



INSOL
INTERNATIONAL



Impeachable dispositions

Professor André Boraine
University of Pretoria

Introduction

- **CORE NOTES CH 12.**
- **Debtor may before commencement dispose of property** –
 - but if debtor is insolvent, it may prejudice creditors, and
 - may thus 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 **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 to 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:**
 - Commencement of 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/ or value disposed of by debtor and distributing the proceeds according to the rules of insolvency.
- Note: If trustee/ liquidator fails to take steps: creditor(s) may
 - Risk and benefits (s 104(3))

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 this 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.
- Rights to Property – all movable immovable property...
 - Ito *Bester NO v Mirror Trading (in liquidation) ta MTI* [2023] 15426-2021 (WCC) “property” includes also crypto currencies.
 - Not a right to an inheritance... Wessels NO v De Jager NO 2000 (4) SA 924 (SCA)

Case law:

- Settlement order:
 - Can settlement order qualify for “by court order” exclusion ?
 - *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 in fraud of creditors?
 - *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).

Disposition without value: s 26, IA

Disposition not for value:

- *Strydom N.O. and Another v Snowball Wealth (Pty) Ltd and Others (356/2021) [2022] ZASCA 91 (15 June 2022)* value means no value received in return.
- **Scenario 1: Section 26(1)(a), Insolvency Act requirements to set aside:**
 - **Trustee/ liquidator proves:**
 - A disposition not made for value (without value in return) occurred;
 - **more than 2** years before sequestration;
 - immediately after disposition;
 - debtor's liabilities exceeded assets.
- **Scenario 2: Section 26(1)(b), Insolvency Act requirements to set aside:**
 - **Trustee proves** disposition not made for value occurred;
 - **within 2 years** of sequestration; **and if**
 - **beneficiary of disposition unable to prove** that immediately after disposition,
 - insolvent's assets exceeded his/ her/ its liabilities (insolvent).

Meaning of value for s 26:

- **Meaning of “value”:**
- **Value** (*quid pro quo*):
 - *Blooms Trustee v Fourie 1921 TPD 599 at 601:*
 - **“Value is ... the price which the property will command in the market ...”**

Meaning of value for s 26:

- *Settlement of a merely unenforceable obligation v illegal transaction?*
- *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.**
 - Are such payments/ settlements dispositions without value since not enforceable?
 - Court found **value in settlement of such debts – even if unenforceable.**
- **Question**: debts based on **illegal grounds**?
 - Value received? **Usually answer is there is no value.**
 - **Visser v Rousseau** 1990 (1) SA 139 (A).
 - “Value” in milk culture powder cultivated for “investment” in illegal pyramid scheme? – no value.
 - Ponzi illegal, void = thus no value in benefits/ interests/ profits received from pyramid scheme..

Special case s 26(2):

- **S 26(2) scenario:**
 - **Examples:**
 - Debtor promises to make donation of R100 000 to X
 - **Scenario i.** At time of commencement of sequestration, money not paid over yet (**incomplete**); or
 - **Scenario ii.** At time of commencement, money paid over (**donation completed.**)
- S 26(2) states in general: “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....”
- **But where:**
 - Disposition was incomplete (like in i.);
 - Not set aside by trustee/liquidator; AND
 - disposition was made bwo a suretyship, guarantee or indemnity
 - Creditor relying on suretyship, guarantee or indemnity **may in principle still claim against insolvent estate.**
- Note: S 26(2) amended: give effect to *Langeberg* judgment.

Special statutory defence: s 27

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

Voidable preference : s 29 of the Insolvency Act

- **Where an 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 requirements proved, court may in principle then set disposition aside,**
 - **but recipient has a statutory defence ito s 29:**
 - Made in ordinary course of business; and
 - Without intention to prefer.
 - **Example:** Premature settlement of a book debt

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 sequestration?

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) as discussed by Burdette and Boraine 2000 Obiter 476.***
 - **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 that debtor is 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 the proceeds of the assets on insolvency amongst the creditors.

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)
 - There must be a **common intent to prejudice creditors** – *Gert De Jager (Edms) Bpk v Jones NO and McHardy NO* 1964 (3) SA 325 (A);
 - *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).
 - Intention of prejudicing creditors, i.e diminishing 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.

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 – if payments were *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) Indemnification

- A (creditor) makes a loan to B (debtor) 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** A returns the watch to B.
 - After sequestration of B's estate, the trustee of B 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 any loss.

2. Section 33(2) protects third parties who acquired disposed property from the recipient - ito ss 26 to 31- if acquired in good faith and for value.

Special defences: Prescription

2. Prescription

- Claim for **setting aside** may become prescribed-
 - Claim to set aside 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, **HENCE** protection for:
 - Set-off;
 - Uncompleted contracts; and
 - Voidable dispositions.
 - Except where fraud is involved,

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:

- A Transfer of business occurred-
 - *Within 6 months prior to sequestration; AND*
- *No notice of transfer published in Government Gazette / newspaper*
 - *within 60-30 days prior to transfer*
- =The transfer is void !
- [Note: Trustee may decide to continue with the initial contract of sale, or to repudiate it –
 - =to be treated as an uncompleted contract.]
 - **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 sequestrated within six months of transfer.
 - = **Transfer** is void – but contract of sale may be an uncompleted contract.
 - **Other consequence:**
 - S 34(2) – *When 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 **sequestered within six months** (or one year in case of a ceded debt) of set-off transaction, **AND IT** 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** secures a debt, but:
 - Where the debtor's estate is sequestered within six months **after lodging** of the mortgage bond in the Deeds Office; **AND**
 - Where the **debt** was (prior to such registration) **initially unsecured**; AND
 - incurred **more** than **two months prior to lodging** of the **bond for registration**,
 - **=is of no effect**;
 - **Note**: debt remains, but bond provides no security.

Disposition of immovable property after commencement ito s 25(4) of Insolvency Act

Note: Estate property may even remain vested in trustee after rehabilitation – s 25 of the insolvency Act (in absence of vesting order).

- S 25(3) and(4): Linked to insolvency interdict – valid for 10 years !
- **The section provides for the setting aside of the unlawful disposition of the property by the insolvent or former insolvent *after commencement* - and where property itself cannot be recovered:**
 - Its value is then recoverable from the insolvent; or
 - From any person who acquired such property whilst knowing about the insolvency; or
 - The balance of the value from a person who acquired such property from the insolvent for inadequate value in return.