

INSOLVENCY LAW: *¹

1 GENERAL PRINCIPLES

- 1.1 Insolvency law contemplates two scenarios, one where an individual person finds himself in insolvent circumstances and, second where a corporate entity finds itself in insolvent circumstances.
- 1.2 The insolvency of an individual person is governed by the Insolvency Act, 24 of 1936 ("**Insolvency Act**") and the insolvency of a corporate entity is governed by the Insolvency Act as read with the Companies Act, 61 of 1973 ("**Old Act**") and the Companies Act, 71 of 2008 ("**New Act**") and the Close Corporation Act, 69 of 1984, as amended by the New Act.
- 1.3 An individual person is liable to be "sequestered" and a corporate entity is liable to be "liquidated" or "wound-up".
- 1.4 A trust, being managed by individuals [trustees], albeit in a representative capacity as trustees, is liable to be sequestered and not liquidated.
- 1.5 An individual or trust is liable to be sequestered if it commits an act of insolvency as contemplated in the Insolvency Act or if actually insolvent, i.e. liabilities exceeds assets.
- 1.6 A corporate entity is liable to be liquidated if it is commercially insolvent (i.e. unable to pay its current creditors), or if it is factually insolvent (i.e. liabilities exceed assets) or in instances contemplated in section 344 of the Old Act or in instances where the Insolvency Act are applicable, such as section 8 (b) or (g).
- 1.7 The court has discretion to grant either a provisional or final winding-up order at the first hearing of the liquidation application, but a provisional

¹ *¹ **DISCLAIMER:** this text contains generalisations, is not exhaustive of all the relevant criteria or issues, there may be exceptions to that stated and does not constitute legal advice to the reader. The reader is strongly advised to consult an admitted attorney and not to rely on this text as being sufficient for the reader's purposes.

sequestration order must first be granted. If a provisional liquidation/sequestration order is granted the court will order a future date on which the final sequestration order may be granted. The provisional liquidation order has to be served on the insolvent corporate entities registered office and be served personally on the sequestered insolvent, and the order must be published as directed.

- 1.8 A creditor may **not** utilise the sequestration/liquidation process to enforce payment of a debt that is genuinely disputed on lawful grounds.
- 1.9 Prior to the hearing of the liquidation or sequestration application, the application must be served on the Master of the High Court, SARS, on the recognised trade union, if any or on every employee of the debtor to be liquidated.
- 1.10 A creditor may intervene in the liquidation/sequestration application and either support or oppose the granting of a liquidation/sequestration order.

2 **SEQUESTRATION OF AN INDIVIDUAL**

- 2.1 The Insolvency Act contemplates eight different acts of insolvency, the two most common acts of insolvency being the judgment debtor's failure to satisfy a judgment debt in favour of his creditor or a debtor's written notice to his creditor confirming his inability to pay the debt owed to his creditor.
- 2.2 Only a creditor of the debtor may bring a sequestration application. The application must be brought in the High Court having jurisdiction over the debtor and the creditor must establish that the debtor is either factually insolvent or there exists an act of insolvency foreshadowed in the Insolvency Act, for example section 8(b) of the Insolvency Act.
- 2.3 The essential criteria to obtain a sequestration order are:
 - 2.3.1 a monetary debt of not less than R100.00 must be owed by the debtor to his creditor;
 - 2.3.2 the person must have committed an act of insolvency (see paragraph 2.1 above) or be demonstrably insolvent (i.e. liabilities exceed assets);

- 2.3.3 the High Court issuing the sequestration application must have jurisdiction over the individual to be sequestrated, namely the debtor must either reside or work within the court's jurisdiction;
- 2.3.4 the sequestration application, must be served personally on the debtor, being an application that affects the debtors status;
- 2.3.5 there must be a demonstrable benefit to all creditors to have the debtor's estate sequestrated, that is there must not be a negligible dividend payable to all known creditors, however, the court has a discretion to order the sequestration even if there is no financial advantage to creditors, but the court does not lightly exercise its discretion in favour of the applicant creditor.
- 2.4 The person to be sequestrated and any creditor of such person have the right to oppose the granting of the sequestration order.
- 2.5 If the court grants a sequestration order it will be provisional and be returnable on a future specified date. The provisional sequestration order must be served on the person sequestrated and there are additional requirements to publish the order.
- 2.6 On the return day, the provisional sequestration order may be made final, unless successfully opposed by the person to be sequestrated or by any of his creditors.
- 2.7 The effective date of the sequestration is the date of the grant of the final order of sequestration.
- 2.8 Pursuant to a granting of a provisional sequestration order the Master of the High Court appoints a trustee to attend to the winding-up of the sequestrated person's estate. The trustee is duty bound to act fairly in regard to all creditors and the sequestrated person. The trustee's appointment and conduct is governed by the Insolvency Act.
- 2.9 The solvent spouses assets vest - in terms of section 21(1) of the Insolvency Act - in the Master of the High Court and ultimately in the trustee of the estate of the spouse placed under sequestration. The solvent

spouse has to apply – on affidavit - to the trustee of the insolvent spouse for the release of her/his assets, duly supported by cogent evidence.

2.10 Sequestration has the effect that certain transactions entered into by the insolvent prior to the sequestration of his estate may be set aside at the instance of the trustee or by a creditor. The relevant sections in the Insolvency Act are sections 26, 29, 30 and 31. Generally this is preceded by an enquiry in terms of section 152 of the Insolvency Act whereat the insolvent and any other person deemed necessary by the Master may be interrogated before a magistrate.

2.11 If there are insufficient funds in the insolvent estate to pay the costs of sequestration, all creditors who prove claims are liable to make good any deficiency.

2.12 Insolvency is terminated by rehabilitation by court in terms of section 129 of the Insolvency Act. Rehabilitation has the effect of discharging all debts of the insolvent which were due, or the cause of which had arisen, before the sequestration, provided they did not arise through any fraud on his part, and relieving him of every disability resulting from the sequestration.

3 LIQUIDATION OF A CORPORATE ENTITY

3.1 Sections 8(b) (c) (d) (e) (g) and (h) of the Insolvency Act are of application to the winding-up of companies as being grounds for bringing a winding-up application, in addition to the grounds contemplated in sections 344 and 345 of the Old Act.

3.2 The debtor must owe the creditor not less than R100 before the creditor may bring a winding-up application.

3.3 The liquidating creditor does not have to demonstrate that there will be a pecuniary advantage to creditors on the winding-up of the debtor.

3.4 The High Court issuing the liquidation application must have jurisdiction over the debtor, namely its principal place of business or its registered office must be in the court's jurisdiction.

- 3.5 The effective date of the liquidation is the date on which the application is first issued by the court.
- 3.6 On the granting of a provisional or final liquidation order – as the case may be - the Master appoints a liquidator to wind-up the affairs of the liquidated entity.
- 3.7 The liquidator or a creditor may seek the Master's consent to conduct an enquiry into the affairs and management of the liquidated entity. The enquiry may either be a secret enquiry in terms of section 417 of the Old Act or it may be held in terms of section 415 of the Old Act, which is not secret in nature.
- 3.8 Any director or officer of the liquidated entity or any person known or suspected to have in its possession any property of the liquidated entity or believed to be indebted to the liquidated entity or is deemed capable of giving information concerning the trade, dealings, affairs or property of the liquidated entity may be subpoenaed and interrogated. The general purpose is to try and locate assets of the liquidated entity and to establish if any individual person may be personally held liable for the debts of the liquidated entity.
- 3.9 In this regard, a director or manager [prescribed officer] of the liquidated entity may be held liable to pay creditors of the liquidated entity and such person may be liable to criminal prosecution as contemplated in the Old Act and in the New Act, which may entail a monetary fine or imprisonment or both.
- 3.10 If there are insufficient funds in the insolvent estate to pay the liquidators fees the liquidating creditor and those creditors who proved claims in the insolvent estate are liable for the liquidator's fees in proportion to their proved claims.