

Unit 1 Introduction

A person who has insufficient assets to discharge his liabilities, although satisfying the test of insolvency, is not treated as insolvent for legal purposes, unless his estate has been sequestrated by an order of the court (formal declaration that he is insolvent).

Disposition (section 2 of the Insolvency Act) 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.

The main objective of a sequestration order is to secure the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors. Premise that once an order of sequestration is granted, a *concursum creditorum* is established. The interests of creditors as a group enjoy preference over the interests of individual creditors. Creditors who have proved a claim have the right to share with other proved creditors in the proceeds of the estate assets. If there is only one creditor who has a judgment, sequestration will not be ordered (no need).

An estate is usually conceived as

1. a collection of assets and liabilities,
2. but a debtor who has only liabilities may be regarded as having an estate for sequestration purposes
3. the joint estate of spouses married in community is an estate for purposes of insolvency.
4. the separate estates of spouses married out of community of property
5. a debtor whose estate has been sequestrated may, during insolvency, acquire a new estate under a title valid against his trustee.

A debtor, section 2:

A person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies.

It may be:

- A natural person
- A partnership
- A deceased person and a person incapable of managing his own affairs
- An external company that does not fall within the definition of external company
- An entity or association of persons that is not a juristic person like a trust

As a rule, only a Provincial or Local Division of the HC may adjudicate upon an insolvency matter.

Section 149: a court has jurisdiction:

Insolvency law

- if on the date of lodging debtor is domiciled or owns property or is entitled to property, situated within the jurisdiction, or
- *At any time* within 12 months immediately preceding lodging the debtor ordinarily resided or carried on business.

Court may refuse or postpone if it appears to the court equitable or convenient that the estate should be sequestrated by another court. The inquiry is not where the sequestration order may more conveniently be granted, but where the estate may more conveniently be administered.

A Master is appointed in terms of the Administration of Estates Act to each of the areas of the Provincial Divisions. For the performance of various functions the Master is entitled to charge fees, some being in cash, some by means of revenue stamps.

Section 157(1) is starting point:

Nothing done under the Act will be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done which in the opinion of the court cannot be remedied by any order of the court.

Courts have recognised additional grounds:

- where a deviation is so slight as to fall within the maxim *de minimis non curat lex*
- where all interested parties have waived compliance
- where the provision in question is not peremptory and has substantially been complied with
- where it was impossible to comply with the Act

Unit 2 Voluntary surrender

Two ways in which a debtor's estate may be sequestrated:

1. A creditor or creditors may apply for sequestration, section 9(1): compulsory sequestration
2. Debtor himself may apply for acceptance of surrender of his estate, section 3(1): voluntary surrender

Who may apply:

- estate of natural person: debtor or his agent, if expressly authorised
- estate of deceased: executor
- estate of debtor incapable of managing own affairs: curator bonus (party entrusted with administering affairs)
- partnership estate: all members of partnership who reside in RSA, or their agent; two exceptions: special partnerships, which can be ignored, and partners en commandite. These last partners are not liable to creditors for partnership debts.
- joint estate of spouses married in community: both spouses, section 17(4) Matrimonial Property Act

Requirements

Court must be satisfied that:

Insolvency law

- debtor's estate is in fact insolvent
- debtor owns realisable property of sufficient value to defray all costs of sequestration which will be payable out of free residue
- sequestration will be to advantage of creditors, section 6(1)

Court is not bound by the valuations in the statement of affairs and may make finding of insolvency even where statement indicates assets exceed liabilities.

The 'costs of the sequestration' include not only the costs of surrender but also all the general costs of administration, section 97. Free residue is defined as that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention. If the free residue is insufficient, the court must refuse application. If uncertain, court may grant application provided a guarantee for costs, to the satisfaction of the Master has been furnished.

Debtor has to prove that sequestration will be to the advantage of creditors whereas, in an application for compulsory sequestration, the creditor has to show merely that there is *reason to believe* that it will be. The onus is thus more strenuous in voluntary surrender.

Unit 3 Voluntary surrender

Procedure for voluntary surrender

1. Notice of surrender is published in the Government Gazette and in a newspaper circulating in the magisterial district, which includes:
 - a. Full names, address and occupation of debtor
 - b. Date upon which application for acceptance will be made, and
 - c. When and where the debtor's statement of affairs will lie for inspection

Notice not more than 30 days and not less than 14 days before date stated in notice as date of hearing of application. Ex parte Harmse: the failure to adhere strictly is a formal defect or irregularity as envisaged by section 157(1) and does not invalidate the application unless it has caused a substantial injustice which cannot be remedied by a court order.

2. Within 7 days after publication, debtor must furnish copies.
 - a. To each creditor whose address he knows or can ascertain;
 - b. To every registered trade union that to his knowledge, represents his employees
 - c. To the employees by:
 - a. Affixing copy to notice board
 - b. Affixing copy to front gate of premises if employees have no access
 - c. Affixing copy to front door
3. To the SA Revenue Services

The statement of affairs must comprise:

1. A balance sheet
2. A list of immovable assets, with estimated value and details of any mortgages

Insolvency law

3. A list of debtors with their residential and postal addresses, details of each debt, and an estimate of the extent to which the debts are good, bad or doubtful
4. A list of creditors, addresses and particulars of each claim and any security held for it
5. A list of any movable assets pledged, hypothecated, subject to a lien, or under attachment in execution of a judgment
6. A list and description of every accounting book used by the debtor at time of notice of surrender or sequestration or at time when he ceased to carry on business
7. A detailed statement of the causes of insolvency
8. Certain personal information, including details of prior insolvency and rehabilitation
9. An affidavit made by debtor verifying that the statement of affairs is true and complete and that every estimated amount contained in it is fairly and correctly estimated.

The statement with supporting documents must be lodged in duplicate at the Master's Office. On expiry of the inspection period, a certificate is issued to the effect that it was duly laid for inspection and whether any objections have been lodged. Certificate is filed with the Registrar before application is heard.

After publication of the notice, it is unlawful to sell any property. The court or Master, if in his opinion the value does not exceed R5 000, may order sale to proceed and direct how proceeds must be applied.

The trustee of the estate cannot claim property unless he proves that the buyer acted in bad faith and with knowledge that the sale was unlawful. Creditor must show that it would be more to the advantage of the general body of creditors to proceed with the sale.

Publication of a notice of surrender has no effect on other civil and criminal proceedings.

As a safeguard against the debtor dissipating his assets after publishing a notice of surrender, the Master may appoint a curator *bonis* to the debtor's estate, section 5(2).

If after having published the notice of surrender:

- debtor fails to lodge a statement of his affairs, or
- lodges one which is incorrect or incomplete in a material effect, or
- fails to make application to court on appointed day,

and the notice is not properly withdrawn, debtor commits an act of insolvency which entitles creditor to apply for compulsory sequestration.

A notice of surrender published cannot be withdrawn without written consent of the Master.

Notice of surrender lapses if:

- the court does not accept the surrender, or
- if the notice is properly withdrawn, or
- if the debtor fails to make the application within 14 days after date advertised as date of hearing.

Application for surrender is brought by notice of motion supported by affidavit, containing:

1. Full name, status, occupation and address of applicant to show jurisdiction and locus standi

Insolvency law

2. An allegation of insolvency and facts to establish this
3. Explanation how the insolvency came about; is debtor bona fide
4. An averment that applicant owns realisable property of sufficient value to defray all the costs of sequestration which will be payable out of the free residue of the estate
5. An allegation that it will be to the advantage of creditors if debtor's estate is sequestrated, amplified by facts supporting the allegation
6. Details of any salary or income that the debtor is receiving
7. Any other information that may influence the court in granting or refusing the surrender; court has discretion, even if all statutory formalities have been complied with and may do so if applicant has not acted in good faith and has not made a full and frank disclosure
8. A description of the procedural steps followed by applicant prior to bringing the application supported by documents proving that each step has been taken.

It must be sworn in and signed before a commissioner of oaths independent of the office in which it was drawn.

If the debtor is an employer he must, at time of making application, provide a consulting party contemplated in section 189 LRA.

A creditor has the right to oppose the application even if his claim is less than amount required to entitle him to apply for compulsory sequestration and even if his claim is disputed.

When adjudicated upon, the following documents must be before the court:

1. Notice of motion and supporting affidavit
2. Debtor's statement of affairs, incorporating the verifying affidavit
3. Any sworn valuation necessary
4. Proof of publication of notice of surrender
5. Proof by affidavit that applicant has delivered or posted copies of the notice as required
6. A certificate from the Master
7. Any report by the Master
8. Any opposing affidavits by creditors
9. Debtor's replying affidavit

Court has discretion even if all requirements are met. Factors may be:

- gross extravagance and running up debts on a pretentious scale
- creditors are not pressing for payment and willing to give time
- ulterior motive
- failure to give a full and frank account of financial position
- papers were deficient in a number of respects

Costs occasioned by unsuccessful opposition to application must be borne by the creditor concerned, but the court may order these costs (or part of) to be paid out of estate

Insolvency law

No appeal lies against order refusing to accept surrender, but any aggrieved by order accepting surrender may appeal against that order. Noting of appeal does not suspend the operation or execution.

Unlike an order of rehabilitation, an order rescinding a sequestration order does not have the effect of releasing debtor from liability for his debts. He is simply placed in the position he occupied before the order was granted, as to both his person and his property.

Unit 4 Compulsory sequestration

Court may grant application if satisfied that:

- applicant has established a claim which entitles him in terms of section 9(1), to apply for sequestration of the debtor's estate;
- The debtor has committed an act of insolvency or is insolvent
- There is reason to believe that it will be to the advantage of creditors of debtor if his estate is sequestrated.

Onus is not on debtor to disprove any element.

Section 9(1) allows proceedings to be instituted by:

- A creditor (or his agent) with a liquidated claim for more than R100, or
- Two or more creditors (agents) with liquidated claims not less than R200.

A liquidated claim is a monetary claim - a claim for transfer of property does not give locus standi. Section 9(2) provides that a liquidated claim which has accrued but which is not yet due by the time the application is heard must be regarded as liquidated for these purposes.

Acts of insolvency

A debtor's estate may in such cases be sequestrated even though he is technically solvent.

1. Absence from Republic or dwelling; if he leaves or, being out of RSA, remains absent, or departs from his dwelling or is otherwise absent himself, with intent by doing so to evade or delay payment of his debts, section 8(a); creditor must establish debtor's intention to evade or delay payment.
2. Failure to satisfy judgment; if a court has given judgment against him and he fails, upon demand of officer whose duty it is to execute judgment, to satisfy it or to indicate to the officer disposable property sufficient to satisfy it, or if it appears from the return made by the officer that he has not found sufficient disposable property to satisfy the judgment, section 8(b); two separate acts therefore. Judgment includes provisional sentence judgment even if the defendant has entered appearance to defend the principal case. Judgment against him in his own name. Uncertain whether court includes small claims court. If insufficient disposable property is pointed out, sheriff may refuse to attach and make return of nulla bona. Creditor may then apply for sequestration. Onus is on sequestrating creditor to establish that property pointed out was insufficient.
3. Disposition prejudicing creditors or preferring one creditor; if he makes, or attempts to make, any disposition of any of his property which has, or would have, the effect of prejudicing his

creditors or of preferring one creditor above another, section 8(c); two sets of circumstances: actual disposition of property and the attempt. If actual, it must have effect of prejudicing debtor's creditors or preferring one above another. If attempt, it must be such that it would, if completed, have the same effect. Payment to a single preferential to creditor and prejudicial to remaining? As debtor has not failed to pay any debt when due, not an act of insolvency.¹

4. Removal of property with intent to prejudice or prefer; if he removes, or attempts to, any of his property with intent to prejudice his creditors or prefer one above another, section 8(d); mere removal is sufficient and the intention of debtor, not the effect, is important.
5. Offer of arrangement; if he makes, or offers to make, any arrangement with any of his creditors for releasing him wholly or in part from his debts, section 8(e); only if it is indicative of the debtor's inability to pay his debts. If debtor offers a lesser sum in settlement and expressly or by implication admits that he owes the full debt then he commits an act of insolvency, because he tacitly acknowledges that he cannot pay the debt.
6. Failure to apply for surrender; debtor must have published a notice of surrender which has not lapsed or been withdrawn and must then have done:
 - a. Failed to lodge statement of affairs with the Master, or
 - b. Filed a statement of affairs which is incorrect or incomplete in a material respect, or
 - c. Failed to apply for acceptance of the surrender on the specified date
7. Notice of inability to pay; if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts, section 8(g); notice must be in writing. It is usually said that debtor must have intended to give notice of his inability to pay. Not his subjective intention counts, but whether a reasonable person in the position of receiver and having the same knowledge of the relevant circumstances would have interpreted the document in question to mean that debtor cannot pay his debts. Not unable, but simply unwilling, then he does not commit an act of insolvency.
8. Inability to pay debts after notice of transfer of business; if, being a trader, he gives notice in the Gazette in terms of section 34(1) of his intention to transfer business and is thereafter unable to pay debts, section 8(h). If notice is published, all liquidated claims fall due forthwith if creditor concerned demands payment. A farmer is not regarded as a trader.

Factual insolvency may be established directly, by evidence of the debtor's liabilities and the market value of his assets, or indirectly, by evidence of facts and circumstances from which the inference of insolvency is fairly and properly deducible.

To advantage of creditors

Creditors means all, or at least the general body of creditors. It must yield at least, a not negligible dividend. If after the costs of sequestration have been met, there is no payment to creditors, or only a negligible one, there is no advantage. It is necessary to compare the position of the creditors if there is no sequestration with their position if there is a sequestration. There must be a greater dividend. Sequestration is usually considered to hold no advantage for creditors, unless the debtor has assets valued in excess of R10 000, estimated cost of sequestration. The converse does not

¹ De Villiers NO v Maursen Properties

apply. Onus of establishing advantage to creditors remains on the sequestrating creditor throughout, even where it is clear that the debtor has committed an act of insolvency. More recently the courts have held that commission of an act of insolvency is not *necessarily* material to the question of advantage to creditors.

Friendly sequestration.

An application for compulsory sequestration brought by a creditor who is not at arm's length is generally referred to as friendly sequestration. Legal position:

1. Mere fact that an application is brought by creditor who is prepared to co-operate with debtor, or who is motivated partly by a desire to assist debtor, does not preclude the granting of a sequestration order.
2. Where debtor and creditor in sequestration proceedings are not at arm's length, there is considerable potential for collusion (suppressing facts, manufacturing evidence) and malpractice (reliance on non-existent claim, repeated extensions of return date for final sequestration)
3. Example of abuse: *Mthimkhulu v Rampersad*; result is that return date is extended for a number of times until genuine creditors have lost interest in the respondent and the rule is then discharged.
4. Application may be brought with sole purpose of obtaining a stay of civil proceedings, and in particular, the stay of an approaching sale in execution. The result is, initially, only a provisional order which must be served on the debtor and may be postponed and subsequently discharged at the instance of the sequestrating creditor.
5. In this light, courts have accepted that they must, as a matter of policy, scrutinise every friendly sequestration with particular care to ensure requirements of the Act are not subverted and the interests of creditors not prejudiced. Required are:
 - a. Full details of claim
 - b. Documentary evidence establishing that he has actually performed as alleged
 - c. Full details of the debtor's realisable assets, including cogent evidence
 - d. If it appears that another creditor has already attached the debtor's property in execution, proof that prior notice of the application has been given to that creditor
 - e. If he requires an extension of the return date *nisi*, an affidavit setting out proper reasons for the extension.

Unit 5 Compulsory sequestration

Application is brought by notice of motion supported by affidavit. Affidavit should contain:

- full names, status, occupation, address of sequestrating creditor, his locus standi, in case of an agent, the authorisation
- Full names, date of birth, identity number and marital status of the debtor and if married, same of his or her spouse. 17(6)(b) Matrimonial Property Act: application to sequester joint estate must be made against both spouses. Creditor must ascertain which matrimonial regime applies.
- Amount, cause, nature of claim, if secured, the nature and value of the security.
- Act(s) of insolvency committed by debtor and/or his de facto insolvency

Insolvency law

- An averment that sequestration will be to the advantage of creditors and an explanation why this will be so
- Any other relevant facts
- A statement that security will be furnished to the Master and his certificate obtained as required by section 9(3)
- A statement that a copy of papers will be lodged with Master with a view to obtaining his report in terms of section 9(4)
- A statement confirming that copies of the application will be furnished to interested parties

Save in exceptional circumstances, an applicant in motion proceedings may not introduce a new matter in his replying affidavit.

Steps prior to adjudication on application

1. Security for costs; creditor is bound to prosecute at his own expense until a trustee or a provisional trustee has been appointed. He is required to deposit security for payment of all fees and charges necessary for prosecution. A certificate must be given not more than 10 days prior to date of application and must accompany the application. Date of signature of notice is the date of application.
2. Search of Master's records; applicant's attorney must file affidavit that he searched the records in the Master's Office and it does not appear that debtor's estate is already under sequestration or that he has published notice of intention to surrender.
3. Filing of application at court; with Registrar
4. Master's report; Master makes a written report to the court of any facts which he has ascertained which would appear to justify the court in postponing the hearing or dismissing application.
5. Copy of papers to debtor and other parties; Dispensing only in cases of urgency. *Standard Bank v Essop*: a clause in a settlement agreement that entitled a creditor to reinstate a sequestration application without notice to debtor was contrary to public policy. In addition applicant is required to furnish copy to:
 - a. Every registered trade union that represents any of debtor's employees
 - b. Debtor's employees themselves and
 - c. SA Revenue ServicesApplication must furnish employees with copy by: affixing it to any notice board, or to front gate, or to front door. See also 4(2)(b) and in case of rule nisi 11(2A)(b)

Creditor has to approach court twice: first to obtain provisional order, section 10, and then to have the provisional order confirmed and made final, section 12. At provisional stage, there must be prima facie satisfaction of the requirements. At the final stage, requirements have to be proved on balance of probabilities. Following must be before the court:

- notice of motion
- Certificate that security has been given
- Affidavit of search through records
- Master's report
- Affidavit responding to report (if any)

Insolvency law

- Affidavit setting out manner in which others were informed

Court may make order sequestrating provisionally or dismissing application, or postponing hearing or may make such other order as appears to be just in circumstances, section 9(5).

The rule nisi must be served with application papers if debtor is not already served with them. If debtor is absent for 21 days from usual place of residence and business, it may be attached to the door of the courthouse and published in the Gazette.

After granting rule nisi, debtor and other interested parties may oppose by filing affidavits setting out grounds.

On application of debtor, court may anticipate return day of rule nisi provided 24 hours' notice of application has been given to creditor. Court must be satisfied that all creditors have been given notice and that none has any valid objection.

Intervention by another creditor

Fullard v Fullard: creditor is entitled to intervene. If he wants fresh sequestrating order, the other must be set aside and a new order must be issued. Intervening creditor must make out a case for sequestration, furnish security as though he were the original, but he does not have to restate facts appearing from record in existing proceedings.

Final sequestration

On return day, court must have:

- The sheriff's return of service of rule nisi
- Any opposing affidavits of debtor and/or other interested parties
- Replying affidavit of applicant
- Any affidavit by provisional trustee

Court may set aside provisional order, require further proof of allegations and postpone the hearing, but not sine die. Since the ordinary procedure for settling disputed questions of fact is by viva voce evidence, the court cannot make a final order of sequestration on papers which raise disputes of fact unless it is satisfied that oral evidence will not disturb balance of probabilities, *Mahomed v Malk*.

Court is not bound to grant final order of sequestration even if requirements are established on a balance of probabilities.

Trustee must, from first available funds of estate, reimburse sequestrating creditor for his taxed costs in sequestrating the estate, section 14(2). Costs of opposition are not paid as part of the costs of sequestration, unless the court has so ordered when granting final order, section 97(3).

As a safeguard the court may, when satisfied that the application is an abuse of the court's procedure or is malicious or vexatious, allow debtor forthwith to prove any damage which he has sustained and award compensation as deemed fit, section 15. Debtor may also or instead, institute action at common law.

Insolvency law

Any person aggrieved may appeal against the order, after obtaining leave to appeal. No appeal against either the granting of a provisional sequestration order or the refusal of such an order.

Unit 6 The legal position of the insolvent

Debtor retains a general competency to make binding agreements, but there are certain restrictions to protect creditors.

He may not make a contract which purports to dispose of any property of his insolvent estate, section 23(2). He may not without written consent, enter into contract which adversely affects his estate of any contribution thereto. Contributions to the estate become due to trustee (23(5)) only once the Master has expressed the opinion that the moneys in question (earnings for example) are not necessary for the support of insolvent and his dependants.

De Polo v Dreyer: insolvent may not enforce performance in his favour unless the Insolvency Act specifically gives him this right. Insolvent may enforce payment for work done after sequestration because section 23(9) gives him this right. The mere fact that an insolvent can enter into a contract does not have the consequence that he is entitled to sue on that contract for his won benefit. There is no nexus between the right to enter into a contract and the entitlement to receive the benefit of that contract adversely to the estate.

Effect of prohibited contract

It is voidable at the option of the trustee, not void.

Section 24(1) provides protection to third parties who contract with debtor, ignorant of his insolvency. If an insolvent purports to alienate for valuable consideration and without consent, property which he acquired after sequestration, to a person who proves he was not aware, and had no reason to suspect that the estate of insolvent was under sequestration, the alienation is nevertheless valid.

This applies only to new assets which came into insolvent's possession after sequestration. *Wessels v De Klerk*: insolvent sold immovable property that formed part of the insolvent estate and received two promissory notes in part payment. He endorsed these to a bona fide purchaser. Court held sale was not validated and therefore voidable.

Section 24(1) places onus on third party to prove his unawareness.

Earning a livelihood

Insolvent may not, without consent of trustee, carry on, be employed in any capacity in, or have any direct or indirect interest in, the business of a trader who is a general dealer or a manufacturer. Trader is widely defined in section 2, including any person who carries on any trade, business or undertaking in which property is sold, or is bought, exchanged, or manufactured for the purpose of sale or exchange, or in which building operations of whatever nature are performed. A farmer is not a trader. A milk depot is not a general dealer, nor is a restaurant business. A general dealer is someone who trades at a fixed and recognised place in all sorts of wares and not just in one kind or a few particular kinds, *S v Van der Merwe*.

Insolvency law

If the trustee refuses to consent or gives consent, any of the creditors or insolvent may appeal to Master.

Instituting and defending legal proceedings

An insolvent may sue or be sued, 23(6)-(10):

- In a matter relating to status like divorce
- Where the matter relates to a right which does not affect the insolvent estate like the right to receive maintenance from insolvent
- Where the claim is to recover remuneration or reward for work done
- Where it is for a pension to which he is entitled for services rendered
- Where it is for compensation in respect of loss or damage suffered by reason of defamation or personal injury
- Where the matter concerns a delict committed by him after sequestration of his estate.

Insolvent may bring proceedings to interfere with the administration of the estate only if he suffers an injustice due to an irregularity or a lack of bona fides on the part of the trustee or creditors.

Security for costs

If the matter is one in respect of which the Insolvency Act specifically gives the insolvent the right to sue, he cannot be required to give security for costs, unless, perhaps, the failure of the action is a foregone conclusion.

	Magistrate's court	High Court	Factors
Case flows from Insolvency Act	Plaintiff compelled if defendant claims security	Cannot claim security	May claim if action will probably not succeed
Case does not flow from Insolvency Act	Plaintiff compelled if defendant claims security	Plaintiff not compelled to lodge security	May claim security if action is reckless or vexatious

Schoeman v Thompson: where the insolvent sues or is sued personally in a matter in which he is entitled to litigate and he obtains an award of costs in his favour, judgment for costs belongs to him personally and he may dispose of it as he likes.

Ecker v Dean: Damages for maladministration on part of trustee accrue to estate, but an award of costs against the trustee enures for the benefit of the insolvent.

Holding office

An insolvent is prohibited from holding some offices if there is a possibility of prejudice to the public interest, like the NA, if a great amount of trust and responsibility is required, like a trustee, or if the possibility of dishonest business practices exists, like running a close corporation.

Common denominators are honesty and trust.

Unit 7 Vesting of the assets of the insolvent

The function of the trustee is to collect the assets in the estate, realise them, and distribute the proceeds amongst creditors in the order of preference laid down by the Act.

The estate remains vested in trustee until:

- The discharge of sequestration order by the court
- The acceptance by creditors of an offer of composition
- An order for the insolvent's rehabilitation is granted, 124(3)

The insolvent state comprises of:

- All property of the insolvent at date of sequestration, including property (or proceeds thereof) in the hands of a sheriff under a writ of attachment; and
- All property which the insolvent acquires or which accrues to him during the sequestration, 20(2), including property he recovers from the benefit of the estate where the trustee fails to take the necessary action

Whenever an insolvent has acquired possession of property which is claimed by the trustee, it is deemed to belong to insolvent estate unless the contrary is proved, section 24(2). But if a person who became a creditor after sequestration alleges that a particular asset does not belong to the estate and claims a right to the asset, it is deemed not to belong to the estate unless the contrary is proved.

Property inherited by a spouse to a marriage in community of property forms part of the insolvent estate, even if the will contains a provision specifically excluding it. Property inherited by an insolvent during his insolvency falls into his insolvent estate, notwithstanding a contrary provision in the will, *Vorster v Steyn*. Also in this case, the court held it had no discretion to award any portion of the inheritance.

Du Plessis v Pienaar NO: SCA held that debtor, not the estate, incurs the debt. So where spouses are married in community of property their creditors may recover debts from both of them, not only from undivided interest in the joint estate, but also from his or her separate estate outside the joint estate. Once the joint estate is sequestrated both spouses are insolvent and property owned by each of them becomes available to the creditors.

Wessels NO v De Jager: the insolvent merely has a competence or power to accept the bequest or nomination and he acquires no right to property or benefit until he has accepted. An insolvent may thus by repudiating ensure it passes to someone other than trustee.

Property which does not fall within the estate

- The insolvent may retain for own use apparel and bedding, as well as such household furniture, tools and other means of subsistence as the creditors may determine, 82(6).

Insolvency law

- Section 23(9): insolvent may recover for his own benefit the remuneration or reward for work done or professional services, after sequestration. Section 23(5) states that the trustee is entitled to any moneys which insolvent has received in course of his profession, occupation, or employment which in opinion of the Master, are not necessary for the support of insolvent and his dependants. The Act does not lay down a time limit within which trustee must take steps to have the insolvent divested of surplus income.
- Insolvent may recover for his own benefit any pension to which he may be entitled for services rendered by him
- Section 23(8): compensation for any loss or damage which he may have suffered, whether before or after sequestration of his estate, by reason of defamation or personal injury (meaning bodily injury and injury to personality interest, iniuria in a wide sense)
- Compensation for occupational injuries or diseases
- Benefits payable to miner
- Unemployment insurance benefits, section 33 Unemployment Insurance Act
- Insurance policies;
 - Policies covering liability to third parties; in terms of section 156 the third person is entitled to recover directly from the insurer the amount of liability. Third party is exposed to all the same defences which the insurer could have raised against the insolvent.
 - Section 156 applies also when another person took out a policy extending such cover to insolvent
 - The section is restricted to insurance against liability to third parties
 - It does not give third person greater rights against insurer than the insolvent had under the policy
 - Life policies; section 63(1) of the Long-term Insurance Act:
 - Policy benefits provided to the insolvent under an assistance, life, disability, or health policy which has been in force for at least three years and in which the insolvent or his spouse is life insured, and
 - Any assets which the insolvent acquired exclusively with such policy benefits
- Share in accrual
- Trust property / funds;
 - The assets of a duly constituted trust do not form part of his personal estate on insolvency
 - Money held in trust account does not form part, unless and until all claims against the trust account have been satisfied and a balance remains
 - Trust property invested, held, kept in safe custody, controlled or administered by a financial institution does not form part of the assets of that institution or company. Any excess left in a trust account after payment is not trust property.
- Right of labour tenant to land or right in land (Land Reform (Labour Tenants) Act)
- Property acquired with money from above sources

Disposal of estate property by insolvent

An insolvent cannot dispose of property, except section 25(3), if the insolvent brings about any act of registration (transfer, mortgage, etc) in respect of immovable property in his estate after expiring

Insolvency law

of every caveat² entered against that property by the Registrar of Deeds, the act is valid. 25(4): if an insolvent unlawfully disposes of immovable property the trustee may recover compensation from:

1. The insolvent personally
2. A person who acquired the property knowing it to be part of the insolvent estate, or
3. A person who did not know but who acquired it without giving sufficient value in return

Trustee thus has two options: claim return or compensation.

Acquisition of a new estate during insolvency: courts have held that the after-acquired estate can, in turn be sequestrated.

Unit 8 Vesting of the assets of the solvent spouse

Section 21(1): additional effect of a sequestration order is to vest the separate property of the spouse of the insolvent in the Master and subsequently the trustee, as if it were property of the insolvent estate, and to empower the Master or trustee to deal with the property accordingly. Transfer is not permanent, solvent spouse may secure the release of assets falling within categories set out in section 21(1).

Solvent spouse: the spouse married not in community of property (otherwise both are insolvent and section 21 has no application).

Harksen v Lane: Section is not expropriating property since it does not contemplate a permanent transfer of ownership. Differentiation between solvent spouse and other persons who might have dealings with insolvent is legitimate. It is discrimination, but not unfair because it does not affect a vulnerable group or a group which has suffered discrimination in the past, it is intended to achieve a worthy and important societal goal and it does not impair the fundamental dignity of the solvent spouses.

Duty of solvent spouse to lodge statement of affairs

Sheriff must serve copy of order on solvent spouse if she has a separate estate that has not been sequestrated. She must within 7 days of service, lodge statement of her affairs, verified by affidavit.

Postponement of vesting

Section 21(10): if the solvent spouse is carrying on the business of a trader apart from the insolvent spouse, or if it appears to the court that the solvent spouse is likely to suffer serious prejudice through the immediate vesting of her property, the court may exclude her property or part of it from the operation of the order.

The sort of contingencies against which the insolvent state must be protected are alienation or fraudulent abandonment of the assets by the solvent spouse, and theft of assets by a third person.

² Notice, esp. in a probate, that certain actions may not be taken without informing the person who gave the notice.

Insolvency law

The court will every time pose the question whether the arrangements proposed by the solvent spouse offer adequate protection against all the contingency that could possibly take place.

Release of solvent spouse's property by trustee

Categories:

1. Property owned before the marriage, 21(2)(a)
2. Property acquired under a marriage settlement, 21(2)(b), no need to prove that the settlement was bona fide
3. Property acquired by valid title during the marriage; a donation between spouses, although formerly invalid, is now permitted, section 22 of the Matrimonial Property Act; the fact that the insolvent made the donation with the specific purpose of shielding the asset from creditors does not affect the question, *Rens v Gutman*. The executory contract of donation (when donation is not yet carried out) must be embodied in a written document signed by the donor or by a person acting on his written authority by him in presence of two witnesses.
4. Property protected under certain other provisions: section 21(2)(d) is obsolete. Sections 44(1) and (2) of the Insurance Act is unconstitutional and thus void.
5. Property acquired with proceeds of the above, 21(2)(e).

Unit 9 Uncompleted contracts and legal proceedings not yet finalised

If solvent has carried out his side and only the other performance is outstanding, that right is an asset. Trustee may either sell it or enforce performance and then sell subject-matter of performance.

Contract not completed by insolvent

Sequestration does not suspend or put an end to the contract.

It may be said that trustee is empowered by reason of his position to terminate the contract, but he only has the power to exclude the right of the other party to invoke the remedy of specific performance.

Once he elected to repudiate or continue, he cannot change his mind. If he fails to reach a decision within a reasonable time, it is assumed he does not intend to perform in terms of the contract.

Statutory controls on the exercise of trustee's election

1. Contract to acquire immovable property; trustee must make his election within 6 weeks after receiving written notice from the other party calling upon him to do so. Failure gives other right to apply to court for cancellation and he may prove a concurrent claim for loss suffered. Tangney's case should not be followed. The correct inquiry would appear to be whether the contract is substantially one for the acquisition of immovable property.
2. Hire of property; trustee may only repudiate³ (determine) the lease by giving notice in writing to lessor. If he fails, within 3 months after his appointment, he is deemed to have repudiated. Repudiation of the lease in accordance with section 37 deprives the insolvent estate of any right

³ refuse to accept or be associated with

Insolvency law

to compensation for improvements, other than those made in terms of any agreement with lessor. Lessor has:

- a. A preferent claim for rent payable from date of sequestration to date of determination
- b. If property is immovable, a secured claim by reason of his tacit hypothec for rent owed at time of sequestration
- c. A concurrent claim in respect of any other loss sustained

Consequences of repudiating

Opposite party is precluded from obtaining an order of specific performance, but he may exercise the other remedies for breach of contract. If he accepts repudiation:

- He may recover any property handed over in performance and still owned by him
- Obligated to make restitution in accordance with normal principles of law of contract unless there is a forfeiture clause in the contract
- Concurrent claim in respect of property which he has transferred and payments which he has made, to debtor, and for the loss which he suffered because of the breach.

Consequences of abiding

Trustee steps into the shoes of the insolvent. Trustee automatically takes over any defects in the rights. Opposite party may cancel for breach even where a notice given to debtor to cure his default has not expired by time of sequestration. There is no excuse for trustee from performing obligations which fall due to be performed between the date of sequestration and the date on which trustee makes his election. Should he fail to perform and should seller in consequence thereof cancel the contract, then trustee cannot be heard to say that the seller's cancellation is ineffective.

By virtue of section 36, a seller of movable for cash, who has delivered but not been paid, cannot reclaim unless:

1. He has given notice in writing within 10 days after delivery that he reclaims, and
2. If trustee disputes, he institutes legal proceedings within 14 days of receiving notice of the objection.

Unit 10 Uncompleted contracts and legal proceedings not yet finalised

Contracts which are suspended or terminate on sequestration

1. Employment contract. During period of suspension employee is not obliged to render services and not entitled to salary or wage. No employment benefit accrues to employee, although he may receive unemployment benefits from date of suspension.

Trustee may terminate provided he consults proper parties. If parties wish to make proposals to trustee, it must be done within 21 days of appointment. Appropriate measures must include sale of the whole or any part of the business. If no measure is adopted and trustee does not bring contract to an end, contract terminates automatically 45 days after date of appointment of trustee. Employee's claim for severance benefits is a preferent one.

2. Mandate; it has been held that a contract of mandate comes to an end on the insolvency of the mandator (principal). This is an overgeneralisation: question is whether the mandate concerns a matter in which the principal can act without his trustee's concurrence.

Contracts which trustee cannot repudiate

1. Lease of immovable property; trustee is required initially to put the property up for sale subject to the lease. Huur gaat voor koop. If the highest bid is not sufficient to cover the amount due to the holder of the real right, trustee must at request of holder, sell the property free of lease. Lessee has concurrent claim for damages
2. Sale of land on instalments; right to repudiate is excluded where insolvent has:
 - a. Sold land on instalments, OR
 - b. Alienated land which has subsequently been sold on instalments
 - c. AND the land has not been transferred pursuant to the transaction in question.

This deals with a sale of land on instalments in which the purchase price is payable in two or more instalments over a period exceeding one year. Land can be disposed of under successive transactions without being transferred. The Alienation of Land Act uses remote purchaser⁴ and intermediary⁵. Main effect is:

- Where insolvent sold land, buyer may compel trustee to pass transfer, provided he arranges to pay all transfer costs plus whichever is the larger of:
 - The total amount outstanding under the deed of alienation, or
 - The sum of the administration costs, any endowment, betterment or enhancement levy etc, and the amount required to discharge the mortgage bond
- Where he alienated to intermediary, the latter is in the same position as the buyer
- Where he alienated and subsequently it was alienated to an intermediary or remote purchaser, these are entitled to transfer if:
 - They fulfil or undertake to fulfil the obligations in terms of their own deed of alienation, and
 - The obligations of every intermediary between owner and himself are fulfilled
- If transfer is not claimed and trustee abandons the agreement and realises the land for creditors, the purchaser of the land has a preferent claim in respect of the proceeds of the realisation.

The Act aims at making sure that every party who has the right to transfer is aware of his right and can exercise it. Trustee is under duty to notify every person who he has reason to believe purchased land in terms of a contract, or is an intermediary of his right to take transfer of the land. If land is sold on instalments, but does not fall within the Act, common law is applicable. Trustee becomes owner of property and must decide whether to perform or not, having regard to the best interests of creditors.

3. Sale of goods in terms of instalment sale transaction; certain writers state that trustee is not entitled to repudiate and vindicate the goods, provided the buyer continues to fulfil his

⁴ A person who purchases land in terms of a contract from another person who is not the owner of the land

⁵ A person who sells land to a remote person or a person who has alienated land which, after alienation, is sold by another person to a remote purchaser and which, at time of sale, has still to be transferred to the first-mentioned person.

Insolvency law

obligations in terms of the contract. There is no clear case authority for this view. It is submitted that trustee is entitled to repudiate the sale.

4. Resale of immovable property not yet acquired; trustee's right to repudiate is excluded where he obtains transfer of immovable property which insolvent bought and resold without receiving transfer, prior to sequestration.

Unit 11 Uncompleted contracts and legal proceedings not yet finalised

Purchase of goods in terms of instalment agreement

Special rules. Seller automatically acquires a hypothec over the res vendita. The effect of sequestration of the buyer's estate is that seller loses his right of ownership in the property and simultaneously becomes a creditor with a hypothec over the property. The type of agreement envisaged is sale of movable property in terms of which:

- all or part of the price is deferred and is to be paid by periodic payments
- Possession and use of property is transferred to the buyer
- Ownership of property passes to buyer only when the agreement is fully complied with.

It presupposes that an agreement is still in force and that the seller is the owner of the res vendita. Only possible exceptions are cases of physical impossibility and the possessor's ability to assert a right which defeats the trustee's right, see *Venter NO*. If the trustee is not in possession, he can and must obtain it. In an insolvency which proceeds normally, the trustee will carry out the elementary task of taking possession and control; that he will do so is assumed and that is why, for purposes of 84(1) it is assumed that he is in possession of the hire-purchase goods. *Hubert Davies* case is confirmed.

If debtor returns the property to seller within one month before sequestration, the trustee may demand seller to deliver to him the property or its value at the date of return, subject to payment to creditor by trustee or to deduction by creditor from value of property of difference between total amount payable and total amount actually paid.

Transaction on exchange

- Exchange may terminate the transaction in accordance with rules of exchange and trustee is bound
- Any resultant claim is limited to amount due upon termination
- Trustee is bound by rules and practices of exchange if the transaction is to be settled on a date after sequestration or settlement is overdue on that date.

Agreement on informal market

Section 35B: Master agreement. All unperformed obligations arising out of agreement terminate automatically on sequestration.

Unit 12 Meetings of creditors and proof of claims

Insolvency law

By means of a system of meetings, the insolvent's creditors establish their claims, elect the trustee and give directions to the trustee on the winding up of the estate.

First meeting: on receipt of final sequestration order, Master is obliged to convene immediately by notice in Gazette, section 40(1). Purpose: to enable creditors to prove claims, and elect trustee.

Notice not less than 10 days prior.

Second meeting: to enable creditors to prove claims, receive trustee's report on affairs and condition of estate, and give directions to trustee.

Special meetings:

- proof of claims: trustee may be called upon to convene by notice in Gazette, for the proof of claims against the estate.
- Interrogation of insolvent: provided Master gives consent, trustee may at any time and must if so required by creditor who has proved claim against estate, convene, by notice in Gazette, for purpose of interrogation.

General meeting: trustee may at any time convene; meeting called for purpose of considering offer of composition is a general meeting. Notice must state matters to be dealt with.

Date and venue: Master determines first, then trustee.

Presiding officer: in district where there is a Master's Office: the Master (or officer in public service designated); in other district, in accordance with directions by Master, by magistrate of district or officer designated.

Record of proceedings: presiding officer must keep record, certify it at conclusion and transmit it to Master. Minutes constitute prima facie proof.

Statement privileged: publication of any statement at meeting is privileged to same extent as publication of statement made in court of law.

Unit 13 Election of trustee

If one person obtains majority in value and other in number, both must be elected. Where trustee is elected at meeting not presided by Master, election is not valid until confirmed by Master.

Master may refuse to accept. If not he, when person has given satisfactory security, must confirm election and appoint by delivering certificate of appointment, section 56(2).

Master may refuse if:

1. He is not properly elected; if creditors did unlawfully, Master is obliged not to confirm and convene a new meeting.
2. He is disqualified from being a trustee
3. He has failed to give required security
4. In the opinion of the Master, he should not be appointed as a trustee to the estate in question; consider personality, experience, age and diligence, as well as complexity or otherwise of the problems presented by the estate.

If Master declines to confirm, he must notify party in writing and state reasons, section 57.

Insolvency law

Any person aggrieved by:

- Appointment of a trustee, or
- The refusal to confirm election or to appoint trustee,

may within 7 days request Master to submit reasons, section 57(7), in writing, to the Minister.

Master must comply within 7 days submitting with reasons any documents. Minister may give appropriate directions in this regard and his decision is final. This right of appeal does not exclude the right under 59 to apply to court for an order declaring a person disqualified.

Joint trustees: must act jointly and are jointly and severally liable. If one acts unlawfully without knowledge of the other, not liable. Disagreement is to be referred to Master.

Absolute disqualification:

- An insolvent
- Minor or other person under legal disability
- Person residing outside RSA
- Company, close corporation or other corporate body
- Former trustee disqualified under section 72
- A person declared under section 59 to be incapacitated for election while it lasts, or any person removed on account of misconduct
- A person convicted of theft, fraud, forgery, uttering, or perjury, sentenced to imprisonment without option of fine, or to fine exceeding R 2 000
- Person party to agreement with debtor or creditor whereby he undertook he would as trustee grant or obtain a benefit for partners not provided for by law, or
- Person who has by misrepresentation reward or the offer of any reward, direct or indirect, induced or attempted to induce, a person to vote for him as trustee or to assist in him in becoming elected

Relative disqualification (particular estates)

- Related in blood or by marriage within 3^d degree
- Person having an interest opposed to general interest of creditors
- Person acted as bookkeeper, accountant or auditor of insolvent, 12 months prior to sequestration
- Agent authorised to vote on behalf of creditor and who acts or purports to act in terms of that authority

Vacation of office:

- if his estate is sequestrated
- If an order for his detention under the Mental Health Act is issued, or he is declared incapable of managing own affairs
- If convicted of offence and sentenced to imprisonment without fine option
- If convicted of theft, fraud, forgery or perjury or uttering a forged document

Removal from office by Master (may)

- If unqualified for appointment, election was illegal or he became disqualified

Insolvency law

- Failure to perform duties satisfactorily or to comply with lawful demand of Master
- Physically or mentally incapable of performing duties satisfactorily
- Majority of creditors requested so in writing
- No longer suitable

Disqualification or removal by court:

- on application of interested party
- Court may declare
- Disqualified
- And incapable of being elected or appointed during lifetime or other period
- If person accepted (was willing to) a benefit from someone who performs work on behalf of estate, or
- The person in order to obtain votes has
 - Wrongfully omitted or included name of creditor, or
 - Given or offered consideration of any kind, or
 - Offered to abstain from investigating previous transactions of insolvent, or
 - Split claims for purpose of increasing number of votes (59)

Unit 14 Impeachable dispositions

Disposition: any transfer or abandonment of rights to property, and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation, or any other contract therefor, but does not include a disposition in compliance with an order of the court.

Property: movable or immovable, wherever situated within RSA

Beneficiary has competence or power to accept inheritance or benefit and until he does so, it is not a part of the estate

Disposition includes contract providing for alienation or abandonment of rights to property, "uncompleted disposition".

If the creditor obtained court order by fraud or by collusion with insolvent and with intention of prejudicing other creditors, the exclusion does not apply.

Disposition which may be set aside are those (Insolvency Act, voidable):

- made not for value
- Having effect of preferring one above other creditors
- Intended to prefer one above the other
- Made in collusion with other person and having the effect of prejudicing creditors or preferring one above another, and
- Made in fraudem creditorum, fraud of creditors (common law!).

Disposition not for value

Section 26(1): court may set it aside; trustee must prove insolvent made disposition, when he made it and that he received no value for it. If made more than 2 years prior, trustee must prove that

Insolvency law

immediately after disposition was made, the liabilities of the insolvent exceeded assets. Not necessary to establish intent to prejudice. Value: reciprocal benefit need not be a monetary or tangible one. It must be adequate, not trifling amount.

Payment of lawful debt is not payment without value, payer receives counter-value in form of discharge of liability.

If proved that liabilities at a any time after making a gratuitous disposition, exceeded assets by less than the value of property disposed of, the disposition may be set aside only to that extent, 26.

The exception to 26 is in a settlement of property in an antenuptial contract, if:

- disposition is immediate benefit
- Given in good faith
- Antenuptial contract must have been duly registered at least 2 years prior to sequestration

Beneficiary to a gratuitous disposition has no right to claim in competition with creditors of the insolvent estate. Exception: where the uncompleted disposition was made by way of suretyship, guarantee or indemnity. Then the promisee may compete for an amount not exceeding the amount by which the value of assets exceeded liability immediately before disposition was made.

Unit 15 Disposition which prefers one creditor above another: voidable preference

Does not have to have been made directly to the creditor concerned, it must merely have had the effect of preferring him. The test whether a creditor has been preferred is whether the proper distribution of the assets as been defeated. Section 29 enables trustee to set aside transactions made and assets alienated by the insolvent while close to insolvency, unless it was made in the ordinary course of business and it was not intended to prefer one above the other. Objective test: whether the disposition was one which would normally be entered into between solvent business persons, or whether it is in conformity with ordinary business methods adopted by solvent persons of business. Seen in light of circumstances. In *Estate Wege v Strauss* insolvent paid a betting debt which had been outstanding for a long period. Court took cognisance of the custom that betting debts must be paid immediately and held that payment was not in ordinary course of business. Both making and receiving of disposition must be lawful. No intention when insolvent made the disposition at a time when he did not contemplate or expect sequestration.

Undue preference

Under section 30: court may set aside a disposition made at any time (in section 29 it is 6 months) before sequestration if it was made with intention of preferring one above the other, and when he made it, his liabilities exceeded his assets. Test is whether his dominant, operative or effectual intention in making the disposition was to disturb the proper distribution of the assets on insolvency. Test is subjective. It stands to reason that insolvent must have applied his mind to the matter. Relevant factors:

- whether insolvent contemplated insolvency when making it
- Whether debtor was, at time of disposition, in a position to exercise free choice (no pressure)
- Whether there is any relationship between insolvent and the creditor

Balance of probabilities. Court must select most plausible or probable inference.

Section 29	Section 30
Voidable	Undue
May only be set aside if not more than 6 months before sequestration	May be set aside irrespective of when it was made
Debtor may be solvent when he makes it, provided he is insolvent immediately after	Debtor must be insolvent
Trustee may show that disposition had effect of preferring one above the other	Trustee must prove intention
Beneficiary has a defence	No defence for the beneficiary

Collusive disposition which prejudices creditors or prefers one creditor

Section 31 provides that court may set aside transaction entered into by debtor before sequestration in terms of which he, in collusion with another, disposed of his property in a manner which had the effect of prejudicing or preferring. Trustee must prove:

- disposition
- In collusion
- With that effect

In addition, trustee may recover from any person who was a party to the disposition:

- any loss which the disposition caused to the insolvent state, and
- a penalty

Disposition in fraud of creditors (actio Pauliana)

Act does not deprive creditors of right under the common law to have a disposition set aside as being in fraudem creditorum. To succeed, plaintiff must prove that:

- the transaction diminished the debtor's assets
- The person who received from the debtor did not receive his own property
- There was an intention to defraud, and
- The fraud took effect

Creditors may invoke the action to recover not only assets disposed of but also any benefits accruing from the insolvent's fraud.

Unit 16 Exemption of certain dispositions from act

Sections 26, 29 and 30 do not apply to property disposed of in accordance with the rules of an exchange or property disposed of in terms of a master agreement.

Insolvency law

Section 34(1) states that if a trader without giving notice as prescribed by the Act, transfers in terms of a contract a business belonging to him, or its goodwill or any goods or property forming part of it, the transfer is void as against his creditors for six months thereafter, and it is void against his trustee if his estate is sequestrated at any time within that period. Transfer includes transfer of possession, actual or constructive. Notice in Government Gazette and two issues of an Afrikaans newspaper and two of an English one. Publication not less than 30 days, not more than 60 before date of transfer.

- section is designed to protect the creditors of a business. It applies whether or not the trader's estate is sequestrated
- It applies only to traders
- Section applies to transfer of part of a business, in particular, the transfer of goodwill of the business, or goods or property forming part of the business.
- Section 34 does not apply to the transfer of goods or property of a business if the transfer is in the ordinary course of that business. See *Ensor NO v Rensco Motors*
- It also is inapplicable where the transfer is to secure the payment of a debt
- Where the trustee alleges that transfer of goods falls within the section, he bears the onus of proving that:
 - The goods formed part of the insolvent's business at time of transfer and
 - Transfer was not in ordinary course of business
- A transfer which has not been advertised is void as against the trustee. Trustee may disregard it and demand return of whatever assets have been delivered to the transferee
- An unadvertised transfer is not void in any absolute sense, only against the trustee. This means that it is within the discretion of the trustee to treat the transfer as void or not.

Transfer of business after proceedings instituted

Section 34(3): transfer is void as against person concerned if either:

- transferee is aware that proceedings have been instituted, or
 - Proceedings have been instituted in a HC or MC having jurisdiction in business district
-
- Section applies irrespective of whether trader have notice
 - Creditor is protected if he has instituted proceedings prior to transfer
 - Protection is not limited as to time
 - A claim to enforce liability of the trader unrelated to the business does not enjoy protection of the section.
 - Creditor is not denied the protection of the section where the agreement on which his claim is based has been amended or superseded by another agreement, provided there is a sufficiently close connection
 - Section renders only void as against creditor who instituted proceedings and to extent of his claim.

Unit 17 Types of creditors and security

Concurrent creditor: no advantage over other creditors. Payment out of free residue after any preferent creditors have been paid. Equal rank.

Insolvency law

Secured creditor: one who holds security for his claim in the form of a special mortgage, landlord's hypothec, pledge or right of retention. Entitled to be paid out of property subject to security, after payment of certain expenses and any secured claim ranked before his. May choose to rely on security exclusively, then waives by implication, any right to participate in free residue. He is then less likely to be called upon to contribute towards the costs of sequestration than one who elects to preserve his right to share in free residue.

Preferent creditor: usually reserved for he whose claim is not secured, but nevertheless ranks above claims of others. Entitled to be paid out of free residue, that portion not subject to any security claims.

Special mortgage:

- mortgage bond hypothecating immovable property
- Notarial bond hypothecating specially described movables in the Security by Means of Movable Property Act
- A notarial bond hypothecating specially described movable property registered before 1993 in terms of the Notarial Bonds Act

It excludes any other bond hypothecating movables. A general notarial bond does not qualify as special mortgage. It does confer a preference in respect of free residue.

Section 88: a bond gives no security or preference if:

- the estate was sequestrated within 6 months after lodging it with registrar
- The debt was incurred more than 2 months prior to lodging, and
- Debt was not previously secured

Section 88 is not intended to restrict passing of bonds generally. It is applicable if only a portion of the debt, and not the whole debt was previously secured.

Landlord's legal hypothec: landlord who is owed rent has a hypothec over movable property on premises. Secured claim in respect of all movables.

Pledge: delivery of movables on understanding that it will be retained by him until claim has been satisfied.

Right of retention: party has right of retention over specific property belonging to another if he has expended labour or incurred expenses in respect of property. Two types: enrichment and debtor and creditor liens.

Instalment agreement hypothec: if movables have been delivered under instalment agreement, seller acquires hypothec securing claim for balance outstanding.

Unit 18 The ranking of claims

Proceeds of each encumbered asset are applied to pay the claim secured by that asset. Any balance remaining after payment of secured creditors is combined with proceeds of unencumbered assets to pay remaining creditors. These moneys, free residue, are applied first to satisfy preferent claims and thereafter the concurrent creditors.

Encumbered assets

1. Initial costs, section 89(1):
 - a. Costs of maintaining, conserving and realising the asset in question
 - b. Trustee's remuneration
 - c. A proportionate share of costs incurred by trustee in giving security
 - d. A proportionate share of Master's fee
 - e. If immovable, any tax which is or will become due on it for period not exceeding 2 years
2. Secured claims, in order of preference, section 95(1):
 - a. Immovable property:
 - i. Enrichment lien
 - ii. Special mortgage bond
 - iii. Debtor and creditor lien
 - b. Movable property:
 - i. Enrichment lien
 - ii. Pledge
 - iii. Special notarial bond in the order in which they were registered
 - iv. Debtor and creditor lien
 - v. Instalment agreement hypothec
 - vi. Landlord's hypothec

Unencumbered assets (free residue)

1. Funeral expenses, maximum of R300
2. Death bed expenses, maximum of R300; expenses for medical attendance, nursing, and medical necessities
3. Costs of sequestration in order:
 - a. Sheriff's charges incurred since sequestration
 - b. Master's fees
 - c. Miscellaneous charges comprising
 - i. Taxed costs of sequestration
 - ii. Fee allowed by Master to person who assisted insolvent or spouse in drawing up statement of affairs
 - iii. Remuneration of curator bonis
 - iv. Remuneration of trustee
 - v. All other costs of administration
4. Costs of execution, not exceeding the proceeds of property in question
5. Salary or remuneration of employees
 - a. Salary or wages due to an employee, maximum of R12 000

Insolvency law

- b. Payment in respect of leave or holiday due to employee, maximum of R4 000
 - c. Payment in respect of paid absence, period not exceeding 3 months, maximum of R4 000
 - d. Any severance or retrenchment pay due, maximum R12 000
 - e. Any contributions owing to any pension etc, maximum of R12 000 in respect of each scheme or fund
 - f. Not included are the directors of companies and members of close corporations. They will rank as concurrent creditors
6. Statutory obligations
- a. Any amount due to Compensation Commissioner in terms of the Compensation for Occupational Injuries and Diseases Act
 - b. Any tax which insolvent deducted or withheld from for instance an employee; remuneration or royalties paid to a non-resident, but did not pay to the Commissioner for SA Revenue Services
 - c. Any amount due to Mines and Works Compensation Fund
 - d. Customs etc due in terms of Customs and Excise Act
 - e. National Supplies Procurement Act
 - f. Value Added Tax Act
 - g. Insurance Contributions Act
7. Income tax: paying any tax on income or profit and interest on tax for which insolvent is personally liable
8. Claim secured by general and special bond over movables registered before 7 May 1993
9. Claims of concurrent creditors:
- a. 103(1)(a): concurrent creditors
 - b. Secured creditors whose claims exceed the sums payable to them from proceeds of their securities and who did not state in their affidavits that they relied solely on the proceeds
 - c. Preferent creditors for the noon-preferent balance of their claims.
 - d. All in proportion to amounts owing to each of them, 103(1)(a).

Unit 19 Composition

A debtor who is in financial difficulty or whose has been provisionally sequestrated can avert insolvency by entering into a compromise with his creditors, section 119. A common-law compromise is based on contract and requires the approval of all creditors. Section 119 is a statutory mechanism under which the decision of the majority of creditors binds the dissenting minority. Disadvantage of this section is that the sequestration order is not discharged.

Common-law: if the offer is made on condition that all creditors sign it, the compromise is inchoate until all have duly signed. No liability attaches to any single creditor until all have signed and any signatory may withdrew before this.

Section 119: At any time after the first meeting of creditors, the insolvent may submit the written offer of composition to trustee. If trustee sees no likelihood that they will accept, he informs insolvent that it is unacceptable and that he proposes not to send it to them. Insolvent may appeal to master. When it is send to creditors, a meeting to consider the offer must be convened. Date of

Insolvency law

the meeting must not be earlier than 14 days, not later than 28, after posting or delivery of notice. Notice must contain specific reference to offer of composition as a matter to be dealt with at the meeting.

Terms of composition

An offer may contain any terms the insolvent sees fit to incorporate in it, including terms to effect that he should immediately be reinvested with his assets and that he should be released from further liability in respect of his debts. Requirements and restrictions imposed by Act:

- 119(7): If the offer provides for the giving of security, the nature of security should be specified fully and if it consists of a surety bond or guarantee, every surety should be named;
- 119(7): offer may not be accepted if it contains a condition entitling one creditor to obtain as against another, a benefit to which the former would not have been entitled upon distribution of the estate in the normal way
- A condition which makes an offer of composition subject to the rehabilitation of the insolvent is of no effect, 119(7). The reason is that the court has to exercise an unfettered discretion when considering an application for rehabilitation.

Acceptance of composition 119

By creditors whose votes amount to not less than $\frac{3}{4}$ in value and $\frac{3}{4}$ in number of votes of all proved creditors.

Zulman v Schultz: where creditors accept an offer of compromise, not in the honest belief that the compromise is in the interests of the estate or for the benefit of creditors generally but from feelings of pity or benevolence, or with a view to benefiting debtor, or some other collateral object, the acceptance is invalid.

Consequences of 119 composition

An offer which is accepted is binding on insolvent and all creditors in so far as their claims are not secured or otherwise preferent, 120(1). Basis of liability is not contractual since creditors may be held bound even though they voted against acceptance or were unable to vote by virtue of their not having proved claims. It is best described as statutory novation.

Restoration of property to insolvent

No transfer or delivery is necessary; the reversion takes place by operation of law if it is a term of the composition.

Restoration of property to solvent spouse

Composition is not binding on creditors of solvent spouse and on acceptance, the property of the spouse which is vested in trustee must be restored, 122.

Trustee to frame accounts, administer composition and report to creditors, 123

Any moneys to be paid must be paid and done as far as practicable through trustee, but he is under no duty to a creditor who fails to prove his claim before the trustee has made a final distribution among proved creditors. Trustee must investigate the affairs and transactions of the

Insolvency law

insolvent prior to insolvency and to report on them to creditors in the usual way, notwithstanding composition.

Right to prompt rehabilitation

Where the offer is accepted, the insolvent may be entitled immediately to apply for his rehabilitation.

Unit 20 Rehabilitation

Rehabilitation takes place automatically, by lapse of a prescribed period of time, but the insolvent usually asks the court to rehabilitate him before expiry of the prescribed period.

Automatic after 10 years from date of provisional sequestration unless otherwise ordered.

Each Registrar must enter a caveat against the transfer of all immovables, or cancellation or cession of any bond belonging to or registered in name of insolvent. This remains in force until rehabilitation.

There is no right to rehabilitation, it is a matter of discretion. Ex parte Le Roux: court is accordingly as concerned with the probable future behaviour of applicant as it is with his past.

When may rehabilitation be sought?

1. Composition of not less than 50 cents in the rand: immediately, 124(1).
2. Lapse of prescribed period after confirmation of first account
 - a. If estate has been sequestrated before, period is 3 years
 - b. If convicted of a fraudulent act in relation to insolvency, 5 years from date of conviction
 - c. If Master has recommended rehabilitation, order may be obtained within 4 years
3. No claims proved after 6 months
 - a. At time of application, there is no claim proved against estate;
 - b. He has not been convicted; and
 - c. His estate has not been sequestrated before
4. Full payment; at any time after confirmation by Master of a plan of distribution providing for the payment in full of all proved claims with interest calculated, 124(5)

Preliminary steps to take:

1. Notice of intention to apply.
 - a. In case of composition: not less than 3 weeks before application, notice in Gazette and by post to trustee
 - b. In case of lapse of prescribed period: six weeks' notice of intention by advertisement in Gazette and notice to Master and trustee
 - c. In case of no proved claims, same as under b
 - d. Full payment: not less than 3 weeks prior, notice to Master and trustee. No advertisement in Gazette!

To calculate: excluding first and last day.

Insolvency law

In notice in Gazette:

- number of estate
- Full name and description of insolvent, identity number, date of birth and place of business or residence
- Date of sequestration
- Date and time of application and name of court to which
- Ground of application

Court may condone omissions and errors, but will do so only if there is no prejudice to interested parties.

2. Security for costs; insolvent must provide, to amount or value of R500.

Trustee's report to Master: any facts which in his opinion would justify the court in refusing, postponing or qualifying the rehabilitation, 124(4).

Court's discretion

1. Postponement; where further information is needed or criminal proceedings against insolvent are pending, or as a mark of disapproval of applicant's conduct.
2. Granting subject to condition; There must be special circumstances which make it just and equitable to impose the condition and it must be properly motivated. Court will not impose condition that insolvent pay unpaid claims simply because he has managed to accumulate an estate during sequestration and is in a position financially to discharge claims. Section 127(3) provides that among conditions that may be attached, the court may require him to consent to judgment being entered against him for payment of the unsatisfied balance of a debt which was or could have been proved against his estate
3. Refusal: examples are failure to keep proper books of account, highly obstructive in administration of estate. When refusing, court will generally indicate some period after which application may be renewed.
4. Considerations in favour of unconditional rehabilitation; only small debts, no blame, no opposition from creditors, trustee or Master

Effect of rehabilitation

Relieve of every disability resulting from sequestration and discharge from all debts which were due or cause of which arose before sequestration. It does not (!) reinvest insolvent with his former estate, except:

1. Where a composition provides different, 120(2), and
2. Where the basis for rehabilitation is that no claims were proved within 6 months of sequestration, 129(2)

Declaratory order regarding property

Insolvent applying for rehabilitation, or thereafter, may ask for order declaring he is entitled to an asset. To obtain the order:

Insolvency law

1. Publish notice of intention in Gazette
2. Service copy of notice on Master, trustee and all creditors whose claims have not been satisfied
3. In application he must show that trustee and creditors have full knowledge of the facts had he must give full information to establish that the property was acquired adversely to the trustee.

Unit 21 Partnership and sequestration

Debtor is defined as including a partnership or estate of partnership.

Voluntary surrender: application by all partners or their agents, 3(2).

Following need not apply:

- a partner not residing in RSA
- A partner en commandite
- A special partner defined in Special Partnerships Limited Liability Act

Surrender of partnership and individual estates of partners may be dealt with in single application, 13(3).

Compulsory sequestration: at same time court is bound to sequester private estates of every member of partnership, except:

- a partner not residing in RSA
- A partner en commandite
- A special partner defined in Special Partnerships Limited Liability Act

As the partnership itself never becomes an insolvent, the simultaneous sequestration is not just procedural but vital. Court will not sequester if partner undertakes to pay the partnership debts within period fixed by court and gives security for payment. Where private estate is unable fully to meet costs of sequestration payable out of that estate, balance must be paid out of assets of partnership, 13(2). Converse does not apply (!).

A partnership estate may be compulsory sequestered on grounds of an act of insolvency committed by one of the partners only if latter acted in his capacity as partner.

Sequestration of partner's estate ipso iure terminated the partnership which must as a result be wound up.

Composition by partnership: probably a new partnership takes the place of the old one. At common law it ceases to exist.

Composition by partner: acceptance of an offer does not take effect until 6 weeks have expired as from the date of a written notice of acceptance given by the trustee of the private estates to the trustee of the partnership estate, 121(1).

Proof of claims: in principle, partnership assets are applied to payment of partnership debts and separate estate assets to payment of separate estate debts. Commissioner of the SA Revenue may prove claims for income tax and interest against a partnership estate for amounts due by partners. Administration of partnership and partner estates must be kept entirely separate.

Insolvency law

If, after all the estates have been administered, a surplus remains in a partner's separate estate, the trustee in the partnership estate is entitled to this surplus for the benefit of partnership creditors, 49(1).

Partnership is ipso facto terminated upon sequestration and it can therefore never be rehabilitated, 128.

Unit 22 Winding-up of companies

Winding-up means the procedure by which a company's assets are sold, its debts are paid and any money left over is divided amongst the members according to their rights.

Modes:

- winding-up by court, initiated by an application to court
- Voluntary, creditor's or a members' voluntary winding-up, 343(2). Initiation by special resolution of members.

By court

Jurisdiction: Provincial or Local Division of the HC, 12(1). Grounds (344):

- special resolution, passed by a general meeting of members, section 199, and lodged with Registrar for registration, 200.
- Premature commencement of business; court may wind up if company has commenced business before Registrar has certified that it was entitled to do so.
- Failure to commence or continue with business, period 1 year
- Public company's members less than 7
- Loss of capital; if 75% of its issued share capital has been lost or become useless for its business
- Inability to pay debts as described in 345. A company is deemed to be unable to pay its debts when:
 - A creditor (at least R100 due) has left a demand for payment which has been neglected for 3 weeks
 - A warrant of execution issued on a judgment against the company has been returned by the sheriff with endorsement that he could not find disposable property sufficient to satisfy judgment
 - It is proved to the satisfaction of the court that the company is unable to pay its debts
- Dissolution of external company; if dissolved in country in which it was incorporated, or has ceased to carry on business, or is carrying on business only for purpose of winding up its affairs.
- Just and equitable; courts do not regard this ground as some limitless or catch-all ground and are reluctant. Instances found:
 - Where the main object for which the company is formed is not possible of being attained
 - Where the company's objects are illegal
 - Where there is a justifiable lack of confidence in the conduct and management of company's affairs
 - Where deadlock cannot be resolved except by winding up

Insolvency law

- Where the company is a quasi-partnership and circumstances exist which would be good grounds for dissolving a partnership
- Where the minority shareholders are oppressed by the controlling shareholders

Parties who may apply: 346

1. The company; difference of opinion whether it must be authorised by special resolution of members or whether it may act on resolution of directors. Former view is preferable
2. One or more creditors, including contingent or prospective creditors (claim will only become enforceable in the future). Claim need not be equal or exceed any particular amount, as it must in an application for compulsory sequestration.
3. One or more members, but not unless he has been registered as such in the register of members for at least six months prior to the date of application. Further not on grounds of special resolution, inability to pay debts or dissolution of external company. Ways of initiating winding-up:
 - a. Special resolution with member's voluntary winding-up
 - b. Special resolution: with a creditor's voluntary winding-up
 - c. Special resolution that company should apply
 - d. One or more members may apply to court
4. Any or all of the above
5. The master, usually to make available the procedure for examination and enquiry under 417 and 418
6. A provisional or final judicial manager

Steps prior to application

1. Security for costs;
2. Master's report to the court any facts which may justify postponing or dismissing application
3. Notification of interested parties: trade union, employees, SA Revenue Services and company

Powers of the court

In practice not directly a final order, but provisional order and rule nisi. It may of course make final order. Discretionary power, but limited where the creditor has a debt which the company cannot pay, in which case creditor is entitled to a winding-up order. Court need not be satisfied that it will be to advantage of creditors. Reason for refusing is essentially that application amounts to abuse of procedure. To resist application successfully, company does not have to establish that it would prove or succeed with its defence; it merely has bona fide to allege facts which if proved, would constitute a good defence to the claim. Court may instead of granting order, direct the company to obtain a certificate from Registrar in case of commencing without.

Voluntary winding-up

If it has adopted a special resolution to that effect, 349 and that resolution has been registered by Registrar.

Members' voluntary winding-up: only if the company is able to pay its debts in full. 350(1): to proceed with resolution is void, unless prior to registration of the resolution:

Insolvency law

- security is furnished for payment of debts within 12 months from commencement for the winding-up, or
- Master dispenses with the security on production of both an affidavit by the directors that there are no debts and a certificate by the auditor that to the best of his knowledge and belief, and according to the records, it has no debts.

Creditor's voluntary winding-up: may be resorted to where the company is unable to pay its debts.

Consequences of winding-up

Deemed to commence at time of presentation to court of the application, section 348.

Winding-up establishes concursus creditorum. Company does not lose its corporate identity (353) nor does it lose its assets unless so ordered. But:

- directors become functus officio
- Company's property is deemed to be in custody and under control of the Master until provisional liquidator has been appointed
- Company may not continue with its business except in so far as necessary for its beneficial winding-up

After commencement:

- any transfer of shares without liquidator's permission is void
- If the company is unable to pay debts, every disposition of its property not sanctioned by the court is void.

Once order is made or special resolution (voluntary) is registered, all civil proceedings by or against the company are suspended until appointment of liquidator. Any attachment or execution put in force against assets is void. After appointment, civil proceedings may continue or commence. This includes execution proceedings put in force before commencement of the order.

Notice of order must be given in Gazette. Registrar must submit copy to certain Sheriffs and Registrars of Deeds. If voluntary, within 28 days after registration of resolution, notice in Gazette and certified copy together with:

- in case of voluntary members' winding-up: certified copy of any resolution passed by the company nominating a liquidator
- In case of creditor's voluntary winding-up, two certified copies of a statement setting out affairs of company.

Liquidator

After order or registration, Master may appoint any suitable person as provisional liquidator, 368.

In case of members' voluntary: person nominated in the resolution

In case of creditors' voluntary and court order, person nominated by first meeting of creditors and the initial meeting of members, 369.

Insolvency law

Aggrieved person may call upon Master to submit his reasons to Minister. Latter may confirm or set aside decision.

Persons disqualified:

372

- insolvent
- A minor or any other person under legal disability
- Person declared incapable of being appointed for dishonesty or abuse of position
- Person removed from office of trust by the court or who has been disqualified from being director
- Body corporate
- Person who has been convicted of theft, fraud, forgery, uttering a forged instrument, or perjury and has been sentenced to imprisonment without the option of a fine or a fine exceeding R20
- Person who by misrepresentation or reward induced or attempted to induce any person to vote or nominate him
- A person not residing in RSA
- A person who has acted as director, officer or auditor of the company within 12 months before winding-up
- Agent authorised to vote for or on behalf of creditor at meeting who acts or purports to act under such authority

Removal from office:

- if not qualified, or has become disqualified
- If he has not performed his duties satisfactorily
- If his estate has become insolvent or he has become mentally or physically incapable
- Majority in number and value of creditors, or majority of members, has requested so
- If master is of opinion that the liquidator is no longer suitable.

If master does not remove, court may, but only if satisfied that removal of liquidator will be to general advantage and benefit of all persons interested in the winding-up.

Impeachable transactions

340: every disposition which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside as well and the provisions of the law of insolvency apply mutatis mutandis.

Unit 23 Judicial management and compromise

A company unable to pay debts has two alternatives to winding-up: judicial management and compromise between company and creditors.

Judicial management is resorted to where there is a potential to recover. Court may grant order (427) when:

- company because of mismanagement or any other cause is unable to pay debts
- Company has not become or has been prevented from becoming a successful concern

Insolvency law

- There is a reasonable probability, not a mere possibility to recover.

Onus on applicant. A judicial management order is a special concession and is granted only in exceptional circumstances. Same parties who may apply for winding-up may apply for judicial management.

Compromise: possible common-law, but it is difficult to secure consent of each creditor. Where a compromise is proposed between a company and its creditors the court may on application order a meeting, 311. Court must be satisfied that the offer of compromise is prima facie fair and reasonable and that it should be placed before the creditors for their consideration. If compromise is agreed to by majority in number representing $\frac{3}{4}$ in value, court may sanction compromise or arrangement. Court retains a discretion to refuse even if the required majority voted in favour of it. Important factor is whether company will be able to trade successfully after compromise. If approved by court, it binds all creditors, 311.

Unit 24 Winding-up of close corporations

A close corporation may be wound up voluntarily or by court. Voluntarily by members' winding-up or creditors' winding-up. It cannot be put under judicial management and cannot conclude a statutory compromise, but it may enter into composition, section 72 Close Corporation Act.

Voluntary: if all its members so resolve at a meeting, 67(1). Members must sign written resolution. Copy, in duplicate with prescribed fee must be lodged with Registrar within 28 days. Resolution takes effect only once registered.

Court order: Jurisdiction HC and magistrate's court.

Grounds, section 68

- resolution of members (50%)
- Failure to commence or continue with business (1 year)
- Inability to pay debts is deemed, 69:
 - Creditor, at least R200, has left demand and this was neglected for 21 days thereafter
 - Any process on a judgment has been returned by sheriff with endorsement that he did not find disposable property to satisfy judgment
 - It is proved to satisfaction of the court

Court may wind up if it appears that this is just and equitable that it should be wound up. Not if an alternative remedy, like an order under section 49 offers solution.

Appointment of liquidator

Master, in accordance with policy determined by Minister, must be suitable, natural person, as soon as practicable after provisional order has been made or resolution registered. He may decline to appoint nominee if he was not properly nominated or is disqualified from being appointed. Any person aggrieved may within 7 days request Master to submit reasons to Minister. Master may

Insolvency law

appoint person as co-liquidator if he was nominated as such at first meeting of creditors and gives security.

Setting aside payments to members

A member who received payment by reason of membership within 2 years before commencement must repay, unless he can prove that:

- assets after payment exceeded its liabilities
- Payment was made while company was able to pay its debts as they became due in the ordinary course of its business and
- The payment did not in fact render the corporation unable to pay its debts

Salary or remuneration must be returned if paid within 2 years prior. Master must consider payment and if, in his opinion, it was not bona fide or reasonable in circumstances, he must direct that it be repaid.

Liquidator's duty to investigate personal liability: 80. Establish whether any member, former member is jointly and severally liable with the corporation for one or more of its debts, 81.

Composition

Any person may submit written offer to liquidator. If unlikely that creditors will accept or if liquidator has insufficient information at his disposal to make a recommendation, he must inform the offeror in writing that the offer is unacceptable and that he does not propose circulating it to creditors, 72. Written representations may be made to Master. When circulating, liquidator must inform all creditors of meeting. Meeting may be held only once a final winding-up order has been made. Once accepted, composition binds every person who had notice and was entitled to vote at meeting, provided that

- it was accepted by $\frac{2}{3}$ of creditors
- Payment under composition is made or secured as specified in the offer
- The rights of secured or preferent creditors are not prejudiced unless waived in writing

Composition may provide for winding-up to be set aside by court. If so, offeror may apply to court for relevant order. Must advertise intention 3 weeks prior in Government Gazette and service copies on Master, Registrar and liquidator. May be opposed by creditor or any interested person on following grounds:

- composition unfairly harms interests of creditor
- Meetings for consideration of the composition involve material irregularity
- Insufficient or materially inaccurate information was disclosed
- There is another ground which the court may deem sufficient.