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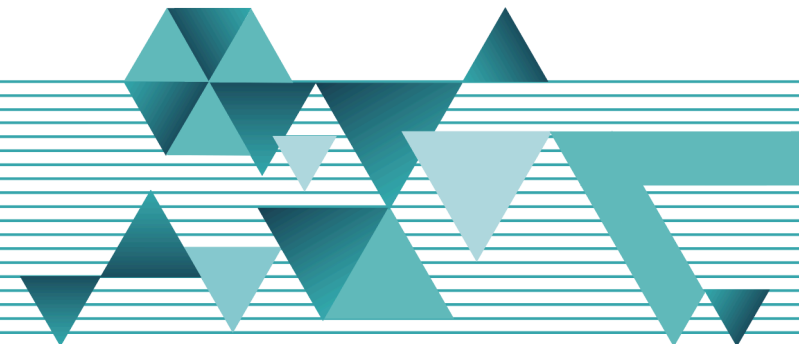
Uncompleted Contracts

PowerPoint Slides

Professor André Boraine

Director: Unit for Business Rescue and Insolvency Law

University of Pretoria, Pretoria



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Introduction: Uncompleted/unexecuted/executory contracts

- **Insolvent debtor still party to a contract at commencement of sequestration or liquidation-**
 - when the contract has not been fully performed yet.
 - Example: ABC Stores(seller) sells a fridge to Icy Frost(purchaser) for R18 000,00 cash.
 - Before the fridge is delivered or the price paid, the estate of Icy Frost is sequestrated.
 - The question is what the legal effects of the sequestration will be on the contract? and
 - If it will differ if the purchaser (**prior to sequestration**) merely refused to continue with the contract?
- **As a general rule insolvency will not terminate such a contract that is still ongoing at time of sequestration or liquidation.**
 - Rules apply in general to sequestration and liquidation(company or CC unable to pay debt)
- **So an uncompleted contract in insolvency can be defined as a contract where**
 - performance has not yet been completed by time of sequestration or liquidation of one of the parties to it -
 - hence, the contractual relationship is ongoing.

Introduction: Uncompleted contracts

- **Outside insolvency, if a party (Icy Frost) does not perform its a contract, it may amount to breach of contract and other party may have the following remedies:**
 - **Contractual remedies in case of breach:**
 - Claim specific performance;
 - Cancel contract and
 - reclaim what has been performed (if any);
 - Damages.
- **In insolvency:**
 - “Insolvent party” to contract (sequestered estate or liquidated);
 - “Solvent party” to contract;
 - Trustee or liquidator steps into shoes of “insolvent party,” and
 - must as a general principle decide to abide by contract or to repudiate it.

Introduction: Uncompleted contracts

- **Trustee acquires rights and obligations from contract.**
 - Must elect if s/he will abide by contract or repudiate,
 - Unless statutory exception, like ss 18-22 of Alienation of Land Act.
 - Must give clear notice
 - Within reasonable time
 - *Concursus creditorum* entails that trustee must act in best interest of group of creditors, also when exercising this right.
- **Note:**
 - When trustee decided to abide, amounts to be paid like purchase price to be paid as **cost of sequestration and administration.**
 - May be personal liability of trustee if there is not sufficient funds.
 - *Kerbels Flooring & Carpeting (Pty) Ltd v Shrosbree* 1994 (1) SA 655 (E).

Introduction: Uncompleted contracts

- **Solvent party may withhold performance until trustee performs**
 - Reciprocal agreement
 - *exceptio non adimpleti contractus*
 - *Goodricke & Son v Auto Protection Insurance Co Ltd* 1968 (1) SA 717 (A)
- **If trustee repudiates - amounts to breach of contract**
 - But solvent party limited as to remedies (as rule no specific performance)
 - May claim restitution of property delivered (if s/he, or it) is still owner
 - Claim for damages: as a rule concurrent claim
 - *Thomas Construction v Grafton Furniture Manufacturers* 1988 (2) SA 546 (A)

Introduction: Various types of contracts

- **GENERAL RULE (ABOVE) AS BACKDROP – DEFAULT POSITION.**
 - *BUT NOTE SPECIAL SITUATIONS / EXCEPTIONS THAT MAY APPLY:*

1. Contracts of sale

1.1 Sale of immovable property.

- a) Seller sequestrated.
- b) Purchaser sequestrated.

1.2. Sale of movable property (various situations).

- a) Cash sale: purchaser sequestrated.
- b) Credit sale: purchaser sequestrated.
 - Credit sale: seller sequestrated.
- c) Instalment agreement NCA: purchaser sequestrated.
 - Instalment agreement NCA: seller sequestrated.

Introduction: Various types of contracts

2. Lease

- a) Lessor (owner) sequestrated.
- b) Lessee sequestrated.

3. Employment contracts

- a) Employee sequestrated.
- b) Employer sequestrated.

4. Other contracts

- 4.1 Mandate.
- 4.2 Partnerships.

Introduction: Questions to ask?

- **Solution: first identify contractual situation and**
 - **the applicable law!**
- **Questions:**
 - What type of contract is this?
 - What performance is still outstanding?
 - Which party has been sequestrated?
 - Does the general rule / common law apply or
 - is there a special (statutory) rule/ exception?
 - **other legislative interventions?**
 - **section 35A and B of Insolvency Act?**
 - **Transactions on the JSE etc**

Introduction: Questions to ask?

- Ownership in case of contract of sale:
 - Who is the owner at date of sequestration?
 - Transfer of ownership
 - Contract does not pass ownership
 - Intention and *nemo plus iuris* etc
 - Type of property:
 - Immovable property
 - Movable property: cash or credit (common law)
 - Movable property: instalment agreement (credit legislation)

Introduction: Options for trustee

- **Trustee wants to continue (perform):**
 - Beware: Personal liability if insufficient funds!
 - *Kerbels Flooring & Carpeting (Pty) Ltd v Shrosbree 1994 (1) SA 655 (E)*
 - Trustee may demand specific performance if tender complete performance
 - Counter-performance: if reciprocal obligation
- **Trustee does not want to perform:**
 - Repudiation
 - Normal contractual remedies,
 - except not specific performance
 - Solvent party may accept repudiation, cancel, claim restitution & damages
 - Concurrent claims

1. Contracts of Sale

Category A: Sale of immovable property

Scenario 1: Seller sequestrated

- Default - general principle, absence of special rule

Facts:

- Common law:
 - A sells her house to B.
 - B pays deposit of R50 000 - purchase price of R800 000,00.
 - A's estate sequestrated before registration to B.
- a) Trustee (of seller's estate, A) can elect whether or not to go ahead with registration (transfer to purchaser, B).
- b) Purchaser cannot claim transfer (even if already paid full price).
 - Only option = cancel contract, claim back purchase price etc = concurrent claim

Special protection to purchaser: Alienation of Land Act 68 of 1981

Scenario 1: Seller sequestrated

- **Protection of purchaser:**
- **a) Purchaser may claim transfer (registration)**
 - “Land” sold for residential purposes-
 - Must be registrable land !
 - Purchase price paid in instalments-
 - More than two instalments and over longer than one year *[but vulnerable purchasers!]
 - Lose right to elect to repudiate
 - Allow to take transfer in exchange for balance of purchase price etc

Extension of A.L.Act protection by CC: transfer

Scenario 1: Seller sequestrated

- ***Vulnerable purchasers to claim transfer**
- *Sarrahwitz v Maritz NO*
 - Expanded scope of application of A.L.Act
 - Constitutional grounds
 - Paid for land **in full within one year** before seller's sequestration
 - Purchaser may become homeless = Vulnerable purchaser
 - Reading into A.L.Act provisions

Special protection to purchaser: Alienation of Land Act 68 of 1981

- **b) Purchaser does not take transfer**
 - **Trustee sells land and if contract recorded against tTitle Deed**
 - Purchaser has preferential right to claim repayment of amounts already paid towards purchase price.
 - After mortgagee is paid from proceeds, purchaser must be paid.
- **c) If purchaser has already paid at least 50% of purchase price:**
 - Can claim transfer of registrable property.
 - Must register a mortgage bond for payment of balance.
- **d) Land not registrable: s 26**
 - Seller must give bank guarantee, pay into trust.
 - Purchase price payable when land attached or subject to sequestration.

Category A: Sale of immovable property: Scenario 2: Purchaser sequestrated

- **S 35 of Insolvency Act applies.**
 - Trustee of purchaser's estate must decide whether to continue or repudiate the sale contract.
 - If no decision in reasonable time: seller can request decision.
 - If still no decision after 6 weeks: seller can apply to court for order to cancel sale.

Category B: Sale of movable property

Scenario 1: Cash sale of movable property: Purchaser sequestrated

- **Example:**
 - A sells car to B for R80 000, 00 cash
 - Ownership passes on delivery of thing plus payment of price.
 - If uncertainty: presumption cash sale.
- **Section 36 of Insolvency Act applies:**
 - Where purchaser receives delivery before payment?
 - And purchaser's estate is thereafter sequestrated.
 - **It s 36 seller may reclaim property, if:**
 - Purchaser or trustee (or master) notified within 10 days of delivery;
 - Regardless if sequestration takes place in those 10 days.
 - Seller must return any part of price already received.
 - But if trustee tenders full price, seller must accept.

Category B: Sale of movable property

Scenario 1: Cash sale of movable property: Purchaser sequestrated

- If trustee disputes seller's right to reclaim:
 - Seller must institute action to prove his/ her/ its ownership.
 - within 14 days after receipt of notice.

Category B: Credit sale of movable property:

Scenario 1: Purchaser sequestrated

- **Example:**

- A sells car on credit (not regulated by NCA).
 - Purchaser's estate sequestrated.

- **Credit sale ito common law:**

- General rule: ownership transfers at delivery.
- Seller cannot reclaim car, but has
 - concurrent claim for balance of purchase price -
 - unless contract stipulated otherwise or
 - Special circumstances where seller still remains owner (fraud.)
 - *Cornelissen NO v Universal Caravan Sales* 1971 (3) SA 158 (A); *Eriksen Motors (Pretoria) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A)

Category B: Credit sale of movable property: Scenario 2: Seller sequestrated

- Trustee of seller's estate must collect outstanding purchase price from purchaser.

Category C: Instalment agreement ito NCA: Scenario 1: Purchaser sequestrated

- **Example:**
 - A sells car on credit ito instalment sales agreement (regulated by NCA).
 - Purchaser's estate sequestrated.
- **Instalment agreement ito NCA:**
 - Transfer of ownership is suspended until payment of final instalment.
 - i.e. seller is still owner when purchaser is sequestrated.
- **Section 84(1) of the Insolvency Act:**
 - Seller loses ownership (passes to purchaser's insolvent estate ex lege).
 - In exchange: seller gets a hypothec (real security right) for outstanding amount = secured creditor.

Category C: Instalment agreement ito NCA: Scenario 1: Purchaser sequestrated

- **But what if thing surrendered to seller within one month before sequestration?**
- **S 84(2):**
 - Trustee may demand the delivery of the goods, or
 - **the value thereof as on the day of its surrender to the seller.**

Category C: Instalment agreement ito NCA: Scenario 2: Seller sequestrated

- **I.e. seller is still the owner of the property when his/her/ its estate is sequestrated/ liquidated.**
 - **Purchaser still owes balance of purchase price.**
- **Opinion 1**
 - Become owner: entitled to keep on paying
 - At fulfilment of condition to become owner
- **Opinion 2**
 - Insolvent seller cannot transfer ownership - concurrent creditor
 - Cannot force transfer, no preference

2. Contracts of Lease: (Letting and hiring)

- **Example:**

- Landlord, lessor rents apartment to Lessee for R5000, 00 per month for a specified period
- Apartment may be subject to mortgage bond on **or not**.
- Scenario 1: Estate of Lessor sequestrated whilst contract still in force.
- Scenario 2: Estate of Lessee sequestrated whilst contract still in force.

Scenario 1: Lessor's (owner) estate sequestrated

- **Lessor sequestrated**

- Not dealt with in Insolvency Act
- Sale subject to huur gaat voor koop, but when subject to
- Mortgage bond (mb) ?

- **Rights of lessee vis-à-vis mortgagee:**

- If rights of lessee vested before mortgage bond, protected but
 - if not, sold subject to lease if insufficient proceeds to satisfy claim
- Unliquidated concurrent claim for damages for breach of contract

Scenario 2: Lessee's estate sequestrated

- **S 37 of Insolvency Act applies**
- **Not automatically terminated.**
- **Trustee may cancel contract through written notice to Lessor**
 - Due to cancellation: estate loses right to claim compensation for improvements unless lessor agreed to improvements.
- **If trustee does not terminate contract:**
 - Lease will automatically **terminate three months after appointed** of trustee, unless trustee notifies lessor of intention to continue.
- **If trustee continues with lease:**
 - bound to all conditions relating to prohibition on transfer of lessee's rights.

Scenario 2: Lessee's estate sequestrated

- **Lessor's claim(s) against estate:**
 - Tacit hypothec over movables, rentals in arrears, secured (s 85 limitation)
 - balance concurrent
 - Rentals due as from commencement sequestration (cost of sequestration)
 - Damages for breach of contract (concurrent)
- **Any term of contract that contract will terminate or be varied on sequestration of lessee, void – s 37(5), but**
 - Lease can still expire i.t.o. termination clause linked to effluxion of time.

3. Employment contracts:

Scenario 1: Employee sequestrated

- **Example:**
 - A is employed by Eskom as an electrician and he earns R25 000,00 per month. His estate is sequestrated.
 - In principle no effect on contract of employment.
- **In employ of a trader, permission of trustee.**

Employment contracts:

Scenario 2: Employer sequestrated

- **Example:**

- A owns a small petrol filling station and runs the business as a sole proprietor.
- He employs 7 people, a manager (earning R20 000,00 pm), a mechanic (earning R12 000,00 pm) and five petrol attendants earning R8000,00 each pm).

- **S 38 of Insolvency Act**

1. **Contracts of employment not terminated upon sequestration/liquidation of employer**

1. **Employees: no work + no pay, but**

- Entitled to unemployment benefits (UIF)

2. **Contracts may be terminated by trustee (after his/her appointment) but**

- **Must first consult employees or trade unions**
 - re proposals to rescue the business

Employment contracts:

Scenario 2: Employer sequestrated

6. Unless terminated earlier by trustee, or agreed otherwise – terminate 45 days after appointment of final trustee

7. Terminate, effects re claims of employees:
 - 7.1 Limited statutory preferent claim (salaries, bonuses etc) = prior to sequestration
 - 7.2 Severance pay
 - 7.3 Compensation for suspension or termination = concurrent (damages)

Employment contracts:

Scenario 2: Employer sequestrated

- **Section 197A of the Labour Relations Act**
 - Transfer of business as going concern.
 - New employer automatically replaces the old employer.
 - If contracts were terminated before transfer = will revive.
- **Section 197B**
 - Employees have right to be informed about financial difficulties that might lead to sequestration as well as of sequestration/ liquidation application.
- **Insolvency Act and Companies Act**
 - Notification of sequestration / liquidation applications.

4. Other contracts

4.1 Mandate

- Mandator's estate sequestrated
 - Mandate terminates

4.2 Partnership

- Sequestration of partnership: terminates partnership.
- Sequestration of the individual estate of a partner leads to withdrawal of his/her contributions, which will lead to dissolution of partnership relationship.