence and disclose to the court the legal proceedings that it intends initiating.[1705]

In *Arendse v Van der Merwe NO*[1706] 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.[1707]

Set-off is allowed against any claim made by the company in legal proceedings before or after commencement of the business rescue proceedings.[1708] Proceedings by a regulatory authority in the execution of its duties are allowed after written notification to the business rescue practitioner.[1709]

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.[1710] 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.[1711] In *Investec Bank Ltd v Bruyns*[1712] 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.

1704 *Ibid*, para [28].

1705 *2001 Management Services (Pty) Limited and Another v Anappa* (88079/14) [2016] ZAGPPHC 353 (20 May 2016).

1706 2016 (6) SA 490 (GJ), para [29].

1707 *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013), para [71].

1708 Companies Act 2008, s 133(1)(c).

1709 *Ibid*, s 133(1)(f).

1710 *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. B van Niekerk and S 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.

1711 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP), para [70].

1712 2012 (5) SA 430 (WCC).

28.10 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 Companies Act 2008 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. [1713]

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 Companies Act 2008.

The order of preference in section 135 is as follows and will be explained in further detail below:[1714]

- 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, that is, for post-commencement finance;
- unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began, that is, 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.

1713 See Levenstein 9-88 – 9-92.

1714 *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].

28.10.1 Practitioner's remuneration in section 143

Section 143 deals with the business rescue practitioner's remuneration. Section 135(3) of the Companies Act 2008 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.

28.10.1.1 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.[1715]

In *Montic Diary (Pty) Ltd (In Liquidation) and Others v Mazars Recovery & Restructuring (Pty) Ltd and Others*[1716] the High Court held that once a business rescue practitioner applies to court for an order discontinuing the business rescue proceedings and placing the company into liquidation, in the manner contemplated in section 141(2)(a) of the Companies Act 2008, 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 Companies Act 1973. 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*[1717] 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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1715 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* [2018] JOL 39938 (WCC); [2018] 3 All SA 71 (WCC), paras 48.2 and 84.

1716 2021 (3) SA 527 (WCC) (10 February 2021).

1717 2020 (5) SA 35 (SCA). See also Levenstein 9-50(8); 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 Companies Act 2008 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.

28.10.1.2 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 Companies Act 2008 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*,[1718] 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*,[1719] 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

[1718] (30123/2015) [2016] GP, para [60]. See also Henochsberg 526(25).

[1719] 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.[1720] 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. The practitioner 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.[1721] 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.[1722]

The rights of property owners during business rescue proceedings are dealt with in section 134 of the Companies Act 2008. 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.

28.10.1.3 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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1720 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 L Jacobs and D 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*.

1721 *Ibid*, paras [61] and [62].

1722 *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.[1723]

28.10.2 Creditors secured before business rescue proceedings

In general terms, the provisions of section 134 of the Companies Act 2008 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.

[1723] 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 the practitioner may in appropriate circumstances appoint advisors, valuators, auctioneers, forensic accountants, lawyers and other experts or persons to assist them in the carrying out of their 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 them 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 the practitioner's own remuneration, s 143(1) entitles a practitioner to charge an amount for their 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 their 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 reg 128(3). A practitioner cannot simply abandon ship before the business rescue proceedings are ended and 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*[1724] the court, with reference to the judgements in *Kritzinger and Another v Standard Bank of South Africa*[1725] and *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd*,[1726] confirmed that a cession of book debts constitutes property for purposes of section 134. It must be noted that financing during business rescue may be secured only by assets not otherwise encumbered.

28.10.2.1 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.[1727]

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.[1728]

1724 (A5076/2018) [2021] ZAGPJHC 7 (20 April 2021).

1725 (3034/2013)[2013] ZAFSHC 215 (19 September 2013).

1726 2016 JDR2258 (GJ).

1727 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.

1728 *Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd And Others* 2019 (3) SA 97 (SCA), paras [23] and [24].

28.10.3 Employee remuneration

28.10.3.1 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).

28.10.3.2 Section 135(3)(a)

The claims mentioned in section 135(1) are treated equally, but have preference over-

(a) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(b) all unsecured claims against the company.

28.10.3.3 Section 144(2)

In terms of section 144(2) of the Companies Act 2008, 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.

28.10.4 Claims for financing obtained during business rescue

28.10.4.1 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 and Industry* [1729] 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 Companies Act 2008. 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 Companies Act 2008.

28.10.4.2 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*[1730] any rental and other amounts payable in respect of occupation of immovable property are not preferent as "financing" or "costs of business recue proceedings".

28.10.6 Preference provided for in the business rescue plan proposals

28.10.6.1 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) 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 sections 98 to 102 of the Insolvency Act, do not enjoy a preference under business rescue proceedings.[1731]

[1729] [2018] JOL 39915 (GP). See also Levenstein 9-111; Henochsberg 526(22).

[1730] 2018 (2) SA 523 (GP), para [25].

[1731] *The Commissioner, South African Revenue Service v Beginsel NO and Others* 2013 (1) SA 307 (WCC) [24]-[35].

28.11 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.[1732]

In this regard, section 136 of the Companies Act 2008 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*[1733] 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. In *Tayob v Multi Furn Wholesalers and Retailers (Pty) Ltd*[1734] 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 Companies Act 2008. Accordingly, care should 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.

In the case of *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others*[1735] 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

1732 See Levenstein 9-83 – 9-88; Henochsberg 526(29).
1733 2015 (3) SA 438 (SCA), para [35].
1734 (32604 / 2017) [2018] ZAGPPHC 548 (6 August 2018).
1735 2017 (4) SA 592 (GJ) (25 November 2016). See also Levenstein 9-84, 9-116; Henochsberg 526(30).

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.[1736]

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. 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.[1737] 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.[1738] Obligations of a company arising from the cession of book debts are not capable of being 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).[1739]

1736 *Schickerling NO and Another v Chickenland (Pty) Ltd trading as Nando's* [2017] JOL 39263 (GP), para [30].
1737 *178 Stanfordhill CC v Velvet Star Entertainment* (1506/15) [2015] KZD (1 April 2015), para [20], [21] and [25].
1738 *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ), para [39]).
1739 *Ibid*, para [47].

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.[1740]

28.11.1 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.[1741] 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.[1742] 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 Companies Act 2008 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.[1743] 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 Companies Act 2008 is to be 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.[1744]

1740 Companies Act 2008, s 140(1)(c)(i); *Clarke / EH Walton Packaging* [2014] JOL 31234 (CCMA), para [101].

1741 See Levenstein 9-73; Henochsberg 526(68).

1742 *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].

1743 *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].

1744 *The Employees of Solar Spectrum Trading 83 (Pty) Limited v Afgri Operations Limited* (Case No 6418/2011, High Court Pretoria, 8 May 2012 [18]).

28.12 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.[1745] 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*[1746] 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.[1747]

28.13 Investigation of the affairs of the company

Chapter 6 of the Companies Act 2008 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 Companies Act 2008, the practitioner may apply to court at any time during the business rescue proceedings for an order removing a director from office 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 their 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*,[1748] an order for the removal of a

1745 *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd and Others* 2017 (3) SA 539 (GJ), para [16].
1746 2016 (6) SA 501 (WCC), para [32].
1747 See also Levenstein 9-22.
1748 (357/2018) [2018] ZAECGHC 24 (29 March 2018).

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.[1749]

In addition to the above, in terms of section 141 of the Companies Act 2008, 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;[1750]

(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.[1751]

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;

1749 See also Levenstein 9-50(4); Henochsberg 526(36)-(37).

1750 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.

1751 *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].

(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 transactions" appears in the Companies Act 2008 and the use of the word "voidable" does not necessarily translate to "voidable dispositions" as set out in the Insolvency Act. 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 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.[1752]

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*[1753] 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.

28.14 First meeting

Within 10 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 the practitioner 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 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.

28.15 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

1752 See Levenstein 9-47; Henochsberg 526(56).
1753 (1841/2012) [2016] FB (21 January 2016); [2017] JOL 37785 (FB).

possible adoption at a meeting convened for this purpose. In *Hlumisa Investment Holdings (RF) Limited and Another v Van der Merwe NO and Others*[1754] the court stated that it was clear from a simple reading of section 150(1) of the Companies Act 2008 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,[1755] 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).[1756]

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, 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.[1757]

1754 (77351/2015) [2015] ZAGPPHC 1055 (14 October 2015). See also Henochsberg 534.

1755 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].

1756 Companies Act 2008, s 152(1)(e).

1757 *Vengadesan NO and Another v Standard Bank Limited* (7415/2017) [2018] ZAKZDHC 59 (30 November 2018), para [11].

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)*[1758] 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 of the Companies Act 2008 has merely created a framework within which a rescue plan can be developed.[1759] Substantial compliance with the provisions of the Act is sufficient for this purpose.[1760]

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.[1761]

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 creditors' voting interest. The whole scheme of the provisions of section 150 to 153 of the Companies Act 2008 is such that there is no room for a business rescue practitioner to reserve the right to amend a business rescue plan. By doing so, practitioner would effectively circumvent the procedure set out in the Companies Act 2008 in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force. A right to

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1758 2017 (3) SA 74 (WCC), para [35]. See also Levenstein 8-44; Henochsberg 535.

1759 *Gormley V West City Precinct Properties (Pty) Ltd* (Case No: 19075/11, High Court Cape Town, 18 April 2012, para 7).

1760 *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).

1761 Companies Act 2008, 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.

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.[1762]

In *Arqomanzi (Pty) Ltd v Vantage Goldfields (Pty) Ltd and Others*[1763] 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 Companies Act 2008. The court has no power to cram down a plan on creditors which they have not discussed and voted on at such a meeting.[1764]

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 Companies Act 2008. In *Commissioner, South African Revenue Service v Beginsel NO and Others*[1765] 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.

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 Companies Act 2008.

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 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

1762 *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC), para [67].
1763 (Case no. 549/2021) ZAMPMBHC, Legodi JP (31 May 2021).
1764 *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five* (624/2016) [2017] ZASCA 131 2017 (3) SA 539 (GJ), para [18].
1765 2013 (1) SA 307 (WCC), para [30].

against the company.[1766] 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.[1767] It is therefore not open to any "affected person" to seek to set aside a plan after it has been adopted.[1768] 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.[1769]

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*[1770] 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.[1771] In terms of section 132(1), 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

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1766 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.

1767 *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.

1768 *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC), para [74].

1769 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP), para [59].

1770 (279/2020) [2021] ZASCA 67.

1771 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].

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).

28.16 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*[1772] and *New Port Finance Company (Pty) Limited and Another v Nedbank Limited*[1773] 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*[1774] 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 to 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.

28.17 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 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

1772 [2014] JOL 31949 (WCC); 2014 (4) SA 521 (WCC), paras [85] and [86].
1773 2016 (5) SA 503 (SCA), para [14].
1774 (279/2020) [2021] ZASCA 67.

goal of rescuing the company.[1775] 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*[1776] 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*[1777] 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 Companies Act 2008 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*[1778] 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 Companies Act 2008 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.[1779]

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

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1775 *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC) [56].

1776 2014 (6) SA 214 (LP). See also Levenstein 9-36(3); Henochsberg 550(2).

1777 (47327/2014) [2015] GP (9 March 2015), paras 38, 44. See also Levenstein 9-134(21); Henochsberg 550(3).

1778 [2017] JOL 37690 (GP), para [33].

1779 *Ibid.* at paras [36] and [44].

adoption of the business rescue plan at a value independently and expertly determined,[1780] 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.[1781]

In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*[1782] (after several disagreements with the decision in *African Banking Corporation*[1783]) 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.[1784]

In *African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others*[1785] 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 Act 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 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

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1780 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].

1781 See Levenstein 9-134(25) – 9-135.

1782 2014 (1) SA 103 (KZP), para [60]. See also Henochsberg 550(5).

1783 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP).

1784 See Levenstein 9-140.

1785 2015 (5) SA 192 (SCA), paras [19] and [21]. See also Levenstein 9-139; Henochsberg 550(6).

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[1786] 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)*[1787] 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 Companies Act 2008. 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 aside).[1788] 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

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1786 Companies Act 2008, 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 s 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).

1787 2017 (5) SA 40 (SCA), para [80]. See also Levenstein 9-134(22), 9-134(24); Henochsberg 550(9), 550(12).

1788 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.

wording of section 153(1).[1789] 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*,[1790] 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.[1791]

If no person takes any of these actions the practitioner must promptly file[1792] 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*[1793] 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*,[1794] the court held that the interpretation of the Companies Act 2008 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 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

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1789 At para [79].

1790 2019 (6) SA 490 (WCC), para [55]. See also Levenstein 9-134(24); Henochsberg 550(12).

1791 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).

1792 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].

1793 (56581/2014) [2014] GP (12 September 2014), para [19].

1794 (A932/14) [2016] ZAGPPHC 737 (23 August 2016).

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.[1795]

Section 153 does not apply if there was no vote on the plan.[1796] 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.[1797]

28.18 Compromise with creditors (section 155, Companies Act 2008)

Sections 311 to 313 of the Companies Act 1973, which dealt with compromises and arrangements, were repealed when the Companies Act 2008 came into operation on 1 May 2011. Section 155 of the Companies Act 2008 replaces sections 311 to 313.

A company may find it necessary to negotiate with creditors[1798] 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 Companies Act 1973 created a mechanism in terms of sections 311 to 313 for the conclusion of such an enforceable arrangement.

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

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1795 *Vengadesan NO and Another v Standard Bank Limited* (7415/2017) [2018] ZAKZDHC 59 (30 November 2018), para [20].

1796 *South African Bank of Athens Limited and Another v Zennies Fresh Fruit CC* 2018 (3) SA 278 (WCC), para [33].

1797 *Landosec (Pty) Ltd t/a Lasertech v Mclaren* (2231/2015) [2015] ECP (3 November 2015).

1798 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].

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.[1799]

The Companies Act 2008 contains detailed provisions regarding the contents of the proposal.[1800] 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.[1801] The class to which creditors belongs is based primarily on the similarity of rights against the company.[1802] 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[1803] 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.[1804]

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.[1805]

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)

1799 See Henochsberg 553, 560(5).
1800 *Ibid*, 554.
1801 *Ibid*, 560(2D).
1802 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).
1803 *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.
1804 See Henochsberg 560(2D)-560(3).
1805 *Ibid*, 560(5)-560(9).

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 this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

CHAPTER 29 – OFFENCES

29.1 Duty of trustee or liquidator to report offences

The trustee or liquidator's duty to report offences has been dealt with in a separate Chapter of these notes above.

Offences reported by trustees or liquidators, if any are reported at all, are usually limited to technical offences such as failure to lodge a statement of affairs or failure to attend the first meeting. Failure to keep proper records is the only other offence reported in a significant percentage of cases.[1806]

One reason why insolvency practitioners are not keen to report offences is probably because they may have to spend a day or so in court if offenders are prosecuted. Their remuneration is based on the proceeds of assets recovered and they are not paid for the investigation of offences and time spent in connection with prosecutions. Another reason may be that prosecutions seldom lead to significant punishment being meted out by the courts.[1807]

Whatever the reasons for failure to conscientiously report offences may be, such failure amounts to a dereliction of duty.

29.2 Many offences

In addition to common law offences, such as theft and fraud, the Insolvency Act and other Acts contain numerous offences that may be committed by the insolvent, company officials, creditors, insolvency practitioners and other persons. It is no exaggeration to state that any conduct before or after sequestration that appears to be questionable, is probably a common law or statutory offence.

29.3 Existence and whereabouts of property

Of particular interest to creditors are the provisions of section 142(2) of the Insolvency Act, which provides that a person who has possession or custody or under his control any property belonging to an insolvent estate and who knows of the sequestration, is guilty of an offence if they fail to inform the trustee of the estate as soon as possible of the existence and whereabouts of the property and (subject to the provisions of section 83) deliver it to, or place it at the disposal of, the trustee.

1806 According to statistics supplied by the police some years ago, the offences in respect of which prosecutions were instituted most often were failure to lodge a statement of affairs (30%), failure to attend meetings (13%), and failure to keep proper records (18%).

1807 According to statistics supplied by the police some years ago, less than 20% of suspects were punished and of those who were punished more than 60% received suspended sentences.

29.4 Problems regarding proof of offences

The problems regarding proof of the offences should be left to the police and prosecuting authorities. The decisions of the Constitutional Court that certain legal presumptions are invalid[1808] will not make their task easier.

29.5 Warn insolvent during interview

It is suggested that during an interview with the insolvent and the directors of a company, the trustee or liquidator should hand them a list that sets out their duties and warn them that failure to comply with their duties may constitute an offence.

29.6 Concealment of liabilities, etc

It is not unusual to find that the financial position of an insolvent or company, or the position as reflected by the insolvent or the company, has shown a remarkable decline before sequestration or liquidation. This may be an indication that an offence has been committed in terms of one or both of the following provisions:

(a) Section 133 – concealment of liabilities or pretext of existence of assets; and

(b) Section 135 – undue preferences, contracting debts without expectation of ability to pay, assets diminished by gambling, betting, hazardous speculation, unnecessary expenditure, etc.

29.7 Failure to submit account or pay monies after confirmation of account

Section 144 of the Insolvency Act provides that a trustee who fails to submit an account to the Master or pay monies within two months after confirmation of the account, commits an offence.

[1808] *S v Zuma* 1995 (2) SA 642 (CC); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); *S v Julies* 1996 (4) SA 313 (CC); *Cf S v Mumbe* 1997 (1) SA 854 (W); *Scagell v Attorney-General, Western Cape* 1997 (2) SA 368 (CC); *S v Coetzee* 1997 (3) SA 527 (CC); *S v Ntsele* 1997 (11) BCLR 1543 (CC); *Uncedo Taxi Service Association v Maninjwa* 1998 (3) SA 417 (ECD); *S v Mello* 1998 (3) SA 712 (CC).

CHAPTER 30 – ESTATE ACCOUNTS

30.1 Time for submission of accounts

30.1.1 Companies

The position of a liquidator of a company in liquidation is similar or identical to the position of a trustee of an individual, apart from the differences set out below.

30.1.2 Time for submission of accounts

The trustee must within six months from the date of (final) appointment submit an estate account to the Master.[1809] If this account is not a final account the trustee must submit further accounts every six months (after lodging the previous account) until a final account has been lodged.[1810] The Master may at any time direct the trustee to submit an account if, in the opinion of the Master, funds in hand ought to be distributed to creditors.[1811]

30.1.3 Application for extension to lodge account

If the trustee of an insolvent estate is unable to submit an account within the prescribed period the trustee must, before the period has expired, submit an affidavit to the Master which states –

- the reasons why an account cannot be lodged;
- any information regarding the affairs of the insolvent required by the Master; and
- the amount of money available for payment to creditors.

The affidavit must be sent to each proved creditor by registered post. The trustee should provide proof that the affidavit has been posted to creditors by registered post.[1812] The Companies Act contains similar provisions in respect of the liquidator of a company.[1813]

30.2 Advertising of account

The estate account itself is usually lodged with the Master in duplicate. In practice the Master will give permission that the account may be advertised, or raise queries that must be dealt with before the account may be advertised. Although there is no explicit requirement that the

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1809 Insolvency Act, s 91; Companies Act 1973, s 403(1).
1810 *Ibid*, s 92(4) and s 403(1)(b).
1811 *Ibid*, s 110 and s 403(1)(b).
1812 Insolvency Act, s 109. The requirement that a trustee had to advertise an application for extension in the *Government Gazette* fell away when this section was amended in 1983, but Form 3 still makes provision for this advertisement.
1813 Companies Act 1973, s 404.

Master must give permission before the account is advertised, the Master has the right, whether or not any objections have been lodged against an account, to direct the trustee or liquidator to amend the account if the Master is of the opinion that the account is in any respect incorrect, contains an improper charge, or that the trustee acted *mala fide*, negligently or unreasonably in incurring any costs included in the account.[1814] To avoid wasted advertisement costs payable by the trustee out of own funds, trustees should satisfy themselves that the Master has no sustainable objections against the account before the account is advertised as lying open for inspection.

30.2.1 Copy of account lie for inspection at magistrate's office

If the insolvent resided or carried on business in a district in which there is no Master's office, a copy of the account must be transmitted to the magistrate with an indication when it will lie open for inspection.[1815] In the case of a company, this is the magistrate's office where the company had its registered office.[1816]

30.2.2 Notice of advertisement of account

The trustee must give notice in the *Government Gazette* on Form No 4 of the regulations framed under section 158 of the Insolvency Act. The trustee of an insolvent estate must place a similar notice in an Afrikaans and English newspaper circulating in the district in question.[1817] The liquidator of a company need not advertise in newspapers but must submit a copy of the notice in the *Government Gazette* to each proved creditor by registered mail or by delivery.[1818] The notice must indicate where the account will be open for inspection (at the particular Master's office and, if applicable, at one or more magistrate's office) and that it will be open for inspection for 14 days from a particular date (usually the date of the notice).

30.3 Objections to account

Any interested person[1819] may at any time before the confirmation of the account submit an objection (with reasons for the objection) to the Master in writing.[1820] A copy of the objection and supporting documents must be sent to the trustee and the trustee has 14 days to submit remarks thereon to the Master, who may refer the remarks to the person objecting.[1821]

1814 Insolvency Act, s 111(2). *Cf* Companies Act 1973, s 407(3).

1815 *Ibid*, s 108(1) and s 406(1) and (2).

1816 *Investec Bank v Strydom and Others* (45664/2012) [2013] ZAGPJHC 59 (28 March 2013), para [9].

1817 Insolvency Act, s 108(2).

1818 Companies Act 1973, s 406(3) and Winding-up Regulations, reg 20; *Investec Bank v Strydom and Others* (45664/2012) [2013] ZAGPJHC 59 (28 March 2013), para [26].

1819 A person nominated by the Master to be appointed as liquidator, but who was not appointed, does not have standing to object to a liquidation account lodged by the appointed liquidator – *Van den Heever NO v Master of the High Court, Pietermaritzburg* (4866/2014) [2014] KZP (14 November 2014), para [11].

1820 Insolvency Act, s 111(1); Companies Act 1973, s 407(1).

1821 Insolvency Regulations, reg 6 and Winding-up Regulations, reg 6. Insolvency Regulation 6 provides that the Master may refer the trustee's remarks to the person objecting or may require the attendance, personally or

30.3.1 Persons aggrieved by Master's decision may apply to court

The Master may direct the trustee to amend the account or may refuse to sustain an objection. The trustee, or any person aggrieved by the direction or refusal of the Master to sustain the objection, may apply to court[1822] within fourteen days from the date of the Master's direction (or intimation to the objecting party of the Master's refusal to sustain the objection) for an order to set aside the Master's decision.[1823] Any person with a legal interest in the matter and not only creditors may apply to review the decision of the Master.[1824]

30.3.2 Master does not hear evidence

Notwithstanding provision in the regulations[1825] for the Master to hear evidence by the trustee or objecting party, the Master does not have the machinery or experience to resolve complex factual disputes and usually refuses to sustain an objection if it involves a factual dispute. In such cases the correct procedure is for the objecting party to apply to the court for a decision, even if it was beyond the powers of the Master to rule on the objection, and the court may refer the matter for the hearing of oral evidence.[1826]

30.3.3 Advertisement of amended account

If the amendment of the account affects the interests of persons other than persons who lodged objections, the amended account must be re-advertised.[1827]

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by agent, of the trustee or the person objecting. There is no similar provision in Winding-up Regulation 6 but it is submitted that this provision in Regulation 6 should be applied to a company unable to pay its debts in terms of section 339 of the Companies Act.

1822 An approach to the court to set aside the decision of the Master can of course not be brought before the Master has given his ruling on the objection – *PMG Motors Kyalami (Pty) Ltd and Another v Firstrand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA), para [31]. The court ruled that on the facts in this matter an objection to the account did not preclude the objector from approaching the court (para [31]).

1823 Insolvency Act, s 111(2); Companies Act 1973, s 407(4). An applicant is limited to the grounds stated in the objection against the account – *Hudson v The Master* 2002 (1) SA 862 (T) 867F. With reference to s 407(4), the court remarked per Griesel J in *Van Zyl NO v The Master* 2000 (3) SA 602(CPD), para [20], that the Master is the official entrusted by the legislature with the administration of all insolvent estates, including companies in liquidation; as such the Master's rulings ordinarily deserve some deference. Where no new facts have been placed before the court, the court should hesitate to substitute its own opinion for that of the Master in exercising its wide powers under section 407(4)(a) of the Act, unless it is clear that any particular ruling by the Master is tainted by irregularity or error. Quoted with approval in *Venditor Asset Management (Pty) Ltd v The Master of the High Court, Pretoria and Others* (38885/2017) [2018] ZAGPPHC 332 (10 May 2018), para [23].

1824 *Tongaat Paper Co (Pty) Ltd v The Master* 2011 (2) SA 17 (KZP).

1825 Insolvency Regulations, reg 6, referred to above.

1826 *Fourie's Poultry Farm v Kwanatal Food Distributors* 1991 (4) SA 514 (N) 522E-528D. See also *Tongaat Paper Co (Pty) Ltd v The Master* 2011 (2) SA 17 (KZP) [20]; *Fey NO & Whiteford NO v Serfontein* 1993 (2) SA 605 (AD), at 614G–H; *Faro v Bingham NO and Others* (4466/2013) [2013] ZAWCHC 159 (25 October 2013), para [27].

1827 Insolvency Act, s 111(2)(b); Companies Act 1973, s 407(4)(b).

30.4 Confirmation of accounts

If the account was open for inspection at the office of a Magistrate, the Magistrate will send the copy of the account to the Master with an endorsement to indicate the period during which it lay open for inspection.

If the Master authorised the advertisement of the account and no objections are received, or the objections have been finalised, the confirmation of the account is a mere formality once proof has been received by the Master that the account has been advertised and has lain open for inspection according to the legal provisions.

The Master confirms the account by way of an endorsement on the account and informs the trustee of the confirmation. The trustee must give notice in the *Government Gazette* of the confirmation of the account.[1828] Form No 5 is used for this notice.[1829]

30.5 Distribution of funds

30.5.1 Effect of confirmation

Immediately after confirmation, the trustee must in accordance with the account distribute the estate and collect the contribution payable by creditors.[1830] Another important effect of confirmation is that the trustee is entitled to draw remuneration as reflected in the account. The trustee must without delay lodge receipts or paid cheques as proof that those dividends have been paid.[1831] Proof of payment of administration costs that have not yet been filed with the Master, should also be lodged. Special provision is made for cases where contribution cannot be collected in terms of the account.[1832]

30.5.2 Deposit with Master of dividends not paid to creditors

If a dividend has not been paid within two months from the date of confirmation of the account, the dividend should be paid to the Master who must deposit it in the Guardian's Fund on behalf of the creditor.[1833] The Master deducts a commission of 5% from all moneys paid to a creditor in this way.[1834] The Master must, in September of each year, publish a list in the *Government Gazette* of all amounts of R100 or more that are claimable and have remained unclaimed for a period exceeding one year but not exceeding three years.[1835] Dividends in the Master's Guardian's Fund that have remained unclaimed for thirty years, are forfeited to the State.[1836]

1828 *Ibid*, ss 113(1) and section 409(2).
1829 *Cf* Mars at 633 and Meskin Appendix II.
1830 Section 113(3) of the Insolvency Act, s 113(3); Companies Act 1973, s 409(1).
1831 *Ibid*, s 114(1) and s 410.
1832 *Ibid*, s 118 and s 342(2).
1833 *Ibid*, s 114(2) and s 410(2).
1834 Paragraph 3 of the Third Sch to the Insolvency Act and para 4 of Ann CM 103 to the Winding-up Regulations.
1835 Administration of Estates Act 1965, s 91.
1836 *Ibid*, s 92.

30.5.3 Surplus after payment of costs and claims

A trustee must pay any surplus in an insolvent estate (that is, the balance available after the payment of all costs and claims) to the Master, who must deposit it in the Guardian's Fund and repay it to the insolvent at their request after rehabilitation.[1837] Members (shareholders) of a company are entitled to the surplus in the case of a company.[1838] The surplus payable to members is awarded to them in the distribution account. The dividends are payable to members after confirmation of the account and are not deposited in the Guardian's Fund.

30.5.4 Failure to pay dividends

Court proceedings may be instituted against a trustee who fails to comply with these duties and as a rule the trustee will be liable for costs.[1839] In the case of a company, the liquidator may even be ordered to pay an additional penalty equal to the amount of the unpaid dividend.[1840]

30.6 Finality of confirmation

30.6.1 Section 112 of the Insolvency Act

Section 112 of the Insolvency Act provides that confirmation of an account by the Master "shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it". Section 408 of the Companies Act 1973 provides that confirmation of the account "shall have the effect of a final judgement", subject to a similar provision in respect of the reopening of the account. This provision of the Companies Act does not mean that confirmation of the account has the effect of a final judgement in respect of amounts collectable in terms of the account.[1841] In view of the finality accorded to confirmation of the account, the trustee or liquidator must see to it that all amounts due to the estate are collected before the account is confirmed.

30.6.2 Re-opening before dividend has been paid

As stated in the provisions referred to in the previous paragraph, the court may reopen a confirmed account before any dividends have been paid under it. Payment takes place when the cheque is paid by the bank and not when the cheque is posted. If the cheque is dishonoured or stopped, for example where the court orders that payment be stopped, actual payment has not taken place.[1842] A person who applies to have a confirmed account reopened must indicate a ground for *restitutio in integrum* (return to the previous legal

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1837 Insolvency Act, s 116(1).
1838 Companies Act 1973, s 342(1).
1839 Insolvency Act, s 116*bis*; Companies Act 1973, s 405.
1840 Companies Act 1973, s 410(3)(b).
1841 *Cf Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) 627D-E; *Standard Bank of South Africa Ltd v Master of the Supreme Court* 1997 (2) All SA (C).
1842 *Wipesco v Herrigel* 1983 (2) SA 20 (C) 26F-27C.

position) such as fraud or *justus error* and that the person has some prospect of success having the account varied or corrected. No purpose would be served in reopening an account if it is likely to remain in the same form.[1843]

30.6.3 Cases where dividend has been paid

In cases where a dividend has been paid, the Appeal Court has expressed doubt whether the court may review the confirmation of the account on the ground of *justus error* or even on the ground of fraud. However, the court noted that fraud was a special case and that it had been said that "fraud unravels everything".[1844] An action for damages on the ground of fraud against the trustee or other persons is not excluded by the confirmation of an account.[1845] It has been held that the payment of a claim for administration costs (post-liquidation creditor) is not subject to confirmation of a liquidation and distribution account reflecting the claim. Even if the liquidator has rejected the claim and the costs have not been reflected in the final accounts, the creditor is entitled to prove a claim by judgment without an application to set aside the final account.[1846] In the unreported decision of *Sequera v Hodgson*[1847] Eloff JP held that once the account had been confirmed and distribution had ensued, even fraud would not entitle a creditor to ask for the account to be set aside and the best the creditor could do was to sue the liquidator for damages.

30.6.4 Setting aside if account not "duly confirmed"

By contrast, in *Wikens v Potgieter*[1848] Roux J set aside a confirmed account even though dividends had been paid. The judge attributed knowledge of the proof of the claim by the Magistrate to the Master because the Magistrate should be regarded as an agent of the Master. The judge also pointed out that the Master should not allow an account to be advertised unless the Master had studied the relevant documents and correlated them with the account. The judge held that the account was not "duly confirmed" because the proper procedure had not been followed in reducing a claim in terms of section 45(3) of the Insolvency Act. A great deal of money was still available to be dealt with in further accounts, so the fact that the creditor was entitled to payment if it had a proper claim cannot be criticised. However, it is respectfully submitted that the setting aside of the confirmed account was incorrect. It is submitted that it would result in section 112 of the Insolvency Act being

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1843 *Ibid*, at 28.

1844 *Gilbey Distillers & Vintners v Morris* 1991 (1) SA 648 (A) 659. *Cf Morris and Strydom v The Master* 1994 (2) SA 731 (N) 735. In *Absa Bank Limited v Moore and Another* 2017 (1) SA 255 (CC) the question arose whether fraud unravelled the cancellation of mortgage bonds. The answer was in the negative. The bonds were accessory to the main debt owed to the Bank and the main obligation was validly cancelled. It followed that the accessory obligation of the mortgage bond had also been discharged (para [40]). One induced to a contract by fraud must choose between upholding the contract and rescinding it – and must do so within a reasonable time after knowledge of the deception – para [50].

1845 *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) 324-326.

1846 *WK Holdings (Pty) Ltd v Swartz NO* [2008] JOL 21194 (T). It is not clear what the effect of such a judgment would be.

1847 Witwatersrand Local Division Case, No 94/17355.

1848 1996 (4) SA 936 (T).

rendered largely inoperative if a confirmed account could be set aside merely because it did not agree with documentation in possession of the Master.

In *Gilbey Distillers & Vintners (Pty) Ltd v Morris*[1849] the appeal court gave the following exposition of the meaning of "duly confirmed":

- the account must have been open for inspection by creditors under section 108;
- objections (if any) must have been dealt with in terms of section 111; and
- confirmation must have taken place by the Master (consequent upon the Master honestly applying their mind to the matter) and not, say, by an imposter.

But the fact that the confirmation is flawed by reason of it having been procured by the fraud of a creditor or the trustee, or because the Master was ignorant of facts material to the decision, cannot detract from the account having been duly confirmed in the sense envisaged by section 151 of the Insolvency Act. To uphold the argument that it does, would result in the provision for finality in section 112 being rendered largely inoperative.

In *Investec Bank v Strydom and Others*[1850] a confirmed account was set aside after payment in terms of the account due to the fact that the account was advertised for inspection at the incorrect magistrate's office and the notice to creditors was not sent by registered mail. The court did not consider whether the account was "duly confirmed" as provided for in section 151 of the Insolvency Act, as explained in the decision in *Gilbey Distillers and Vintners* (referred to above).

30.6.5 Recovery of dividends paid to creditors

There is also a possibility that a trustee may be able to recover a paid dividend from creditors on the basis of unjust enrichment.[1851] Although a confirmed account may not be reopened once dividends have been paid out, the possibility that dividends or a portion thereof may be recovered and an amended or supplementary account may be lodged, is apparently not excluded.[1852] An adjustment of the liquidation and distribution account if further assets came to light after it had been confirmed, would not amount to the reopening of a previously confirmed account.[1853]

1849 1991 (1) SA 648 (A) at 656C-656E.
1850 (45664/2012) [2013] ZAGPJHC 59 (28 March 2013), paras [29] and [30].
1851 See the *Willers* case above at 333. *Cf Bowman, De Wet and Du Plessis v Fidelity Bank Ltd* 1997 (2) SA 35 (A).
1852 *Cf Kilroe-Daley v Barclays National Bank* 1984 (4) SA 609 (A) 627; *Morris and Strydom v The Master* 1994 (2) SA 731 (N).
1853 *Standard Bank of South Africa Ltd v Master of the Supreme Court* 1997 (2) All SA (C).

30.6.6 Asset not dealt with in trustee's account

In *FNB of SA Ltd v Cooper NO*[1854] the trustee obtained a warrant for the handing over of title deeds about four-and-a-half years after confirmation of the final liquidation and contribution account. The trustees had second thoughts about their previous view that the property had no financial value. Roux J stated that the matters dealt with in the account were finally disposed of and that the trustee did not obtain permission to act as trustee or re-open the account and set aside the attachment order. It is respectfully submitted that the decision to set aside the attachment order for this reason[1855] is incorrect since the trustee need not re-open the confirmed account and can merely lodge a supplementary account dealing with property left out of a previous account, as happens in practice all the time. It is, with respect, totally artificial to argue that the account dealt finally with immovable property that was not reflected in the account.

30.7 Form and contents of accounts

Prescriptions regarding the form and content of accounts are contained in sections 92, 93, 94, 105 and 107 of the Insolvency Act and Annexure CM 101 to the Winding-up Regulations. These provisions are dealt with in a practical manner in **Appendix A** to these notes.

The drafting of an account is not merely an accounting exercise. The account gives effect to the applicable legal rules, especially those discussed in these notes, and constitutes the trustee or liquidator's account of their administration of the estate.

Self-Assessment Questions

Question 1
When is a trustee or liquidator obliged to submit an estate account after appointment?

Question 2
Explain the procedure to be followed by a trustee or liquidator if the estate account cannot be submitted to the Master within the prescribed time limits.

Question 3
Describe the procedure to be followed by the Master and the trustee / liquidator when an objection to an estate account is submitted by an interested party.

Question 4
When can an estate account be said to have been "duly confirmed"? Provide authority for your answer.

1854 1998 (3) SA 894 (W).

1855 On appeal in *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 SCA, the setting aside of the warrant was confirmed on the ground that notice was not given of the application for the warrant, but the cost order was overturned.

Question 5
Describe the circumstances in which a confirmed estate account can be re-opened by the court.

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

PART E – MISCELLANEOUS

CHAPTER 31 – ETHICS

31.1 Introduction

Ethics, in the sense used here, is a code of behaviour considered to be correct, especially the behaviour of a particular group or profession. The principles set out below in respect of trustees apply to liquidators too.

In *Standard Bank v Master of the High Court*[1856] the court noted that liquidators must realise that they perform important functions. The Master, creditors and, importantly, courts rely on them. In the liquidation process they are expected to act impeccably. The profession must be under no illusion that courts, in appropriate circumstances and when called upon to do so, will act to ensure the integrity of the sequestration or winding-up process.

In terms of paragraph 2 of the SARIPA Code of Ethics and Professional Conduct (hereinafter referred to as the SARIPA Code), "[p]ractitioners must at all times render and perform their services and conduct themselves in a professional, competent, proper, honourable and impartial manner and with the highest degree of integrity, objectivity and independence."[1857] SARIPA's Memorandum of Incorporation provides that any contravention of the Code by a member constitutes improper conduct and subjects such member to the disciplinary powers of SARIPA and SARIPA's Council.[1858]

On 23 July 2021 SARIPA adopted the SARIPA Disciplinary Rules, which sets out in detail the steps to be taken when a complaint is made against a member of SARIPA for having breached the SARIPA Code.[1859] While it is not intended to deal with the Disciplinary Rules in any detail in these notes, it is important to note what sanctions can be imposed on a member found guilty of breaching the Code. Prior to the adoption of the Disciplinary Rules, a member found guilty of improper conduct could be fined for an amount not exceeding R2,000, reprimanded, or have their membership of SARIPA cancelled. In terms of the Disciplinary Rules adopted in 2021, the following sanctions may be imposed against a member who has breached the Code:[1860]

- a reprimand;[1861]

1856 2010 (4) SA 405 (SCA).

1857 The SARIPA Code is available at https://saripa.co.za/downloads/SARIPA-Code-Ethics.pdf.

1858 The suggestion that the imposition of professional and ethical rules upon members of the legal profession is unconstitutional, has been dismissed – see *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) 607A. *Cf* also *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA) 759F.

1859 The Disciplinary Rules can be accessed by following this link: https://saripa.co.za/downloads/SARIPA-Disciplinary-Rules-adopted-2021-07-23.pdf.

1860 Disciplinary Rules, para 15.6.

1861 *Ibid*, para 15.6.1.

- a fine of up to R50,000;[1862]
- suspension of the respondent's membership of SARIPA for a period of up to one year;[1863]
- a recommendation to the Board that the respondent's membership of SARIPA be cancelled;[1864]
- a recommendation to the Board that all or part or a summary of the of the disciplinary panel's judgments on the merits and sanctions be published to members or any other interested party;[1865]
- require the respondent to reimburse SARIPA for all or part of the reasonable costs for conducting the inquiry;[1866] and / or
- suspend any of the sanctions for such period and on such conditions as it may deem appropriate.[1867]

In determining the appropriate sanction(s) to be imposed, the panel considering such conduct must consider all relevant mitigating and aggravating factors, including:

- the seriousness of the breaches of the SARIPA Code;[1868]
- whether the respondent acted intentionally, negligently or grossly negligently;[1869]
- the impact of the respondent's conduct on members of the public, the reputation of SARIPA and the respondent's profession and / or the administration of justice;[1870]
- what steps (if any) the respondent has taken to mitigate such impact;[1871]
- any previous judgments, decisions or reports against the respondent by any court, statutory body, regulator or professional body (including SARIPA);[1872]
- what sanctions have been imposed on other members in similar circumstances;[1873]

1862 *Ibid*, para 15.6.2.
1863 *Ibid*, para 15.6.3.
1864 *Ibid*, para 15.6.4.
1865 *Ibid*, para 15.6.5.
1866 *Ibid*, para 15.6.6.
1867 *Ibid*, para 15.6.7.
1868 *Ibid*, para 15.7.1.
1869 *Ibid*, para 15.7.2.
1870 *Ibid*, para 15.7.3.
1871 *Ibid*, para 15.7.4.
1872 *Ibid*, para 15.7.5.
1873 *Ibid*, para 15.7.6.

- the respondent's level of experience;[1874] and

- whether the respondent has shown remorse (bearing in mind that a respondent cannot be considered remorseful if they have not pleaded guilty to the charge).[1875]

Although the Code only applies to SARIPA members, most of the principles contained in the Code are of general application and will find application to members of other professional bodies as well. Any insolvency practitioner can expect to be acted against by the Master if they make themselves guilty of unethical conduct.

31.2 Impartiality, objectivity and independence

The SARIPA Code contains a number of references to impartiality, objectivity, or independence.[1876]

Paragraph 8.1 of the SARIPA Code states that practitioners may not accept any appointment if they are disqualified from doing so in terms of section 55 of the Insolvency Act and section 372 of the Companies Act 1973. Section 55(e) of the Insolvency Act provides that a person who has an interest opposed to the general interest of the creditors of an insolvent estate is disqualified from being elected or appointed as trustee. Paragraph 13.10.2 of the code provides that practitioners must in cases where they hold joint appointments immediately report conflicts of interest to the Council and the Master. Section 55(b) of the Insolvency Act disqualifies a person related to the insolvent by consanguinity or affinity within the third degree and sections 55(l) of the Insolvency Act and 372(i) of the Companies Act 1973 disqualify any person who acted as bookkeeper, accountant, auditor, director or officer of the insolvent entity.

The most clear-cut example of unacceptable partiality is the attorney of a creditor.[1877] In *Krumm v The Master*[1878] reference was made to a Master's Instruction which stated that because of possible bias a wide range of candidates may not be considered for appointment. The court stated that the exercise of a discretion by the Master to appoint a provisional liquidator could only be attacked on review on the basis that the Master failed to exercise his discretion at all, that he acted *mala fide*, or was motivated by improper considerations. The court held that it was not grossly unreasonable for the Master to issue and apply a directive such as the one that had been issued in the matter. The court concluded with the following:[1879]

> "His (the Master's) approach may be said to be over-cautious, but is it not better that, if he should err, he should do so on the side of caution?"

1874 *Ibid*, para 15.7.7.
1875 *Ibid*, para 15.7.8.
1876 Paragraphs 2, 4 and 7.2 of the Code.
1877 See, eg, *Jordaan v Richter* 1979 (3) SA 1213 (O).
1878 1989 (3) SA 944 (D).
1879 952F-G.

There is authority for the view that the mere possibility that there will be a conflict of interests does not disqualify someone if that possibility is so remote that for all practical purposes it can be disregarded. The possibility that the appointment of a person would lead to bias must be weighed against the convenience and advantages of the same person dealing with all related and entwined matters.[1880] There is also authority for the view that the fact that the trustee is involved with a subsidiary company of a company which has a claim against an estate does not mean that the trustee has conflicting interests if the claim by the creditor is not disputed.[1881]

No hard and fast rules can be set down to determine when a person has interests opposed to the general interests of creditors[1882] and perhaps practitioners should rather err on the side of caution.

Care should be taken by trustees and liquidators that in performing their important functions they must, where appropriate, be detached, independent, impartial and even-handed. However, the fact that a trustee has fiduciary duties towards say creditors, does not mean that they can always be even-handed. Trustees and liquidators are obliged, should the occasion arise, to dispute a creditor's claim.

In *Standard Bank v Master of the High Court*[1883] the court removed liquidators due to, *inter alia*, the following considerations:

- in respect of a claim the liquidators lost all objectivity;
- in relation to a fee sharing arrangement, they failed to appreciate the conflict in which they found themselves.

The trustee should act impartially,[1884] not only in respect of the creditors themselves but also in respect of the insolvent. Although the trustee occupies a position of trust towards the insolvent, the object of the Insolvency Act is to ensure the due distribution of assets among creditors and the trustee should take all lawful steps to ensure that it is the creditors rather than the insolvent who benefit from the sequestration.[1885]

31.3 Integrity

Integrity means the adherence to moral principles and honesty. Exacting demands are made of any person in a position of trust and the trustee of an insolvent estate is no exception. On the contrary, because it is so difficult to control acts and omissions effectively, trustees may

1880 *SA Neckwear (Pty) Ltd v Dagbreek Kontant Winkel* 1952 (3) SA 697 (O) 702.
1881 *Bankorp Trust Bpk v Pienaar* 1993 (4) SA 98 (A) 109A.
1882 Mars at p 252.
1883 2010 (4) SA 405 (SCA).
1884 *Grace Heaven Industries (Pty) Ltd and 25 Others v During Pressings (Pty) Ltd (In Liquidation)* (10005/2016) [2016] GJ (23 September 2016), paras [40] and [47].
1885 *Hobson v Abib* 1981 (1) SA 556 (N) 559H-560A.

often be tempted to enrich themselves in an improper manner. If large amounts of money are involved, interested parties often exert severe pressure on a trustee.

Because trustees act in a fiduciary capacity and deal with the affairs of other persons and not their own affairs, greater care and caution are required of them than are required from persons dealing with their own affairs.[1886]

Abuse of trust, dishonesty and recklessness clearly constitute "misconduct".[1887] It is therefore not surprising that the Code requires[1888] that practitioners must be honest, truthful and conscientious in the performance of their services, must avoid all relationships as well as direct and indirect interests which will adversely influence, impair or threaten their integrity or in any manner create the impression of doing so. The Code also states[1889] that practitioners must at all times render and perform their services as well as conduct themselves in a honourable manner and with the highest degree of integrity.

Several other provisions in the Code are related to the requirement of integrity.[1890] A person clearly lacks the honesty expected of a trustee if they commit certain offences. Section 55(i) of the Insolvency Act provides that a person is disqualified from being elected or appointed a trustee if at any time convicted of theft, fraud, forgery or uttering a forged document, or perjury and has been sentenced to serve a term of imprisonment without the option of a fine or to a fine exceeding R20.[1891]

31.4 Professionalism

Professionalism requires suitability and competence to engage in the activities under consideration. It embraces notions such as courtesy, non-discrimination, co-operation, and

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1886 *Cf Sackville-West v Nourse* 1925 AD 516, at 519; *Ex parte National Board of Executors (EL) Ltd* 1978 (3) SA 445 (E) 450E; *Transvaal Provincial Administration v Coley* 1925 AD 24 at 27; *Tijmstra NO v Blunt-Mackenzie NO* 2002 (1) SA 459 (T) 472C; *ECS NO v Ronald Bobroff and Partners* [2013] JOL 29823 (SCA), para [29](a).

1887 *Cf Fey and Whitford v Serfontein* 1993 (2) SA 605 (A) 613A.

1888 Paragraph 3 of the SARIPA Code.

1889 Paragraph 2 of the SARIPA Code.

1890 Practitioners may not by means of misrepresentation or reward attempt to induce a person to vote for their appointment, or influence their appointments by obtaining confidential information in an irregular manner, by wrongfully omitting the name of a creditor from any record, offering consideration to a person, offering to abstain from investigating transactions, or improperly splitting claims for the purpose of increasing the number of votes in their favour – paras 8, 9 and 12.7 of the SARIPA Code. Practitioners may not agree with a debtor or creditor that they will endeavour to grant any benefit not provided by law – para 10 of the SARIPA Code. Practitioners may not accept or express their willingness to accept a share of the commission or remuneration of an auctioneer, agent, or other person or any other benefits in return for engaging such a person to render services in connection with the estate – para 11 of the SARIPA Code. Practitioners must not bribe public officials, whether by way of formal presentation or otherwise, although donations may be made (usually to a social club) under the authority of the Council – para 12.5 of the SARIPA Code. Practitioners must, in the performance of their service and the administration of estates in respect of which joint appointments are held, immediately report irregularities, corrupt practices or conduct by a joint appointee that will detrimentally affect or prejudice the estate or creditors, to the Council and the Master – para 13.10 of the SARIPA Code.

1891 See also Companies Act 1973, s 372(f).

acting in a manner that enhances good relations and the good name, standing or integrity of the profession.[1892]

The SARIPA Code provides[1893] that practitioners must at all times render and perform their services and conduct themselves in a professional, competent and proper manner.

The SARIPA Code also provides[1894] that practitioners must render and perform their services with such a degree of skill, care and attention, efficiency and competence and of a quality and standard considered to be necessary in the opinion of the Council and the Master. More is reasonably to be expected of a skilled professional than an untrained layman.[1895] In a field where expertise is required, the expert should display the skill of a reasonable expert.[1896] It may be negligent to undertake work requiring a certain degree of expertise without possessing the necessary competence.[1897] It is clearly expected of practitioners to ensure that they have sufficient knowledge of the applicable law. Persons who come into contact with legislative provisions are bound in law to know the provisions and comply with them.[1898]

The SARIPA Code provides[1899] that practitioners should not claim to be an expert or to have specialised knowledge in respect of insolvency or the performance of their services if in fact they are not such experts or do not have such special knowledge.

The following provisions of the SARIPA Code can be classified under the requirement of professionalism:

(a) A practitioner should not without lawful excuse fail to make or delay payment of monies to other parties within a reasonable time from the date that such monies become due and payable.[1900]

(b) A practitioner must not without just cause publish or divulge any confidential information or details concerning the business, affairs, trade secrets, patents, technical methods or processes of any estate in respect of which they hold an appointment.[1901]

(c) Practitioners must keep proper books of account and records in respect of all the financial transactions relating to their services, give proper and efficient attention to their

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1892 *Cf* paras 6 and 16 of the SARIPA Code.
1893 Paragraph 2 of the SARIPA Code.
1894 Paragraph 5 of the SARIPA Code.
1895 *Cf Guardian National Insurance Co Ltd v Weyers* 1988 (1) SA 255 (A) 263D.
1896 *Charter Hi (Pty) Ltd v Minister of Transport* [2011] JOL 27296 (SCA), para [32]. *Cf Mlenzana v Goodrick and Franklin Incorporated* [2012] JOL 29026 (FSB).
1897 South African Law Commission, *Report on the review of the law of trusts*, June 1987, para 9.15 at 35. *Cf Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O) 764C; *Durr v ABSA Bank Ltd* 1997 (3) SA 448 (SCA).
1898 *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O) 763F-G.
1899 Paragraph 12.9 of the SARIPA Code.
1900 Paragraph 12.3 of the SARIPA Code.
1901 Paragraph 12.11 of the SARIPA Code.

services, adequately and continuously supervise and control their employees, representatives, or agents, within a reasonable time answer or appropriately respond to and deal with any correspondence or other communications which reasonably require a reply or other response, comply with all orders, requirements and requests of the Council, comply within a reasonable time with all orders of court and all lawful orders, rulings, requirements, directions and requests issued or made by the Master or any other lawful authority.[1902]

If practitioners are the sole proprietor of a business, or a partner of a partnership or a director of a company or a member of a close corporation, they are responsible for any contravention of, or failure to comply with, the SARIPA Code by any other partner, director or member or by any practitioner or employee in service of such proprietorship, etc unless they have, in the opinion of the Council or the Master, prior to such contravention or failure to comply taken all reasonable steps to prevent the same and could in the circumstances not have prevented such contravention or failure to comply.[1903]

Self-Assessment Questions

Question 1
Write a brief note on each of the following aspects of ethics dealt with in the Chapter above:

- Impartiality, objectiveness and independence

- Integrity

- Professionalism

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

[1902] Paragraph 13 of the SARIPA Code.
[1903] Paragraph 15 of the SARIPA Code.

CHAPTER 32 – CROSS-BORDER INSOLVENCY

32.1 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.[1904]

South African courts will, in terms of *Jones v Krok*[1905] 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 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-

1904 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.

1905 1995(1) SA 677(A).

border insolvency and give favourable consideration to UNCITRAL's Model Law on Cross-Border Insolvency.[1906] 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 Cooperation[1907] with detailed guidelines to judges on court-to-court co-operation and information on protocols.

32.1.1 Inbound Recognition - Cross-Border Insolvency Act 42 of 2000

The stated purposes of the UNCITRAL Model Law on Cross-Border Insolvency are reflected in the preamble to the Cross-Border Insolvency Act as –

"the need –

- to strengthen cooperation between the courts and other competent authorities of the Republic of South Africa and those of foreign states involved in cases of cross-border insolvency;
- for greater legal certainty for trade and investment;
- for fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- for protection and 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 Act to provide in section 2 thereof that the South African Minister of Justice must designate the states to which the Act will apply. No such designation has as yet occurred, nor does designation (which must be tabled in Parliament) appear to be imminent.[1908]

1906 The *Model Law with Guide to Enactment* (Guide) is available on the UNCITRAL website (go to "Adopted Texts" and then to "Cross-Border Insolvency").

1907 Available on the UNCITRAL website.

1908 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

32.1.2 Inbound Recognition - Common Law

South Africa has a mixed legal system that relies on case law, statutes, customary law and the Constitution.

Therefore, although no designation under the Cross-Border Insolvency Act has occurred, the values espoused in this Act's preamble and in the UNCITRAL Model Law, and which aligns with the common law principles of equity, comity, convenience and public policy, have been adopted and developed by our Courts.

In this regard, 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 a 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. Regrettably, obtaining a copy of this order has so far proved fruitless.

32.1.3 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 2000.

South African business rescue proceedings have been recognised under Chapter 15 in the United State of America by the United States Bankruptcy Court, Southern District of New York, in respect of Comair Limited.

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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 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).

However, even prior to the business rescue proceedings of Comair Limited being recognised as aforesaid, in *In re Edcon Holdings Ltd*[1909] the US Bankruptcy Court entered an order summarily recognising a South Africa compromise proceeding under section 155 of the Companies Act 2008 as a foreign main proceedings pursuant to 11 USC, section 1517, under Chapter 15 of the US Bankruptcy Act and recognising and rendering enforceable Edcon's compromise (and related orders and documents) upon its effective date. Further, in *In re Cell C Proprietary Ltd*[1910] 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.

32.1.4 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.[1911]

32.1.5 Outbound Recognition - European Union Regulation

The Council of the European Union issued Regulation 1346/2000 of 29 May 2000 on insolvency proceedings, which is binding and directly applicable where insolvency proceedings are opened in any Member States of the Union, except Denmark. The main insolvency proceedings take place in the state of the centre of main interests (COMI). The law of the opening state is the applicable law and the proceedings apply to all goods of the

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1909 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 SDNY Jan 19, 2017).

1910 *In re Cell C Proprietary Ltd*, 571 BR 542, 544-45 (Bankr SDNY 2017).

1911 Arts 246 *et seq*.

debtor in the European Union.[1912] Proceedings do not affect rights *in rem* and may be ignored if they are contrary to the public policy of another country.

32.2 Common law

32.2.1 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.

32.2.2 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[1913] and convenience play an important role in the exercise of the discretion of the court to recognise a foreign trustee or liquidator,[1914] 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.

1912 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.

1913 Trusting to receive reciprocal recognition of local orders and appointments in foreign courts.

1914 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.

32.2.3 External Companies

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

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.[1915]

In this regard the Supreme Court of Appeal has noted, in *Cooperativa Muratori Cementisti - CMC Di Ravenna and Others v Companies and Intellectual Property Commission*[1916] (the CMC judgment), that 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 Companies Act 2008. Indeed, the Supreme Court of Appeal described this express exclusion of external companies as the "final nail in the coffin for [the] argument" that the business rescue provisions of the Companies Act 2008 applied to foreign companies operating in South Africa.

Therefore, external companies are excluded from the provisions of Chapter 6 of the Companies Act 2008 under the CMC Judgment cited above and so must look to the company law provisions in their countries of incorporation if they are to seek relief from financial distress and seek to have those proceedings recognised in South Africa.

32.2.3 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.[1917] The view has been expressed that South African insolvency legislation is

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1915 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.

1916 2021 (3) SA 393 (SCA) para 12.

1917 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.

not intended to have extra-territorial operation.[1918] The unity principle has as its object a single "common" insolvency regime with the result that there could only ever be one administration of a cross-border insolvency. This principle is only workable in situations involving treaties among countries sharing similar laws and customs or binding directions such as the European Insolvency Regulation. The universality principle seeks, primarily, a high degree of predictable recognition, assistance and co-operation for cross-border insolvency. Circumstances would dictate whether the proceeding might be conducted through a main insolvency proceeding with the possible support of an ancillary proceeding, or through two or more concurrent proceedings.[1919]

32.2.4 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.[1920]

32.2.5 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[1921] but the principal place of business may afford jurisdiction even if the place of the registered office is elsewhere.[1922]

32.2.6 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.[1923]

32.2.7 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

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1918 *Viljoen v Venter* 1981 (2) SA 152 (W) 154H. *Cf Ex parte Steyn* 1979 (2) SA 309 (O) 311E.

1919 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.

1920 *Sackstein NO v Proudfoot SA (Pty) Ltd* 2003(4) SA 348 (SCA). *Cf Viljoen v Venter* 1981 (2) SA 152 (W) 154F.

1921 *Cf Ex parte Palmer: In re Hahn* 1993 (3) SA 359 (C) 364E.

1922 *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.

1923 *Deutsche Bank AG v Moser* 1999 (4) SA 216 (C) 219J.

principle.[1924] 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.

32.2.8 Recognition of provisional judgement or appointment

In *Bekker v Kotzé*[1925] 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*[1926] 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.

32.3 A South African trustee and foreign assets

32.3.1 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.

32.3.2 Letters of request[1927]

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*[1928] 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*[1929] 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

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1924 *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.

1925 1996 (4) SA 1287 (Nm).

1926 1996 (4) SA 1293 (Nm).

1927 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.

1928 1996 (2) SA 677 (O).

1929 2002 (5) SA 796 (C) 810H.

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.[1930]

32.3.3 Powers of a South African liquidator (foreign dispositions)

In *Sackstein NO v Proudfoot SA (Pty) Ltd*[1931] a Namibian company was registered in South Africa as an external company.[1932] 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.[1933] 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.[1934]

1930 *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 their responsibilities.

1931 2003(4) SA 348 (SCA).

1932 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.

1933 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.

1934 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.

32.3.4 Need to consult foreign experts

The trustee should consult experts on foreign law. These may be experts in the foreign country or local attorneys who have experience in dealing with such matters.

32.3.5 Assistance by laws of other countries

32.3.5.1 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.

32.3.5.2 Section 426(5) of the UK Insolvency Act 1986

Section 426 of the UK Insolvency Act 1986 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.[1935] 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.[1936] 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.

32.3.5.3 Section 135 of the New Zealand Insolvency Act 1967

Section 135 of the New Zealand Insolvency Act 1967 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.

1935 Statutory Instrument 1996/253 dated 8 February 1996.

1936 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.

32.4 Recognition in South Africa of a foreign trustee

32.4.1 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.[1937] In general, a foreign 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.[1938] 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.

32.4.2 Factors to persuade the court to recognise foreign proceedings

32.4.2.1 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.[1939]

32.4.2.2 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 their 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.[1940] Several cases have expressed a preference for a single forum of administration. The general rule is that the court of the domicile[1941] should direct the main sequestration and that all other decrees should be ancillary or subsidiary.[1942] 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

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1937 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."

1938 *In re Leydsdorp & Pietersburg Estates Ltd (In Liquidation)* 1903 TS 254.

1939 *Nahrungsmittel Gmbh v Otto* 1991 (4) SA 414 (C).

1940 *Deutsche Bank AG v Moser* 1999 (4) SA 216 (C) 219H-220C.

1941 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.

1942 *Re Estate Morris* 1907 TS 657 at 668.

foreign proceedings as if a local winding-up order had been granted.[1943] In *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd*[1944] the court expressed a preference for a single *concursus creditorum* but refused recognition because application was not made timeously.[1945] It was decided 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 an external company, notwithstanding that it was the subject of a voluntary or compulsory winding-up in the country of its incorporation.[1946]

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)."

1943 *Donaldson v British South African Asphalt and Manufacturing Co Ltd* 1905 TS 753 and the *Leydsdorp* case referred to above.
1944 1998 (3) SA 175 (SCA) 179G.
1945 See the discussion of the *Sackstein NO v Proudfoot* case.
1946 At 183H.

The Companies Act 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;
> (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 above is that Schedule 5, Item 9 of the Companies Act 2008 retains Chapter XIV of the Companies Act 1973 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 Companies Act 2008. Therefore it also does not qualify as a company to which the winding-up provisions of the Companies Act 1973 should apply.

32.4.2.3 Assets in South Africa not a prerequisite for recognition

In *Moolman v Builders & Developers (Pty) Ltd*[1947] 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.

32.4.2.4 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.[1948]

32.4.2.5 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.[1949] The qualifications of a liquidator or trustee are decided according to the law of the country where the liquidator or trustee was appointed and not according to the law of the country where their appointment is recognised.[1950]

32.4.2.6 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*.[1951] 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;

1947 1990 (1) SA 954 (A).
1948 *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]
1949 *Herman v Tebb* 1929 CPD 65 at 76; *Chaplin v Gregory* 1950 (3) SA 555 (C) 562A-B.
1950 *Ex parte Robinson's Trustee* 1910 TPD 25.
1951 1990 (1) SA 954 (A).

- 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 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.[1952]

32.4.2.7 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.[1953] Creditors will probably enjoy priority, whether as a secured creditor or otherwise, only if priority is recognised by the *lex fori* (local law).[1954]

32.4.2.8 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.[1955] 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.

1952 *Cf 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.

1953 Mars at 340.

1954 *Cf Ex parte Steyn* 1979 (2) SA 309 (O) 311B-D.

1955 *Ibid*.

32.4.2.9 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.[1956] A foreign debt is discharged in South Africa by rehabilitation of the debtor in South Africa.[1957]

Self-Assessment Questions

Question 1
Briefly discuss the aims of the Cross-Border Insolvency Act 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)

For feedback on this self-assessment exercise, see the document "Comment and Feedback on Self-Assessment Questions", which is made available to you as a separate document

1956 *Cf Cape of Good Hope Bank (In Liquidation) v Mellé* 10 SC (1893) 280; *Dyer v Carlis* 4 Official Reports (1897) 67.

1957 *North American Bank Ltd (In liquidation) v Grant* 1998 (3) SA 557 (W).

APPENDIX A

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 appendix should be studied alongside the relevant chapters 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 appendix 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,[1958] 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.

[1958] See Companies Act 1973, Ann CM 101, which sets out the form requirements for an estate account.

2.1 Definitions

The following definitions are important for drafting the liquidation and distribution accounts:

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,[1959] the remaining funds are applied in a certain way, as explained in this annexure.

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.[1960] Preferent creditors are paid out of the free residue of the estate.[1961]

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).[1962] 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

1959 See s 89(1) in this regard.
1960 For example, Insolvency Act, ss 96 to 102.
1961 See the wording of ss 96 to 102.
1962 See s 83(12).

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.

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.[1963] 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.[1964]

Where a creditor's claim is secured by a mortgage bond and the relevant creditor does not prove his claim, the Insolvency Act provides[1965] 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.[1966] The position after 7 May 1993 has changed as a result of the promulgation of the Security by Means of Movable Property Act,[1967] and the position is now uniform throughout the country. See paragraphs 23.8 to 23.10 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,

1963 Insolvency Act, s 86.
1964 *Ibid*, s 87.
1965 *Ibid*, s 95(2) to (5).
1966 In terms of the Notarial Bonds Act (Natal).
1967 Act 57 of 1993.

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 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. 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.[1968]

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.[1969] The

[1968] *Trust Bank van Afrika Bpk v Van der Walt* 1972 (3) SA 166 (C).
[1969] Insolvency Act, s 85.

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):

- 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 change 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.
- Plus: R25 for each completed R5,000 above R15,000, with a maximum fee of R25,000.

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[1970]

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*,[1971] 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.[1972] 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%)[1973]	210.00
Fee	11,290.00
VAT thereon	1,693.50

1970 See Government Notice No 323 in Government Gazette No 16293 of 10 March 1995.
1971 (Unreported), case number 504/94. Judgment was only given on 21 July 1995.
1972 Act 89 of 1991.
1973 That is, less 15% of 10% on the VAT of R15,000.00.

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 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.[1974] 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.[1975]

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.[1976]

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.[1977] 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.

1974 *Rennie v The Master* 1980 (2) SA 600 (C).
1975 *Cf Janse van Rensburg v Knuth* (3892/2010) [2014] ECP (11 March 2014).
1976 Companies Act 1973, s 384 read with Ann CM 104.
1977 Insolvency Act, s 89(1).

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:
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[1978]

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.[1979]

1978 Excluding balances, if any, transferred from the encumbered asset account(s).

1979 *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);[1980] and
- Income, interest earned and/or occupational rent on the above assets.[1981]

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,[1982] 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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1980 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.

1981 *Singer v The Master* 1996 (2) SA 133 (A).

1982 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 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:

2 years sequestration transfer
I----------I----------I

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.[1983] The levies must be paid by the trustee in terms of 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.

[1983] *Barnard v Die Regspersoon van Aminie* 2001 (3) SA 973 (SCA).

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.[1984] 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.[1985]

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.[1986] 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*,[1987] 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 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.

1984 Insolvency Act, s 89(5).
1985 *Ibid*, s 96(4).
1986 *Boland Bank Ltd v The Master* 1991 (3) SA 387 (A) read with s 103(2) of the Insolvency Act.
1987 1996 (2) SA 133 (A).

Section 83(12) provides that if the claim of a secured creditor[1988] 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.[1989]

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.[1990]

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.[1991] This includes the surplus from the proceeds of a security.[1992]

The position in respect of a company in liquidation is the same as the position in the case of sequestrations.[1993] Where there are differences, these will be pointed out.

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:

1988 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."

1989 *Bank of Lisbon and South Africa v The Master* 1987 (1) SA 276 (A) 287E-288C.

1990 See the definition of free residue and the provisions of s 83(12).

1991 See the definition of "free residue" in s 2 of the Insolvency Act.

1992 Insolvency Act, s 83(12).

1993 Companies Act 1973, s 342(1).

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[1994] 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.

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.[1995]

1994 In terms of s 96(3) this means expenses incurred for medical assistance, nursing, medicines and medical necessities.

1995 Insolvency Act, s 111(2). *Cf* Companies Act, s 407(3). See also s 53(1) of the Insolvency Act.

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.*[1996]

- *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. 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.

[1996] Insolvency Act, s 16(5).

- *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.[1997]

- *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.[1998] 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.

- *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.

1997 Insolvency Act, s 97(2)(c) read with s 153(2).
1998 *Muller v Die Meester* 1992 (4) SA 277 (T).

5.3.4.4 Section 98 - 100

This aspect has been dealt with in the main text (see Chapter 22).

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 the main text (see Chapter 22) 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.[1999] 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.[2000] 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.[2001] The interest payable after sequestration is simple interest and not compound interest.[2002] 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.

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

1999 Insolvency Act, s 103.
2000 *Ibid*, s 83(12) and *Singer v The Master*, *supra*.
2001 *Ibid*, s 103(1).
2002 *Boland Bank v The Master* 1991 (3) SA 378 (A).

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.[2003] 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

[2003] 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 23 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.[2004] The provisions of the Insolvency Act are also applicable to the winding-up of companies.[2005] Contribution by the members of a company is a rarity in practice.[2006]

5.6.2 Form requirements and contents

Section 105 of the Insolvency Act[2007] 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.

2004 See also Companies Act 1973, s 403(1).
2005 See Companies Act 1973, ss 337 and 342(2).
2006 *Ibid*, ss 395-399.
2007 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.[2008] 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.[2009] 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):

[2008] Annexure CM 101 in the case of a company.
[2009] 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.[2010] 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.

[2010] See Ann CM 101.

5.8.2 Content and form requirements

Because the available funds and the payments should cancel each other out,[2011] 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):

[2011] 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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