



INSOL
INTERNATIONAL



Discharge of debts and claims; areas where insolvency law and business rescue overlap

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“Striking a balance”

- Business rescue as part of a system of insolvency
- Value maximization as a key objective
 - Balance advantages of debt collection versus preservation of value
 - Best outcome: rescue of the “business” (*where appropriate*)
- Effect of procedures (in principle):
 - Liquidation minimize losses
 - Business rescue creates future value
- Social policy considerations relevant to maximizing “value”

Balance to be struck between, *inter alia*:

- Private rights / public interests / alternative means to address those public interests;
- Desirability of facilitating high levels of creditor participation / need to ensure efficient and cost-effective mechanisms therefor
- Roles in oversight and supervision by:
 - the court
 - the insolvency representative
 - debtor
 - creditors
- Supervision of creditors / independence of insolvency representative / desirability of speed and cost-effectiveness.

Applicable Law: *Insolvency*

- Chapter XIV of Companies Act 1973 (still applicable)
 - Section 339: “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 specifically provided for by this Act”.
 - Insolvency Act 24 of 1936 – *generally*, applicable to natural persons
- Winding-up of insolvency companies
 - by the court
 - creditors’ voluntary winding-up
- Court process: provisional and final order...

Applications for liquidation (insolvent companies)

- Section 344(f) – **grounds** include where unable to pay debts
- Section 345 – when company deemed **unable to pay debts**
 - Written demand + not paid for 3 weeks
 - *Nulla bona* return of service
 - Proved to satisfaction of the court (by any relevant evidence)
- Section 346(1) – company and creditors have **locus standi**
- Formalities:
 - Section 346(3) – security
 - Section 346(4) – copy of application to Master (who reports to court)
 - Section 346(4A) – service requirements

Liquidators

- Appointment
 - Provisional liquidator
 - Final liquidator
- Powers
 - Set out in section 386 of the Companies Act 1973
 - Section 69(3) warrant for “search and seizure”

Effect of liquidation on transactions

- Dispositions made after date of liquidation application **void**.
 - Section 341(2): “Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court orders otherwise.”
- Certain transactions occurring before *conkursus*, may be set a side on various bases.
 - Section 340(1): “Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by the company, be set aside in the event of the company being wound up and unable to pay its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.”

Impeachable transactions *(before concursus)*

- **Voidable preferences**

- Any disposition of property
- Within **6 months prior** to liquidation
- Had **effect** of **preferring** one of creditors above another
 - *Objective test: Was result that one creditor received more pro rata / payment earlier than another with equal rights?*
- Immediately **after** disposition, companies **liabilities > assets**
 - *Objectively, to be proven "clearly & conclusively" on preponderance of probabilities*

Court will set transaction aside, **unless** recipient able to prove:

- Disposition made in ordinary course of business
- Not intended to prefer one creditor above another

Impeachable transactions *(before concursus)*

- **Undue preferences**

- Disposition of property at a time when **liabilities > assets**
- Made with the **intention** of **preferring** one creditor above another
- No requirement that made 6 months prior
- But *no presumption of intention* (as with voidable preferences)
- Once proven, **court will set transaction aside** (no defense available)

Impeachable transactions *(before concursus)*

- **Collusive dispositions**

- The company **in collusion with** another person *(i.e. some agreement which has a fraudulent purpose)*
- Disposed of its property prior to liquidation
- In a manner which **had the effect** of:
 - prejudicing its creditors, or
 - preferring one above another
- Court may order that:
 - transaction is set aside, and
 - other colluding party liable for any loss suffered by the company

Impeachable transactions *(before concursus)*

- **Actio Pauliana** – *cf.* collusive dispositions
(common law remedy more broadly applicable)

Must prove that:

- Disposition diminished the debtor's assets
- Recipient had not in fact received its own property
- Intention to defraud existed
- The fraud had its effect

Impeachable transactions *(before concursus)*

- **Dispositions not made for value**

- Disposition made without company receiving **adequate compensation**.
- To set aside (even though assets exceed liabilities), must prove:
 - disposition of property
 - made by the insolvent
 - when it was made
 - in whose benefit it was made
 - value was not received
- If made **>2 years** before liquidation, must prove ***liabilities > assets***.

Impeachable transactions *(before concursus)*

- **Impact of proceedings on other pre-existing contracts**

- Contract for acquisition of immovable property not transferred – *election*.
- Receipt of movable property in terms of sale where payment on delivery – *seller may be able to reclaim property if purchase price not paid in full*.
- Liquidator may terminate lease on written notice, subject to damages.
- Employment contracts suspended from date of liquidation order, and may be terminated, subject to ss 38(5) and (7).

Applicable Law: *Business Rescue*

- Chapter 6 of Companies Act 2008
(Already covered in detail)
- Bear in mind the moratorium
 - takes effect on date of order / filing
 - Restricts creditors' enforcement of claims
+ dispositions by the company

Points of comparison

- Supervision and oversight
 - Less in business rescue – practitioner enjoys wider discretion
 - Easier for creditors to remove liquidator than practitioner
 - Powers of the Master in a winding-up – s 417 of Companies Act 1973
- Investigation into conduct of company's management
 - Formal insolvency inquiry not available in business rescue
 - Practitioner requires working relationship with (displaced) management
 - Practitioner cannot set aside impeachable transactions

Points of comparison (*continued*)

- Access to finance in winding down of company
 - Relevant to secondary goal of business rescue
 - “Administration” may involve sale of business as going concern
 - Accessing finance for business rescue easier than liquidation
- Rights of employees
 - Statutory protection contained in Chapter 6:
 - Employment contracts do not terminate
 - Retrenchments subject to Labour Relations Act 66 of 1995
 - Priority as post-commencement creditors

Interplay between two procedures

“To ensure that insolvency proceedings are not abused by either creditors or the debtor and that the procedure most appropriate to resolution of the debtor’s financial difficulty is available, an insolvency law should also provide for conversion between the different types of proceedings in appropriate circumstances.”

– *UNCITRAL Legislative Guide on Insolvency Law* at 11 para 6

Business rescue → *liquidation*

- Relevant sections
 - Section 132(2)(a) – at commencement, failure to adopt plan
 - Section 141(2) – no reas. prospect of rescue (obligation to convert)
 - Section 135(4) – prioritization of practitioner (BRP) remuneration
- Status of practitioner's actions taken during office
 - E.g. dispositions in accordance with Chapter 6
 - Can't be overturned by liquidator if in good faith & best interests of co.
- Effect on preferences
 - Preferences conferred in terms of s 135 remain in force, *except* to extent of any claims arising out of the costs of liquidation.

Liquidation → *business rescue*

- Relevant sections
 - Section 131(7) – court has wide discretion
- When is conversion possible?
 - *Van Staden v Angel Ozone Products* 2013 (4) SA 630 (GNP)
 - *Richter v ABSA Bank* 2015 (5) SA 57 (SCA)
- Effect of business rescue application in respect of a company already in liquidation is to *suspend* the winding-up process... problem for company “in limbo”.

