



**INSOL**  
INTERNATIONAL



# Unexecuted contracts

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# Introduction: Uncompleted 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.**
- **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 [court order to compel –see s 35 of Insolvency Act]
  - ***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.**
    - 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)***
- **Rectification**
  - Patent error can be rectified after commencement
- **Rights acquired pre-sequestration will be retained:**
  - E.g. accrued right to cancel the contract.
    - Thus, can continue with cancellation.
      - ***Ellerine Brothers (Pty) Ltd v McCarthy Ltd 2014 (4) SA 22 (SCA)***

# Introduction: Various types of contracts

- **General rule (above) as backdrop – default position.**
  - *Special situations / exceptions:*

## 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.
- c) Credit sale: seller sequestrated.
- d) Instalment agreement NCA: purchaser sequestrated.
- e) 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 !
- 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?



# 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):**
  - Personal liability if insufficient funds !
    - ***Kerbels Flooring & Carpeting (Pty) Ltd v Shrosbree 1994 (1) SA 655 (E)***
  - Demand specific performance if tender complete performance
  - Counter-performance: only if reciprocal obligation
- **Trustee refuses to perform:**
  - Repudiation
  - Normal contractual remedies,
    - except no claim for specific performance
  - Thus, solvent party may accept repudiation, cancel, claim restitution & damages
  - Concurrent claims
- **Divisible:** Sub contracting - ***Du Plessis NNO v Rolfes Ltd 1997 (2) SA 354 (A)*** and ***Gore v Roman Agencies CC 1998 (2) SA 518 (C)***

# 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- and
    - 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
- b) **Not take transfer, preferential claim for repayment**
  - Contract recorded in Deeds Office: endorsement against title deed
  - May trustee compel purchaser to take transfer?

# 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 ON 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
    - The A.L.Act...to facilitate transfer of residential property from the estate of an insolvent seller to a vulnerable instalment purchaser.
    - Basic rights: ...right of access to adequate housing, the right to dignity and the right to equality in so far as it relates to the differential treatment of vulnerable purchasers of residential property.

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

- **b) If trustee sells land + contract recorded against title 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 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-
  - **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.
- **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 as defined by instalment agreement ito NCA read with s 84(1) of Insolvency Act).
  - Purchaser's estate sequestrated.

- **Credit sale ito common law:**

- General rule: ownership transfers at delivery
- Seller cannot reclaim car,
  - Concurrent claim for balance of purchase price -
- even if purchase price not paid in full at time of sequestration,
  - unless contract stipulated otherwise [**but then may be instalment sale defined ito NCA read with s 84 below**]; or
  - Special circumstances (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 defined in NCA: Scenario 1: Purchaser sequestrated

- **Example:**

- A sells car on credit instalment sales agreement (defined by s 1 of NCA).
  - Purchaser's estate sequestrated.

- **Instalment agreement defined in NCA read with s 84(1) of I Act:**

- S 1 of NCA

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either:
  - (i) passes to the consumer only when the agreement is fully complied with;...

- **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.

# Category C: Instalment agreement into 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**
  - **Where sold again, 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:**

- Lessor rents apartment to Lessee for R10 000, 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 ?
- **Rights of lessee vis-à-vis mortgagee:**
  - If rights of lessee vested before mortgage bond, protected but
    - **if not, sold subject to lease if offer insufficient 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**
    - Trustee acts on instruction of creditors.
    - 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) –so called ipso facto clause, 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**
    - 1.1 **Effect: no work + no pay**
      - 1.1.1 **Entitled to unemployment benefits (UIF)**
  2. **But contracts may be terminated by trustee (after his/ her appointment) but**
    - **Must first consult employees or trade unions**
    - **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:**

**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 termination of partnership relationship.