CASES SUMMARY

Insolvency Law
MRL301-M

Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly NO 1984 (1) SA 160(W)	
Facts	A company in liquidation had a claim for R 1,6 million, which was due and payable, against the Summerly Trust who: i) committed an act of insolvency in terms of Section 8(g) of the Insolvency Act; and ii) was insolvent in any event. This company proceeded with an application for a provisional sequestration order on an urgent basis as it was to the advantage of the creditors. There had been sufficient service of the papers on the trustee of the trust and the one provisional liquidator of the applicant company had *locus standi* to apply for the provisional sequestration of the trust estate. Furthermore, the necessary security bond had been duly lodged and also annexed to the court papers.
Legal question	Could a trust be regarded as a debtor in the usual sense of the word for purposes of Section 2 of the Insolvency Act and, therefore, be sequestrated?
Finding	The provisional sequestration order was granted.
Ratio decidendi	As no South African case seemed to have dealt with this issue, the court relied on the Southern Rhodesian case of *Ex parte Milton* where the voluntary surrender of the estate of an administrative trust created by contract was approved. The trust fell within the definition of a "debtor" and could be described as a debtor in the usual sense of the word. Through its trustee, the trust could borrow money and, as a property owner, be liable for rates and taxes. Creditors would be paid only from the trust's property and the trustees incurred no personal liability. A *concursus creditorum* could not be established by sequestrating the estates of the donor of the trust property, the trust beneficiaries, or the trustee. The Rhodesian court also relied on a South African decision concerning a club which owned property apart from its members, who were not liable for its debts beyond the amount of their subscriptions. Such a club was a debtor within the meaning of the Insolvency Act, and its estate could therefore be sequestrated. The court further gave the common-law meaning of "any body corporate" as an association of individuals capable of holding property and of suing and being sued in its corporate name, or a *universitas* having the capacity to acquire certain rights apart from the rights of the individuals which form it, and having perpetual succession (ie, continuous existence) and held that a trust could not be regarded as a body corporate. The court held that a trust is not a juristic person and so it may not be liquidated in terms of the Companies Act. A trust, however, qualified as a debtor in the ordinary sense of the word as it can clearly possess assets and incur liabilities, which are evident from the founding affidavit, and therefore a trust estate may indeed be sequestrated.
***Ex parte* Henning 1981 (3) SA 843 (O)**	
Facts	In an application for the surrender of the applicant's estate, it appeared that his wife, to whom he was married out of community of property, made a monthly contribution from her salary to pay his creditors. A creditor opposed based on the following grounds: i) that the application didn't comply with the requirements of Section 6(1) because the applicant's assets didn't cover costs of sequestration payable from the free residue; ii) that the respondent would be much better off if the application for voluntary

	surrender were refused and the applicant were compelled to continue paying the respondent for 9 years; iii) that the applicant was approaching the court to avoid paying respondent's claim; iv) that the statement of affairs that lay for inspection did not contain the personal information (Annexure VIII).
Legal question	Can failure to comply with any prescribed formalities be condoned and should the wife's contributions be taken into account to determine whether sequestration would be to the advantage of the creditors?
Finding	The voluntary surrender of the applicant's estate was accepted.
Ratio decidendi	The court held the following in respect of the respondent's grounds: i) That even if sequestration costs had to be available at the time of the application, the applicant's assets would probably fetch R 1,030 and would therefore cover the sequestration costs which the parties had agreed would run to about R 1,000. Where there are sufficient assets to cover costs of sequestration and administration at time of an application for voluntary sequestration, there's proper compliance with Section 6(1). ii) That the test was not to compare the respondent's position at the time of immediate voluntary surrender of the applicant's estate with the respondent's position if the monthly debt payments were continued for 9 years. The question was merely whether the court papers showed whether voluntary surrender would be to the advantage of all the creditors. Nobody could force the applicant's wife to work if she did not want to work and, if she stopped working there would scarcely be sufficient to meet the requirements of the family. Accordingly, this factor is too vague or uncertain to take into account in evaluating whether sequestration will be to the advantage of the creditors. iii) That, on the facts, the argument of applicant's avoidance lacked substance. If the applicant had wished to avoid paying the claim, it would have suited him and his spouse for her to stop working and sit back without paying anything, so that his creditors could sequestrate his estate. iv) It was clear that no creditor had been prejudiced by this defect in deciding whether to oppose the application. In the circumstances, court was prepared to condone the defect.
Epstein v Epstein 1987 (4) SA 606 (C)	
Facts	The applicant in an application for a provisional sequestration order was respondent's mother, whom he owed R 6,000.00 and to whom he wrote a letter notifying her of his inability to repay her loan, thus committing an act of insolvency. Respondent's father-in-law paid an amount of R 2,500.00 into trust account of applicant's attorneys distribution among respondent's creditors after the sequestration costs had been met. Aim was to prevent respondent's imprisonment. Sequestration costs being estimated at R 1,500.00, a sum of R 1,000.00 would then remain for distribution. This is an example of a "friendly sequestration".
Legal question	Is "friendly sequestrations" precluded from a provisional sequestration order being granted?
Finding	No, but court should scrutinise such applications with particular care in order to protect the interests of creditors. Application for a provisional sequestration order was refused.
Ratio decidendi	In a "friendly" sequestration, debtor avoids complying with preliminary formalities for an application for voluntary surrender. Accordingly, creditors other than the "friendly" creditor don't get advance notice of the application nor can they take notice of debtor's financial position, as there is no statement of affairs that lies for inspection. For these reasons there is a risk that a sequestration order may be made in circumstances where it would in fact not be in the interests of the group of creditors as a whole. That

	is why the courts pay special attention to the requirement of advantage to creditors when it appears that the applicant's primary motivation in bringing the application is to assist the debtor. Also, where a family member's offered of a small contribution as the "price" for granting a sequestration order, it was held that it should reluctantly be approved. This procedure conflicted with the principles underlying the Act and the role which it assigned to the court. It amounted to confronting the court with a not very wholesome "carrot" to induce it to grant relief if it could not, and would not, otherwise do so. The court should resist such inappropriate cajolery. Although the first two requirements of granting a provisional order were satisfied, the third requirement relating to advantage to creditors posed a problem. The concurrent creditors in this case wouldn't have received anything out of the estate, because the Receiver of Revenue had a preferent claim with respect to arrear income tax, which would in any event have swallowed up everything that might have remained after payment of the costs of sequestration.
Amod v Kahn 1947 (2) SA 432 (N)	
Facts	Respondent had a claim against applicant's son, which was larger than the claim of applicant against respondent. Sequestration would mean that respondent would no longer have a claim against the son. In the circumstances, sequestration would not have been to the advantage of the creditors as a group and the application was dismissed. The applicant appealed.
Legal question	Could a court exercise its discretion in the granting of a sequestration order?
Finding	Yes, the court exercised its discretion by refusing an application for compulsory sequestration because the applicant was clearly abusing the process. The applicant's correct remedy was to take out a warrant for the execution of his judgment against the debtor, and then have the debtor's claim against the applicant's son attached in payment of the judgment debt.
Ratio decidendi	Even if it were assumed that sequestration would have been to the advantage of the creditors, it was clear that the applicant had brought the application with the exclusive aim of preventing the debtor from enforcing his claim against the applicant's son. That amounted to an abuse of the court process, and for that reason the court should in any event exercise its discretion against the applicant.
Vorster v Steyn NO en andere 1981 (2) SA 831 (O)	
Facts	In applicant's application for rehabilitation, he also asked for a declaratory order relating to property he inherited from his father. His father's will have a proviso that, should the applicant be insolvent at the time of his death, the bequest should be held in a trust until such time as the applicant is rehabilitated.
Legal question	i) What happens to the asset (property), inherited by the insolvent while his estate is under sequestration and the insolvent has not yet been rehabilitated? ii) Does the court have discretion to grant a declaratory order entitling the insolvent to a part of property inherited on rehabilitation?
Finding	The rehabilitation was granted, but the declaratory order refused.
Ratio decidendi	i) Court held that the proviso in his father's will was a *nudum praeceptum* (of no legal force) and that the envisaged trust would have been invalid. Section 20(2) provides that property acquired during the period of insolvency will be part of the insolvent's estate and thus the property inherited by the insolvent falls into his estate notwithstanding a contrary provision in the testator's will. The court agrees with **Mars: The Law of Insolvency in South Africa** that an inheritance will not fall into the insolvent estate if the testator appoints another beneficiary who should receive the inheritance if the original beneficiary is insolvent. A second possibility is for the will to provide that, in case of insolvency of the beneficiary, the executors will have the exclusive discretion to grant the inheritance to another person.

	ii) It was argued that Section 127(2) of the Insolvency Act gives the court a discretion to make such an order part of a rehabilitation order, even if a creditor objects to it. The court correctly rejected this argument. It is clear that Section 127(2) empowers the court to make a rehabilitation order subject to conditions which burden the insolvent (eg, the payment of a further dividend), but it does not empower the court simply to award an asset that forms part of the insolvent estate to the insolvent personally, thereby benefiting him. The court does not have a discretion to grant the applicant an order declaring him entitled to any part of inherited property.
Estate Wege v Strauss 1932 AD 76	
Facts	During the period immediately preceding sequestration of Wege, he made payments to Strauss in respect of betting debts and a loan in his position as a bookmaker of Tattersall. The trustees of Wege's insolvent estate sued Strauss for payment thereof and they submitted that: i) a wagering contract is null and void; ii) no value was received, because a payment which is made in terms of an invalid agreement cannot be regarded as value; iii) the fact that a wagering agreement is unenforceable plays an important role. The trustees appealed the original decision of the court.
Legal question	Is a payment of a wagering debt a disposition without value in terms of Section 26?
Finding	The appeal was dismissed. Payment of a wagering debt is not a disposition without value merely because the party who received payment gave nothing in return. The "value" of the other party lies in the fact that this party would have paid, if he/she had lost the wagering bet.
Ratio decidendi	i) A bet is not illegal at common law and it is also not null and void in the sense that it gives rise to no claim at all. However, the parties to the bet can't enforce it in court and null and void merely means that courts will not assist parties to enforce a bet. ii) The argument that no value was received, because a payment which is made in terms of an invalid agreement cannot be regarded as value, was rejected. Court held that the word "value" carries its ordinary meaning. Under a racing bet, the person placing the bet promises to pay money to the bookmaker if a certain horse loses, and the bookmaker promises to pay money if the horse wins. Each of these mutual promises is made in return for the other promise. Clearly, the bookmaker's promise may be a valuable right or asset even though its value may be speculative. iii) Fact that the parties couldn't enforce a bet in a court didn't mean that the promise to pay was of no value. Law doesn't regard a bet as being established on a base cause (a *turpis causa*). It's neither illegal nor immoral to bet on horseraces and horseracing is subject to regulations. Appeal court quoted judge in the trial court, who indicated that even though the bookmaker's promise couldn't be enforced in a court it could be enforced by other means which were just as effective. Under the rules of Tattersall's, a bookmaker would lose his rights as a member of Tattersall's if he failed to pay as promised. So the bookmaker had a powerful incentive to carry out his promise. In addition, under the rules of Tattersall's, the bookmakers' association guaranteed Wege's bets up to £500. If Wege won his bet he was therefore practically certain of obtaining his money.
Pretorius' Trustee v Van Blommenstein 1949 (1) SA 267 (O)	
Facts	Insolvent purchased a lorry from the defendant and sometime later pledge it to secure payment of the price, because the seller had sued for the price and was only prepared to agree to an extension, if real security existed. Trustee of insolvent estate applied for the disposition to be set aside either as a voidable preference in terms of Section 29 or as an undue preference in terms of Section 30. Defendant raised the defence of ordinary course of business and no intention to prefer in terms of Section 29.

Legal question	i) Could pledging of the lorry by the insolvent, in an effort to gain extra time in which to pay his debts and save his estate, be regarded as in the ordinary course of business? ii) Had the insolvent intended to prefer a creditor?
Finding	It was dismissed as: i) Although it wouldn't normally fall within ordinary course of business for a debtor to give a pledge on a debt he had earlier incurred, here the insolvent had no choice and, therefore, it was found to be in the ordinary course of business. ii) His position was by no means hopeless and he did not contemplate sequestration.
Ratio decidendi	i) An objective test was used to determine whether the transaction took place in the ordinary course of business and court held that it was entitled to consider all circumstances. Court, in considering the transaction in surrounding circumstances, looks at whether the transaction is one which two solvent business persons would conclude. It wasn't necessary to ask what the insolvent's liabilities and assets were at the time of the disposition or by which means he raised the funds for the disposition. Legislature had also deliberately separated the intention to prefer from this element. ii) Insolvent's state of mind was held to be the determining factor and is a question of fact. He expected to stave of insolvency if he could obtain an extension of time in which to dispose of his main assets, the plot; the only method in which he could obtain the desired facilities from a pressing creditor was to pledge the lorry.
Hendriks NO v Swanepoel 1962 (4) SA 338 (A)	
Facts	The defendant, Swanepoel, sold 800 sheep to Viviers and granted several extensions for payment to him. Finally, they agreed that Swanepoel will buy 726 of the sheep back at the same price Viviers bought them for despite the fact that they were in a much poorer condition. Viviers gave Swanepoel a postdated cheque for the shortfall, but he died within the next month and his estate was sequestrated. The trustee of the insolvent estate applied for the agreement to be set aside as a voidable preference. The trial court found in favour of the defendant and the trustee appealed.
Legal question	Was the agreement reached in the ordinary course of business?
Finding	The appeal succeeded as it was not in the ordinary course of business.
Ratio decidendi	An objective test must be used to determine whether the transaction took place in the ordinary course of business and no regard must be given to the fact that insolvent's liabilities exceeded his assets or an intention to prefer. In considering the transaction in the surrounding circumstances, a Court should look at whether the transaction is one which two solvent business persons would conclude. The transaction was found to be extremely disadvantageous to Swanepoel and, viewed from the viewpoint of a solvent business person; it wasn't the sort of transaction to be done in the ordinary course of business.
Pretorius NO v Stock Owners' Co-operative Co Ltd 1959 (4) SA 462 (A)	
Facts	Froneman, who speculated with cattle, delivered 193 head of cattle to Jones, the manager of the respondent company. Froneman had been in debt with the company for several months and they agreed that the cattle will be sold and the proceeds first applied in payment of this debt. The trustee in the insolvent estate of late Froneman applied for the disposition to be set aside on the ground that it preferred respondent. The trial court dismissed the action and the trustees appealed.
Legal question	Did the insolvent intend to prefer the creditor?
Finding	The appeal was upheld as the insolvent intended to prefer the creditor.
Ratio decidendi	Froneman, who was dead at the time of the trial, couldn't be called to give evidence on

	whether he had contemplated sequestration or intended to prefer the creditors. By making a disposition of his head of cattle to Jones, the insolvent deprived himself of almost all of his stock and he lacked the means to continue his speculating business. Between the date of the disposition and the date of his death, he didn't seem to try to continue his speculating business. Instead he made promises that he knew he could not perform. Court held that from facts, Froneman must've known that sequestration was inevitable and, even though no special friendship or relationship existed between Froneman and Jones, he deliberately chose the respondent for payment before all his other creditors.
Ensor NO v Rensco Motors (Pty) Ltd 1981 (1) 815 (A)	
Facts	MacKenzie's Garage carried on business as a dealer for Mazda products, including vehicles and spare parts, as a franchise. MacKenzie's was in financial difficulties and they were warned against liquidation by their attorney. The franchise agreement for the Mazda products was cancelled and they consequently sold their entire stock of Mazda parts to the franchising company. MacKenzie's was subsequently liquidated and the trustee of the insolvent estate (the appellant) requested the disposition to be set aside on the ground of Section 34.
Legal question	Was the alienation by an insolvent company of certain goods just before its liquidation in the ordinary course of that business?
Finding	The appeal was dismissed as it was in the ordinary course of business.
Ratio decidendi	Section 34 provides that unless certain formalities are complied with, the transfer in terms of a contract of a business of goods or property forming par thereof, will be void for a period of 6 month as against the creditors of the trader and against the trustee of his estate. The only exception to this rule is where the transfer took place in the ordinary course of business. The court held that the sale of all its Mazda spare parts by a dealer after cancellation of the franchise agreement to sell Mazda cars, was what a solvent dealer would have done after losing the franchise.
Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd 1982 (1) SA 103 (A)	
Facts	A lends money to B. C guarantees the debt. D indemnified C against possible loss thereunder. Later, D passes surety bonds over certain of its property in favour of C. B defaults. D is placed under liquidation within 6 months after lodging the bonds C pays A. C claims against D (in liquidation) under the indemnity, relying on the bonds for a preference. The liquidators of D dispute any preference and lodge an application for a declaration that the bonds do not confer any preference. The application was dismissed and they appealed.
Legal question	When did D 'incur a debt' to C within the meaning of Section 88: when D indemnified C against the possible loss or when B defaulted and C had to pay A?
Finding	The appeal was dismissed as the debt was incurred when C had to pay A, which was not more than 2 months prior to the lodging of the bonds but in fact after and preferent status was conferred.
Ratio decidendi	Section 88 provides that a bond registered to secure a previously unsecured debt which was incurred more than 2 months before the bond was lodged for registration, will not confer a preference on the bondholder if the estate of the debtor is sequestrated within 6 months after such lodging. The court held that a surety bond wasn't registered for a debt already in existence, as the surety would only become liable for payment if the principal debtor were to default, which made this a conditional liability. Such a bond would therefore not be hit by the sanction of Section 88 if it was lodged for registration more than 2 months after the deed of suretyship had been entered into, because the actual debt was only incurred after lodging of the bond when the principal debtor defaulted and the surety was required to pay.

Prinsloo en 'n ander v Van Zyl NO 1967 (1) SA 581 (T)	
Facts	An offer of composition by the insolvent, Prinsloo (1st applicant), had been accepted by a simple majority in value of creditors, but not by a three-fourths majority in number or in value. The presiding officer at the meeting of creditors erroneously noted the composition as having been accepted, the insolvent was reinstated with his assets and subsequently entered into an agreement with Otto (2nd applicant) in terms of which the latter took possession of part of the immovable property in the estate. The error was discovered, the insolvent informed and the proposed sale of the immovable property by the trustee was advertised. Applicants obtained a provisional interdict against this sale and a rule *nisi* was issued calling on the trustee to show reason why the composition should not be accepted as valid. This judgement was given on the return day of the rule *nisi*.
Legal question	Would a composition be valid if the requirement that three-fourths in value and number of creditors, who have proved their claims, must accept the offer of composition in terms of Section 119(7) have not been met?
Finding	The interdict was not granted.
Ratio decidendi	The offer of composition was accepted only by a majority in value and did not comply with Section 119(7). So there was no valid acceptance and thus no valid composition.
Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W)	
Facts	In an application for the winding up of the respondent company, difficulties arose regarding the validity of the grounds for liquidation on which the applicant relies. The respondent is alleged to be indebted to the applicant in respect of the hire by the respondent of certain plant and equipment. Applicant alleged that respondent was unable to pay its debts in terms of Section 344(h), read with Section 345(1)(a), of the Companies Act.
Legal question	Can the ground of just and equitable be relied on as an alternative that the company is not able to pay its debts?
Finding	Application was refused and the attempt to rely on ground of just and equitable as an alternative to ground that company was unable to pay its debts, proved unsuccessful.
Ratio decidendi	The inability to pay referred to in Section 345(1)(a) is the one if, after a demand having been served on the company by leaving the same at its registered office, requiring it to pay the sum so due, it fails for 3 weeks thereafter to pay, secure or compound for it to the reasonable satisfaction of creditor. A summons isn't a demand as contemplated in Section 345(1)(a) as it is a document in which the sheriff is ordered to convey certain information to the debtor and not a demand to pay addressed to debtor himself. Section 344(h) provides for winding up of a company on the ground that it appears just and equitable to the court, without giving any indication of what could be regarded as such and the courts accordingly still have a discretion to identify new situations. Some categories have been laid down in this case for that is deemed just and equitable: i) If the main object of why the company was formed can no longer be attained. It is said that the company's *substratum* has disappeared. ii) If the companies objects are illegal or it was formed to defraud the persons invited to subscribe for its shares. iii) If there is justifiable lack of confidence in the way that the directors are managing the affairs. iv) There is a deadlock in the companies' management. v) The company is a quasi-partnership and grounds exist on which a partnership could be dissolved. This situation is encountered where the personal relationship between the members is based on good faith. vi) If the minority share holders are oppressed by the controlling shareholders.

	If the applicant's real reason for the application is the company's inability to pay its debts he should rely on that ground. He may not allege that it will be to the advantage of the creditors if the company's affairs are investigated by a liquidator, and that it will therefore be just and equitable to wind up the company.
Makhuva v Lukhoto Bus Service (Pty) Ltd 1987 (3) SA 376 (V)	
Facts	Application was made by 3 directors and shareholders of the company that Lukhoto be placed under judicial management. It was opposed by the remaining 2 directors and shareholders of the company. Applicants submitted that the company was prevented from becoming a successful concern by mismanagement.
Legal question	When may a company be placed under judicial management?
Finding	Application denied as not all the circumstances required by Section 427 existed.
Ratio decidendi	Court laid down 2 principles for judicial management: i) Judicial management may not be used merely to make a company more profitable than it is. Accordingly, the company must have financial problems before such an order may be considered. This also appears clearly from the requirements set out in section 427(1) of the Companies Act. ii) It won't be regarded as just and equitable to grant the judicial management order if the company's problems may be solved by "internal remedies". Examples of these internal remedies are to be found in the Companies Act: removal of a director - Section 220; on the legal remedy against oppressive or unreasonably prejudicial behaviour towards a member - Section 252; and on the institution of a derivative action by a member on behalf of the company – Section 266. "Internal remedies" are granted to a member of the company and a creditor's application judicial management won't be dismissed merely because the applicant has not exhausted his internal remedies and he, as an outsider, has no internal remedies to rely on.