SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 35

PROJECT 63

# REVIEW OF THE LAW OF INSOLVENCY

## Insolvency interdicts

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**INTRODUCTION**

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

The members of the Commission are -

The Honourable Mr Justice H J O van Heerden (Chairman)
The Honourable Mr Justice P J J Olivier (Vice-Chairman)
Prof D J Joubert
Mr J E Knoll
Mr G G Smit
Dr W G M van Zyl

The members of the Insolvency Project Committee are -

Mr G G Smit (Chairman)
Mr N Coetzer
Prof E M de la Rey
Mr A Hyman
Mr G P Volschenk
The Honourable Mr Justice R H Zulman

The Acting Secretary is Mrs A-M Havenga. The Commission's offices are on the 8th Floor, NG Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. The postal address is:

The Secretary
South African Law Commission
Private Bag X 668
0001 PRETORIA

Telephone (012) 322-6440

**HIERDIE WERKSTUK IS OOK IN AFRIKAANS BESKIKBAAR.**

## 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 19 July 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.

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CONTENTS PAGE


1. INTRODUCTION 1

2. THE PRESENT POSITION 4

3. DISCUSSION OF COMMENTS AND PROVISIONAL RECOMMENDATIONS

(a) Introduction 6
(b) Identification of the debtor 7
(c) Identification of the spouse of the insolvent 11
(d) Transmission of particulars to the Registrar of Deeds 13
(e) Registration of interdicts 14
(f) Expiry of insolvency interdicts 17
(g) Liquidation interdicts 24
(h) Other proposals 24
(i) Abolition of the system of insolvency interdicts 26
(j) Amendment of other rules of the law of insolvency 30

4. SUMMARY OF RECOMMENDATIONS SUGGESTING AMENDMENTS

(a) Draft legislation 33
(b) Amendment of the Rules of Court 33
(c) Proposed administrative procedure 33

ANNEXURE : DRAFT LEGISLATION 34

## 1. INTRODUCTION

1.1 On 16 April 1984 the Association of Law Societies of the Republic of South Africa submitted a document entitled Re: Interdicts in Deeds Offices (hereinafter referred to as the memorandum) to the Department of Justice. The memorandum discussed insolvency interdicts. According to the memorandum the problem is twofold: first, new interdicts do not identify the insolvent in question properly; and second, all interdicts registered since the introduction of insolvency interdicts are still on the register.

1.2 The Department of Justice submitted the memorandum to the Masters of the Supreme Court for comment. The Department replied to the memorandum in the light of comment received from the Masters.

1.3 On 27 January 1987 Mr K A Wilson, on behalf of the attorneys' profession, proposed amendments to several Acts and regulations. The Association of Law Societies supported the proposals.

1.4 During May 1985 and July 1986 the Chief Registrar of Deeds put forward proposals aimed at solving problems regarding insolvency interdicts.

1.5 The project committee of the South African Law Commission instituted to review the law of insolvency was requested to give urgent attention to the problems.

1.6 After considering the comments on Mr Wilson's proposals by the Chief Master of the Supreme Court and the Registrars of Deeds, the project committee, during April 1989, sent a Discussion Paper containing proposed amendments to certain interested parties for comment.

1.7 After considering the comment on the Discussion Paper, amended proposals were sent for comment to persons and bodies directly affected by the amendments, namely the Chief Registrar of Deeds, the Association of Insolvency Practitioners of Southern Africa and the South African Institute of Chartered Accountants (hereinafter referred to as the Institute of Accountants). Further discussions were held with the Chief Registrar of Deeds and other registrars. The Chairman of the Standing Committee on Conveyancing of the Association of Law Societies of the Republic of South Africa was present at some of these discussions.

1.8 The following considerations apply with regard to interim recommendations:

(a) Only matters that are urgent should be dealt with in the recommendations. Regarding interdicts, urgent amendments will be justified only if they deal with the removal of existing interdicts as well.

(b) Only matters on which a reasonable measure of consensus has been reached should be dealt with in interim recommendations. Any attempt to finalise controversial recommendations urgently would be futile because it would take too long and the same process would have to be repeated after the review as a whole has been completed.

1.9 The Chief Registrar and the said Chairman support the interim proposals in this working paper. The Chief Master of the Supreme Court raised no objections to the proposals. Objections by the Institute of Accountants against some of the proposals are discussed later in this working paper.

1.10 Although all matters regarding insolvency interdicts will still be dealt with in the ordinary course of the review, the Commission decided to give all interested parties an opportunity to comment on the interim proposals because this procedure will

not affect the earliest date on which legislation can be introduced.

## 2. THE PRESENT POSITION

2.1 In so far as it is relevant here, section 17 of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act) provides as follows:

* The Registrar of the Supreme Court transmits one original of every sequestration order[1] to each Registrar of Deeds.

* Each Registrar who has received an order must register the day and hour of receipt thereon.

* The Registrar must enter a "caveat" against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent or his or her spouse.

2.2 The provisions of section 357 of the Companies Act 61 of 1973 are similar, but the liquidation order or a special resolution for the winding-up of the company must be transmitted only to a Registrar of Deeds with whom property which appears to be an asset of the company is registered. In practice the orders are apparently transmitted to all the Registrars.

2.3 Section 58 of the Deeds Registries Act 47 of 1937 (hereinafter referred to as the Deeds Act) provides that immovable property which has vested in a trustee in accordance with the insolvency law and remains vested in him may before or after rehabilitation be transferred only by the trustee. The debtor may after his rehabilitation deal with the property only once the trustee, or if there is no trustee the Master of the Supreme Court (hereinafter referred to as the Master), has transferred the property to him. The provisions of section 58 also apply, in so

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1 The provisional order or, if a provisional order has not been issued, then the final order.

far as they are applicable in these cases, to an insolvent deceased estate, a company liquidated because it is unable to pay its debts, and assets administered by a liquidator or trustee in terms of the Agricultural Credit Act.

2.4 In terms of section 3(1)(x) of the Deeds Act an insolvency or liquidation interdict may be removed with the approval of the Master after the lapse of ten years from the date of entry thereof.

2.5 When any deed is examined the examiner in the deeds office has to determine whether a sequestration or liquidation order has been filed in respect of the person or company whose rights are being dealt with. If there is a possibility, even a remote possibility, that a sequestration order applies to a person, the conveyancer is asked whether the interdict applies to that person. If, for instance, the court order merely refers to "Botha" or "Van der Merwe" an interdict is noted against all Bothas or Van der Merwes in all deeds offices even if the Botha or Van der Merwe in question owns no immovable property. There are thousands of insolvency and liquidation interdicts, and the numbers are growing by the day. There is rarely no interdict note, and sometimes there are nine or ten in respect of a single transaction. The conveyancer must investigate the interdicts and certify that they do not apply. He is responsible for mistakes.

2.6 It takes time to reply to queries regarding interdicts. In the meantime interest is paid on thousands of rands pending registration in the deeds office. It has become practice to obtain an affidavit from the person whose rights are being dealt with that he has never been insolvent and that any insolvency interdict in the deeds office does not apply to him. Requests for such affidavits cause embarrassment and give offence. The affidavit is no final solution because the deeds office still has to check whether the sequestration order was not perhaps issued after the date of the affidavit. A certificate by the conveyancer that the interdict does not apply is still required. There have

been cases where, despite the affidavits, it came to light afterwards that sequestration in fact applied.

## 3. DISCUSSION OF COMMENTS AND PROVISIONAL RECOMMENDATIONS

### (a) Introduction

3.1 The system of insolvency and liquidation interdicts causes delays and gives the deeds office and conveyancers extra work. The Registrar of Deeds, Kimberley, says that his office noted 33 884 insolvency interdicts during 1987. According to accurate calculations it takes seven minutes to deal with an interdict from receipt to final registration in an unmechanised office, that is, 453 man-hours during that year. Insolvency interdicts take up storage space, because they are not stored on microfilm.

3.2 The aim of insolvency interdicts is to prevent an insolvent person or company from dealing with immovable property to which the insolvent estate is entitled.

3.3 The deeds offices do not keep a record of the number of improper dispositions prevented annually by the existing system. The Registrars who ventured an estimate when requested to do so said that there were only a few each year. The Registrar, Johannesburg, pointed out that conveyancers checked the interdicts before lodging a deed and that they did not proceed if they traced an applicable interdict. Interdicts also led to the withdrawal of deeds without the examiner knowing the reason for the withdrawal. Deeds office staff did not get to know of all cases where interdicts might have prevented improper dispositions.

3.4 According to comment received there are mainly two problems regarding the existing interdict system. First, that the interdicts do not adequately identify the debtor or his or her spouse; and second, there is no effective mechanism for removing interdicts that have served their purpose. Proposals to solve these problems, as well as other proposals, are discussed below.

### (b) Identification of the debtor

3.5 According to information collected from deeds examiners by the Registrar of Deeds, Kimberley, less than 5% of all interdict notes are relevant to any particular case. Proper identification would obviate 95% of the unnecessary work done by deeds controllers and conveyancers.

3.6 The obvious way to identify a person is by his identity number or date of birth. Such identification is acceptable to computerised deeds offices.

3.7 There were several proposals for ensuring that identity numbers or dates of birth are supplied to the Registrar of Deeds. Some of these proposals presupposed certain events, for instance that the debtor will lodge a statement of affairs, or that he will appear at the first meeting or request to be excused from attendance. Because sequestration is impossible without a court application, it is submitted that the particulars should already be furnished when application is made for sequestration.

3.8 It is generally desirable that the applicant properly identify the debtor for whose sequestration he applies. A creditor who grants credit to someone of whose identity he is not sure deserves no sympathy. From the comment on the Discussion Paper it appears that this view enjoys wide support.

3.9 In the Discussion Paper it was proposed that the applicant should state the identity number or date of birth of the debtor in his application for sequestration - in the case of compulsory sequestration by requiring this in section 9(3) of the Insolvency Act and in the case of voluntary surrender by requiring these particulars in the statement of affairs which the applicant has to lodge together with his application.

3.10 These proposals received significant support, but in the case of compulsory sequestration Mr Justice Kannemeyer, J P, the Institute of Accountants, the Masters of Grahamstown and Cape Town

and Mr Wilson[2] held the view that the applicant would often not have these particulars at his disposal in cases where it would be unfair to refuse the remedy of sequestration. Especially in urgent cases, these requirements would create problems. It was proposed that the particulars should be given unless the court orders otherwise, or if they are available. It was also proposed that the trustee should furnish the particulars if they are not given in the application, that the deputy sheriff should obtain the particulars when serving the provisional order, or that the particulars should be obtained in some or other way through the Master.

3.11 The Deeds Training Division of the Justice College referred to the provisions of Deeds Regulation 18 which provides, inter alia, that a natural person's identity must be determined by means of his names and identity number, or if his identity number contains incorrect information, by means of his names and date of birth. The commentator attached a computer printout which showed that a sequestration interdict was not reflected unless the person's identity number contained his correct date of birth. The Deeds Training Division proposed an amendment to the deeds regulations which fall outside the scope of the review of the law relating to insolvency. The possibility that a debtor may intentionally or negligently furnish a creditor with an incorrect identity number or date of birth cannot be excluded. Mistakes by the applicant himself cannot be ruled out either. Not everyone has an identity number. If the interdict contains an incorrect date of birth it will not be effective.

3.12 A number of possibilities may be considered:

1. Compulsory or voluntary sequestration should be granted only if the applicant states the insolvent's date of birth and, if available, his identity number in the application. The Chief Registrar prefers this alternative, but according to a number of commentators

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2 Cf par 1.3 above.

this would be impractical and unfair to the applicant in the case of compulsory sequestration.

2. The applicant should state the particulars, or if he is unable to do so he should state the reason for this.

3. The applicant should state the particulars unless the court orders otherwise.

3.13 The last two possibilities will probably not differ much in practice. It appears to be desirable that if the particulars are not furnished, the trustee should endeavour to obtain the particulars. It is also desirable that the Master should be advised of the results of the investigation by the trustee.

3.14 It is recommended that -

* the applicant for compulsory sequestration should state in his application the full names and date of birth of the debtor and, if an identity number has been assigned, the identity number, and if he does not state those particulars he should give the reason why he is unable to do so;

* the said particulars should be reflected in the statement of affairs (which is inter alia lodged before a voluntary surrender);

* the date of birth and identity number should be stated in a draft order or an annexure to the application;

* the particulars should be stated in the sequestration order;

* the trustee (provisional or final) should as soon as possible after his appointment determine whether

the correct particulars appear in the sequestration order; and

* if the particulars do not appear in the order the trustee should take all reasonable steps to obtain them.

**(c) Identification of the spouse of the insolvent**

3.15 In terms of section 21 of the Insolvency Act the effect of the sequestration of the separate estate of one of two spouses is that all the property of the solvent spouse is vested in the trustee of the insolvent spouse. This section applies to a spouse by virtue of a marriage according to any law or custom and to an unmarried man and woman living together as husband and wife. If the assets of the solvent spouse are not released in terms of section 21, the trustee of the insolvent spouse deals with the assets.

3.16 Problems regarding the application of section 17(4) of the Matrimonial Property Act 88 of 1984[3] and section 21 of the Insolvency Act[4] must still be investigated in detail. The question considered here is whether the noting of an insolvency interdict against the assets of a solvent spouse is satisfactory in the light of the existing law. Section 17(3) of the Insolvency Act provides that a caveat shall be entered against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of the insolvent's spouse or belonging to the spouse.

3.17 In theory it is desirable for a caveat to be registered against the assets of the spouse. The Chief Registrar of Deeds says that it is impossible to apply this provision in practice and

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3 Cf Du Toit v Du Toit 1985 3 SA 1007 (T); Acar v Pierce 1986 2 SA 827 (W); Trust Bank van Afrika Bpk v Meintjies 1990 2 SA 268 (T).

4 Cf Snyman v Rheeder 1989 4 SA 496 (T).

that the deletion of this part of section 17(3) should be considered.

3.18 It is desirable that the application for sequestration contain particulars of the solvent spouse and the matrimonial property system. A prerequisite that the application should contain these particulars would, however, be impractical and unreasonable. If the debtor married after incurring the debt, the creditor could not be expected to have particulars of the spouse or the matrimonial property system. The creation of a statutory right that enabled the applicant creditor to compel the debtor by means of a court order to disclose those particulars would be too cumbersome and costly.

3.19 It is recommended as follows:

(a) The applicant should furnish any of the following particulars that he has at his disposal in the application for sequestration or state the reason why he is unable to do so:

(i) The marital status of the debtor.

(ii) If the debtor is married the full names, date of birth and identity number of the spouse.

(b) The statement of affairs, completed by the insolvent in person, should in addition to the particulars mentioned in (a) state the following:

* The date of marriage.

* Whether the marriage is in or out of community of property and whether it is subject to the accrual system.

* <u>Whether the matrimonial property system has been changed since marriage and, if so, the nature of the change.</u>

(c) <u>Any of these particulars which are available should be stated in a draft order or an annexure to the application and should be given in the sequestration order.</u>

(d) <u>A trustee (provisional or final) should as soon as possible after his appointment determine whether the correct particulars appear in the sequestration order and should take all reasonable steps to obtain particulars which do not appear in the court order.</u>

**(d) <u>Transmission of particulars to the Registrars of Deeds</u>**

3.20 In terms of section 357 of the Companies Act winding-up orders and resolutions are transmitted to Registrars of Deeds charged with the maintenance of a register in respect of any property "which appears to be an asset of such company". In practice these orders are apparently transmitted to all deeds offices. The memorandum submitted by the Association of Law Societies recommended that in a case of voluntary surrender by an individual the court order should be transmitted only to Registrars of Deeds within whose area of jurisdiction immovable property is registered according to the insolvent's statement of affairs. In the case of compulsory sequestration it was proposed that the trustee should on receipt of the statement of affairs inform the Registrars of Deeds of the properties specified in the statement of affairs and that other interdicts should be deleted.

3.21 If the correctness of the insolvent's particulars in his statement of affairs is relied on, the system of insolvency interdicts may just as well be abolished and the insolvent's honesty or fear of punishment be relied on. The notices by the trustees and the resultant deletion of interdicts would entail extra work. If interdicts identified an insolvent properly they

would not given rise to so many problems. It is recommended that the interdicts and the notices by trustees be transmitted to all deeds offices.

(e) Registration of interdicts

3.22 On receipt of a sequestration or winding-up order the deeds office does nothing to link the order to a particular owner or holder of rights.[5] The order is registered as an interdict. When any person attempts to deal with rights the examiner in the deeds office has to determine whether an interdict is registered against the person. If there is any possibility that an order applies to the person the conveyancer must certify whether the interdict is applicable. Because there are thousands of interdicts that do not identify the debtor properly the absence of such an interdict note is, as pointed out in paragraph 2.5 above, rare; sometimes there are nine or ten in respect of a single transaction. Usually an affidavit is obtained from the person who wishes to deal with rights. Dealing with the queries causes delays (which cost money) and embarrassment. There have been cases where, in spite of an affidavit by the person wishing to deal with rights, it came to light afterwards that a sequestration order in fact applied.

3.23 There would be obvious advantages if the sequestration order identified the debtor unambiguously. Unnecessary queries would be avoided. (According to the Registrar of Deeds, Kimberley, about 95% of the existing queries would be obviated.) In addition, the system would not depend so heavily on the correctness of the affidavit by the person involved in the transaction. However, it would be impractical and unfair to the applicant in the case of compulsory sequestration if compulsory sequestration were granted only in cases where the applicant stated the insolvent's date of birth or identity number in the application.[6]

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5 See the proposal in par 3.55 below.

6 Par 3.12 supra.

3.24 If sequestration is granted notwithstanding the fact that the application fails to identify the debtor properly, it must be considered whether the Registrars should receive and register all sequestration orders or whether they should receive and register only orders containing the date of birth or identity number.

3.25 In a letter on shortcomings in the insolvency law in general the Institute of Accountants recommended that a central computerised register of all insolvent persons should be maintained. This would enable applicants to check whether a person has already been sequestrated. It would be easier for the general public to check the status of a person before credit is granted to him, etc. Mr A Duncan made a similar proposal.

3.26 A central computerised system maintained merely to indicate which persons are insolvents would not justify the cost of such a system. The Registrar of Births, Marriages and Deaths maintains a central computerised system, but it is not accessible to the general public and the information is at least three months old.[7] Under the existing system any person may against payment of a small fee determine at any deeds office whether an insolvency interdict has been registered against a particular person. If all sequestration orders are not registered with all the deeds offices this facility will no longer be available.

3.27 <u>The first alternative is that the Registrars should continue to register all sequestration orders. The trustee must, if the particulars in the court order are incorrect, or if he traces particulars not contained in the court order, notify the Registrars and the Master accordingly. The Registrars should register such a notice in the same way as a sequestration order.</u> The practical effect of such a system will depend on the success of the proposal above in ensuring that sequestration orders identify the debtor unambiguously. If the proposal does not

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7 <u>Acar v Pierce</u> 1986 2 SA 827 (W) 828H.

serve this purpose to a reasonable extent, such a system will not differ much from the existing position.

3.28 The second alternative is that court orders or notices should be transmitted to the Registrars only if they contain the date of birth or identity number of the debtor and that the Registrars register a court order or notice only if it contains this information. The following objections can be raised against this alternative (see paragraph 3.71 below):

1. There will no longer be a central registry which in theory contains particulars of all sequestration orders.

2. The interdict system will no longer be "comprehensive".[8]

The advantage of this alternative is that the total number of interdicts and the interdicts to be dealt with for each transaction will be reduced.

3.29 The crux of the matter is which system has the most advantages, taking into account the cost of the system and the delays and inconvenience caused by it. The first alternative is recommended.

3.30 The considerations which apply with regard to the registration of an interdict against the assets of the solvent spouse are similar to those in the case of the insolvent. An important difference is that the court order or application documents often contain no particulars regarding the solvent spouse at all, while they at least contain the name of the insolvent. It is recommended that the Registrar should register an interdict against the spouse of the insolvênt only if the court order or the notice by the trustee contains at least the name of the spouse.

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8 See par 3.70 below.

### (f) Expiry of insolvency interdicts

3.31 Section 3(1)(x) of the Deeds Act provides that insolvency or liquidation interdicts may be removed with the approval of the Master after the lapse of ten years from the date of entry thereof. It appears from comment received that this section is not applied.

3.32 Thousands of insolvency interdicts are registered annually. It stands to reason that, if no provision is made that interdicts may be removed when a certain period has elapsed or when a certain event has taken place, the number of interdicts will increase until the position is untenable. Proper identification of the insolvent may ease the problem or delay the increase in the number of interdicts, but it cannot solve the problem in the long run.

3.33 The Insolvency Act provides that the insolvent estate vests in the Master and upon his appointment in the trustee.[9] The estate remains vested in the trustee until the insolvent is reinvested therewith pursuant to a composition. In general[10] any property that immediately before rehabilitation vested in the trustee remains vested in him for purposes of realisation and distribution.[11] Property obtained by the former insolvent after his rehabilitation and any property excluded by the Insolvency Act does not form part of the insolvent estate.

3.34 Section 58 of the Deeds Act provides that immovable property that has vested and remains vested in the trustee shall before or after rehabilitation be transferred only by the trustee. If the debtor wishes to deal with the property after his

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9 Sec 20(1)(a).

10 In terms of sec 129(2) the estate of an insolvent is reinvested in him if he is rehabilitated on the ground that no claims have been proved against his estate.

11 Sec 25.

rehabilitation it must have been transferred to him by the trustee or the Master.

3.35 The period of time that must elapse before an insolvent may be rehabilitated varies according to the circumstances. In terms of section 127A of the Insolvency Act any insolvent not rehabilitated within ten years from the date of sequestration "shall be deemed to be rehabilitated" unless the court orders otherwise prior to the expiry of the ten years. The court has very rarely ordered otherwise[12] and for the purposes of this working paper it is assumed that a person is rehabilitated at the latest after a period of ten years.

3.36 No insolvency interdict lapses merely as a result of the effluxion of time. Rehabilitation does not result in the lapse of an interdict, because it still has to be proved that the property should not be transferred by the Master or the trustee. A practice has arisen for a debtor who applies to the court for his rehabilitation to apply simultaneously for a declaratory order that he is entitled to claim rights to immovable property.

3.37 The Commission still has to investigate in detail such subjects as rehabilitation, prescription of claims, and the vesting and revesting of assets. Insolvency interdicts are aids in preventing improper dispositions by an insolvent over rights registered in the deeds office. Although the practicability of an interdict system is a consideration, rules relating to the system should not too lightly be adapted with the sole aim of improving the operation of interdicts. The adaptation of such rules relating to insolvency should be evaluated as part of a whole.

3.38 The possible solutions to the problem of the removal of insolvency interdicts can be divided into two groups:

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12 The only known case is referred to in the decision of De Polo v Dreyer 1990 2 SA 290 (W) 293A.

* The individual removal of interdicts upon the occurrence of an event; or

* the removal of all interdicts after a certain period of time has elapsed.

Individual removal has the advantage that each case is considered. However, it involves a considerable amount of work.

3.39 Section 3(1)(x) of the Deeds Act provides that interdicts be removed individually. After ten years from the date of an interdict being entered the Master may approve its removal. The section does not require that there should be a request for approval or indicate the person who should apply for approval. According to comment by the Masters the section has never been applied because no request for approval has ever been received. The section gives the Master a discretion. A prerequisite for the exercise of the discretion is that the interdict should be ten years old. For the rest, the Master has to act as he deems fit. It may be argued that he should in each case ascertain whether the removal of the interdict may prejudice creditors. The Master may destroy his insolvency file five years after rehabilitation.[13] If the Master still has his file, he can check whether the administration of the estate has been completed. If all his records have been destroyed he may assume that the administration has been completed. An insolvent's failure to disclose certain assets to his trustee, or the trustee's failure to deal with an asset in his account, will not appear from the Master's records. The section can be applied but the Master would apparently have to consider each case individually and the Registrar of Deeds would have to remove each interdict individually. Approval by the Master will not guarantee that there are no further assets to be realised as part of the insolvent estate. It is recommended that section 3(1)(x) of the Deeds Act be deleted.

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13 Sec 155(2) Insolvency Act.

3.40 The memorandum by the Association of Law Societies recommended prescription of claims against an insolvent estate ten years after confirmation of the final account. The trustee and the Master should inform the Registrar of the confirmation of new and old accounts respectively in order that the interdicts may be removed after ten years. This proposal will give rise to considerable extra work for trustees, the Master and the Registrar of Deeds. The Master pointed out that he destroys some of his old files and cannot supply information. A provision that claims prescribe does not mean that creditors will not in fact be prejudiced. The practical effect of this proposal does not differ much from the operation of section 3(1)(x) of the Deeds Act discussed in the previous paragraph.

3.41 Rehabilitation would have to be investigated in detail before the Commission made recommendations in that regard. Because, so far as is known, the court has ordered the suspension of automatic rehabilitation in only one exceptional case, it would not make much difference in practice if no provision was made for the court to suspend such rehabilitation. As an interim measure it is recommended that a court order should not suspend rehabilitation by lapse of time.[14] According to a sample taken in the office of the Master, Pretoria, the final liquidation and distribution accounts in insolvent estates are in 92% of the cases confirmed within 30 months after sequestration.[15]

3.42 The purpose of the system of insolvency interdicts is to protect creditors against improper dispositions of rights to which they are entitled. According to the present system the interdicts remain in force indefinitely. This means that the number of interdicts increases continuously to the detriment of persons who have nothing to do with the insolvent estate. Thousands upon thousands of existing interdicts that do not identify the

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14 See par 3.72 below.

15 Schedule 4 Working Paper 29 Review of the law of insolvency: Prerequisites for and alternatives to sequestration South Africa Law Commission.

insolvent properly remain on the register for ever, causing delays, frustration, embarrassment and financial losses. Any provision that interdicts expire or are cancelled will detract from the protection of creditors of insolvent estates. The interests of creditors must be weighed against the interests of the large number of persons who daily seek to conduct transactions in the deeds office. It is submitted that the damaging effect of the perpetuity of insolvency interdicts is not justified by the protection that it affords to creditors of insolvent estates.

3.43 How will a reduction of the period during which interdicts remain in force affect the protection of creditors?

3.44 As regards rights of which the trustee becomes aware shortly after sequestration a long period is unnecessary. More than 90% of the estates are finalised within three years after sequestration. Of the remaining 10% there are few cases where the trustee has not during three years sold and transferred the immovable property. Cases do, however, occur where the trustee becomes aware of immovable property some time after sequestration or where there is a long delay before a trustee is appointed. Mr Wilson proposed that all interdicts should be removed after three years, except where the trustee has given notice of a sale or the life of the interdict has been extended with the consent of the Master.

3.45 According to the Discussion Paper distributed amongst interested parties the proposal that sales by the trustee should be noted in the deeds office would entail a great amount of work while not offering many advantages. During the existence of the interdict registered rights belonging to the insolvent estate can in any case not be dealt with without the co-operation of the trustee. A period of three years would in almost all cases afford the trustee sufficient opportunity to deal with rights to immovable property.

3.46 It may happen that rights are registered in the name of the insolvent some time after sequestration. Examples are

property inherited by the insolvent after sequestration or property purchased by him on instalments and registered in his name after sequestration. An insolvency interdict will not interfere with the registration of rights in the name of the insolvent. If simultaneously with transfer a bond is registered over the immovable property or if the person subsequently wishes to register a transaction regarding the property, the insolvency interdict will be raised. Mr Wilson is of the opinion that the protection of windfalls after sequestration from fraudulent dealings by the insolvent, is not a sufficient reason to sacrifice the many advantages of limiting the currency of interdicts, in the light of the heavy penalties for such actions.[16]

3.47 Any period of time to be fixed for the expiry of insolvency interdicts is to a certain extent arbitrary. If the register of interdicts is used as a list of unrehabilitated insolvents the period should according to existing law be ten years. Property accruing to an insolvent before rehabilitation usually forms part of the insolvent estate, while property accruing thereafter does not form part of the estate.[17] However, the insolvency interdict does not play a role when property accrues but when an attempt is made before <u>or after</u> rehabilitation to deal with the property. Under the existing law, therefore, a period of ten years is not conclusive. The periods proposed ranged from one to ten years. The shorter the period the less protection is afforded to creditors. The longer the period the more work, the longer the delays and the higher the costs that will be caused by the number of existing interdicts. The periods of three and ten years, in that order, were the most popular among those who commented on the Discussion Paper. In terms of section 14 of the Bankruptcy (Scotland) Act 1985 the effect of an insolvency interdict expires three years after sequestration unless its effect is renewed by the trustee before the expiry of the three years or a further period of three years. <u>A period of</u>

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16 Imprisonment not exceeding three years in terms of section 132(b) of the Insolvency Act.

17 Sec 20(2)(b) Insolvency Act.

ten years is recommended. Interdicts registered before the commencement of an amendment Act should also be affected after the expiry of a transitional period of (say) six months.

3.48 A provision that old interdicts must be removed will place a heavy burden on the Registrars of Deeds. If it is merely provided that the interdicts expire, the Registrars can decide for themselves whether to remove all old interdicts, whether to remove the old interdicts as they arise, or whether merely to ignore old interdicts. For the convenience of deeds offices it is desirable that notices furnishing new particulars should expire as if they were an original interdict. The trustee should include a copy of the sequestration order with any notice so that all the particulars the Registrar needs will be available to him together with the last notice.

3.49 It is recommended that insolvency interdicts or notices in connection with such interdicts should be effective for ten years from the registration of the interdict or notice and that the Registrars should be authorised to destroy interdicts or notices that have expired.

3.50 Cases where a trustee has after ten years not been able to deal with immovable property will be extremely rare. In the few cases where the extension of the interdict might be necessary, the trustee could be required to identify the insolvent clearly and likewise the immovable property or bond to which the interdict should apply. The further period during which the caveat should apply would depend on the circumstances. In order to avoid the extension of a caveat as a result of a trustee having failed to do his work properly, the consent of a responsible authority, such as the Master, should be required. It is recommended that the trustee may with the consent of the Master have a caveat noted against the transfer of specified immovable property or the cancellation or cession of a specified bond. The notice to the Registrar should identify the insolvent clearly and the caveat should remain in force until the date specified by the Master in his consent.

(g) Liquidation interdicts

3.51 In the case of the winding-up of companies the identification of the company does not give rise to serious problems. In the deeds office use is made of the registration number of the company together with its name. Although it is not unreasonable to expect that an application for winding-up should state the registration number, it must be conceded that such a requirement is not essential. For practical purposes there is no question of windfalls after liquidation. There is, however, a possibility that immovable property purchased by the company on instalments may be registered in the name of the company after winding-up.

3.52 The Institute of Accountants proposed that these interdicts should expire when the company (or close corporation) is removed from the register and not after a fixed period. Objections to the individual removal of interdicts were discussed above. The Registrars of Deeds emphasised that these interdicts do not cause problems.

3.53 Because these interdicts do not really cause problems and amendments are therefore not urgent, no recommendations regarding liquidation interdicts are made in this report.

(h) Other proposals

3.54 Proposals regarding the identification of the debtor and the registration and expiry of interdicts were discussed above. There were also other proposals relating to insolvency interdicts.

3.55 A proposal that the Registrar of Deeds should on receipt of the insolvency interdict inform the trustee through the Master of rights registered in the name of the insolvent, was discussed in the Discussion Paper. This proposal will place an additional burden on the Registrar and is not compatible with his existing

functions. The statement in the Discussion Paper that the trustee's duties should not be transferred to the Registrar was supported by the comment on the Discussion Paper.

3.56 There was a proposal that each trustee should be compelled to enquire at all deeds offices through a conveyancer whether rights are registered in the name of the insolvent. Although work is being done on a system which would enable conveyancers to make telephonic enquiries at all deeds offices, a centralised information system is not envisaged at present. It appears to be desirable to leave it to the trustee to decide whether and at which deeds offices to have a deed search done.

3.57 The Chief Registrar of Deeds proposed that upon automatic rehabilitation after ten years all rights registered in the name of an insolvent should revest in him without any act of registration. Section 25 of the Insolvency Act and section 58 of the Deeds Act will have to be amended.

3.58 The advantages and disadvantages of this proposal are discussed in paragraph 3.72.

3.59 A related question is whether section 58 of the Deeds Act should be amended if insolvency interdicts do not remain in force for ever. It is assumed that legislation will provide expressly that insolvency interdicts cease to apply after a certain period of time and that they may then be destroyed by the deeds office.

3.60 Some of the Registrars of Deeds contend that section 58 cannot be applied if the interdict system is not comprehensive, because they will not know whether the registered owner or the trustee of an insolvent estate should act as owner. In terms of section 20 of the Deeds Act the deed of transfer must be executed by the owner or someone authorised by him. In terms of section 102(1) "owner" means, inter alia, "the person registered as the owner or holder thereof and includes the trustee in an insolvent estate". Section 58 provides that immovable property which has

vested in a trustee in accordance with the law relating to insolvency and which has not been revested in the insolvent may, whether before or after rehabilitation, be transferred only by the trustee. The insolvent cannot deal with revested property until an endorsement to that effect has been made by the registrar on the title deed. These provisions in section 58 are necessary because section 25 of the Insolvency Act provides as a general rule that property vested in the trustee immediately before rehabilitation remains so vested after rehabilitation. Section 3(1)(b) provides that the Registrar shall reject any deed or other document if his examination reveals that execution or registration is not permitted or that some other valid objection exists. If immovable property was at any time included in an insolvent estate, special procedures must therefore be followed. For every transaction in the deeds office it must be ascertained whether the person who wishes to deal with rights has at any time been sequestrated. At present the deeds office uses the comprehensive[18] interdict system to determine whether a person has ever been insolvent. The question is whether an acceptable alternative exists.

(i) <u>Abolition of the system of insolvency interdicts</u>

3.61 The Institute of Accountants, the memorandum by the Association of Law Societies, the Chief Master of the Supreme Court, the Master, Pietermaritzburg, the Chief Registrar of Deeds, and all the other Registrars except the Registrar, Cape Town, support the retention of a system of insolvency interdicts. The following reasons for the retention of the system were given:

* It prevents property that has been concealed by the insolvent from being dealt with. It is the only measure of control to limit improper transactions.

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18 See par 3.70 below.

* Deeds offices must at any rate maintain a system of interdicts for other cases.

* If the system is abolished a conveyancer will have to enquire at all master's offices to determine whether or not a person is insolvent and not at one of the deeds offices only. There is no central register of insolvent persons, and to a certain extent the interdict system serves this purpose.

* The "infallibility" of the registration system will disappear.

* Alternative protective measures are unacceptable.

3.62 The Master, Kimberley, is of the opinion that if the system is abolished provision would have to be made for attachment of immovable property by the sheriff or in terms of a warrant issued by the Registrar of the Supreme Court.

3.63 The Master, Cape Town, a Deputy Master from Pretoria and the Master, Grahamstown, were also in favour of other measures instead of interdicts. The Acting Master, Bloemfontein, asks whether the reasons for the repeal of section 10 of the Administration of Estates Act 66 of 1965 do not apply to insolvencies as well. (This section provided that the Master should in certain cases furnish the Registrar of Deeds with a return to protect a deceased spouse's interest in immovable property.) If heirs are expected to protect their own interests, why not also the creditors of an insolvent estate or the trustee on their behalf?

3.64 The Registrar of Deeds, Cape Town, proposed that the system of insolvency interdicts should be abolished. The alternatives proposed by him are discussed below.

3.65 The Discussion Paper put forward the following arguments in favour of the abolition of the system of insolvency interdicts:

* The interdicts cause delays, frustration and embarrassment and require a great deal of manpower.

* Section 132(b) of the Insolvency Act makes the concealment of any asset of the insolvent estate an offence liable to imprisonment for a period not exceeding three years. This provision serves as a deterrent.

* Apparently interdicts seldom produce anything positive in the way of preventing the improper disposition of assets of an insolvent estate.

* The provisional liquidator should be appointed immediately after sequestration and should take steps to protect both movable and immovable assets.

3.66 Because the abolition of the interdict system will be controversial, it is not considered in this working paper.

3.67 With reference to his proposal that the system of interdicts be abolished, the Registrar of Deeds, Cape Town, proposed two alternatives to protect creditors.

3.68 The first proposal was that Deeds Regulation 44A should be amplified in order that a person who prepares a document for the deeds office should certify that any natural person who performs any act of registration in the deeds office has full legal capacity on the date of execution or registration of a transaction. (Apparently he would also have to certify whether the person has ever been insolvent.) This notion is not so unusual if one considers section 15(4)(c) of the Sectional Titles Act 95 of 1986. In terms of this section the conveyancer must certify that no interdict, attachment caveat or other such notice

is applicable and that the transferor is not insolvent, unless the interdict, etc, is being dealt with or transfer is from an insolvent estate. The Chief Registrar of Deeds says that this proposal, which would place the burden of proof as to the legal capacity of the person who acts squarely upon the shoulders of the conveyancers, would surely be opposed by the profession. At present the interdict system enables the conveyancer to enquire at any of the eight deeds offices. It would be far more difficult, time-consuming and inflationary if enquiries had to be made at all the master's offices. He adds that the sectional titles regulation board is at present investigating the possibility of bringing the registration of sectional titles into line with the registration of conventional deeds. According to the proposal it would still be necessary to check whether an interdict has not been registered between the date of the conveyancer's certificate and the date of the act of registration.

3.69 The second proposal by the Registrar, Cape Town (if conveyancers strongly oppose his first proposal), is that upon the lodging of each deed it should be enquired whether the person acting is or has been insolvent. He argues that this query is in any case raised in respect of almost every deed and would not add significantly to the workload of deeds examiners. If the note is raised in every case, the person acting would have no cause for complaint. This would result in a massive reduction of work in the deeds office. Storage space would also be saved, because interdicts are kept as originals and are not microfilmed. He adds that the system of interdicts should be maintained only if it is infallible. If the system is abolished as a whole, the nagging question of how long the interdicts should remain in force would fall away.

3.70 References to the infallibility of the existing interdict system should not be taken literally. Notwithstanding this system cases occur where someone succeeds in dealing improperly with an asset of an insolvent estate. The Institute of Accountants also points out that there is at times a delay before a sequestration order is transmitted to the Registrar and

registered. The "comprehensive" system occasionally referred to in this paper merely signifies that in theory an interdict is registered for every sequestration order and that the interdict does not lapse.

### (j) Amendment of other rules of the law of insolvency

3.71 Is an incomplete interdict system, or no interdict system at all acceptable without adaptation of other legal rules? As indicated by the Chief Registrar of Deeds, it would create serious problems if the conveyancers were to enquire from every master's office whether a person has ever been insolvent for each and every transaction in the deeds office. The numerous enquiries would cause problems for the staff of the Master as well. A central computerised system for this purpose alone would not be justified. The conveyancer would to a large extent have to rely on an affidavit by the person whose rights are being dealt with. It does not seem desirable that the system should depend on the integrity of the very person whose improper transactions the system seeks to curb. If an interdict system is retained, it should probably, at least in theory, contain an entry for every unrehabilitated insolvent and every rehabilitated insolvent with rights to immovable property that belong to the insolvent estate.

3.72 The Chief Registrar of Deeds proposed that all rights registered in the name of an insolvent should revest in him without any act of registration when he is rehabilitated automatically after ten years. If all insolvents were rehabilitated after ten years or less,[19] it would mean that all insolvency interdicts older than ten years could be ignored.

The Institute of Accountants submits that immovable property that has vested in the insolvent should not revert to him on his rehabilitation. It is conceivable that immovable property has not been dealt with by the trustee before rehabilitation. Usually the insolvent may apply for rehabilitation after four years or even

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19 See par 3.41 above.

earlier if the Master recommends it. The Institute is furthermore of the opinion that the amendment of section 127A in order that a creditor could no longer delay rehabilitation and an amendment of section 58 so that the consent of the trustee would be required in fewer cases, would adversely affect creditors.

It has to be conceded that the amendments would have the effect that an insolvent who can conceal windfalls or any other rights to immovable property for long enough would become the lawful owner of the property. It was proposed above[20] that the interdicts should expire ten years after the registration thereof. The interdict will not lapse at rehabilitation but at the earliest some time thereafter. The trustee can prevent the expiry of the interdict by having a notice registered. The insolvent's capacity to deal with immovable property in the deeds office can be linked to the expiry of the interdict.

It was submitted above[21] that the damaging effect of the perpetuity of insolvency interdicts is not justified by the protection that it affords to creditors. It should be borne in mind that certainty in the system of deeds registration is desirable, that the possibility of creditors being prejudiced more than ten years after sequestration is already slight and that it is reduced further by the proposed power of a trustee to note a further interdict. While the objections in principle raised by the Institute of Accountants are appreciated, the real possibility of prejudice to creditors is so slight that it does not weigh up against the advantages of interim measures to reduce the number of interdicts. The proposed amendment to section 127A[22] and a provision that the former insolvent may after the expiry of all interdicts deal with immovable property in the deeds office, are the minimum adaptations that will enable the Registrar of Deeds to fulfil his duties if provision is made for the lapse of interdicts

20 Par 3.49.

21 Par 3.42.

22 Par 3.41.

after a fixed period of time. Although the debtor's authority to deal with immovable property after the lapse of the interdict cannot be curtailed without undermining the registration system, a trustee can be given authority to register a caveat with the consent of the Master in respect of specified immovable property or bonds even after rehabilitation. The trustee or creditors can also be given the right to recover the value of the property from the insolvent or someone who knew that the property formed part of the insolvent estate, or from someone who did not give sufficient value in return for the disposition.

3.73 <u>It is recommended that a debtor may after the expiry of all insolvency interdicts (after his rehabilitation) deal in the deeds office with any immovable property registered in his name. The trustee may with the consent of the Master have a caveat registered in respect of specified immovable property, even after rehabilitation. If a former insolvent unlawfully deals with immovable property that forms part of his insolvent estate, the trustee or a creditor may recover the value of the property from the insolvent, or from someone who obtained the property from the insolvent knowing that it formed part of the insolvent estate, or from someone who did not give sufficient value in return for the disposition in so far as he failed to give such value. It is recommended that the provisions of sections 32 and 104(3) of the Insolvency Act should apply to proceedings to recover the value of property. Because a person other than the insolvent is liable only in so far as he did not give sufficient value, it is not advisable that the provisions of section 34 should apply.</u>

3.74 It is possible that, before an interdict is due to expire as a result of the effluxion of time according to the proposal above, it should no longer be in force: for instance, where the sequestration order is set aside, or the court orders that the debtor is entitled to the property, or the trustee signs a waiver. At present these cases do not give rise to any problems. No legislation is proposed to make provision for these cases.

## 4. SUMMARY OF RECOMMENDATIONS SUGGESTING AMENDMENTS

### (a) Draft legislation

4.1 The draft legislation has been prepared in the form of amendments to existing Acts. Some archaic expressions are used in the draft because the wording of an amendment Act must agree with the wording of the principal Act. When a new insolvency Act is drafted the wording will be modernised.

4.2 The proposed amendments of the Insolvency Act and the Deeds Act are set out in the Annexure.

### (b) Proposed amendments to the rules of court

4.3 It may be argued that a provision directing that certain particulars be stated in a draft order or an annexure belongs in the rules of court. The said rules do not contain any provisions as to the form of an application for sequestration. Section 9 of the Insolvency Act prescribes the particulars to be stated in the application. As an interim measure it is recommended that section 9 be amended to indicate which particulars should be stated in a draft order or annexure. (Par 3.14, 3.19.)

### (c) Proposed administrative procedure

4.4 It is proposed that an administrative arrangement should be made with the Registrars of the Supreme Court that certain particulars should appear in the court order. (Par 3.14, 3.19.)

## ANNEXURE : DRAFT LEGISLATION

GENERAL EXPLANATORY NOTE:

| | |
|---|---|
| [ ] | Words in bold type in square brackets indicate omissions from existing enactments. |
| ____________ | Words underlined with solid line indicate insertions in existing enactments. |
| | References to paragraphs refer to the paragraph in this report where the provision in question is recommended. |

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## INSOLVENCY AMENDMENT BILL

**To amend the Insolvency Act, 1936, so as to regulate further the particulars to be stated in an application for sequestration; to provide for further notices to officers charged with the registration of title to immovable property and the registration of such notices; to make provision that some caveats expire after the effluxion of a certain period of time; to provide that a trustee shall examine particulars in the sequestration order, obtain particulars that are lacking, and transmit the correct and further particulars; to provide that a trustee has authority with the consent of the Master of the Supreme Court to cause a caveat to be registered; to regulate further the registration of transactions in respect of immovable property after the expiry of caveats; to provide for the recovery of the value of immovable property disposed of unlawfully; further to regulate rehabilitation by effluxion of time; to amend the particulars to be furnished in a statement of affairs; to amend the Deeds Registries Act, 1937, so as to authorize the Registrar of Deeds to destroy documents relating to a caveat which has expired; to delete the provision for the removal of certain entries with the approval of the Master of the Supreme Court; and to provide for incidental matters.**

**Amendment of section 9 of Act 24 of 1936, as amended by section 6 of Act 16 of 1943 and section 2 of Act 99 of 1965**

1. Section 9 of the Insolvency Act, 1936 (Act No. 24 of 1936, hereinafter referred to as the Insolvency Act), is hereby amended by the substitution for subsection (3) of the following subsection:

"(3)(a) Such a petition shall set forth the following, namely -

(i) the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number;

(ii) the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of the spouse;

(iii) the amount, cause and nature of the claim in question **[shall state]**;

(iv) whether the claim is or is not secured and, if it is, the nature and value of the security **[and shall set forth]**; and

(v) the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent.

(b) The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

(c) The petition shall be accompanied by a draft order or an annexure which sets forth the particulars referred to in paragraphs (a)(i) and (a)(ii) and if the creditor is unable to furnish all the particulars he shall state the reason why he is unable to do so.". (Par 3.14, 3.19)

**Amendment of section 17 of Act 24 of 1936, as amended by section 1 of Act 57 of 1951 and section 10 of Act 16 of 1943**

2. Section 17 of the Insolvency Act is hereby amended -

(a) by the substitution for subsection (2) of the following subsection:

"(2) Every officer who has received an order transmitted to him in terms of subsection (1), or a copy of an order transmitted to him in terms of section 18A, shall register it and note thereon the day and hour when it was received in his office."; and

(b) by the substitution for subsection (3) of the following subsection:

"(3)(a) Upon the receipt by any officer referred to in subparagraph (ii) of paragraph (b) of subsection (1) of a sequestration order, or of a copy of an order referred to in section 18A, he shall enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent **[or to his or her spouse]**, and if the order or copy of the order contains the name of the spouse of the insolvent, he shall in like manner enter a caveat in respect of the spouse also.

(b) A caveat referred to in this subsection, whether it was entered before or after the commencement of the Insolvency Amendment Act, 1991 (Act No. of 1991), shall expire after the effluxion of ten years from the entry of the caveat, or six months after the commencement of the said Act, whichever date is the later.". (Par 3.47, 3.48, 3.49)

**Insertion of section 18A in Act 24 of 1936**

3. The following section is hereby inserted in the Insolvency Act after section 18:

**"Trustee to furnish particulars of insolvent**

18A. Any person appointed as provisional trustee after the commencement of the Insolvency Amendment Act, (Act No. of 1991), or if no provisional trustee has been appointed, or if he failed to perform the duties mentioned below, then a trustee so appointed, shall as soon as possible after his appointment determine whether the particulars referred to in sections 9(3)(a)(i) and (ii) are stated correctly in the

sequestration order and if any of the particulars are incorrect or are lacking, he shall forthwith take all reasonable steps to obtain the correct particulars and shall enter such particulars on a copy of the sequestration order and transmit it to every officer charged with the registration of title to any immovable property in the Republic and to the Master. (Par 3.14, 3.27, 3.49)

**Insertion of section 18B in Act 24 of 1936**

4. The following section is hereby inserted after section 18A of the Insolvency Act:

**"Trustee may cause caveat to be entered**

18B (1) A trustee may, before or after the rehabilitation of an insolvent, with the written consent of the Master, by notice to the officer charged with the registration of title to immovable property, cause in respect of immovable property or a bond registered in the name of the insolvent or his spouse a caveat to be entered against the transfer of the immovable property or the cancellation or cession of the bond referred to in the notice.

(2) The notice referred to in subsection (1) shall be accompanied by the written consent of the Master provided for in that subsection and shall identify sufficiently the person in respect of whom and the property or bond in respect of which the caveat shall be entered so as to enable the officer charged with registration to enter the caveat as provided in the said subsection.

(3) The caveat remains in force until the date stated by the Master in his consent.". (Par 3.50, 3.73)

**Amendment of section 25 of Act 24 of 1936, as amended by section 2 of Act 6 of 1972**

5. Section 25 of the Insolvency Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) The estate of an insolvent shall remain vested in the trustee until the insolvent is reinvested therewith

pursuant to a composition as in section 119 provided, or until the rehabilitation of the insolvent in terms of section 127 or 127A: Provided that, subject to the provisions of subsection (3), any property which immediately before the rehabilitation is vested in the trustee shall remain vested in him after the rehabilitation for the purposes of realization and distribution.", (Par 3.73) and

(b) by inserting the following subsections after subsection (2):

"(3) After the expiry of every caveat entered in terms of sections 17(3) and 18B in respect of the property of the insolvent, he may transfer or mortgage any immovable property registered in his name or otherwise cause registration of any other act relating to such property as if his estate was never sequestrated. (Par 3.73)

(4) If a person who is or was insolvent unlawfully disposes of immovable property or a right to immovable property which under the law relating to insolvency forms part of his insolvent estate, the trustee may, notwithstanding the provisions of subsection (3), recover the value of the property or right so disposed of -

(a) from the insolvent or former insolvent;

(b) from any person who, knowing such property or right to be part of the insolvent estate, acquired such property or right from the insolvent or former insolvent; or

(c) from any person who acquired such property or right from the insolvent or former insolvent without giving sufficient value in return for the disposition, such recovered value to be commensurate with the extent to which such person failed to give sufficient value.". (Par 3.73)

**Amendment of section 32 of Act 24 of 1936**

6. Section 32 of the Insolvency Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Proceedings to recover the value of property or a right to property in terms of section 25(4), or to set aside any disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee. If the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.". (Par 3.73)

tendering the surrender of the debtor's estate, or who is the representative of the debtor or his estate.

AFFIDAVIT

I, ............................ declare under oath* / solemnly and sincerely declare that to the best of my knowledge and belief the statements contained in the foregoing balance sheet and the Annexures thereto are true and complete, and that every estimated amount therein contained is fairly and correctly estimated.

Signature of declarant .......................................

Sworn / Solemnly declared * before me on the ..........................

day of ............................ at ....................

..............................
Commissioner of Oaths

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* Delete inappropriate words".

(Par 3.12, 3.19)

**Amendment of section 3 of Act 47 of 1937, as amended by section 14 of Act 50 of 1956, section 2 of Act 43 of 1957, section 2 of Act 43 of 1962 and substituted by section 2 of Act 87 of 1965 and further amended by section 1 of Act 41 of 1977, section 1 of Act 92 of 1978, section 1 of Act 44 of 1980, section 3 of Act 27 of 1982 and section 28 of Act 88 of 1984**

10. Section 3 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended -

(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:

"(a) take charge of and, except as provided in subsection (2) or (3), preserve or cause to be preserved all records which were prior to the commencement of this Act, or may become after such commencement, records of any deeds registry in respect of which he has been appointed: Provided that the registrar may destroy or otherwise dispose of any record as prescribed which has been cancelled in terms of this sub-section or any document in connection with a caveat that has expired in terms of section 17(3) or 18B of the Insolvency Act, 1936 (Act No. 24 of 1936);"; (Par 3.49) and

(b) by the deletion of paragraph (x) of subsection (1). (Par 3.39)

**Amendment of section 58 of Act 47 of 1937 as amended by section 9 of Act 3 of 1972 and section 8 of Act 92 of 1978 and substituted by section 17 of Act 27 of 1982**

11. Section 58 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) Immovable property which has vested in a trustee in accordance with the law relating to insolvency and which has not in terms of that law been re-vested in the insolvent may, subject to the provisions of section 25(3) of the Insolvency Act, 1936 (Act No 24 of 1936), whether before or after rehabilitation of the insolvent, be transferred only by

**Amendment of section 104 of Act 24 of 1936**

7. Section 104 of the Insolvency Act is hereby amended by the substitution for subsection (3) of the following subsection:

> "(3) If any creditor has, under section 25(4) taken proceedings to recover the value of property or a right or has, under subsection 32(1) taken proceedings to set aside any disposition of or dealing with property under section 26, 29, 30 or 31 or for the recovery of damages or a penalty under section 31, no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.". (Par 3.73)

**Substitution of section 127A of Act 24 of 1936 as inserted by section 6 of Act 6 of 1972**

8. The following section is hereby substituted for section 127A of the Insolvency Act:

> "**Rehabilitation by effluxion of time**
>
> **127A.** Any insolvent not rehabilitated by the court within a period of ten years from the date of sequestration of his estate shall be deemed to be rehabilitated after the expiry of that period **[unless a court upon application by an interested person after notice to the insolvent orders otherwise prior to the expiration of the said period of ten years or before the 31st December, 1972, whichever date is the later]**.". (Par 3.41)

**Amendment of First Schedule to Act 24 of 1936**

9. The First Schedule to the Insolvency Act is hereby amended by the substitution for Annexure VIII of Form B of the following Annexure:

"

## ANNEXURE VIII

## PERSONAL INFORMATION

State whether the debtor is married, widowed or divorced ...
...........................................................

If the debtor is or was married, state -

(a) name or names of spouse or spouses ..............
..............................................; and

(b) whether the debtor is or was married in or without community of property and whether the accrual system applies ..................................
..............................................

(c) date of marriage ..................................

(d) whether the matrimonial property system has been changed since entering into the marriage and, if so, the nature of the change ....................
..............................................

(e) full names and date of birth of the spouse and if an identity number has been assigned, the identity number of the spouse ...........................
..............................................

State the debtor's race and nationality ..................

State the debtor's place of birth, date of birth and, if an identity number has been assigned, the identity number ..........
...........................................................

Was the debtor's estate or the estate of a partnership in which the debtor is or was a partner previously sequestrated or placed in bankruptcy, whether in the Republic or elsewhere? .....
...........................................................

If the preceding answer is in the affirmative, state -

(a) whether debtor's own estate or his partnership's estate was (i) sequestrated; or (ii) placed in bankruptcy ....
..............................................

(b) the place where and the date when that estate was sequestrated or placed in bankruptcy .................
..............................................

(c) whether the debtor has been rehabilitated or his estate released; if so when ...............................
..............................................

The foregoing balance sheet and statements shall be verified by an affidavit in the subjoined form, made by the debtor or by the person who on behalf of the debtor presented the petition

the trustee, and may not after such rehabilitation be transferred, mortgaged or otherwise dealt with by the insolvent until it has been transferred to him by the trustee: Provided that if after rehabilitation the trustee has been discharged or there is no trustee in existence, the Master shall, if satisfied that the rehabilitated insolvent is entitled to the property, give him transfer thereof in such manner as may be prescribed."; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) If by virtue of the provisions of the law relating to insolvency an insolvent has been re-vested with the ownership of any property, such property may, subject to the provisions of section 25(3) of the Insolvency Act, not be transferred, mortgaged or otherwise dealt with by the insolvent until an endorsement that the property has been restored to him has been made by the registrar on the title deed of the property.".

**Short title and commencement**

**12.** This Act shall be called the Insolvency Amendment Act, 1991, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.