



INSOL
INTERNATIONAL



Effects of sequestration and winding-up

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

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Vesting of the estate and excluded assets

- Company remains owner of its property after winding-up and only control of assets pass to Master and then to liquidator
- Debtor – loses control of their estate once sequestration order is granted
 - Property vests in Master and, after appointment, in trustee

Custody and control of assets

- S361 of '73 Act: winding-up order by court – property deemed in custody and control of Master until provisional liquidator appointed and has assumed office.
- When position of liquidator vacant/liquidator cannot perform duties – property of company deemed under control of Master
- Custody and control passes to final liquidator on appointment, irrespective of whether there is a provisional liquidator

Vesting of Company Assets

- If court thinks expedient, it may direct property belonging to company shall vest in liquidator NO but this rarely happens
- May need to apply because no legal proceedings on behalf of company may be instituted or defended till appointment of final liquidator/ till liquidator obtains authority from creditors or Master
- If liquidator obtains vesting order, liquidator may institute legal proceedings to recover assets or resist attempts to disposal of company assets

Vesting of assets of insolvent debtor

- After sequestration, debtor's assets vest in Master of the High court till trustee is appointed, whereafter it vests in trustee
- Master normally does not perform any acts in respect of property
- Will appoint provisional trustee/liquidator at early stage
- Insolvent must lodge statement of affairs with Master within seven days of being served with notice of final sequestration order.
- Debtor must hand over all documents and records that were not taken into custody by sheriff

Copies of Sequestration order

- Registrar of court must send copy of sequestration order to:
 - Sheriff in every district where insolvent resides/carries on a business
 - Every Registrar of Deeds office (register *caveat* against transfer)
 - Every officer in charge of an official register of ships (register *caveat* against transfer)
 - Every official who holds property of debtor under attachment
- Every officer must register the order and note day and hour of receipt
- *Caveat* expires ten years after date on which sequestration order was made
- Each act of registration after expiry of *caveat* is valid even if property still forms part of insolvent estate
- Trustee can also request registration of *caveat*.
- Where court order prevents insolvent from automatic rehabilitation, registrar of court must send copy of such order to registrars to enter *caveats* that will remain in force till insolvent's rehabilitation

Recovery of immovable property unlawfully disposed of

- Insolvent unlawfully disposes of immovable property belonging to insolvent estate and property is transferred to buyer, registration remains valid
- Trustee may recover value of property from any person who obtained it knowing the debtor was insolvent
- Where purchaser did not pay sufficient value in return, trustee can recover difference between value of property and value given in return
- Where trustee omits to act, creditors can institute action on behalf of trustee.
- Successful creditor obtains preferent claim regarding payment of his claim and costs of suit

Attachment by sheriff

- Upon receipt of sequestration order, sheriff must attach and make inventory of movable property of estate in the sheriff's district and which is not in possession of person who claims to be entitled to retain it under right of pledge or retention
- Sheriff must send all cash to Master
- Arrange for safekeeping of movable property
- After attachment is completed, sheriff must report to Master in writing
- Sheriff must also report property that is in lawful possession of pledgee or person who is entitled to retain it under right of retention
- Send copy of inventory to Master
- Officers who attached property of estate, must provide master and trustee with inventory of attached property

Curator Bonis

- If *curator bonis* is appointed after publication of notice of intention to surrender, curator is replaced by the Master or provisional trustee and final trustee
- Trustee may demand account of safekeeping of estate from *curator bonis*

Insolvent debtor's interest in assets

- Insolvent still has interest in estate
- May litigate to enhance value of estate where trustee decides not to take steps
- After rehabilitation, where debtor was not actually insolvent or where assets increased in value, entitled to any residue after all debts were paid
- May obtain control of part or whole of estate if concludes composition with creditors.
- Assets not immediately realised before rehabilitation will remain vested in trustee after rehabilitation for purposes of realisation and distribution.
- If trustee is removed/dies estate will vest in Master till new trustee appointed

Property

- Movable and immovable property wherever situated in the Republic.
 - Contingent right of fideicommissary heir or legatee is excluded

Property

- Money in bank account: trustee not entitled to money in bank account that was obtained through theft or fraud or erroneously credited to account
- Where investment transaction, tainted by fraud, investor merely has concurrent claim
- Money in bank account earmarked for someone else and bank aware of this, other person entitled to the money
- When funds are electronically transferred to a bank account and bank has no knowledge of theft of funds, bank may use to extinguish debts on accounts

Property

- Funds in bank account blocked by exchange control regulations, will not vest in trustee of insolvent estate
- Purpose of blocking – to secure assets that may be forfeited in terms of regulations
- Blocking order not terminated by sequestration
- Blocking order temporarily delay determination whether funds in account vests in trustee
- Debts payable to insolvent are forthwith payable to trustee
- If debtor pays insolvent, obligation not terminated unless debtor can prove he was *bona fide* & had no knowledge of sequestration

Foreign assets

- Movable property of insolvent in a foreign country will vest in insolvent estate if estate is sequestrated by court where insolvent is domiciled
- Immovable property in foreign country- trustee must obtain recognition of appointment as trustee in foreign court
- If trustee fails to obtain recognition, property remains vested in insolvent
- Trustee appointed in foreign country can apply to High Court for recognition of appointment in RSA.
 - With movable property recognition mere formality
 - With immovable property, recognition is necessity & courts have absolute discretion to approve or reject application
- Where court recognises foreign trustee, court may impose conditions to safeguard interests of local creditors
- No application for recognition/application refused – may apply for sequestration in foreign country

Wearing apparel, bedding, household furniture, tools & essential means of subsistence

- Wearing apparel & bedding excluded: Master and creditors have no say
- Bedding means bedclothes, sometimes considered together with mattress
- Luxury beds or antique furniture excluded
- May argue car falls under 'tools and other essential means of subsistence' – but exception is subject to determination by Master and creditors
- May hand property to debtor as allowance in return for assisting with collecting, taking charge and realising property

Contingent interest of *fideicommissary* heir

- Fideicommissary heir's contingent interest in property does not vest in insolvent estate, unless actual right accrues to insolvent before his rehabilitation.
- If fiduciary is sequestrated, property will vest in trustee
 - Trustee may realise asset subject to the fideicommissary burden
- If mortgage bond was registered over property with consent of court of fideicommissary, in favour of creditor of fiduciary, then trustee may sell mortgaged property if fideicommissary is unable to fulfil mortgage obligations

Trust Property

- Trust property does not form part of trustee's personal estate, except in as far as trustee is beneficiary
- Only applies to trusts established with written trust deed
- Trust money held in trust account of any trust account practice does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or any advocate.
- Any excess remaining after all claims against trust account were paid, will form part of assets of trust account practice
- Trust property held by financial institution in its capacity as trustee does not form part of assets of that institution

Property mortgaged by Land Bank

- Trustee may not sell property mortgaged in favour of Land Bank, unless Bank agrees in writing or has failed to sell mortgaged property within three months after receipt of a written notice from trustee requesting bank to sell property

Insurance policies

Full value of policy benefits protected

Where debtor or spouse of debtor's life was insured

Policy in force for at least 3 years

Policy benefits excluded during person's lifetime

If person dies and is survived by spouse, child, stepchild or parent – policy benefits not available for payment of debts

Policy benefits: Registered insurer – assistance, life, disability or health policies

Licensed insurer, policies written under risk, fund risk, credit life, funeral, life annuities, individual investment or income drawdown class of life insurance business.

Benefits & assets protected for period of five years from date when benefits were provided

Insurance Policies

- *Pieterse v Shrosbee NO & Others*: appointment of beneficiary has effect that payment is made to beneficiary, not estate of deceased
- Can protect policy benefits by nominating beneficiaries under policy
- If estate sequestrated before acceptance of benefits *Shrosbee* does not apply

Insurance Policies

- *Malcolm Wentzel v Discovery Lift Ltd & Others: In Re Botha & Others NNO v Wentzel*
 - Mr and Mrs W married in community of property
 - Mr W took out life insurance that insured both their lives
 - In terms of policy, surviving spouse nominated as beneficiary
 - Joint estate was sequestrated in 2012
 - Mrs W passed away in 2017
 - Question – was proceed of policy asset in insolvent estate
 - Proceeds paid to Mr W as nominated beneficiary
 - Court held proceeds fell into insolvent estate – both spouses became insolvent debtors and Mr Wentzel did not cease being insolvent when Mrs Wentzel passed away
 - SCA failed to consider s63(1)(i)- Mr W who was policy holder was protected person inters of Long-Term Insurance Act, policy benefits should have been protected during lifetime of Mr W

Insurance policies

- No provision in 1998 act that court may order owner of policy to repay premiums paid with intent to benefit person at expense of creditor

Property of 3rd parties

- Property in possession of insolvent that belongs to 3rd parties, does not vest in insolvent estate.
- Includes property leased/loaned to insolvent/property sold but not yet delivered/ property insolvent bought in cash sale but not yet delivered & insolvent has not paid & and property insolvent acquired as representative of principal
- CPA- supplier not owner of property belonging to / under control of consumer
- Liquidator/executor/administrator of supplier must investigate to ascertain existence of any money or property in possession of insolvent supplier, belonging to a consumer and must deal with property for benefit of consumer

Property sold subject to suspensive condition

- Property sold subject to suspensive condition, and purchaser's estate is sequestrated before condition was fulfilled, seller may reclaim property
- Seller must notify *curator bonis*, Master of trustee that he is rightful owner & is reclaiming property
- Where trustee sells property in good faith, owner may claim proceeds

Family Home

- No protection of family home against insolvency in SA
- Must comply with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.
- *Mayekise & Another v Patel & Others* court dismissed appeal against eviction because presence of minor children does not prevent owner from evicting parents of children.
 - Court held imminent homelessness was contradicted by occupant's wealthy lifestyle.
- court held just and equitable to evict

Property in possession of insolvent after sequestration

- General rule: property acquired after sequestration will fall into insolvent estate

Property excluded from insolvent estate

- Remuneration – insolvent entitled to recover for own benefit remuneration for work done
- If insolvent earns more than necessary for support of insolvent and family, trustee may approach master to make assessment of earnings and determine surplus that trustee is entitled to
- Available surplus income does not establish advantage to creditors

Property

Funds obtained fraudulently – trustee entitled to gains of insolvent's fraud (*Singer v Weiss* – insolvent fraudulently obtained funds after sequestration)

Any property in possession of insolvent deemed to belong to insolvent estate, until contrary is proven

Person becomes creditor after sequestration and claims property does not belong to estate, property deemed NOT to belong to estate till contrary is proven

Right to Inheritance

- Right of inheritance accrues before rehabilitation, right vests in trustee
- Provision in will that excludes inherited property from insolvent estate void.
- Testator may direct that if heir is insolvent, property diverts to another person – in that case, trustee has no right to inheritance
- Separate property of spouse: *Du Plessis v Pienaar* confirmed decision in *Badenhorst v Bekker* – sequestration of joint estate both spouses insolvent. Spouses are co-debtors – separate property will also fall in insolvent estate

Right to inheritance

- *Wessels NO v De Jager NO* – prior to acceptance of inheritance or insurance benefits, the beneficiary merely has ‘spes’ (competence) to inherit – not right to property
- Only becomes right to property once insolvent adiates
- When repudiates – does not dispose of property

Compensation, pension & other benefits excluded from insolvent estate

- Insolvent may retain for own account benefits in terms of UIF act, COIDA/ Occupational Diseases in Mines and Works, damages for defamation or personal injury.
- Includes damages for medical expenses and loss of earnings, pain & suffering
- Not entitled to damages suffered in business activities prior to sequestration
- Any benefit received under any pension law excluded from insolvent estate
- Definition of pension includes annuities
- Third party may claim damages directly from insurer for liability insolvent incurred against third party
- Assets excluded from insolvent estate constitute separate estate of insolvent.

Effects of sequestration on insolvent's spouse

- Persons married in community of property both become insolvent,
- If divorced before sequestration, spouse who incurred debt liable for full amount and other spouse is liable for half without first excussing spouse.
- Nulla bona return while parties are married = act of insolvency by both spouses
- Insolvency of one spouse after divorce does not extinguish liability of spouse for debts of joint estate.

Effect of sequestration on solvent spouse

- S21 applies only to marriages out of community of property and not marriages in community of property where one spouse owns separate property
- Property of solvent spouse will vest in Master and thereafter in trustee
- Solvent spouse may claim release of property
- Section 21 does not apply to estate of surviving spouse where marriage was terminated by divorce prior to sequestration of deceased insolvent's spouse estate

Section 21

- S21 does not apply to disability benefits that are protected in terms of s63 of Long-Term Insurance Act in hands of insolvent protected person where benefits are subsequently transferred to solvent spouse, whose disability is reason for protection
- S21 aimed at recovering property that belongs to insolvent estate.
- *De Magalhaes v Christensen NO & Another*- disability benefits transferred to spouse of insolvent protected person does not become property of insolvent estate – it is protected in terms of s63.

Section 21

- Spouse has extended meaning- includes wife or husband married according to any law or custom, and persons living together as husband and wife, though not legally married
- Civil Union Act legalised civil unions between same-sex partners – Latter has same consequences as any marriage in any other law. Spouse therefor includes civil union partner
- Where solvent spouse carries on business of trader/ likely to suffer prejudice because of vesting, a court may exclude property of the spouse from operation of sequestration order
- Solvent spouse must provide evidence in support of her claim to property and trustee must notify whether property will be released

Section 21

- *Harksen v Lane*
 - Court held s21 does not violate equality clause or property clause in Interim Constitution
- Trustee must obtain warrant from magistrate to take possession of property of solvent spouse
- Trustee must give solvent spouse six weeks written notice that he will realise property belonging to spouse
- Must also publish notice in government gazette and a newspaper.
- Separate creditors of solvent spouse must be invited to prove claims

Section 21

- Creditors of solvent spouse must prove claims
- Paid according to ordinary priorities from proceeds of assets of solvent spouse
- Creditors must first try and obtain payment from released assets
- No voting rights at meetings of creditors
- May not share in assets of insolvent estate
- Balance of assets of solvent spouse distributed as part of insolvent estate

Release of property

- Burden of proof on solvent spouse
- Statement filed with antenuptial contract that assets belonged to one spouse does not constitute proof of ownership.
- Trustee shall release property
 - Property belonged to solvent spouse before marriage
 - Property acquired under marriage settlement
 - Property acquired during marriage by valid title against creditors
 - Property protected in terms of Long Term Insurance Act
 - Property bought with proceeds of above

Benefit under antenuptial contract

- Immediate benefit (delivered before three months after date of marriage)
- Duly registered antenuptial contract, that has been registered for at least two years prior to sequestration
- Given in good faith by man to his wife other or to a child to be born of marriage
- ANC – not registered in deeds office –only binding on spouses and not on their creditors
- “man to his wife” – unfair discrimination???

Donations between spouses

- Donation may provide valid title
- Requirement of good faith
- Onus on solvent spouse to prove true transaction
- Can challenge donations with section 26, 30, 31 & *actio Pauliana*.

Marriage subject to accrual system

- Right to share in accrual only arises upon dissolution of marriage

Effect of sequestration on insolvent personally

- Cannot be a member of National Assembly, provincial legislature or municipal council
- Disqualified from being director of company
- May not participate in management of close corporation
- Insolvent may be removed from fiduciary appointments: trustee, liquidator, executor, tutor
- Cannot practice as quantity surveyor, accountant or estate agent
- Legal practitioner insolvent: High court may order that *curator bonis* be appointed to control and administer trust account

Effect of sequestration on insolvent personally

- May not during insolvency carry on business or be employed as a trader or have direct or indirect interest in business of trader who is a general dealer, unless trustee consents in writing
- Insolvent may conclude any contract, except:
 - Cannot dispose of property belonging to insolvent estate
 - Cannot conclude contract that will adversely affect insolvent estate, except with written consent of trustee
 - Cannot contract that will adversely affect contribution that insolvent is obliged to make to insolvent estate, except with permission of trustee

Validity of contracts

- Prohibited contract not void, but voidable at instance of trustee
- If voids contract, restoration must take place
- Prohibited sale valid where insolvent purports to sell , for valuable consideration, without consent of trustee any property acquired after sequestration and other person proves they had no reason to suspect estate was insolvent
- Trustee does not void contract- remains binding on parties

Vesting of property

- All property acquired by Insolvent during sequestration forms part of insolvent estate
- Assets will only become insolvent's personal property if insolvent's counter-performance comes from assist or money insolvent is entitled to recover for own benefit

Obligations of insolvent

- Keep trustee informed of residential and postal addresses
- Deliver business records
- Lodge statement of affairs
- Attend first and second meeting of creditors
- Deliver assets to trustee
- Assist trustee in collecting, taking charge of and realising property against payment of allowance in goods/money

Effect of Insolvency on execution of judgments and other civil proceedings

- Effect on attachments and sales in execution
 - Notice to sheriff and messenger
 - Attachment of property does not confer any preference after sequestration, except small preference to costs
 - Attached property vests in trustee
 - Publication of notice of intention to surrender stops sale in execution that has not taken place, but not transfer of property after the sale took place

Attachment of property of a company

- Ownership of property of company does not vest in liquidator
- Company remains owner, liquidator deemed to be in custody and control of assets
- *Legh v Nungu Trading 353 (Pty) Ltd*: assets of company must be applied in payment of costs, charges and expenses incurred during winding up and claims of creditors.
- This cannot be achieved if property belonging to company and subject to attachment is transferred out of the company
- Liquidator must recover property

Attachment of property

- If execution debtor is sequestrated or liquidated before sheriff sells movable property under attachment, or transferred immovable property and paid over proceeds, trustee/liquidator entitled to property or its proceeds
- Where sheriff delivered interpleader notice due to adverse claims & paid proceeds to registrar before liquidation, registrar holds money on behalf of creditors & liquidator cannot claim it
- Execution of a judgment is stayed as soon as sheriff becomes aware of sequestration
- Court may order execution be continued if expedient and necessary and will not prejudice general body of creditors

Winding-up

- Winding-up suspends all civil proceedings until appointment of liquidator
- Attachment or execution put in force after commencement of winding-up = void.
- Execution is put into force when sheriff attached property/ in pursuance of writ of execution, when sheriff or messenger gains possession of property
- Where company is liquidated before transfer of property, liquidator has choice to decide whether to abide by or abandon sale in execution

Sale by public auction

- Sale by public auction without reserve price is completed upon “fall of the hammer”

Legal proceedings

- Liquidator/trustee may institute or defend proceedings
- Sequestration stays all civil proceedings
- Proceedings that do not affect insolvent estate may proceed.
- S23 does not contain exhaustive list of cases where insolvent has standing.
- If claim in which proceedings were stayed is proven against insolvent estate or compromised, claimant may prove claim for their taxed costs incurred in connection with those proceedings before sequestration

Legal Proceedings

- Civil proceedings that instituted before sequestration lapse three weeks after first meeting of creditors, unless notice was given that proceedings will continue
- Court has discretion to permit continuation of proceedings
- Company/ creditor or member may, between presentation of application for winding-up and granting of winding-up order, apply to court to stay action/proceedings against company
- Liquidation order suspends all civil proceedings until appointment of liquidator
- Person who intends continuing legal proceedings must within four weeks after appointment of final liquidator give liquidator three weeks' notice of intention to proceed
- No notice given, presumed that proceedings were abandoned

Legal Proceedings

- *Umbogintwini Land & Investment Co v Barclays National Bank Ltd* – s359 applies when creditor institutes proceedings to prove claim and not if attempted to prove claim at first meeting of creditors.
- Creditor retains right to enforce claim through legal proceedings
- Trustee/liquidator should take steps to substitute debtor for continuation of legal proceedings stayed by insolvency
- In case of company – add (in liquidation) after name of company

Institution of legal proceedings against company after liquidation

- Every person who after liquidation intends to institute legal proceedings to enforce a claim that arose prior to liquidation, must within four weeks after appointment of liquidator give at least three weeks notice in writing.
- Liquidator has authority to bring and defend in name and on behalf of company legal proceedings, both civil and criminal
 - Authority granted to liquidator by meeting of creditors & members/
Master
 - Master may authorise urgent legal proceedings
 - Other party cannot challenge lack of authority

Legal proceedings against insolvent after sequestration

- Rejection of claim does not prevent claimant from proving claim in action of law
- May not institute legal proceedings after confirmation of trustee's account in respect of liability that arose before sequestration
- Court may allow if reasonable excuse for delay

Arbitration

- Rules of civil proceedings apply to arbitration proceedings
- Unless agreement provides otherwise, arbitration agreement or appointment of arbitrator is not terminated by sequestration/liquidation



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Questions??

