

(3) The Commissioner must be served with a copy of an appeal or review in terms of this section.

CHAPTER 3

LIQUIDATION PROCEEDINGS

PART 1

COMMENCEMENT STANDARDS

Acts of insolvency

- 16.** (1) A debtor commits an act of insolvency if-
- (a) that debtor leaves Namibia or, being out of Namibia remains absent therefrom, or absents himself or herself from his or her dwelling, or regular place of business, with intent thereby to evade or delay the payment of his or her debts;
 - (b) that debtor disposes or attempts to dispose of the debtor's property or any part thereof in a manner which appears to the Court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the Court that such debtor was able to pay the debtor's debts after the disposition;
 - (c) that debtor removes or attempts to remove any of the debtor's property in a manner which appears to the Court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the Court that such debtor was able to pay the debtor's debts after the removal or attempted removal;
 - (d) that debtor makes or offers to make any arrangement with any of the debtor's creditors for releasing the debtor wholly or partially from the debtor's debts;

- (e) having applied in terms of **section 17** for liquidation, that debtor fails to comply with the requirements of that section or submits a statement of affairs contemplated in that section which is substantially incorrect or incomplete; or
 - (f) that debtor gives notice in writing to any of the debtor's creditors that the debtor is unable to pay any of the debtor's debts;
 - (g) if the debtor exhibits to any meeting of the debtor's creditors any statement of the debtor's assets and liabilities that shows that the debtor is insolvent, or presents or causes to be presented to any such meeting a written admission of the debtor's inability to pay the debtor's debts;
 - (h) if the debtor defaults in any proposal made under this Act; or
 - (i) the debtor is generally unable to pay debts which are due and payable, or the debtor's liabilities exceed the value of the debtor's assets.
- (2) For purposes of subsection (1)(i) a debtor is unable to pay that debtor's debts if-
- (a) a creditor to whom the debtor is indebted in an amount of not less than the amount prescribed from time to time has, by cession or otherwise, in the manner contemplated in subsection (3) served on the debtor a statutory demand, corresponding substantially with **Form F of Schedule 1-**
 - (i) for payment of the amount which is due and payable;
 - (ii) to give security to the reasonable satisfaction of the creditor for such amount;
 - (iii) to enter into a compromise therefor,

and the debtor has for 21 days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;
or

(b) it appears from the return of the officer charged with the execution of a judgment of any court against that debtor that the judgment has not been satisfied after a valid execution thereof.

(3) The statutory demand referred to in subsection (2) must be served on the debtor by the messenger of the magistrate's court within whose jurisdiction the debtor resides or by the creditor's legal practitioner by delivering it -

(a) to the debtor personally;

(b) at the debtor's main office or place of residence; or

(c) in such other manner as a magistrate's court may direct.

(4) In determining whether a debtor is unable to pay its debts, a Court must also take into account the contingent and prospective liabilities of the debtor.

(5) If a debtor committed any of the acts of insolvency contemplated in subsection (1), any person entitled to do so in terms of this Chapter may commence insolvency proceedings.

PART 2

APPLICATIONS FOR LIQUIDATION AND LIQUIDATION ORDERS

Application by debtor for liquidation of estate

17. (1) (a) The following persons may make application to a Court in accordance with the Rules of the Court for the liquidation of the estate of a debtor or of a deceased person:

- (i) the debtor;
- (ii) a person who lawfully acts on behalf of a debtor who is incompetent to manage his or her own affairs; or
- (iii) the executor or liquidator of the estate of that deceased person.

(b) An applicant contemplated in paragraph (a) must prove that-

- (i) the estate of that debtor or deceased person, as the case may be, is or will be generally unable to pay its debts as they mature; or
- (ii) the liabilities of the estate of that debtor or deceased estate exceed the value of its assets.

(2) Subject to subsection (7), an application contemplated in subsection (1) must, where applicable contain the following information:

- (a) The full name and date of birth of the debtor or deceased person, as the case may be and, if an identity number has been assigned to him or her, that identity number;
- (b) any other names under which the debtor traded, if applicable;
- (c) the marital status of the debtor or deceased person, as the case may be and, if he or she is married in community of property the full name and date of birth of his or her spouse and, if an identity number has been assigned to the spouse, that identity number.

(3) The particulars referred to in subsection (2) must appear in the heading of the application.

(4) An application contemplated in subsection (1) must be accompanied by-

- (a) an affidavit in support of the relief sought in the application;
- (b) a statement of affairs of the debtor or deceased person, as the case may be, corresponding substantially with **Form A1 of Schedule 1** and which must contain the particulars provided for in the said Form, which particulars must be sworn to or confirmed as required by the said Form; and
- (c) a certificate of the Commissioner, issued not more than 14 days before the date on which the application is to be heard by the Court, that sufficient security has been given for-
 - (i) the payment of all costs in respect of the application that might be awarded against the applicant; and
 - (ii) all costs of the liquidation of the estate referred to in **section 74**, which are not recoverable from other creditors of the estate.

(5) The applicant must, in accordance with the Rules of the Court lodge an application contemplated in subsection (1) no later than noon on the fifth court day before the day on which the application is to be heard by the Court, with the Registrar of the Court for enrolment and deliver by standard notice to the Commissioner-

- (a) a copy of the application together with the supporting affidavit referred to in subsection (4)(a); and
- (b) two copies of the statement of affairs referred to in subsection (3)(b).

(6) Before the documents referred to in subsection (5) are delivered to the Commissioner the applicant must give notice of the application with the affidavit referred to in subsection (4)(a) attached thereto-

- (a) by direct notice to the head office of every trade union that, to the applicant's knowledge, represents employees, if any, of the debtor; and

- (b) to the employees themselves-
 - (i) by affixing a copy of such notice and attached affidavit to any notice board to which the employees have access inside the debtor's premises; or
 - (ii) if there is no access to the premises by the employees, by affixing a copy of the notice and attached affidavit to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the date of the application; and
 - (c) by direct notice to-
 - (i) the Commissioner of Inland Revenue; and
 - (ii) the head office of bondholders with special bonds registered against any property of the debtor.
- (7) (a) If an applicant is unable to comply with any of the requirements of subsection (2), the Court may dispense with such requirement and dispose of the application in the manner that it finds just.
- (b) Where the Court is satisfied that there are exceptional circumstances justifying it the Court may authorise the applicant to give notice in a manner other than subsection (6)(b) which the Court regards as appropriate under the circumstances to bring the matter to the notice of any affected employees.
- (8) The Commissioner may require the applicant to cause the property enumerated in the statement of affairs to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, or any other suitably qualified person approved by the Commissioner.

- (9) The Court may, having considered the application -
 - (a) make an order as contemplated in **section 22**;
 - (b) make -
 - (i) an order in terms of Chapter 4 as if the application was a reorganization proceeding; or
 - (ii) an administration order in terms of section 74 of the Magistrates' Courts Act;
 - (c) dismiss the application or postpone its hearing; or
 - (d) make any other order that the Court finds to be just.

Application by creditor for liquidation of debtor's estate

18. (1) The following categories of creditors may make application to a Court in accordance with the Rules of the Court for the liquidation of a debtor's estate:

- (a) A creditor who has against a debtor who committed an act of insolvency or who is insolvent, a liquidated claim for not less than the amount determined by the Commissioner from time to time by notice in the *Gazette*; or
- (b) two or more creditors who have against a debtor who committed an act of insolvency or who is insolvent in the aggregate liquidated claims for not less than the amount determined by the Commissioner as contemplated in paragraph (a).

(2) A claim in respect of a liquidated debt which is payable at some determined time in the future may be taken into account for purposes of subsection (1).

- (3) An application contemplated in subsection (1) must-
 - (a) be made by direct notice to the debtor and to the debtor's spouse, where applicable unless the Court orders that such notice may be dispensed with where the Court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with the notice; and
 - (b) subject to subsection (5), contain the following information, namely-
 - (i) the full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number;
 - (ii) any other names under which the debtor traded, if applicable;
 - (iii) the marital status of the debtor and if he or she is married in community of property, the full name and date of birth of his or her spouse and if an identity number has been assigned to the spouse, such identity number;
 - (iv) the amount, cause and nature of such claim;
 - (v) whether or not security has been given for the claim and if so, the nature and value of the security; and
 - (vi) the act of insolvency or ground of liquidation on which the application is founded or otherwise an allegation that the debtor is in fact insolvent.
- (4) An application contemplated in subsection (1) must be accompanied by-
 - (a) an affidavit in support of the relief sought in the application;

(b) a certificate of the Commissioner, issued not more than 14 days before the date on which the application is to be heard by the Court, that sufficient security has been given-

(i) for the payment of all costs in respect of the application that might be awarded against the applicant; and

(ii) all costs of the liquidation of the estate referred to in **section 74**, which are not recoverable from creditors of the estate.

(5) The particulars referred to in subsection (3)(b)(i), (ii) and (iii) must appear also in the heading of the application unless the Court dispenses with this requirement if the applicant is unable to furnish all such particulars.

(6) The applicant must in accordance with the Rules of the Court-

(a) lodge an application with the Registrar of the Court for enrolment; and

(b) serve a copy of the application, supporting affidavit and all annexures thereto on-

(i) the debtor unless notice to the debtor has been dispensed with by the Court; and

(ii) the Commissioner.

(7) When the application is lodged with the Registrar of the Court in accordance with subsection (6), the applicant must give notice (with the affidavit referred to in subsection (4)(a) attached thereto) of the application -

(a) by direct notice to the head office of every trade union that, to the applicant's knowledge, represents employees, if any, of the debtor; and

(b) to the employees themselves-

- (i) by affixing a copy of such notice and attached affidavit to any notice board to which the employees have access inside the debtor's premises; or
 - (ii) if there is no access to the premises by the employees, by affixing a copy of the notice and attached affidavit to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the date of the application; and
- (c) by direct notice to-
- (i) the Commissioner of Inland Revenue; and
 - (ii) the head office of bondholders with special bonds registered against any property of the debtor.

(8) If the debtor wishes to oppose the application, that debtor in accordance with the Rules of the Court -

- (a) must file a notice of opposition and answering papers with the Registrar of the Court and serve a copy thereof on the applicant and on the Commissioner;
 - (b) may apply to the Court that the application commenced in terms of this section be converted into any reorganization proceeding contemplated in **Chapter 4**, in which event the application will be stayed until the Court determined the debtor's application for conversion into reorganization proceedings.
- (9) (a) If an applicant is unable to comply with any of the requirements of subsections (3)(b), the Court may dispense with such requirement and dispose of the application in the manner that the Court finds to be just.

- (b) Where the Court is satisfied that there are exceptional circumstances justifying it the Court may authorise the applicant to give notice in a manner other than subsection (7)(b) which the Court regards as appropriate under the circumstances to bring the matter to the notice of any affected employees.

(10) The Court, having considered an application contemplated in subsection (1), may-

- (a) make an order as contemplated in **section 22**;
- (b) make -
 - (i) an order in terms of Chapter 4 as if the application was a reorganization proceeding; or
 - (ii) an administration order in terms of section 74 of the Magistrates' Courts Act;
- (c) dismiss the application or postpone its hearing; or
- (d) make any other order that the Court finds to be just.

Liquidation of partnership estate

19. (1) When application is made to a Court for the liquidation of the estate of a partnership, whether in terms of this Act or another Act, application must simultaneously be made for the liquidation of the separate estate of every partner, other than a partner who is not liable for partnership debts or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate.

- (2) The provisions of-

- (a) **section 17**, in so far as they are applicable, applies with the changes necessitated by the context in respect of an application by members of a partnership for the liquidation of the partnership estate; and
- (b) **section 18**, in so far as they are applicable, applies with the changes necessitated by the context in respect of an application by a creditor or creditors of a partnership for the liquidation of the estate of the partnership.

(3) A Court granting a provisional or a final order for the liquidation of the estate of a partnership must simultaneously grant an order for the liquidation of the separate estate of every partner, except a partner who is not liable for partnership debts or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate: Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the Court and has given security for such payment to the satisfaction of the Registrar of the Court, the separate estate of that partner may not be liquidated by reason only of the liquidation of the estate of the partnership.

(4) In the case where there is no partner whose estate may be liquidated as contemplated in subsection (3), the Court may nevertheless liquidate the partnership estate and in such event every director, officer or member of a juristic person, which juristic person is a partner of the partnership in question and every natural person who is a partner but whose estate may not be liquidated, is deemed, for the purpose of performing any statutory requirement in respect of the partnership estate, to be a person whose estate is under liquidation.

(5) Where the separate estate of a partner is unable to meet fully the costs of the liquidation of that estate, the balance must be paid out of the partnership estate and where the partnership estate is unable to meet fully the costs of liquidation the balance must be paid out of the estates of the partners.

(6) If a partnership has been dissolved and the partnership estate is unable to pay its debts, the partnership estate may, on the application of a creditor of the partnership or a former partner, be liquidated as an insolvent estate and the provisions

of subsections (1) to (5) apply with the changes necessitated by the context to such liquidation.

Application for stay of proceedings from the time application for commencement of liquidation is made

20. (1) At any time after the making of a liquidation application, and before the Court grants a liquidation order, a debtor, a creditor of that debtor or a third party with an interest in that application may, to protect and preserve the value of the assets of the debtor or the interests of creditors, apply to the Court-

- (a) if legal proceedings against that debtor are pending in the Court, for the proceedings to be stayed;
- (b) if proceedings relating to a matter are pending against the debtor in another Court, including a magistrate's court to restrain further proceedings in respect of that matter in that other court;
- (c) to stay execution against the assets of the debtor, including actions to make security interests effective against third parties or the enforcement of security interests;
- (d) to entrust the administration or supervision of the debtor's business, if any, which may include the power to use and dispose of assets in the ordinary course of business, to an insolvency practitioner or other person designated by the Court; or
- (e) to entrust the realization of all or part of the assets of the debtor to an insolvency practitioner or other person designated by the Court, in order to protect and preserve the value of assets of the debtor that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy.

(2) On the hearing of an application made in terms of subsection (1), the Court may make an order contemplated in subsection (1) on such terms as the Court considers appropriate, including but not limited to-

- (a) requiring the applicant to provide security to the satisfaction of the Commissioner to indemnify the debtor in the event that the liquidation application is dismissed or a liquidation order is set aside; and
- (b) where appropriate, to pay costs or fees in respect of the application and the orders of the Court contemplated in subsection (1).

Abuse of Court's procedures or malicious or vexatious application for liquidation

21. Whenever a Court is satisfied that an application for the liquidation of a debtor's estate is an abuse of the Court's procedures or is malicious or vexatious, the Court may allow the debtor forthwith to prove any damages which that debtor may have sustained by reason of the application and award the debtor such compensation as the Court finds to be just.

Provisional liquidation order

22. (1) If a Court hearing an application for the liquidation of the estate of a debtor as contemplated in **section 17, 18 or 19** is satisfied upon initial examination that sufficient corroborating evidence appears to exist that-

- (a) the applicable requirements of **section 17, 18 or 19**, as the case may be, have been complied with;
- (b) the debtor has committed an act of insolvency, or that the debtor is insolvent; and

- (d) in the case of an application contemplated in **section 18**, the applicant has a claim against the debtor as contemplated in subsection (1) of that section,

the Court may grant a provisional order for the liquidation of the estate of the debtor.

(2) A Court granting a provisional liquidation order contemplated in subsection (1) may simultaneously grant a rule *nisi* calling upon all interested parties and the respondent, if any, to appear on a date mentioned in the rule and show cause why the respondent's estate should not be liquidated finally.

(3) The return day of the rule *nisi* may on the application of the respondent be anticipated for the purpose of discharging the order for provisional liquidation if 24 hours' notice is given to the applicant.

(4) If the Court does not grant a provisional liquidation order as contemplated in subsection (1) the Court may-

- (a) grant an order in terms of **section 23**;
- (b) make -
 - (i) an order in terms of Chapter 4 as if the application was a reorganization proceeding; or
 - (ii) an administration order in terms of section 74 of the Magistrates' Courts Act;
- (c) dismiss the application;
- (d) postpone the hearing thereof, but not indefinitely; or
- (e) make any other order which the Court finds to be just.

(5) When a provisional liquidation order is granted the Registrar of the Court must, where applicable ensure that the particulars required in terms of **section 17(6) and 18(5)** to appear in the heading of the application appear also on the order.

(6) If there are reasonable grounds to believe that an insolvent may flee the country to avoid prosecution or to take assets out of the reach of creditors, the Court may when granting a provisional or final liquidation order, or at any time thereafter on an application by the liquidator, issue an order that the passport or passports of such insolvent is handed to the liquidator for the period stated in the order.

(7) Notwithstanding time periods set out in the Rules of the Court, the Court must hear and consider an application contemplated in subsection (1) in an expedited manner to enable the Court to reach a decision on whether or not to issue a provisional order or an order referred to in subsection (4) as quickly as possible.

Final liquidation order

23. (1) If at the hearing of an application as contemplated in **section 17, 18 or 19** or pursuant to the rule *nisi* referred to in **section 22(2)** the Court is satisfied that -

- (a) in the case where the application for liquidation was made by a creditor, that creditor has established a claim against the debtor in accordance with **section 18**; and
- (b) the debtor has committed an act of insolvency or is insolvent,

that Court may make an order for the final liquidation of the estate of the debtor.

(2) If the Court does not issue a provisional order in terms of **section 22**, and is not satisfied as contemplated in subsection (1), the Court may-

- (a) dismiss the application for the liquidation of the estate of the debtor and set aside the provisional liquidation order; or

(b) require further proof of the allegations in the application and postpone the hearing for a reasonable period but not indefinitely.

(3) When a final liquidation order is granted the Registrar of the Court must, where applicable ensure that the particulars which must in terms of **section 17(2) and 18(3)(b)(i)-(iii)** appear in the heading of the application also appear on the order.

Public register of rehabilitated and unrehabilitated insolvents

24. The Commissioner must in accordance with **Chapter 7** establish and maintain a public register of rehabilitated and unrehabilitated insolvents.

Obligations of creditor upon whose application a liquidation order is made

25. (1) The creditor upon whose application a liquidation order is made must, at that creditor's own cost, prosecute the liquidation proceedings until a liquidator is appointed.

(2) The liquidator must pay to the creditor referred to in subsection (1) that creditor's costs in respect of the prosecution of the liquidation proceedings, as costs of the liquidation and the costs so payable to the said creditor must be taxed according to the tariff applicable in the Court that made the liquidation order.

Notice of liquidation

26. (1) The Registrar of the Court that has granted a provisional liquidation order must without delay send by standard notice a copy of that order and of any order amending or discharging that order on the date any such order is issued -

(a) to the Registrar of Deeds; and

(b) to the sheriff of the district in which the insolvent resides, appears to be carrying on business or owns property.

(2) The Registrar of Deeds and sheriff who received a copy of an order in accordance with subsection (1) must note thereon the date and time when he or she received that order.

(3) The Registrar of Deeds who has received a copy of a provisional liquidation order in terms of subsection (2) must enter a caveat against-

- (a) the transfer of immovable property; or
- (b) the cancellation or cession of every bond,

registered in the name of or belonging to the insolvent.

(4) If the Registrar referred to in subsection (3) receives a copy of an order discharging a provisional liquidation order, he or she must immediately cancel every caveat entered as a result of such provisional liquidation order.

(5) A caveat entered in terms of subsection (3) expires ten years after the commencement of liquidation.

(6) The Registrar of the Court must without delay send by standard notice to the Commissioner a copy of every provisional or final liquidation order and any other order made by the Court in respect of the insolvent or the liquidator of the insolvent estate.

(7) Upon the granting of a provisional liquidation order the applicant who applied for the order must without delay cause a notice of the order to be published in the *Gazette* and a newspaper circulated in the area where the debtor normally resides.

PART 3

EFFECT OF LIQUIDATION

Effect of commencement of liquidation on insolvent and his or her property

27. (1) The issue of a provisional liquidation order in respect of an insolvent has the effect that the insolvent is divested of his or her estate and that all the property of that insolvent is deemed to be in the custody and under the control of the Commissioner until a liquidator is appointed, whereupon the insolvent estate is deemed to be in the custody and control of that liquidator.

(2) The estate of the debtor remains in the custody and under the control of the liquidator until it reverts to the insolvent in terms of a composition contemplated in **Chapter 4** of this Act, or until the liquidation order is set aside.

(3) If the liquidator vacates his or her office or dies or becomes incompetent to exercise his or her powers and perform his or her duties, the estate vests in any remaining liquidator or if there is none, in the Commissioner until the appointment of a new liquidator.

(4) After the expiry of every caveat entered in terms of **sections 26(3), 66(9), or 117(3)** in respect of the property of an insolvent any act of registration in respect of such property brought about by such insolvent is valid despite the fact that the property formed part of the insolvent estate.

(5) If a person who is or was insolvent unlawfully disposes of immovable property which forms part of his or her insolvent estate, the liquidator may recover the value of the property so disposed of, from -

- (a) the insolvent or former insolvent;
- (b) any person who, knowing such property to be part of the insolvent estate, acquired such property from the insolvent or former insolvent; or
- (c) any person who acquired such property from the insolvent or former insolvent without giving sufficient value in return, in which case the amount so recovered is the difference between the value of the property and any value given in return.

(6) (a) The execution of a judgment in respect of property of the debtor is stayed as soon as the sheriff becomes aware of the issue of a provisional liquidation order against the insolvent, unless the Court orders otherwise.

(b) If costs in connection with the sale in execution of assets of the insolvent have already been incurred when the execution of a judgment is stayed as contemplated in paragraph (a), the Commissioner may-

(i) on the application of the liquidator;

(ii) on the conditions the Commissioner finds just and subject to confirmation of the sale price by him or her; or

(iii) by resolution of a meeting of creditors of the estate,

approve the continuation of the sale for the benefit of the insolvent estate, in which case the costs of the sale before or after liquidation must be deducted from the proceeds.

(c) The liquidator of an insolvent estate is entitled to recover from a creditor of the debtor the net amount of any payment in pursuance of the execution of any judgment made to such creditor after the granting of the provisional liquidation order.

(7) For the purposes of this section –

(a) the following property is excluded from a person's insolvent estate:

(i) the necessary beds, bedding and wearing apparel of the insolvent and his or her family;

- (ii) the necessary furniture (other than beds) and household utensils of the insolvent in so far as they do not exceed the prescribed amount in value;
 - (iii) stock, tools and agricultural implements of a farmer, in so far as they do not exceed the prescribed amount in value;
 - (iv) the supply of food and drink in the house sufficient for the needs of the insolvent and his or her family during one month;
 - (v) tools and implements of trade, in so far as they do not exceed the prescribed amount in value;
 - (vi) professional books, documents or instruments necessarily used by the insolvent in his or her profession, in so far as they do not exceed the prescribed amount in value;
 - (vii) arms and ammunition that the insolvent is required by law to have in his or her possession as part of his or her equipment; and
 - (viii) a motor vehicle not exceeding the prescribed value;
 - (ix) necessary medicine and medical devices; and
- (b) notwithstanding the provisions of any other law, all property of the insolvent-
- (i) not included in paragraph (a), at the date of issue of the provisional liquidation order, including property or the proceeds thereof which are in the hands of the sheriff under a writ of attachment or a warrant of execution; and
 - (ii) subject to **section 29**, all property acquired by or which accrued to the insolvent during his or her insolvency,

form part of the insolvent's insolvent estate.

The effect of liquidation on civil proceedings by or against the insolvent

28. (1) Subject to the provisions of **section 29(8)**, the issue of a provisional liquidation order in respect of an insolvent has the effect that all civil proceedings instituted in a Court by or against the insolvent is stayed.

(2) Proceedings that are stayed in terms of subsection (1) may-

(a) with the consent of the Court or a liquidator appointed in terms of **section 53**; or

(b) with three weeks' standard notice to that liquidator,

be continued against the insolvent estate.

(3) The opposite party in the civil proceedings referred to in subsection (1) may apply to the Registrar of the Court to substitute the liquidator appointed in terms of **section 53** for the insolvent in the proceedings referred to in subsection (2).

(4) That liquidator may, by giving a liquidator's notice to all parties and to the Registrar of the Court, substitute himself or herself as party for the insolvent in proceedings by or against the insolvent, other than proceedings contemplated in **section 29(8)**.

(5) The Court may on application by that liquidator or a creditor who has proved a claim against the insolvent estate, prohibit the continuation of proceedings against that estate if the Court is of the opinion that-

(a) the institution or continuation of the proceedings was unreasonably delayed; and

- (b) the continuation of the proceedings will unreasonably delay the finalisation of that estate.

(6) After the confirmation by the Commissioner of the liquidator's first account in terms of **section 106** and no more than three months after the conclusion of the first meeting of creditors, no person may institute legal proceedings against the insolvent estate in respect of any liability which arose before the commencement of liquidation: Provided that the Court may, subject to the provisions of **section 109** and subject to such conditions as the Court may impose, permit the institution of such proceedings if the Court is of the opinion that there was a reasonable excuse for the delay in instituting the proceedings.

Rights and obligations of debtor during insolvency

29. (1) The fact that a person entering into a contract is insolvent does not affect the validity of that contract: Provided that if a debtor thereby-

- (a) purports to dispose of any property of his or her insolvent estate; or
- (b) without the consent in writing of the liquidator of his or her estate, enters into any contract whereby any earnings which accrues to his or her insolvent estate in terms of subsection (2) is or is likely to be adversely affected,

the contract is in either case voidable at the option of the liquidator, but subject to the provisions of **section 31**.

(2) After the issue of a provisional liquidation order, the insolvent may follow any profession or occupation and, subject to subsection (6), may collect for his or her own benefit any remuneration for work done or payment for professional services rendered by him or her or someone on his or her behalf.

(3) Any person who, after the commencement of liquidation of an insolvent's estate, became a creditor of the insolvent as a result of illegal conduct on the part of the insolvent is entitled to payment of the debt out of any assets that accrued to the insolvent estate as a result of the said illegal conduct to the extent that such debt cannot be recovered from the insolvent personally and after payment of all costs attributable to such assets, subject thereto that such creditor was not at the time when he or she became a creditor aware, and could not by exercising reasonable care have acquired knowledge, of the illegal conduct.

(4) (a) The insolvent must-

- (i) keep a detailed record of all assets and income received by him or her from whatever source and of all expenses incurred by him or her;
- (ii) for a period of one year from the issue of the provisional liquidation order send to the liquidator monthly during the first week of every month a statement of his or her income and expenses during the preceding month, confirmed by an affidavit or a solemn declaration;
- (iii) after the expiry of the period of one year referred to in subparagraph (ii), send to the liquidator annually a return of his or her income and expenses for the preceding year, likewise sworn to or confirmed; and
- (iv) at the written request of the liquidator within seven days after such request, submit to the liquidator particulars of income received and expenses incurred by him or her for the period indicated by the liquidator.

(b) The liquidator may-

- (i) at all reasonable times inspect the records referred to in paragraph (a); and
- (ii) require the insolvent to submit proof in support of such records and of expenses which he or she claims to have incurred for his or her own support or that of his or her dependants.

(5) No benefit in terms of any pension law or the rules of a fund which is claimable by an insolvent and is paid after the commencement of liquidation of his or her estate, and no social benefit which is so claimable and paid, forms part of the debtor's insolvent estate.

(6) (a) The liquidator may issue from the magistrate's court of the district in which the insolvent resides, carries on business or is employed a notice calling on the insolvent to appear at a hearing before that court in chambers on a date specified in such notice to give evidence on and supply proof of-

- (i) the earnings received by the insolvent or his or her dependants out of the exercise of his or her profession, occupation or employment;
- (ii) all assets or income received by the insolvent or his or her dependants from whatever source; and
- (iii) his or her estimated expenses,

for his or her own support and that of his or her dependants.

(b) The notice, substantially in the form of **Form E1 of Schedule 1** must be drawn up by the liquidator, signed by the liquidator and the clerk of that court and served in accordance with the Rules of the Court by the messenger of the court on the insolvent at least 7 days before the date specified in the notice for the hearing.

- (c) That court may at any time in the presence of the insolvent postpone the proceedings to such date as the court may determine and may order the insolvent to produce such documents as the court may specify at the hearing on the date determined by the court.
- (d) On the appearance of the insolvent before that court in chambers, the court must-
 - (i) call upon the insolvent to give evidence under oath or affirmation on his or her earnings or estimated expenses contemplated in paragraph (a); and
 - (ii) receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court finds to be just by or on behalf of either the insolvent or the liquidator as is material to the determination of the said earnings or estimated expenses.
- (e) The court, after the hearing must issue a certificate indicating which proportion of the insolvent's future earnings, if any, is not required for the support of the insolvent and his or her dependants and must accrue to his or her insolvent estate.
- (f) The liquidator may send a copy of a certificate contemplated in paragraph (e) to the insolvent's employer by standard notice whereupon the employer must transmit to the liquidator in accordance with the certificate the amount stated therein.
- (g) Any property which the debtor obtains after the issue of a provisional liquidation order with earnings which do not in terms of a certificate contemplated in paragraph (e) accrue to his or her insolvent estate, does not form part of the insolvent estate.

- (7) (a) If an emoluments attachment order issued by any court in respect of a judgment debtor prior to the commencement of liquidation of his or her estate is in force when his or her estate is liquidated, such order remains in force for a period of six months from the date of the provisional liquidation order.
- (b) The employer upon whom that emoluments attachment order was served must in accordance with the order make payments to the liquidator for the benefit of the insolvent estate.
- (8) (a) An insolvent may sue or be sued in his or her own name without reference to the liquidator of his or her estate-
- (i) in any matter relating to status;
 - (ii) any right in so far as it does not affect his or her insolvent estate;
or
 - (ii) in respect of any claim due to or against him or her under this section,

but no cession of his or her earnings after the commencement of liquidation of his or her estate, whether made before or after the issue of the provisional liquidation order, is of any effect so long as his or her estate is under liquidation.

- (b) An insolvent may be sued in his or her own name for any delict committed by him or her after the commencement of liquidation of his or her estate, and his or her insolvent estate is not be liable therefor.
- (c) An insolvent may for his or her own benefit recover any compensation for any loss or damage which he or she may have suffered, whether before or after the commencement of liquidation of his or her estate, by reason of any defamation or personal injury: Provided that-

- (i) where such compensation recovered by that insolvent includes medical or other expenses a creditor in respect of such expenses is entitled to be paid out of the compensation or recover the compensation from the insolvent even though the claim for such expenses arose before the commencement of liquidation of the estate; and
- (ii) the insolvent may not without leave of the Court institute any action against the liquidator of his or her estate on the ground of malicious prosecution or defamation.

(9) Any property claimable by the liquidator from the insolvent under this section may be recovered from the insolvent by warrant of execution to be issued by the Registrar of the Court upon the production to him or her of a certificate by the Commissioner that the property stated therein is so claimable.

(10) The insolvent must at the request of the liquidator assist the liquidator to the best of his or her ability in collecting, taking charge of or realising any property belonging to the insolvent estate and the liquidator during the period of such assistance, must give to the insolvent out of the insolvent estate such an allowance in money or in goods as is, in the opinion of the Commissioner, necessary to support the insolvent and his or her dependants.

(11) The insolvent must keep the liquidator informed in writing of his or her postal and residential address.

(12) If a notice is to be conveyed to an insolvent in terms of this Act notice must be sent to such insolvent at the address referred to in subsection (11).

PART 4

IMPEACHABLE DISPOSITIONS

General

30. (1) A debtor commits an offence if the debtor knowingly participates in-

- (a) transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;
- (b) transactions where a transfer of an interest in property or the undertaking of an obligation by the debtor was a gift or was made in exchange for a nominal or less than equivalent value or for inadequate value that occurred at a time when the debtor was insolvent or as a result of which the debtor became insolvent (undervalued transactions).

(2) A creditor and a debtor commit an offence if they knowingly participate in transactions where that creditor obtained, or received the benefit of, more than its proportional share of the debtor's assets that occurred at a time when the debtor was insolvent.

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

31. If an insolvent, without the consent of the liquidator of his or her estate, alienates for value any property or any right to such property which he or she acquired after the commencement of liquidation of his or her estate and which forms part of his or her insolvent estate, to a person who proves that he or she was not aware and had no reason to suspect that the estate of the insolvent was under liquidation, the alienation is nevertheless valid.

Presumptions relating to property in possession of insolvent

32. (1) Whenever an insolvent has acquired the possession of property and the liquidator of his or her estate claims that property for the benefit of the insolvent estate that property is presumed to belong to the insolvent estate, unless the contrary is proved.

(2) If any person who became a creditor of the insolvent after the commencement of liquidation of the insolvent's estate alleges against the insolvent or the liquidator that property acquired by the insolvent does not belong to the insolvent estate and claims any right thereto, it is presumed that such property does not belong to the insolvent estate, unless the contrary is proved.

Disposition without value

33. (1) The Court may set aside every disposition of property not made for value if such disposition was made by the insolvent-

- (a) within two years before the presentation of the application for liquidation of his or her estate to the Registrar of the Court; or
- (b) within three years before the presentation of the application for liquidation to that Registrar if the disposition was made in favour of an associate:

Provided that if it is proved by someone opposing the setting aside of the disposition that the liabilities of the insolvent at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of such excess.

(2) A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent, does not give rise to any claim in competition with the creditors of the debtor's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent, and which -

- (a) was made by way of suretyship, guarantee or indemnity; and
- (b) has not been set aside under subsection (1),

the beneficiary concerned may compete with the creditors of the insolvent's estate for an amount not exceeding the amount by which the value of the insolvent's assets exceeded his or her liabilities immediately before the making of that disposition.

Antenuptial contracts

34. (1) No immediate benefit under a duly registered antenuptial contract given in good faith by one spouse to the other or to any child to be born of the marriage may be set aside as a disposition without value, unless the application for the liquidation of the estate of the spouse who gave the benefit was presented to the Registrar of the Court within two years of the registration of that antenuptial contract.

(2) In subsection (1) the expression "immediate benefit" means a benefit given by a transfer, delivery, payment, cession, pledge, or special bond of property completed before the expiration of a period of three months as from the date of the marriage.

Voidable preferences

35. (1) The Court may set aside every disposition an insolvent makes of his or her property which has the effect that any one of his or her creditors receives a benefit to which that creditor would not have been entitled had the insolvent's estate been under liquidation at the time of the making of the disposition if -

- (a) the insolvent's liabilities exceeded the value of his or her assets immediately after the making of the disposition; and
- (b) the disposition was made within six months before the presentation of the application for liquidation of the insolvent's estate to the Registrar of the Court or within 12 months before such presentation where that disposition was made to an associate of the debtor,

unless the person for whose benefit the disposition was made, proves that it was made in the ordinary course of business and that it was not intended thereby to prefer one

creditor above the other, and if he or she is an associate of the insolvent, also proves that he or she was not aware and had no reason to suspect that the insolvent's liabilities would exceed the value of his or her assets immediately after the making of the disposition.

(2) For purposes of subsection (1) it is presumed unless the contrary is proved, that a disposition was made not in the ordinary course of business if -

- (a) it was made by way of payment of a debt that was not due and payable or not legally enforceable;
- (b) it embodied payment in an unusual form or a form not originally agreed upon.

(3) The Court may set aside any disposition a debtor makes of his or her property at a time when his or her liabilities exceed his or her assets, made with the intention of preferring one of his or her creditors above another, if the application for the liquidation of the estate of the debtor is presented to the Registrar within three years after the making of the disposition.

(4) For purposes of this section a surety of a debtor or a person by law in a position analogous to that of a surety is deemed to be a creditor of the debtor.

(5) Every disposition of property made under a power of attorney, whether revocable or irrevocable, is for the purposes of this section, deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place.

Collusive dealings for prejudicial disposition of property

36. (1) Any transaction which-

- (a) was entered into by a debtor before or after the liquidation of his or her estate in collusion with another person for disposing of property belonging to the debtor or the debtor's estate; and

- (b) had the effect of prejudicing that debtor's creditors or preferring one creditor above another,

may after the liquidation of his or her estate be set aside by the Court.

- (2) Any person who was a party to such collusion-
 - (a) is liable to make good any loss thereby incurred by the insolvent estate;
 - (b) must pay for the benefit of the insolvent estate, by way of penalty, such sum as the Court may determine, which sum may not be more than the amount by which he or she would have benefited if the disposition had not been set aside; and
 - (c) if that person is a creditor he or she forfeits his or her claim against the insolvent estate.

(3) The compensation and penalty referred to in subsection (2) may be recovered in any proceedings for the setting aside of the transaction concerned.

Certain contributions to funds may be recovered for benefit of insolvent estate

37. (1) If a debtor at any time within two years before the presentation to the Registrar of the Court of the application for the liquidation of that debtor's estate undertook new obligations in respect of a fund at a time when the debtor's liabilities exceeded that debtor's assets, or as a result of which the debtor's liabilities exceeded the debtor's assets, the liquidator of that debtor's estate may recover from such fund for the benefit of the insolvent estate any contribution in respect of such new obligation which together with the total contributions in respect of existing obligations, exceed the amount per annum as prescribed: Provided that-

- (a) if it is proved by someone opposing the recovery of contributions that the liabilities of the debtor at any time after the new obligation was

undertaken exceeded that debtor's assets by less than such prescribed amount which the liquidator may recover the amount which may be recovered may not be greater than the amount by which the debtor's liabilities exceeded the debtor's assets;

- (b) payment by one fund to another fund upon termination of service or dissolution of a fund and contributions to a new fund in so far as they replace contributions to another fund is not regarded as new obligations;
- (c) if contributions which are recoverable have been made to more than one fund, the amount which may be recovered from any such fund must be proportioned according to the contributions made to each fund in respect of such new obligations.

(2) The prescribed amount referred to in subsection (1) must be periodically amended to take account of subsequent fluctuations in the value of money.

(3) Notwithstanding the provisions of any other law, a fund from which any contribution is recovered as contemplated in subsection (1) may reduce the benefits to which the debtor concerned would have been entitled in terms of the rules of the fund in respect of such contributions, in proportion to the contributions so recovered from the fund.

(4) No greater amount may be recovered from a fund in terms of subsection (1) than the amount that would have been payable to the debtor if the fund had been dissolved on the date when the amount is recovered.

(5) If the full amount in terms of subsection (1) cannot be recovered because of the limitation in subsection (4), the liquidator may recover the deficit proportionately from-

- (a) the insolvent personally in respect of benefits which he or she received from the said fund within three years after the commencement of liquidation of the insolvent's estate; and

- (b) from another beneficiary in respect of benefits which he or she received from the said fund, within three years after the commencement of liquidation in connection with the insolvent.

(6) If a fund had bought an annuity for a debtor from an insurer, the fund may recover from the insurer that part of the purchase price paid out of contributions recoverable in terms of subsection (1) and the insurer may, notwithstanding the provisions of any other law, reduce the future benefits in respect of the annuity accordingly: Provided that the amount so recovered may not exceed the value of the debtor's annuity on the date when the amount is recovered.

(7) If a debtor-

- (a) conceals the payment of a contribution to a fund from his or her creditors;
- (b) partakes in the concealment thereof; or
- (c) resigns himself or herself thereto,

the liquidator may recover such contribution made before creditors discovered, or could reasonably have discovered if they had acted with due care, the payment of such contribution, irrespective of whether such contribution was made within two years before presentation to the Registrar of the Court of the application for the liquidation.

(8) This section does not prejudice the rights of a liquidator or creditors in terms of the common law or this Act, if contributions were made fraudulently to the disadvantage of creditors or if there were collusive dealings as contemplated in **section 36**.

(9) If the payment of premiums in respect of a life policy is a contribution to a fund in terms of this section, the provisions of section 47 of the Long-term Insurance Act, 1998 (Act No. 5 of 1998) does not apply.

- (10) For the purpose of this section-
- (a) “contribution” in respect of a fund or annuity means a contribution made to such fund or annuity by a debtor in respect of the debtor, less that part of the contribution which represents commission or a premium in respect of death or disability benefits and benefits paid to the debtor before the commencement of liquidation;
 - (b) “fund” means any pension fund, provident fund or pension scheme which is instituted in terms of any law or regulation or a fund which is registered or provisionally registered in terms of section 4 of the Pension Funds Act, 1956 (Act No. 24 of 1956);

Attachment of property in possession of associate

38. (1) If a liquidator believes on reasonable grounds that a disposition of property by the debtor to an associate of the debtor may be liable to be set aside, the liquidator may instruct the sheriff to attach such property.

- (2) The sheriff must-
 - (a) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;
 - (b) without delay deposit in a banking account as contemplated in **section 103(1)(a) or (b)** all cash taken into his or her custody;
 - (c) in so far as possible leave all other movables which the sheriff has attached, other than animals, in a properly locked storage place or appoint a suitable person to keep the said property in that person’s custody, in which case the sheriff must-

- (i) hand to such person a copy of an inventory of the property left in his or her custody; and
 - (ii) draw that person's attention to the offence contemplated in **section 213(2)(f)** in respect of the unauthorised disposition of property under attachment;
- (d) be entitled to fees according to **Tariff A in Schedule 2**.
- (3) The property must be released if the liquidator instructs the sheriff to do so.
- (4) The liquidator must instruct the sheriff to release property as soon as it is evident that attachment of the property is not required to safeguard the interests of the estate in the setting aside of a disposition of property.
- (5) An associate may apply to the Court for appropriate relief if property of the associate is attached or held under attachment without reasonable cause.
- (6) Unless the Court orders otherwise, the costs of attachment of the property form part of the costs of liquidation.

Certain rights not affected by improper disposition

39. (1) A person who in return for any disposition which is in terms of **sections 33, 35 or 36** liable to be set aside, acting in good faith -

- (a) has parted with any property or security which he or she held; or
- (b) has lost any right against another person,

is not be obliged to restore any property or other benefit received under such disposition, unless the liquidator has indemnified him or her for parting with such property or security or for losing such right.

(2) **Sections 33, 35 or 36** do not affect the rights of any person who acquired property in good faith and for value from any person other than a person whose estate was subsequently liquidated.

(3) The setting aside of a disposition made by a debtor in terms of **sections 33, 35 or 36** does not discharge a surety for the debtor.

Set-off

40. If-

- (a) two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is liquidated within a period of six months after the taking place of the set-off; or
- (b) a person who had a claim against another person (in this section referred to as the “debtor”) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is liquidated,

the liquidator of the insolvent estate may in either case-

- (i) abide by the set-off; or
- (ii) if the set-off was not effected in the ordinary course of business, disregard it and call upon the person concerned to pay to the insolvent estate the debt which that person would owe the estate but for the set-off, and thereupon that person is obliged to pay that debt and may prove his or her claim against the estate as if no set-off took place:

Provided that any set-off is effective and binding on the liquidator if it takes place between a financial market infrastructure or a market participant as defined in **section 44** and any other party in accordance with the rules of such market infrastructure, or if it amounts to payment of a net amount in terms of **section 45**.

Payment of debt to insolvent after liquidation

41. If on or after the date of liquidation of an insolvent's estate a debtor of the insolvent-

- (a) pays to the insolvent a debt that was due before the date of liquidation;
or
- (b) fulfils any obligation towards the insolvent the cause of which arose before the date of liquidation,

such payment or such fulfilment is void, unless the debtor proves that it was made or done in good faith without knowledge on his or her part of the liquidation.

Institution of proceedings on behalf of insolvent estate

42. (1) Proceedings to set aside any disposition of property made by an insolvent or for the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of the insolvent estate may be instituted by the liquidator and, if the liquidator fails to institute such proceedings they may be instituted by any creditor on behalf of the insolvent estate upon indemnifying the liquidator against all costs thereof to the reasonable satisfaction of the liquidator.

(2) If any creditor instituted proceedings under subsection (1) no creditor who was not a party to the proceedings may 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.

(3) In the proceedings referred to in subsection (1) an insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he or she may be called upon by the Court to give evidence and the provisions of **section 87(6)** apply with the changes necessitated by the context to the giving of evidence at such proceedings.

(4) In any proceedings under **sections 33, 35 or 36** it is presumed, until the contrary has been proved, that the liabilities of a debtor exceeded his or her assets or the value of his or her assets at any time within one year before the commencement of liquidation of the insolvent estate.

(5) When the Court sets aside any disposition of property-

- (a) the Court must declare the liquidator entitled to recover the alienated property or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher; and
- (b) interest as prescribed in section 1 of the Prescribed Rate of Interest Act may be recovered on the value of such property and for the period ordered by the Court.

PART 5

EFFECT OF LIQUIDATION UPON CERTAIN CONTRACTS

Uncompleted acquisition of immovable property by debtor

43. (1) If before the commencement of liquidation of his or her estate an insolvent had entered into a contract for the acquisition of immovable property by him or her and such property had not yet been transferred to him or her at the commencement of liquidation, the liquidator of the insolvent estate may elect either to abide by the contract or to abandon it.