

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 86

VOLUME 1

Project 63

REVIEW OF THE LAW OF INSOLVENCY

CLOSING DATE FOR COMMENT: 29 October 1999

Please do not repeat comments already discussed in this paper

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

During 1996 the Commission published a Draft Insolvency Bill and Explanatory Memorandum as Discussion Paper 66. The comments on Discussion Paper 66 are discussed below. The Draft Bill in Volume 2, indicates the changes to the Bill to take account of comments on the previous Bill, further research and subsequent developments. This discussion paper has been prepared to elicit responses from key parties on these changes. **Please do not repeat comments already dealt with in this discussion paper.** Following an evaluation of the responses and any final deliberations on the matter the Commission may issue a report on this subject which will be submitted to the Minister of Justice for Tabling in Parliament. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views.

For the convenience of the reader a summary of the changes proposed in the Bill appear on page 7 below.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **29 October 1999** at the address appearing on the previous page.

The researcher allocated to this project, who may be contacted for further information, is Mr M B Cronje. The project leader responsible for this project is the Honourable Mr Justice R H Zulman.

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1 Background

1.1 The principal Act dealing with insolvency in South Africa is the Insolvency Act 24 of 1936. This Act replaced the Insolvency Act 32 of 1916 but did not amend it drastically. The 1936 Act has been amended more than 20 times, but it has never been reviewed as a whole.

1.2 Six interim reports were submitted and seven working papers were published for comments. During 1996 a draft Insolvency Bill and Explanatory Memorandum was published as Discussion Paper 66. Numerous commentators furnished comments on the working papers and the Discussion Paper 66. It is obvious that many commentators went to a lot of trouble to submit comprehensive comments. More than 350 pages of comments were received on Discussion Paper 66 alone (the names of the commentators on Discussion Paper 66 are listed in paragraph 8 below). The Commission values public participation in its work and appreciates the time and trouble taken by commentators to comment on the matter.

1.3 A project committee was appointed to assist with the investigation. The names of the members of the project committee are reflected in the introduction above. The committee held 27 meetings during the course of the investigation. The Commission expresses its appreciation for the valuable inputs by members of the project committee.

1.4 For ease of reference the proposed Insolvency Bill is contained in a separate volume. A summary of the changes proposed in the Bill is given in paragraph 4 below. A clause by clause explanatory memorandum at the end of this paper expounds the changes to the present law in detail.

2 Guidelines for reform

2.1 The general principles of a number of legal systems and reform proposals were considered in search of innovative solutions to the problems experienced with the law of insolvency. There are shifts in emphasis and many differences in detail in the provisions applicable in different legal systems. In the few cases where it seemed advisable, provisions were adapted for use in South Africa. With the obvious exception of countries where private enterprise is only now beginning to develop, the similarity of the general principles found in different systems of insolvency laws is surprising. Upon reflection it is clear that similar solutions are used because of similar problems

experienced worldwide. There is a general need for efficient procedures to deal with assets of the insolvent estate. If liquidation ensues, a fair distribution of the proceeds of the assets must be effected as soon as possible. All systems contain measures to investigate the affairs of the insolvent and to set aside some transactions entered into to the detriment of the general body of creditors. Systems require from debtors to co-operate but afford them an opportunity for a fresh start.

2.2 The general guidelines proposed by commentators (paragraph 3 below) did not reveal any startling solutions for existing problems. The aim of this investigation is to balance and satisfy the needs of the different stakeholders. The major stakeholders are the commercial community in general and creditors in particular; insolvent debtors; insolvency practitioners and the government. Because of conflicting interests it is often difficult to strike a fair balance between the different interests. *Effective, speedy and fair procedures are important needs of stakeholders and formed the basis for this review.*

2.3 The value of reforms of a practical or technical nature should not be underestimated. It is in the interest of the economy and society as a whole that insolvency problems should be solved fairly and efficiently. The following example illustrates the point: a seemingly innocuous proposal that directions by creditors should be obtained early in the liquidation process is expected to have a marked effect on finalising insolvencies and limiting the time that funds are caught up in insolvent estates; especially in difficult economic times it is important that money should be available to generate growth and should not be entangled by tiresome and time consuming procedures.

2.4 The constitutionality of the provisions proposed in the Bill was considered carefully.

3 General guidelines proposed by commentators

Role of the Master and others

3.1 A commentator says because the Master of the High Court (the "Master") fulfills such an important role creditors are less interested and involved. As a result creditors do not exercise proper control over the administration of the estate and shift the responsibility to finalise the administration to the Master. Another commentator says the existing Act leans heavily on "policing" by the State. The Master's office is burdened with the duty to make many decisions

with the result that creditors have perhaps become too complacent and too reliant on the Master's office to protect their interests. He suggests a move away from criminalisation and towards self enforcement, financial incentives and civil liability; greater self regulation under the control of creditors and easing the burden of the Master; and a move towards self regulation of the liquidator's profession by professional bodies. Another commentator submits, with reference to overseas systems, that the Master's burden should be lightened by providing that the Master should not be intimately concerned in the appointment of liquidators and the examination of their accounts. He concludes that the Master's office functions should be reduced as far as possible.

3.2 By contrast, another commentator says standards have dropped and more and more claims are instituted against fidelity funds; professional people go insolvent; in more sophisticated Western Countries the general public has better and cheaper access to legal assistance; South Africa has a largely unskilled and poor population and the Master provides an invaluable service to aggrieved creditors; without the Master to monitor the administration of estates liquidator's fraud will become rampant; the Master's is a unique and valuable part of our Roman Dutch heritage and a necessary protection for our people.

3.3 The implications of relying on the Master to protect the interests of creditors are illustrated by the decision of *Wilkins v Potgieter* 1996 (4) SA 936 (T). Judge Roux says that there is a clear duty on the Master to study the relevant documents and to correlate them with the draft account; only if the Master is satisfied should he or she permit an account to be advertised and to lie for inspection. (The *Wilkins* decision is discussed in paragraph 90.2 of the explanatory memorandum below.)

3.4 The Master is placed in a difficult position if on the one hand it is expected of him or her to become involved in the administration of the estate and on the other it is expected of him or her to act as an impartial arbitrator. It is naive to think that the Master can exercise proper control over liquidators by examining documents in his or her possession - paper doesn't blush! Even if checking documents was an effective control measure the Master does not have the staff to do it properly and it takes a lot of time to try and do it properly while creditors wait for their money.

3.5 The Bill places more responsibilities on creditors and reduces the role of the Master, as appears from the following examples. Clause 53 limits the appointment of liquidators to members of professional bodies who maintain and enforce rules for ensuring that their members are fit and

proper persons to be appointed as liquidators and meet acceptable requirements for education and practical experience and training. The Master's discretion in connection with the appointment of liquidators has been removed (see the discussion in paragraphs 32.2 to 32.5 of the explanatory memorandum). In terms of clause 41 the liquidator instead of the Master or a magistrate may preside at most meetings. Clause 87(9) of the Bill and items 3.4 and 6.1 of Schedule 1, Form D require vouchers or proved claims upon the request of the Master and not as a matter of course. The reduction of the Master's role does not exclude an investigation of so much of a liquidator's work as the Master deems necessary when complaints are received about the work of a liquidator. In terms of clause 58(2) the Master may suspend a liquidator from office while complaints or charges against a liquidator are investigated.

Liquidation before all the assets have been dissipated

3.6 A commentator says that perhaps the most serious problem in practice is that insolvency procedures start too late when there is very little left for creditors. He suggests that it should be made easier to sequestrate; the equivalent of the United Kingdom Administration Order should be introduced; and directors should be motivated to "surrender" the company much sooner by providing far more effective remedies and penalties, supported by presumptions and so forth. Another commentator says too often action is taken too late. He submits that the Act should aim at facilitating the liquidation procedure at a time when the debtor is still possessed with assets and is not a hopeless case. The Insolvency Act should assist the creditor to recover money on the one hand and on the other hand assist the honest debtor to "wipe the slate clean" and start afresh. He says disregard for fundamental principles of integrity, honesty and fair dealing of the persons involved requires attention with a view to cleaning up the practice of insolvency law and raising the ethical standards of those who deal in the field.

3.7 It is agreed that it is undesirable that there are little or no assets in many estates when the estates are liquidated. However, there appears to be no magic solution to this problem. Reference is made in paragraph 3.5 above to the limitation of appointments by clause 53 to members of professional bodies. Measures to encourage a fresh start for the insolvent, decriminalisation of the insolvency law, more effective penalties and improved measures to ensure that some creditors do not obtain an unfair advantage are highlighted in paragraph 4 below under the summary of changes proposed in the Bill.

Sequestration without diminution of status and other matters revisited

3.8 The basic premises and principles proposed by a commentator can be summarised as follows:

- (a) Sequestration should merely take away the insolvent's power to dispose over assets and limit his right to incur further debts and should not punish the insolvent by, *inter alia*, diminution of status. If this is the case, sequestration can be dealt with administratively by the Master's Office. On the strength of an investigation authorised by the court it may be ordered that the effects under the present Act will follow.
- (b) All creditors should be bound by the provisions of the Insolvency Act, including the Land Bank.
- (c) Preferences in favour of institutions such as the State (income tax), the Workmens' Compensation Commissioner, etc, should be limited to the absolute minimum.
- (d) Formalities should be limited to the minimum and should be as simple as possible.

3.9 With regard to paragraph (a), a debtor should not be absolved from debts without the cooperation of creditors unless some or other form of investigation has been conducted into the reasons for the inability to pay debts. Schedule 4 of the Draft Bill contains proposals for a composition with creditors which will avoid the ordinary effects of sequestration. It is submitted that further provision for sequestration without diminution of status is not advisable.

3.10 In Working Paper 61 *Statutory Provisions that Benefit Creditors* (par 5.6 on page 12) it was submitted that statutory provisions which prefer creditors are undesirable and cannot be justified merely because revenue is utilised for the benefit of the public or because the State or State assisted bodies are involved. See the discussion in paragraph 7 below of statutory provisions outside the Insolvency Act that benefit creditors. The preferences in favour of State institutions are discussed with the comments on clause 80 of the Bill, where the abolition of most of the preferences is proposed.

3.11 The view that formalities should be limited to the minimum and should be as simple as

possible is supported and was borne in mind when the provisions of the Draft Bill were considered.

4 Summary of changes proposed in the Bill

4.1 The explanatory memorandum below expounds the changes to the present law in detail. Some of the changes are highlighted here.

Generating interest by creditors

4.2 The lack of interest displayed by creditors in the administration of insolvent estates is notorious. The active participation by creditors is important because they often have information that is of value for the liquidator. It is expected from creditors to protect their own interests. They are in a better position than the State or its officials to supervise the liquidation and the liquidator's administration of the insolvent estate. It has been submitted that creditors should, as the interested parties, be allowed to deal with the problem of insolvency with as little as possible interference by the State or its organs.

4.3 The Bill accepts as a general premise that creditors should accept responsibility for the protection of their own interests. In the important matter of the appointment of liquidators the Bill removes the discretion of the Master to appoint a liquidator if a liquidator is nominated or elected by creditors (clauses 32 and the discussion of the clause in the explanatory memorandum).

4.4 One of the reasons for the lack of interest displayed by creditors is that concurrent creditors seldom receive any benefit from the insolvent estate. A survey conducted by the Commission in the office of the Master of the High Court, Pretoria, revealed that concurrent creditors received dividends in only 28,6% of the sequestrations included in the survey. In 40,6% of the cases creditors were required to pay a contribution. (Working Paper 29 Schedule 3. See *Hillhouse v Stott: Freban Investments v Itzkin: Botha v Botha* 1990 (4) SA 580 (W) 586F.) The following provisions of the Bill encourage creditors to participate in the administration of insolvent estates:

4.4.1 The requirement that there is reason to believe that the liquidation of the estate of the debtor will be to the advantage of creditors has been retained (clauses 7(1)(b) and 8(1)(c)). If the first meeting is held before a final liquidation order is issued, the

liquidator's report must deal with the question whether the liquidation will probably be to the advantage of creditors and this question must be considered at the meeting of creditors or a subsequent meeting of creditors (clause 38(6)).

- 4.4.2 In order to discourage liquidations which are not to the advantage of creditors, the security to be given by a creditor who applies for liquidation is extended to cover all costs in respect of the application that might be awarded against the applicant and all costs of liquidation that are not recoverable from other creditors (clause 4(2)(c)). The requirement to give security for costs is extended to applications by the debtor for the liquidation of his or her estate (clause 3(3)(b)). The proposed procedure for a composition between a debtor and creditors before liquidation (Schedule 4) or other debt recovery procedures in the Magistrates Courts can be considered in cases where the value of the assets is not sufficient to ensure that liquidation will be to the advantage of creditors.
- 4.4.3 In addition to the existing requirement of notice of the first meeting in the Government Gazette, provision is made for personal notice to creditors (clause 38(2)). The notice in newspapers that the liquidation account will be open for inspection has been replaced by personal notice to creditors (clause 88).
- 4.4.4 The right of creditors to institute proceedings for the setting aside of dispositions if the liquidator fails to take such steps is extended to any proceedings for the recovery of a debt, asset, compensation, penalty or benefit of any kind for the benefit of the insolvent estate (clause 25(1)).
- 4.4.5 In order to expedite the administration of estates and the payment of dividends to creditors, provision is made for the appointment of a (provisional) liquidator in every estate soon after the granting of the liquidation order (clause 32(2)). The liquidator must convene a first meeting of creditors within 60 days after his or her appointment where directions in respect of the administration of the estate can be given by creditors (clause 38) in order that the realisation of assets and the administration of the estate can proceed. At present several months elapse after the first sequestration order before a meeting can be held to obtain directions by creditors. If the majority in value of creditors voting at the meeting is not satisfied with the liquidator's report the liquidator must submit a report to an adjourned or subsequent meeting or refer the report to the Master who may give such

directions as he or she deems appropriate (clause 38(9)).

- 4.4.6 One of the reasons why concurrent creditors seldom receive a dividend from the estate, is the preferences payable from the free residue to the State and other creditors and the special rights enjoyed by the State and other persons. The only preferences payable out of the free residue retained in the Bill are those in favour of employees; contributions to employee funds; and claims for arrear maintenance payable in terms of a court order (clause 80). In cases where the debtor failed to submit returns to the Receiver of Revenue substantial claims are often submitted against insolvent estates by the Receiver with the result that nothing remains for ordinary creditors. Clause 62(7)(d) provides that the liquidator is entitled to be apprised in writing of the basis for any estimated assessment made in terms of any revenue law.

Measures to curb unfair advantage to some creditors

- 4.5 The Bill contains proposals to ensure that some creditors do not obtain an unfair advantage as a result of the liquidation.

- 4.5.1 The ordinary rule before insolvency that a creditor must prove a claim on a balance of probabilities is at present undermined by the rule that *prima facie* proof of a claim against an insolvent estate is sufficient. The liquidator is given the right, if authorised thereto by the Master or a resolution of creditors and having afforded the claimant the opportunity of substantiating the claim, to reduce or disallow a claim proved at a meeting (clause 46(4)). The creditor retains the right to establish a claim by means of an action at law (clause 46(5)).
- 4.5.2 The right to prove a claim in respect of the capital amount of a debt which becomes payable after liquidation is retained, but such a debt is reduced by twelve percent of that amount from the date of the liquidation to the date on which the debt becomes payable (clause 49(3)).
- 4.5.3 A creditor who, after liquidation of the estate, received payment of a debt proved against the estate from a source other than the insolvent estate must notify the liquidator of such payment (clause 51) to enable the liquidator to ensure that no creditor receives more than 100 cents in the Rand.

- 4.5.4 The rule that concurrent creditors are entitled to interest after liquidation on their claims only if their claims have been paid in full, is extended to the concurrent part of secured claims (clause 75(5)).
- 4.5.5 In terms of clause 76, a creditor under a financial lease agreement is, like a suspensive sale creditor, treated as a secured creditor and must prove a claim.

Debtor's opportunity for a fresh start and duty to act honestly and assist in winding up of estate

4.6 It is accepted that a debtor may become insolvent through no fault of his or her own and that such a debtor should be given the opportunity to make a fresh start. Creditors sometimes contribute towards insolvencies by giving credit to debtors who cannot repay it. A balance must be struck between the rights of creditors and giving a debtor an opportunity to make a fresh start. It is, however, expected from debtors to act honestly and assist in the winding up of their insolvent estates.

- 4.6.1 The property excluded from an insolvent estate is brought into line with property not subject to attachment for payment of debts (clause 11(6)). The liquidator has the power, if authorised by the Master or by resolution of a meeting of creditors, to make further assets available to the insolvent (clause 62(4)(1)).
- 4.6.2 The insolvent may follow any profession or occupation and may collect for his or her own benefit any remuneration for work done or professional services rendered after liquidation, until the Master has certified that earnings received by the insolvent are not required for the support of the insolvent and dependants and should be paid over to the liquidator of the estate (clause 15(2)). The insolvent must keep a detailed record of all assets and income received and expenses paid. For a period of one year after liquidation the insolvent must send a monthly statement of receipts and expenses to the liquidator and thereafter must, for as long as he or she is insolvent, send an annual return to the liquidator. The liquidator may at any time request particulars of income and expenses. (Clause 15 (3)(a).) A hearing can be held before a magistrate to obtain evidence on the insolvent's earnings and expenses for support (clause 15(5)(a)). If an emoluments attachment order issued by a court in respect of a judgment debtor prior to the liquidation of the estate is in force when the estate is liquidated, such order shall remain in force for

a period of six months from the date of the liquidation order. The employer upon whom the emoluments attachment order was served shall in accordance with the order make payments to the liquidator for the benefit of the insolvent estate (clause 15(6)).

- 4.6.3 The value of a debtor's assets to the debtor is usually considerably greater than the amount which the assets would realise on a forced sale. The fact that creditors would probably have to wait a long time for dividends in the ordinary course also plays a role. If a debtor obtains money somewhere or is able to conclude satisfactory arrangements for the payment of debts a composition may be more advantageous for both the debtor and creditors than the liquidation of the debtor's estate. The required votes for acceptance of an offer of composition is relaxed from 75% in value and 75% in number of all creditors who have proved claims to a majority in number and two-thirds in value of the concurrent creditors who have voted on the offer (clause 71(4)). At present the offer may be made at any time after the first meeting, which is usually held a month or two after the final sequestration order. To expedite matters and prevent unnecessary proceedings, it is provided that an offer can be made at any time after the issuing of the first liquidation order after the insolvent has submitted his or her statement of affairs (clause 71(1)). Provision may be made in a composition for the discharge of a provisional liquidation order or the setting aside of a final order upon the acceptance of an offer of composition (clause 71(6)). If creditors accept a composition the debtor may apply for rehabilitation without any requirement of a percentage dividend payable to creditors (clause 96(1)(b)). Provision is also made for an offer of composition before liquidation (Schedule 4).
- 4.6.4 The court may not grant a rehabilitation order until 10 years after the liquidation of a debtor's estate if the court is satisfied on the strength of a certificate by the Master or other evidence that the debtor has intentionally impeded, obstructed or delayed the administration of the insolvent estate (clause 97(2)). Claims which are not discharged by rehabilitation have been expanded by adding to claims arising out of fraud, claims arising after an insolvent obtained credit by giving false information or after an insolvent falsely concealed insolvency in respect of a previous liquidation (clause 99(1)(b)).

Measures against dishonest or incompetent liquidators

- 4.7 In the light of consistent complaints that some liquidators act dishonestly or that they are

not competent, the Bill contains the following provisions:

- 4.7.1 Only a person who is a member of a professional body recognised by the Minister of Justice and who is permitted to act as a member of that body in terms of its rules may be appointed as liquidator (clause 53(1)(a)). The Minister may from time to time publish the name of a recognised professional body if it appears to the Minister that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member is a fit and proper person to be appointed as liquidator and meets acceptable requirements for education and practical experience and training (clause 53(2)). The Minister may revoke the recognition of a professional body if it no longer satisfies the requirements (clause 53(3)).
- 4.7.2 The Master may, after a liquidator has been charged with an offence or on the strength of a complaint made to him on affidavit, pending an investigation into the suitability of a liquidator to remain in office, suspend the liquidator from office and, if necessary, appoint an interim liquidator for the preservation of the estate (clause 58(2)).
- 4.7.3 The Master may (as is provided in the Companies Act) appoint a person to investigate the affairs of a liquidator (clause 68(2)).

Constitutionality of provisions

- 4.8 The following provisions that may breach the Constitution have been removed:
- 4.8.1 Discrimination between husbands and wives in respect of the protection of benefits under antenuptial contracts (clause 19(1)).
- 4.8.2 A review by the Minister which bars a review by the courts (clause 54(3)).
- 4.8.3 A provision that the Master is not required to specify his reasons for refusing to appoint a particular person as liquidator (clause 54(2)).
- 4.8.4 Presumptions in connection with criminal offences (clause 101).
- 4.9 The definition of "spouse" in clause 1 applies to persons of the same sex living together

as if married.

4.10 Enforcing summonses and giving of evidence are in accordance with decisions of the Constitutional Court (see the explanatory memorandum on clause 68A).

Expedition of administration

4.11 The following provisions are intended to expedite the administration of insolvent estates:

4.11.1 The court is given a discretion to issue a final liquidation order without a rule **nisi** (clause 8(1)).

4.11.2 The existing practice that a liquidator may attach assets himself and need not wait for the sheriff to attach assets has been embodied in the Bill (clause 33).

4.11.3 In order to avoid delays experienced in connection with questionings at meetings, provision is made for the liquidator to call for records and books (clause 67(7) and (8)), for interrogations before a commissioner (clause 66) and for written questions by the liquidator (clause 67(1)).

4.11.4 The taxation of costs is dispensed with if the liquidator (properly authorised thereto by the Master or creditors) has entered into a written agreement with a legal adviser or legal representative in respect of a tariff of remuneration for services (clause 81(1)).

4.11.5 Resolutions can be adopted at the first meeting convened by the initial liquidator (clause 38).

4.11.6 Most meeting may be held before the liquidator (clause 41(3)).

Partnerships

4.12 The following provisions are proposed in respect of partnerships:

4.12.1 Provision is made for the liquidation of a partnership where there is no partner whose estate may be liquidated in terms of the insolvency law (clause 5(4)).

4.12.2 When the estate of a partner is liquidated without the estate of the partnership being liquidated, partnership claims against the partner's insolvent estate are regarded as unliquidated until partnership debts have been settled in terms of the dissolution of the partnership (clause 43).

4.12.3 When the estate of a partnership and the estates of the partners are under liquidation simultaneously a shortfall of a partnership claim against the partnership estate ranks against the estates of the partners without formal proof of the claim (clause 44).

Voidable dispositions

4.13 In respect of dispositions before liquidation that may be set aside, wider provisions apply to associates of the insolvent than to other persons (clauses 18 and 20).

4.14 In proceedings to set aside dispositions it is presumed, until the contrary has been proved, that a debtor's liabilities exceeded his or her assets at any time within three years before the liquidation of the estate (clause 25(2A)).

4.15 Provision is made for the payment of interest if a disposition is set aside (clause 25(3)).

4.16 A cap of R200 000 has been placed on the exclusion of pension benefits claimable by the insolvent prior to rehabilitation in the year after the date of liquidation or a subsequent year (clause 15(4)).

4.17 Certain contributions to pension funds may be recovered for the benefit of insolvent estates (clause 22).

Criminal sanctions

4.18 It appears that very few insolvents are punished effectively for offences committed by them. Because an insolvent has his or her own funds from which a fine can be paid, provision is made for fines. A fine is a more effective punishment than a jail sentence suspended on a condition which is highly unlikely to be fulfilled. Offences which can be dealt with in terms of the common law have been omitted. Presumptions have been omitted. Some offences have been

replaced by provisions that delay rehabilitation. (Clauses 101 and 97(2).)

Simplification of formalities

4.19 The formalities for the voluntary surrender of an estate have been simplified (clause 3). The power to dispense with non-compliance with provisions of the Act has been redefined and expanded (clause 110). Many of the changes in the Bill are aimed at clarifying and simplifying the existing position. It is submitted that the value of such changes should not be underestimated. Examples of such changes are the substitution of two types of meetings for the existing four types (clauses 38-40), the new definitions for secured creditors, preferent creditors and concurrent creditors (clause 2), the reorganisation and adaptation of provisions in respect of secured claims (clauses 73 to 75) and the powers of liquidators, whether provisional or final (clause 62).

Modern technology

4.20 The definition of "book" or "books" in clause 1 provides for information stored on electronic or mechanical devices.

4.21 The definition of "personal notice" in clause 1 provides for notice by telefax and electronic mail.

4.22 Provision is made for the electronic transfer of funds instead of payment by cheque (clause 92(1)).

5 Uniform provisions for corporate and individual insolvencies

5.1 There is strong support for uniform provisions for all corporate and individual insolvencies, at least as regards the administration of the liquidation process, with nuances for banks, insurance companies and others where such differences are justified by structural requirements. The Bill is drafted in such a way that it would not be too difficult to adapt the provisions in question for legal persons. Uniform provisions for individuals and companies and substantive corporate law issues like rescue procedures are under consideration by the Standing Advisory Committee on Company Law.

5.2 The project committee holds the view that the review of corporate insolvency should be finalised simultaneously with the review of provisions for individuals for, amongst others, the

following reasons:

- Once a start has been made it is surprising how easy it is to unify the provisions.
- A unified Act is more user friendly, especially for foreigners like prospective foreign investors.
- Corporate insolvencies far exceed individual insolvencies in terms of value.
- Unnecessary differences complicate matters and are mostly inexplicable.
- If the opportunity is not taken to enact a unified Act now it may not arise again in the near future.
- It is easier to make amendments to a single Act than to separate Acts administered by different Ministers and considered by different portfolio committees.
- There will be confusion if the insolvency law relating to individuals is reformed and nothing is done in connection with corporate insolvencies.

5.3 The Commission has resolved not to delay its report on the review of the law of insolvency until the proposals regarding uniform provisions and other corporate insolvency matters have been finalised. The Commission appreciates the importance of corporate insolvencies and the benefits of uniform legislation. However, the consideration of reforms for individual insolvencies should not be delayed any longer. Many of the provisions applicable to individual insolvencies apply to corporate insolvencies as well. It is important to commence the debate on provisions that are desirable for individuals so that the appropriate provisions can be finalised for individuals and for incorporation in the envisaged uniform legislation for all insolvencies.

6 UNCITRAL Model Law on Cross-Border Insolvency

At its meeting of 5 June 1999 the Commission approved an interim report which recommends the enactment of the UNCITRAL Model Law on Cross-Border Insolvency, adapted for enactment in South Africa.

7 Statutory provisions outside the Insolvency Act that benefit creditors

7.1 Working Paper 61 dealing with *Statutory Provisions that Benefit Creditors* was published for comment late in 1995. Comments on the working paper were furnished by 36 commentators.

7.2 Aspects of Working Paper 61 that relate to provisions of the Insolvency Act are dealt with in the Draft Bill and explanatory memorandum. About half of the commentators on Working Paper 61 commented on behalf of local authorities on special rules for the payment of "taxes" to local authorities. This matter is dealt with in clause 75 of the Draft Bill and the explanatory memorandum on the clause. Proposals for changes to legislation outside the Insolvency Act are dealt with here. No draft provisions were published for comment and changes proposed below to provisions outside the Insolvency Act are not reflected in the Draft Bill.

7.3 *It is submitted that statutory provisions which prefer creditors are undesirable and cannot be justified merely because revenue is utilised for the benefit of the public or because the State or State assisted bodies are involved.*

7.4 *As a basic premise it is submitted that creditors who enjoy special statutory protection should have the same rights as common law secured creditors. The same rules regarding realisation of security by the liquidator, proof of claim by the creditor, etc, should apply.*

7.5 In February 1991 a committee under the chairmanship of Dr A S Jacobs made available the *Verlag van die Landbouwerkkomitee insake Landboufinansiering en die Versterking van Koöperasies se Kapitaalstruktuur*. The majority of the Committee, excluding the representatives of the South African Agricultural Union, recommended (paragraph 21 at page 142 of the report) that the pledge system in respect of co-operative should lapse. The Final Report of the Commission of Inquiry into the *Provision of Rural Financial services* ("Strauss Commission") RP 108/96 dated 18 September 1996 recommended that the legislative provisions designed to provide preferential creditor status to the Land Bank, the Agricultural Credit Board and the co-operatives, should be reviewed. No one working on such a review could be traced. *It is submitted that the pledge system in respect of co-operatives, provided for in sections 173 and 174 of the Co-operatives Act 91 of 1981 should lapse, subject to the retention of rights acquired by virtue of the system in respect of amounts advanced before the date when the legislation repealing the statutory pledges comes into operation.*

7.6 The report of the Strauss Commission (referred to in the previous paragraph) made the following recommendations:

1. The legislative provisions designed to provide preferential creditor status to the Land Bank, the Agricultural Credit Board and co-operatives, should be reviewed.
2. Consideration should be given to the introduction of a Pledge Registration Office, where pledges of movable objects could be registered. The registration of such pledges must be simple and cheap.
3. The credit provision facilities of the Agricultural Credit Board should be terminated as soon as possible and the loan books, suitably vetted or guaranteed, transferred to the Land Bank.

Recommendation 3 above was implemented by the Land Bank Amendment Act 21 of 1998. This will have the effect that the special provisions in the Agricultural Credit Act 28 of 1966 will be phased out over time.

7.7 According to comments by the Land Bank during 1996 the Land Bank Act in its existing form was no longer in tune with changed conditions and it had been decided to pass legislation during (hopefully) 1996 which would replace the Land Bank Act, providing for the total restructuring of the Bank's activities. The new legislation would not provide for any powers of execution without court order (compare sections 34 and 55 of the Land Bank Act 13 of 1944). The envisaged legislation also provided for the repeal of section 90 of the Insolvency Act. The manager of the Land and Agricultural Bank was satisfied that the new legislation would be in line with the recommendations contained in Working Paper 61 and therefore contribute in a constructive way to eliminating any disparity which might exist in the area of agricultural financing. According to an official at the Land Bank the proposed reforms were not proceeded with and there are no plans to proceed with such reforms at present. ***It is recommended that the steps to promote legislation to remove special protective measures for the Land Bank should be revived as a matter of urgency.***

7.8 Unsatisfactory aspects in sections 22, 23, 35 and 42 of the Agricultural Credit Act 28 of 1966 will disappear as a result of the phasing out of financing under the Agricultural Credit Act by the Land Bank Amendment Act 21 of 1998. ***It is recommended that section 5 of the Giving of Security by Means of Movable Property Act 57 of 1993 should be amended by removing the provisions that rights acquired under the Agricultural Credit Act are not affected. It is***

submitted that vested rights will be protected satisfactorily under the ordinary rules against the retrospective operation of legislation and that no transitional provision is necessary.

7.9 The creation of security instruments in connection with farming operations or a registration system for the pledge of movables (or other security devices regarding movable property such as cession of rights or reservation of ownership) appears to merit consideration, but does not form part of the review of the law of insolvency.

7.10 Section 15B(3)(a) of the Sectional Titles Act 95 of 1986 provides that the registrar of deeds shall not register the transfer of a unit unless a conveyancer has certified that specified moneys have been paid, provision has been made for payment thereof, or no moneys are payable. The effect of this provision is that upon insolvency a preference is enjoyed by the body corporate of the sectional title scheme in respect of pre-liquidation levies. (*Nel v Body Corporate of the Seaways Building* 1995 (1) SA 130 (C) and 1996 (1) SA 131 (A).) The Institute of Estate Agents of South Africa made representations for this protection for bodies corporate of sectional title schemes. The protection has to do with the payment of municipal taxes and other monies, but it is basically in favour of a private institution, namely the body corporate of the sectional title scheme. The motivation was purely that losses were suffered in the event of insolvency. No particular reasons were advanced why the parties involved could not themselves take steps to protect their interests or why the body corporate was entitled to special protection. Although the parties involved will no doubt complain if the protection is removed it is quite remarkable that the special protection was conferred at all.

7.11 C G van der Merwe "Does the restraint on transfer provision in the Sectional Titles Act accord sufficient preference to the body corporate for outstanding levies?" 1996 *THHR* 367 says levies are the main source from which the body corporate finances the cost of maintenance and administration of a sectional title scheme; failure by one owner to pay levies might lead to insolvency of the body corporate for which the other owners are personally liable in proportion to their participation quotas; since the efficient maintenance and administration of a scheme is to the advantage of every single unit owner he submits that the body corporate's interest in receiving most of the levies due to it, justifies the creation of a statutory mortgage in favour of the body corporate to secure outstanding levies; he proposes a preferent right with regard to six months' arrear levies only (on page 386). He submits that the six months' priority strikes an equitable balance between the need to enforce collection of unpaid levies and the obvious necessity to

protect the security interests of mortgage lenders (on page 387).

7.12 Professor Van der Merwe does not refer to Working Paper 61 in his article. The reasons for the preference given by Professor Van der Merwe does not justify special protection. *It is submitted that the special protection conferred in section 15B(3)(a) of the Sectional Titles Act 95 of 1986 is not justified.*

7.13 There is justification for the provision of section 10 of the Admiralty Jurisdiction Regulation Act 105 of 1983 that property subject to admiralty jurisdiction should first be applied in terms of the rules in section 11 of that Act before the balance is paid over to a trustee, liquidator or judicial manager in terms of section 11(13). It is also acceptable that the position that applies before sequestration in respect of the preference of ship mortgages should be maintained after sequestration. However, the reform of the position before sequestration does not form part of the review of the law of insolvency.

7.14 The following provisions are acceptable:

7.14.1 Section 8 of the Convention on the International Recognition of Rights in Aircraft Act 59 of 1993, which provides that the right of preference given to a mortgagee by a registered mortgage of an aircraft is not affected by sequestration of the estate of the mortgagor.

7.14.2 Provisions such sections 18 and 20 to 22 of the Alienation of Land Act 68 of 1981 that protect a purchaser of immovable property.

7.14.3 The provisions regarding restraint orders and related matters in the Prevention of Organised Crime Act 121 of 1998 and the International Co-operation in Criminal Matters Act 75 of 1996.

7.14.4 The following provisions that provide that trust property does not form part of the property of a person: section 12 of the Trust Property Control Act 57 of 1988; section 79 of the Attorneys Act 53 of 1979; section 32(8) of the Estate Agents Act 112 of 1976; section 19(5) of the Agricultural Produce Agents Act 12 of 1992; section 74J(7) of the Magistrates' Court Act 32 of 1944 (duties of administrator); section 22 of the Sheriff's Act 90 of 1986; section 14(6) of the Stock Exchanges Control Act 1 of 1985; and section

17B(6) of the Financial Markets Control Act 55 of 1989.

7.14.5 The following provisions that consideration must be repaid if a person referred to in the particular Act becomes insolvent: section 5A(3) of the Share Blocks Control Act 59 of 1980; section 6(4) of the Housing Development Schemes for Retired Persons Act 65 of 1988; section 26(4) of the Alienation of Land Act 68 of 1981; and section 7(4) of the Property Time-sharing Control Act 75 of 1983.

7.15 The provisions of section 24 of the Electricity Act 41 of 1987 and section 88 of the Defence Act 44 of 1958, which exclude certain assets from an insolvent estate, do not appear to create problems in practice.

7.16 With reference to section 14(5)(b) of the Agricultural Produce Agents Act 12 of 1992, it is submitted that the “council” should have the rights of an ordinary secured creditor.

7.17 In the absence of reasons for the following provisions they should be repealed:

7.17.1 Section 5A of the National Supplies Procurement Act 89 of 1970, which excludes certain assets from an insolvent estate.

7.17.2 Section 18 of the Correctional Services Act 8 of 1959, section 58 of the South African Police Service Act 68 of 1995 and section 139 of the Defence Act 44 of 1957 that exclude salaries from insolvent estates.

7.18 The provisions in section 18A of the Community Development Act 3 of 1966 can be criticised and should be reconsidered because security by the State or other persons should be dealt with as is done with ordinary secured creditors.

7.19 The following provisions are not justified:

7.19.1 Section 19 of the Atmospheric Pollution Prevention Act 45 of 1965 provides that a local authority may, where another person fails to do so, take measures to prevent the emanation of smoke. The costs with interest thereon form a first charge against the land after expenses referred to in section 89 of the Insolvency Act.

- 7.19.2 Section 27 of the Health Act 63 of 1977 contains a similar provision in respect of costs and measures taken to prevent a condition that is offensive or a danger to health.
- 7.19.3 Section 92(4) of the Water Act 54 of 1956 provides that rates levied by an irrigation board enjoy a preference in the event of insolvency above any registered mortgage bond, subject to the provisions of section 89(1) of the Insolvency Act.
- 7.20 The lien in section 114 of the Customs and Excise Act 91 of 1964 provides extraordinary protection at the expense of creditors.
- 7.20.1 The lien is established, not only in respect of goods belonging to the debtor, but also in respect of other goods in the possession or under the control of the debtor. An asset may be subject to the lien although it is not used illegally or although duty is not evaded and although the owner is unaware that duty has not been paid.
- 7.20.2 Comments were invited on a proposal that the lien should be limited to property attached in terms of section 114(2) before insolvency; that the lien should be limited to property of a person liable for duty or a levy or of persons who are guilty of or take part in tax evasion; and that the rights of the State as lienholder should be limited to the rights enjoyed by an ordinary lienholder on insolvency.
- 7.20.3 The Commissioner for Customs and Excise says that amounts are not necessarily paid at the time when they become due; the Office of the Commissioner can be distinguished from ordinary creditors in that there is no financial gain for the Office in allowing credit balances to accumulate because finance charges on outstanding balances are not charged and interest is levied only if the debtor is *in mora*; the taxpayer, and as a result his creditors, enjoy the benefit that money due to the State is in his possession and money need not leave his estate to pay monthly interest. The Commissioner says if the Commissioner is not afforded a lien without possession as contemplated in section 114(1)(aA), the only alternative is for security to be taken in the form of guarantees. The financial implications for the debtor before insolvency and consequently for the economy of the country, have already been elucidated. (In a previous submission the Commissioner indicated that tax up to R23 000 000,00 will have to be insured. The excise duty of other

firms amounts to up to R70 000 000,00 per month. The monthly cost to maintain a guarantee as insurance for these amounts will have the result that several firms will not be in a position to continue with business. This type of insurance will probably only be obtainable abroad and as a consequence currency will leave the country.) The Commissioner submits that parties who are affected should be approached with a view to gauging their opinions. The Commissioner submits with regard to the proposed limitation of the lien (to property of a person liable for duty or a levy or of persons who are guilty or take part in tax evasion) that if these provisions are not declared unconstitutional by the Constitutional Court, they should remain in the present form.

7.20.4 The general comments of the Commissioner did not find favour with the Commission when the preference in section 99 of the Insolvency Act was considered in 1984 (see the explanatory memorandum on clause 80). The suggestion by the Commissioner that parties who are affected should be approached with a view to gauging their opinions probably refers to parties liable for the taxes. It stands to reason that debtors would prefer special rights which affect their creditors to security requirements which affect themselves. The view of the Commissioner appears to be that because the legislature has the power to enforce special rights this is preferable to the ordinary rules applicable to all commercial transactions. It is submitted that the matter should be approached with normal commercial principles as guideline. Surely the fact that massive debts are involved and that furnishing of security may be problematic cannot be conclusive. Similar situations are addressed in ordinary commercial transactions and difficulties to obtain and the cost involved in furnishing security are important factors to be taken into account. The difference that the Commissioner's debtors are not "voluntary" in the sense that they cannot be selected is not conclusive and was rejected by the Commission when the preferent claim was considered. The fact that a group of debtors are liable for debts by legislation does not justify special measures to the prejudice of other creditors of the debtor. The mere fact that a provision has not been found unconstitutional is not conclusive. It is clearly an extraordinary measure to attach the assets of a person who is not liable for duty or a levy, or not guilty of or taking part in tax evasion.

7.20.5 *It is submitted that the lien in terms of section 114 of the Customs and Excise Act 91 of 1964 should be limited to property attached before insolvency in terms of section 114(2). It is further submitted that the lien should be limited to property of a person*

liable for duty or a levy or of persons who are guilty of or take part in tax evasion. Lastly, it is submitted that the rights of the State as lienholder should be limited to the rights enjoyed by an ordinary lienholder on insolvency.

8 Commentators who commented on Discussion Paper 66: Draft Insolvency Bill and Explanatory memorandum

The following commentators commented on Discussion Paper 66:

AIPSA (The Association of Insolvency Practitioners of Southern Africa)

Alexander, Mr J C, of attorneys Cox Yeats, at the request of the Natal Law Society

Anglo American Corporation of South Africa Limited

Agricultural Co-operative Business Chamber (who also supports the comments by Mr Edeling whole-heartedly)

Clothing Industry Bargaining Council (Western Cape), comments by attorneys Sonnenberg, Hoffmann & Galombik

COSAB (Council of South African Banks), comments by four (unidentified) banks

Edeling, Chris

Evans, R G, Department of Mercantile Law, UNISA

Financial Services Board

Hartzenberg, C J, SC an advocate practising at the Pietermaritzburg Bar

Heaton, Prof Jacqueline, Department of Private Law, UNISA

Investec Bank Limited and Werksmans Attorneys

Johannesburg Stock Exchange

Law Society of the Cape of Good Hope, comments by a committee of Cape Town members

Law Society of the Transvaal

Life Offices' Association and Institute of Retirement Funds, comments by a Work Group consisting of Messrs Dries Visagie, Kobus Hanekom and Rod Stevenson

Master of the Supreme Court, Pietermaritzburg, comments by an Assistant Master Mr H van Wijk,

Master of the Supreme Court, Pretoria

Nel, B B, of Price Waterhouse Coopers

Oelofse, Prof and others, comments prepared by a working group consisting of Prof AN Oelofse (UNISA), now a member of the Pretoria Bar, Prof A Boraine (UP), Ms J de Klerk

(Attorney and insolvency practitioner), Ms M Roestoff (UP), Mr D Burdette (UP, previously an Insolvency Practitioner) and Ms L Jansen van Rensburg (PUCHO)

Registrar of Companies and of Close Corporations

Registrar of Co-Operatives

Registrar of Pension Funds

Republic Trustees

Sackstein, L N, of attorneys Israel & Sackstein

SA Glass Supply (Pty) Ltd, comment by a director Mr Michael Elias

Society of Advocates of Natal (a committee consisting of advocates GC Marneville SC, A Gordon, G D Harpur and J C King)

Southern African Institute of Chartered Secretaries and Administrators

Explanatory memorandum
Clause 1

EXPLANATORY MEMORANDUM ON THE DRAFT BILL

Clause 1: Definitions

Introduction

1.1 The definitions in clause 1 which are not discussed here are substantially the same as definitions in section 2 of the Insolvency Act.

"associate"

1.2 *In line with modern developments in other legal systems, "associate" is defined to simplify the wording of special provisions for persons who have a close association with the insolvent.* "Associate" is referred to in clause 18 - dispositions without value; clause 20 - voidable preferences; and clause 83 - persons incompetent to acquire property from insolvent estates.

1.3 It is submitted that special categories of persons should be defined in such a way that they cover cases where the probability that improper transactions have occurred justifies special rules. In order to discourage and limit evasion the categories should not be defined too narrowly, but if the definition is too wide the disruption of the free trade would be unacceptable. If a narrow definition is used there is greater justification for drastic rules.

1.4 Partners and beneficiaries of trusts have been included despite submissions that this casts the net too widely. A partner accepts joint responsibility for debts and a partnership is usually a close association. Although some trusts are not closely associated with the beneficiaries and have independent trustees, the beneficiaries of a trust will only be associates if the trustee is an associate of the beneficiaries. On the other hand submissions that persons whose bank accounts have been used to launder money, or shareholders of private companies should be included were rejected as being impractical or casting the net too widely.

1.5 Provisions similar to paragraph (bA) of the definition appear in sections 6(3)(d) and 37(7) of the Banks Act 94 of 1990 and section 1 of the Independent Broadcasting Act 153 of 1993.

1.6 The intention with paragraph (d) of the definition can be illustrated by way of an example: Where a natural person makes a disposition to a company, the company will in terms of the wording of paragraph (a) not be an associate of the natural person. However, in terms of paragraph (b) a natural person may be an associate of a company. Paragraph (d) makes it clear that the company should in such a case be regarded as an associate of the natural person.

"bank"

1.7 This definition replaces the definitions of "banking institution" and "building society". The purpose of the definition is to indicate where estate funds may be invested in terms of clause 82. The Banks Act 94 of 1990 no longer makes provision for provisional or final registration. There is no reason why investments cannot be made in Mutual Banks (the former Building Societies). The Mutual Banks Act 124 of 1993 still makes provision for provisional and final registration. *It is submitted that only registered banks and finally registered mutual banks should qualify to hold estate funds.*

"book or books"

1.8 In terms of clause 33(7)(a) the liquidator must take into his personal custody all books of account, invoices, etc. A number of other sections also refer to "books". The Insolvency Act does not provide for books or information that is stored in a computer. These days a lot of relevant information is stored in a computer and the latest information can probably only be retrieved from a computer. *The definition of books extends to information in electronic form.*

1.9 The type of documents included in the definition mirrors the wording in clauses 33(7)(a) and 34(1)(a).

"concurrent creditor"

1.10 The decision in *Ongevallekommissaris v Die Meester* 1989 4 SA 69 (T) highlights the fact that section 106 (now clause 94) is worded clumsily and that there is a need to define "concurrent creditor", "free residue", "preferent creditor" and "secured creditor".

"contribution"

1.11 This new definition and the new definitions of "fund" and "social benefit" relate to clause 15(4) (exclusion of pension and social benefits from insolvent estate) and clause 22 (certain contributions to pension funds may be recovered for the benefit of insolvent estate). The definition of "contribution" provides that benefits paid to the insolvent before liquidation should be deducted because such payments already form part of the insolvent estate.

1.12 A commentator submits that contributions by associates of the insolvent should also be covered. When the provisions regarding contributions to funds were developed (the definitions of "contribution", "fund", "social benefit" and clauses 15(4) and 22) consideration was given to make special provision for "controlled funds", namely funds controlled by the insolvent so that, for instance, contributions are made to a fund by an employer instead of the employer paying the insolvent a salary. These provisions were not included because it became too complicated. It was concluded that improper conduct should be dealt with by the *actio Pauliana* and actions for the setting aside of collusion. *It is submitted that the provisions for the recovery of benefits to pension funds should be limited to contributions made by the insolvent and which therefore reduced the estate available to creditors.*

"court"

1.13 In *Spendiff v Kolektor* 1992 2 SA 537 (A) 548 it was pointed out that it was a matter of some difficulty to determine the true meaning of the word "Court" as defined in section 2. Judge of Appeal Nestadt described the definition as "an instance of rather inartistic draughtsmanship". The proposed definition is simple and comprehensible. The jurisdiction of the court is dealt with in clause 104.

1.14 A proposal for specialised insolvency courts in large centres such as Cape Town, Johannesburg and Durban is dealt with in paragraph 104.3 below.

"date of liquidation"

1.15 Section 348 of the Companies Act provides that a winding-up of a company by the court shall commence at the time of the presentation to the court of the application for the winding-up.

According to comment received this provision creates uncertainty and may operate unfairly. Clause 10(6) of the Bill published in Discussion Paper 66 provided that the time of commencement of liquidation should be the time when the first liquidation order was granted by the court. This is in accordance with the position for individuals in terms of the Insolvency Act.

1.16 Commentators point out that creditors may be prejudiced if the time periods for the impeachment and setting aside of dispositions run from the date of the court order and not the date when the application is lodged with the Registrar of the court. *According to the definition of "date of liquidation" the liquidation commences on the date of the first liquidation order, but the periods in clauses 18, 19, 20 and 22 run from the time of the presentation of the application for liquidation to the Registrar of the court.*

"debtor"

1.17 Paragraph 1.22 of the Explanatory Memorandum in Discussion Paper 66 notes that a definition of "debtor" will be considered once it has been decided how to deal with provisions for the liquidation of legal persons.

1.18 There is strong support for the view that the same provisions should apply to companies and individuals, at least as regards the administration of the liquidation process, with nuances for banks, insurance companies and others where such differences are justified by structural requirements. The Bill is drafted in such a way that it would not be too difficult to adapt the provisions in question for legal persons. Uniform provisions for individuals and companies have not been finalised and substantive corporate law issues like rescue procedures must also receive attention. For the time being the essence of the definitions of "debtor" and "insolvent" in the Insolvency Act has been retained.

"disposition"

1.19 The list of dispositions is clearly not exhaustive, but *in accordance with decided cases "suretyship" has been included expressly.*

1.20 The exclusion of dispositions in compliance with an order of court in the present definition

is problematic. Court orders must be respected and not lightly be set aside so that someone who has enforced a claim in accordance with a court order will have certainty that this state of affairs will not be disturbed by the subsequent insolvency of the debtor. However, *Sackstein en Venter v Greyling* 1990 (2) SA 323 (O) held that it was not the purpose of the legislature to protect a creditor who, in collusion with the insolvent, fraudulently obtained a court order prejudicial to other creditors, and that such a creditor could not claim the protection of the exclusionary provisions. The evidence could therefore show that the disposition provided for by the deed of settlement was indeed a disposition in terms of the Insolvency Act, and therefore voidable. *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A) 945 held that a trustee or creditor who was not a party to proceedings was not bound by a judgment against the debtor and might, for instance, apply to have the registration of a bond set aside in terms of section 26 of the Insolvency Act. *It is submitted that the definition of "disposition" should not exclude a disposition in compliance with an order of court.*

"exchange"

1.21 The definitions of "exchange", "market participant", "rules of exchange" and "transaction" relate to clause 27 - transactions on an exchange read with clause 23A - set-off.

"financial lease"

1.22 This definition relates to clause 76 - security in respect of reserved ownership or financial lease. See the comments on clause 76 below.

"first liquidation order"

1.23 Clause 8(1) of the Bill makes provision for a final liquidation order without a provisional order having been issued. The liquidation commences on the date of the provisional order or, if no such an order has been issued, the date of the final order. It is often necessary to refer to the order that commenced the sequestration, in other words the provisional liquidation order, or if no such order has been issued, the final liquidation order. It is also sometimes necessary to distinguish between a provisional liquidation order and a final liquidation order (see clauses 8, 10, 38(6), 55(1), 71(6), 105(1), 105(3), and 105(4)). Occasionally reference is made to any liquidation order, whether provisional or final.

Free residue

1.24 The decision in *Ongevallekommissaris v Die Meester* 1989 4 SA 69 (T) highlights the fact that section 106 (now clause 94) is worded clumsily and that there is a need to define "concurrent creditor", "free residue", "preferent creditor" and "secured creditor".

"fund"

1.25 This definition and the definitions of "contribution" and "social benefit" relate to clause 15(4) (exclusion of pension and social benefits from insolvent estate) and clause 22 (certain contributions to pension funds may be recovered for the benefit of insolvent estate).

"gazette"

1.26 The definition of "gazette" in the Insolvency Act contained a reference to the Official Gazette of Namibia and the definition was removed when references to Namibia were deleted from the Insolvency Act. There is a long definition of "Gazette" in the Interpretation Act 33 of 1957, but this shorter definition in the Bill will be useful.

"insolvent"

1.27 *The definition of "insolvent" is extended to include a spouse married in community of property*, which is in accordance with the law as propounded by the court in *Badenhorst v Bekker* 1994 (2) SA 155 (N) 159.

"insolvent estate"

1.28 *The "separate property of the spouses" is included in the insolvent estate* in accordance with the decision in *Badenhorst v Bekker* 1994 (2) SA 155 (N). A commentator complains about this aspect of the definition because it prefers the interests of the insolvent's creditors above the interests of the spouse and in practical terms discriminates against women because the exclusion of property is usually in women's favour. The commentator also submits that the intention of testators who wish to exclude assets from the joint estate will be frustrated.

1.29 The principle that all assets of a joint estate are available to creditors brings the position

after insolvency into line with the position before insolvency. If the law discriminates it is the family law that discriminates and not the Insolvency law, which merely perpetuates the position before insolvency. The parties to a marriage must accept the effects of their chosen marital regime and testators can protect heirs against insolvency if they draft the provisions correctly.

"market participant"

1.30 The definitions of "exchange", "market participant", "rules of exchange" and "transaction" relate to clause 27 - transactions on an exchange read with clause 23A - set-off.

"movable property"

1.31 A commentator submits that a reference to corporeal and incorporeal property should be included in the definition, but this is clearly covered by "every right or interest which is not immovable property".

"personal notice"

1.32 *Numerous clauses provide for notice to creditors or other persons and a definition is included to simplify the wording.*

1.33 A case can be made out for an approach that notice should be given in a manner tailored to the occasion and to the circumstances of the particular estate. For instance, in the case of a major company with thousands of creditors it may be better to buy pages of advertising in newspapers inviting creditors to prove their claims rather than attempting to give personal notice to each creditor. However, there are several notices that must be placed in each estate and others that must be placed in certain circumstances. It would be unwieldy to provide that each advertisement should be preceded by an investigation of the best way to give notice. *It is submitted that provision should be made for a standard form of notice, but that there should be a mechanism to deal with extraordinary circumstances, namely a form of notice approved by the Master.*

1.34 Paragraph 3.2 of the Explanatory Memorandum in Discussion Paper 66 submits that the usefulness of legal notices in newspapers is extremely doubtful and that it should be replaced by

written notice to creditors. A number of commentators disagree. One submits that in many instances the insolvent's records are atrocious and a reliable list of creditors is not available. He adds that the run of the mill trade creditors certainly do not read the Government Gazette and are more likely to read a daily newspaper. Another commentator proposes that newspaper notices should be retained for the sake of the few creditors who receive notice in this way.

1.35 Even if a person is armed with the name and the date of a newspaper it is a major operation to find the notice amongst the mass of unsystematic notices. Unlike in times gone by, a number of daily papers are published in many areas and all must be checked to ensure that a notice is seen. The notices in the Government Gazette appear once a week and are at least systemised. Although the Government Printer has indicated that notices cannot be alphabetised with existing systems, the Printer will investigate ways to make the notices more user friendly, for instance, electronic publishing. *It is submitted that the standard form of notice should require notice in the Government Gazette, but not notice in newspapers.*

1.36 Commentators supported personal notices, but concern was expressed about the cost of these notices. If circumstances justify it the Master may authorise an alternative method of notice. In estates with few creditors the costs of personal notices will be more than made up for by the saving of the significant costs of newspaper notices. Notices by fax and e-mail received support from commentators and this may also be cheaper under certain circumstances. Concerns about problems to prove delivery of faxes or e-mail do not appear to be conclusive. It will be left to the liquidator to certify that the notices were delivered successfully. *It is submitted that provision should be made for personal notice by mail, telefax, electronic mail, or personal delivery, supported by an affidavit by the liquidator of the list of persons given notice; or another form of notice approved by the Master.*

1.37 In the Insolvency Act a ten day period appears in section 40(2) in connection with convening the first meeting (where no personal notice is given) and also in sections 9(3)(b) and 36(1) where notice is not involved. In the case of personal notice a period of fourteen days is used (sections 4(1), 36, 116bis and 119). *Except for procedural notices in clauses 3(4) and 4(3)(e) the Bill provides consistently for a notice period of 14 days because 10 days notice is too short*

if postal services are used.

"preferent creditor"

1.38 The decision in *Ongevallekommissaris v Die Meester* 1989 4 SA 69 (T) highlights the fact that section 106 (now clause 94) is worded clumsily and that there is a need to define "concurrent creditor", "free residue", "preferent creditor" and "secured creditor".

1.39 The definition of "preference" in the Insolvency Act does not distinguish between secured claims and unsecured claims with a preference payable from the free residue. *The Bill uses "preferent creditors" to refer to creditors with a preference on the free residue and "secured creditors" when creditors are entitled to assets as security.*

1.40 *The definition of preferent creditor makes it clear that it is not the intention to interfere with similar preferences provided for in legislation outside the Insolvency Act.*

"Property"

1.41 *The exclusion of the contingent interest of a fidei commissary heir or legatee in the present definition of "property" has been omitted.* Before the vesting of the interest, the interest of a *fidei commissary* heir is not a contingent interest which has any monetary value. A proposal that inheritances received after insolvency should be excluded from the insolvent estate was not accepted due to lack of support for such a proposal.

1.42 The intention with the reference to "wherever situated within the Republic" in the existing definition is to extend the operation of a liquidation order beyond the territorial limits of the particular court granting it, and not to narrow it to assets within the Republic. The common law is applied in deciding the extent to which the insolvent's assets situated in a foreign country pass to the liquidator. See *Viljoen v Venter* 1981 (2) SA 152 (W) 154. In the absence of clear authority on the matter the existing wording creates uncertainty. *The reference to "within the Republic" has been omitted from the definition of "property".*

"reservation of ownership"

1.43 The definition relates to clause 76 - security in respect of reserved ownership or financial lease. It can be concluded that section 84 of the Insolvency Act applies to a transaction which is an instalment sale transaction contemplated in the definition of instalment sale transaction in the Credit Agreements Act 75 of 1980, irrespective of whether the transaction is or is not one to which the Credit Agreements Act itself applies. Section 84 does not apply to an invalid transaction (*Oosthuizen v Standard Credit Corporation* 1993 (3) SA (A)). A contract of sale of movable property which does not qualify as an instalment sale transaction, within the meaning of that expression as defined in the Credit Agreements Act, is not regulated by the Insolvency Act and accordingly the common law applies. Where such a credit sale contains a term that the seller reserves ownership of the property until the purchase price has been paid, and at the institution of the liquidation proceedings such is not the case, the liquidator's election to terminate the contract clearly entails his returning the property to the seller (*A-Team Drankwinkel v Botha* 1994 (1) SA 1 (A) 17). It is submitted that practical considerations support the contention that reservation of ownership credit sales that do not qualify as instalment sale transactions should also be governed by section 84 (now clause 76). The effect of section 84(1) is to deprive the seller of hire-purchase goods of ownership upon the sequestration of the purchaser's estate, which ownership is passed on to the liquidator (*Morgan v Wessels* 1990 (3) SA 57 (E); *Van der Burgh v Van Dyk* 1993 (3) SA 312 (E)). The onus is on the creditor to prove a claim. In terms of the common law the creditor would be able to claim the property from the liquidator with the *rei vindicatio* (*A-Team Drankwinkel* decision at 17). In practice this could be problematic. ***The proposed definition of "reservation of ownership contract" embraces reservation of ownership credit sales that do not qualify as instalment sale transactions.***

1.44 In the *A-Team Drankwinkel* case the Appellate Division (in a majority decision) acknowledged the right of ownership, and gave effect to its reservation, in respect of incorporeal things such as a business and its goodwill. Although it does not appear as if the majority decision can be interpreted as a ***general*** recognition of the right of ownership with regard to incorporeals, Judge of Appeal Botha, in a dissenting decision (at 19), asked whether there was not a need to extent the notion of limited real rights in respect of incorporeals to the right of ownership. Since the Appellate Division has already acknowledged the right of ownership, and given effect to its

reservation in respect of a business and its goodwill, present day realities and needs may well give course for an extension of the right of ownership in respect of incorporeals. *The proposed definition of "reservation of ownership contract" includes reservation of ownership credit sales of incorporeals.*

"rules of exchange"

1.45 The definitions of "exchange", "market participant", "rules of exchange" and "transaction" relate to clause 27 - transactions on an exchange read with clause 23A - set-off.

"secured creditor"

1.46 This definition must be read with the definition of "security".

"security"

1.47 The decision in *Ongevallekommissaris v Die Meester* 1989 4 SA 69 (T) highlights the fact that section 106 (now clause 94) is worded clumsily and that there is a need to define "concurrent creditor", "free residue", "preferent creditor" and "secured creditor". See the discussion of the definition of "special bond" below.

1.48 Security granted in legislation outside the Insolvency Act is not excluded, for instance section 20(5) of the Alienation of Land Act 68 of 1981.

1.49 The present definition of "security" does not mention a instalment sale transaction seller. Although a reservation of ownership seller is the owner of the asset before liquidation, the estate becomes owner after liquidation and the creditor then has a secured claim. *For the sake of clarity and consistency all secured creditors are mentioned in the new definition of security.*

1.50 As appears from the case of *Bank of Lisbon and South Africa Ltd v the Master* 1987 (1) SA 276 (A) 294 a cession of rights is regarded as a "pledge". It is not advisable to attempt to expound all the effects of a cession of rights in the event of insolvency, but *for the sake of clarity the definition of "security" indicates that "pledge" includes a cession of rights.*

"social benefits"

1.51 This definition and the definitions of "contribution" and "fund" relate to clause 15(4) (exclusion of pension and social benefits from insolvent estate) and clause 22 (certain contributions to pension funds may be recovered for the benefit of insolvent estate).

"special bond"

1.52 *References to "mortgage" are inappropriate in so far as bonds over movables are concerned and the wording has been changed accordingly. The scheme of the Bill makes it clear that only the bonds listed are included and the express exclusion of "other mortgage bonds hypothecating movable property" has been omitted.*

"spouse"

1.53 *A person who lives with a debtor as his or her spouse is included in the definition of spouse even if the debtor is still legally married* (compare to the contrary *Chaplin v Gregory* 1950 (3) SA 555 (C) 565). A debtor is more likely to make over assets to a live in partner than to an estranged spouse.

1.54 *There is no reason why the definition of spouse should not include persons of the same sex living together* (see *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T)).

"transaction"

1.55 The definitions of "exchange", "market participant", "rules of exchange" and "transaction" relate to clause 27 - transactions on an exchange; read with clause 23A - set-off.

Clause 2: Acts of insolvency

2.1 In the light of the support for the retention of the acts of insolvency and the lack of compelling reasons for departing from the existing position, the acts of insolvency have been retained in essence subject to the changes discussed below. Any of two spouses married in

community of property can commit an act of insolvency (section 17(5) of the Matrimonial Property Act 88 of 1984).

2.2 Section 8(b) often gives cause for problems because the return made by the officer does not disclose clearly that an act of insolvency has been committed. The result of the wording of section 8(b) is that the return is not a true reflection of what happened, or could lawfully have happened, when the writ was served. It refers to "disposable property" (which may include immovable property) although only movable property was, or could have been, sought. In principle a judgment creditor should be able to apply for the liquidation of the estate of the judgment debtor where the sheriff is unable to obtain satisfaction of the judgment or to find any movable property to satisfy it. If the judgment debtor does not have movable property sufficient to satisfy the judgment, he is probably in most cases commercially insolvent. ***According to clause 2(b) it is sufficient to constitute an Act of Insolvency if it appears from a return of service that a judgment of a court against the debtor has not been satisfied after a valid execution thereof.***

2.3 The acts of insolvency are intended to assist applicants who are unable to prove insolvency. As is pointed out by a commentator, the prejudice of creditors in section 8(c) can hardly be proved without proof that the debtor is insolvent. The intention to prefer or prejudice required in section 8(d) is mostly impossible to prove. ***In terms of clause 2(c) and 2(d) proof of a likelihood of prejudice is sufficient to constitute an act of insolvency unless the debtor can prove that he or she was able to pay his or her debts.***

2.4 There was strong support for an act of insolvency similar to section 345(1) of the Companies Act 61 of 1973, namely, failure to respond to a formal demand to pay, secure or compound a debt. In response to the argument that an insolvent individual does not have a registered address like a company, it was submitted that provision could be made for personal delivery of a demand. The view is nevertheless held that such an act of insolvency would place too much of a risk on individual debtors and open the door for abuses.

2.5 Section 34 of the Insolvency Act provides that a sale of a business by a trader is voidable if notice of the sale has not been given in newspapers and the Government Gazette. Doubt is

thrown upon the justifiability to lay down special rules for the transfer of a business or part thereof. In principle, there is no difference between a trader and any other entrepreneur, therefore they should not be treated differently in respect of their creditors. As a result of changes in technology creditors are better able than ever to make informed decisions as to whether or not to extend credit. The mood of law reform has been quite clear - legislation of this kind has no place in a modern system of commercial law. The provision gives rise to serious practical problems and disruption of commerce. The provisions to set aside dispositions without value, voidable preferences and collusive dealings should be applied. *Section 34 of the Insolvency Act has been omitted. The act of insolvency in section 8(h) which refers to section 34 has accordingly also been omitted. Section 8(f) has been omitted in line with changes to applications by a debtor in terms of clause 3.*

Clause 3: Application by debtor for liquidation of his estate

3.1 In theory and according to the practice provided for in the Insolvency Act there is a substantial difference between an application for voluntary surrender by the debtor and an application for compulsory liquidation by a creditor: additional formalities must be complied with; advertisements must be placed; notice must be given to creditors and the statement of affairs must lie open for inspection; the court issues a final order without a rule nisi. In practice a compulsory application by a creditor is often a "friendly" application controlled by the debtor or the debtor's attorney. Some differences between a voluntary and a compulsory liquidation are logical and expedient: the debtor applicant can always supply full details for his or her spouse and can include a statement of affairs with the application. The justification for other differences, like the extra formalities for a voluntary surrender, is not so obvious. Why should creditors in the case of a voluntary surrender be entitled to prior notice and not in the case of compulsory sequestration? Are the extra costs and bother involved with the formalities really justified by active participation by creditors? A long notice period causes delay, but too short a period of notice is meaningless.

3.2 *Clause 3(7) read with clause 7 makes provision for a provisional order in the case of a voluntary surrender as is the case for compulsory liquidation.* It is acceptable in the case of an *ex parte* application to issue a *rule nisi* calling on all interested parties to show cause why a final order should not be made. See, for example, *Ex parte Madikiza et Uxor* 1995 (4) SA 433

(TKA) 435 and *1820 Settlers National Monument Foundation v Van Aardt* 1977 (2) SA 368 (E) 375. The court will not grant a final order without a rule nisi if there is doubt that liquidation will be to the advantage of creditors. Creditors will get an opportunity to oppose the granting of a final order. ***There was strong support for the notion that the debtor who apply for voluntary surrender should merely lodge a statement of affairs with the application and this is provided for in the Bill.***

3.3 In the case of a voluntary surrender the Insolvency Act requires that the court must be satisfied that the debtor owns property of a sufficient value to defray all costs of sequestration payable out of the free residue. Advantage for creditors must be proved for both a voluntary surrender and a compulsory sequestration. Unless there is a realistic expectation that liquidation will lead to recovery of assets to the advantage of creditors, there will be no such advantage if the assets in the free residue do not realise enough to pay costs. ***The requirement of assets of sufficient value to pay costs does not add much to the requirement of "advantage of creditors" and has been omitted.***

3.4 In the case of an application by the debtor for the liquidation of the estate there is no creditor who is in terms of clause 94(a) liable to contribute for costs. This state of affairs is open to criticism. In practice liquidators are often expected to foot the bill. ***It is proposed that an applicant for voluntary sequestration must give security for costs, as is required when a creditor applies for liquidation.***

3.5 The applicant's giving of security in terms of section 9(3)(b) of the Insolvency Act covers no costs or only minor costs if a trustee or provisional trustee is appointed. The implication of clause 32 of the Bill is that a liquidator will be appointed in all instances. Giving of security as provided for in section 9(3)(b) of the Insolvency Act will therefore be of little value. It is extremely unfair that liquidators should be liable foot the bill for costs when an applicant had averred solemnly that liquidation would be to the advantage of creditors. ***Clauses 3(3)(b) and 4(3)(c) provides for security for the payment of all costs that might be awarded against the applicant and all costs of liquidation which are not recoverable from other creditors of the estate.***

3.6 The requirement of "advantage of creditors" do not apply in the case of companies and is

not common in other legal systems. The requirement has been criticised because of the difficulties to prove an advantage of creditors and the result that a debtor cannot escape from the quagmire of debts if he or she does not own unencumbered assets of sufficient value. Special requirements for "friendly" sequestrations are also problematic. See *Beinash & Co v Nathan (Standard Bank of South Africa Ltd Intervening)* 1998 (3) SA 540 (W); *Van Eck v Kirkwood* 1997 (1) SA 289 (SEC) and cases quoted there; *Meyer v Batten* 1999 (1) SA 1041 (W); and *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W). The requirement that meaningful security must be given to pay costs will make it even more difficult to obtain liquidation orders. It is submitted that it is unacceptable to use the expensive procedure of liquidation by the court in cases where the value of the assets is insufficient to ensure a benefit for creditors. Schedule 4 of the Bill proposes a procedure which will assist debtors to arrive at a composition with creditors before liquidation. Provision is also made for a less expensive liquidation procedure if a composition cannot be reached with the requisite majority of creditors notwithstanding a reasonable offer by the debtor. ***Clause 7(1)(b) retains the requirement of advantage of creditors.***

3.7 Although it may be argued that the provisions in clauses 3(4) and 4(3)(e) and (f) belong in the rules of court these rules do not at present contain procedures tailored for liquidation proceedings. Form 2 of the First Schedule of the Rules of Court does not appear to be appropriate in cases where the respondent receives notice. It is only directed to the Registrar and does not give any indication as to what is required by the respondent should he or she intend to oppose the application (compare Form 2(a)). Form 2(a) is also not appropriate as it refers to the ordinary periods of notice to oppose. In the case of liquidation these periods are inadequate. Practice Note 4/1992 of the Witwatersrand Local Division in its original form and provisions of Rule 6 have been used as a basis. ***Clauses 3(4) and 4(3)(e) and (f) contain procedural provisions regarded as appropriate for liquidation proceedings. Clause 3(4A) and 4(4) caters for urgent or other special cases.***

3.8 The requirement in section 9(4) of the Insolvency Act that the Master or a designated officer may report to the court does not lead to meaningful reports being presented to the court, at least not in some divisions of the court. ***The requirement of a report by the Master has been omitted from the Bill and is left to be dealt with according to the practice of the particular court.*** In terms of clauses 3(4) and 4(3)(g) the documents must however be lodged with the

Master for inclusion in his or her records when a file is opened or an appointment of a liquidator is made by the Master.

Clause 4: Application by creditor for liquidation of debtor's estate

4.1 The purpose of the requirement of a minimum claim in clause 4(1) is to limit liquidation applications to creditors who have a material interest. A minimum amount is by nature arbitrary.

4.2 If a fixed amount is mentioned in an Act, the problem arises that the amount does not keep pace with inflation. The Legislature has accepted the principle that amounts in Acts may be adjusted by notice in the Government Gazette. Section 98A(2)(a) of the Insolvency Act provides that in order to ensure that the balance of the free residue is applied in an equitable manner, the Minister of Justice may by notice in the Gazette determine maximum amounts which shall be paid as preferent claims to employees and funds. Section 98A(2)(b) provides that in order to take into account subsequent fluctuations in the value of money, the Minister may from time to time supplement, amend or withdraw the relevant maximum amounts by notice in the Gazette. Section 98A(2)(c) authorises the Minister to replace a notice in paragraph (a) with a new notice. In terms of section 98A(2)(d) of the Insolvency Act the Minister shall not exercise the powers conferred upon him or her by paragraph (a) or (c), unless he or she—

has caused to be published in the Gazette a draft of the proposed notice, together with a notice inviting all interested parties to lodge with the Director-General: Justice in writing within a period of 60 days from the date of the publication of the notice any representations that they may wish to make in connection with the proposed notice; and has caused to be forwarded to the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act 35 of 1994 a copy of such draft.

4.3 In *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) 142 Deputy President Mahomed leaves open the question whether a delegation to the executive to amend an Act of Parliament would always be unconstitutional; much might depend on whether the power to delegate is limited to what is reasonably necessary and expedient for the efficient conduct and execution of local government in the country and on

whether there are suitable directions and controls to ensure that Parliament is not effectively abdicating its law-making function.

4.4 Prof G J Swart "Constitutional limitations on the delegation of powers of taxation" (1996) 11 *SAPR/PL* 446 at 469 argues that differences in the wording of the interim Constitution and the final Constitution leave no room under the final Constitution, for the argument that there may be exceptional circumstances in which there will be a necessary implication that laws can be made without following the manner and form provisions of the final Constitution, as suggested tentatively with respect to the interim Constitution in the *Western Cape Legislature* case. He concludes at 470 that the final Constitution contemplates the delegation only of subordinate legislative powers to the executive; these must therefore be exercised only within the parameters of clear principles, guidelines or directives which leave no room for the arbitrary exercise of these powers and which are embodied in the enabling legislation, that is, principles debated publicly in the national or provincial legislature and embodied in legislation which has been published for general notice.

4.5 A consultation process is prescribed in section 98A(2)(d) but conceptually nothing prevents the Minister from acting in an arbitrary manner by ignoring comments or suggestions or fixing all the amounts at nil Rand or at ridiculously high amounts. Changes to legislation based on a consultation process outside Parliament may for this very reason be regarded as a delegation of the legislative power of Parliament. There is a guideline that the aim is to "ensure that the balance of the free residue is applied in an equitable manner" but this is vague.

4.6 The Commission is concerned that authority for a Minister to change legislation without clear guidelines may be unconstitutional. The Commission is of opinion that a guideline that amounts in an Act may be changed in order to take account of fluctuations in the value of money is sufficient. *Clause 4(1A) provides that the Minister may amend the amount specified in the Bill by notice in the Gazette in order to take account of fluctuations in the value of money.*

4.7 The majority of commentators were of the opinion that the requirement of a liquidated claim (clause 4(2)) should be retained. The intention with the requirement of a liquidated claim, is that there must be certainty about the amount of the claim (*Kleynhans v Van der Westhuizen*

1970 (2) SA 742 (A) 749.) If the applicant cannot prove that he or she has a claim for at least the prescribed amount, the applicant should not be allowed to make the application. If the applicant can prove that a certain amount of the claim is liquidated (the amount is fixed by agreement, an order of court or otherwise) the applicant can apply if the amount is more than the limit. It would be untenable if a creditor who has an unliquidated claim could apply for the liquidation of a debtor's estate, and subsequently be unable to prove a claim. It is no answer to argue that the application can be refused if the claim cannot be proved. Allowing creditors who have unliquidated claims to apply for liquidation would cause uncertainty and delay and place an additional burden on the court, including the possibility of hearing oral evidence. A further advantage of the retention of the requirement of a liquidated claim is that it precludes a creditor from relying on a claim that cannot be accommodated in an application by way of motion.

4.8 Clause 4(2) is necessary because a creditor whose claim is, for instance, payable in instalments would be prejudiced if he or she had to wait until a sufficient amount was payable while the insolvent paid other creditors or squandered assets. *The suggested "payable at some determined time in the future" makes the position clearer than section 9(2) which provides for a claim "which has accrued but which is not yet due".*

4.9 In terms of the Insolvency Act and the Bill a secured creditor qualifies to apply for liquidation. A rule excluding secured creditors would cause problems in cases where it is not clear whether or not the security is sufficient.

4.10 The requirements of the different divisions of the High Court regarding notice of the sequestration application to the debtor are not uniform. *The majority of commentators supports the proposal in clause 4(3)(a) that notice of the application for liquidation to the debtor or the debtor's spouse should be required unless the court is in the exercise of its discretion of the view that notice should be dispensed with.* It is clear that rules in respect of notice may be included in the Rules of Court. It is, however, submitted that it would be expedient to include such a provision in the Bill.

4.11 See paragraph 3.5 above for the requirement of security in clause 4(3)(c); paragraph 3.7 for the procedures set out in clause 4(3)(e) and (f); and paragraph 3.8 for the omission of section

9(4) of the Insolvency Act dealing with reports by the Master.

Clause 5: Liquidation of partnership estate

5.1 The simultaneous sequestration of the partnership estate "is not simply a procedural matter but a vital component of the law of insolvency as applied to partnerships" (*Acar v Pierce* 1986 (2) SA 827 (W) 832). In addition to the express exceptions contained in section 13(1) of the Insolvency Act, a partner who otherwise would have no defence thereto, may be able to avoid the automatic sequestration of his or her estate on a ground personal to the partner, for instance, that such sequestration is blocked under the Moratorium Act 25 of 1963. Section 13(1) therefore does not require the court to sequester the private estate of a partner if there is a lawful bar to its doing so. Where in a particular case the court cannot sequester the estate of an individual partner in a partnership (not falling within the exceptional cases), it can apparently not sequester the estate of the partnership (see *P De V Reklame v Gesamentlike Onderneming van SA Numismatiese Buro en Vitaware* 1985 (4) SA 876 (C)). Execution against such a partnership must therefore be levied as prescribed by common law which can be time-consuming and cumbersome. It is submitted that one should not attempt to provide a list in respect of partners who (or that) are exempted from liquidation. *Clause 5(1) makes it clear that where a partner's estate may not be liquidated by law, or where a partner's liability is limited in terms of the partnership agreement, the court may liquidate the estate of the partnership and that (or those) of the other partner (or partners). Provision is also made in clause 5(3) for cases where the partnership cannot be liquidated in terms of the Bill, but for instance is a company which must be liquidated in terms of the Companies Act.*

5.2 The situation where there is a lawful bar to the liquidation of all of the partners' estates, is problematic. Who would attend meetings of creditors in respect of the insolvent partnership estate, deliver business records, lodge statements, etc? *The solution proposed in clause 5(4) of the Bill is to designate somebody to fulfil the statutory duties of the insolvent partner, had there been one.*

5.3 *Section 13(2) of the Insolvency Act provides that where the individual estate of a partner is unable fully to meet the costs of sequestration, the balance shall be paid out of the*

assets of the estate of the partnership. However, the converse is not provided for. Consequently any shortfall in the partnership estate has to be recovered by way of contribution. **Clause 5(5) remedies the position.**

5.4 Our courts have, over the course of years, decided that it is competent to sequester the estate of a dissolved partnership on, it would appear, the basis that for the purpose of the Insolvency Act a partnership must be regarded as a *persona* distinct from the partners and that it continues to exist until its creditors have been satisfied. This construction of the law has, however, also evoked criticism. There are certain obvious legal difficulties attendant upon sequestering a partnership which, because of prior dissolution, is no longer in existence (*Cloete v Senekal and Roux* 1950 (4) SA 132 (C) 133). It appears that most of the authorities that criticise the practice of sequestering the estate of a partnership which has been dissolved, admit that there are practical considerations that necessitate this state of affairs. If a consequence of a dissolution of a partnership is that the partnership continues for the purpose of completing pending transactions, winding up the business and adjusting the rights of the partners, it is submitted that there is no convincing reason why the estate of a partnership which has been dissolved but not yet liquidated, cannot be sequestered. **Clause 5(6) provides for the liquidation of the estate of a dissolved partnership.**

5.5 Proposals that provision should also be made in clause 5 for the liquidation of joint ventures were not accepted. A person who contracts with a "joint venture" should ensure that he or she knows the true identity of the debtor. It should not be provided that the provisions for partnerships apply to joint ventures. The partnership provisions are based on the fact that partners are liable for the debts of the partnership. This is not necessarily the position in the case of a joint venture. It would be unfair to apply the partnership provisions to persons or entities who are not liable for the debts of a joint venture. The term "joint venture" also does not appear to have a legally defined meaning. It may include diverse entities such as partnerships, syndicates and even co-contractors.

Clause 6: Malicious or vexatious application for liquidation

6.1 Although the corresponding provisions of section 15 of the Insolvency Act is not applied

in practice, these provisions have been retained to serve as a deterrent.

6.2 Because too many obstacles should not be placed in the way of an application for liquidation, a suggestion that the court should have the power to order an applicant for liquidation to furnish security for damages that might be suffered by the respondent was not accepted.

Clause 7: Provisional liquidation order

7.1 See paragraph 3.6 above for a discussion of the requirement of "advantage of creditors".

7.2 According to information received debtors who flee the country after liquidation is a fairly common phenomenon. Courts seldom order passports to be impounded and suspects are able to flee with impunity. Legislation in certain foreign jurisdictions empower the court to impound the debtor's passport when necessary. Although such a provision would not always be effective, most commentators support a provision for the impoundment of passports of insolvent persons. Section 21 of the Constitution of the Republic of South Africa, Act 108 of 1996 provides, inter alia, that everyone has the right to leave the Republic and every citizen has the right to a passport. These rights are obviously limited. A serving prisoner would, for instance, not have the right to leave for the Bahamas. In terms of section 36 these rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking all relevant factors into account, including, inter alia, the importance of the purpose of the limitation and less restrictive means to achieve the purpose. *It is submitted that the provisions in clause 7(6), that a court may order the confiscation of an insolvent's passport if there is reason to believe that the insolvent plans to flee the country to avoid prosecution or to take assets out of the reach of creditors, will be constitutional.* Any provision that automatically prohibits the insolvent's use of a passport may fall foul of the constitution because less restrictive means are available to achieve the purpose of the limitation.

7.3 Although there was some support for a proposal that funds should be made available to a debtor to oppose the granting of a final order, the proposal was not accepted because it would probably lead to abuse such as unnecessary and expensive litigation.

Clause 8: Final liquidation order

The Insolvency Act does not empower the court in compulsory sequestration matters to issue a sequestration order without first issuing a rule *nisi*. The intention is apparently that the debtor should have the opportunity of opposing the application before a final sequestration order is issued. It is clearly not desirable to make a rule that no provisional order be required. The question is whether there would be a significant number of cases in which the court would be justified to summarily issue a final liquidation order. If so, the court should have a discretion in this regard. If the debtor received notice of the application (see clause 4(3)(a)) and liquidation is on the face of the papers to the advantage of creditors, the courts might be disposed to issuing a final order immediately. *It is submitted that the court should have a discretion to issue a final liquidation order without having issued a provisional order as is provided in clause 8(1).*

Clause 9: Obligations of a creditor upon whose application a liquidation order is made

Section 14(2) of the Insolvency Act provides that the trustee shall pay the creditor who made the application his taxed costs "*out of the first funds of the estate available for that purpose*". A liquidator cannot pay the costs until he has established that sufficient funds are available to pay *all* costs of liquidation. *The quoted phrase has no meaning and has been omitted.*

Clause 10: Notice of liquidation

10.1 Section 17 of the Insolvency Act requires, inter alia, that sequestration orders be transmitted to officers who are in charge of registers of ships and that caveats be entered in respect of ships registered in the name of or belonging to the insolvent. Registers of ships are clearly not as sophisticated and comprehensive as the registers in the Deeds Office. The probability of a person or company that owns a registered ship being declared insolvent, is small. In the few cases where such an insolvency does occur it is highly unlikely that the liquidator would not be aware that a registered ship is an asset of the estate. The possible benefit that the registration of caveats in the registers of ships would produce is totally out of proportion to the work and cost that this involves. *All the respondents agreed that the requirement of an automatic caveat in registers*

of ships should be deleted.

10.2 Section 17(4) requires the Master to give notice in the **Gazette** of a sequestration order. Although the Insolvency Act already prescribes this, some court orders require a notice in the **Gazette** (see, for instance, *Ex Parte Clifford Homes Construction* 1989 (4) SA 610 (W)). In practice the person who will carry out such order, is the attorney of the applicant. With a view to eliminating delays in the publication of liquidation orders in the **Gazette** and ensuring that this aspect is reported to the court on the return date, *clause 10(5) provides that the Master's duty in regard to the publication of orders should be transferred to the applicant's attorney or the applicant if the applicant does not have an attorney.*

10.3 A proposal that the notice in clause 10(5) should be coordinated with the notice of the first meeting in clause 38 has merit, but the elimination of unnecessary notices is outweighed by the need to publish the liquidation order as soon as possible.

10.4 A proposal that court orders should be sent by facsimile or electronic mail was not acceptable because a record of the order must be kept for a considerable time.

10.5 No provision is made for publication of a court order in newspapers (see paragraph 1.34 above), but the courts will retain the existing authority to order such advertisements.

Clause 11: Effect of liquidation on insolvent and his or her property

11.1 On the assumption that uniform provisions should apply to companies and persons, consideration was given to the rule at present applicable to companies or a similar rule - only the custody and control of assets pass and as a rule the assets vest in the company. The difference in the rule in respect of companies and persons is, however, based on the substantial difference between companies and individuals. After liquidation the company continues to exist and the liquidator merely acts on behalf of the company. An individual can accumulate assets that do not form part of his insolvent estate. Notwithstanding views to the contrary (see for instance A L Stander "Die eenaar van die bates van die insolvente boedel" 1996 *THRHR* 388; R G Evans Who owns the insolvent estate" 1996 *TSAR* 719), the existing rule does not give rise to any problems,

except perhaps problems related to section 21. *Clause 11(1) has retained the present position that assets vest in the liquidator.*

11.2 Section 129(2) of the Insolvency Act provides that a rehabilitation order granted in circumstances described in section 124(3) (no claims proved against the estate within six months after sequestration) shall have the effect of reinvesting the insolvent with his estate. Section 124(3) has not been repeated in the Bill because the absence of proved claims is not an indication that the debtor is entitled to rehabilitation at an early stage - see the comments on clause 96 below. Section 129(2) has accordingly also not been repeated in clause 99 of the Bill. Clause 93 of the Bill provides that any surplus after the payment of debts is deposited into the Guardian's Fund and can be repaid to the debtor after rehabilitation. In terms of clause 11(6)(b) assets acquired by the Insolvent after liquidation forms part of the insolvent estate except if excluded by clause 15. Excluded assets form part of a separate estate. *There is no longer re-vesting of assets upon rehabilitation and clause 11(2) does not like section 25(1) of the Insolvency Act make provision for re-vesting upon rehabilitation.*

11.3 Cases may occur where it is in the interest of all parties that the sale in execution should proceed. The existing provisions to authorise the continuation of execution are not used frequently. In the case of sequestration the cost of a court application discourages the continuation of a sale in execution. *Clause 11(5)(b) authorises the Master to approve the continuation of a sale in execution, subject to the confirmation of the sale price by the Master or by resolution of a meeting of creditors of the estate.* The advantages of this provision should be weighed against the extra work that it would bring about for the Master. To discourage applications that have no merit it is provided that the Master may be approached only if expenses regarding the sale of the property have already been incurred. It is submitted that secured creditors cannot be prejudiced because a creditor with a pledge or right of retention has possession of the property, a landlord has a lien which is not impaired by the liquidator's removal of assets and it is difficult to see how the mortgagee contemplated in the Security by Means of Movable Property Act 57 of 1993 could forfeit his secured claim should the hypothecated property be sold in execution for the benefit of the insolvent estate in terms of clause 11(5). *In line with proposals by commentators, the liquidator must apply for approval to continue with a sale in execution.*

11.4 Section 82(6) of the Insolvency Act effectively excludes the insolvent's wearing apparel and bedding from the estate since these may not be sold by the trustee. It effectively excludes any of the household furniture, tools and other means of subsistence which the creditors have (or, if no creditor has proved a claim, the Master has) resolved should be retained by the insolvent for his or her own use, since the trustee may not sell these either. Section 39 of the Supreme Court Act 59 of 1959 and section 67 of the Magistrates' Courts Act 32 of 1944 contain more categories of exempted property than section 82(6). Although it could be argued that the phrase "other essential means of subsistence" gives section 82(6) a wider application, it is submitted that the phrase lacks certainty and gives no clear guidance about what property may be retained. If it is accepted that certain basic property is essential for a basic minimum standard of living, *the inconsistency between property exempt from execution and property exempt from sale in terms of section 82(6) cannot be justified. Clause 11(6) harmonises the different categories.* Proposals for minor changes to the wording and the maximum amounts have not been accepted in order to retain the harmony between the Insolvency Act and the other provisions.

11.5 One of the reasons for the expansion of section 82(6) of the Insolvency Act is to create certainty and give clear guidance about what property is excluded from the insolvent estate. This aim would not be achieved if the matter is left entirely in the hands of the liquidator. *In terms of clause 62(4)(l) the liquidator can, with the authority of the Master or creditors, make available to the insolvent assets in excess of the minimum values reflected in the clause* and this give flexibility to deal with the different circumstances in each estate. There can be no objections from creditors' point of view if a majority of creditors in value decides to exceed the values usually applicable in respect of assets to be released to the insolvent. The probability that the Master would be overly generous towards an insolvent appears to be remote and the Master will in practice only be approached in exceptional circumstances. The values in clause 11 are not high and some flexibility appears to be advisable. Cases will probably arise where creditors act unreasonably in directing which assets should be released. Clause 42(9) of the Bill provides for the setting aside of a directive by creditors, but a court application is necessary and only directives that infringe the rights of *creditors* can be set aside. Section 39 of the Supreme Court Act 59 of 1959 and section 67 of the Magistrates' Court Act 32 of 1944 provides that the court has a discretion in exceptional circumstances to increase the amounts of the value of property exempt from execution. *Clause 62(5) provides that a liquidator who disagrees with the assets made available in terms of*

subsection (4)(l) by resolution of a meeting of creditors may refer the matter to the Master for his or her decision. The decision of the Master will, as usual, be subject to review by the court in terms of clause 106.

11.6 The majority of creditors did not support a proposal that a vehicle as a primary means of transport should be excluded from the insolvent estate, because it could cause an outrage on the part of the insolvent's creditors; it is unjustified or unacceptable; it will reduce the award to concurrent creditors; it will be difficult to draw the line between inexpensive and expensive vehicles; the solvent spouse would usually be in possession of a vehicle; and the provision of a vehicle at the cost of the estate is an unjustified luxury.

11.7 Clause 11(6)(b) of the Bill provides that property or the proceeds thereof which are in the hands of the sheriff under a writ of attachment or a warrant of execution at the date of liquidation form part of the insolvent estate. In terms of court decisions (see for instance *Syfrets Bank Ltd v Sheriff of The Supreme Court, Durban Central* 1997 (1) SA 764 (D)) a liquidator has the right to repudiate, cancel or withdraw from a sale of assets in execution if the assets have not been delivered or transferred by the date of liquidation. It is not necessary or advisable to spell out the right of a liquidator to repudiate a sale in execution as this right is not spelled out in the case of sales in general.

Clause 12: The effect of civil proceedings by or against the insolvent

12.1 Clause 12(1) corresponds to the first part of section 20(1)(b) of the Insolvency Act. The exception in section 20(1)(b) refers to proceedings that do not affect the insolvent's estate, such as proceedings relating to status or assets that do not form part of the insolvent estate. These exceptions are contained in clause 15(7).

12.2 There are insufficient grounds to make provision for the stay of proceedings before the granting of a liquidation order.

12.3 Although attempts may be made to abuse insolvency proceedings to delay civil proceedings the courts should take steps to curb such abuse. A particular creditor would be able to obtain an

advantage if civil proceedings are continued after the granting of the first liquidation order.

12.4 In terms of the proviso to section 20(1)(b) of the Insolvency Act, if a claim in respect of which proceedings were stayed is subsequently proved against the estate or is compromised by the trustee after being tendered for proof, the claimant may also prove a claim for taxed costs incurred in connection with those proceedings before sequestration. It is probably not desirable to prescribe special rules in this regard. The fact that a claim has been submitted does not imply that all the costs incurred can be recovered from the defendant. If the liquidator is satisfied with the costs it may be proved without taxation (*Benson v Walters* 1981 (4) SA 42 (C) 49). If the liquidator disputes the claim for costs the issue should be resolved according to the ordinary procedures. If the costs concerned constitute a liquidated claim a claim for those costs can in any event be proved and there seems to be no need to make special provision for it.

12.5 Section 75(1) of the Insolvency Act provides that legal proceedings instituted before sequestration shall lapse three weeks after the first meeting, unless the person who instituted the proceedings has given three weeks' notice to the trustee or the Master of his intention to continue the proceedings. Cases where legal proceedings were instituted because a debtor was unable to pay should not be continued after insolvency because this would in any case be of no avail to the creditor. In the case of a dispute about the validity or the amount of a claim it might be desirable to continue the proceedings after insolvency. The liquidator needs time to decide on his attitude towards a claim. Consultation with creditors may be advisable. *Clause 12(2) makes it clear that unless the court or liquidator consents, the liquidator elected at the first meeting should be allowed three weeks to decide on the continuation of proceedings.*

12.6 Although Rule 15(3) of the Uniform Rules of Court works well in practice it appears odd that no provision is made in the Insolvency Act or the Companies Act for the continuation by the debtor of legal proceedings stayed by insolvency. *Clause 12(3) provides for the substitution of the liquidator in proceedings by or against the insolvent.*

12.7 In both the High Court and the Magistrate's Court the Rules can be employed to ensure that actions are finalised within a reasonable period of time. It is nevertheless deemed desirable to cover this aspect in the Bill. *Clause 12(4) provides that the court may on application by the*

liquidator or a creditor who has proved a claim against the insolvent estate prohibit the continuation of proceedings against the insolvent estate if the court is of the opinion that the institution or continuation of the proceedings was delayed unreasonably and that the continuation of the proceedings will delay the finalisation of the insolvent estate unreasonably.

12.8 Section 75(2) of the Insolvency Act provides that the consent of the court is required to institute proceedings in respect of a liability which arose before sequestration if any liquidator's account has been confirmed. A first account may be confirmed very early in the administration of the estate. Decisions on the future administration of the estate are usually finalised at the first meeting. *Clause 12(5) affords a party at least three months after the conclusion of the first meeting to institute legal proceedings.*

Clause 13: Instalment sale agreement by insolvent as seller

A redraft of clause 13 has been moved to before clause 29 dealing with the effect of liquidation on goods sold on credit.

Clause 14: Payment to insolvent of debt which arose before liquidation

Clause 14 has been deleted because it was duplicated in clause 24.

Clause 15: Rights and obligations of insolvent during insolvency

15.1 The second proviso to section 23(2) of the Insolvency Act refers to a contract by which the insolvent's estate is, or is likely to be, adversely affected. In practice the application of the above-mentioned criterion appears to pose a problem. Trustees and insolvents often differ over the question as to whether the trustee's consent is necessary or not. It was considered whether the proviso in question was superfluous, namely whether the first proviso and the contribution part of the second proviso did not include "any contract whereby his estate . . . is or is likely to be adversely affected." It appears that the only possibility that might not be included is the cession by the insolvent of future rights or even the **spes** of such rights, thus adversely affecting the estate (if it can be accepted that such rights may indeed be ceded). In the case of an insolvent cedent such

Clause 15

rights will, however, vest in the liquidator who can then refuse to give effect to the cession on the ground that it will adversely affect the estate. *It appears that the expunction of the reference in section 23(2) to a contract adversely affecting the insolvent's estate will not be prejudicial to creditors and clause 15(1) omits the phrase in question.*

15.2 The contribution mentioned in section 23(2) of the Insolvency Act is a reference to section 23(5) which provides that the trustee is entitled to any moneys received by the insolvent in the course of a profession, occupation or other employment which in the opinion of the Master are not necessary for support or the debtor or the debtor's dependants (*Mervis Brothers (Pty) Ltd v Hanekom* 1963 (2) SA 125 (T) 127). *Clause 15(1) contains an express reference to any contract whereby any earnings which accrue to the insolvent estate are or are likely to be adversely affected, thus eliminating any obscurity in the meaning of the phrase.*

15.3 A contract within the exceptions contained in section 23(2) of the Insolvency Act, and not validated under the saving provision (section 24(11)), is not void but only voidable at the option of the trustee (*Ex Parte Olivier* 1948 (2) SA 545 (C) 548 -549; *WL Carrol & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T) 730 - 731). For the sake of clarity the legal position is embodied in clause 15(1).

15.4 In terms of section 23(3) of the Insolvency Act an insolvent may carry on or be employed in any capacity or have any direct or indirect interest in the business of a trader who is a general dealer or manufacturer, only if the insolvent obtains the written consent of the trustee. "Trader" as defined in section 2 of the Act has a wide meaning. Neither "manufacturer" nor "general dealer"(section 23(3)) is defined in the Act. The prohibition in section 23(3), in its present form, appears to be somewhat of an anachronism. A pawnbroker or auctioneer and other individuals who might well be a danger to the public can ply their trades without the consent of their trustees with impunity but an insolvent may not be employed without such consent as a shop assistant or clerk in a large department store, where the insolvent's chances of inflicting harm are so remote as to constitute no danger at all. It is undoubtedly anomalous that the trustee's consent is not required where the business is not that of a general dealer or a manufacturer but nevertheless that of a "trader" as envisaged by section 2. A similar prohibition does not exist in England, Scotland, Australia or the United States of America. *The requirement to obtain the trustee's consent to*

Clause 15

work as a trader who is a general dealer or manufacturer is omitted in clause 15(2). Professions and industry can devise their own rules to exclude an insolvent.

15.5 In *Singer v Weiss* 1992 (4) SA 362 (T) 367 Judge De Villiers stated his view that the real intention of sections 23(3), (5) and (9) of the Insolvency Act was to encourage industriousness on the part of the insolvent and to ensure that insolvency would not destroy the insolvent as an income-producing person. The legislature could never have intended that this indulgence be extended to an insolvent who was acquiring income by means of fraud. If "work done" relates to lawful work only, the anomalous situation arises that the fruits achieved by the insolvent from criminal activities will become available to the pre-sequestration creditors, as opposed to the fruits of honest labours which become available to the debtor and the debtor's post-sequestration creditors. ***It is equitable that those who became post-liquidation creditors as a result of the insolvent's illegal conduct without knowledge of the illegality of the conduct should benefit from the assets obtained by the insolvent in the course of such conduct. Clause 15(2A) makes provision for this.***

15.6 It appears that liquidators often do not of their own free will make use of their powers under section 23(4) of the Insolvency Act. Section 23(4) and (5) contains an important advantage for ordinary creditors and ideally liquidators should in all instances make full use of their powers in terms of section 23(4). In *Ex Parte Jacobs* 1977 (4) SA 155 (NC) 156 - 157 Judge Van den Heever points out that there is an omission in the Insolvency Act in that respect that there is no obligation on an insolvent to keep the trustee informed of income and the financial position of the insolvent after distribution of capital assets; and to expect of the trustee that he or she, without any guarantee that even disbursements in this connection would be recovered, should of his or her own volition undertake the detective work for this purpose, is to misjudge both human nature and what experience teaches us. ***In terms of clause 15(3)(a) the insolvent is obliged to send a monthly statement to the liquidator for a period of one year from the issuing of the provisional liquidation order, and thereafter annually.*** The liquidator retains the authority to at any time require a statement. The insolvent is required to keep record of all receipts and a submission that all persons making contributions to the household should keep detailed records was not accepted.

15.7 Section 23(7) of the Insolvency Act and legislative provisions in other Acts in respect of

Clause 15

the exclusion of pensions or social benefits from insolvent estates are consolidated in clause 15(4). The repeal or amendment of such provisions in other Acts are dealt with in Schedule 5 to the Bill. "Social benefits" is defined in clause 1. Clause 22 makes provision for the recovery of certain contributions to pension funds. *Pension funds or annuities have become such an attractive vehicle to safeguard funds against creditors that clause 15(4) also contains a cap of R200,000 on the exclusion from the insolvent estate of a debtor of pension benefits paid in the year after liquidation or a subsequent year. In line with paragraphs 4.2 to 4.6 above, clause 15(4A) provides that the Minister may amend the amount in subclause (4) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.* It is not deemed necessary or advisable to make the exclusion of pension benefits expressly subject to section 37D of the Pension Funds Act 24 of 1956 as is done in section 37B of that Act. The benefits falls outside the insolvent estate and there does not seem to be any reason why deductions cannot be made or the insolvent sued in his or her own name in terms of clause 15(7)(a) of the Bill.

15.8 Section 23(5) of the Insolvency Act refers to moneys *received* or *to be received* by the insolvent. Requiring of the insolvent to contribute surplus moneys that *have already been received*, might have inequitable consequences. Until the Master directs that the trustee is entitled to moneys which have been received by the insolvent, the moneys belong to the insolvent who may use it to advantage. *Clause 15(5)(a) makes it clear that only moneys which are to be received by the insolvent in future may form the basis of a direction by the Master.* The insolvent should not be penalised because a liquidator may be lax. *The fact that the liquidator is reliant on information supplied by the insolvent to claim a part of the insolvent's earnings is alleviated by clause 15(5)(a) which enables a liquidator to force the insolvent to give evidence.*

15.9 It is not quite clear whether section 23(5) of the Insolvency Act would apply to property purchased by the insolvent with his earnings. In *Hicks v Hicks' Trustee* 1909 TS 727 at 733 Judge Bristowe observed that it may be that " . . . it is a hardship on the insolvent that the trustee and creditors should lie by and allow him to receive wages and use them for his own benefit, and then turn round and say, 'The accumulation of those wages belongs to us'." It is conceivable that it would often be extremely difficult to decide whether property which has been purchased out of past earnings falls within that portion of moneys which the insolvent ought not to be allowed to retain. *Clause 15(5)(c) expressly excludes property obtained with money which does not accrue*

Clause 15

to the insolvent estate.

15.10 When an order is granted for the liquidation of a judgment debtor's estate, an emoluments attachment order that was served on the debtor's employer no longer has any force and effect and payments cease. In some cases the debtor or his or her attorney demands a refund of payments which may have been deducted by the debtor's employer in terms of the emoluments attachment order after the date of the liquidation order. Immediately before they are liquidated many debtors make, and have in some cases for a considerable period of time made, monthly payments to their creditors in terms of orders of court. Theoretically a higher proportion of the insolvent's earnings should therefore in terms of clause 15(5) accrue to his insolvent estate. ***Clause 15(6) will ensure that the insolvent estate receives the benefit of an emoluments attachment even before the liquidator applies for a certificate in terms of clause 15(5)(a).***

15.11 The following criticism has been levelled at the procedure under section 23(5) of the Insolvency Act that the Master certifies the portion of the insolvent's earning which is not necessary for the insolvent or those dependant on the insolvent:

The Master is reluctant to give a certificate on the strength of the application by the liquidator without obtaining the views of the insolvent. The matter is delayed by giving the insolvent the opportunity to comment and referring these comments to the liquidator. It is in any case difficult to decide such a matter merely on papers lodged with the Master with the result that certificates are issued rarely.

It is unreasonable to summon the insolvent to appear before the Master if the insolvent does not stay or work near the office of the Master. It is problematic if the interrogation is not held before the person who will consider the application for the certificate.

The Master has little experience in considering whether a surplus of earnings is available for the payment of debts. Magistrates who preside over debtors' courts are familiar with similar investigations in terms of the Magistrates' Courts Act 32 of 1944, especially sections 65D(4)(a) and 65J(6).

Clause 15(5)(a) provides for procedures similar to procedures in terms of the Magistrates' Courts Act 32 of 1944 to determine the proportion of a debtor's earnings which is not required for the support of the debtor and the debtor's dependants.

15.12 Section 23(8) of the Insolvency Act provides that the insolvent may *for his own benefit* recover any compensation for any loss or damages which he may have suffered, whether before or after the sequestration of the estate, by reason of any defamation or personal injury. In *Santam Versekeringsmaatskappy v Kruger* 1978 (3) SA 656 (A) it was confirmed that section 25(8) entitles an insolvent who has suffered loss or damage by reason of personal injuries sustained by him or her, to recover for his or her own benefit, *to the exclusion of his trustee*, not only what can be called "general damages" (for instance compensation for pain and suffering) but also "special damages" (for instance medical expenses). Judge Miller referred to the anomaly which would arise if creditors in respect of medical and hospital expenses incurred by the insolvent prior to sequestration were to be left with a concurrent claim against the insolvent estate, while the insolvent received for his or her own benefit compensation paid for those very expenses. This situation gives cause for unfairness and *clause 15(7)(c) provides that where compensation recovered by the insolvent includes medical or other expenses a creditor in respect of such expenses is entitled to be paid out of the compensation or recover the compensation from the insolvent even though the claim for such expenses arose before the date of liquidation of the estate.*

Clause 16: Alienation by insolvent of property to third party who is in good faith

This clause re-enacts section 24(1) of the Insolvency Act.

Clause 17: Presumptions relating to property in the possession of insolvent

This clause re-enacts section 24(2) of the Insolvency Act.

Clause 18: Dispositions without value

18.1 A presumption of insolvency for three years before liquidation is proposed in clause 25(2A) below. *In the light of the presumption of insolvency the onus of rebuttal of insolvency for two year before insolvency in section 26(1) of the Insolvency Act has been omitted in clause 18(1). Clause 18 also makes it clear that the onus to prove whether the liabilities of the insolvent at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of is borne by someone opposing the setting aside of the disposition.* If this is not the position the presumption of insolvency will be meaningless because the liquidator (or a creditor on behalf of the liquidator) will be saddled with the heavier burden to prove the extent of the excess of assets over liabilities.

18.2 Numerous commentators point out that when applications for liquidation are opposed many months may pass before a liquidation order is granted. This will result in time limits for the setting aside of dispositions running out if the time limits are calculated before the date of the liquidation order. *The time periods in clauses 18(1), 19, 20(4), 22(1) and 22(6) are calculated before the date of the presentation of the application for liquidation to the registrar of the court and not before the date of the liquidation (defined in section 1 as the date of the court order).*

18.3 Most commentators support the provision that there should be a general time limit for the setting aside of dispositions without value. There is no justification to set aside a disposition which, for example, took place five years ago at a time when the present creditors were perhaps not involved in any business with the debtor. Even an "associate" as defined in clause 1 is entitled to a time limit. *Clause 18 limits the setting aside of dispositions without value to three years before the presentation of the application in the case of a disposition in favour of an associate and to two years in other cases.*

18.4 Like section 26 of the Insolvency Act, clause 18 deals with dispositions "not made for value". In *Terblanche NO v Baxtrans CC* 1998 (3) SA 912 (C) 917E the court rejected an argument that inadequate value is always *prima facie* evidence of no value. A party who avers that a monetary or other benefit is illusory or nominal and that it therefore amounts to no value at all

must plead that fact. Paragraph 3.44 of Working Paper 41 *Voidable Dispositions and Dispositions that May Be Set Aside and the Effect of Sequestration on the Spouse of the Insolvent* proposed (in line with a provision in the Insolvency Act in England) that the test should be whether the disposition was "for consideration the money value of which is significantly less than the value of the consideration" that the other party provided in return. Despite tacit support for this proposal, it was decided to retain the phrase "not made for value" which has been interpreted by the courts .

18.5 Suppose that a debtor, without giving value, issues an acknowledgement of debt to a creditor and prevails upon a surety to guarantee payment of the debt. Suppose further that the estate of the debtor is then liquidated and the acknowledgement of debt is then liable to be set aside as a disposition of property in terms of section 26(1). In these circumstances, the creditor will naturally turn to the surety to make good his or her undertaking. The courts have consistently decided that the surety can contend that section 26 does not contain a defence personal to the debtor; and thus it can be raised by the surety. CF Forsyth & JT Pretorius *Caney's The Law of Suretyship in South Africa* fourth edition Cape Town: Juta 1992 at 172 refer to criticism of the cases on this point. The authors point out (at 174) that creditors seek sureties precisely because they fear the insolvency of the debtor and should not find, even in the restricted case of dispositions without value, that the insolvency of the debtor has released the surety. They submit (at 175) that the position is not clear and that other courts may be persuaded that a defence which is for the benefit of the creditors of the debtor is not available to the surety. In *Ruskin v Barclays Bank DCO* 1959 (1) SA 577 (W) 585 it was decided, albeit *obiter*, that the surety was not discharged if the creditor had received payment from the principal debtor and it afterward turned out that such payment was void as a fraudulent preference. In *Millman and Stein v Kampfer* 1993 (1) SA 305 (C) the respondent contended that the agreement in terms of which she had bound herself as surety was void because of the provisions of section 29. Judge Conradie held (at 309 - 310) that the setting aside of a disposition under section 29 did not hit the validity of the debt. It struck only at the unusual and prejudicial discharge thereof. The reason that a surety might not avail himself of a defence *in personam* is that the defence was not such as to destroy the obligation. The surety's undertaking was to see to it that the creditor got paid, but he had a right of recourse against the debtor. In *Standard Bank Financial Nominees v Bamberger* 1993 (4) SA 84 (W) Acting Judge Levy dealt with the clauses in a deed of suretyship. He held (at 90 - 91)

Clause 19

that a clause with a clearly expressed intention to ensure that the sureties remained liable in respect of amounts that may have been discharged by the debtor but which the creditor was obliged to refund in the event of insolvency, was not in any way an inroad on the rights of sureties or oppressive of the sureties beyond the reasonable limits of protection which a creditor was entitled by agreement to secure for itself from the surety when undertaking to lend money to the debtor. A strong majority of commentators submit that a surety should not be discharged if the main debt is voidable or set aside under the insolvency law. *Clause 23(3) provides that the setting aside of a disposition made by a debtor in terms of clause 18, 20 or 21 shall not discharge a surety for the debtor.*

Clause 19: Antenuptial contracts

19.1 *Section 27 of the Insolvency Act refers in a discriminatory manner to a benefit given by a man to his wife. Clause 19 refers to a benefit given by one spouse to the other.*

19.2 A commentator says that in the bliss of a new marriage earthly matters do not receive the attention that it deserves and proposes a longer period for the completion of dispositions promised in an antenuptial contract. It is submitted that even newlyweds do not deserve protection if they do not finalise benefits under their antenuptial contracts promptly and that the three month limit in clause 19(2) should be retained.

Clause 20: Voidable preferences

20.1 Section 29(1) of the Insolvency Act requires of the beneficiary to prove that the debtor did not have the intention to prefer the beneficiary at the expense of creditors. This requirement appears to be unfair. The test is subjective and it stands to reason that there will seldom be direct evidence of the debtor's intention.

20.2 *It is submitted that special rules should apply for "associates" of the insolvent as defined in clause 1. A time limit of 12 months is set in the case of a disposition to an associate while the 6 month limitation is retained for other cases.*

20.3 One of the requirements of section 29 of the Insolvency Act to resist the setting aside of the disposition is that the person in whose favour the disposition was made must prove that the disposition was made in the ordinary course of business. It is necessary to decide objectively whether solvent persons would in the normal course of business act in the same way as the parties. Although there are numerous decided cases on this requirement and guidelines have been laid down, it remains a question of fact and each case must be decided according to its special circumstances. In borderline cases it is difficult to predict the court's decision beforehand. On the one hand the requirement brings about flexibility, but it may also give rise to uncertainty. *In order to facilitate proof, subclauses 20(2)(a) to (c) provide for cases where it is presumed that dispositions were not made in the ordinary course of business.* The intention is not to limit the meaning of "ordinary course of business" at all, but to assist proof thereof in certain cases. *The rules in clause 20(2)(a) to (c) are based on rules in other legal systems.* Commentators submit that a further category should be added for dispositions made under pressure, threat or duress, because such dispositions are made regularly and it is difficult to distinguish between dispositions made under pressure and collusion. Conceptually it is a contradiction to say that dispositions which are made "regularly" should be presumed not to be in the ordinary course of business. A majority of the Committee responsible for the "Cork Report" which preceded the 1986 reform of the United Kingdom Insolvency Act, recommended (paragraph 1256 on page 285) that genuine pressure by the creditor should continue to afford a defence because a creditor who was active to obtain payment ought in principle to be allowed to retain the fruits of his or her diligence and creditors who delayed taking steps took the risk that the debtor would pay other creditors. It is not clear why a creditor should be penalised for using a legal threat, coercion or pressure to obtain payment of a debt, for instance, a threat not to extend further credit or to take legal action if a debt is not paid. Duress in the sense of the illegal exercise of coercion (compelling by force) is a different matter, for instance blackmailing the debtor. However, such cases are surely not common and proof of such action will surely indicate that payment was not in the ordinary course of business. Dispositions as a result of pressure, coercion or duress should not be presumed to have been made not in the ordinary course of business.

20.4 Consideration was given to a rule modelled on a recommendation by the Law Reform Commission of British Columbia that the periods should not run if facts are concealed. This rule was discarded because of problems to formulate it clearly and because it would be difficult to

apply.

20.5 A commentator proposed that the *actio Pauliana* should be codified in accordance with modern developments in other jurisdictions. A reason given was that the action applies also where an estate was not sequestrated, in other words in the general law. It can be argued that that unnecessary differences between pre-insolvency and insolvency law are undesirable. Although cases about the *actio Pauliana* are reported from time to time it is almost never applied in cases of sequestration or winding-up. The reason is that it is easier to prove the preconditions for the statutory provisions. It was decided not to investigate the codification of the *actio Pauliana* as part of the review of the law of insolvency.

Clause 21: Collusive dealings for prejudicial disposition of property

21.1 *There was support for the application of clause 21, a re-enactment of section 31 of the Insolvency Act, to transactions after liquidation as well.* Even if collusion after liquidation is not common, it is desirable that provision should be made therefor.

21.2 Consideration was given to proposals that provisions similar to sections 423 and 424 of the Companies Act 61 of 1973 - liability for fraudulent conduct of business, should apply to individuals as well. It was argued that there was no reason why a person who was knowingly a party to reckless or fraudulent carrying on of business of an individual person should not be liable to the same extent as a person who acted accordingly in respect of a company. This proposal was not accepted because it might spread the net too widely without the necessity, as in the case of companies, to pierce the corporate veil.

Clause 22: Certain contributions to pension funds may be recovered for benefit of the estate

22.1 Section 63 of the Long-Term Insurance Act 52 of 1998 protects certain life policies against claims by creditors up to the value of R30,000. However, an insolvent may recover all annuities and pension benefits to which he or she is entitled. Provisions that would strike a balance between the interests of creditors and the interests of pension or provident funds and their members were investigated. Consultations were held with a working group of the Life Offices' Association. One

member of the Life Offices' Association indicated that it was unable to support any change to the present position. The Registrar of Pension Funds would prefer the exclusion of pension benefits to be addressed as a section in the Pension funds Act, 1956. Section 37B of the Act already deals with the position of pension benefits upon insolvency. However, it seems better to deal, as far as possible, with all assets excluded from an insolvent estate in the Insolvency Act (clause 15) and not spread the provisions throughout the statute book.

22.2 Creditors cannot complain if a debtor makes provision for retirement. Long-term obligations for the retirement of a debtor is part of the debtor's profile which should be considered by creditors before they extend credit to the debtor. However, it is unfair if a debtor undertakes new obligations while he or she is insolvent. Creditors are still obliged to protect their own interest and if the debtor survives for a length of time after incurring new obligations it is not reasonable to allow creditors to attack the new obligations incurred by the debtor, unless the debtor concealed obligations from creditors. *Clause 22(6) provides for cases where the debtor concealed the payments of contributions to a fund from his or her creditors.*

22.3 Time periods are to a large extent arbitrary. Section 29(1) of the Insolvency Act distinguish between dispositions made more or less than two years before liquidation. The fixing of amounts is also arbitrary, but in this case it should accord to an amount which the average person could be expected to spend on provision for retirement. In an attempt to keep the provisions as simple as possible and to limit disruption and administrative problems for funds, the limitation of the protection accorded to contributions to funds is confined to extraordinary cases. *Clause 22(1) provides that if an insolvent at any time within two years before the presentation to the Registrar of the application for the liquidation of his or her estate undertook new obligations in respect of a fund at a time when the insolvent's liabilities exceeded his or her assets, or as a result of which his or her liabilities exceeded his or her assets, the liquidator of his or her estate may recover from the fund or funds concerned for the benefit of the insolvent estate any contribution in respect of such new obligation which together with the total contributions in respect of existing obligations, exceed the amount of R10 000 per annum or the amount fixed by the Minister from time to time by notice in the Gazette.* The amount of R10 000 may appear to be small but it should be borne in mind that it refers to increases in contributions. *In line with paragraphs 4.2 to 4.6 above, clause 22(1A) provides that the Minister may amend the amount*

in subclause (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

22.4 *It should not be regarded as new obligations if funds are transferred from one retirement fund to another when benefits are paid on termination of service or the dissolution of a fund. The joining of a new fund in place of existing membership of another fund should also be excluded from the expression "new obligations" in so far as the rate of contributions payable by a member does not exceed the rate of contributions payable to the old fund. These matters are provided for in clause 22(1).*

22.5 Because a fund does not have a surrender value like insurance policies, the amount that can be recovered by the liquidator was in the Bill published in Discussion Paper 66 limited to contributions to a fund. If the insolvent or other beneficiaries receive benefits, it is fair that extraordinary contributions to a fund that cannot be recovered from the fund, should be recoverable from persons who received or will receive benefits from the fund. *Because payments to an insolvent before the liquidation of the estate form part of the insolvent estate, clause 22(4) limits the recovery of benefits from the insolvent to payments received from the fund after liquidation.* Upon reconsideration it has been decided that there should also be a cap, albeit a generous cap, on benefits paid from pension funds. *Clause 15(4) provides that benefits are not protected to the extent that such benefits exceed R200 000, or the amount fixed by the Minister from time to time by notice in the Gazette, paid prior to the date of rehabilitation in the year after the date of liquidation or a subsequent year.*

22.6 *An attempt was made to make special provision for funds controlled by the debtor and his associates, but this proved to be too complicated.* It was decided to rely on provisions against fraudulent dispositions to cater for these cases. The working group of the Life Offices' Association feels strongly that contributions which fall outside the extraordinary contributions dealt with in clause 22(1) should enjoy absolute protection and that the extraordinary contributions should be open to attack only on the grounds of collusion or fraud. The working group is concerned that the proposed provisions could result in a flood of claims to recover contributions from funds. The protection of the interests of creditors without proof of fraud or collusion is justified in the extraordinary cases provided for in clause 22(1). For cases not regarded as

extraordinary according to clause 22(1) a strong case can be made out for the setting aside of the fraudulent transactions - “fraud unravels everything” (*Gilbey Distillers & Vintners (Pty) Ltd v Morris* 1991 (1) SA 648 (A)). To set aside a transaction on the grounds of collusion (section 31 of the Insolvency Act or clause 21 of the Bill) there must be proof that two minds were concurring to defraud the estate or that both parties knew that the act was unlawful and dishonest. In order to set aside a fraudulent transaction under the common law *actio Pauliana*, there needs to be fraud on the part of both the debtor and the recipient, although fraud by the recipient need not be proved if he or she acquired something gratuitously (without counter performance). Section 37A of the Pension Funds Act 24 of 1956 provides, subject to certain provisos, that no benefit provided for in the rules of a registered fund, or a right to such benefit, or a right in respect of contributions made by or on behalf of a member, shall be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law. Section 31 of the Insolvency Act (clause 21 of the Bill) and the common law *actio Pauliana* do not deal with attachment of assets, but with the setting aside of transactions. Section 37B of the Pension Funds Act protects benefits payable in terms of the rules of a fund and not contributions to the fund. ***Clause 22(7) retains the rights of a liquidator or creditors in terms of the common law or clause 21 of the Bill if contributions were made fraudulently to the disadvantage of creditors or if there were collusive dealings as contemplated in clause 21.***

22.7 The definition of “pension fund organization” in section 1 of the Pension Fund Act 24 of 1956 refers to associations of persons established with the object of providing annuities. Uncertainty may arise whether payments protected in terms of the Long-Term Insurance Act 52 of 1998 are excluded from insolvent estates in terms of the provisions of that Act or whether the provisions of the Bill will apply. ***Clause 22(8) provides that the provisions of the Long-Term Insurance Act which exclude payments from an insolvent estate do not apply if the payment of premiums in respect of a life policy is a contribution to a fund in terms of clause 22.***

Clause 22A: Attachment of property in possession of associate

22A.1 Paragraph 11.10 and following of the Explanatory Memorandum in Discussion Paper 66 discussed criticism of section 21 of the Insolvency Act and submitted that the section should be

scrapped. The view was expressed that the section was an anachronism and that there was doubt whether it would be upheld under the constitution. A majority of commentators on Discussion Paper 66 supported the scrapping of section 21.

22A.2 In *Harksen v Lane* 1998 (1) SA 300 (CC) the Constitutional Court declared section 21 of the Insolvency Act constitutional. The majority judgment given by Judge Goldstone was concurred in by President Chaskalson, Deputy President Langa and Judges Ackermann and Kriegler. Judge O'Regan gave a minority judgment concurred in by Judges Madala and Mokgoro. Judge Sacks, in a separate judgment, joined with Judge O'Regan in registering his dissent. All the judges agreed that section 21 was not in breach of section 28(3) of the interim Constitution of the Republic of South Africa Act 200 of 1993 dealing with expropriation. The applicant did not rely on subsection 28(1), dealing with the right to acquire and hold rights and dispose of rights, or subsection 28(2), dealing with the deprivation of rights otherwise than in accordance with a law, and the court did not give any decision in that regard. Linda Jansen van Rensburg and Leoni Stander "Weeg die belange van die skuldeisers swaarder as die belange van die solvante eggenoot?" 1998 (2) *TSAR* 334 at 340 argues that section 21 is unconstitutional because it cannot be justified in terms of section 28(2) or the similar provision in the 1996 Constitution. All the judges agreed that there was a rational connection between the differentiation between solvent spouses and other persons in section 21 and the legislative purpose of the section to prevent collusion between spouses to the disadvantage of the creditors of the insolvent spouse. They also agreed that the differentiation amounted to "discrimination". However, the majority decided that the discrimination was not "unfair discrimination" in terms of section 8, while the minority decided that the discrimination was unfair and could not be justified in terms of section 33 of the interim Constitution.

22A.3 Judge Goldstone says in the case of honest spouses, who are married out of community of property, it is not infrequently a matter of complexity for the spouses themselves to determine which property in their possession belongs to each of them; or, indeed, which is held in co-ownership because both contributed to the purchase price. If it is difficult for them to do so, then so much more difficult and complex is it for a trustee who comes as a complete stranger to the financial affairs of the spouses. Whilst in no way wishing to minimise the inconvenience, potential prejudice and embarrassment that the provisions of section 21 of the Act may cause to a solvent

spouse, and even accepting that those consequences may be described as “drastic”, Judge Goldstone disagrees that they are arbitrary or without rationality. He says it must be acknowledged that remedies other than that provided by section 21 cast an onus on the Master or the trustee to establish ownership of property claimed from the solvent spouse. If a claim were to be contested, inevitable delays inherent in the legal system would result. Those delays, certainly in cases of collusion, could well be fatal to the recovery of property rightfully belonging to the insolvent estate. The power of the High Court to grant relief by way of an interim interdict to protect the property or relief elsewhere provided in the Act would require some evidence from the Master or trustee which might not necessarily be available without a time consuming enquiry. Often facts necessary for the determination of the question of ownership will be peculiarly within the knowledge of the solvent spouse. Judge Golstone regards it as rational that the onus should be cast upon the solvent spouse. In the consideration of the effect of section 21 one must assume that Masters and trustees will act reasonably and honestly and not wish to claim for insolvent estates that which solvent spouses are able to establish belongs to them. One must also assume that in an appropriate case the courts will intervene where the Masters and trustees do not so act. It must also be borne in mind that the statutory vesting of the property of the solvent spouse does not have as a consequence that such property is necessarily removed from the possession of the solvent spouse. It is attached by the sheriff of the magistrate’s court or by a deputy sheriff. Looked at from the perspective of solvent spouses, it is the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary. Indeed it could arise whenever a vindicatory claim (whether justified or not) is brought against a person in possession of property. Again, the inconvenience and burden of having to resist such a claim does not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature.

22A.4 Judge O'Regan says the effect of the discriminatory provisions of section 21 on the spouses of insolvents is substantial. All property, movable and immovable, whether the subject matter of a bequest or marriage settlement, whether the personal, business or trading effects of the spouse entirely unrelated to the affairs of the insolvent or of an intrinsically personal nature such as clothing and personal effects, is as a result of the provisions of section 21 automatically vested in the Master and then the trustee. This may happen suddenly and without notice to the spouse of the insolvent. It is plain that section 21 catches within its net all spouses of insolvents, even those spouses innocent of collusion, and even those whom the trustee and creditors accept to be

innocent of collusion. On the other hand, the provision does not affect a range of people who may be in a similarly questionable relationship with the insolvent, such as other close family members, personal friends or business associates. In that sense, the provision is under inclusive in that it does not seek to prevent collusion by other people who may be equally well placed to act fraudulently. She is prepared to accept that the provision may deter collusion between spouses in at least some cases. However, it also seems plain to her that a calculated plan by fraudulent spouses would not easily be waylaid by a trustee's use of section 21. Although the purpose of section 21 is an important one the balance between the interests of the spouse of the insolvent and the interests of the creditors of the insolvent estate seems to favour the interests of creditors disproportionately. The absence of similar provisions in other legal systems seems to support the conclusion that that balance has not been achieved. In the circumstances she finds that section 21 does not meet the test of section 33 and is therefore inconsistent with the provisions of the interim Constitution.

22A.5 Judge Sachs says that the *raison d'être* of the legislation is a blunderbuss application of the stereotype and not a fine-tuned satisfaction of the claims.

22A.6 Cathi Albertyn and Beth Goldblatt submit in "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248 at 263 that if, instead of the assets of an extremely wealthy and flamboyant woman married to a controversial businessman in the *Harksen* case, the equipment necessary for her livelihood together with her family's possessions of a poor black woman with her own hairdressing business, had been confiscated the court might have been exposed to some of the realities of section 21. The question arises whether provisions as drastic as section 21 are necessary. Linda Jansen van Rensburg and Leoni Stander "Weeg die belange van die skuldeisers swaarder as die belange van die solvente eggenoot?" 1998 (2) *TSAR* 334 at 342 submit that the same result can be achieved if control over the estate is taken away from the spouse temporarily. The main object is to give the trustee the opportunity to investigate transactions with persons closely associated with the insolvent. Andre Boraine and Kathleen van der Linde, in "The draft Insolvency Bill - an exploration" 1998 (4) *TSAR* 621, say that notwithstanding the decision by the Constitutional Court the view that section 21 must be scrapped must still be supported. Section 21 remains a drastic measure which should not be tolerated in a modern society.

22A.7 The definition of "spouse" in clause 2 of the Bill includes a person of any sex living with another as if married. Special rules apply to "associates" of the insolvent, which include a "spouse". In terms of clause 18, if a disposition without value is made to an associate within three years before liquidation the onus is on the associate who resists the setting aside of the disposition to prove that the liabilities of the insolvent at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of. In terms of clause 20 a voidable preference can be set aside if it was made to an associate within 12 months before liquidation instead of the ordinary 6 months. In addition to proving that a disposition was made in the ordinary course of business in order to avoid a setting aside an associate must also prove that he or she was not aware and had no reason to suspect that the debtor's liabilities would exceed the value of his or her assets immediately after the making of the disposition.

22A.8 The Project Committee prefers the retention of section 21 of the Insolvency Act. *However, the Commission prefers the following less drastic replacement for section 21, contained in clause 22A:*

The sheriff shall, if instructed to do so by the liquidator, attach property in the possession of an associate of the insolvent pending an application to have a disposition of the property set aside. The property must be released if the sheriff is instructed to do so by the liquidator. The liquidator shall instruct the sheriff to release property as soon as it is evident that attachment of the property is not required to safeguard the interests of the estate in the setting aside of a disposition of property. The costs of attachment of the property shall form part of the costs of liquidation.

If section 21 is retained, consequential changes to clauses 34, 62, 71 and 73 would be required to make provision for the vesting of the spouse's assets.

Clause 23: Certain rights not affected by improper disposition

23.1 Clauses 23(1) and (2) re-enacts section 33 of the Insolvency Act.

23.2 Clause 23(3) provides that the setting aside of a disposition made by a debtor in terms of

section 18, 20 or 21 shall not discharge a surety for the debtor. The reason for this provision is explained in paragraph 18.5 and the following above.

23A Set-off

23A.1 Clause 23A re-enacts section 46 of the Insolvency Act, but has been moved to the other clauses dealing with voidable dispositions.

23A.2 Because chicanery is easier in the case of a ceded claim a longer period of one year has been retained in the case of ceded claims instead of the ordinary 6 months period.

23A.3 It is not clear why the Master should be involved and *the requirement that the Master should approve before set-off, not effected in the ordinary course of business, may be disregarded has been omitted.*

23A.4 A commentator proposed that provision should be made for netting and set-off generally in line with Rule 4.90 of the United Kingdom Insolvency Rules. The commentator added that it should be specifically stated that all transactions capable of being set off are to be terminated immediately upon insolvency. Rule 4.90 does not appear to differ dramatically from set-off under South African law. These proposals are not appropriate for ordinary set-off and special rules for specialised transactions are dealt with in clause 28.

Clause 24: Payment of debt to insolvent after liquidation

Clause 24 re-enacts section 22 of the Insolvency Act.

Clause 25: Institution of proceedings on behalf of insolvent estate

25.1 *The ambit of section 32(1) of the Insolvency Act is extended in clause 25(1) to cover all recovery actions, not merely the impeachable transactions mentioned in section 32(1). The ambit of section 104(3) of the Insolvency Act has been extended accordingly in clause 25(1A).*

Opperman v Estate Opperman held under a previous provision similar to section 32(1) that a personal indemnity was not sufficient and that "sufficient and satisfactory security" was required. According to the decision in *Lane v Dabelstein* 1999 (3) SA 150 (C) 165G the trustee must be satisfied that the indemnity is adequate. ***Clause 25(1) requires an indemnity "to the reasonable satisfaction of the liquidator"***.

25.2 A commentator proposed that a creditor who funded an interrogation which culminated in legal proceedings as envisaged in section 25 should also be entitled to recover costs of such interrogations before the claim and costs of other creditors and should also be paid first from any proceeds of the enquiry. It is agreed that creditors who are prepared to fund a questioning should be reimbursed if the questioning leads to sufficient recoveries. In the case of a court order following legal proceedings it is clear who the participants are and that the recovery is a result of the court order. It may not be clear whether the recovery is the result of a questioning. If a matter is settled out of court it will also not always be obvious whether the settlement was the result of a questioning and whether the settlement was the result of "proceedings" by a creditor or some creditors. Clause 65(2) provides that a creditor on whose request a person was summoned (and who in practice would have paid for the questioning) has the right to ask questions at the questioning (see paragraph 65.3 of the Explanatory Memorandum in Discussion Paper 66). Clause 66(9) repeats the provision of section 417(6) of the Companies Act 61 of 1973 that a creditor at whose request an interrogation by a commissioner is carried out is liable for all costs and expenses incurred in connection with the interrogation unless the court or the Master order that the whole or any part of the costs or expenses shall be reckoned as costs of the liquidation. Apparently there is a practice to arrange (and the creditor has only himself or herself to blame if there is no such arrangement) that the costs of a sponsored interrogation are paid from the estate if the interrogation leads to sufficient recoveries. In the absence of structured procedures for the sponsoring of interrogations it will be risky to award a preference to a creditor or creditors who sponsored an interrogation. Detailed provisions for the sponsoring of interrogation by creditors will lead to rigid and unwieldy procedures and are not supported. ***Clause 65(11) provides that the liquidator may in terms of an agreement with a creditor repay the creditor's costs and expenses in connection with an questioning conducted by the creditor if sufficient money is recovered as a result of the questioning and in the absence of such an agreement the court or the Master may order that the whole or any part of such costs or expenses shall be reckoned as costs of***

liquidation.

25.3 *Clause 25(2) corresponds to section 32(2) of the Insolvency Act but takes into account the measures proposed to ensure constitutionality regarding incriminating questions in terms of clause 65(6).*

25.4 A commentator proposes that the latest balance sheet information should be regarded as binding on the insolvent and should rebut other allegations, for instance, that assets belong to the spouse. This proposal is too drastic. It is advisable that evidence of information in a balance sheet should be treated according to the ordinary rules and that other persons are not prejudiced by false statements by the insolvent.

25.5 It is often difficult for the liquidator to prove insolvency. It has been suggested that the problems experienced by liquidators to prove insolvency on a particular date make a mockery of the provisions to set aside dispositions. It is difficult to get an admission by the insolvent that he or she was insolvent and the insolvent is often the only person who can supply evidence in respect of the true position. Discussion Paper 66 invited comment on a proposal that in proceedings to set aside dispositions it should be presumed, until the contrary had been proved, that the liabilities of the debtor exceeded his or her assets or the value of his assets at any time within 5 years before the liquidation of the estate. Many commentators objected that the period of 5 years was too long and would lead to disruption of commerce and be unfair towards persons who entered into transactions with the debtor. Most commentators supported a period of three years. Creditors have a duty to enforce the timely payment of their debts and cannot rely on the insolvency law to protect them against their own tardiness. It is logical to provide for a longer period in the case of associates, but such a provision would be complicated. Clauses 18(1) and 20(1) contain other special provisions applicable to associates. *Clause 25(2A) provides that in any proceedings under clause 18, 20, or 22 it is presumed, until the contrary has been proved, that the liabilities of the debtor exceeded his or her assets or the value of his or her assets at any time within 3 years before the date of liquidation of the estate.*

25.6 Section 32(3) of the Insolvency Act does not provide for the payment of interest and as a result delays are encouraged. *Clause 25(3) makes provision for the recovery of interest in*

accordance with section 2A of the Prescribed Rate of Interest Act 55 of 1975.

Clause 26: Uncompleted acquisition of immovable property by insolvent

26.1 Clause 26, which re-enacts section 35 of the Insolvency Act, did not elicit any comments. General comments on uncompleted contracts are dealt with here as this is the first clause dealing with uncompleted contracts.

26.2 A commentator complains that much hardship is suffered by layby creditors who have partially purchased goods when businesses go insolvent. Sections 10 and 12 of the Layby Sales Act of New Zealand contain provisions protecting layby buyers which are reminiscent of the provisions in sections 20 and 22 of the Alienation of Land Act 68 of 1981. The position of a layby purchaser upon insolvency elicits sympathy because these creditors can usually not afford other forms of credit. A preference for these creditors may create a precedent for further preferences and problems will be experienced to define layby transactions in such a way that it cannot be abused to give a preference to persons who are not bona fide layby purchasers. No preference for layby purchasers is recommended.

26.3 A number of commentators and academic writers in journals propose that there should be general provisions which govern the effect of liquidation of one of the parties to an uncompleted contract. The main problem referred to by commentators is that a liquidator's election to abandon a contract is a repudiation and does not itself terminate the contract. It is averred that a stalemate arises if the solvent party does not accept the repudiation by the liquidator. There is no doubt that the position is open to criticism from an academic point of view. However, the conceptual problems do not seem to cause problems in practice. Working Paper 33 *The Effect of Insolvency on Assets Civil Proceedings and Contracts* invited comments on the question whether it was advisable to lay down general rules regarding the effect of insolvency on contracts in an Act and, if so, invited proposals for the contents of such rules (paragraph 10.118 on page 98). Commentators agreed that it was not advisable to lay down general rules. In particular, commentators were not in favour of amendments to deal specifically with construction contracts, mainly because these contracts and practices surrounding it had been adapted to interpretations of the current law. If the general rules are amended without enacting special rules for construction

contracts, the position in respect of construction contracts will change. It seems that insolvency practitioners and the industries that are often confronted with the effect of insolvency on contracts prefer the current law, warts and all, above the unknown evil of new legislation. The position may have been different if concrete proposals had been submitted for public comment. Most of the cases are dealt with in practice by agreement between the liquidator and other parties that the contract will not be continued with. If a liquidator unilaterally elects not to continue with the contract it is accepted in practice that the other party will have to be content with a concurrent claim for damages. General rules regarding the effect of insolvency on contracts are not set out in the draft legislation. Special provisions are dealt with in the clauses that follow. No attempt is made to clarify the right to place a party *in mora* after liquidation (*cf Porteus v Strydom* 1984 (2) SA 489 (D)).

26.4 Section 27 of the Alienation of Land Act 68 of 1981 provides that any purchaser who has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand transfer against registration of a mortgage bond to secure the balance of the purchase price and interest. The question was raised whether this section is enforceable against a liquidator. This question does not seem to have practical significance because the liquidator may refuse transfer a court will not, in the face of a *concursum creditorum*, order the liquidator to give transfer.

Clause 27: Transactions on an exchange

27.1 Clause 27 re-enacts section 35A(2)-(5) of the Insolvency Act. The definitions in clause 35A(1) is enacted in clause 1 of the Bill.

27.2 A commentator expressed concern about the exclusion in clause 27(4) of the Bill of certain remedies to set aside dispositions. The setting aside of fraudulent dispositions or collusive dealings are not excluded. The exclusion of other remedies is a matter of principle which was considered in depth by the Justice Portfolio Committee when these provisions were inserted into the Insolvency Act. In the light of the controlled environment of licensed exchanges and their

particular needs for certainty the exclusion of some remedies is justified.

Clause 28: Agreements providing for termination and netting

28.1 Section 35B of the Insolvency Act provides for "agreements on informal markets". Discussion Paper 66 retained the essence of this section in clause 28 of the Bill published for comment.

28.2 A commentator says the problems with section 35B start as early as the definition of the word "agreement" for purposes of the section. The definition is clearly much wider than required for the purpose of the provision, namely to regulate further the position of participants in "financial" contracts. Furthermore the commentator submits that the definition is particularly unclear and badly worded. The heading also refers to "agreements on informal markets" while "agreement" as defined does not necessarily have anything to do with any "market". The commentator points out that section 35B (4) provides that section 341(2) of the Companies Act and sections 26, 29 and 30 of the Insolvency Act do not apply to property disposed of in terms of an "agreement". This provision, in conjunction with the excessively wide definition of "agreement" lead to totally unacceptable results. The commentator gives the following example: A and his son enter into a contract of donation. In terms of the contract A undertakes to pay his son on a particular date an amount equal to the price of ten ounces of gold on that date. This is clearly an "agreement" as defined in section 35B (1). Say that A's estate is sequestrated after fulfilment of the donation. Regarded literally, this disposition is immune against attack in terms of section 26 dealing with dispositions without value. Even if the donation has not yet been fulfilled A's son will be able to prove a claim in competition with other creditors because section 26(2) will also not apply. If all this is true an easy and convenient method has been created to circumvent the provisions regarding voidable preferences.

28.3 The commentator's concerns over the wide wording of "transaction" are justified. Further examples of ordinary transactions that will be covered by the definition are not hard to find, for instance an agreement by a scrap metal dealer to deliver any "base metal" next week. The provisions are much wider than the provisions in France or the United States. The French legislation refers to forward transactions (futures and options) on certain transactions and all

transactions on interest rates, indices or currencies governed by a master agreement complying with the general principles of a standard master agreement where one of the parties is a bank, credit institution, insurance undertaking, or stockbroker. The United States Bankruptcy Code defines a "swap agreement", which is singled out for special treatment, by reference to the type of agreement, for instance, rate swap agreement, basis swap, forward foreign exchange agreement, rate cap agreement, rate floor agreement and rate collar agreements. An attempt was made to define the South African equivalents of these transactions but representatives of the market participants submitted that these definitions would have to be supplemented by further definitions and that it would be difficult to define them adequately. (See paragraphs 4.43 to 4.46 on pages 29 to 31 of the Commission's *Interim Report on the Protection of Financial Markets in the Event of Insolvency*.) In paragraph 4.45 on page 30 of the report the following factors were listed as justifying special rules - an intricate and unique settlement system, large amounts involved, and volatile markets that fluctuate constantly. In the light of the criticism of section 35A (which differs appreciably from the wording recommended in the Interim Report) market participants were requested to comment on the criticism and invited to come up with proposals that limit the provisions to the special cases that deserve protection.

28.4 The same commentator referred to above submits that considered literally section 35B, in contrast to section 35A(2) (or clause 27(1)) applies also if the insolvent party has already complied with all his or her obligations and the *solvent* party only have not yet complied with all his obligations. The commentator says that considered literally section 35B(2) applies even if the contract or contracts *do not* provide for termination followed by netting. The commentator submits that it is a total anomaly if section 35B applies *automatically* when a transaction is concluded outside the rules of an exchange, but *does not apply at all* when the same contract is entered into subject to the rules and the rules do not provide for termination and netting. A more important criticism is that if section 35A applies even without an agreement for netting, the solvent party may be prejudiced seriously. The commentator gives the following example: A sells a quantity of American dollars which he will receive as payments for exports to a bank. He must deliver the dollars to the bank on a future date on which date the bank will pay a previously agreed amount in Rand for the American dollars. In the mean time the estate of A is sequestrated. According to general principles the trustee of A's estate can elect whether to fulfill the contract or repudiate it. If he follows the first course the bank will not be prejudiced by the sequestration.

If the bank repudiates it will no longer have to perform and will have a concurrent claim for damages if it suffers any damages as a result of the breach of contract (for instance if the rand weakens against the dollar in the meantime and the bank would have made a profit on the transaction). If section 35B(2) applies *without* an agreement regarding netting, the trustee of A's estate will have a *full* claim in respect of performance by the bank (albeit in the form of "damages") while the bank will only have a concurrent claim for damages in respect of the dollars. The solvent party is therefore in a much worse position than he would have been in according to general principles, because he is obliged to pay full damages in exchange for a concurrent claim for damages. The commentator says the present section 35B seems to have been influenced by the comparable provision in section 18 of the German *Konkursordnung*. However, the German provision *does not* separate the calculation of damages and netting from each other. It is agreed that there is no logical reason why the provisions should apply when the insolvent has complied with all his or her obligations. The commentator is also correct in saying that the substitution of a damages claim for a claim for specific performance (inserted at the request of market participants after the Commission's interim report) may seriously prejudice solvent market participants.

28.5 Clause 28 was drafted in consultation with market participants. *For purposes of the clause "agreement" means in broad terms an agreement providing, in the event of liquidation of a party to the agreement before that party has performed fully its obligations, for all unperformed obligations to be terminated, for termination values of unperformed obligations to be determined and for termination values to be netted so that a net amount only will be payable by one party to the other. The clause provides that upon liquidation all unperformed obligations are automatically terminated as at the date of liquidation, termination values are calculated at market value and a net amount becomes payable.* The application of this clause is clearly not limited to informal markets. On the other hand the effect is less drastic than the effect of section 35B because the setting aside of dispositions without value or voidable dispositions (sections 29, 30 and 31) are not excluded. The provision endorses a general rule that a party who has rights before sequestration does not lose those rights after sequestration. The clause will not apply if the insolvent has complied with all his or her obligations. The clause will achieve the predictability required by informal markets in that exposure is limited to net values at the date of liquidation and all obligations are terminated. According to a representative of a market participant the clause caters for internationally recognised standard contracts. Because all agreements are

terminated, cherry-picking or reverse cherry-picking will be avoided. The ideal solution would be if the informal market were strictly regulated and controlled and provisions could be tailored to such a market. However, in the absence of a formalised market the proposal is a considerable improvement on section 35B. Creditors of the insolvent cannot complain because the position after sequestration is according to agreements between the parties and there will be a large measure of certainty about the results upon insolvency. Although the provision will be contrary to clause 62(11) (which provides that the liquidator will not be bound by provisions in a contract which purports to regulate the manner in which property belonging to a person shall be disposed of on or after insolvency), the field of application will be limited to agreements defined in the clause.

Clause 28A: Effect of liquidation of estate of seller under reservation of ownership contract

28A.1 The Insolvency Act is silent on the question of the insolvency of the seller under an instalment sale transaction (hire-purchase seller) and accordingly the common law applies. However, the legal position has occasioned some controversy. (See for instance Reinecke and Cronje 1979 *THRHR* 389; Forder 1986 *SALJ* 83.) Paragraph 13.2 of the Explanatory Memorandum in Discussion Paper 66 proposed that the purchaser should be protected and should not be left with a concurrent claim for damages. Clause 13 of the Bill proposed in Discussion Paper 66 protected a purchaser by providing that a liquidator who elected to abide by the terms of the contract should give the purchaser 30 days to make provision for the balance on the contract and obtain ownership of the assets sold.

28A.2 Commentators are divided on the question whether the proposed clause 13 in Discussion Paper 66 will protect the purchaser too much or whether more protection is fair. The present practice seems to be that a purchaser is allowed to continue payments in terms of the contract and obtain ownership. The liquidator can repudiate the contract if payments are not made strictly in accordance with the contract. A rule that the liquidator is obliged to allow the purchaser to pay the balance in terms of the contract would be in accordance with the present practice. In a sense the liquidator retains a secured claim which is what the parties intended in the first place. Some academics support the view that this is also the legal position. *Clause 28A provides that liquidation of the estate of a seller under a reservation of ownership sale (defined in clause 1) does not give a right to the liquidator of the estate to reclaim property sold under the contract.*

The clause has been moved to other provisions dealing with the effect of liquidation on contracts.

Clause 29: Goods purchased on credit but not paid for

29.1 Clause 29 re-enacts section 36 of the Insolvency Act, but subsections 36(5) and (6) dealing with the sale of property not belonging to the estate have been moved to after clause 82 which deals with the sale of estate assets.

29.2 *In line with other 10 day periods in the present Act the ten day period to reclaim the asset in section 36(1) has been changed to 14 days in clause 29(1).* A liquidator may not yet have been appointed or the seller may not be aware of the details of the liquidator. Clause 29(1) provides for notice to the liquidator or the Master.

Clause 30: Effect of liquidation upon lease

30.1 In *Montelindo Compania Naviera v Bank of Lisbon* 1969 (2) SA 127 (W) it was held that section 37 of the Insolvency Act applied to the lease of both movables and immovables, as the natural meaning in this country of the word "lease" was wide enough to include contracts for the hire of movables. This decision differed from a previous decision of the Natal Court (*Neon and Cold Cathode Illuminations v Lowe* 1957 (1) SA 80 (N)) which held that section 37 was applicable only to a lease of immovable property. *There is no reason why the provisions should not apply to immovables and movables as is provided in clause 30(1).*

30.2 Commentators were divided on the question whether clause 30 should favour landlords more or should be more favourable towards the insolvent estate. There does not appear to be any reason why a lessor should be assisted to limit his damages as a result of liquidation if no other creditors are assisted in this regard. If the lease lapses automatically after three months the lessor does not necessarily receive advance notice. Although a liquidator will probably give notice where possible, there is insufficient justification to require the liquidator to give notice before he or she cancels the lease. *Clause 30(1) states clearly that the liquidator may terminate a lease without prior notice.*

30.3 Even though clause 38 of the Bill provides that resolutions can be obtained at a first meeting which may be convened after the first liquidation order has been issued, circumstances may still arise where it is necessary for a decision to be taken on a lease before resolutions can be adopted at a meeting. Three months should normally be enough time to enable the liquidator under the new provisions to obtain a resolution, failing which he can consult major creditors and approach the Master for consent in terms of clause 30(1).

30.4 Section 37(5) of the Insolvency Act provides that a stipulation in a lease which restricts or prohibits the transfer of any right under the lease or which provides for the termination or cancellation of the lease by reason of the death of the lessee or of his successor in title, shall bind the trustee of the insolvent estate of the lessee. In *Slims (Pty) Ltd v Morris* 1988 (1) SA 715 (A) 734 Judge of Appeal Botha commented as follows on the intention of the amendment of the section in 1943:

The rationale underlying the remedial provision was clearly to remove what were perceived to be inequitable and harsh results imposed on a lessor under the pre-existing regime, despite the detrimental results that might follow for the creditors in the lessee's insolvent estate under the new provision.

There appears to be no valid reason for a special rule in respect of a lease and section 37(5) of the Insolvency Act has not been re-enacted. It is not desirable to endeavour to set out in detail the rules that limit the liquidator's power to realise assets. It will be cumbersome and difficult. At present there is the legal qualification that a limitation on the insolvent's power of disposal does not bind the liquidator if it only proscribes voluntary actions by the insolvent personally (*Bodasing v Christie* 1961 (3) SA 553 (A); *Lithins v Laeveldse Koöperasie Bpk* 1989 (3) SA 891 (T)). Clause 62(11) provides for clauses in contracts that purport to regulate the position after liquidation.

Clause 31: Contract of service terminated by insolvency of employer

31.1 Clause 31 re-enacts the substance of section 38 of the Insolvency Act which provides that sequestration of the estate of an employer terminates contracts of service, leaving the employee with a (concurrent) claim for compensation for loss suffered by reason of the termination. Clause 80 provides for a preferent claim, limited in time and amount, for salary or wages, payment for

leave or holiday due, other paid absence and severance or retrenchment pay.

31.2 Section 197 of the Labour Relations Act 66 of 1995 provides that a contract of employment may not be transferred from one employer to another without the employee's consent, unless, *inter alia*, the whole or a part of a business, trade or undertaking is transferred as a going concern if the former employer is insolvent and being wound up or is being sequestrated or because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency. If a business is transferred in these circumstances, unless otherwise agreed (with an appropriate person or body referred to in section 189(1)), the contracts of all employees that were in existence *immediately before the old employer's winding-up or sequestration* transfer automatically to the new employer, but all the rights and obligations between the old employer and each employee *at the time of the transfer* remain rights and obligations between the old employer and each employee.

31.3 Judge Landman of the Labour Court in Johannesburg submits that the Labour Relations Act is silent on the termination of an employment contract on the grounds of insolvency and that there is no conflict between the Labour Relations Act and the Insolvency Act (*South African Agricultural Plantation and Allied Workers Union v HL Hall and Sons (Group Services) Ltd* Case J2858/98 date 10 October 1998). Judge Landman held that the liquidation of a company unable to pay its debts terminates the contract of employment.

31.4 In the cases provided for in section 197(1) (transfer as a going concern after insolvency or because of a scheme of arrangement or compromise in insolvency) the contracts of employers as they existed immediately prior to insolvency (and before the termination thereof in terms of clause 31) will automatically transfer to the new employer, unless otherwise agreed. The rights and obligations between the former employer and each employee, which include concurrent claims against the former employer's insolvent estate for loss (if any) suffered by reason of the termination of contracts in terms of clause 31, remain rights and obligations between the former employer and each employee.

31.5 In *Ndima v Waverley Blankets Limited* (judgment given on 12 February 1999 in Case P14/98 in the Labour Court held in Port Elizabeth) a scheme of arrangement in terms of section

311 of the Companies Act 61 of 1973 was sanctioned for a company and the provisional liquidation order discharged. The essence of the scheme of arrangement was that another company brought shares in the company in question. Judge Zondo held that the transfer of the shares and of possession and control of a business did not bring the case within the ambit of section 197 as a transfer of a business. Judge Zondo submits [paragraph 77] that there is a crying need for an amendment of section 197 to cover such situations. He says Government, Business and Labour may do well to consider the desirability of such an amendment or that another way to deal with the problem may be to amend section 38 of the Insolvency Act to say that upon the granting of a provisional liquidation order existing contracts of employment are suspended pending the discharge of the rule or the granting of a final liquidation order. Upon granting of a final liquidation order the contracts of employment may then terminate by operation of law, or upon the discharge of the provisional liquidation order the suspension of contracts may be uplifted by operation of law and the contracts of employment may continue as before.

31.6 A commentator submits that the principle that contracts of service should terminate upon liquidation of the employer is a healthy one which should be retained. However, the commentator submits that section 197 of the Labour Relations Act should be deleted because it creates unacceptable uncertainty and practical problems in respect of the period from liquidation until it is determined eventually whether the business in question will be transferred "as a going concern" (an undefined term) or not. (See E C Schlemmer and A N Oelofse "Konflik tussen die Wet op Arbeidsverhoudinge en die Insolvensiewet" 1996 *TSAR* 559 where it is submitted that no salary claims should be admitted for the period between the date of sequestration and the transfer of the business.)

31.7 The transfer of employment contracts, dealt with in section 197 of the Labour Relations Act, falls within the activities of the National Economic, Development and Labour Council (NEDLAC) established by section 2(1) of the National Economic, Development and Labour Council Act 35 of 1994. Insofar as clause 31 of the Bill does not amend section 197 it is an insolvency law matter. The proposal by Judge Zondo that contracts of employment should be suspended upon provisional liquidation and terminated upon the granting of a final liquidation order will not solve all the problems because a scheme of arrangement can be effected and the liquidation order discharged after the granting of the final liquidation order. In the absence of

amendments to section 197, clause 31 makes it clear that the liquidation of the estate of an employer terminates contracts of service, notwithstanding the provisions of section 197. *If NEDLAC considers amendment to section 197 it is suggested that the views of representative bodies of insolvency practitioners should be taken into account.*

Clause 32: Appointment of liquidator

32.1 This clause of the Bill elicited the most comments by far, especially the question whether the Master should be bound by nominations by creditors or whether the Master should have a discretion to appoint someone else as liquidator. Discussion Paper 66 contained both options and there was no clear favourite in a head count of commentators. Commentators agree that a seven day delay is too long before the appointment of a liquidator. There is little support for a proposal that nominations by creditors should be in affidavit form, but there is concern that fraudulent nominations should be curbed. The last main point of comment on this clause is that the relaxation of the rules against touting is supported.

32.2 Consistent rumours of undue influence with regard to appointments must be taken into account. There were complaints that certain liquidators get more than their legitimate share of appointments. Statistics were obtained of provisional appointments in estates larger than R1 million by the Master, Pretoria, from which it appears that discretionary joint appointments are common in large estates and that a few individuals receive a large percentage of appointments in large estates. The question whether these individuals enjoy the support of creditors was not investigated, because the persistent perception that the Master does not exercise his discretion properly can in any case not be ignored. The problem can be alleviated if the Master gives reasons for his or her decisions as is required by section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996. It was also considered that the Master should keep up to date statistics available on appointments of liquidators who did not enjoy the support of a majority of creditors in number or value.

32.3 Conceptually a discretion for the Master may be preferable. A properly exercised discretion is preferable to rigid rules which cannot provide adequately for all circumstances. The argument that creditors are the interested parties and should decide on the person to be appointed is not

conclusive. The very fact that creditors are interested parties creates the possibility that a creditor or some creditors may abuse the right to nominate a liquidator to further own interests at the expense of other interested parties. There are no proved claims and there is not enough time to investigate claims in detail. Very few creditors appear to be qualified or interested to participate meaningfully in the administration of insolvent estates. Many nominations of liquidators appear to be the result of successful touting rather than creditor interest or a serious wish to nominate a particular person. A liquidator's independence is influenced, albeit subtly or unconsciously, if creditor support is relied on for the appointment. Proposals that the liquidator should be appointed by the court was rejected by a vast majority of commentators on Working Paper 30 *Qualifications, appointment and removal of liquidators*, because the applicant would be in a favourable position to dominate the entire process and there would be a risk of collusion between the applicant on the one hand and the insolvent or the officers of a company on the other hand. A return to a position that was abandoned by the legislator in 1936 is not supported. However, the appointment by the court of a provisional liquidator to take control of the assets in urgent cases, is discussed below.

32.4 Notwithstanding the conceptual attractiveness of a discretion for the Master to appoint liquidators, this procedure cannot be supported. The present position has simply lead to too much dissatisfaction to be retained unchanged. Clause 53 provides that only persons who are members of a professional body qualify for appointments. This opens the way for creditors, who are the interested parties, to nominate a qualified candidate who can be disciplined by a professional body if necessary. The Master must decide disputes amongst liquidators and between liquidators and other persons, such as creditors. It is unacceptable for the Master to act as arbitrator in a matter involving a liquidator appointed by the Master. If creditors do not exercise their rights properly they have only themselves to blame. One example is the nomination of a liquidator who is not familiar with a specialised business environment in which the insolvent operated. There are indications that creditors are taking steps to acquire the necessary knowledge about insolvency matters to enable them to protect their own interests effectively. It is impossible for the Master to protect the interests of creditors effectively, and attempts to do so lead to unacceptable delays.

32.5 *It is proposed in clause 32(2) that creditors should be given the right to nominate a liquidator of their choice by a majority in value or number according to the rules that apply*

at the first meeting and that the Master's discretion to overrule the wishes of creditors should be removed. This recommendation applies to the initial appointment in clause 32 and also to subsequent appointments or removals in clauses 52, 54, 55, 58 and 60.

32.6 The Bill in Discussion Paper 66 proposed that creditors should have 7 days to nominate a liquidator, but this is too long. *The present practice to allow 48 hours for nominations of a liquidator is provided for in clause 32(2).* A shorter time will not allow creditors a sufficient opportunity to lodge nominations. Sometimes there are urgent matters that cannot be delayed for 48 hours before they are attended to. In such urgent cases an urgent court order is often obtained. *Although a general power for the court to appoint a liquidator upon the recommendation of the applicant is not supported, an appointment by the court for the limited purpose of recovery and taking possession of assets and giving effect to directions by the Court for a period of 48 hours is supported and subclauses 32(3) and (4) provide therefore.* In terms of clause 32(6) this liquidator is entitled to remuneration in accordance with Tariff B, taxed by the Master. In practice the provisional liquidator will probably be appointed as liquidator in many cases and no separate fee will be claimed by him or her.

32.7 According to section 18(1) of the Insolvency Act the Master has a discretion to appoint a provisional trustee. In order to speed up the liquidation process the Bill gives important functions to the initial liquidator, such as service of the liquidation order (clause 33) and convening the first meeting (clause 38). Accordingly *clause 32(7) provides that the Master shall appoint a liquidator in all cases where a valid nomination is not made by creditors. In terms of clause 32(8) the Master must apply to have the liquidation order set aside if the Master is unable to appoint a liquidator.*

32.8 The Insolvency Act makes provision for the appointment of a provisional trustee. The provisional liquidator provided for in clause 32 has very limited powers and the appointment is for a very limited time. The initial liquidator in terms of clause 32, whose position is similar to a provisional trustee under the Insolvency Act, is not distinguished by name from a liquidator. There is much uncertainty about which powers a provisional trustee has under the Insolvency Act. *Clause 62 of the Bill does not distinguish between the duties and powers of an initial liquidator and a liquidator elected at a meeting. They have the same powers subject to authority by the*

Master or creditors. Clauses 38(1), 52(3) and 54(4) refer to a liquidator appointed in terms of clause 32 where a distinction is necessary. The term "liquidator" is not defined in clause 1 to include a provisional liquidator as is done with the definition of "trustee" in the Insolvency Act. This proposal is similar to the position in terms of the Close Corporations Act 69 of 1984.

32.9 The question whether an initial liquidator should be secure in his or her appointment after the first meeting is discussed with the comments on clause 52 below.

32.10 A strong majority of commentators opposes a requirement that nominations should be in the form of an affidavit because an affidavit is impractical; it would impede the appointment of liquidators in urgent situations; it would not be cost or time effective; a practice to insist on affidavits was abandoned for these reasons years ago; and it will result in fewer creditors participating in one of the most important aspects of the liquidation process. An affidavit will not avoid all abuses or play a major role in excluding fictitious requisitions. The effect of the provision in clause 101(4)(a) that it is an offence to lodge a false requisition would be much the same without the problems that will be caused by insisting on an affidavit. ***Clause 32(10) provides that nominations should be substantially in the form of Form AA of Schedule 1.*** Proposal that requisitions should be lodged by insolvency practitioners or that creditors who nominate a liquidator should confirm who the other creditors are, were not accepted. However, ***clause 53(1)(k) provides that a person is disqualified from being a liquidator if he or she by means of misrepresentation or reward induces or attempts to induce a person to nominate him or her as liquidator. In terms of clause 101(2)(i) it is an offence to make, cause or allow to be made a false nomination in terms of clause 32 or to sign such a nomination without reasonable grounds for believing it to be correct, or to knowingly submit a false nomination to the Master.*** A practice to allow creditors or nominees for appointment to oppose nominations as liquidator is not supported. When such a practice was allowed in the past it led to endless disputes. There are no proved creditors and the Master will in practice have to hear arguments from any person who claims to have an interest in the matter. Because appointments are urgent the Master cannot investigate each claim in detail and call for further information or documents. It reflects negatively on the impartiality of nominees if they defend claims of creditors who support them and attack claims of creditors who support others. ***The Master must in terms of clause 32(2) consider the documents lodged and reject a nomination by a creditor if it appears from the information in***

the nomination or other information available to the Master that a creditor with a similar claim would not have been entitled to vote for a liquidator at a meeting.

32.11 Section 83(2) of the Attorneys Act 53 of 1979 provides that no person shall tout for work in connection with the administration of an insolvent estate. There are sound reasons why touting by professional persons is usually not allowed. The quality of a person's work should be the decisive factor. Touting is regarded as unprofessional and can lead to all kinds of malpractices. If creditors are given the right to nominate a liquidator shortly after insolvency, there appears to be no method to get them to do so other than to permit a candidate for the office of liquidator to inform creditors of the insolvency and to request them to support a nomination as liquidator. A proposal that notifications should be limited to written communication will not be practical. The majority of respondents support the relaxation of legalisation in respect of touting. Clause 53 proposes that members of professional associations only will qualify for appointment as liquidator. Unprofessional conduct will still be subject to disciplinary steps by professional bodies. *Schedule 3 provides for the amendment of section 83 of the Attorneys Act 53 of 1997 to allow a candidate for appointment to inform a creditor of the liquidation of the insolvent estate and indicate his or her availability for appointment as liquidator.*

Clause 33: Liquidator shall serve first liquidation order on insolvent and attach property belonging to insolvent estate

33.1 It is clearly advisable that the debtor should receive notice of the liquidation order and that movables are to be attached as soon as possible. The question is what would be the best way to bring this about in practice.

33.2 Service of the order by the applicant's attorney or the liquidator both have advantages and disadvantages.

33.3 Advantages of service by the sheriff under the directions of the applicant's attorney are that—

- (a) this is the present position to which attorneys and the sheriffs are used to;

- (b) the attorney must report back to court which is easier if the attorney arranges service;
- (c) possible delays in the appointment of the liquidator will not delay service of the order;
- (d) clause 10(5) already provides that notice of the order should be published by the applicant's attorney.

33.4 Advantages of service by the liquidator are that —

- (a) in terms of clause 33(3) mistakes or omissions in the order should be notified and the liquidator will be in a better position than the sheriff to discover mistakes and report thereon, especially if personal service is impossible;
- (b) in terms of clause 33(6) the liquidator may attach assets and it is convenient and cost effective that the liquidator serves the order at the same time;
- (c) commentators have pointed out that every applicant will not have an attorney, (however the duty can be entrusted to the applicant);
- (d) service may in terms of clause 33(4) still be made by the sheriff, if requested by the liquidator;
- (e) it is in any case advisable that a liquidator should be appointed as soon as possible and delays in this regard should be avoided as far as possible;
- (f) the liquidator may utilise the opportunity to explain the completion of the statement of affairs, which in terms of clause 33(1) must be handed to the debtor, or even to assist the debtor to complete it.

33.5 *The proposal that the liquidator should serve the liquidation order on the debtor elicited very little negative comment and is recommended in clause 33(1).*

33.6 What should the position be if the debtor is not available for personal service? An immutable requirement that all liquidation orders should be served personally does not appear to be advisable. Regulation 4(2) (R.1379 in *Regulation Gazette* 115 of 24 August 1962) provides that a notice to attend an insolvency inquiry may be served by the trustee or his clerk by delivering it to the person in question. *Subclauses 33(1), (4) and (5) provide that the liquidator or his or*

her clerk, or the sheriff if so directed by the liquidator, should serve the liquidation order in accordance with section 11(2) of the Insolvency Act (contained in clause 31(5)) and the Uniform Rules of Court. Clause 31(8) limits the liquidator's choice to direct someone to effect service on his or her behalf to the sheriff. This will allay fears that a body of "professional attachers" will emerge who will discharge, for a fee, the liquidators responsibility, thus giving rise to a situation that would lead to abuse.

33.7 The basis of the satisfactory administration of any insolvent estate is a complete and accurate statement of affairs. All too frequently, however, no such statement is ever filed. This is partly due to the fact that in many instances the final order of sequestration is never served on the debtor. The prescribed forms are often unobtainable so that it is most unlikely that a debtor in a country town would ever be able to obtain possession of them. *Clause 33(1) provides that two copies of the necessary forms, one for the liquidator and one for submission to the Master, should be delivered to the insolvent by the liquidator when serving the provisional liquidation order.*

33.8 *In cases where the liquidator, his clerk or the sheriff is in a position to serve the liquidation order on the debtor personally, it is practical that they endeavour to obtain the information necessary to identify the debtor or to be able to join the spouse. This is provided for in clause 33(2).* The liquidator is in the best position to notify the Master and the registrars of deeds of incorrect or incomplete particulars on the liquidation order. It does not add much to the duty in clause 33(4), to give notice to every deeds registry, the Master and the registrar of the court, to include notice to the applicant as well. Although it will serve little purpose to give notice to the applicant if a final order has already been issued, *clause 33(4) requires notice to the applicant in all cases where the particulars on the liquidation order were incomplete or incorrect.* This is provided to simplify matters.

33.9 There is unanimity that property belonging to the insolvent estate should be attached as soon as possible. There is great dissatisfaction with the present position. It appears that in general the execution by sheriffs of the provisions of section 19 of the Insolvency Act is extremely poor. In a great many instances no attachment is made and no report is filed with the Master. Where an attachment is made, the sheriff's inventory is of no real use. Many sheriffs consider that an

attachment should only be made after the final sequestration order. It frequently takes a number of months before sheriffs prepare an inventory. In this way assets may disappear or their value may decline. Sheriffs themselves acknowledge the unsatisfactory operation of section 19. They convincingly argue that the sheriff is in an invidious position and that section 19 in its present form is an anachronism for which there is no place in a modern Insolvency Act. In practice the majority of provisional trustees call upon the insolvent as soon as they receive their appointments, usually during the same week as the provisional order is granted. They make an inventory of the property of the insolvent estate, make arrangements for the custody of the assets, take possession of the books, etc. The liquidator will in terms of clause 32(1) receive the court order shortly after it has been granted. If the liquidator is empowered to attach all property in possession of the insolvent, he or she will be in a position to obtain control of the property much sooner than if the sheriff were to attach the property. *In line with almost unanimous support by commentators, clause 33(6) enacts the present practice by providing that the liquidator may elect to attach assets and complete an inventory instead of requesting the sheriff to do so.*

33.10 Sections 19 and 69 of the Insolvency Act refer to the attachment and taking into possession of movable property and not of immovable property as well. The reason is probably that immovable property cannot get lost or be removed as easily as movables. It is possible to attach immovable property (see for instance section 66 of the Magistrates' Courts Act 32 of 1944). A debtor may disrupt the administration of the estate by refusing to give possession of immovable property to the liquidator. *It can do no harm if the liquidator attaches immovable property as well as movable property in terms of clause 33(6).* Unnecessary costs may be incurred if the sheriff attaches immovable property when it is not really necessary. However, in terms of clause 33(8) unnecessary costs can be avoided because the sheriff will attach property only if directed to do so by the liquidator.

33.11 A commentator submits that all property which can be proved to be property of the insolvent should be attached and not only property in the possession of the insolvent as is provided in clause 33(6). The sheriff is not liable if he or she attaches property of another person in the possession of the execution debtor, unless the sheriff knew that the property belonged to another person. This is because property in possession of the debtor is deemed to belong to the debtor (*cf Weeks v Amalgamated Agencies Ltd* 1920 AD 218 at 226). It is submitted that the special

procedure in clause 35 should be used to attach property not in possession of the debtor and not the ordinary attachment in terms of clause 33.

33.12 *Clause 33(7)(f) provides that a liquidator should draw the attention of a person in whose custody assets are left to the offence in respect of the unauthorised disposition of property under attachment.* It is good practice for a liquidator to inform a debtor of the provisions regarding impeachable transactions, of the debtor's responsibilities regarding the lodging of the statement of affairs and to attend meetings, etc. A commentator proposes that the liquidator should be compelled to serve a copy of the sections of the Act dealing with impeachable transactions on the debtor and question the debtor on such matters. This proposal was not accepted as it is impractical to spell out all matters that a liquidator should discuss with the debtor.

33.13 *Although service of the order may in terms of clause 33(4) be effected by the liquidator's clerk, attachment of assets is in terms of clause 33(8) restricted to the liquidator or the sheriff.* If the liquidator appoints a clerk, or the appraiser in terms of clause 33(11), or someone else to effect the attachment, the responsibility for the actions of the liquidator's representative should remain with the liquidator.

33.14 Clause 33(9)(b) provides that the insolvent should sign the inventory and have an opportunity to comment thereon.

33.15 Section 69(1) of the Insolvency Act requires appraisal of all *movable* property. *Clause 33(11) provides for the valuation of all attached property, movable or immovable, because it is almost always advisable to have all such property valued.*

Clause 34: Insolvent shall hand over books to liquidator and shall submit statement of affairs to Master and liquidator

34.1 In terms of section 16(2)(b) of the Insolvency Act an insolvent must lodge two copies of a statement of affairs with the Master within seven days after the *final* order of sequestration has been served on the insolvent. It is desirable for the one copy to be lodged directly with the liquidator and that the statement be lodged as soon as possible after the issuing of the order.

Clause 34(1)(b) provides that within 7 days after the service of the first liquidation order the insolvent shall submit to the Master and the liquidator one copy each of a statement of affairs in the prescribed form. There is insufficient justification for a proposal that the statement should be supplied to the applicant or the applicant's attorney as well.

34.2 A commentator proposes that the insolvent should be obliged to immediately disclose in writing full details of all disposition to associates, dispositions without value, voidable preferences and collusive transaction. This proposal is not supported. It is often not a simple matter to decide whether a transaction is impeachable. The liquidator must investigate transactions, if necessary with the machinery provided for in clauses 64 to 68.

Clause 35: Liquidator may obtain search warrant

35.1 *It is advisable that, in addition to an affidavit, a warrant can be issued on the strength of evidence given at questionings in terms of clauses 65, 66 or 68 or the answers contemplated in clause 67(3)(b) of the Bill. It is also advisable that any magistrate who presided at a questioning may issue a warrant as is stated expressly in subclauses 35(1) and (2).*

35.2 *The archaic reference in section 69(4) of the Insolvency Act to "a warrant to search for stolen property" is replaced in clause 35(3) by a reference to the relevant provisions in the Criminal Procedure Act 51 of 1977.*

Clause 35A: Registration of name and address with liquidator

Clause 35A re-enacts the essence of section 43 of the Insolvency Act. *Clause 35A(2) provides that the Minister may amend the amount specified in the Bill by notice in the Gazette in order to take account of fluctuations in the value of money* (see paragraphs 4.2 to 4.6 above).

Clause 36: Liquidator's report

36.1 The essence of the provisions regarding the contents of the report in section 81(1) of the Insolvency Act has been retained in clause 36(1) with the changes pointed out below.

36.2 There are persistent complaints that not enough is done to ensure that surplus income is made available to creditors. In addition to the measures discussed in paragraph 15.6 above, *clause 36(1)(d) requires a report in particular on whether the debtor has submitted a statement of affairs and of his or her income and expenses. Clause 36(1)(e) requires a statement of the monthly income and expenses of an insolvent and the assistance given to the liquidator if an allowance is paid to the insolvent.*

36.3 Although the security requirements in clause 3(3)(b) and 4(3)(c) will discourage applications where the free residue is insufficient, the security will not protect concurrent creditors who have proved their claims against the danger of paying a contribution. The provision in clause 38(9) that a majority in value of *proved* creditors may reject a liquidator's report, will not assist in this regard. *Clause 36(1)(aA) provides that the liquidator should indicate in his report whether there is in his or her opinion a risk of a contribution in terms of clause 94 or indicate why he or she is unable to express an opinion on the matter.*

36.4 One of the reasons for delays in prosecuting persons in connection with insolvency offences is that the offences are reported to the Master who reports them to the Attorney General who refers them to the Commercial Crime Unit of the South African Police Services. In line with comments by commentators *clauses 36(2), 69, and the amendments of clauses 65A(5) and 74B of the Magistrates' Court Act in Schedule 3 provide for reporting of contraventions directly to the Commercial Crime Unit of the South African Police Services. To avoid delays when affidavits are called for, clause 36(2) provides that the report on contraventions should be in affidavit form.*

36.5 Commentators propose that the Attorney General or Master should require written reasons from the liquidator if offences have not been reported and that the liquidator should be obliged to follow up the prosecution of offences and report to creditors and the Master. The idea underlying these proposals may be sound, but it is not advisable or practicable to provide for these matters in the Insolvency Act. Commentators complain that serious commercial offences are not prosecuted timeously despite the availability of evidence obtained during investigations. Liquidators and trustees are disheartened by the perception that their investigations of criminal

Clause 38

offences are a waste of time. One commentator proposes that a special unit should be set up for this purpose. These comments and proposals were submitted to the National Director of Public Prosecutions for consideration.

Clause 37: Recovery of debts due to the estate

Clause 37 re-enacts section 77 of the Insolvency Act.

Clause 38: First meeting of creditors

38.1 At present there are four types of meetings - the first and second meetings to be held in every estate and special and general meetings that are held when required. *To simplify matters the types of meetings are reduced from four to two, namely a first meeting in terms of clause 38 and a special meeting in terms of clause 39 or 40.*

38.2 Notwithstanding fears that it may cause problems if a meeting is held to consider a report and give directives to the liquidator shortly after the first liquidation order, the advantages of holding this meeting as soon as possible outweigh the disadvantages. The administration of the estate cannot commence in earnest until creditors have given directions. As was pointed out by a commentator, when a debtor is about to be sequestered there is considerable activity and interest shown by creditors which is lost because of delays in convening meetings. There are indications that the Master sometimes fails to convene the first meeting expeditiously and there will probably be delays if the Master has to convene the first meeting. Even if it is accepted that the Master will convene the meeting expeditiously, notice in the *Gazette* and the involvement of the Government Printer will cause the meeting to be convened at a date more or less three to four weeks in the future. If the liquidator must report at the meeting and draft resolutions must be circulated beforehand, it is essential that the meeting should be convened for a date that suits the liquidator. Action can be taken against liquidators who fail to convene a meeting expeditiously. Delays will also be to the detriment of the liquidator because he or she will have to wait longer to obtain instructions from creditors. *Clause 38(1) provides that the liquidator must convene the first meeting.*

38.3 Ideally the meeting should be held before the return date so that creditors can in terms of clause 38(6) consider whether liquidation will probably be to the advantage of creditors. The return date is presently about six weeks after the date of the provisional order. ***The meeting should be held as soon as possible and clause 38(1) provides that the first meeting should be convened to be held within 60 days after the appointment of the liquidator.*** If the court feels strongly about a report in terms of clause 38(6) before a final order is granted, the return date may be extended or fixed so that the meeting can be held in time.

38.4 Section 40(2) of the Insolvency Act provides that notice of the first meeting must be published in the *Government Gazette* at least 10 days before the date fixed for the meeting. Due to limitations of the postal system and practical considerations ***it is provided in clause 38(2) and 38(3) that at least 14 days must elapse between notice of the first meeting and the commencement of the meeting.*** In line with the type of notices required in the Bill, as discussed in paragraphs 1.34 and the following above, the meeting must be advertised by notice in the *Government Gazette* and personal notice to creditors. Although a proposal that the liquidation order and the first meeting should be published in one notice will save costs, it may take a while before the liquidator is ready to convene the first meeting and notice of the liquidation order should be published as soon as possible.

38.5 Section 81(1)*bis* (b) of the Insolvency Act refers to at least 24 hours before the time advertised for the commencement of the second meeting. If the day before the meeting is not a working day, it is not clear when the affidavit should be submitted. ***Clause 38(4) provides that documents should be lodged with the presiding officer on or before the second working day before the date determined for the first meeting.***

38.6 Proposals that creditor committees should be provided for have surfaced from time to time. In practice the liquidator consults with major creditors on an informal basis. There is nothing to prevent creditors from electing a committee and instructing the liquidator to consult with the committee. Creditor committees are not provided for in the Bill.

38.7 Concerns were expressed, usually with reference to clause 38(5)(f) of the Bill, that directives to the liquidator might be given before the final liquidation order had been issued.

According to the proviso to subclause 62(4) the powers of the liquidator listed in the subclause can before the issue of the final order be exercised only with the consent of the insolvent or the court.

38.8 There have been numerous complaints to the effect that liquidators' reports to creditors are unsatisfactory. Section 40(3) of the Insolvency Act merely provides that the report of the trustee is received at the meeting. *Clause 38(9) provides that if the majority in value of creditors voting at the meeting rejects the liquidator's report the liquidator shall submit a report to an adjourned or subsequent meeting or refer the report to the Master who may give such directions with regard to the report as he or she deems appropriate.*

Clause 39: Special meeting of creditors

39.1 The special meeting of creditors in clause 39 is a combination of the general meeting to obtain directions of creditors in section 41 and the special meeting to prove claims in section 42 of the Insolvency Act.

39.2 The technical rules which make it difficult to convene a meeting just for the sake of a questioning are unnecessary (compare *Marques v De Villiers NO* 1990 (4) SA 415 (W); *Bernard v Klein* 1990 (2) SA 307 (W)). *Clause 39 provides that the liquidator may at any time convene a special meeting to question any person in terms of the Act.* The phrase "interrogation" which is used in the Insolvency Act has been replaced by "questioning" which is less confrontational.

Clause 40: Special meeting for late proof of claim

40.1 In terms of section 42(1) of the Insolvency Act any interested person who requires a special meeting of creditors (after the second meeting of creditors) for the proof of claims must tender to the trustee all expenses to be incurred in connection with such meeting. In practice such expenses are eventually deducted from the creditor's dividend. In terms of the proviso to section 44 no claim shall be proved after three months as from the conclusion of the second meeting, except with the leave of the court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the court or Master may direct.

Creditors already experience distress when their debtors are insolvent and they should not be impeded without good reason when proving their claims. Creditors are often reluctant to prove claims early in the administration of an estate because they fear that they will have to contribute. On the other hand the administration of the estate should not be delayed because creditors are indolent to prove their claims. Requiring the Master's permission for the late proof of claims creates a lot of work and in any event the Master eventually allows the late proof of claims. Until the liquidator is ready to finalise an account, it does not really inconvenience him or her if all the creditors have not yet proved their claims. It appears to be desirable that there should not be encumbrances to the proof of claims until the liquidator is ready to submit the account. *Clause 40(1) requires that the creditor who requested a special meeting for the purpose of enabling him to prove a claim tender payment of all costs resulting from such meeting. Clause 40(2) provides, after analogy of section 366(2) of the Companies Act 61 of 1973, for a notice by the liquidator fixing a cut-off date for the proof of claims.*

40.2 Clause 47 deals with the position where a creditor has not proved a claim before the cut-off date for proof of claims.

Clause 41: General provisions relating to meetings of creditors

41.1 The provision in section 39(2) of the Insolvency Act that the Master may give directions to a magistrate for the holding of a meeting has been deleted. Conflicts between the Master and magistrates should be resolved administratively and not by undermining the authority of the magistrate.

41.2 Genuine participation by creditors in insolvency meetings has become exceptional. Although creditors do nominate liquidators and adopt resolutions, they usually do what is required by the liquidator who is interested in the appointment. The flurry that sometimes occurs at first meetings when claims are vigorously contested presumably has little to do with the interests of creditors, but with the interests of practitioners who seek nomination as final liquidator. Most meetings appear to be a mere formality.

41.3 The following can be advanced as reasons for creditors' reluctance to attend insolvency

meetings:

- (a) Creditors realise that attendance of a meeting is unlikely to make any difference to the dividend which they will ultimately receive.
- (b) Creditors are not prepared to go to the expense of attending a meeting or paying the costs of an agent to do so on their behalf.
- (c) Meetings are all convened to take place at the same time and at the same place. Creditors sometimes have to wait for hours for the meeting in which they have an interest to be called.
- (d) The presiding officer normally has no knowledge of the position in any particular estate so that the proceedings are purely formal without a free discussion regarding the affairs of the estate.

41.4 The objections in paragraphs (c) and (d) can be overcome to a large extent if liquidators are allowed to convene and preside over meetings. Although it can hardly be said that a liquidator is independent (see for instance *Wynne and Godlonton v Michael* 1973 (1) SA 284 (E)), the disadvantages of a liquidator arranging a meeting and presiding over it, should be weighed against the advantage of a measure of formalism and an independent presiding officer such as the Master or a magistrate. There is some substance in the view that it is undesirable that a liquidator who is reliant on support of creditors must decide on the admissibility of claims at a meeting. However, the decision on the claim at the meeting is only preliminary and the liquidator must in any case at present in terms of section 45 of the Insolvency Act investigate claims and dispute claims that are not in order. There is also some substance in criticism that the same person should not accept or reject a claim at a meeting and subsequently dispute it or allow it. However, this follows from informal review or settlement procedures for claims in order to avoid expensive and time consuming court cases. At present the position also arises that the Master may accept a claim at a meeting and subsequently has to decide whether it should be disallowed in terms of section 45(3) of the Insolvency Act. Allowing someone to wear two hats may not be ideal, but it is sometimes the best solution. Although a lot of time is not spent in the run of the mill cases on proving claims,

it will save time and energy to allow the liquidator to deal with the proof of claims at meetings before him or her. It is at the first and second meeting where the most time is wasted by formal meetings before the Master or a magistrate and where some knowledge by the chairperson of the matters being dealt with will be most beneficial. How many company meetings are not chaired successfully by persons who are by no means impartial or specially trained? Any creditor who feels that a chairperson is acting improperly or has no confidence in the chairperson has only himself to blame if he or she does not use the wide power provided in the provisions to have the matter heard by the Master or a magistrate. *Clause 41(3) provides that a liquidator may convene any meeting to be held before himself or herself, but no questioning can take place at such a meeting and if questioning must take place or any person who avers that he or she is a creditor requests that the meeting must be held or continued before the Master or a Magistrate, the meeting must be held or continued before the appropriate Master or magistrate.*

41.5 Section 39(1) of the Insolvency Act provides that meetings should be held at a time and place which the Master considers to be most convenient for all parties concerned. Because clause 41(3) provides that the liquidator convenes most meetings, *guidance regarding the place of the meetings is provided in clause 41(1A).*

41.6 For practical purposes it is necessary that meetings must sometimes be continued before a different presiding officer or at a different location. Furthermore clause 68A makes provision for the incarceration of recalcitrant witnesses. According to the decision in *De Lange v Smuts NO* 1998 (3) SA 785 (CC) only judicial officers who may hold court can incarcerate witnesses. *Because of the extreme practical importance of the ability to incarcerate recalcitrant witnesses, clause 41(2A) provides for the availability of sufficient magistrates for this purpose. Clause 41(5A) provides that a meeting may after an adjournment be presided over by a different presiding officer and that a meeting before the Master may be adjourned to take place before a magistrate. Clause 41(5B) provides that a meeting may with the consent of the Master be convened in a magisterial district other than the one indicated by the rules in subsection 42(1A) and that a meeting may be adjourned to take place at a different place, including a place in another magisterial district.*

41.7 Because of creditors' lack of interest, it happens that only the presiding officer and perhaps

the liquidator appear at a meeting. Section 184 of the Companies Act 61 of 1973 expressly provides that in the case of a company having only one member, such member present in person or by proxy shall be deemed to constitute a meeting. According to information a number of presiding officers are of the opinion that there cannot be a meeting if no creditors are present. In most cases presiding officers merely note the fact that there has been no appearance at the meeting, but it is considered a meeting and the administration of the estate can continue. *Clause 41(8) provides that a valid "meeting" can be held where no creditor or only one creditor or representative attends a meeting.*

Clause 42: Voting at meeting of creditors

42.1 The principle in section 53(1) of the Insolvency Act that creditors may not vote on matters relating to the distribution of the assets of the estate is correct. If a person's estate has been liquidated, the insolvency law determines how the estate should be divided. A question which in practice gives cause for a difference of opinion is whether this section is also applicable to costs of liquidation. Creditors can direct the liquidator to follow a certain course of action, for instance instructing an attorney or advocate to conduct a questioning. The provisions that empower the Master to decide on the liquidation costs imply that creditors do not have the final say in respect of the admissibility of the costs. Indeed it does not make sense to provide that creditors cannot decide on the distribution of assets, but that they can decide on the strongest preference, namely liquidation costs. *Clause 42(2) prohibits votes by creditors on the distribution of the estate or the payment of costs of liquidation.*

42.2 Section 52(3) of the Insolvency Act provides that a creditor cannot vote in number if the claim is for less than R100. It goes without saying that small creditors with little interest in the estate should not be allowed to control matters. However, the creditors who have small claims have a vote in number in defined cases only, namely, the election or removal of a liquidator and acceptance of a composition. In those cases a majority in value (or two thirds in value) also have a say. If it is accepted that voting must sometimes be reckoned in number, it is accepted in principle that every creditor should have an equal vote in such instances, irrespective of the value of the claim. However, by excluding negligible claims the legislature shrinks back from the logical consequences of this principle. Mentioning a figure in an Act has the disadvantage that the amount

is invariably arbitrary and needs updating from time to time. Furthermore, if in this case the amount is very small it can just as well be omitted, but if it is large it undermines the principle that in defined cases all creditors should have a vote. *The monetary limit for a creditor to have a vote in number has been omitted.*

42.3 The thought underlying section 52(5) of the Insolvency Act, that the voting rights of a secured creditor are limited, makes sense. To the extent that a claim is secured, a secured creditor has no interest in the administration of the estate other than that the liquidator must realise the creditor's security and see to it that the creditor gets his or her money. However, a commentator submits that difficulties arise when it is probable that the assets will realise marginally more than the value of the security. Concurrent creditors have nothing to lose if a liquidator is directed to take a risk in the hope of realising a higher price in order to obtain a small surplus for the concurrent creditors. The risk is borne by the secured creditor as well as the clause 75(4) costs of maintaining, conserving and realising the assets. There is a possibility of prejudice to the secured creditor which is difficult to provide for in legislation without favouring the secured creditor unduly. In small estates the bondholder will usually have a majority in value of the claims and can protect himself or herself. It is also unusual for creditors not to give the liquidator wide powers regarding the sale of assets. Although it may sometimes be cold comfort, clause 42(9) gives a creditor whose rights are being infringed by a directive of creditors the right to apply to court to set aside the directive. It is submitted that it would do more harm than good to attempt to protect secured creditors against prejudice in this regard.

42.4 Nowhere in the Insolvency Act is it stated clearly what the effect is if a secured creditor does not value the security when proving a claim. It rarely happens that the creditor realises security in terms of section 83 of the Insolvency Act and consequently it can usually not be determined at which value the secured creditor can vote if he or she had not valued the security when proving the claim. Undoubtedly it is sometimes impossible for a creditor to value the security accurately at an early stage. Against this, however is not desirable to give a creditor a say in the administration of the estate if the creditor has no interest in it. At present the only effect of the creditor's valuation of the security is that the liquidator can take over the security for that value. *In terms of clause 45(3) a creditor who holds security for a claim shall place a value on the security or have his or her voting rights limited. Clause 42(5)(b) provides that on most matters*

a secured creditor may vote only if he or she has placed a value on his or her security when proving the claim or the security has been valued or realised by the liquidator. In terms of clause 73(5) the liquidator shall cause property held by a creditor as security, to be valued. If a creditor relies on security the creditor will in accordance with clause 75(3) have no concurrent claim and no vote on the excess of the claim over the value of the security.

42.5 An attempt was made in 1965 to limit the control exercised by liquidators on voting by creditors. Section 14 of the Insolvency Amendment Act 99 of 1965 added a proviso to section 53(2) of the Insolvency Act that the trustee or persons with a defined connection with the trustee shall not vote on behalf of creditors at a meeting. The effect of this provision appears to be that the trustee arranges with a person who is not disqualified to attend and vote at the meeting. In the unreported case of *Cohen v Lawrence* (2187/91 (W) 25 March 1991) Acting Judge Claassen remarked in passing that the trustee could not authorise or instruct someone else to do that which the trustee self was prohibited from doing. It is submitted that the provision has not resulted in creditors exercising their votes independently from the trustee, but causes problems. Although, according to *Sutter v Scheepers* 1932 AD 165 at 171, it is risky to sign a blank power of attorney, there is no reason why a person should not act in this way if he or she has justifiable confidence in the person to whom the power of attorney is entrusted. If his or her confidence is not justified, he or she should bear the consequences. Section 55(m) provides that any agent authorised specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors and acting or purporting to act as such, shall be disqualified from being elected or appointed a trustee. Section 60(a) provides that a trustee who has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney may be removed from office by the Master. Commentators were evenly divided on the retention of the provisions, but for the reasons given above *the provisions that the liquidator and the liquidator's connections may not vote have been omitted from the Bill.*

42.6 Section 53(2) of the Insolvency Act provides that "every creditor may vote either personally or by an agent specially authorised thereto or acting under his general power of attorney". In *African Diamond Distributors v Van Der Westhuizen* 1988 (4) SA 726 (T) 727 Deputy Judge President Eloff stated that some proof of proxy might possibly, for reason of good

order, be required. In the unreported case of *Cohen v Lawrence* (2187/91 (W) 25 March 1991) Acting Judge Claassen held that it would seem sensible and prudent that some documentary proof in the form of either a letter, a telegram, articles of association, or even a scrap of paper should be readily at hand. This would serve to avoid unnecessary disputes and irregularities. ***Clause 42(7) provides that no person shall vote as agent of a creditor unless he or she submits proof of his or her mandate.***

42.7 A commentator says that the wishes of employees, who often constitute a substantial body of creditors, are often overlooked because they are unsophisticated and simply accept what the liquidator does. The commentator submits that where employees are members of a trade union, the trade union should be authorised to act on their behalf in regard to liquidations; for proof of claims a single affidavit with lists of the names and amounts should suffice. Clause 80 provides that an employee is entitled to a preferent claim even though he has not proved a claim, but that the liquidator may require an affidavit. Nothing prevents trade unions from assisting employees with the lodging of their claims or even lodging affidavits in support of employees' claims themselves. It is advisable that the liquidator should retain a discretion to call for an affidavit by the employee. Nothing prevents employees from authorising trade unions to act on their behalf, or perhaps even giving officials the right to act on their behalf in industrial agreements. In line with the view expressed in the Commission's *Report on the review of preferent claims in insolvency* (1984 paragraph 3.9.5 on page 58) it is submitted that it is not advisable to provide by legislation that industrial councils or trade unions should always act on behalf of employees.

42.8 In order to avoid disruption, ***clause 42(9) provides that applications to set aside resolutions must be made within 90 days or such further period as the court may allow for good cause.***

42.9 Section 53(5) of the Insolvency Act provides that the majority of creditors (reckoned in number and in value) may direct the trustee to employ or not to employ a particular attorney or auctioneer in connection with the administration of the estate and that if the trustee has reason to believe that it will not be in the interests of the estate to carry out such direction, the trustee may submit the matter to the Master, whose decision, after considering any representations in writing by the trustee and the creditors, will be final. Before its amendment in 1965 section 53(5) provided

as follows:

The creditors shall not be entitled to direct the trustee to employ or not to employ a particular attorney or auctioneer in connection with the administration of the estate but the creditors may recommend the employment of a particular attorney or auctioneer and if the trustee does not accept the recommendation, any creditor may submit the matter to the Master whose decision, after hearing the trustee, shall be final.

After electing the liquidator, the creditors should leave the employment of the attorney or auctioneer to the liquidator. It is a fact that liquidators, apart from any sinister reasons that may exist, prefer to use an auctioneer who is known to them and in whom they have confidence. The liquidator remains responsible for the proper course of the auction. The same applies to legal steps undertaken by an attorney. Although the present section 53(5) makes provision for the Master to rescind the creditors' decision to employ a particular attorney or auctioneer, it places all the parties in a difficult position. There are consistent rumours that fee sharing between liquidators and others (especially auctioneers) is rife, despite the right of creditors in terms of section 53(5) to direct the trustee to employ or not to employ a particular attorney or auctioneer. There is no evidence that the provision is successful in curbing fee sharing and if it is successful, as a matter of logic, it would encourage sharing between creditors and auctioneers or others. The liquidator will surely be called upon to give reasons if he or she rejects a recommendation by the creditors. *Clause 42(10) is modelled on the old wording of section 53(5) quoted above, but it is made clear that the Master is called upon to decide the matter only if the liquidator does not accept the recommendation by creditors.*

Clause 43: Claim by partnership creditor against estate of insolvent partner

43.1 Insolvency of one or more of the members of a partnership dissolves the firm, but it does not cause the partnership estate to be sequestrated. A consequence of the dissolution is the winding-up or liquidation of the partnership. After dissolution each partner becomes liable for the whole of the debts of the partnership (*singuli in solidum*). Each partner may be sued for the whole of such debts without the necessity of the creditors taking any action against the other members or assets of the partnership. Because section 49(1) of the Insolvency Act, re-enacted in clause 45, does not apply where the estate of a member of a partnership is sequestrated unless the partnership is also sequestrated, it appears that partnership creditors would be entitled to prove claims against the estate of the insolvent partner. The trustee of the insolvent partner's estate has no control over

the process of liquidation of the dissolved partnership. It is cumbersome and disruptive for the trustee to claim against other partners with a view to settling all the partnership accounts.

43.2 *Clause 43 provides that in the case of insolvency of a partner without the partnership being liquidated as insolvent, partnership creditors cannot prove claims against the estate of the partner until the partnership debts have been settled in terms of the dissolution of the partnership.*

Clause 44: Claims against partnerships

44.1 Section 49(1) of the Insolvency Act departs from the common law (see *Michaelow v Premier Milling Co Ltd* 1960 (2) SA 59 (W) 61) by retaining the "partnership estate" as a separate estate from the estate of the individuals and by precluding "partnership creditors" from preferring their claims against the individual estates: in the initial stages they look for payment to the partnership estate only. The creditors of the individuals are similarly precluded from proving claims against the "partnership estate". Only after all the creditors of an individual partner have been paid in full is the residue, if any, in the estate transferred to the partnership estate for the benefit of the partnership creditors, and vice versa. In the *Michaelow* case Judge Marais observed (at 61) that the common law process of liquidation and distribution was so cumbersome and costly that the legislature substituted for it a practicable, though wholly artificial, scheme for dealing with joint (partnership) debtors who are unable to meet their liabilities.

44.2 The present statutory position was apparently adopted from the English insolvency law. In England the deviating rule of English law has been severely criticised by English writers. The Review Committee (Insolvency Law and Practice) was satisfied that the rule was neither logical nor fair, and should be abrogated (Report of the Review Committee - Cmnd. 8558 1981 paragraph 1688). The Committee remarked as follows (paragraph 1689):

It is right that the joint debts should be paid out of the joint estate in the first instance, and that the separate creditors should have no resort to it until the joint creditors have been paid in full. This in accordance with principle; for a partner is not entitled to receive any share of the firm's assets until the firm's debts have been paid, and his private creditors can be in no better position. If, however, the joint estate is insufficient to pay the joint debts in full, each of the partners remains liable to the joint creditors, and there is no justification for postponing the claims of the joint creditors against the separate estates to those of the

separate creditors.

In Scotland, too, on the sequestration of a firm and of its individual partners, the creditors of the firm are entitled to be ranked for the amount of their debts on the partnership estate and, when they have not been paid in full out of that estate, on the estates of the individual partners (Bankruptcy (Scotland) Act 1985, section 6 of Schedule 1). In the United States, if there is a deficiency to pay in full all claims concerning a partnership, the trustee shall have a claim against a general partner for the full amount of the deficiency (United States Bankruptcy Code, section 723).

44.3 Supreme Court Rule 14(2) and Magistrates' Court Rule 54(1) permit a partnership to sue or be sued in the partnership name. The effect of the somewhat differing Supreme Court Rules 14(5)(h) and 14(6) and Magistrates' Court Rule 40(3) is that execution must first be levied against the partnership assets, and only if these are insufficient may the creditor turn to the individual partners' estates.

44.6 It is submitted that section 49(1) of the Insolvency Act is an encroachment upon the rights of partnership creditors. There appears to be no justification to tolerate an exception inspired by English law to our common law principles. *Clause 44 provides that where the partnership estate is deficient, the partnership creditors should rank in the separate estates for the balance of their claims.*

44.7 Section 49 of the Insolvency Act does not prevent claims being lodged in both the partnership estate and the estate of a partner if the claims are based on different causes of action. In *Barclays Bank v The Master* 1958 (2) SA 119 (O) 121 Judge Grobler held that section 49 could not be construed to deprive partnership creditors, who were also creditors of the partner, of the right to prove against the partner's estate, where the claim against the partner was founded on a cause of debt which was distinct and separate from that on which the claim against the partnership was based. At first sight it appears that a creditor in this instance is given preference over other creditors: the former can prove a claim in respect of a partnership debt against the partner's estate *and* against the partnership's estate. *The first part of clause 44 makes it clear that only if the partnership estate is deficient, can the creditor prove a claim against the partner based on the latter's personal obligation in respect of a partnership debt.*

44.4 A commentator submitted that the present position where the surplus in each partner's estate accrues to the partnership estate, would appear to be the lesser of two evils because clause 44 will be difficult to implement. It is conceded that clause 44 will result in the finalisation of partners' estates being delayed until the partnership's estate has been finalised. This follows logically because partners are liable for partnership debts and if the position is regulated logically and fairly the partner's estate cannot be finalised before the partner's liability for partnership debts has been determined and therefore the partnership estate has been finalised. It will be possible to calculate a worse scenario and pay interim dividends to creditors of the partner's estate if finalisation of the partnership estate is delayed.

Clause 45: Proof of claims

45.1 A commentator submits that the right of a presiding officer to condone defects in terms of clause 110 may lead to nine out of ten claims being bad and endless arguments. The commentator proposes a two-staged enquiry which is discussed below. Claims which do not comply with the prescribed mandatory requirements should be rejected. The commentator submits that there is no prejudice, except that the creditor cannot vote at that meeting. At present a creditor can be allowed to correct a claim provided that a proper affidavit was lodged in time. A meeting cannot be held if it has not been convened according to the Act. From a theoretical point of view there can be no objection against the discretion given to presiding officers in clause 110 to condone non-compliance with the Act, because the exercise of this discretion is limited to cases where no substantial injustice is caused. From a practical perspective the question arises whether such a discretion would lead to endless arguments and requests for condonations. With regard to the statement that the rejection of claims leads to no prejudice except that the creditor cannot vote, reference is made to a remark which refers to the right to vote for a liquidator as "a valuable and important right" (*Garlick Wholesale & Others v Magistrate of Sutherland and Others* 1926 CPD 267 at 274). It is unlikely that a creditor would purposely be shoddy when drafting a claim because of the availability of a discretion to excuse mistakes. The availability of a discretion should not increase the number of incorrect claims significantly, but may lead to numerous requests to condone mistakes. In some cases, like failure to advertise a meeting at all, it would, it is submitted, be impossible to condone the failure because the presiding officer could not be sure that no substantial injustice had been caused. In other cases, like where an affidavit was not properly

signed, the presiding officer may very well decide to condone non-compliance if no one had been prejudiced or possible prejudice could be remedied by appropriate instructions. Condonation of silly mistakes will no doubt reduce delays and frustrations and is supported expressly or impliedly by all the other commentators. ***It is submitted that a discretion by presiding officers (including the Master) to condone mistakes which have not lead to substantial injustices, is advisable and should be retained in clause 110(1).***

45.2 Section 44(3) of the Insolvency Act requires that a claim be proved to the satisfaction of the officer presiding at the meeting. Although it is clear that the decision of the presiding officer is not final, the Act does not indicate which evidentiary yardstick is to be applied by the presiding officer. A number of decisions indicate that *prima facie* proof of a claim (proof on the face of the documents) is sufficient (see for instance *Ben Rossouw Motors v Druker* 1975 (1) SA 816 (T)). The reason for a *prima facie* basis probably is the prevention of delays caused by protracted disputes about the admissibility of claims. In *Aircondi Refrigeration (Pty) Ltd v Ruskin* 1981 (1) SA 799 (W) it was held that a creditor was entitled to have his claim considered without any evidence being heard except his own under section 44(7).

45.3 Contrasting comments were received on the question whether the yardstick of proof on the face of documents should be spelled out in the legislation. One commentator proposed a two staged enquiry, the first to decide whether the formalities have been complied with and the second to decide whether the presiding officer is reasonably satisfied that the claim is in order; the analysis of supporting documents and creditor evidence are relevant to the second stage only; if objections are received a mini-enquiry should take place, provisional votes be cast and the matter be reviewed by the Master whose decisions are subject to review by the court. It is submitted that the proposed mini-examination with a review by the Master in each case of an objection is impractical. How will the Master in any case decide questions of fact? If, as suggested above, formalities can be condoned it is not clear why the division of the procedure into two phases is advisable.

45.4 From time to time "dog fights" are popular at first meetings of creditors. In this discussion "dog fights" means arguments on any imaginable grounds for the rejection of claims in order to ensure that the candidate of choice receives the nomination or the sole nomination as liquidator. It is accepted that claims may occasionally be attacked for other reasons as well. One commentator

submits that the involvement of presiding officers should be kept to a minimum. Another points out that a lot of time is spent to attack claims on petty grounds merely because liquidators want certain claims to be rejected in order to ensure an appointment as liquidator. Other commentators submitted that liquidators and proved or unproved creditors should be allowed to lodge objections to claims. *Clause 45(8) gives the liquidator (initial or final), the insolvent, and any creditor (not necessarily a proved creditor) or the representative of any of them the right to peruse the claim documents before the meeting.* It is submitted that these parties should have the right to inspect documents. It would be illogical to give them the right to inspect the documents but refuse them the opportunity to object to claims at the meeting. In terms of clause 101(1)(j) an insolvent commits an offence if he fails to inform the Master and the liquidator of knowledge or a suspicion that a person has proved or intends to prove a false claim. Although it is not a new phenomenon, one feels uncomfortable with the vision of supposedly impartial liquidators who vigorously oppose the claims of all creditors who oppose their appointments. It will serve no purpose to outlaw this type of opposition by a liquidator if creditors retain this right, because, as happens occasionally at present, the fight will be fought under the banner of a creditor. *According to clause 45(10) the liquidator or a creditor who has proved a claim at a previous meeting may question a proved creditor or someone who wishes to prove a claim about the claim of the creditor.* The question whether this right should be afforded to persons who have submitted claims but have not yet proved claims is discussed below. *Clause 45(8) provides that the liquidator, insolvent or any creditor may lodge motivated objections to the proof of a claim at the meeting where the claim is submitted for proof or with the presiding officer before the meeting. In order to limit unnecessary delays or "dog fights" and give clear guide-lines to presiding officers, clause 45(2) provides that a claim against an insolvent estate shall be admitted at a meeting of creditors of the estate if it has been proved to the satisfaction of the presiding officer on the face of the claim form, documents in connection with the claim submitted by the creditor or another person, if any, and on the evidence, if any, by the creditor.*

45.5 Clause 45(3) provides that a secured creditor loses some voting rights if the creditor does not value his or her security. See the discussion in paragraph 42.4 above.

45.6 Section 44(4) of the Insolvency Act provides that the affidavit *or a copy thereof* shall be delivered at the office of the presiding officer. Claims sometimes need to be faxed urgently to the

presiding officer. Unnecessary obstacles should not be placed in the way of creditors. Commentators supported the provision in clause 45(6) that copies of the claim or supporting documents should be acceptable.

45.7 Section 44(4) of the Insolvency Act provides that the affidavit must be lodged at the office of the presiding officer not later than twenty four hours before the advertised time of the meeting at which the creditor intends to prove the claim. If the day before the meeting is not a working day, it is not clear when the affidavit should be submitted. *Hence the wording in clause 45(6) that documents must be lodged before the time of day advertised for the commencement of the meeting on or before the second working day before the date of the meeting.*

45.8 A commentator points out that claims by foreign creditors are increasing. The Insolvency Act does not stipulate how claims in a foreign currency should be converted into South African currency. In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 776 Chief Justice Corbett held, in a majority judgment, that a damages claim should be expressed in United States dollars (the currency in which the loss was "felt"); that the judgment may be satisfied in South Africa by payment in the foreign currency or by the payment of its equivalent in Rand; and that the conversion date should be the date of payment. It would not make much difference whether, in a case of insolvency the claim is proved in the foreign currency, or in Rand. In fact, it may be better to prove the claim in the currency of the creditor and leave the conversion to the liquidator. A rule that the conversion date should be the date of payment would create serious problems in insolvent estates, at least in the case of concurrent claims. In *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) 30 acting judge of appeal M T Steyn held that in the particular case conversion at the date of payment would not be practical and that the only practical date closest to the date of payment, would be the date of judgment. The conversion date closest to date of payment which could perhaps be practical in insolvent estates is the estimated date of confirmation of the account, which is also used to make interest calculations on concurrent claims. It is, however, not simple to formulate this date in legislation. It is agreed with a commentator that the logical date would be the date of liquidation. *Clause 46(6A) provides that where appropriate the amount of a claim may be expressed in a foreign currency, but that all claims in a foreign currency shall be paid in its equivalent in Rand and the conversion date of Rand to a foreign currency shall be the date of liquidation.*

45.9 The proviso to section 44(4) provides that a creditor who has proved an incorrect claim may, with the consent in writing of the Master given after consultation with the trustee and on such conditions as the Master may think fit to impose, correct the claim or submit a fresh correct claim. If the amount of the proved claim is too small, it goes without saying that the creditor may submit a claim for the additional amount. If the amount of the claim is too big, the liquidator may in terms of clause 46(4) reduce the claim. *Clause 45(7) merely provides that a claimant who has proved an incorrect claim may at a subsequent meeting prove a corrected claim.*

45.10 The Insolvency Act does not clearly provide how an unliquidated claim should be proved. According to court decisions unliquidated claims may not be proved at a meeting in terms of section 44. The claim may be tendered at a meeting of creditors, but it is not admitted until the trustee, if authorised thereto by the creditors or by the Master, has compromised or admitted the claim, or the claim has been settled by a judgement of the court, whereafter it shall be deemed to have been proved. (Section 78(3) of the Insolvency Act; see *Proksch v Die Meester* 1969 (4) SA 567 (A) 589.) Debtors may dispute a claim and the creditor is consequently left with an unliquidated claim which cannot be proved before the appointment of a liquidator and the settlement of the claim. Big creditors are prejudiced because they cannot contribute to decision making until the second meeting of creditors. However, there wasn't much support amongst commentators for the idea that a creditor should be able to vote on an unliquidated claim. In terms of clause 38 the liquidator will receive directives sooner, but a creditor with an unliquidated claim will not be able to vote at the first meeting. *Clause 45(9) provides expressly that an unliquidated claim cannot be proved at a meeting, but that it may be tendered for proof.*

45.11 In terms of section 44(7) of the Insolvency Act only a creditor whose claim has been proved may interrogate other creditors. Creditors whose claims have numerically been proved before other creditors sometimes aver that they are entitled to interrogate creditors whose claims have been tendered at the same meeting but have not yet been proved. The argument that the incidental allocation of claim numbers gives certain creditors more rights than others is ridiculous (*cf Peach v Stewart* 1929 WLD 228). *Clause 45(10) makes it clear that a creditor who has proved a claim at a meeting shall not be permitted to question a creditor who wishes to prove a claim at the same meeting before the claim of the creditor who wishes to prove a claim has*

been admitted or rejected.

45.12 Comment were invited on the question of whether creditors who had submitted their claims for proof should also be allowed to interrogate creditors who wish to prove claims. Only two commentators support interrogations by unproved creditors without any reasons except that it is unfair to exclude unproved creditors. *Clause 45(10) limits questioning to proved creditors because an unproved creditor has insufficient standing.*

45.13 If a proved creditor fails to appear in answer to a summons, refuses to take the oath, etc, section 44(9) of the Insolvency Act provides that the claim may be expunged by the Master. Clause 46(4) now provides that a liquidator may reduce or disallow claims after giving the creditor an opportunity to substantiate the claim. Clause 45(12) provides that claims submitted for prove may be rejected if the creditor fails to appear or to answer questions fully and satisfactorily.

Clause 46: Liquidator shall examine claims

46.1 In terms of section 81(2) of the Insolvency Act the Commissioner for Inland Revenue (now the Commissioner for the South African Revenue Services) must permit the trustee to inspect and make copies of the insolvent's return. *Clause 46(2) empowers the liquidator to require additional supporting proof for a claim and the basis on which an estimate by the Commissioner of Revenue Services was arrived at.* See also clause 62(7)(d).

46.2 Section 45(3) of the Insolvency Act empowers the Master to confirm, reduce or disallow a claim if the trustee disputes a claim after it has been proved. The general rule is that the claimant has the burden to prove his or her claim on a preponderance of probability. Presumably the trustee has to convince the Master on a preponderance of probability that the claim is not in order. Should there be a factual dispute, the Master does not have the means to resolve it and the proved claim will probably remain as it is. Irrespective of the fact that a claim has been proved at a meeting, it is submitted that the liquidator should in principle have the right to dispute the claim and leave the choice to the creditor to prove the claim by means of an action at law. A measure of formalism is probably justified if the liquidator is empowered to dispute a claim without the cumbersome procedure of the Master having to consider it.

46.3 Creditors have a direct interest in the decision of the liquidator to dispute a claim, because ordinarily the estate will be liable for the litigation costs if the creditor succeeds in establishing a claim by means of a court action. However, a requirement of a specific resolution would probably not force uninvolved creditors to involve themselves and would therefore be a waste of time. *Clause 62(4)(cA) requires a general resolution to authorise the liquidator to disallow or reduce a claim, similar to the resolution required to compromise a claim.* In terms of clause 42(3)(b) the creditor in question cannot vote on the issue of whether his or her claim should be contested.

46.4 A commentator proposed that if a liquidator disputes a proved claim, this dispute should be placed before the Master for a ruling. This may obviate the necessity of expensive litigation as many creditor's may be prepared to accept the Master's decision. The proposal that the Master should have a right of review cannot be supported. In many cases where claims are disallowed, there are factual disputes which cannot be decided by the Master. The whole idea is to have the ordinary rule apply, namely, that the claimant has the burden to prove a claim on a preponderance of probability. If the liquidator or creditors are not happy with the claim they can decide that the creditor should be left to prove his claim in a court of law if no compromise or agreement can be reached. An intervening review by the Master may cause delays and may devalue the right of the liquidator on behalf of the debtor to decide whether a claim should be settled without court action. A proposal that the decision of the liquidator should be subject to review by the court was also not accepted because the creditor should be left with its usual rights to go to court.

46.5 Commentators propose that the liquidator should also examine securities relied on by a secured creditor. Although the liquidator must examine a secured creditor's security, section 45 of the Insolvency Act and clause 46 of the Bill deals with a liquidator who disputes a claim - whether the estate owes the claimant the amount claimed - and not whether the creditor enjoys security for the claim. The appropriate time to deal with the question whether a creditor has a secured (or a preferent claim) is when the liquidator lodges an account and objections against the account are dealt with (*Callinicos v Burman* 1963 (1) SA 489 (A) at 500; *Bowman v De Souza Rolado* 1988 (4) SA 326 (T) at 333; *Grufin Finance Co (Pty) Ltd v Cohen* 1991 (2) SA 345 (W) at 349; *Caldeira v The Master* 1996 (1) SA 868 (N) at 875)

Clause 47: Late proof of claims

Clause 47 re-enacts provisions in section 104 of the Insolvency Act. Clause 40 makes provision for the fixing of a date similar to section 366(2) of the Companies Act 61 of 1973.

Clause 48: Conditional claims

48.1 Conditional claims are uncommon. It follows that conditional claims in instances where the condition will be fulfilled, if at all, within a year of sequestration, hardly ever occur. It is not desirable to provide extensively for cases which hardly ever occur, as is done in section 48 of the Insolvency Act, if simpler provisions can govern the position satisfactorily.

48.2 *Clause 48 is derived from provisions that exist in the United Kingdom and provides for the valuation of a conditional claim by the liquidator and payment on the full amount if the condition is fulfilled in time.*

Clause 49: Arrear interest and debt due after liquidation

49.1 In terms of section 50(2) of the Insolvency Act a creditor may claim the full amount of a debt payable after the date of sequestration, but if the debt bears no interest the claim must be reduced by 8% from the date of sequestration to the due date if the account is confirmed before the due date. Claims payable on a future date that do not bear interest are rare. Provision for the proof of debts that are payable after sequestration is justified. However, even for interest-bearing debts payable on a future date it is unfair to allow the creditor to merely prove his claim as if the debt had already become due. There is no clear provision that finance charges should be recalculated in the case of insolvency and in practice creditors under instalment sales agreements are allowed to claim interest that is not yet due. ("Insolvencies: Burdette se artikel aangeval en verdedig" 1992 *De Rebus* 589.)

49.2 *Clause 49(2) provides that no claim shall be proved for interest which accrues after the date of liquidation.* Interest after liquidation is payable in terms of clauses 75(5) and 80(5) if sufficient funds are available to pay capital claims in full.

49.3 Clause 49(3) provides that the capital amount of a debt that becomes payable after liquidation should be reduced by 12% per annum compounded monthly on completed months from the date of liquidation to the date on which the debt becomes due. The rate of 12% is used for similar calculations in the Estate Duty Act 45 of 1955. A commentator pointed out that the reduction of a claim by simple interest tends to give rough results. For instance, a creditor will get nothing for amounts that become due more than 8 years after liquidation. It makes sense to compound the interest daily or monthly so that the calculations can be made reasonably accurately. This requires multiple calculations or a calculator or computer that can calculate compound interest. Word processing programs and most spreadsheet programs can do the calculations. If interest is compounded daily the number of days between the date of liquidation and each day on which payments are due, will have to be calculated. Although this is also done when interest is paid on secured claims, the difference between the results when compounding interest daily and monthly is not significant and it would involve less work to calculate the months from liquidation to due date rather than the days.

Clause 50: Withdrawal of claim

50.1 Clause 50 is based on section 51 of the Insolvency Act, but lessens the role of the Master.

*50.2 A commentator complains that it is expensive to give notice to all creditors when a claim is withdrawn. The notification requirement is not new as section 51(2) of the Insolvency Act provides therefor. The reason is probably to alert creditors that another creditor is withdrawing a claim because of a perceived danger of paying a contribution. The question is whether it is appropriate to warn other creditors or whether all creditors should protect their own interests. **On balance the requirement of notice of withdrawal to all creditors appears to be inappropriate and clause 50(2) provides that notice should be given to the Master by the liquidator.***

Clause 51: Creditor may not recover the debt from insolvent estate which is recovered from another source

51.1 In *De Wet Bros v The Master* 1934 CPD 427 it was held that where a creditor had two co-principal debtors (in practice the one principal debtor is usually a surety and the other the principal debtor), A and B, and he had received part payment of the debt from A before he proceeded to prove against the insolvent estate of B, he could only prove for the balance of the debt. But where no such payment had been made prior to proof, then at the time of proof the creditor was entitled to prove against each for the whole amount. This was subject to the limitation that the creditor could not in all receive more than the full amount of his debt. C F Forsyth & J T Pretorius **Caney's The Law of Suretyship in South Africa** fourth edition Cape Town: Juta 1992 at 104 suggest that a surplus must be returned to the last payer - the destiny of this will then be a matter between those who have paid. If the refund has been made to the principal debtor or the debtor's estate, the surety or the estate of the surety will have the right of recourse, whilst if the refund is made to a co-surety, a question of contribution will arise between co-sureties.

51.2 Although it appears to be unfair that the creditor can institute two claims for the same amount, it follows from the nature of suretyship that the creditor has two debtors. ***Clause 51 provides that the creditor must inform the liquidator of an insolvent estate against which he has a claim that he has received payment from another source. If a creditor fails to do so, double the amount may be recovered from him or her. If a creditor has received payment before liquidation the payment must be deducted from the claim before it is proved.***

51.3 A commentator submits that if a creditor has insured his or her debtors and thereafter receives payment from his or her insurance company, the creditor should have the right to cede his or her dividend to the insurance company and remain reflected as a creditor with all his or her rights protected. It is, of course, for the creditor to decide whether to claim from insurance for losses suffered. However, if the creditor receives payment from insurance he or she should report it to the liquidator who must decide whether a refund should be made.

Clause 52: Election of liquidator

52.1 The question was considered whether certain creditors should be excluded from voting for a liquidator because of an existing or past association with the insolvent. When a list of persons who may not vote for a liquidator is drawn up, it is difficult to decide who should be included in

the list. If the list is long and complicated it will be a source of difficulty to anyone who wishes to prove a claim and will also create opportunities for disputes. A different approach is that any person who has proved a claim may nominate a liquidator. There are decisions which indicate that suspect claims should be examined carefully before they are admitted. Relationship between the creditor and the insolvent or a case where the interests of the creditor coincide with those of the insolvent give rise to suspicion, which justifies a careful examination of the claims (*Marendaz v Smuts* 1966 (4) SA 66 (T) 73). *It is submitted that suspect claims be examined carefully (as is the position at present) but in terms of clause 52(1) any proved creditor is allowed to vote for a liquidator.* In *Sabie Mediese Sentrum v Die Meester* 1977 (4) SA 389 (T) Judge Le Grange held that a creditor may vote for one trustee only.

52.2 The advantage of voting according to value *and* number is that one or a few big creditors cannot dominate decision-making. The disadvantages are that the rules are somewhat cumbersome and that a number of small creditors can thwart the resolutions of creditors who have the biggest financial interest without consideration of the merits of the resolution by the large creditors. One commentator submits that a liquidator's appointment at the meeting (in addition to a liquidator appointed initially) should be supported by a majority in number and value or else all the energy at the first meeting would be directed towards preventing the appointment of a joint liquidator or, on the other hand, to obtain an appointment as joint liquidator. If voting for a liquidator is retained it is unavoidable that some energy would be directed towards obtaining votes for liquidators. All the other correspondents agree that the present position should be retained and clause 52(2) provides that the liquidator or liquidators who obtain the majority in number and value, or either of the two, be elected as liquidators.

52.3 Section 18(4) of the Insolvency Act provides that the Master shall appoint the provisional trustee as final trustee if no trustee has been elected at the first meeting. This rule is logical and did not elicit adverse comments. Clause 52(3) provides accordingly.

52.4 Comments were invited on a clause that gives the Master a discretion to appoint the liquidator appointed by him in terms of clause 32, as joint liquidator, if he or she is not elected as such. Comment was also invited on a possibility based on section 74 of the Close Corporations Act 69 of 1984 that the liquidator appointed by the Master in terms of clause 32 should automatically

be appointed final liquidator, with creditors being entitled to nominate an additional liquidator. It can be argued that continuity is important and that the (provisional) liquidator must be in a position to act in the knowledge that he will be one of the final liquidators. On the other hand it can be questioned why the (provisional) liquidator should be appointed as final liquidator if he, for example, has been a discretionary appointment and has not realised any property or done any other important work. In practice it often happens that creditors are not aware of a pending sequestration and do not have the opportunity to support a candidate for appointment as liquidator

52.5 Commentators supported a wide range of proposals - there should be no voting at the meeting and the "provisional" appointment should prevail; or the provisional appointee should always (or almost always) be one of the final liquidators; or the creditors' vote at the first meeting should be conclusive without any security of tenure for the person appointed provisionally; or the Master should have a discretion to retain the provisional appointee if he or she is voted out at the first meeting. One commentator questioned whether a creditor who submitted a nomination should be allowed to vote for someone else as this encourages a practice to urge creditors to change their support. Other comments were that a unhealthy situation arises if a "provisional" liquidator can sit back assured of his or her appointment, or that only in very large or intricate liquidations should an additional liquidator be appointed. If the Master has a discretion when making the appointment in terms of clause 32 it appears appropriate that the Master should have a discretion to appoint the provisional appointee if he or she is voted out. If it appears that a liquidator was appointed on the strength of incorrect requisitions the Master would surely take this into account when exercising his discretion. The wastefulness of more than one liquidator in estates that do not justify it, should also be taken into account. The election of more than one liquidator by creditors at a meeting does not occur often. If a discretion is retained for the Master it should be provided that the votes at the meeting are conclusive unless the Master decides that a liquidator voted out at the meeting should be retained.

52.6 However, in paragraph 32.5 above it was proposed that the discretion of the Master to appoint liquidators in clause 32 and subsequent sections should be removed. The wishes of creditors should again be conclusive. The proposal that the provisional appointment should merely stand is not supported because at least the creditors who could not lodge requisitions within the limited time available should be allowed to give their views. The question is whether creditors who

lodged requisitions should be allowed to change their minds. It may be argued that it would encourage undue influence if creditors are allowed to change their minds within a relatively short time. On the other hand it would create additional administrative work if it is provided that creditors may not change their vote. Each vote at a first meeting will have to be compared with the requisitions. In cases of multiple creditors this may be a major operation. Uncertainty that requisitions will ensure an appointment may put a damper on orchestrated liquidations with the appointment of a particular liquidator as an important part of the plan. ***Clause 52 read with clause 55 provides that the person or persons elected at the meeting are appointed by the Master if they qualify for appointment.***

52.7 Section 57(5) of the Insolvency Act provides that whenever the Master considers it desirable he or she may appoint a person not disqualified from holding the office of trustee as co-trustee with the trustee or trustees of the insolvent estate. If the Master had a discretion to appoint a liquidator in terms of clause 32 it would make sense that he or she should have a discretion to appoint a joint liquidator, provided that the Master should in each case give reasons for making a joint appointment and for the choice of the person to be appointed. From statistics obtained in the office of the Master, Pretoria, it appears that there is a trend that joint appointments are commonly made in large estates. A commentator submits that where two liquidators are appointed, it happens almost without exception that the liquidators agree between them that one will do all the work and receive, say 60% of the fees while the other liquidator who does nothing will receive 40% of the fees (see the discussion of clause 61 below). ***In line with paragraph 32.5 above, it is submitted that the Master should not be given a discretion to appoint a joint liquidator.*** However, what should the Master do if, for instance, the sole liquidator is convicted of fraud and about to be removed. At present there is a practice for the Master to appoint joint liquidators before removing the unsuitable liquidator and thereby saving time. This also enables the Master, for practical reasons, to appoint the same person or persons in all estates of the liquidator who is about to be removed. However, if the Master is not given a discretion in clause 32 it would be inconsistent to give him a discretion to appoint a joint liquidator. In terms of clause 32 the Master shall in such a case appoint the person nominated by creditors as "provisional" liquidator and in terms of clause 60(2) this liquidator shall convene a meeting for the appointment of a new liquidator. A commentator proposes that (where no vacancies arise as a result of death, resignation, etc) the choice should be left to the liquidators already appointed or a majority in value of creditors to

approach the Master with a request that further liquidators should be appointed. It is not clear why the liquidator should have a say if creditors are not convinced that a further liquidator is advisable. Surely a liquidator who requires assistance may obtain it somewhere without the necessity to appoint another liquidator. *In terms of clause 60(1), when a majority of proved creditors in value at any time requests it the Master shall direct the liquidator or liquidators to convene a meeting for the election of a further liquidator.*

Clause 53: Persons disqualified from being liquidators

53.1 Section 55 of the Insolvency Act lists disqualifications for the appointment of trustee but the Act does not lay down qualifications. The Master may in the exercise of his or her discretion prescribe qualifications. A considerable number of comments were received on the qualifications that should be required for liquidators and whether liquidators should be limited to members of certain professions. During 1985 the Department of Justice was requested by the South African Institute of Chartered Accountants to place an "Insolvency Practitioners' Act" on the statute book. The reason was to ensure that insolvency practitioners would meet required standards and a professional body could investigate complaints against practitioners. Some of the most significant objections against the proposed legislation were that it would result in unnecessary costs; attorneys or accountants who wished to act as insolvency practitioners would have to belong to two professional bodies; the Master's powers of supervision and control should not be limited; the creation of a monopoly would not be in the public interest; and the number of professional insolvency practitioners did not justify the cost of a statutory professional body. In 1986 insolvency practitioners formed the Association of Insolvency Practitioners of Southern Africa (AIPSA). According to AIPSA its members represent in excess of 95% of all practising insolvency practitioners in South Africa. AIPSA has a written constitution and code of professional conduct and ethics and presents a course in insolvency law and practice. AIPSA indicated that it intended to apply to the Government for its conversion into a statutory professional body along the lines of the Law Society and of the South African Institute of Chartered Accountants. The Institute of Commercial and Financial Accountants requested the recognition of certain professional bodies in the same format as section 60(1)-(2) of the Close Corporations Act 69 of 1984.

53.2 Discussion Paper 66 invited comments on provisions that only members of recognised

professional bodies should qualify for appointments and that the Minister of Justice might from time to time publish by notice in the Government Gazette the name of a recognised professional body if it appeared to him or her that such body regulated the practice of a profession and maintained and enforced rules for ensuring that a member of such body was a fit and proper person to be appointed as liquidator and met acceptable requirements for education and practical experience and training. The proposal enjoys significant support, but one commentator submits that attorneys and chartered accountants have for many years taken appointments as liquidators and should not be excluded because they are not members of a body recognised by the Minister. The commentator also submits that the group of liquidators in South Africa is a relatively small and select body and a person who is a competent and honest liquidator may not wish to be associated with the professional body. The commentator says a small group of liquidators who have a vested interest can reject the acceptance of a competent outsider as liquidator and no provision is made for the decision to be taken on review. It is important that the disciplinary body of a profession should be impartial and, perhaps even more important, should be perceived to be impartial. It is agreed that a committee elected from about 250 members of which a small number handles a large portion of insolvent estates may not be perceived to be impartial. If attempts are made to exclude the courts power of review of a decision to admit or refuse membership, this would surely be a factor to take into account when deciding on the suitability of a professional body for recognition. It seems advisable to insist on a Council with outside representation by, for instance a Master of the High Court, a full-time employee of the Department of Justice nominated by the Director General of Justice and a senior member of the Bar. It does not seem to be advisable to force attorneys and accountant (if they are recognised as suitable professionals to administer insolvent estates) to belong to a body such as AIPSA in order to qualify as insolvency practitioners. Although a strong case can be made out that qualifications should be prescribed for liquidators, it may be regarded as arbitrary to disqualify, for instance, attorneys and accountants who do not belong to AIPSA from these appointments. (See *S v Lawrence* 1997 (4) SA 1176 (CC) par [33] and *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) 606C-D.) In the United Kingdom approximately 90% of 1,800 licenced insolvency practitioners belong to the Society of Practitioners of Insolvency (SPI). However, there are eight recognised professional bodies authorised by the United Kingdom Department of Trade and Industry to supervise the regulation and activities of Insolvency Practitioner members which include professional bodies for accountants and attorneys. There is a joint Insolvency Examination. Passing this very stiff exam

qualifies professionals to become Insolvency practitioners. It is submitted that the Minister can ensure that no unacceptable monopoly comes into being. It is important that insolvent estates are administered by professionals who have sufficient training and are subject to disciplinary steps by their professional body. *Clause 53(1)(a) provides that a person who is not a member of a professional body recognised under the provisions of the clause is disqualified from being elected or appointed as a liquidator. Clause 53(2) provides that the Minister of Justice may from time to time publish by notice in the Gazette the name of a recognised professional body if it appears to him or her that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member of such body is a fit and proper person to be appointed as liquidator and meets acceptable requirements for education and practical experience and training. Clause 53(3) provides that a notice recognising a professional body may be revoked by a further notice if it appears to the Minister that the body no longer satisfies the requirements of subsection (2). A notice revoking a previous notice may provide that members of such body continue to be treated as authorised to act as liquidators for a specified period after the revocation takes effect.*

53.3 A proposal that recognised professional bodies should be limited to bodies that make provision for a fidelity fund received little support. The requirement is not necessary because each liquidator has to lodge security with the Master. Fidelity funds do not cover all liability and many claims are disallowed or take long to finalise.

53.4 A commentator submits that provision should be made for special circumstances where specialised knowledge is required and a person who is not a member of a recognised professional body should be appointed to further sound administration. It will surely be possible to appoint a practitioner with specialised knowledge from the ranks of professional bodies recognised by the Minister. Even if this is impossible the appointee can make use of specialised advice.

53.5 Section 53(d) of the Insolvency Act provides that any person who does not reside in South Africa is disqualified from being appointed liquidator. It is not uncommon for a person to have assets in South Africa and in another country or for partners in a partnership to reside in more than one country. In such cases there would probably be a need for someone in the foreign country to assist the locally appointed liquidator. Comment was invited on a proposal that the Master should

have a discretion to appoint a person who does not reside in the Republic as co-liquidator with a person who resides in the Republic. One commentator submits that with the number of independent states that existed before April 1994 there was perhaps justification, but that these problems no longer exist. Another submits that it is undesirable for liquidators who practice in one province to take appointments in another province. He recommends that a person who does not have a properly manned office in the area of jurisdiction of the Master appointing the liquidator should be disqualified save for exceptional circumstances. A Master said the proposed provision is of absolute importance because liquidators often have to go overseas on behalf of estates at great cost to the general body of creditors.

53.6 It seems logical that with South Africa's re-entry into international commerce more cross-border insolvencies will occur. Although it is agreed that a liquidator should ideally have an office where the liquidation takes place, it would not be a solution to provide that the liquidator must have an office within the area of jurisdiction of the Master. A liquidator in Bloemfontein would, for instance, be entitled to take an appointment in Sasolburg and not a liquidator in Verening which is a lot closer. It is submitted that this matter should be left to creditors to decide. In connection with the appointment of persons not resident in the Republic the question arises whether the local liquidator should not rather get recognition of his or her appointment overseas and appoint people there to act on his or her behalf. A further question is whether a non-resident must qualify in terms of the Bill for appointment, for instance, as a member of a recognised (South African) professional body. According to the decision in *Ex parte Robinson's Trustee* 1910 TPD 25 the qualifications of a liquidator are decided according to the law of the country where he is appointed and not according to the law of the country where his appointment is recognised. Recognition of a non-resident of South Africa will therefore not be excluded by South African law and it may not really assist to save costs if a non-resident is appointed in South Africa. ***It is submitted that provision should not be made for the appointment of non-residents as liquidators, but that this matter should be dealt with in terms of the general rules for cross-border insolvencies.***

53.7 Section 55(b) of the Insolvency Act provides that any person related to the insolvent by consanguinity or affinity within the third degree is disqualified from being appointed. Section 55(1) disqualifies any person who at any time during a period of 12 months immediately preceding the

date of sequestration acted as the bookkeeper, accountant or auditor of the insolvent. A commentator submits that an "associate" of the insolvent should be disqualified. This would include persons such as a partner of the insolvent, or the spouse of a partner of the insolvent, or any person related within three degrees to such partner or spouse, or beneficiaries of a trust of which the insolvent is a trustee. Another commentator submits that attorneys and other advisors of the insolvent should also be disqualified. In principle a case can be made out for the extension of categories of disqualified persons. Broad disqualifications would complicate matters and make the rules difficult to apply. The question arises where the lists should stop. ***Why not include an employer, employee, etc. The essence of the present disqualification, mentioned above, is retained in subclauses 53(d), (e) and (l).*** Before appointment as liquidator the candidate must declare that he or she is not disqualified and clause 53(1)(n) disqualifies a person with interests that are opposed to the general interests of creditors. Although it is agreed that it may be difficult to determine whether a person has such an interest, because of the importance that a liquidator should be unbiased this requirement contained in section 55(e) of the Insolvency Act has been retained.

53.8 As was pointed out above, section 55(b) of the Insolvency Act disqualifies a person as trustee who is related to the insolvent by consanguinity or ***affinity*** within the third degree. Degrees of relationship are, however, in terms of section 1(3)(d) of the Intestate Succession Act 81 of 1987 determined with reference to blood relationship only, except in the case of adoption where a fiction of blood relationship is employed. There are therefore no degrees of relationship by affinity. ***Subclauses 53(d) and (e) disqualify the insolvent's spouse and relations of the insolvent or spouse within the third degree of relationship.***

53.9 Section 55(e) of the Insolvency Act disqualifies a person who has been convicted of theft, fraud, forgery or uttering a forged document, or perjury and has been sentenced therefor to serve a term of imprisonment without the option of a fine, or to a fine exceeding ten pounds. The reference to specific crimes can be criticised because it is difficult to apply and disqualification may be avoided for purely technical reasons. Section 20(2)(a) of the Trust Property Control Act 57 of 1988 and section 218(1)(d)(iii) of the Companies Act 61 of 1973 contains an additional reference to any offence involving dishonesty. In ***Nusca v Da Ponte*** 1994 (3) SA 251 (BGD) 256 Acting Judge President Friedman eruditely expounded ***the phrase "offence involving dishonesty"*** and this phrase ***is used in clause 53(1)(i) of the Bill without reference to particular offences.*** It may

be argued that there are no degrees of dishonesty and that imprisonment or a minimum fine should not be required. However, *clause 53(1)(i) requires imprisonment or a fine of at least R1 000 in order to exclude petty convictions.*

53.10 *Section 55(k) disqualifies any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for him as trustee or to effect or assist in effecting his election as trustee of any insolvent estate. This provision has been retained in clause 53(1)(k). In order to curb undue influences regarding nominations in terms of clause 32 the offence has been extended to nominations for a liquidator.*

53.11 Section 55(m) of the Insolvency Act provides that any agent authorised specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the estate concerned and acting or purporting to act under such special authority or general power of attorney is disqualified from being appointed as liquidator. For the reasons set out in paragraph 42.5 above, this section has been omitted from the Bill.

Clause 54: Master may refuse to appoint elected liquidator

54.1 If the Master's discretion to appoint a liquidator is taken away it follows logically, as is submitted in paragraph 32.5 above, that the Master should not have authority to refuse to appoint a person because *the Master does not regard the person as suitable for appointment. This ground of refusal in clause 57(1) of the Insolvency Act is not repeated in clause 54(1) of the Bill.*

54.2 In terms of section 57(1) of Insolvency Act, if in the opinion of the Master the person elected as trustee should not be appointed as trustee, the Master may decline to confirm his election and the Master need not state a reason for declining to appoint the person on this ground. This ground has been omitted. It is in any case submitted that constitutionality requires that the Master should always give reasons for a decision and that the decision should be reviewable. *Clause 54(2) enjoins the Master to give reasons for his refusal to appoint as liquidator a person elected as such.*

54.3 *All the respondents agreed that there were not sufficient grounds for non-judicial review by the Minister of Justice and that the power of the court to review the decision was sufficient.*

It is, however, submitted that it is essential that objections to the Master's decision should not delay the appointment and the administration of the estate. *Clause 54(3) provides for review of the Master's decision within a limited time.* It may be regarded as undesirable that the Master should be empowered to review his or her own decision. However, new facts might come to the attention of the Master and provision is made for review by the court. One commentator submits that perhaps there should be a general provision entitling a Master to reconsider his or her decision, of course giving all interested persons an opportunity to have their representations considered. It is sometimes difficult to decide whether the Master is *functus officio* (having discharged his or her duties) or not. Clearly if someone has acted on a decision by the Master (for instance a purchaser has taken possession of a property sold with the permission of the Master) the Master should not have authority to revoke the decision. It is submitted that there should not be a general provision that the Master may review his or her own decision and that this matter should be left to the rules of administrative law.

Clause 55: Appointment of liquidator and security

Clause 55 re-enacts section 56(2), (3), (6) and (7) of the Insolvency Act.

Clause 56: Joint liquidators shall act jointly

Clause 56 re-enacts section 56(4) and (5) of the Insolvency Act.

Clause 57: Vacation of office of liquidator

57.1 A commentator points out that clause 57 does not provide for cases under section 56A of the Mental Health Act 18 of 1973. Section 56A is a rather informal procedure to appoint a curator for a person whose capital assets are worth less than R100 000 or whose annual income is less than R24 000. An expansion to cover these cases will have little effect because insolvency practitioners are surely worth more than the limits. It is in any case advisable to limit clause 57 to cases of

"mental patients" or persons declared incapable by court order.

57.2 Comment was invited on the question whether a liquidator should vacate office if he or she ceased to be a member or was no longer permitted to act as such a member in terms of a professional body or should be removed from office by the Master. *The circumstance of a liquidator ceasing to belong to a professional body can be dealt with logically and naturally under a ground for removal by the Master and clause 58(1)(d) provides for removal if a liquidator becomes disqualified after appointment.*

Clause 58: Removal of liquidator from office by the Master

58.1 Clause 58(1)(a) provides that the Master shall remove a liquidator from office if he or she was not qualified for appointment as liquidator or of his or her appointment was unlawful. It could be argued that the Master's removal of a liquidator in these circumstances amounts to reviewing his or her own decision. If the Master erred in thinking that an election or appointment was legal and has appointed the person, the logical procedure is to review the Master's decision. In *Fey and Whiteford v Serfontein* 1993 (2) SA 605 (A) 614 it was pointed out that it may be that by entrusting the statutory removal of a trustee to the Master the legislature sought to provide a remedy which is cheaper and more expeditious. It is submitted that this cheap and expeditious procedure in section 60(a) of the Insolvency Act should be retained. In terms of clause 106 any decision by the Master is subject to review.

58.2 Section 60(a) provides that a trustee who has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney may be removed from office by the Master. This provision has been omitted for the reasons stated in paragraph 42.5 above.

58.3 Section 60(d) of the Insolvency Act provides that a majority in number and value of creditors may request the Master to remove the trustee from office. The intention of section 60(d) probably is that the decision need not be taken at a meeting. Problems can arise if the liquidator must convene a meeting for the consideration of a resolution that he or she should be removed

from office. *Clause 58(1)(b) provides clearly that creditors may request the Master in writing to remove a liquidator or resolve at a meeting that the liquidator should be removed.*

58.4 Section 60 of the Insolvency Act gives the Master a discretion to remove a liquidator in the circumstances set out in the section. Section 60(e) provides in particular that the Master may remove a trustee if in the opinion of the Master the trustee is no longer suitable to be the trustee of the estate concerned. In paragraph 32.5 above it is proposed that the Master should give effect to the wishes of creditors and should not have a discretion to appoint a liquidator of his or her choice. It follows that *the Master should not have a discretion whether or not to remove a liquidator and should in particular not have a discretion to remove a liquidator who in his or her opinion is not suitable to be the liquidator.* The only exception is that the Master is given a discretion in clause 58(1) to remove a liquidator on the ground that the liquidator has failed to perform duties satisfactorily. The reason is that the liquidator's failure may be minor and may have been corrected by the liquidator. In such circumstance it may be inappropriate for the Master to be compelled to remove the liquidator, especially as the Master will be bound by the election of the same liquidator by creditors.

58.5 It is a common complaint that the Master does not take steps expeditiously against liquidators who act improperly. *Clause 58(2) provides that the Master may, when a liquidator has been formally charged with the committal of an offence, or on the strength of a complaint on affidavit or similar evidence suspend the liquidator pending an investigation into the suitability of the liquidator to remain in office.* A commentator submits that the liquidator should be given an opportunity to submit to the Master an affidavit in response to the complaint before being suspended. The commentator also submits that where an insolvent or an associate or creditor whose interests conflict with the interest of the estate has lodged a complaint based on alleged malicious or vexatious actions, the application for suspension should be determined by the court and not the Master. The proposal that the liquidator should be given an opportunity to reply agrees with the present practice and has been found to be unsatisfactory because quick action is required. *Subclause 58(2) states that the Master must without delay carry out the necessary investigation and either remove the liquidator from office or set aside the suspension.* The Masters will surely take it into account if the complainant is an insolvent or a creditor with interests contrary to the general interests of creditors and the Master's decision will be subject to review by the Court in

terms of clause 106. There cannot be complaints if a liquidator's career as such is ended if the court has found that he or she had acted improperly.

58.6 The aim of the appointment of an interim liquidator is to preserve the estate and creditors should not have the right to give directions. It is not intended that the interim liquidator should deal with assets except for the limited purpose of preserving the estate. The Master may have some particular instructions regarding the investigation of the liquidator's actions. *Clause 82(4) provides that the interim liquidator shall give effect to any directions by the Master and may without the authorisation of the Master perform any act which is necessary for the preservation of the estate until the suspension of the liquidator is set aside or another liquidator is appointed.*

58.7 There is no requirement that the interim liquidator should have any support by creditors. It does not appear to be advisable that provision should be made to join the interim liquidator as liquidator if a new liquidator is appointed. This would be contrary to the underlying principle that creditors' wishes regarding the appointment of a liquidator should be supreme. A meeting will be held in terms of clause 60 to replace the liquidator if he or she is removed from office. It is possible that the interim liquidator will be elected. It appears to be advisable that *the interim liquidator should in the first place be accountable to the liquidator (as the position is in respect of a "provisional" liquidator if another person is appointed as liquidator). This is provided for in clause 58(7). If the Master taxes the fee of an interim liquidator in terms of clause 58(6) the Master will no doubt ask for an account of the duties fulfilled by the interim liquidator,* and it is not necessary to regulate this in the Bill.

Clause 59: Court may declare liquidator disqualified or remove liquidator

59.1 Views differ on the question of whether the court's power to remove a trustee from office is limited to the circumstances mentioned in section 59 of the Insolvency Act. However, in *Fey v Serfontein* 1993 (2) SA 605 (A) it was decided that it was clear that at common law the Supreme Court had the power to remove the trustee of an insolvent estate on the ground of his misconduct as a trustee and this power had not been displaced by the Insolvency Act. Judge of Appeal Hoexter expressed himself as follows:

The Master's office, from the nature of things, is ill-equipped to determine disputed facts.

The recognized procedure for settling disputed facts is trial by action. A Court is the obvious tribunal for the determination of such disputed matters. Grave injustice may be done to a litigant who is denied the ordinary procedure adopted in investigating the truth of conflicting allegations.

Clause 59 is enacted on the understanding that the court's common law power has not been displaced by the Insolvency Act.

59.2 Comment was invited on the question whether examples should be given of persons who may be removed from office as liquidator, as is done in section 59 of the Insolvency Act. All but one of the commentators say that the giving of examples are not advisable as the courts discretion is wide enough and should not be limited. *Clause 59 does not list examples or persons who may be removed from office.*

Clause 60: Election of new liquidator

As was proposed in paragraph 52.7 above, the Master is not given a discretion to appoint a new liquidator of his or her choice. *In terms of clause 60(1), when a majority of proved creditors in value at any time requests it the Master shall direct the liquidator or liquidators in office to convene a meeting for the election of a further liquidator.*

Clause 61: Remuneration of liquidator

61.1 The payment of remuneration according to an hourly tariff and the negotiation of a fee between creditors and the liquidator were considered.

61.2 It is argued that remuneration according to an hourly tariff would incite liquidators to undertake more investigative work. A commentator says few prosecutions are pursued because liquidators are not paid for spending countless hours investigating the affairs of the insolvent and assisting in the prosecution of offenders. The submission that proper investigations should be encouraged cannot be criticised. It is, however, submitted that a system in terms of which a person is remunerated according to an hourly tariff for unsuccessful work, will encourage incongruities. It is submitted that the present practice that a special fee is allowed in exceptional circumstances

only is acceptable. However, *in order to encourage assistance with criminal prosecutions and investigations of the insolvent's affairs clause 61(3) provides expressly that the Master may for good cause increase a liquidator's remuneration to compensate the liquidator for time spent in assisting with criminal prosecutions or investigating the affairs of the insolvent. Because of the interest of creditors in the matter, copies of an application for an increase in the tariff remuneration must be delivered to creditors at least 14 days before the application for an increase is lodged with the Master.*

61.3 A commentator submitted that a person convicted of an offence in terms of the Insolvency Act should be ordered to pay to the insolvent estate the costs of the liquidators and other witnesses for assisting the prosecution by preparing for and giving evidence. In the absence of a general rule that convicted criminals are held liable for the costs of prosecutions, a rule that insolvency criminals should be held liable for such costs is unjustified. Section 342A(3)(e) of the Criminal Procedure Act 51 of 1997 applies only to costs caused by unreasonable delays. Costs of investigation should according to this commentator also be recoverable from the defendant if the estate is successful in civil proceedings. It is submitted that a liquidator and other interested parties are in effect compensated if civil proceedings are successful. If proceedings are unsuccessful the liquidator can apply for a special fee if circumstances warrant it.

61.4 A commentator proposes that a special fee for investigative work should not be divided equally between joint liquidators but that the liquidators who undertook such work should receive the fee. Another commentator submits that where two liquidators are appointed, it happens almost without exception that the liquidators agree between them that one will do all the work and receive, say 60% of the fees while the other liquidator who does nothing will receive 40% of the fees. Although it is agreed that free riding co-liquidators should be discouraged, it is submitted that this should be done when the splitting of fees is agreed upon by the joint liquidators and not spelled out in legislation.

61.5 One commentator submits that the negotiation of a fee with a liquidator would not necessarily be detrimental to the winding-up of the insolvent estate or the insolvency profession as a whole, especially if guidelines are laid down, possibly in line with similar guidelines applicable to attorneys. It is, however, submitted that the idea of a liquidator negotiating with creditors about

the liquidator's fee is incompatible with the independence expected from a liquidator. It will also be difficult to lay down guidelines that may have to cater for several professions.

61.6 Clause 61(5) provides that a person who employs the liquidator or who is a fellow employee of or who is ordinarily in the employment of the liquidator shall not be entitled to any remuneration out of the insolvent estate for services rendered to the estate and that a liquidator or his or her partner shall not be entitled to remuneration out of the estate for services rendered to the estate, except the remuneration to which he or she is under the Act entitled as a liquidator. This clause is similar to section 63 of the Insolvency Act. A commentator points out that a conveyancer who is also appointed executor may claim fees relating to the transfer of fixed property from the estate. (Section 7 of the General Law Amendment Act 139 of 1992 brought about this change to the general rule that the executor occupies a fiduciary position and must not therefore engage in any transaction by which he or she will personally acquire an interest adverse to his or her duty.) The commentator also points out that the subclause does not refer to members of the family of the liquidator or auctioneers, appraisers and those working part time for a liquidator. Starting with a clean slate it may have been better to apply the general principle that a liquidator must not acquire a personal interest adverse to his fiduciary duties and not to prohibit explicitly that extra remuneration cannot be charged in certain cases. However, to change the existing position now without attempting to codify the general rule will be risky and a mere omission of the clause may be misinterpreted. It is submitted that, in the light of the general acceptance by commentators, clause 61(5) should be retained with the wording that appears in the existing section 63 of the Insolvency Act.

61.7 Notwithstanding strong views by some Masters that a liquidator is not allowed to draw his fees before confirmation of the account, there have for many years been liquidators who held the view that they were allowed to draw their fees. It appears to be advisable to clarify the position in the Bill. A submission by a commentator that the liquidator should as a matter of course be allowed to draw a percentage of his or her fees before confirmation of the account is not acceptable. Allowable costs which a liquidator has incurred may be paid subject to the resolute condition that the fees are not eventually disallowed in the account. The liquidator can get his or her fee as soon as the work in connection with particular assets have essentially been finalised, in other words, when the liquidation and distribution account dealing with assets and the remuneration thereon,

has been finalised. However, cases will occur where this may be unfair, for instance, there may be a dispute being resolved by litigation on the question whether a creditor is entitled to security. The liquidator who has done all that he or she can to finalise the matter, may have to wait for time-consuming litigation to be finalised. The Master may refuse to accept an account if a substantial distribution is not made in the account. *Clause 61(6) provides that a liquidator shall not be entitled to receive any remuneration before the liquidation account making provision for the remuneration has been confirmed as provided in section 90, unless payment of such remuneration or part thereof has been approved in writing by the Master.* This provision is similar to section 51(4) of the Administration of Estates Act 66 of 1965.

Clause 62: Duties and powers of liquidator

62.1 In contrast with sections 386 to 390 of the Companies Act, the Insolvency Act does not contain a group of provisions that expound the powers and duties of a trustee. Provisions in this regard are scattered in the Insolvency Act. Clause 62 arranges the powers and duties of a liquidator under one heading. Under the Insolvency Act it is not always clear what powers may be exercised by a provisional trustee. *The Bill does not distinguish by name between a provisional and a final liquidator and they have the same powers. Clause 62 indicates clearly which powers can be exercised without the authority of the Master or creditors (clause 62(3)) and for which powers such authority is required (clause 62(4)).*

62.2 In terms of section 80 of the Insolvency Act a trustee has power to continue the business of the insolvent with the authority of creditors or, in the absence of their instructions, of the Master. The authority of creditors here envisaged is one given at a meeting of creditors duly convened. If a business is to be continued, it is not practical to wait for the first meeting, or even for the authority of the Master. Leaving the responsibility with the Master might be unfair. Ordinarily, the Master would have no personal knowledge of the financial position of the estate and of the desirability or otherwise of there being an uninterrupted continuation of the business. *Clause 62(3)(d) provides that, pending the obtaining of authorisation of creditors or the Master thereto in terms of clause 62(4)(d), the liquidator should have the power to carry on the business in so far as it is necessary that expenses of the estate be paid or necessary expenses be incurred in*

order to avoid loss.

62.3 Liquidators are obliged to pay certain costs, such as bond of security premiums, out of their own pockets. If there are no funds in the estate, it is not exceptional that they have to wait several months for a contribution out of which they can recover such amounts. This is unfair and ***clause 62(3)(e) authorise a liquidator to obtain credit for the payment of necessary expenses which he or she is obliged to incur before funds for the payment thereof are available.***

62.4 There were proposals that the liquidators duty to investigate the affairs of the insolvent should be imposed under clause 62(1). The heading of clause 62 refers to "general duties and powers" of a liquidator. Obviously all the powers and duties are not set out in the clause. It is clear from clause 36 that a liquidator's power to investigate commences immediately after the appointment.

62.5 A commentator proposes that during the period up to the first meeting those creditors who lodged nominations, known secured creditors and the applicant for liquidation should be entitled to give instructions and authority to the liquidator. Informal consultation with creditors is advisable and commonplace. Many decisions do not need formal approval. It is, however, not advisable to formalise the right of unproved creditors to give directions. In an unopposed application for liquidation a mere statement that the applicant has a claim will suffice. The applicant should in any case not be allowed to dominate the liquidation process. The provision that the first meeting can be held urgently will assist in this regard.

62.6 ***It is not clear whether authorisation by the creditors or the Master is required before a liquidator may exercise his or her election whether to continue with contracts entered into before liquidation, including his or her election in terms of clause 26 or 30. Clause 62(4)(e) provides that authority by creditors or the Master is required before the liquidator makes this important decision.***

62.7 Section 80*bis* of the Insolvency Act deals with the sale of property before the second meeting of creditors and section 82 deals with the sale of property after such meeting. In general the trustee's powers in respect of the realisation of assets are to a great extent restricted under the

present Act. There is a vast contrast between the position where creditors authorise the selling of property (section 82(1)) and the position where the creditors have not given any directions (second proviso to section 82(1)). It should be borne in mind that the directions proposed by liquidators are stereotypic and that they are almost without exception accepted if there are creditors present at the meeting. The selling of property is therefore wholly in the discretion of the liquidator. If no directions have been given the property must be sold by public auction or public tender after prescribed notices and upon such conditions as the Master may direct. The procedures in respect of tenders prescribed in section 82(2) and (5) are cumbrous and inflexible and consequently they are hardly ever employed. It appears to be ironical that in instances where creditors show interest the trustee can, in practice, do whatever he or she wants to, but where creditors do not show interest, the Master endeavours to protect their interests by prescribing conditions. ***Clause 62(4)(f) simplifies the position by merely providing that the liquidator has the power to sell or alienate property of the insolvent estate, subject only to the authorisation of the creditors or the Master and the written consent of a secured creditor if the property is subject to a secured claim. The unused provisions in respect of tenders have been omitted in order that the creditors or the Master can act according to the circumstances.*** Proposals that a sale should be allowed before a meeting without the consent of the Master were considered. Because it is now possible to convene a meeting urgently and because informal consultation with creditors is possible, the said proposals were not accepted. It is accepted that liquidators should have the authority of the Master or a resolution by creditors at a meeting for important matters such as the sale of assets.

62.8 Section 73(1) of the Insolvency Act, as amended by the Judicial Matters Amendment Act 34 of 1998, provides that the trustee of an insolvent estate may with the prior written authorisation of the creditors engage the services of any attorney or counsel to perform the legal work specified in the authorisation on behalf of the estate. The section contains the following provisos: (a) If the trustee is unable to obtain the prior written authorisation of the creditors due to the urgency of the matter or the number of creditors involved, he or she may with the prior written authorisation of the Master engage the services of any attorney or counsel to perform the legal work specified in the authorisation on behalf of the estate; or (b) if it is not likely that there will be any surplus after the distribution of the estate, the trustee may at any time before the submission of his or her accounts obtain written authorisation from the creditors for any legal work performed by any attorney or counsel.

62.9 The conclusion seems inescapable that “written authorization of the creditors” refers to individual written authorisation by *all* creditors and not to a resolution or direction adopted at a meeting. It is predicted with confidence that the Master will have to give permission in most cases. There seems to be no reason why a resolution by creditors, whether before or after the event, should not be sufficient in this case, as is required for most other decisions. *Clause 62(4)(g) provides that a liquidator, if authorised thereto by the Master or by resolution of a meeting of creditors, should have authority to engage the services of an attorney or advocate.*

62.10 It was suggested that the liquidator should have the additional power to employ other professional persons such as chartered accountants, architects, and quantity surveyors. This would make the administration of the estate more efficient. If a company's books are audited, it is easier for the liquidator to investigate claims and determine whether there is a good prospect of setting aside dispositions. As regards the interests of the estate and creditors, the power to employ someone is not as important as the decision as to whether the costs should be recovered from the estate. In terms of clause 79(2)(g) the costs of liquidation shall include the salary, wages or fees of any person who was engaged or appointed by the liquidator in connection with the administration of the estate. If the Master is of the opinion that the account is in any respect incorrect or that it contains any improper charge or that the liquidator acted *mala fide*, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, the Master may in terms of clause 89(2) direct the liquidator to amend the account or may give such other direction in connection therewith as the Master may think fit. *Clause 62(4)(g) provides that that the liquidator, if authorised thereto by the Master or by a resolution of a meeting of creditors, has the power to employ any person to render professional or other services in respect of the insolvent estate.*

62.11 According to judicial interpretation of section 78(1) of the Insolvency Act (*George Hartman & Kie v Landdros, Reitz* 1958 (4) SA 514 (O); *Cohen NO v Lawrence* unreported case 2187/91 WLD) creditors must authorise each instance separately if a part of a debt that exceeds R1 000 is accepted in discharge of the whole debt. If the debt is less than R1 000, the trustee may accept any reasonable part of the debt in discharge of the whole debt. This provision can easily be bypassed by selling the debt for a minimal amount. *Clause 62(4)(i) provides that creditors or the*

Master should authorise the disposal or settlement of a debt or the giving of extension of time for the payment thereof. A provision to give creditors the opportunity to take over a debt was considered, but it was eventually rejected because it would be impractical and expensive to give creditors such an opportunity.

62.12 *In terms of section 79 of the Insolvency Act the Master may consent to a subsistence allowance for the insolvent and his or her family. Clause 62(4)(k) classifies this power as a power that can be exercised with the authorisation of the creditors or the Master.*

62.13 Subclauses 62(4)(l) and 62(5) are discussed in paragraph 11.5 above.

62.14 It is a common practice for a liquidator to appoint agents or representatives. This practice does not lead to problems and no express provision in this regard is recommended in clause 63.

62.15 There is currently a practice that a provisional liquidator is not allowed to sell property without the consent of the debtor before the final sequestration order is made. There are other important decisions which should also not be made without the consent of the debtor before the order has been made final. A debtor may however refuse permission unreasonably and prevent urgent steps by a liquidator. *The last sentence of clause 62(4) provides that the powers set out in the subsection can before the issue of a final liquidation order only be exercised with the consent of the insolvent or the court.*

62.16 Section 386(5) of the Companies Act provides that the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets. It is not clear why section 386(5) refers to the raising of funds in particular. *Clause 62(6) provides that a liquidator may at any time approach the court in regard to any matter arising from the liquidation and the court may give directions or grant the liquidator all powers that in its opinion are necessary for the proper administration, liquidation and distribution of the insolvent estate in question.*

62.17 *Because spouses now submit separate tax returns, clause 62(7)(a) includes a reference*

to the spouse (as defined in clause 1) of an insolvent. If the insolvent did not render a return before sequestration the Commissioner for the South African Revenue Services will naturally have to make approximate calculations. Liquidators often complain that the Commissioner's assessments are excessive. It is unfair that the creditors are prejudiced by an estimate which could possibly be unrealistic. *Clause 62(7)(d) provides that a liquidator is entitled to be apprised in writing by or on behalf of the Commissioner of the basis for any estimated assessment made in terms of any revenue law.*

62.18 Clause 62(11) and the omission of section 37(5) of the Insolvency Act are discussed in paragraph 30.4 above.

Clause 63: Insolvent shall attend meetings of creditors

63.1 A commentator submits that once an insolvent has been informed of the provisions of the Bill requiring attendance at meetings, it should be his or her duty to establish when and where the first meeting (which shall include an adjourned first meeting) is to be held and should not be reliant upon receiving a notice from the liquidator. Another commentator recommends that the liquidator should be clothed with the discretion to excuse an insolvent from attending a creditors' meeting instead of the Master or presiding officer in view of the fact that the liquidator is in a better position to decide whether the insolvent's attendance of such meeting is of importance. It is unfair to expect from the insolvent to find out about the date and venue of meetings and whether his or her attendance is required. Although insolvents tend to leave their previous address after insolvency, written notice to the insolvent should be required. However, it appears to be unnecessary to require written notice of an adjourned meeting if the chairperson informs the insolvent to be present at the adjourned meeting. The proposal that the liquidator should decide whether the insolvent should attend is supported, provided that an appeal can be made to the Master or the other presiding officer.

63.2 *Clause 63 provides that an insolvent shall attend all meetings of creditors of his or her insolvent estate of which he or she is notified in writing by the liquidator or an adjourned meeting which he or she is directed by the presiding officer to attend, unless he or she is*

excused in writing by the liquidator, the Master or the person who is to preside at such meeting from attending such meeting or the resumption of such adjourned meeting.

Clause 64: Summons to attend meeting of creditors and notice to furnish information

64.1 The words "interrogation" and "interrogate" have confrontational and negative connotations. The Bill uses "questioning" and "question".

64.2 Commentators complain that short notice is given for questionings and that summonses are served shortly before the date of a hearing. One commentator submits that a witness should be advised specifically about what documents are required and, at least in general terms, what issues will be addressed. There can be no argument about the fact that short notice to attend meetings should be avoided, unless good reasons exist. However, any presiding officer worth his or her salt will consider the time allowed before the meeting when he or she signs a subpoena. The officer will take into account the time of serving of the subpoena if there is default to appear. It is not advisable to tell the person to be questioned what questions will be asked. The witness will, of course, know that the questions relate to the affairs of the insolvent estate. The very aim of questioning is to test the witness's answers in a "live" environment. If the witness is given the questions or the general scope of the questions, it can be done informally or in writing and need not be addressed at a questioning, especially in view of the provisions of clause 67(5) that the answers to written questions are regarded as evidence given at a questioning.

64.3 It is clear that documents to be handed in at a questioning should be identified with sufficient clarity in a subpoena. In *Beinash v Wixley* 1997 (3) SA 721 (SCA) the Supreme Court of Appeal confirmed the setting aside of a subpoena which was vague about the documents required. It was held to be an abuse of Rule 38(1) of the Uniform Rules of Court and the erring party was ordered to pay costs on a scale of attorney and own client. The court held that an application to set aside the subpoena could be made before the commencement of the main proceedings. The court expressed the view that the setting aside of the subpoena would also have been proper on the ground that the subpoena was vague and lacking in specificity. Form 24 of the Magistrates' Courts Rules provides that documents to be lodged should be "specified". The person who signs the subpoena should obviously apply his or her mind to the question whether documents

to be handed in are identified with sufficient clarity. *Clause 64(1) and the prescribed Form E in Schedule 1 requires that documents should be specified in a subpoena.*

64.4 Subpoenas are issued on the strength of information supplied by the person who is conducting the questioning (usually the liquidator or the liquidator's legal advisor) and in practice witnesses are not heard before subpoenas are issued (*cf Friedland and Others v The Master and Others* 1992 (2) (SA) 370 (W)). A witness cannot apply to have a subpoena set aside before he has appeared at the meeting and raised his or her objections with the presiding officer (*Mondi Ltd and Another v The Master and Others* 1997 (2) SA 450 (N)). These matters can be dealt with sensibly by presiding officers applying their minds properly. If a summonsed person complains to the presiding officer on grounds that appear justified the liquidator or other party managing the questioning can be heard and an appropriate ruling made. Even if a presiding officer is not entitled to change or set aside a subpoena issued by himself or herself, it is obvious that a presiding officer will not enforce a subpoena that he or she disagrees with. It is submitted that these practical matters should be left to the good judgment of presiding officers and the right to review their decisions should they act improperly.

64.5 In *The Master of the Supreme Court v Wallace* (unreported case no 14797/92 (C)) Judge Berman expressed the view that the form of subpoena should be that employed in Form 24 in Annexure 1 of the Magistrates' Courts Rules. A commentator submitted that there would be subtle differences between Form 24 and a form for insolvency questionings. Furthermore, not all insolvency practitioners keep the Magistrates' Courts Rules handy. *Form E in Schedule 1 to the Bill contains a prescribed form for the summons.*

64.6 A commentator says that magistrates' courts are seldom equipped to make copies of documents and witnesses are often justifiably reluctant to surrender their document without retaining at least a copy. *Form E provides that the subpoena should indicate whether the original or a copy is required.* This will enable the witness to make copies of documents beforehand if copies must be handed in or if the witness must hand in the original and requires a copy.

64.7 A commentator submits that questionings should not be disrupted because the presiding officer is not available to sign subpoenas. It may also occur that the person who is supposed to

preside signs the subpoenas but is subsequently not available so that someone else must preside. If the meeting is to be held at a magistrates office it appears to be advisable that another magistrate and not necessarily the Master should be allowed to sign the summons. *Clause 64(1) provides that a summons may be signed by the officer who presides or is to preside at a meeting of creditors or any Master or magistrate.*

64.8 Section 65(1) of the Insolvency Act states that the witnesses can be questioned about the business, affairs and property of the insolvent's spouse. In *Harksen v Lane* 1998 (1) SA 300 (CC) 345 paragraph [116] (reported as paragraph [117]) Judge O'Regan expresses the view that sections 64(2) and 65(1) do not permit questions to be put regarding the spouse falling beyond the affairs of the insolvent estate in its widest sense. As Judge O'Regan points out in the previous paragraph of her judgment it has long been recognised that the subject-matter of the investigations that take place at creditors' meetings is the affairs of the insolvent taken in the very widest sense. *The reference to the affairs of the spouse has been omitted from clause 64(1)(c).* A commentator suggests that the affairs of associates or other persons or entities whose affairs are relevant should also be the subject of a questioning. The commentator also says that it often happens where a group of companies is liquidated, that it is necessary to investigate the affairs of more than one group member. If the affairs of an insolvent's associates or other companies in a group are relevant to the affairs of the insolvent estate then the affairs of the associates or other companies can clearly be investigated at a meeting of the insolvent. It is not necessary to hold two meetings at the same time. An arrangement to pay the costs of a questioning from more than one insolvent estate may be appropriate.

64.9 *The provisions of clause 64 regarding a summons to attend a meeting and furnish information are supplemented by clause 67 which provides for a liquidator putting written questions or calling for accounts, books, documents, records or information.*

64.10 A commentator made proposals dealing with a host of practical matters regarding questionings in general: questionings are often frustrated and delayed by disputes about privileged documents - attorneys who have acted for the insolvent before liquidation should not be entitled to claim a privilege against the liquidator; witnesses should not have an absolute right to have access to the liquidator's documents; the threat of reviews are used to force postponements; a

favourite trick of lawyers who act for insolvents or directors of companies is to also obtain instructions from a creditor and obtain the right to question witnesses and have an attorney present. These matters were not published for comment. There is bound to be difference of opinion on the submission that the legal professional privilege should not apply as against a liquidator and no recommendation is made in this regard. The right of access to documents should be left for resolution by general principles of law. The practical approach adopted by the Constitutional Court has removed fears that unreasonable insistence on perceived constitutional rights will seriously hamper the administration of insolvency administration. Problems can be solved by presiding officers doing their work properly. The Bill contains sufficient measures to enable presiding officers to curb abuses. *Clause 65(2) provides that a creditor other than the creditor on whose request the questioning is conducted can only put questions through the presiding officer. Clause 65(4) provides that the presiding officer may order that any particular person or persons may not be present during any particular stage of the proceedings.*

Clause 65: Questioning of insolvent and other persons

65.1 Several commentators favour the limitation of representation at an interrogation to attorneys or advocates. However, a commentator argued convincingly that there is no reason why a liquidator may not ask his partner, or an auditor who has examined the books, to interrogate on his or her behalf - very few advocates have sufficient knowledge of accounting matters to expose accounting irregularities; why should a witness not be assisted by an employer or someone other than a professional lawyer? It is not unknown for incompetent or long-winded attorneys or advocates to appear at interrogations. If the liquidator or creditor can appear in person it is not clear why he or she cannot select any representative to appear on his or her behalf. The presiding officer should control proceedings by the powers vested in him or her to exclude persons from the meeting (clause 65(4)) or disallowing questions that prolong the proceeding unnecessarily (clause 65(8)(a)). *Clause 65(2) provides that a witness may be questioned by the presiding officer, the liquidator, a proved creditor or the representative of any of them.*

65.2 In practice it is problematic when a creditor indicates that he or she wants to ask questions while the liquidator or another creditor is conducting an interrogation. If this is permitted the former creditor to an extent does his or her questioning at the expense of the estate or the creditor who

initiated the interrogation. Moreover, it can seriously impair an interrogation if all the creditors have the right to ask questions. There was a submission that any creditor, even a creditor who had not proved a claim, should be permitted to interrogate the debtor and other persons in connection with the debtor's income, expenditure, assets, etc. The argument is that unless the creditor has this information, he or she cannot decide whether it would be expedient to prove a claim against the insolvent estate. It is, however, submitted that it would be risky to allow any person who avers that he or she is a creditor to interrogate the insolvent and other persons without holding the person accountable for the costs of the interrogation. *There was general support for the provision in clause 65(2) that only the presiding officer, the liquidator or a proved creditor who conducts a questioning should as of right be entitled to ask questions. The presiding officer may allow any other creditor to put questions through the presiding officer.*

65.3 Apparently the legal position is that a legal representative of a witness may not interrogate other witnesses. Questions which the legal representative may put to a witness are apparently restricted to the clarification of aspects in respect of the interrogation of the witness. (Compare *Loeve v Loeve Building and Civil Engineering Contractors* 1987 (2) SA 92 (D) 95.) *Clause 65(3) provides that the representative of a witness may question his or her own witness only in so far as it is necessary to clarify answers given by the witness.*

65.4 Section 65(2A)(a) of the Insolvency Act provides that where a person is obliged to answer incriminating questions, the presiding officer shall order that such part of the proceedings be held *in camera* and that no information regarding such questions and answers may be published in any manner whatsoever. It is not always clear at first sight whether a reply to a question will incriminate a witness (*S v Heyman* 1966 (4) SA 598 (A) 608). As regards section 65(2A)(b) of the Insolvency Act, it can be argued that if an incriminating answer were to slip through during a meeting that was not held behind closed doors, such evidence would be permissible. It may be desirable to have *in camera* proceedings with a view to encouraging a witness to speak the truth or to protect a person from the publication of incriminating evidence. It does not, however, appear to be desirable to link the obligation to answer incriminating questions to an interrogation behind closed doors.

65.5 The risk of incriminating questions is not the only reason why it might be desirable to hold a questioning behind closed doors or to exclude certain persons. It is, for example, undesirable that

slandrous allegations be heard in an open meeting, state secrets may be involved or a witness may justifiably be hesitant to give evidence in an open meeting. The presiding officer should also have the right to order an unruly witness or a witness who still has to testify to leave the meeting. Section 4(2) of the Small Claims Courts Act 61 of 1984 provides that a court may in the interest of the administration of justice or of good order or of public morals or at the request of the parties to the proceedings for reasons considered sufficient by the court, order that the proceedings shall be held behind closed doors or that specified persons shall not be present thereat. (Compare also section 153(1) of the Criminal Procedure Act 51 of 1977.) Subsection (3) provides that if any person disturbs the order of the court, the court may order that such person be removed and detained in custody until the court adjourns, or the court may, if in its opinion order cannot be otherwise maintained, order that the court room be cleared and that the public shall not be present at the proceedings. *Clause 65(4) gives a presiding officer wider powers to order that the proceedings shall take place behind closed doors or that specified persons shall be excluded from the proceedings.*

65.6 Section 65(2) of the Insolvency Act preserves the law relating to privilege as applicable to a witness. However, a banker at whose bank the insolvent in question or his or her spouse keeps or at any time kept an account, shall be obliged to produce, if summoned to do so, any cheque in his or her possession which was drawn by the insolvent or his or her spouse within one year before the sequestration of the insolvent's estate, or if any cheque so drawn is not available, then any record of the payment, date of payment and amount of that cheque which may be available to him or her, or a copy of such record and if called upon to do so, to give any other information available to him or her in connection with such cheque or the account of the insolvent or his or her spouse. Commentators submit that the one year period is too short as bank statements and other banking records frequently provide the starting point for tracing assets which have been concealed and impeachable transactions. It is agreed that one year may be too short. Instead of an arbitrary period it seems advisable to leave out the period. Clause 65(5) deals with the bankers privilege only and the question of which documents should be lodged must still be decided in terms of clauses 64 and 67. There does not seem to be any reason why the bank's privilege should be waived in certain cases only. If the documents are relevant to the insolvent estate and should be submitted at a meeting or to the liquidator, the privilege should not apply at all. *Clause 65(5) provides that a banker is , notwithstanding the law relating to privilege, obliged to produce documents or give information*

if it is required in terms of clauses 64 or 67.

65.7 The Constitutional Court cases of *Fereira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) and *Bernstein v Bester* 1996 (2) SA 751 (CC) dealt with the constitutionality of sections 417 or 418 of the Companies Act. According to the decision in *De Lange v Smuts NO* 1998 (3) SA 785 (CC) paragraph [34] similar considerations apply to the insolvency of individuals.

65.8 In the *Ferreira* case the court held unconstitutional the proviso to section 417(2)(b) of the Companies Act which permits self-incriminating answers extracted under compulsion in the Companies Act enquiry, to be used as evidence against the person who testified in subsequent criminal proceedings. *The effect of the holding is that a person summoned to testify in terms of section 417 of the Companies Act, may still be compelled to answer all questions put to him, including those which may incriminate him. However, self-incriminating answers given by a person who testifies in the enquiry may no longer be used in subsequent criminal proceedings against such a person. The court, however, excepted the use of self-incriminating answers in criminal proceedings in which the person examined is charged with the offence of perjury. Clause 65(6) is in accordance with this exposition in the Ferreira decision.*

65.9 The court in the *Ferreira* case made no order regarding the use, in a subsequent criminal trial against the person in question, of evidence which had been derived from compelled testimony (as distinct from the compelled testimony itself) but decided by a majority that the admission or exclusion of such "derivative evidence" was a matter to be decided by the officer presiding over the criminal trial in ensuring that the accused received a fair trial. In *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC) the court said with reference to "derivative" evidence that at times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted. If the evidence to which the applicant objects is tendered in criminal proceedings against him or her, the applicant will be entitled at that stage to raise objections to its admissibility. It will then be for the trial judge to decide whether the circumstances are such that fairness requires the evidence to be excluded.

65.10 In *Bernstein v Bester* 1996 (2) SA 751 (CC) 780 - 781 the Constitutional Court referred

to the jurisdiction of the Supreme Court to order relief on the basis that an examination was being conducted in an oppressive, vexatious or unfair manner. If it is shown that proceedings in an insolvency, and the examination of an insolvent, are likely to prejudice the insolvent in his or her defence in related criminal proceedings, the court has a discretion to stay all proceedings until all the criminal proceedings have been concluded (*Kamfer v Millman and Stein* 1993 (1) SA 122 (C) 125). The adoption of clause 65(6) will, however, lessen the possibility of a witness being prejudiced in criminal proceedings (*Equiseq (Pty) Ltd v Rodrigues* 1999 (3) SA 113 (W)). **Clause 65(6) provides that a court should not have a discretion to postpone an insolvency inquiry unless the questioning would be oppressive, vexatious or unfair.**

65.11 In *Pretorius v Marais* 1981 (1) SA 1051 (A) counsel submitted that the witnesses to be examined at an inquiry would be witnesses in any trial which might follow and they should not be subjected to interrogation in order to give the liquidator or the creditor an advantage which any other litigant would not have. Acting Judge of Appeal Galgut agreed (at 1064) with the following statement in *Levin v Ensor* 1975 (2) SA 118 (D) 121:

There is nothing in the Companies Act to exempt from interrogation one who might be a witness in a pending civil trial relating to the subject-matter of the proposed interrogation.

...

I do not understand why the circumstance that the action is ripe for hearing should distinguish this case from a case in which the action has just been commenced or is about to be commenced.

65.12 The question of whether the liquidator should enjoy the special privilege of examining the other party or the other party's witnesses or potential recalcitrant witnesses prior to litigation is a matter of policy. There are certain English cases from which it appears that the liquidator should not be in a better position than other litigants. On the other hand the liquidator, like the executor of a deceased estate, has no knowledge of the matter and should be in a position so that he or she can determine the facts. In *Bernstein v Bester* 1996 (2) SA 751 (CC) 808 the Constitutional Court states that the very purpose of proceedings under sections 417 and 418 of the Companies Act is to provide a company with information about itself which it cannot get from its erstwhile "brain" and other "sensory organs" or other persons who have a public duty to furnish such information but are unwilling to do so fully and frankly. If it was oppressive, or vexatious or unfair to summons or interrogate persons in the way they were summoned or interrogated, their remedy was to approach the Supreme Court. Neither the purpose nor the effect of sections 417 or 418 was to place the

company in a better position than its debtors or creditors. *In terms of clause 65(10), which corresponds to section 65(5), evidence given under clause 65 shall, subject to the proviso regarding the use of incriminating evidence, be admissible in any proceedings instituted against the person who gave the evidence.*

65.13 Section 65(3), (4) and (7) of the Insolvency Act is re-enacted in clause 65(7), (8) and (9). *The bulk of section 65(3) is, however, omitted. Clause 65(8)(b) provides that the proceedings must be recorded. It is unnecessary to prescribe the manner in which it must be recorded. It is submitted that the proviso to section 65(3) is also superfluous. If omitted there is nothing that prevents the statement from being put to the witness by way of questioning or in order to confirm its contents.*

65.14 Section 65(7) of the Insolvency Act provides that a witness other than the insolvent and his or her spouse shall be entitled to witness fees to be paid out of the estate, to which he or she would be entitled if he or she were a witness in any civil proceedings in a court of law. Section 65(8) provides that the insolvent or his or her spouse is entitled to an allowance out of the insolvent estate to defray his or her necessary expenses in connection with attendance. *Clause 65(9) provides that all witnesses, including the insolvent and a spouse, are entitled to witness fees.*

65.15 Clause 65(11) is explained in paragraph 25.2 above.

Clause 66: Questioning by commissioner

66.1 Section 417 of the Companies Act provides for questioning by the court or the Master. Section 418 provides for questioning by commissioners appointed by the Court or the Master. In practice the court itself does not question witnesses. In estates where there are sufficient funds it may be desirable to hold an enquiry before a commissioner. *Sections 417 and 418 of the Companies Act have been combined in clause 66 which makes provision for questioning in front of commissioners appointed by the Master or the court.* Clause 68 provides for questioning by or on behalf of the Master.

66.2 Although there is a risk that the procedure may be abused, the Master or court can see to

it that the insolvent estate is not encumbered with excessive costs. *Abuse of the procedure will be curtailed further by the provision in clause 66(2) that the applicant must supply security for the costs in connection with the questioning.*

66.3 *Clause 66(1) does not limit applications to proved creditors because in urgent cases no claims might have been proved.* The creditor must lodge security for costs and the Master or the court will consider the validity of the creditor's claim on the face of the documents. Applications under sections 417 and 418 of the Companies Act are in practice often done by liquidators. *The liquidator is in a good position to decide on the necessity for a questioning before a commissioner and clause 66(1) allows a liquidator to apply for such a questioning without the necessity to lodge security.*

66.4 *Commissioners are given the power to issues summonses in terms of clause 66(5), but the decision whether a questioning should be private and confidential is in terms of clause 66(10) reserved for the court or the Master.*

66.5 Section 418(2) of the Companies Act provides that a commissioner who is a magistrate has the power of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417. The provision regarding decisions on a lien over documents have been omitted because a questioning before a commissioner is not the appropriate occasion to deal with such matters. *Clause 68A provides powers for a magistrate who may hold court to deal with recalcitrant witnesses.*

Clause 67: Liquidators may put written questions

67.1 The proviso to section 65(3) of the Insolvency Act provides that if a person, who may be required to give evidence, made to the trustee or his agent a statement which was reduced to writing, that statement may be read by or read over to that person when the person is called as a witness and if then adhered to, shall be deemed to be evidence given under section 65. It is common for the liquidator to have an interview with the insolvent with a view to obtaining particulars about the insolvent and his or her affairs. Although it is unacceptable for the liquidator to question the

insolvent formally at a meeting not presided over by an independent person, it is submitted that the insolvent, the spouse, creditors, etc, should be compelled to reply in writing to written questions put by the liquidator. It may be argued that an insolvent who co-operates will probably furnish all the relevant information in the statement of affairs or corresponding form whereas written questions put to a recalcitrant insolvent will probably not have the desired effect. It would nevertheless be helpful to obtain written replies to questions by the liquidator in terms of clause 67 which could be used against the person who gave the answers in terms of clause 65(10) read with clause 67(5).

67.2 *Clause 67(1) gives authority to a liquidator to call for answers to written questions regarding the affairs of the insolvent and clause 67(2) lists the subject matter of questions that may be posed.*

67.3 Unlike cases under clause 65 where there is the safety measure of a subpoena signed by an independent officer, clause 67 gives the liquidator the power to call for certain answers. *Clause 67(2)(a) provides that questions may be put to the insolvent with regard to all matters relating to his or her business or affairs, whether before or after the liquidation of his or her estate, and with regard to any property which at any time belonged to the insolvent estate.* An insolvent has an obligation to give information about his or her affairs without the need for a subpoena. *In terms of clause 67(2)(b) a creditor who has proved a claim or offered a claim for proof may be questioned on the claim without the need for a subpoena.* In response to a proposal that questions may be put to other persons with regard to any transaction which such persons had with the insolvent within 12 months before the liquidation of the estate, several commentators submitted that questions should not be limited to a period of 12 months. It is submitted that questions should be allowed without a warrant if there is a natural connection, namely, that a person entered into a transaction with the insolvent or was in possession of property, books, documents or other records of the insolvent. However, *clause 67(2)(c) limits such questions to persons who entered into a transaction or were in possession of estate property or documents within 36 months before liquidation of the estate. For the reasons set out in paragraph 64.8 above, the affairs of a "spouse" or "associate" are not mentioned expressly.*

67.4 A commentator proposes provisions that answers should be direct and comprehensive, supported by documents where appropriate and non-evasive. The commentator also proposed

provisions regarding questioning by a liquidator without a presiding officer being present. It is submitted that these matters should be dealt with by agreement between the parties, failing which persons should be summonsed to appear at a meeting.

67.5 With reference to clause 67(7) and (8) a commentator submits that the liquidator would be allowed to go on a fishing expedition without applying his or her mind and that the power under these subsections needs to be severely restricted. Commentators also submit that there must be a right to be adequately compensated in respect of disbursements in respect of gathering information and furnishing photocopies. Other commentators propose that the period of 12 months should be extended. It may indeed be disruptive, for instance in the case of a large business with an active banking account, to require from a bank or someone else to lodge statements of account for the last year, let alone two years. The objections against a summons calling for documents without specifying them (paragraph 64.3 above) apply with even more force in this case where there is no requirement of the signature of a summons by a Master or magistrate. ***Clause 67(8) provides that the liquidator must specify in the notice the documents or information or property to be made available.*** If the liquidator cannot obtain the required information on a voluntary basis or by asking questions in terms of clause 67, the information can be obtained by issuing a summons in terms of clause 64(1). The question of compensation for furnishing statements or copies is problematic. The liquidator steps into the shoes of the insolvent and it may be argued that because the insolvent would have been entitled to statements the liquidator should not be in a worse position. However, sometimes, as in the case with most bank statements, the insolvent would have been obliged to pay for statements. A mere provision that the reasonable costs or adequate compensation should be paid, may result in the liquidator being held to ransom in order to obtain the documents or information that he or she may need for investigations. The prescribed witness fees do not make provision for costs regarding the making of copies or the like. ***Clause 67(7) provides that persons who have done business with an insolvent are obliged to give information on transactions or accounts held with the insolvent within 12 months before liquidation without being paid for it. Clause 67(8) does not provide for payment to make information or documents available either.***

67.6 ***Clause 67(6) provides that giving answers to questions referred to in the clause or a refusal to give such answers shall not prevent a person from being summoned in terms of clause 64 or from being questioned in terms of clause 65 or clause 66 and shall not absolve a person***

from the obligation to give evidence when called upon to do so.

Clause 68: Questioning by or on behalf of the Master

68.1 Despite isolated comments that questioning on behalf of the Master should be omitted or combined with clause 66, this type of questioning is retained in terms similar to section 151 of the Insolvency Act to provide for questioning of a liquidator or other urgent investigations.

68.2 Section 381(3) of the Companies Act provides that the Master may at any time appoint a person to investigate the books and vouchers of a liquidator. There appears to be no justification for the absence of this power in the case of the liquidator of an individual's estate. *The first part of clause 68(2) is similar to section 381(3) of the Companies Act. The second part of clause 68(2) is similar to section 381(4) and (5) of the Companies Act which deals with the costs incurred in this regard.* However, if the liquidator is removed from office consequent upon such an investigation, there is no reason why he or she should not be held responsible for the reasonable costs. The liquidator can approach the court if he or she feels that the removal has been unfair. *The second part of clause 68(2) provides that the costs of the investigation are payable by the liquidator if the liquidator is removed from office consequent upon an investigation.*

68.3 In terms of section 152(4) of the Insolvency Act the Master or other presiding officer, and if a person other than the trustee was summoned, also the trustee or his or her agent, may interrogate the witness in regard to any matter relating to the insolvent or the estate or the administration of the estate. It does, however, appear to be desirable to empower the presiding officer to allow any interested person to question a witness to the extent that the presiding officer allows. *Because the Master may consider steps against a liquidator as a result of evidence given at the questioning clause 68(4) allows the liquidator to cross-examine other witnesses. There is no reason why a representative can ask questions on behalf of the liquidator but not on behalf of another person allowed to ask questions by the presiding officer, and clause 68(4) allows this.*

68.4 In *Hosking v Van Der Merwe* 1992 (1) SA 920 (W) 924 Judge Goldstone held that the presiding officer at an interrogation held under section 152 had a discretion to allow the insolvent

and the witnesses legal assistance. According to the judge it was neither practical nor desirable to attempt in any way to define or circumscribe the manner in which a presiding officer should exercise this discretion. He might exercise it in favour of some persons and not others, or in respect of some issues and not others. *It is submitted that a person summoned in terms of clause 68 should have the right to be assisted by a legal representative, and clause 65(3) read with clause 68(5) provides accordingly.*

68.5 *Clause 65(7) provides that an insolvent who appears at a questioning shall declare that he or she has disclosed all his or her affairs fully and correctly. Clause 65(8) provides that the presiding officer shall disallow all questions that are irrelevant and may disallow questions that would prolong the proceedings unnecessarily and that the presiding officer shall record the proceedings or cause them to be recorded. Clause 68(5) applies these clauses to a questioning by the Master in terms of clause 68.*

68.6 In *Appleson v Bosman* 1951 (3) SA 515 (W) 517 Judge Blackwell commented as follows on the nature of an enquiry in terms of section 152 of the Insolvency Act:

If, therefore, the Master wished the inquiry in the present estate to be a public one then, so far as I can see, there was no reason why he should not have ordered that interrogation to take place at a meeting of creditors, but if for any reason with which he is acquainted, he prefers that the interrogation take place under sec. 152, then, in my view, this cannot and should not take place in public but in private. If these interrogations are held in public, names may be bandied about indiscriminately to the pain and detriment of persons who are helpless to rebut any accusations or wrong inferences that may be drawn, and I would think, moreover, that the persons to be examined would speak more freely, and part with information more readily, if they knew that the examination was a private one from which the newspapers were excluded.

In *Roux v Die Meester* 1997 (1) SA 815 (T) the court confirmed that the proceedings were private and that the insolvent was not entitled to be present or represented. *Clause 68(6) expressly provides that the proceedings are private and confidential.*

68.7 The Bill does not contain provisions to prevent the disposal or destruction of incriminating evidence. Comment was invited on whether the Master should be vested with powers similar to those of the Director: Office for Serious Economic Offences in terms of section 6 of the Investigation of Serious Economic Offences Act 117 of 1991. The said powers relate to the

entering upon premises with or without prior notice for the purposes of an inquiry; the making of enquiries; the examining of objects found on such premises; requiring a person in charge of such objects to give information in connection therewith; the making of copies of books or documents found on such premises; and the seizure of anything found on such premise. The majority of commentators are opposed to such provisions. The Master has powers to obtain documents and cases where a need may arise for drastic powers of search and seizure will probably be extremely rare. No special search and seizure provisions are proposed.

Clause 68A: Enforcing summonses and giving of evidence

68A.1 The provisions of section 66 of the Insolvency Act that empowers a presiding officer to summarily order the detention of a recalcitrant witness are drastic and presiding officers are justly apprehensive to apply the provisions. Clause 101(2)(a) and (b) makes failure without lawful cause to comply with the provisions of clauses 64, 66 and 68 an offence. A criminal sanction alone will not be effective. A meeting of creditors or a questioning can evidently not wait for a possible conviction at a criminal trial and hope for a sentence suspended appropriately to encourage compliance. Comment was invited on a provision which authorised the presiding officer to issue a warrant to bring a person who failed his or her duties before the presiding officer. Comment was also invited on a summary procedure to apply to a magistrate or judge to order a recalcitrant witness to comply with his or her duty to answer questions fully and satisfactorily and to order that the witness be held in custody until he or she complied with the order.

68A.2 The Constitutional Court has since ruled in the case of *De Lange v Smuts NO* 1998 (3) SA 785 (CC) that section 66(3) of the Insolvency Act read with section 39(2) is constitutionally invalid to the extent that it authorises a presiding officer who is not a magistrate to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65. An overwhelming majority of commentators supports the proposal that a magistrate or judge should have authority to commit a witness to prison for failure to answer questions fully and satisfactorily.

68A.3 The view is held that such provisions are necessary to maintain the efficacy of questionings and to ensure that these questionings can be conducted in a speedy and meaningful manner. The majority of commentators favours the widest possible power for presiding officers that will be

constitutional. In the light of the *De Lange* case the widest possible power is incarceration by a judicial officer. It is submitted that these powers should be available in all cases, also where meetings in terms of clause 65 were not presided over by a judicial officer, questionings by commissioners in terms of clause 66, questionings by or on behalf of the Master in terms of clause 68 and a hearing on the earnings and expenses of an insolvent in terms of clause 15(5)(a). *The provisions of clause 68A agree substantially with section 66 of the Insolvency Act. The witness will have the opportunity to appear before the judicial officer. No provision is made for a hearing by a judge but clause 68A(5) provides for an application to the high court for a discharge from custody in the case of wrongful commission to prison or detention in prison.* A proposal of a fine with imprisonment if it is not paid falls away in the light of the option of imprisonment which is available after the *De Lange* case.

68A.4 A proposal that people who conceal assets or are involved in impeachable transactions should be held responsible for the costs of recovery or investigations appears to be too drastic. However a proposal that someone who causes wasted costs because he or she fails to attend a meeting or answer questions properly, should be held liable for wasted costs has merit. A somewhat similar provision in section 264B(5) of the Australian Bankruptcy Act of 1966 provides that the court, the Registrar or the magistrate, as the case may be, may order a person apprehended for not attending an examination to pay the costs of the apprehension. *Clause 68A(7) provides that a magistrate who considers imprisonment also has the option, on the application of the liquidator the Master, a commissioner or a proved creditor, to hold a hearing and order the recalcitrant witness to pay wasted costs to the amount determined by the magistrate.*

68A.5 *Clause 41(5A) provides for the adjournment of a meeting to a different presiding officer, without the consent of the Master if the presiding officer takes over at the same venue. Provision is also made for a meeting commenced before a Master to be continued before a magistrate who is a judicial officer. Clause 42(2A) provides that the Department of Justice shall ensure that sufficient magistrates who may hold court under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), are available to preside over creditors' meetings to be held before a Master or a magistrate, where such a magistrate is required to consider the incarceration of recalcitrant witnesses.*

Clause 69: Suspected commission of offence shall be reported to Commercial Crime Unit

Clause 69 is based on section 67 of the Insolvency Act, but in line with the discussion in paragraph 36.4 above provision is made for the reporting of contraventions to the Commercial Crime Unit.

Clause 70: Proof of record of proceedings of meeting of creditors

Clause 70 re-enacts section 68 of the Insolvency Act.

Clause 71: Composition

71.1 Compromises for companies and appropriate provisions for close corporations in general and provisions for close corporation compromises in particular form part of the insolvency company law reform which is being dealt with separately.

71.2 The value of a debtor's assets to the debtor himself is usually considerably greater than the amount which the assets would realise on a forced sale. The fact that, in the ordinary course, creditors would probably have to wait a long time for dividends also plays a role. If a debtor obtains money somewhere or is able to conclude satisfactory arrangements for the payment of debts, a composition may be more advantageous for both the debtor and creditors than the liquidation of the debtor's estate. Private enterprise with its benefits are encouraged if a business is rescued instead of liquidated. Clause 71 encourages compositions in three ways:

71.2.1 *Clause 71(1) provides that an insolvent may make an offer of composition as soon as the first liquidation order has been granted and the insolvent has lodged a statement of affairs. It is no longer necessary to wait for a final order before a composition can be considered.* In fact Schedule 4 makes provision for an offer of composition before liquidation. The disruption to an enterprise and costs can be minimised if a composition is considered as soon as possible.

71.2.2 Section 119(7)) of the Insolvency Act requires that 3/4 in value and in number of all the *proved creditors* must accept the offer of composition. This discourages the acceptance of a composition. In the United States and in Scotland the requirement in similar instances is 1/2 in number and 2/3 in value. Section 311 of the Companies Act requires a majority in number and 3/4 in value. *Clause 71(4) provides that a majority in number and 2/3 in value of the concurrent creditors who have voted on the offer is sufficient for an acceptance of the offer.*

71.2.3 *The first proviso to section 119(7) of the Insolvency Act provides that any condition which makes an offer of composition or the fulfilment thereof subject to the rehabilitation or the consent of creditors to the rehabilitation shall be of no effect. This provision is not repeated in the Bill.* It is not clear why an agreement to consent to rehabilitation should be disallowed if it is disclosed in an offer of composition. It is an offence in terms of clause 101(2)(e) for any person to receive a benefit or accept a promise of a benefit as a reward for having agreed or having undertaken to agree to a composition or rehabilitation or for not opposing it. *Clause 71(6), which is discussed further below, provides that a provision in a composition providing for the discharge of a provisional liquidation order or the setting aside of a final liquidation order upon the acceptance of an offer of composition is valid.*

71.3 Because the insolvent is a party to the composition it appears unnecessary that the court should sanction a composition if a final order has not yet been made, as was proposed by a commentator.

71.4 A commentator submits that the meeting to consider the acceptance of an offer of composition should be advertised in a newspaper and that the acceptance should be advertised in the Government Gazette. Advertisement in newspapers was discussed in paragraph 1.34 above. Although it is agreed that consideration of a composition is an important matter, it does not appear to be advisable that this notice should differ from, for instance, the notice for the first meeting which is also very important. *Clause 71(14) allows creditors who did not prove their claims in time six months to recover directly from the insolvent. In terms of clause 71(2) personal notice of the*

meeting is given to all known creditors (instead of proved creditors as is required in section 119(2) of the Insolvency Act). The account for distribution in accordance with the composition will be advertised by personal notice and notice in the Government Gazette. If a composition has been adopted through fraudulent means, the court will have the right to set aside the composition. The proposals that the meeting should be advertised in a newspaper and that the acceptance should be advertised in the Government Gazette are not supported.

71.5 Section 119(2) of the Insolvency Act provides that the trustee should submit an offer of composition to creditors if *the trustee is of the opinion that creditors will probably accept the offer*. Section 119(3) provides that the trustee must inform the insolvent if he or she does not propose to send a copy because he or she is of opinion *that there is no likelihood that the creditors will accept the offer. The wording should be symmetric and both subclauses 71(2) and (3) refer to "a likelihood that creditors will accept the offer"*. The question is whether "a man of business would reasonably approve of it" (see *Ex Parte De Villiers No: In Re M S L Publications (Pty) Ltd (In Liquidation)* 1990 (4) SA 59 (W) 63E).

71.6 A commentator proposes that the Master or the court should exercise a discretion whether a composition should be accepted and regard should be had to the commercial morality generally and the public interest. The provisions of the Insolvency Act regarding compositions for individuals and partnerships do not contain any general requirement that the Master or the Court should consider the merit of the proposal. The view of creditors are conclusive, subject to provisions such as clause 71(5) that a creditor may not be given a preference outside insolvency law. It is true that the present law does not provide for a composition coupled with the setting aside of a liquidation order, which may create opportunities for connivance. Clause 71(8), discussed below, affords a remedy if an insolvent misleads creditors. If a majority in number and 66% in value of creditors support a composition, it is submitted that they should be allowed to be the masters of their destiny. It is submitted that the Master or the court should not have the power to veto the decision of creditors that a composition should be accepted.

71.7 A commentator proposes that clause 71(6) should be expanded to provide that the discharge of a provisional or final liquidation order shall result in the automatic rehabilitation of the insolvent. The setting aside of a liquidation order differs from rehabilitation by the insolvent. Rehabilitation

entails that the insolvent is supposed to have seen the errors of his or her ways and is fit to once more be let loose on commercial society (see *Greub v the Master* 1999 (1) SA 746 (C) 753). One of the consequences of rehabilitation is that most of the debts are extinguished, but usually the liquidator maintains control over the insolvent estate. The setting aside of a liquidation order nullifies the liquidation order and its effects. Unless there is an agreement to the contrary the assets will revert to the insolvent who will be liable for his or her debts. The notion that rehabilitation should follow if a composition is accepted will be considered with the comments on clause 96. The parties should be left with a choice whether they prefer a setting aside of the order, rehabilitation (whether immediately or in due time), or neither of the two. The most appropriate choice will depend on the circumstances. One possibility which deserves attention is an insolvent who makes an offer of composition with misleading or grossly inaccurate information; the offer is subject to the setting aside of the liquidation order; the composition is accepted and the order is set aside. Will creditors have a satisfactory remedy if they discover that they have been defrauded? If their payment under the composition was in full and final settlement, they may not have a claim to apply for liquidation and share in a distribution. This aspect is dealt with in clause 71(8) which is discussed below.

71.8 If the insolvent or another party does not comply with the stipulations of a composition, an awkward vacuum can arise. In *Blou v Lampert and Chipkin* 1970 (2) SA 185 (T) 206 it was decided that because the composition in question did not contain provisions in respect of a breach of any of its terms, neither the trustees nor the creditors could thus claim cancellation of the composition. It could be argued that the creditors should see to it that the necessary stipulations are contained in the composition, but this is probably asking too much. ***Clause 71(8) will remedy the situation by providing that the liquidator shall, despite the absence of a resolution of creditors authorising him or her to do so, be competent to approach the court for the cancellation of a composition or for other relief if the insolvent or any other person has failed to give effect to the terms of the composition or to comply with the provisions of clause 71. In order to discourage an insolvent from having a composition accepted or obtaining the setting aside of a liquidation order by means of a fraudulent offer of composition, clause 71(8) provides that the liquidator shall be entitled to approach the court for the cancellation of a composition, the setting aside of an order providing for the discharge of a first liquidation order or an order setting aside a final liquidation order, or for other relief if the offer of composition supplied***

incorrect information which might reasonably have resulted in the requisite majority of creditors voting in favour of the composition.

71.9 A commentator raises an interesting point regarding impeachable transactions. If all the assets or vaguely identified assets are returned to the insolvent in return for an offer to pay an amount or a percentage of the claims, the question arises whether claims in respect of impeachable transactions vest in the insolvent or remain vested in the liquidator in terms of clause 71(10). It will often be difficult for the liquidator to report meaningfully on possible impeachable transactions at an early stage. Clause 36 (or section 81 of the Insolvency Act) does not require a report on impeachable transactions as such and this is usually dealt with, if at all, under "any other matter relating to the administration ... of the insolvent estate". It appears to be undesirable that claims regarding impeachable transactions could be nullified by a composition. If it is advisable to make a settlement regarding impeachable transaction this should be done by the liquidator in the ordinary course of the administration. Most impeachable transactions apply only to sequestrated estates. If the liquidation order is set aside it follows that most of the grounds for impeachment fall away. If the possibility of impeachable transactions is not dealt with during consideration of the composition in cases where the order is set aside it seems that the payments under the composition should finalise matters. If the liquidation is not set aside it appears advisable that the right to impeach transactions should be preserved. *Clause 71(11) provides that a composition shall not affect any liability regarding transactions that are invalid or liable to be set aside.*

Clause 72: Set-off

This clause has been moved to clause 23A.

Clause 73: Realization of security

73.1 In terms of section 83(1) of the Insolvency Act a creditor of an insolvent estate who holds as security for a claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has been appointed. If the notice is not given, the creditor may not realise the property. Any such realisation without the required notice would be void. With a view to curtailing malpractices, it is considered essential that

the liquidator should be notified of the security, especially before empowering the creditors to realise the security themselves. *Clause 73(1) provides that a secured creditor of an insolvent estate shall as soon as he or she becomes aware of the liquidation of the estate notify the liquidator in writing of the nature and extent of his or her security and the amount of his or her claim. The requirement applies to movable and immovable property.*

73.2 Section 83(3) of the Insolvency Act provides that a secured creditor may realise property subject to certain conditions. A commentator submits that the liquidator should be the only person authorised to realise assets vesting in the insolvent estate; it is undesirable to allow a creditor with an unproved claim to realise assets; in the event of the value of the security exceeding the quantum of the creditor's claim the general body of creditors has a real interest; a realisation of an asset by the liquidator with authority from the Master or creditors, would not be more cumbersome than the requirements for a sale by the creditor. With the possibility of an early meeting to obtain directions the reason for empowering a creditor (other than a creditor who holds a marketable security or a financial instrument) falls away. Creditors make little use of this power, except that they sometimes collect debts ceded to them. There is no reason why ceded debts cannot be collected on behalf of the liquidator, if necessary. *The power of ordinary secured creditors to sell their security in terms of section 83(3) of the Insolvency Act has been omitted.*

73.3 Section 83(2) of the Insolvency Act authorises a secured creditor to realise the security after notice to the Master and the trustee, if one has been appointed. Clause 32 of the Bill provides for the appointment of a liquidator in each estate. A sale by the creditor is justified only if, given the nature of the assets, time may be of the essence and a controlled market exists for the sale of the assets at prices determined by market forces. *Clause 73(2) retains the right of a secured creditor to sell the security on the stock exchange or other controlled markets after notice to the liquidator if the security consists of securities or financial instruments dealt with on the markets.*

73.4 Section 83(10) provides that a secured creditor who has sold the security shall forthwith pay the "net proceeds of the realization" to the trustee. *Clause 73(4) states that the proceeds after deduction of the reasonable costs of realisation should be paid over to the liquidator.* The creditor must prove his or her claim and cannot retain payment for the secured claim.

73.5 The second part of section 83(10) of the Insolvency Act provides that after a secured creditor has paid over the net proceeds of security realised by him or her, the creditor is entitled to the payment out of such proceeds of the preferent claim if the claim has been proved and the Master and the trustee are satisfied that the claim is secured by the property which has been realised. The subsection continues that if the trustee disputes the preference the creditor may either object to the account or apply to the court for an order compelling the trustee to pay him or her forthwith, whereupon the court may make such order as to it seems just. In *Grufin Finance Co (Pty) Ltd v Cohen* 1991 (2) SA 345 (W) it was held that in enacting section 83(10) the legislature intended to provide a speedy and relatively inexpensive procedure to resolve matters of an interim nature which did not require proof of a debt on a balance of probabilities. The court held that the creditor was entitled to payment of his secured claim subject to security for payment if the claim was challenged in terms of section 45. It is submitted that the decision is open to criticism. It would have made better sense to order that security be furnished for repayment if according to the confirmed account the creditor was not entitled to the amount. Disputes in respect of security are not resolved finally in terms of section 45 or 83. The appropriate time to deal with the question whether a creditor has a secured (or a preferent claim) is when the liquidator lodges an account and objections against the account are dealt with. (See the *Grufin* case, *Callinicos v Burman* 1963 (1) SA 489 (A) at 500, *Bowman v De Souza Rolado* 1988 (4) SA 326 (T) and *Caldeira v The Master* 1996 1 SA 868 (N)). *Clause 73(9) provides that after proof of his or her claim and the realisation of the security, any secured creditor is entitled to payment of the secured claim if he or she has furnished security to the satisfaction of the liquidator for the repayment with interest of the payment if according to the confirmed account the creditor is not entitled to the payment or a part thereof.*

73.6 In terms of section 83(11) of the Insolvency Act the trustee may, with the creditors' authorisation, if the creditor has valued the security when proving a claim, "take over" the property at such value within certain time limits. By "take over" in this context is meant, in effect, to purchase the property from the creditor for a price equivalent to the amount of such value, thereby settling the claim and freeing the property from the creditor's real right in it. It is not clear why the concept of "take over" was created in the Insolvency Act. In *Kahan v Hydro Holdings* 1980 (3) SA 511 (T) 513 the court merely stated that section 83(11) created an option in favour of the

creditors to purchase the asset held as security through the trustee. Later (at 514) reference was made to the fact that the trustee purchased the assets "privately". Why would the trustee want to employ the somewhat cumbersome procedure of buying the property from the creditor only then to sell it for the benefit of the creditors if the trustee in any case from the outset has the power to realise it for the benefit of all creditors whose claims are secured thereby? Presumably the trustee would take over the security only if he or she could realise it for a price that exceeds the valuation placed on it by the creditor. Be that as it may, in terms of clause 11(1) the effect of liquidation is to vest the insolvent estate, including securities, in the liquidator. Why should a secured creditor in this instance be burdened with the valuation of security? While it may be quite straightforward to value certain types of security, it is not so easy to place a value on security such as book debts, mortgage bonds, etc and a secured creditors may find themselves in a position where the trustee could abandon the security to him if creditors valued the security optimistically or, if they valued conservatively, the trustee could take over the security at the value placed thereon. *The concept of "take over" is not justified and is abandoned. The liquidator may sell the asset in the ordinary course (clause 73(7)) or to the creditor in terms of clause 73(8).*

73.7 In terms of section 83(6) of the Insolvency Act a creditor with movable property as security shall as soon as possible after the commencement of the second meeting deliver the property to the liquidator. Clause 73 deals with movable and immovable property (see *Roux v Van Rensburg NO* 1996 (4) SA 271 (A)). *There is no reason why the creditor who is not entitled to sell the security should wait until the meeting before handing the property to the liquidator. Clause 73(5) provides that such a creditor should place the liquidator in possession of immovable or movable property held as security as soon as possible after liquidation. The secured creditors who are entitled to sell the security must place the liquidator in possession within five days after the commencement of the first meeting if they have not sold the property.* In order to determine the voting rights in terms of clause 42(5) and assist with the realisation of the security, *the liquidator must obtain a valuation of security which has not been realised.*

73.8 In terms of section 47 of the Insolvency Act delivery of security does not result in loss of the creditor's security if, when effecting it, he or she notifies the trustee in writing of his or her rights and in due course proves a claim. It makes sense to combine the provisions of section 83(6) and section 47 of the Insolvency Act. Since the creditor must retain the physical custody or control

of the pledged article with the object of securing the benefit of his or her pledge, the omission of a reference to pledge in section 47 does not make sense. It is submitted that section 47 should be framed in more general terms. According to information, written notification as contemplated in section 47 is seldom adhered to in practice. The notification requirement in clause 73(1) applies to movable and immovable property. It follows that the property referred to in clause 73(5) includes immovable property. There appears to be no reason to retain the requirement of notification in section 47 as a prerequisite for the preservation of the creditor's right of security or to limit the rule to property subject to a landlord's hypothec or a right of retention. Proving a claim should be a sufficient requirement for preserving the creditor's right of security if the property which is held as security is surrendered. *Clause 73(6) provides that a creditor who has placed the liquidator in possession of assets held as security does not thereby lose the security to which he or she is entitled to in respect of such property.*

73.9 The trustee's power to sell property of the estate includes by implication a power (with creditors' authorisation) to relinquish movable or immovable property held as security to the creditor concerned in settlement of his or her claim; *in effect to sell the property to the creditor for a price equal to the amount of the claim, or for such other amount as may be agreed. This option is expressly provided for in clause 73(8).* Clause 42(5) retains a provision that a secured creditor can place a value on his or her security. A liquidator would be looking for serious trouble if he or she sold security for less than the value placed thereon by the secured creditor without consulting the secured creditor. In general it is good practice to consult a secured creditor in connection with the realisation of the security.

Clause 74: Attachment of property upon failure to deliver to liquidator

Clause 74 corresponds to section 83(6) of the Insolvency Act, but following a suggestion by a commentator it is provided explicitly that wasted costs are debited against the security if it cannot be recovered from the creditor.

Clause 75: Application of proceeds of security

75.1 Clause 75(1) provides that a secured creditor must prove a claim to share in the distribution

of the proceeds of security.

75.2 A commentator refers to an article by J C Sonnekus "Insolvensie: Toekomstige rente en voorkeur" 1996(4) *TSAR* 756 and submits that if there is any vagueness the new Act should spell out clearly what the position with regard to the payment of arrear interest and future interest is. Another commentator says that liquidators commonly allow the two year interest (referred to in section 89(3) of the Insolvency Act and clause 75(2)) as part of the secured claim even if the total exceeds the security limit in the bond. The commentator submits that the Bill should provide that a secured creditor shall not be paid more than the amount secured in terms of the security instrument. The article by Sonnekus referred to by the commentator criticises the decision in *Kursan v Eastern Province Building Society* 1996 (3) SA 17 (A) in which a mortgage bond was interpreted to mean that interest secured by the Bond was not limited to the security limit in the bond. Sonnekus points out that there is now certainty on this question but requests the reform of the matter, perhaps by the Law Commission (paragraphs 21 and 22 1996 (4) *TSAR* on page 774). Reference can also be made to *Klagsbruns Inc v Adjunk-Balju, Bronkhorstspruit* 1979 (2) SA 169 (T) where it was held that interest was not a "future debt" for purposes of section 51(1)(b) of the Deeds Registries Act 47 of 1937. If a bond is properly worded the interest will be secured even if it causes the claim to exceed the sum of the secured claim fixed in the bond, subject to the limitation to interest for two years before liquidation. It may be argued that the security offered by bonds should not exceed the amount fixed in the bond, but this is clearly not an insolvency problem, even though it may raise its head mainly in cases of insolvency. The general law is applied by clause 75(2) but that still does not make this an insolvency problem. *It is submitted that the general rules regarding the limitation of security afforded by bonds should not be dealt with as part of this review of the insolvency law.*

75.3 *Although section 83(12) of the Insolvency Act does not contain an explicit reference to section 89(2), any claim which is not discharged in full ranks for the balance as a concurrent claim unless the creditor concerned has relied on his security, as envisaged by section 89(2). Clause 75(3) consolidates the provisions in question.*

75.4 Section 89(1) of the Insolvency Act provides for the payment of the costs of maintaining, conserving and realising any property, including certain taxes on immovable property.

75.5 There is uncertainty about the apportionment of a minimum liquidator's fee. *A fair arrangement seems to be that the excess of the minimum fee above the ordinary tariff should be apportioned against the proceeds of securities and clause 75(4A) provides accordingly.*

75.6 Section 89(4) of the Insolvency Act provides that immovable property can be transferred by a trustee of an insolvent estate if taxes due on the property for two years immediately preceding liquidation with interest have been paid, notwithstanding the provisions of any law which prohibits the transfer of property unless the taxes have been paid in full. Section 89(5) defines "tax" for this purpose as any amount payable periodically in respect of immovable property to the State and other statutory institutions where the liability "is an incident of the ownership of that property". In practice the provisions are applied to rates and taxes due to local authorities. A "clearance certificate" by the local authority is required before transfer can be effected.

75.7 According to commentators the special rights in respect of property rights lead to laxity by protected creditors in recovering their debts. Working Paper 61 *Review of the Law of Insolvency: Statutory provisions that benefit creditors* paragraph 7.18 on page 23 submits as follows:

It is to be expected that bodies who benefit from special rights will object strongly against the abolition of the rights which they have enjoyed for a long time. The culture of non-payment of monies payable to these bodies places a burden on the available funds. However, it is submitted that there is no justification for the special rights enjoyed by these bodies. The special rights enjoyed by them are also not conducive to the realisation by consumers that services rendered must be paid for. Were these bodies not to enjoy special rights they would be obliged to ensure that they hold sufficient deposits to cover non-payment and take urgent steps to recover outstanding amounts for which they do not hold security. Should it be decided that the State must pay for services for which consumers cannot pay, that would be fairer than a system under which outstanding amounts are recovered at the expense of other creditors.

75.8 The Working Paper invited comment on a submission that the existing provisions containing special rules for the payment of "tax" to local authorities were not desirable. Twelve commentators, most of them local authorities, disagree with this submission, some of them in strong terms. They say that local government cannot choose whether or not to supply goods and services or to evaluate its clients to determine the financial risks involved. Section 27 of the Constitution of the Republic

of South Africa 108 of 1996 provides that everyone has the right to sufficient water and the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right and other rights such as the right to sufficient food and social security. The Department of Health and Welfare in a circular has given notice to local authorities that in the event of local authorities ceasing to supply domestic water as a result of non-payment the local authority would be held responsible for any nuisance which might arise by reason of the disconnection of the water supply. The commentators say commercial creditors can earn profits and consequently they must accept the risks associated with business. The levying of tax is not a commercial transaction because the statutory (community) tax is utilised for the compulsory provision of community services, the benefit of which cannot be measured for individual persons in the same way as for electricity and water. Because of the large amounts involved it is cost effective for financial institutions to register appropriate security over property while in comparison property tax represents small amounts and registration of bonds would not be cost effective. Commentators disagree with the view expressed in Working Paper 61 that the special rights lead to laxity and say that escalation of the amount protected under section 89 of the Insolvency Act to an unreasonable level due to inaction is the exception and not the rule. A commentator says that in many instances litigation is instituted timeously, but litigation is a notoriously long and drawn out process. When faced with thousands of defaulters it becomes impossible to act expeditiously in all cases. Another commentator says that without the preference there would not be justification for declaring property specially executable and the time consuming and expensive excussion of movable assets before the immovable property will be required. Finding "absentee" owners with out of date addresses for the purposes of execution can be fraught with difficulties and delays. See *Venter NO v Eastern Metro Substructure, Greater JHB TC* 1998 (3) 1076 for a case where R353 616.74 was paid to obtain a clearance certificate, of which approximately R225 000 related to assessment rates with interest thereon.

75.9 Commentators contend that the preference should only be applicable with regards to property rates and should be limited to a reasonable period of two years. There cannot be the same justification for according secondary claims, such as cost of a sewer connection, the same importance and preference as the claim for rates.

75.10 Commentators point out that if local authorities are placed in the same position as other

creditors they would run the risk of being liable to contribute towards the costs of liquidation. Any decrease in the liquidity of a local authority because of a forfeiture of tax will have to be financed in other ways, for instance an increase in other municipal rates and tariffs. The question is asked whether it is equitable to exact monies from persons who are perhaps less affluent to subsidise a potential loss of property tax in respect of those who are supposed to be in a more favourable position to afford such tax. One commentator disagrees with the contention that for the State to pay for services for which consumers cannot pay is fairer than to recover outstanding amounts at the expense of other creditors. If one is already faced with the situation where there must be a loss, the loss should according to the commentator rather fall with creditors who have the options and rights to properly protect their contractual debt than either the more constrained local authority or the uninvolved general population (increased taxes).

75.11 The comments on Working Paper 61 did not throw much new light on the basic question - what is a fair way to try and ensure that local authorities are paid for essential services? The effect of the existing preference is that the local authority is paid in preference to the creditors of a particular estate. The creditors, usually a limited group, are the losers. Some commentators proceed from the premise that these creditors would be large financial institutions and businesses and that they can well afford losses in this regard. It is correct that bondholders are the first in the line of fire to lose as a result of the preference, but bondholders are paid in full in a substantial percentage of cases and then the preferent creditors are next in line. It can surely be argued that at least the employees deserve sympathy because local authorities are paid at their expense if sufficient money is not available from other sources. The concurrent creditors are next in line and it is probably correct that the majority of them would be businesses. It is probably simplistic to accept that concurrent creditors are strong firms who can afford to and should be expected to carry losses at the expense of local authorities. Quite a number of commentators accept that the preference should be limited to a period of two years and that it should not include charges for electricity, water and other service charges.

75.12 It is recommended that the special treatment for property taxes should be retained, but that it should be limited to assessment rates for two years before liquidation. ***Clause 75(4A) provides that if property is immovable, any assessment rates as defined in subclause (4C) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the***

date of the liquidation and in respect of the period from that date to the date of the transfer of that property by the liquidator of that estate, with any interest or penalty which may be due on the said assessment rates in respect of any such period, shall form part of the costs of realisation. Clause 75(4D) defines "assessment rates" in relation to immovable property as any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property, but excluding any payment for services rendered in respect of such property.

75.13 An insolvency practitioner complains that local authorities insist on payment of rates before they will issue a clearance certificate and refuse to accept a bank guarantee or other form of guarantee. Another commentator submits that there appears to be no reason, either in principle or in practice, why the transfer should not ensue on the basis that the local authority has a guarantee for the payment of the tax where the issue of the relevant clearance certificate is the only obstacle to the transfer. It is wholly undesirable that the trustee should have to borrow money personally in order to pay the "tax" simply in order to enable the transfer to occur. *Clause 75(4B) provides that notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any assessment rates as defined in subclause (4C) due thereon have been paid, that law shall not debar the liquidator of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if the liquidator has paid or offered reasonable security for payment of the assessment rates which may have been due on that property in respect of the periods mentioned in subclause (4A).*

75.14 Section 95(1) of the Insolvency Act is the only section that deals specifically with interest on secured claims after sequestration. In *Singer v The Master* 1996 (2) SA 133 (A) it was accepted that section 95(1) impliedly granted a secured creditor a right to interest on his or her secured claim from the date of sequestration to the date of payment. The Appellate Division considered the question of where the claim to interest should rank in the administration of an insolvent estate. Judge of Appeal Grosskopf construes that the distinction between principal debt and interest disappears when section 83(12) is applied, leaving a colourless excess which falls to be dealt with in terms of section 103(1)(a). In regard to unsecured claims section 103(1) clearly indicates that the

common law rule (payment must first be credited to account of interest and thereafter of the principal) is to be reversed - the principal debt is to be paid in full before the interest is paid. Judge Grosskopf held that no such provision is to be found for interest on secured claims and that section 103(1)(b) does not make adequate provision for the ranking of interest on secured claims not fully satisfied out of the proceeds of the security. The common law rule that interest is paid before the principal debt applies. Although the Appellate Division's interpretation and conclusion are accepted as correct, it is submitted that the result is to the detriment of the ordinary creditors. Judge Grosskopf conceded that on the construction suggested by him a secured creditor might in effect get compound interest. This would happen if the excess, containing an interest component, and all other concurrent claims were fully paid under section 103(1)(a). Interest would then be paid on all these claims under section 103(1)(b). *Clause 75(5) provides that the proceeds of security should be appropriated first to the principal debt and then to interest.* The effect would be that, as is the case with a concurrent creditor, a secured creditor will receive interest only if the proceeds is sufficient to pay the capital claim in full. This was the practice before the *Singer* case.

75.15 In terms of section 95(2) - (5) of the Insolvency Act a creditor whose claim is secured by a mortgage over immovable property is protected although the creditor has failed to prove a claim. According to information it happens rarely that a liquidator is unable to obtain any communication at all from the mortgagee. On the other hand it may be argued that a real right in property should not be extinguished without a serious attempt having been made to determine whether a secured creditor still enjoys rights in the property. Comment was invited on the submission that section 95(2) - (5) should be omitted from the new Insolvency Act. Despite support for the omission of these provisions they have been retained in clause 75(7) to (10) because their omission prejudices important policies regarding the registration of immovable property.

Clause 76: Security in respect of reserved ownership and financial lease

76.1 "Reservation of ownership contract" and "financial lease" are defined in clause 1. See paragraph 1.43 above and the following paragraph for a discussion of the definition of "reservation of ownership contract".

76.2 The difference between an ordinary lease and a financial lease is that the financial lease

agrees substantially with a reservation of ownership sale. In the case of a reservation of ownership sale the purchaser becomes the owner of the assets once it has been paid for. The lessee can become the owner by paying a release figure. The release figure is calculated in such a way that the lessee will in effect pay what is still owing on the assets. It is not more drastic to give a lessor a secured claim than it is to give the owner under a reservation of ownership sale a secured claim. In terms of existing law it does happen occasionally that the trustee pays a release figure and takes over the lease assets and sells the assets for the benefit of the estate free of the lease. Problems are however experienced to get the cooperation of the lessor who prefers to keep the assets and deal with it as he or she deems fit. At present the assets are usually returned to the lessor who sells it or deals with it as he or she thinks fit. According to clause 76 the trustee will try to sell the assets and pay over the proceeds (after the deduction of costs) to the lessor. If the trustee cannot get a fair price for the assets he or she can bargain with the lessor to purchase the assets or dispose of the property to the lessor in settlement of the lessor's claim (clause 73(8)). At present the trustee is to a large extent dependent on the cooperation of the lessor. ***The main change that will be brought about is that the trustee will be in control (and receive remuneration for exercising control) and the lessor will have to prove a claim. The principle that assets subject to financial leases should be dealt with by the liquidator received substantial support.***

76.3 A commentator says that in many cases the insolvent disposes of the goods before liquidation and receives value for such goods without settling the credit agreement account. In some such instances the credit grantor is aware of the disposal and in fact may have consented implicitly to such alienation. Had it not been for the intervening insolvency, the purchaser would have been protected in his possession of the goods as he will have a defence against the alienator by way of contract and against the credit grantor or owner by way of estoppel. The commentator says the present Insolvency Act and the proposed draft Bill make no provision for the raising of any of these defences and leave the bona fide and innocent purchaser defenceless where in terms of the common law he was protected. The commentator says that if clause 76 is limited to those circumstances where the insolvent is still in possession of the goods, the same intended results can be achieved without hardship to any other party. The bona fide purchaser would retain his defence (if any) unless the goods were purchased for less than the actual market value (disposition without adequate value) and the insolvent estate will not lose any benefit as it has been paid in full. If viewed from the other side the credit grantor is the only person to benefit in circumstances where he should have

lost his security - and also possibly the liquidator because the insolvent estate now has an asset to increase the fee of the liquidator.

76.4 In most cases clause 76 ought to apply only if the debtor is in possession and it should apparently not be applied if the property was not delivered to the insolvent at some stage. However, cases may occur where the section should apply even if the debtor is not in possession, for instance, a debtor who lends a car to a child or who has handed the car to a garage for repairs. A proposal that the clause should apply only if the creditor was owner of the property on the date of sequestration can not be accepted without reservation - if the creditor is estopped from sustaining ownership before liquidation he or she should not be able to do so after liquidation. ***It is a precondition for the application of clause 76 that the assets were delivered to the debtor and that the creditor could immediately before liquidation assert ownership to the property (see clause 76(1)).***

76.5 A commentator says that the instalment finance sector finances floor plan agreements for motor dealers which entail the provision of credit to a motor dealer for the purchase of stocks intended for resale and obviously ownership is reserved in favour of the credit grantor. The commentator says if clause 76 is implemented, it will have a far reaching effect on the new car market. Motor manufacturers have always placed vehicles ex stock from an insolvent dealer with another dealer at original trade prices. This is essential to preserve the value of the vehicle and the new car market. The instalment seller does not carry any losses except for arrear interest. The possibility of selling the vehicles for a profit bearing in mind the additional costs associated with insolvency sales, is remote. If new vehicles are to be sold by the liquidator on auction, the manufacturers will not provide any new vehicle guarantees in respect of such sales.

76.6 The nature of a floor plan agreement appears from the terms of a contract quoted in ***Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd*** 1994 (3) SA 188 (A) 195. See also ***Nedcor Bank Ltd v ABSA Bank Ltd*** 1998 (2) SA 830 (W) 839 where it was held that a similar floor plan agreement was a simulated transaction which did not have the effect in law of transferring ownership in the vehicle to the finance company, leaving the company without any security.

76.7 It is a policy question whether the application of clause 76 should be limited to certain

installment sale agreements. In some legal systems security is not dealt with by the liquidator at all. If clause 76 is applied to financial leases it is illogical not to apply it to all reservation of ownership agreements. It will admittedly bring about extra costs and bother for financial institutions who make use of financial leases and reservation of ownership to finance transactions. It is submitted that the extra costs and bother can be justified by better control in the interest of the general body of creditors. *Clause 76 applies to all reservation of ownership contracts as defined in clause 1.*

76.8 In terms of section 84(1) of the Insolvency Act the trustee shall, if required by the creditor, deliver the property to the trustee, and thereupon the creditor shall be deemed to be holding that property as security for his or her claim and the provisions of section 83 shall apply. In *Williams Hunt v Slomowitz* 1960 (1) SA 499 (T) 501 the reason for this provision was explicated as follows:

(t)he creditor is required in terms of the Act to place a valuation upon his security or to make up his mind whether to claim as a secured creditor or as a concurrent creditor and he is able to do neither of these things unless he obtains possession of the asset . . . so that he may examine it, value it and make up his mind about his rights.

This is not a valid reason since possession of the property by the trustee would not preclude the creditor from either examining or valuing.

76.9 André Boraine and Kathleen van der Linde "The draft Insolvency Bill - an exploration" 1999 *TSAR* 38 at 50 say the real reason behind the provision that the property must be handed to the creditor is to enable the creditor to realise the security under section 83 . (See also *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) and *Venter NO v Avfin (Pty) Ltd* 1996 (1) SA 826 (A) where this was confirmed.) They submit that it is clear from the wording of s 84(1) that after delivery the creditor will be deemed to hold the property as security for the purposes of s 83; since section 83, and also the proposed clause 73, clearly requires a creditor to be in possession of the security he wants to realise, the delivery provision in s 84(1) has an important function; by implication the creditor's opportunity of realising the property himself is thus removed, (clause 76(2) provides that the property must be recovered by the liquidator and realised for the benefit of the secured creditor) and the Explanatory Memorandum in Discussion Paper 66 offers no explanation as to why this far-reaching change was thought necessary (see Explanatory Memorandum par 76.4 where it is merely stated that: "Since the property must in any case be returned to the liquidator for the benefit of the insolvent estate (clause 73(5) - this is underscored in clause 76(2)), it is unnecessary to

deliver the property to the creditor."). Boraine and Van der Linde say this unfortunate omission of the seller's right to delivery of the property also means that the present uncertainty regarding the consequences of the trustees inability to deliver is not addressed. Compare for example *Hubert Davis Water Engineering (Pty)Ltd v Body Corporate of "The Village" and Others* 1981 (3) SA 97 (D) *UDC Bank Ltd v Seacat Leasing and Finance Co (Pty)Ltd and Another* 1979 (4) SA 687 (T).

76.10 In paragraph 73.2 above it was submitted that *the right of a secured creditor to sell security other than marketable securities or financial instruments should be removed*. The fact that the liquidator need not hand security to the creditor will not impede the sale of shares on the stock exchange or financial instruments before the first meeting because these assets need not be handed to the liquidator before then. If the liquidator need not hand the security to the creditor the uncertainty referred to by Boraine and Van der Linde loses its significance. If ordinary secured creditors cannot sell security, it is submitted that the liquidator need not hand the security to the creditor. *The requirement in section 84(1) that the liquidator should deliver security to the secured creditor is omitted from clause 76*.

76.11 Andre Boraine and Kathleen van der Linde "The draft Insolvency Bill - an exploration" 1999 *TSAR* 38 at 50 say a problem with clause 76 relates to the ranking of competing secured claims: where the same property serves as security for the claim of the seller under a reservation of ownership or financial lease and for that of another secured creditor, the position is uncertain; section 2 of the Security by means of Movable Property Act 57 of 1993 provides that a landlord's hypothec cannot exist over property subject to instalment sale transaction as defined in the Credit Agreements Act; unless this Act is also amended (it does not appear in Schedule 3 as a legislative provision which will be amended), it will mean that in cases where the reservation of ownership contract is also an instalment sale transaction as defined, a landlord's hypothec will not apply, whereas in other cases, such as in the case of a financial lease, there could be competing claims. A commentator submits that financial leases should have preference above the landlord's hypothec in terms of section 2 of the Security by means of Movable Property Act.

76.12 It is true that the definition of "reservation of ownership agreement" in clause 1 of the Bill differs from the definition of "instalment sale transaction" referred to in section 2 of the Security

by means of Immovable Property Act 57 of 1993 and that a financial lease is not dealt with in that section. There should be reasonable certainty regarding the ranking of secured claims. However, it does not follow that clause 76 is intended to or should deal with the ranking of secured claims. This should be left to pre-insolvency law. The function of clause 76 is to regulate the administration of assets which are not security in terms of the common law or pre-insolvency law as if they were subject to secured claims. *Clause 76(1) provides that the clause applies subject to the rights of other secured creditors and therefore does not influence the rankings given in section 2 of the Security by means of Immovable Property Act.*

76.13 In terms of clause 76(2) proposed in the Discussion Paper 66 property referred to in subclause 76(1) must be recovered by the liquidator of the debtor's estate and realised for the benefit of the secured creditor. Clause 76(1) provides that upon liquidation the debtor under a reservation of ownership contract or a financial lease is deemed to hold assets as security. This deeming provision results in the creditor being treated as a secured creditor throughout the Bill and not only in respect of the sale of the asset by the liquidator. The proposed clause 76(2) has been omitted.

76.14 Clause 76(3) provides that if property subject to reservation of ownership contract or financial lease was returned to the debtor by the creditor within three months before the date of liquidation, the liquidator may demand from the creditor that he or she deliver to the liquidator the property or its value, subject to payment to the creditor or the deduction from the value of the difference between the total amount payable under the transaction and the total amount actually paid. The "total amount payable under the transaction" includes reductions for early payments and the liquidator is not liable to pay future interest. If the asset was handed back within three months before liquidation (whether under pressure or not) the liquidator can, if he or she thinks the estate has been prejudiced claim back the asset or its proceeds. The ordinary remedies for voidable dispositions remain available (delivery is a "disposition" in terms of clause 1). *The one month period in section 84(2) of the Insolvency Act is very short and has been increased to three months to enhance the protection of other creditors without creating unacceptable uncertainty or delay.* The rest of clause 76(3) is essentially the same as section 84(2), except that section 84(2) ends with the following sentence: *"If the property is delivered to the trustee the provisions of subsection (1) shall apply."* It is not clear what exactly the reference to the provisions of section

84(1) entails. One of these provisions deems the creditor to be a secured creditor, but for what? The liquidator has to pay the creditor's claim to get back the asset and there will not be any claim left.

The sentence quoted above has been omitted from clause 76(3).

Clause 77: Security in respect of landlord's hypothec

Clause 77 re-enacts section 85 of the Insolvency Act.

Clause 78: Certain mortgages afford no preference

78.1 In *Sentraalwes v Die Meester* 1992 (3) SA 86 (A) 89-90 Judge of Appeal Joubert explained that the aim of section 88 of the Insolvency Act was to protect creditors against the registration of hurried bonds to obtain security when insolvency was imminent. Section 88 removes the security of the claims leaving concurrent claims.

78.2 It is significant that the "impeachable transaction" sections (see clauses 18, 20 and 21) require the *court* to set aside the disposition whereas in terms of section 88 a mortgage bond is devoid of any preference without the need for a court order. There are other distinguishing characteristics too, expounded as follows by Judge Melamet in *Joint Liquidators of Glen Anil v Hill Samuel (SA) Ltd* 1980 (1) SA 432 (W) 439:

It is irrelevant to "s 88" whether the liabilities of the insolvent exceeded his assets at the time the mortgage bond was passed or whether at the time he intended to or did in fact prefer one creditor above another or whether creditors were prejudiced thereby or whether the mortgage bond was lodged or registered in the ordinary course of business . . . It would appear to me to be an additional remedy introduced for the benefit of creditors in certain specified circumstances to alleviate difficulties which might be caused by the provisions relating to the setting aside of impeachable transactions.

A further indication that clause 88 applies in addition to the impeachable transaction sections can be found in *Caldeira v the Master and Another* 1996 (1) SA 868 (N) where reference is made to section 88 and the other remedies in respect of the same claim. Clause 78 applies in addition to the remedies in clauses 18, 20 and 21.

78.3 Paragraph 78.4 of the Explanatory Memorandum in Discussion Paper 66 says there appears

to be no valid reason to distinguish between the giving of security by the registration of a bond and other forms of security - the principle contained in section 88 of the Insolvency Act should cover all forms of the giving of security. Andre Boraine and Kathleen van der Linde "The draft Insolvency Bill - an exploration" 1999 *TSAR* 38 at 51 support the wider application of this provision because the same considerations that apply to "hurried bonds" apply also to any other form of security. Commentators support the wider application and several submit that creditors should not be allowed to "perfect" their security by taking possession of assets subject to a general bond shortly before liquidation. A bondholder who has taken possession of assets is a secured creditor as the holder of a pledge.

78.4 It is common for holders of bonds over movables to perfect their security shortly before liquidation and this is acceptable. *Despite the support for the wider application of clause 78 it is submitted that the clause should be limited to the registration of bonds, whether the bond affords security or merely affords a preference in terms of clause 80(3A).*

78.5 It is a policy question whether the operation of the somewhat drastic clause 78 should be extended to transactions a certain time before the presentation of the application, which may occur without any publication and may be quite some time before the first liquidation order and publication thereof. (See the discussion in paragraphs 1.15 and the following above.) Secured creditors involved in "hurried" securities would probably be in the know. The very reason why they might want security for unsecured debts would be because of concerns that the liquidation is imminent. However, clause 78 could hit innocent people in the cross-fire. Even in their case fairness appears to require that they should not be allowed a preference. *The six month period in clause 78 is calculated from the date when the application for liquidation is presented and not from the date of the liquidation order.*

Clause 79: Costs of liquidation

79.1 Section 97(2) of the Insolvency Act sets out an order of priority applying *inter se* for administration costs. It is not clear why there should be differentiation between the different administration costs. Section 97(2)(c) can be criticised for being too complicated. *Clause 79(1) does not provide for any priority applying inter se for different administration costs and the*

wording of section 97 has been simplified.

79.2 *In terms of section 153(2) of the Insolvency Act the court has the power to order that the expenses incurred in the protection of the assets of an insolvent estate or in carrying out any provision of the Act should not be regarded as part of the costs of sequestration.* The Master may in terms of clause 89(2) disallow costs and in terms of clause 79(1)(f) the court *or the Master* may order that the costs in question does not form part of the costs of liquidation. The Master as a creature of statute has the powers given to him in legislation. Nowhere is the Master authorised to incur costs for the protection of assets. Apparently the Master does not in practice do anything to protect assets vested in the Master, except to appoint a liquidator to protect the assets. *This strange provision in section 153(2) of the Insolvency Act probably does more harm than good and is not repeated in clause 79(1)(f).*

79.3 A commentator complained because he did work for an executor in a deceased estate but could not recover his expenses when the deceased estate was sequestrated. It is submitted that provision should also be made for costs incurred in the administration of a deceased estate before the liquidation of the estate. The Master is used to consider whether costs should be allowed against deceased estates and probably better able to do so than liquidators. Cases where deceased estates are liquidated are rare and it will not burden the Master too much to decide on the allowable costs in the few cases where the Master may be called upon to do so. *Clause 79(1)(h) provides for the payment as cost of liquidation of such costs incurred in the administration of a deceased estate before the liquidation of the estate as the Master may allow.*

79.4 The purpose of the insolvency procedure is to bring about a *concursum creditorum* whereupon the creditors, apart from acknowledged preferences, share on an equal footing. It is submitted that even the limited preference for costs contained in section 98 of the Insolvency Act cannot be justified. If a person is not a preferent creditor for some other reason, there is no justification for the creditor enjoying a preference for costs just because the creditor attached property before sequestration. However, if the attached property is handed over to the liquidator after liquidation, the insolvent estate is saved the costs of attachment. The attachment by the creditor before liquidation would be to the benefit of the insolvent estate and it would be unfair if only one creditor were to bear the costs. *Clause 79(2) provides that costs of execution before*

liquidation are included in the costs of liquidation if the property was under attachment at the date of liquidation. The preference at present provided for in section 98 is abolished.

Clause 80: Application of the free residue

80.1 In 1984 the Commission published a *Report on the review of preferent claims in insolvency* (ISBN 0 621 090840 X, the “Preferences Report”). The Commission recommended that the following claims be paid out of the free residue with preference over other creditors:

- (a) Firstly, the costs of sequestration and administration of the estate. (Report p 18.)
- (b) Secondly, claims by employees, limited to R3 000 per employee, for salary and commission for a period of three months immediately before sequestration, leave pay for a period of 21 days and bonus. (Report p 51 et seq.)
- (c) Thirdly, claims for arrear maintenance in terms of a court order, limited to three months and R1 500 per estate. (Report p 67.)

80.2 It was further recommended that all other preferences at present provided for in sections 96, 98, 99 and 101 of the Insolvency Act be abolished.

80.3 On 6 December 1989 the Cabinet endorsed the view taken by the Cabinet Committee for Economic Affairs that the abolition of preferences could not be supported. Apparently the reason for not implementing the Commission's recommendations was the fact that the abolition of preferences for taxes would have unacceptable cost implications for the State. Although the Commission's other recommendation for the abolition of preferences that did *not* affect the *fiscus* had apparently not been considered, it was decided that the Commission's views on preferent claims in insolvency should be reconsidered in the light of the Cabinet's decision not to abolish preferences in favour of the State. This does not exclude the possibility to make the same recommendations with additional motivation.

80.4 In the Preferences Report (page 6) the Commission held the view that justified preferences

should be based on considerations of fairness. It should be accepted as a general premise that the unsecured creditors should be dealt with on an equal footing except for justified preferences.

80.5 In his thesis *Die rol van 'n concursus creditorum in die Suid-Afrikaanse insolvensiereg* 1990, B H Swart scrutinises the recommendations of the Commission. He agrees that the equal treatment of unsecured creditors is justified. Swart, adduces additional motivation for the abolition of preferences, namely legal economical considerations. He says that the preferences provides for different rules after sequestration than before sequestration and can lead to sequestration for the wrong reasons. Creditors who are prejudiced by the preferences may oppose sequestration.

80.6 Referring to the so-called "Masterbond calamity", John Stewart "Winding-up blues: Masterbond creditors may rue inaction on Law Commission recommendations" (October 1991 **Finance Week** 26) pointed out that it was clear that the imminent insolvency of this magnitude, as well as the countless winding-up orders recorded weekly in the **Government Gazette**, should swing public focus to the question of a review of preferent claims in insolvency. The article deplores the fact that the Commission's recommendations have as yet not been heeded.

80.7 A conference on cross-border insolvencies held in Austria from 17-19 April 1994 identified preferential claims as a major difficulty in arriving at a satisfactory solution to the issue of how best to regulate multinational and cross-border insolvencies.

80.8 The Commission's Working Paper 61 on the *Review of the Law of Insolvency: Statutory provisions that benefit creditors*, published for comment late in 1995, supports the conclusion in the Preferences Report that the mere fact that the State is a creditor, does not justify a preference. The possible loss of State revenue does not outweigh the unfair effect which the existing preferences have on ordinary creditors. There is no logical reason why other creditors of an insolvent estate should be compelled to bear the losses in State revenue in the first place. Existing special rights lead to requests for similar benefits or the extension of existing benefits. According to comments received, the granting of special rights leads to preferred creditors not being as vigorous in enforcing their claims as are other creditors.

80.9 If it is accepted for argument's sake that provisions which confer special preferences cannot

be declared invalid because they are contrary to the rights enshrined in Chapter 2 of the Constitution of the Republic of South Africa 108 of 1996, the provisions of the Constitution still form a basis for arguing for legislative reform. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The Appeal Court pointed out (*Land- en Landboubank van SA v Cogmanskloof Besproeiingsraad* 1992 (1) SA 217 (A) 243E-F) that if special rights according to a statutory provision destroys existing rights of other creditors it amounts to expropriation without compensation. Section 25(2) of the Constitution provides that property may be expropriated only for a public purpose or in the public interest; and subject to compensation. The Preferences Report refers to a strong tendency to treat the State as an ordinary creditor. This applies in particular under modern conditions where the State is increasingly entering into ordinary business transactions. Similar rules preferring the State have been described as "little more than a vestige of absolutism". Rules that manifest the absolute power of the State cannot be reconciled with "a people-centred society" to which the government has committed itself (opening speech by President Mandela before a Joint Sitting of Parliament on 24 May 1994 and by President Mbeki in his opening address to Parliament on 25 June 1999).

80.10 Most commentators on Working Paper 61 (referred to above) and Discussion Paper 66 support a submission that statutory provisions which prefer creditors are undesirable and cannot be justified merely because revenue is utilised for the benefit of the public or because the State or State assisted bodies are involved. The Department of Finance (Inland Revenue) and the National Department of Agriculture oppose this submission without advancing fresh arguments which were not considered in 1984 when the Commission recommended the abolition of most of the preferences. Two of the Commentators support the abolition of preferences but think that it will be difficult to get the preferences abolished in practice.

80.11 It is clear that the case for abolition of the incongruous and over-long list of preferent rankings in the Insolvency Act has not been altered. Moreover, it should be borne in mind that the decision not to abolish preferences in favour of the State was endorsed by the Cabinet of the previous Government before the enactment of the new Constitutions.

80.12 In terms of section 96 of the Insolvency Act funeral and deathbed expenses enjoy a higher

preference on the proceeds of the free residue than liquidation costs. A commentator on Discussion Paper 66 says that funeral and death bed expenses should be preferred if an insolvent estate is possessed of substantial assets to provide for funeral and deathbed expenses. The commentator says that bearing in mind the annual inflation rate, an amount of R300 at present is a ridiculous figure and for that reason a maximum sum should change depending upon an increase of costs. The abolition of the preference for funeral and death bed expenses was motivated in the Preferences Report and the isolated request for the retention of the preference for funeral and deathbed expenses is rejected.

80.13 It is obvious that liquidation costs should enjoy the highest preference. Before an insolvent estate can be distributed the estate must be liquidated, a liquidator must be appointed and the liquidator must comply with the statutory requirements and liquidate the estate. If the persons who have to render services in connection with the liquidation and administration of the estate are not assured of payment the administration of insolvent estates will be seriously impaired. This is why in cases where there are no or insufficient assets to pay these costs, they must be paid by specified creditors. *Clause 80(1) provides that the highest preference on the free residue should be retained for costs of liquidation.*

80.14 As was recommended in the Preferences Report, section 98 of the Insolvency Act which provides for a very limited preference for costs of execution has been omitted. See paragraph 79.4 above.

80.15 A commentator says with reference to the preferences in sections 99 and 101 that the Commissioner for Inland Revenue should not be prejudiced; there should be some penalty for the insolvent not paying the Receiver of Revenue taxes owed to the Receiver and it is suggested that depending on the size of the free residue of the insolvent estate, the Receiver should be entitled to participate as a preferent creditor and be paid first out of the free residue after certain other expenses; the amount that the Receiver of Revenue can claim should be limited to a maximum sum and this sum should be determined on a sliding scale bearing in mind the amount available out of the free residue; if penalties are to be levied by the Receiver of Revenue for the non-payment of taxes, the penalty amount should certainly not rank as preferent but should rank as concurrent. This is the only commentator on Discussion Paper 66 who supports the preference by the Commissioner

for Inland Revenue (as it was known previously) in principle. It is agreed that there is no justification at all for a preference for penalties (as was stated in the Preferences Report). It is acknowledged that the preferences in section 99 for monies deducted or received but not yet paid over may deserve more sympathy than the preference in section 101 for ordinary taxes. *However, it is submitted that the preferences in favour of the Commissioner for the South African Revenue Service and other preferences in section 99 of the Insolvency Act are not justified, except for contributions to certain funds which are discussed below.*

80.16 The Commission accepts that a preference for salaries is essential because an employee has no choice but to render services on a credit basis and a salary is, in most cases, the employer's only livelihood. A preferent claim against an insolvent estate has obvious shortcomings, for instance delays to obtain payment and the unavailability of sufficient assets. This is not an insolvency law matter, and the viability and affordability of a guarantee fund for the payment of claims against the estate of an insolvent employer should be considered by the appropriate labour authorities.

80.17 The Commission proposed in the Preferences Report that no claims other than claims for administration costs payable out of the free residue should enjoy a higher preference than those of employees. A super-preference or secured status by means of devices such as statute-created security interests is not advisable. In addition to the preferences proposed in the Preferences Report, the Bill with Discussion Paper 66 made provision that a claim for severance pay, pay in lieu of notice or compensation for wrongful dismissal in respect of the period of three months immediately before sequestration should also enjoy a preference. It was proposed that a maximum amount should apply to all salary related claims, that claims under the different provisions should rank equally and that the Minister of Justice should have the power to fix the maximum by regulation.

80.18 The essence of proposals by the National Economic Development and Labour Council (NEDLAC) has been enacted as a new section 98A of the Insolvency Act. The wording of some of the proposals was taken from the International Labour Organisation's Convention 173: The protection of Workers' Claims (Employer's Insolvency) Convention, 1992. The new legislation agrees in principle with the preliminary proposals in Discussion Paper 66. *Clause 80(2) to (2E) of the Bill agrees with section 98A of the Insolvency Act except for a few aspects explained below.* The legislation has been approved by Parliament recently and is not discussed in detail.

80.19 Provision is made for salary or wages for a period not exceeding three months due to an employee. Any payment in respect of any period of leave or holiday due to an employee is also preferent if it accrued in the year of liquidation or the previous year, whether or not payment thereof is due at the date of liquidation. Concern was expressed that this provision may lead to the payment of exorbitant leave to the prejudice of other creditors. However, the Minister can limit the amount of the preference. Section 98A(1)(iii) allows a preference for any other form of paid absence "for a period not exceeding three months prior to the date of sequestration of the estate". The intention seems to be to refer to a period immediately prior to liquidation. Elsewhere in the Bill and in the Insolvency Act this intention is expressed clearly (compare clauses 77(1), 80(2)(b) and 101(1)(g) of the Bill). *Clause 80(2)(a)(iii) refers to any payment due in respect of any other form of paid absence for a period not exceeding three months immediately prior to the date of liquidation of the estate.*

80.20 Clause 80(2)(a)(iv) provides for any severance or retrenchment pay due to the employee in terms of any law, agreement, contract or wage-regulating measure. It was suggested that the preference for severance pay should be limited to pay for a period of three months immediately before liquidation. The provision in clause 80(2)(a)(iv) agrees with Convention 173, referred to above, and the maximum amount can be limited.

80.21 In terms of section 98A(5)(a) of the Insolvency Act an "employee" in the section means any person, excluding an independent contractor, who works for another person and who—

- (i) receives, or is entitled to receive, any salary or wages; or
- (ii) in any manner assists in carrying on or in conducting the business of an employer.

It is submitted that an independent contractor is a person who does work for the insolvent but who is not an employee in the legal sense of the word. The presence of a right of supervision and control is one of the most important indications that a particular contract is one of employer-employee. The "or" between paragraphs (i) and (ii) of the definition above is difficult to understand (the similar definition in section 213 of the Labour Relations Act 66 of 1995 uses "and"). Does it mean that an employee need not receive or be entitled to salary or wages to qualify for the preference as long as he or she assists in carrying on or conducting the business of an employee, for instance someone

working for commission? Salary or wages must be due to an employee for a claim in terms of section 98A(1)(a)(i). If it was the intention to cover commission, why was it not done clearly as was done in section 100(1)(b) before its repeal? The intention may be, although it is difficult to think of an example where this will apply, that a person who assists in carrying on or conducting a business has a preferent claim for payment in respect of leave, holiday or other paid absence, or severance or retrenchment pay, in terms of paragraph (ii), (iii) or (iv) even though he or she does not receive or is entitled to receive salary or wages. *It is submitted that the definition of "employee" should rather be omitted and the common law meaning of "employee" should be applied.*

80.22 Section 98A(5)(b) provides that "'salary or wages' includes all cash earnings received by the employee from the employer". The use of "received" is not understood, because an employee will not have a claim for earnings "received". The words "is entitled to receive" in section 98A(5)(a)(i) are preferable. It is a policy question whether benefits such as housing subsidies and the like, which are not paid in cash, should be included in the preference, but the position should be stated clearly. (Contributions to funds are covered separately in section 98A(1)(b) of the Insolvency Act and clause 80(2)(b) of the Bill.) *Clause 80(2C)(a) provides that "salary and wages" includes all cash earnings which the employee is entitled to receive from the employer, but excludes other benefits.*

80.23 A commentator proposed that contributions to pension funds, in particular contributions deducted from salaries, should be preferred before salaries. It is submitted that this proposal is not acceptable and the Bill provides, in line with section 98A of the Insolvency Act, that the preference for salary has preference above contributions payable to funds. A proposal that a preference should be allowed for industrial council expenditure was not accepted. Although it is accepted that employees should be protected, this protection must be limited to what is fair towards other creditors. It may be argued that a preference for contributions for a training scheme or fund can be abused. Unlike section 99(1)(f) of the Insolvency Act, the contributions are not limited to contributions payable "under the provisions of any law" A limit to the amount of the preference will curb abuse. In terms of section 98A(2)(a)(ii) of the Insolvency Act the Minister may determine maximum amounts which shall be paid out in respect of this preference or any single scheme or fund and different amounts may be determined in respect of different schemes or funds..

80.24 The Commission is concerned that authority for the Minister to change legislation without clear guidelines may be unconstitutional (paragraph 4.2 to 4.6 above). The guideline in section 98A(2) of the Insolvency Act, to "ensure that the balance of the free residue is applied in an equitable manner", is vague. *Clause 80(2A)(b) provides that the Minister may amend the amount specified in the Bill by notice in the Gazette in order to take account of fluctuations in the value of money.* The Department of Justice is consulting on the maximum amounts which should be allowed for the different preferences. *It is proposed that the maximum amounts for salary and related preferenced should be left to Parliament to fix when legislation is considered, taking into account the results of the consultation process by the Department of Justice.* The draft Bill in Discussion Paper 66 proposed a limit of R7,500 per employee. The Insolvency Project Committee of the Commission recommends that the preference should be limited to the employee's salary for six months. *As a point of departure clause 80(2A)(a) limits the preferences in respect of a single employee to the smaller of R7,500 or six months' salary.*

80.25 According to section 98A(6) of the Insolvency Act the Minister of Justice may, after consultation with NEDLAC by notice in the *Gazette* exclude from the operation of the provisions of the section a category of employees, schemes or funds specified in the notice-

- (a) in the case of employees, by reason of the particular nature of the employment relationship between the employer and the employees;
- (b) in the case of employees, schemes or funds, by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in this section; or
- (c) in the case of schemes or funds, by reason of the fact that the sequestration of the employer's estate will make it impossible to achieve the objects of the schemes or funds.

80.26 Article 4 of the International Labour Organisation's "Protection of Workers' Claims (Employer's Insolvency) Convention", 173 of 1992 provides that the Convention shall apply to all employees and to all branches of economic activity, unless the competent authority, after consulting the most representative organisations of employers and workers, has excluded specific categories of workers.

80.27 Although the Commission is not aware of any guarantees of the type referred to in paragraph (b), the paragraph contains a clear guideline. *Clause 80(2D) of the Bill provides that the Minister may, after consultation with NEDLAC, by notice in the Gazette exclude from the operation of the provisions of the clause a category of employees, schemes or funds specified in the notice by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in the clause.*

80.28 The phrase in paragraph (a) "by reason of the particular nature of the employment relationship between the employer and the employees" is very wide in ambit and provides little guidance. It is submitted that consultation cannot ensure constitutionality of the delegation of legislative authority. The Legislator probably had in mind the exclusion of classes of persons like the directors of a company or members of a close corporation. Family members or "associates" may also be candidates, but their exclusion will apparently not be "by reason of the particular nature of the employment relationship between the employer and the employees". A person and his or her associates have a relationship but not an employment relationship of a particular nature. It is submitted that exclusion from the preference should be specified in the Bill. *Clause 80(2E) provides that a director of a company employed by the company or a member of a close corporation employed by the corporation is not entitled to payment in terms of the clause.* The consultation by the Department of Justice covers this aspect too. Parliament may consider the results of such consultation when deciding on the exclusions to be specified in the Bill.

80.29 Section 98A(6)(c) of the Insolvency Act provides that the Minister may after consultation exclude schemes or funds from the operation of the clause by reason of the fact that the sequestration of the employer's estate will make it impossible to achieve the objects of the schemes of funds. It is difficult to envisage a case where paragraph (c) should be applied in practice. It follows that no clear guidelines are furnished. *In the absence of clarity on the meaning of this exclusion of a fund, it has been omitted.*

80.30 A commentator submits that the recommendation that the accountants' preference be abolished may result in an accountant refusing to write up books and records and gathering of

financial information which will ultimately be used by the liquidator for the benefit of creditors; for this reason it may be in creditors interests to retain the preference. An accountant may be employed by the liquidator to write up books and records and gather financial information (clause 62(4)(g) of the Bill) and the costs will be preferent as costs of liquidation in terms of clause 79(1)(g). Liens claimed by auditors on books should be dealt with on a case to case basis. In line with section 98A of the Insolvency Act, *it is recommended that the preferences for accountants, auditors and nurses should be abolished.*

80.31 A proposal that liquidators should have the right to pay employees before confirmation of the account is not supported. What happens if it appears subsequently that there was not enough money? A liquidator who pays a salary claim before confirmation does so at his or her own risk. A provision that other creditors should bear any shortfall on preferent salary claims would impose too much of a burden on other creditors. A provision that salary claims should, in the event of a deficit in the free residue, be paid from assets subject to secured claims would be of assistance only if there were such assets and this would seriously prejudice the position of secured creditors. (See par 3.9.5 on page 56 of the Preferences Report.)

80.32 Regarding maintenance in terms of a court order which became due before liquidation, the insolvent estate is liable and arrear maintenance cannot be recovered from the insolvent personally. In respect of these claims the persons who did not receive maintenance are in a position similar to that of an employee who did not receive salary. The maintenance creditor is dependent on the creditworthiness of the debtor for the payment of the claim. The divorced spouse and children usually have little knowledge of the financial affairs of the other spouse or parent. The maintenance creditors are usually dependent on maintenance payments to meet their reasonable requirements. A limit should, however, be placed on the amount of the preferent claim and the period for which a preference may be claimed. The motivation for a preference for maintenance claims is not identical to the motivation for salary claims. The reliance on salary is probably more vital in general than reliance on maintenance claims. It is true, however, that in many cases there would be a similar need for a preference for maintenance than the preference for salary. It would simplify matters if the maximum amount fixed for preferent maintenance claims is the same as for salary claims. *Clause 80(3) provides that the maximum amount for the preference for maintenance claims should be the same as for salary claims, but that salary claims and related claims should rank before*

maintenance claims.

80.33 Paragraph 80.24 of the Explanatory Memorandum to Discussion Paper 66 mentions the view that there is no compelling reason to retain the preference granted by section 102 of the Insolvency Act because the Security by Means of Movable Property Act 57 of 1993 provides the creditor with a sufficient mechanism to secure his or her claim. *Working Paper 61: Statutory provisions that benefit creditors* (paragraph 8.4 on page 29) invited comment on the retention of the preference for a general bond over movables.

80.34 The possibility of abolition of the preference for general bonds provided for in section 102 of the Insolvency Act elicited almost universal opposition and was supported by one commentator only. Commentators say there is a need for such a preference because South African law does not provide for floating charges like the Anglo American law; general bonds are flexible, well known and much used; it is not always possible to comply with the requirements of the Security by Means of Movable Property Act 57 of 1993, especially the requirement to specify and describe the asset in a manner which renders it readily recognisable, for instance for incorporeal property, stock in trade, stock in production, growing trees, crops, other farming assets, or a liquor licence. The case for the retention of a preference (without security) for a bond over movables is convincing.

80.35 The Commission's *Report on the giving of security by means of movable property* (February 1991), which preceded the Security by Means of Movable Property Act, said the distinction between a "general" and "special" mortgage and the argument that the preference provided under section 102 also included immovable property in the free residue, would receive the attention of the Commission in the investigation into insolvency. To translate the problem into practical language - a creditor holds a duly registered special mortgage bond over movables which does not give him security; if a preference in terms similar to section 102 is retained, should the creditor be entitled to a preference in respect of the movables mentioned in the bond only or in respect of all the assets in the free residue? The subsidiary question is whether any bondholder over movables should have a preference over the proceeds of immovable property (whether unencumbered or transferred to the free residue after payment of secured creditors). As an urgent interim response to the decision in *Cooper NO v Die Meester* 1992 (3) SA 60 (A), section 1(3) of the Security by Means of Movable Property Act 57 of 1993 provides that a special notarial bond

other than a notarial bond contemplated in section 1 of the Notarial Bonds (Natal) Act, 1932 (Act 18 of 1932), which was registered before the commencement of the Act confers a preference in respect of the entire free residue.

80.36 After the coming into operation of the Security by Means of Movable Property Act it serves little purpose to register a special bond over movables if there is no prospect that the bond will confer security over movables specified and described in the bond in a manner which renders it readily recognisable. It is advisable to register a general bond in such cases. An attempt to register a bond which confers security may fail because the property is not specified and described sufficiently. It seems as though a general clause in a special bond over movables hypothecating all movable property not specified and described sufficiently, including incorporeal property, will not invalidate the provisions which confer security. The effect of all this is that bonds that do not confer security and hypothecate only a part of a debtors movables will probably be rare. The question remains whether such bonds should confer a preference on a part of the free residue or whether it should confer a preference on the whole of the free residue. It seems inadvisable to enact complicated provisions for these cases. The best solution is that all general notarial bonds over movable property or a general clause in a special notarial bond should confer a preference on the total balance of the free residue after payment of prior preferent claims, including costs of liquidation. The further question is whether the proceeds of immovable property should ever be applied to pay a preferent claim of a bondholder over movables. At first blush it appears to be unacceptable and unfair that a bondholder over movables should be entitled to a preference over the proceeds of immovable property. However, if immovable property is sold before sequestration, the proceeds will after payment of secured claims be available to a bondholder over movables. It is therefor not strange to confer a preference in similar circumstances after sequestration. The present position is that the bondholders over movables are entitled to the proceeds of immovable property after payment of secured claims and other preferent claims. The position is simplified considerably if special rules are not made for proceeds originating from immovable property. The insolvent has a reversionary interest in all his or her assets and the *concursum creditorum* is applied retrospectively to the assets after realisation thereof. The preference should, however, be limited to any maximum amount in terms of the bond. ***Clause 80(3A) provides that any holder of a general bond over movables or a special bond over movables with a general clause, registered in the deeds office, enjoys a preference over the whole free residue after payment of costs and prior***

preferences, subject to any maximum amount in terms of the bond.

80.37 A commentator raises the question whether preferent creditors should be entitled to interest after liquidation. On the one hand it makes sense to award interest after liquidation on claims if the preferences are justified - interest does no more than compensate for a delay in payment. It will encourage liquidators to pay claims as soon as possible if interest is payable. On the other hand preferences should be limited as far as possible. Interest on preferent claims will complicate matters. Because of the commercial nature of a bondholder's claim it makes sense to pay interest after liquidation on such claims. *Clause 80(3A) provides for simple interest on the preferent claims of bondholders from the date of liquidation to the date of payment at the rate of interest prescribed in the Prescribed Rate of Interest Act 55 of 1975 or a higher rate of interest by virtue of a lawful stipulation agreed upon in writing.* In line with the present position no interest after liquidation is payable on other preferent claims.

Clause 81: Costs incurred in respect of legal services

81.1 It was recommended in paragraph 62.9 above that clause 62(4)(g) of the Bill should be retained rather than re-enacting section 73(1) of the Insolvency Act.

81.2 Section 71(3) to (5) of the Insolvency Act agrees substantially to clause 81 recommended in Discussion Paper 66. The main differences are the following. The proviso to subsection (2) which provides for express prior authorisation for contingency fees is acceptable and in line with section 3 of the Contingency Fees Act 66 of 1997. At the end of subsection (3) it is provided that in exceptional circumstances fees should be assessed by the body or person designated under section 5(1) of the Contingency Fees Act instead of the Master provided for in clause 81. This designated person is designated especially to assess fees where a legal practitioner is not a member of a professional controlling body and is acceptable. Subsection (4) is new, but is merely a restatement of the acceptable requirements set out in *Muller v The Master* 1992 (4) SA 277 (T) 285. The essence of section 71(2) to (5) has been re-enacted in clause 81(1) to (3) of the Bill. Section 71(5) provides that the Master may disallow costs if the Master is of opinion that the costs are *incorrect or improper*. Creditors are often not really aware of arrangements in this regard. In order to avoid agreements for excessive fees *clause 81(3) provides that the Master may also*

disallow fees if they are excessive or unnecessary.

81.3 A commentator says that costs incurred in respect of legal services have been covered by clause 62 and should be dealt with there. The arrangement of clauses is not an exact science and difference of opinion is unavoidable. It is submitted that it is acceptable to deal with the powers in clause 62 and allowable costs in clause 81 shortly after clause 79 dealing with costs of liquidation.

81.4 The fact that special rules apply to legal costs can be criticised, but this is not a phenomenon exclusive to insolvency law. Special rules regarding legal costs appear outside insolvency law as well. A proposal that the inclusion of any costs should be subject to an appeal to the Master is unacceptable. It is certainly expected from a liquidator to see to it that costs that he or she agrees to pay are reasonable and according to tariff where applicable. In terms of clause 89(2) the Master may order a liquidator to amend an account if the Master is of opinion that it contains any improper charge or that the liquidator acted *mala fide*, negligently or unreasonably in incurring any costs.

81.5 Section 74 of the Insolvency Act provides that if it appears to the court that any attorney or counsel has, with intent to benefit himself, improperly advised the institution, defence or conducting of legal proceedings by or against an insolvent estate or has incurred any unnecessary expense therein, the court may order the whole or part of the expense thereby incurred to be borne by that attorney or counsel personally. A commentator submitted that the liquidator should also be punished if he or she was the instigator of legal proceedings aimed at benefiting himself or herself. There appear to be sufficient measures to bring to book a liquidator who acts to the detriment of creditors to benefit himself or herself improperly. The liquidator is accountable to creditors and the Master who may, for instance, disallow expenses or reduce a liquidator's remuneration. Comments that the provision should not be limited to the institution, defence or conducting of legal proceedings are justified. *Clause 81(4) has been extended to apply to any legal representative or adviser who with intent to benefit himself or herself improperly has given legal advice or acted with intent to benefit himself or herself.*

Clause 82: Non-compliance with provisions of Act in sale of property of insolvent estate

In *Mookrey v Smith* 1989 (2) SA 707 (C) it was held that if a trustee acted outside his or her

powers under section 82(1) of the Insolvency Act, the action, leaving out ratification, was invalid. In *S A I Investments v Van der Schyff* 1999 (3) SA 340 (N) 353 it was decided that a contract entered into by a provisional trustee without *prior* consent by the Master of the Court was a nullity. An innocent third party must be protected against the consequences of having entered into an unenforceable transaction. *Clause 82(1) does this by providing that if a purchaser is bona fide and if he or she acquired the property for value the sale shall nevertheless be valid, the onus of proving that the purchaser falls within the special provision of the subsection being on the purchaser.*

Clause 82A: Bona fide sale of property in possession of insolvent

Clause 82A re-enacts section 36(5) and (6) of the Insolvency Act. Section 36 deals with goods purchased on credit but not paid. The provisions have been moved to after other provisions dealing with the sale of assets by the liquidator in clause 82.

Clause 83: Persons incompetent to acquire property from insolvent estate

Section 82(7) of the Insolvency Act is intended to give effect to the principle of the common law that a transaction ought not to be recognised where in concluding it a party's interest and duty conflict. The limitations in section 82(7) are too narrow. According to its wording the liquidator can sell property to his favourite person or to a company of which the liquidator is the only shareholder. *Clause 83 widens the net to include all associates as defined in clause 1.* The list of excluded persons must stop somewhere and a proposal that employers or employees of the liquidator or auctioneer should be excluded was not accepted and sales to these persons should be dealt with according to the common law rule.

Clause 84: Banking accounts and investments

84.1 A commentator submits that it should not be necessary for a liquidator to give notice to the Master if a banking account is transferred from one branch to another, as is provided in section 70(3) of the Insolvency Act.

Clause 85

84.2 The submission makes sense. If a liquidator may open a prescribed account or make prescribed investments without any notice to the Master, why may the liquidator not change it to a prescribed account or investment without notice? Section 70(3) is probably a legacy of the wording of section 70 of the Insolvency Act before amendment by Act 6 of 1972 when the trustee had to inform the Master within 14 days of the branch where he or she had opened the banking account and before Act 101 of 1983 when a trustee needed the Master's permission before investing estate funds. If a liquidator is up to mischief regarding banking accounts or investments he or she will in any case not heed the provision to inform the Master of changes. *The provisions of section 70(3) of the Insolvency Act have been omitted.*

Clause 85: Recording of receipts by liquidator

Clause 85 re-enacts section 71 of the Insolvency Act.

Clause 86: Unlawful retention of moneys or use of property by liquidator

86.1 Section 72(3) of the Insolvency Act provides that a person whose estate is sequestrated while the person is indebted to an estate of which he or she was trustee for any sum of money which he or she misappropriated from that estate, shall be for ever incapable of holding the office of trustee, provisional trustee, liquidator, curator dative, tutor dative, curator bonis, or executor dative.

86.2 The Insolvency Act should not regulate the disqualification of persons for appointment to the office of **curator dative, curator bonis, tutor or executor dative**. As regards the disqualification of a liquidator, it is submitted that clause 53 is adequate. *Section 72(3) of the Insolvency Act has not been re-enacted.*

Clause 87: Estate accounts

87.1 Prescriptions regarding the form and content of liquidator's accounts are contained in sections 92, 93, 94, 105 and 107 of the Insolvency Act. It is submitted that these sections are too general. As a result the specific format of accounts submitted by liquidators may vary substantially.

This can lead to a variety of problems, not the least of which is difficulty by the Master in exercising his or her functions. Most accounts are, however, drawn by professional insolvency practitioners and follow a fixed format. Most accounts use the narrative form. Experience with the detailed provisions for the form of accounts in deceased and other estates shows that such an approach has advantages and disadvantages. The provisions provide a handy guide for the details that should be reflected in the accounts and enables the Master to ensure that the accounts contain the necessary information by insisting on compliance with the detailed provisions. Care should, however, be taken that the provisions do not contain unnecessary requirements or are applied rigidly in cases where compliance adds nothing or very little to the purpose of the account, namely, to report on and explain the liquidation and distribution of the estate. It is submitted that more detailed provisions for the form of accounts are desirable. *Except for a few provisions in sections 91 and 92(4) - (5) of the Insolvency Act, the provisions set out in Schedule 1, Form D (Form and contents of accounts) replace sections 91 - 94 of the Insolvency Act. The Master may in terms of clause 87(2), as he deems fit, insist on strict compliance with these provisions.*

87.2 A commentator submits that in order to keep creditors informed and to involve them in the administration process, the liquidation and distribution account which is lodged with the Master should simultaneously be sent to all known creditors; the cost thereof must be paid out of the estate; this will give creditors the opportunity, before the Master proposes that the account be confirmed or lay open for inspection, to raise objections which may be taken into account by the Master; this will expedite confirmation of the account; the costs for the estate is justified by the faster finalisation of the estate; it would also lighten the responsibility of the Master to inspect the account and comment on it; the careful and at times unnecessarily critical dissection of liquidation and distribution accounts by the Master, which delay the finalisation of estates, can be avoided in this way; the only duty of the Master should be to see that fees payable to the Master has been calculated correctly and paid.

87.3 In *Wilkens v Potgieter* 1996 (4) SA 936 (T) Judge Roux said that there was a clear duty on the Master to study the relevant documents and correlate them with the draft account produced by a trustee. Only if the Master was satisfied should he or she permit an account to be advertised and to lie for inspection.

87.4 It is agreed that the Master should not have a duty to examine each account critically. If circumstances permit or require it, the Master should have the right to investigate an account critically, even in the absence of objections by creditors. However, the proposal that accounts should be lodged with creditors is not supported. Proved creditors receive personal notice when an account is advertised in terms of clause 88 and it is not necessary to send copies of all accounts to creditors in order to lessen the Master's burden. The proposal is impractical, will probably not expedite confirmation of accounts and the costs will not be justified. If there is no duty on the Master to examine all accounts critically, there is no need that vouchers and proved claims should accompany all accounts lodged with the Master. *Clause 87(9) and items 3.4 and 6.1 of Schedule 1, Form D, require vouchers or proved claims upon the request of the Master and not as a matter of course.*

87.5 In terms of section 109(1)(b) of the Insolvency Act the trustee must send to each proved creditor a copy of the affidavit in support of an application for extension to lodge an account. Experience has shown that having to send creditors copies of affidavits for extensions is a waste of time and money and seldom provokes response from creditors. It is submitted that the Master should be the sole arbiter as to whether an extension should be granted. Creditors should, however, be kept informed of progress with the administration of the estate, even if costs are involved. It will encourage liquidators to lodge accounts in time if copies of successful applications for extension must be sent to creditors. *The requirement in section 109(1)(b) of the Insolvency Act has been omitted. Clause 87(5A) provides that if the Master extends the period for the lodging of an account the liquidator must inform proved creditors of the extension by personal notice and enclose a copy of the affidavit in support of the application for extension.*

Clause 88: Copies of liquidator's account to be open for inspection

88.1 Section 108(2) of the Insolvency Act refers to the giving of notice in the manner prescribed by section 40(3)(b) and (c), by notice in the **Gazette** and published in one or more newspapers circulating in the district where the insolvent resides or his principal place of business is situated, simultaneously in English and Afrikaans. In terms of section 406(3) of the Companies Act the liquidator must give due notice in the **Gazette** and transmit by post or deliver a similar notice to every creditor who has proved a claim against the company. The notice to proved creditors works

in practice but not the many advertisements. Newspaper advertisements also have cost implications. Advertising in the **Gazette** only and circularising proved creditors usually cost less and experience shows it is far more effective than press advertisements. (See paragraph 1.34 above.) The requirement of newspaper advertisements often causes delays in respect of the confirmation of accounts. In line with section 406(3) of the Companies Act, *clause 88(2) provides for notice in the Government Gazette and personal notice to creditors that accounts will lie open for inspection.* There is no provision at present that the notice must be given a certain time before the account lies for inspection. A requirement that notice should be given, say 14 days before the account lies open for inspection, will complicate matters and will cause delay. It is obvious that notice must be given before the period of inspection starts so that the notices will be given at least 14 days before the period expires.

88.2 There is a practice for the Master not to require advertisements if a supplementary account deals with interest earned on current accounts or investments which were not included in the final account. There seems to be no difference in principle between additional interest or any other additional funds, provided it is clear whether the additional assets are subject to rights of a particular secured creditor. No person can be prejudiced by a lack of notice if the distribution agrees with the distribution in an advertised account. It is not advisable to embody this practice in the Bill.

88.3 In *Wilkens v Potgieter* 1996 (4) SA 936 (T) Judge Roux said that there was a clear duty on the Master to study the relevant documents and correlate them with the draft account produced by a trustee. Only if he is satisfied should the Master permit an account to be advertised and to lie for inspection. The remark by the judge appears to be obiter (not part of a binding precedent) and is not motivated with reference to the provisions of section 108 of the Insolvency Act dealing with advertisements of the account. Clause 88 provides, like section 108, that as soon as possible after the account has been submitted to the Master it shall be sent to the Magistrate. No attempt has been made to clarify this issue in the Bill as the Master should merely have a discretion to raise queries on the account and hard and fast rules are inadvisable. See paragraph 90.2 below.

Clause 89: Objections to liquidator's account

89.1 A commentator says that there have recently been disputes as to whether an objector is

entitled to file his objection before an account commences to lie for inspection. It is easier for a creditor or other person to object to an account if it is not necessary to wait for the account to lie open for inspection before an objection is lodged with the Master. However, a creditor will under the Bill receive personal notice and this should not be too much of a problem. It is confusing if an account is regarded as such before it is advertised. Before then it is merely a draft account. **Clause 89(1) provides that an objection may be lodged at any time after the commencement of the period for inspection until the account is confirmed.**

89.2 Section 111(2) empowers the Master to give a direction in connection with the account *apart* from any objection. ***There has been strong support for the retention of the present position and clause 89(2) retains the Master's right to intervene of his or her own accord.***

89.3 Sections 111(2)(a) and section 151 of the Insolvency Act contain the phrase "person aggrieved". The phrase standing alone has little or no definitive content and is generally acknowledged to be of wide import. Examples of cases in which the phrase has been given a restricted meaning (mostly in reference to insolvency and bankruptcy proceedings) are given in the majority judgement in ***Francis George Hill Family Trust v South African Reserve Bank*** 1992 (3) SA 91 (A) 104. The Appellate Division endorsed the restricted meaning. Judge of Appeal Hoexter held (at 102) that "the tenor of decided cases in South Africa points . . . to the general conclusion that the words "person aggrieved" signify someone whose legal rights have been infringed - a person harbouring a legal grievance". It is submitted that it is unnecessary to attempt any sort of comprehensive definition of what, within the meaning of sections 111(2)(a) and 151, may be said to constitute a "person aggrieved". It is, however, uncertain whether the liquidator may bring the Master's decision under review by the court. In ***Friedman's Trustee v Katzeff*** 1924WLD 298 the trustee was held not to be "a person aggrieved" under section 151, but the contrary view was expressed in ***De Hart v Klopper and Botha*** 1969 (2) SA 91 (T) 99 - 100. In ***Wynne & Cornish v Mitchell*** 1973 (1) SA 283 (E) 292 the reasoning in the ***De Hart*** case was preferred to that in the ***Friedman*** case. It seemed to Judge Addleson that a trustee was eminently, in his representative capacity, a "person aggrieved" by a decision of a presiding officer to admit a claim which the trustee contested in that capacity. The weight of authority therefore supports the view that the liquidator could be a "person aggrieved". This cannot be criticised. ***Clause 89(3) provides expressly that a liquidator can review a decision by the Master as a "person aggrieved".***

89.4 Section 407(4)(a) of the Companies Act corresponds to section 111(2)(a) of the Insolvency Act. In *South African Bank of Athens v Sfier* 1991 (3) SA 534 (T) 536 the Full Bench agrees that the procedure, although called a review, is not a review in the strict sense and that the applicant is not limited to the material placed before the Master. It is not a review, and not even an appeal in the wide sense, limited to the facts which had been before the Master. It is indeed a fresh application where new facts and in appropriate cases also oral evidence will be allowed. This decision was followed in *Fouries Poultry Farm v Kwanatal Food Distributors* 1991 (4) SA 514 (N). These extensive powers of the court are not apparent from a reading of section 111(2)(a) of the Insolvency Act. Section 23 of the Trust Property Control Act 57 of 1988 provides as follows:

Any person who feels aggrieved by an authorisation, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the Court for relief, *and the Court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.*

With a view to eliminating any uncertainty in this regard clause 89(3) spells out the court's wide power in similar terms.

Clause 90: Confirmation of liquidator's accounts

90.1 In *Gilbey Distillers & Vintners v Morris* 1991 (1) SA 648 (A) 659 the Appellate Division expressed doubt whether a confirmed account could be reopened on the ground of fraud or *iustus error* after a dividend had been paid under it (cf *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) 324). The appropriate remedy appears to be an action for damages on the ground of fraud or negligence and not an application to reopen the account. (In the sequence to this case reported as **Kommissaris van Binnelandse Inkomste v Willers** 1999 (3) SA 19 (SCA) the action failed mainly because of lack of proof of negligence).

90.2 In *Wilkens v Potgieter* 1996 (4) SA 936 (T) dividends had been paid in terms of the first account. Judge Roux said that there was a clear duty on the Master to study the relevant documents and correlate them with the draft account produced by a trustee. Only if the Master is satisfied should he permit an account to be advertised and to lie for inspection. Judge Roux held that the account was not “duly confirmed” because the provisions of section 45(3) of the Insolvency Act

were not observed in reducing a claim. The court rejected a special plea that section 112 of the Insolvency Act precluded a claim to have the liquidation and distribution account amended. It is respectfully submitted that the setting aside of the confirmed account was wrong. In *Gilbey Distillers & Vintners (Pty) Ltd v Morris* 1991 (1) SA 648 (A) at 656c-656E the appeal court gave the following exposition of the meaning of “duly confirmed”:

The account must have been open for inspection by creditors under section 108; objections (if any) must have been dealt with in terms of section 111; and confirmation must have taken place by the Master (consequent upon him honestly applying his mind to the matter) and not, say, by an imposter. But the fact that the confirmation is flawed by reason of it having been procured by the fraud of a creditor or the trustee or because the Master was ignorant of facts material to his decision cannot detract from the account having been duly confirmed in the sense envisaged by s 151. To uphold the argument that it does would result in the provision for finality in s 112 being rendered largely inoperative.

It is submitted that it would result in section 112 being rendered largely inoperative if a confirmed account could be set aside merely because it did not agree with documentation in possession of the Master.

90.3 Intervention by the legislature might impede any further development by the courts to meet practical needs. However, some clarification seems to be advisable. *Clause 90 provides that notwithstanding mistakes in an account the confirmation of an account by the Master is final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it.*

90.4 In *Kilroe-Daley v Barclays National Bank* 1984 (4) SA 609 (A) 627 Acting Judge of Appeal Galgut referred to the possibility of submitting a supplementary account after the first account had been confirmed:

It may well happen, after the first account has been confirmed, that additional facts come to the liquidator's notice. If, as is my view, the whole account is, after confirmation, final, the liquidator cannot reopen it. This would not preclude him from, in his later account, reducing or increasing a creditor's claim or increasing or reducing a creditor's contribution. He will probably have to make the necessary adjustments in the amounts to be paid or collected.

The Insolvency Act does not provide for supplementary accounts where, for example, additional

facts come to the liquidator's notice or where a mistake in the confirmed account is discovered. In the event of a creditor's claim being reduced in a supplementary account, it would be extremely difficult to recover any dividend paid out in terms of the previous confirmed final account. It is also uncertain whether the liquidator would in principle be entitled to recover any dividend so paid out by merely submitting a supplementary account.

90.5 In the light of the decision in *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) 333 there is a possibility that the liquidator will be able to recover a dividend on the basis of enrichment. The court considered an exception to a claim on the ground that the claim was based on the *condictio indebiti*, alternatively enrichment, and that no common law action was available to an unpaid creditor of a company against shareholders who had received more from the dissolution of the company than they would have received had the creditor been duly paid. Judge of Appeal Botha held that the plaintiffs were in principle entitled to make such a claim. In *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) it was confirmed that an amount incorrectly paid by a liquidator (in this case before confirmation of an account) can be reclaimed on the basis of enrichment.

90.6 It is submitted, in order not to stunt development, that the question as to whether a dividend paid out in terms of a confirmed account could be recovered by submitting a supplementary account, and recovery on the basis of enrichment, should not be laid down by statute.

Clause 91: Distribution of estate and collection of contributions

Clause 91 re-enacts section 113 of the Insolvency Act.

Clause 92: Liquidator to produce acquittances for dividends or pay over dividends to Master

92.1 In terms of section 114(1) of the Insolvency Act the trustee shall without delay lodge with the Master the receipts for dividends paid to creditors. In practice the Master insists on dividend receipts being lodged within the two month period after the confirmation of the account (section 114(2)). This is not practical as section 114(2) reads that dividends must be paid within two months. Dividend receipts are the paid cheques and even if the trustee arranges to obtain bank

statements on the date two months after the confirmation of the account, he cannot lodge the paid cheques within the two month period. *Clause 92(1) allows one month after the period of two months during which dividends are to be paid out for the lodgement of dividend receipts.*

92.2 A commentator points out that the Master has a discretion to accept paid cheques in lieu of receipts. There is no reason why the Master should ever refuse it. According to insolvency practitioners the theft of estate cheques is rife. Section 114 of the Insolvency Act does not provide for proof of electronic transfer instead of a paid cheque. It may be a problem in the case of electronic transfers to certify that an account has been credited, but most banks will be able to furnish a statement to indicate that the bank of a beneficiary has been instructed to credit a specified account with the electronic transfer of a specified amount. Electronic transfers and proof thereof appear to be at least as reliable as paid cheques and there is no reason why proof of electronic transfer should not be accepted instead of a receipt. *The prescribed forms for the proof of claims (Schedule 1 Form B item 8 and Form C item 9) make provision for details of the bank, branch and account number if a creditor prefers to be paid by electronic transfer. The form for the distribution account (Schedule 1, Form D item 6.2(b)) also makes provision for the bank details of the creditor.* It was also suggested that an affidavit by the liquidator that creditors had been paid should be sufficient. Such a proposal should only be considered if the lodging of all vouchers is dispensed with. *Clause 92(1) provides that the Master shall in the place of a receipt by a creditor or a paid cheque accept a statement by a bank that the bank of the creditor has credited or has been instructed to credit the account of the creditor with the amount of the dividend.*

92.3 A commentator submits that the Master creditors should receive interest on monies paid into the Master's Guardian's Fund on their behalf and that the Master should not charge 5%. Section 88 of the Administration of Estates Act 65 of 1966 provides that interest is payable on monies in the Master's Guardian's Fund payable on account of any minor, lunatic, unborn heir or any person having an interest therein of a usufructuary, fiduciary or fideicommissary nature. In terms of Schedule 3 to the Insolvency Act and Schedule 2 Tariff C to the Bill the Master is entitled (eventually on behalf of the State) to a commission of five percent on moneys paid into the Guardian's Fund on account of creditors. There is no sympathy for a creditor who does not promptly cash a dividend cheque. It is fair that the Master should be paid a handling fee in these cases. The liquidator must pay the dividends immediately after confirmation and dividends are paid

over to the Master's Guardian's Fund if they have not been paid at the expiration of two months from confirmation. If it is the liquidator's fault that a creditor did not have sufficient time to cash a cheque the liquidator can be held liable if the amount involved it worth while. The proposal that the Master's 5% commission should be abolished and that creditors should receive interest on funds deposited in the Guardian's Fund is not supported.

Clause 93: Surplus to be paid into Guardian's Fund

A commentator questioned the position that interest is not earned on surplus amounts deposited on behalf of insolvents. Cases where a surplus is deposited for an insolvent is exceptional and it is fair that the insolvent should receive interest on a surplus. *It is recommended in Schedule 3 to the Bill that section 88 of the Administration of Estates Act 66 of 1965 should be amended to provide for interest on surplus monies in an insolvent estate.*

Clause 94: Contribution by creditors towards cost of liquidation

94.1 In terms of section 106(c) of the Insolvency Act and *Ongevallekommissaris v Die Meester* 1989 (4) SA 69 (T) it is most unlikely that a preferent creditor would ever have to contribute towards costs. A secured creditor who has relied solely on security in terms of section 89(2) of the Insolvency Act, is liable to contribute in terms of section 106(a) if all creditors are secured creditors who rely on their security. A preferent creditor, on the other hand, is liable to contribute only in the exceptional circumstances mentioned in section 106(c), namely, where there were concurrent creditors who had proved claims and all of whom had withdrawn their claims, in which case a preferent creditor would be liable for only those liquidation costs incurred after the last concurrent claim was withdrawn. The Explanatory Memorandum with Discussion Paper 66 proposed in paragraph 94.5 that unsecured preferent creditors should not be required to contribute towards cost of liquidation. Paragraph 94.7 of the Explanatory Memorandum proposed that a secured creditor who relied solely on security should not be required to contribute towards costs unless the creditor applied for liquidation.

94.2 Andre Borraine and Kathleen van der Linde "The draft Insolvency Bill - an exploration" 1999 *TSAR* 52 say where an unsecured preferent creditor applies for liquidation the creditor will not be

Explanatory memorandum
Clause 95

liable to contribute. It may then happen that no concurrent claims are proved and nobody will be liable to contribute towards costs. Two commentators propose that preferent and secured creditors should be liable to contribute if no other creditors are liable.

94.3 The Bill provides for the abolition of most preferences because preferent claims should be limited to exceptional cases. It makes no sense to prefer a creditor when there is a distribution, but to hold that creditor liable for costs if there is a shortfall. A secured creditor's very reason for relying on security is to distance himself or herself from the free residue and its application in defraying the cost of liquidation. In terms of clause 75(4) secured creditors who have proved claims are liable to pay any deficiency resulting from the cost of maintaining, conserving and realising the security. In terms of clause 94(a) a secured creditor who applied for liquidation is liable for contribution on a shortfall on his secured claim, whether or not he proved a claim or relied on his or her security. In terms of clauses 3(3)(b) and 4(3)(c) of the Bill the applicant must lodge security for all costs which are not recoverable from the proceeds of assets or creditors of the estate. Preferent or secured creditors who rely on their security are at present and will according to proposals by commentators be liable for contribution in exceptional circumstances. *Exceptional cases should be catered for by security for costs in terms of clauses 3(3)(b) and 4(3)(c) and clause 94 of the Bill provides that non-applicant secured creditors who rely on their security and unsecured preferent creditors should not be liable for contribution.*

94.4 If the creditor's liability to contribute expires when the liquidator disputes the claim, it is possible that the liquidator could "dispute" the claim as a favour to the creditor. Liquidators should not be tempted to reduce or disallow a claim as a favour to a creditor in order to free the latter from paying contribution. *Clause 94(d) provides that a creditor remains liable for contribution until the time when a claim is reduced or disallowed.*

Clause 95: Enforcing payment of contribution

95.1 A commentator proposes that the simple procedure to collect contribution in clause 95(1) should be expanded to include any amount payable to an estate. Although problems are experienced by liquidators to collect money, the proposal is too drastic. The provision in clause 408 of the

Companies Act that confirmation of the account "shall have the effect of a final judgment" does not mean that confirmation of the account has the effect of a final judgment in respect of amounts collectable in terms of the account. (*Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) 627D-E; *Standard Bank of South Africa Ltd v Master of the Supreme Court* 1997 (2) All SA (C).) Liquidators should collect amounts due to them in the ordinary manner.

95.2 Clause 95 re-enacts section 118 of the Insolvency Act.

Clause 96: Rehabilitation

96.1 Section 124 of the Insolvency Act has been simplified. Some changes have also been effected.

96.2 Section 124(3) refers to a period of six months if no claims have been proved against an estate. The fact that no claims have been proved against an estate is not necessarily an indication that the debtor is entitled to rehabilitation at an early stage. It may in fact be an indication that the debtor has disposed of all his assets and creditors do not wish to run the risk of being liable to pay a contribution. *Clause 96(1)(c) incorporates cases where no claims have been proved so that the normal period or four years applies to these cases.*

96.3 The Bill published with Discussion Paper 66 provided that a person convicted of specified offences may apply for rehabilitation five years after conviction. Andre Boraine and Kathleen van der Linde "The draft Insolvency Bill - an exploration" 1999 *TSAR* 54 point out that should the conviction relate to a prior insolvency it may happen that the insolvent will be entitled to apply for rehabilitation very early on, even before any account has been confirmed. A commentator also raised this point. *Clause 96(1A) provides that a person convicted of certain offences may not apply within five years after his conviction and such a person is also subject to the other waiting periods.*

96.4 Commentators submit that an insolvent should be entitled to apply for rehabilitation immediately after a composition has been accepted, without the requirement that the composition provides for not less than 50 cents for every one rand of proved claims; arrangements with creditors

benefit the economy as a whole; it is inequitable that a company can be discharged from debts without a limit on the dividend to creditors and not an individual debtor. The setting aside of a company liquidation order differs from rehabilitation by an insolvent. Rehabilitation entails that the insolvent is supposed to have seen the errors of his or her ways and is fit to once more be let loose on commercial society. Company law differs from the insolvency of individuals in so far as provision is not made for the rehabilitation of a company and personal liability is limited. However, it is agreed that compositions should be encouraged. The limit of 50 cents in the Rand having been paid is arbitrary and there is probably little correlation between the percentage paid to creditors and the fitness of the insolvent to be rehabilitated. *Clause 96(1)(b) provides without a precondition regarding the percentage of the dividend that the court has a discretion to rehabilitate an insolvent immediately if the requisite majority of creditors has accepted a composition.*

96.5 At present there is no provision for the giving of notice of intention to apply for rehabilitation to creditors, and the notice in the *Gazette* constitutes the only notification to them. *It is submitted that there can be no objection against expecting of the insolvent to give specific notice of his intention to his known creditors (clause 96(3)(a)(ii)).* In this way "secret" rehabilitations would be countered. In terms of the normal rules of the law of civil procedure, when applying for rehabilitation, an insolvent will have to indicate by way of affidavit that he or she has complied with the provisions of the Insolvency Act. It is submitted that the only practicable criminal sanction for failure to comply with clause 96(3)(a) is perjury if it appears that the insolvent intentionally omitted certain known creditors from the affidavit.

96.6 Clause 96(3)(a)(ii) provides for notice to the liquidator *if there is one*. Although clause 32 provides that a liquidator should always be appointed, the liquidator may have died after finalising the estate and it is usually not worth while or appropriate to appoint a new liquidator merely to deal with rehabilitation. *Clause 96(3)(a)(i) dispenses with notice to creditors if provision has been made to pay proved creditors in full.*

96.7 *Clause 96(3A) provides that the Minister may amend the amount in subclause (3) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money* (see paragraph 4.2 to paragraph 4.6 above).

96.8 *Clause 96(4) requires of the insolvent to state in the notice to creditors the estimated value and reflect full details of the assets at the time of the application.* It is submitted that this would prevent creditors from unexpectedly being confronted with the rehabilitation of the insolvent while still investigating possible assets and would ensure that a creditor is offered the opportunity to oppose the grant of an application for rehabilitation.

96.9 Clause 96(5) corresponds to section 126 of the Insolvency Act. *The phrase "and his own as well as his spouse's contribution to his household" is, however, a new insertion.* In *Ex Parte Palmer and Palmer* 1961 (1) 602 (W) 603, after referring approvingly to a principle endorsed in a number of decisions, namely that "it is the duty of the husband and wife, both according to their means, to contribute towards the support of the marriage", Judge De Wet expressed himself as follows:

It seems to me that a Court considering an application for rehabilitation will usually consider whether the means of the applicant are such that he should be ordered to make a further payment for the benefit of his creditors. In considering this question it is clearly relevant to consider the whole of the income accruing to the household. To take a simple example, if the wife and the children are self-supporting, the husband's income is required only for his own support, and it follows that if some income accrues to other members of the family the drain on the husband's income is *pro tanto* reduced.

It is submitted that an insolvent should be compelled to provide information in respect of the insolvent's own as well as a spouse's contribution to the household.

96.10 A commentator submits that more stringent conditions be introduced relating to the reporting by the liquidator in terms of clause 96(6) in respect of the question of whether the insolvent has or appears to have contravened any provisions of the Act or any other offences including properly completing the statement of affairs and such other facts which would warrant the Court to refuse, postpone or qualify the rehabilitation. The commentator adds that clause 96(6) should also compel the liquidator to submit the report not only to the Master, but also to the Court. It is submitted that the concerns expressed by the commentator will be taken care of by the way in which these matters are dealt with in practice. Clause 98 places an obligation on the liquidator to report on the matters stated there. The Master will be aware of contraventions and should deal with it in his or her report if the liquidator fails to do so. If the Master receives a report from the liquidator the Master will submit a copy to the court or inform the court of the contents thereof.

Clause 97: Opposition to rehabilitation or refusal of rehabilitation by court

97.1 Section 127(1) of the Insolvency Act provides that the Master shall report on an application for rehabilitation *upon the day fixed for the hearing*. This provision is impractical. The Master issues a written report as soon as the report has been finalised. As was suggested by a commentator, it is advisable to inform the applicant as soon as possible of the content of the report. Ambiguities pointed out in the report may be cleared up or the applicant may even decide to withdraw the application. *Clause 97(1) provides that the Master shall report to the court and furnish a copy of the report to the applicant or the applicant's attorney.*

97.2 Although some form of sanction is necessary with a view to inducing the insolvent to cooperate, it need not necessarily be a criminal sanction. The inception of the Decriminalization Act 107 of 1991 has begun a process whereby the South African legal system is being ridden from statutory offences that do not belong in the criminal courts. In keeping with this development it is submitted that a number of the strictly "technical" offences in the Insolvency Act should be replaced by alternative sanctions. Although the stigma of being insolvent is not as intense as it used to be in the past, a person nevertheless wants to be rehabilitated as soon as possible. *Clause 97(2) provides that the insolvent's intentional obstruction of the administration of the insolvent estate by any failures listed in clause 97(2)(a) - (e) delays rehabilitation until the expiration of a period of 10 years after liquidation.*

97.3 A commentator proposes that a copy of clause 97(2) should accompany the notice sent to creditors in terms of clause 96(3)(a). This proposal is impractical. It would almost always be the Master or the liquidator who would initiate the issue of a certificate. The probability that creditors would make information available if they receive a copy of the provision seems negligible.

97.4 A commentator proposes that clause 97(2) should not be peremptory, but should empower the court hearing the application to exercise its discretion as to whether or not an order for rehabilitation should be granted. There will clearly be degrees of culpability in terms of clause 97(2) and it appears somewhat undiscerning to delay rehabilitation by 10 years in all cases where the

Master issues a certificate. There should, however, be a real danger for an insolvent being penalised and a wide discretion for the court is not desirable.

97.5 Blatant disregard after liquidation can be judged with relative ease by the Master and is dealt with in clause 97(2). In addition, in terms of clause 97(3) rehabilitation is dependent upon the insolvent's previous history and is not a right to which an insolvent is entitled. (*Ex parte Hittersay* 1974 (4) SA 326 (SWA).) The question is whether the insolvent ought to be allowed to trade with the public on the same basis as any other honest man or woman. That depends entirely on how the insolvent conducted his or her trade before insolvency. If the insolvent conducted it in a negligent manner, or so as to deceive others, he or she is not a person who ought to be rehabilitated until it is clear that he or she intends to adopt better methods. Rehabilitation ought to be withheld, or at any rate it ought to be postponed for such a time that the insolvent will receive a severe lesson as to the necessity of trading honestly. (See for instance *Ex Parte Kruger* 1982 (1) SA 754 (W) 758.)

97.6 A proposal that the liquidator should receive notice of rehabilitation makes sense. The question is whether it is practicable and worth the hassles to require the registrar to send a copy of the order to the liquidator. There may perhaps not even be a liquidator and the registrar will probably not have the address. Similarly the question arises whether it is worth the trouble to require the Master to send a copy of the order to the liquidator. Liquidators do not experience problems at present because they do not receive copies of rehabilitation orders and the proposal that they should receive notice is not supported.

Clause 98: Rehabilitation by effluxion of time

98.1 Three commentators submit that the period of ten years should be reduced or that a different period should apply to insolvents who have been sequestrated more than once. The period of 10 years is somewhat arbitrary as would be any other period substituted for it. The only guideline is a vague feeling about what a proper period should be. Other countries have reduced their periods for "automatic" rehabilitation. Conceptually it makes sense to provide for different periods for different scenarios. However, simplicity is desirable in this regard and it is advisable for a simple rule that rehabilitation takes place after a fixed number of years unless there is a court order. In the light of the limited comments in this regard and the fact that the 10 year period in the present

legislation has become relatively well-known, no shortening of the period is proposed.

98.2 Orders that delay automatic rehabilitation are rare. It is important that the Master and liquidator should be aware of such orders. *Clause 98(2) provides that the registrar of the court shall send a copy of an order that delays rehabilitation to the Master and every officer charged with the registration of titles in immovable property. The Master must forward a copy of the order to the liquidator.*

Clause 99: Effect of rehabilitation

99.1 In terms of section 129(1)(b) of the Insolvency Act debts that arose out of any fraud on the part of the insolvent are not discharged. The term "fraud" in this section probably bears the same meaning as when used in connection with the *actio Pauliana*, namely not necessarily fraud in the criminal sense of the word. If the continuation of debts that arose out of fraud on the insolvent's part is justified, there should be no objection to extending this principle to offences stipulated in the Insolvency Act. In terms of clause 101(1)(e) it is an offence to give false information with the intent to obtain credit or the extension of credit. According to clause 101(1)(c) it is an offence for a debtor to conceal his or her insolvent status when asked about financial standing or credit worthiness. Andre Boraine and Kathleen van der Linde "The draft Insolvency Bill - an exploration" 1999 *TSAR* 55 point out that clause 101(1)(c) cannot relate to a debt which arose before the present liquidation. It can, however, relate to a debt which arose before a previous liquidation. *Clause 99(1)(b) provides that rehabilitation does not discharge debts which arise out of the commission of an offence referred to in clause 101(1)(e) or clause 101(1)(c) in respect of a previous liquidation.*

99.2 The decision of the English Court of Appeal in *Hollington v Hewthorn* 1943 KB 587 is the leading authority for the rule that a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he or she was convicted. The rule has been the subject of a great deal of criticism, but in South Africa there has been no direct statutory reform in this regard. In the context of insolvency law creditors would therefore themselves bear the burden of proving the necessary facts on a preponderance of probabilities. Creditors might consequently fail to recover debts from the rehabilitated insolvent.

The interests of creditors are met by the provision in clause 99(3) that evidence of convictions on offences contemplated in clause 99(1)(b) is admissible in subsequent civil proceedings as prima facie evidence that the insolvent committed any of the offences in question.

99.3 In terms of section 129(2) of the Insolvency Act an insolvent is upon rehabilitation reinvested with his or her estate if no claims were proved against the estate within six months after sequestration. The Bill published with Discussion Paper 66 proposed that a rehabilitated insolvent should not be reinvested with assets not reflected in the statement of affairs or in the affidavit in support of rehabilitation. *The omission of section 129(2) of the Insolvency Act and of the proposal in the Discussion Paper is explained in paragraph 11.2 above.*

Clause 100: Penalties for unlawful inducement to accept compromise or in connection with rehabilitation

Clause 100 re-enacts sections 130 and 131 of the Insolvency Act.

Clause 101: Offences

101.1 A number of commentators are concerned because insolvency crimes are in their view not punished adequately. One says that although there are adequate measures to deal with contraventions and hold enquiries, in practice the procedures are far too costly to creditors. Another commentator submits that white collar crime is probably the most insidious and damaging and should be combatted with gusto. A large corporation says it funded an enquiry in terms of section 417 and 418 of the Companies Act. As a result of the enquiry it became apparent that criminal offences had probably been committed. These offences were of a serious nature and constituted fraud on creditors. Several years have passed since the Commissioner's report was received and transmitted to the Master of the High Court and although the matter was investigated by the Office for Serious Economic Offences, prosecution proceedings have not yet been commenced. They are advised by liquidators and trustees that even though they report contraventions of the Act to the Master, usually no further action is taken against the insolvent. They suggest that where contraventions are reported to the Master, he or she should be obliged to report these to the Attorney-General who should be obliged to prosecute if there is a prima facie case. They

understand that in Chile the Courts impose harsh penalties for insolvency contraventions with the result that the insolvency contraventions are treated with utmost seriousness. In other countries there are special insolvency courts where the same judge tries the offence of the same insolvent on different occasions and thereby becomes aware of the pattern of conduct so that far from the offence being perceived as a mere technical omission, it is perceived to be part of a pattern of defrauding creditors or that the insolvent has a reckless disregard for obligations. They therefore request an investigation of the amendment of the Act to ensure increased criminal sanctions (whether by the imposition of compulsory meaningful fines or prison sentences or otherwise) so that the contraventions of the Act are treated seriously, in that they could be manifestations of fraud, and the fact that creditors risk not being paid their legitimate undisputed claims affects the whole fabric of commercial relations, adding to the deterioration of commercial morality in our society.

101.2 In the light of the rejection of specialised insolvency courts by the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court it will serve no purpose to pursue the matter in this paper. Compulsory fines or prison sentences do not appear to be a viable option. Liquidators are disheartened by the perception that their investigations are a waste of time. In paragraph 95 above it is stated that one of the reasons for delays in prosecuting persons in connection with insolvency offences is that the offences are reported to the Master who reports them to the Attorney General who refers them to the Commercial Crime Unit of the South African Police Services. In line with comments by commentators clauses 36(2), 65A(5), 69(2), and the amendments of clauses 65A(5) and 74B of the Magistrates' Court Act in Schedule 3 provide for reporting of contraventions directly to the Commercial Crime Unit of the South African Police Services. To avoid delays when affidavits are called for, clause 36(2) provides that the report on contraventions should be in affidavit form. It seems that sufficient machinery is available and that the problem lies more with the application of available measures. The National Director of Public Prosecutions has been informed of the concerns of commentators and the proposals for reform. President Mbeki announced in his opening address to Parliament on 25 June 1999 that urgent work was proceeding to determine the possibility of establishing special commercial crime courts as soon as possible as well as the gathering of the necessary complement of intelligence officers, investigators and prosecutors to ensure that white collar crime was dealt with effectively.

101.3 Imprisonment without the option of a fine is provided for in sections 132 - 138, 140 and 142

of the Insolvency Act. Except for sections 137 and 142 these provisions apply to an insolvent only. Only four sections provide for the option of a fine, namely sections 139, 141, 144 and 145. None of these sections apply expressly to an insolvent. In *S v Clifford* 1976 (1) SA 695 (A) Judge of Appeal Corbett observed that some indication of how seriously the lawgiver regards a contravention of section 137(a) of the Insolvency Act is provided by the fact that no provision is made for a fine and that a sentence of imprisonment of up to a year is the penalty laid down. Although the gravity of the offence is not doubted, it would appear that the reason for not providing for the option of the payment of a fine is because it is considered that owing to his insolvent circumstances the insolvent would not be in a position to pay a fine. It is, however, submitted that this premise is erroneous. Most of the time an insolvent does have assets and income that do not vest in the liquidator. In *S v Moll* 1988 (3) SA 236 (T) it was held that the portion of the insolvent's salary which he or she was able to save during employment, and which was not claimed by the trustee in terms of section 23(5), belonged to the insolvent and not to the insolvent estate and could be used for the payment of a fine. It appears that imprisonment in the context of insolvency offences is ineffective. Short-term imprisonment contributes to the overpopulation of prisons and the insolvent comes in touch with criminals without there being sufficient time to rehabilitate. Neither does a suspended sentence in accordance with the section 297 of the Criminal Procedure Act 51 of 1977 really punish the insolvent because it holds no threat. Take, for example, the case of an insolvent who is sentenced for not attending a first meeting, but the sentence is suspended subject to the condition that the insolvent does not commit the same offence within a period of three years. A sentence like this would only be of value if the insolvent were to be sequestered again during the period of three years. In certain circumstances a small fine can be a more effective punishment than a suspended sentence which has no practical effect. A commentator submits that imprisonment of white collar criminals is probably more effective as a deterrent than it is to the majority of the prison population. Special rules for imprisonment of white collar criminals do not appear to be justified. The fact that a fine is possible does not exclude a term of imprisonment; it may even encourage imprisonment as an alternative if a fine is not paid. ***Clause 101(4) provides that in all instances a fine should be considered as an alternative to imprisonment.***

101.4 Because the Insolvency Act contains many "technical" offences, it appears that every offence is viewed as a mere technicality. It is submitted that there is a need to limit technical

offences to the minimum and to give a clear wording to those offences and sentences which are justified. It is agreed that the Insolvency Act should not make criminals of honest persons and that the emphasis should rather be on those cases where the insolvent acted with criminal intent or with flagrant disregard for the rights of creditors. The following offences have been scrapped, but the conduct may delay rehabilitation in terms of clause 97(2): section 136(b) - failure to make available or notify the liquidator of property or books; 138(d) - failure to keep liquidator advised of address; section 137(c) - failure to keep and supply records of assets and income received and expenses as required by clause 15(3). Section 137(c) - failure to lodge a statement of affairs- has been retained as an offence in clause 101(1)(h) because of the importance of this requirement, although such failure can also delay rehabilitation in terms of clause 97(2).

101.5 The offences in sections 136(c) and 138(b) and (c) relate to failure by the insolvent to supply information. These offences have been omitted because there are sufficient measures to force an insolvent to give information.

101.6 Some offences have been omitted because of its similarity with other offences. Section 132(b) and (d) - conceals assets or destroys, damages, removes or makes dispositions of assets to prejudice of creditors - is similar to clause 101(2)(f), conceals, parts with, damages, destroys, alienates or otherwise disposes of property with intent to prejudice creditors. Section 135(1) - disposition with intention to prefer one creditor - is similar to clause 101(2)(f), disposition with intent to prejudice creditors. Section 135(3)(a) - contracting debts without reasonable expectation of paying the debts - is similar to clause 101(1)(g), incurring debts while insolvent or within six months before liquidation if not reasonably necessary for maintenance. Section 135(3)(a) has nevertheless been retained as clause 101(1)(ga). In line with a suggestion by Andre Boraine and Kathleen van der Linde "The draft Insolvency Bill - an exploration" 1999 *TSAR* 56 section 136(a) - ***failure by insolvent to inform of false claims - has not been omitted as proposed in Discussion Paper 66. In fact clause 101(1)(j) expands the offence to include failure to disclose false nominations as liquidator in terms of clause 32.*** A commentator proposes a severe criminal sanction for removal of assets by the insolvent and that there should be a sanction for collusion at auctions or otherwise and if assets are hidden on other premises. Subclauses 101(2)(f) and (g) read with clause 101(4)(a) make provision for imprisonment up to three years if property is disposed of with the intent to prejudice creditors or failure to notify the liquidator of the whereabouts of assets

and make it available to the liquidator.

101.7 In terms of the present position an insolvent who acts fraudulently in connection with the insolvent estate is usually charged with fraud, alternatively with the offences provided for in sections 132 - 134 of the Insolvency Act. Offences which can be committed by a person whether or not he or she is insolvent are better left to be governed by the general criminal law. Fraudulent acts or other acts committed by the insolvent in connection with the insolvent estate should not be made offences in the Insolvency Act where the common law already provides for offences such as fraud, theft or forgery and uttering. *To this end section 137(d) and the reference to "falsify" in section 132(a) (now clause 101(1)(a)) are scrapped. The provision in section 139(2) that certain conduct constitutes perjury has been scrapped. The offence in section 140 of failure by an insolvent to give evidence in proceedings has been omitted.*

101.8 *As proposed in paragraph 32.10 above, clause 101(2)(i) makes provision for a new offence regarding false nominations of liquidators.*

101.9 Many of the sections of the Insolvency Act relating to offences contain deeming provisions which have the effect of rebuttable presumptions in favour of the prosecution. The legal burden of rebuttal on the accused is referred to as a "reverse onus". Such presumptions offend against the very essence of the right to a fair trial, which includes the right to be presumed innocent, and is protected by s 25(3)(c) of the Constitution of the Republic of South Africa Act 200 of 1993 and section 35(3)(h) of the Constitution Act 108 of 1996. (See, for instance, *S V Mello and Another* 1998 (3) SA 712 (CC)). A commentator submits that the latest balance sheet information should be regarded as binding on the insolvent and should rebut other allegations, for instance that assets belong to the spouse. Although an irrebuttable presumption that the latest balance sheet is correct will not necessarily be contrary to section 25(3)(c) of the 1993 Constitution or section 35(3)(h) of the Constitution of the Republic of South Africa Act 108 of 1996, it would nevertheless not be acceptable to prejudice third persons who may have had nothing to do with the balance sheets prepared by an insolvent. If an insolvent lodges false balance sheets he or she may be guilty of a contravention of clause 101(1)(e). A commentator made the valid point that there may be difficulties to prove tampering with computers. Problems to prove offences connected with computers will be dealt with under the Commission's investigation into computer related crimes

(project 108). *The presumptions in sections 132 (now clause 101(1)(a) and (b)), 134 (now clause 101(1)(f)), proviso to 135(3) (now clause 101(1)(g)), 138bis, 142(1) (now clause 101(2)(f)) and 146 of the Insolvency Act have been scrapped.*

101.10 A commentator complained that existing fines were too low to be a deterrent and that fines should be adjusted regularly. The provisions of section 1 of the Adjustment of Fines Act 101 of 1991, read with section 92(1) of the Magistrates' Courts Act 32 of 1944 can be utilised. Section 92(1) allows the Minister of Justice to fix maximum amounts of fines by magistrates' courts from time to time by notice in the Government Gazette. The Minister has by Government Notice 3441 in *Government Gazette* No 14498 of 31 December 1992 fixed the maximum amount at R20 000 for a magistrates' court and R200 000 for a regional court. *The Bill makes provision for fines without stating an amount so that the maximum fine will, according to the Adjustment of Fines Act and the existing limit fixed by the Minister, be R20 000 for each year of the maximum imprisonment. Offences have been divided into three groups and penalties prescribed for the groups instead of penalties for the offences in each section of the Insolvency Act.*

101.11 A proposal that fines should be paid into the insolvent estate deals with a policy matter outside the scope of this investigation.

Clause 102: Giving of evidence after conviction for failure to testify

It is very important to obtain information relating to the affairs of the insolvent estate. The aim of these new provisions (similar to clause 68A) is to encourage co-operation by witnesses who previously refused to co-operate.

Clause 103: Criminal liability of partners, administrators, servants or agents

Clause 103 re-enacts section 143 of the Insolvency Act.

Clause 104: Jurisdiction of court

104.1 In *Spendiff v Kolektor* 1992 (2) SA 537 (A) 548 Judge of Appeal Nestadt intimated that

it is a matter of some difficulty to determine the true meaning of the word "Court" as defined in section 2. Describing the definition as "an instance of rather inartistic draftsmanship", he concluded as follows:

It would seem therefore that the effect of the definition is the following. In matters falling under s 149 (ie where the proceedings relate to a debtor or his estate), the jurisdictional criteria therein referred to determine which is the competent Provincial or Local Division. In matters not governed by s 149 the definition does not operate; the ordinary grounds of jurisdiction apply.

Judge Nestadt consequently held (at 550) that the jurisdictional criteria referred to in section 149(1) did not determine what court had jurisdiction in terms of section 26(1) to set aside a disposition not made for value. Jurisdiction in such a case is governed by ordinary principles. Judge Nestadt emphasised (at 549) that any interpretation of section 149 should take account of the basic common law principle *actor sequitur forum rei* (you sue a defendant in his or her forum). Clear wording would be required to deny a defendant this procedural advantage. The position would seem to be that in so far as the common law jurisdiction of the courts in respect of rehabilitation and reviews is concerned, the weight of authority supports the view that the courts of one province have no jurisdiction either to grant an order for the rehabilitation of an insolvent whose estate was liquidated in another province or to review any decision by the Master serving the court of such other province (*Spendiff* case at 550; *Goode Durrant & Murray v Lawrence* 1961 (4) SA 329 (W) 331; *Kruger v The Master* 1982 (1) SA 754 (W) 759 - 760). Considerations of clarity and convenience require that the same grounds of jurisdiction apply to all instances under the Insolvency Act. Although it may be inconvenient for a person resident outside a court's area of jurisdiction to be subject to such court merely because it is the liquidating court, considerations of inconvenience also exist in relation to proceedings by the liquidator where the intended defendant is resident outside the area of jurisdiction of the liquidating court and can only be sued in some other court. ***Clause 104(2) provides that a court which has jurisdiction to liquidate the debtor has jurisdiction in any matter arising out of the liquidation of the estate of the person.***

104.2 The definition of "court" in clause 1 have been redrafted to make it simpler and comprehensible. The definition indicates the instances where a magistrates' courts have jurisdiction. A commentator proposes that most matters should be dealt with by magistrates' courts to save costs and make it easier for the liquidator or creditors to approach the court. This proposal was not published for comment and is not supported.

104.3 Paragraph 104.6 of the Explanatory Memorandum with Discussion Paper 66 notes that the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court has been requested to consider specialised courts for insolvency matters in large centres such as Cape Town, Johannesburg and Durban because insolvency law is a specialised field and it appears to be desirable that insolvency matters should be dealt with by judges who specialise in insolvency law. Three commentators supported the introduction of specialised insolvency courts. In the light of the rejection of specialised insolvency courts by the said Commission in December 1997 the matter is not pursued in this paper.

104.4 In accordance with the proviso to section 149(1) of the Insolvency Act, clause 104(3) provides that when it appears equitable or convenient that the estate of a person who is not domiciled in the Republic should be liquidated elsewhere, the court may decline to exercise jurisdiction in the matter and make such order as it finds appropriate. This provision would be too simplistic if an adapted UNCITRAL Model Law on Cross-Border Insolvency is enacted in the Republic. *It is proposed that the following provisions should be substituted for section 149(1) of the Insolvency Act if an adapted Model Law is enacted:*

- (1) The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who-
 - (a) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within the jurisdiction of the court; or
 - (b) at any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court:

Provided that when it appears to the court equitable or convenient ~~that the estate of a person not domiciled in the Republic be sequestrated elsewhere, or~~ that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic,

the court may refuse or postpone the acceptance of the surrender or the sequestration.

(1A) Foreign representatives and creditors have access to the court as provided in Chapter 2 of the Cross-Border Insolvency Act, 19 (Act No of 19) and liquidation of the estate of a debtor shall be limited as provided in Chapter 5 of that Act.

Clause 105: Appeals

105.1 Section 150(5) of the Insolvency Act confines appeals "against any Order made by the court in terms of this Act" to final orders of sequestration and orders setting aside provisional sequestration (see section 150(1)). In *Spendiff v Kolektor* 1991 (2) SA 537 (A) 548 Judge of Appeal Nestadt stated that the legislature could not have intended to deprive a defendant, against whom an order in terms of section 26(1) is granted, of the right of appeal. It is agreed that it would be incongruous to deprive a defendant of the right to appeal against an order in terms of section 26(1), but a plain reading of section 150(5) clearly excludes any other appeal, except as provided in section 150(1). Section 150(1) does not refer to an appeal against an order of provisional sequestration or against a refusal to grant an order of provisional sequestration. There is no need to appeal against a provisional order, as the debtor can in terms of the rule *nisi* anticipate the return date and show cause why his estate should not be liquidated finally (clause 7(2)). The final order or a refusal to make the order final is subject to appeal. However, in the case of a refusal to grant a provisional liquidation order, a new application appears to be the only course of action available to the liquidating creditor.

105.2 The general rule is that only orders that finally dispose of a portion of, or a certain phase of the issue between the parties are appealable. This rule is not simple to formulate and is in any case not immutable (see *Shepstone & Wylie and Others v Geysers NO* 1998 (3) SA 1036 (SCA); *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) 301). Section 151(5) of the Insolvency Act which generally excludes orders made in terms of the Act from appeals, has been omitted from the Bill. This subsection, inter alia, persuaded the court in *Gottschalk v Gough* 1997 (4)(SA 52 (C) that a refusal of a provisional order is not appealable. It is submitted that the Bill should expressly include appeals about which there were doubts historically (see the *Gottschalk*

case). *Clause 105(1) provides that any person aggrieved by a final liquidation order, or by a refusal to grant a provisional order or to grant a liquidation order without a provisional liquidation order, or by an order setting aside a provisional liquidation order, or by any other appealable order made in terms of the Bill may, subject to the usual leave, appeal against such order.*

105.3 In terms of section 150(3) of the Insolvency Act an appeal against a final order of sequestration does not suspend the operation of such order or the operation of the provisions of the Insolvency Act regulating the administration of the estate. The only exception to this is that property of the estate may not be realised without the insolvent's written consent. Rule 49(11) of the Uniform Rules of Court provides for the suspension of an order of court where an appeal has been noted or an application for leave to appeal has been made. In terms of the rider to Rule 49(11) a party can, however, apply to the court for interim relief. Rule 49(12) reads as follows:

(12) If the order referred to in subrule (11) is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or the registrar may decide for the restitution of any sum obtained upon such execution. The registrar's decision shall be final.

A provision similar to Rule 49(12) has merit. There can only be substantial prejudice if property belonging to the liquidated estate is realised. From a legal policy point of view it seems correct to invoke the approval of the court in this matter. However, if the insolvent is prepared to consent in writing to the realisation of property belonging to the liquidated estate, there appears to be no reason to incur costs by invoking the approval of the court. *Clause 105(3) provides that property belonging to the insolvent estate may notwithstanding an appeal against the liquidation order be realised with the written consent of the insolvent, or with permission granted by order of court on application by an interested person who has furnished security to the satisfaction of the court for restitution in the event of the appeal being successful.* It is submitted that security must be lodged even if the liquidator applies for leave to sell.

Clause 106: Review

106.1 *The reason for specifically including the liquidator in clause 106(1) is discussed in paragraph 89.3 above.*

106.2 Commentators submit that there should be a time limit for review proceedings in order not to disrupt the administration process unduly. *Clause 106(1) provides (as is provided in clause 42(9)) that a decision must be brought under review within six months or such further period as the court may allow for good cause shown.*

106.3 The review envisaged under section 151 of the Insolvency Act is of the third kind to which reference is made in the case of *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 and accordingly, the court ". . . may enter upon and decide the matter **de novo**. It possesses not only the powers of a court of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at . . ., to deal with the whole matter upon fresh evidence . . .". (Confirmed in *Gilbey Distillers & Vintners v Morris* 1991 (1) SA 648 (A) 655.) In paragraph 89.4 above it is stated that the court's extensive powers are not apparent from a reading of section 111(2)(a). The same argument holds for section 151. Section 23 of the Trust Property Control Act 57 of 1988 (quoted in paragraph 89.4 above) spells out that the *court shall have the power to consider the merits of a matter, to take evidence and to make any order it deems fit. The court's power of review is spelled out in similar terms in clause 106(3).*

Clause 107: Master's fees

Clause 107 corresponds to section 153(1) of the Insolvency Act.

Clause 108: Custody and destruction of documents

108.1 Section 154(2) - (4) of the Insolvency Act is omitted. *It is submitted that the Insolvency Act is not appropriate for regulating the admissibility of documentary evidence in civil or criminal proceedings.* Adequate provisions exist in sections 212, 231, 233 and 234 of the Criminal Procedure Act 51 of 1977.

108.2 Section 155 of the Insolvency Act provides that the trustee may, after six months have elapsed since the confirmation by the Master of the final account, with the consent in writing by the

Master, destroy all books and documents in his or her possession relating to the estate. Storage space for books and papers is scarce and expensive and books and documents should not be stored for longer than is necessary. The present position that the Master's written consent is always required before documents may be destroyed is impractical. As regards the retention of documents with a view to prosecution, it can be accepted that, by the time that the destruction of documents comes into prominence, the liquidator will know which documents to retain. *Clause 108(2) provides for the retention of the documents for one year after the confirmation of the final liquidation account. In terms of clause 108(2) the Master may still consent to the earlier destruction of documents or direct that documents be retained for a longer period.* Important documents such as court orders, the liquidator's report, liquidation accounts, etc, are in the possession of the Master for five years after the rehabilitation of an insolvent in terms of clause 108(3). It is conceded that the five year period is arbitrary. This is the period presently contained in section 155(2) of the Insolvency Act. The basic prescription periods which may be used as a guide vary between three and thirty years, but are subject to particular circumstances.

Clause 109: Insurer's liability in respect of indemnification of insolvent

Clause 109 re-enacts section 156 of the Insolvency Act.

Clause 110: Non-compliance with directives

110.1 There is a great lack of uniformity in the various decided cases regarding the phrase "formal defect or irregularity" in section 157(1) of the Insolvency Act. (See for example *Ex Parte Hetzler* 1969 (3) SA 90 (T) and *Ex Parte Slabbert* 1960 (4) SA 677 (T).) Authority to condone non-compliance with formalities has been extended to the Master or the presiding officer in cases where the court is not involved.

110.2 *Clause 110(1) provides that nothing done under the Bill shall be invalid merely by reason of the non-compliance with any directive prescribed by or in terms of the Bill, unless in the opinion of the court, or if the court is not involved, in the opinion of the Master or the presiding officer, a substantial injustice has thereby been caused which cannot be remedied by an appropriate order of the court, the Master or the presiding officer.*

Clause 111: Regulations and other powers of Minister

111.1 Clause 111 re-enacts sections 158 of the Insolvency Act.

111.2 Section 158*bis* of the Insolvency Act empowers the Minister to amend a Schedule which provides for the sheriff's fees, remuneration of the trustee and Master's fees. On the face of it this provision empowers the Minister to amend the statute. The need to change the provisions of the Schedule without legislation arises in respect of the adjustments of amounts. In line with the discussion in paragraphs 4.2 to 4.6 above, *clause 111(2) provides that the Minister may by notice in the Gazette amend Schedule 2 by adjusting amounts in order to take account of subsequent fluctuations in the value of money.*

Clause 112: Amendment and repeal

112.1 Section 1 of the Insolvency Act provides that, if an estate was sequestrated before the commencement of the Act, the sequestration; all proceedings in connection therewith; and a person whose estate was sequestrated before the commencement, must be dealt with as if the repealing Act had not been passed. If an estate was not sequestrated before the commencement, any action taken with the view to the surrender or sequestration of an estate, is after the commencement deemed to have been taken under the repealing Act in so far the new Act makes provision therefor. Estates sequestrated before the commencement were therefore completed in terms of the previous Act and estates sequestrated after the commencement in terms of the "new" Act. This is an uncomplicated way to arrange the transition from one Act to another, but it has the effect that two Acts operate side by side until all estates sequestrated under the previous Act have been finalised. This can create a bit of confusion and two sets of forms must be kept available and used. A possible alternative is a provision such as section 26(2) of the Trust Property Control Act 57 of 1988 which provides that anything done under a provision of a repealed law which may be done under a corresponding provision of the new Act is deemed to have been done under that corresponding provision of the new Act. Where the old and the new Act contain corresponding provisions the new Act is applied.

112.2 Section 12(2) of the Interpretation Act 33 of 1957 provides as follows:

Where a law repeals any other law, then unless the contrary appears the repeal shall not -

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

The effect of section 12(2) read with a provision such as section 26(2) of the Trust Property Control Act is that where the repealed and the new Act contain corresponding provisions the new Act will apply as a general rule. However, if a right, privilege, obligation or liability was acquired, accrued or incurred under the repealed law, or a penalty, forfeiture or punishment was incurred in respect of any offence committed against a repealed law, then such a right, privilege, obligation, liability, penalty, forfeiture or punishment will not be affected by the commencement of the new Act and an investigation, legal proceeding or remedy in respect of such right, privilege, obligation or liability may be instituted, continued or enforced and a penalty, forfeiture or punishment imposed as if the repealing law had not been passed.

112.3 Clause 112(2), based on section 26(2) of the Trust Property Act 57 of 1988, provides that anything done under any provision of the Insolvency Act 24 of 1936 which may be done under a corresponding provision of the Bill, shall be deemed to have been done under that corresponding provision.

Clause 113: Short title and commencement

This clause is self-explanatory

114 Schedule 1 Form A: Statement of Debtor's Affairs

114.1. As was pointed out by a commentator, the statement of affairs is an important document which in many respects is the cornerstone of the liquidation. It is the starting point for investigations and provides a list of creditors to be informed of the liquidation process. *In order to highlight the importance of the document a note near the beginning of the form points out that failure to submit the form to the Master and the liquidator within seven days is a criminal offence and may delay rehabilitation.* A commentator submits that the statement of affairs should contain details of all types of accounts held during the previous 5 years; an explanation of the impeachable transactions and questions aimed at extracting full details of dispositions; it should point out the duty to attend meetings; and call for any other information which is important for the liquidator to know. The statement of affairs is already a long form and this submission is not supported. Clause 33(1) provides as a general rule that the liquidator should serve the liquidation order on the insolvent. Any liquidator worth his or her salt will inform the insolvent of his or her main duties and obtain relevant information if the liquidator gets an opportunity to see the insolvent.

114.2. Commentators say that the form does not make provision for details of insurance policies, bank accounts, etc. *Because the forms are often completed by lay persons or persons who are not keen to co-operate, a note with Part 3 makes it clear that movables include insurance policies and credit balances in accounts with banks or other institutions or persons.*

114.3. *Part 9 - Personal information - has been adjusted to agree with the definition of "spouse" in clause 1.*

115 Schedule 1 Form AA: Nomination for liquidator

This is a new form similar to the forms used in practice in some offices. A form is prescribed in

order to curb abuses and ensure a reasonable degree of clarity and uniformity in the nomination forms.

116 Schedule 1 Form B: Affidavit for proof of claim other than a claim based on a promisory note or other bill of exchange

116.1. Technical objections against claims are lodged at meetings from time to time. Many of the objections arise from problems experienced with the prescribed form for the proof of claims. Problems can be avoided if the form clearly indicates that which should be declared.

116.2. *Item (1) of the form indicates that written authority of some kind is required* (see paragraph 42.6 above).

116.3. Section 44(2) of the Insolvency Act provides that the affidavit may be made by the creditor or any person fully cognisant of the claim, who must set forth in the claim the facts upon which knowledge of the claim is based. As it was pointed out in *R v Verachia* 1958 (4) SA 529 (T) 532, no firm employing hundreds of employees could ever prove a claim in an insolvent estate if a director or secretary or manager could not make the affidavit from information supplied. “Fully cognisant” should be read as “fully informed”. The capacity of the person who makes the affidavit may be an indication of the reasons why the person has knowledge of the claim (*Ben Rossouw Motors v Druker* 1975 (1) SA 821 (W) 824). *Item (1) requires that the declarant should state his or her capacity and item (2) that declarant should state whether he or she has personal knowledge of the claim or has satisfied himself or herself as to the nature and particulars of the claim.*

116.4. Clause 42(3)(a) provides that a creditor may not vote in respect of any claim ceded to him or her after the commencement of the proceedings. *Item (3) requires that the declarant give information regarding cession of the claim after liquidation.*

116.5. Section 44(6) of the Insolvency Act requires that a claim for payment of the purchase price of goods sold and delivered on an open account must be accompanied by a statement showing a monthly total and a brief description of purchases and payments. The liquidator may need this

information to examine the claim (clause 46(2)). The liquidator needs information of debits and credits in respect of any claim which accrued over a period or in respect of which payments were made. *Item (4) provides that in respect of debts which accrued over a period or in respect of which payments were made a statement shall be submitted with a brief description of all debits and credits over the period of 12 months immediately preceding the date of liquidation.*

116.6. In terms of clause 49 a claim which becomes due after the date of liquidation must be reduced. *Item (5) calls for information on debts that become due after liquidation.*

116.7. In terms of clause 42(5) the vote of a secured creditor is influenced by the monetary value placed on the security if the creditor elects to value the security. In terms of clause 75(3) a secured creditor who relies solely on security does not have a concurrent claim and is, in terms of clause 94, not liable for a contribution unless the liquidation order was made upon his or her application. *Item (6) makes provision for a secured creditor to place a value on security and rely solely on security for payment of the claim.*

116.8. *Clause 51 provides that a creditor who has received payment of a debt from a source other than the insolvent estate must notify the liquidator and item (7) requires information in this respect.*

116.9. *Item (8) provides for the banking details of a debtor who prefers that dividends be transferred electronically to a banking account* (see paragraph 92.2 above).

116.10. *The proposed Form B incorporates the formal requirements for an affidavit or solemn declaration.*

117 Schedule 1 Form C: Affidavit for the proof of a claim based on a promissory note or other bill of exchange

This form is similar to proposed Form B, explained above, and replaces Schedule 1, Form D of the Insolvency Act.

118 Schedule 1 Form D: Form and contents of accounts

118.1. In paragraph 87.1 above it is argued that more detailed provisions for the form of accounts are desirable. *Except for a few provisions in sections 91 and 92(4) - (5), Form D replaces sections 91 - 94 of the Insolvency Act.*

118.2. It is customary to lodge accounts in duplicate. As a commentator points out, the Master incurs extra expenses in regard to postage by returning the duplicate to the liquidator. There may be confusion occasionally about the form of the account "approved" by the Master and magistrates may be used to receive a duplicate account with stamps for their certificate that the account has lain for inspection. These matters do not weigh up against the costs of supplying the account to the Master in duplicate, even if it lies for inspection at the office of the Master. *Form D does not required that the account be lodged in duplicate.*

118.3. Section 92(3) of the Insolvency Act provides that the liquidation account shall be accompanied by the trustee's bank pass book. In the case of a cheque account the requirement is obsolete. Liquidators lodge the bank statements with their accounts. Section 92(3) requires the bank pass book but does not mention any vouchers regarding other investments made by the liquidator. *Item 5.1 of Schedule 1, Form D enjoins the liquidator to lodge complete statements up to the date on which the accounts were made up of all accounts opened in terms of clause 84.*

118.4. Section 92(2) of the Insolvency Act requires that the dates of receipts and disbursements should be set out in the account. Most accounts lodged with the Master do not comply with this requirement. The vouchers lodged in support of an account usually reflect this information. The vouchers are not available if accounts lie for inspection at a magistrate's office, but cases where creditors inspect accounts at the magistrate's office are extremely rare. *It is submitted that the amount of work involved in complying with the requirement that the dates of receipts and disbursements should be reflected in the account is not justified by the usefulness which this*

information may have and it has been omitted from Schedule 1, Form D, item 3.2.

118.5. As proposed in paragraph 87.3 above, items 3.4 and 6.1 of Form D require that vouchers and claims should be lodged upon the request of the Master and not as a matter of course.

118.6. A commentator submits that apportionment schedules should not be attached to the account, but should be part of the vouchers. This proposal is not supported because vouchers are not always available when an account lies for inspection or copies are made available to interested parties. The apportionment statement contains information that are necessary for a proper check of or understanding of the account.

118.7. Section 93 of the Insolvency Act requires a trading account if "the trustee has carried on any business". This account must reflect, inter alia, the daily receipts and payments. It is not clear whether these provisions apply in cases where the liquidator keeps the premises open and sells stock over the counter (sometimes at an attractive discount), but does not purchase any new stock. A similar position arises when a liquidator continues a business, such as a construction business, in order to complete contracts, but does not enter into any new transactions. The accepted view seems to be that a liquidator is merely realising estate assets in these cases and that a trading account need not be lodged. *The requirement that daily receipts and payments must be reflected causes problems in some cases and has been omitted.* The considerations regarding this requirement are similar to those regarding the requirement discussed in paragraph 118.4 above. *Item 4 of Form D provides that a trading account need only be lodged if the liquidator carried on business by either purchasing stock or entering into new transactions for the purpose of trading.*

118.8. A commentator submits that the form for accounts and other prescribed forms should be computer friendly. This object is achieved because substantial compliance is sufficient for all the provisions prescribing forms (clauses 3(3)(a), 32(10), 34(1)(b), 45(5), 64(2) and 87(2)).

119 Schedule 1 Form E: Summons in terms of section 64(1) of the Insolvency Act

The reasons for this new form is explained in paragraph 64.5 above.

120 Schedule 2 Tariff A: Sheriff's fees

Tariff A re-enacts Schedule 2, Tariff B of the Insolvency Act.

121 Schedule 2 Tariff B: Remuneration of liquidator

121.1. Schedule 2 Tariff B of the Insolvency Act provides for 6 different categories of remuneration with tariffs of 1, 2, 3, 5, 6 or 10 percent for the different tariffs. A commentator complains that 2% remuneration for the amount distributed in terms of a composition is extremely unreasonable and inadequate; it should be increased to 5% in particular because the work done by the liquidator is substantial up to the time when the insolvent proposes the composition. Another commentator complains about the "ridiculously low fee" sometimes allowed by judges for compromises or compositions. Commentators also complain because the percentage is halved from 10% to 5% for movables or reduced from 3% to 2% for immovables if property is disposed of in settlement of the creditors claim. They argue that the work by the liquidator remains the same whether the creditor bought in the item or whether it was sold on an ordinary auction.

121.2. In the case of immovable property the amount of work would mostly be approximately the same if the property is disposed of to the creditor rather than being sold. The liquidator is involved in effecting transfer of the property and auctions are often held before it is decided to dispose of the property to the creditor. In the case of movable property the amount of work is not always approximately the same. Movables are often left in the possession of the creditor and once the liquidator has established that the security is worth less than the amount of the claim the matter is finalised without a sale. It is true that the tariff percentages are rough guides and to a large extent arbitrary. Sometimes it may, for instance, be easier to collect a debt at 10% than collecting the money in a current account at 1%. A lot of luck or bad luck is involved. If the good or bad luck gets out of hand, keeping in mind that swings and roundabouts must endure to a certain extent, clause 61 can be applied to increase or decrease remuneration according to the tariff. The fact that a lot of work is done before a composition can be effected does not distinguish this case from others because a lot of work is always done before and in addition to the actual realisation of assets. The large number of arbitrary percentages is unrealistic and give rise to unnecessary problems. *According to Tariff B the tariff remuneration on the proceeds of movable property, other than*

shares or similar securities sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income remains at 10%, but the tariff for all other assets is fixed at 5%.

121.3. A commentator submits that where creditors hold cessions of book debts as security the creditors are in most cases more qualified to collect the book debts of the liquidated company than the liquidator, as these creditors have the relevant systems in place to collect such debts; in these cases, a liquidator should endeavour to allow these creditors to collect the debts on behalf of the liquidator and the liquidator's fees should in this case be reduced; if the liquidator appoints an agent such as a factoring company or any other collection agent to collect the book debts, then whatever costs are incurred in employing such factoring company or collection agent should be deducted from the liquidator's fees. The principle has been accepted that security forms part of the insolvent estate. The liquidator is therefore duty bound to control the recovery of the security until the security has been disposed of by the estate, by for instance selling remaining debts, abandoning it, or making it over to the secured creditor in satisfaction of the claim. The liquidator can make arrangements for someone else to act on his or her behalf. If an attorney is instructed to collect debts which cannot be collected by the liquidator the attorney's fees may form part of the administration costs. A person who merely does the liquidator's work on his or her behalf cannot claim against the estate and his or her payment, if any, is a matter between the person and the liquidator. In *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1990 (2) SA 217 (SE) a creditor continued a business on behalf of the estate. The judge remarks on page 228 that the liquidator may well be wrong in his view that in all the circumstances he was entitled to 6% on the turnover. This remark was not part of the decision, but clearly if a liquidator is according to tariff entitled to a large fee for little work and responsibility this will be a factor that may justify a reduction of the tariff fee. It is submitted that the tariff fee should be retained for cases of ceded debts and that arrangements to act on behalf of a liquidator should be left to a secured creditor and the liquidator to work out between them. The possibility of a reduction of the tariff fee in terms of clause 61(3) remains.

122 Schedule 2 Tariff C: Master's fees office

122.1. The formula in Schedule 3 of the Insolvency Act for the calculation of Master's Fees on

estates appears to be inordinately complicated. As a percentage, a larger fee is levied on small estates than on larger estates. This seems to be unfair, especially as a contribution must often be levied in small estates to pay the Master's fees. It is also not worth the bother to calculate and pay Master's fees of a piffling amount. A minimum amount of R100 Master's fee applies to companies, but there is no minimum for insolvent individuals. There is no reason for such a distinction. *Item 1 of Schedule 2 Tariff C of the Bill provides for a minimum of R500 for Master's fees and a simpler formula.*

122.2. The 5% fee charged by the Master on money deposited for creditors is discussed in paragraph 92.3 above.

122.3. *It is recommended that the fixed amounts in item 2 for copies made or certified by the Master should be updated regularly to ensure that the amounts remain realistic.*

123 Schedule 3: Provisions of laws amended or repealed

Introduction

123.1. Schedule 3 contains the amendments and repeals referred to in clause 112. The Insolvency Act and all provisions that amended the existing Insolvency Act should be repealed in the Schedule. In order to simplify matters and concentrate on essential amendments, the formal repeals of these provisions are not reflected in the Schedule. Clause 15(4) provides that pension or social benefits paid to an insolvent after liquidation of the estate up to a certain amount do not form part of the insolvent estate. Ten provisions in other Acts also provide that such benefits are excluded from an insolvent estate. It is submitted that these other provisions should be amended or repealed. The amendment or repeal of Acts dealing with pension benefits would usually be reflected chronologically in the schedule of laws amended or repealed. For ease of reference these provisions are reflected separately in Schedule 5.

Magistrates' Courts Act sections 65A and 74B

123.2. Alternatives should be available to provide for cases where there are not enough assets to ensure that liquidation of the estate will benefit creditors. However, as in the case of liquidation proceedings, the debtor should be encouraged to cooperate and act honestly. *The amendments of*

sections 65A and 74B provide that the magistrate should report the commission of offences that come to light during procedures before him in a similar fashion than provided for in clause 69(2).

Magistrates' Courts Act section 74(1)(b)

123.3. If administration orders are to be regarded as a realistic alternative to sequestration the amount prescribed in terms of section 74(1)(b) should not be too low. *According to the amendment of section 74(1)(b) the prescribe maximum amount refers to unsecured debts and not to all debts.*

Magistrates' Courts Act - insertion of section 74X

123.4. In the ordinary course the proposed section 74X should appear in Column 3 of Schedule 3. For the sake of convenience and legibility the proposed section is reflected separately in Schedule 4.

Administration of Estates Act section 88(1)

123.5. The amendment of section 88(1) of the Administration of Estates Act gives effect to the recommendation that interest should be paid on surplus monies in an insolvent estate (see the comments on clause 93).

Prescription Act section 13(1)(g)

123.6. Section 13(1)(i)(g) and (i) of the Prescription Act 68 of 1969 provides as follows:

- (1) If-
...
- (g) the debt is the object of a claim filed against ... the insolvent estate of the debtor or against a company in liquidation ...; and
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph ... (g) ... has ceased to exist,

the period of subscription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

123.7. The provisions of section 13(1) have been described as inept. In particular it is not obvious when the impediment in paragraph (g) ceases to exist. (*Leipsig v Bankorp Ltd* 1994 (2) SA 128

(A) 133F; 135A.) In *Regering van die RSA v SA Eagle Versekeringsmpy* 1985 (2) SA 42 (O) 53 it was held that in cases where the proof of a claim is a requirement a claim must be duly submitted for proof at a meeting before it becomes “the object of a claim filed against” an estate. However, creditors often delay the proof of their claims until it is clear whether creditors would be liable to pay a contribution. The Act contains provisions that encourage creditors to prove their claims timeously and confirmation of the accounts brings about finality. ***The proposed amendment of the Prescription Act does not require the submission of a claim before the running of prescription is suspended.***

123.8. One commentator says prescription should not be suspended by liquidation until a year after the confirmation of the final account (as provided in the *Leipsig* case). Another commentator strongly disagrees that the running of prescription should be suspended by liquidation until the date of the conclusion of the first meeting; the problem for banks is in respect of suretyships held for the insolvent’s liabilities; the surety’s liability prescribes at the same time that the principal liability prescribes; often in practice the suretyship is not called up until finalisation of the insolvent estate, because it is only on finalisation that the amount outstanding is known; it is, therefore, at times impractical to call up the suretyship before finalisation of the insolvent estate and to ensure that the bank’s claim against the surety does not prescribe before finalisation of the estate it is imperative that the period remain as currently provided in section 13(1)(i)(g) and (i) of the Prescription Act.

123.9. The impression given by the commentator that debts will prescribe at the conclusion of the first meeting is incorrect. In terms of the proposed amendment prescription will be suspended until a year after the conclusion of the meeting. It may be convenient to see what a dividend is before proving a claim against the surety, but usually banks have sureties and co-debtors who have waived the *beneficio excussionis* so that there is no legal bar to prove a claim for the full debt against the surety earlier. An earlier draft of the Bill provided for suspension of prescription until a year after the confirmation of the final account, but creditors in insolvent estates should like any other creditor be subject to prescription save during the period during which they are unable to file a claim with the liquidator. This period terminates on the date of the first meeting at which the creditor is able to prove a claim.

123.10. ***The proposed amendment of the Prescription Act provides that the running of***

prescription is suspended by liquidation until a year after the conclusion of the first meeting.

Attorneys Act section 83

123.11. This amendment is explained in paragraph 32.11 above.

124 Schedule 4: Insertion of section 74X in Act 32 of 1944 - Composition with creditors

124.1. Because of the requirement that liquidation of the estate of the debtor must be to the advantage of creditors (clauses 7(1)(b) and 8(1)(c)), liquidation is not available if the unencumbered assets are insufficient to warrant liquidation. Provision must be made for debtors with little or no assets who through no fault of their own are unable to pay their debts. A debtor should not be absolved from his debts without the cooperation of his creditors unless some or other form of investigation has been conducted into the reasons for his or her inability to pay debts. At common law it is possible for a debtor to conclude an agreement or compromise with creditors. To be effective, however, such an agreement or compromise must be accepted by all the creditors concerned. The value of a debtor's assets to the debtor himself is usually considerably greater than the amount which the assets would realise on a forced sale. The fact that, in the ordinary course, creditors would probably have to wait a long time for dividends also plays a role. If a debtor obtains money somewhere or is able to conclude satisfactory arrangements for the payment of debts, a composition may be more advantageous for both the debtor and creditors than the liquidation of the debtor's estate. *The new section proposed in Schedule 4 makes provision for a composition between a debtor and his creditors before liquidation which is binding on dissenting creditors. The composition is supervised by a magistrate and takes place after an investigation of the affairs of a debtor.*

124.2. Most commentators support the proposal in Schedule 4 subject to further proposals discussed below. One point out that a composition before liquidation would save costs including the costs of the liquidation application and appointment of a liquidator. See also M Roestoff and L Jacobs "Statutêre akkoord voor likwidatie: 'n Toereikende skuldenaarremedie?" 1997 *De Jure* 189. One commentator strongly opposes the proposal as ill-conceived and impractical. The commentator's main reason for rejecting the whole proposal is that officials of the magistrate's court are not sufficiently competent or experienced to deal with such matters nor do they have the time

or capacity to do so. If this argument is valid, a case can be made out that insolvency meetings and administration order hearings should also not be dealt with by the magistrate's office. Although the proposal may entail extra work for the magistrate's offices this must be weighed against the advantages of the proposal. The work does not differ much and is not more difficult than other functions entrusted to magistrates' offices. The isolated call for the scrapping of the proposal is not supported.

124.3. One commentator proposes that the magistrate should, in line with proposed Dutch legislation, be given statutory power to fix a repayment period, where after the debtor obtains a release from his debts. Roestoff and Jacobs propose something similar to chapter 13 - rehabilitation of the American Bankruptcy Code in their article referred to in the previous paragraph: provision should be made for a scheme by the court in terms whereof the debtor should pay his debts within a fixed time from future income; the legislature should fix a maximum term; the court must have power to reduce the debtor's debts so that the debtor will be able to pay the reduced debts within the maximum term; concurrent and preferent claims should be bound by the scheme and should be barred from taking any further steps regarding debts arising before the order (see the discussion of subclause (17) below); provisions should be made for the debtor to apply after the fixed or maximum term for the termination of the scheme and the discharge of debts which arose before the application; the bona fides of the debtor should play a role and if, for instance the debtor was guilty of not complying with his liabilities in terms of the scheme the debtor should be denied a discharge of debts; a discharge can be refused for a debtor who received a discharge less than six years previously and a discharge should be refused for certain types of debts, for instance maintenance. Another commentator says it is clear that the debtor should offer all property to the creditors for realisation which should be part of the compromise; magistrates' courts should only have jurisdiction where the assets of the debtor do not exceed R100 000; as the Insolvency Act is intended to apply to companies, close corporations, individuals and other legal entities the provisions of section 311 of the Companies Act and the provisions of Schedule 4 should be combined to provide a standard procedure for effecting a compromise on an informal basis without the need to place the legal entity into liquidation; once the mechanics and procedure for the composition or for that matter the compromise are clearly defined, then a court of competent jurisdiction will be in a position to grant an order, to convene meetings of creditors to consider a composition or compromise and if the statutory majority in value and in number is attained, then

the composition or compromise can be sanctioned by the court; a composition or compromise should only have any legal effect once there is an order of court sanctioning the composition or compromise as the case may be.

124.4. The proposals in the Bill deal only with individuals. Seeing that comment has been obtained on the proposals, the Bill contains provisions for compositions between individuals and their creditors before liquidation. The possibility of a section 311-like proposal that caters for individuals as well as corporation is left for consideration by the Standing Advisory Committee on Company Law. One commentator raises the question whether the proposals should be limited to cases with assets worth R100, 000 or less. Such a requirement immediately introduces a somewhat arbitrary amount and problems to determine whether the assets are less than the fixed amount. The proposal is not supported because it is important that the procedures should be kept as simple as possible. Any proposal which requires an application to the High Court, let alone several applications to the High Court, is also not supported. It has been stressed in this paper that creditors should be allowed to be the masters of their own faith. Subclause (16), which allows a proposal rejected by creditors to have effect, will be discussed below. If a debtor misleads creditors, does not comply with obligations, etc, creditors may apply for revocation of the composition in terms of subclauses (13) or (14) of Schedule 4. If all the assets are not included in the offer, or creditors are not paid in full, the requisite majority of creditors can decide whether the proposal is nevertheless acceptable or not. Fixed rules that creditors must be paid within a certain time, that the court can reduce liabilities, etc, are not supported. Chapter 13 of the American Bankruptcy Code deals only with future income. There does not appear to be anything provided for in that Chapter that cannot be dealt with in a composition in terms of Schedule 4.

124.5. For the sake of convenience the prescribed form, referred to in subclause (1), is reflected as an Annexure to the clause. *To avoid delaying tactics or abuse, cash must in terms of subclause (1) be invested in a trust account with an attorney or an approved person if the proposed composition makes provision for the immediate payment of a cash amount.*

124.6. **In order to safeguard the interests of creditors and deter abuse of the procedure a debtor may in terms of the second part of subclause (2) not dispose of property which will be made available to creditors in terms of the composition. In accordance with the comments**

in paragraph 101.10 above provision is made for a fine without mention of the amount of the fine.

124.7. Comments were invited on the question whether the notice of the offer of composition should be published in the Government Gazette. Although large institutions take note of matters published in the Government Gazette, such a requirement will cause delay, especially if the debtor does not stay near Pretoria. Notice in the Gazette will undermine the objective that the procedure should be as simple as possible. No commentator supported notice in the Gazette and it is not provided for in the proposal.

124.8. *Subclause (14) provides that a creditor can, without a further hearing in terms of subclause (13), apply to have the composition revoked if a debtor does not comply therewith.*

124.9. Comment was invited on the question whether in terms of subclause (16) the permission of creditors should be required before a debtor may choose that assets be administered and divided in terms of the Insolvency Act or whether the compromise should merely lapse if it is not accepted by creditors. A commentator submits that the composition should lapse if it is not accepted by the prescribed majority of creditors; because such a lapsing will again leave the debtor without remedy, section 74 of the Magistrates' Courts Act should be further amended by increasing the debt limit to the jurisdiction of the Magistrates Court or that the limit be scrapped so that a debtor with any amount of debt can apply for an administration order.

124.10. The requirement that the magistrate must decide whether the debtor is able to make substantially more available to creditors than offered in the composition is the most onerous duty given to magistrates in terms of Schedule 4. The notion that creditors should be left to decide matters affecting them is not honoured. If the requirement of advantage of creditors is retained and security for all costs is required, a debtor who is caught up in debts will remain at the mercy of creditors indefinitely if he or she does not qualify for an administration order. Administration orders are not always suitable or satisfactory. Subclause (16) is one of the few provisions in the Bill which clearly favours a fresh start for a debtor in line with modern trends. The objections to this paragraph were isolated. Subclause (16) corresponds to section 28 of the Agricultural Credit Act 28 of 1966, but is not limited to farmers. *If a debtor cannot submit an offer of compromise which satisfies*

the prescribed majority of creditors, he or she is clearly insolvent and there is no reason why the debtor should not with his or her consent be regarded as insolvent. The debtor will in terms of subclause (16) be subject to all the duties and disabilities of an insolvent in terms of the Insolvency Act. Because the debtor's status has not been changed by an order of the High Court and he or she has made an attempt to arrive at a compromise with creditors, the debtor is not regarded as insolvent or the estate as liquidated when any other Act is applied and the debtor will, for instance, be able to serve on statutory boards or be elected as a member of Parliament.

124.11. The form in the Annexure is designed to serve as a statement of affairs and the “insolvent” need not submit a statement of affairs. The registration of a **caveat** by the Registrar of Deeds and the attachment of books and records take place after a liquidation order has been issued. *It is provided in subclause (16) that the magistrate should submit a notice to the Registrar of Deeds for the registration of a caveat and that the magistrate may instruct that the assets and books of the debtor be attached. If a liquidator is appointed, he or she will give notice of the appointment and continue with the administration as usual. In all matters not provided for in the subclause the insolvent or his estate shall be dealt with as if the estate of the debtor was liquidated on the date when the debtor exercised the choice to be dealt with as insolvent.*

124.12. A debtor who lodges a copy of an offer of composition will probably commit an act of insolvency in terms of clause 2(e) or (g). In terms of subclause (11) a creditor who has not been informed of the hearing or did not appear at the hearing will not be bound by the composition. Such a creditor who applies for liquidation will have to prove that there is reason to believe that the liquidation will be to the advantage of creditors (clauses 7(1)(b) and 8(1)(c)). Comments were invited on the question of whether an offer of composition should suspend further steps by creditors. A commentator submits that further steps by creditors should be suspended pending the acceptance or refusal of the composition; creditors should also not during this period apply for liquidation; further steps by creditors during this period can lead to one creditor being preferred above others. The proposal that an offer should suspend steps by creditors until a decision has been made on the composition has merit. It is true that some creditors may be preferred if further actions are allowed pending the submission of an offer. Creditors will not be encouraged to consider the offer seriously if the possibility of other actions remains. The main objection to a suspension of actions by a creditor is that the provisions may be abused to delay payment of debts. Creditors may

also have problems to stop prescription of debts. The provision in subclause (3) that an offer may not be made within six months since a previous one will curb abuse. It does not make sense that creditors may notwithstanding the steps to consider a composition continue with steps against the debtor or liquidate the debtor's estate. *Subclause (17) provides that between the determination of a date for a hearing and the conclusion of the hearing no creditor with a claim, the cause of which arose before the determination of the date, shall without the permission of the court institute any action against the debtor or apply for the liquidation of the estate of the debtor.*

124.13. The prescribed form in the Annexure corresponds to section 74A(2) of the Magistrates' Courts Act (application form for administration order) and the Statement of affairs prescribed in Schedule 1, Form A of the Bill. The Annexure should be prescribed in the rules, but for ease of reference the prescribed form is reflected after the proposed section 74X.

125 Schedule 5: Provisions of social benefit or pension laws amended or repealed

Clause 15(4) provides that payments of pension or social benefits to an insolvent after liquidation of the estate do not, up to a prescribed amount, form part of the insolvent estate. *Ten provisions in other Acts provide that such benefits are excluded from an insolvent estate. Schedule 5 provides for the amendment or repeal of these other provisions.* The amendment or repeal of these provisions would usually be reflected chronologically in the schedule of laws amended or repealed (Schedule 3), but for ease of reference these provisions are dealt with separately in Schedule 5.

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 86

VOLUME 2

Draft Insolvency Bill

Project 63

REVIEW OF THE LAW OF INSOLVENCY

CLOSING DATE FOR COMMENT: 29 October 1999

Please do not repeat comments already discussed in Volume 1 of the Discussion Paper

ISBN: 0-621-29377-6

DRAFT INSOLVENCY BILL

The attached draft Insolvency Bill contains the preliminary recommendations of the Commission on the review of the law of insolvency.

The Bill must be read with Volume 1 of the discussion paper with an explanatory memorandum to the Bill.

During 1996 the Commission published Discussion Paper 66 which contained an earlier draft Insolvency Bill. The changes to the Bill to take account of comments on the Bill, further research and subsequent developments are indicated on the attached Bill. The corresponding provisions in the existing Insolvency Act and some other legislation are reflected in footnotes. A key at the end of this document gives the numbers of clauses of the Bill for sections of the Insolvency Act

The contents of the Bill has been considered carefully in the light of comments received on the Bill, but does not conform with technical requirements for legislation. The Bill is not drafted in "plain language" and many of the provisions are in gender neutral language where it could perhaps have been expressed more elegantly in gender free language.

The arrangement of the Bill can be improved by adding chapter headings and moving clauses 61 and 62 to after clause 37 and clauses 63 to 70 to after clause 42. Sections and subsections should be renumbered properly to take account of insertions and omissions. This will be attended to once the further comments on the Bill have been considered.

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GENERAL EXPLANATORY NOTE:

Omissions Words in bold type with strikethrough indicate omissions from the Bill in Discussion Paper 66

Insertions Words in bold type and underlined with a solid line indicate insertions in the Bill published with Discussion Paper 66

BILL

To consolidate and amend the law relating to ~~the~~ insolvency of ~~natural~~ persons

BE IT ENACTED by the Parliament ~~and the President~~ of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—

“**account**”, in relation to a liquidator, means a liquidation account and ~~plan of~~ distribution account or ~~of~~ contribution account, or any supplementary liquidation account and ~~plan of~~ distribution account or ~~of~~ contribution account;¹

“**associate**” (a) in relation to a natural person means—

(i) the spouse of such person; or

1 **Insolvency Act section 2:**

In this Act unless inconsistent with the context—

'account', in relation to a trustee, means a liquidation account or a plan of distribution or of contribution, or any supplementary liquidation account or plan of distribution or contribution, as the case may require; ...

Draft Insolvency Bill
Clause 1

- (ii) any person who is by consanguinity related to such first-mentioned person or to his or her spouse, in the first, second or third degree of relationship as determined in accordance with section 1(3)(d) or (e) of the Intestate Succession Act, 1987 (Act No. 81 of 1987); or
 - (iii) the partner of such person or the spouse of such partner or any person who is related to such partner or spouse as is contemplated in subparagraph (ii); or
 - (iv) the beneficiaries of a trust of which such person is the trustee; or
 - (v) a company of which such person is a director or officer or a close corporation of which such person is a member or any other juristic person of whom such person is a manager or of which he has control;
- (b) in relation to a juristic person means—
- (i) any natural person who is a director, officer or member of that juristic person or who has control of that juristic person, either alone or together with his or her associate as contemplated in sub paragraph (a); or
 - (ii) any other juristic person which is controlled by the same person who controls the first-mentioned juristic person;
- (bA) of another person means a person who has control of an undertaking of the other person, and that person also has control of an undertaking if the person who manages the undertaking is or the persons who manage it are accustomed to act in accordance with that person's directions or instructions, unless that person gives advice in a professional capacity only;**

Draft Insolvency Bill
Clause 1

- (c) means a natural person or juristic person who was an associate of another natural person or juristic person at the time of the disposition in question or at the **time date** of the liquidation of the estate or liquidation of one of the parties; and
- (d) means that two entities are associates of each other if the one is an associate of the other;
[New definition]

~~"bank" means a bank which is registered finally in terms of the Banks Act, 1990 (Act No. 94 of 1990);~~

"bank" means a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990) or a mutual bank finally registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993);²

"**book or books**" in relation to bookkeeping or the recording or storage of information, includes any electronic or mechanical device by means of which the information concerned is recorded or stored, and in relation to the production, the handing over or the attachment of any book or books, means the production, the handing over or the attachment of a print-out or other written version of the said information produced by means of such device; [New definition]

"**concurrent creditor**" means a creditor who **in whole or in part** has a claim other than as a secured creditor or a preferent creditor; [New definition]

2 Insolvency Act section 2:

'banking institution' means a banking institution as defined in section 1 of the Banks Act, 1965 (Act 23 of 1965), and registered or provisionally registered or deemed to be registered as a banking institution in terms of section 4 of that Act, but does not include a provisionally registered banking institution which is so registered provisionally after the coming into operation of the Insolvency Amendment Act, 1972;

'building society' means a building society as defined in section 1 of the Building Societies Act, 1965 (Act 24 of 1965), and finally registered or deemed to be finally registered as a building society in terms of section 5 of that Act;

Draft Insolvency Bill
Clause 1

"**contribution**" in respect of a fund or annuity means a contribution made to such fund or annuity by the insolvent in respect of the insolvent, less that part of the contribution which represents commission or a premium in respect of death or disability benefits and benefits paid to the insolvent before **the date of** liquidation; [New definition]

"**court**" means the provincial or local division of the **Supreme High** Court which has jurisdiction in the matter or a judge of that division, and in section 2(b); 12(1); 18, 20, 21, 101 and 102 **and** also a magistrate's court which has jurisdiction in respect of the matter or offence concerned;³

“date of liquidation” means the date of the first liquidation order; [New definition]

“debtor”, in connection with the liquidation of the debtor’s estate, means a person or entity which is a debtor in the usual sense of the word, except a debtor which can be wound up under the Companies Act, 1973 (Act No. 61 of 1973) or any other Act and, unless inconsistent with the context or clearly inappropriate, includes such a debtor before the date of liquidation of his or her estate;⁴

"**disposition**" means any transfer or abandonment of rights to property and includes a sale, mortgage, pledge, delivery, payment, release, compromise, donation, suretyship or any

3 Insolvency Act section 2:

'Court' or 'the Court', in relation to any matter means the provincial or local division of the Supreme Court which has jurisdiction in that matter in terms of section one hundred and forty-nine or one hundred and fifty-one, or any judge of that division; and in relation to any offence under this Act or in section eight, twenty-six, twenty-nine, thirty, thirty-one, thirty-two, paragraph (a) of subsection (3) of section thirty-four, seventy-two, seventy-three, seventy-five, seventy-six, seventy-eight or one hundred and forty-seven the expression 'Court' or 'the Court' includes a magistrate's court which has jurisdiction in regard to the offence or matter in question;

4 Insolvency Act section 2:

'debtor', in connection with the sequestration of the debtor's estate, means 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;

'insolvent' when used as a noun, means a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context;

Draft Insolvency Bill
Clause 1

contract therefor, ~~but does not include a disposition in compliance with an order of court,~~⁵

"**exchange**" in relation to transactions on an exchange, means a stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial exchange or clearing house as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989);⁶

"financial lease" means a contract whereby a lessor leases specified movable property to a lessee at a specified rent over a specified period subject to a term of the contract that—

- (a) at the expiry of the contract the lessee may acquire ownership of the leased property by paying an agreed or determinable sum of money to the lessor; or
- (b) the rent paid in terms of the contract shall at the expiry of the contract be applied in reduction of an agreed or determinable price at which the lessee may purchase the leased property from the lessor; or
- (c) the proceeds of the realization of the leased property at the expiry of the lease shall accrue wholly or partly to the lessee; [New definition]

"first liquidation order" means a provisional order for the liquidation of the estate of a debtor or an order for the final liquidation of the estate of the debtor if a provisional liquidation order has not been granted. [New definition]

5 Insolvency Act section 2:

'disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and 'dispose' has a corresponding meaning;

6 Insolvency Act section 35A(1):

(1) In this section—

'exchange' means a licensed stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act 1 of 1985), or a financial exchange or clearing house as defined in section 1 of the Financial Markets Control Act, 1989 (Act 55 of 1989);

Draft Insolvency Bill
Clause 1

"**free residue**" in relation to an insolvent estate, means that portion of the estate which is not subject to any claim by a secured creditor;⁷

"**fund**" means any pension fund, provident fund or pension scheme which is instituted in terms of any law or regulation or a fund which is registered or provisionally registered in terms of section 4 of the Pension Funds Act, 1956, (Act No. 24 of 1956); [New definition]

"**Gazette**" means the **Government Gazette**; [New definition]

"**good faith**" in relation to the disposition of property, means the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above the other;⁸

"**immovable property**" means land and every right, **title** and interest in **and to** land or minerals which is registerable in any office in the Republic intended for the registration of title to land or **to the** right to mine;⁹

"**insolvent**" means a debtor whose estate is under liquidation, and in relation to a debtor who at the **time date** of the liquidation of his or her estate is married in community of property, includes the spouse of such debtor;¹⁰

7 **Insolvency Act section 2:**

'free residue', in relation to an insolvent estate, means 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;

8 **Insolvency Act section 2:**

'good faith', in relation to the disposition of property, means the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above another;

9 **Insolvency Act section 2:**

'immovable property' means land and every right or interest in land or minerals which is registrable in any office in the Republic intended for the registration of title to land or the right to mine;

10 **Insolvency Act section 2:**

'insolvent' when used as a noun, means a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context;

Draft Insolvency Bill
Clause 1

"**insolvent estate**" means an estate which is under liquidation and where the joint estate of spouses married in community of property is under liquidation it includes the separate property of the spouses;¹¹

"**liquidation order**" means an order of a court whereby the estate of a debtor is placed under liquidation and includes a provisional liquidation order, **when it has not been set aside**;¹²

"**magistrate**" includes an additional magistrate and an assistant magistrate;¹³

"**market participant**" in relation to transactions on an exchange, means a stock broker **or a member** as defined in section 1 of the Stock Exchanges Control Act, 1985, or a financial instrument principal or a financial instrument trader as defined in section 1 of the Financial Markets Control Act, 1989, or a client of such a stock broker, **member**, or financial instrument trader **or any other party to a transaction**;¹⁴

"**Master**" means the Master of the **Supreme High** Court within whose area of jurisdiction the matter concerned is to be dealt with and includes a Deputy Master and an Assistant Master;¹⁵

"**Minister**" means the Minister of Justice;[New definition]

11 **Insolvency Act section 2:**

'insolvent estate' means an estate under sequestration;

12 **Insolvency Act section 2:**

'sequestration order' means any order of court whereby an estate is sequestrated and includes a provisional order, when it has not been set aside;

13 **Insolvency Act section 2:**

'magistrate' includes an additional magistrate and an assistant magistrate;

14 **Insolvency Act section 35A(1):**

'market participant' means a stockbroker or a member as defined in section 1 of the Stock Exchanges Control Act, 1985, or a financial instrument principal or a financial instrument trader as defined in section 1 of the Financial Markets Control Act, 1989, or a client of such a stockbroker, member or financial instrument trader or any other party to a transaction;

15 **Insolvency Act section 2:**

'Master' in relation to any matter, means the Master of the Supreme Court within whose area of jurisdiction that matter is to be dealt with and includes an Assistant Master;

Draft Insolvency Bill
Clause 1

"**movable property**" means every kind of property and every right or interest which is not immovable property;¹⁶

“personal notice” means a notice or delivery by mail, telefax, electronic mail, or personal delivery supported by an affidavit by the liquidator with a list of the persons given notice and the method of delivery used by the liquidator: Provided that the liquidator may substitute for personal notice another form of notice approved by the Master;[New definition]

"**preferent creditor**" means a creditor whose claim enjoys preference in terms of section 80(2) or (3) **or a similar preference in terms of any other Act;**¹⁷ [New definition]

"**property**" means movable or immovable property wherever situated ~~within the Republic~~ and includes contingent interests in property;¹⁸

"**Republic**" means the Republic of South Africa; [New definition]

"**reservation of ownership contract**" means a contract in terms of which corporeal or incorporeal movable property is sold to a purchaser, the purchase price is payable wholly or partly in the future, the property is delivered to or placed at the disposal of the purchaser and the ownership in the property does not pass to the purchaser upon delivery of the property, but remains vested in the seller until the purchase price is fully paid or until the occurrence of some other specified event;¹⁹

16 Insolvency Act section 2:

'movable property' means every kind of property and every right or interest which is not immovable property;

17 Insolvency Act section 2:

'preference', in relation to any claim against an insolvent estate, means the right to payment of that claim out of the assets of the estate in preference to other claims; and 'preferent' has a corresponding meaning;

18 Insolvency Act section 2:

'property' means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fidei commissary heir or legatee;

19 Credit Agreements Act section 1:

'instalment sale transaction' means a transaction in terms of which-

- (a) goods are sold by the seller to the purchaser against payment by the purchaser to the seller of a

Draft Insolvency Bill
Clause 1

"**rules of an exchange**" means rules made pursuant to either section 12 of the Stock Exchanges Control Act, 1985 or section 17 of the Financial Markets Control Act, 1989²⁰;

"**secured creditor**" means a creditor of an insolvent estate who holds security for his **or her** claim against the estate; [New definition]

"**security**" in relation to the claim of a creditor of an insolvent estate, means property of the insolvent estate over which the creditor has a preferent right by virtue of any special ~~mortgage~~ **bond**, landlord's legal hypothec, pledge, **including a cession of rights to secure a debt**, right of retention, ~~or~~ reservation of ownership, **financial lease, or a preferent right over property in terms of any other Act**,²¹

"**sheriff**" includes a deputy sheriff;²²

"**social benefit**" means the pension, allowance or benefits payable to a person in terms of ~~the Aged Persons Act, 1967 (Act No. 81 of 1967), the War Veterans' Pensions Act 1968 (Act No. 25 of 1968), the Blind Persons Act, 1968 (Act No. 26 of 1968), the Disability Grants Act 1968 (Act No. 27 of 1968), the Social Pensions Act, 1973 (Act No. 37 of 1973), the Occupational Diseases in Mines and Works Act 1973 (Act No. 78 of 1973), section 9 of the Civil Protection Act 1977 (Act No. 67 of 1977), the Social Aid Act (House of Assembly)~~

stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future; and

(b) the purchaser does not become the owner of those goods merely by virtue of the delivery to or the use, possession or enjoyment by him thereof; or

(c) the seller is entitled to the return of those goods if the purchaser fails to comply with any term of that transaction;

20 Insolvency Act section 35A(1):

'rules of an exchange' means rules made pursuant to either section 12 of the Stock Exchanges Control Act, 1985, or section 17 of the Financial Markets Control Act, 1989;

21 Insolvency Act section 2:

'security', in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention;

22 Insolvency Act section 2:

'sheriff' includes a deputy sheriff;

Draft Insolvency Bill
Clause 2

~~1989 (Act No. 37 of 1989)~~, the Social Assistance Act, 1992 (Act No. 59 of 1992) and the Compensation for Occupational Injuries and Diseases Act 1993 (Act No. 130 of 1993); [New definition]

"**special mortgage bond**" means a mortgage bond hypothecating any immovable property or a notarial ~~mortgage~~ bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act 57 of 1993), or such a notarial ~~mortgage~~ bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act No. 18 of 1932), ~~but excludes any other mortgage bond hypothecating movable property;~~²³

"**spouse**" means a spouse in the legal sense, and even if there is such a spouse, also a spouse according to any law or custom or a person of any sex living with another **as a spouse as if married**;²⁴ [21(13)]

"**transaction**" in relation to transactions on an exchange, means any transaction to which the rules of an exchange apply.²⁵

Acts of insolvency

- 2.** A debtor commits an act of insolvency—

23 Insolvency Act section 2:

'special mortgage' means a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act 57 of 1993), or such a notarial mortgage bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act 18 of 1932), but excludes any other mortgage bond hypothecating movable property;

24 Insolvency Act section 21(13):

In this section the word 'spouse' means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.

25 Insolvency Act section 35A(1):

'transaction' means any transaction to which the rules of an exchange apply.

Draft Insolvency Bill
Clause 2

- (a) if he or she leaves the Republic or, being out of the Republic remains absent therefrom, or absents himself or herself from his or her dwelling or regular place of business, with intent thereby to evade or delay the payment of his or her debts;²⁶
- (b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof;²⁷
- (c) if he or she disposes or attempts to dispose of his or her property or any part thereof in a manner which ~~has or would have the effect of prejudicing his or her creditors or of preferring one creditor above the other~~ appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she was able to pay his or her debts after the disposition;²⁸
- (d) if he or she removes or attempts to remove any of his or her property ~~with intent to prejudice his or her creditors or to prefer one creditor above another~~ in a manner which appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she was able to pay his or her debts after the removal or attempted removal;²⁹

26 **Insolvency Act section 8(a):**

A debtor commits an act of insolvency-

(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;

27 **Insolvency Act section 8(b):**

A debtor commits an act of insolvency- ...

if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

28 **Insolvency Act section 8(c):**

A debtor commits an act of insolvency- ...

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;

29 **Insolvency Act section 8(d):**

A debtor commits an act of insolvency- ...

if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;

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Clause 3

- (e) if he or she makes or offers to make any arrangement with any of his or her creditors for releasing him or her wholly or partially from his or her debts;³⁰
- ~~(f) if, having applied in terms of section 3 for the liquidation of his or her estate, he or she fails to comply with the requirements of that section or submits a statement of affairs contemplated in that section which is substantially incorrect or incomplete;~~³¹
- (g) if he or she gives notice in writing to any one of his or her creditors that he or she is unable to pay any of his or her debts.³²

Application by debtor for liquidation of his estate

3. (1) A debtor who is insolvent or a person who lawfully acts on behalf of an insolvent debtor who is incompetent to manage his or her own affairs or the executor or liquidator of the insolvent estate of a deceased person may apply to a court for the liquidation of the estate of the debtor.³³

30 Insolvency Act section 8(e):

A debtor commits an act of insolvency- ...

if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

31 Insolvency Act section 8(f):

A debtor commits an act of insolvency- ...

if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of subsection (3) of section four or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;

32 Insolvency Act section 8(g):

A debtor commits an act of insolvency- ...

if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;

33 Insolvency Act section 3(1):

An insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor or of an insolvent debtor who is incapable of managing his own affairs, may petition the court for the acceptance of the surrender of the debtor's estate for the benefit of his creditors.

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Clause 3

(2) The application shall contain the following information, which shall also appear in the heading of the application:

- (a) The full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number; and
- (b) the marital status of the debtor and, if he or she is married in community of property, the full name and date of birth of his or her spouse and, if an identity number has been assigned to the spouse, that identity number.³⁴

(3) An application referred to in subsection (1) shall be accompanied by—

- (a) a statement of affairs of the debtor corresponding substantially with Form A of Schedule A and which shall contain the particulars provided for in the said Form, which particulars shall be sworn to or confirmed as required by the said Form;³⁵
- (b) a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 79, which are not recoverable from other creditors of the estate.³⁶

34 Insolvency Act section 9(3)(a)(i) & (ii):

Such a petition shall, subject to the provisions of paragraph (c), contain the following information, namely-

- (i) the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number;
- (ii) the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse;

35 Insolvency Act section 4(3):

The petitioner shall lodge at the office of the Master a statement in duplicate of the debtor's affairs, framed in a form corresponding substantially with Form B in the First Schedule to this Act. That statement shall contain the particulars for which provision is made in the said Form, shall comply with any requirements contained therein and shall be verified by an affidavit (which shall be free from stamp duty) in the form set forth therein.

36 Insolvency Act section 9(3)(b):

The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all

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Clause 3

(4) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and—

~~(a) give personal notice to every creditor of the debtor whose address is known to him or her or which he or she can reasonably obtain, of the date on which the application is to be heard by the court and of the name and address of the debtor's attorney or other person where the statement of affairs may be examined and where a copy thereof may be obtained;~~

~~(b)~~ send a copy of the application and two copies of the statement of affairs referred to in subsection 3(a) as well as a copy of the affidavit in support of the application, to the Master.³⁷

(4A) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just. [New provision]

(5) The affidavit in support of the application for liquidation referred to in subsection (1) shall confirm that the requirements of subsection (4) have been complied with. [New provision]

(6) The Master may require the applicant to cause the property enumerated in the statement of affairs to be valued by an appraiser appointed in terms of the Administration of Estates Act 1965 (Act 66 of 1965), or by a person designated by the Master.³⁸

costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

³⁷ See section 4(3) in footnote 35.

³⁸ **Insolvency Act section 4(4):**

Upon receiving the said statement, the Master may direct the petitioner to cause any property set forth therein to be valued by a sworn appraiser or by any person designated by the Master for the purpose.

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Clause 3

(7) ~~The Master may report to the court on any matter relevant to the application for liquidation contemplated in subsection (1) and shall so report on request of the Court. A copy of the Master's report shall be sent to the applicant. The Master's report, if any, and any affidavit by the applicant in answer to the Master's report;~~ the court may make an order as contemplated in section 7 or may dismiss the application or postpone its hearing or make any other order that it deems just.³⁹

Application by creditor for liquidation of debtor's estate

4. (1) A creditor who has a liquidated claim of not less than the amount of R2000 ~~or the amount fixed by the Minister from time to time in the Gazette~~ against a debtor who has committed an act of insolvency or who is insolvent or two or more creditors who in the aggregate have liquidated claims against such debtor for not less than the amount of R2000 ~~or the amount thus fixed by the Minister~~ may apply to a court for the liquidation of the debtor's estate.⁴⁰

(1A) The Minister may amend the amounts in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(2) A claim in respect of a liquidated debt which is payable at some determined time in the future may be taken into account for purposes of subsection (1).⁴¹

39 **Insolvency Act section 9(5):**

The court, on consideration of the petition, the Master's or the said officer's report thereon and of any further affidavit which the petitioning creditor may have submitted in answer to that report, may act in terms of section ten or may dismiss the petition, or postpone its hearing or make such other order in the matter as in the circumstances appears to be just.

40 **Insolvency Act section 9(1):**

A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.

41 **Insolvency Act section 9(2):**

A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of subsection (1).

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Clause 4

- (3) (a) An application contemplated in subsection (1) shall be made with notice to the debtor and to the debtor's spouse ~~with whom he or she is married in community of property~~, unless the court orders that such notice may be dispensed with.[New provision]
- (b) Such an application shall, subject to subparagraph (d), contain the following information, namely—
- (i) the full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number;
 - (ii) the marital status of the debtor and if he or she is married in community of property, the full name and date of birth of his or her spouse and if an identity number has been assigned to the spouse, such identity number;
 - (iii) the amount, cause and nature of such claim;
 - (iv) whether or not security has been given for the claim and if so, the nature and value of the security; and
 - (v) the act of insolvency on which the application is founded or otherwise an allegation that the debtor is in fact insolvent.⁴²

42 **Insolvency Act section 9(3)(a):**

Such a petition shall, subject to the provisions of paragraph (c), contain the following information, namely-

- (i) the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number;
- (ii) the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse;
- (iii) the amount, cause and nature of the claim in question;
- (iv) whether the claim is or is not secured and, if it is, the nature and value of the security; and
- (v) the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent.

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Clause 4

- (c) The allegations in the application shall be supported by an affidavit and the application shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 79, which are not recoverable from creditors of the estate.⁴³
- (d) The particulars in paragraph (b)(i) and (ii) shall appear also in the heading of the application and if the applicant is unable to furnish all such particulars he or she shall mention the reason why he or she is unable to do so.⁴⁴
- (e) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and, unless notice to the debtor has been dispensed with, a copy of the application and copies of all annexures thereto shall be served on the debtor or handed to him or her by the applicant or his or her attorney or the attorney's clerk.
[New provision]
- (f) If the **applicant debtor** wishes to oppose the application he or she shall lodge a notice and replying affidavit with the registrar and serve on or hand a copy thereof to the applicant, before noon on the second court day before the day on which the application is to be heard by the court. [New provision]

43 **Insolvency Act section 9(3)(b):**

The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

44 **Insolvency Act section 9(3)(c):**

The particulars contemplated in paragraph (a) (i) and (ii) shall also be set out in the heading to the petition, and if the creditor is unable to set out all such particulars he shall state the reason why he is unable to do so.

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Clause 5

(g) A copy of the application and of every affidavit in support of the allegations in the application shall be sent to the Master when the application is lodged with the registrar ~~and the provisions of section 3(7) shall mutatis mutandis apply with regard to reporting by the Master to the court in respect of such application.~~⁴⁵

(4) If an applicant is unable to comply with any of the requirements of subsection (3), the court may dispense with such requirement and dispose of the application in the manner that it finds just. [New provision]

(5) ~~The Master may report to the court on any matter relevant to the application for liquidation contemplated in section 4(1) and shall so report on request of the Court. A copy of the Master's report shall be sent to the applicant.~~ Having considered the application, ~~the Master's report, if any, and any affidavit by the applicant in answer to the Master's report,~~ the court may make an order as contemplated in section 7 or may dismiss the application or postpone its hearing or make any other order that it deems just.⁴⁶

Liquidation of partnership estate

5. (1) When application is made to a court for the liquidation of the estate of a partnership, **whether in terms of this Act or another Act,** application shall simultaneously be made for the liquidation of the separate estate of every partner, other than a partner ~~whose liability is in terms of the partnership agreement limited~~ **who is not liable for partnership debts** or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate.⁴⁷

45 **Insolvency Act section 9(4):**

Before such a petition is presented to the court, a copy of the petition and of every affidavit confirming the facts stated in the petition shall be lodged with the Master, or, if there is no Master at the seat of the court, with an officer in the public service designated for that purpose by the Master by notice in the Gazette, and the Master or such officer may report to the court any facts ascertained by him which would appear to him to justify the court in postponing the hearing or in dismissing the petition. The Master or the said officer shall transmit a copy of that report to the petitioning creditor or his agent.

46 **Insolvency Act section 9(5):**

The court, on consideration of the petition, the Master's or the said officer's report thereon and of any further affidavit which the petitioning creditor may have submitted in answer to that report, may act in terms of section ten or may dismiss the petition, or postpone its hearing or make such other order in the matter as in the circumstances appears to be just.

47 **Insolvency Act section 3(2):**

All the members of a partnership (other than partners en commandite or special partners as defined in the Special

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Clause 5

(2) The provisions of section 3, in so far as they are applicable, shall apply **mutatis mutandis** in respect of an application by members of a partnership for the liquidation of the partnership estate and the provisions of section 4, in so far as they are applicable, shall apply **mutatis mutandis** in respect of an application by a creditor or creditors of a partnership for the liquidation of the estate of the partnership.⁴⁸

(3) A court granting a provisional or a final order for the liquidation of the estate of a partnership, **whether in terms of this Act or another Act**, shall simultaneously grant a **corresponding** order for the liquidation of the separate estate of every partner, except a partner ~~whose liability is in terms of the partnership agreement limited~~ **who is not liable for partnership debts** or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate: Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be liquidated by reason only of the liquidation of the estate of the partnership.⁴⁹

Partnerships Limited Liability Act, 1861 (Act 24 of 1861) of the Cape of Good Hope or in Law 1 of 1865 of Natal) who reside in the Republic, or their agent, may petition the court for the acceptance of the surrender of the estate of the partnership and of the estate of each such member.

Insolvency Act section 13(1):

If the court sequestrates the estate of a partnership (whether provisionally or finally or on acceptance of surrender), it shall simultaneously sequester the estate of every member of that partnership other than a partner en commandite or a special partner as defined in the Special Partnerships' Limited Liability Act, 1861 (Act 24 of 1861) of the Cape of Good Hope or in Law 1 of 1865 of Natal, who has not held himself out as an ordinary or general partner of the partnership in question: Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be sequestered by reason only of the sequestration of the estate of the partnership.

Insolvency Act section 13(3):

The surrender of the estate of a partnership shall not be accepted unless and until the court is satisfied that petitions have been presented for the acceptance of the surrender of the separate estates of all the partners in the partnership concerned, and that in this regard the requirements of section four have been observed. The petitions re the surrender of the separate estates of the several partners may be incorporated in the petition re the surrender of the estate of the partnership.

48 See section 13(3) of the Insolvency Act in footnote 47 above.

49 See sections 13(1) and 13(3) of the Insolvency Act in footnote 47 above.

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Clause 6

(4) In the case where there is no partner whose estate may be liquidated as contemplated in subsection (3), the court may nevertheless liquidate the partnership estate and in such event every director, officer or member of a juristic person that is a partner of the partnership in question and every natural person who is a partner but whose estate may not be liquidated, shall for the purpose of performing any statutory requirement in respect of the partnership estate be deemed to be a person whose estate is under liquidation. [New provision]

(5) Where the separate estate of a partner is unable to meet fully the costs of the liquidation of that estate, the balance shall be paid out of the partnership estate and where the partnership estate is unable to meet fully the costs of liquidation the balance shall be paid out of the estates of the partners.⁵⁰

(6) If a partnership has been dissolved and the partnership estate is unable to pay its debts, the partnership estate may, on the application of a creditor of the partnership or a former partner, be liquidated as an insolvent estate and the provisions of subsections (1), (2), (3), (4) and (5) shall **mutatis mutandis** apply to such liquidation. [New provision]

Malicious or vexatious application for liquidation

6. Whenever the court is satisfied that an application for the liquidation of a debtor's estate is malicious or vexatious, the court may allow the debtor forthwith to prove any damages which he or she may have suffered by reason of the provisional liquidation of his or her estate and award him or her such compensation as it deems fit.⁵¹

Provisional liquidation order

50 **Insolvency Act section 13(2):**

Where the individual estate of a partner is unable fully to meet the costs of sequestration, the balance shall be paid out of the assets of the estate of the partnership.

51 **Insolvency Act section 15:**

Whenever the court is satisfied that a petition for the sequestration of a debtor's estate is malicious or vexatious, the court may allow the debtor forthwith to prove any damage which he may have sustained by reason of the provisional sequestration of his estate and award him such compensation as it may deem fit.

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Clause 7

7. (1) If a court hearing an application for the liquidation of the estate of a debtor as contemplated in section 3 or 4 is satisfied **prima facie** that—

- (a) the applicable requirements of section 3 or 4, as the case may be, have been complied with;
- (b) there is reason to believe that the liquidation of the estate of the debtor will be to the advantage of his or her creditors;
- (c) the debtor has ~~prima facie~~ committed an act of insolvency or that he or she is insolvent; and
- (d) in the case of an application contemplated in section 4, the applicant has a claim against the debtor as contemplated in subsection (1) of that section,

the court may grant a provisional order for the liquidation of the estate of the debtor.⁵²

(2) A court granting a provisional liquidation order contemplated in subsection (1) shall simultaneously grant a rule **nisi** calling upon the ~~debtor~~ **all interested parties and the respondent, if any**, to appear on a date mentioned in the rule and show cause why his or her estate should not be liquidated finally.⁵³

52 **Insolvency Act section 10:**

If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie—

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.

53 **Insolvency Act section 11(1):**

If the court sequestrates the estate of a debtor provisionally it shall simultaneously grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his estate should not be sequestrated finally.

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Clause 8

(3) The return day of the rule **nisi** may on the application of the **debtor respondent** be anticipated for the purpose of discharging the order for provisional liquidation if 24 hours notice is given to the applicant.⁵⁴

(4) If the court does not grant a provisional liquidation order as contemplated in subsection (1) it may **grant a final order in terms of section 8**, dismiss the application **or**, postpone the hearing thereof **but not sine die**, or make any other order which it deems just.⁵⁵

(5) When a provisional liquidation order is granted the registrar shall ensure that the particulars which shall in terms of section 3(2) and 4(3)(d) appear in the heading of the application appear also on the order.⁵⁶

(6) If there are reasonable grounds to believe that an insolvent may flee the country to avoid prosecution or to take assets out of the reach of creditors, the court may when it grants a provisional or final liquidation order, or at any time thereafter on an application by the liquidator issue an order that the passport or passports of the insolvent should be handed to the liquidator for the period stated in the order. [New provision]

Final liquidation order

8. (1) If at the hearing of an application as contemplated in section 3 or 4 or pursuant to the rule **nisi** contemplated in section 7(2) the court is satisfied that—

54 **Insolvency Act section 11(3):**

Upon the application of the debtor the court may anticipate the return day for the purpose of discharging the order of provisional sequestration if twenty-four hours' notice of such application has been given to the petitioning creditor.

55 **Insolvency Act section 12(2):**

If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die.

56 **Insolvency Act section 9(3)(d):**

In issuing a sequestration order the registrar shall reflect any of the said particulars that appear in the heading to the petition on such order.

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Clause 9

- (a) in the case where the application for liquidation was made by a creditor, that creditor has established a claim against the debtor in accordance with section 4;
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his or her estate is liquidated,

it may make an order for the final liquidation of the estate of the debtor.⁵⁷

(2) If the court **does not issue a provisional order in terms of section 7 and** is not satisfied as contemplated in subsection (1), it shall dismiss the application for the liquidation of the estate of the debtor and set aside the provisional liquidation order or require further proof of the allegations in the application and postpone the hearing for a reasonable period but not **sine die**.⁵⁸

(3) When a final liquidation order is granted the registrar shall ensure that the particulars which shall in terms of section 3(2) and 4(3)(d) appear in the heading of the application appear also on the order.⁵⁹

Obligations of creditor upon whose application a liquidation order is made

57 Insolvency Act section 12(1):

If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that-

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequester the estate of the debtor.

58 Insolvency Act section 12(2):

If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.

59 Insolvency Act section 9(3)(d):

In issuing a sequestration order the registrar shall reflect any of the said particulars that appear in the heading to the petition on such order.

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Clause 10

9. (1) The creditor upon whose application a liquidation order is made shall, at his or her own cost, prosecute all the proceedings in the liquidation until a liquidator is appointed.⁶⁰

(2) The liquidator shall pay to the said creditor his or her costs in respect of the prosecution of the liquidation proceedings, as costs of the liquidation and the costs so payable to the said creditor shall be taxed according to the tariff applicable in the court that made the liquidation order.⁶¹

~~(3) A creditor referred to in subsection (1) shall be liable to contribute towards the costs of the liquidation irrespective of whether or not he or she has proved a claim against the estate and he or she shall be liable to contribute not less than the amount which he or she would have had to contribute if he or she had proved the claim stated in his or her application, without relying on his or her security if he or she is a secured creditor.~~

Notice and commencement of liquidation

10. (1) The registrar of the court which has granted a first liquidation order shall without delay send a copy of that order and of any order amending or discharging that order—

(a) to the registrar of deeds of every deeds registry in the Republic; and

(b) to the sheriff of the district in which the insolvent resides or appears to be carrying on business.⁶²

60 Insolvency Act section 14(1):

The creditor upon whose petition a sequestration order has been made shall, at his own cost, prosecute all the proceedings in the sequestration until a provisional trustee has been appointed or if no provisional trustee has been appointed until a trustee has been appointed.

61 Insolvency Act section 14(2):

The trustee shall pay to the said creditor out of the first funds of the estate available for that purpose under section ninety-seven his costs, taxed according to the tariff applicable in the court which made the sequestration order.

62 Insolvency Act section 17(1)(b):

1) The registrar shall without delay transmit-

- (a) one original of every sequestration order and of every order relating to an insolvent estate or to a trustee or to an insolvent, made by the court, to the Master;
- (b) one original of every provisional sequestration order or if a final sequestration order was not

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Clause 10

(2) Every registrar of deeds and every sheriff who has received a copy of an order sent to him or her in pursuance of subsection (1) shall note thereon the date and time when it was received by him or her.⁶³

(3) A registrar of deeds who has received a copy of a first liquidation order **in terms of subsection (2) or section 33(3)** shall, **if he has not yet entered a caveat**, enter a **caveat** against the transfer of all immovable property or the cancellation or cession of every bond registered in the name of or belonging to the insolvent, and **if the liquidation order contains the name of the spouse of the insolvent, he shall in like manner enter a caveat in respect of such spouse**. **If** the registrar receives a copy of an order discharging a liquidation order, he or she shall cancel every **caveat** entered in respect of such first liquidation order. A **caveat** entered in terms of this subsection shall expire ten years after the date of the liquidation order in question.⁶⁴

(4) The registrar of the court shall without delay send a copy of every provisional or final liquidation order and any other order made by the court in respect of the insolvent or the liquidator of the insolvent estate, to the Master.⁶⁵

-
- preceded by a provisional sequestration order, then of that final order, and of every order amending or setting aside any prior order so transmitted, which was made by the court to-
- (i) the deputy-sheriff of every district in which it appears that the insolvent resides or owns property;
 - (ii) every officer charged with the registration of title to any immovable property in the Republic;
 - (ii)bis every officer having charge of a register of ships kept at a port of registry appointed as such in terms of paragraph (c) of section four of the Merchant Shipping Act, 1951, for the registration of ships;
 - (iii) every sheriff and every messenger who or whose deputy holds under attachment any property belonging to the insolvent estate.

63 Insolvency Act section 17(2):

Every officer who has received an order transmitted to him in terms of subsection (1), or a certificate and a copy of an order transmitted to him in terms of section 18A, shall register each such order, certificate or copy and note thereon the day and hour when it was received in his office.

64 Insolvency Act section 17(3):

Upon the receipt by any officer referred to in subparagraph (ii) of paragraph (b) of subsection (1) of a sequestration order, or of a certificate and a copy of an order referred to in section 18A, he shall, if he has not yet entered such a caveat, enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent, and if the sequestration order or the certificate referred to in section 18A contains the name of the spouse of the insolvent, he shall in like manner enter a caveat in respect of such spouse.

65 Insolvency Act section 17(1)(a):

The registrar shall without delay transmit-

- (a) one original of every sequestration order and of every order relating to an insolvent estate or to

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(5) Upon the granting of a first liquidation order the ~~attorney for the~~ applicant who applied for the order shall without delay cause a notice of the order to be published in the **Gazette**.⁶⁶

~~(6) The time of commencement of liquidation is the time when the first liquidation order is granted by the court.~~

Effect of liquidation on insolvent and his or her property

11. (1) The issuing of a first liquidation order in respect of an insolvent shall have the effect that the insolvent is divested of his or her estate and that his or her insolvent estate vests in the Master until a liquidator is appointed whereupon the insolvent estate vests in the liquidator.⁶⁷

(2) The estate of the insolvent remains vested in the liquidator until it reverts to the insolvent in terms of a composition contemplated in section 71 ~~or until the rehabilitation of the insolvent in terms of section 96 or 98, or until the liquidation order is set aside: Provided that property that was vested in the liquidator immediately prior to the rehabilitation shall remain vested in him or her for realization and distribution.~~⁶⁸

(3) If the liquidator vacates his or her office or dies or becomes incompetent to exercise his or her powers and perform his or her duties, the estate shall vest in any remaining liquidator or if there is none, in the Master until the appointment of a new liquidator.⁶⁹

a trustee or to an insolvent, made by the court, to the Master;

66 Insolvency Act section 17(4):

When the Master has received a sequestration order or an order setting aside a provisional sequestration order he shall in each case give notice in the Gazette of such order.

67 Insolvency Act section 20(1)(a):

The effect of the sequestration of the estate of an insolvent shall be-

- (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;

68 Insolvency Act section 25(1):

The estate of an insolvent shall remain vested in the trustee until the insolvent is reinvested therewith pursuant to a composition as in section 119 provided, or until the rehabilitation of the insolvent in terms of section 127 or 127A: Provided that, subject to the provisions of subsection (3), any property which immediately before the rehabilitation is vested in the trustee shall remain vested in him after the rehabilitation for the purposes of realization and distribution.

69 Insolvency Act section 25(2):

When a trustee has vacated his office or has been removed from office or has resigned or died the estate shall vest in the remaining trustee, if any; otherwise it shall vest in the Master until another trustee has been appointed.

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(3A) After the expiry of every caveat entered in terms of sections 10(3), 62(8), or 98(3) or paragraph 16 of Schedule 4 in respect of the property of an insolvent any act of registration in respect of such property brought about by him or her shall be valid in spite of the fact that the property formed part of the insolvent estate.⁷⁰

(4) If a person who is or was insolvent unlawfully disposes of immovable property which forms part of his or her insolvent estate, the liquidator may recover the value of the property so disposed of—

- (a) from the insolvent or former insolvent; or
- (b) from any person who, knowing such property to be part of the insolvent estate, acquired such property from the insolvent or former insolvent; or
- (c) from any person who acquired such property from the insolvent or former insolvent without giving sufficient value in return, in which case the amount so recovered shall be the difference between the value of the property and any value given in return.⁷¹

(5) (a) The execution of a judgment in respect of property of the insolvent shall be stayed as soon as the sheriff becomes aware of the issuing of a **provisional first** liquidation order against the insolvent, unless the court orders otherwise.⁷²

70 Insolvency Act section 25(3):

After the expiry of every caveat entered in terms of section 17 (3), 18B or 127A in respect of the property of an insolvent any act of registration in respect of such property brought about by him shall be valid in spite of the fact that the property formed part of his insolvent estate.

71 Insolvency Act section 25(4):

If a person who is or was insolvent unlawfully disposes of immovable property or a right to immovable property which forms part of his insolvent estate, the trustee may, notwithstanding the provisions of subsection (3), recover the value of the property or right so disposed of-

- (a) from the insolvent or former insolvent;
- (b) from any person who, knowing such property or right to be part of the insolvent estate, acquired such property or right from the insolvent or former insolvent; or
- (c) from any person who acquired such property or right from the insolvent or former insolvent without giving sufficient value in return, in which case the amount so recovered shall be the difference between the value of the property or right and any value given in return.

72 Insolvency Act section 20(1)(c):

The effect of the sequestration of the estate of an insolvent shall be- ...

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- (b) If costs in connection with the sale in execution of assets of the insolvent have already been incurred when the execution of a judgment is stayed as contemplated in paragraph (a), the Master may on the application of the liquidator, on the conditions he or she finds just and subject to confirmation of the sale price by the Master or by resolution of a meeting of creditors of the estate, approve the continuation of the sale for the benefit of the insolvent estate, in which case the costs of the sale before or after liquidation shall be deducted from the proceeds.⁷³[New provision]
- (c) The liquidator of an insolvent estate is entitled to recover from a creditor of the insolvent the net amount of any payment in pursuance of the execution of any judgement made to such creditor after the granting of the first liquidation order ~~in pursuance of the execution of any judgment~~. [New provision]
- (6) For purposes of this section—
- (a) the following property shall be excluded from a person's insolvent estate:
- (i) the necessary beds, bedding and wearing apparel of the insolvent and his or her family;
 - (ii) the necessary furniture (other than beds) and household utensils of the insolvent in so far as they do not exceed ~~R1000~~ 2000 in value;
 - (iii) stock, tools and agricultural implements of a farmer, in so far as they do not exceed ~~R1000~~ 2000 in value;

-
- (c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs;

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- (iv) the supply of food and drink in the house sufficient for the needs of the insolvent and his or her family during one month;
 - (v) tools and implements of trade, in so far as they do not exceed R~~1000~~ 2000 in value;
 - (vi) professional books, documents or instruments necessarily used by the insolvent in his or her profession, in so far as they do not exceed R~~1000~~ 2000 in value;
 - (vii) such arms and ammunition as the insolvent is required by law, regulation or disciplinary order to have in his or her possession as part of his or her equipment;⁷⁴ and
- (b) all other property of the insolvent at the date of the issuing of the **provisional first** liquidation order, including property or the proceeds thereof which are in the hands of the sheriff under a writ of attachment **of or** a warrant of execution, and, subject to section 15, all property acquired by or which accrued to the insolvent during his or her insolvency, shall notwithstanding the provisions of any other law form part of the insolvent's insolvent estate.⁷⁵

(7) The Minister may change the amounts referred to in subsection (6)(a)(ii), (iii), (v) and (vi) from time to time by notice in the **Gazette**. [New provision]

⁷⁴ **Insolvency Act section 82(6):**

From the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain, for his own use any property so excepted from the sale.

⁷⁵ **Insolvency Act section 20(2):**

For the purposes of subsection (1) the estate of an insolvent shall include-

- (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;
- (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three.

Insolvency Act section 23(1):

Subject to the provisions of this section and of section twenty-four, all property acquired by an insolvent shall belong to his estate.

The effect of liquidation on civil proceedings by or against the insolvent

12. (1) The issuing of a **provisional first** liquidation order in respect of an insolvent has the effect that all civil proceedings instituted in a court by or against the insolvent shall, subject to the provisions of section 15(7), be stayed.⁷⁶

(2) Proceedings which have been stayed in terms of subsection (1) may with the consent of the **court or** liquidator **appointed in terms of section 55** or with three weeks' notice to **the such** liquidator be continued against the insolvent estate. The opposite party may apply to the Registrar to substitute the liquidator for the insolvent in the proceedings.⁷⁷

(3) The liquidator may, by giving written notice to all parties and to the registrar, substitute himself or herself as party for the insolvent in proceedings by or against the insolvent, other than proceedings contemplated in section 15(6). [New provision]

(4) The court may on application by the liquidator or a creditor who has proved a claim against the insolvent estate prohibit the continuation of proceedings against the insolvent estate if the court is of the opinion that the institution or continuation of the proceedings was delayed unreasonably and that the continuation of the proceedings will delay the finalisation of the insolvent estate unreasonably.⁷⁸

76 **Insolvency Act section 20(1)(b):**

The effect of the sequestration of the estate of an insolvent shall be... to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate;

77 **Insolvency Act section 75(1):**

Any civil legal proceedings instituted against a debtor before the sequestration of his estate shall lapse upon the expiration of a period of three weeks as from the date of the first meeting of the creditors of that estate, unless the person who instituted those proceedings gave notice, within that period, to the trustee of that estate, or if no trustee has been appointed, to the Master, that he intends to continue those proceedings, and after the expiration of a period of three weeks as from the date of such notice, prosecutes those proceedings with reasonable expedition: Provided that the court in which the proceedings are pending may permit the said person (on such conditions as it may think fit to impose) to continue those proceedings even though he failed to give such notice within the said period, if it finds that there was a reasonable excuse for such failure.

78 Compare section 75(1) in the previous footnote.

(5) **After the confirmation of the liquidator's first account by the Master and more that three months after the conclusion of the first meeting** no person shall institute legal proceedings against the insolvent estate in respect of any liability which arose before the **date of** liquidation ~~after three months after the conclusion of the first meeting and the confirmation of any liquidator's account by the Master~~: Provided that the court may, subject to the provisions of section 90 and subject to such conditions as the court may impose, permit the institution of such proceedings if it is of the opinion that there was a reasonable excuse for the delay in instituting the proceedings.⁷⁹

Instalment sale agreement by insolvent as seller

~~13. (1) If an insolvent, before the liquidation of his or her estate, sold and delivered movable property by virtue of a contract of purchase and sale in terms of which the purchase price of the property was payable in more than two instalments and the ownership of the property would not pass to the purchaser until the full purchase price had been paid, the liquidator shall within six weeks after the receipt of written notice from the purchaser of the existence of the contract, elect whether or not to abide by the terms of the contract.~~

~~(2) The liquidator shall within the period of six weeks mentioned in subsection (1), inform the purchaser in writing of his or her decision, failing which he or she shall be deemed to have elected to abide by the terms of the contract.~~

⁷⁹ **Insolvency Act section 75(2):**

After the confirmation, by the Master, of any trustee's account in an insolvent estate in terms of section one hundred and twelve, no person shall institute any legal proceedings against that estate in respect of any liability which arose before its sequestration: Provided that the court in which it is sought to institute proceedings may, on such conditions as it may think fit to impose, but subject to the provisions of the said section, permit the institution of such proceedings after the said confirmation, if it finds that there was a reasonable excuse for the delay in instituting such proceedings.

~~—(3) If the liquidator elects not to abide by the terms of the contract he or she shall, when informing the purchaser of his or her decision—~~

~~—(a) state the full balance outstanding in respect of the purchase price; and~~

~~—(b) inform the purchaser that he or she is entitled to obtain ownership of the property on payment of the said balance within such period as the liquidator may allow, which period shall not be less than 30 days.~~

~~—(4) Ownership of the property shall pass to the purchaser upon payment of the balance of the purchase price stated in subsection (3) within the fixed period in accordance with that subsection. [New provision]~~

Payment to insolvent of debt which arose before liquidation

~~14. If payment is made to an insolvent of a debt which became due or in respect of which the cause arose before the issuing of the provisional **first** liquidation order, such payment shall be void unless the debtor proves that it was made in good faith and without knowledge of the liquidation order. [22]~~

Rights and obligations of insolvent during insolvency

15. (1) The fact that a person entering into a contract is insolvent shall not affect the validity of that contract: Provided that if the insolvent thereby purports to dispose of any property of his insolvent estate or, without the consent in writing of the liquidator of his or her estate, enters into any contract whereby any earnings which accrues to his or her insolvent estate in terms of subsection (5) is or is likely to be adversely affected, the contract shall in either case be voidable at the option of the liquidator, but subject to the provisions of section 16.⁸⁰

80 **Insolvency Act section 23(2):**

The fact that a person entering into any contract is an insolvent, shall not affect the validity of that contract: Provided that the insolvent does not thereby purport to dispose of any property of his insolvent estate; and provided further that an insolvent shall not, without the consent in writing of the trustee of his estate, enter into any contract whereby his estate or any contribution towards his estate which he is obliged to make, is or is likely to be adversely

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(2) The insolvent may follow any profession or occupation and, subject to subsection (5), he or she may collect for his or her own benefit any remuneration for work done or payment for professional services rendered by him or her or someone on his or her behalf after the issuing of the **provisional first** liquidation order.⁸¹

(2A) Any person who, after the date of liquidation of an insolvent's estate, became a creditor of the insolvent as a result of illegal conduct on the part of the insolvent shall be entitled to payment of the debt out of any assets that accrued to the insolvent estate as a result of the said illegal conduct to the extent that such debt cannot be recovered from the insolvent personally and after payment of all costs attributable to such assets: Provided that the said creditor was not at the time when he or she became a creditor aware of and could not by exercising reasonable care have acquired knowledge of the illegality of the conduct.

[New provision]

(3)(a) The insolvent shall keep a detailed record of all assets and income received by him or her from whatever source and of all expenses incurred by him or her and he or she shall for a period of one year from the issuing of the **provisional first** liquidation order send to the liquidator monthly during the first week of every month a statement of his or her income and expenses during the preceding month, confirmed by an affidavit or a solemn declaration, and after the expiry of the said period of one year he or she shall send to the liquidator annually a return of his or her income and expenses for the preceding year, likewise sworn to or confirmed, and in addition he or she shall at the written request of the liquidator within seven days after such

affected, but in either case subject to the provisions of subsection (1) of section twenty-four.

81 **Insolvency Act section 23(3):**

An insolvent may follow any profession or occupation or enter into any employment, but he may not, during the sequestration of his estate without the consent in writing of the trustee of his estate, either carry on, or be employed in any capacity or have any direct or indirect interest in, the business of a trader who is a general dealer or a manufacturer: Provided that any one of the creditors of the insolvent's estate or the insolvent himself may, if the trustee gives or refuses such consent, appeal to the Master, whose decision shall be final.

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request, submit to the liquidator particulars of income received and expenses incurred by him or her for the period indicated by the liquidator.⁸²

- (b) The liquidator may at all reasonable times inspect the records referred to in paragraph (a) and may require the insolvent to submit proof in support of such records and of expenses which he or she claims to have incurred for his or her own support or that of his or her dependants.⁸³

(4) No benefit in terms of any pension law or the rules of a fund which is claimable by the insolvent and is paid after the **date of** liquidation of his or her estate, and no social benefit which is so claimable and paid, shall form part of the insolvent's insolvent estate, **except to the extent that such benefit exceeds R200 000, paid prior to the date of rehabilitation in the year after the date of liquidation or a subsequent year.**⁸⁴

(4A) The Minister may amend the amount in subsection (4) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

- (5)(a) ~~The Master shall on the application of the liquidator and upon proof of the earnings received by the insolvent out of the exercise of his or her profession, occupation or employment and his or her estimated expenses for his or her own support and that of his or her dependants, issue a certificate indicating which proportion of the insolvent's future earnings, if any, is not required for such support and shall accrue to his or her insolvent estate.~~ **[23(5)] The liquidator may issue from the magistrates court of the district in which the insolvent**

82 **Insolvency Act section 23(4):**

The insolvent shall keep a detailed record of all assets received by him from whatever source, and of all disbursements made by him in the course of his profession, occupation or employment, and, if required thereto by the trustee, shall transmit to the trustee in the first week of every month a statement verified by affidavit of all assets received and of all disbursements made by him during the preceding month. The trustee may inspect such record at all reasonable times and may demand the production of reasonable vouchers in support of any item in such accounts and of the expenditure of the insolvent for the support of himself and those dependent upon him.

83 See section 23(4) in the previous footnote.

84 **Insolvency Act section 23(7):**

The insolvent may for his own benefit recover any pension to which he may be entitled for services rendered by him.

resides, carries on business or is employed a notice calling on the insolvent to appear at a hearing before the court in chambers on a date specified in such notice to give evidence on and supply proof of the earnings received by the insolvent out of the exercise of his or her profession, occupation or employment and his or her estimated expenses for his or her own support and that of his or her dependants.⁸⁵

The notice shall be drawn up by the liquidator, shall be signed by the liquidator and the clerk of the court and shall be served by the sheriff on the insolvent at least 7 days before the date specified in the notice for the hearing, in the manner prescribed by the rules of the court Uniform Rules of Court for the service of process in general.⁸⁶

The court may at any time in the presence of the insolvent postpone the proceedings to such date as the court may determine and may order the

85 **Insolvency Act section 23(5):**

The trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this subsection, to any part of the insolvent's remuneration due to him at the same time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee.

Section 65A(1)(a) of Magistrates' Courts Act 32 of 1944:

If a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalments or otherwise of such an amount, and such judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable or from the expiry of the period of suspension ordered in terms of section 48 (e), as the case may be, the judgment creditor may issue, from the court of the district in which the judgment debtor resides, carries on business or is employed, or if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situate, a notice calling upon the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.

86 **Magistrates' Court Act 32 of 1944 section 65A(1)(b):**

A notice referred to in paragraph (a) shall be drawn up by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and served by the sheriff, or by the attorney of the judgment creditor or any candidate attorney in his or her employ, on the judgment debtor or, if the judgment debtor is a juristic person, on the director or officer summonsed as the representative of the juristic person and in his or her personal capacity, in the manner prescribed by the rules for the service of process in general and at least ten days before the date fixed in the notice for the appearance before the court.

insolvent to produce such documents as the court may specify at the hearing on the date determined by the court.⁸⁷

On the appearance of the insolvent before the court the court in chambers shall call upon the insolvent to give evidence under oath or affirmation on his or her earnings or estimated expenses contemplated in the first paragraph above and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just by or on behalf of either the insolvent or the liquidator as is material to the determination of the said earnings or estimated expenses.⁸⁸

The court shall after the hearing issue a certificate indicating which proportion of the insolvent's future earnings, if any, is not required for such support and shall accrue to his or her insolvent estate.⁸⁹

87 **Magistrates' Court Act 32 of 1944 section 65D(2):**

The court may at any time in the presence of the judgment debtor or the said director or officer postpone the proceedings to such date as the court may determine.

88 **Magistrates' Courts Act 32 of 1944 section 65D(1):**

On the appearance before the court of the judgment debtor or, if the judgment debtor is a juristic person, the director or officer of the juristic person summonsed as the representative of the juristic person or in his or her personal capacity, on the return day of the notice referred to in section 65A(1) or (8) (b), in pursuance of his or her arrest under a warrant referred to in section 65A(6), or on any date to which the proceedings have been postponed, the court in chambers shall, subject to the provisions of subsection (2) of this section, call upon him or her to give evidence under oath or affirmation on his or her financial position or the financial position of the juristic person, as the case may be, and the court shall permit the examination or cross-examination of the judgment debtor or the said director or officer on all matters relevant to the judgment debtor's financial position and his or her ability to pay the judgment debt, and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just, by or on behalf of either the judgment debtor or the judgment creditor, as is material to the determination of the judgment debtor's financial position and his or her ability to pay the judgment debt, and for the purposes of such evidence witnesses may be summoned in the manner prescribed in the rules.

89 **Magistrates' Courts Act 32 of 1944 section 65D(4)(a):**

In determining the ability of the judgment debtor to pay the judgment debt in instalments or otherwise the court shall take into consideration-

- (a) in the case of a judgment debtor who is a natural person, the nature of his income, the amounts needed by him for his necessary expenses and those of the persons dependent on him, and for the making of periodical payments which he is obliged to make in terms of an order of court, agreement or otherwise in respect of his other commitments as disclosed in the evidence presented at the hearing of the proceedings;

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(b) The liquidator may submit a copy of a certificate contemplated in paragraph (a) to the insolvent's employer whereupon the employer shall be obliged to transmit to the liquidator in accordance with the certificate the amount stated therein.⁹⁰

(c) Any property which the insolvent obtains after the issuing of a **provisional first** liquidation order with earnings which ~~does~~ not in terms of a certificate contemplated in paragraph (a) accrue to his or her insolvent estate, shall not form part of the insolvent estate.⁹¹

(6) If an emoluments attachment order issued by a court in respect of a judgment debtor prior to the **date of** liquidation of his estate is in force when his estate is liquidated, such order shall remain in force for a period of six months from the date of the **first** liquidation order. The employer upon whom the emoluments attachment order was served shall in accordance with the order make payments to the liquidator for the benefit of the insolvent estate.⁹²

(7) (a) The insolvent may sue or be sued in his or her own name without reference to the liquidator of his or her estate in any matter relating to status or any right in so far as it does not affect his or her insolvent estate or in respect of any claim due to or against him or her under this section but no cession of his or her earnings after the **date of** liquidation of his or her estate, whether made before or after the issuing of

90 See section 23(5) in footnote 98.

91 **Insolvency Act section 23(9):**

Subject to the provisions of subsection (5) the insolvent may recover for his own benefit, the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate.

92 **Magistrates' Courts Act 32 of 1944 section 65J:**

(a) Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed.

(b) An emoluments attachment order-

(i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and

(ii) shall oblige the garnishee to pay from time to time to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor in accordance with the order of court laying down the specific instalments payable by the judgment debtor, until the relevant judgment debt and costs have been paid in full.

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the **provisional first** liquidation order, shall be of any effect so long as his or her estate is under liquidation.⁹³

(b) The insolvent may be sued in his or her own name for any delict committed by him or her after the **date of** liquidation of his or her estate, and his or her insolvent estate shall not be liable therefor.⁹⁴

(c) The insolvent may for his or her own benefit recover any compensation for any loss or damage which he or she may have suffered, whether before or after the **date of** liquidation of his or her estate, by reason of any defamation or personal injury: Provided that ~~compensation payable to him or her for personal injuries shall be paid over to the liquidator of his or her estate who shall out of that amount pay the insolvent's debts in respect of medical treatment and hospitalisation and shall pay the balance to the insolvent~~ **where such compensation recovered by the insolvent includes medical or other expenses a creditor in respect of such expenses is entitled to be paid out of the compensation or recover the compensation from the insolvent even though the claim for such expenses arose before the date of liquidation of the estate**: Provided further that the insolvent shall not without leave of the court institute any action against the liquidator of his or her estate on the ground of malicious prosecution or defamation.⁹⁵

93 **Insolvency Act section 23(6):**

The insolvent may sue or may be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his estate or in respect of any claim due to or against him under this section, but no cession of his earnings after the sequestration of his estate, whether made before or after the sequestration shall be of any effect so long as his estate is under sequestration.

94 **Insolvency Act section 23(10):**

The insolvent may be sued in his own name for any delict committed by him after the sequestration of his estate, and his insolvent estate shall not be liable therefor.

95 **Insolvency Act section 23(8):**

The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of any defamation or personal injury: Provided that he shall not, without the leave of the court, institute an action against the trustee of his estate on the ground of malicious prosecution or defamation.

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(8) Any property claimable by the liquidator from the insolvent under this section may be recovered from the insolvent by warrant of execution to be issued by the registrar upon the production to him or her of a certificate by the Master that the property stated therein is so claimable.⁹⁶

(9) The insolvent shall at the request of the liquidator assist the liquidator to the best of his or her ability in collecting, taking charge of or realising any property belonging to the insolvent estate and the liquidator shall during the period of such assistance, give to the insolvent out of the insolvent estate such an allowance in money or in goods as is, in the opinion of the Master, necessary to support the insolvent and his or her dependants.⁹⁷

(10) The insolvent shall keep the liquidator informed **in writing** of his or her postal and residential address.⁹⁸

(11) ~~Any notice which is to be conveyed to an insolvent in terms of this Act may be delivered to him or her personally or may be sent to him or her per certified post to the address referred to in subsection~~ **If a notice is to be conveyed to an insolvent in terms of this Act personal notice may be given to the insolvent to the address referred to in subsection (10).**⁹⁹

Alienation by insolvent of property to third party who is in good faith

96 Insolvency Act section 23(11):

Any property claimable by the trustee from the insolvent under this section may be recovered from the insolvent by writ of execution to be issued by the registrar upon the production to him of a certificate by the Master that the property stated therein is so claimable.

97 Insolvency Act section 23(12):

The insolvent shall at any time before the second meeting of the creditors of his estate held in terms of section forty, at the request of the trustee assist the trustee to the best of his ability in collecting, taking charge of or realising any property belonging to the estate: Provided that the trustee shall, during the period of such assistance, give to the insolvent out of the estate such an allowance in money or goods as is, in the opinion of the Master, necessary to support the insolvent and his or her dependants.

98 Insolvency Act section 23(13):

The insolvent shall keep the trustee of his estate informed of his residential and postal addresses.

99 Insolvency Act section 23(14):

Any notice or information which is to be conveyed to an insolvent in terms of this Act, may be delivered to him personally or may be delivered at or sent in a registered letter by post to an address given by the insolvent to the trustee in terms of subsection (13).

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Clause 16

16. If the insolvent, without the consent of the liquidator of his or her estate, alienates for value any property which he or she acquired after the **date of** liquidation of his or her estate and which forms part of his or her insolvent estate, or any right to such property, to a person who proves that he or she was not aware and had no reason to suspect that the estate of the insolvent was under liquidation, the alienation shall nevertheless be valid.¹⁰⁰

Presumptions relating to property in possession of insolvent

17. (1) Whenever an insolvent has acquired the possession of property and the liquidator of his or her estate claims that property for the benefit of the insolvent estate that property shall be presumed to belong to the insolvent estate, unless the contrary is proved.¹⁰¹

(2) If any person who became a creditor of the insolvent after the **date of** liquidation of the insolvent's estate alleges against the insolvent or the liquidator that property acquired by the insolvent does not belong to the insolvent estate and claims any right thereto, then it shall be presumed, unless the contrary is proved, that the said property does not belong to the insolvent estate.¹⁰²

Disposition without value

18. (1) Every disposition of property not made for value within three years before the **presentation of the application for** liquidation of an insolvent's estate **to the Registrar** may be

100 **Insolvency Act section 24(1):**

If an insolvent purports to alienate, for valuable consideration, without the consent of the trustee of his estate any property which he acquired after the sequestration of his estate (and which by virtue of such acquisition became part of his sequestrated estate) or any right to any such property to a person who proves that he was not aware and had no reason to suspect that the estate of the insolvent was under sequestration the alienation shall nevertheless be valid.

101 **Insolvency Act section 24(2):**

Whenever an insolvent has acquired the possession of any property, such property shall, if claimed by the trustee of the insolvent's estate, be deemed to belong to that estate unless the contrary is proved; but if a person who became the creditor of the insolvent after the sequestration of his estate, alleges (whether against the trustee or against the insolvent) that any such property does not belong to the said estate and claims any right thereto, the property shall be deemed not to belong to the estate, unless the contrary is proved.

102 See section 24(2) in the previous footnote.

Draft Insolvency Bill
Clause 18

set aside by the court if such disposition was made by the insolvent ~~(a) more than two years before the presentation of the application for liquidation of his or her estate to the Registrar, and it is proved that immediately after the disposition was made the liabilities of the insolvent exceeded his or her assets; or (b) within two years before the presentation of the application for liquidation of his or her estate to the Registrar or within three years before the presentation of the application for liquidation to the Registrar if the disposition was made in favour of an associate: ~~and the person claiming under or benefited by the disposition is unable to prove that immediately after the disposition was made the assets of the insolvent exceeded his or her liabilities:~~ Provided that if it is proved by someone opposing the setting aside of the disposition that the liabilities of the insolvent at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of such excess.¹⁰³~~

(2) A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent, shall not give rise to any claim in competition with the creditors of the insolvent's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent, and which—

- (a) was made by way of suretyship, guarantee or indemnity; and
- (b) has not been set aside under subsection (1),

103 **Insolvency Act section 26(1):**

Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-

- (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
- (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

Draft Insolvency Bill
Clause 19

the beneficiary concerned may compete with the creditors of the insolvent's estate for an amount not exceeding the amount by which the value of the insolvent's assets exceeded his or her liabilities immediately before the making of that disposition.¹⁰⁴

Antenuptial contracts

19. (1) No immediate benefit under a duly registered antenuptial contract given in good faith by one spouse to the other or to any child to be born of the marriage shall be set aside as a disposition without value, unless the **application for the liquidation of the** estate of the spouse who gave the benefit was **liquidated presented to the Registrar** within two years of the registration of that antenuptial contract.¹⁰⁵

(2) In subsection (1) the expression "immediate benefit" means a benefit given by a transfer, delivery, payment, cession, pledge, or special **mortgage bond** of property completed before the expiration of a period of three months as from the date of the marriage.¹⁰⁶

Voidable preferences

20. (1) Every disposition of his or her property made by a debtor which has the effect that any one of his or her creditors receives a benefit to which he or she would not have been entitled

104 Insolvency Act section 26(2):

A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent, shall not give rise to any claim in competition with the creditors of the insolvent's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent, and which-

- (a) was made by way of suretyship, guarantee or indemnity; and
- (b) has not been set aside under subsection (1), the beneficiary concerned may complete with the creditors of the insolvent's estate for an amount not exceeding the amount by which the value of the insolvent's assets exceeded his liabilities immediately before the making of that disposition.

105 Insolvency Act section 27(1):

No immediate benefit under a duly registered antenuptial contract given in good faith by a man to his wife or any child to be born of the marriage shall be set aside as a disposition without value, unless that man's estate was sequestrated within two years of the registration of that antenuptial contract.

106 Insolvency Act section 27(2):

In subsection (1) the expression 'immediate benefit' means a benefit given by a transfer, delivery, payment, cession, pledge, or special mortgage of property completed before the expiration of a period of three months as from the date of the marriage.

Draft Insolvency Bill
Clause 20

had the debtor's estate been under liquidation at the time of the making of the disposition may be set aside by the court if—

- (a) the debtor's liabilities exceeded the value of his or her assets immediately after the making of the disposition; and
- (b) the disposition was made within **3 6** months before the **presentation of the application for** liquidation of the debtor's estate **to the Registrar** or within **6 12** months before the **liquidation said presentation** in the case where it was made to an associate of the debtor,

unless the person for whose benefit the disposition was made, proves that it was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above the other, and if he or she is an associate of the debtor, also proves that he or she was not aware and had no reason to suspect that the debtor's liabilities would exceed the value of his or her assets immediately after the making of the disposition.¹⁰⁷

(2) For purposes of subsection (1) it shall be presumed unless the contrary is proved, that a disposition was made not in the ordinary course of business if—

- (a) it was made by way of payment of a debt that was not due and payable or not legally enforceable;
- (b) it embodied payment in an unusual form or a form other than that originally agreed upon;

107 Insolvency Act section 29(1):

Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

Draft Insolvency Bill
Clause 20

(c) it was made by way of securing an existing unsecured debt or securing a debt in novation or substitution of an existing unsecured debt which existed for more than one month after the creditor in respect of such debt performed his or her obligations in respect of the transaction giving rise to that debt. [New provision]

~~(3) If any material fact relating to a disposition of property made by a debtor was concealed by a creditor who has received a benefit as contemplated in subsection (1) or if such creditor assisted in or identified himself or herself with the concealment of any such fact, the period referred to in of subsection (1)(b) shall not start to run against a person who institutes proceedings for the setting aside of the disposition, until he or she became aware, or acting with diligence ought to have become aware, of such fact. [New provision]~~

(4) Any disposition of his or her property by a debtor at a time when his or her liabilities exceed his or her assets, made with the intention of preferring one of his or her creditors above another, may be set aside by the court if the **application for the liquidation of the** estate of the debtor is **liquidated presented to the Registrar** within 3 years after the making of the disposition.¹⁰⁸

(5) For purposes of this section a surety of a debtor or a person by law in a position analogous to that of a surety shall be deemed to be a creditor of the debtor.¹⁰⁹

(6) Every disposition of property made under a power of attorney, whether revocable or irrevocable, shall for the purposes of this section, be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place.¹¹⁰

108 Insolvency Act section 30(1):

If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.

109 Insolvency Act section 30(2):

For the purposes of this section and of section twenty-nine a surety for the debtor and a person in a position by law analogous to that of a surety shall be deemed to be a creditor of the debtor concerned.

110 Insolvency Act section 29(3):

Every disposition of property made under a power of attorney whether revocable or irrevocable, shall for the purposes of this section and of section thirty be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place.

Collusive dealings for prejudicial disposition of property

21. (1) Any transaction entered into by a debtor before **or after** the liquidation of his or her estate in collusion with another person for disposing of property belonging to ~~him or her~~ **the debtor or the debtor's estate** in a manner which had the effect of prejudicing his or her creditors or preferring one creditor above another, may after the liquidation of his or her estate be set aside by the court.¹¹¹

(2) Any person who was a party to such collusion shall be liable to make good any loss thereby incurred by the insolvent estate and shall pay for the benefit of the estate, by way of penalty, such sum as the court may determine, which sum shall not be more than the amount by which he or she would have benefited if the disposition had not been set aside, and if he or she is a creditor he or she shall also forfeit his or her claim against the insolvent estate.¹¹²

(3) The compensation and penalty referred to in subsection (2) may be recovered in any proceedings for the setting aside of the transaction concerned.¹¹³

Certain contributions to pension funds may be recovered for benefit of insolvent estate

22. (1) If an insolvent at any time within two years before the **presentation to the Registrar of the application for the** liquidation of his or her estate undertook new obligations in respect of a fund at a time when the insolvent's liabilities exceeded his or her assets, or as a result of which his or her liabilities exceeded his or her assets, the liquidator of his or her estate may recover from the fund or funds concerned for the benefit of the insolvent estate any contribution in respect of

111 **Insolvency Act section 31(1):**

After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

112 **Insolvency Act section 31(2):**

Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.

113 **Insolvency Act section 31(3):**

Such compensation and penalty may be recovered in any action to set aside the transaction in question.

Draft Insolvency Bill
Clause 22

such new obligation which together with the total contributions in respect of existing obligations, exceed the amount of R10 000 per annum: Provided that **if it is proved by someone opposing the recovery of contributions that the liabilities of the insolvent at any time after the new obligation was undertaken exceeded his or her assets by less than the said amount which the liquidator may recover** the amount which may be recovered shall not be greater than the amount by which the insolvent's liabilities exceeded his or her assets: **Provided further that payment by one fund to another fund upon termination of service or dissolution of a fund and contributions to a new fund in so far as they replace contributions to another fund shall not be regarded as new obligations:** Provided further that if contributions which are recoverable have been made to more than one fund, or membership has been transferred from one fund to another, the amount which may be recovered from any such fund shall be proportioned according to the contributions made or transferred to each fund in respect of such new obligations.

(1A) The Minister may amend the amount in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(2) Notwithstanding the provisions of any other law, a fund from which any contribution is recovered as contemplated in subsection (1) may reduce the benefits to which the insolvent concerned would have been entitled in terms of the rules of the fund in respect of such contributions, in proportion to the contributions so recovered from the fund.

(3) No greater amount shall be recovered from a fund in terms of subsection (1) than the amount that would have been payable to the insolvent if the fund had been dissolved on the date when the amount is recovered.

(4) If the full amount in terms of subsection (1) cannot be recovered because of the limitation in subsection (3), the liquidator may recover the deficit proportionately from the insolvent personally in respect of benefits which he or she received from the said fund **within three years** after **date of** liquidation, and from another beneficiary in respect of benefits which he or she received from the said fund before or **within three years** after **the date of** liquidation in connection with the insolvent.

Draft Insolvency Bill
Clause 22A

(5) If a fund had bought an annuity for a member from an insurer, the fund may recover from the insurer that part of the purchase price paid out of contributions recoverable in terms of subsection (1) and the insurer may, notwithstanding the provisions of any other law, reduce the future benefits in respect of the annuity accordingly: Provided that the amount so recovered shall not exceed the value of the insolvent's annuity on the date when the amount is recovered.

(6) If the insolvent conceals the payment of a contribution to a fund from his or her creditors or partakes in the concealment thereof or resigns himself or herself thereto, the liquidator may recover contributions made before creditors discovered the payment of the contribution, or could reasonably have discovered if they had acted with due care, ~~irrespective of whether the insolvent became a member of the fund within two years before~~ presentation to the Registrar of the application for the liquidation and irrespective of whether the said contributions were made within two years before presentation to the Registrar of the application for the liquidation.

(7) The provisions of this section shall not prejudice the rights of a liquidator or creditors in terms of the common law or this Act, if contributions were made fraudulently to the disadvantage of creditors or if there were collusive dealings as contemplated in section 21.

(8) If the payment of premiums in respect of a life policy ~~or contributions to a friendly society~~ are contributions to a fund in terms of this section, the provisions of ~~sections 39 to 47 of the Insurance Act, 1934⁴³ (Act No. 27 of 1934⁴³) and sections 48A and 48B of the Friendly Societies Act, 1956 (Act No. 25 of 1956)~~ section 63 of the Long-Term Insurance Act, 1998 (Act No. 52 of 1998), shall not apply to such a life policy ~~or benefits payable by the friendly society~~ .

[New provision]

Attachment of property in possession of associate

22A.(1) The sheriff shall, if instructed to do so by the liquidator, attach property in the possession of an associate of the insolvent pending an application to have a disposition of the property set aside.

(2) The property must be released if the sheriff is instructed to do so by the liquidator.

(3) The liquidator shall instruct the sheriff to release property as soon as it is evident that attachment of the property is not required to safeguard the interests of the estate in the setting aside of a disposition of property.

(4) The costs of attachment of the property shall form part of the costs of liquidation.

Certain rights not affected by improper disposition

23. (1) A person who, in return for any disposition which is in terms of section 18, 20 or 21 liable to be set aside, has parted with any property or security which he or she held or who has lost any right against another person shall, if he or she acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the liquidator has indemnified him or her for parting with such property or security or for losing such right.¹¹⁴

(2) Section 18, 20 and 21 shall not affect the rights of any person who acquired property in good faith and for value from any person other than a person whose estate was subsequently liquidated.¹¹⁵

114 Insolvency Act section 33(1):

A person who, in return for any disposition which is liable to be set aside under section twenty-six, twenty-nine, thirty, or thirty-one, has parted with any property or security which he held or who has lost any right against another person, shall, if he acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the trustee has indemnified him for parting with such property or security or for losing such right.

115 Insolvency Act section 33(2):

Section twenty-six, twenty-nine, thirty, or thirty-one shall not affect the rights of any person who acquired property in good faith and for value from any person other than a person whose estate was subsequently sequestrated.

(3) The setting aside of a disposition made by a debtor in terms of section 18, 20 or 21 shall not discharge a surety for the debtor.[New provision]

Set-off

23A. If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is liquidated within a period of six months after the taking place of the set-off, or if a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is liquidated; then the liquidator of the insolvent estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place: Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 1 and any other party in accordance with the rules of such an exchange, or if it amounts to payment of a net amount in terms of section 28.¹¹⁶

Payment of debt to insolvent after liquidation

116 Insolvency Act section 46:

If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is sequestrated within a period of six months after the taking place of the set-off, or if a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is sequestrated; then the trustee of the sequestrated estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place: Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 35A and any other party in accordance with the rules of such an exchange, or if it takes place under an agreement defined in section 35B.

Draft Insolvency Bill
Clause 24

24. If **on or** after the **date of** liquidation of an insolvent's estate a debtor of the insolvent pays to the insolvent a debt that was due before the **date of** liquidation or otherwise fulfils any obligation towards the insolvent the cause of which arose before the **date of** liquidation, such payment or such fulfilment shall be void, unless the debtor proves that it was made or done in good faith without knowledge on his or her part of the liquidation.¹¹⁷

Institution of proceedings on behalf of insolvent estate

25. (1) Proceedings for the setting aside of any disposition of property made by a debtor or for the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of the insolvent estate of the debtor may be instituted by the liquidator and, if the liquidator fails to take any such steps they may be taken by any creditor on behalf of the insolvent estate upon having indemnified the liquidator against all costs thereof **to the reasonable satisfaction of the liquidator**.¹¹⁸

(1A) If any creditor has taken proceedings under subsection (1) no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.¹¹⁹

117 **Insolvency Act section 22:**

Every satisfaction in whole or in part of any obligation the fulfilment whereof was due or the cause of which arose before the sequestration of the creditor's estate shall, if made to the insolvent after such sequestration, be void, unless the debtor proves that it was made in good faith and without knowledge of the sequestration.

118 **Insolvency Act section 32(1):**

- (a) Proceedings to recover the value of property or a right in terms of section 25 (4), to set aside any disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee.
- (b) If the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.

119 **Insolvency Act section 104(3):**

If any creditor has under subsection (1) of section 32 taken proceedings to recover the value of property or a right under section 25 (4), to set aside any disposition of or dealing with property under section 26, 29, 30 or 31 or for the recovery of damages or a penalty under section 31, no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.

Draft Insolvency Bill
Clause 26

(2) In any such proceedings the insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he or she may be called upon by the court to give evidence and the provisions of section 65(6) shall **mutatis mutandis** apply to the giving of evidence at such proceedings.¹²⁰

(2A) In any such proceedings under section 18, or 20, or 22 it is presumed, until the contrary has been proved, that the liabilities of the debtor exceeded his or her assets or the value of his or her assets at any time within 3 years before the date of liquidation of the estate. [New provisions]

(3) When the court sets aside any disposition of property it shall declare the liquidator ~~or the creditor, as the case may be,~~ entitled to recover the alienated property or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher, and interest may be recovered on the value of such property in accordance with section 2A of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).¹²¹

Uncompleted acquisition of immovable property by insolvent

26. (1) If before the **date of** liquidation of his or her estate an insolvent had entered into a contract for the acquisition of immovable property by him or her and such property had not yet been transferred to him or her at the **time date** of ~~the~~ liquidation, the liquidator of the insolvent estate may elect either to abide by the contract or to abandon it.

(2) The other party to the said contract may call upon the liquidator by written request to exercise his or her choice and if the liquidator fails to exercise his or her choice and to notify the

120 **Insolvency Act section 32(2):**

In any such proceedings the insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he may be called by the court to give evidence. When giving such evidence he may not refuse to answer any question on the ground that the answer may tend to incriminate him or on the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

121 **Insolvency Act section 32(3):**

When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.

Draft Insolvency Bill
Clause 27

other party thereof within 6 weeks after he or she has received the written request, the other party may apply to the court for an order for the cancellation of the contract and for restoring any such immovable property which came in possession or under the control of the insolvent or the liquidator by virtue of the contract.

(3) The court may, in respect of an application referred to in subsection (2), make any order it finds just.

(4) The provisions of this section shall not affect any right which the said other party may have to establish against the insolvent estate a concurrent claim for any loss suffered by him or her as a result of the non-fulfilment of the contract.¹²²

Transactions on an exchange

27. (1) If upon the **date of** liquidation of the estate of a market participant the obligations of such market participant in respect of any transaction entered into prior to the **date of** liquidation have not been fulfilled, the exchange in question in respect of any obligation owed to it, or any other market participant in respect of obligations owed to such market participant, shall in accordance with the rules of that exchange applicable to any such transaction be entitled ~~either to fulfil all such unfulfilled obligations of the insolvent market participant or~~ to terminate all

122 **Insolvency Act section 35:**

If an insolvent, before the sequestration of his estate, entered into a contract for the acquisition of immovable property which was not transferred to him, the trustee of his insolvent estate may enforce or abandon the contract. The other party to the contract may call upon the trustee by notice in writing to elect whether he will enforce or abandon the contract, and if the trustee has after the expiration of six weeks as from the receipt of the notice, failed to make his election as aforesaid and inform the other party thereof, the other party may apply to the court by motion for cancellation of the contract and for an order directing the trustee to restore to the applicant the possession of any immovable property under the control of the trustee, of which the insolvent or the trustee gained possession or control by virtue of the contract, and the court may make such order on the application as it thinks fit: Provided that this section shall not affect any right which the other party may have to establish against the insolvent estate, a non-preferent claim for compensation for any loss suffered by him as a result of the non-fulfilment of the contract.

Draft Insolvency Bill
Clause 27

such transactions and the liquidator of the insolvent estate of the market participant shall be bound by such ~~fulfilment or~~ termination.¹²³

(2) No claim as a result of the termination of any transactions as contemplated in subsection (1) shall exceed the amount due upon termination in terms of the rules of the exchange in question.¹²⁴

(3) Any rules of an exchange and the practices thereunder which provide for the netting of a market participant's position or for set-off in respect of transactions concluded by the market participant or for the opening or closing of a market participant's position shall upon the **date of** liquidation of the estate of the market participant be binding on the liquidator in respect of any transaction or contract concluded by the market participant **on or** prior to such **date of** liquidation, but which is, in terms of such rules and practices, to be settled on a date occurring after the **date of** liquidation, or settlement of which was overdue on the date of liquidation.¹²⁵

(4) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 18 and 20 of this Act shall not apply to property disposed of in accordance with the rules of an exchange.¹²⁶

123 Insolvency Act section 35A(2):

If upon the sequestration of the estate of a market participant the obligations of such market participant in respect of any transaction entered into prior to sequestration have not been fulfilled, the exchange in question in respect of any obligation owed to it, or any other market participant in respect of obligations owed to such market participant, shall in accordance with the rules of that exchange applicable to any such transaction be entitled to terminate all such transactions and the trustee of the insolvent estate of the market participant shall be bound by such termination.

124 Insolvency Act section 35A(3):

No claim as a result of the termination of any transaction as contemplated in subsection (2) shall exceed the amount due upon termination in terms of the rules of the exchange in question.

125 Insolvency Act section 35A(4):

Any rules of an exchange and the practices thereunder which provide for the netting of a market participant's position or for set-off in respect of transactions concluded by the market participant or for the opening or closing of a market participant's position shall upon sequestration of the estate of the market participant be binding on the trustee in respect of any transaction or contract concluded by the market participant prior to such sequestration, but which is, in terms of such rules and practices, to be settled on a date occurring after the sequestration, or settlement of which was overdue on the date of sequestration.

126 Insolvency Act section 35A(5):

Section 341 (2) of the Companies Act, 1973 (Act 61 of 1973), and sections 26, 29 and 30 of this Act shall not apply to property disposed of in accordance with the rules of an exchange.

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~~28. — Agreements on informal markets. - (1) In this section 'agreement' means any agreement, other than a transaction as defined in section 27, providing primarily for delivery, exchange, settlement or payment, as the case may be, on a future date, of, or in connection with, or based on, or based on the price of, currency of a country other than the Republic, interest rates, exchange rates, indices, gold, precious or base metals, financial instruments as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), whether or not it is a standardised contract as defined therein, securities as defined in section 1 of the Stock Exchange Control Act, 1985 (Act No. 1 of 1985), or such other commodity or corporeal or incorporeal thing or agreements as may be specified by the Minister, after consultation with the Minister of Finance, by notice in the Gazette, or any combination of, or option on, any of the foregoing agreements.~~

~~— (2) If upon **the date of** liquidation of the estate of a party to an agreement, any obligation, whether then immediately claimable or not, arising out of such agreement has not been fulfilled, the right of a party to claim specific performance in terms of such agreement shall be replaced by a claim for payment of damages as at the date of liquidation, which damages shall be deemed to constitute a liquidated claim for purposes of netting or set-off.~~

~~— (3) Any provision in an agreement for the netting or set-off of the parties' claims under one or more agreements shall, upon **the date of** liquidation of the estate of any party, be binding on the liquidator in respect of any agreement concluded **on or** prior to such **date of** liquidation but which is, in terms of such agreement, to be settled on a date occurring after the **date of** liquidation, or settlement of which was overdue on the date of liquidation.~~

~~— (4) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 18 and 20 of this Act shall not apply to property disposed of in terms of an agreement. [35B]~~

Agreements providing for termination and netting

28. (1) Subject to the provisions of subsection (2), in this section "agreement" means—

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(a) an agreement which provides that, in the event of the estate of a party thereto or the estate of a party to two or more agreements with the same counterparty, being liquidated before such party has performed fully in terms of the agreement or one or more of the agreements;

(i) all unperformed obligations of the parties terminate or may be terminated; and

(ii) the termination values of the unperformed obligations are determined or may be determined; and

(iii) the termination values are netted or may be netted, so that only a net amount (whether in South African currency or some other currency) is payable to or by a party; or

(b) any agreement declared by the Minister after consultation with Minister of Finance, by notice in the Gazette to be an agreement for the purposes of this section.

(2) In this section "agreement" does not include—

(a) a transaction contemplated in section 27; or

(b) a netting arrangement as contemplated in the National Payment System Act, 1998 (Act No. 78 of 1998); or

(c) any agreement declared by the Minister after consultation with the Minister of Finance, by notice in the Gazette to not be an agreement for the purposes of this section.

(2) Upon the liquidation of the estate of a party to an agreement all unperformed obligations arising out of such agreement or all such agreements between the same parties

shall, notwithstanding any conflicting rule of the common law, automatically be terminated as at the date of liquidation, termination values be calculated at market value at that date and a net amount be payable.

(3) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973) shall not apply to property disposed of in terms of an agreement. [New provision.]

Effect of liquidation of estate of seller under reservation of ownership contract

28A The liquidation of the estate of a seller under a reservation of ownership contract shall not give a right to the liquidator of the estate to reclaim property sold under the contract. [New provision.]

Goods purchased not on credit but not paid for

29.(1) If a person, before the **date of** liquidation of his or her estate, received delivery of movable property bought by him or her and the purchase price of such property had not been paid in full at the time of the delivery despite a term of the contract that the purchase price shall be paid on delivery of the property, the seller may, after the liquidation of the purchaser's estate, reclaim the property if within ~~10~~ **14** days after the delivery thereof he or she has given notice in writing to the purchaser or the liquidator or the Master that he or she reclaims the property.¹²⁷

(2) If the liquidator disputes the seller's right to reclaim the property he or she shall, within 14 days after having received notice of the claim, notify the seller in writing that he or she disputes

127 **Insolvency Act section 36(1):**

If a person, before the sequestration of his estate, by virtue of a contract of purchase and sale which provided for the payment of the purchase price upon delivery of the property in question to the purchaser, received any movable property without paying the purchase price in full, the seller may, after the sequestration of the purchaser's estate, reclaim that property if within ten days after delivery thereof he has given notice in writing to the purchaser or to the trustee of the purchaser's insolvent estate or to the Master, that he reclaims the property: Provided that if the trustee disputes the seller's right to reclaim the property, the seller shall not be entitled to reclaim it, unless he institutes, within fourteen days after having received notice that the trustee so disputes his right, legal proceedings to enforce his right.

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the claim, whereupon the seller may within 14 days after the receipt of the said notice, institute legal proceedings to enforce his or her right.¹²⁸

(3) For the purposes of subsection (1) a contract of purchase and sale shall be deemed to provide for the payment of the purchase price upon delivery of the property in question to the purchaser, unless the seller has agreed that the purchase price or any part thereof shall not be payable before or at the time of such delivery.¹²⁹

(4) The liquidator of the purchaser's insolvent estate shall not be obliged to restore any property reclaimed by the seller in terms of subsection (1), unless the seller refunds to him or her every part of the purchase price already received by him.¹³⁰

(5) Except as provided in this section, a seller shall not be entitled to recover any property which he or she sold and delivered to a purchaser whose estate was liquidated after the sale, only by reason of the fact that the purchaser failed to pay the purchase price.¹³¹

~~—(6) The owner of movable property which was in the possession or custody of a person at the time of the liquidation of that person's estate, shall not be entitled to recover that property if it has, in good faith, been sold as part of the said person's insolvent estate, unless the owner has, by notice in writing given before the sale to the curator bonis, the liquidator or the Master, demanded the return of that property. [36(5)]~~

128 See section 36(1) in the previous footnote.

129 **Insolvency Act section 36(2):**

For the purposes of subsection (1) a contract of purchase and sale shall be deemed to provide for the payment of the purchase price upon delivery of the property in question to the purchaser, unless the seller has agreed that the purchase price or any part thereof shall not be claimable before or at the time of such delivery.

130 **Insolvency Act section 36(3):**

The trustee of the purchaser's insolvent estate shall not be obliged to restore any property reclaimed by the seller in terms of subsection (1) unless the seller refunds to him every part of the purchase price which he has already received.

131 **Insolvency Act section 36(4):**

Except as in this section provided, a seller shall not be entitled to recover any property which he sold and delivered to a purchaser whose estate was sequestrated after the sale, only by reason of the fact that the purchaser failed to pay the purchase price.

~~(7) If property contemplated in subsection (6) has been sold as part of the insolvent estate, the former owner of the property may recover from the liquidator, before the confirmation of the liquidator's account as contemplated in section 90 the net proceeds of the sale of that property, unless he or she has recovered the property itself from the purchaser, and thereupon he or she shall lose any right to reclaim the property as contemplated in subsection (6). [36(6)]~~

Effect of liquidation upon lease

30. (1A) This section does not apply to a financial lease.

(1) A lease of movable or immovable property shall not be terminated by the liquidation of the estate of the lessee, but the liquidator of the insolvent estate may, **without prior notice, terminate the lease** by notice in writing to the lessor ~~terminate the lease~~ with the approval of the Master or in terms of a resolution of creditors taken at a meeting of creditors of the insolvent estate.¹³²

(2) The lessor may claim from the insolvent estate compensation for any loss which he or she may have sustained by reason of the non-performance of the terms of the lease.¹³³

(3) If the liquidator does not within 3 months of his or her appointment notify the lessor that he or she continues the lease on behalf of the insolvent estate, he or she shall be deemed to have terminated the lease at the end of the said three months.¹³⁴

132 **Insolvency Act section 37(1):**

A lease entered into by any person as lessee shall not be determined by the sequestration of his estate, but the trustee of his insolvent estate may determine the lease by notice in writing to the lessor: Provided that the lessor may claim from the estate, compensation for any loss which he may have sustained by reason of the non-performance of the terms of such lease.

133 See section 37(1) in the previous footnote.

134 **Insolvency Act section 37(2):**

If the trustee does not, within three months of his appointment notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such three months.

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(4) The rent due in terms of the lease from the date of ~~the~~ liquidation of the estate of the lessee to the termination or cession of the lease by the liquidator, shall be included in the cost of the liquidation.¹³⁵

(5) The termination of the lease by the liquidator in terms of this section shall **not** deprive the insolvent estate of any right to compensation for improvements, other than improvements made in terms of an agreement with the lessor, made to the leased property during the period of the lease.¹³⁶

Contract of service terminated by insolvency of employer

31.(1) Notwithstanding the provisions of section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), the liquidation of the estate of an employer shall terminate the contract of service between the employer and his or her employees **that was in existence at the time date of liquidation.**¹³⁷

(2) Any employee whose contract of service has been so terminated shall be entitled to claim compensation from the insolvent estate of his or her employer for any loss which he or she may have sustained by reason of the termination of his or her contract of service prior to its expiration.¹³⁸

135 Insolvency Act section 37(3):

The rent due under any such lease, from the date of the sequestration of the estate of the lessee to the determination or the cession thereof by the trustee, shall be included in the costs of sequestration.

136 Insolvency Act section 37(4):

The determination of the lease by the trustee in terms of this section shall deprive the insolvent estate of any right to compensation for improvements, other than improvements made in terms of an agreement with the lessor, made on the leased property during the period of the lease.

137 Insolvency Act section 38:

The sequestration of the estate of an employer shall terminate the contract of service between him and his employees, but any employee whose contract of service has been so terminated shall be entitled to claim compensation from the insolvent estate of his former employer for any loss which he may have suffered by reason of the termination of his contract of service prior to its expiration.

138 See section 38 in the previous footnote.

Appointment by Master of liquidator

32. ~~*OPTION A:*~~ (1) ~~The Master shall as soon as may be after he or she has received a copy of a first liquidation order sent to him or her in pursuance of section 10(3) or when a person appointed as liquidator ceases to be liquidator or to function as such, appoint a liquidator or liquidators.~~ A creditor of the estate with a liquidated claim, the cause of which arose before liquidation and who will after proof of the claim have the right to vote for a liquidator at a meeting, may ~~lodge an affidavit in support of his claim and in writing~~ nominate a person to be appointed by the Master as liquidator. [New provision]

(2) The Master shall as soon as possible after the expiry of forty eight hours after the granting of the first liquidation order or after the time when a liquidator ceases to function as liquidator according to the provisions of section 52 as if the nominations were votes for a liquidator at a meeting appoint the liquidator or liquidators nominated by creditors in nominations received by the Master within ~~seven days after the granting of the first liquidation order or after the time when a liquidator ceases to be or to function as liquidator~~ the said forty eight hours: Provided that the Master may reject a nomination or amend the amount of a claim in a nomination if it appears from the information in the nomination or information available to the Master that the creditor's claim cannot be proved at a meeting or cannot be proved for the amount reflected in the nomination.¹³⁹

(3) If the appointment of a liquidator is so urgent that it cannot be delayed for forty eight hours after the granting of the first liquidation order the Court may when granting the order simultaneously appoint a provisional liquidator for the preservation of the estate on such conditions regarding the giving of security or otherwise the court deems fit. [New provision]

139 **Insolvency Act section 18(1):**

As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his duties as provisional trustee and shall hold office until the appointment of a trustee.

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(4) The provisional liquidator shall after his or her appointment proceed to recover and take into possession all the assets and property of the insolvent estate and shall give effect to any directions by the Court.¹⁴⁰ [New provision]

(5) In the event of the provisional liquidator not being appointed in terms of subsection (2) or (7), the provisional liquidator shall vacate his or her office when a liquidator is appointed in terms of subsection (2) or (7) and shall deliver the assets, property and books to the liquidator and account to the liquidator. [New provision]

(6) The provisional liquidator is entitled to remuneration taxed by the Master in accordance with Tariff B in Schedule 2. [New provision]

(7) Failing any valid nomination **for the appointment of a liquidator in terms of subsection (2)** the Master shall appoint a person of his choice as liquidator.¹⁴¹

(8) If the Master is unable to appoint a liquidator he shall, after **the issue of a final order and after** giving notice to the person who applied for liquidation and in the **Gazette**, report to the court with or without any formal application or motion and request the court to set aside the liquidation order.¹⁴²

140 **Insolvency Act section 18(2):**

At any time before the first meeting of the creditors of an insolvent estate in terms of section forty, the Master may, subject to the provisions of subsection (3) of this section, give such directions to the provisional trustee as could be given to a trustee by the creditors at a meeting of creditors.

Insolvency Act section 69(1):

A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

141 **Insolvency Act section 54(5):**

If at any meeting of creditors convened for the purpose of electing a trustee, no trustee is elected and the estate is not vested at the time of that meeting in a provisional trustee, the Master may appoint a trustee and if he does not so appoint a trustee, the Master or the insolvent with the Master's consent, may apply, at the cost of the estate, to the court by petition to set aside the sequestration and the court may make such order thereon as it thinks fit.

142 See section 54(5) in the previous footnote.

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(9) The court may on receipt of the Master's report set aside the liquidation order, or refer the report back to the Master and direct the Master to proceed by way of formal application or motion at the cost of the estate, or make any other order it deems fit.¹⁴³

~~**[OPTION B: (1) The Master shall as soon as may be after he or she has received a copy of a first liquidation order sent to him or her in pursuance of section 10(3), appoint as liquidator or liquidators of the insolvent estate concerned a person or persons who in his or her opinion is competent to act as liquidator or liquidators and he or she shall supply that person or persons with a copy of the provisional **first** liquidation order. In making such appointment the Master shall take into account the wishes of the creditors of the insolvent estate.] [18(1)]**~~

(10) The written nomination referred to in subsection (1) shall be substantially in the form of Form AA of Schedule 1 to this Act. [New provision]

~~**(2) (11)** No person shall be appointed in terms of subsection ~~(1)~~ **(2) or (7)** unless he or she has given security to the satisfaction of the Master for the proper exercise of his or her powers and performance of his or her duties as liquidator and has lodged an affidavit stating that he or she is not disqualified in terms of section 53 ~~**[OPTION B: and does not have interests that are opposed to the general interests of creditors.]**~~¹⁴⁴~~

~~**(3) (12)** A liquidator appointed in terms of subsection ~~(1)~~ **(2) or (7)** shall, before the first meeting of creditors of the insolvent estate, be obliged to give effect to any direction given to him or her by the Master.¹⁴⁵~~

143 **Administration of Estates Act 66 of 1965 section 96(2):**

Whenever in the course of his duties the Master finds it necessary to lay any facts before the Court otherwise than upon formal application or motion, he may do so by a report in writing: Provided that the Court may refer any such report back to the Master and direct him to proceed by way of formal application or motion.

144 See section 18(1) in footnote 150.

145 See section 18(2) in footnote 151.

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Liquidator shall serve first liquidation order on insolvent and attach property belonging to insolvent estate

33.(1) The liquidator shall immediately after his or her appointment serve a copy of the first liquidation order on the insolvent and if the name of the insolvent's spouse appears on the order he or she shall serve a copy of the order also on the spouse. When a copy of a first liquidation order is served on an insolvent he or she shall be supplied with **two copies of** the form referred to in section 34(1)(b).¹⁴⁶

(2) When serving the first liquidation order the liquidator shall in so far as it is possible, obtain the following particulars in respect of the insolvent and his or her spouse, namely—

- (a) the full name, date of birth and identity number of the insolvent;
- (b) the insolvent's marital status and, if he or she is married in community of property, the full name, date of birth and identity number of his or her spouse.¹⁴⁷

(3) If the name, date of birth or identity number of the insolvent or his or her spouse which appears on the **provisional first** liquidation order is incorrect or if any of these particulars are not stated the liquidator shall note the correct particulars on the copy of the first liquidation order and he or she shall send a copy thereof to the registrar of every deeds registry in the Republic together

146 Insolvency Act section 16(1):

The registrar of the court granting a final order of sequestration (including an order on acceptance of surrender) shall without delay cause a copy thereof to be served by the deputy sheriff, in the manner provided by the rules of court, on the insolvent concerned and if such order relates to the separate estate of one of two spouses who are not living apart under a judicial order of separation, also on the spouse whose estate has not been sequestrated, and file with the Master a copy of the deputy sheriff's return of service.

147 Insolvency Act section 18A:

Any person appointed as provisional trustee after the commencement of the Insolvency Amendment Act, 1993, or if no provisional trustee has been appointed, or if the provisional trustee has failed to perform the duties mentioned below, a trustee appointed after the said commencement shall as soon as possible after his appointment determine whether the particulars referred to in section 9 (3) (a) (i) and (ii) are correctly reflected in the sequestration order, and if any of such particulars are not so reflected or are incorrectly reflected he shall forthwith take all reasonable steps to obtain the correct particulars and shall transmit a certificate containing such particulars, a copy of the sequestration order and of his appointment to every officer charged with the registration of title to any immovable property in the Republic and to the Master.

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with a copy of his or her letter of appointment and he or she shall also send a copy of the order on which the particulars have thus been noted, to **the applicant**, the Master and to the registrar of the court.¹⁴⁸

(4) Service of a copy of a liquidation order may be effected by the liquidator's clerk or by the sheriff, if requested thereto by the liquidator, in which event the provisions of subsections (2) and (3) relating to the particulars which shall be endorsed on the copy of the order shall apply to the said clerk or sheriff, as the case may be. [New provision]

(5) Service of a copy of a liquidation order shall be carried out in accordance with the **rules of court Uniform Rules of Court**: Provided that if the insolvent has been absent from his or her usual place of residence or his or her business in the Republic during a period of 21 days, the court may be approached for directions with regard to some other mode of service.¹⁴⁹

(6) The liquidator shall, after the ~~first liquidation order has been served on the insolvent~~ **issue of his or her appointment**, attach all the movable property in the possession of the insolvent and he or she shall compile a full inventory thereof. Such property in respect of which a person allegedly has a right of pledge or a right of retention or which is under judicial attachment shall not be attached but shall be shown on the inventory.¹⁵⁰

148 See section 18A in the previous footnote.

149 **Insolvency Act section 11(2):**

If the debtor has been absent during a period of twenty-one days from his usual place of residence and of his business (if any) within the Republic, the court may direct that it shall be sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the Gazette, or may direct some other mode of service.

150 **Insolvency Act section 19(1):**

As soon as a deputy-sheriff has received a sequestration order he shall attach, as hereinafter provided and make an inventory of the movable property of the insolvent estate which is in his district and is capable of manual delivery and not in the possession of a person who claims to be entitled to retain it under a right of pledge or a right of retention or under attachment by a messenger, that is to say-

- (a) he shall take into his own custody all books of account, invoices, vouchers, business correspondence, and any other records relating to the affairs of the insolvent, cash, share certificates, bonds, bills of exchange, promissory notes, and other securities, and remit all such cash to the Master;
- (b) he shall leave movable property other than animals in a room or other suitable place properly sealed up or appoint some suitable person to hold any movable property in his custody;
- (c) he shall hand to the person so appointed a copy of the inventory, with a notice that the property has been attached by virtue of a sequestration order. That notice shall contain a statement of the

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(7) The liquidator shall—

- (a) take into his or her personal custody all books of account, invoices, vouchers, business correspondence and any other records relating to the affairs of the insolvent and make a specified list of all such books, documents and other records;¹⁵¹
- (b) if the insolvent is present, ask him or her whether the list referred to in paragraph (a) is a complete list of all books and records relating to his or her affairs and note his or her reply on the list;¹⁵²
- (c) note on the list any explanation which the insolvent gives with regard to the books, documents and other records relating to his or her affairs or in respect of any books, documents or other records which he or she is unable to supply;[New provision]
- (d) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;¹⁵³
- (e) without delay deposit in a banking account as contemplated in section 83(1)(a) or (b) all cash which he or she has taken into his or her custody;[New provision]

-
- (d) offence constituted by section one hundred and forty-two and the penalty provided therefor; he shall make a detailed list of all such books and records and endorse thereon any explanation offered by the insolvent in respect thereof or in respect of any books or records relating to his affairs which the insolvent is unable to produce;
 - (e) if the insolvent is present he shall enquire from him whether the list referred to in paragraph (d) is a complete list of the books and records relating to his affairs and record his reply thereto.

Insolvency Act section 19(3)(a):

The deputy-sheriff shall-

- (a) immediately after effecting the attachment, report to the Master in writing that the attachment has been effected and mention in his report any property which to his knowledge is in the lawful possession of a pledgee or of a person who is entitled to retain such property by virtue of a right of retention and shall submit with such report a copy of the inventory made by him under subsection (1);

151 See section 19(1)(a) and (d) in footnote 161.

152 See section 19(1)(e) in footnote 161.

153 See section 19(1)(a) in footnote 161.

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(f) in so far as is possible leave all other movable property which he or she has attached, other than animals, in a properly locked storage place or appoint a suitable person to keep the said property in his or her custody, in which case he or she shall hand to such person a copy of an inventory of the property left in his or her custody and he or she shall draw that person's attention to the offence contemplated in section 101(2)(**ef**) in respect of the unauthorised disposition of property under attachment.¹⁵⁴

(8) The liquidator may perform the attachment himself or herself or he or she may cause the attachment to be performed in whole or in part by the Sheriff. **The Sheriff shall be entitled to fees taxed by the Master according to tariff A in Schedule 2 and the rules for the construction of that tariff.**[New provision]

(9) (a) Any person who has an interest in the insolvent estate or in any property which is attached is entitled to be present or may authorise a person to be present on his or her behalf when property of the insolvent estate is attached and when an inventory in respect thereof is compiled.¹⁵⁵

(b) If the insolvent or his or her representative is present, he or she shall sign the inventory and a copy thereof shall be handed to him or her and any comment which he or she may have with regard to the inventory or with regard to any assets, books or records of the insolvent not included in the inventory should be attached to the inventory. [New provision]

(10) The liquidator shall send a copy of the inventory to the Master.¹⁵⁶

154 See section 19(1)(b) and (c) in footnote 161.

155 **Insolvency Act section 19(2):**

Any person interested in the insolvent estate or in the property attached may be present or may authorize another person to be present when the deputy-sheriff is making his inventory.

156 **Insolvency Act section 19(4):**

A messenger shall transmit to the Master without delay an inventory of all property attached by him which he knows to belong to an insolvent estate.

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(11) The liquidator shall cause the property attached to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, 1965 (Act 65 of 1965) or some other person approved by the Master and he or she shall supply the Master with a copy of the valuation.¹⁵⁷

Insolvent shall hand over books to liquidator and shall submit statement of affairs to Master and liquidator

34.(1) When a liquidation order is served upon an insolvent as contemplated in section 33(1), the insolvent shall—

- (a) immediately hand over to the liquidator all books **of account, invoices, vouchers, business correspondence** and **any other** records relating to his or her affairs and obtain from him or her a specified receipt in respect thereof;
- (b) within 7 days after the service of the said order submit to the Master **and the liquidator** ~~two copies~~ **one copy each** of a statement of affairs as on the date of liquidation, compiled in a form substantially corresponding to Form A of Schedule A and which shall contain the particulars provided for in that Form, which particulars shall be confirmed by affidavit.¹⁵⁸

157 Insolvency Act section 69(1):

A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

158 Insolvency Act section 16(2):

An insolvent upon whom a copy of such order has been served shall-

- (a) forthwith deliver to the deputy sheriff all books and records relating to his affairs, which have not yet been taken into custody in terms of paragraph (a) of subsection (1) of section nineteen and obtain from the deputy sheriff a detailed receipt therefor; and
- (b) within seven days of such service lodge, in duplicate, with the Master a statement of his affairs as at the date of the sequestration order, framed in a form corresponding substantially with Form B of the First Schedule to this Act, containing the particulars for which provision is made in the said Form and verified by an affidavit (which shall be free from stamp duty) in the form set forth therein.

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(2) All stock in trade enumerated in a statement of affairs contemplated in subsection (1) shall be valued at cost price or at the market value thereof at the time of the making of the sworn statement, whichever value is the smallest.¹⁵⁹

(3) If the Master is satisfied that the insolvent was unable to draw up the statement of affairs that was submitted he or she may allow a person who has assisted the insolvent or his or her spouse to draw up the statement of affairs to recover from the insolvent estate the costs which the Master determines.¹⁶⁰

Liquidator may obtain search warrant

35.(1) If the liquidator suspects that any book **or**, document or **other** record relating to the affairs of the insolvent or any property belonging to the insolvent is being concealed or otherwise unlawfully withheld from him or her he or she may apply to the magistrate within whose area of jurisdiction such book, document, record or property is suspected to be **or a magistrate who presided at an interrogation a questioning in terms of section 65, 66 or 68**, for a search warrant.¹⁶¹

(2) If it appears to a magistrate to whom such application is made on the ground of an affidavit, **or evidence given at an interrogation a questioning in terms of section 65, 66 or 68 or answers to question contemplated in section 67(3)(b)** that there is substantiated reason to suspect that a book, document or other record relating to the affairs of the insolvent or property

159 Insolvency Act section 16(4):

In the statement referred to in paragraph (b) of subsection (2) or in subsection (3) any merchandise mentioned therein shall be valued at its cost price or at its market value, at the same time of the making of the said affidavit whichever is the lower.

160 Insolvency Act section 16(5):

If the Master is satisfied that the insolvent or a spouse referred to in subsection (3) was unable to prepare, without assistance, such a statement which he lodged as aforesaid, the person who assisted the insolvent or such spouse with the preparation of the statement shall be entitled to a reasonable fee, to be determined by the Master, which shall be deemed to be part of the costs of the sequestration.

161 Insolvency Act section 69(2):

If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

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belonging to the insolvent estate is being concealed in possession of a person or at a place or on a vehicle or vessel or in a container of whatever nature or is otherwise unlawfully withheld from the liquidator, within the area of jurisdiction of the said magistrate, he or she may issue a warrant authorising the liquidator or a police officer to search a person, or place or vehicle, vessel or container mentioned in the warrant and to take possession of such book, document, record or property.¹⁶²

(3) The provisions of sections 21, 27 and 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) shall, in so far as they are applicable, apply **mutatis mutandis** with regard to the execution of a warrant referred to in subsection (2).¹⁶³

Registration of name and address with liquidator

35A.(1) Any person who claims to be a creditor of the estate may register his or her name and address in the Republic with the liquidator of the estate upon payment to the liquidator of a fee of R200 and may indicate property which he or she claims to hold as security for a claim.

(2) The Minister may amend the amount in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) Thereupon the liquidator shall send to that address a notice of every meeting of creditors of the estate, a copy of every report contemplated in section 36(1), a copy of every notice in terms of section 88(2) that an account will lie open for inspection and a notice of the date, time and place of the sale of any property which a person claims to hold as security in terms of subsection (1).

162 Insolvency Act section 69(3):

If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.

163 Insolvency Act section 69(4):

Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee.

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(4) The liquidator shall send a copy of an account which has been advertised to lie open for inspection to a person registered in terms of this section upon the request of the person for a copy of the account and upon payment of the reasonable costs to make a copy of the account and send the copy to the person.

(5) Failure on the part of the liquidator to comply with a provision of this section shall constitute a failure to perform his or her duties but shall not invalidate anything done under this Act.¹⁶⁴

Liquidator's report

36. (1) The liquidator shall investigate the affairs of the insolvent and the business transactions entered into by him or her before the liquidation of his or her estate and shall at the first meeting of creditors of the insolvent estate, or in so far as he or she is then not ready to do so, at a ~~later~~ **special** meeting of creditors submit a full written report on those affairs and transactions and on any matter of importance relating to the insolvent or the insolvent estate. The liquidator shall in particular report on—

(a) the assets and liabilities of the insolvent estate;

(aA) whether, in his or her opinion, there is a risk of a contribution by creditors in terms of section 94, or indicate why he or she is unable to express an opinion on the matter;[New provision]

(b) the cause of the insolvent's insolvency;

164 Insolvency Act section 43:

Any person who claims to be a creditor of an insolvent estate may register his name and address in the Republic, with the trustee of that estate upon payment to the trustee of a fee of R25. Thereupon the trustee shall send to that address a notice of every meeting of creditors of that estate, a copy of every account which he is submitting to the Master and a notice of the date, time and place of the sale of any property over which the creditor has a preferent right by virtue of a special mortgage, pledge or right of retention or a landlord's tacit or legal hypothec. Failure on the part of the trustee to comply with a provision of this section shall constitute a failure to perform his duties but shall not invalidate anything done under this Act.

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- (c) the bookkeeping relating to the insolvent's affairs, the question whether proper bookkeeping in respect of his or her business transactions was carried out and if not, in what respect it is defective, insufficient or incorrect;
- (d) the question whether the insolvent appears to have contravened any provision of this Act or to have committed any other offence, in particular whether he or she has failed to submit a statement of affairs and of his or her income and expenses as required by this Act;
- (e) the monthly income and expenses of the insolvent, **and** any allowance made by the liquidator to the insolvent by way of maintenance for himself or herself and his or her family, **and the assistance given to the liquidator during the period for which the allowance was paid;**
- (f) any business carried on on behalf of the insolvent estate and the result thereof;
- (g) any legal proceedings instituted by or against the insolvent which were suspended by the liquidation of the estate and any other legal proceedings which are pending or may be instituted against the insolvent estate;
- (h) any transaction entered into by the insolvent before the liquidation of his or her estate in respect of the acquisition of immovable property which was not transferred to him or her or any transaction entered into by the insolvent as lessee;
- (i) any other matter relating to the administration or the realisation of the insolvent estate requiring direction of the creditors.¹⁶⁵

165 Insolvency Act section 81(1):

A trustee shall investigate the affairs and transactions of the insolvent concerned before the sequestration of his estate and shall, at the second meeting or, with the written permission of the Master obtained before the second meeting, at an adjourned second meeting of the creditors of that estate, or, if an offer of composition has been accepted by creditors in terms of section one hundred and nineteen, within one month after the acceptance of such offer of composition, submit a full written report on those affairs and transactions and on any matter of importance relating to the insolvent or the estate, and more especially in regard to-

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(2) The liquidator shall supply the ~~attorney-general~~ **Commercial Crime Unit of the South African Police Service** with **an affidavit containing** a report relating to any offence which the insolvent in his or her opinion committed and shall on request of the ~~attorney-general~~ **Unit** supply the further particulars that the ~~attorney-general~~ **Unit** may require. A copy of the liquidator's report to the ~~attorney-general~~ **Unit** shall be sent to the Master.¹⁶⁶

Recovery of debts due to estate

37. The liquidator shall, in the notification of his or her appointment in the **Gazette**, call on all persons indebted to the estate of which he or she is liquidator to pay their debts within a period and at a place stated in the notice, and if any such person fails to do so, the liquidator shall forthwith recover payment from him or her, if need be by legal process.¹⁶⁷

-
- (a) the assets and liabilities of the estate;
 - (b) the cause of the debtor's insolvency;
 - (c) the books relating to the insolvent's affairs, and the question whether the insolvent appears to have kept a proper record of his transactions, and if not, in what respect the record is insufficient, defective or incorrect;
 - (d) the question whether the insolvent appears to have contravened this Act or to have committed any other offence;
 - (e) any allowance he has made to the insolvent in terms of section seventy-nine and the reasons therefor;

 - (f) any business which he may have been carrying on on behalf of the estate, any goods he may have purchased for that business, and the result of carrying on that business;
 - (g) any legal proceedings instituted by or against the insolvent which were suspended by the sequestration of his estate which may be pending or threatened against the estate;
 - (h) any matter mentioned in section thirty-five or thirty-seven;
 - (i) any matter in regard to the administration or realization of the estate requiring the direction of the creditors.

166 Insolvency Act section 81(4):

The report referred to in subsection (1) shall contain full particulars of all the facts relating to any alleged contravention of this Act by the insolvent or the alleged commission by him of any offence reported in terms of paragraph (d) of that subsection and the trustee shall furnish such further information in regard thereto as the Master or the Attorney-General may require.

167 Insolvency Act section 77:

A trustee shall, in the notification of his appointment in the **Gazette**, in terms of subsection (3) of section fifty-six, call upon all persons indebted to the estate of which he is trustee to pay their debts within a period and at a place mentioned in that notice, and if any such person fails to do so, the trustee shall forthwith recover payment from

First meeting of creditors

38.(1) A liquidator of an insolvent estate appointed in terms of section 32 shall **convene a first meeting of creditors to be held** within ~~30~~ **60** days of his or her appointment by notice in the **Gazette** ~~convene a first meeting of creditors of the estate.~~¹⁶⁸

(2) The notice referred to in subsection (1) shall state the time and place of the meeting and the matters that will be dealt with and shall be published in the **Gazette** not less than ~~10~~ **14** days ~~and not more than 21 days~~ before the date fixed for the meeting. ~~A copy of the~~ **Personal** notice shall, not less than ~~ten~~ **14** days before the date fixed for the meeting, be ~~sent by certified mail or telefax or delivered by hand~~ **given** to the insolvent and to every creditor of the insolvent whose name and address is known to the liquidator or which he or she can reasonably obtain.¹⁶⁹

(3) The liquidator shall at least ~~10~~ **14** days before the date determined in the **Gazette** for the holding of the first meeting of creditors of the estate send by ~~certified mail or telefax or deliver by hand~~ **personal notice** to every creditor whose name and address are known to him or her or which he or she can reasonably obtain, the following documents namely:

- (a) a copy of the report contemplated in section 36(1);
- (b) a copy of the inventory contemplated in section 33(4);

him, if need be by legal proceedings.

168 **Insolvency Act section 40(1):**

On the receipt of an order of the court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee.

169 **Insolvency Act section 40(2) and (3)(a) and (b):**

(2) The Master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held.

(3) (a) After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting of creditors for the proof of claims against the estate, and for the purpose of receiving the report of the trustee on the affairs and condition of the estate and giving the trustee directions in connection with the administration of the estate.

(b) The trustee shall convene the second meeting of creditors by notice in the Gazette and in one or more newspapers circulating in the district in which the insolvent resides or his principal place of business is situate.

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- (c) a copy of the valuation contemplated in section 33(11);
- (d) a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting;
- (e) a copy of the notice contemplated in subsection (2);
- (f) **any composition which is to be considered.**¹⁷⁰

(4) The liquidator shall submit to the Master or a magistrate who is to preside at the meeting, before the time of the day advertised for the commencement of the meeting on **or before** the second working day before the date determined for the meeting of creditors—

- (a) **two a copies copy** of the report contemplated in section 36(1)(a);
- (b) a copy of the documents contemplated in subsection (3)(b), (c), (d) and (e); and
- (c) an affidavit containing a list of the names and addresses of the creditors to whom the documents referred to in subsection (3) have been sent.¹⁷¹

(5) Any one or more of the following matters may be dealt with at the meeting:

170 Insolvency Act section 81(1)bis (a):

The trustee shall, at least fourteen days before the date specified in the notice in the Gazette for the holding of the meeting at which the report referred to in subsection (1) is to be submitted, send by registered post to each creditor of the estate whose name and address is known to him a copy of such report and of the inventory transmitted to him by the deputy sheriff under section nineteen and of the valuation furnished by him to the Master under section sixty-nine and shall submit therewith any recommendation in respect of any resolution or direction which in his opinion ought to be passed or given at such meeting.

171 Insolvency Act section 81(1)bis (b):

The trustee shall at least twenty-four hours before the time advertised for the commencement of the meeting referred to in paragraph (a) submit to the officer who is to preside at that meeting an affidavit setting out the names and addresses of the creditors to whom copies of the report, inventory and valuation have been sent in terms of paragraph (a) and containing full particulars of each resolution and direction recommended by him to such creditors under the said paragraph.

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- (a) the proof of claims against the estate;
- (b) the **interrogation questioning** of any person in terms of the Act;
- (c) the considering of the report of the liquidator;
- (d) the nomination and appointment of one or more co-liquidators;
- (e) the considering of a composition;
- (f) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the estate. [New provision]

(6) If the first meeting of creditors is held before a final liquidation order is given, the liquidator's report shall deal with the question whether the liquidation of the debtor's estate will probably be to the advantage of his or her creditors and the said question shall be considered at the said meeting or at a subsequent meeting of creditors and **the liquidator shall submit a report there shall be reported** to the court **and the applicant** on this question **when it before the court** considers whether a final liquidation order should be made. [New provision]

(7) If the liquidator is unable to convene a meeting in the manner contemplated in subsection (1) he or she shall obtain the Master's permission to convene the meeting within the time determined by the Master. [New provision]

(8) If the liquidator fails to convene a meeting as contemplated in subsections (1) or (7), the Master may take any steps he or she deems necessary to force the liquidator to convene a meeting of creditors of the insolvent estate. [New provision]

(9) If the majority in value of creditors voting at the meeting rejects the liquidator's report the liquidator shall submit a report to an adjourned or subsequent meeting or refer the report to the

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Master ~~for his or her decision on whether the report is acceptable~~ who may give such directions with regard to the report as he or she deems appropriate. [New provision]

Special meeting of creditors

39.(1) The liquidator of an insolvent estate may at any time and shall, if requested thereto by not less than one fourth in value of creditors who have proved claims against the estate or on request of the Master or whenever a composition has to be considered, convene a special meeting of creditors of the estate.¹⁷²

(2) Any one or more of the following matters may be dealt with at a special meeting of creditors:

- (a) The proof of claims against the estate;
- (b) the ~~interrogation~~ questioning of any person in terms of the Act;
- (c) considering of a composition;
- (d) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the insolvent estate. [New provision]

(3) The liquidator shall not less than ~~ten~~ 14 days before the date set for the meeting referred to in subsection (1) publish in the **Gazette** a notice of the time and place of the meeting and the matters to be dealt with.¹⁷³

172 **Insolvency Act section 41:**

The trustee of an insolvent estate may at any time and shall, whenever he is so required by the Master or by a creditor or creditors representing one-fourth of the value of all claims proved against the estate, convene in the manner prescribed by subsection (3) of section forty, a meeting of creditors (hereinafter called a general meeting of creditors) for the purpose of giving him directions concerning any matter relating to the administration of the estate and shall state in such notice the matters to be dealt with at that meeting.

173 See section 41 in footnote 183 and section 40(3)(b) in footnote 180.

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(4) The liquidator shall ~~not less than~~ **at least 10 14** days before the date set **determined in the Gazette for the holding of** ~~for~~ the meeting send ~~per certified mail or telefax or deliver by hand~~ **by personal notice** to every creditor whose name and address are known to him or her or which he or she can reasonably obtain, ~~copies of~~ **the following documents, namely:**

(a) any composition which is to be considered;

(aA) a copy of any report contemplated in section 36(1) to be considered at the meeting;

(b) ~~an exposition of every resolution or directive that is to be considered at the meeting~~ **a written draft of any resolution or direction which in his of her opinion should be taken or given at that meeting;**

(c) a ~~notice of the meeting stating the time and place of the meeting and the matters that will be dealt with at the meeting~~ **copy of the notice contemplated in subsection (3).**¹⁷⁴

(5) The liquidator shall before the time of day advertised for the commencement of the meeting on **or before** the second working day before the date set for the meeting lodge with the person who is to preside at the meeting copies of the documents sent to creditors in terms of subsection (4) together with a list of the names and addresses of the persons to whom they were sent.¹⁷⁵

Special meeting for late proof of claim

40.(1) If a creditor of an insolvent estate has not proved his claim against the estate at the first or a subsequent meeting of creditors, he or she may request the liquidator in writing to convene a special meeting for the purpose of enabling him or her to prove his or her claim and, if

174 See section 81(1)*bis* (a) in footnote 181.

175 See section 81(1)*bis*(b) in footnote 182.

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the creditor tenders payment to the liquidator of all costs resulting from such meeting, the liquidator shall convene a special meeting on a date set by him or her in order to enable the said creditor to prove his or her claim.¹⁷⁶

(2) The liquidator may at any time after his report has been accepted by creditors or the Master by notice in the **Gazette** fix a date after which creditors who have not proved claims against the estate will be excluded from participation in any distribution in terms of an account which will be submitted to the Master within two weeks after the said date. The said notice shall be published not less than 4 weeks before the date so fixed and before such publication a copy thereof shall be sent by ~~certified mail or telefax or delivered by hand~~ **personal notice** to each unproved creditor whose name and address are known to the liquidator or which he or she can reasonably obtain.¹⁷⁷

(3) The liquidator shall not less than **ten 14** days before the date set for the meeting referred to in subsection (1) publish in the **Gazette** a notice of the time and place of the meeting and the matters to be dealt with.¹⁷⁸

General provisions relating to meetings of creditors

41.(1A) A meeting shall, subject to subsection (5B), be convened

(a) in the magisterial district where the insolvent had his main place of business at the time of liquidation, or

176 **Insolvency Act section 42(1):**

After the second meeting of creditors the trustee shall convene by notice in the Gazette a special meeting of creditors for the proof of claims against the estate in question whenever he is thereto required by any interested person who at the same time tenders to the trustee payment of all expenses to be incurred in connection with such a meeting.

177 **Companies Act 61 of 1973 section 366(2):**

The Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved.

178 Compare section 41 in footnote 183.

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- (b) if the insolvent did not carry on a business or if it is unclear where the insolvent's main business was situated, in the magisterial district where the insolvent had his ordinary residence at the date of liquidation; or**
- (c) if the insolvent did not have his ordinary residence within the Republic or it is unclear where he had his ordinary residence, within the magisterial district of the court which issued the liquidation order.**¹⁷⁹

(1) The Master or an officer of his or her office appointed by him or her shall, subject to subsection (3), preside at a meeting of creditors convened within a magisterial district in which the Master has an office.¹⁸⁰

(2) If a meeting of creditors is to take place in a magisterial district where the Master has no office, the magistrate of the district concerned or a person appointed by him or her shall, subject to subsection (3), preside at the meeting.¹⁸¹

(2A) The Department of Justice shall ensure that sufficient magistrates who may hold court under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), are available to preside over creditors' meetings to be held before a Master or a magistrate, where such a magistrate is required to consider the incarceration of recalcitrant witnesses. [New provision]

(3) A liquidator may convene any meeting to be held before himself or herself at any place within the magisterial district contemplated in subsection (1A), but no interrogations questioning can take place at such a meeting and if an interrogation a questioning must be

179 **Insolvency Act section 39(1):**

Whenever the Master convenes any meeting of creditors as hereinafter provided, he shall appoint it to be held at such time and place as he considers to be most convenient for all parties concerned and may, if necessary, alter the time and place of any such meeting: Provided that he shall publish in the Gazette sufficient notice of any such alteration.

180 **Insolvency Act section 39(2):**

All meetings of creditors held in the district wherein there is a Master's office shall be presided over by the Master or an officer in the public service, designated, either generally or specially, by the Master for that purpose. Meetings of creditors held in any other district shall be held in accordance with the direction of the Master and shall be presided over by the magistrate of the district, or by an officer in the public service, designated, either generally or specially, by the magistrate for that purpose.

181 See section 39(2) in the previous footnote.

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held or if any person who avers that he or she is a creditor of the insolvent estate demands, before or during the meeting, that the meeting must be held or continued before the Master or a magistrate, the meeting shall be held or continued before the Master or the magistrate contemplated in subsection (1A). The liquidator shall announce at the meeting when and where the meeting will be continued or convene the meeting to be held before the Master or the magistrate. ~~A liquidator may preside at a meeting of creditors if the only matter to be dealt with at the meeting is the formal proof of claims against the estate.~~ [New provision]

(4) The ~~person presiding~~ presiding officer at a meeting of creditors shall keep a record of the proceedings, which he shall certify at the conclusion of the meeting, and if he or she is not the Master, he or she shall transmit the record to the Master.¹⁸²

(5) A meeting of creditors may, if necessary, be adjourned from time to time.¹⁸³

(5A) A meeting may after an adjournment be presided over by a different presiding officer and a meeting before the Master may be adjourned to take place before a magistrate.

[New provision]

(5B) With the consent of the Master

(a) a meeting may be convened in a magisterial district other than the district contemplated in subsection (1A); and

(b) a meeting may after an adjournment take place at a different place, including a place in another magisterial district. [New provision]

182 **Insolvency Act section 39(3):**

The officer presiding at such a meeting shall keep a record of the proceedings, which he shall certify at the conclusion of the proceedings, and if he is not the Master, he shall transmit the record to the Master.

183 **Insolvency Act section 39(5):**

The officer presiding at a meeting of creditors may, if necessary or desirable, adjourn the meeting from time to time.

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(6) The place where a meeting of creditors is held shall, subject to section 65(4), be accessible to the public.¹⁸⁴

(7) Any statement made by any person or any evidence given at a meeting of creditors shall be privileged to the same extent as evidence given in a court of law.¹⁸⁵

(8) A meeting of creditors shall, if duly convened, for purposes of this Act be deemed to be a meeting of creditors although no creditor or only one creditor or his or her representative attended the meeting personally. [New provision]

Voting at meeting of creditors

42.(1) Every creditor of an insolvent estate who has proved a claim against the estate shall, subject to subsection (3), be entitled to vote at a meeting of creditors of the estate.¹⁸⁶

(2) A creditor may vote on all matters relating to the administration of the estate, but may not vote on matters relating to the distribution of the assets of the estate or the payment of costs of liquidation.¹⁸⁷

(3) A creditor may not vote—

184 **Insolvency Act section 39(6):**

The place where a meeting of creditors is held shall be accessible to the public and the publication of any statement made at such a meeting shall be privileged to the same extent as in the publication of a statement made in a court of law.

185 See section 39(6) in the previous footnote.

186 **Insolvency Act section 52(1):**

Save as in this section and in section forty-eight is otherwise provided, every creditor of an insolvent estate shall be entitled to vote at any meeting of the creditors of that estate as soon as his claim against the estate has been proved.

187 **Insolvency Act section 53(1):**

A creditor may vote at a meeting of creditors upon all matters relating to the administration of the estate, but may not vote in regard to matters relating to the distribution of the assets of the estate, except for the purpose of directing the trustee to contest, compromise or admit any claim against the estate.

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- (a) in respect of any claim which was ceded to him or her after commencement of the proceedings for the liquidation of ~~his or her~~ **the debtor's** estate; or¹⁸⁸
 - (b) on the question as to whether steps should be taken to contest his or her claim or preference.¹⁸⁹
- (4) (a) Voting by creditors takes place according to value except where this Act provides that voting shall take place according to number and value.¹⁹⁰
- (b) (i) In the case of voting according to number the number of votes brought out in favour of a resolution and those brought out against the resolution are determined, without taking into account the value represented by the votes.
 - (ii) In the case of voting according to value the aggregate value of votes brought out in favour of a resolution and the aggregate value of votes brought out against the resolution are determined, without taking into account the number of votes for or against the resolution.¹⁹¹
- (5) (a) A secured creditor is entitled to vote on the full value of his or her claim in respect of any matter affecting his or her security or on the election of a liquidator.
- (b) On a matter other than those mentioned in paragraph (a)

188 Insolvency Act section 52(4):

A creditor may not vote in respect of any claim which was ceded to him after the commencement of the proceedings by which the estate was sequestrated.

189 Insolvency Act section 52(6):

A creditor may not vote on the question as to whether steps should be taken to contest his claim or preference.

190 Insolvency Act section 52(2):

The vote of any creditor shall be reckoned according to the value of his claim, except when it is provided in this Act that votes shall be reckoned in number.

191 Insolvency Act section 54(4):

For the purposes of this section 'majority of votes in number' means a greater number of votes (apart from the value of the claims which they represent, but subject to the provisions of subsection (3) of section fifty-two) than has been obtained by any competitor and 'majority of votes in value' means votes representing claims of a greater aggregate value than the votes obtained by any competitor.

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- (i) a secured creditor may vote only if he or she had placed a **monetary** value on his or her security when he or she proved his or her claim or the liquidator has obtained a valuation of the security **or the security has been realised**.
- (e) (ii) If a secured creditor's security has been realized, the creditor may vote on the amount (if any) by which his or her claim exceeds the proceeds of the realization of the security.
- (d) (iii) If the security has not been realized, the secured creditor may vote on the amount (if any) by which his or her claim exceeds—
- (i) (aa) the value placed by him or her on the security; or
- (ii) (bb) the valuation of the security obtained by the liquidator;

whichever is the greater.¹⁹²

(6) A creditor may vote personally or through an agent appointed thereto by him or her by power of attorney¹⁹³: ~~Provided that no creditor shall vote through an agent who is -~~

192 Insolvency Act section 52(5):

A creditor holding any security for his claim shall, except in the election of a trustee and upon any matter affecting that security, be entitled to vote only in respect of the amount by which his claim exceeds the amount at which he valued his security when proving his claim, or if he did not value his security, in respect of the amount by which his claim exceeds the amount of the proceeds of the realization of his security in terms of section eighty-three.

193 Insolvency Act section 53(2):

Subject to the provisions of section fifty-four and subsection (7) of section one hundred and nineteen, every matter upon which a creditor may vote shall be determined by the majority of votes reckoned in accordance with subsection (2) of section fifty-two, and every creditor may vote either personally or by an agent specially authorized thereto or acting under his general power of attorney: Provided that no creditor shall vote by any agent being-

- (a) the trustee or a person nominated for election as trustee in the estate concerned;
- (b) the employer or employee of such trustee or person;
- (c) the employee of any person or association of persons, whether corporate or unincorporate, by whom or by which such trustee or the person referred to in paragraph (a) is employed;
- (d) the spouse of or a person related to such trustee or the person referred to in paragraph (a) by consanguinity or affinity within the third degree; or
- (e) a person directly or indirectly having a pecuniary interest in the remuneration of such trustee or the person referred to in paragraph (a).

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- ~~(a) the liquidator or a person nominated for election as liquidator in the estate concerned;~~
- ~~(b) the employer or employee of such liquidator or person;~~
- ~~(c) the employee of any person or association of persons by whom or by which such liquidator or person referred to in paragraph (a) is employed;~~
- ~~(d) the spouse of or a person related to such liquidator or the person referred to in paragraph (a) by consanguinity in the third degree of relationship; or~~
- ~~(e) a person directly or indirectly having a pecuniary interest in the remuneration of such liquidator or the person referred to in paragraph (a).~~

(7) No person shall vote as an agent of a creditor, unless he or she submits proof of his or her mandate ~~and proves that he or she is not a person who is in terms of subsection (6) prohibited from voting as such.~~ [New provision]

(8) Every resolution taken at a meeting of creditors and the result of the voting on any matter shall be recorded in the minutes of the meeting and in so far as a resolution contains a directive to a liquidator, it shall be binding upon the liquidator.¹⁹⁴

(9) Any directive of creditors which infringes the rights of any creditor may be set aside by the court on application, **within 90 days or such further period as the court may allow for good cause,** of the creditor, or the liquidator with the consent of the Master.¹⁹⁵

194 **Insolvency Act section 53(3):**

Every resolution of creditors at a meeting of creditors and the result of the voting on any matter as declared by the officer presiding at that meeting, shall be recorded upon the minutes of the meeting and shall be binding upon the trustee in so far as it is a direction to him; and no other direction of creditors shall be binding upon him.

195 **Insolvency Act section 53(4):**

Any direction by creditors which infringes the rights of any creditor may be set aside by the court on the application of the creditor whose rights are affected or of the trustee with the consent of the Master.

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(10) No resolution of creditors that a specific attorney, auctioneer or any other person be employed in connection with the administration of an insolvent estate shall be binding upon the liquidator, but creditors may by resolution recommend the employment of any such person and **if the liquidator does not accept the recommendation** the Master's decision in respect of such employment shall be final.¹⁹⁶

Claim by partnership creditor against estate of insolvent partner

43. When the estate of a partner in a partnership is liquidated and the partnership is as a result thereof dissolved without the partnership being placed under liquidation, any claim that a creditor of the partnership might have against the estate of the insolvent partner shall be regarded as an unliquidated claim until the debts of the partnership have been settled in terms of the dissolution of the partnership. [New provision]

Claims against partnerships

44. When the estate of a partnership and the estates of the partners in that partnership are **liquidated under liquidation** simultaneously any claim in respect of a partnership debt shall be proved against the partnership estate, irrespective of the fact that a partner might be personally liable for such debt. In so far as the partnership estate is insufficient to meet such debt a creditor who has proved his or her claim against the partnership estate shall for the balance of his or her claim have a claim against the separate estates of the partners without formal proof of his or her claim in respect of such balance. **The liquidator of the estate of a partner shall be entitled to any balance of the partnership's estate that may remain over after satisfying the claims of**

¹⁹⁶ **Insolvency Act section 53(5):**

The majority of creditors (reckoned in number and in value) may direct the trustee to employ or not to employ a particular attorney or auctioneer in connection with the administration of the estate and if the trustee has reason to believe that it will not be in the interests of the estate to carry out such direction, he may submit the matter to the Master, whose decision, after considering any representations in writing by the trustee and the creditors, shall be final.

the creditors of the partnership estate, so far as that partner would have been entitled thereto if his or her estate had not been liquidated.¹⁹⁷

Proof of claims

45.(1) Any person who has a liquidated claim against an insolvent estate, the cause of which arose **on or** before the **date of** liquidation of the estate, or the authorised **representative agent** of such person, may at any time before the final distribution of the estate, but subject to the provisions of section 47, prove that claim against the estate.¹⁹⁸

(2) A claim against an insolvent estate shall be admitted at a meeting of creditors of the estate if it has been proved **to the satisfaction of the presiding officer according to on the face of** the claim form, documents in connection with the claim submitted by the creditor or another person, if any, and **on the** evidence, **if any**, by the creditor, ~~if any~~. If the claim has not been proved in this manner, the presiding officer shall reject it.¹⁹⁹

¹⁹⁷ **Insolvency Act section 49(1):**

When the estate of a partnership and the estates of the partners in that partnership are under sequestration simultaneously, the creditors of the partnership shall not be entitled to prove claims against the estate of a partner and the creditors of a partner shall not be entitled to prove claims against the estate of the partnership; but the trustee of the estate of the partnership shall be entitled to any balance of a partner's estate that may remain over after satisfying the claims of the creditors of the partner's estate in so far as that balance is required to pay the partnership's debts and the trustee of the estate of a partner shall be entitled to any balance of the partnership's estate that may remain over after satisfying the claims of the creditors of the partnership estate, so far as that partner would have been entitled thereto, if his estate had not been sequestrated.

¹⁹⁸ **Insolvency Act section 44(1):**

Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section one hundred and thirteen, but subject to the provisions of section one hundred and four, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.

¹⁹⁹ **Insolvency Act section 44(3):**

A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim: Provided that the rejection of a claim shall not debar the claimant from proving that claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of section seventy-five: and provided further that if a creditor has twenty-four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that meeting the affidavit and other documents mentioned in subsection (4), he shall be deemed to have tendered proof of his claim at that meeting.

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(3) A creditor who holds security for his or her claim shall place a monetary value on his or her security, **or have his or her voting rights limited in terms of clause 42(5).**²⁰⁰

(4) The rejection of a claim shall, **subject to the provisions of section 12(5),** not debar the claimant from proving the claim at a later meeting of creditors or by an action at law.²⁰¹

(5) Every claim shall be proved by an affidavit in a form corresponding substantially with Form B or C of Schedule 1 to this Act and, subject to subsections (10) and (11) no oral evidence shall be received in support of any claim.²⁰²

(6) The affidavit contemplated in subsection (5) and all documents submitted in support of the claim **or a copy thereof** shall be lodged with the person who is to preside at the meeting of creditors, before the time of day advertised for the commencement of the meeting on **or before** the second working day before the date of the meeting, failing which the claim shall not be admitted at that meeting unless the presiding officer is of the opinion that **through no fault on his part** the creditor ~~was unable~~ **had a reasonable excuse for his or her failure** to lodge the claim with the presiding officer within the said time.²⁰³

(6A) Where appropriate the amount of a claim may be expressed in a foreign currency, but all claims in a foreign currency shall be paid in its equivalent in Rand and the

200 Insolvency Act section 44(4):

Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section eighty-three, the amount at which he values the security. The said affidavit or a copy thereof and any documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than twenty-four hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidences of his claim within the prescribed period: Provided that if a creditor has proved an incorrect claim, he may, with the consent in writing of the Master given after consultation with the trustee and on such conditions as the Master may think fit to impose correct his claim or submit a fresh correct claim.

201 See section 44(3) in footnote 210.

202 See section 44(4) in footnote 211.

203 See section 44(4) in footnote 211.

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conversion date of Rand to a foreign currency shall be the date of liquidation. [New provision]

(7) A claimant who has proved a claim which is deficient in any respect may at a subsequent meeting of creditors prove a corrected claim.²⁰⁴

(8) The documents referred to in subsection (6) may be perused free of charge by the liquidator, the insolvent and any creditor of the insolvent estate or the representative of any of them during office hours at the office of the person who is to preside at the meeting and the liquidator, insolvent, or creditor may submit motivated objections to the prove of a claim at the meeting where the claim is submitted for proof or with the presiding officer before the meeting.²⁰⁵

(9) Any person who has an unliquidated claim against an insolvent estate may tender such claim for proof at a meeting of creditors, but such claim shall not be admitted to proof until it has been accepted by the liquidator by way of compromise or proved in an action at law. When such claim is compromised or proved in an action at law it shall be deemed to have been proved and admitted against the estate at the meeting where it was submitted for proof, unless the creditor informs the liquidator in writing within seven days of the compromise or judgment that he or she abandons the claim.²⁰⁶

(10) The ~~person presiding~~ presiding officer at the meeting of creditors may of his or her own motion or at the request of the liquidator or his or her representative or any creditor who

204 See the proviso to section 44(4) in footnote 211.

205 **Insolvency Act section 44(5):**

Any document by this section required to be delivered before a meeting of creditors at the office of the officer who is to preside at that meeting, shall be open for inspection at such office during office hours free of charge by any creditor, the trustee or the insolvent or the representative of any of them.

206 **Insolvency Act section 78(3):**

If authorized thereto by the creditors or if no creditor has proved a claim against the estate, by the Master, the trustee may compromise or admit any claim against the estate, whether liquidated or unliquidated if proof thereof has been duly tendered at a meeting of creditors. When a claim has been so compromised or admitted, or when it has been settled by a judgment of a court, it shall be deemed to have been proved and admitted against the estate in the manner set forth in section forty-four, unless the creditor informs the trustee in writing within seven days of the compromise or admission or judgment that he abandons his claim: Provided that the preceding provisions of this subsection shall not debar the trustee from appealing against such judgment, if authorized thereto by the creditors.

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has proved a claim at a **previous** meeting of creditors or the representative of such creditor, call upon any person present at the meeting who wishes to prove a claim or who has proved a claim against the estate to submit to **interrogation questioning** by the presiding officer, the liquidator or his or her representative or any such creditor or his or her representative in regard to such claim, and for purposes of such **interrogation questioning** the presiding officer shall administer to the said person the oath or take from him or her a solemn declaration to speak the truth: **Provided that a creditor who has proved a claim at a meeting shall not be permitted to interrogate question a creditor who wishes to prove a claim at the same meeting before the claim of such creditor has been admitted or rejected.**²⁰⁷

(11) Any person who wishes to prove or who has at any time proved a claim against an insolvent estate and who is absent from a meeting of creditors may be summoned in writing by the presiding officer to appear before him or her at a place and time stated in the summons for the purpose of being **interrogated questioned** by the presiding officer in regard to such claim, the liquidator or a creditor who has proved a claim against the estate, or the representative of the liquidator or such creditor, and the provisions of subsection (10) with regard to the administering of the oath or the taking of a solemn declaration shall **mutatis mutandis** apply with regard to the giving of evidence by such person.²⁰⁸

(12) If a person who wishes to prove a claim is called upon to be **interrogated questioned** as contemplated in subsection (10) and fails without reasonable excuse to appear or refuses to take the oath or make a solemn declaration or to submit to **interrogation questioning**

207 Insolvency Act section 44(7):

The officer presiding at any meeting of creditors may of his own motion or at the request of the trustee or his agent or at the request of any creditor who has proved his claim, or his agent, call upon any person present at the meeting who wishes to prove or who has at any time proved a claim against the estate to take an oath, to be administered by the said officer, and to submit to interrogation by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, in regard to the said claim.

208 Insolvency Act section 44(8):

If any person who wishes to prove or who has at any time proved a claim against the estate is absent from a meeting of creditors the officer who presided or who presides thereat, may summon him in writing to appear before him at a place and time stated in the summons, for the purpose of being interrogated by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, and if he appears in answer to the summons the provisions of subsection (7) shall apply.

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or to answer fully and satisfactorily any lawful question put to him or her, his or her claim, may be rejected.²⁰⁹

Liquidator shall examine claims

46.(1) The person who presided at a meeting of creditors shall, if he or she is not the liquidator, after the meeting deliver to the liquidator every claim proved against the insolvent estate at that meeting and every document submitted in support of any claim.²¹⁰

(2) The liquidator shall examine the claims and supporting documents referred to in subsection (1) and all available books, **and** documents **or records** relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed and the liquidator may require the claimant to submit additional supporting proof of his or her claim and, in the case where the claim is based on an estimate, the basis on which the estimate was arrived at.²¹¹

~~(3) The liquidator shall cause corporeal movable property held by a creditor as security, to be valued. [New provision]~~

(4) If the liquidator disputes a claim after it has been proved at a meeting of creditors, he or she may, ~~if authorised thereto by a resolution of creditors~~ **with the authority of the Master or creditors in terms of section 62(4)** and after having afforded the claimant the opportunity of substantiating his or her claim or any part thereof, reduce or disallow the claim, and he or she shall

209 Insolvency Act section 44(9):

If any such person fails without reasonable excuse to appear in answer to such summons or having appeared or when present at any meeting of creditors refuses to take the oath or to submit to the said interrogation or to answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the Master, and if not yet proved, may be rejected.

210 Insolvency Act section 45(1):

After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.

211 Insolvency Act section 45(2):

The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed.

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forthwith notify the claimant **and the Master** in writing of such reduction or disallowance of the claim.²¹²

(5) The reduction or disallowance of a claim as contemplated in subsection (4) shall **subject to the provisions of section 12(5)** not debar a claimant from establishing his or her claim by means of an action at law.²¹³

Late proof of claims

47.(1) Subject to the provisions of section 80(8), a creditor of an insolvent estate who has not proved his or her claim against the estate before ~~the a date on which the liquidator of the estate submitted to the Master a proposed distribution account of the assets in the estate~~ **fixed in terms of section 40(2)** shall, subject to subsection (2), not be entitled to share in the distribution of the assets reflected in ~~that an~~ **account submitted to the Master within 2 weeks after the said date.**²¹⁴

(2) If the Master is satisfied that a creditor referred to in subsection (1) has a reasonable excuse for the delay in proving his or her claim, the Master may permit him or her to prove his or her claim before the confirmation of the ~~proposed distribution~~ **account contemplated in subsection (1)** and the Master may order the liquidator to draw up a new account in which

212 Insolvency Act section 45(3):

If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five.

213 See section 45(3) in the previous footnote.

214 Insolvency Act section 104(1):

Subject to the provisions of section 95 (2) and section 98A (3), a creditor of an insolvent estate who has not proved a claim against that estate before the date upon which the trustee of that estate submitted to the Master a plan of distribution in that estate, shall not be entitled to share in the distribution of assets brought up for distribution in that plan: Provided that the Master may, at any time before the confirmation of the said plan permit any such creditor who has proved his claim after the said date to share in the distribution of the said assets, if the Master is satisfied that the creditor has a reasonable excuse for the delay in proving his claim.

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provision is made for the claim so proved, provided that the creditor tenders all costs in connection with the drawing-up of the new account, **including wasted advertisement costs, if any.**²¹⁵

(3) A creditor of an insolvent estate who has proved a claim against the estate ~~after the date on which the proposed distribution account was submitted to the Master by the liquidator~~ and who was not in terms of subsection (2) permitted to share in the assets reflected in ~~that an~~ account, shall, in so far as available funds allow, be entitled to be awarded out of any subsequent distribution account the amount to which he or she would have been entitled under the earlier distribution account if he or she had proved his or her claim in time.²¹⁶

(4) A creditor who delayed proving his or her claim pending the outcome of proceedings ~~in terms of sections 18, 20 or 21~~ **for the setting aside of any disposition of property made by a debtor or for the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of the insolvent estate of the debtor** shall not be entitled to share in the distribution of any money or the proceeds of property recovered as a result of such proceedings.²¹⁷

Conditional claims

48.(1) A creditor who has a claim against an insolvent estate which is dependent upon the fulfilment of a condition, may request the liquidator to place a value on the claim.

(2) If a liquidator places a value on a claim referred to in subsection (1), he or she shall indicate in writing the grounds on which he or she arrived at the valuation.

215 See section 104(1) in the previous footnote.

216 **Insolvency Act section 104(2):**

A creditor of an insolvent estate who proved a claim against that estate after the date upon which the trustee submitted to the Master a plan of distribution in that estate and who was not permitted to share in the distribution of assets under that plan, in terms of subsection (1), shall be entitled to be awarded under any further plan of distribution submitted to the Master after the proof of his claim, the amount which would have been awarded to him under the previous plan of distribution, if he had proved his claim prior to the submission of that plan to the Master: Provided that the Master is satisfied that the creditor had a reasonable excuse for the delay in proving his claim; and provided further that any creditor who was aware that proceedings had been instituted under section twenty-six, twenty-nine, thirty or thirty-one and who delayed proving his claim until the court had given judgment in those proceedings, shall not be entitled to share in the distribution of any money or the proceeds of any property recovered as a result of such proceedings.

217 See section 104(2) in the previous footnote.

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(3) The valuation of a conditional claim by a liquidator is subject to review by the court on application of the creditor.

(4) After a conditional claim has been valued as contemplated in this section, the claim may be proved by the creditor for the amount of the valuation.

(5) If the condition upon which a claim is dependent is fulfilled before the inclusion of the amount referred to in subsection (4) in a proposed distribution account, the claim may be proved in full. If the condition is fulfilled after provision had already been made in a distribution account for the claim contemplated in subsection (4), the balance of the claim may be proved, subject to the provisions relating to the late proving of claims.²¹⁸

Arrear interest and debt due after liquidation

49.(1) A creditor may prove a claim against an insolvent estate in respect of a capital debt and interest thereon which ~~is due~~ **has accrued** at the date of ~~the~~ liquidation.²¹⁹

218 Insolvency Act section 48:

A creditor whose claim against an insolvent estate is dependent upon a condition, may prove that claim in the manner set forth in section forty-four but subject to the following provisions:-

- (a) If the condition is of such a nature that it will be fulfilled, if at all, within a year of the sequestration, the creditor may prove his claim, but he shall have no vote in respect of that claim at a meeting of creditors. If a dividend is awarded on such a claim it shall be paid by the trustee to the Master, who shall pay it to the creditor, if the condition has been fulfilled, and otherwise shall return it to the trustee for distribution among the other creditors.
- (b) If the condition is not such as is described in paragraph (a), the creditor may call upon the trustee at a meeting of creditors to place a value upon the claim and the trustee shall thereupon lay before the officer presiding at that meeting a written valuation of the claim with the reasons therefor, and the presiding officer shall admit that claim at such value as he may determine, or reject it: Provided that when the condition has been fulfilled, before the confirmation, by the Master, in terms of section one hundred and twelve, of a trustee's account in the liquidation of the estate, the creditor may prove his claim as if it had been unconditional.

219 Insolvency Act section 50(1):

When a debt bearing interest became due before the sequestration of the debtor's estate, the creditor to whom that debt is owing may include in his claim against the debtor's estate in respect of that debt any interest thereon, which is in arrear, to the date of the sequestration.

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(2) No claim shall be proved for interest which ~~becomes due~~ **accrues** after the date of ~~the~~ liquidation, but such interest is payable in the circumstances set out in sections 75(5) and 80(5).
[New provision]

(3) The capital amount of a debt which becomes **due payable** after the date of ~~the~~ liquidation shall be reduced by twelve percent of that amount per annum **compounded monthly on completed months** from the date of ~~the~~ liquidation to the date on which the debt becomes **due payable**.²²⁰

Withdrawal of claim

50.(1) A creditor who has proved a claim against an insolvent estate may withdraw his or her claim by written notice to the liquidator.

(2) A liquidator who receives a notice of withdrawal of a claim shall **notify give personal notice to** the ~~other creditors~~ **Master** ~~in writing~~ of the withdrawal ~~by certified mail or telefax or delivery by hand~~.

(3) A creditor who has withdrawn his or her claim remains liable for his or her **pro rata** share of the costs of liquidation up to the date when the notice of withdrawal was received by the liquidator.

(4) A creditor who has withdrawn his or her claim may by written notice to the liquidator cancel his or her withdrawal, but if he or she does so he or she shall not be entitled to payment of his or her claim out of the estate until all other creditors who have proved claims have been paid in full.

220 Insolvency Act section 50(2):

If a person, before the sequestration of his estate, incurred a debt which is payable upon a date (hereinafter referred to as the due date) after the date of the sequestration, the creditor, towards whom the debt was incurred, may claim from the insolvent estate the full amount of that debt as if it were payable on the date of sequestration: Provided that if the debt bears no interest and a distribution account in the estate in question is confirmed by the Master in terms of section 112 before the due date, an amount shall be paid on that claim equal to the amount which would have been paid thereon under the distribution account if the debt had been payable on the date of sequestration, less eight per cent of that amount per annum, reckoned from the date of sequestration to the due date.

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(5) If a creditor cancels his or her withdrawal as contemplated in subsection (4), he or she shall not be liable for liquidation costs for which he or she was not liable at the time of the cancellation of the withdrawal of his or her claim.²²¹

Creditor may not recover the debt from insolvent estate which is recovered from another source

51. A creditor who has proved a claim against an insolvent estate and who, after the **date of** liquidation of the insolvent estate, has received payment of that debt in whole or in part, from a source other than the insolvent estate, shall notify the liquidator in writing of such payment **within 60 days from receiving payment** and if he or she fails to do so double the amount paid to him or her out of the insolvent estate to which he or she is not entitled, may be recovered from him or her.
[New provision]

Election of liquidator

52.(1) Any creditor of an insolvent estate who has proved claims against the estate may vote for one liquidator at the first meeting of creditors or a subsequent meeting convened to elect a liquidator.²²²

221 Insolvency Act section 51:

(1) A creditor who has proved a claim against an insolvent estate may withdraw his claim by registered letters addressed to the Master and to the trustee and the latter shall in writing notify the other creditors of the withdrawal: Provided that the creditor so withdrawing his claim shall remain liable in terms of section one hundred and six for his pro rata share of the costs of sequestration and all costs lawfully incurred by the trustee in connection with the sequestration up to the time when he received the creditor's letter of withdrawal.

(2) A creditor who has so withdrawn his claim may, by registered notice addressed to the Master and to the trustee, cancel his withdrawal, but if he does so, he shall not become liable for any costs in connection with the sequestration for which he was not liable at the time of cancellation and he shall not be entitled to any payment out of the estate in respect of his claim until all the other creditors who have proved their claims have been paid in full.

222 Insolvency Act section 54(1):

At the first meeting of the creditors of an insolvent estate the creditors who have proved their claims against the estate may elect one or two trustees.

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- (2) (a) A liquidator is elected by the majority in number and in value of the votes of creditors who are entitled to vote and who voted at such meeting.²²³
- (b) If no candidate for the office of liquidator has obtained a majority in number and in value of the votes, the candidate who has obtained a majority of votes in number shall be deemed to be elected as liquidator if no candidate has obtained a majority of votes in value, and the candidate who has obtained a majority of votes in value shall be deemed to have been so elected if no candidate has received a majority of votes in number.²²⁴
- (c) If one candidate obtained a majority of votes in value and another a majority in number, both such candidates shall be deemed to be elected as liquidators, and if either of them declines to share the office of liquidator with the other, the other candidate shall be deemed to be the sole elected liquidator.²²⁵
- (3) If no liquidator is elected at a meeting of creditors the liquidator appointed by the Master in terms of section 32 shall be the liquidator of the estate.²²⁶

{Option B in clause 32}

223 Insolvency Act section 54(2):

Any person who has obtained a majority in number and in value of the votes of the creditors entitled to vote, who voted at such meeting, shall be elected trustees.

224 Insolvency Act section 54(3)(a):

If no person has obtained such a majority of votes then-

- (a) the person who has obtained a majority of votes in number, when no other person has obtained a majority of votes in value, or has obtained a majority of votes in value, when no other person has obtained a majority of votes in number, shall be deemed to be elected sole trustee;

225 Insolvency Act section 54(3)(b):

(3) If no person has obtained such a majority of votes then-

...

- (b) if one person has obtained a majority of votes in value and another a majority of votes in number, both such persons shall be deemed to be elected trustees, and if either person declines a joint trusteeship, the other shall be deemed to be elected sole trustee.

226 Insolvency Act section 18(4):

When a meeting of creditors for the election of a trustee has been held in terms of section forty and no trustee has been elected, and the Master has appointed a provisional trustee in the estate in question, the Master shall appoint him as trustee on his finding such additional security as the Master may have required.

~~—(4) If the liquidator appointed by the Master in terms of section 32 is not elected as liquidator at a meeting of creditors, but one or more other persons are elected, the Master shall **may** appoint the first-mentioned liquidator as joint liquidator **subject to the Master supplying reasons for the decision to each elected liquidator.** [New provision]~~

~~[OPTION B IN CLAUSE 32:~~

~~—(5) If the Master deems it necessary for the proper administration of an insolvent estate, he or she **the Master** may at any time appoint one or more joint liquidators, **provided that the Master shall upon written request by a proved creditor give reasons why the Master decided to appoint one or more joint liquidators and why the Master appointed the particular person or persons.**] [57(5)]~~

Persons disqualified from being liquidators

53.(1) Any of the following persons shall be disqualified from being elected or appointed as a liquidator—

- (a) any person who is not a member of a professional body recognised under subsection (2) or who is not permitted to act as a member of that body in terms of its rules;
[New provision]
- (b) an insolvent;²²⁷
- (c) any person who does not reside in the Republic: ~~Provided that the Master may in his or her discretion appoint a person who does not reside in the Republic as co-liquidator with a liquidator who resides in the Republic;~~²²⁸

227 **Insolvency Act section 55(a):**

Any of the following persons shall be disqualified from being elected or appointed a trustee-

(a) any insolvent;

228 **Insolvency Act section 55(d):**

any person who does not reside in the Republic;

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- (d) the spouse of the insolvent concerned;²²⁹
- (e) any person who is by consanguinity related or deemed to be related in the first, second or third degree of relationship, as determined in accordance with section 1(3)(d) or (e) of the Intestate Succession Act, 1987 (Act No. 81 of 1987), to such insolvent or to his or her spouse;²³⁰
- (f) a minor or any other person under legal disability;²³¹
- (g) any person who is declared under section 59 to be disqualified, while such disqualification lasts, or any person removed by the court from office of trust on account of misconduct;²³²
- (h) a corporate body or any other entity which is not a natural person;²³³
- (i) any person who has been convicted, in the Republic or elsewhere, of an offence in terms of this Act or an offence of which dishonesty is an element and who was sentenced to imprisonment without the option of a fine or to a fine of not less than R1000 ~~or the amount fixed from time to time in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991)~~;²³⁴

229 **Insolvency Act section 55(b):**

any person related to the insolvent concerned by consanguinity or affinity within the third degree;

230 See section 55(b) in the previous footnote.

231 **Insolvency Act section 55(c):**

a minor or any other person under legal disability;

232 **Insolvency Act section 55(g):**

any person declared under section fifty-nine to be incapacitated for election as trustee, while any such incapacity lasts, or any person removed by the court, on account of misconduct, from an office of trust;

233 **Insolvency Act section 55(h):**

a corporate body;

234 **Insolvency Act section 55(i):**

any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, or perjury and has been sentenced therefor to serve a term of imprisonment without the option of a fine, or to a fine exceeding ten pounds;

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- (j) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he or she undertook that he or she would, when performing the functions of a liquidator, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law;²³⁵
- (k) any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person **to nominate him or her as liquidator** to vote for him or her as liquidator or to effect or assist in effecting his or her election as liquidator of any insolvent estate;²³⁶
- (l) any person who at any time during a period of twelve months immediately preceding the date of liquidation acted as the bookkeeper, accountant or auditor of the insolvent;²³⁷
- ~~(m) any agent authorized under a power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate concerned and acting or purporting to act under such power of attorney. [55(m)]~~

~~**{OPTION A CLAUSE 32:**~~

- (n) any person with a proven interest opposed to the general interest of the creditors of the insolvent estate.²³⁸

235 Insolvency Act section 55(j):

any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he undertook that he would, when performing the functions of a trustee or assignee, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law;

236 Insolvency Act section 55(k):

any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for him as trustee or to effect or assist in effecting his election as trustee of any insolvent estate;

237 Insolvency Act section 55(l):

any person who at any time during a period of twelve months immediately preceding the date of sequestration acted as the bookkeeper, accountant or auditor of the insolvent;

238 Insolvency Act section 55(e):

any person who has an interest opposed to the general interest of the creditors of the insolvent estate;

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(2) The Minister may from time to time publish by notice in the **Gazette** the name of a recognised professional body if it appears to him or her that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member of such body is a fit and proper person to be appointed as liquidator and meets acceptable requirements for education and practical experience and training. [New provision]

(3) A notice recognising a professional body may be revoked by a further notice if it appears to the Minister that the body no longer satisfies the requirements of subsection (2). A notice revoking a previous notice may provide that members of such body continue to be treated as authorised to act as liquidators for a specified period after the revocation takes effect. [New provision]

Master may refuse to appoint elected liquidator

54.(1) The Master may on any one or more of the following grounds refuse to appoint as liquidator a person elected in terms of section 52, namely that the said person—

- (a) was not properly elected;
- (b) is in terms of section 53 disqualified from being appointed as liquidator or as liquidator of the insolvent estate in question;
- (c) has failed to give security, within 7 days after his or her election or within such longer period as the Master may allow, to the satisfaction of the Master for the proper performance of his or her duties as liquidator;²³⁹

239 Insolvency Act section 57(1):

If a person who has been elected as trustee was not properly elected or is disqualified, under section fifty-five, from being elected or appointed a trustee or is disqualified from being a trustee of the estate in question or has failed to give within a period of seven days as from the date upon which he was notified that the Master had confirmed his election, or within such further period as the Master may allow, the security mentioned in subsection (2) of section fifty-six or if in the opinion of the Master the person elected as trustee should not be appointed as trustee to the estate in question, the Master shall give notice in writing to the person so elected that he declines to confirm his election or to appoint him as trustee and shall, in that notice, state his reason for declining to confirm his election or to appoint him: Provided that if the Master declines to confirm the election of a trustee because he is

~~OPTION B CLAUSE 32:~~

~~(d) is in the opinion of the Master not a suitable person for appointment as liquidator of the insolvent estate in question.]~~

(2) If the Master refuses to appoint as liquidator a person elected as such, he or she shall notify such person in writing of the reason for his or her refusal.²⁴⁰

(3) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to appoint a person elected as liquidator, may within a period of seven days from the date of such appointment or refusal submit his objections to the Master in writing. The Master shall within seven days of the receipt by him of the objections inform the objector and the person elected, if applicable, of his decision. Any interested party may apply to the court for a review of the Master's decision within fourteen days after the Master has informed the objector and the person elected, if applicable, of his decision.²⁴¹

(4) Whenever the Master refuses to appoint as liquidator a person elected as such, or the court has set aside an appointment of a liquidator by the Master, the Master shall direct the liquidator appointed in terms of section 32 to convene a meeting of creditors of the insolvent estate for purposes of electing another person as liquidator in the place of such person or liquidator.²⁴²

of the opinion that the person elected should not be appointed as trustee, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person elected should not be appointed as trustee to the estate in question.

240 See section 57(1) in the previous footnote.

241 **Insolvency Act section 57(7):**

Any person aggrieved by the appointment of a trustee or the refusal of the Master to confirm the election of a trustee or to appoint a person elected as a trustee, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister of Justice.

Insolvency Act section 57(8):

The Master shall within seven days of the receipt by him of the request referred to in subsection (7) submit to the Minister, in writing, his reasons for such appointment or refusal together with any relevant documents, information or objections received by him.

242 **Insolvency Act section 57(2):**

When the Master has declined to confirm the election of a trustee or to appoint a person elected as a trustee, or the Minister has under subsection (9) set aside the appointment of a trustee, the Master shall in accordance with the provisions of subsections (1) and (2) of section forty convene a meeting of creditors of the estate in question for the purpose of electing another trustee in the place of the person whose election as a trustee the Master declined to confirm or whom the Master declined to appoint or whose appointment as trustee has been so set aside. In the notice convening the meeting the Master shall state that he has declined to confirm the election of the person

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- (5) The notice of the meeting referred to in subsection (4)—
- (a) shall state that the purpose of the meeting is to elect a liquidator;
 - (b) shall set out the reason in subsection (1) (a), (b), **or** (c), ~~or (d)~~ why the Master has refused to appoint the person elected as liquidator, or shall state that the appointment of the liquidator has been set aside by the court;
 - (c) shall be published in the **Gazette** not less than ~~10~~ **14** days and not more than 21 days before the date fixed for the meeting;
 - (d) shall be sent by ~~certified mail or telefax or handed~~ **personal notice** to every creditor who has proved a claim against the estate.²⁴³
- (6) The meeting mentioned in subsection (4) shall be held as if it were the continuation of a first meeting of creditors held after an adjournment thereof.²⁴⁴

(7) If the Master refuses to appoint as liquidator a person elected at a meeting convened in terms of subsection (4), he or she shall notify such person in writing and state the reason for his or her refusal, as contemplated in subsection (2), whereupon the Master may, if he or she deems it necessary for the proper administration of the estate, appoint as joint liquidator any **competent** person whom he or she regards as a suitable person for appointment.²⁴⁵

previously elected as trustee, or to appoint the person so elected, and the reasons therefor (but subject to the proviso to subsection (1)), or that the appointment of the person previously appointed as trustee has been set aside by the Minister, as the case may be, and that the meeting is convened for the purpose of electing another trustee. The Master shall post a copy of the notice to every creditor whose claim against the estate was previously proved and admitted.

243 See section 57(2) in the previous footnote.

244 **Insolvency Act section 57(3):**

A meeting mentioned in subsection (2) shall be deemed to be the continuation of a first meeting of creditors held after an adjournment thereof.

245 **Insolvency Act section 57(4):**

If the Master declines, for any reason mentioned in subsection (1), to confirm the election of a person who was elected as trustee at a meeting mentioned in subsection (2), or to appoint a person so elected, he shall act in accordance with the provisions of subsection (1) and thereupon, if the person whose election the Master declined to confirm or whom the Master declined to appoint, was elected as sole trustee, or if two trustees were elected and the Master did not appoint both or one of them, the Master shall appoint as trustee of the estate in question any other person who is not disqualified from being a trustee of that estate.

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(8) All the provisions of this Act relating to a liquidator shall apply to a liquidator appointed by the Master under this section.²⁴⁶

Appointment of liquidator and security

55.(1) When final liquidation order has been made and a person elected as liquidator has given security to the satisfaction of the Master for the proper performance of his or her duties and lodged an affidavit stating that he or she is not disqualified in terms of section 53 ~~{OPTION B CLAUSE 32: and that he or she does not have interests that are opposed to the general interests of creditors}~~, the Master shall, subject to section 54, appoint him or her as liquidator and issue him or her with a letter of appointment, which shall be valid throughout the Republic.²⁴⁷

(2) After the receipt of his or her letter of appointment the liquidator shall make known his or her appointment and his or her address by notice in the **Gazette**.²⁴⁸

(3) The costs to the liquidator of giving security shall, up to a maximum amount which the Master deems reasonable, be included as part of the costs of the liquidation.²⁴⁹

(4) The Master may ~~in the course of the liquidation~~ **at any time** call for additional security, or reduce the security given by the liquidator if the liquidator has to the satisfaction of the Master accounted for any property in the estate and the Master is of the opinion that the reduced security

246 **Insolvency Act section 57(6):**

All the provisions of this Act, relating to a trustee shall apply to a trustee or a co-trustee appointed by the Master under this section.

247 **Insolvency Act section 56(2):**

Subject to the provisions of section fifty-seven, the Master shall, when a person so elected has given security to his satisfaction for the proper performance of his duties as trustee, confirm his election and appoint him as trustee by delivering to him a certificate of appointment, which shall be valid throughout the Republic.

248 **Insolvency Act section 56(3):**

On receipt of his certificate of appointment the trustee shall notify his appointment and address in the Gazette.

249 **Insolvency Act section 56(6):**

Subject to the provisions of subsection (1) of section eighty-nine the cost of giving the security mentioned in subsection (2), to an amount which the Master considers reasonable, shall be paid out of the estate in question as part of the costs of sequestration.

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will suffice to indemnify the estate or the creditors against any maladministration by the liquidator of the remaining property in the estate.²⁵⁰

Joint liquidators shall act jointly

56.(1) When more than one liquidator has been appointed in respect of an insolvent estate all such liquidators shall act jointly in performing their functions as liquidators and each of them shall be jointly and severally liable for every act performed by them jointly.²⁵¹

(2) Whenever liquidators of an insolvent estate disagree on any matter relating to the estate, the matter shall be referred to the Master who shall determine the question in issue or give directions as to the procedure to be followed for the determination thereof.²⁵²

Vacation of office of liquidator

57.(1) A liquidator shall vacate his or her office—

- (a) if his or her estate is liquidated;
- (b) if he or she is in terms of the Mental Health Act, 1973 (Act No. 18 of 1973), received and detained in an institution contemplated in the said Act or if he or she is declared by a competent Court to be incapable of managing his or her own affairs;

250 Insolvency Act section 56(7):

When a trustee has, in the course of liquidating an insolvent estate accounted to the Master, to his satisfaction, for any property in the estate, the Master may consent to a reduction of the security mentioned in subsection (2) if he is satisfied that the reduced security will suffice to indemnify the estate or the creditors thereof against any maladministration by the trustee of the remaining property in the estate.

251 Insolvency Act section 56(4):

When two trustees have been appointed or when the Master has appointed a co-trustee in terms of section 57 (5) both or all three trustees shall act jointly in performing their functions as trustees and each of them shall be jointly and severally liable for every act performed by them jointly.

252 Insolvency Act section 56(5):

Whenever the trustees in the estate disagree on any matter relating to the estate of which they are trustees, the matter shall be referred to the Master who shall determine the question in issue or give directions as to the procedure to be followed for the determination thereof.

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- (c) if he or she is convicted in the Republic or elsewhere of an offence of which dishonesty is an element and is sentenced to imprisonment without the option of a fine or to a fine of at least R1000 ~~or such other amount fixed from time to time in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991).~~²⁵³

(2) Whenever a liquidator of an insolvent estate vacates his or her office for whatever reason, any legal proceedings pending against the estate shall not lapse merely by reason of the vacating of office and may, with the permission of the court, be continued in the name of any remaining or newly appointed liquidator.²⁵⁴

Removal of liquidator from office by the Master

~~[Provisions for *clause 58(1)* OPTION A IN CLAUSE 32 are reflected between brackets]~~

58.(1) The Master shall ~~[may]~~ remove a liquidator from office—

- (a) if he or she was not qualified for appointment as liquidator or if his or her appointment was unlawful,²⁵⁵

253 Insolvency Act section 58:

A trustee shall vacate his office-

- (a) if his estate is sequestrated under this Act; or
- (b) if an order is issued under the law relating to mental disorders for his reception and detention in an institution, or if he is declared by a competent court to be incapable of managing his own affairs; or
- (c) if he is convicted of any offence and sentenced to serve any term of imprisonment without the option of a fine, or if he is convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, or perjury.

254 Insolvency Act section 76:

(1) Whenever a trustee of an insolvent estate has vacated his office or has been removed from office or has resigned or died, no legal proceedings previously instituted, in which the said estate is involved, shall lapse merely by reason of the vacating, removal, resignation or death.

(2) The court in which any such proceedings are pending may, upon receiving notice of the vacating, removal, resignation or death, allow the name of the surviving or new trustee to be substituted for the name of the former, and the proceedings shall thereupon continue as if the surviving or new trustee had originally represented the estate in those proceedings.

255 Insolvency Act section 60(a):

The Master may remove a trustee from his office on the ground-

- (a) that he was not qualified for election or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election or appointment as a trustee or has been authorized, specially or under a general power of

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- (b) if the majority in value and the majority in number of the creditors who have proved claims against the estate—
- (i) have requested the Master in writing to do so, **stating their reasons for the request**; or
- (ii) have at a meeting of creditors of the estate, after notice of the intended resolution was given, resolved, **stating reasons for the resolution**, that the liquidator shall be removed from office;²⁵⁶
- (c) if he or she resigns from the office of liquidator;²⁵⁷
- (cA) if he or she is temporarily absent from the Republic for a period longer than 60 days without the permission of the Master, or contrary to the conditions, if any, set by the Master when he or she gave permission;**²⁵⁸
- (d) if after his or her appointment he or she becomes disqualified from being a liquidator;²⁵⁹

~~**[OPTION B CLAUSE 32:**~~

attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney; or

256 Insolvency Act section 60(d):

... that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors has requested him in writing to do so; or

257 Insolvency Act section 61:

At the request of a trustee the Master may permit him to be absent from the Republic for a period longer than 60 days or may relieve him of his office, in either case upon such conditions as the Master may think fit to impose and subject to his giving such notice of his intention to be so absent from the Republic or to resign as the Master may direct.

258 See section 61 in the previous footnote.

259 See section 60(a) in footnote 266 above.

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~~(e) if in the opinion of the Master he or she no longer is a suitable person to be a liquidator.~~ [60(e)]

~~*[OPTION A CLAUSE 32:*~~ and the Master may remove a liquidator from office on the ground that he or she has failed to perform satisfactorily any duty imposed upon him or her by this Act or to comply with a lawful demand of the Master.²⁶⁰

~~**[Clause 58(1) for Option B in clause 32]**~~

~~(1) The Master may remove a liquidator from office -~~

~~(a) if he or she was not qualified for appointment as liquidator or if his or her appointment was unlawful;~~

~~(b) if the majority in value and the majority in number of the creditors who have proved claims against the estate -~~

~~(i) have requested the Master in writing to do so, stating their reasons for the request; or~~

~~(ii) have at a meeting of creditors of the estate, after notice of the intended resolution was given, resolved, stating reasons for the resolution, that the liquidator shall be removed from office;~~

~~(c) if he or she resigns from the office of liquidator;~~

260 Insolvency Act section 60(b):

... that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master; or

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- ~~(ca) if the he or she is absent from the Republic for a period longer than 30 days without the permission of the Master, or contrary to the conditions, if any, set by the Master when the he or she gave permission;~~
- ~~(d) if after his or her appointment he or she becomes disqualified from being a liquidator;~~
- ~~(da) he or she has failed to perform satisfactorily any duty imposed upon him or her by this Act or to comply with a lawful demand of the Master;~~
- ~~(e) if in the opinion of the Master he or she no longer is a suitable person to be a liquidator.~~

(2) The Master may, when a liquidator has been formally charged with the committal of an offence, or on the strength of a complaint made to him or her on affidavit, or evidence given at an interrogaiton in terms of section 65, 66 or 67, or written answers in terms of clause 67 and pending an investigation by him or her into the suitability of a liquidator to remain in office, suspend the liquidator from office and, if necessary, appoint an interim liquidator for the preservation of the estate: Provided that the Master shall in the case of a complaint, evidence or written answers without delay carry out the necessary investigation and either remove the liquidator from office or set aside the suspension and in the case of a liquidator charged with an offence remove the liquidator from office or set aside the suspension as soon as the prosecution has been finalised. [New provision]

(3) No person shall be appointed as interim liquidator unless he or she has given security to the satisfaction of the Master for the proper exercise of his or her powers and performance of his or her duties as interim liquidator and has lodged an affidavit stating that he or she is not disqualified in terms of section 53. [New provision]

(4) The interim liquidator shall after his or her appointment proceed to recover and take into possession all the assets and property of the insolvent estate and all books ~~and documents~~ of

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account, invoices, vouchers, business correspondence and any other records relating to the **affairs of the** insolvent ~~estate~~ and may apply for a search warrant in terms of section 35. [New provision]

(5) The interim liquidator shall give effect to any directions by the Master and may ~~with or~~ without the authorisation of the Master as contemplated in section 62 perform any act which is necessary for the ~~proper administration~~ **preservation** of the estate until the suspension of the liquidator is set aside or another liquidator is appointed. [New provision]

(6) The interim liquidator is entitled to remuneration taxed by the Master in accordance with Tariff B in Schedule 2. [New provision]

(7) The interim liquidator vacates his or her office when the suspension of the liquidator is set aside or ~~another~~ liquidator is appointed **in the place of the removed liquidator** and shall deliver the assets, property, ~~and~~ books, **documents or records** to the liquidator and give account to the liquidator. [New provision]

Court may declare liquidator disqualified or remove liquidator

59. If in the opinion of the court it is in the interests of the proper administration of an insolvent estate, it may, on the application of the Master or any other interested party—

- (a) declare any person disqualified from being a liquidator of the estate; or
- (b) remove from office any person who has been appointed as liquidator; and
- (c) declare such a person incapable of being elected or appointed as liquidator under this Act during his or her lifetime or for such other period as determined by the court.²⁶¹

261 **Insolvency Act section 59:**

On the application of any person interested the court may either before or after the appointment of a trustee, declare

~~[OPTION B CLAUSE 32. The provisions for OPTION A are reflected between brackets]~~

Election of new liquidator

60.(1) When one of two or more joint liquidators of an insolvent estate has vacated his or her office, has been removed from office by the Master or the court, or has resigned or died, the Master ~~may~~ [shall] direct the remaining liquidator or liquidators to convene a meeting of creditors of the estate for the purpose of electing a new liquidator in the place of the one who vacated his office ~~and when a majority of proved creditors in value at any time requests it the Master shall direct the liquidator or liquidators to convene a meeting for the election of a further liquidator~~.

(2) When every liquidator or the sole liquidator of an insolvent estate has vacated his or her office, has been removed from office by the Master or the court, or has resigned or died, the Master shall =

~~— [Paragraph (a) should be omitted for OPTION A]~~

~~(a) — appoint a suitable person as liquidator of the estate in terms of section 32; and~~

~~— (b) — shall~~ direct the liquidator appointed in terms of clause 32 to convene a meeting of creditors of the estate for the purpose of electing a liquidator.

that the person appointed or proposed is disqualified from holding the office of trustee, and, if he has been appointed, may remove him from office and may in either case declare him incapable of being elected or appointed trustee under this Act during the period of his life or such other period as it may determine, if-

- (a) he has accepted or expressed his willingness to accept from any person engaged to perform any work on behalf of the estate in question, any benefit whatever in connection with any matter relating to that estate; or
- (b) in order to induce a creditor to vote for him at the election of a trustee or in return for his vote at such election, or in order to exercise any influence upon his election as trustee, he has-
 - (i) wrongfully omitted or included or been privy to the wrongful omission or inclusion of the name of a creditor from any record by this Act required; or
 - (ii) directly or indirectly given or offered or agreed to give to any person any consideration; or
 - (iii) offered to or agreed with any person to abstain from investigating any previous transactions of the insolvent concerned; or
 - (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

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(3) The provisions of section 38(2) shall **mutatis mutandis** apply to a meeting referred to in subsections (1) or (2).²⁶²

Remuneration of liquidator

61.(1) A liquidator shall be entitled to a reasonable remuneration for his or her services and for expenses incurred by him or her in the administration of an insolvent estate.²⁶³

(2) The remuneration and expenses referred to in subsection (1) shall be taxed by the Master in accordance with Tariff B in Schedule 2 to this Act.²⁶⁴

(3) **The liquidator may apply for an increase in remuneration at least 14 days after a copy of his or her application with the reasons for the increase has been delivered to proved creditors by personal notice.** The Master may for good cause increase or decrease the liquidator's remuneration or disallow his or her remuneration, either wholly or in part, **on account by reason** of any failure of or delay in the discharge of his or her duties or on account of any improper performance of his or her duties, **and in particular the Master may increase the liquidator's**

262 Insolvency Act section 62:

(1) When a Court or the Master has removed one of two joint trustees from office, the Master may convene a meeting of the creditors of the estate in question for the purpose of electing a new trustee in the place of the trustee who was removed.

(2) When a sole trustee has vacated his office or has been removed from office, has resigned or died, the Master shall convene a meeting of the creditors of the estate in question for the purpose of electing a new trustee, and in the meantime the Master may appoint a provisional trustee for the preservation of the estate.

(3) When one of two joint trustees has vacated his office or has resigned or died the Master may convene a meeting of the creditors of the estate in question for the purpose of electing a new trustee in the place of the trustee who has vacated his office or has resigned or died.

(4) The provisions of section fifty-four shall apply in connection with the election of a new trustee in terms of this section.

263 Insolvency Act section 63(1):

Every trustee or curator bonis shall be entitled to a reasonable remuneration for his services, to be taxed by the Master according to tariff B in the Second Schedule to this Act: Provided that the Master may, for good cause, reduce or increase his remuneration, or may disallow his remuneration either wholly or in part on account of any failure of or delay in the discharge of his duties or on account of any improper performance of his duties.

264 See section 63(1) in the previous footnote.

remuneration to compensate him or her for the time spent in assisting with criminal prosecutions or investigating the affairs of the insolvent.²⁶⁵

(4) The Minister may by notice in the **Gazette** amend the said tariff.²⁶⁶

(5) Any person who employs the liquidator or who is a fellow employee of or who is ordinarily in the employment of the liquidator shall not be entitled to any remuneration out of the insolvent estate for services rendered to the estate, and a liquidator or his **or her** partner shall not be entitled to remuneration out of the estate for services rendered to the estate, except the remuneration to which he **or she** is under this Act entitled as a liquidator.²⁶⁷

(6) A liquidator shall not be entitled to receive any remuneration before the liquidation account making provision for the remuneration has been confirmed as provided in section 90, unless payment of such remuneration or part thereof has been approved in writing by the Master.²⁶⁸ [New provision]

General dDuties and powers of liquidator

62.(1) The liquidator of an insolvent estate shall proceed forthwith to recover and take into his or her possession all the assets and property of the insolvent estate and he or she shall apply the said assets and property, as far as they extend, in satisfaction of the costs of the administration of

265 See section 63(1) in footnote 274.

266 **Insolvency Act section 63(1)bis:**
The Minister of Justice may by notice in the Gazette amend the said tariff B.

267 **Insolvency Act section 63(2):**
A person who employs or is a fellow employee or is ordinarily in the employment of the trustee shall not be entitled to any remuneration out of the insolvent estate for services rendered to the estate, and a trustee or his partner shall not be entitled to any remuneration out of the estate for services rendered to the estate, except the remuneration to which under this Act he is entitled as trustee.

268 **Administration of Estates Act section 51(4):**
An executor shall not be entitled to receive any remuneration before the estate has been distributed as provided in section 34 (11) or 35 (12), as the case may be, unless payment of such remuneration has been approved in writing by the Master.

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the estate and the claims of creditors of the estate and if any cash balance remains, he or she shall deal therewith in accordance with the provisions of section 93.²⁶⁹

(2) The liquidator shall, in addition to any powers that he or she has in terms of this Act, have power to perform any act which is necessary for the proper administration and distribution of the estate and, except where otherwise provided by this Act, he or she need not obtain formal authorisation for the performance of any such act.²⁷⁰

(3) The liquidator shall in particular have the power—

- (a) to execute in the name of and on behalf of the estate all deeds, receipts and other documents;²⁷¹

269 Insolvency Act section 69(1):

A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

(Clause 33(1) deals with valuation of property by a liquidator.)

Companies Act section 391:

A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.

270 Companies Act section 386(3):

The liquidator of a company-

- (a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;
- (b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and
- (c) in a members' voluntary winding-up, with the authority granted by a meeting of members,

shall have the powers mentioned in subsection (4).

Companies Act section 386(4)(i):

... to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.

See also section 386(1)(e) in footnote 287 below.

271 Companies Act section 386(1)(a):

The liquidator in any winding-up shall have power-

- (a) to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;

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- (b) to prove a claim in the estate of any debtor of the insolvent estate and to receive payment or a dividend in respect thereof;²⁷²
- (c) to draw, accept, make or ~~exchange~~ **endorse** any bill of exchange or promissory note in the name of or on behalf of the estate: Provided that any such act by which the estate is burdened with additional liabilities shall require the authorisation of the Master or the creditors of the estate;²⁷³
- (d) to carry on the business of the insolvent or any part thereof: Provided that the liquidator may, pending the obtaining of authorisation thereto, only carry on the business of the insolvent in so far as it is necessary that expenses of the estate be paid or necessary expenses be incurred in order to avoid loss;²⁷⁴
- (e) to obtain credit for the payment of necessary expenses which he or she is obliged to incur before funds for the payment thereof are available; [New provision]

272 **Companies Act section 386(1)(b);**
... to prove a claim in the estate of any debtor or contributory of the company and receive payment in full or a dividend in respect thereof;

273 **Companies Act section 386(1)(c):**
... to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company: Provided that no liquidator shall, except with the leave of the Court or the authority referred to in subsection (3) or (4), or for the purposes of carrying on the business of the company in terms of subsection (4) (f) have power to impose any additional liabilities upon the company;

274 **Insolvency Act section 80:**
(1) A trustee shall not carry on the business of the insolvent concerned or any part thereof unless authorized thereto by the creditors of the insolvent's estate or, in the absence of instructions from the creditors, by the Master. Such authorization may be given by the Master at any time, whether before or after the second meeting of creditors.

(2) If the trustee is authorized to carry on any such business, he shall, unless the creditors have otherwise directed him, purchase for cash only and only out of the takings of that business any goods which he may require for that business.

Companies Act section 386(4)(f) to be read with 386(3) in footnote 281 above:

... to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;

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- (f) to convene a meeting of creditors of the estate;²⁷⁵
- (g) to take the necessary measures for the protection and the administration of the estate.²⁷⁶

(4) The liquidator shall, if authorised thereto by the Master or by resolution of a meeting of creditors of the estate, have the power—

- (a) to institute or defend any legal steps in civil proceedings by or against the estate and to settle such proceedings;²⁷⁷
- (b) to submit to determination of arbitrators any dispute concerning the estate;²⁷⁸

275 Companies Act section 386(1)(d):

... to summon any general meeting of the company or the creditors or contributories of the company for the purpose of obtaining its or their authority or sanction with respect to any matter or for such other purposes as he may consider necessary;

276 Companies Act section 386(1)(e):

... subject to the provisions of subsections (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.

277 Insolvency Act section 18(3):

A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.

Companies Act section 386(4)(a) to be read with section 386(3) in footnote 281 above:

(4) The powers referred to in subsection (3) are-

- (a) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;

278 Insolvency Act section 78(2):

If authorized thereto by the creditors, or if no creditor has proved a claim against the estate, by the Master, the trustee may submit to the determination of arbitrators any dispute concerning the estate or any claim or demand upon the estate, when the opposite party consents to arbitration.

Companies Act section 386(4)(e) to be read with section 386(3) in footnote 281 above:

... to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

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- (c) to compromise or admit any claim submitted for proof at a meeting of creditors of the estate ~~against the estate~~, including any unliquidated claim, ~~submitted for proof at a meeting of creditors of the estate~~,²⁷⁹

(cA) to disallow or reduce a claim in terms of section 46; [New provision]

- (d) to carry on the business or part of the business of the insolvent in accordance with the directions of the Master or the creditors of the estate,²⁸⁰
- (e) to ~~continue or terminate any contract in terms of which the insolvent has any obligation~~ exercise his or her election in respect of contracts entered into before liquidation, including his or her election in terms of section 26 or 30,²⁸¹
- (f) to sell or alienate property of the insolvent estate, subject to the directions of the Master or the creditors of the estate: **Provided that if such property or a portion thereof is subject to rights of a secured creditor the secured creditor must give his or her consent in writing**,²⁸²

279 **Insolvency Act section 78(3) first part:**

If authorized thereto by the creditors or if no creditor has proved a claim against the estate, by the Master, the trustee may compromise or admit any claim against the estate, whether liquidated or unliquidated if proof thereof has been duly tendered at a meeting of creditors. ...

Section 386(4)(c) of the Companies Act to be read with section 386(3) in footnote 281 above:

...to compromise or admit any claim or demand against the company, including an unliquidated claim;

280 See section 80 of the Insolvency Act and section 386(4)(f) of the Companies Act in footnote 285 above.

281 **Section 386(4)(g) of the Companies Act to be read with section 386(3) in footnote 281 above:**

... to exercise mutatis mutandis the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;

282 See section 18(3) of the Insolvency Act in footnote 288 above.

Section 80bis of the Insolvency Act:

(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.

(2) The Master may thereupon authorize the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorize the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has

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- (g) to engage the services of an attorney or advocate or any other professional person or to employ any other person to render services on behalf of the insolvent estate;²⁸³
- ~~(h) to obtain credit for the payment of expenses;~~ [New provision]
- (i) ~~subject to subsection (5),~~ to dispose of a debt owing to the estate or to accept payment of a reasonable part of a debt in full settlement of the debt or to give a reasonable extension of time for payment of a debt or part thereof;²⁸⁴

guaranteed that person against loss by such sale.

Section 82(1) of the Insolvency Act (part):

Subject to the provisions of sections eighty-three and ninety the trustee of an insolvent estate shall, as soon as he is authorized to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct: ... Provided that if the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee shall sell the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the Gazette and after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct.

Section 386(2A) and(2B) of the Companies Act:

(2A) At any time before a general meeting contemplated in subsection 1 (d) is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.

(2B) The Master may thereupon authorise the sale of such property or any portion thereof on such conditions and in such manner as he may determine: Provided that if such property or a portion thereof is subject to a preferential right, the Master shall not authorise the sale of such property or portion unless the person entitled to such preferential right has given his consent thereto in writing.

Section 386(4)(h) of the Companies Act to be read with section 386(3) in footnote 281 above:

... to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;

283 Insolvency Act section 73(1):

Subject to the provisions of this section and section 53 (4), the trustee of an insolvent estate may with the prior written authorization of the creditors engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate: Provided that the trustee-

- (a) if he or she is unable to obtain the prior written authorization of the creditors due to the urgency of the matter or the number of creditors involved, may with the prior written authorization of the Master engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate; or
- (b) if it is not likely that there will be any surplus after the distribution of the estate, may at any time before the submission of his or her accounts obtain written authorization from the creditors for any legal work performed by any attorney or counsel,

and all costs incurred by the trustee, including any costs awarded against the estate in legal proceedings instituted on behalf of or against the estate, in so far as such costs result from any steps taken by the trustee under this subsection, shall be included in the cost of the sequestration of the estate.

284 Insolvency Act section 78(1):

The trustee may accept from a debtor of the insolvent estate who is unable to pay his debt in full, any reasonable part of the debt in discharge of the whole debt or grant any debtor of the estate an extension of time for the payment of his debt in so far as this is compatible with the provisions of section ninety-one: Provided that if the debt exceeds

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- (j) to draw, accept, make or endorse any bill of exchange or promissory note by which the estate is burdened with liabilities;²⁸⁵
- (k) to make available to the insolvent or his or her dependants a **some sum** of money or assets for his or her maintenance or that of his or her dependants;²⁸⁶
- (l) to make available to the insolvent assets of the insolvent estate in excess of the values referred to in section 11(6) or the amounts fixed in terms of section 11(7):
[New provision]

Provided that the powers set out in this subsection can before the issue of a final order only be exercised with the consent of the insolvent or the court. [New provision]

(5) A liquidator who disagrees with the assets made available in terms of subsection (4)(l) by resolution of a meeting of creditors can refer the matter to the Master for his or her decision. [New provision]

~~(5) If a debt contemplated in subsection (4)(i) exceeds R5000, the liquidator shall send by certified mail or telefax or deliver by hand to creditors who have proved claims against the estate a notice of the amount which he or she intends accepting in full settlement of the debt and he or she shall afford the said creditors the opportunity, within a time of at least ten **14** days stated in the notice to make a better offer for the right to collect the debt. [78(1); 386(4)(b) Companies Act]~~

R1 000, the trustee shall not accept a part of the debt in discharge of the whole debt, unless he has been authorized thereto by the creditors of the estate, or if no creditor has proved a claim against the estate, by the Master.

Companies Act section 386(4)(b) to be read with section 386(3) in footnote 281 above:

... to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;

285 See section 386(1)(c) of the Companies Act in footnote 284 above.

286 **Insolvency Act section 79:**

At any time before the second meeting of creditors the trustee may, with the consent of the Master, allow the insolvent such moderate sum of money or such moderate quantity of goods out of the estate as may appear to the trustee to be necessary for the support of the insolvent and his dependants.

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(6) A liquidator may at any time ~~when a dispute or uncertainty exists with regard to the powers of the liquidator~~, approach the court ~~to adjudicate such dispute~~ **in regard to any matter arising from the liquidation** and the court may **give directions or** grant the liquidator all powers that in its opinion are necessary for the proper administration, liquidation and distribution of the insolvent estate in question.²⁸⁷

(7) Notwithstanding the provisions of any law relating to **income tax** **or duties** a liquidator of an insolvent estate shall be entitled—

- (a) to inspect any return or other document submitted to the Commissioner for **Inland Revenue** **the South African Revenue Services** by or on behalf of an insolvent or the spouse of an insolvent in connection with **income tax** **or duties**;
- (b) to make copies of any such return;
- (c) to have any such copy ~~which is correct~~, certified as correct by or on behalf of the Commissioner;²⁸⁸

287 Companies Act section 386(5):

In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.

Companies Act section 387(3):

Where the Master has refused to give directions as aforesaid or in regard to any other particular matter arising under the winding-up, the liquidator may apply to the Court for directions.

288 Insolvency Act section 81(2):

For the purpose of any investigation mentioned in subsection (1) the Commissioner for Inland Revenue and the officers under him shall (notwithstanding the provisions of the law relating to income tax) permit a trustee to inspect any return rendered to the Commissioner by or on behalf of the insolvent in question in connection with income tax, and shall permit the trustee to make copies of any such return. At the request of the trustee the said Commissioner or any officer under him who is in charge of any such return shall certify as correct any such copy which is correct, and if any entry in such return is relevant in any proceedings, whether civil or criminal, in which the insolvent estate or the insolvent is involved, that return or a copy thereof, purporting to have been certified as aforesaid, shall be admissible in evidence in those proceedings, on its mere production by any person and any such certified copy shall have the same force and effect as the original return.

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- (d) at his or her request to be apprised in writing by or on behalf of the Commissioner of the basis for any estimated assessment made in terms of any **tax revenue** law.
[New provision]

(8) A liquidator may, before or after the rehabilitation of an insolvent, with the written consent of the Master, by notice to the officer charged with the registration of title to immovable property in the Republic, in respect of immovable property or a bond registered in the name of the insolvent, or his or her spouse if he or she is married in community of property, cause a **caveat** to be entered against the transfer of the immovable property or the cancellation or cession of the bond referred to in the notice.²⁸⁹

(9) The notice referred to in subsection (8) shall be accompanied by the written consent of the Master and shall identify sufficiently the person in respect of whom and the property or bond in respect of which the **caveat** is to be registered so as to enable the officer charged with the registration to enter the **caveat** as contemplated in subsection (8). The **caveat** shall remain in force until the date indicated by the Master in his consent.²⁹⁰

(10) If any entry in a return contemplated in subsection (7) is relevant in any civil or criminal proceedings in which the insolvent or the insolvent estate is involved, that return or a copy thereof, purporting to be certified as contemplated in subsection (7), shall be admissible in those proceedings on its mere production by any person and such certified copy shall have the same evidentiary value as the original return.²⁹¹

289 Insolvency Act section 18B(1):

A trustee may, before or after the rehabilitation of an insolvent, with the written consent of the Master, by notice to the officer charged with the registration of title to immovable property in the Republic, in respect of immovable property or a bond registered in the name of the insolvent or of his spouse contemplated in section 21 (13), cause a caveat to be entered against the transfer of the immovable property or the cancellation or cession of the bond referred to in the notice.

290 Insolvency Act section 18B(2) and (3):

(2) The notice referred to in subsection (1) shall be accompanied by the written consent of the Master contemplated in that subsection and shall identify sufficiently the person in respect of whom and the property or bond in respect of which the caveat is to be entered so as to enable the officer charged with the registration to enter the caveat as contemplated in the said subsection.

(3) The caveat shall remain in force until the date indicated by the Master in his consent.

291 See section 81(2) of the Insolvency Act in footnote 299 above.

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(11) No provision in any contract, including the Memorandum or Articles of Association of a company, which purports to regulate the manner in which property belonging to a person shall be disposed of on or after his or her insolvency or which on his or her insolvency limits a person's power to dispose of his or her rights to property as he or she wishes, shall bind the liquidator of such person's insolvent estate. [New provision]

Insolvent shall attend meetings of creditors

63. An insolvent shall attend all meetings of creditors of his or her insolvent estate of which he or she is notified in writing by the liquidator or an adjourned meeting which he or she is directed by the presiding officer to attend, unless he or she is excused in writing by the liquidator, the Master or the person who is to preside at such meeting from attending such meeting or the resumption of such adjourned meeting.²⁹²

Summons to attend meeting of creditors and notice to furnish information

64.(1) If the officer who presides or is to preside at a meeting of creditors or any Master or magistrate has reasonable ground for believing that a person—

- (a) has or had in his or her possession or custody property belonging to the insolvent estate; or
- (b) is indebted to the insolvent estate; or
- (c) is able to give material information ~~concerning the affairs of the insolvent~~ on all matters relating to the insolvent or his or her business or affairs, whether before or after the liquidation of his or her estate, or concerning any property ~~belonging to the~~ which at any time belonged to the insolvent estate; or

292 **Insolvency Act section 64(1):**

An insolvent shall attend the first and second meetings of the creditors of his estate and every adjourned first and second meeting, unless he has previously obtained the written permission of the officer who is to preside or who presides at such meeting granted after consultation with the trustee to absent himself. The insolvent shall also attend any subsequent meeting of creditors if required so to do by written notice of the trustee of his estate.

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- (d) has in his or her possession or custody any book, ~~or~~ document, or record relating to the insolvent's affairs or his or her property,

he or she may summon the said person to appear at a meeting of creditors of the insolvent estate at a time stated in the summons, in order to be questioned in terms of section 65 and, where applicable, to produce the books, ~~or~~ documents, or records stated specified in the summons.²⁹³

(2) A summons referred to in subsection (1) shall be substantially in the form of ~~Form 24 in Annexure 1 of the Magistrates' Courts Rules~~ Form E of Schedule 1 to this Act. [New provision]

~~—(3) The liquidator of an insolvent estate may by written notice order any person with whom the insolvent or his or her spouse had an account within 12 months before the date of the liquidation of the insolvent's estate to furnish the liquidator within 7 days or such longer period as the liquidator may allow, with a statement reflecting the state of the said account during the said period of 12 months. [New provision]~~

~~—(4) The liquidator may by written notice order any person whom he or she has reason to believe to be in possession or control of any book or document or material information relating to the affairs of the insolvent or his or her spouse, before or after the liquidation of the insolvent's estate or of property which belong or had belonged to the insolvent or his or her spouse, to make such book, document, information or property available to the~~

293 **Insolvency Act section 64(2) and (3):**

(2) The officer who is to preside or who presides at any meeting of creditors may summon any person who is known or upon reasonable ground believed to be or to have been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate or to the spouse of the insolvent or to be indebted to the estate, or any person (including the insolvent's spouse) who in the opinion of said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate or concerning the business, affairs or property of the insolvent's spouse, to appear at such meeting or adjourned meeting for the purpose of being interrogated under section sixty-five.

(3) The said officer may also summon any person who is known or upon reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is mentioned in subsection (2), to produce that book or document, or an extract therefrom at any such meeting of creditors.

~~liquidator within 7 days of the date of the said notice or within such longer time as the liquidator may allow and such person shall allow the liquidator or someone on behalf of the liquidator to make copies of or extracts from any such book or document. [New provision]~~

Interrogation Questioning of insolvent and other persons

65.(1) The ~~person presiding~~ presiding officer at a meeting of creditors of an insolvent estate may call upon the insolvent or any person summoned for ~~interrogation~~ questioning or the production of any book, ~~or~~ document or record in terms of section 64, or any other person who is present and who possesses relevant information, to appear before him or her and to give evidence, to be ~~interrogated~~ questioned on all matters relating to the insolvent or his or her business or affairs, whether before or after the liquidation of the estate, and concerning any property which at any time belonged to the insolvent estate or to produce a book, ~~or~~ document or record and the said presiding officer shall administer to such person the oath or take from him or her an affirmation to speak the truth.²⁹⁴

(2) A person who, in terms of subsection (1), is called upon to testify or to produce a book, ~~or~~ document, or record may be ~~interrogated~~ questioned by the ~~chairperson~~ presiding officer, the liquidator and ~~the~~ a proved creditor on whose request that person was summoned or called upon to testify, or the ~~legal~~ representative of any of them, and the ~~chairperson~~ presiding officer may allow any other creditor to put questions to that person through the ~~chairperson~~ presiding officer to the extent that the ~~chairperson~~ presiding officer in his discretion allows such questions.²⁹⁵

294 **Insolvency Act section 65(1):**

At any meeting of the creditors of an insolvent estate the officer presiding thereat may call and administer the oath to the insolvent and any other person present at the meeting who was or might have been summoned in terms of subsection (2) of section sixty-four and the said officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person so called and sworn concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse: Provided that the presiding officer shall disallow any question which is irrelevant and may disallow any question which would prolong the interrogation unnecessarily.

295 See section 65(1) in the previous footnote.

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(3) A person called upon in terms of subsection (1) to testify may be assisted by a ~~legal~~ representative and such ~~legal~~ representative may question the said person only in so far as it is necessary to clarify answers given by him or her.²⁹⁶

(4) The place where proceedings under this section takes place shall be accessible to the public: Provided that if in the opinion of the presiding officer it is necessary for the effective questioning of a person or for the maintenance of good order or the protection of the public interest, he or she may order that the proceedings or any part thereof shall take place behind closed doors or that any particular person or persons may not be present during any particular stage of the proceedings or that the proceedings or any part thereof may not be published.²⁹⁷

(5) If a banker ~~at whose bank the insolvent keeps or kept an account~~ is summoned in terms of section 64 ~~or ordered in terms of clause 67~~ to produce documents, books or statements or give information ~~with regard to transactions carried out by the insolvent or his or her spouse~~, such banker shall, notwithstanding the law relating to privilege, be obliged to produce ~~any cheque in his or her possession which was drawn by the insolvent or his or her spouse within one year before the date of liquidation of the insolvent's estate or if such cheque is not at his or her disposal he or she shall produce any record of payment thereof available to him or her or a copy of such record and all other information available to him or her in connection with such cheque or the account of the insolvent~~ such documents, books or statements or give such information.²⁹⁸

296 Insolvency Act section 65(6):

Any person called upon to give evidence under this section may be assisted at his interrogation by counsel, an attorney or agent.

297 Insolvency Act section 39(6):

The place where a meeting of creditors is held shall be accessible to the public and the publication of any statement made at such a meeting shall be privileged to the same extent as in the publication of a statement made in a court of law.

298 Insolvency Act section 65(2):

In connection with the production of any book or document in compliance with a summons issued under subsection (3) of section sixty-four or at an interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law, shall apply: Provided that a banker at whose bank the insolvent in question or his or her spouse keeps or at any time kept an account, shall be obliged to produce, if summoned to do so under subsection (3) of section sixty-four, any cheque in his possession which was drawn by the insolvent or his or her spouse within one year before the sequestration of the insolvent's estate, or if any cheque so drawn is not available, then any record of the payment,

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(6) Notwithstanding the provisions of any other law or the common law, but subject to the court's power to avoid **interrogations questioning** being conducted in an oppressive, vexatious or unfair manner, no person **interrogated questioned** in terms of this section may refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or her or apply for a postponement of the **interrogation questioning** until the criminal or disciplinary proceedings have been finalised: Provided that evidence given by a person in terms of this section is not admissible against him or her in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged **in connection with evidence given during the questioning** with perjury or the giving of false evidence under oath or affirmation or a contravention of section 68(3) for refusal or failure to answer lawful questions fully and satisfactorily.²⁹⁹

(7) The insolvent **may shall** at **an interrogation a questioning** under this section be **interrogated questioned** with regard to any matter relating to his or her insolvency and he or she is obliged to disclose **required to declare that he or she has disclosed** all his or her affairs fully and correctly.³⁰⁰

date of payment and amount of that cheque which may be available to him, or a copy of such record and if called upon to do so, to give any other information available to him in connection with such cheque or the account of the insolvent or his or her spouse; and provided further that a person interrogated under subsection (1) shall not be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or upon the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

299 Insolvency Act section 65(2A):

(a) Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions which may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial, the presiding officer shall, notwithstanding the provisions of section 39 (6), order that such part of the proceedings be held in camera and that no information regarding such questions and answers may be published in any manner whatsoever.

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, and in criminal proceedings contemplated in section 139 (1) relating to a failure to answer lawful questions fully and satisfactorily.

(c) Any person who contravenes any provision of an order contemplated in paragraph (a), shall be guilty of an offence and liable on conviction to the penalty mentioned in subsection (5) of section 154 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

300 Insolvency Act section 65(4):

The insolvent shall at such interrogation be required to make a declaration that he has made a full and true disclosure of all his affairs.

Draft Insolvency Bill
Clause 65

(8) The ~~person presiding~~ **presiding officer** at proceedings in terms of this section—

- (a) shall disallow all questions that are irrelevant and may disallow questions that would prolong the proceedings unnecessarily;³⁰¹
- (b) shall record the proceedings or cause them to be recorded.³⁰²

(9) A person who in answer to a summons issued in terms of section 64 attends a meeting of creditors or a person called upon in terms of this section to testify at such meeting or to produce books, ~~or~~ documents, **or records** including the insolvent, shall be entitled to the witness fees to which he or she would have been entitled if he or she were a witness in civil proceedings before a court of law.³⁰³

(10) Any evidence given under this section shall, subject to the proviso to subsection (6), be admissible in any proceedings instituted against the person who gave such evidence.³⁰⁴

(11) The liquidator may in terms of an agreement with a creditor repay the creditor's costs and expenses in connection with an interrogation questioning conducted by the creditor if sufficient money is recovered as a result of the investigation questioning and

301 See section 65(1) of the Insolvency Act in footnote 305 above.

302 Insolvency Act section 65(3):

The presiding officer shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section made to the trustee or his agent a statement which was reduced to writing, or delivered a statement in writing to the trustee or his agent, that statement may be read by or read over to that person when he is called as a witness under this section and if then adhered to by him, shall be deemed to be evidence given under this section.

303 Insolvency Act section 65(7) and (8):

(7) Any person summoned to attend a meeting of creditors for the purpose of being interrogated under this section (other than the insolvent and his or her spouse) shall be entitled to witness fees to be paid out of the estate, to which he would be entitled if he were a witness in any civil proceedings in a court of law.

(8) If the insolvent or his or her spouse is called upon to attend any meeting of creditors held after the second meeting or an adjourned second meeting, he or she shall be entitled to an allowance out of the insolvent estate to defray his or her necessary expenses in connection with such attendance.

304 Insolvency Act section 65(5):

Any evidence given under this section shall, subject to the provisions of subsection (2A), be admissible in any proceedings instituted against the person who gave that evidence.

in the absence of such an agreement the court or the Master may order that the whole or any part of such costs or expenses shall form part of the costs of liquidation. [New provision]

Interrogation Questioning by commissioner

66.(1) **The liquidator or any** ~~A~~ creditor of an insolvent estate may at any time after the liquidation of the insolvent's estate apply to the court or the Master—

- (a) that a person known or suspected to have in his or her possession any property belonging to the insolvent estate or to be indebted to the insolvent estate or to be able to give material information regarding the affairs of the insolvent or of his or her property, be summoned to appear before a commissioner for **interrogation questioning**,³⁰⁵ and
- (b) that a suitable person be appointed as commissioner to carry out the **interrogation questioning** contemplated in paragraph (a).³⁰⁶

(2) A creditor who makes an application contemplated in subsection (1) shall furnish security to the satisfaction of the court or the Master for all costs in connection with the **interrogation questioning**. [New provision]

305 **Companies Act section 417(1):**

In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

306 **Companies Act section 418(1)(a):**

Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company.

Draft Insolvency Bill
Clause 66

(3) If the court or the Master grants an application referred to in subsection (1) the Court or the Master ~~shall~~—

- (a) ~~shall~~ appoint a magistrate or any other person ~~it or he or she~~ the court or the Master deems suitable, as commissioner with the assignment to carry out the interrogation questioning in terms of this section;³⁰⁷ and
- (b) may summon a person referred to in subsection (1)(a) to appear before the said commissioner and to produce any books, ~~or papers~~ documents or records in his or her custody or under his or her control relating to the insolvent on a date and at a place stated in the summons in order to be interrogated questioned with regard to the affairs of the insolvent.³⁰⁸

(4) A commissioner appointed in terms of subsection (3) shall administer the oath to the person who appears before him or her for interrogation questioning or take from him or her an affirmation to speak the truth.³⁰⁹

(5) A commissioner has the power to summons witnesses and to ~~interrogate~~ question them and to require the production of documents.³¹⁰

(6) If a commissioner—

307 See section 418(1)(a) of the Companies Act in the previous footnote.

308 See section 417(1) of the Companies Act in footnote 316 above.

Companies Act section 417(2)(a):

The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

309 See section 417(2)(a) of the Companies Act in the previous footnote.

310 Companies Act section 418(2):

A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417.

Draft Insolvency Bill
Clause 66

- (a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or
- (b) has been appointed by the court, he shall, in such manner as the court may direct, report to the Master and the court,

on any **interrogation questioning** referred to him.³¹¹

(7) The provisions of subsections (2), (3), (5), (6), (7), (8) and (9) of section 65 shall apply **mutatis mutandis** with regard to the giving of evidence and the production of documents in terms of this section.³¹²

(8) A witness who gave evidence in terms of this section shall at his or her own costs be entitled to a copy of the record of his or her evidence.³¹³

(9) A creditor at whose request **an interrogation a questioning** is carried out in terms of this section shall be liable for all costs and expenses incurred in connection with the **interrogation questioning**: Provided that the court or the Master may order that the whole or any part of such costs or expenses shall be reckoned as costs of the liquidation.³¹⁴

311 Companies Act section 418(3):

If a commissioner-

- (a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or
- (b) has been appointed by the Court, he shall, in such manner as the Court may direct, report to the Master and the Court,

on any examination or enquiry referred to him.

312 The application of provisions similar to clause 65 of the Bill are dealt with in sections 416(1), 417(1A), 417(5), and 418(1)(c) of the Companies Act.

313 Companies Act section 418(4):

Any witness who has given evidence before the Master or the Court under section 417 or before a commissioner under this section, shall be entitled, at his cost, to a copy of the record of his evidence.

314 Companies Act section 417(6):

Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.

Draft Insolvency Bill
Clause 67

(10) ~~An interrogation~~ A questioning in terms of this section and any application therefor shall be private and confidential, unless the court or the Master, either generally or in respect of any particular person, directs otherwise.³¹⁵

Liquidator may put written questions or call for accounts, books, documents, records or information

67.(1) If in the opinion of the liquidator of an insolvent estate it would be convenient to obtain information concerning the ~~insolvent estate or the~~ affairs of the insolvent ~~or a claim against the estate~~ by means of written questions and answers instead of oral evidence given at a meeting of creditors of the estate contemplated in section 65 ~~or an interrogation~~ questioning in terms of section 66, he or she may send such written questions to the insolvent or a creditor or to any other person to be answered by him or her.

(2) (a) Questions contemplated in subsection (1) may be put to the insolvent with regard to ~~any~~ all matters relating to his or her business or affairs, whether before or after the liquidation of his or her estate, and with regard to ~~all~~ any property ~~belonging~~ which at any time belonged to the insolvent estate ~~or accruing thereto~~.

(b) Questions may be put to a creditor of the estate with regard to a claim proved by him or her against the estate or a claim offered for proof.

(c) Questions may be put to

(i) any other person with regard to any transaction which such person had with the insolvent, or

315 **Companies Act section 417(7):**

Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.

Draft Insolvency Bill
Clause 67

(ii) any property, books, documents or records of the insolvent which such person had in his or her possession

within ~~12~~ 36 months before the date of liquidation of the estate of the insolvent.

(3) (a) ~~The~~ Personal notice of the questions contemplated in subsection (1) shall be ~~sent by certified mail or telefax or delivered by hand~~ given to the person to whom they are put.

(b) The written answers to the questions shall be sworn to or affirmed and shall be sent to the liquidator by certified mail or telefax or delivered by hand within ~~10~~ 14 days after receipt of the questions.

(4) The provisions of subsections (5) and (6) of section 65 are **mutatis mutandis** applicable with regard to the written answers to questions referred to in this section.

(5) The answers to questions referred to in this section shall be regarded as evidence given in terms of section 65.

(6) The giving of answers to questions referred to in this section or a refusal to give such answers shall not prevent a person from being summoned in terms of section 64 or from being questioned in terms of section 65 or section 66 and shall not absolve a person from the obligation to give evidence when called upon to do so.

~~(3)~~ (7) The liquidator of an insolvent estate may by written notice order any person with whom the insolvent or his or her spouse had an account or transactions within 12 months before the date of the liquidation of the insolvent's estate to furnish the liquidator within 7 days or such longer period as the liquidator may allow, with a statement reflecting the state of the said account or the debits, credits and balance due in respect of the transactions during the said period of 12 months.

Draft Insolvency Bill
Clause 68

~~(4)~~ **(8)** The liquidator may by written notice order any person whom he or she has reason to believe to be in possession or control of any book, ~~or~~ document, **record** or material information relating to the affairs of the insolvent or his or her spouse, before or after the liquidation of the insolvent's estate or of property which belong or had belonged to the insolvent or his or her spouse, to make the book, document, **record** information or property **specified in the said notice** available to the liquidator within 7 days of the date of the said notice or within such longer time as the liquidator may allow and such person shall allow the liquidator or someone on behalf of the liquidator to make copies of or extracts from any such book, ~~or~~ document **or record**. [New provision]

Interrogation Questioning by or on behalf of the Master

68.(1) If at any time after the liquidation of an insolvent's estate and before his rehabilitation the Master is of the opinion that the insolvent or the liquidator of the insolvent estate or any other person is able to give information **or is in possession of books, documents or records** which the Master considers desirable to obtain, concerning the insolvent or his or her insolvent estate or the administration of the estate or concerning any demand made against the estate, the Master may by notice in writing delivered to the insolvent or the liquidator or such other person, summon him or her to appear before the Master or before a magistrate at a place and on a date and time stated in the notice, and to furnish all the information within his or her knowledge concerning the insolvent or his or her estate or the administration of the estate **and produce the books, documents or records specified in the notice**.³¹⁶

316 Insolvency Act section 152(2):

If at any time after the sequestration of the estate of a debtor and before his rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate.

Draft Insolvency Bill
Clause 68

(2) The Master may at any time appoint a person to investigate the books, **documents, records** and vouchers of the liquidator and direct the liquidator to deliver to the person so appointed or to the Master any book, **or document, or record** relating to or property belonging to the insolvent estate of which he or she is the liquidator. The reasonable costs incurred in performing such an investigation shall, unless the court otherwise orders, be regarded as part of the costs of liquidation, and if the liquidator is removed from office consequent upon such an investigation, it shall be paid by the liquidator **de bonis propriis**.³¹⁷

(3) After having **interrogated questioned** the person summoned in terms of subsection (1), the Master or the magistrate may deliver to him or her a notice to appear again before the Master or the magistrate at a place and time stated in the notice and to furnish such further information or to produce any book, **or document, or record** specified in such notice.³¹⁸

(4) A person summoned in terms of subsection (1) may be **interrogated questioned** by the Master or the magistrate presiding at the proceedings and if a person other than the liquidator is summoned in terms of the said subsection, the liquidator or his or her representative may cross-examine the person concerned in regard to evidence given by him or her and to the extent that the presiding officer allows any person having an interest in the estate or the administration thereof **or his or her representative** may question the person **in question concerned**.³¹⁹

317 **Companies Act section 381(3), (4) and (5):**

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator.

(4) The Court may, upon the application of the Master, order that any costs reasonably incurred by him in performing his duties under this section be paid out of the assets of the company or by the liquidator de bonis propriis.

(5) Any expenses incurred by the Master in carrying out any provision of this section shall, unless the Court otherwise orders, be regarded as part of the costs of the winding-up of that company.

318 **Insolvency Act section 152(3):**

(3) After having interrogated the person summoned as aforesaid the Master or other officer concerned may deliver to him a written notice to appear again before the Master or other officer at a place and upon a date and hour stated in such notice and to submit to the Master or such other officer any further information or any book or document specified in such notice.

319 **Insolvency Act section 152(4):**

When any person summoned as aforesaid appears before the Master or other officer in question in compliance with a notice issued under subsection (2) or (3) the Master or such other officer may administer the oath to him and the Master or such other officer and if a person other than the trustee was summoned, also the trustee (or his agent) may interrogate the person summoned in regard to any matter relating to the insolvent or his estate or the administration of the estate.

Draft Insolvency Bill
Clause 68A

(5) The provisions of section 65(3), (5), (6), (7) and (8) shall **mutatis mutandis** apply to **an interrogation questioning** under this section. Section 65(9) shall apply **mutatis mutandis** but the liquidator of the insolvent estate shall not be entitled to witness fees.³²⁰

(6) Proceedings under this section shall be private and confidential and without the permission of the **person presiding presiding officer** at the proceedings no person whose attendance thereat is not necessary shall be present at the proceedings and no publication of the proceedings shall take place without the permission of the said presiding officer. [New provision]

Enforcing summonses and giving of evidence

68A.(1) If a person summoned under section 64, 66 or 68 fails to appear at a meeting of creditors or questioning in answer to the summons, or if an insolvent fails to attend a hearing in terms of section 15(5)(a) or a meeting of creditors in terms of section 63, or fails to remain in attendance at that hearing or meeting, any magistrate for the district where the meeting, questioning or hearing was scheduled to be held who may hold a court under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), may issue a warrant, authorizing any member of the police force to apprehend the person summoned or the insolvent, as the case may be, and to bring him before the said magistrate.³²¹

(2) Unless the person summoned or the insolvent, as the case may be, satisfies the said magistrate that he had a reasonable excuse for his failure to appear at or attend such

320 **Insolvency Act section 152(5) and (7):**

(5) The provisions of subsection (2) of section 65 shall, subject to subsection (2A) of that section, *mutatis mutandis* apply in connection with the production of any book or document or with the interrogation of any person under the preceding provisions of this section. ...

(7) The provisions of subsection (7) of section sixty-five shall *mutatis mutandis* apply in connection with any person (other than a trustee) who has been summoned under this section for the purpose of furnishing any information: Provided that if there are no assets in the estate in question sufficient to pay the witness fees in question, those fees shall be paid by the State.

321 **Insolvency Act section 66(1):**

If a person summoned under section sixty-four fails to appear at a meeting of creditors, in answer to the summons, or if an insolvent fails to attend any meeting of creditors in terms of subsection (1) of section sixty-four, or fails to remain in attendance at that meeting, the officer presiding at such meeting may issue a warrant, authorizing any member of the police force to apprehend the person summoned or the insolvent, as the case may be, and to bring him before the said officer.

meeting, questioning or hearing, or for absenting himself from the meeting, hearing or questioning, the said magistrate may commit him or her to prison to be detained there until such time as the said magistrate may determine, and the officer in charge of the prison to which the said person or insolvent was committed, shall detain him or her and produce him or her at the time and place determined by the magistrate for his or her production.³²²

(3) If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book, document or record which he or she was summoned to produce, or if any person who may be questioned at a meeting of creditors in terms of section 65 or during an interrogation in terms of section 66 or 68 or a hearing in terms of section 15(5)(a) refuses to be administered the oath or make an affirmation to speak the truth at a meeting of creditors, questioning or hearing at which he or she is called upon to give evidence or refuses to answer any question lawfully put to him or her under the said sections or does not answer the question fully and satisfactorily, the said magistrate may issue a warrant committing the said person to prison, where he or she shall be detained until he or she has undertaken to do what is required of him or her, but subject to the provisions of subsection (5).³²³

(4) If a person who has been released from prison after having undertaken in terms of subsection (3) to do what is required of him or her, fails to fulfil his or her undertaking, the

322 **Insolvency Act section 66(2):**

Unless the person summoned or the insolvent, as the case may be, satisfies the said officer that he had a reasonable excuse for his failure to appear at or attend such meeting, or for absenting himself from the meeting, the said officer may commit him to prison to be detained there until such time as the said officer may appoint, and the officer in charge of the prison to which the said person or insolvent was committed, shall detain him and produce him at the time and place appointed by the first-mentioned officer for his production.

323 **Insolvency Act section 66(3):**

If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was summoned to produce, or if any person who may be interrogated at a meeting of creditors in terms of subsection (1) of section sixty-five refuses to be sworn by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the question fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of subsection (5).

Draft Insolvency Bill
Clause 68A

said magistrate may commit the person to prison as often as may be necessary to compel him or her to do what is required of him or her.³²⁴

(5) Any person committed to prison under this section may apply to the court for his or her discharge from custody and the court may order the discharge if it finds that the person was wrongfully committed to prison or is being wrongfully detained.³²⁵

(6) In connection with the apprehension of a person or with the committal of a person to prison under this section, the magistrate who issued the warrant of apprehension or committal to prison shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him or her in the exercise of his or her functions.³²⁶

(7) The said magistrate may upon the request of the liquidator, the Master, a Commissioner or a proved creditor and after giving the witness or the insolvent the opportunity to be heard, order the witness or the insolvent to pay costs occasioned by failure contemplated in subsection (1) and the costs to have him or her brought before the magistrate in the amount determined by the Magistrate. [New provision]

Suspected commission of offence shall be reported to Attorney-General Commercial Crime Unit

324 **Insolvency Act section 66(4):**

If a person who has been released from prison after having undertaken in terms of subsection (3) to do what is required of him, fails to fulfil his undertaking, the said officer may commit him to prison as often as may be necessary to compel him to do what is required of him.

325 **Insolvency Act section 66(5):**

Any person committed to prison under this section may apply to the court for his discharge from custody and the court may order his discharge if it finds that he was wrongfully committed to prison or is being wrongfully detained.

326 **Insolvency Act section 66(6):**

In connection with the apprehension of a person or with the committal of a person to prison under this section, the officer who issued the warrant of apprehension or committal to prison shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him in the exercise of his functions.

Draft Insolvency Bill
Clause 69

69.(1) If it appears from an answer or statement given by a person who is **interrogated** ~~or~~ questioned under section 65, 66, 67 or 68, that there are reasonable grounds for believing that any person has committed an offence, the ~~person presiding~~ **presiding officer** at the proceedings ~~(if he or she is not the Master)~~, or the liquidator in the case of proceedings under section 67, shall **submit the answer or statement or a certified copy thereof with supporting documents, if any, and** report such suspicion to the ~~Master~~ **Commercial Crime Unit of the South African Police Service** and set out the grounds on which the suspicion rests. **If the presiding officer is not the Master, a copy of the answer or statement and supporting documents, if any, and the report to the Unit shall be sent to the Master.**³²⁷

(2) ~~If it appears to the Master from any report made to him or her in pursuance of subsection (1) or from evidence given at any proceedings at which he or she presided, that there are reasonable grounds for suspecting that any person has committed an offence, the Master shall transmit all the relevant evidence or certified copies thereof to the Attorney-General in whose area of jurisdiction the interrogation was held or the offence is suspected of having been committed to enable him or her to determine~~**The said Unit shall with due consideration of the provisions of section 65(6) investigate** whether criminal proceedings should be instituted in the matter.³²⁸

Proof of record of proceedings of meetings of creditors

327 **Insolvency Act section 67(1):**

If it appears from any statement made at an interrogation under section sixty-five that there are reasonable grounds for suspecting that any person has committed any offence the Master shall transmit the said statement, or a certified copy thereof, and all necessary documents to the Attorney-General in whose area of jurisdiction the interrogation was held or the offence is suspected to have been committed, to enable him to determine whether any criminal proceedings shall be instituted in the matter.

Insolvency Act section 67(2):

When any such statement has been made at a meeting at which an officer other than the Master presided, the presiding officer, when transmitting the record of the proceedings to the Master, in terms of subsection (3) of section thirty-nine, shall direct the attention of the Master to what appears to him to be reasonable grounds for suspecting that the insolvent has been guilty of a contravention of this Act.

328 See section 67(1) in the previous footnote.

Draft Insolvency Bill
Clause 70

70(1) Any record purporting to be a record of the proceedings at a meeting of the creditors of an insolvent estate or ~~an interrogation~~ **a questioning** held under this Act and purporting to have been signed by a person describing himself or herself as Master or magistrate or other presiding officer or commissioner shall, upon its mere production in judicial proceedings, be **prima facie** proof of the proceedings recorded therein.³²⁹

(2) Unless the contrary is proved, it shall be presumed that any meeting of creditors or any ~~interrogation~~ **questioning** referred to in subsection (1) was duly convened and held and that all acts performed thereat were validly performed.³³⁰

Composition

71.(1) An insolvent may at any time after the issuing of the first liquidation order but after he or she has submitted his or her statement of affairs as required by section 34, submit to the liquidator of his or her estate a written offer of composition.³³¹

(2) If the liquidator is of the opinion that **there is a likelihood that** the creditors of the estate will **probably** accept the offer of composition, he or she shall as soon as possible after the receipt of the offer send ~~by certified mail or telefax or deliver by hand~~ a copy thereof together with his or her report thereon and notice of the time and the place of the meeting at which the composition will be considered **by personal notice** to every creditor whose name and address are known to the liquidator or which he or she can reasonably obtain. If a special meeting is convened to consider

329 **Insolvency Act section 68(1):**

Any record purporting to be a record of any proceedings at a meeting of the creditors of an insolvent estate held under this Act and purporting to have been signed by a person describing himself as Master, magistrate or other presiding officer shall, upon its mere production by any person, be received as prima facie evidence of the proceedings recorded therein.

330 **Insolvency Act section 68(2):**

Unless the contrary is proved, it shall be presumed that any meeting, of the proceedings whereat there was kept and signed such a record as is mentioned in subsection (1), was duly convened and held and that all acts performed thereat were validly performed.

331 **Insolvency Act section 119(1):**

At any time after the first meeting of the creditors of an insolvent estate, the insolvent may submit to the trustee of his estate a written offer of composition.

Draft Insolvency Bill
Clause 71

a composition the notice in the **Gazette** shall be published not less than ~~10~~ **14** days and not more than 21 days before the date fixed for the meeting.³³²

(3) If the liquidator is of the opinion that there is no likelihood that creditors will accept the offer of composition, he or she shall inform the insolvent that the offer is unacceptable and that he or she does not propose to send a copy thereof to the creditors. The insolvent may thereupon require the Master to review the liquidator's decision and the Master may, after having considered the offer and the liquidator's report thereon, direct the liquidator to submit the offer to the creditors of the estate in the manner provided in subsection (2).³³³

(4) If the offer is accepted by a majority in number and two-thirds in value of the concurrent creditors who have voted on the offer and payment under the composition has been made or security for such payment has been given as specified in the composition, the insolvent shall, subject to subsection (5), (6) and (7), be entitled to a certificate under the hand of the Master of the acceptance of the offer.³³⁴

332 Insolvency Act section 119(2):

If the trustee is of the opinion that the creditors will probably accept the offer of composition, he shall as soon as possible after receipt of the offer post in a registered letter or deliver to every creditor who has proved his claim, a copy of the offer with his report thereon.

Insolvency Act section 119(5):

Whenever the trustee posts or delivers to the creditors a copy of an offer of composition in terms of the preceding provisions of this section, he shall simultaneously convene and give notice to the creditors of a meeting for the purpose of considering the said offer and any other matter mentioned in the notice.

Insolvency Act section 119(6):

The said meeting shall be convened for a date not earlier than fourteen days and not later than twenty-eight days after the date upon which the said notice is posted or delivered to any creditor.

333 Insolvency Act section 119(3):

If the trustee is of the opinion that there is no likelihood that the creditors will accept the offer of composition, he shall inform the insolvent that the offer is unacceptable and that he does not propose to send a copy thereof to the creditors.

Insolvency Act section 119(4):

The insolvent may thereupon appeal to the Master who, after having considered a report from the trustee, may, if he considers the offer of composition sufficient for submission to the creditors, direct the trustee to post or deliver a copy of the offer to every creditor who has proved his claim.

334 Insolvency Act section 119(7):

If the offer of composition has been accepted by creditors whose votes amount to not less than three-fourths in value and three-fourths in number (calculated in accordance with the provisions of section fifty-two) of the votes of all the creditors who proved claims against the estate, and payment under the composition has been made or security for such payment has been given as specified in the composition, the insolvent shall be entitled to a certificate under the hand of the Master of the acceptance of the offer: Provided that no offer may be so accepted if it contains any condition whereby any creditor would obtain as against another creditor any benefit to which he

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(5) An offer of composition which contains any condition under which any creditor would obtain as against another creditor any benefit to which he or she would not have been entitled upon the distribution of the estate in the ordinary manner, shall be invalid.³³⁵

(6) Subject to subsection (5), a condition providing for the discharge of a provisional liquidation order or the setting aside of a final liquidation order upon the acceptance of an offer of composition shall not be invalid. [New provision]

(7) If the composition provides for the giving of security, the nature of the security shall be fully specified and if it consists of a surety bond or guarantee, every surety shall be named.³³⁶

(8) The liquidator shall, despite the absence of a resolution of creditors authorising him or her to do so, be competent to approach the court for the cancellation of a composition, **the setting aside of an order providing for the discharge of a first liquidation order or an order setting aside a final liquidation order,** or for other relief if the insolvent or any other person has failed to give effect to the terms of the composition or to comply with the provisions of this section, **or if the offer of composition supplied incorrect information which might reasonably have resulted in the requisite majority of creditors voting in favour of the composition.** [New provision]

(9) An offer of composition which has been accepted as aforesaid shall be binding upon the insolvent and upon all creditors of the insolvent estate in so far as their claims are not secured or preferent but the right of any secured or preferent creditor shall not be prejudiced thereby, except in so far as he or she has expressly and in writing waived his or her preference.³³⁷

would not have been entitled upon the distribution of the estate in the ordinary way; and provided further that any condition which makes the offer of composition or the fulfilment thereof or of any part thereof subject to the rehabilitation or to the consent of the creditors to the rehabilitation of the insolvent shall be of no effect, and provided also that if the composition provides for the giving of any security, the nature of that security shall be fully specified, and if it is to consist of a surety bond or guarantee, every surety shall be named.

335 See section 119(7) of the Insolvency Act in footnote 345.

336 See section 119(7) of the Insolvency Act in footnote 345.

337 **Insolvency Act section 120(1):**

An offer of composition which has been accepted as aforesaid shall be binding upon the insolvent and upon all the

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(10) If the composition is subject to the condition that any property in the insolvent estate shall be restored to the insolvent, the acceptance of the composition shall divest the liquidator of such property and vest such property in the insolvent as from the date on which such property is in pursuance of the composition to be restored to the insolvent, but subject to any condition provided for in the composition.³³⁸

(11) A composition shall not affect the liability of a surety for the insolvent **or any liability regarding transactions that are invalid or liable to be set aside.**³³⁹

(12) When the estate of a partnership and the estate of a partner in that partnership are simultaneously under liquidation, the acceptance of an offer of composition by the separate creditors of the partner shall not take effect until the expiration of a period of six weeks as from the date of a notice in writing of that acceptance given by the liquidator of the partner's separate estate to the liquidator of the partnership estate, or if the liquidator of the partner's estate is also the liquidator of the partnership estate, as from the date of the acceptance of the composition. The said notice shall be accompanied by a copy of the deed embodying the composition.³⁴⁰

(13) At any time during the period of six weeks referred to in subsection (12) the liquidator of the partnership estate may take over the assets of the estate of the insolvent partner

creditors of the insolvent estate in so far as their claims are not secured or otherwise preferent but the right of any preferent creditor shall not be prejudiced thereby, except, in so far as he has expressly and in writing waived his preference.

338 Insolvency Act section 120(2):

If it be a condition of the composition that any property in the insolvent estate shall be restored to the insolvent, the acceptance of the composition shall divest the trustee of such property and re-invest the insolvent therewith as from the date upon which such property is in pursuance of the composition to be restored to the insolvent, but subject to any condition provided for in the composition.

339 Insolvency Act section 120(3):

A composition shall not affect the liability of a surety for the insolvent.

340 Insolvency Act section 121(1):

When the estate of a partnership and the estate of a partner in that partnership are simultaneously under sequestration, the acceptance of an offer of composition by the separate creditors of the partner shall not take effect until the expiration of a period of six weeks as from the date of a notice in writing of that acceptance given by the trustee of the partner's separate estate to the trustee of the partnership estate, or if the trustee of the partner's estate is also the trustee of the partnership estate, as from the date of the acceptance. The said notice shall be accompanied by a copy of the deed embodying the composition.

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if he or she fulfils the obligations of the insolvent partner in terms of the composition, other than obligations to render any service or obligations which only the insolvent partner can fulfil: Provided that if the composition provides for the giving of any specific security, the Master shall determine what other security the liquidator of the partnership estate may give in lieu thereof.³⁴¹

(14) Any moneys to be paid and anything to be done for the benefit of creditors in pursuance of a composition shall be paid and shall be done, as far as practicable, through the liquidator: Provided that any creditor who has failed to prove his or her claim before the liquidator has made a final distribution among those creditors who have proved their claims, shall be entitled to recover direct from the insolvent within six months from the confirmation by the Master of the account under which the distribution was made, any payments to which he or she may be entitled under the composition and the liquidator shall have no duty in regard thereto, and after the said distribution the creditor shall have no claim against the insolvent estate.³⁴²

(15) When a composition has been entered into between an insolvent and the creditors of his or her estate **and the liquidation order has not been discharged or set aside**, the liquidator of that estate shall frame a liquidation account and ~~plan of~~ distribution **account** of the assets which are or will become available for distribution among the creditors under the composition, and all the provisions of this Act which relate to a liquidation account and ~~plan of~~ distribution **account** of

341 Insolvency Act section 121(2):

At any time during the said period of six weeks the trustee of the partnership estate may take over the assets of the estate of the insolvent partner if he fulfils the obligations of the insolvent partner in terms of the composition except obligations to render any service or obligations which only the insolvent partner can fulfil: Provided that if the composition provides for the giving of any specific security, the Master shall determine what other security the trustee of the partnership estate may give in lieu thereof.

342 Insolvency Act section 123(1):

Any moneys to be paid and anything to be done for the benefit of creditors in pursuance of a composition shall be paid and shall be done, as far as practicable, through the trustee: Provided that any creditor who has failed to prove his claim before the trustee has made a final distribution among those creditors who have proved their claims, shall be entitled to recover direct from the insolvent within six months as from the confirmation by the Master, of the account under which the distribution was made, any payments to which he may be entitled under the composition and the trustee shall have no duty in regard thereto and after the said distribution the creditor shall have no claim against the insolvent estate.

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assets among creditors shall apply in connection with the liquidation account and ~~plan of~~ distribution account, and the assets.³⁴³

~~72. — Set-off. - (1) If a debt which was owed to an insolvent or a claim which he or she had was extinguished by set-off within one year before the date of liquidation of his or her estate in a transaction which took place otherwise than in the ordinary course of business, the liquidator of the estate may, with the approval of the Master, despite the fact that set-off took place, direct the person by whom the debt was owed or to whom the claim was made over, to pay the debt or the value of the claim to the estate, whereupon that person shall be obliged to pay such debt or the value of such claim to the estate: Provided that any set-off shall be effective and binding on the liquidator of the insolvent estate if it takes place between an exchange or a market participant and any other party in accordance with the rules of such an exchange, or if it takes place under an agreement defined in section 28.~~

~~— (2) A person who has paid to the insolvent estate a debt or the value of a claim as contemplated in subsection (1) shall be entitled to prove a claim in respect thereof against the insolvent estate. [46]~~

Realization of security

73.(1) A secured creditor of an insolvent estate ~~who holds movable or immovable property as security for his or her claim against the estate~~ shall as soon as he or she becomes aware of the liquidation of the estate notify the liquidator in writing of the nature and extent of ~~the~~ his or her security ~~held by him or her~~ and the amount of his or her claim.³⁴⁴

343 **Insolvency Act section 123(2):**

When a composition has been entered into between an insolvent and the creditors of his estate, the trustee of that estate shall frame a liquidation account and plan of distribution of the assets which are or will become available for distribution among the creditors under the composition, and all the provisions of this Act which relate to a liquidation account and plan of distribution and to the distribution of assets among creditors shall apply in connection with the first-mentioned liquidation account and plan of distribution, and with the first-mentioned assets.

344 **Insolvency Act section 83(1):**

A creditor of an insolvent estate who holds as security for his claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has

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(2) If such property consists of securities as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial instrument as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), the creditor may, subject to the provisions of subsection (5), after giving the notice mentioned in subsection (1), realize the property in the following manner:³⁴⁵

- (a) if it is property of a class ordinarily sold through a stockbroker as defined in section 1 of the Stock Exchanges Control Act, 1985, the creditor may, subject to the provisions of the said Act and (where applicable) the rules referred to in section 12 thereof, forthwith sell it through a stockbroker, or if the creditor is a stockbroker, also to another stockbroker; or
- (b) if it is a financial instrument, the creditor may, subject to the provisions of the Financial Markets Control Act, 1989, and rules referred to in section 17 thereof, forthwith sell it through a financial instrument trader as defined in section 1 of the said Act, or, if the creditor is a financial instrument trader or financial instrument principal as defined in section 1 of the said Act, also to another financial instrument trader or financial instrument principal.³⁴⁶

been appointed.

345 Insolvency Act section 83(2):

If such property consists of a marketable security, a bill of exchange or a financial instrument as defined in section 1 of the Financial Markets Control Act, 1989 (Act 55 of 1989), the creditors may, after giving the notice mentioned in subsection (1) and before the second meeting of creditors, realize the property in the manner and on the conditions mentioned in subsection (8).

346 Insolvency Act section 83(8):

The creditor may realize such property in the manner and on the conditions following, that is to say-

- (a) if it is-
 - (i) any property of a class ordinarily sold through a stockbroker as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act 1 of 1985), the creditor may, subject to the provisions of the said Act and (where applicable) the rules referred to in section 12 thereof, forthwith sell it through a stockbroker, or if the creditor is a stockbroker, also to another stockbroker; or
 - (ii) a financial instrument referred to in subsection (2), the creditor may, subject to the provisions of the Financial Markets Control Act, 1989, and rules referred to in section 17 thereof, forthwith sell it through a financial instrument trader as defined in section 1 of the said Act, or, if the creditor is a financial instrument trader or financial

~~(3) A creditor may, subject to the provisions of subsection (5), realize property, other than property contemplated in subsection (2), with the permission of the liquidator and in the manner stipulated in writing by the liquidator with the authority of the Master. [83(3), (8)(d)]~~

(4) A creditor who has realized property contemplated in subsections (2) ~~or (3)~~ shall forthwith pay over to the liquidator the net proceeds ~~over to the liquidator~~ after deduction of the reasonable costs of realization and furnish ~~him or her~~ the liquidator with vouchers in support of the realization of the property and the costs of realization.³⁴⁷

(5) A secured creditor with security other than property contemplated in subsection (2) shall as soon as possible after liquidation place the liquidator in possession of the security and ~~If a secured creditor who holds property as with security for his or her claim against an insolvent estate has not realized the said property~~ contemplated in subsection (2) which has not been realized by the creditor before the first meeting of creditors, ~~he or she~~ shall within five days after the commencement of that meeting or within such longer period as the liquidator may allow, ~~make the property available to the liquidator~~ place the liquidator in possession of the security and the liquidator shall cause the security to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, 1965 (Act 65 of 1965) or some

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- instrument principal as defined in section 1 of the said Act, also to another financial instrument trader or financial instrument principal;
- (b) if it is a bill of exchange, the creditor may realize it in any manner approved of by the trustee or by the Master;
 - (c) if it consists of a right of action, the creditor shall not realize it except with the approval of the trustee or of the Master;
 - (d) if it is any other property, the creditor may sell it by public auction after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as the trustee directed.

347 **Insolvency Act section 83(10):**

Whenever a creditor has realized his security as hereinbefore provided he shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master and thereafter the creditor shall be entitled to payment, out of such proceeds, of his preferent claim if such claim was proved and admitted as provided by section forty-four and the trustee or the Master is satisfied that the claim was in fact secured by the property so realized. If the trustee disputes the preference, the creditor may either lay before the Master an objection under section one hundred and eleven to the trustee's account, or apply to court, after notice or motion to the trustee, for an order compelling the trustee to pay him forthwith. Upon such application the court may make such order as to it seems just.

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other person approved by the Master and he or she shall supply the Master with a copy of the valuation.³⁴⁸

(6) A creditor who has ~~made available to~~ **placed** the liquidator **in possession of** property held by him or her as security shall not thereby lose the security to which he or she is entitled in respect of such property.³⁴⁹

(7) Subject to subsection (8) and section 62(4), the liquidator shall realize the property made available to him or her pursuant to subsection (5) for the benefit of a creditor whose claim is secured by such property.³⁵⁰

(8) The liquidator may, if authorised thereto by the Master or by resolution at a meeting **of** creditors of the estate, ~~dispose of~~ **sell** property constituting the security of a creditor **whose claim**

348 Insolvency Act section 83(6):

If he has not so realized such property before the second meeting of creditors, he shall as soon as possible after the commencement of that meeting deliver the property to the trustee, for the benefit of the insolvent estate and if the creditor has not delivered the said property to the trustee within a period of three days as from the commencement of the said meeting the trustee may demand from him delivery of such property. If the creditor fails to comply with such demand of the trustee, the Master, at the request of the trustee and after notice to the creditor shall direct the deputy-sheriff within whose area of jurisdiction the property is situate to attach the property and to deliver it to the trustee, and in that case the creditor shall be liable for the deputy-sheriff's costs, as taxed and allowed by the Master. If those costs cannot be recovered from the creditor, they shall be paid out of the estate as part of the costs of the sequestration.

349 Insolvency Act section 47:

If a creditor of an insolvent estate who is in possession of any property belonging to that estate, to which he has a right of retention or over which he has a landlord's legal hypothec, delivers that property to the trustee of that estate, at the latter's request, he shall not thereby lose the security afforded him by his right of retention or lose his legal hypothec, if, when delivering the property, he notifies the trustee in writing of his rights and in due course proves his claim against the estate: Provided, that a right to retain any book or document of account which belongs to the insolvent estate or relates to the insolvent's affairs shall not afford any security or preference in connection with any claim against the estate.

350 Insolvency Act section 83(11):

If a creditor has valued his security when proving his claim, the trustee, if authorized by the creditors, may, unless the creditor has realized his security in terms of subsection (2) or (3), within three months as from the date of his appointment or as from the date of the proof of the claim (whichever is the later) take over the property (whether movable or immovable) which constitutes the security at the value placed thereon by the creditor when his claim was proved: Provided that if two or more creditors have a pledge or special mortgage of the same property, a creditor who has valued his security shall be deemed to have valued, and the trustee shall be entitled to take over, only the preferent rights of the creditor in respect of the property, and not the property itself. If the trustee does not, within that period, take over the said property or security he shall realize it for the benefit of all creditors whose claims are secured thereby, according to their respective rights.

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ranks first in preference and who has proved his or her claim against the estate, to such creditor at a value agreed upon between the liquidator and the creditor. [New provision]

(9) After proof of his or her claim and the realisation of the security, any secured creditor is entitled to payment of his or her secured claim if he or she has furnished security to the satisfaction of the liquidator for the repayment of the payment with interest at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), if according to the confirmed account the creditor is not entitled to the payment or a part thereof.³⁵¹

Attachment of property upon failure to deliver to liquidator

74.(1) If a creditor has failed to ~~make available to~~ **place** the liquidator **in possession of** the property constituting his or her security as contemplated in section 73(5), the liquidator shall send to him or her ~~by certified mail or telefax or deliver by hand~~ a written demand **by personal notice** to ~~make~~ **place the liquidator in possession of** such property ~~available~~ and if the creditor fails to ~~make the property available~~ **do so** within 7 days after such demand was delivered or sent to him or her, the liquidator may obtain from the Master or the magistrate of the district where the property is or is situated a warrant directing the sheriff to attach such property and to ~~make it available to the liquidator~~ **place the liquidator in possession of the property**³⁵².

(2) The creditor concerned shall be liable for all costs resulting from his or her failure to ~~make the property concerned available to the liquidator~~ **place the liquidator in possession of the property** and if such costs cannot be recovered from the said creditor they shall form part of the costs of ~~liquidation~~ **realizing the security in terms of section 75(4)**.³⁵³

Application of proceeds of security

351 See section 83(10) in footnote 359 above.

352 See section 83(6) in footnote 360 above.

353 See section 83(6) in footnote 360 above.

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75.(1) A secured creditor shall be entitled to share in the distribution of the proceeds of his or her security only if he or she has proved a claim against the insolvent estate.³⁵⁴

(2) Any interest due in respect of a secured claim in respect of any period not longer than two years before the date of ~~the~~ liquidation shall be secured as if it were part of the capital debt.³⁵⁵

(3) If the claim of a secured creditor exceeds the sum payable to him or her in respect of his or her security, he or she shall be entitled to rank against the estate in respect of the excess as a concurrent creditor, unless when proving his or her claim he or she had indicated that he or she relied solely on his or her security for the fulfilment of his or her claim.³⁵⁶

(4) The costs of maintaining, conserving and realizing any security shall be paid out of the proceeds of that security if sufficient and, if insufficient, the costs shall be paid by the secured creditor who would have been entitled, in priority to other creditors, to the proceeds if it had been sufficient to cover the said costs.³⁵⁷

354 See section 83(10) in footnote 359 above.

355 **Insolvency Act section 89(3):**

Any interest due on a secured claim in respect of any period not exceeding two years immediately preceding the date of sequestration shall be likewise secured as if it were part of the capital sum.

356 **Insolvency Act section 83(12):**

If the claim of a secured creditor exceeds the sum payable to him in respect of his security he shall be entitled to rank against the estate in respect of the excess, as an unsecured creditor, and if the net proceeds of any such property exceed all claims secured thereby the balance, after payment of those claims, shall be added to the other free residue (if any) in the estate in question.

Insolvency Act section 89(2):

If a secured creditor (other than a secured creditor upon whose petition the estate in question was sequestrated) states in his affidavit submitted in support of his claim against the estate that he relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not be liable for any costs of sequestration other than the costs specified in subsection (1), and other than costs for which he may be liable under paragraph (a) or (b) of the proviso to section one hundred and six.

357 **Insolvency Act section 89(1):**

The cost of maintaining, conserving and realizing any property shall be paid out of the proceeds of that property, if sufficient and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention the deficiency shall be paid by those creditors, pro rata, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims. The trustee's remuneration in respect of any such property and a proportionate share of the costs incurred by the trustee in giving security for his proper administration of the estate, calculated on the proceeds of the sale of the property, a proportionate share of the Master's fees, and if the property is immovable, any tax as defined in subsection (5) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and

(4A) The liquidator's remuneration in respect of any security and a proportionate share of any excess of minimum liquidator's remuneration over the ordinary tariff, a proportionate share of the costs incurred by the liquidator in giving security for his or her proper administration of the estate, a proportionate share of the Master's fees, calculated on the proceeds of the security, and if the property is immovable, any assessment rates as defined in subsection (4C) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the liquidation and in respect of the period from that date to the date of the transfer of that property by the liquidator of that estate, with any interest or penalty which may be due on the said assessment rates in respect of any such period, shall form part of the costs of realization.³⁵⁸

(4B) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any assessment rates as defined in subsection (4C) due thereon have been paid, that law shall not debar the liquidator of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if the liquidator has paid or offered reasonable security for payment of the assessment rates which may have been due on that property in respect of the periods mentioned in subsection (4A) and no preference shall be accorded to any claim for such assessment rates in respect of any other period.³⁵⁹

(4C) For the purposes of subsections (4) and (4B) "assessment rates" in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments,

in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the said tax in respect of any such period, shall form part of the costs of realization.

358 See section 89(1) in the previous footnote.

359 **Insolvency Act section 89(4):**

Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in subsection (5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in subsection (1) and no preference shall be accorded to any claim for such a tax in respect of any other period.

if that liability is an incident of the ownership of that property, but excluding any payment for services rendered in respect of such property.³⁶⁰

(5) After payment of the costs referred to in subsection (4), the balance of the proceeds of the security shall be applied in satisfying, in order of preference of secured creditors, first the capital sums of claims secured by the said security, and thereafter simple interest on the capital sums at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or a higher rate of interest by virtue of a lawful stipulation in writing, from date of ~~the~~ liquidation to the date of payment.³⁶¹

(6) Any balance of the proceeds of the security remaining shall be added to the free residue of the insolvent estate.³⁶²

(7) If a creditor whose claim is secured by a special bond over immovable property belonging to the insolvent estate has not proved his claim and the liquidator is not satisfied that the debt in question has been discharged or abandoned, he shall deposit with the Master for payment into the Guardians' Fund the proceeds of the sale of the former mortgagee's security to an amount not exceeding such capital amount of the said mortgage and such arrears of interest for which the mortgagee would have been a secured creditor, after deduction of an amount equal to the costs which the secured creditor would have had to pay if he or she had proved a claim and had stated in the affidavit submitted in support of his or her claim that he or she relied for the satisfaction of his or her claim solely on the proceeds of the sale of the said property. The amount so deposited or the part thereof to which the

360 **Insolvency Act section 89(5):**

For the purposes of subsections (1) and (4) 'tax' in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property.

361 **Insolvency Act section 95(1):**

The proceeds of any property which was subject to a special mortgage, landlord's legal hypothec, pledge or right of retention, after deduction therefrom of the costs mentioned in subsection (1) of section eighty-nine, shall be applied in satisfying the claims secured by the said property, in their order of preference, with interest thereon calculated in manner provided in subsection (2) of section one hundred and three from the date of sequestration to the date of payment, but subject to the provisions of subsection (4) of section ninety-six.

362 See section 83(12) in footnote 369 above.

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former mortgagee may be entitled shall be paid to him or her if, within a period of one year after confirmation in terms of section 90 of the distribution account under which the money is distributed, he or she applies therefor to the Master and the Master is satisfied after proof of the former mortgagee's claim, that he or she is entitled to the amount or part thereof.³⁶³

(8) Any amount deposited with the Master in terms of subsection (7) which has not been paid out to the former mortgagee, as in that subsection provided, shall after the expiry of the year mentioned in that subsection be distributed among the creditors who have proved claims against the insolvent estate prior to the confirmation of the said distribution account, as if the amount had, at the time of such confirmation, been available for distribution among them.³⁶⁴

(9) Any creditor claiming to be entitled to share in the said distribution shall apply in writing to the Master for payment of his or her share, and the Master may pay out to such creditor or may hand the money to the liquidator, if any, for distribution among the creditors entitled thereto, or, if there is no liquidator, may appoint a liquidator on such conditions as the Master may think fit to impose for the purpose of making such distribution.³⁶⁵

363 **Insolvency Act section 95(2):**

If a creditor whose claim is secured by a mortgage over immovable property belonging to the insolvent estate has not proved his claim and the trustee is not satisfied that the debt in question has been discharged or abandoned, he shall deposit with the Master for payment into the Guardians' Fund the proceeds of the sale of any such property to an amount not exceeding such capital amount of the said mortgage and such arrears of interest as the mortgagee would have had a preferent right to claim, after deduction of an amount equal to the costs which he would have had to pay if he had proved his claim and had stated in the affidavit submitted in support of his claim that he relied for the satisfaction of his claim solely on the proceeds of the sale of the said property. The amount so deposited or the part thereof to which the former mortgagee may be entitled shall be paid to him if, within a period of one year after confirmation in terms of section one hundred and twelve of the distribution account under which the money is distributed, he applies therefor to the Master and the Master is satisfied after proof of his claim, that he is entitled to the amount or part thereof.

364 **Insolvency Act section 95(3):**

Any amount deposited with the Master in terms of subsection (2) which has not been paid out to the former mortgagee, as in that subsection provided, shall after the expiry of the year mentioned in that subsection be distributed among the creditors who have proved claims against the insolvent estate prior to the confirmation of the said distribution account, as if the amount had, at the time of such confirmation, been available for distribution among them.

365 **Insolvency Act section 95(4):**

Any creditor claiming to be entitled to share in the said distribution shall make written application to the Master

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(10) Any liquidator charged with the duty of making such a distribution shall submit to the Master a supplementary account in respect thereof and the provisions of this Act relating to an account shall apply in respect of such supplementary account.³⁶⁶

Security in respect of reserved ownership or financial lease

76.(1) If a creditor could immediately before the liquidation of the estate of a debtor assert his or her ownership to Pproperty ~~sold~~ delivered to a debtor under a reservation of ownership contract or a financial lease the property shall, subject to the rights of other secured creditors, upon the liquidation of the estate of the debtor be deemed to be held by the ~~seller~~ creditor or his or her successor in title (herein referred to as the creditor) as security for the amount outstanding in respect of the purchase price of the property or the balance owing on the financial lease.³⁶⁷

~~(2) Property referred to in subsection (1) shall be recovered by the liquidator of the debtor's estate and realized for the benefit of the creditor whose debt is thereby secured.~~
~~[84(1)]~~

(3) If property referred to in subsection (1) was returned by the debtor to the creditor within ~~one month~~ three months before the date of liquidation of the debtor's estate, the liquidator may demand from the creditor that he or she deliver to the liquidator the property or its value at the date

for payment of his share, and the Master may pay out to such creditor or may hand the money to the trustee, if any, for distribution among the creditors entitled thereto, or, if there is no trustee, may appoint a trustee on such conditions as he may think fit to impose for the purpose of making such distribution.

366 Insolvency Act section 95(5):

Any trustee charged with the duty of making such a distribution shall submit to the Master a supplementary plan of distribution in respect thereof, and the provisions of this Act relating to a plan of distribution shall apply in respect of such supplementary plan.

367 Insolvency Act section 84(1):

If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction which is an instalment sale transaction contemplated in paragraphs (a) and (b) of the definition of 'instalment sale transaction' in section 1 of the Credit Agreements Act, 1980, such a transaction shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's insolvent estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding that property as security for his claim and the provisions of section 83 shall apply.

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when it was returned to him or her, subject to payment to the creditor by the liquidator or to deduction from the value (as the case may be) of the difference between the total amount payable under the transaction and the total amount actually paid.³⁶⁸

Security in respect of landlord's hypothec

77.(1) A landlord's hypothec shall confer a preference with regard to the property which is subject to the hypothec, for rent due in respect of the period immediately prior to the date of ~~the~~ liquidation, but not exceeding rent for a period of—

- (a) three months, if the rent is payable monthly or at shorter intervals than one month;
of or
- (b) six months, if the rent is payable at intervals exceeding one month but not exceeding three months; or
- (c) nine months, if the rent is payable at intervals exceeding three months but not exceeding six months; or
- (d) fifteen months, if the rent is payable at intervals exceeding six months.³⁶⁹

368 Insolvency Act section 84(2):

If the debtor returned the property to the creditor within a period of one month prior to the sequestration of the debtor's estate, the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor, subject to payment to the creditor by the trustee or to deduction from the value (as the case may be) of the difference between the total amount payable under the said transaction and the total amount actually paid thereunder. If the property is delivered to the trustee the provisions of subsection (1) shall apply.

369 Insolvency Act section 85(2):

A landlord's legal hypothec shall confer a preference with regard to any article subject to that hypothec for any rent calculated in respect of any period immediately prior to and up to the date of sequestration but not exceeding-

- (a) three months, if the rent is payable monthly or at shorter intervals than one month;
- (b) six months, if the rent is payable at intervals exceeding one month but not exceeding three months;
- (c) nine months, if the rent is payable at intervals exceeding three months but not exceeding six months;
- (d) fifteen months in any other case.

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(2) A tacit or legal hypothec other than a landlord's hypothec in subsection (1) shall not confer any preference against an insolvent estate.³⁷⁰

Certain mortgages afford no security or preference

78. With the exception of a kustingsbrief, no ~~general or~~ special ~~mortgage~~ bond, ~~notarial bond or any form of security~~ or a general bond over movables, or a general clause in a special bond over movables passed ~~or given~~ for the purpose of securing the payment of an existing unsecured debt or obtaining a preference for an existing concurrent debt which was incurred more than two months prior to the lodging of the ~~relevant documents~~ bond with the registrar of deeds concerned for registration ~~or the giving of security~~, or for the purpose of securing the payment of a debt or obtaining a preference for a debt incurred in novation of or substitution for any such first-mentioned debt, shall confer any security or preference if the application for the liquidation of the estate of the debtor ~~who has given the security is liquidated~~ is lodged with the Registrar within six months after such lodging of the said ~~documents~~ bond with the registrar of deeds ~~or giving of security~~: Provided that a bond shall be deemed not to have been lodged as aforesaid if it was withdrawn from registration.³⁷¹

Costs of liquidation

79. (1) The costs of liquidation shall include—

370 **Insolvency Act section 85(1):**

A tacit or legal hypothec (other than a landlord's legal hypothec or the hypothec mentioned in subsection (1) of section eighty-four) shall not confer any preferent right against an insolvent estate.

371 **Insolvency Act section 88:**

A mortgage bond, other than a kustingbrief, whether special or general passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such first-mentioned debt, shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging: Provided that a mortgage bond shall be deemed not to have been lodged as aforesaid, if it was withdrawn from registration.

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- (a) the sheriff's charges incurred since the date of ~~the~~ liquidation;³⁷²
- (b) fees payable to the Master in connection with the liquidation;³⁷³
- (c) the costs, as taxed by the registrar of the court, incurred in connection with the application by a debtor for the liquidation of his or her estate or of a creditor for the liquidation of a debtor's estate, excluding the costs of opposition to such application, unless the court has ordered that such costs shall be included in the costs of liquidation;³⁷⁴
- (d) the amount determined by the Master for the preparation of a statement of his or her affairs by the insolvent as required by section 34;³⁷⁵

372 Insolvency Act section 97(2)(a):

The costs of the sequestration shall rank according to the following order of priority-

- (a) the sheriff's charges incurred since the sequestration;

373 Insolvency Act section 97(2)(b):

The costs of the sequestration shall rank according to the following order of priority-

- (b) fees payable to the Master in connection with the sequestration;

374 Insolvency Act section 97(2)(c):

The costs of the sequestration shall rank according to the following order of priority-

- (c) the following costs which shall rank *pari passu* and abate in equal proportions if necessary, that is to say: the taxed costs of sequestration (as defined in subsection (3), the fee mentioned in section 16 (5), the remuneration of the curator bonis and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, in so far as they are not payable by a particular creditor in terms of section 89 (1), any expenses incurred by the Master or by a presiding officer in terms of section 53 (2) and the salary or wages of any person who was engaged by the curator bonis or the trustee in connection with the administration of the insolvent estate.

Insolvency Act section 97(3):

In paragraph (c) of subsection (2) the expression 'taxed costs of sequestration' means the costs (as taxed by the registrar of the court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the court directs that they shall be included.

375 See section 97(2)(c) in footnote 387 above.

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- (e) the remuneration of an interim liquidator **appointed in terms of clause 58** and of the liquidator, including the costs incurred by the liquidator in giving security for the proper administration of the estate;³⁷⁶
- (f) any expenses incurred by the Master or by a presiding officer in ~~the protection of the assets of the insolvent estate or the~~ carrying out of the provisions of this Act, unless otherwise ordered by the Master or the court and subject to the provisions of section 68(2);³⁷⁷
- (g) the salary, wages or fees of any person who was engaged or appointed by ~~the curator bonis or~~ the liquidator in connection with the administration of the estate;³⁷⁸
- (h) **reasonable such** costs incurred in the administration of a deceased estate before the liquidation of the estate **as the Master may allow**; [New provision]
- (i) all other costs of the administration and the liquidation of the estate of the insolvent.³⁷⁹

(2) The taxed fees of the sheriff in connection with proceedings stayed in terms of section 12 shall be regarded as costs of liquidation of the estate; [New provision]

376 See section 97(2)(c) in footnote 387 above.

377 See section 97(2)(c) in footnote 387 above and **Insolvency Act section 153(2)**: Any expenses incurred by the Master or by an officer who is to preside or presides or has presided at a meeting of the creditors of an insolvent estate in the protection of the assets of an insolvent estate or in carrying out any provision of this Act shall, unless the court otherwise orders, be regarded as part of the costs of the sequestration of that estate.

378 See section 97(2)(c) in footnote 387 above.

379 See section 97(2)(c) in footnote 387 above.

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(3) The costs of liquidation referred to in subsections (1) and (2) shall rank **pari passu** and abate in equal proportion, if necessary.³⁸⁰

Application of the free residue

80.(1) The free residue of an insolvent estate shall be applied in the first place in defraying the costs of liquidation contemplated in section 79, but excluding the costs referred to in section 75(4).³⁸¹

(2) Thereafter the balance of the free residue shall be applied in paying—

~~(a) the salary or wages due to an employee of the insolvent for the period not exceeding three months immediately prior to the **date of** liquidation of the estate; [100(1)(a)]~~

~~———— (b) salary or wages in respect of the period of leave due to the employee, not exceeding 21 days; [100(2)]~~

~~———— (c) any bonus due to the employee whether or not payment thereof is due at the date of liquidation of the estate; and [100(2)]~~

~~———— (d) a claim for severance pay, pay in lieu of notice or compensation for wrongful dismissal in respect of the period not exceeding three months immediately prior to the **date of** liquidation of the estate, [New provision]~~

380 See section 97(2)(c) in footnote 387 above.

381 **Insolvency Act section 97(1):**

Thereafter any balance of the free residue shall be applied in defraying the costs of the sequestration of the estate in question with the exception of the costs mentioned in subsection (1) of section eighty-nine.

~~subject to a maximum amount of R7500 in total per employee in respect of the said payment, or the maximum amount fixed in terms of section 111(3). [100(1)(a)]~~

~~(a) to an employee who was employed by the insolvent—~~

- ~~(i) any salary or wages, for a period not exceeding three months, due to an employee;~~
- ~~(ii) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the insolvent in the year of liquidation or the previous year, whether or not payment thereof is due at the date of liquidation;~~
- ~~(iii) any payment due in respect of any other form of paid absence for a period not exceeding three months immediately prior to the date of liquidation of the estate; and~~
- ~~(iv) any severance or retrenchment pay due to the employee immediately before the date of liquidation in terms of any law, agreement, contract or wage-regulating measure; and~~

~~(b) any contributions which were payable by the insolvent, including contributions which were payable in respect of any of his or her employees, and which were, immediately prior to the liquidation of the estate, owing by the insolvent, in his or her capacity as employer, to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or any similar scheme or fund.³⁸²~~

~~(2A)(a) The payments in subsection (2) shall not exceed the smaller of R7500 or six months' salary in respect of a single employee.~~

~~(b) The Minister may amend the amount in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.~~

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(2B) (a) The claim referred to in subsection (2)(a)(i) shall be preferred to the claims referred to in subsections (2)(a)(ii), (iii) and (iv) and (2)(b).

(b) The claims referred to in subsection (2)(a)(ii), (iii) and (iv) shall be preferred to the claims referred to in subsection (2)(b) and shall rank equally and abate in equal proportions, if necessary.

(c) The claims referred to in subsection (2)(b) shall rank equally and abate in equal proportions, if necessary.³⁸³

(2C) For the purposes of this section—

(a) 'salary and wages' includes all cash earnings which the employee is entitled to receive from the employer, but excludes other benefits;

(b) 'unemployment fund' does not include the unemployment insurance fund referred to in section 6 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966).³⁸⁴

(2D) The Minister may, after consultation with the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act, 1994, by notice in the Gazette exclude from the operation of the provisions of this section a category of employees, schemes or funds specified in the notice by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in this section.

383 The wording of clause 80(2B) is in effect identical to section 98A(4) of the Insolvency Act.

384 **Section 98A(5) of the Insolvency Act:**

For the purposes of this section-

- (a) 'employee' means any person, excluding an independent contractor, who works for another person and who-
 - (i) receives, or is entitled to receive, any salary or wages; or
 - (ii) in any manner assists in carrying on or in conducting the business of an employer;
- (b) 'salary or wages' includes all cash earnings received by the employee from the employer;
- (c) 'unemployment fund' does not include the unemployment insurance fund referred to in section 6 of the Unemployment Insurance Act, 1966 (Act 30 of 1966).

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(2E) A director of a company employed by the company or a member of a close corporation employed by the corporation is not entitled to payment in terms of this section.³⁸⁵

(3) Thereafter any balance of the free residue shall be applied in paying maintenance due by the insolvent in terms of a court order and in arrear at the date of ~~the~~ liquidation of the estate, for a period not exceeding three months subject to ~~a maximum amount of R1500 or the maximum amount fixed in terms of section 111(3)~~ **the maximum amount fixed for payments in terms of clause (2)(a)(i).**[New provision]

(3A) Thereafter the balance of the free residue shall, subject to any maximum amount in terms of a bond, be applied in payment of the proved claims of creditors who are holders of a general bond over movables or a special bond over movables with a general clause, registered in the deeds registry, in their order of preference with simple interest from the date of liquidation to the date of payment at the rate of interest prescribed in the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or a higher rate of interest by virtue of a lawful stipulation agreed upon in writing.³⁸⁶

(4) Thereafter any balance of the free residue shall be applied in payment of the concurrent claims of creditors proved against the estate, in proportion to the amount of each claim.³⁸⁷

385 Insolvency Act section 98A(6):

The Minister of Justice may, after consultation with the National Economic, Development and Labour Council established by section 2 (1) of the National Economic, Development and Labour Council Act, 1994, by notice in the Gazette exclude from the operation of the provisions of this section a category of employees, schemes or funds specified in the notice-

- (a) in the case of employees, by reason of the particular nature of the employment relationship between the employer and the employees;
- (b) in the case of employees, schemes or funds, by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in this section; or
- (c) in the case of schemes or funds, by reason of the fact that the sequestration of the employer's estate will make it impossible to achieve the objects of the schemes or funds.

386 Insolvency Act section 102:

Thereafter any balance of the free residue shall be applied in the payment of any claims proved against the estate in question which were secured by a general mortgage bond, in their order of preference with interest thereon calculated in manner provided in subsection (2) of section one hundred and three.

387 Insolvency Act section 103(1)(a):

Any balance of the free residue after making provision for the expenditure mentioned in sections ninety-six to one hundred and two inclusive, shall be applied-

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(5) When the concurrent claims have been paid in full, any balance of the free residue shall be applied in payment of simple interest on such claims from the date of ~~the~~ liquidation to the date of payment, in proportion to the amount of each such claim.³⁸⁸

(6) The interest referred to in subsection (5) shall be calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the amount of the claim bears interest ~~of~~ **at** a higher rate of interest by virtue of a lawful stipulation agreed upon in writing.³⁸⁹

~~—(7) For purposes of subsection (2) commission due to a person who is or was a full-time employee of the insolvent shall be deemed to be salary or wages. [100(1)(b)]~~

(8) An employee of the insolvent shall be entitled to ~~salary or wages, leave and bonus~~ **payment** in terms of subsection ~~(1)~~ **(2)(a)** even though he or she has not proved a claim against the estate in respect thereof, but the liquidator may require the employee to submit an affidavit indicating the amount due to him or her.³⁹⁰

-
- (a) in the payment of the unsecured or otherwise non-preferent claims proved against the estate in question in proportion to the amount of each such claim;

388 Insolvency Act section 103(1)(b):

Any balance of the free residue after making provision for the expenditure mentioned in sections ninety-six to one hundred and two inclusive, shall be applied—...

- (b) if the unsecured or otherwise non-preferent claims have been paid in full, in the payment, thereafter, of interest on such claims from the date of sequestration to the date of payment, in proportion to the amount of each such claim.

389 Insolvency Act section 103(2):

The interest mentioned in subsection (1) shall be calculated at the rate of eight per cent per annum, unless the amount of any claim bears a higher rate of interest by virtue of a lawful stipulation in writing, when the interest on that amount shall be calculated at the stipulated rate of interest.

390 Insolvency Act section 98A(3):

An employee shall be entitled to salary, wages, leave or other payments in terms of subsection (1) (a) even though he or she has not proved his or her claim therefor in terms of section 44, but the trustee may require such employee to submit an affidavit in support of his or her claim for such salary, wages, leave or payment.

Costs incurred in respect of legal services

81.(1) ~~The costs incurred in respect of legal services rendered on behalf of an insolvent estate, excluding~~ Subject to the provisions of subclause (2), costs incurred to engage the services of attorneys or counsel or both to perform legal work on behalf of the estate except costs awarded against the estate in legal proceedings, shall not be subject to taxation ~~if the liquidator (if properly authorised thereto by the Master or the creditors) has prior to the rendering of such services entered into a written agreement with the legal adviser or legal representative concerned in respect of a tariff of remuneration for such services~~ by the taxing master of the court if the liquidator has entered into any written agreement in terms of which the fees of any attorney or counsel will be determined in accordance with a specific tariff: Provided that no contingency fees agreement referred to in section 2(1) of the Contingency Fees Act, 1997 (Act No. 66 of 1997), shall be entered into without the express prior written authorization of the creditors³⁹¹.

(2) ~~Where the liquidator has not entered into an agreement as contemplated in subsection (1), or where there is a dispute between the liquidator and the legal adviser or legal representative in respect of the costs of the services rendered, such costs shall be taxed by the taxing master of the Supreme Court concerned or, where such costs are not subject to taxation by the said taxing master they shall be taxed by the appropriate law society or Bar Council or where the services of a person other than an attorney or advocate have been obtained such costs shall be taxed by the Master. If—~~

- (a) the liquidator has not entered into an agreement under subsection (2); or
 - (b) there is any dispute as to the fees payable in terms of such an agreement
- the costs shall be taxed by the taxing master of the High Court having jurisdiction or, where the costs are not subject to taxation by the said taxing master, such costs shall be

391 Insolvency Act section 73(2):

Subject to the provisions of subsection (3), costs incurred under this section, except costs awarded against the estate in legal proceedings, shall not be subject to taxation by the taxing master of the court if the trustee has entered into any written agreement in terms of which the fees of any attorney or counsel will be determined in accordance with a specific tariff: Provided that no contingency fees agreement referred to in section 2 (1) of the Contingency Fees Act, 1997 (Act 66 of 1997), shall be entered into without the express prior written authorization of the creditors.

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assessed by the law society or bar council concerned or, where the counsel concerned is not a member of any bar council, by the body or person designated under section 5(1) of the Contingency Fees Act, 1997.³⁹²

(2A) No bill of costs based upon an agreement entered into under subsection (1) shall be accepted as cost of liquidation of the estate, unless such bill is accompanied by a declaration under oath or affirmation by the liquidator stating—

- (a) that he or she had been duly authorized by either the creditors or the Master, as the case may be, to enter into such an agreement;
- (b) that any legal work specified in such bill has been performed to the best of his or her knowledge and belief;
- (c) that any disbursements specified in such bill have been made to the best of his or her knowledge and belief; and
- (d) that, to the best of his or her knowledge and belief, the attorney or counsel concerned has not overreached him or her.³⁹³

~~(3) The Master may disallow any costs incurred in respect of legal services rendered on behalf of the insolvent estate, including costs taxed by a taxing master or by a law society or Bar Council, if in his or her opinion the liquidator acted mala fide or negligently or unreasonably in incurring such costs~~ Notwithstanding anything to the contrary contained in this Act, the Master may disallow any costs incurred under this section if the Master is of

392 Clause 81(2) is identical in effect with section 73(3) of the Insolvency Act.

393 **Insolvency Act section 73(4):**

No bill of costs based upon an agreement entered into under subsection (2) shall be accepted as cost of the sequestration of the estate, unless such bill is accompanied by a declaration under oath or affirmation by the trustee stating-

- (a) that he or she had been duly authorized by either the creditors or the Master, as the case may be, to enter into such an agreement;
- (b) that any legal work specified in such bill has been performed to the best of his or her knowledge and belief;
- (c) that any disbursements specified in such bill have been made to the best of his or her knowledge and belief; and
- (d) that, to the best of his or her knowledge and belief, the attorney or counsel concerned has not overreached him or her.

the opinion that any such costs are excessive, unnecessary, incorrect or improper or that the liquidator acted in bad faith, negligently or unreasonably in incurring any such costs.³⁹⁴

(4) If it appears to the court that a legal representative or legal adviser has, with intent to benefit himself or herself, improperly ~~advised the institution, defence or conducting of legal proceedings by or against an insolvent estate~~ given legal advice or acted with intent to benefit himself or herself, whether for or against an insolvent estate, or has caused any unnecessary expense ~~therein~~ in that regard, the court may order that such expense or any part thereof shall be borne by that legal representative or legal adviser personally.³⁹⁵

Non-compliance with ~~prescripts~~ provisions of Act in sale of property of insolvent estate

82.(1) If property of an insolvent estate is sold without the prescripts of this Act having been complied with, the sale shall be void unless the purchaser proves that he or she acquired the property in good faith and for value and, where applicable, that a court order authorising the sale was not a prerequisite.

(2) Any person who disposes of property of an insolvent estate contrary to the prescripts of this Act shall be liable to make good to the estate twice the amount of the loss which the estate might have sustained as a result of any such disposition.³⁹⁶

394 Insolvency Act section 73(5):

Notwithstanding anything to the contrary contained in this Act, the Master may disallow any costs incurred under this section if the Master is of the opinion that any such costs are incorrect or improper or that the trustee acted in bad faith, negligently or unreasonably in incurring any such costs.

395 Insolvency Act section 74:

If it appears to the court that any attorney or counsel has, with intent to benefit himself, improperly advised the institution, defence or conducting of legal proceedings by or against an insolvent estate or has incurred any unnecessary expense therein, the court may order the whole or part of the expense thereby incurred to be borne by that attorney or counsel personally.

396 Insolvency Act section 82(8):

If any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section, or if any person in good faith and for value acquired from a person mentioned in subsection (7) any property which the last mentioned person acquired from an insolvent estate in contravention of that subsection, the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section.

Bona fide sale of property in possession of insolvent

82A.(1) The owner of movable property which was in the possession or custody of a person at the time date of the liquidation of that person's estate, shall subject to the provisions of section 76 not be entitled to recover that property if it has, in good faith, been sold as part of the said person's insolvent estate, unless the owner has, by notice in writing given before the sale to the liquidator or the Master, demanded the return of that property.³⁹⁷

(2) If property contemplated in subsection (6) has been sold as part of the insolvent estate, the former owner of the property may recover from the liquidator, before the confirmation of the liquidator's account as contemplated in section 90 the net proceeds of the sale of that property, unless he or she has recovered the property itself from the purchaser, and thereupon he or she shall lose any right to reclaim the property as contemplated in subsection (6).³⁹⁸

Persons incompetent to acquire property from insolvent estate

83. The liquidator or an auctioneer employed to sell property of the insolvent estate in question or an employer, employee or associate of such liquidator or auctioneer shall not acquire any property of the insolvent estate unless the acquisition is authorised by an order of the court.³⁹⁹

³⁹⁷ **Insolvency Act section 36(5):**

The owner of the movable property which was in the possession or custody of a person at the time of the sequestration of that person's estate, shall not be entitled to recover that property if it has, in good faith, been sold as part of the said person's insolvent estate, unless the owner has, by notice in writing, given, before the sale, to the curator bonis if one has been appointed or to the trustee of the insolvent estate, or if there is no such curator bonis or trustee, to the Master, demanded a return of the property.

³⁹⁸ **Insolvency Act section 36(6):**

If any such property has been sold as part of the insolvent estate, the former owner of that property may recover from the trustee, before the confirmation of any trustee's account in the estate in terms of section one hundred and twelve, the net proceeds of the sale of that property (unless he has recovered the property itself from the purchaser), and thereupon he shall lose any right which he may have had to recover the property itself in terms of subsection (5).

³⁹⁹ **Insolvency Act section 82(7):**

The trustee or an auctioneer employed to sell property of the estate in question, or the trustee's or the auctioneer's spouse, partner, employer, employee or agent shall not acquire any property of the estate unless the acquisition is confirmed by an order of the court.

Banking accounts and investments

- 84.(1) The liquidator of an insolvent estate—
- (a) shall open a cheque account in the name of the estate with a banking institution within the Republic and shall deposit therein all moneys received by him or her on behalf of the estate;
 - (b) may open a savings account in the name of the estate with a banking institution within the Republic and may transfer thereto from the account referred to in paragraph (a) moneys not immediately required for the payment of any claim against the estate;
 - (c) may place moneys deposited in an account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate, on interest-bearing deposit with a banking institution or building society within the Republic.⁴⁰⁰
- (2) Whenever required by the Master to do so, the liquidator shall notify the Master in writing of the banking institution or building society and the office, branch office or agency thereof with

400 **Insolvency Act section 70(1):**

The trustee of an insolvent estate-

- (a) shall open an account from which amounts are withdrawable by cheque, in the name of the estate with a banking institution within the Republic, and shall deposit therein to the credit of the estate from time to time all sums received by him on behalf of the estate;
- (b) may open a savings account in the name of the estate with a banking institution or a building society within the Republic, and may transfer thereto moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate;
- (c) may place moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate, on interest-bearing deposit with a banking institution or building society within the Republic.

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which he or she has opened an account or placed a deposit referred to in subsection (1) and furnish the Master with a bank statement or other sufficient evidence of the state of the account.⁴⁰¹

~~(3) The liquidator shall not transfer any account referred to in subsection (1) to any other office, branch office or agency of that banking institution or any other banking institution, except after written notice to the Master. [70(3)]~~

(4) All cheques or orders drawn upon an account referred to in subsection (1) shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by every liquidator or his or her authorised agent.⁴⁰²

(5) The Master and any surety for the liquidator, or any person authorised by such surety, shall have the same right to information in regard to an account referred to in subsection (1) as the liquidator himself or herself has, and may examine all vouchers relating thereto, whether in the hands of the ~~banking institution or building society~~ or of the liquidator.⁴⁰³

(6) The Master may, after notice to the liquidator, direct in writing the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, to pay over into the Guardian's Fund all moneys standing to the credit of that account at the time of the receipt by the said Manager of that direction, and all moneys which may thereafter be paid into that account, and the said Manager shall carry out that direction.⁴⁰⁴

401 Insolvency Act section 70(2):

Whenever required by the Master to do so, the trustee shall in writing notify the Master of the banking institution or building society and the office, branch office or agency thereof with which he has opened an account referred to in subsection (1) and furnish the Master with a bank statement or other sufficient evidence of the state of the account.

402 Insolvency Act section 70(4):

All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by every trustee or his duly authorized agent.

403 Insolvency Act section 70(5):

The Master and any surety for the trustee, or any person authorized by such surety, shall have the same right to information in regard to that account as the trustee himself possesses, and may examine all vouchers in relation thereto, whether in the hands of the banking institution or building society or of the trustee.

404 Insolvency Act section 70(6):

The Master may, after notice to the trustee, in writing direct the manager of any office, branch office or agency

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Recording of receipts by liquidator

85. (1) The liquidator of an insolvent estate shall immediately after his or her appointment open a record in which all moneys, goods, accounts and other documents received by him or her on behalf of the estate are recorded.⁴⁰⁵

(2) The Master may at any time direct the liquidator in writing to produce the said record for inspection and every creditor who has proved a claim against the estate and, if the Master so orders, every person claiming to be a creditor or surety for the liquidator, may inspect the said record at all reasonable times.⁴⁰⁶

Unlawful retention of moneys or use of property by liquidator

86.(1) A liquidator who, without lawful cause, retains any money exceeding one hundred rand belonging to the insolvent estate of which he or she is liquidator, or knowingly permits his or her co-liquidator to retain such a sum of money longer than the earliest day after its receipt on which it was possible for him or her or his or her co-liquidator to pay that money into a bank, or who uses or knowingly permits his or her co-liquidator to use any property of the insolvent estate, except for the benefit of the estate, shall, in addition to any other penalty to which he or she may be liable, be liable to pay into the estate an amount equal to double the amount so retained or double the value of the property so used.⁴⁰⁷

with which an account referred to in subsection (1) has been opened, to pay over into the Guardians' Fund all moneys standing to the credit of that account at the time of the receipt, by the said manager, of that direction, and all moneys which may thereafter be paid into that account, and the said manager shall carry out that direction.

405 Insolvency Act section 71(1):

Immediately after his appointment the trustee of an insolvent estate shall open a book wherein he shall enter as soon as possible a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the estate.

406 Insolvency Act section 71(2):

The Master may at any time direct the trustee in writing to produce the said book for inspection and every creditor who has proved his claim against the estate, and, if the Master so orders, every person claiming to be a creditor or a surety for the trustee may inspect the said book at all reasonable times.

407 Insolvency Act section 72(1):

A trustee who, without lawful cause, retains any money exceeding twenty pounds belonging to the estate of which he is trustee, or knowingly permits his co-trustee to retain such a sum of money longer than the earliest day after

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(2) The amount which a liquidator is liable to pay in terms of subsection (1) may be deducted from any remuneration to which he or she is entitled out of the insolvent estate or may be recovered from him or her by action in a court of law at the instance of his or her co-liquidator or the Master or any creditor who has proved a claim against the estate.⁴⁰⁸

Estate Accounts

87.(1) Subject to subsections (5), (6) and (7), a liquidator shall within a period of six months from the date of his or her appointment as final liquidator in terms of section 55(1) submit to the Master a liquidation account and a **plan-of** distribution **account** of the proceeds of the property in the insolvent estate available for payment to creditors, or, if all realisable property in the insolvent estate has been realised and brought into account and the proceeds are insufficient to cover the costs and charges referred to in section 79 a **plan-of** contribution **account** apportioning the liability for the deficiency among creditors who are liable to contribute.⁴⁰⁹

(2) The accounts referred to in subsection (1) shall be substantially in the form set out in Form D of Schedule 1: Provided that the Master may insist on strict compliance with any item of the said Form. [New provision]

its receipt on which it was possible for him or his co-trustee to pay that money into a bank, or who uses or knowingly permits his co-trustee to use any property of the estate except for the benefit of the estate, shall, in addition to any other penalty to which he may be liable, be liable to pay into the estate an amount equal to double the amount so retained or double the value of the property so used.

408 Insolvency Act section 72(2):

The amount which a trustee is so liable to pay may be deducted from any claim which the said trustee may have against the estate in question or may be recovered from him by action in a court of law at the instance of his co-trustee, the Master or any creditor of the estate who has proved his claim.

409 Insolvency Act section 91(1):

Subject to the provisions of sections one hundred and nine and one hundred and ten, a trustee shall within a period of six months as from the date of his appointment, submit to the Master a liquidation account and a plan of distribution of the proceeds of the property in the estate available for payment to creditors, or, if all realizable property in the estate has been realized and brought to account and the proceeds are insufficient to cover the costs and charges mentioned in section ninety-seven, a plan of contribution apportioning the liability for the deficiency among creditors who are liable to contribute.

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(3) If a liquidation account is not a final account, the liquidator shall from time to time as the Master may direct, but at least every six months unless he or she has received an extension of time as contemplated in subsections (5), (6) or (7), submit to the Master periodical accounts in form and in all other respects similar to the accounts mentioned in subsection (2).⁴¹⁰

(4) If the estate of a partnership is under liquidation, separate accounts shall be submitted in respect of the partnership and the estate of each partner whose estate is under liquidation.⁴¹¹

(5) If a liquidator is unable to submit an account to the Master within the period of six months as required by subsection (1) or (3), he or she shall before the expiration of such period or within the further period that the Master may allow, submit to the Master an affidavit in which he or she shall state—

- (a) the reasons for his or her inability to submit the account concerned; and
- (b) those affairs, transactions or matters relating to the insolvent or the insolvent estate as the Master may require; and
- (c) the amount of money available for payment to creditors or, if there is no free residue or the free residue is insufficient to meet all costs referred to in section 79, the deficiency the creditors are liable to make good,

410 Insolvency Act section 92(4):

If a liquidation account is not the final liquidation account, the trustee shall further set forth therein-

- (a) all property still unrealized;
- (b) all outstanding debts due to the estate;
- (c) the reasons why that property has not been realized or those debts have not been collected.

In that event the trustee shall, from time to time and as the Master may direct, but at least once in every six months, unless he has received an extension of time as provided in section one hundred and nine, frame and submit to the Master periodical accounts in form and in all other respects similar to the account mentioned in subsections (1) and (2).

411 Insolvency Act section 92(5):

If the estate of a partnership is under sequestration, separate trustees' accounts shall be framed in the estate of the partnership and in the estate of each member of that partnership whose estate is under sequestration.

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and the Master may thereupon extend such period to a date determined by him or her.⁴¹²

(5A) If the Master extends the period in terms of subsection (5) the liquidator shall inform proved creditors of the extension by personal notice and enclose a copy of the affidavit in terms of the subsection. [New provision]

(6) If a liquidator fails to submit an account within the period required by subsection (1) or before the date determined by the Master in terms of subsection (5), the Master may, subject to subsection (7), serve a notice on the liquidator in which he or she is required—

- (a) to submit the account concerned to the Master; or
- (b) if he or she is unable to submit such account, to submit an affidavit as contemplated in subsection (5) to the Master,

within a period of 14 days from the date of the notice and the Master may, if the account concerned or the said affidavit is not submitted to him or her, after the expiration of the said 14 days extend such period to a date determined by him or her.⁴¹³

412 Insolvency Act section 109(1):

If a trustee is unable to submit an account to the Master within the period prescribed therefor by section 91, he shall before the expiration of such period or within the further period as the Master may allow-

- (a) submit to the Master an affidavit in which he shall state-
 - (i) the reasons for his inability so to submit the account concerned;
 - (ii) those affairs, transactions or matters of importance relating to the insolvent or the estate as the Master may require;
 - (iii) the amount of money available for payment to creditors or, if there is no free residue or the free residue is insufficient to meet all the costs referred to in section 97, the deficiency the creditors are liable to make good;
- (b) send to each creditor of the estate who proved a claim against the estate, by registered post a copy of the affidavit referred to in paragraph (a),

and the Master may thereupon extend such period to a date determined by him.

413 Insolvency Act section 109(2):

If a trustee fails to submit an account to the Master within the period prescribed therefor by section 91 or before the date determined under subsection (1), the Master, subject to the provisions of section 110, or any person having an interest in the insolvent estate may serve a notice on the trustee in which he is required-

- (a) to submit the account concerned to the Master; or
- (b) if he is unable to submit such account, to submit an affidavit as contemplated in subsection (1) to the Master and to send a copy thereof to each creditor of the estate who proved a claim against that estate,

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(7) If the Master refuses to extend the period as contemplated in subsection (6), the liquidator may apply by motion to the court, after having given the Master notice of his or her intention to make the application, for an order extending the said period and the court may thereupon make such order as it deems fit.⁴¹⁴

(8) If a liquidator has funds in hand which, in the opinion of the Master, ought to be distributed among creditors of the estate and the liquidator has not submitted to the Master a plan for the distribution of those funds, the Master may direct him or her in writing to submit to the Master a plan for the distribution of those funds, although the period prescribed in subsection (1) or (3) may not have elapsed.⁴¹⁵

(9) If any liquidator fails to submit any account to the Master as and when required by or under this Act, or to submit any vouchers in support of such account **upon the request of the Master**, or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of an estate, the Master or any person having an interest in the liquidation or distribution of the estate may, after giving the ~~trustee~~ **liquidator** not less than fourteen days' notice, apply to the court for an order directing the liquidator to submit such account or any vouchers in support thereof or to perform such duty or to comply with such demand.⁴¹⁶

within a period of 14 days from the date of the notice and the Master may, if the account concerned is not submitted and the said affidavit is submitted to him, after the expiration of the said period of 14 days extend such period to a date determined by him.

414 Insolvency Act section 109(3):

If the Master refuses to extend the said period under subsection (1) or (2) or does not so extend such period within a period of 14 days as from the date on which the affidavit referred to in subsection (1) has been submitted to him, the trustee may apply by motion to the court (after having given the Master notice of his intention to make the application) for an order extending the said period and the court may thereupon make such order as it thinks fit.

415 Insolvency Act section 110(1):

If a trustee has funds in hand which, in the opinion of the Master, ought to be distributed among the creditors of the estate in question and the trustee has not submitted to the Master a plan for the distribution of those funds, the Master may direct him in writing to submit to him a plan for the distribution of those funds, although the period prescribed in section ninety-one may not have elapsed.

416 Insolvency Act section 116bis(1):

If any trustee fails to submit any account to the Master as and when required by or under this Act, or to submit any vouchers in support of such account or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of an estate, the Master or any person having an interest in the liquidation or distribution of the

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(10) The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the **trustee liquidator de bonis propriis**.⁴¹⁷

Copies of liquidator's accounts to be open for inspection

88.(1) The liquidator shall as soon as possible after he or she has submitted an account to the Master as contemplated in section 87 transmit a copy of the account to the magistrate of the district in which the insolvent resided or carried on business before his or her insolvency in the case where there is no Master's office in the said district, and if the insolvent resided or carried on business in a portion of a district in respect of which an additional magistrate or assistant magistrate permanently carries out the functions of the magistrate of the district at a place other than the seat of the magistracy of that district, a copy of the account shall be sent to that additional magistrate or assistant magistrate.⁴¹⁸

(2) The liquidator shall give notice in the **Gazette** that the account will lie open for inspection by creditors at the place and during the period stated in the notice and shall ~~send a copy of the~~ **give personal** notice to each creditor who has proved a claim against the estate.⁴¹⁹

estate may, after giving the trustee not less than fourteen days' notice, apply to the court for an order directing the trustee to submit such account or any vouchers in support thereof or to perform such duty or to comply with such demand.

417 Insolvency Act section 116bis(2):

The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the trustee de bonis propriis.

418 Insolvency Act section 108(1):

If an insolvent resided or carried on business, before the sequestration of his estate, in a district (other than the district of Wynberg, Simonstown or Bellville in the Province of the Cape of Good Hope) in which there is no Master's office, the trustee of that estate shall transmit to the magistrate of that district or, if the insolvent resided or carried on business in a portion of that district in respect of which an additional or assistant magistrate permanently carries out the functions of the magistrate of that district at a place other than the seat of magistracy of that district, to such additional or assistant magistrate, a duplicate of every account which he submitted to the Master as hereinbefore provided.

419 Insolvency Act section 108(2):

The trustee shall, as soon as possible after he has submitted an account to the Master, give notice in the manner prescribed by paragraphs (b) and (c) of subsection (3) of section forty that he has so submitted such account and that the account will lie open for inspection by the creditors of the estate at the place or places and during the period stated in the notice.

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(3) Every such account and every copy thereof transmitted to a magistrate shall be open for inspection by creditors of the estate in question at the office of the Master and of such magistrate during a period of 14 days as from the date of the publication of the notice in the **Gazette**.⁴²⁰

(4) A magistrate who has received a liquidator's account shall cause a notice to be affixed in a public place in or about his or her office that the account will lie open for inspection at his or her office during the period stated in the notice.⁴²¹

(5) After the expiration of the said period the magistrate shall endorse upon the account a certificate that the account was open for inspection at his or her office as hereinbefore provided, and he or she shall transmit the account to the Master.⁴²²

Objections to liquidator's account

89.(1) The insolvent or any person having an interest in the estate may at any time **before after the commencement of the period contemplated in section 88 until** the liquidator's account is confirmed in terms of section 90 submit to the Master in writing any objection to that account, stating the reasons for such objection..⁴²³

420 Insolvency Act section 108(3):

Every such account and every duplicate thereof transmitted to a magistrate shall be open for the inspection by creditors of the estate in question at the office of the Master and of such magistrate during a period of fourteen days as from the date of publication of the said notice in the Gazette.

421 Insolvency Act section 108(4):

A magistrate who has received a trustee's account shall cause to be affixed in a public place in or about his office a notice that he has received the account and that it will lie open for inspection in his office during a period stated in that notice.

422 Insolvency Act section 108(5):

After the expiration of the said period the magistrate shall endorse upon the account a certificate (which shall be free from stamp duty) that the account was open in his office for inspection as hereinbefore provided, and shall transmit the account to the Master.

423 Insolvency Act section 111(1):

The insolvent or any person interested in the estate may, at any time before the confirmation of the trustee's account, in terms of section one hundred and twelve, lay before the Master in writing any objection, with the reasons therefor, to that account.

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(2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he or she is of the opinion that the account is in any respect incorrect or that it contains any improper charge or that the liquidator acted **mala fide**, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he or she may direct the liquidator to amend the account or may give such other direction in connection therewith as he or she may think fit.⁴²⁴

(3) Any person who feels aggrieved by any such direction of the Master or by the Master's refusal to sustain an objection so lodged, including the liquidator, may within 14 days as from the date of the Master's direction apply to the court for relief and the court shall have the power to consider the merits of any such matter, to hear evidence and to make any order it deems fit.⁴²⁵

(4) When any direction by the Court affects the interests of a person who has not lodged an objection the account so amended shall again lie open for inspection by creditors in the manner and with the notice prescribed by section 88, unless the person affected as aforesaid consents in writing to the immediate confirmation of the account.⁴²⁶

Confirmation of liquidator's accounts

424 Insolvency Act section 111(2):

If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted mala fide, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit: Provided that-

- (a) any person aggrieved by any such direction of the Master or by the refusal of the Master to sustain an objection so lodged, may apply by motion to the court within fourteen days as from the date of the Master's direction, or as from the date of intimation to the objector of the Master's refusal to sustain his objection, after notice to the trustee, for an order to set aside the Master's decision and the court may thereupon confirm the account or make such order as it thinks fit; and
- (b) when any such direction affects the interests of a person who has not lodged an objection with the Master, the account so amended shall again lie open for inspection by the creditors in the manner and with the notice hereinbefore prescribed, unless the person affected as aforesaid consents in writing to the immediate confirmation of the account.

425 See section 111(2) in footnote 438.

426 See section 111(2) in footnote 438.

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90. When a liquidator's account has been open to inspection as prescribed by this Act and—

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been open for inspection, if necessary, and no application for relief has been made to the court in terms of section 89(3); or
- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to court for relief,

the Master shall confirm the account and his or her confirmation shall **notwithstanding mistakes in the account** be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it.⁴²⁷

Distribution of estate and collection of contributions

91.(1) Immediately after the confirmation of a liquidator's account the liquidator shall give notice of the confirmation in the **Gazette** and shall state in that notice that a dividend to creditors is in the course of payment or that a contribution is in the course of collection from creditors, as the case may be, and that every creditor liable to contribute is required to pay to the liquidator the amount for which he is liable.⁴²⁸

⁴²⁷ **Insolvency Act section 112:**

When a trustee's account has been open to inspection by creditors as hereinbefore prescribed and-

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been open for inspection if necessary as in paragraph (b) of subsection (2) of section one hundred and eleven prescribed and no application has been made to the court in terms of paragraph (a) of the said subsection (2) to set aside the Master's decision; or
- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to the court in terms of the said paragraph (a),

the Master shall confirm the account and his confirmation shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it.

⁴²⁸ **Insolvency Act section 113(1):**

Immediately after the confirmation of a trustee's account, the trustee shall give notice of the confirmation in the

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(2) If any contribution is payable the liquidator shall specify fully in that notice the address at which payment of the contribution is to be made and he or she shall send a copy of the notice by ~~certified mail or telefax or deliver it by hand~~ **personal notice** to every creditor who is liable to contribute.⁴²⁹

(3) Immediately after the confirmation of a liquidator's account but not later than two months after such confirmation the liquidator shall in accordance therewith distribute the estate or collect from each creditor who is liable to contribute, the amount for which he or she is liable.⁴³⁰

Liquidator to produce acquittances for dividends or pay over unpaid dividends to Master

92.(1) The liquidator shall within three months after the confirmation of the account lodge with the Master the receipts for dividends paid to creditors and if there is a contribution account, the vouchers necessary to complete the account: Provided that a cheque purporting to be drawn payable to a creditor in respect of a dividend due to him or her and paid by the banker on whom it is drawn, **may or a statement by a bank that the bank of the creditor has credited or has been instructed to credit the account of the creditor with the amount of the dividend shall** be accepted by the Master in lieu of any such receipt.⁴³¹

Gazette and shall state in that notice according to the circumstances, that a dividend to creditors is in course of payment or that a contribution is in course of collection from the creditors and that every creditor liable to contribute is required to pay to the trustee the amount for which he is so liable.

429 Insolvency Act section 113(2):

If any contribution is payable, the trustee shall specify fully in that notice the address at which the payment of the contribution is to be made, and shall deliver or post a copy of the notice to every creditor liable to contribute.

430 Insolvency Act section 113(3):

Immediately after the confirmation of a trustee's account the trustee shall in accordance therewith distribute the estate or collect from each creditor liable to contribute the amount for which he is liable.

431 Insolvency Act section 114(1):

The trustee shall without delay lodge with the Master the receipts for dividends paid to creditors and if there is a contribution account the vouchers necessary to complete the account: Provided that a cheque purporting to be drawn payable to a creditor in respect of any dividend due to him and paid by the banker on whom it is drawn, may be accepted by the Master in lieu of any such receipt.

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(2) If any such dividend has at the expiration of a period of two months from the confirmation of the account under which it was payable, not been paid to the creditor who is entitled thereto, the liquidator shall within three months after confirmation of the account pay the dividend over to the Master who shall deposit it in the Guardian's Fund on account of the creditor.⁴³²

Surplus to be paid into Guardian's Fund

93. If after the confirmation of a final **plan of distribution account** there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the liquidator shall after the confirmation of that account pay the surplus over to the Master who shall deposit it in the Guardian's Fund and after the rehabilitation of the insolvent shall pay it out to **him the insolvent** at **his the insolvent's** request.⁴³³

Contribution by creditors towards cost of liquidation

94. Where there is no free residue in an insolvent estate or where the free residue is insufficient to meet all the costs mentioned in section 79 the following rules shall apply with regard to the liability of creditors to pay contributions towards defraying any such deficiency.⁴³⁴

432 Insolvency Act section 114(2):

If any such dividend has at the expiration of a period of two months as from the confirmation of the account under which it is payable, not been paid out to the creditor entitled thereto, the trustee shall immediately pay in the dividend to the Master who shall deposit it in the Guardians' Fund for account of the creditor.

433 Insolvency Act section 116:

If after the confirmation of a final plan of distribution there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the trustee shall, immediately after the confirmation of that account, pay that surplus over to the Master, who shall deposit it in the Guardians' Fund and after the rehabilitation of the insolvent shall pay it out to him at his request.

434 Insolvency Act section 106:

Where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all the expenses, costs and charges mentioned in section ninety-seven, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non-preferent creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any: Provided that-

- (a) if all the creditors who have proved claims against the estate are secured creditors who would not have ranked upon the surplus of the free residue, if there had been any, such creditors shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim;
- (b) if a creditor has withdrawn his claim, he shall be liable to contribute in respect of any deficiency

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Clause 94

- (a) The creditor upon whose application the liquidation order was made, whether or not he or she has proved a claim against the estate, shall be liable to contribute not less than the amount he or she would have had to contribute if he or she had proved a claim for the amount stated in his or her application for liquidation and where he or she is a secured creditor, without reliance on his or her security;⁴³⁵
- (b) each concurrent creditor shall be liable to pay a contribution in proportion to his or her concurrent claim;⁴³⁶
- (c) if a creditor has withdrawn his or her claim, he or she shall be liable to pay a contribution only so far as is provided in section 50 and if a creditor withdraws his or her claim within 5 days after the date of any resolution of creditors he or she shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution;⁴³⁷
- (d) if a claim has been reduced or disallowed by a liquidator in terms of section 46(4) the creditor shall, unless the claim is subsequently admitted by means of compromise or proved in action at law, be liable to pay a contribution, ~~in respect of costs incurred after the date of the notice referred to in the said subsection, on the~~

only so far as is provided in section fifty-one, and if a creditor has withdrawn his claim within five days after the date of any resolution of creditors he shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution;

- (c) if all the creditors who would have ranked upon the surplus of the free residue, if there had been any, have withdrawn their claims and, after payment of their contribution in terms of paragraph (b) there is still a deficiency, the remaining creditors whose claims have been proved against the estate shall, notwithstanding the fact that they would not have ranked upon the surplus of the free residue, if there had been any, be liable to make good such deficiency, each in proportion to the amount of his claim.

435 Insolvency Act section 14(3):

In the event of a contribution by creditors under section one hundred and six, the petitioning creditor, whether or not he has proved a claim against the estate in terms of section forty-four, shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition.

436 See section 106 in footnote 448.

437 See section 106(b) in footnote 448.

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~~amount of the claim admitted by the liquidator, and~~ in respect of costs incurred before the ~~said~~ date of notice referred to in the said subsection on the amount of the claim before the claim was reduced or disallowed and in the case of a reduced claim in respect of costs incurred after the date of the ~~said~~ notice ~~referred to in the said subsection~~, on the amount ~~of the claim admitted~~ to which the claim was reduced by the liquidator. [New provision]

Enforcing payment of contribution

95.(1) If a creditor who is liable to contribute under ~~a plan of distribution~~ an account has failed to pay the amount of his or her liability within a period of 30 days after the date of the sending or delivery to him or her of a notice referred to in section 91(2) the liquidator may take out a writ of execution for the amount of the creditor's liability in the magistrate's court in which the creditor could be sued for the contribution in question.⁴³⁸

(2) Whenever a creditor who is liable to contribute under ~~a plan of distribution~~ an account is in the opinion of the Master and of the liquidator unable to pay the contribution for which he or she is liable or whenever the liquidator has incurred expenses in connection with the recovery of any contribution, which expenses are in the opinion of the Master and the liquidator irrecoverable, the liquidator shall as soon as practicable and in any event within such period as the Master may prescribe therefor, frame and submit to the Master a supplementary ~~plan of~~ contribution account wherein he or she shall apportion the share of the creditor who is unable to pay or the expenses in question among the other creditors who are in the opinion of the Master and the liquidator able to pay.⁴³⁹

438 **Insolvency Act section 118(1):**

After the expiration of a period of thirty days as from the delivery or posting in a registered letter to any creditor of the notice mentioned in subsection (2) of section one hundred and thirteen, the trustee may take out a writ of execution in the magistrate's court in which the creditor could be sued for the contribution in question against any such creditor who, being liable to contribute under the plan of contribution, has failed to pay the amount of his liability.

439 **Insolvency Act section 118(2):**

Whenever a creditor liable to contribute under a plan of contribution is in the opinion of the Master and of the trustee unable to pay the contribution for which he is liable or whenever the trustee has incurred in connection with the recovery of any contribution any expenses which are in the opinion of the Master and of the trustee

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(3) The provisions of subsection (2) shall **mutatis mutandis** apply whenever a creditor who is liable to contribute under a first or further supplementary **plan of distribution account** is, in the opinion of the Master and the liquidator, unable to pay the contribution for which he or she is liable, or whenever the liquidator has incurred expenses in connection with the recovery of a contribution under a first or further supplementary **plan of distribution account** which are, in the opinion of the Master and the liquidator, irrecoverable by the liquidator.⁴⁴⁰

(4) The liquidator may in lieu of complying with the requirements of section 88 in connection with any supplementary **plan of contribution account**, furnish a copy of that plan to every creditor who is liable to contribute thereunder and thereupon the provisions of subsection (1) shall **mutatis mutandis** apply.⁴⁴¹

Rehabilitation

96.(1) An insolvent may, **subject to the provisions of subsection (1A)**, apply to the court for an order for his or her rehabilitation—

- (a) at any time after the confirmation by the Master of a **plan of distribution account** providing for the full payment of all claims proved against the estate, with interest

irrecoverable, the trustee shall as soon as practicable and in any event within such period as the Master may prescribe therefor, frame and submit to the Master a supplementary plan of contribution wherein he shall apportion the share of the creditor who is unable to pay or the expenses in question among the other creditors who are in the opinion of the Master and of the trustee able to pay.

440 Insolvency Act section 118(3):

The provisions of subsection (2) shall **mutatis mutandis** apply whenever a creditor liable to contribute under a first or further supplementary plan of distribution is, in the opinion of the Master and of the trustee, unable to pay the contribution for which he is liable, or whenever the trustee has incurred expenses in connection with the recovery of a contribution under a first or further supplementary plan of distribution which are, in the opinion of the Master and the trustee, irrecoverable by the trustee.

441 Insolvency Act section 118(4):

A trustee may, in lieu of complying with the requirements of section one hundred and eight in connection with any supplementary plan of contribution, furnish a copy of that plan to every creditor liable to contribute thereunder and thereupon the provisions of subsection (1) shall **mutatis mutandis** apply.

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thereon from the date of ~~the~~ liquidation, calculated in terms of section 80(5) and (6) and all costs of liquidation;⁴⁴² or

(b) at any time after the Master has issued a certificate of acceptance of a composition as contemplated in section 71, ~~if in terms of the composition not less than 50 cents for every one rand of every claim proved or to be proved against the estate has been paid or security for the payment thereof has been given as required by the composition;~~⁴⁴³ or

~~(c) in the case where he or she has been convicted in respect of the existing or any prior insolvency for an offence referred to in section 101(1)(a), (b), (d), (e) or (g) or 2(e) or (f) or for any other fraudulent act, after a period of five years has elapsed from the date of the conviction concerned; or [124(2)(c)]~~

~~(d)~~ (c) in any other case, but subject to subsection (2), after the expiration of four years from the date of the confirmation by the Master of the first liquidation account in the estate.⁴⁴⁴

442 Insolvency Act section 124(5):

At any time after the confirmation by the Master, of a plan of distribution providing for the payment in full of all claims proved against an insolvent estate, with interest thereon from the date of sequestration, calculated in terms of subsection (2) of section one hundred and three and of all the costs of sequestration, the insolvent concerned may apply to the court for his rehabilitation: Provided that he has not less than three weeks before making the application given notice in writing to the Master and to the trustee of his estate of his intention to make the application.

443 Insolvency Act section 124(1):

An insolvent who has obtained from the Master the certificate mentioned in subsection (7) of section one hundred and nineteen may apply to the court for an order for his rehabilitation: Provided that he has not less than three weeks before making the application, given, by advertisement in the Gazette notice of his intention to make the application and delivered or posted in a registered letter to the trustee of his estate a copy of that notice: and provided further that the said certificate shows that payment has been made or the security prescribed by subsection (7) of section one hundred and nineteen has been given for the payment of not less than ten shillings for every pound of every claim proved or to be proved against the estate of the insolvent.

444 Insolvency Act section 124(2):

An insolvent who is not entitled under subsection (1) to apply to the court for his rehabilitation and who has previously given to the Master and to the trustee of his estate in writing and by advertisement in the Gazette not less than six weeks' notice of his intention to apply to the court for his rehabilitation may so apply-

- (a) after twelve months have elapsed from the confirmation by the Master, of the first trustee's account in his estate, unless he falls within the provisions of paragraph (b) or (c); or
- (b) after three years have elapsed from such confirmation if his estate has either under this Act or

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(1A) In the case where an insolvent has been convicted in respect of the existing or any prior insolvency for an offence referred to in section 101(1)(a), (b), (d), (e) or (g) or 2(e) or (f) or for any other fraudulent act, the insolvent may not apply to the court for an order for his or her rehabilitation before a period of five years has elapsed from the date of the conviction concerned.⁴⁴⁵

(2) The Master may on the request of the insolvent recommend to the court that an application referred to in subsection (1)(~~1c~~) may be made before the expiration of the said period of four years but no such application shall be made within a period of twelve months from the said date or, in the case where the insolvent's estate was liquidated prior to the liquidation in respect of which he or she applies for rehabilitation, within a period of three years from the said date.⁴⁴⁶

(3) An insolvent who wishes to apply for a rehabilitation order shall—

(a) send a written notice of his or her intended application by ~~certified mail or telefax or deliver it by hand~~ **mail, telefax, electronic mail, or personal delivery**—

(i) in the case of an application contemplated in subsection (1)(a), to the Master and the liquidator, not less than ~~three~~ **four** weeks before the date of the intended application; or⁴⁴⁷

-
- (c) a prior law been sequestrated prior to the sequestration to which he desires to put an end and if he does not fall within the provisions of paragraph (c); or
after five years have elapsed from the date of his conviction of any fraudulent act in relation to his existing or any previous insolvency or of any offence under section one hundred and thirty-two, one hundred and thirty-three or one hundred and thirty-four of this Act or under any corresponding provision of the Insolvency Act, 1916 (Act 32 of 1916):

Provided that no application for rehabilitation under this subsection shall be granted before the expiration of a period of four years from the date of sequestration of the estate of the applicant, except upon the recommendation of the Master.

445 See section 124(2)(c) in footnote 458.

446 See section 124(2)(b) and the proviso to section 124 in footnote 458.

447 See section 124(5) in footnote 456.

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(ii) in the case of an application contemplated in subsection (1)(b), **(1)(c)** or **(d1A)**, to the Master and the liquidator (if there is one), not less than six weeks before the date of the intended application, and by way of notice in the **Gazette**, and he or she shall send a copy of the said notice by ~~certified mail or telefax or deliver it by hand~~ **mail, telefax, electronic mail, or personal delivery** to every creditor of the estate whose name and address are known to him or her or which he or she can readily obtain;⁴⁴⁸ and

(b) furnish security to the registrar of the court in the amount of or to the value of R5000 ~~or such other amount as the Minister may from time to time determine by notice in the Gazette~~, in respect of the costs of any person who may oppose the application for rehabilitation and who may be awarded costs by the court.⁴⁴⁹

(3A) The Minister may amend the amount in subsection (3) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(4) The notice referred to in subsection (3)(a)(i) or (ii) shall state the estimated value and reflect full details of the assets of the insolvent at the time of the application. [New provision]

(5) An insolvent shall in support of his or her application for rehabilitation submit an affidavit that he or she has made a complete surrender of his or her estate and that he or she has not granted or promised any benefit to any person or entered into any secret agreement with intent to induce the liquidator of the estate or any creditor not to oppose the application for rehabilitation. The said affidavit shall contain a statement of his or her assets and liabilities and of his or her earnings and his or her own as well as his or her spouse's contribution to his household, on the date of the application. Furthermore the court shall be apprised of the dividend (if any) paid to his or her creditors, what further assets in the insolvent estate are available for realisation and the estimated

448 See section 124(1) in footnote 457 and section 124(2) in footnote 458.

449 **Insolvency Act section 125:**

Not less than three weeks before applying to the court for his rehabilitation an insolvent shall furnish to the registrar of the court security, to the amount or value of R500, for the payment of the costs of any person who may oppose the rehabilitation and be awarded costs by the court.

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value thereof, the total amount of all claims proved against the estate, and the total amount of his or her liabilities at the date of ~~the~~ liquidation of his or her estate. If application is made for ~~liquidation~~ rehabilitation pursuant to subsection (1)(b), the insolvent shall set out the particulars of the composition and shall state whether there are or are not creditors whose claims against the estate have not been proved, and if there are such creditors, shall state their names and addresses and particulars of their claims.⁴⁵⁰

(6) A liquidator who has received a notice contemplated in subsection (3)(a) shall report to the Master any facts which in his or her opinion would warrant the court to refuse, postpone or qualify the insolvent's rehabilitation.⁴⁵¹

(7) A partnership whose estate has been sequestrated shall not be rehabilitated.⁴⁵²

Opposition to rehabilitation or refusal of rehabilitation by court

97.(1) ~~On the date of the hearing of the application for rehabilitation the~~ The Master shall report to the court on the merits of the application and furnish a copy of the report to the applicant or the applicant's attorney. ~~the~~ The Master, the liquidator or any other person having

450 Insolvency Act section 126:

In support of an application for his rehabilitation, an insolvent shall submit his affidavit that he has made a complete surrender of his estate and has not granted or promised any benefit whatever to any person or entered into any secret agreement with intent to induce his trustee or any creditor not to oppose the rehabilitation. Such affidavit shall include a statement of his assets and liabilities and of his earnings at the date of the application. Information shall also be laid before the court as to what dividend was paid to his creditors, what further assets in his estate are available for realization and the estimated value thereof, the total amount of all claims proved against his estate, and the total amount of his liabilities at the date of the sequestration of his estate. If application for rehabilitation is made pursuant to subsection (1) of section one hundred and twenty-four the insolvent shall set out the particulars of the composition and shall state whether there are or are not creditors whose claims against his estate have not been proved, and if there are such creditors, he shall state their names and addresses and particulars of their claims.

451 Insolvency Act section 124(4):

A trustee who has received a notice mentioned in subsection (1), (2), or (3) shall report to the Master any facts which in his opinion would justify the court in refusing, postponing, or qualifying the insolvent's rehabilitation.

452 Insolvency Act section 128:

A partnership whose estate has been sequestrated shall not be rehabilitated.

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an interest in the estate may appear in person or through a legal representative to oppose the application.⁴⁵³

(2) If the court is satisfied on the strength of a certificate by the Master or on any other evidence that the insolvent has intentionally impeded, obstructed or delayed the administration of his or her insolvent estate—

- (a) through failure to submit a statement of affairs in accordance with the requirements of the Act; or
- (b) through failure to make available to the liquidator of the estate in accordance with written directives by the liquidator or the Master property belonging to the insolvent estate which was in his or her possession or custody or under his or her control or any book, ~~or~~ document **or record** relating to his or her affairs which was in his or her possession or custody or under his or her control; or
- (c) through failure to notify the liquidator of the estate of the existence of any book, ~~or~~ document, **or record** relating to his or her affairs which was not in his or her possession or custody or under his or her control, and as to where such book, ~~or~~ document, **or record** could be found, or of any property belonging to his or her insolvent estate which was not mentioned in his or her statement of affairs, and as to where such property could be found; or
- (d) through failure to keep the liquidator of the estate informed of any change of his or her address during the period of three years after the liquidation of his or her estate;
or

(dA) through failure to comply with section 15(3); or

453 **Insolvency Act section 127(1):**

Upon the day fixed for the hearing of an application for rehabilitation the Master shall report thereon to the court, and the Master, the trustee or any creditor or other person interested in the estate of the applicant may appear in person or by counsel to oppose the grant of the application.

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(e) through any other act or omission,

the court shall not grant a rehabilitation order until the expiry of a period of 10 years after the **date of** liquidation of his or her estate. [New provision]

(3) The court may, whether the application for rehabilitation is opposed or not, refuse the application or postpone the hearing of the application or grant the application for rehabilitation subject to any condition it may think fit, including any provision that the insolvent shall consent to judgment against him or her for the unpaid portion of a debt proved against the estate or which could have been proved against the estate or for such lesser amount that the court may determine, but in such instance no execution shall take place in terms of the judgment save with permission of the court and after proof that the insolvent has since the **date of** liquidation of the estate acquired property or income which is available for the payment of his or her debts, and apart from such judgment the court may impose any other condition with regard to any property or income which may in future accrue to the insolvent. The court may order the insolvent to pay the costs of any opposition to the application for rehabilitation, unless the court is satisfied that the opposition is vexatious.⁴⁵⁴

(4) When granting an order for rehabilitation in respect of an application made in terms of section 96(1)(b), the court may order that any obligation incurred by the applicant **on or** before the

⁴⁵⁴ **Insolvency Act section 127(2):**

Whether the application be opposed or not, the court may refuse an application for rehabilitation or may postpone the hearing of the application or may rehabilitate the insolvent upon such conditions as it may think fit to impose and may order the applicant to pay the costs of any opposition to the application if it is satisfied that the opposition was not vexatious.

Insolvency Act section 127(3):

Among the conditions referred to in subsection (2), the court may require the insolvent to consent to judgment being entered against him for the payment of any unsatisfied balance of any debt which was or could have been proved against his estate, or of such lesser sum as the court may determine, but in such case execution shall not be issued on the judgment except with leave of the court and on proof that the insolvent has since the date of sequestration of his estate acquired property or income available for the payment of his debts; or apart from any such judgment the court may impose any other condition with respect to any property, or income which may accrue to the insolvent in the future.

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date of of his or her estate and which, but for the order, would be discharged as a result of the rehabilitation, shall remain of full force and effect notwithstanding the rehabilitation.⁴⁵⁵

(5) The registrar of the court shall forthwith give notice to the Master of every order for rehabilitation which is granted by the court.⁴⁵⁶

Rehabilitation by effluxion of time

98.(1) Any insolvent not rehabilitated by the court within a period of ten years from the date of ~~the~~ liquidation of his or her estate, shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent orders otherwise prior to the expiration of the said period of ten years.⁴⁵⁷

(2) If a court makes an order under subsection (1), the registrar of the court shall send a copy of the order to **the Master and** every officer charged with the registration of titles to immovable property in the Republic. **The Master shall forward a copy of the order to the liquidator.**⁴⁵⁸

(3) Whenever such officer receives such order he or she shall enter a **caveat** against the transfer of all immovable property and the cancellation of every bond registered in the name of the

455 Insolvency Act section 127(4):

In granting an application for rehabilitation made under subsection (1) of section one hundred and twenty-four the court may order that any obligation incurred by the applicant before the sequestration of his estate which, but for that order, would be discharged as a result of the applicant's rehabilitation, shall remain of full force and affect, notwithstanding the rehabilitation.

456 Insolvency Act section 127(5):

The registrar of the court shall forthwith give notice to the Master of every rehabilitation of an insolvent granted by the court.

457 Insolvency Act section 127A(1):

Any insolvent not rehabilitated by the court within a period of ten years from the date of sequestration of his estate, shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent orders otherwise prior to the expiration of the said period of ten years.

458 Insolvency Act section 127A(2):

If a court issues an order contemplated in subsection (1), the registrar shall transmit a copy of the order to every officer charged with the registration of title to any immovable property in the Republic.

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insolvent or which belongs to the insolvent. The **caveat** remains in force until the date on which the insolvent is rehabilitated.⁴⁵⁹

Effect of rehabilitation

99.(1) Subject to the provisions of subsection (2) and any conditions which the court may have imposed when granting an order for rehabilitation, the rehabilitation of an insolvent shall have the effect—

- (a) of putting an end to the liquidation;
- (b) of discharging all debts of the insolvent which were due, or the cause of which had arisen, **on or** before the **date of** liquidation, and which did not arise out of any fraud on his or her part or the commission by him or her of any offence referred to in sections 101(1)(c) ~~or (e)~~ **or section 101(1)(c) in respect of a previous liquidation;**
and
- (c) of relieving the insolvent of every disability resulting from the liquidation.⁴⁶⁰; **and**

~~(d) of re-investing the insolvent with his or her estate: Provided that assets which the insolvent failed to disclose in his or her statement of affairs referred to in section 34 and which have not during the liquidation been brought into account, and assets which he or she failed to disclose in the affidavit referred~~

459 Insolvency Act subsections 127A(3) and (4):

(3) Upon receipt of the order by such officer he shall enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent.

(4) The caveat shall remain in force until the date upon which the insolvent is rehabilitated.

460 Insolvency Act section 129(1):

Subject to the provisions of subsection (3) and subject to such conditions as the court may have imposed in granting a rehabilitation, the rehabilitation of an insolvent shall have the effect-

- (a) of putting an end to the sequestration;
- (b) of discharging all debts of the insolvent, which were due, or the cause of which had arisen, before the sequestration, and which did not arise out of any fraud on his part;
- (c) of relieving the insolvent of every disability resulting from the sequestration.

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~~to in section 96 shall not vest in him or her as a result of the rehabilitation and the rehabilitation shall not affect any rights which creditors who had not proved claims against the estate may have in respect of such assets.~~

- (2) The rehabilitation of an insolvent shall not affect—
- (a) the rights of a liquidator or of creditors under a composition;
 - (b) the power or duties of the Master or the duties of the liquidator in connection with a composition;
 - (c) ~~subject to the provisions of subsection (1)(d)~~, the right of the liquidator or of creditors to any part of the insolvent's estate which is vested in the liquidator but as yet not distributed by him or her;
 - (d) the liability of a surety for the insolvent;
 - (e) the liability of any person to pay any penalty or suffer any punishment under any provision of this Act.⁴⁶¹

(3) Evidence of a conviction on any offence contemplated in subsection (1)(b) shall be admissible in subsequent civil proceedings as **prima facie** evidence that the insolvent committed the offence in question. [New provision]

Penalties for unlawful inducement to accept compromise or in connection with rehabilitation

461 **Insolvency Act section 129(3):**

A rehabilitation shall not effect-

- (a) the rights of the trustee or creditors under a composition;
- (b) the powers or duties of the Master or the duties of the trustee in connection with a composition;
- (c) the right of the trustee or creditors to any part of the insolvent's estate which is vested in but has not yet been distributed by the trustee, but subject to the provisions of subsection (2);
- (d) the liability of a surety for the insolvent;
- (e) the liability of any person to pay any penalty or suffer any punishment under any provision of this Act.

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100.(1) It shall be unlawful for any person to offer or promise to any other person any benefit in order to induce him or her to accept an offer of composition or to agree to or refrain from opposing an application for the rehabilitation of an insolvent, or as a consideration for his or her acceptance of an offer of composition or for supporting or refraining from opposing an application for the rehabilitation of an insolvent and any person who has accepted or agreed to accept any such benefit, whether for himself or herself or for any other person, shall be liable to pay, by way of penalty, for the benefit of the other creditors of the insolvent estate—

- (a) a sum equal to the amount of any claim proved by him or her against the estate; and
- (b) the amount or value of the benefit promised or given; and
- (c) in the case of a composition, the amount paid or to be paid to him or her under the composition.⁴⁶²

(2) The liquidator shall be competent to enforce the penalty referred to in subsection (1) and if he or she fails to do so any creditor of the estate may enforce the penalty in the name of the liquidator, if he or she indemnifies the liquidator against all costs in connection with such action.⁴⁶³

Offences

462 Insolvency Act section 130:

Any undertaking to grant any benefit to any person in order to induce him or any other person to accept an offer of composition or to agree to, or refrain from opposing the rehabilitation of an insolvent, or as a consideration for the acceptance of an offer of composition or for the agreement to or non-opposition of the rehabilitation of an insolvent (whether by the person for whom the benefit is intended or by any other person), shall be void and any person who has accepted any such benefit or who has stipulated for any such benefit, whether for himself or any other person shall be liable to pay by way of penalty for the benefit of the creditors of the insolvent estate in question-

- (a) a sum equal to the amount of the claim (if any) which he originally proved against the estate; and
- (b) the amount or value of any benefit given or promised; and
- (c) in case of a composition, the amount paid or to be paid to him under the composition.

463 Insolvency Act section 131:

The trustee may enforce and recover any penalty mentioned in section one hundred and thirty and if he fails to do so any creditor may do so in the name of the trustee, upon his indemnifying the trustee against all costs in connection with such action.

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- 101.(1)** An insolvent shall be guilty of an offence—
- (a) if before or after the liquidation of his or her estate he or she conceals or parts with or intentionally destroys any book or accounting record relating to his or her affairs or if he or she intentionally erases the information contained therein or makes it illegible or permits any other person to perform any such act in regard to any such book or accounting record; or⁴⁶⁴
 - (b) if before or after the liquidation of his or her estate he or she alienates property, obtained by him or her on credit and not paid for, otherwise than in the ordinary course of business; or⁴⁶⁵
 - (c) if he or she, despite having been expressly asked about his or her financial standing and credit worthiness, falsely conceals his or her insolvent status and as a result thereof obtains credit for more than R500; or⁴⁶⁶
 - (d) if he or she offers or promises to any person any reward in order to procure the acceptance by a creditor of his or her estate of an offer of compromise or to induce a creditor not to oppose an application for rehabilitation or to give up any

464 Insolvency Act section 132(a):

An insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding three years if at any time before or after the sequestration of his estate he does any of the following acts, unless it is proved that he had no intention to defraud; that is to say, if he-

- (a) conceals, parts with, destroys, mutilates, falsifies or makes any false entry or erasure in any book or document relating to his business, property or affairs or permits any other person to commit any such act in regard to any such book or document; or

465 Insolvency Act section 132(c):

(Introduction in previous footnote) ...

- (c) otherwise than in the ordinary course of business makes, or permits the making of a disposition of any property which he has obtained on credit and has not paid for; or

466 Insolvency Act section 137(a):

Any person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year-

- (a) if, during the sequestration of his estate, he obtains credit to an amount exceeding ten pounds without previously informing the person from whom he obtains credit that his is an insolvent, unless he proves that such person had knowledge of that fact; or

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investigation in regard to the estate or to conceal any information in connection therewith; or⁴⁶⁷

- (e) if at any time within two years before the **date of** liquidation of his or her estate he or she, with intent to obtain credit or the extension of credit, intentionally gave false information in connection with his or her assets and liabilities to a creditor or to anyone who became his or her creditor on the strength of information given by him or her to such person, or intentionally concealed any material fact or made any false representation with regard thereto; or⁴⁶⁸
- (f) if before the liquidation of his or her estate he or she carried on any business or for his or her own account practised any profession or occupation and has failed to keep proper accounting records of all business transactions, income, expenditure, assets and liabilities and to retain the accounting records for a period of at least three years; or⁴⁶⁹

467 Insolvency Act section 137(b):

Any person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year-

- ... (b) if he grants, promises, or offers any consideration whatever in order to procure the acceptance by any creditor of an offer of composition or to prevent opposition to a rehabilitation or, during the sequestration of any estate, to induce any person to refrain from investigating any matter relating to that estate or from disclosing any information in regard thereto; or

468 Insolvency Act section 133:

An insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding three years if, within two years immediately preceding the sequestration of his estate, when making any statement either verbally or in writing in regard to his business, property or affairs to any person who was then his creditor or to any person who became his creditor on the faith of such a statement, he concealed any liability, present or future, certain or contingent, which he may then have contracted, or failed to disclose the full extent of his liability or mentioned, as if it were an asset, any right or property which at the time was not an asset, or represented that he had more assets than he in fact had or made any false statement in regard to the amount, quality or value of his assets, or in any way concealed or disguised or attempted to conceal or disguise any loss which he had sustained, or gave any incorrect amount thereof, unless it is proved that he had good reason to believe that the said statement was correct in every respect and that he was not concealing or failing to disclose or disguising any relevant fact.

469 Insolvency Act section 134(1):

An insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding one year if his occupation or transactions prior to the sequestration of his estate were such that he might reasonable be expected to keep a record of his transactions, and he failed to keep a proper record of his transactions in the English or the Dutch language and to preserve that record during a period of not less than three years.

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- (g) if at any time when his or her liabilities exceeded his or her assets or at any time within six months immediately prior to the **date of** liquidation of his or her estate he or she reduced his or her assets through gambling, betting or risky speculation or contracted debts which were not reasonably necessary in connection with business or occupation or for his or her own maintenance or that of his or her dependants; or⁴⁷⁰
- (ga)** if he or she contracted any debt of R100 or more or debts to the aggregate of R500 pounds or more, without any reasonable expectation of being able to discharge such debt or debts; or⁴⁷¹
- (h) if he or she without good cause fails to submit a statement of his or her affairs as required by section 34(1)(b); or⁴⁷²
- (i) if he or she without lawful cause fails to attend any meeting **or continuation of a meeting** of creditors of his or her estate of which he or she has been notified ~~in terms of section 38(2)~~ **writing** or the continuation of such meeting which he or

470 **Insolvency Act section 135(3)(b):**

An insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding two years if, prior to the sequestration of his estate-

- ...(b) at a time when his liabilities exceeded his assets or during the period of six months immediately preceding the sequestration of his estate, he diminished his assets by gambling, betting, hazardous speculations or expenditure, not reasonably necessary in connection with his business or vocation or for the maintenance of himself and his dependants, or being a trader, alienated any business belonging to him, or the goodwill of such business or any goods or property forming part thereof not in the ordinary course of that business, without publishing a notification of his intention so to alienate in the Gazette and in a newspaper, in terms of the provisions of subsection (1) of section thirty-four:

471 **Insolvency Act section 135(3)(a):**

An insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding two years if, prior to the sequestration of his estate-

- (a) he contracted any debt of fifteen pounds or more or debts to the aggregate of fifty pounds or more, without any reasonable expectation of being able to discharge such debt or debts;

472 **Insolvency Act section 137(c):**

Any person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year-

- ...(c) if he contravenes or fails to comply with the provisions of section sixteen, or of subsection (3), (4) or (12) of section twenty-three unless he proves that he had a reasonable excuse for such contravention or failure; or

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Clause 101

she **is has been** directed by the **chairperson presiding officer** of the meeting to attend at the time and place determined by the **chairperson presiding officer**;⁴⁷³

- (j) if at any time during the liquidation of his estate he knows or suspects that any person has lodged or intends to lodge a nomination contemplated in section 32 which is false or has proved or intends to prove a false claim against his estate and fails to inform the Master in the case of a nomination and the Master and the liquidator of his estate in the case of a claim in writing of that knowledge or suspicion within 14 days as from the date upon which he acquired that knowledge or upon which his suspicion was aroused.**⁴⁷⁴

(2) Any person who—

473 Insolvency Act section 66(1) to (3):

(1) If a person summoned under section sixty-four fails to appear at a meeting of creditors, in answer to the summons, or if an insolvent fails to attend any meeting of creditors in terms of subsection (1) of section sixty-four, or fails to remain in attendance at that meeting, the officer presiding at such meeting may issue a warrant, authorizing any member of the police force to apprehend the person summoned or the insolvent, as the case may be, and to bring him before the said officer.

(2) Unless the person summoned or the insolvent, as the case may be, satisfies the said officer that he had a reasonable excuse for his failure to appear at or attend such meeting, or for absenting himself from the meeting, the said officer may commit him to prison to be detained there until such time as the said officer may appoint, and the officer in charge of the prison to which the said person or insolvent was committed, shall detain him and produce him at the time and place appointed by the first-mentioned officer for his production.

(3) If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was summoned to produce, or if any person who may be interrogated at a meeting of creditors in terms of subsection (1) of section sixty-five refuses to be sworn by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the question fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of subsection (5).

Insolvency Act section 139(1):

Any person shall be guilty of an offence and liable to a fine not exceeding R500 or to imprisonment without the option of a fine for a period not exceeding six months if he is guilty of an act or omission for which he has been or might have been lawfully committed to prison in terms of subsection (2) or (3) of section 66.

474 Insolvency Act section 136(a):

An insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding three years-

- (a) if at any time during the sequestration of his estate he, knowing or suspecting that any person has proved or intends to prove a false claim against his estate, fails to inform the Master and the trustee of his estate in writing of that knowledge or suspicion, within seven days as from the date upon which he acquired that knowledge or upon which his suspicion was aroused;

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- (a) evades the service of a summons on or a notice to him or her as contemplated in section **15(5)(a)**, 64, 66, or 68 or who without lawful cause fails to attend at the time and place determined in the summons or notice or having appeared, without lawful cause fails to remain in attendance until he or she is excused from further attendance by the **chairperson presiding officer** of the meeting concerned; or⁴⁷⁵
- (b) who has been called up for **interrogation questioning** in terms of section **15(5)(a)** 64, 66 or 68 and who refuses to be sworn as a witness or to take an affirmation or who without lawful cause refuses or fails to answer any question lawfully put to him or her or who without lawful cause refuses or fails to produce any book, **or** document, **or record** which is in his or her possession or custody and which he or she is in terms of the summons or a direction of the **chairperson presiding officer** of the meeting obliged to produce; or⁴⁷⁶
- (c) without lawful cause fails to comply with a written order of a liquidator contemplated in section 64(3) or (4); or [New provision]
- (d) without lawful cause fails to answer fully and correctly any written questions put to him or her by the liquidator of the insolvent estate in terms of section 67 or to submit the said answers within the time and in the manner contemplated in section 67(3); or [New provision]
- (e) receives any benefit or accepts any promise of a benefit as a reward for having kept in abeyance or stopped any action for the liquidation of the estate of the insolvent or for having undertaken to keep such action in abeyance or to stop it or for having agreed to a composition or rehabilitation or for not opposing it or for having undertaken to agree to such composition or rehabilitation or not to oppose it or for having kept any inquiry in connection with any matter relating to the insolvent

475 See sections 66 and 139(1) in footnote 486.

476 See section 66 and 139(1) in footnote 486.

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estate in abeyance or for having undertaken to hold it in abeyance or for having concealed particulars of an insolvent or an insolvent estate or for having undertaken to conceal such information; or⁴⁷⁷

- (f) before or after the liquidation of the estate of an insolvent, conceals, parts with, damages, destroys, alienates or otherwise disposes of property belonging to the insolvent or his or her insolvent estate with intent to frustrate the attachment of such property by virtue of a liquidation order or with intent to prejudice creditors of the insolvent estate; or⁴⁷⁸
- (g) has in his or her possession or custody or under his or her control property belonging to an insolvent estate and who intentionally fails to notify the liquidator of the insolvent estate as soon as possible of the existence and whereabouts of such property and to make it available to the liquidator; or⁴⁷⁹

477 Section 141 Insolvency Act:

Any person shall be guilty of an offence and liable to a fine not exceeding R500 or to imprisonment without the option of a fine for a period not exceeding six months if he accepts any benefit or the promise or offer of any benefit as a consideration for having refrained from or discontinued, or for his undertaking to refrain from or to discontinue any proceedings for the sequestration of an estate or for having agreed to, or not opposed, or for his undertaking to agree to or not to oppose a composition in an insolvent estate or the rehabilitation of an insolvent, or for having refrained or undertaken to refrain from investigating any matter relating to an insolvent or an insolvent estate or from disclosing any information in regard to an insolvent or an insolvent estate.

478 Insolvency Act section 142(1):

Any person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years if, either before or after the sequestration of an estate, he removes, conceals, disposes of, deals with or receives any asset belonging to that estate with intent to defeat an attachment by virtue of a sequestration order, or with intent to prejudice the creditors in that estate: Provided that in any proceedings for an offence under this subsection, any such removal, concealment, disposal of, dealing with or receipt of assets which had the effect of defeating or was calculated to defeat such attachment or which prejudiced or was calculated to prejudice the creditors of that estate, shall, unless the contrary is proved, be deemed to have been committed with intent to defeat the attachment or (as the case may be) to prejudice those creditors.

479 Insolvency Act section 142(2):

Any person who has in his possession or custody or under his control any property belonging to an insolvent estate and who knows of the sequestration of the estate and that the property belongs to it, shall be guilty of an offence and liable to a fine not exceeding R1 000 or to imprisonment without the option of a fine for a period not exceeding one year if he fails to inform the trustee of the estate as soon as possible of the existence and whereabouts of the property and (subject to the provisions of section 83) to deliver it to, or place it at the disposal of, the trustee.

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- (h) intentionally impedes or hinders an ~~interim~~ liquidator **appointed in terms of section 58** or a liquidator appointed in terms of this Act or any person acting under his or her command, in the execution of his or her duties,⁴⁸⁰
- (i) **makes or causes to be made or allows to be made a false nomination in terms of section 32 or who signs such a nomination without reasonable grounds for believing it to be correct, or who knowingly submits a false nomination to the Master,** [New provision]

shall be guilty of an offence.

(3) A liquidator of an insolvent estate who intentionally or negligently fails to submit to the Master an account or to pay over a sum of money within 30 days from the date on which he or she became obliged to submit such account or pay over such sum of money, shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.⁴⁸¹

- (4) (a) Any person who is convicted of an offence contemplated in subsection (1)(a) or (b) or subsection (2)(f), ~~or (g)~~ **or (h)** shall be liable to a fine ~~not exceeding ten thousand rand~~ or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.
- (b) Any person who is convicted of an offence contemplated in subsection (1)(c), (d), (e), (f), (g), **(ga)**, (h), ~~or (i)~~, **or (j)** or subsection (2)(e) shall be liable to a fine ~~not~~

480 **Insolvency Act section 145:**

Any person who obstructs or hinders a curator bonis appointed under this Act or a trustee or a representative of either in the performance of his functions as such shall be guilty of an offence and liable to a fine not exceeding R500, or to imprisonment without the option of a fine for a period not exceeding six months.

481 **Insolvency Act section 144:**

If it was the duty of a trustee to submit an account to the Master or to pay a sum of money to the Master or to a creditor, and he failed to submit that account or to pay that sum of money within a period of two months as from the time when that duty arose, he shall (apart from any other offence which he may have committed in connection with such sum of money) be guilty of an offence and liable to a fine not exceeding R500.

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Clause 102

~~exceeding three thousand rand~~ or imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.

- (c) Any person who is convicted of an offence contemplated in subsection (1)(h) or subsection (2)(a), (b), (c), (d) or (h) shall be liable to a fine ~~not exceeding one thousand rand~~ or to imprisonment not exceeding six months or to both such fine and such imprisonment.⁴⁸²

Giving of evidence after conviction for failure to testify

102.(1) Any person who is serving a term of imprisonment for the offence contemplated in section 101(2)(c) and who declares himself or herself willing to give the required evidence or to produce the required books, ~~or~~ documents, ~~or records~~ may, on the written application of the Master ~~or another person who is to preside at a meeting or to chair a commission,~~ made to the head of the institution where the said person is being held in custody, be brought before the Master or other ~~officer presiding at a meeting of creditors of the insolvent estate~~ ~~person~~ for the hearing of such ~~person's~~ evidence or the production ~~by him or her~~ of the required books, ~~or~~ documents, ~~or records~~. [New provision]

(2) A person contemplated in subsection (1) who has given the required evidence or produced the required books, ~~or~~ documents, ~~or records~~ may on his or her own application be brought before the court which imposed the sentence and that court may, irrespective of whether or not it is composed as it was when the sentence was imposed, suspend the remaining portion of the sentence or any portion thereof upon the conditions that it deems just, if the court is satisfied that the said person has answered fully and correctly all questions put to him or her or produced all books, ~~or~~ documents, ~~or records~~ required of him or her, in so far as it was possible for him or her to do so. [New provision]

482 The penalties for offences in sections 132 to 145 of the Insolvency Act are reflected in the sections quoted in the footnotes.

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Clause 103

(3) In order to satisfy itself concerning the facts contemplated in subsection (2), the court may accept as conclusive proof of those facts a certificate given by the **chairperson presiding officer** to the effect that the said person had appeared before him or her and had answered fully and correctly all questions put to him or her and produced all books, ~~or~~ documents, **or records** required of him or her. [New provision]

Criminal liability of partners, administrators, servants or agents

103.(1) Any person who—

- (a) is or was a member of a partnership and who does or omits to do in relation to any property or to the affairs of that partnership or of the insolvent estate of that partnership; or
- (b) is or was charged with the administration of an estate and who does or omits to do in relation to any property or to the affairs of that estate; or
- (c) as a servant or agent has had the sole or practical control of any property or of the affairs of his or her employer or principal and who does or omits to do in relation to that property or the affairs of his or her employer or principal or of the insolvent estate or his or her former employer or principal,

any act which, if done or omitted by him or her in like circumstances in relation to his or her own property or affairs or to any property belonging to, or the affairs of his or her insolvent estate, would have constituted an offence under this Act, shall be deemed to have committed that offence.⁴⁸³

483 Insolvency Act section 143(1):

(1) A person who-

- (a) is or was a member of a partnership and who does or omits to do in relation to any property or to the affairs of that partnership or of the insolvent estate of that partnership; or
- (b) is or was charged with the administration of an estate and who does or omits to do in relation to any property or to the affairs of that estate; or
- (c) as a servant or agent has or had the sole or practical control of any property or of the affairs of his employer or principal and who does or omits to do in relation to that property or to the affairs of his employer or principal or of the insolvent estate of his former employer or principal,

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Clause 104

(2) The liability under subsection (1) of a partner, servant or agent shall not affect the liability under that subsection or under any other provision of this Act, of another partner or of a servant or agent of the same partnership, or of the employer or principal of the employee or agent who is so liable.⁴⁸⁴

Jurisdiction of court

104.(1) A court shall have jurisdiction in respect of an application for the liquidation of the estate of any person who—

- (a) on the date of the application—
 - (i) is domiciled within the court's area of jurisdiction; or
 - (ii) owns or is entitled to property situate within the court's area of jurisdiction; or
- (b) at any time within twelve months immediately before the date of the application ordinarily resided or carried on business within the court's area of jurisdiction.⁴⁸⁵

any act which, if done or omitted by him in the like circumstances in relation to his own property or affairs or to any property belonging to, or the affairs of his insolvent estate, would have constituted an offence under this Act, shall be deemed to have committed that offence.

484 Insolvency Act section 143(2):

The liability under subsection (1) of a partner, servant or agent shall not affect the liability under that subsection or under any other provision of this Act, of another partner or of a servant or agent of the same partnership, or of the employer or principal of the employee or agent who is so liable.

485 Section 149(1) of the Insolvency Act:

(1) The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who-

- (a) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within the jurisdiction of the court; or
- (b) at any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court:

Provided that when it appears to the court equitable or convenient that the estate of a person not domiciled in the Republic be sequestrated elsewhere, or that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration.

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Clause 104

(2) A court which has jurisdiction over a person or the insolvent estate of a person by virtue of subsection (1) shall have jurisdiction in respect of any matter regulated by this Act arising out of the liquidation of the estate of the said person. [New provision]

(3) When it appears to a court equitable or convenient that the estate of a person over whom it has jurisdiction in terms of subsection (1) should be liquidated by another court in the Republic ~~or that the estate of a person who is not domiciled in the Republic should be liquidated elsewhere~~, the court may decline to exercise jurisdiction in the matter and make such order as it finds appropriate.⁴⁸⁶

(3A) Foreign representatives and creditors have access to the court as provided in Chapter 2 of the Cross-Border Insolvency Act, 19 (Act No. of 19) and liquidation of the estate of a debtor shall be limited as provided in Chapter 5 of that Act. [New provision]

(4) The court may rescind or vary any order made by it under the provisions of this Act.⁴⁸⁷

Appeals

105.(1) Any person aggrieved by a final liquidation order, or by **a refusal to grant a provisional order or to grant a liquidation order without a provisional liquidation order, or by** an order setting aside a provisional liquidation order, or by any other **final appealable** order made in terms of this Act may, **subject to the provisions of section 20(4) and (5) of the Supreme Court Act, 1959 (Act No. 59 of 1959),** appeal against such order.⁴⁸⁸

486 See the proviso to section 149(1) in the previous footnote.

487 **Insolvency Act section 149(2):**
The court may rescind or vary any order made by it under the provisions of this Act.

488 **Insolvency Act section 150(1):**
Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20 (4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959), appeal against such order.

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Clause 106

(2) The rules applicable to appeals from judgments or orders given in civil matters by the court concerned shall, subject to subsection (3), **mutatis mutandis** apply to appeals contemplated in subsection (1).⁴⁸⁹

(3) Notwithstanding the provisions of any other law, the noting of an appeal against a final liquidation order shall not have the effect of suspending the operation of any provision of this Act: Provided that pending judgment on appeal no property belonging to the insolvent estate shall be realised without the written consent of the insolvent or, failing such consent, permission granted by order of court on an application by an interested person who has furnished security to the satisfaction of the court for restitution in the event of the appeal being successful.⁴⁹⁰

(4) If an appeal against a final liquidation order is allowed, the respondent may be ordered to pay all liquidation costs.⁴⁹¹

Review

106.(1) Any person aggrieved by any decision, or order or taxation of the Master or by a decision or order of an officer presiding at a meeting of creditors of an insolvent estate, including the liquidator, may **, within 90 days or such further period as the court may allow for good cause shown,** bring such decision, order or taxation under review by the court upon notice to the

489 Insolvency Act section 150(2):

Such appeal shall be noted and prosecuted as if it were an appeal from a judgment or order in a civil suit given by the court which made such final order or set aside such provisional order, and all rules applicable to such last-mentioned appeal shall mutatis mutandis but subject to the provisions of subsection (3), apply to an appeal under this section.

490 Insolvency Act section 150(3):

When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.

491 Insolvency Act section 150(4):

If an appeal against a final order of sequestration is allowed, the court allowing such appeal may order the respondent to pay the costs of sequestrating and administering the estate.

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Clause 107

Master or the presiding officer as the case may be and to any other person whose interests are affected.⁴⁹²

(2) If all or most of the creditors are affected by an application referred to in subsection (1), notice need to be given to the liquidator only.⁴⁹³

(3) The court reviewing any decision, order or taxation shall have the power to consider the merits of any such matter, to hear evidence and to make any order it deems fit: Provided that it shall not re-open any confirmed liquidator's account otherwise than as is provided in section 90.⁴⁹⁴

(4) If the court on review confirms any decision, order or taxation of the Master or officer referred to in subsection (1) the applicant's costs shall not be paid out of the estate concerned unless the court otherwise directs.⁴⁹⁵

Master's fees

107. The Master shall in respect of the matters mentioned in Schedule 3, ensure that the fees specified therein are recovered in the manner prescribed in the Schedule.⁴⁹⁶

492 Insolvency Act section 151:

Subject to the provisions of section fifty-seven any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve.

493 See the first proviso to section 151 in footnote 505.

494 See the second proviso to section 151 in footnote 505.

495 Insolvency Act section 151bis:

If the court reviewing any matter referred to in section one hundred and fifty-one confirms any decision, ruling, order or taxation of the Master or officer referred to in that section the costs of the applicant for the review of that matter shall not be paid out of the assets of the estate concerned unless the Court otherwise directs.

496 Insolvency Act section 153(1):

The Master shall recover in respect of the several matters and in the manner mentioned in the Third Schedule to this Act the fees therein specified.

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Clause 108

Custody and destruction of documents

108.(1) The Master shall have custody of all documents relating to an insolvent estate.⁴⁹⁷

(2) The liquidator of an insolvent estate may after one year has elapsed as from the confirmation by the Master of the final liquidation account destroy all books, **and** documents **and records** in his or her possession relating to the insolvent estate, unless the Master consents to the earlier destruction of such book, **or** documents **or records** or directs that they be retained for the longer period determined by him or her.⁴⁹⁸

(3) The Master may destroy all records in his or her office relating to an insolvent estate after five years have elapsed as from the rehabilitation of the insolvent.⁴⁹⁹

Insurer's liability in respect of indemnification of insolvent

109. Whenever any person (herein referred to as the insurer) is obliged to indemnify another person (herein referred to as the insured) in respect of any liability incurred by the insured towards a third party, such third party shall, on the liquidation of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party, but not exceeding the maximum amount for which the insurer is bound in terms of the indemnity.⁵⁰⁰

⁴⁹⁷ **Insolvency Act section 154(1):**
The Master shall have the custody of all documents relating to insolvent estates.

⁴⁹⁸ **Insolvency Act section 155(1):**
After six months have elapsed as from the confirmation by the Master of the final trustees' account in any insolvent estate, the trustee may, with the consent in writing of the Master, destroy all books and documents in his possession relating to the estate.

⁴⁹⁹ **Insolvency Act section 155(2):**
After five years have elapsed as from the rehabilitation of an insolvent the Master may destroy all records in his office relating to the estate of that insolvent.

⁵⁰⁰ **Insolvency Act section 156:**
Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to

Non-compliance with directives

110. (1) Nothing done under this Act shall be invalid merely by reason of the non-compliance with any directive prescribed by or in terms of this Act, unless in the opinion of the court, or if the court is not involved, in the opinion of the Master or the presiding officer, a substantial injustice has thereby been caused which cannot be remedied by an appropriate order of the court, the Master or the presiding officer.⁵⁰¹

(2) No defect or irregularity in the election or appointment of a liquidator shall vitiate anything done by him or her in good faith.⁵⁰²

Regulations and other powers of Minister

111.(1) The Minister may make regulations prescribing—

- (a) the procedure to be observed in Masters' offices in connection with insolvent estates;
- (b) the form, and manner of conducting proceedings under this Act;
- (c) the manner in which fees payable under this Act shall be paid and brought to account.⁵⁰³

indemnify the insured.

501 Insolvency Act section 157(1):

Nothing done under this Act shall 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.

502 Insolvency Act section 157(2):

No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith.

503 Insolvency Act section 158:

The Minister of Justice may from time to time make regulations not inconsistent with the provisions of this Act, prescribing-

- (a) the procedure to be observed in any Master's office in connection with insolvent estates;
- (b) the form of, and manner of conducting proceedings under this Act;

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(2) The Minister may by notice in the **Gazette** amend Schedule 2 **by adjusting amounts in order to take account of subsequent fluctuations in the value of money.**⁵⁰⁴

(3) ~~The Minister may by notice in the Gazette from time to time fix the maximum amounts which may be paid by way of salary, wages, leave and bonuses in terms of section 80(2) or maintenance in terms of section 80(3).~~ [New provision]

Amendment and repeal

112.(1) The laws mentioned in Schedule 3 are hereby amended or repealed to the extent indicated in the third column of the Schedule.⁵⁰⁵

(2) Anything done under any provision of any law repealed by subsection (1) which may be done under a corresponding provision of this Act, shall be deemed to have been done under that corresponding provision. [New provision]

Short title and commencement

113. This Act shall be called the Insolvency Act, 19..., and shall come into operation on a date fixed by the President in the **Gazette**.⁵⁰⁶

(c) the manner in which fees payable under this Act shall be paid and brought to account.

504 Insolvency Act section 158bis:

The Minister of Justice may by notice in the Gazette amend the First Schedule.

505 Insolvency Act section 1:

The Insolvency Act, 1916 (Act 32 of 1916), the Insolvency Act, 1916, Amendment Act, 1926 (Act 29 of 1926) (except the title and preamble thereof and sections one, seventy-one, seventy-two and seventy-four thereof) and section twenty of the Land Bank Amendment Act, 1934 (Act 58 of 1934) are hereby repealed: Provided that if an estate was sequestrated or assigned before the commencement of this Act the sequestration or assignment and all proceedings in connection therewith shall be completed, and a person whose estate was sequestrated or assigned before such commencement and any matter relating to such sequestration, assignment or person shall be dealt with as if this Act had not been passed; and provided further that if, before the said commencement, any action was taken under the said Act 32 of 1916 with a view to the surrender or sequestration of an estate but the surrender or sequestration was not effected before the said commencement, such action shall, after such commencement, be deemed to have been taken under this Act, in so far as this Act makes provision therefor.

506 Insolvency Act section 159:

This Act shall be called the Insolvency Act, 1936, and shall come into operation on the first day of July, 1936.

SCHEDULE 1

FORM A⁵⁰⁷

STATEMENT OF DEBTOR'S AFFAIRS

**FAILURE TO SUBMIT THIS FORM TO THE MASTER AND THE LIQUIDATOR
WITHIN 7 DAYS IS A CRIMINAL OFFENCE
AND MAY DELAY REHABILITATION**

PART 1

BALANCE SHEET OF*

* Here insert the name in full of the debtor

Liabilities	R	c	Assets	R	c
Debts due as per Part 5			Immovable property as per Part 2 Movable property as per Part 2 Outstanding claims, etc, as per Part 3 Deficiency/surplus		
Total			Total		

507 This form corresponds with Schedule 1, Form B of the Insolvency Act. For technical reasons Form B is not reflected in a footnote, but the Explanatory Memorandum discusses the changes.

PART 2
IMMOVABLE PROPERTY

	Description of property	Situation and extent	Mortgages, and other secured claims	Estimated values
Property situate in the Republic				R c
Property situate elsewhere				
			Total	

PART 3

**ANY MOVABLE PROPERTY WHATSOEVER WHICH IS NOT INCLUDED IN
PART 4 OR PART 5**

	Description of property	Estimated values
Property situate in the Republic .		R c
Property situate elsewhere		
	Total	

Note: Movable property includes assets such as insurance policies and credit balances in accounts with banks or other institutions or persons. Any merchandise mentioned in this part shall be valued at its cost price or at its market value at the time of the making of this statement, whichever is the lower, and the statement shall be supported by detailed stock sheets relating to such merchandise.

PART 4

OUTSTANDING CLAIMS, BILLS, BONDS AND OTHER SECURITIES

	Names and residential and postal address of the debtor	Particulars of claim	Estimated amount good	Estimated amount bad or doubtful
In the Republic			R c	R c
Elsewhere				
		Total		

PART 5

LIST OF CREDITORS

Name and address of creditor	Nature and value of security for claim	Nature of claim	Amount of claim
			R c
		Total	

PART 6

**MOVABLE ASSETS PLEDGED, HYPOTHECATED, SUBJECT TO A RIGHT OF
RETENTION OR UNDER ATTACHMENT IN EXECUTION OF A JUDGMENT**

Description of asset	Estimated value of asset	Nature of charge on asset	Amount of debt to which charge relates	Name of creditor in whose favour charge is

PART 7

**ENUMERATION AND DESCRIPTION OF EVERY BOOK OR DOCUMENTING
RECORD IN USE BY THE DEBTOR AT TIME OF THE LIQUIDATION OR AT
TIME WHEN HE OR SHE CEASED CARRYING ON BUSINESS**

.....

.....

.....

.....

PART 8

DETAILED STATEMENT OF CAUSES OF DEBTOR'S INSOLVENCY

.....

.....

.....

.....

PART 9
PERSONAL INFORMATION

State whether the debtor is married, widowed or divorced

If the debtor is or was married, state—

- (a) name or names of spouse or spouses (a 'spouse' means not only a wife or husband in the legal sense, but also a person who in terms of any legal system or recognised custom is recognised as such a person's spouse and also any person with whom such person is cohabitating in a marriage relationship, irrespective of whether or not he or she is lawfully married to any other person).

.....

.....

.....

- (b) whether the debtor is or was married in or without community of property and whether the accrual system applies

Draft Insolvency Bill
Schedule 1, Form A

.....
.....

(c) date of marriage

.....

(d) whether the matrimonial property system has been changed since entering into the marriage and, if so, the nature of the change

.....
.....

(e) full names and date of birth of the spouse and, if an identity number has been assigned, the identity number of the spouse

.....
.....

State the debtor's nationality

.....

State the debtor's place of birth, date of birth and, if an identity number has been assigned, the identity number

.....

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Schedule 1, Form A

.....

Was the debtor's estate or the estate of a partnership in which the debtor is or was a partner previously liquidated or placed in bankruptcy, whether in the Republic or elsewhere?

.....

If the preceding answer is in the affirmative, state—

- (a) whether debtor's own estate or his partnership's estate was (i) liquidated; or (ii) placed in bankruptcy

.....
.....

- (b) the place where and the date when that estate was liquidated or placed in bankruptcy

.....
.....

- (c) whether the debtor has been rehabilitated or his estate released; if so, when

.....
.....

PART 10
AFFIDAVIT/SOLEMN DECLARATION

I, declare under oath/solemnly and sincerely declare* that to the best of my knowledge and belief the statements contained in this Schedule are true and complete, and that every estimated amount therein contained is fairly and correctly estimated.

Draft Insolvency Bill
Schedule 1, Form A

Signature of declarant

Sworn/solemnly declared before me on theday of at
.....

.....
Commissioner of Oaths

.....
Full names

.....
Business address

.....
Designation and area or office

[Schedule 1, Form B]

**Draft Insolvency Bill
Schedule 1, Form AA**

Corporation/Financial Institution

SIGNATURE

DATE

PRINTED NAME

CAPACITY

FORM B⁵⁰⁸

**AFFIDAVIT FOR PROOF OF ANY CLAIM OTHER THAN A CLAIM BASED ON
A PROMISSORY NOTE OR OTHER BILL OF EXCHANGE**

Strike out inapplicable words where * occurs.

In the insolvent estate of:
Date of liquidation:
Name of creditor:
Address of creditor:
Fax number of creditor (if any)
E-mail address of creditor (if any)
Amount of claim at date of liquidation:

I,declare *under oath/solemnly as follows

- (1) *I am the creditor/I am the(capacity) of the creditor and have authority to make this declaration and submit the claim for proof as appears from the attached documentation.
- (2) *I have personal knowledge of the nature and particulars of the claim/I have satisfied myself as to the nature and particulars of the claim.⁵⁰⁹
- (3) *The claim was not obtained by cession after the commencement of liquidation proceedings/The claim was obtained by cession on(date).⁵¹⁰
- (4) The nature of the claim (for instance money advanced, goods delivered, salary due) is as appears from the attached documentation or declaration.^{511]}

508 This form corresponds with Schedule 1, Form C of the Insolvency Act. For technical reasons Form C is not reflected in a footnote, but the Explanatory Memorandum discusses the changes.

509 **Insolvency Act section 44(4) first part:**
Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section eighty-three, the amount at which he values the security.

510 See section 44(4) in the previous footnote.

511 See section 44(4) in footnote 522.

**Draft Insolvency Bill
Schedule 1, Form B**

(In respect of debts which accrued over a period or in respect of which payments were made a statement shall be submitted with a brief description of all debits and credits over the period of 12 months immediately preceding the **date of** liquidation.)⁵¹²

(5) The debt arose on or since (date), ~~and *the~~ **The** debt was due to me on the date of liquidation ~~and remains due to me/~~ **The debt or part thereof became due to me or will become due to me after liquidation** ~~the amounts~~ as set out on the attached statement ~~became due to me or will become due to me on the dates indicated in the statement.~~

(6) *I hold no security in respect of the debt/The particulars of security held by me for payment of the debt and the value placed be me on the security (if a value is placed on the security) are as follows:

.....
.....
.....

*** I do not rely on my security for the payment of my claim./I rely solely on my security for the payment of my claim.**⁵¹³

(7) *To the best of my knowledge no one except the insolvent estate is liable for the debt or a part thereof/The particulars of others who are to my knowledge liable for the debt and the security held in respect thereof are as follows

.....
.....
.....

***(8) I authorize the liquidator to have any dividend due to me transferred electronically to my banking account (supply name of account, branch number and account number).**.....
.....

.....

512 Insolvency Act section 44(6):

A claim against an insolvent's estate for payment of the purchase price of goods sold and delivered to the insolvent on an open account shall not be admitted to proof unless a statement is submitted in support of such claim showing the monthly total and a brief description of the purchases and payments for the full period of trading or for the period of twelve months immediately before the date of sequestration, whichever is the lesser.

513 See section 44(4) in footnote 522.

Draft Insolvency Bill
Schedule 1, Form B

Signature of declarant

*Sworn to/ solemnly declared before me on:(date) at
.....(place)

.....

Commissioner of oaths

.....

Full names

.....

Business address

.....

Designation and area or office

FORM C⁵¹⁴

**AFFIDAVIT FOR THE PROOF OF A CLAIM BASED ON A PROMISSORY NOTE
OR OTHER BILL OF EXCHANGE**

Strike out inapplicable words where * occurs.

In the insolvent estate of:
 Date of liquidation:
 Name of creditor:
 Address of creditor:
Fax number of creditor (if any)
E-mail address of creditor (if any)
 Amount of claim at date of liquidation:

I,declare *under oath/solemnly as follows

- (1) *I am the creditor/I am the(capacity) of the creditor and have authority to make this declaration and submit the claim for proof as appears from the attached documentation.
- (2) *I have personal knowledge of the nature and particulars of the claim/I have satisfied myself as to the nature and particulars of the claim.⁵¹⁵
- (3) *The claim was not obtained by cession after the commencement of liquidation proceedings/The claim was obtained by cession on(date).⁵¹⁶
- (4) The debtor was on the date of liquidation and still is indebted to me by virtue of the following *promissory note/bill of exchange:

Date of note or bill	Name of maker or drawer	
	Etc as per existing Form C	

- (5) The nature of the claim (for instance money advanced, goods delivered, salary due) is as appears from the attached documentation or declaration.⁵¹⁷

514 This form corresponds with Schedule 1, Form D of the Insolvency Act. For technical reasons Form D is not reflected in a footnote, but the Explanatory Memorandum discusses the differences.

515 See section 44(4) in footnote 522.

516 See section 44(4) in footnote 522.

517 See section 44(4) in footnote 522.

Draft Insolvency Bill
Schedule 1, Form C

(In respect of debts which accrued over a period or in respect of which payments were made a statement shall be submitted with a brief description of all debits and credits over the period of 12 months immediately preceding the **date of** liquidation.)⁵¹⁸

- (6) That the said *note/bill is in **full all** respects genuine and valid.
- (7) *I hold no security in respect of the debt / The particulars of security held by me for payment of the debt and the value placed be me on the security (if a value is placed on the security) are as follows:

.....
.....
.....

*** I do not rely on my security for the payment of my claim./I rely solely on my security for the payment of my claim.**⁵¹⁹

- (8) *To the best of my knowledge no one except the insolvent estate is liable for the debt or a part thereof / The particulars of others who are to my knowledge liable for the debt and the security held in respect thereof are as follows

.....
.....
.....

***(9) I authorize the liquidator to have any dividend due to me transferred electronically to my banking account (supply name of account, branch number and account number).**.....
.....

518 See section 44(6) in footnote 525.
519 See section 44(4) in footnote 522.

Draft Insolvency Bill
Schedule 1, Form C

.....

Signature of declarant

*Sworn to/ solemnly declared before me on:(date) at
.....(place)

.....

Commissioner of oaths

.....

Full names

.....

Business address

.....

Designation and area or office

FORM D [New form]
FORM AND CONTENTS OF ACCOUNTS

1. The accounts shall be lodged ~~in duplicate~~ on A4 standard paper and totals shall be added up separately at the foot of each sheet with a total at the end of each account.
[New provision]

2. Heading

The heading of the account shall contain the following information:

- (a) The name of the insolvent;
- (b) the address of the insolvent;
- (c) the identity number or date of birth of the insolvent;
- (d) the date of ~~the~~ liquidation;
- (e) the ordinal number of the account or supplementary account;
- (f) the nature of the account (eg liquidation account);
- (g) where applicable, whether it is a final or supplementary account;
- (h) whether it is a distribution account or a contribution account or both;
- (i) the Master's reference number.

[New provision]

3. Liquidation account

3.1 A liquidation account shall contain a record of all receipts derived from the realisation of assets and disbursements made or to be made in defraying the costs of liquidation, except receipts and disbursements reflected in a trading account.⁵²⁰

3.2 The record of receipts and disbursements shall reflect full particulars explaining their nature and state the amount thereof in a money column.⁵²¹

520 Insolvency Act section 92(1):

A liquidation account shall contain an accurate record of all moneys received and of all moneys disbursed by the trustee otherwise than in the course of a business which he carried on for the insolvent estate in question.

521 Insolvency Act section 92(2):

The record of each such receipt and disbursement shall set forth the amount and date thereof and sufficient particulars to explain its nature.

Draft Insolvency Bill
Schedule 1, Form D

3.3 The gross proceeds of assets shall be reflected and the disbursements incidental to the realisation shall be entered as disbursements.

[New provision]

3.4 Receipts and disbursements shall **upon the request of the Master** be supported by satisfactory vouchers numbered consecutively in the top right-hand corner by reference to the number appearing in the account opposite the relative item.⁵²²

3.5 The account shall reflect separately the distribution to be made (if any) to secured claims, preferent claims and concurrent claims and the contribution to be levied (if any).

[New provision]

3.6 If security has been realised, the liquidation account shall contain a free residue account dealing with receipts not subject to security and consecutively numbered encumbered asset accounts dealing with receipts subject to security.

[New provision]

3.7 If disbursements or income are apportioned amongst the free residue and encumbered asset accounts the liquidation account shall indicate how the apportionment has been calculated.

[New provision]

3.8 An encumbered asset account shall be drawn to indicate the proceeds of **the realization of** security, the disbursements payable out of the proceeds of the security and the amount payable to a creditor or creditors with the period for and rate at which interest before and after liquidation (if any) has been calculated.

[New provision]

4. Trading account

When the liquidator carried on business by **either** purchasing stock or entering into new transactions **for the purpose of trading**, a separate trading account including the following items only, shall be submitted:

- (a) The value of the stock on hand at the date of liquidation shown on the credit side;
- (b) the receipts and disbursement on the trading account;
- (c) the value of stock on hand at the date on which the accounts were made up shown on the debit side with a note of the items in the liquidation

522 **Insolvency Act section 92(3):**

The liquidation account shall be accompanied by the trustee's bank pass book and by vouchers in support of the record of receipts and disbursements.

account reflecting the proceeds of the stock that has been realised (if any).⁵²³

5. Bank reconciliation

5.1 The liquidator shall lodge complete statements up to the date on which the accounts were made up of all accounts opened in terms of section 84.⁵²⁴

5.2 The account shall contain a bank reconciliation statement with the following information:

- (a) The ~~date on which the accounts were made up and the~~ balance in the cheque account ~~at that date~~ **and the date at which the bank statement reflected that balance;**
- (b) the amount of the contribution provided for in the contribution account (if any);
- (c) the amount (if any) of each outstanding deposit with sufficient particulars to explain its nature or a reference to the item in the liquidation account which together with the even numbered voucher **(if any)** explain its nature;
- (d) the amount of each disbursement in the liquidation account that must still be paid with sufficient particulars to explain its nature or a reference to the item in the liquidation account which together with the even numbered voucher, **if any,** explain its nature;
- (e) the amount of the payment (if any) still to be made to each secured creditor with an explanation if this amount does not agree with the amount reflected in the distribution account;
- (f) the total amounts to be paid to preferent creditors and concurrent creditors (if any) with an explanation if these amounts do not agree with the totals reflected in the distribution account;
- (g) the amount (if any) to be transferred to a next account.

523 **Insolvency Act section 93:**

If the trustee has carried on any business on behalf of the estate, he shall submit to the Master, in addition to the liquidation account, a trading account containing the following data and no others, namely-

- (a) a record of the value of the stock on hand at the date of sequestration;
- (b) a record of the value of the stock on hand on the date up to which the account is made up;
- (c) the daily totals of receipts and payments in connection with the business;
- (d) the result of his conduct of the business.

524 See section 92(3) in footnote 535.

[New provision]

6. Distribution account, contribution account or contribution and distribution account

6.1 The liquidator shall, upon the request of the Master, lodge all proved claims and unproved claims admitted or compromised by the liquidator or proved in an action at law.

6.2 The account shall indicate the basis for contribution if this is not the amount of the concurrent claim and contain the following columns that are applicable to the account:

- (a) claim reference number;
- (b) creditor's name **and if dividends are to be transferred electronically the account name, branch number and account number of the creditor's account;**
- (c) total claim;
- (d) concurrent claim;
- (e) secured claim;
- ~~(f) preferent claim;~~
- ~~(g)~~ **(f)** award in previous accounts;
- ~~(h)~~ **(g)** concurrent award with a separate column for interest after liquidation (if any) and an explanation in the account of the rate at and period for which interest has been calculated;
- ~~(i)~~ **(h)** secured **or preferent** award;
- ~~(j)~~ **(i)** **preferent award;**
- ~~(k)~~ **(i)** amount of contribution;
- ~~(l)~~ **(j)** shortfall.⁵²⁵

525 Insolvency Act section 94:

A plan of distribution shall show in parallel columns under separate headings-

- (a) every claim or the part of every claim against the estate in question which is secured or otherwise preferent;
- (b) every claim or the part of every claim against the estate which is unsecured and otherwise non-preferent;
- (c) the amount awarded under that plan and under any previous plan of distribution to every creditor of the estate;

Draft Insolvency Bill
Schedule 1, Form E

7. Certificate

7.1 Each liquidator shall sign the certificate under oath or affirmation.⁵²⁶

7.2 The certificate shall state that the account contains a true account of the administration of the estate.⁵²⁷

7.3 If it is a final account, the certificate shall state that so far as the liquidator is aware all the assets of the insolvent estate have been disclosed in the accounts.⁵²⁸

7.4 If it is not a final account, the certificate shall reflect a list of all unrealised assets of which the liquidator is aware with the reason why the assets have not been realised and an estimate of the value of the assets.⁵²⁹

FORM E [New form]

SUMMONS IN TERMS OF SECTION 64(1) OF THE INSOLVENCY ACT ?? OF 19?? (THE "ACT")
TO ATTEND A MEETING OF CREDITORS FOR QUESTIONING IN TERMS OF SECTION 65 OF
THE ACT

In re

INSOLVENT ESTATE OF
MASTER'S REFERENCE NO

To:

(d) the deficiency in respect of each claim;
and shall make provision for the division of the proceeds of the property in the insolvent estate in the order of preference and in the manner set forth in sections ninety-five to one hundred and four inclusive.

Insolvency Act section 105:

A plan of contribution shall show in parallel columns-

- (a) each claim in respect of which the claiming creditor is liable to contribute; and
- (b) the amount which he is liable to contribute,

and shall make provision for all such contributions in accordance with the provisions of section one hundred and six.

526 Insolvency Act section 107:

A trustee shall sign every account which he submits to the Master and he shall verify by his affidavit (which shall be free from stamp duty) that the account is a full and true account of the administration of the estate in question up to the date of the account and that, so far as he is aware, all the assets of the estate have been disclosed in the account.

527 See section 107 in the previous footnote.

528 See section 107 in footnote 539.

529 Insolvency Act section 92(4) first part:

If a liquidation account is not the final liquidation account, the trustee shall further set forth therein-

- (a) all property still unrealized;
- (b) all outstanding debts due to the estate;
- (c) the reasons why that property has not been realized or those debts have not been collected.

**Draft Insolvency Bill
Schedule 1, Form E**

You are hereby summonsed in terms of section 64(1) to appear in person at a meeting of creditors in the above estate to be held at (details of venue) on the.....day of..... 19..... at..... to give evidence and to be questioned on all matters relating to the insolvent or his or her business or affairs, whether before or after the liquidation of the estate, and concerning any property which at any time belonged to the insolvent estate and to produce to the presiding officer at the meeting all the books, papers and documents specified hereunder:

LIST OF BOOKS, PAPERS OR DOCUMENTS TO BE PRODUCED

<u>Description of book, paper or document</u>	<u>Date (if any)</u>	<u>Copy or original required</u>

Dated at.....this.....day of....., 19.....,

.....

Presiding Officer

(Here insert details of the name, address
telephone number of the liquidator
or the attorneys action for the liquidator)

NOTES:

1. A cheque for witness fees in the form of appearance money and travelling allowances in the sum of R ... (....., Rand) is attached to your copy of the summons. You are entitled to make representations to the Presiding Officer of the meeting for additional necessary witness fees.
2. Your attention is specifically drawn to the provisions of subsections 65(3), 65(6), 65(9), 69(10) and 68A of the Act which sections are printed on the reverse side hereof.

[Print on back, subsections 65 (3), (6), (9) and (10) and section 68A.]

SCHEDULE 2
TARIFF A⁵³⁰
SHERIFF'S FEES (SECTION 33)

1.	For each separate attachment of movable property	R50,00
2.	For the attachment of moneys, 7,5% to a maximum of	R200,00
3.	For any abortive attempt at attachment, including one hour's search and enquiry	R22,00
4.	For making an inventory and the list of books and records referred to in section 33(7) of the Act including all necessary copies and time spent in stocktaking, per hour or part thereof	R37,50
5.	For assistance, where necessary in the opinion of the Master, in taking inventory, a reasonable and inclusive fee not exceeding, per day or part thereof	R37,50
6.	For notice of attachment of movable property, if necessary, to a single person	R4,00
7.	For identical notices when there is more than one person to be given notice, for each after the first	R2,50
8.	For each separate possession (as defined in the rules for the construction of this tariff), a fee which is reasonable in the opinion of the Master, not exceeding, per day or part thereof	R37,50
9.	For an additional officer, where necessary, limited to one, per day or part thereof	R22,50
10.	When no officer is left in possession, but movable property attached remains under supervision of the sheriff, per day or part thereof	R0,60
11.	For removal and storage: The necessary costs thereof.	
12.	For insuring movable property attached when it is considered necessary by the deputy sheriff, in addition to the amount of the premium paid, an inclusive fee of	R6,00
13.	For the herding and tending of livestock: The necessary costs thereof.	

530 This Form corresponds with Schedule 2 Tariff A of the Insolvency Act. There are no substantive changes and the existing Schedule is not included in a footnote.

Draft Insolvency Bill
Schedule 2, Tariff A

- | | | |
|-----|---|-------|
| 14. | Travelling allowance, per kilometre or fraction thereof | R1,25 |
| 15. | For each necessary letter | R4,00 |
| 16. | For any work necessarily done by or on behalf of the sheriff in performing the duties under section 33 of the Act, for which no provision is made in this tariff: An amount to be determined by the Master. | |

**RULES FOR THE CONSTRUCTION OF THE TARIFF AND THE GUIDANCE OF
THE SHERIFF**

- (1) In the Tariff 'possession' means the continuous and necessary presence on the premises in question for the period in respect of which possession is charged of a person employed and paid by the sheriff for the sole purpose of retaining possession.
- (2) When a charge is made for possession of any property, no charge shall be allowed for herding and tending of livestock if one and the same person could render both services.
- (3) If there are more ways than one of doing any particular act, the least expensive way shall be adopted unless there is some reasonable objection thereto.
- (4) No travelling allowance shall be charged unless it was necessary for the deputy-sheriff to go beyond a distance of one kilometre from his office; but when any such allowance is payable, it shall be paid for the actual distance travelled in going from and returning to the office.
- (5) No charge shall be made for the cost of any transport, railway fare, etc., in addition to a charge for travelling allowance.
- (6) If more services than one can be performed on the same journey, the distance to the first place of service may be brought into account only once, and shall be apportioned equally to the respective services; and the distance from the first place of service to the next place of service shall similarly be apportioned equally to the remaining services, and so forth.
- (7) If the execution of a judgment has been stayed because of a liquidation order after an inventory has been made for the purpose of the execution, no charge shall be made for a second inventory of the same goods. The sheriff's fees for making the inventory shall be charged to the insolvent estate in question, according to the tariff, and not to the execution creditor, unless the estate is unable to pay those fees.
- (8) The sheriff may pay rent, if necessary for premises required for the storage of goods attached, for a period of one month or such longer period as the Master shall authorize.
- (9) Every question arising under or relative to the tariff shall be determined by the Master.

TARIFF B⁵³¹
REMUNERATION OF LIQUIDATOR (SECTIONS 61)

1. On the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income 10 per cent.
2. On the gross proceeds of **any other assets or immovable property, shares or similar securities**
~~— sold, life insurance policies and mortgage bonds recovered and the balance~~
~~— recovered in respect of immovable property sold prior to sequestration~~ **3 per cent.**
3. ~~On~~
 - ~~(i) money found in the estate;~~
 - ~~(ii) the gross proceeds of cheques and postal orders payable to the insolvent, found in the estate; and~~
 - ~~(iii) the gross proceeds of amounts standing to the credit of the insolvent in current, savings and other accounts and of fixed deposits and other deposits at banking institutions, building societies or other financial institutions.~~ **1 per cent.**
4. ~~On~~ sales by the liquidator in carrying on the business of the insolvent, or any part thereof, in terms of section 62(3)(d) **6 5 per cent.**
5. ~~On the amount distributed in terms of a composition, excluding any amount on which remuneration is payable under any other item of this tariff~~ **2 per cent.**
6. ~~On the value at which movable property constituting security has been disposed of to a creditor in settlement of his claim~~ **5 per cent.**
7. ~~On the value at which immovable property constituting security has been disposed of to a creditor in settlement of his claim~~ **2 per cent.**

Provided that the total remuneration of a liquidator in terms of this tariff shall not be less than two thousand five hundred rand.

REMUNERATION OF INTERIM LIQUIDATOR (SECTION 58)

531 This Schedule replaces Schedule 2 Tariff B of the Insolvency Act. For technical reasons the Tariff is not reflected in a footnote, but the changes are explained in the Explanatory Memorandum..

Draft Insolvency Bill
Schedule 2, Tariff B

A reasonable remuneration to be determined by the Master, not to exceed the rate of remuneration of a liquidator under this tariff.

TARIFF C
MASTER'S FEES OF OFFICE (SECTION 79(1)(b))

1. On all insolvent estates under final liquidation in which the total gross value of the assets according to the liquidator's ~~liquidation and distribution~~ account ~~and/or contribution account~~ is more than R5 000 for each complete R5 000 R25 subject to a **minimum fee of R500 and a** maximum fee of R25 000.⁵³²

2. (a) For a copy of or an extract from any document preserved in the office of a Master, when made in such office (including the certification of such copy or extract), a fee of R4,50 shall be paid.

- (b) For the certification of such copy or extract not made in such office a fee of R9,00 shall be paid.

3. On any amount paid by the liquidator into the Guardians' Fund for account of creditors, a commission of five per cent shall be payable, to be deducted by the Master from the moneys so paid into the Guardians' Fund.

4. (a) The fees referred to in item 1 shall be assessed by the Master and shall be payable on or before a date determined by the Master to any receiver of revenue. Proof of such payment shall be submitted by the liquidator to the Master.

- (b) The payment of the fees referred to in item 2 shall be denoted-
 - (i) by affixing adhesive revenue stamps to; or
 - (ii) by impressing stamps by means of a franking machine approved by the Commissioner for Inland Revenue

on, the written request for the rendering by the Master of the service in question.

[Schedule 3]

532 **Tariff C agrees with Schedule 3 of the Insolvency Act, except for item 1 which reads as follows:**
 On all insolvent estates under final sequestration the total gross value of the assets according to the trustee's liquidation and distribution account and/or contribution account of which-

	R
(a) is R5 000 or more, but less than R15 000.....	100,00
(b) is R15 000 or more, for each complete further R5 000	
when the gross value exceeds R15 000, a further.....	25,00
subject to a maximum fee of.....	25 000,00

SCHEDULE 3
PROVISIONS OF LAWS AMENDED OR REPEALED (SECTION 112)

[] **Words in bold type in square brackets indicate omissions from existing enactments.**

_____ **Words underlined with solid line indicate insertions in existing enactments.**

No and year of law	Short title	Extent of amendment or repeal
Act No. 32 of 1944	Magistrates' Courts Act, 1944	<p>1. The amendment of section 65A by the addition of the following subsection:</p> <p>“(5) If it appears to the court during proceedings in terms of subsection (1) that there are reasonable grounds for suspecting that any person has committed an offence, the court shall transmit the relevant information and certified copies of relevant documents to the Attorney-General <u>Commercial Crime Unit of the South African Police Service</u> in whose area of jurisdiction the proceedings was held or the offence is suspected of having been committed to enable the Attorney-General <u>Unit</u> to determine whether criminal proceedings should be instituted in the matter.”.</p> <p>2. The amendment of section 74 by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p>“(b) states that the total amount of all his <u>unsecured</u> debts does not exceed the amount determined by the Minister from time to time by notice in the Gazette.”.</p> <p>3. The amendment of section 74B by the addition of the following subsection:</p> <p>“(6) If it appears to the court during a hearing in terms of subsection (1) that there are reasonable grounds for suspecting that any person has committed an offence, the court shall transmit the relevant information and certified copies of relevant documents to the Attorney-General <u>Commercial Crime Unit of the South African Police Service</u> in whose area of jurisdiction the proceedings was held or the offence is suspected of having been committed to enable the Attorney-General <u>Unit</u> to determine whether</p>

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No and year of law	Short title	Extent of amendment or repeal
		<p>criminal proceedings should be instituted in the matter.”.</p> <p>4. Section 74X set out in Schedule 4 is hereby inserted after section 74W.</p>
<p><u>Act No. 66 of 1965</u></p>	<p><u>Administration of Estates Act, 1965</u></p>	<p><u>The amendment of section 88 by the substitution for subsection (1) of the following subsection:</u></p> <p><u>“(1) Subject to the provisions of sub-sections (2) and (3), interest calculated on a monthly basis at the rate per annum determined from time to time by the Minister of Finance, and compounded annually at the thirty-first day of March, shall be allowed on each rand of the principal of every sum of money received by the Master for account of any minor, lunatic, unborn heir or any person having an interest therein of a usufructuary, fiduciary or fideicommissary nature, or for an insolvent in terms of section 93 of the Insolvency Act, 199?.”</u></p>
<p>Act No. 68 of 1969</p>	<p>Prescription Act, 1969</p>	<p>The amendment of section 13 by the substitution for paragraph (g) of subsection (1) of the following paragraph:</p> <p>“(g) the debt is the object of a claim [filed] against the estate of a debtor who is deceased <u>before the distribution in accordance with the final account in terms of the Administration of Estates Act, 1966 (Act No. 66 of 1965)</u>; or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No. 28 of 1966) <u>before the conclusion of the first meeting;</u> or.”.</p>

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No and year of law	Short title	Extent of amendment or repeal
Act No. 53 of 1979	Attorneys Act, 1979	The amendment of section 83 by the insertion after paragraph (g) of subsection (11) of the following paragraph: <u>“(h) a candidate for appointment as liquidator or judicial manager who informs a creditor of an insolvent estate or of a company of the liquidation of the insolvent estate or the judicial management or liquidation of the company and indicates that he or she is available for such appointment.”.</u>

SCHEDULE 4

INSERTION OF SECTION 74X IN ACT 32 OF 1944

“74X. Composition with creditors (1) Any debtor who cannot pay his or her debts and who wants to offer his or her creditors a composition, may lodge a signed copy of the composition and a complete sworn statement in the form prescribed in the Annexure with the magistrate’s court in the district where he or she normally resides (hereafter referred to as “the court”). If the composition provides for the immediate payment of a cash amount for distribution among creditors, the amount shall, pending the outcome of the offer of composition, be invested in an interest-bearing savings account in trust with an attorney or someone else whom the court approves. The debtor shall offer proof that the cash amount has been invested in this manner.⁵³³

(2) If a debtor incurs debt during the period from lodging the composition with the magistrate until creditors have voted on the composition, he or she shall notify the creditor who offers him or her credit of the pending composition and at the first appearance before a magistrate in connection with the composition, he or she shall provide full particulars concerning any such debt incurred by him or her. During the said period or after a composition has been accepted, a debtor shall not alienate, encumber or voluntarily dispose of any property which shall be made available to creditors in terms of the composition or do anything which can impede compliance with the composition. A debtor who contravenes these provisions shall be guilty of an offence and upon conviction be liable to a fine ~~not exceeding one thousand rand~~ or to imprisonment not exceeding six months or to both such fine and such imprisonment.⁵³⁴

(3) On receipt of the composition and statement, the court determines a date for the ~~interrogation~~ **questioning** of the debtor and the consideration of the composition by the

533 **Magistrates' Courts Act 32 of 1944 section 74A(1):**

With an application referred to in section 74 (1) the debtor shall submit a full statement of his affairs in the form prescribed in the rules.

534 **Magistrates' Courts Act 32 of 1944 section 74S:**

Any person who is subject to an administration order and who during the currency of such order incurs any debt without disclosing that he is subject to an administration order shall be guilty of an offence and on conviction liable to imprisonment for a period not exceeding 90 days or to periodical imprisonment for a period not exceeding 2 160 hours in accordance with the laws relating to prisons and, in addition, the court may, upon application by any interested person, set aside the administration order.

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creditors of the debtor (hereafter referred to as the “hearing”), if it appears to the court that no such date has been determined during the preceding six months. The date determined shall give the debtor sufficient time to notify creditors of the hearing, as prescribed in subsection (4).⁵³⁵

(4) The debtor shall at least ~~ten~~ **14** days before the date determined for the hearing send by ~~certified mail or telefax or deliver by hand~~ **mail, telefax, electronic mail, or personal delivery** to each of his or her creditors a copy of the composition and of the statement and a notice with the case number and the place and date of the hearing. The debtor shall before the date of the hearing offer proof to the court that he or she gave notice in the prescribed manner.⁵³⁶

(5) At the hearing—

- (a) a creditor may, whether he or she has received notice or not, prove the debt and object to a debt listed in the statement by the debtor;
- (b) every debt listed by the debtor in the said statement shall, subject to any amendments to it by the court, be deemed to be proved, unless a creditor objects to it or the court rejects it or requires that it be corroborated by evidence;
- (c) a creditor whose debt is being objected to by the debtor or another creditor or who is required by the court to corroborate his debt with evidence, shall prove his debt;
- (d) a court may defer the proving of a debt and the consideration of the composition, or allow the other creditors to vote on the composition, and if a composition is accepted, the debt is added to the listed debts at a later stage when it is proved;

535 Magistrates' Courts Act 32 of 1944 section 74B(5):

No administration order shall be granted at the request of any debtor if it is proved that any administration order was rescinded within the preceding period of 6 months because of the debtor's non-compliance therewith, unless the debtor proves to the satisfaction of the court that his non-compliance with the order was not wilful.

536 Magistrates' Courts Act 32 of 1944 section 74A(5)

The debtor shall lodge an application for an administration order and the statement referred to in subsection (1) with the clerk of the court and shall deliver to each of his creditors, at least 3 days before the date appointed for the hearing, personally or by registered post a copy of such application and statement on which shall appear the case number under which the original application was filed.

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- (e) the debtor may be **interrogated** **questioned** by the court and by any creditor whose debt has been acknowledged or proved, or by any other interested party with the permission of the court, about—
- (i) his or her assets and liabilities;
 - (ii) his or her present and future income and that of his or her spouse living in with him or her;
 - (iii) his or her standard of living and the possibility of living more frugally; and
 - (iv) any other matter which the court considers to be relevant.⁵³⁷

537 Magistrates' Courts Act 32 of 1944 section 74B:

(1) At the hearing of an application for an administration order-

- (a) any creditor, whether he has received notice in terms of section 74A (5) or not, may attend the hearing and provide proof of his debt and object to any debt listed by the debtor in the statement of his affairs referred to in section 74A (1);
- (b) every debt listed by the debtor in the said statement shall be deemed to be proved, subject to any amendment made thereto by the court, unless any creditor raises objections thereto or the court rejects it or requires substantiation thereof by evidence;
- (c) any creditor to whose debt an objection is raised by the debtor or any other creditor or who is required by the court to substantiate his debt with evidence shall provide proof of debt;
- (d) the court may defer proof of debt and postpone consideration of the application for an administration order or proceed to deal with such application and, if an administration order is granted, the debt shall subsequently when proved be added to the debts listed;
- (e) the debtor may be interrogated by the court and by any creditor whose debt has been acknowledged or proved, or by leave of the court, by any creditor the proof of whose debt has been deferred, or by the legal representative of such creditor with regard to-
 - (i) his assets and liabilities;
 - (ii) his present and future income and that of his wife living with him;
 - (iii) his standard of living, and the possibility of economising; and
 - (iv) any other matter that the court may deem relevant.

(2) If at the hearing it appears to the court that any debt other than a debt on the ground of or arising from any judgment debt is a matter of contention between the debtor and the creditor or between the creditor and any other creditor of the debtor, the court may, upon inquiry into the objection, allow or reject the debt or a part thereof.

(3) Any person whose debt has been rejected in accordance with subsection (2) may, notwithstanding the provisions of section 74P, institute proceedings or proceed with an action already instituted in respect of such debt.

(4) If any person referred to in subsection (3) has obtained judgment in respect of any debt referred to in that subsection, the amount of the judgment shall be added to the list of proved debts referred to in subsection (1).

(5) No administration order shall be granted at the request of any debtor if it is proved that any administration order was rescinded within the preceding period of 6 months because of the debtor's non-compliance therewith, unless the debtor proves to the satisfaction of the court that his non-compliance with the order was not wilful.

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(6) If it appears to the court at the hearing that a debt, other than a debt which is based upon or derives from a judgment debt, is disputed between the debtor and the creditor or between the creditor and another creditor of the debtor, the court may, after it has investigated the objection, admit or disallow the debt or part thereof.⁵³⁸

(7) Any person whose debt has been disallowed in terms of subsection (6) may institute an action or continue with an action which has already been instituted in respect of such debt.⁵³⁹

(8) If a person contemplated in subsection (7) obtains judgment in respect of a debt contemplated in that subsection, the amount of the judgment is added to the list of proved debts referred to in subsection (5).⁵⁴⁰

(9) A creditor may by written power of attorney authorise any person to appear at a hearing on his or her behalf and to do everything at such hearing which the creditor would have been entitled to do.

(10) The hearing may be deferred by the court and the proposed composition may be amended or revoked with the permission of the debtor.

(11) A composition is not accepted if a creditor demonstrates to the satisfaction of the magistrate that it accords a benefit to one creditor over another creditor to which he or she would not have been entitled on liquidation of the debtor's estate. If the composition is accepted by the majority in number and 2/3 in value of the concurrent creditors who vote on the composition, the court shall certify that the composition is accepted as such and thereafter the composition is binding on all creditors who have been informed of the hearing or appeared at the hearing, but the right of a secured or otherwise preferent creditor shall not be prejudiced by the composition, unless he or she consents to the composition in writing.

538 See section 74B(2) in footnote 549.

539 See section 74B(3) in footnote 549.

540 See section 74B(4) in footnote 549.

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(12) (a) If the composition provides for payments by the debtor in determined instalments or otherwise, the acceptance of the composition has the effect of a judgment in terms of section 65 of the Magistrates' Courts Act 32 of 1944 in respect of the payments. Any person who in terms of the composition shall receive the payments on behalf of creditors, or if there is no such person, any creditor who is in terms of the composition entitled to a benefit out of the payments, shall have the rights which a judgment creditor would have in terms of the section.⁵⁴¹

(b) If any person is appointed in terms of the composition to execute the composition, he or she shall be entitled to the remuneration which is payable in terms of the composition.

(13) (a) The court may at any time on application of the debtor or an interested person direct the debtor to appear for such further **interrogation questioning** as the court may deem necessary, after notice to creditors of at least **ten 14** days by **certified mail or telefax or delivery by hand mail, telefax, electronic mail, or personal delivery** by the debtor or the interested person, as the case may be. The court may—

(i) revoke the composition for cogent reasons; and

541 Magistrates' Courts Act 32 of 1944 section 74Q(1)-(3):

(1) The court under whose supervision any administration order is being executed, may at any time upon application by the debtor or any interested party re-open the proceedings and call upon the debtor to appear for such further examination as the court may deem necessary, and the court may thereupon on good cause shown suspend, amend or rescind the administration order, and when it suspends such an order it may impose such conditions as it may deem just and reasonable.

(2) The court may at any time at the request of the administrator in writing and with the written consent of the debtor, amend any administration order.

(3) Upon any application for the rescission of an administration order the court may-

(a) rescind the order under subsection (1); or

(b) if it appears to the court that the debtor is unable to pay any instalment, suspend the order for such period and on such conditions as it may deem fit or amend the instalments to be paid in terms thereof and make the necessary amendments to any emoluments attachment order or garnishee order issued so as to ensure payment in terms of the administration order, or set aside the said emoluments attachment order or garnishee order; or

(c) authorize the issue of an emoluments attachment order or garnishee order to ensure the payments in terms of the administration order; or

(d) set aside or amend any emoluments attachment order or garnishee order issued so as to ensure payments in terms of the administration order.

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(ii) authorise a debtor who on reasonable grounds is not able to comply with his or her obligations in terms of the composition to submit an amended composition to creditors in the manner and with the consequences contemplated in subsection (1).

(b) Without limiting the phrase “cogent reason” in subsection 13(a)(i), it shall include the following:

(i) If the debtor does not comply with his or her obligations in terms of the composition; or

(ii) If the debtor renders false information in his or her statement or in the course of the **interrogation questioning**; or

(iii) If the debtor gives a benefit in respect of a claim which falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.

(14) Any creditor who is entitled to a benefit in terms of the composition can, notwithstanding the provisions of subsection (13), after **ten 14** days notice to the debtor apply to the court to revoke the composition if the debtor does not comply with his or her obligations in terms of the composition. The creditor must submit an affidavit in support of his or her application. The court shall order that the composition be revoked if the debtor did not substantially comply with his or her obligations.

(15) If the composition is revoked, or if the estate of a debtor has been liquidated in terms of the Insolvency Act ... of 19... before he or she complied with his or her obligations in terms of the composition, the claim of a creditor is restored to the extent that the claim has not been satisfied in terms of the composition.

(16) If a composition is not accepted by the required majority, and the court is of the opinion that the debtor is unable to make available to **debtors creditors** substantially more than that

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which he or she offered in the proposed composition, the court shall inquire from the debtor whether he or she prefers that his or her assets be administered and divided in terms of the Insolvency Act and his or her debts be acquitted in terms of the said Act as though his or her estate were liquidated on the date on which his or her choice was exercised, but without being regarded as insolvent or his or her estate as being liquidated when any other Act is applied. If the debtor affirms, the court shall forward to the Master of the **Supreme High** Court a certificate stating that the debtor exercised the choice and the statement submitted by the debtor. The debtor shall not be required to submit a statement of affairs. The court shall forward the certificate to the Registrar of Deeds who shall enter a **caveat** as if a liquidation order had been issued on the date when the debtor exercised his or her choice. The court may instruct the sheriff to attach assets and books in terms of the Insolvency Act. If any creditor who declares his or her particulars of claim accepts liability for the cost of administration as if his or her claim has been proved, the Master shall, after receipt of the certificate, appoint a liquidator who shall hold such office until a liquidator is elected at a first meeting. The Master shall convene a meeting for the election of a liquidator and proof of claims and if no claims are proved at the meeting and a **provisional** liquidator has not yet been appointed, the Master shall consider the estate to be concluded until a creditor accepts liability for the costs as if he or she has proved a claim. In all matters not provided for in this subsection the debtor or his or her estate or matters related to the debtor or his or her estate shall be dealt with as if the estate of the debtor was liquidated on the date when the debtor exercised his or her choice.

(17) ~~The lodgement of a composition in terms of subsection (1) does not suspend any steps which a creditor has instituted against a debtor and, subject to the provisions of the composition, does not preclude creditors from instituting steps against the debtor, unless the court on application of the debtor so orders.~~ Between the determination of a date for a hearing and the conclusion of the hearing no creditor with a claim the cause of which arose before the determination of the date, shall without the permission of the court institute any action against the debtor or apply for the liquidation of the estate of the debtor.

ANNEXURE

STATEMENT IN RESPECT OF PROPOSED COMPOSITION

PART A

PERSONAL PARTICULARS OF DEBTOR

Full names and surname
.....

Address

(Documents in connection with the composition may be delivered to the debtor at this address until such time as he or she has notified the magistrate of a change of address)

Date of birth

Identity number, if one has been assigned

Marital status

If married, state—

full names of spouse (“spouse” means a spouse in the legal sense, and even if there is such a spouse, also a spouse according to any law or custom or a person of any sex living with another as a spouse)
.....

date of birth of spouse

identity number of spouse, if one has been assigned

whether the debtor is or was married in or without community of property and whether the accrual system applies
.....

date of marriage

whether the matrimonial property system has changed since entering into the marriage and, if so, the nature of the change
.....

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Whether the debtor's estate has been placed under administration during the last five years or whether it is under administration at present and, if so, the date of the administration order and whether it has been concluded

Whether the debtor has during the last six months lodged a composition with a magistrate for submission to creditors

Whether the debtor's estate has been liquidated during the last ten years and, if so, the date of liquidation and the Division of the **Supreme High** Court that issued the liquidation order . . .

. **PART B**

APPLICABLE STATUTORY PROVISIONS

The debtor declares that he or she is aware of the following statutory provisions in connection with his or her application:

If the composition provides for the payment of a cash amount for distribution among creditors, the amount shall, pending the outcome of the offer of composition, be invested with an attorney or someone else whom the court approves in an interest-bearing savings account in trust. The debtor shall offer proof that the cash amount has been invested in this manner.

If a debtor incurs debt during the period from lodging the composition with the magistrate until creditors have voted on the composition, he or she shall notify the creditor who offers him or her credit of the pending composition and at the first appearance before a magistrate in connection with the composition, he or she shall provide full particulars concerning the said debt incurred by him or her. During the said period or after a composition has been accepted, a debtor shall not alienate, encumber or voluntarily dispose of any property which shall be made available to creditors in terms of the composition or do anything which can impede compliance with the composition. A debtor who contravenes these provisions shall be guilty of an offence.

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If the composition provides for payments by the debtor in determined instalments or otherwise, the acceptance of the composition has the effect of a judgment in terms of section 65 of the Magistrates' Courts Act 32 of 1944 in respect of the payments. Any person who in terms of the composition shall receive the payments on behalf of creditors, or if there is no such person, any creditor who is in terms of the composition entitled to a benefit out of the payments, shall have the rights which a judgment creditor would have in terms of the section.

The magistrate may revoke the composition for cogent reasons. "Cogent reason" shall include the following:

1. If the debtor does not comply with his or her obligations in terms of the composition; or
2. If the debtor renders false information in his or her statement or in the course of the ~~interrogation~~ questioning; or
3. If the debtor gives a benefit in respect of a claim which falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.

PART C

INCOME AND EXPENDITURE

The name and business address of the debtor's employer or, if the debtor is not employed, the reason why he or she is not employed

.....
.....

The debtor's trade or vocation and his or her bruto weekly or monthly income as well as the income of his or her spouse living in with him or her, and particulars of all deductions therefrom

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by way of debit order or otherwise, supported as far as possible by written statements by the employer of the debtor or his or her spouse

.....
.....
.....

A detailed list of the debtor's weekly or monthly necessary expenses and the expenses of persons who are dependent on him or her, including the travelling expenses of the debtor or his or her spouse to and from work and such expenses of his or her children to and from school, and expenses required to retain assets that are subject to the composition

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The number and ages of persons who are dependent on the debtor or his or her spouse and their relationship to the debtor or his or her spouse

.....
.....
.....
.....

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.....
.....
.....

The debtor affirms that assets which are subject to the composition are in safe custody, that obligations in respect of the assets are included in “necessary expenses” in Part C above, and that such obligations will be fulfilled until conclusion of the composition.

PART E

DEBTS

(i) Debts not subject to security

<u>Name and address of debtor</u>	<u>Amount</u>	<u>Give particulars if the debt is not immediately claimable</u>
.....		
.....		
.....		
.....		
.....		
.....		

(ii) Debts subject to security

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<u>Name and address of debtor</u>	<u>Amount</u>	<u>Nature of security and identification of asset subject to security (Part D above) Give particulars if the debt is not immediately claimable</u>
.....		
.....		
.....		
.....		
.....		
.....		

Name and address of any other person who is apart from the debtor liable for any of the abovementioned debts
.....
.....

AFFIDAVIT/SOLEMN DECLARATION

I,.....declare under oath/solemnly and sincerely declare* that to the best of my knowledge and belief the statements contained in this form are true and complete, and that every estimated amount therein contained is fairly and correctly estimated.

.....
Signature of declarant

Sworn/solemnly declared before me on theday of.....at.....

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.....

....

Commissioner of Oaths

.....

....

Full names

.....

Business address

.....

Designation and area of office

* Delete which is not applicable.

[New provision]

SCHEDULE 5
PROVISIONS OF SOCIAL BENEFIT OR PENSION LAWS
AMENDED OR REPEALED

[] **Words in bold type in square brackets indicate omissions from existing enactments.**

_____ **Words underlined with solid line indicate insertions in existing enactments.**

No and year of Act	Short title	Extent of amendment or repeal
Act No. 28 of 1912	Railways and Harbours Service Act, 1912	<p>The amendment of section 79 by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“ (1) If any person in receipt of an annuity be declared insolvent, the annuity shall forthwith determine: Provided that in any such case all or any part of the annuity shall be paid to or for the benefit of all or any of the following persons, namely, the insolvent, his wife or any minor children, or failing a wife or minor children, to the mother of illegitimate children or any children whether legitimate or adopted or illegitimate or other relatives dependent on him for maintenance. [If the payment be to the insolvent, it shall be for his own personal use and may not in any way be attached or appropriated by the trustee in insolvency or by his creditors, anything to the contrary notwithstanding in any law relating to insolvency]”.</p>

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No and year of Act	Short title	Extent of amendment or repeal
Act No. 24 of 1956	Pension Funds Act, 1956	The repeal of section 37B.
Act No. 44 of 1958	Post Office Act, 1958	The amendment of section 10C by the deletion of the proviso to subsection (1).
Act No. 81 of 1967	Aged Persons Act, 1967	The amendment of section 14 by the deletion of subsection (3).
Act No. 78 of 1973	Occupational Diseases in Mines and Works Act, 1973	<p>The amendment of section 131 by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“ (1) A right to a benefit to which any person is entitled under this Act, and a right to a gratuity under section 133, shall not be capable of being ceded by the holder thereof, and such a right or any money paid by the commissioner as such a benefit or gratuity to or for the benefit of the person entitled thereto, or any money paid by the commissioner to or for the benefit of any person as a special award or a special allowance under any provision of this Act, shall not be subject to attachment in execution of a judgment or order of a court of law, except at the instance of the commissioner acting under section 104[, and if the estate of the holder of such a right or of a person to whom or for whose benefit such money has been paid, is sequestrated as insolvent, the said right or money shall not form part of his insolvent estate].”</p>

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No and year of Act	Short title	Extent of amendment or repeal
Act No. 79 of 1974	Members of the Coloured Persons Representative Council Pensions Act, 1974	The repeal of section 15.
Act No. 86 of 1974	Members of the South African Indian Council Pensions Act, 1974	The repeal of section 15.
Act No. 29 of 1979	General Pensions Act, 1979	The repeal of section 3.
Act No. 62 of 1990	Transnet Pension Fund Act, 1990	The amendment of section 8 by the deletion of the second proviso to subsection (1).
Act No. 59 of 1992	Social Assistance Act, 1992	<p>The amendment of section 11 by the substitution for subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">“ (2) If[-</p> <p style="padding-left: 80px;">(a) the estate of a beneficiary is sequestrated; or</p> <p style="padding-left: 80px;">(b)] a beneficiary dies,</p> <p style="padding-left: 40px;">an amount payable to such beneficiary by virtue of the rendering of social assistance, shall not form part of the [insolvent or] deceased estate[, as the case may be].”.</p>

Key with sections of Insolvency Act and clauses of Bill (see end for sections omitted)

Section Insolvency Act	Clause Bill
1	112(1)
2	1
3 (1)	3(1)
3 (2)	5(1)
4 (1)	3(4)
4 (3)	3(3)(a)
4 (4)	3(6)
8 (a)	2(a)
8 (b)	2(b)
8 (c)	2(c)
9 (1)	4(1)
9 (2)	4(2)
9 (3) (a)	3(2)
9 (3) (a)	4(3)(b)
9 (3) (b)	3(3)(b)
9 (3) (b)	4(3)(c)
9 (3) (c)	4(3)(d)
9 (3) (d)	7(5)
9 (3) (d)	8(3)
9 (4)	3(7)
9 (4)	4(3)(g)
9 (5)	3(7)
9 (5)	4(5)
10	7(1)
11 (1)	7(2)
11 (2)	33(5)

11 (3)	7(3)
12 (1)	8(1)
12 (2)	7(4)
12 (2)	8(2)
13 (1)	5(3)
13 (2)	5(5)
13 (3)	5(2)
13 (3)	5(3)
14 (1)	9(1)
14 (2)	9(2)
14 (3)	94(c)
15	6
16 (1)	33(1)
16 (2)	34(1)
16 (4)	34(2)
16 (5)	34(3)
17 (1) (a)	10(4)
17 (1) (b)	10(1)
17 (2)	10(2)
17 (3)	10(3)
17 (4)	10(5)
18 (1)	32(2)
18 (1)	32(11)
18 (2)	32(4)
18 (2)	32(12)
18 (3)	62(4)(a)
18 (3)	62(4)(f)
18 (4)	52(3)
18 A	33(2)

18 A	33(3)
18 B (1)	62(8)
18 B (2) & (3)	62(9)
19 (1)	33(6)
19 (1) (a)	33 (7) (d)
19 (1) (a) & (d)	33(7)(a)
19 (1) (b) & (c)	33(7)(f)
19 (1) (e)	33(7)(b)
19 (2)	33(9)(a)
19 (3) (a)	33(6)
19 (4)	33(10)
20 (1) (a)	11(1)
20 (1) (b)	12(1)
20 (1) (c)	11(5)(a)
20 (2)	11(6)(b)
21	22A
22	24
23 (1)	11(6)(b)
23 (2)	15(1)
23 (3)	15(2)
23 (4)	15(3)
23 (5)	15(5)(a)
23 (5)	15(5)(b)
23 (6)	15(7)(a)
23 (7)	15(4)
23 (8)	15 (7) (c)
23 (9)	15 (5) (c)

Key with sections of Insolvency Act and clauses of Bill (see end for sections omitted)

Section Insolvency Act	Clause Bill
23 (10)	15(7)(b)
23 (11)	15(8)
23 (12)	15(9)
23 (13)	15(10)
23 (14)	15(11)
24 (1)	16
24 (2)	17(1)
24 (2)	17(2)
25 (1)	11(2)
25 (2)	11(2)
25 (3)	11(3A)
25 (4)	11(4)
26 (1)	18(1)
26 (2)	18(2)
26 (3)	29(4)
27 (1)	19(1)
27 (2)	19(2)
29 (1)	20(1)
29 (3)	20(6)
30 (1)	20(4)
30 (2)	20(5)
31 (1)	21(1)
31 (2)	21(2)
31 (3)	31(3)
32 (1)	25(1)
32 (2)	25(2)

32 (3)	25(3)
33 (1)	23(1)
33 (2)	23(2)
35	26
35 A (1)	1
35 A (2)	27(1)
35 A (3)	27(2)
35 A (4)	27(3)
35 A (5)	27(4)
36 (1)	29(1)
36 (1)	29(2)
36 (2)	29(3)
36 (4)	29(5)
36 (5)	82A(1)
36 (6)	82A(2)
37 (1)	30(1)
37 (1)	30(2)
37 (2)	30(3)
37 (3)	30(4)
37 (4)	30(5)
38	31(1)
38	31(2)
39 (1)	41(1A)
39 (2)	41(1)
39 (2)	41(2)
39 (3)	41(4)

39 (5)	41(5)
39 (6)	41(7)
39 (6)	65(4)
39 (6)	41(6)
40 (1)	38(1)
40 (2)	38(2)
40 (3) (a)	38(2)
40 (3) (b)	38(2)
41	39(1)
41	39 (3)
41	40(3)
42 (1)	40(1)
43	35A
44 (1)	45(1)
44 (2)	40(2)
44 (2)	Sch 1 Frm C item 2
44 (2)	Sch 1 Frm C item 3
44 (2)	Sch 1 frm C item 5
44 (3)	45(2)
44 (3)	45(4)
44 (4)	45(3)
44 (4)	45(5)
44 (4)	45(7)
44 (4)	45(6)

Key with sections of Insolvency Act and clauses of Bill (see end for sections omitted)

Section Insolvency Act	Clause Bill
44 (4)	Sch 1 Frm B item 2
44 (4)	Sch 1 Frm B item 3
44 (4) intr	Sch 1 Frm B item 4
44 (4)	Sch 1 Frm B item 6
44 (4)	Sch 1 Frm C item 2
44 (4)	Sch 1 Frm C item 3
44 (4)	Sch 1 Frm C item 5
44 (4)	Sch 1 Frm C item 7
44 (5)	45(8)
44 (6)	Sch 1 Frm B item 4 end
44 (6)	Sch 1 Frm C item 5 end
44 (7)	45(10)
44 (8)	45(11)
44 (9)	45(12)
45 (1)	46(1)
45 (2)	46(2)
45 (3)	46(4)

45 (3)	46(5)
46	23A
47	73(6)
48	48
49 (1)	44
50 (1)	49(1)
50 (2)	49(3)
51	50
52 (1)	42(1)
52 (2)	42(4)(a)
52 (4)	42(3)(a)
52 (5)	42(5)
52 (6)	42(3)(b)
53 (1)	42(2)
53 (2)	42(6)
53 (3)	42(8)
53 (4)	42(9)
53 (5)	42(10)
54 (1)	52(1)
54 (2)	52(2)(a)
54 (3) (a)	52(2)(b)
54 (3) (b)	52(2)(c)
54 (4)	42(4)(b)
54 (5)	32(7)
54 (5)	32(8)
54 (7)	54(7)

55	53
56 (2)	55(1)
56 (3)	55(2)
56 (4)	56(1)
56 (5)	56(2)
56 (6)	55(3)
56 (7)	55(4)
57 (1)	54(1)
57 (1)	54(2)
57 (2)	54(4)
57 (2)	54(5)
57 (3)	54(6)
57 (6)	54(8)
57 (7)	54(3)
57 (8)	54(3)
58	57(1)
59	59
60 (a)	58(1)(a)
60 (a)	58(1)(d)
60 (b)	58(1) after (d)
60 (d)	58(1)(b)
61	58(1)(c)
61	58(1)(cA)
62	60
63 (1)	61(1)
63 (1)	61(2)

Key with sections of Insolvency Act and clauses of Bill (see end for sections omitted)

Section Insolvency Act	Clause Bill
63 (1)	61(3)
63 (1) bis	61(4)
63 (2)	61(5)
64 (1)	63(1)
64 (2) & (3)	64(1)
65 (1)	65(1)
65 (1)	65(2)
65 (1)	65(8)(a)
65 (2)	65(5)
65 (2 A)	65(6)
65 (3)	65(8)(b)
65 (4)	65(7)
65 (5)	65(11)
65 (6)	65(3)
65 (7) & (8)	65(9)
66	68A
66 (1), (2) & (3) & 139 (1)	101(1)(i)
66 (1), (2) & (3) & 139 (1)	101(2)(a) & (b)
67	69
68	70
69 (1)	32(4)

69 (1)	33(11)
69 (1)	62 (1)
69 (2)	35(1)
69 (3)	35(2)
69 (4)	35(3)
70 (1)	84(1)
70 (2)	84(2)
70 (4)	84(4)
70 (5)	84(5)
70 (6)	84(6)
71	85
72	87
73 (1)	62(4)(g)
73 (2)	81(1)
73 (3)	81(2)
73 (4)	81(2A)
73 (5)	81(3)
74	82(4)
75 (1)	12 (2)
75 (1)	12(4)
75 (2)	12(5)
76	57(2)
77	37
78 (1)	62(4)(i)
78 (2)	62(4)(b)
78 (3)	45(9)

78 (3)	62(4)(c)
79	62(4)(k)
80	62 (3)(d)
80	62(4)(d)
80 bis	62(4)(f)
81 (1)	36(1)
81 (1) bis (a)	38(3)
81 (1) bis (a)	39(4)
81 (1) bis (b)	38(4)
81 (1) bis (b)	39(5)
81 (2)	62(7)
81 (2)	62(10)
81 (4)	36(2)
82 (1)	62(4)(f)
82 (6)	11(6)(a)
82 (7)	83
82 (8)	82(2)
83 (1)	73(1)
83 (2)	73(2) intr
83 (6)	73(5)
83 (6)	74(1)
83 (6)	74(2)

Key with sections of Insolvency Act and clauses of Bill (see end for sections omitted)

Section Insolvency Act	Clause Bill
83 (8)	73(2)(a) & (b)
83 (10)	73(4)
83 (10)	73(9)
83 (10)	75(1)
83 (11)	73(7)
83 (12)	75(3)
83 (12)	75(6)
84	76
85	77
88	78
89 (1)	75(4)
89 (1)	75(4A)
89 (2)	75(3)
89 (3)	75(2)
89 (4)	75 (4B)
89 (5)	75 (4C)
91 (1)	87(1)
92 (1)	Sch 1 Frm D item 3.1
92 (2)	Sch 1 Frm D item 3.2
92 (3)	Sch 1 Frm D item 3.4
92 (3)	Sch 1 Frm D item 5.1
92 (4)	87(3)

92 (4)	Sch 1 Frm D item 7.4
92 (5)	87(4)
93	Sch 1 Frm D item 4
94	Sch 1 Frm D item 6.2
95 (1)	75(5)
95 (2)	75(7)
95 (3)	76(8)
95 (4)	76(9)
95 (5)	76(10)
97 (1)	80(1)
97 (2) & (3)	79
98 A (1)	80(2)
98 A (2)	80 (2A)
98 A (3)	80 (8)
98 A (4)	80(2B)
98 A (5)	80(2C)
98 A (6)	80(2D)
102	80(3A)
103 (1) (a)	80(4)
103 (1) (b)	80(5)
103 (2)	80(6)
104 (1)	47(1)
104 (1)	47(2)

104 (2)	47(3)
104 (2)	47(4)
104 (3)	25(1A)
105	Sch 1 Frm D item 6.2
106	94(1)
107	Sch 1 Frm D item 7.1, 7.2 & 7.3
108	88
109 (1)	87(5)
109 (2)	87(6)
109 (3)	87(7)
110 (1)	87(8)
111 (1)	89(1)
111 (2)	89(2)
111 (2)	89(3)
111 (2)	89(4)
112	90
113	91
114	92
116	93
116 bis (1)	87(9)
116 bis (2)	87(10)
118	95
119 (1)	71(1)

Key with sections of Insolvency Act and clauses of Bill (see end for sections omitted)

Section Insolvency Act	Clause Bill
119 (2) & (5) & (6)	71(2)
119 (3) & (4)	71(3)
119 (7)	71(4)
119 (7)	71(5)
119 (7)	71(7)
120 (1)	71(9)
120 (2)	71(10)
120 (3)	71(11)
121 (1)	71(12)
121 (2)	71(13)
123 (1)	71(14)
123 (2)	71(15)
124 (1)	96(1)(b)
124 (1)	96(3)(a)(ii)
124 (2)	96(1)(c)
124 (2)	96(3)(a)(ii)
124 (2) (b) and proviso	96(2)
124 (2) (c)	96(1A)
124 (4)	96(6)
124 (5)	96(1)(a)
124 (5)	96(3)(a)(i)
125	96(3)(b)
126	96(5)

127	97
127 A	98
128	96(7)
129 (1)	99(1)
129 (3)	99(2)
130	100(1)
131	100(2)
132 (a)	101(1)(a)
132 (c)	101(1)(b)
132 to 145 penalties	101(4)
133	101(1)(e)
134 (1)	101(1)(f)
135 (3) (b)	101(1)(g)
136 (a)	101(1)(j)
137 (a)	101(1)(c)
137 (b)	101(1)(d)
137 (c)	101(1)(h)
141	101(2)(e)
142 (1)	101(2)(f)
142 (2)	101(2)(g)
143	103
144	101(3)
145	101(2)(h)
149	104
150	105

151	106(1) (2) & (3)
151 bis	106(4)
152 (2)	68(1)
152 (3)	68(3)
152 (4)	68(4)
152 (5) & (7)	68(5)
153 (1)	107
154 (1)	108(1)
155 (1)	108 (2)
155 (2)	108(3)
156	109
157	110
158	111(1)
158 bis	111(2)
159	113
Sch 1 Frm D	Sch 1 Frm C
Sch 1 Frm B	Sch 1 Frm A
Sch 1 Frm C	Sch 1 Frm B
Sch 2 Tar A	Sch 2 Tar A
Sch 2 Tar B	Sch 2 Tar B

Section Insolvency Act	Clause Bill
Sch 2 Tar C	Sch 2 Tar C

References for discussion of omissions of sections of the Insolvency Act

References for discussion of omissions of sections of the Insolvency Act

Sections of Insolvency Act Omitted	Paragraph in Explanatory Memorandum Volume 1
8(h)	2.5
9(4)	3.8
16(3)	22A.8
17(1)(ii) bis	10.1
20(1)(b) proviso	12.4
21	22A.8
23(3)	15.4
34	2.5
39(2)	41.1
53(2) proviso	42.5
55(m)	42.5
60(a)	42.5
70(3)	84.2
72(3)	86.1 and 86.2
83(3) (ordinary property)	73.2
83(12)	22A.8
109(1)(b)	87.5
119(7) first proviso	71.2.3
122	22A.8