SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 33

PROJECT 63

REVIEW OF THE LAW OF INSOLVENCY

EFFECT OF INSOLVENCY ON ASSETS, CIVIL PROCEEDINGS AND CONTRACTS

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INTRODUCTION

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

The members of the Commission are -

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PREFACE

This working paper was prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The working paper is being published in full so as to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made the Commission will assume that the commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

Any person or body wishing to make verbal representations to the Commission should submit a brief summary of his or its proposed representations together with a request to be heard by the Commission, in writing.

It would be appreciated if written comments, representations or requests could reach the Commission by 28 February 1991 at the address that appears on the previous page. Please contact the researcher if you are unable to submit your comments in time.

The researcher responsible for the investigation, who may be contacted for further information, is Mr M B Cronje. The project leader and chairman of the project committee is Mr G G Smit. Mr O Kellner prepared the draft of paragraph 10 of this working paper.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR.

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MAIN SOURCES QUOTED

Cork Report	Report of the Review Committee Insolvency Law and Practice Chairman Sir Kenneth Cork GBE Cmnd 8558 London: Her Majesty's Stationery Office 1982
Corporate Law	Corporate Law editors H S Cilliers & M L Benade, Durban: Butterworths 1987
Dalhuisen	J H Dalhuisen Dalhuisen on International Insolvency and Bankruptcy Vol I New York: Mathew Bender 1986
Henochsberg	Henochsberg on the Companies Act fourth edition edited by Philip M Meskin, Durban: Butterworths 1985
Mars	Mars The Law of Insolvency in South Africa eighth edition by Elmarie de la Rey, Cape Town: Juta 1988
Practice Manual	Practice Manual Transvaal Provincial Division & Witwatersrand Local Division, Johannesburg: Lex Patria 1986
Smith	Catherine Smith The Law of Insolvency third edition Durban: Butterworths 1988
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Working Paper 29	South African Law Commission Working Paper 29 Review of the Law of Insolvency: Prerequisites for and Alternatives to Sequestration 1989
Working Paper 30	South African Law Commission Working Paper 30 Review of the Law of Insolvency: Qualifications, Appointment and Removal of Liquidators

SUMMARY OF PROVISIONAL RECOMMENDATIONS AND QUESTIONS ON WHICH COMMENTS ARE SOUGHT

1. Uniform provisions should apply regarding the effect of insolvency on individuals and companies. (Par 2.22)

2. The provision that the court may order that a company's property should vest in the liquidator should be deleted. The liquidator should be empowered to act on behalf of the estate in appropriate cases, possibly with the consent of the court. (Par 2.25)

3. Comments are invited on a provision such as the following:

(a) On the granting of an insolvency order the insolvent estate is deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed.

(b) On the appointment of a liquidator the custody of and control over the insolvent estate pass to him.

(c) At all times when there is no liquidator who is qualified and able to exercise control over the insolvent estate the custody of and control over the insolvent estate vest in the Master.

(d) The insolvent estate remains in the custody and under the control of the liquidator or the Master until custody and control pass to the debtor or some other person according to law. (Par 2.26)

4. Notice of sequestration or liquidation should be given in the Government Gazette as soon as possible. (Par 4.6)

5. A liquidator of an insolvent estate or company should send a copy of his report to all creditors whose names and addresses are known to him or could reasonably be ascertained by him. (Par 4.8)

6. Comments are invited on the following alternatives regarding the attachment of property and service of the insolvency order:

First alternative: Present practice to be set out by statute

A liquidator should as soon as possible after his appointment attach all property in possession of the insolvent at his residence, place of employment or business and his books and financial records. If the liquidator does not wish to perform these duties himself he should appoint someone for whose acts he accepts responsibility to do so on his behalf. If it appears that some of the property does not belong to the insolvent estate, the liquidator should not attach the property or keep it under attachment, but should hand it over to the person who claims it. The liquidator should attach the property, books and records by making an inventory thereof and handing a copy to the insolvent or leaving it at the premises where the property has been attached. If reasonably possible, the insolvent or his representative should be afforded the opportunity to be present during the attachment. If the insolvent or his representative is present he should sign the original inventory, and any comment which he may have on the inventory or assets, books and records of the insolvent estate that is not included in the inventory should be attached to the inventory. If the liquidator deems it advisable he may take the property attached into his personal possession or appoint a suitable person to keep the property in his custody. The liquidator may direct the sheriff to attach property in possession of the insolvent or the company. Comments are invited on the question of whether the liquidator should indemnify the sheriff should he direct him

to attach property that is not in the possession of the insolvent or the company. (Par 5.19 and 5.24)

The liquidator serves the sequestration order on the debtor by handing it to him personally. In the case of a company the liquidation order may be served by handing it to a managing director, director or secretary of the company. As proposed above, the liquidator may appoint someone for whose acts he accepts responsibility to effect service on his behalf or may direct the sheriff to serve the insolvency order. (Par 5.31)

Second alternative: The sheriff continues to make attachments and serve orders

The liquidator should in all cases direct the sheriff to serve the insolvency order and attach the property, books and records of the insolvent estate. The liquidator or his representative should be afforded the opportunity to be present during attachment and to give directions to the sheriff. The question of whether the liquidator should indemnify the sheriff should he direct him to attach property that is not in the possession of the insolvent or company is relevant here as well. (Par 5.36)

7. Comments are invited on a provision such as the following:

The liquidator of an insolvent individual or company may, after three years have elapsed since the confirmation of the final liquidation and distribution account, destroy all documents relating to the insolvent estate unless the Master consents to the earlier destruction of the documents or directs that the documents should be kept longer. (Par 5.27)

8. A provision that all the insolvent's post should be handed to the liquidator is not desirable. (Par 5.29)

9. The requirement in section 69 of the Insolvency Act that the liquidator should have reasonable grounds for suspicion and should convince the magistrate thereof, limits abuse of this section sufficiently. Section 69 should be retained with the following adjustments:

(a) The archaic reference in subsection (4) to "a warrant to search for stolen property" should be replaced by a reference to a search warrant in terms of section 21 of the Criminal Procedure Act 51 of 1977.

(b) The section should apply to the property of insolvent individuals and companies. (Par 5.42)

10. Uniform provisions should apply to the effect of sequestration or liquidation orders on property subject to attachment. (Par 6.7) Comments are invited on a provision such as the following (par 6.11):

Property or the proceeds of property which are in the hands of the sheriff or messenger of the court under a warrant of execution, should form part of the insolvent estate of a company or individual.

11. Comments are invited on a provision such as the following:

(a) The execution of a judgment awarded against a debtor, should be stayed as soon as the sheriff or messenger charged with the execution becomes aware of the sequestration or liquidation of the debtor's estate.

(b) If at the time of the stay of execution costs have already been incurred with regard to the sale in execution of an asset of the insolvent estate, the Master may

approve the continuation of the sale for the benefit of the insolvent estate subject to such conditions as he deems fit.

(c) The reasonable costs of such a sale in execution may be deducted from the proceeds of the sale.

(Par 7.35)

The liquidator should be entitled to reclaim the net amount of a payment to the execution creditor if he has been paid after the presentation of an application for sequestration or liquidation that was granted subsequently. (Par 6.18)

It is not necessary or desirable to provide by statute when an execution is put in force or completed. (Par 7.36)

12. Civil proceedings by or against a debtor, except proceedings that cannot affect the insolvent estate, should be stayed by the granting of a liquidation or sequestration order. There are insufficient grounds to make special provision for the stay of proceedings before the granting of a liquidation or sequestration order. (Par 7.21) Proceedings against a debtor, which are stayed by an insolvency order, may be continued with the consent of or after three weeks' notice in writing to the final liquidator. (Par 7.24)

13. Is it desirable to provide expressly that a liquidator may by notice to all other parties and the registrar substitute himself for the debtor in proceedings by or against the debtor? (Par 7.25)

14. Comments are invited on a provision such as the following:

The court may, upon the application of the liquidator or any creditor who has proved a claim, refuse that proceedings instituted against an insolvent estate be continued 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 would unreasonably delay the finalisation of the insolvent estate.

(Par 7.29)

15. The proving of a claim for costs incurred before insolvency should not be provided for specifically by statute. (Par 7.30)

16. The requirement that sequestration or liquidation orders be transmitted to officers who are in charge of registers of ships should be deleted. Comments are invited on a provision to the effect that the liquidator may have a caveat registered in a register of ships. (Par 9.8)

17. No amendments to the Alienation of Land Act are contemplated. (Par 10.96)

18. Comments are invited on a provision such as the following:

(a) If a debtor, before the sequestration or liquidation of his estate, sold and delivered any 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 over a period of more than one year and ownership of the said property would not pass to the purchaser until the full purchase price had been paid, the liquidator of such person's estate shall, within three weeks after receipt of written notice of the existence of such a contract from the purchaser, elect whether or not to abide by the terms of the contract.

(b) The liquidator shall, within the period of three weeks mentioned in subsection (1), inform the purchaser in

writing of his decision, failing which he shall be deemed to have elected to abide by the terms of the contract.

(c) If the liquidator elects not to abide by the terms of the contract he shall, when informing the purchaser of his decision -

(i) state the full balance outstanding in respect of the purchase price; and

(ii) inform the purchaser that he is entitled to obtain ownership of the property sold on payment of the said balance within such period as the liquidator may allow, which period shall not be less than thirty days.

(d) Ownership of the property shall pass to the purchaser upon payment by the purchaser of the balance contemplated in paragraph (a) of subsection (3) within the period contemplated in paragraph (b) of the subsection.

(Par 10.98)

19. Comments are invited on the substitution for subsections 37(2) and (3) of the Insolvency Act of the following:

(2) If the trustee does not within three months after having been advised in writing by the lessor of the existence of the lease notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have terminated the lease at the end of such three months.

(3) The rent due under any such lease, from the date of receipt of the written notice by the lessor contemplated in subsection (2) to the date of the termination or

cession thereof by the trustee, shall be included in the costs of sequestration: Provided that if the trustee has at any time made use of the leased property the rent due under such lease as from the date of such use shall be included in the costs of sequestration.

(Par 10.100)

20. Section 37(1) of the Insolvency Act should be amended to make it clear that it applies to a lease of immovable property and a lease of movable as well as immovable property. Should provisions similar to section 84 of the Insolvency Act apply to a lease of movables? (Par 10.101)

21. A lease may be continued or terminated by a final trustee in accordance with the directions of a meeting of creditors or, where directions have not been given by creditors, by the provisional or final trustee subject to the consent of the Master. (Par 10.102)

22. Does the application of the Insolvency Act to a lease or tenancy of property that is occupied by the insolvent and his family as a permanent residence lead to hardship in a significant number of cases? If so, what solutions should be investigated? (Par 10.103)

23. Should provision be made for the giving of security by the trustee for the due payment of rent if he is temporarily short of funds with which to pay it? (Par 10.104)

24. Should amendments be introduced regarding properties of an insolvent that are subject to unfavourable leases? (Par 10.105)

25. Should it be provided that a trustee may, within a certain period during which he is investigating the feasibility of completing an executory contract, perform certain acts in terms of the contract without thereby making the estate liable to fulfil

all the pre-sequestration obligations of the insolvent? (Par 10.112)

26. The effect of insolvency on retention moneys and moneys paid to the main contractor in the course of construction contracts must be determined according to the ordinary rules in the light of the terms of such contract. (Par 10.114)

27. Should executory contracts be terminated by insolvency unless otherwise provided in the Act? Comments are invited on all aspects of problems related to executory contracts. (Par 10.115)

28. The practical difficulties in the notarial execution and registration of prospecting contracts do not justify a departure from the existing position. (Par 10.117)

29. Comments are invited on the following general proposals:

1. The effect of insolvency on contracts should be the same for insolvent individuals and companies in liquidation.

2. Unless the contrary is stated expressly, any reference to a trustee in the present legislation should include a provisional and a final trustee.

3. Is it advisable to lay down general rules regarding the effect of insolvency on contracts in an Act? If so, proposals for the contents of such rules would be appreciated.

(Par 10.118)

1. INTRODUCTION

(a) Establishment of a project committee

1.1 The working committee of the Commission appointed Mr G G Smit, the member of the Commission acting as project leader, as a member and chairman of a project committee.

1.2 The Minister of Justice appointed the following persons members of the project committee:

Mr J N Coetzer, an attorney of Hoopstad.
Prof E de la Rey of the University of South Africa.
Mr A Hyman, a retired attorney nominated by the Standing Advisory Committee on Company law.
Mr G P Volschenk, Chief Master of the Supreme Court.
Mr R H Zulman, SC, of Johannesburg.

1.3 Not all interested groups can be represented on the project committee. All interested parties will, however, be given sufficient opportunity to express their points of view and to comment on the tentative proposals.

(b) Scope of the investigation

1.4 The Commission intends to review and modernise the Insolvency Act against the background of the common law rules that still apply to insolvency. It is intended, as far as possible, to include overlapping provisions regarding insolvency and the liquidation of legal persons in a single statute and to make provision for a uniform procedure for the application of such provisions.

1.5 The Commission has already completed an investigation regarding preferent claims in insolvency and has reported to the Minister of Justice thereon. The Commission feels that those

recommendations should not be held in abeyance pending the conclusion of this investigation. The Commission is also busy with an investigation into the giving of security by means of movable property.

1.6 The review of insolvency law is a big task. The project committee has decided to divide the investigation into subdivisions and to publish working papers for comments in respect of these subdivisions as and when the working papers are completed. This is the third of the working papers. The first dealt with the prerequisites for and alternatives to sequestration and the second with the qualifications, appointment and removal of liquidators. The following further subjects have been identified provisionally for investigation:

(i) Subjects that affect sequestration and liquidation

1. Voidable dispositions

2. The powers, duties and remuneration of liquidators

3. Meetings of creditors and members or contributories

4. Interrogations

5. Proof of claims

6. Secured creditors and the realisation of security

7. The application and distribution of assets (including preferent claims)

8. Contribution by creditors

9. Liquidators' accounts

10. Composition, compromise or moratorium

11. Jurisdiction, appeal and review

12. Offences

13. Transborder insolvencies

14. Agricultural credit

(ii) Subjects that affect individuals only

1. Assets excluded from insolvent estates

2. The effect of sequestration on the insolvent's person, his rights and liabilities and his spouse

3. Rehabilitation

4. Partnerships

(iii) Subjects that affect legal persons only

1. The effect of liquidation on officials

2. Judicial management

3. The dissolution and deregistration of legal persons

4. Provisions regarding close corporations

5. Provisions regarding other legal persons

(iv) Other legal notions

1. Trusts

2. Deceased estates

(v) Consolidation of provisions regarding insolvency in one Act

(c) Uniform provisions for individuals and companies

1.7 In Woodley v Guardian Assurance Co of S A Ltd[1] Colman, J, reasoned as follows:

> I would go further and suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those (of) the insolvency of an individual.

1.8 In the first working paper on the review of the law of insolvency[2] the project committee suggested that only those differences that are necessary as a result of material differences between a company and an individual should be retained and that uniform provisions should apply in other cases. The project committee still holds this view. To facilitate the drafting of uniform provisions terminology that can be used for sequestration and for the liquidation of companies is desirable.

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1 1976 1 SA 758 (W) 763D.

2 Working Paper 29 Prerequisites for and Alternatives to Sequestration par 4.133.

(d) Vocabulary

1.9 The meanings of certain phrases used in this working paper are indicated opposite them below. Sometimes the phraseology entails more than mere terminology, and comments on the meaning attached to these phrases would be appreciated.

Companies Act	Companies Act 61 of 1973, as amended.
debtor	Unless the contrary appears, the person whose estate has been sequestrated or the company under liquidation.
estate or insolvent estate	Unless the contrary appears, this includes the assets of an insolvent company under liquidation.
Insolvency Act	Insolvency Act 24 of 1936, as amended.
insolvency order	The court order that liquidates an insolvent company provisionally or sequestrates a person's estate provisionally.
liquidator	The provisional or final liquidator of an insolvent company or trustee of an insolvent estate. If a provisional or final liquidator only is intended, this is stated expressly.
Master	The Master of the Supreme Court.

2. THE EFFECT OF SEQUESTRATION OR LIQUIDATION ON THE ESTATE OR ASSETS

(a) Present position

2.1 Section 20(1) of the Insolvency Act provides as follows:

> 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 ....

2.2 Section 25 provides as follows:

> (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 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.
>
> (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.

2.3 Section 69(1) provides as follows:

> A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in sub-section (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.

2.4 According to the definition of "trustee" in section 2 this includes a provisional trustee unless inconsistent with the context. The final trustee will almost without exception be involved when a composition is accepted in terms of section 119 or when the insolvent is rehabilitated. The rest of the provisions set out above apply to a provisional trustee as well.

2.5 Section 361 of the Companies Act provides as follows:

> (1) In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.
>
> (2) In any winding-up of any company, at all times while the office of liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master.
>
> (3) If for any reason it appears expedient, the Court may by the winding-up order or by any subsequent order direct that all or any part of the property, immovable and movable (including rights of action), belonging to the company, or to trustees on its behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official capacity any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purpose of effectually winding-up the company and recovering its property.

There is a clear implication that the custody and control of the property pass to the final liquidator upon his appointment, irrespective of whether a provisional liquidator has been appointed.[1] The reference to "liquidator" in subsection (3) includes a provisional liquidator.[2]

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1 Henochsberg 632.

2 Ibid 633.

2.6 Section 391 of the Companies Act provides as follows:

> 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.

Only the final liquidator will usually pay costs and creditors.[3]

(b) Position in other countries

(i) England and Wales

2.7 Section 306 of the Insolvency Act 1986 provides that the bankrupt's estate shall vest in the (final) trustee immediately on his appointment or in the Official Receiver on his becoming trustee, without any conveyance, assignment or transfer.

2.8 When a bankruptcy order has been made the bankrupt is required to deliver possession of his estate to the Official Receiver and, in the case of things that cannot be delivered to the Official Receiver or that may be claimed by the trustee, to do all things reasonably required by the Official Receiver for their protection. These provisions do not apply where a trustee is appointed immediately (for instance in the case of "criminal bankruptcy" or "summary administration").[4] The estate is protected and managed by the Official Receiver during the period between sequestration and vesting in the trustee.[5] While there

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3 Cf Henochsberg 690.

4 Sec 291 Insolvency Act 1986

5 Sec 287.

is a vacancy in the office of trustee the Official Receiver is the trustee.[6]

2.9 Where a winding-up order has been made or a provisional liquidator has been appointed before liquidation, the liquidator or provisional liquidator takes the property of the company into his custody or under his control.[7] The court may on the application of the liquidator direct that all or any part of the company's property shall vest in the liquidator.[8] After liquidation or during any vacancy in the office of liquidator the Official Receiver becomes liquidator until another person is appointed.[9]

2.10 The Cork Report states that vesting orders in the case of companies are "extremely rare".[10] Regarding the difference that the property of a company does not vest in the liquidator as in the case of bankruptcy, the report states that this distinction has no practical significance in relation to the disposal of the company's property. In terms of the Joint Stock Companies Winding-Up Acts 1848-49 the company's assets vested in the manager automatically.[11] At that stage there was no clear distinction between a company and a partnership.

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6 Sec 300(2).

7 Sec 144(1).

8 Sec 145(1).

9 Sec 136(2) and (3).

10 Par 1095 at 251.

11 Palmer's Company Law 24th edition London: Stevens & Sons 1987 at 1408.

(ii) Scotland

2.11 In Scotland the estate does not vest in the interim trustee. He may give directions to the debtor regarding the management of his estate and require that he deliver money or valuables or place these in safe custody.[12] Apparently the interim trustee himself cannot do much if the debtor has absconded. In terms of section 31 of the Bankruptcy (Scotland) Act 1985 "the whole estate of the debtor shall vest as at the date of sequestration in the permanent trustee for the benefit of creditors".

2.12 The provisions for the liquidation of a company in England and Wales apply to Scotland as well, with an occasional adjustment to provide for the fact that there is no Official Receiver in Scotland. Section 144(2) of the Insolvency Act 1986 provides that property of a company liquidated in Scotland is deemed to be in the custody of the court for so long as there is no liquidator.

(iii) The United States of America

2.13 Section 541 of the Bankruptcy Code provides that the commencement of a case creates an estate. In terms of section 542 property must (with certain exceptions) be delivered to the trustee and accounted for to him. The trustee is the representative of the estate.[13] These provisions apply to individuals as well as companies.

(iv) European continent

2.14 In France, Belgium, Luxembourg, Italy, West Germany and the Netherlands the debtor loses possession of his estate but

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12 Sec 18 Bankruptcy (Scotland) Act 1985.

13 Sec 323.

technically he remains the owner. The trustee disposes of and controls the estate.[14]

(c) Discussion and provisional recommendations

2.15 Except for assets subject to attachment, which are discussed in paragraph 6 below, the assets that ought to form part of an insolvent estate are not discussed in this working paper. A proposal by an attorney that part of the estate should be released to enable the debtor to oppose the final order will be discussed in a subsequent working paper.

2.16 The provisions that the estate of an insolvent or the custody and control of a company's property pass to the Master are mere technicalities and do not result in the Master performing any acts in respect of the property. At sequestration or liquidation the custody and control of property are taken away from the persons who exercised it previously. Because custody and control must technically be vested in someone, and there is not always a liquidator, it is provided that the estate or control and custody vest in the Master.

2.17 The Commission did not receive comments on the vesting of the insolvent estate or the custody and control of a company's assets. In practice the provisions rarely give rise to problems. The only question discussed here is whether the difference between the provisions applicable to individuals and companies is justified. The project committee's point of departure is that differences between the provisions for individuals and companies should be confined to the minimum.

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14 Dalhuisen 2-50 et seq and 3-323 et seq.

2.18 As in England and Wales[15], the difference between the provisions for companies and individuals has little practical significance in South Africa.

2.19 Applications in terms of section 361(3) of the Companies Act that the court should order property of a company to vest in the liquidator in his official capacity occur rarely, if ever. According to Henochsberg[16], such an application may be necessary because no legal proceedings on behalf of the company may be instituted or defended until the appointment of a final liquidator or until the liquidator has obtained authority from creditors or the Master. If a provisional or final liquidator obtains a vesting order he is able to institute legal proceedings in his official capacity (not in the name of the company) and thereby recover assets or resist any attempt to dispossess the company.

2.20 The following arguments can be advanced in support of different provisions for individuals and companies:

(1) The difference is based on essential differences between an individual and a company. Corporate functions must of necessity be performed by human functionaries.[17] In the case of liquidation it is convenient to provide that the company's functions will after liquidation be exercised by the Master or the liquidator. In the case of individuals there is no commonplace distinction between the person and the entity that acts on his behalf. Certain assets are released to an individual to enable his rehabilitation as a productive member of society.

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15 Par 2.10 above.

16 633.

17 Corporate Law 170.

This objective does not apply in the case of a company.[18]

(2) The distinction has applied since the first legislation on the liquidation of companies in South Africa.[19] An amendment could have unforeseen results.

(3) Although the provisions for individuals and companies differ, the way in which a company's or an individual's assets are dealt with does not differ much in practice and the provisions do not really give rise to problems.

2.21 The following arguments can be advanced in favour of uniform provisions for individuals and companies:

1. The differences between individuals and companies are not in this regard so significant as to justify different provisions. In the overseas systems reviewed only English law and the systems based on English law contain different provisions. According to an English Act of 1844 companies were subject to bankruptcy law. There was uncertainty as to whether the Court of Chancery or the Court of Bankruptcy had jurisdiction. This confusion was cleared up in 1856 by enactment of separate provisions for the liquidation of companies and the bankruptcy of individuals. Gower comments on this as follows:[20]

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18 Cf Cork Report par 1096 at 251.

19 Cf sec X1 Winding-up Act 12 of 1868 and sec 46, 47 and 48 of the Insolvent Estates Ordinance 6 of 1843. In a few cases, eg Dantex Investment Holdings v National Explosives 1990 1 SA 736 (A) 748F, it was stated that in terms of the Companies Act 46 of 1926 the assets of a company in liquidation vested in the liquidator, but see sec 124(3)(b) and 213 of that Act.

20 Gower's Principles of Modern Company Law fourth edition by L C B Gower, J B Cronin, A J Easson & Lord Medderburn of Charlton, London: Stevens & Sons 1979 at 43.

It is to these historical accidents that we owe the distinction drawn in English law (but unknown to most other systems) between bankruptcy and liquidation.

(2) The differences between the provisions have lead to the court deciding that the position in the case of liquidation differs drastically from that in the case of insolvency. (See the discussion in paragraph 4.6 below.) Uniform provisions would remove any doubt as to whether the position in the case of liquidation differs from that in the case of insolvency.

(3) Uniform provisions regarding the effect of liquidation and sequestration on property would facilitate the drafting of other provisions.

2.22 The provisional view of the project committee is that uniform provisions should apply for individuals and companies.

2.23 Assuming that uniform provisions should apply, a choice must be made from the following:

1. 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.

2. The rule at present applicable to insolvencies or a similar rule - the assets vest in the Master and later in the liquidator. It is possible that assets revest in the debtor at a later stage.

3. A new system, like that in the United States, in terms of which an estate with the liquidator as representative is brought about.

2.24 In most of the European continent a system is in force that is similar to the system at present applicable to companies in South Africa. The debtor loses possession of his estate and the liquidator disposes of and controls the estate. Such a system has been put to the test in South Africa and does not cause many problems. An arrangement that assets revest on insolvency is to a certain extent artificial. There is no immediate delivery or transfer. If it is provided that the debtor's assets are in the custody and under the control of the Master or the liquidator, to deal with in terms of the Act, the continued vesting of the assets in the debtor would probably not give rise to problems. At the death of a debtor there would be uncertainty, as at the death of any person, about the ownership of the estate, but this uncertainty does not cause problems in practice.

2.25 It was pointed out above that applications to court for an order that the company's property vest in the liquidator rarely, if ever, occur. The provisional view of the project committee is that it is not desirable to retain such a provision and that the liquidator should be empowered to act on behalf of the estate in certain cases, possibly with the consent of the court.[21] This matter will be dealt with when the powers and duties of a liquidator are discussed in a subsequent working paper. The same applies to the requirement in section 69(1) of the Insolvency Act that the trustee must furnish the Master with a valuation of movable property.

2.26 Comments are invited on a provision such as the following:

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21 Cf par 2.19 above.

1. On the granting of an insolvency order[22] the insolvent estate is deemed to be in the custody and under the control of the Master until a provisional liquidator is appointed.[23]

2. On the appointment of a liquidator[24] the custody of and control over the insolvent estate pass to him.

3. At all times when there is no liquidator who is qualified and able to exercise control over the insolvent estate the custody of and control over the insolvent estate vest in the Master.

4. The insolvent estate remains under the custody and control of the liquidator or the Master until custody and control pass to the debtor or someone else according to law.

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22 See par 1.9 above. If the voluntary liquidation of insolvent companies is retained, provision will have to be made accordingly.

23 It is assumed that the Master will always appoint a provisional liquidator. See par 4.1 below.

24 See par 1.9 above. Liquidator means a provisional or final liquidator.

3. NOTICE OF LIQUIDATION OR SEQUESTRATION ORDER

3.1 In terms of section 17(1)(a) of the Insolvency Act the Registrar of the Supreme Court transmits 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. According to the definition in section 2 "sequestration order" includes a provisional order when it has not been set aside.

3.2 Section 17(1)(b) provides that the Registrar shall transmit "one original of every provisional sequestration order or if a final sequestration order was not 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" the deputy sheriff of every district in which the insolvent resides or owns property, every Registrar of Deeds, every officer having charge of a register of ships kept at a port of registry, and every sheriff and messenger who holds property belonging to the insolvent estate under attachment.

3.3 Section 14 of the Companies Act provides that the Registrar of the Supreme Court shall transmit a copy of any order relating to the winding-up or judicial management of a company to the Master. In terms of section 357 the Registrar shall forthwith transmit a copy of every winding-up order, whether provisional or final, and any order staying, amending or setting such order aside to the sheriff of the province in which the registered office of the company or the main office of the body corporate is situate, to the sheriff of every province in which it appears that the company or body corporate owns property, to every registrar or other officer charged with the maintenance of any register in respect of any property within the Republic which appears to be an asset of such company, and to the messenger of every magistrate's court by order whereof it appears that property of such company is under attachment.

3.4 In a previous working paper[1] it was suggested that certain procedures in the case of voluntary surrender should be brought into line with procedures for compulsory sequestration and that a provisional order should usually be issued first. In the discussion that follows it is assumed that there will always be a provisional order. If this does not happen the proposals would have to be adjusted to provide for sequestration without a provisional order.

3.5 This investigation does not deal with members' voluntary winding-up. In the previous working paper[2] comments were invited on a proposal to do away with "voluntary winding-up by creditors". In the discussion that follows the procedures regarding provisional liquidation orders are discussed. If a provisional liquidation order were not required for each case of liquidation the recommendations would have to be adjusted to provide for liquidation without such an order (by a final order or a resolution by members).

3.6 The provisional liquidation or sequestration order is transmitted to the Master, certain sheriffs, the Registrars of Deeds and the holders of a register of ships. The actions of each of these persons on receipt of the court orders are discussed below. Usually these actions have an effect on the property of the insolvent estate.

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1 Par 5.58 at 141 of Working Paper 29 Prerequisites for and Alternatives to Sequestration.

2 Par 5.99 at 146.

4. MASTER - PROVISIONAL APPOINTMENT AND NOTICE IN GOVERNMENT GAZETTE

4.1 At present the Master considers whether he should appoint a provisional liquidator on receipt of the provisional order. In the case of the liquidation of a company the Master almost inevitably appoints a provisional liquidator, but in the case of the sequestration of an individual's estate he appoints a provisional trustee only if urgent action is necessary. In the previous working papers it was recommended that the Master should always appoint a provisional liquidator irrespective of whether an individual or a company is involved. The provisional liquidator must take control of the assets of the insolvent estate.

4.2 The notice in the Government Gazette does not directly affect assets, but for the sake of convenience it is discussed here. The purpose of the notice is to inform creditors and others of the sequestration or liquidation. Although the average person does not read the Government Gazette, publication in the Government Gazette serves an important function. Any person or body to whom specific notices, such as notice of sequestration or liquidation, are important can, at little cost and with the inconvenience of a short weekly routine, ensure that he sees the notice. The notice appears at least two weeks after the order and it is not exceptional that the notice appears after the return date of the provisional order. The Master often receives the provisional order from candidates for the office of provisional liquidator before he receives it from the Registrar.

4.3 There are other ways as well in which insolvency orders are made known. Candidates for the office of liquidator approach creditors to solicit support for their appointment as liquidator. In a previous working paper comments were invited on the question of whether this practice should be legalised. The candidates do not necessarily approach all creditors. Private businesses publish details of judgments and liquidation and sequestration

orders by the day, week, etc. The cost involved is a few hundred rand per month. For small businesses and individuals with few creditors this specialised and rapid service is not cost effective.

4.4 In consequence of insolvency seminars presented by the Association of Law Societies of the Republic of South Africa, an attorney from the Eastern Cape proposed that notice of sequestration should, as in the case of liquidation, be given to all known creditors. He complained about a case in which proceedings were instituted against a surety but a special plea was raised that the respondent had been sequestrated a year before.

4.5 Not all the divisions of the Supreme Court require personal service of provisional liquidation on all known creditors.[1] The standard order for provisional sequestration in the Transvaal[2] does not provide for notice to any person other than the respondent, while the standard order for provisional liquidation directs that a provisional order shall "be published forthwith once in the Government Gazette and in a Transvaal daily newspaper".[3] In a previous working paper[4] serious doubt was expressed about the usefulness of legal notices in a newspaper. It is not clear why some court orders require a notice in the Government Gazette while the Act already prescribes this. The reason may be to ensure that publication takes place before the return date. There are cases in which the applicant has little knowledge of the respondent's creditors, and in such cases the usefulness of notice to known creditors can be questioned.

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1 Cf Ex parte Clifford Homes Construction 1989 4 SA 610 (W).

2 Practice Manual Z8 at 47.

3 Z7 at 46.

4 Par 4.38 at 35 Working Paper 29 Prerequisites for and Alternatives to Sequestration.

4.6 It is submitted that notice of liquidation or sequestration should be given in the Government Gazette as soon as possible. The practical implementation of this recommendation will receive attention once the proposed procedures have been decided upon.

4.7 Section 81(1)*bis*(a) of the Insolvency Act provides that the trustee shall before the second meeting send a copy of his report and certain documents by registered post to each creditor whose name and address are known to him. The Companies Act does not contain a similar provision. Section 406(3) of the Companies Act provides that the liquidator shall give notice that an account will be open for inspection to every creditor who has proved a claim.

4.8 It appears to be desirable that personal notice should at some stage be given to all creditors in the case of a company and of an individual. The proper person to send the notice is the liquidator and the most suitable time is when he reports to the creditors. It is recommended that a liquidator of an insolvent estate or company should send a copy of his report to all creditors whose names and addresses are known to him or could reasonably be ascertained by him.

5. SHERIFF - SERVICE OF ORDER AND ATTACHMENT

(a) Present position

5.1 The Insolvency Act does not prescribe how a provisional sequestration order should be served on the debtor. Unless the court issues special directions, service must be in accordance with the rules of court.[1] Rule 4 of the Uniform Rules of Court makes provision for personal service, service at the place of residence, business or employment, etc. Section 11(2) of the Insolvency Act provides that if the debtor has been absent for 21 days from his usual place of residence and of his business (if any) within the Republic, the court may direct that the rule be served by affixing a copy at the door of the court and publishing it in the Government Gazette, or the court may direct some other mode of service.

5.2 The provisions of section 11(2) are directory and not peremptory.[2] Whether a sequestrating creditor who knows that the debtor is absent from the court's area of jurisdiction should apply to the court for directions as to service, depends upon the circumstances. If the creditor has reason to believe that service in the usual way is unlikely to come to the notice of the debtor he should apply to court for directions as to service.[3] If the service was a good one, it remains so even if it has not come to the debtor's notice.[4]

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1 Asmal Wholesalers (Pty) Ltd v Dawood 1963 1 SA 250 (N) 253G.

2 Ibid 254 C.

3 Ibid 256A.

4 Ibid 256F.

5.3 Section 19 of the Insolvency Act provides as follows:

(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 offence constituted by section one hundred and forty-two and the penalty provided therefor;

(d) 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.

(1)*bis* If an insolvent has in reply to the deputy sheriff's enquiry intimated that the list referred to in paragraph (d) of sub-section (1) is a complete list of the books and records relating to his affairs, the books and records referred to in such list shall, unless the contrary is proved, in any criminal proceedings against him under this Act, be deemed to be the only books and records maintained by him.

(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.

(3) 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 sub-section (1);

(b) as soon as possible after the appointment of the trustee, submit a copy of such inventory to him.

(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.

(5) The deputy-sheriff shall be entitled to fees taxed by the Master according to tariff A in the Second Schedule to this Act and the rules for the construction of that tariff.

(6) The Minister of Justice may by notice in the Gazette amend the said tariff A and rules.

5.4 Section 69(1)[5] of the Insolvency Act provides that a trustee (which includes a provisional trustee) shall, as soon as possible after his appointment, but not before the deputy sheriff has made his inventory, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee.

5.5 In the case of the winding-up of a company, regulation 2 of the Companies Act regulations for winding-up and judicial management[6] provides that the sheriff shall attach movable assets of a company under liquidation if the Master so directs. When effecting an attachment the sheriff must follow as far as possible the procedure laid down in section 19 of the Insolvency Act and he is entitled to the fees and preference that apply in the case of insolvency. The liquidator need not wait for the

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5 Quoted in par 2.3 above.

6 R.2490 Government Gazette 4128 of 28 December 1973.

sheriff before he takes possession of movables.[7] Rule 4(1)(a)(v) of the Uniform Rules of Court provides that the sheriff shall serve a process of court on a corporation or company by delivering a copy to a responsible employee at its registered office or principal place of business within the court's jurisdiction or, if there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or "in any manner provided by law". Apparently section 11(2) of the Insolvency Act does not apply in the case of a company because a company as debtor can hardly be absent from its place of residence or business within the Republic.

(b) Comments received

5.6 Seven persons or bodies commented on attachment by the deputy sheriff in terms of section 19 and not one of them was satisfied with the present position.

5.7 The commercial units of the South African Police in Cape Town and Klerksdorp say that deputy sheriffs do not comply with the provisions of section 19, with the result that prosecutions cannot be instituted or the State's burden of proof becomes heavier. Because the failure by deputy sheriffs to comply with these provisions is not an offence, this failure cannot be combated.

5.8 In consequence of seminars on insolvency law presented by the Association of Law Societies, an attorney from Cape Town urged that attachments should be executed better with particular reference to the making of inventories, which are sometimes not drawn up or are found to be incomplete.

5.9 Mr Ensor, an experienced insolvency practitioner from Natal, says that in general the execution by deputy sheriffs of the provisions of section 19 is extremely poor. In a great many

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[7] Sec 391 Companies Act quoted in par 2.6 supra.

instances no attachment is made and no report is filed with the Master. Where an attachment is made, the deputy sheriff's inventory, particularly in regard to business undertakings, is of no real use. "1 quantity of buttons" may, for instance, be plastic buttons at 10c a dozen or brass buttons at R1,00 each and it may be 1 000 or 50 000. The appraiser must invariably base his valuation on the trustee's stock sheets, and this apparently defeats the object of the provision. The procedure in the case of companies, namely that an attachment is made by the deputy sheriff only if the Master so directs, works quite satisfactorily and Mr Ensor suggests that the same procedure should apply to insolvent estates. In the case of companies as well as individuals the Master should have the right to prescribe the manner in which the inventory is to be taken.

5.10 The South African Institute of Chartered Accountants says that the order is served but that very few deputy sheriffs attach property and send a inventory to the Master and the trustee. According to the Institute, many deputy sheriffs consider that an attachment should only be made after the final sequestration order. The Institute suggests that the Act should state clearly that the attachment must be of all the assets of the insolvent and the solvent spouse. (The position of the insolvent's spouse will be discussed in a later working paper.)

5.11 The Cape Town branch of the Association of Insolvency Practitioners of Southern Africa says it is imperative that a provisional trustee should forthwith take charge of all assets of the insolvent and not wait for the deputy sheriff's inventory. Deputy sheriffs frequently fail to prepare such an inventory or it takes a number of months before they do so. In this way assets may disappear or their value may decline. The diligent trustee who forthwith takes charge of the assets in order to avoid any prejudice is running foul of the law. If the deputy sheriff does not have a valuation made the trustee should have a discretion to decide whether a valuation is necessary.

5.12 The South African Association of Deputy Sheriffs says that since the establishment of the Association the Board has received continual complaints about the unsatisfactory operation of section 19 and that this item has been a discussion point on the agenda of each year's annual meeting. An ad hoc committee of four members, with considerable experience in larger centres where insolvencies are common, gave the profession's views and made proposals.

Section 19 does not differ much from section 18 in the 1916 Act. At that time there were no professional liquidators who made big business out of insolvent estates. Even 20 to 30 years ago fierce competition for provisional appointments was unheard of. The Master rarely made a provisional appointment. In terms of the 1916 Act the court made such appointments. It is essential that someone should attach the assets of the insolvent and exercise control over them after insolvency. The Association is of the opinion that this function should at present be assigned to the provisional trustee, as in fact already happens almost without exception. 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 a list of movable assets, make arrangements for the custody of the assets, take possession of the books, etc.

A considerable time elapses before the deputy sheriff receives the documents, and he then has to perform his duties in terms of section 19.

First, he must attach all movable assets. He does not know which movable assets belong to the insolvent. In the case of a voluntary surrender he may obtain the insolvent's statement of affairs. Voluntary surrender is so difficult and complicated that debtors are usually advised to arrange a friendly compulsory sequestration, often with the spouse or some other member of the family as sequestrating creditor. The deputy sheriff has to accept the word of the insolvent when he points out assets or says that assets in his possession belong to someone else. Some deputy sheriffs

believe that they are obliged to search for assets that may be hidden, but the Association is of the view that this should be the trustee's duty. Although the deputy sheriff formally attaches the insolvent's property and serves the order on the insolvent and his spouse, he is like after death the doctor because those concerned already know about the sequestration and the provisional liquidator has already drawn up an inventory and attached the books.

In terms of section 2 of the Insolvency Act a "sequestration order" includes a provisional order when it has not been set aside. The Association raises the question of whether it is appropriate to do all that section 19 requires while the order may well be set aside on the return date, as in fact often happens. (According to a survey conducted in the Office of the Master, Pretoria, 15,8% of all compulsory sequestrations are set aside.)[8]

The Association says that section 19(1)(a) and (d) appear to be acceptable on paper but that they are in fact useless and frustrating provisions. In terms of these provisions the deputy sheriff "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", he shall make a detailed list of these and endorse thereon any explanation offered by the insolvent in respect thereof or in respect of books and records that he is unable to produce. The section does not specify for how many years previously this should be done and in the case of a business this amounts to <u>all</u> the papers in the insolvent's possession. The result is that the deputy sheriff puts thousands of papers that have nothing to do with the insolvency into boxes and takes them to his office, where storage space is limited. Usually he has trouble to get the trustee to fetch the records because the trustee has no interest in them. The deputy sheriff is not allowed to charge for storage. It takes him several days to make a detailed list as required by section 19(1)(d).

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8 Schedule 2 Working Paper 29 <u>Prerequisites for and Alternatives to Sequestration</u>.

He is expected to do this at R5,00 per hour, and no-one even looks at the lists. The result is that most deputy sheriffs ignore these provisions.

The Act does not specify who should pay the deputy sheriff's fees. The trustee will not pay until his account has been approved eventually. The applicant's attorney refuses to pay because he did not give any directions. According to the Association, no-one is responsible for the account if the application is set aside on the return date or at the request of the Master. All deputy sheriffs vouch for the frustration experienced in collecting these amounts, which are usually trifling.

The profession regards the tariff of fees in the Schedule to the Insolvency Act completely insufficient for what is expected from the sheriffs. The Association believes that the tariffs in rule 68 of the Uniform Rules of Court were wrongly used as a basis for different duties prescribed in another Act. If the duties of the sheriffs are retained the Association wishes to make representations regarding their fees.

All the members of the Association who gave their views on section 19 mentioned their intense frustration and not one asked that section 19 should be retained unchanged. The considered opinion of the Association is that section 19 in its present form is an anachronism for which there is no place in a modern Insolvency Act. The respective duties of the provisional trustee and the deputy sheriff regarding the attachment, taking possession and custody of assets should be set out in detail. A practical arrangement would be to give the Master authority to issue a writ to the deputy sheriff to perform clearly defined acts, such as the attachment or custody of assets.

(c) Discussion and provisional proposals

5.13 It is clearly advisable that the debtor should receive notice of the insolvency order and that movables are to be at-

tached as soon as possible. The question is what would be the best way to bring this about in practice.

5.14 In practice, liquidators make an inventory of the property of the insolvent estate as soon as possible after their appointment. Sections 71(1) of the Insolvency Act and 393(1) of the Companies Act provide that the trustee or liquidator shall keep a record of all moneys, goods, books, accounts and other documents received by him on behalf of an insolvent estate. On the assumption that the Master will always make a provisional appointment, it can be accepted that the provisional liquidator will receive the court order shortly after it has been granted. The first possibility which will be discussed is that the present practice should be retained but that the procedure should be embodied in legislation. The procedure applicable in the case of ordinary attachments by the sheriff is taken as a starting point.

5.15 According to Magistrate's Court rule 41 the sheriff attaches movable property by making an inventory. The sheriff leaves movable property in the possession of the debtor unless the execution creditor or warrant instructs otherwise. In terms of rule 41(1)(a) the sheriff goes to the residence, place of employment or business of the execution debtor or to some other place pointed out by the execution creditor with a view to attachment as soon as circumstances permit. The sheriff is not liable if he attaches property of another person in the possession of the execution debtor, unless he knew that the property belonged to another person. This is because property in the possession of the execution debtor is deemed to belong to him.[9] Should the sheriff be in doubt as to the validity of any attachment he may require that the execution creditor give security to indemnify him.[10] In terms of rule 41(2) the sheriff may open any door on any premises or of any piece of furniture if this is refused or if

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9 Weeks v. Amalgamated Agencies Ltd 1920 AD 218 at 226.

10 Rule 38.

the debtor or his representative is absent. If necessary he may use force to that end. In any case where resistance is met or is reasonably expected, the sheriff may call upon the police for assistance.[11]

5.17 In terms of section 69 of the Insolvency Act the trustee may apply to a magistrate for a search warrant if he has reason to believe that property or a book or document is being concealed or otherwise unlawfully withheld. Such a warrant "shall be executed in a like manner as a warrant to search for stolen property". It appears that the section referred to section 49(1)(a) of the Criminal Procedure and Evidence Act 31 of 1917. Such a warrant was executed by the police. Section 20 of the Criminal Procedure Act 51 of 1977 does not refer to a warrant to search for stolen property.

5.18 Section 24(2) of the Insolvency Act provides that when an insolvent has acquired the possession of property, such property shall, if claimed by the trustee, be rebuttably presumed to belong to the estate unless a person who became a creditor after sequestration, and who claims a right to the property, alleges that the property does not belong to the estate, in which case it is rebuttably presumed that the property does not belong to the estate. It appears that these presumptions apply only to property acquired after sequestration.

First alternative: Present practice to be set out by statute

5.19 The presumption that property in the possession of the debtor belongs to his insolvent estate, is realistic. It is probably not desirable to give a liquidator the wide powers available to a sheriff, for instance to use force. The basic rule should be that a liquidator should as soon as possible after his appointment attach all property in possession of the insolvent at his residence, place of employment or business. If the liquidator

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11 Rule 8(3).

does not wish to perform these duties himself he should appoint someone for whose acts he accepts responsibility to do so on his behalf. If it appears that some of the property does not belong to the insolvent estate the liquidator should not attach the property or keep it under attachment, but should hand it over to the person who claims it. The liquidator should attach the property, books and records by making an inventory thereof and handing a copy to the insolvent or leaving it at the premises where the property has been attached. If reasonably possible, the insolvent or his representative should be afforded the opportunity to be present during the attachment. If the insolvent or his representative is present he should sign the original inventory and any comment which he may have on the inventory or assets of the insolvent estate that is not included in the inventory should be attached to the inventory. If the liquidator deems it advisable he may take the property attached into his personal possession or appoint a suitable person to keep the property in his custody. The liquidator may direct the sheriff to attach property in possession of the insolvent or the company. Comments are invited on the question of whether the liquidator should indemnify the sheriff should he direct him to attach property that is not in the possession of the insolvent or the company.

5.20 In terms of section 134 a person who is subsequently declared insolvent commits an offence if his occupation or transactions were such that he might reasonably have been expected to keep a record of his transactions and he has failed to do so. In terms of section 132 an insolvent commits an offence if before or after insolvency he conceals, parts with, destroys or falsifies a book or document relating to his business, property or affairs.

5.21 The Association of Deputy Sheriffs submits in its comments that the provisions of section 19(1)(a) of the Insolvency Act are too broad in cases where the debtor had an extensive business. According to the Association it is unrealistic in such cases to attach all the books, vouchers and business correspondence. Section 69 provides that a trustee shall after attachment

by the sheriff take all the books and documents into his possession or under his control. A possible solution would be to provide that all the records, stock sheets, balance sheets, invoices and cheque books that should be kept in terms of the penal provision should be attached. According to the present wording it would, however, not always be possible to determine at the time of attachment which documents should be kept in terms of the penal provision.

5.22 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 possession relating to the estate. Section 422 of the Companies Act provides that when a company has been wound up and is about to be dissolved the books and papers may in the case of a winding-up by the court be disposed of by the liquidator in such way as the Master may direct. After five years from the dissolution of the company no responsibility rests on the liquidator, or any person to whom the custody of the books and papers has been committed, by reason of the books and papers not being available. When the affairs of a company have been completely wound up the Master must transmit a certificate to that effect to the Registrar of Companies and the liquidator. On receipt of the certificate the Registrar records the dissolution of the company.[12] The Master transmits his certificate after confirmation of the final account.

5.23 If an insolvent carried on business or entered into a considerable number of transactions before his insolvency his liquidator needs the books and vouchers of the insolvent in order to investigate his affairs and transactions. Should a criminal prosecution be instituted, it is necessary to determine which books were kept by the insolvent and what happened to them. There

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12 Sec 419.

is no real problem if the insolvent did not have many books or vouchers. If his business transactions were extensive, the identification and custody of the books and vouchers create a problem.

5.24 Although problems may arise if all books and vouchers are attached, it is impossible to determine at the time of attachment which books and vouchers will be of importance and to attach those documents only. It is suggested that the recommendation in paragraph 5.19 above or 5.36 below regarding property of the insolvent should apply in respect of books and financial records of the insolvent as well.

5.25 Storage space for books and papers is scarce and expensive. The books and papers should not be stored for longer than is necessary. For the sake of convenience the destruction of documents is discussed here. The administration of an insolvent estate is usually finalised to a large extent when the final liquidation and distribution account has been confirmed. In the case of an individual it is advisable to retain certain documents in order to report meaningfully on any application for rehabilitation. This consideration does not apply to a company, where dissolution puts an end to the legal personality of the company. In both cases documents sometimes have to be retained to serve as vouchers or to assist in the investigation with a view to a prosecution.

5.26 At present the Master's consent or directions are required before documents may be destroyed. The Master checks whether the statutory requirements for destruction have been met and sometimes sets requirements. Although the Insolvency Act does not provide for a notice in the Government Gazette the regulations prescribe a form (Form No 7) for a notice that the trustee will destroy the documents relating to the insolvent estate after six weeks from the date of publication in the Gazette. It seems that the Master's consent or directions are mere formalities that entail unnecessary delay and work. The Master has to rely on the

liquidator because he does not know himself which books and documents should perhaps be retained. The usefulness of the notice in the Government Gazette can be questioned.

5.27 Comments are invited on a provision such as the following:

> The liquidator of an insolvent estate[13] may, after three years have elapsed since the confirmation of the final liquidation and distribution account, destroy all documents relating to the insolvent estate unless the Master consents to the earlier destruction of the documents or directs that the documents should be kept longer.

5.28 Documents or correspondence received by a debtor after insolvency may be of value to the liquidator. In terms of section 17 of an ordinance that was accepted in Amsterdam in 1777 the post office was directed to send all the debtor's post to the sequestrators after sequestration. In terms of section 371 of the English Insolvency Act 1986 the court may order the post office to deliver a bankrupt's post to the trustee for such period, not exceeding three months, as the court may specify. In the case of a company the liquidator can without much trouble ensure that the company's post is opened by himself or his representative.

5.29 In the case of an individual it is a violation of his privacy if all his post is received by his liquidator. It would probably not be practicable to provide that post of interest to the liquidator of the insolvent estate should be handed to him. It would be difficult to enforce a provision to the effect that the insolvent should hand over such post to the liquidator. Should it be provided that the court may order that the post be handed to the liquidator, the cost of an application to court would seldom be justified. The practical problems that the redirection of post entails for the post office should be borne in

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13 Whether it is the estate of an individual or a company.

mind. Although comments are invited in this regard, the provisional view of the project committee is that a provision to the effect that the insolvent's post should be handed to the liquidator is not desirable.

5.30 At present the sheriff serves the sequestration order on the debtor. It was accepted above that the liquidator should attach the insolvent estate as soon as possible. It would save time and expense if the liquidator himself served the court order. Regulation 4(2)[14] 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.

5.31 It is proposed that the liquidator may serve the sequestration order on the debtor by handing it to him personally. In the case of a company the liquidation order may be served by handing it to the managing director, director, or secretary of the company. As recommended above, the liquidator may appoint someone for whose acts he accepts responsibility to effect service on his behalf or he may direct the sheriff to serve an insolvency order.

Second alternative: The sheriff continues to make attachments and serve orders

5.32 It may be argued that the liquidator should not exercise functions that belong formally to an officer of the court.

5.33 According to regulation 2 for the liquidation of companies[15] the sheriff attaches movable assets of a company only if the Master so directs.

5.34 In theory it is desirable that in addition to the liquidator an impartial person should be present during attachment.

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14 R.1379 in Regulation Gazette 115 of 24 August 1962.

15 R.2490 Government Gazette 4128 of 28 December 1973.

From time to time there are complaints that not all the movable assets have been realised for the benefit of the insolvent estate. As a rule it is not possible to investigate such complaints properly or for a liquidator to avoid arousing suspicion if only the liquidator or his representative and the debtor or his employees were involved. The question is whether it is feasible in practice for the sheriff and the provisional liquidator to be involved in the attachment, or for the sheriff to do the attachment in all cases.

5.35 For the period 1 July 1987 to 30 June 1988 a total of 5 027 sequestrations and liquidations were registered with the Master (about 97 per week). The figures for each office were as follows:

Pretoria	3 103 (60 per week)
Cape Town	676 (13 per week)
Bloemfontein	435 (8 per week)
Pietermaritzburg	460 (9 per week)
Grahamstown	257 (5 per week)
Kimberley	96 (2 per week)

5.36 Attachment is an urgent matter and arrangements to suit both the liquidator and the sheriff would take time. The sheriff should receive reasonable remuneration for work done by him. Comments are invited on a proposal that the liquidator should in all cases direct the sheriff to serve the insolvency order and attach the property, books and records of the insolvent estate. The liquidator or his representative should be afforded the opportunity to be present during attachment and to give directions to the sheriff. The question of whether the liquidator should indemnify the sheriff if he directs him to attach property that is not in the possession of the insolvent or company is also relevant here.

5.37 The provisional view of the project committee is that the second alternative is preferable.

5.38 The fees of the sheriff and the payment of these fees will be discussed in a subsequent working paper.[16]

5.39 The question discussed next is whether a provision similar to section 69 of the Insolvency Act, viz that a magistrate may issue a warrant to search for property, should be retained. Apparently this power is not exercised frequently at present.

5.40 This provision has been described as draconian.[17] The purpose of the section is to enable the liquidator to obtain speedy possession of goods which he believes on reasonable grounds to be assets of the estate. The liquidator need not prove a *prima facie* case. (If he can prove this he may obtain a court order in terms of the normal procedures.) The *onus* to prove ownership is on the person who wishes to reclaim the assets. The liquidator is entitled to the order if after an objective investigation there are reasonable grounds to suspect that the property belongs to the estate and the liquidator satisfies the magistrate that such grounds exist.[18] When a person is holding the property openly he must be heard before the magistrate makes an order.[19] It has been held that a liquidator of a company is not allowed to use section 69 of the Insolvency Act, but should institute an ordinary action or other legal proceedings.[20]

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16 The fees were increased on 2 March 1990. Most of the items were increased by 50% or 25%. See R.410 Government Gazette 12310 of 2 March 1990 at 6.

17 Bruwil Konstruksie v Whitson 1980 4 SA 703 (T) 711 A.

18 Ibid 711 A-H.

19 Putter v Minister of Law and Order 1988 2 SA 259 T 261D.

20 Ibid 261H.

5.41 The liquidator may interrogate 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", or any person who in the opinion of the presiding officer may be able to give material information concerning property of the estate. Evidence given is admissible in any proceedings against the person who gave that evidence.[21]

5.42 The provisional view of the project committee is that the requirement that the liquidator should have reasonable grounds for suspicion, and should convince the magistrate thereof, limits the abuse of the section sufficiently. The project committee proposes that section 69 should be retained with the following adjustments:

(a) The archaic[22] reference in subsection (4) to "a warrant to search for stolen property" should be replaced by a reference to a search warrant in terms of section 21 of the Criminal Procedure Act 51 of 1977.

(b) The section should apply to the property of insolvent individuals and companies.

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21 Secs 64 and 65 of the Insolvency Act. Cf secs 414 and 415 of the Companies Act.

22 Par 5.17 above.

6. ASSETS SUBJECT TO ATTACHMENT

(a) Present position

6.1 The Registrar of the Supreme Court must transmit a copy of the sequestration or liquidation order to every sheriff and messenger who holds property of the insolvent estate under attachment.[1]

6.2 According to the common law an attachment in execution created a judicial lien. Custody of the goods attached passed from the judgment debtor to the officer of the court and did not pass to the trustee of the debtor in the event of his subsequent sequestration. The debtor, however, retained ownership until the property was sold and delivered or transferred.[2]

6.3 In terms of section 20 of the Insolvency Act the estate of the insolvent, including property under attachment, vests in the Master and upon his appointment in the trustee. The attachment does not confer any preference after sequestration, except a small amount for costs.[3]

6.4 Section 20 does not apply to the liquidation of a company because the ownership of the property of the company does not vest in the liquidator. All the property is deemed to be in the custody and under the control of the Master and after his appointment of the liquidator[4] but the company remains the owner. In the light of this fundamental distinction between sequestration and

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1 Sec 17(1)(b)(iii) of the Insolvency Act. Cf sec 357(1)(c) of the Companies Act.

2 Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co 1922 AD 549 at 558-559 read with Simpson v Klein 1987 1 SA 405 (W) 411C. Cf Shalala v Bowman 1989 4 SA 900 (W) 905.

3 Sec 98(2) of the Insolvency Act.

4 Sec 361 of the Companies Act.

liquidation Philips, AJ, held in Ex parte Vermaak: In re Klopper v Lavdas[5] that the custody of and control over assets subject to attachment do not pass to the liquidator and that the question of preference under the Insolvency Act does not even arise. It is accepted that this decision is wrong.[6] Because ownership of property subject to attachment vests in the company until the property has been delivered or transferred after the sale, the liquidator must recover the property and reduce it into possession.[7] The provision of the Insolvency Act that attachment confers a small preference for costs only, applies to a company as well.[8]

6.5 If the execution debtor is sequestrated or liquidated before the sheriff has sold movable property subject to attachment or transferred immovable property and paid over the proceeds, the liquidator is entitled to the property or its proceeds.[9] Where a sheriff has delivered an "interpleader notice" because of adverse claims and has paid the proceeds to the registrar[10] before sequestration, the registrar holds the money on behalf of

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5 1980 2 SA 696 (T) 700.

6 See eg Liquidator, Mr Spares v Goldies Supplies 1982 4 SA 607 (W); Strydom v MGN Construction Ltd: In re Haljen (in liq) 1983 1 SA 799 (D); Shalala v Bowman 1989 4 SA 900 (W); Michael Blackman 1980 SALJ 379; C Rosenthal 1982 SALJ 209.

7 Sec 391 of the Companies Act.

8 Sec 98 of the Insolvency Act read with sec 342 of the Companies Act.

9 Simpson v Klein 1987 1 SA 405 (W) 412; Shalala v Bowman 1989 4 SA 900 (W) 905.

10 Uniform Rules of Court 58.

creditors and the liquidator of an insolvent estate cannot claim it.[11]

(b) Discussion and provisional proposals

6.6 Professor Michael Blackman[12] submits the following:

> As M Bisset KC argued some sixty years ago, it would be "very embarrassing and unfortunate from the commercial point of view that a different rule should be applicable in the case of companies from that applicable in the case of partnerships and individuals"...

Margo, J, agrees:[13]

> It would be strange to find that an execution creditor enjoys no preference (other than for costs of execution) as against an insolvent estate, but enjoys a full preference as against an insolvent company.

6.7 Although the provisions in the case of sequestration and liquidation differ, the effect of the provisions appears to be the same. In paragraph 2.26 above a uniform provision was proposed regarding the effect of an insolvency order on the property of the insolvent estate. It is submitted that uniform provisions should apply to the effect of the insolvency order on property subject to attachment as well.

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11 Wichmann v The Master 1980 4 SA 395 (SWA) 398A. This was a case involving the liquidation of a company. The judge pointed out that section 20 of the Insolvency Act does not apply. It is, however, submitted that the same principle applies in the case of the sequestration of an individual's estate.

12 1980 SALJ 380.

13 Liquidator Mr Spares v Goldies Supplies 1982 4 SA 607 (W) 611B.

6.8 Insolvency brings about a *concursus creditorum*:[14]

> The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.

6.9 The present position is that an execution creditor who has not been paid at the time of sequestration (or on whose behalf money has not been paid to the Registrar) is not entitled to the attached property or the proceeds thereof. He enjoys a small preference for costs but for the rest he is merely a concurrent creditor. There were no comments on the present position. The principle that ordinary creditors should not after sequestration improve their own position to the detriment of other creditors is unassailable. The questions discussed are whether provisions are necessary to state the position clearly and whether minor adjustments are desirable.

6.10 Section 20(2)(a) of the Insolvency Act provides that "property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment" shall be included in the insolvent estate which vests in the liquidator. This provision does not apply in the case of the liquidation of a company because the assets of a company remains vested in the company. If it were provided that the liquidator should take the assets of the insolvent estate or company into his control and deal with them according to prescribed rules, a provision such as section 20(2)(a) would make no difference. According to the common law property subject to attachment vests in the debtor.[15] The question is simply whether a provision such as section 20(2)(a) does more harm than good. Section 346(3) of the English Insolvency Act 1986 and

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14 Walker v Syfret 1911 AD 141 at 166.

15 Michael Blackman 1980 SALJ 381 et seq.

section 37(4) of the Bankruptcy (Scotland) Act 1985 contain comparable provisions. It is not known whether these provisions were necessary to clear up ambiguities in the common law.

6.11 It is an impossible task to draft a comprehensive definition of an "insolvent estate". It is inevitable that the ordinary legal rules should determine which property or rights to property form part of an insolvent estate.[16] The general rules regarding ownership of property subject to attachment were set out authoritatively in 1922.[17] One decision on the application of the general principles to the liquidation of a company has been criticised. This decision was probably due to the fact that section 20(2)(a) of the Insolvency Act does not apply to companies. A provision such as the following is proposed:

> Property or the proceeds of property which is or are in the hands of the sheriff or messenger of the court under a warrant of execution shall form part of the insolvent estate (of a company or individual).

6.12 There have been conflicting decisions on the question of when execution proceedings are "put in force". This question and the effect of sequestration or liquidation on execution proceedings are discussed in paragraph 7 below.

6.13 The time at which it is determined whether property subject to attachment forms part of the insolvent estate is the "date of the sequestration". In a previous working paper[18] it was proposed that the date of insolvency should be the date on which the

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16 Cf Dantex Investment Holdings v National Explosives 1990 1 SA 736 (A).

17 Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co 1922 AD 549.

18 Working Paper 29 Prerequisites for and Alternatives to Sequestration par 4.174 at 89.

special resolution authorising the winding-up is registered or the application to wind up or sequestrate is presented to the court, provided, of course, that the application is granted.

6.14 In England the net proceeds of a sale in execution or money paid in order to avoid a sale in execution must be paid to the bankrupt's estate if -

> the judgment was for a sum exceeding £500;
>
> within 14 days after the sale or payment the sheriff or other officer is given notice that a bankruptcy petition has been presented; and
>
> a bankruptcy petition is or has been made on that petition.[19]

6.15 Section 37(4) of the Bankruptcy (Scotland) Act 1985 provides that no "arrestment or poinding" executed within 60 days before the date of sequestration or on or after the date of sequestration shall create a preference (except for certain expenses before sequestration) and that the assets or proceeds thereof shall be handed over to the trustee. Scottish law is exceptional in that provision is made for creditors to share in the proceeds of executions that occurred within 60 days before "apparent insolvency", even if the debtor is not sequestrated.

6.16 The provisions in England and Scotland are intended to prevent a few creditors from being paid shortly before sequestration at the expense of creditors in general. This involves balancing of interests. There is no magic formula to determine what is fair towards an execution creditor on the one hand and other creditors on the other hand. A sale in execution does not drop from the sky. The creditor must obtain a judgment and a writ of

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19 Sec 346(3) of the Insolvency Act 1986. Section 346(4) provides that such an amount shall not be paid out within 14 days.

execution, attach the property, and then have it sold in execution. In the mean time other creditors have the opportunity to protect their interests. If a debtor's assets are about to be sold in execution this may constitute grounds for an urgent application to wind up or sequestrate.[20]

6.17 Section 341(2) of the Companies Act provides that every disposition of its property after "the commencement of the winding-up" by an insolvent company that is being wound up shall be void unless the court otherwise orders. In terms of section 348 a winding-up commences at the time of the presentation to the court of the application for the winding-up. The Insolvency Act does not contain such a provision. Because the property of the insolvent estate vests in the Master at the time of sequestration and later in the trustee, dispositions of such assets by the debtor after sequestration are void. For the sake of convenience this matter will be discussed in a subsequent working paper together with dispositions that may be set aside.

6.18 The question is whether the cut-off point for payments to the execution creditor that are unassailable should be the date of the sequestration or liquidation order or whether it should be an earlier date, as in England and Scotland. It is submitted that other creditors would be protected sufficiently if the cut-off point were the date of presentation of the application for winding-up or sequestration. However, the sheriff does not get notice of the presentation of the application. If it were provided that he should be notified of the application he would have to be kept informed of the result of the application. This would give rise to uncertainty and extra work. It is recommended that the presentation of an application for sequestration or winding-up should not prevent payments after a sale in execution. The liquidator should, however, be entitled to reclaim the net amount of a payment to the execution creditor if he has been paid after the presentation of an application that was granted subsequently. In

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20 Cf C Rosenthal 1982 SALJ 209.

terms of the recommendation in paragraph 7.35 below the execution of a judgment is stayed as soon as the sheriff or messenger becomes aware of the sequestration or winding-up of the debtor's estate.

7. THE EFFECT OF INSOLVENCY ON CIVIL PROCEEDINGS

(a) Present position

(i) The Insolvency Act

7.1 Section 20(1)(b) provides that the effect of sequestration of the estate of an insolvent is to stay any civil proceedings instituted by or against the insolvent, except such proceedings as may in terms of section 23 be instituted by the insolvent for his own benefit or as may be instituted against the insolvent. The exception 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. The English version provides for a stay of proceedings "until the appointment of a trustee". There is no equivalent to these words in the Afrikaans version, which is the signed one. These words are ignored in the discussion below[1].

7.2 In terms of the proviso to section 20(1)(b), 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 his taxed costs incurred in connection with those proceedings before sequestration.

7.3 Section 20(1)(c) provides that the execution of a judgment against an insolvent shall be stayed as soon as the sheriff or messenger in question becomes aware of the sequestration, unless the court otherwise directs.

7.4 Section 75 provides that any civil legal proceedings instituted before sequestration shall lapse three weeks after the first meeting, unless the person who instituted those proceedings has given notice within that period to the trustee or, if no trustee has been appointed, to the Master, that he intends to continue the proceedings and after three weeks from that notice "prosecutes

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1 See De Polo v Dreyer 1990 2 SA 290 (W) 300. Cf contra Krige v Wallace; Wallace v Krige 1990 3 SA 727 (C). (The references to secs 20(3) at 729E and 20(1)(c) at 730G are incorrect.)

those proceedings with reasonable expedition". The court may permit the continuation of the proceedings on such conditions as it may think fit if notice has not been given but the court finds that there was a reasonable excuse for such failure.

(ii) The Companies Act

7.5 In terms of section 358 a company or a creditor or member thereof may, between the presentation of an application for the company's winding-up and the granting of the winding-up order, apply to the court concerned to stay any action or proceeding by or against the company or may apply to the court to which the application for winding-up has been presented to restrain further proceedings in any action or proceeding being or about to be instituted. The court may stay or restrain the proceedings on such terms as it thinks fit.

7.6 Section 359(1) provides that the making of the liquidation order (usually the provisional order) suspends all civil proceedings by or against the company until the appointment of a liquidator. Any attachment or execution put in force after the commencement of the winding-up[2] is void.

7.7 Section 359(2) provides that every person who intends to continue legal proceedings suspended by winding-up or to enforce a claim which arose before winding-up by legal proceedings shall within four weeks after the appointment of the liquidator give the liquidator at least three weeks' notice in writing before continuing or commencing the proceedings. If notice is not so given the proceedings are considered to be abandoned unless the court otherwise directs.

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2 The presentation of an application which is subsequently granted.

(b) Position in other countries

(i) England and Wales

7.8 Regarding individuals the first part of section 285 of the Insolvency Act 1986 provides as follows:

> (1) At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.
>
> (2) Any court in which proceedings are pending against any individual may, on proof that a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.
>
> (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall-
>
> > (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
> >
> > (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.
>
> This is subject to sections 346 (enforcement procedures) and 347 (limited right to distress).

7.9 The provisions of section 346(3) regarding sales in execution were discussed in paragraph 6.14 above. Section 346(1) provides that the execution creditor is not entitled to payments unless the execution or attachment was completed before the commencement of bankruptcy. Section 346(5) states when an execution or attachment is completed. In terms of section 346(6) the court may award such an amount to the execution creditor as it thinks fit.

7.10 The provisions of section 126 of the Insolvency Act 1986 regarding companies are for all practical purposes the same as section 358 of the South African Companies Act, as discussed in paragraph 7.5 above. Section 128 provides that any attachment,

execution, etc, put in force after the commencement of the winding-up is void (the same as section 359(1)(b) of the South African Companies Act). Section 130 provides that no action or proceeding shall be commenced or proceeded with after the making of a winding-up order, except by leave of the court and subject to such terms as the court may impose.

7.11 The provisions regarding sales in execution in the case of a company under winding-up[3] are similar to the provisions for a bankrupt as discussed above.

7.12 The provisions in Scotland are not discussed here because they cannot be understood without a discussion of terms such as diligence, arrestment, inhibition and adjudication, which have special meanings in Scottish law.[4]

(ii) The United States of America

7.13 Section 362 of the Bankruptcy Code provides as a general rule that the commencement or continuation of all civil proceedings against a debtor is stayed by the filing of a bankruptcy petition. The court may on the request of an interested party terminate, modify or set conditions for the automatic stay.

(c) Comments received

7.14 M Klein expressed the hope that the reasoning in Simpson v Klein[5] would in future also be applied to companies, namely that the assets vest in the insolvent estate and that the liquidator should deal with such assets if the company is wound up before the

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3 Secs 183 and 184.

4 Sec 37 Bankruptcy (Scotland) Act 1985; sec 185 Insolvency Act 1986.

5 1987 1 SA 405 (W).

execution proceedings have been completed.[6] He appears to be opposed to the execution being completed and only the proceeds being paid over to the insolvent estate.

(d) Discussion and provisional proposals

7.15 Civil proceedings in general are discussed before execution proceedings are dealt with.

7.16 An essential difference between companies and individuals should be borne in mind. Not all the assets of an individual vest in his insolvent estate and the insolvent may enforce certain rights personally.[7] The insolvent remains personally liable for certain claims, namely maintenance claims for the period after sequestration and other claims against the insolvent personally that came into existence after sequestration.[8] The provisions regarding the stay and lapsing of civil proceedings should apply only to claims by or against the insolvent estate.

7.17 Except for the difference that an individual has rights that do not form part of the insolvent estate, it is submitted that there is no justification for differences between the rules that apply to individuals and those that apply to companies.[9]

7.18 The aim of the provisions is clear: first, to prevent certain creditors from obtaining an unfair advantage during the confusion and sense of resignation that often prevail before and

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6 1988 De Rebus 441.

7 Sec 23 of the Insolvency Act.

8 Mars 317.

9 Cf the position in the USA (par. 7.13 above) and the premise in par. 1.8 above.

during sequestration;[10] second, to prevent the liquidator from being inundated with legal proceedings without having sufficient time to decide which claims to resist and to prevent unnecessary costs from being incurred before the appointment of the liquidator;[11] third, to prevent pending proceedings from delaying the finalisation of the estate.

7.19 The last point at which civil proceedings should be stayed is the granting of a sequestration or liquidation order. In terms of the Bankruptcy Code in the United States the filing of a petition stays civil proceedings. In England and in terms of the South African Companies Act the court may be approached to stay or restrain civil proceedings after the presentation to the court of an application for liquidation or sequestration.

7.20 The time lapse between the filing of an application and the granting of a provisional order is not long. During this period few costs can be incurred and a creditor can hardly obtain compliance with a court order. If necessary, a sequestration or liquidation order may be obtained as a matter of urgency.[12] A liquidator is not bound by any judgment to which he was not a party.[13] A judgment itself is not a disposition by the debtor.[14] The presentation of an application may be abused as delaying tactics if it stays civil proceedings. The costs of applying to court to stay proceedings would seldom be justified.

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10 See Langley Constructions (Brixham) Ltd v Wells as quoted by Henochsberg at 628.

11 Henochsberg 630.

12 Henochsberg 627.

13 Swadif (Pty) Ltd v Dyke 1978 1 SA 928 (A) 945A.

14 Ibid 940A.

7.21 It is proposed that civil proceedings by or against a debtor, except proceedings that cannot affect the insolvent estate, should be stayed by the granting of a liquidation or sequestration order. There are insufficient grounds to make special provision for the stay of proceedings before the granting of a liquidation or sequestration order.

7.22 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. Section 359(2)(a) of the Companies Act provides that in similar circumstances the litigant should within four weeks after the appointment of the "liquidator" give him three weeks' notice of his intention to continue the legal proceedings. In Strydom v MGN Construction Ltd: In re Haljen (in liq)[15] it was held that "liquidator" in section 359 refers to a final liquidator. In terms of the Insolvency Act and the Companies Act the court may excuse failure to give notice.

7.23 The overseas provisions that have been considered do not contain similar notice requirements. The leave of the court is required and the court may impose terms.[16] These provisions have the advantage that they are straightforward and flexible, but they give rise to costs.

7.24 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

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15 1983 1 SA 799 (D) 807C.

16 Secs 130(2) and 285(2) of the Insolvency Act 1986 (England) and sec 362(d) of the Bankruptcy Code (USA).

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. Three weeks is not long in relation to the duration of legal proceedings. It is proposed that proceedings against a debtor, which are stayed by an insolvency order, may be continued with the consent of or after three weeks' notice in writing to the final liquidator.

7.25 The power of a liquidator to institute or defend legal proceedings will be discussed in a subsequent working paper on the powers of a liquidator. No particular rules of procedure are necessary. It does, however, appear 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. Rule 15(3) of the Uniform Rules of Court provides that when a party ceases to be capable of acting as such "his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted". Comments are invited on the question of whether it is desirable to amend this rule to make it clear that it applies when proceedings have been stayed by insolvency and whether it is desirable that the relevant Act should make provision for these cases.[17]

7.26 Section 359(2)(a) of the Companies Act provides that every person who (after liquidation) intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the winding-up, should also within four weeks after the appointment of the liquidator give him at least three weeks' notice in writing. Section 75(1) of the Insolvency Act does not apply to legal proceedings instituted after sequestration. Section 44(3) provides that the rejection of a claim at

17 Cf Spendiff v J A J Distributors (Pty) Ltd 1989(4) SA 126 (C) 128E; Krige v Wallace; Wallace v Krige 1990 3 SA 727 (C).

a meeting shall not debar the claimant from establishing his claim by an action at law, "but subject to the provisions of section seventy-five." The position is the same if the Master has disallowed or reduced a proved claim in terms of section 45. The reference to section 75 should be to section 75(2).[18] In terms of section 75(2) no person shall after the confirmation of any trustee's account institute legal proceedings in respect of any liability which arose before sequestration, unless the court finds that there was a reasonable excuse for the delay. (The Companies Act does not contain a similar provision.) The court may order the reopening of a confirmed account but not if any dividend has been paid under the account.[19] Before or after a claim has been proved by a judgment it must be tendered for proof at a meeting.[20]

7.27 In Umbogintwini Land & Investment Co v Barclays National Bank Ltd[21] Viljoen, JA, held that section 359 of the Companies Act[22] applies only if the creditor institutes proceedings to prove his claim forthwith and not if he has attempted to prove his claim at a meeting first.

7.28 If proceedings are instituted against an insolvent estate after the granting of the insolvency order the liquidator receives notice of the facts that he requires in the ordinary course of the process. It does not appear to be necessary for him to be afforded extra time. It is, however, desirable that proceedings

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18 Cf Umbogintwini Land & Investment Co v Barclays National Bank Ltd 1987 4 SA 894 (A) 908J.

19 Secs 112 of the Insolvency Act and 408 of the Companies Act.

20 Secs 44(1) and 78(3) of the Insolvency Act; Cachalia v De Klerk and Benjamin 1952 4 SA 672 (T).

21 1987 4 SA 894 (A) 910.

22 See previous paragraph.

should be instituted only against the final liquidator because he does not merely hold an interim office and has the opportunity to consult with or get resolutions from proved creditors. If a creditor wastes time unnecessarily before instituting proceedings this may delay the finalisation of the insolvent estate. In terms of section 75(1) of the Insolvency Act the claimant must prosecute the proceedings "with reasonable expedition". There are provisions at present that aim to prevent the late proving of claims from delaying the finalisation of the estate. Section 44(1) of the Insolvency Act provides that a creditor may only with the leave of the court or the Master prove his claim more than three months after the second meeting. In terms of section 104(1) a creditor who has proved his claim after the lodging of an account is entitled to share in the distribution only if the Master is satisfied before confirmation of the account that there is a reasonable excuse for the delay. In terms of section 366(2) of the Companies Act the Master may, on the application of the liquidator, fix a time within which creditors are to prove their claims or otherwise be excluded from any distribution under any account lodged previously. On the assumption that similar provisions will be retained this would encourage a litigant to finalise legal proceedings rapidly. If the assets were to be distributed before he has finalised his legal proceedings he would be prejudiced. On the other hand, it may cause problems for a liquidator if costs are awarded against the estate after the assets of the estate have been distributed. The same consideration that legal proceedings should be finalised rapidly applies to proceedings that are continued after insolvency.[23]

7.29 Comments are invited on a provision such as the following:

> The court may upon the application of the liquidator or any creditor who has proved a claim, refuse that proceedings instituted against an insolvent estate be continued if the court is of the opinion that the institution or continuation

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23 Par 7.24 above.

of the proceedings was delayed unreasonably and that the continuation of the proceedings would unreasonably delay the finalisation of the insolvent estate.

7.30 Section 20(1)(b) of the Insolvency Act provides that a creditor whose claim has been proved or compromised may also prove a claim for taxed costs incurred by him before sequestration. Mars[24] mentions the problem that costs can usually be taxed only if judgment has been given or the defendant has consented to taxation and that according to the wording of the section the claim for costs cannot be disputed if the main claim has been admitted. It is probably not desirable to prescribe special rules in this regard. The fact that a claim has been admitted does not imply that all the costs incurred can be recovered from the defendant. If the liquidator is satisfied with the costs this may be proved without taxation.[25] If the liquidator disputes the claim for costs the issue should be resolved according to the ordinary procedures. It is recommended that the proving of a claim for costs incurred before insolvency should not be provided for specifically by statute.

7.31 The effect of sequestration or liquidation on execution proceedings will be discussed next.

7.32 Section 20(1)(c) of the Insolvency Act provides that the execution of a judgment is stayed as soon as the sheriff concerned becomes aware of the sequestration, unless the court otherwise directs. The court may order that execution be continued if this is expedient and necessary and the general body of creditors will not be prejudiced, but the proceeds must be paid to the Master or the trustee.[26] Section 359(1) of the Companies Act provides that

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24 141.

25 Benson v Walters 1981(4) SA 42(C) 49C.

26 Mars 141 and 142.

the making of a winding-up order suspends all civil proceedings until the appointment of a liquidator and that any attachment or execution put in force after the commencement of the winding-up[27] is void. Any person who intends to continue legal proceedings should within four weeks after the appointment of the final liquidator give him three weeks' notice of his intention to proceed.[28] There are conflicting decisions on the question of whether execution is only put in force by attachment or whether it is also put in force by a sale.[29] It is up to the final liquidator to allow execution proceedings to continue after notice to him, but the proceeds must be paid to him.[30]

7.33 Cases may occur where it is in the interests of all parties that the sale in execution should proceed,[31] for instance where an auction has already been arranged and the advertisements placed. Assuming that a fair price is obtained at the auction, it would be in the interests of everyone for the auction to 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 proceedings. In the case of a company a few months usually pass before a final liquidator is appointed and can be given three weeks' notice.

7.34 In the case of a deceased estate the Master may authorise a sale in execution if the property is worth less than R200.[32] The

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27 The presentation of an application that is subsequently granted.

28 Cf par 7.22 above.

29 Henochsberg 629; Shalala v Bowman 1989 (4) SA 900(W) 903 et seq.

30 Ibid.

31 Michael Blackman 1980 SALJ 388.

32 Sec 30 of the Administration of Estates Act 66 of 1965.

question is whether the Master should be authorised to approve the continuation of execution proceedings after sequestration or liquidation. The advantages of such a provision should be weighed against the extra work that this would bring about for the Master. To discourage applications that have no merit it could be provided that the Master may be approached only if expenses regarding the sale of the property have already been incurred.

7.35 Comments are invited on a provision such as the following:

1. The execution of a judgment awarded against a debtor shall be stayed as soon as the sheriff or messenger charged with the execution becomes aware of the sequestration or liquidation of the debtor's estate.

2. If at the time of the stay of execution costs have already been incurred with regard to the sale in execution of an asset of the insolvent estate, the Master may approve the continuation of the sale for the benefit of the insolvent estate subject to such conditions as he deems fit.

3. The reasonable costs of such a sale in execution may be deducted from the proceeds of the sale.

7.36 Sections 183(3) and 346(5) of the English Insolvency Act 1986 indicate when execution has been completed. It was noted above that there are conflicting decisions in South Africa about the question of when an execution is put in force. In terms of the above proposal the execution is stayed as soon as the sheriff or messenger becomes aware of the sequestration or liquidation. Earlier it was recommended[33] that a liquidator may after sequestration or liquidation reclaim all payments made to an execution

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33 Par 6.18.

creditor after the presentation of an application for winding-up or sequestration. The preference, if any, which an execution creditor or the sheriff or messenger should enjoy will be discussed in a subsequent working paper. Consideration will also be given to the question of whether any person who has purchased immovable property at a sale in execution should have a preference for damages suffered by him if the liquidator sells the property to someone else and the original purchaser does not recover his full deposit. It is submitted that it is not necessary or desirable to provide by statute when an execution is put in force or completed.

8. INTERDICTS IN THE DEEDS OFFICE

8.1 Sections 17 of the Insolvency Act and 357 of the Companies Act provide that the Registrar of the Supreme Court shall transmit insolvency orders to the Registrars of Deeds. Every Registrar who receives such an order shall enter a "caveat" against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of the debtor (and in the case of an individual also in the name of the spouse of the insolvent).

8.2 Interdicts give rise to problems, in particular because the insolvency orders do not identify the debtor properly and because there is no effective measure to remove the interdicts once they have been entered. The Commission's project committee has been requested to give urgent attention to these problems.

8.3 After consultation with interested parties the Commission proposed interim recommendations to solve these problems. Once the outcome of these recommendations is known consideration will be given to the question of whether a working paper on this subject should be published for general comment.

9. INTERDICTS IN REGISTERS OF SHIPS

9.1 In terms of section 17(1)(b)(iii)*bis* the Registrar of the Supreme Court shall transmit one original of every provisional sequestration order or in the case of voluntary surrender the final sequestration order and of every order amending or setting aside such order to every officer having charge of a register of ships at a port of registry appointed as such in terms of section 4 of the Merchant Shipping Act. In terms of section 17(2) and (3)*bis* the officer shall note the day and hour when the order was received in his office thereon and upon receipt of a sequestration order enter a caveat against the transfer of every ship or a share in a ship or the cancellation or cession of every mortgage of a ship or share in a ship registered in the name of or belonging to the insolvent or his or her spouse.

9.2 Section 357(1) of the Companies Act provides that the Registrar shall transmit winding-up orders and any order staying, amending or setting such order aside to "every registrar or other officer charged with the maintenance of any register under any Act in respect of any property within the Republic which appears to be an asset of such company" (own underlining). In terms of subsection (4)(b) the officer shall note on the order the day and hour of receipt thereof and "enter a *caveat* in his register accordingly". An officer having charge of a register of ships is clearly such an "other officer".

9.3 In its comments on a discussion paper dealing with interdicts in the Deed's Office the South African Institute of Chartered Accountants recommended that court orders should be forwarded to all officers that maintain a shipping register.

9.4 It could not be determined with certainty which ports are "ports of registry". The harbours at Cape Town and Durban have by far the majority of ships that are registered in South Africa on their registers. Telephone interviews were conducted with the officials in charge of the registers of ships in Durban and Cape Town.

9.5 The Durban official said that he receives the orders from the various courts and keeps them for two years. According to him the orders do not really give rise to problems. He has been in charge of the register since 1969 and can recall only one case where a sequestration or liquidation order in respect of a registered owner of a ship was received. According to a rough estimate he has 200 ships on his register.

9.6 The Cape Town official has had custody of the register for approximately five years. She regards the filing of the orders as a nuisance and a waste of time. The orders take up scarce storage space. She recalls one or two cases where an owner of a ship was sequestrated or liquidated. By the time that she received such an order all the interested parties already knew about the insolvency. She estimates that there are approximately 1 000 ships on the register, some of which were registered during the previous century.

9.7 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 a person becomes insolvent 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 positive results is totally out of proportion to the work and cost that this involves.

9.8 It is proposed that the requirement that all sequestration or liquidation orders be transmitted to the officers who are in charge of registers of ships should be deleted. Comments are invited on a provision to the effect that the liquidator may have a caveat registered in a register of ships. The entire question of ship mortgages will be reconsidered once the investigation referred to in the next paragraph has been completed.

9.9 The Maritime Law Association has requested that the Commission give urgent consideration to a draft Ship Mortgages Bill submitted to the Commission by the Association. The draft Bill will be considered as soon as a suitable opportunity arises. In the mean time the draft Bill will on request be forwarded to interested parties for comment.

10. THE EFFECT OF INSOLVENCY ON CONTRACTS

(a) Present legal position

(i) The effect of insolvency on contracts generally

10.1 The insolvency of one of the parties to a contract does not, as a general rule, automatically terminate the contract. The trustee steps into the shoes of the insolvent and, since he has to act in the interests of the general body of creditors, he cannot be compelled to give specific performance of the insolvent's obligations under the contract.[1]

10.2 If the trustee does not within a reasonable time make it known that he intends to enforce the terms of the contract it may be assumed that he is not going to perform in terms of the contract.[2] He may also give notice of his refusal to render specific performance, leaving the other party to the contract with the choice of either accepting the repudiation and proving a concurrent claim for damages owing to breach of contract or rejecting the repudiation and proving a concurrent claim for a monetary substitute for performance.[3]

10.3 If the trustee elects to perform in terms of the contract this is regarded as an act of administration and any payments he has to make in this connection are expenses of administration.[4] The trustee is bound to fulfil all the insol-

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1 Mars 143; Smith 172; Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1988 2 SA 546 (A) 566H; A N Oelofse 1988 THRHR 543 et seq.

2 Mars 143.

3 Mars 144.

4 Smith 173; Mars 144.

vent's obligations, both pre-insolvency and post-insolvency, under the contract.[5]

(ii) **The effect of insolvency on uncompleted contracts for the acquisition of immovable property**

(1) **Insolvency of the purchaser**

10.4 The position in this respect is regulated by section 35 of the Insolvency Act, which provides as follows:

> 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.

10.5 If the trustee or provisional trustee decides to adopt the contract, both parties are bound to perform any outstanding obligations. If he decides to repudiate the contract he is discharged from liability for the performance of any remaining obligations under the contract.[6] In such cases the other party cannot demand specific performance but is entitled to obtain or retain possession of the property and prove a concurrent claim for

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5 Ex parte Venter NO: In re Rapid Mining Supplies (Pty) Ltd 1976 3 SA 267 (O) 281.

6 Mars 146.

damages arising from the repudiation.[7] Payments received by the other party can be taken into consideration when calculating his damages but the trustee cannot refuse to return the property until the other party returns the payments previously made as part of the purchase price.[8] The trustee's decision to abandon the contract cannot affect the rights of others such as a cessionary to whom the insolvent had ceded his rights under a cession *in securitatem debiti*.[9]

10.6 Between the date of sequestration and the date upon which the trustee makes his election the trustee is bound to perform the insolvent's obligations under the contract or otherwise the seller might be able to cancel the contract.[10]

(2) Insolvency of the seller

10.7 The Insolvency Act does not deal with the insolvency of the seller of immovable property. The position is therefore governed by the common law or the provisions of section 22 or 27 of the Alienation of Land Act.[11]

10.8 As is the case with contracts generally, the trustee of an insolvent seller of immovable property can elect to abide by the terms of the contract. In that case he would have to discharge all the insolvent's obligations under the contract. The purchaser retains all his rights in terms of the contract.[12]

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7 Ibid; Smith 150.

8 Mars 146.

9 Ibid; Smith 150.

10 Smith 151.

11 Act 68 of 1981.

12 Smith 152; Mars 147, 149.

10.9 If the trustee does not abide by the terms of the contract the position at common law is governed by the rule enunciated in Harris v Trustee of Buissinne[13], in terms of which if the seller is sequestrated before passing transfer of the property to the purchaser the property vests in his trustee, leaving the purchaser with a concurrent claim against the estate. If the seller is a company, the property vests in the company.

10.10 This position caused hardship in numerous cases and led to efforts to protect the purchaser by means of the legislation referred to below, namely sections 22 and 27 of the Alienation of Land Act.[14] Under the said Act protection is provided to a purchaser of land in terms of a written contract under which payment is to be made by means of more than two instalments over a period of more than a year.

10.11 Section 22 is concerned with land used mainly for residential purposes, but not, inter alia, agricultural land. It makes provision for land owned by an insolvent to be transferred to a purchaser who has made arrangements for certain payments within such period as the trustee may allow, such period being not less than thirty days. In order to obtain transfer in this manner the purchaser must make arrangements for the payment of the amounts owing under the deed of alienation or the sum of various amounts such as the cost of any attachment, endowment, amounts due in terms of any mortgage bond, etc, whichever of the two is the greater, and transfer costs.[15]

10.12 If the purchaser does not take transfer and the trustee realises the land in the normal way the purchaser will, if the

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13 (1850) 2 Menz 105; Smith 152; Mars 147.

14 Act 68 of 1981.

15 See the various amounts mentioned in sec 22 of the said Act.

contract has been recorded in terms of section 20 of the said Act, have a preferent claim ranking immediately after that of a mortgagee whose bond was registered prior to such recording.[16]

10.13 For the purposes of section 27 "land" includes agricultural land and land not used for residential purposes.

10.14 The section allows a purchaser who has in terms of a deed of alienation undertaken to pay the purchase price of land in specified instalments over a period and who has paid at least fifty per cent of the purchase price to demand transfer against registration of a first mortgage bond in favour of the seller for the balance of the purchase price and interest.

10.15 If the seller fails to tender transfer within three months the purchaser may cancel the deed of alienation and would have a concurrent claim against the estate for a refund of amounts paid, damages, interest and improvements, less any claim by the seller for occupation, use and enjoyment of the property, and damage to the property for which the purchaser might be liable.

10.16 This section cannot, of course, assist a purchaser once the seller's estate has been sequestrated since he cannot force the trustee to render specific performance at that stage.

(iii) <u>The effect of insolvency on movables purchased by the insolvent but not paid for</u>

10.17 The position with regard to cash sales is regulated by section 36 of the Insolvency Act. If the estate of a purchaser is sequestrated to whom movables have been delivered pursuant to a sale where payment is to be made upon delivery of the property the seller may recover the goods by giving written notice within ten days of delivery to the purchaser, the trustee or the Master to the effect that he reclaims the property.

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16 Mars 149; sec 20(5) of the said Act.

10.18 If the trustee disputes the seller's right to reclaim the property the seller has fourteen days after receiving notice that the trustee disputes his right within which to enforce the claim by means of legal proceedings, otherwise he is left with a concurrent claim for the unpaid purchase price.[17]

10.19 The trustee need not return the goods to the seller unless the latter refunds any part of the purchase price already received.[18]

10.20 Section 36(4) of the Insolvency Act provides as follows:

> 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.

On the strength of the majority judgment in Cornelissen v Universal Caravan Sales (Pty) Ltd[19] it appears that the subsection applies to cases in which ownership of the goods sold and delivered had not passed to the purchaser.

10.21 As far as credit sales are concerned the general common law rules apply, except in the case of instalment sale transactions, which are discussed below.

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17 Smith 160.

18 Sec 36(3).

19 1971 3 SA 158 (A) 179H and 187E.

(iv) Effect of insolvency on leases

(1) Insolvency of the lessee

10.22 Section 37 of the Insolvency Act deals with the effect of a lessee's sequestration on leases. Although there are conflicting decisions in this regard,[20] the better view appears to be that the section applies to leases of both movables and immovables.[21]

10.23 A lease is not automatically terminated by the insolvency of the lessee. The trustee may terminate the lease by giving notice of termination to the lessor, subject to the lessor's right to claim compensation from the estate for loss suffered as a result of non-performance.[22]

10.24 The trustee is deemed to have terminated the lease if he has failed to notify the lessor, within three months of his appointment, of his desire to continue the lease.[23]

10.25 The rent due under the lease, from the date of sequestration to the date of termination or cession of the lease by the trustee, forms part of the cost of sequestration.[24] The lessor has a limited[25] secured claim for rent due prior to sequestration

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20 Neon & Cold Cathode Illuminations (Pty) Ltd v Lowe 1957 1 SA 80(N); Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd 1969 2 SA 127 (W).

21 Smith 161; Mars 156.

22 Sec 37(1) of the Insolvency Act; Norex Industrial Properties v Monarch SA Insurance Co 1987 1 SA 827 (A).

23 Sec 37(2).

24 Sec 37(3).

25 Sec 85(2).

but rental due under a sharecropping agreement consisting of part of the produce of the land that is payable at the end of the lease is payable in its entirety as costs of sequestration since the contract is indivisible.[26]

10.26 If the trustee terminates the lease either by giving notice of termination or by doing nothing about it for three months after his appointment the insolvent estate is deprived of the right to compensation for improvements to the leased property except for those made in terms of an agreement with the lessor.[27]

10.27 A stipulation in a lease to the effect that the sequestration of either party's estate terminates it is null and void, but one that restricts or prohibits the transfer of rights under the lease or provides for termination upon the death of the lessee, binds the trustee.[28]

(2) Insolvency of the lessor[29]

10.28 The effect of the insolvency of a lessor on a lease is, except for the provision referred to in the previous paragraph, governed by the common law. The trustee of an insolvent has an obligation to realise the assets of the estate and must therefore alienate the leased property. If there is no prior mortgage over the property it must be sold subject to the lease.

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26 Noord-Westelike Koöp v Die Meester 1982 4 SA 486 (NC).

27 Sec 37(4).

28 Sec 37(5); and see Slims (Pty) Ltd v Morris 1988 1 SA 715 (A), in which it was held (Corbett and Nestadt, JJA, dissenting) that a liquor licence was a "right under the lease" and that the trustee was bound by a prohibition against transfer of the licence provided for in the lease.

29 Mars 154 et seq.

10.29 If, prior to the lease being entered into, the property had been mortgaged, the mortgagee's rights cannot be prejudiced and the property should be provisionally offered for sale subject to the lease. If no offer sufficient to satisfy the mortgagee's claim in full is received, the property must be sold free of the lease.

10.30 At common law the lessee enjoyed a tacit hypothec to receive compensation for improvements out of the proceeds of the property. Section 85(1) of the Insolvency Act apparently deprives the lessee of this preference.

10.31 If the property is sold free of the lease the lessee's claim for compensation for improvements can lie against the purchaser unless this is specifically excluded in the conditions of sale.

(v) The effect of insolvency on contracts of service

10.32 In terms of section 38 of the Insolvency Act the insolvency of an employer terminates the contract of service between him and his employees.

10.33 An employee whose contract of service is so terminated has a concurrent claim for compensation against the insolvent estate for any loss suffered by virtue of the early termination.[30]

10.34 The employees's claim for salary or wages up to two months prior to the date of sequestration is preferent provided that not more than R2 000 is paid out. He is also entitled to salary or wages in lieu of leave for up to twenty-one days, or to

30 Sec 38 of the Insolvency Act.

a bonus, whether or not payment is due at the date of sequestration, or to such salary or wages and bonus provided that an amount of R1 000 is not exceeded in this respect.[31]

10.35 The Insolvency Act is silent on the effect of an employee's insolvency on his contract of service, although it is clear that an insolvent may work or render professional services.[32] It seems that unless there is a particular statutory disqualification in respect of particular posts, or unless a contract of service expressly so provides, or unless his insolvency affects his qualifications for a particular post or profession, an employee's insolvency need not terminate the contract of employment.[33]

(iv) The effect of insolvency on instalment sale transactions

(1) Introduction

10.36 The various types of instalment sale agreements defined in the Credit Agreements Act[34] are those in which movables are sold against payment of a stated or determinable sum of money at a stated or determinable future date, either in whole or in part in future instalments, and the purchaser does not become the owner of the goods merely by delivery, use, possession or enjoyment, or the seller is entitled to return of the goods if the purchaser fails to comply with any term of the transaction.

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31 Sec 100 of the Insolvency Act. In its Report on the Review of Preferent Claims in Insolvency the Commission recommended a limit of 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 a bonus.

32 Sec 23(3) of the Insolvency Act.

33 Smith 165; Mars 159.

34 Act 75 of 1980.

10.37 The Insolvency Act deals only with sales where ownership is reserved and only with cases where the estate of the purchaser is sequestrated.[35]

10.38 It is intended here to deal first with the position on sequestration of the seller's estate and then with the position on sequestration of the purchaser's estate.

(2) Insolvency of seller's estate

10.39 Where ownership remains vested in the seller the trustee must elect, within a reasonable time, whether to abide by the contract or to repudiate the insolvent's obligations.[36]

10.40 If the trustee elects to abide by the contract he must fulfil all the insolvent's obligations under the contract.[37]

10.41 Since the insolvent seller (and hence the trustee) generally has no further obligations towards the purchaser at this stage, save to permit ownership to pass to him on completion of the contract, it has been suggested that the normal common law position holds, i.e. that since there is no obligations that the seller's trustee can refuse to perform the contract is not affected by the seller's insolvency. It is argued that at common law the trustee cannot terminate a contract, he can merely refuse specific performance.[38]

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35 Sec 84 of the Insolvency Act.

36 Mars 151.

37 Ibid.

38 See Forder 1986 SALJ 83 et seq.

10.42 According to Mars, however, although, in terms of the common law the contract is not terminated by the seller's insolvency, ownership remains vested in the estate and the trustee is entitled to realise the goods as unencumbered assets in the estate, leaving the purchaser with a concurrent claim for damages.[39]

10.43 This position is the subject of considerable academic debate.[40]

10.44 In transactions where ownership has passed to the purchaser he is a debtor of the estate and the trustee is bound to collect the debt in the usual manner. He can only vindicate the goods if the purchaser is in default.[41]

(3) Insolvency of purchaser

10.45 The Insolvency Act provides that in instalment sale agreements where ownership is reserved such agreement creates a hypothec over the goods sold in favour of the seller on the insolvency of the purchaser whereby the amount still due under the contract is secured.[42] The seller loses ownership in the goods and becomes a secured creditor.

10.46 Different views have been expressed regarding the applicability of these provisions by the Transvaal and Natal courts. The Transvaal court held that they apply only where the trustee is

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39 Mars 151; and see Smith 171-172.

40 Ibid; and see South African Law Commission, Working Paper 23 The Giving of Security by Means of Movable Property 113, where the Commission expressed the provisional view that the purchaser should be given the option of paying the outstanding balance and thereby receiving ownership.

41 Mars 152.

42 Sec 84(1).

in possession of the goods and the Natal and Orange Free State courts that they apply regardless of physical possession of the goods.[43]

10.47 The trustee of the purchaser's insolvent estate is bound to deliver the goods to the seller, if he so requires, and the seller thereupon holds the goods as security for his claim, thus giving him the rights of a secured creditor to realise his asset in terms of section 83 and imposing on him the obligations of a secured creditor.[44]

10.48 If within a month prior to the sequestration of his estate a purchaser returned the goods to the seller, the trustee can demand return of the goods or of the value thereof as at the date when the purchaser returned them. The trustee must in such cases pay to the seller or allow the seller to deduct from such value the difference between the total amount payable under the contract and the total amount actually paid.[45] The idea is to enable the trustee to reclaim the goods for the benefit of the creditors where the outstanding amount is small compared to the value of the goods.[46]

10.49 In cases falling outside the scope of section 84 (such as agreements that cannot be brought within the ambit of the definition of "instalment sale agreement" as contempted by section 84 of the Insolvency Act) the general common law rules described above apply.[47]

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43 UDC Bank v Seacat Leasing and Finance 1979 4 SA 682 (T); Hubert Davies v The Body Corporate 1981 3 SA 97 (D); Morgan v Wessels 1990 3 SA 57 (O).

44 Sec 84(1).

45 Sec 84(2).

46 Mars 153.

(b) **Problems experienced by commentators**

(i) **Insolvency of the seller (owner)**

10.50 That the common law position on the insolvency of the seller often leads to hardship is borne out by legislative efforts to alleviate the position of some purchasers, as described above.[48]

10.51 The Association of Insolvency Practitioners of Southern Africa (AIPSA) feels that the whole position pertaining on the insolvency of a seller should be investigated and regulated by statute so as to alleviate the position of those purchasers who are not protected by the present legislation, which would also include purchasers of movables in cases where ownership has not at the date of sequestration passed to the purchaser.[49]

(ii) **Goods sold and delivered but not paid for (section 36)**[50]

10.52 One commentator suggests that there is no good reason for the retention of this section in the Insolvency Act since a seller should ensure that he is paid on delivery or he should not deliver. If he does, he must bear the consequences.

(iii) **Leases**

10.53 Since the lessee's estate is liable for post-sequestration rentals as a cost of administration, commentators feel that something should be done to ensure that trustees are made aware of

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48 See pars 10.7 to 10.16 above; Smith 152.

49 See pars 10.39 to 10.44 above; Smith 168-172; SA Law Commission Working Paper 23 The Giving of Security by Means of Movable Property 78 et seq.

50 See pars 10.17 to 10.21 above.

the existence of leases at an early stage or that provision should be made for the estate to be liable for such rentals as from the date when the trustee becomes aware of the existence of the lease.[51]

10.54 One commentator feels that cases where the insolvent is a lessor cause problems if the terms of the lease are such that no buyer is attracted to the property if it is sold subject to the lease.[52]

10.55 Many commentators raised the question of the trustee's remuneration in respect of the administration of leased property. This matter will be dealt with in a later working paper.

10.56 As pointed out above,[53] there are conflicting decisions as to whether section 37 of the Insolvency Act applies only to leases of immovable property or whether it applies to leases of both movables and immovables. Commentators feel that the section should make it clear that it applies to leases of both movable and immovable property.

10.57 The South African Institute of Chartered Accountants raised the matter of section 386(2) of the Companies Act, in terms of which the liquidator requires the Master's consent to terminate a lease before the first meeting of creditors. It feels that the delay caused in obtaining such consent could result in unnecessary loss of money. It points out that no such requirement is set in section 37 of the Insolvency Act with regard to a trustee's right to terminate a lease.

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51 See pars 10.23 to 10.25 above.

52 See par 10.28 above.

53 Par 10.22.

10.58 As regards section 37 of the Insolvency Act one commentator posed the question of whether the term "trustee" as used in that section includes a provisional trustee. From a copy of an opinion by Mr P A M Magid it appears that it is virtually impossible to decide the question one way or the other. The commentator feels that this should be clarified by legislation and goes on to suggest that it is not desirable for a provisional trustee without proper authority from creditors to be able to elect to commit the estate to a future obligation such as a lease that might prove to be onerous and continue for a long time. He feels that the election to terminate a lease is, however, one that can properly be made by a provisional trustee since it does not involve the estate in future obligations.

10.59 The same commentator feels that a lease or tenancy of property occupied by the insolvent and his family as a permanent residence should be excluded from the operation of the Insolvency Act unless it is a long lease that can be regarded as being tantamount to ownership.

10.60 According to the same commentator, another question that requires clarification is whether failure by a trustee to pay post-sequestration rental on the due date is a ground for cancellation of the lease by the landlord. Since it is sometimes difficult for the trustee to obtain cash until the assets have been disposed of, he feels that the landlord should not be able to cancel on this ground alone but that he should be entitled to interest on arrear post-sequestration rental.

(iv) Other executory contracts

10.61 Commentators mentioned executory contracts such as building contracts, factoring agreements and collective bargaining agreements which they say require scrutiny in the light of decisions such as Muller v Bryant & Flanagan[54] and Ex parte Venter:

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54 1978 2 SA 807 (A).

In re Rapid Mining Supplies (Pty) Ltd[55] to the effect that if a trustee elects to abide by a contract he is obliged to perform all the insolvent's obligations, including those which arose prior to sequestration.

10.62 Commentators maintain that especially in the case of building contracts efforts by trustees to complete such contracts lead to immense problems and it is difficult to apply the normal rules of insolvency to them.

10.63 Various organisations representing companies that often act as subcontractors in building contracts feel that moneys paid to the main contractor for work done by a subcontractor should not upon the insolvency of the main contractor vest in the latter's trustee, thus leaving the subcontractor with a concurrent claim. Similar considerations also apply to retention moneys held by the owner until completion of the contract.[56]

(v) Prospecting contracts

10.64 At present the holder of rights in terms of a notarially executed and registered prospecting contract is protected in the event of the insolvency of the grantor. The Anglo-American Corporation maintains that it is not always practicable for every prospecting contract to be notarially executed and registered. It proposes that new legislation should be accepted to protect the holder of an unregistered prospecting contract on the insolvency of the grantor.

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55 1976 3 SA 267 (O).

56 See Grime and Sutton v Cape Provincial Administration 1988 2 SA 602 (EC).

(c) **Position in other countries**

(i) **The United States of America**

10.65 The Bankruptcy Code of 1978 provides for the assumption and rejection of executory contracts and unexpired leases by the trustee. Section 365(a) of title 11 provides as follows:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

10.66 Sections 765 and 766 contain special provisions for "commodity broker liquidation". Commodity brokers are dealers in futures and options.

10.67 "Executory contract" cannot be precisely defined for bankruptcy purposes. It seems, however, that the majority favour the view that for the purposes of bankruptcy an executory contract is one under which the obligations of both the debtor and the other party are so far unperformed that failure of either to perform would constitute a material breach excusing performance by the other party.[57]

10.68 Clauses in contracts providing for the forfeiture of the debtor's interest either in property or under a contract or lease upon the commencement of a bankruptcy case, or upon the debtor's financial position deteriorating, or upon the appointment of a trustee, can by virtue of the provisions, inter alia, of section 365(e) be rendered unenforceable in certain circumstances.[58]

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57 Treister et al 229.

58 Treister et al 231.

10.69 The trustee must assume or reject an executory contract or unexprired lease within 60 days after sequestration, failing which the contract is deemed to have been rejected.[59] Provision is, however, made in the Code for an extension of time by the court.

10.70 Between the filing of the petition and the time when the contract is assumed or rejected the other party must, apparently, continue to perform if the debtor is not in default.[60] The Code is, however, silent as to the rights and obligations of the parties to an executory contract during this period. As regards an unexpired lease of non-resident real property, section 365(d)(3) obliges the trustee to perform the obligations of the debtor during this period.

10.71 The effect of a rejection under section 365(a) is that it is treated as having been made before the petition was lodged instead of thereafter. The result is that the claim to which the breach gives rise is treated as a concurrent claim and not as administration costs arising after bankruptcy. Rejection under section 365 excuses the trustee from future performance under the contract and enables him to substitute a damages claim for an otherwise undesirable obligation of specific performance.[61]

10.72 Rejection is subject to court approval. The courts normally accept the trustee's judgment as to whether a contract should be rejected. In cases where the effect of rejection would marginally favour the debtor but cause hardship to the other party, or where it would favour the debtor but not creditors, the court might refuse to authorise rejection.[62]

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59 Sec 365(d)(1) and (4).

60 Treister et al 235.

61 Treister et al 237.

62 Ibid.

10.73 Assumption of a contract by the trustee also requires court approval. Assumption makes the debtor's executory contract the estate's contract as if the estate had entered into it after bankruptcy. At the time of the assumption (after court approval) the trustee must cure any defaults (other than those concerning the debtor's financial position) or provide adequate assurance of a prompt cure. He must also compensate the other party for pecuniary loss caused by the default or must assure prompt compensation. He must also furnish adequate assurance of future performance under the contract.[63]

10.74 The Code also gives the trustee the power to assign an executory contract or unexpired lease notwithstanding a clause in the contract prohibiting assignment.[64] Before such contract may be assigned it must be assumed in terms of the section.[65] The trustee must also furnish adequate assurance of future performance by the assignee.[66] After assignment the estate is no longer liable for post-assignment defaults.[67]

10.75 If the trustee rejects an unexpired lease of land under which the insolvent is the lessor the lessee may treat the lease as terminated and lodge a claim for damages or he may elect to remain in possession of the leasehold property for the remainder of the term and for any renewal or extension period. The same applies to a time-sharing contract where the insolvent is the

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63 Treister et al 241 et seq.

64 Sec 365(f)(1).

65 Sec 365(f)(2)(A).

66 Sec 365(f)(2)(B).

67 Sec 365(k).

time-share seller.[68] If he elects to remain in possession the lessee or time-share purchaser may as an exclusive remedy for the breach set off rentals after the rejection against damages caused after rejection as a result of the non-performance of the debtor.[69]

10.76 Similar rules apply if the trustee rejects an executory contract of sale of land or time-share interest where the debtor is the seller and the purchaser is in possession. Furthermore, if he remains in possession the purchaser must continue to make payments under the contract. The trustee has no obligations other than to deliver the title to such purchaser in terms of the contract.[70] In certain cases a purchaser who did not remain in possession has a lien on the debtor's interest in the property for repayment of the part of the purchase price paid.[71]

10.77 In terms of section 554 of the Bankruptcy Code the trustee may also abandon property of the estate that is burdensome or is of little value or benefit to the estate. He must give notice to interested parties and obtain permission from the court after a hearing before he can abandon such property.

10.78 An interested party can, after notice, request the court to order the trustee to abandon such property.[72]

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68 Sec 365 (h)(1).

69 Sec 365(h)(2).

70 Sec 365(i)(2)(B).

71 Sec 365(j).

72 Sec 554(b).

(ii) Scotland

10.79 In Scotland the permanent trustee may adopt a contract entered into before sequestration if he feels it would be beneficial to the administration of the estate or he may refuse to adopt such contract.[73] However, where such adoption is precluded by the express or implied terms of the contract, he may not adopt it.[74]

10.80 The trustee has 28 days from receipt of a request in writing from any party to the contract to adopt or refuse to adopt such contract. The court may extend the period on the application of the trustee.[75]

10.81 If the trustee has not adopted the contract in writing within the period of 28 days or any extension of such period he is deemed to have refused to adopt it.[76]

10.82 If the trustee declines to adopt such contract the other party has a claim for damages against the estate.[77] If he does adopt it he is personally liable in relation to the contract.[78]

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73 Sec 42(1) of the Bankruptcy (Scotland) Act 1985.

74 Ibid.

75 Sec 42(2) of the said Act.

76 Sec 42(3).

77 Peter Allsop, Kevan Norris and Julie Harris (eds) Current Law Statutes Annotated 1985 London Sweet and Maxwell 1986, 66-70.

78 Ibid.

(iii) **England and Wales**

10.83 In England and Wales the trustee automatically becomes vested with the property of the insolvent and according to general principles he is personally liable for the rent payable in terms of leases and other liabilities in terms of the contract.[79] This can often be very onerous, especially as it also applies to other unprofitable contracts of the insolvent with regard to land. With regard to property other than land the trustee does not become liable under the contracts unless he adopts them.[80]

10.84 To meet the risk of the trustee becoming automatically fixed with liability under the insolvent's leases the doctrine of disclaimer was introduced by an Act of 1869.[81]

10.85 Under the Insolvency Act 1986 the trustee may, by giving the prescribed notice, disclaim onerous property, whether or not he has taken possession of it, tried to sell it, or otherwise exercised rights of ownership in relation thereto.[82]

10.86 Property that may be disclaimed includes unprofitable contracts and any other property that is unsaleable or not readily saleable or that may give rise to liability to pay money or perform an onerous act.[83]

10.87 A disclaimer determines as from the date thereof the rights, interests and liabilities of the insolvent and his estate

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79 Cork Report par 1183.

80 Cork Report par 1184.

81 Cork Report par 1185.

82 Sec 315(1).

83 Sec 315(2).

in respect of the property disclaimed and discharges the trustee from personal liability in respect of the property as from the commencement of his trusteeship.[84]

10.88 A person who sustains loss or damage as result of a disclaimer has a claim for such loss or damage as a bankruptcy debt.[85]

10.89 If a person interested in the property applies in writing to the trustee requiring him to decide whether or not to disclaim a contract he must disclaim such contract within 28 days of such application or he is deemed to have adopted the contract and is no longer entitled to disclaim it.[86]

10.90 A disclaimer of leasehold property has no effect unless a copy thereof is served on every person (of whose address the trustee is aware) claiming under the insolvent as sub-lessee or mortgagee.[87] If the disclaimer is in respect of a dwelling house it must also be served on every person in occupation of or claiming a right to occupy the dwelling house.[88]

10.91 On the application of a person who claims an interest in disclaimed property or anyone who is under a liability in respect of such property that has not been discharged by the disclaimer, or a person in occupation of or entitled to occupy a dwelling house that is the subject of a disclaimer, the court may make an

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84 Sec 315(3).

85 Sec 315(5).

86 Sec 316.

87 Sec 317.

88 Sec 318.

order vesting the disclaimed property in or for delivery to such person.[89]

10.92 Where, in respect of leasehold property, no person is willing to accept an order of vesting subject to the conditions of the lease the court may vest the estate or interest of the insolvent in the property in any person who is liable to perform the lessee's obligations under the lease.[90]

10.93 The effect of a vesting order under section 320 is taken into account in assessing the extent of any loss or damage sustained by any person in consequence of the disclaimer.[91]

(d) Discussion and proposed reform

(i) Contracts of sale

10.94 The insolvency of the purchaser[92] does not appear to cause many difficulties. The position with regard to the sale of a business, about which the commentators have had much to say, will be dealt with in a later working paper on voidable dispositions. It has been suggested[93] that section 36 of the Insolvency Act should be repealed, but it is felt that there is merit in its retention since the section does not lead to any injustice but does lay down a procedure to be followed in such cases, thus eliminating possible confusion and unnecessary litigation.

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89 Sec 320.

90 Sec 321(3).

91 Sec 320(5).

92 See pars 10.4 to 10.6 above.

93 See par 10.52 above.

10.95 The position on the insolvency of the seller, however, has elicited comment. It has been suggested that the entire position in this regard should be codified so as to protect all types of purchasers under all types of sale agreements.[94]

10.96 The position of the purchaser of land on instalments is regulated under the Alienation of Land Act 68 of 1981.[95] Although it has been stated that the Act has shortcomings[96] it does not appear possible to improve substantially on these provisions and in the absence of further suggestions in this regard no new legislation is contemplated.

10.97 The purchaser of movables on credit to whom ownership has not been passed as at the date of the insolvency of the seller is at a distinct disadvantage compared with the purchaser of land under the Alienation of Land Act. If the trustee decides to repudiate the contract and realise the goods, the purchaser only has a concurrent claim for damages.

10.98 Accordingly, comments are requested on the proposal below, which would enable such a purchaser to obtain ownership of the goods on his being advised that the trustee does not intend to abide by the contract. It is proposed that a provision be inserted in the Insolvency Act along the following lines:

(1) If a debtor, before the sequestration or liquidation of his estate,sold and delivered any 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 that two instalments over a period of more than one year and ownership of the said property would not pass to the purchaser until the full purchase price had been paid, the liquidator of such person's estate shall, within three weeks after receipt of written notice of the existence of such a contract from the purchaser,

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94 See par 10.51 above.

95 See pars 10.10 to 10.16 above.

96 See Smith 155.

elect whether or not to abide by the terms of the contract.

(2) The liquidator shall, within the period of three weeks mentioned in subsection (1), inform the purchaser in writing of his decision, failing which he shall be deemed to have elected to abide by the terms of the contract.

(3) If the liquidator elects not to abide by the terms of the contract he shall, when informing the purchaser of his decision -

(a) state the full balance outstanding in respect of the purchase price; and

(b) inform the purchaser that he is entitled to obtain ownership of the property sold on payment of the said balance within such period as the liquidator may allow, which period shall not be less than thirty days.

(4) Ownership of the property shall pass to the purchaser upon payment by the purchaser of the balance contemplated in paragraph (a) of subsection (3) within the period contemplated in paragraph (b) of the subsection.

This proposal is a more detailed version of a proposal in the Commission's working paper on The Giving of Security by Means of Movable Property.[97] Comments were invited on a proposal that in the case of reservation of ownership the choice should rest with the purchaser as to whether he wishes to pay the outstanding balance to the trustee and thereby receive ownership.

(ii) **Leases**

10.99 It often happens that a trustee only becomes aware of the existence of a lease some time after his appointment. In the interim rentals due under the lease as from the date of sequestration are payable as part of the cost of sequestration.[98] These can, in some cases, amount to a considerable sum, and this is to the detriment of the general body of creditors. The commentators

97 Working Paper 23 par 5.2.1 at 113.

98 Sec 37(3) of the Insolvency Act.

feel that the problem could be alleviated to some extent if provision were to be made for rentals to become payable as part of the cost of sequestration only as from the date on which the trustee becomes aware of the existence of the lease. It is felt that it would not be unreasonable to require a lessor to take positive action to protect his interests by making the trustee aware of the existence of the lease as soon as possible.

10.100 Comments are accordingly invited on the proposal below to amend subsections (2) and (3) of section 37 so as to place the onus of advising the trustee on the lessor as a precondition for the payment of the rentals to him:

> (2) If the trustee[99] does not within three months after having been advised in writing by the lessor of the existence of the lease notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have terminated the lease at the end of such three months.
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> (3) The rent due under any such lease, from the date of receipt of the written notice by the lessor contemplated in subsection (2) to the date of the termination or cession thereof by the trustee, shall be included in the costs of sequestration: Provided that if the trustee has at any time made use of the leased property the rent due under such lease as from the date of such use shall be included in the costs of sequestration.

10.101 In order to resolve the uncertainty brought about by conflicting decisions[100] it should be made clear whether section 37 of the Insolvency Act applies to both movable and immovable property. The provisional view of the project committee is that leases of movables and immovables differ substantially[101] and that there are not sufficient reasons to apply the special rules in

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99 See par 10.102 below.

100 See par 10.22 above.

101 Cf Nereus Joubert "Die regsaard van die finansiële huurkontrak" 1989 4 TSAR 568 at 583.

section 37 to leases of movables.[102] If, however, a lease covers movables as well as immovables it appears to be advisable that the lease as a whole should be covered by section 37. It is proposed to amend subsection (1) by the insertion after the word "lease", where it appears for the first time, of the words "of immovable property or immovable and movable property." Comments are also invited in this regard on the question of whether provisions similar to section 84 of the Insolvency Act should apply to leases of movables.

10.102 The question raised in paragraph 10.58 above as to whether the "trustee" contemplated in section 37 of the Insolvency Act includes a provisional trustee is another one on which comments are sought. The question is whether a provisional trustee should have the power to elect to continue with a lease, thus committing the estate to future expenditure, or whether this should be the prerogative of the final trustee duly authorised by resolutions of creditors. It is futile to reserve a decision to continue a lease to a final trustee acting on the directions of creditors if a provisional trustee has the authority to determine the lease. It appears to be desirable that the preconditions for the continuation and determination of a lease should be the same. It is clear that the decision to cancel a lease cannot in all cases be delayed until a final trustee has obtained directions from creditors because this may burden the estate with unnecessary administration costs. Section 37(1) of the Insolvency Act provides that the trustee may determine the lease by notice in writing to the lessor. Section 386(2) of the Companies Act provides that, subject to the consent of the Master, a liquidator may, at any time before a general meeting, terminate any lease in terms of which the company is the lessee. The provisional view of the project committee is that the provision in the Companies Act is preferable. It is proposed that a lease may be continued or terminated by a final trustee in accordance with the directions of a meeting of creditors or, where directions have not been given by

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102 Cf contra sec 386(2) of the Companies Act.

creditors, by the provisional or final trustee subject to the consent of the Master.

10.103 Further comments are invited on the question raised in paragraph 10.59 above regarding the tenancy of property occupied as a residence by the insolvent. Section 337 of the English Insolvency Act protects the insolvent's rights of occupation in respect of a dwelling house occupied by himself and his minor children, but it is not known to what extent the present position in South Africa warrants similar legislation. Comments on the present practice in South Africa and whether the present position leads to hardship in a significant number of cases would be appreciated.

10.104 It has been suggested[103] that legislation should make it clear that failure by the trustee to pay post-sequestration rental on the due date should not afford a ground for cancellation of the lease by the landlord. Comments are invited on whether or not legislation should provide for the giving of security by the trustee for the due payment of such rent if he is temporarily short of funds with which to pay it. The provisional view of the project committee is that the present position should be retained.

10.105 As regards the position on the insolvency of a lessor, although (as pointed out by a commentator)[104] a situation can arise where it is difficult to sell a property subject to a lease owing to the unfavourable terms thereof, it is felt that the need to protect the lessee outweighs the desirability of facilitating such sales by allowing the property to be sold free of the lease. In extreme cases, where the terms of the lease are so unfavourable

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103 See par 10.60 above.

104 See par 10.54 above.

as to point to a disposition without value, the lease could probably be set aside by a court.[105] Comments on the question of properties subject to unfavourable leases on the insolvency of lessor are accordingly also invited.

(iii) **Other executory contracts**

10.106 As mentioned above[106], the effect of decisions in cases such as Muller v Bryant & Flanagan and Venter: In re Rapid Mining Supplies (Pty) Ltd is that if a trustee elects to complete an executory contract, such as a building contract started by the insolvent, he is obliged to perform all the insolvent's obligations under the contract, including those which arose before insolvency.

10.107 A commentator[107] has furnished the Commission with a memorandum in this regard in which he lists some of the difficulties facing a trustee who elects to complete a building contract started by the insolvent. These include payment of the work force when cash is not available, lack of loyalty by the work force towards the trustee, "front-end-loaded" contracts where the bulk of the money is paid out while most of the work is still to be done, under-tendering by the insolvent as his financial position becomes weaker shortly before insolvency, etc. Often on completion of the contract the trustee discovers that work previously done by the insolvent is not up to standard and in terms of the decisions mentioned above the trustee is liable to make good the defects, which results in an eventual loss on the contract.

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105 Cf the reference by Voet 42 8 15 to Digesta 42 5 8 1.

106 Par 10.61.

107 Mr M Ensor.

10.108 The commentator concludes that it would be best for legislation to provide that such a contract is terminated on sequestration and that the trustee cannot elect to complete it.

10.109 From the memorandum it does certainly appear that the pitfalls facing a trustee who elects to complete such a contract are many, but it may be argued that a trustee should nevertheless be allowed to elect whether or not to complete the contract since there may be instances in which this would be to the advantage of creditors.

10.110 While it is possible to grant a trustee a longer period within which to assess the feasibility of completing a contract, the practical difficulties (such as keeping the work force remunerated and motivated in the meanwhile) appear to negate any advantage that might be gained.

10.111 To provide that the trustee shall not be liable for defective workmanship and other pre-sequestration obligations of the insolvent might go some way towards alleviating the trustee's problems but it would be unfair to the other party to the contract, who would have no choice in the matter.

10.112 A possibility that suggests itself and that may go some way towards easing the trustee's dilemma would be to provide that a trustee may within a certain period, while he is investigating the feasibility of completing the contract, perform acts in terms of the contract without thereby involving the estate in liability to complete the contract or to fulfil the pre-sequestration obligations of the insolvent. This appears to be the position in England and Wales.[108]

10.113 Comments are invited on all aspects of the problems caused by executory contracts.

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108 See par 10.85 above.

10.114 The question raised in paragraph 10.63 above with regard to retention moneys and moneys paid out to the main contractor in the course of construction contracts must, it seems, be resolved by the terms of such contract themselves since no appropriate amendment of the insolvency law to meet the situations that might arise suggests itself. Further comments and suggestions in this regard would be welcome.

10.115 At this stage it is the provisional view of the project committee that executory contracts should be terminated by insolvency unless otherwise provided in the Act. The project committee is consulting with interested parties identified by it with regard to various proposals received by the Commission.

(iv) Prospecting contracts

10.116 The question has been raised of the protection of the holder of an unregistered prospecting contract on the insolvency of the grantor.[109] It was suggested that it is not always practicable for every prospecting contract to be notarially executed and registered and that legislation is therefore necessary for the protection of the holder of unregistered prospecting contracts.

10.117 The practical difficulties encountered in the notarial execution and registration of such contracts are not immediately apparent and it is therefore difficult to decide whether they are of such a nature as to justify a departure from the existing procedure. In the absence of further comments it is not proposed to call for new legislation in this regard.

(v) General

10.118 Comments are invited on the following general proposals:

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109 See par 10.64 above.

1. The effect of insolvency on contracts should be the same for insolvent individuals and companies in liquidation.

2. Unless the contrary is stated expressly, any reference to a trustee in the present legislation should include both a provisional and a final trustee.

3. Is it advisable to lay down general rules regarding the effect of insolvency on contracts in an Act? If so, proposals for the contents of such rules would be appreciated.