

Assets of the insolvent estate; assets of the solvent spouse; consequences of sequestration and liquidation; execution of judgments and attachments

PowerPoint Slides

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PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE

Assets of the Insolvent Estate

Effects of Sequestration / Insolvency



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VESTING OF THE ESTATE AND EXCLUDED ASSETS

- **Custody and control of company assets**

- Section 361 of Companies Act - 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.

- **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.
- 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.

VESTING OF THE ESTATE AND EXCLUDED ASSETS

- **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.

- **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.

VESTING OF THE ESTATE AND EXCLUDED ASSETS

- **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.

- **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) and every official who holds any of the debtor's property under attachment.
- 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.

VESTING OF THE ESTATE AND EXCLUDED ASSETS

- **Recovery of immovable property unlawfully disposed of**
 - Section 25(4) of Insolvency Act - Where someone who is insolvent unlawfully disposes of immovable property, or a right to such property which still forms part of their insolvent estate, the trustee has a right of recourse.
 - The trustee has the right to recover the value of the property or rights which were disposed of by the insolvent; from any person obtaining the property or right from the insolvent while knowing that it forms part of the insolvent estate; or from any person who obtained the property from the 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).

VESTING OF THE ESTATE AND EXCLUDED ASSETS

- **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.
- Immediately after making the attachment, the sheriff must report, in writing, to the Master that the attachment has been completed.

- **Interest of insolvent debtor in assets**

- The insolvent's assets vest in the Master and, after appointment, in the trustee. 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.
- Where a sequestration order has been set aside, the insolvent will regain control of the estate.

VESTING OF THE ESTATE AND EXCLUDED ASSETS

PROPERTY OF THE INSOLVENT ESTATE

▪ Estate property

- “Property” includes all movable and immovable property wherever situated in the Republic.
- 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.
- Debts payable to the insolvent are forthwith payable to the trustee.

▪ Foreign assets

- Movable property of the insolvent in a foreign country will, according to the common law, vest in the insolvent estate if the estate is sequestered by the court where the insolvent is domiciled.
- Trustee can only gain control of immovable property in foreign country if the trustee obtains recognition of the appointment as trustee from the foreign court.

VESTING OF THE ESTATE AND EXCLUDED ASSETS

PROPERTY OF THE INSOLVENT ESTATE

- **Wearing apparel, bedding, household furniture, tools and essential means of subsistence**
 - Section 82(6) of Insolvency Act – exclusion.
 - The exclusion of wearing apparel and bedding is absolute in the sense that creditors or the Master do not have any say.

- **Contingent interest of fideicommissary heir**
 - A fideicommissary's contingent interest in property does not vest in the insolvent estate, unless the actual right accrues to the insolvent before his rehabilitation.

- **Trust property**
 - Section 12 of Trust Property Control Act - trust property does not form part of a trustee's personal estate.

VESTING OF THE ESTATE AND EXCLUDED ASSETS

PROPERTY OF THE INSOLVENT ESTATE

▪ Life insurance policies

- Policy benefits not part of insolvent estate: Section 63 of Long-Term Insurance Act affords policyholder protection to policy benefits under certain long-term insurance policies.
- If person or spouse of that person is the life insured (and policy has been in force for at least 3 years), (i) the policy benefits will not form part of the insolvent estate; or (ii) upon the insolvent's death, if he or she is survived by a spouse, child or parent, the policy benefits will not be available for the purpose of payment of his or her debts.
- Where policy benefits are payable to any of the above persons as a nominated beneficiary, section 63(1)(ii) does not apply.

VESTING OF THE ESTATE AND EXCLUDED ASSETS

PROPERTY OF THE INSOLVENT ESTATE

▪ **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.
- 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.

▪ **Family home**

- The family home is not afforded protection against the insolvency of a debtor.

PROPERTY IN POSSESSION OF INSOLVENT AFTER SEQUESTRATION

▪ **General rule**

- Property acquired after the sequestration order also forms part of the insolvent estate (save for the exceptions).

▪ **Remuneration**

- All property that the insolvent may acquire, or which may accrue to him during the sequestration forms part of the insolvent estate.
- Exception: 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.

▪ **The right to an inheritance**

- If a right of inheritance accrues before the rehabilitation of the insolvent, such right immediately vests in the trustee of the insolvent estate.
- 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.

PROPERTY IN POSSESSION OF INSOLVENT AFTER SEQUESTRATION

- **Pension benefits**

- Section 3 of General Pensions Act - 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.

- **New estate**

- 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.

EFFECT OF SEQUESTRATION ON INSOLVENT'S SPOUSE

- **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.

- **Marriages out of community of property and vesting of assets**

- Section 21 of Insolvency Act - effect of the sequestration of the separate estate of one of two spouses shall be to vest in the trustee, all the property of the spouse whose estate has not been sequestrated (the “solvent spouse”), as if it were property of the sequestrated estate.
- A trustee cannot simply dispossess a solvent spouse of their property. The trustee needs a warrant to take possession of the property.

EFFECT OF SEQUESTRATION ON INSOLVENT'S SPOUSE

- **Proof that spouse is entitled to release of property**

- The burden of proving that the insolvent spouse is entitled to their property, is on the solvent spouse.
- In terms of section 21(2) of the Insolvency Act, the trustee shall release property to the solvent spouse if it is proved:
 - (a) that it was the property of the spouse before the marriage;
 - (b) that it is property acquired under a marriage settlement;
 - (c) that it was property acquired during the marriage by a title valid against creditors;
 - (d) that it is property protected under the Long-Term Insurance Act 52 of 1998;
 - (e) that it was acquired with property under (a) - (d) above or the income or proceeds thereof.

EFFECT OF SEQUESTRATION ON INSOLVENT'S SPOUSE

- **Property acquired by a title valid against creditors**

- Requirement of good faith. Unlike a real donation, a simulated donation does not provide a valid title.
- The onus is on the solvent spouse to prove the true transaction and that it is a valid one such as may confer a valid title.

- **Marriage subject to accrual system**

- 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.

EFFECT OF SEQUESTRATION ON INSOLVENT PERSONALLY

- **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 etc.

- **Employment of insolvent**

- The insolvent may follow any profession or occupation or enter into any employment, but he may not be employed in the business of a trader who is a general dealer or manufacturer.

- **Contracts entered into by insolvent**

- An insolvent may conclude any contract, except, a) a contract by which the insolvent purports to dispose of any property of their estate; b) a contract by which the insolvent's estate is, or is likely to be, adversely affected; and c) a contract by which any contribution to the estate which the insolvent is obliged to make is, or is likely to be, adversely affected.
- Contract not void but voidable at option of trustee. If gives written consent, contract is valid and enforceable.

EFFECT OF INSOLVENCY ON THE EXECUTION OF JUDGMENTS

▪ **Effect on attachments and sales in execution**

- 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.
- Attached property vests in trustee (section 20).
- Section 20 does not apply to the liquidation of a company, as 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, but the company remains the owner.
- If the execution debtor is sequestered 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.

▪ **Execution against property of insolvent stayed**

- Section 20 – execution of a judgment is stayed as soon as the sheriff concerned becomes aware of the sequestration (unless court directs otherwise).

EFFECT OF INSOLVENCY ON THE EXECUTION OF JUDGMENTS

- **Attachment and execution after winding-up order is void**
 - Section 359 of Companies Act - the making of a winding-up order suspends all civil proceedings by or against the company until the appointment of a liquidator.
 - Any attachment or execution “put in force after the commencement of the winding-up” is void.
- **Proceedings by liquidator or trustee**
 - The liquidator or trustee may institute or defend proceedings only with authority to do so.
- **Effect of sequestration on civil proceedings**
 - Section 20(1)(b) - the effect of sequestration of the estate of an insolvent is to stay any civil proceedings instituted by or against the insolvent.

EFFECT OF INSOLVENCY ON THE EXECUTION OF JUDGMENTS

- **Continuation of suspended proceedings after liquidation order**

- Section 359 of Companies Act - the making of a winding-up order suspends all civil proceedings until the appointment of a liquidator.
- Any person who intends to continue legal proceedings should within four weeks after the appointment of the final liquidator give the liquidator three weeks' notice of an intention to proceed. If notice is not so given, the proceedings are considered to be abandoned.

- **Institution of legal proceedings by the liquidator after liquidation**

- The liquidator of a company, with the authority granted by meetings of creditors, has 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.

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