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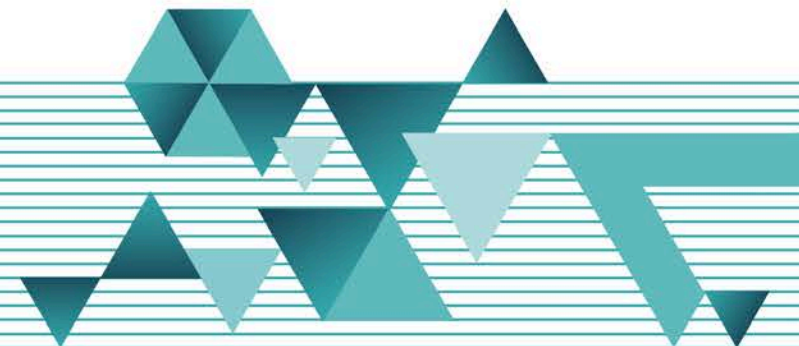
Impeachable Dispositions

PowerPoint Slides

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Impeachable dispositions

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Introduction

- **CORE NOTES: CHAPTER 12.**
- **Debtor may dispose of property –**
 - but if debtor insolvent, it may prejudice creditors, and
 - may be set aside under prescribed circumstances, and
 - reclaimed from the recipient by trustee or liquidator.
- **Remedies are provided to common law: *Actio Pauliana*, and**
 - there are **statutory remedies prescribed mainly by the Insolvency Act of 1936, ss 26 -31**
- **Two main categories:**
 - Dispositions without value – s 26; and
 - Preferences – ss 29 and 30.
 - *Estate Jager v Whittaker* 1944 AD 246 at 250 as to characteristic of preference: prefers an existing creditor based on pre-existing debt (by payment, or elevating position from unsecured to secured creditor for instance).

Actio Pauliana

- **Requirements:**
 - Alienation of property caused value of estate/ property available to diminish;
 - Recipient did not receive property due to him or her ito pre-existing agreement;
 - Debtor intended to defraud creditors & recipient knew of this intention where value was exchanged;
 - Fraud = caused or increased insolvency – prejudice to creditors.
- **Procedure:**
 - *Court procedure:*
 - Prior to sequestration by creditor, or
 - After commencement of sequestration by trustee or liquidator.

Statutory remedies: ito Insolvency Act

- **General requirements: Disposition without value or preferences:**
 - Sequestration or liquidation is a pre-requisite;
 - transactions must result in diminution of debtor's assets; **or**
 - preference to one or more select creditors;
 - debtor must have been insolvent at time of, or in consequence of, the transaction;
 - some have prescribed time periods prior to commencement of sequestration or liquidation.

Procedure

- These transactions are **voidable at the instance of the trustee/ liquidator** and **remains valid until** recipient agrees (following a demand) OR a court declares it void:
 - 1) set voidable transaction **aside**, and
 - 2) declare that the trustee is **entitled** to recover the property **or value** thereof.
 - **See 32(3):** "When the Court sets aside..., it shall declare the trustee ***entitled to recover any property*** alienated under the said disposition **or in default** of such property the ***value*** thereof **at the date of the disposition** OR **at the date on which the disposition is set aside**, whichever is the ***higher***."
- Remedy situation by recovering the property/value disposed of by debtor and distributing the proceeds according to the rules of insolvency.

Categories of statutory remedies: ito Insolvency Act

- **Main statutory categories ito Insolvency Act:**
 - Dispositions without value – s 26;
 - Voidable preferences – s 29;
 - Undue preferences – s 30;
 - Collusive dealings – s 31 (fraudulent intent).
- **Related provisions:**
 - Property of the solvent spouse – s 21;
 - Transfer of business – s 34 (may also link with uncompleted contracts);
 - Set-off - s 46;
 - Instalment sale transaction – s 84(2);
 - No preference provided by some registered mortgages – s 88.

Relevant considerations re statutory provisions

- 1. Time of disposition?
 - “Disposition of property” before sequestration, hence the commencement date of sequestration/ liquidation is important
 - **Sequestration**
 - Compulsory sequestration = date of provisional sequestration order;
 - Voluntary surrender = date of (final) sequestration order.
 - **Liquidation:**
 - By court order – date of issuing of liquidation application – s 348 of Companies Act of 1973;
 - Voluntary – date of registration of special resolution at CIPC.
 - **Note: Statutory prescribed time periods**

Relevant considerations

- **2. Disposition of property**
 - Definitions in s 2 of Insolvency Act:
 - **'disposition'** means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, **but does not include a disposition in compliance with an order of the court**; and **'dispose'** has a corresponding meaning"
 - **"property'** means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a *fideicommissary* heir or legatee"
- **Examples of such dispositions:**
 - The debtor donates R100 000 from his savings account to his daughter;
 - The debtor sells his house worth R1 000 000 for R10 000;
 - The debtor binds himself as a surety for his wife's personal loan;
 - The debtor writes off the debts owed to him by his own creditors (eg an architect releases a client from his duty to pay him for construction plans drawn up);
 - The debtor accepts R5 000 as full and final settlement of a debt worth R50 000;
 - The debtor encumbers his house with a second mortgage bond.
- **Examples: not deemed to be such dispositions of (rights to) property:**
 - Note: specifically excluded in definition of disposition: **payments made in compliance of a court order.**
 - Where asset disposed of is not "property" or a "right to property":
 - The debtor repudiates an inheritance, or life insurance benefits as nominee.

Case law:

- **All statutory “dispositions” hinges on definition in s 2 - above:**
 - any transfer or abandonment of rights to property;
 - bwo a sale, lease, mortgage, pledge, delivery, payment (includes suretyship), release, compromise, donation or any contract therefore; **but**
 - excludes a disposition in compliance with an order of court.
- **Definition wide but not exhaustive:** *Langeberg Ko-op Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 (2) SA 589 (A) - found definition of disposition (without value) **to include a suretyship.**
- Remarks at 673E-675A in *Klerck NO v Kaye* 1989 (3) SA 669 (C) - both the **conclusion of a contract**, and **subsequent performance** in terms of the contract may qualify as "dispositions".

Case law:

- **Settlement order:**
 - Can qualify for “by court order” exclusion ?
 - *Swadif (Pty) Ltd v Dyke* 1978(1) SA 928 (A).
 - *Dabelstein v Lane and Fey NNO* 2001(1) SA 1222 SCA the court held that a consent order stands until set aside due to fraud etc.
 - Divorce settlement orders?
 - See *Moreau and Another v Murray and Others* 2020 (6) SA 55 (SCA) at para 36 where the debtor and his spouse had tried to dispose of assets by means of a divorce settlement agreement. After considering all the facts, the Court found that it amounted to a sham and that the disposition amounted to **collusion** (see paras 33-35).

Case law:

- *Wessels NO v De Jager NO* 2000 (4) SA 924 (SCA) - before acceptance of an inheritance, or insurance benefits the heir/nominated beneficiary had no rights to the inheritance/benefits that can vest in the insolvent estate, but merely a **“competence”**.
 - It follows that an insolvent’s refusal to accept the benefits does not amount to a disposition of property or a right to property.

Continue...Relevant considerations: (see later too)

- **3. Other**

- Sequestration or liquidation pre-requisite;
- Valid, until set aside by trustee or liquidator;
 - If not by trustee, by creditors.

Disposition without value: s 26 of the Insolvency Act

- **Section 26(1)(a), Insolvency Act:**
 - **Trustee/ liquidator proves:**
 - disposition **not made for value occurred**;
 - **more than 2** years before sequestration;
 - immediately after disposition;
 - liabilities exceeded assets.
- **Section 26(1)(b), Insolvency Act**
 - **Trustee proves** disposition not made for value occurred;
 - **within 2 years** of sequestration; **and**
 - ***beneficiary of disposition unable to prove*** that immediately after disposition,
 - insolvent's assets exceeded his/ her/ its liabilities.

Disposition without value: s 26 of the Insolvency Act

- If the disposition **caused** the insolvency = only set aside for the amount that the **liabilities exceeded the assets** after disposition.
- **Example:**
 - R120 000 assets and R100 000 liabilities: donates R 60 000
 - Recover R40 000 (assets R40 000 less than liabilities)

Meaning of value for s 26:

- **Meaning of “value”:**
- Value (*quid pro quo*) includes also inadequate value:
 - *Blooms Trustee v Fourie 1921 TPD 599 at 601:*
 - **“Value is ... the price which the property will command in the market ... otherwise a disposition to a creditor could not be set aside if assets of large value are “sold” for entirely *inadequate consideration* or for merely trifling consideration”**

Meaning of value for s 26:

- *Estate Wege v Strauss* 1932 AD 76: A paid his betting debts to a bookmaker at a time when A was insolvent.
- Betting debts not enforceable debt, but not illegal.
- Such payments/ settlements - dispositions without value ?
- Court found **value in settlement of such debts** – even if unenforceable.
 - Question: debts based on illegal grounds?
 - Value received?
 - *Visser v Rousseau* 1990 (1) SA 139 (A).
 - “Value” in milk culture powder cultivated for “investment” in illegal pyramid scheme?

Special case s 26(2):

- S 26(2): “A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent, shall not give rise to any claim in competition with the creditors of the insolvent's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent, and which –
 - (a) was made by way of suretyship, guarantee or indemnity;
 - (b) has not been set aside under subsection (1), the beneficiary concerned may compete with the creditors of the insolvent's estate for an amount not exceeding the amount by which the value of the insolvent's assets exceeding his liabilities immediately before the making of that disposition.
- **Elements:**
 - “Disposition” can be **completed, or not be completed** at time of sequestration/ liquidation:
 - Example: donation completed, or not completed yet:
 - E.g. suretyship where surety has paid or not paid creditor yet = both “dispositions”.
 - **If disposition is set aside**, or if uncompleted by insolvent, the recipient/ beneficiary denied a claim in competition with other creditors.
 - But a disposition by way of a suretyship, guarantee or indemnity allows beneficiary, ***if not yet set aside***, to compete with other creditors.
 - S 26(2) amended: give effect to *Langeberg* judgment.

Special statutory defence: s 27

- **Donation between spouses:**
 - S 21 release, but
 - may amount to disposition without value.
- **But s 27 of Insolvency Act provides a defence for beneficiary:**
 - Donation ito of registered ANC (ante-nuptial contract) to wife or child born out of the marriage;
 - made in good faith;
 - completed within 3 months from marriage;
 - unless estate is sequestrated with 2 years of registration of ante-nuptial contract,
 - = donation protected.

Voidable preference : s 29 of the Insolvency Act

- **S 29 Voidable preferences:**

- “Every disposition of his property made by a debtor **not more than six months** before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the **effect of preferring one of his creditors above another**, may be set aside by the Court if immediately after the making of such disposition the **liabilities of the debtor exceeded the value of his assets**, *unless* the person in whose favour the disposition was made proves that the disposition was made in the **ordinary course of business** *and* that it was **not intended** thereby to prefer one creditor above another.”

Voidable preference : s 29 of the Insolvency Act

- **Insolvent has more than one creditor, trustee/ liquidator proves that insolvent:**
 - disposed of property (e.g. payment or granting security);
 - within 6 months prior to *sequestration or liquidation*;
 - thereby preferring one creditor above another; and
 - immediately thereafter, insolvent's liabilities exceeded assets (insolvent).
- **If above proved, court may in principle then set aside,**
 - **but recipient has a statutory defence to s 29:**
 - Made in ordinary course of business; and
 - Without intention to prefer.

Case law:

- **Objective test: Insolvent disposed in “ordinary course of business”**
 - *Hendriks N.O. v Swanepoel* 1962(4) SA 338 (AD)
 - Was it done in the ordinary course of a business? = factual question.
 - *Al-Kharafi & Sons v Pema and others NNO* 2010 (2) SA 360 (W) - the Court is obliged to consider **all relevant circumstances** pertaining to transaction.
- **Subjective test: Insolvent had “no intention to prefer”**
 - Look at circumstances surrounding the disposition, i.e. insolvency looming/ contemplated?

Case law: intention

- ***Pretorius N.O. v Stock Co – Operative Company Limited:***
 - Debtor must contemplate sequestration and
 - debtor “contemplates sequestration at any rate when he knows that **it is substantially inevitable.**”
- ***Cooper N.O. v Merchant Trade Finance Ltd 2000(3) SA 1009 (SCA):***
 - No intention to prefer when a debtor hands over movable property to creditor under a pre-existing obligation recorded in a general notarial bond and following the proper exercise of a perfecting clause in such notarial bond.

Undue preference: s 30 of the Insolvency Act

- **Section 30 Undue preference to creditors:**

- “If a debtor made a disposition of his property **at a time when** his liabilities exceeded his assets, with the **intention** of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.”

- **Elements that the trustee/ liquidator must prove:**

- (1) disposition of property;
- (2) at that **time already insolvent**; and
- (3) the intention is to prefer one creditor above another.

Undue preference: s 30 of the Insolvency Act

- **Insolvency?:**

- *Venter v Volkscas Limited* 1973(3) SA 175 (7):

- show that liabilities fairly estimated, exceeded assets fairly valued;

- to be determined objectively.

- **Subjective intention to prefer?:**

- In general it is an intention to disturb the orderly distribution of assets on insolvency.

Voidable v Undue preference: ss 29 & 30 of the Insolvency Act

- **Application of s 29 versus s 30 (comparison):**

S 29 Voidable preference	S 30 Undue preference
Made in six months prior to commencement	No time period prescribed
Debtor factually insolvent after disposition	Made when debtor already factually insolvent
Had the effect to prefer	With the intention to prefer
Beneficiary has statutory defence: Disposition made in ordinary course of business & no intention to prefer	A similar defence is not provided for by s 30.

Section 31 of Insolvency Act - Collusion

- **Section 31(a) requirements:**
- Collusive disposition, trustee/ liquidator proves:
 - Any transaction whereby insolvent disposed of property prior to *commencement*; and
 - in collusion with another person (creditor or another)
 - (**common intent**—*Gert De Jager (Edms) Bpk v Jones NO and McHardy NO* 1964 (3) SA 325 (A));
 - See *Moreau and Another v Murray and Others* 2020 (6) SA 55 (SCA) at para 36 where the debtor and his spouse had tried to dispose of assets by means of a divorce settlement agreement.
 - After considering all the facts, the Court found that it amounted to a sham and that the disposition amounted to **collusion** (see paras 33-35).
 - With intention of prejudicing creditors (diminish assets) or preferring one creditor above another.

Collusion

- **Section 31(2), consequences:**
- Participating party liable to:
 - make good any loss thereby caused to the insolvent estate; and
 - shall pay a penalty to estate, as determined by court (but not exceeding the value of the benefit received);
 - if party is a creditor, forfeits claim(s) against estate.

Procedural matters

- **Section 32 deals with procedural matters:**
 - *Locus standi*: Trustee or liquidator to institute action-
 - But if trustee or liquidator fails, any creditor may institute the proceedings in name of T or L-
 - if trustee/liquidator indemnified against legal costs.

Procedural matters

- **Section 32(3) – powers of court on setting aside:**
 - Order recovery of the disposed property; or
 - Where property cannot be recovered, **the value at date of disposition OR date of the court order, whichever is higher.**
- **Where creditors pursue action: Apply section 104(3):**
 - Where creditor(s) successful in claim:
 - Entitled to legal costs, and
 - then recover his/ her /its claims from proceeds of recovered property.
- **Practice note:** Proceedings to set aside usually may be preceded by an interdict preventing the recipient/beneficiary to dispose the property pending the impeachment proceedings.

Legal costs

- **May be prohibitive for trustee or liquidator, but:**
 - Creditors may fund it; or
 - Run the process (as explained).
 - Third Party Litigation Funding?

Application in insolvent liquidation matters

- **Impeachable dispositions of Insolvency Act will apply to companies and close corporations – see:**
 - Ss 340(1) of Companies Act of 1973, and see
 - S 66 of Close Corporations Act.
- **Special rules in ss 70(4) and 71(1) of the Close Corporation Act of 1984:**
 - Certain payments to members may be set aside
 - by certificate issued by the Master.
 - **Firstly**, the Master must decide – payments *bona fide*; and
 - **Secondly** whether the member has discharged the burden of proving that the corporation was able to pay its debts at time of payment or not.

Special defences: S 33, Prescription etc

1. SECTION 33(1):

- A makes a loan to B and A holds B's Rolex watch as a pledge. B pays the debt to A two weeks before sequestration of B's estate and in return A returns the watch to B. The trustee of B now attacks the payment by B as a voidable preference.
 - What may A do re the watch he returned to B - **assuming the settlement of debt is voidable?**
- If the recipient (A):
 - acted in good faith, and
 - had parted with any property or security (the watch) in return,
 - the defendant does not have to restore the property or benefit received under the disposition,
 - **unless the trustee has indemnified** the defendant for the loss.
- **Section 33(2) protects third parties who acquired disposed property in good faith and for value.**

Special defences: Prescription

2. Prescription

- Claim for setting aside may become prescribed-
 - Claim is a debt, and
 - Prescription starts to run from date of appointment of trustee or liquidator - *Duet and Magnum Financial Services Services CC (In Liquidation v Koster 2010 (4) SA 499 (SCA)*.

Special defences: Sections 35A AND B: Protection of participants in financial markets

3. Certain transactions of exchange protected

- These sections protect certain dispositions/ transactions by market participants that would otherwise be voidable etc if they relate to **transactions on an exchange** or agreements providing for termination and netting, **except if fraud was involved.**
- Market participants may be involved in many transactions on a daily basis.
 - Legal issues may arise if such party (MP) becomes insolvent:
 - Set-off;
 - Uncompleted contracts;
 - Voidable dispositions.

Related remedies

1. S 21 of Insolvency Act – estate property of solvent spouse – as discussed (predecessor was introduced in 1926 to assist trustees.)

2. S 34. Voidable sale of business

- S 34 (1): **Notice must be given** of the **transfer of a business** or its goodwill or any goods or property forming part thereof (**except** disposed of in ordinary course of that business **or** for securing the payment of a debt) by the trader by publishing the notice:-
 - **in the** Gazette and two issues of an Afrikaans and English newspaper circulating in the district in which that business is carried on:
 - **Within 30 to 60 days prior to transfer.**
 - **[Transfer includes transfer of possession s 34(4).]**
- **Effects:** If notice is not (properly) given, the ***transfer* is void against the creditors *if* the estate** of the trader is ***sequestered or liquidated* within six months of the transfer.**
 - **Example:** A (owner of a hardware store, a trader) sells and transfers business to B for R1m. A transfers the business to B, but:
 - A does not give proper notice as per s 34(1) of the Insolvency Act;
 - A's estate is sequestered within six months of transfer.
 - = **Transfer** is void – contract of sale/ uncompleted contract?
 - **Other consequence:**
 - S 34(2) – As soon as notice is published, every liquidated claim becomes due.

Related remedies

3. S 46: set-off

- Set-off between a debtor and another, and
- debtor's estate **sequestrated within six months** (or one year in case of ceded debt) of set-off transaction, **and**
- the transaction was not effected in the **ordinary course of business**,
- the trustee may, **with the approval of the Master, ignore** the set-off agreement.
 - In such circumstances, the other party shall be obliged to pay his or her debt to the liquidator and shall be required to prove the debt in insolvency.

4. Cancelled instalment sale transaction – s 84(2) – see **uncompleted contracts**.

5. S 88: Mortgage bonds

- A **registered mortgage bond** that secures a debt;
- which debt was *initially unsecured*; and
- which debt was incurred *more* than **two months prior to lodging** of the **bond for registration** in the Deeds Office,
- **is of no effect**;
- **if the estate of the mortgagor is sequestered within six months after lodging the bond** for registration.
 - = debt remains, but bond provides no security.