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Meetings and Proof of Claims

PowerPoint Slides

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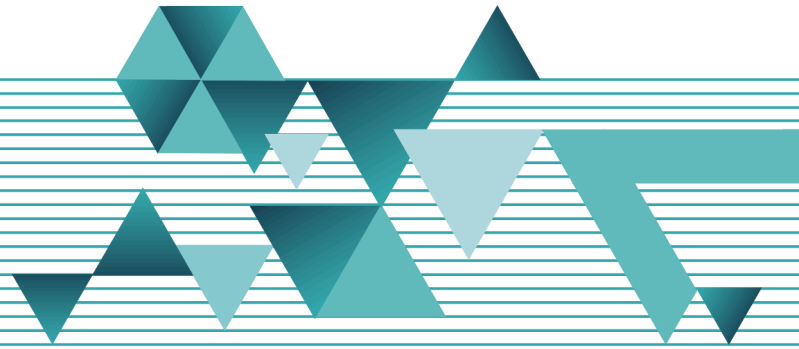

CHAPTER 18 & 19: MEETINGS AND PROOF OF CLAIMS

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MEETINGS

- By means of a system of meetings, the insolvent's creditors, inter alia, establish their claims, elect a trustee, and give directions to the trustee on the winding up of the estate

- The meetings of creditors provide a forum for interaction between trustee and creditors and enable creditors to receive information on the course of insolvency proceedings

- *"Creditor participation in insolvency proceedings has been widely seen as an essential feature of any well-developed insolvency administration system. This notion has been expressed in different ways in national systems of insolvency law, ranging from principles such as the pari passu rule, to the holding of creditor meetings to decide matters of importance in the insolvency proceedings, to the role of insolvency representatives in such proceedings"*

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ROLE OF THE CREDITOR

- In terms of *Walker v Syfret* NO 1911 AD 141 166 the court explained the underlying principle of a sequestration order as follows:

  The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. 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

- The insolvent estate of the debtor vests firstly in the Master and then in the Trustee appointed as such by the Master.

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AIMS OF MEETINGS

(a) to prove claims;

(b) to nominate a trustee;

(c) to receive the report by the trustee;

(d) to give directions to the trustee;

(e) to interrogate the insolvent and other persons; and

(f) to consider an offer of composition by the insolvent.

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TYPES OF MEETINGS

- First meeting of creditors in insolvency
- Second meeting of creditors in insolvency
- Optional=
  - General meeting of creditors in insolvency
  - Special meeting of creditors in insolvency
- NB purpose of each meeting!

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GENERAL PROVISIONS

- Date and venue of meetings-
- Master determines the date and time of the first meeting.
- The fixing of the dates and times of other meetings is left to the trustee.
- The presiding officer has the power to adjourn a meeting from time to time
- The Act makes no provision regarding the venue of the various meetings, except that every meeting must be held at a place which is accessible to the public (s 39(6))

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VENUE & RECORD OF PROCEEDINGS

- The Insolvency Act does not provide for an order that a meeting be held before a presiding officer independent of the offices of the Master or Magistrate (*Steelnet (Zimbabwe) Ltd v Master of the High Court, Jhb* (2007/463) [2008] ZAGPHC 185 (24 June 2008)
- S 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. The Master usually convenes the first meeting in the district where the insolvent resided or had his main place of business
- The presiding officer at every meeting must keep a record of the proceedings, certify it at the conclusion of the proceedings, and transmit it to the Master (s 39(3))
- The minutes of the meeting constitute prima facie evidence of the proceedings (s 68(1))—Unless the contrary is proved, it is presumed that the meeting was duly convened and that all acts done at it (were validly performed (s 68(2))

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FIRST MEETING

- On the receipt of a final sequestration order, the Master is obliged to convene immediately, by notice in the Gazette, a first meeting of creditors of the estate (s 40(1))
- The purpose of the meeting is to enable creditors of the estate to prove their claims against the estate and elect a trustee
- The notice in the Gazette must appear not less than 10 days before the date of the meeting (counting backwards from the date of the meeting and excluding the first day)

ELECTION OF TRUSTEE

- Creditors who have proved their claims at the first meeting “may elect one or two trustees”
- The rules are as follows:

(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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De Wet and Another v Khammissa and Others (358/2020) [2021] ZASCA 70 (4 June 2021)

- SCA has provided finality in what became a peculiar back and forth of decisions by the Master in respect of the appointment of liquidators in an insolvent estate
- The doctrine of “functus officio” was thus considered
- The question to be considered was whether the Master had the power to vary the first decision or whether the first decision was final
- SCA found that the Master’s first decision had in fact passed into the public domain, thus, in the absence of any statutory provision to state otherwise, the Master had no power to revoke the first decision
- 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. On this basis, the SCA found that the appeal failed

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VOTING RULES

- The basic rules are set out in section 52 of the Insolvency Act which in terms of s 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

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VOTING RULES = 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

(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

(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

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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.(internal remedy= *Reed v Master of the High Court* [2005] ZAECHC 5;[2005] 2 All SA 429 (E))

- This procedure does not apply to appointments outside the nomination process at meetings, such as provisional appointments or joint appointments in the exercise of the Master's discretion

- S 371(1) of the Companies Act reads as follows:
  - (1) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister

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SECOND MEETING

- The purpose of this meeting is to:
  - enable creditors to prove their claims,
  - receive the trustee's report on the affairs and condition of the estate and
  - give the trustee directions in connection with the administration of the estate

REPORT BY TRUSTEE?

81. Trustees report to creditors.-(1) A trustee shall investigate the affairs and transactions of the insolvent concerned before the sequestration of his estate and shall, at the second meeting or, with the written permission of the Master obtained before the second meeting, at an adjourned second meeting of the creditors of that estate, or, if an offer of composition has been accepted by creditors in terms of section one hundred and nineteen, within one month after the acceptance of such offer of composition, submit a full written report on those affairs and transactions and on any matter of importance relating to the insolvent or the estate, and more especially in regard to-

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REPORT….

(a) the assets and liabilities of the estate;

(b) the cause of the debtor's insolvency;

(c) the books relating to the insolvent's affairs, and the question whether the insolvent appears to have kept a proper record of his transactions, and if not, in what respect the record is insufficient, defective or incorrect;

(d) the question whether the insolvent appears to have contravened this Act or to have committed any other offence;

(e) any allowance he has made to the insolvent in terms of section seventy-nine and the reasons therefor;

(f) any business which he may have been carrying on on behalf of the estate, any goods he may have purchased for that business, and the result of carrying on that business;

(g) any legal proceedings instituted by or against the insolvent which we re suspended by the sequestration of his estate which may be pending or threatened against the estate;

(h) any matter mentioned in section thirty-five or thirty-seven;

(i) any matter in regard to the administration or realization of the estate requiring the direction of the creditors.

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SPECIAL AND GENERAL MEETING

- Special meeting:
  - Proof of claim
  - Interrogations
- General meeting:
  - The trustee may at any time convene a meeting of creditors—called a general meeting—for the purpose of giving him instructions concerning any matter relating to the administration of the estate

CLAIMS

- *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*

- Only a liquidated claim that arose before and existed at the date of sequestration, and that did not prescribe at that date is capable of being proved

- *A liquidated claim is a claim for an amount which is determined, ie, certain, whether the determination is the result of an agreement, a judgment of a Court or otherwise*

- An unliquidated claim may be tendered at a meeting of creditors. The claim is to be deemed to have been proved against the estate at such meeting where the trustee (with the permission of either other creditors or the Master) has compromised or admitted it or it has been settled by a judgment of a Court

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TYPES OF LIQUIDATED CLAIMS

- SECURED CLAIMS
- PREFERENT CLAIMS
- CONCURRENT CLAIMS
- CONDITIONAL CLAIM

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HOW TO PROOF A CLAIM?

- A claim can be proved at any time before the final distribution of the estate
- A creditor may delay proof of his claim whilst there exists a danger of a contribution?
- The claim must be submitted by way of an affidavit, together with the documents supporting the claim, with the officer who is to preside at the meeting (S 44 of the Insolvency Act deals with the proof of claims. Ss (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)
- At a meeting of creditors all submitted claims will either be admitted or rejected by the presiding officer.
- The presiding officer's decision to reject a proved claim may be taken on review

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SECTION 44

- S 44 of the Insolvency Act sets out the procedure in terms of which all claims against an insolvent estate are to be proved, subject to what is stated below regarding the provisions of section 83

MESKIN:

- *Notwithstanding that section 44 purports to set out the procedure in terms of which all claims are to be proved, following the amendment of section 83(5) of the Insolvency Act (with effect from 23 May 2019), the provsions 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 (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) (hererinafter referred to as a "Master Agreement"), 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.*

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ADJUDICATION OF CLAIM

- A claim must be proved to the satisfaction of the presiding officer who must either admit or reject it (s 44(3)) = the presiding officer performs a quasi-judicial function and, as such, must exercise an independent judgment
- If the claim is on the face of it bad (eg, if it has prescribed), the presiding officer should reject it
- If prima facie proof of the claim is produced, he should admit it …
- Unless the claim is on the face of it bad, the presiding officer should not reject it without hearing the creditor's evidence under s 44(7) or allowing the creditor the opportunity to present further evidence, as entitled to in terms of section 44(7) and to postpone the meeting of creditors for that purpose (*Umbane Technology CC v Master of the High Court of SA Pretoria Division and Oth*ers (14471/18) [2021] ZAG-PPHC 50 (9 February 2021))
- The rejection of a claim at a meeting does not bar the creditor from proving his claim at a subsequent meeting or from establishing his claim by legal action before the time for such actions has expired in terms of section 75 of the Insolvency Act (s 44(3) of the Insolvency Act).

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OBJECTIONS?

- The decision by the presiding officer to reject or admit a claim can be reviewed in terms of s 151 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
- It is not necessary to wait with the review of a decision by a presiding officer to admit a claim until the trustee has examined the claim, has in terms of s 45(3) decided to dispute the claim, or until the Master has decided to confirm the claim
- …power to expunge a claim or to reduce it is conferred on the Master alone. (Wishart v Billiton (162/2016) [2016] ZASCA 164 (16 November 2016))
- Only when the Master has made a decision in this regard may an interested person approach a court to review it
- The court may take into account evidence that was not available to the presiding officer at the meeting
- Another remedy = judicial review of administrative actions. *The functions of the presiding officer at meetings constitute an "administrative action" in terms of the PAJA 2000 which can be reviewed on grounds that for instance the functions are exercised irrationally or without properly applying the audi alterem partem (hear the other side or case) rule (Steelnet (Zimbabwe) Ltd v Master of the High Court, Johannesburg [2008] JOL 21948 (W))*

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ROLE OF TRUSTEE?

- The admission of a claim by the PO is, in a sense, only provisional because the trustee may still dispute the claim
- …the admission has the effect of putting the onus of disproving the existence of the claim on the trustee
- After a meeting of creditors at which claims have been proved, the presiding officer must deliver to the trustee every claim proved along with the documents filed in support of it (s 45(1))
- Trustee is obliged to examine all available books and documents relating to the estate for the purpose of ascertaining whether the estate in fact owes the amount claimed (s 45(2))
- If trustee decides to dispute the claim, he must report this in writing to the Master, stating his reasons (s 45(3)). At the same time he must give the creditor a copy of such reasons and notify him that he may, within 14 days, or any longer period as the Master may on application allow, show cause why his claim should not be disallowed or reduced (reg 3(1))
- The Master may either confirm the claim or, after allowing the creditor an opportunity to substantiate it—for instance, by calling evidence—reduce or disallow it (s 45(3))

TIME FOR PROOF

- PROOF CLAIM at any time before the final distribution of the estate.
- But if it is not effected at the first or second meeting of creditors, or at a special meeting of them during the period of three months after the conclusion of the second meeting, it may occur only at such a special meeting if the Master or the Court accords leave accordingly and on payment of such amount to cover the cost occasioned by the late proof as the Master or the Court may direct
- MESKIN:
- *Mayo NO and Others v De Montlehu 2016 (1) SA 36 (SCA), the SCA held that the three-month period stipulated in s 44(1) applies to both sequestrations and liquidations. Apart from consent for the proof of the claim the Master must fix costs for a late claim and there must be payment in respect thereof in order for such a late claim to be valid.*
- *See also Wishart NO and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd and Others [2017] 1 All SA 90 (SCA), 2017 (4) SA 152 (SCA) at paras 15 and 16 for further endorsement of the judgment of the Supreme Court of Appeal in the De Monthlehu case on this point).*

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