

(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.

(2) The other party to the contract referred to in subsection (1) may call upon the liquidator of that insolvent estate by written request to make an election as contemplated in that subsection and if the liquidator fails to do so and to notify the other party of his or her election by standard notice within four weeks after he or she has received the written request, the other party may apply to the Court for an order for the cancellation of the contract and for restoring any such immovable property which came in possession or under the control of the insolvent or the liquidator by virtue of the contract.

(3) The Court must, in respect of an application referred to in subsection (2), make any order it finds to be just.

(4) The provisions of this section do not affect any right which that other party may have to establish against the insolvent estate a concurrent claim for any loss suffered by him or her as a result of the non-fulfilment of the contract.

Transactions on a financial market infrastructure

44. (1) In this section-

“financial market infrastructure” means-

- (a) an exchange as defined in section 78 and registered in terms of Chapter 3 of the Financial Institutions and Markets Act, 2018 (Act No. – of 2018);
- (b) a central securities depository as defined in section 121 and registered in terms of Chapter 3 of that Act;
- (c) a securities clearing house as defined in section 78 and registered in terms of Chapter 3 of that Act;
- (d) any other financial market infrastructure as determined by the Minister by notice in the *Gazette*;

“rules” means-

- (a) the exchange rules, the depository rules or securities clearing house rules as defined in section 78 of the Financial Institutions and Markets Act, 2018 (Act No. – of 2018);
- (b) the rules of a financial market infrastructure referred to in paragraph (d) of the definition of financial market infrastructure;

“market participant” means-

- (a) an authorised user, a portfolio member, authorised advisor or authorised representative registered in terms of section 91 of the Financial Institutions and Markets Act, 2018 (Act No. – of 2018);
- (b) a participant registered in terms of section 97 of that Act, a clearing member or a client as defined in section 1 of the Financial Markets Act, 2012, or any other party to a transaction;

“transaction” means any transaction to which the rules apply.

(2) If upon the sequestration of the estate of a market participant the obligations of such market participant in respect of any transaction entered into prior to sequestration have not been fulfilled, the financial market infrastructure in respect of any obligation owed to it, or any other market participant in respect of obligations owed to such market participant, is in accordance with the rules applicable to any such transaction entitled to terminate transactions or revoke settlement instructions and the trustee of the insolvent estate of the market participant is bound by such termination or revocation.

(3) No claim as a result of the termination or revocation of any transaction as contemplated in subsection (2) may exceed the amount due upon termination or revocation in terms of the rules in question.

(4) Any rules and the practices thereunder which provide for the netting of a market participant's position or for set-off in respect of transactions concluded by the market participant or for the opening or closing of a market participant's position or for the revocation of settlement instructions is upon sequestration of the estate of the market participant binding on the trustee in respect of any transaction or contract concluded by the market participant prior to such sequestration, but which is, in terms of such rules and practices, to be settled on a date occurring after the sequestration, or settlement of which was overdue on the date of sequestration.

Agreements providing for termination and netting

45. (1) For purposes of this section-

“master agreement” means-

(a) an agreement in accordance with standard terms published by the International Swaps and Derivatives Association, the International Securities Lenders Association, the Bond Market Association or the International Securities Market Association, or any similar agreement, which provides that, upon the liquidation of one of the parties-

(i) all unperformed obligations of the parties in terms of the agreement-

(aa) terminate or may be terminated; or

(bb) become or may become due immediately; and

(ii) the values of the unperformed obligations are determined or may be determined; and

(iii) the values are netted or may be netted, so that only a net amount (whether in the currency of the Republic or any other currency) is payable to or by a party,

and which may further provide that the values of assets which have been transferred as collateral security for obligations under that agreement must be included in the calculation of the net amount payable upon liquidation; or

- (b) any agreement declared by the Minister, after consultation with the Minister of Finance, by notice in the *Gazette* to be a master agreement for the purposes of this section.

"unperformed obligation" includes an obligation of a party to an agreement to return to the other party assets (whether tangible or intangible), in which ownership had been transferred to the first-mentioned party as security for the latter party's prospective liability under the agreement;

"market value" means a value determined without reference to the ability of the debtor to perform;

- (2) In this section "agreement" does not include -

- (a) a transaction contemplated in **section 44**; or
- (b) a netting agreement as contemplated in the Payment System Management Act, 2003 (Act No. 18 of 2003).
- ~~(c) any agreement declared by the Minister after consultation with the Minister responsible for finance, by notice in the *Gazette* not to be an agreement for the purposes of this section.~~

(3) Notwithstanding any rule of the common law to the contrary, upon the commencement of liquidation of the estate of a party to a master agreement-

- (a) all unperformed obligations arising out such agreement, or obligations arising from such agreement in respect of assets in which ownership has

been transferred as collateral security, terminate automatically at the commencement of liquidation;

- (b) the values of those obligations must be calculated at market value as at the commencement of liquidation;
- (c) the values so calculated must be netted; and
- (d) the net amount must be payable.

(4) Section 346 of the Companies Act and **sections 33** and **35** of this Act do not apply to property disposed of in terms of a master agreement.

Effect of liquidation of estate of seller under reservation of ownership contract

46. The liquidation of the estate of a seller under a reservation of ownership contract does not give a right to the liquidator of the estate to reclaim property sold under the contract.

Goods purchased not on credit but not paid for

47. (1) If a debtor, before the commencement of liquidation of his or her estate, received delivery of movable property bought by him or her and the purchase price of such property had not been paid in full at the time of the delivery despite a term of the contract that the purchase price must be paid on delivery of the property, the seller may after the liquidation of the debtor's estate, reclaim the property if within 14 days after the delivery thereof the seller gives standard notice to the debtor, the liquidator or the Commissioner that he or she reclaims the property.

(2) If the liquidator disputes the seller's right to reclaim the property he or she must, within 14 days after receipt of the seller's notice of the claim, notify the seller by standard notice that he or she disputes the claim, whereupon the seller may within 14 days after receipt of the liquidator's notice, institute legal proceedings to enforce the seller's right.

(3) For the purposes of subsection (1) a contract of purchase and sale is deemed to provide for the payment of the purchase price upon delivery of the property in question to the debtor, unless the seller has agreed that the purchase price or any part thereof is not payable before or at the time of such delivery.

(4) The liquidator of a debtor's insolvent estate is not obliged to restore any property reclaimed by the seller in terms of subsection (1), unless the seller refunds to the liquidator every part of the purchase price already received by the debtor or liquidator, as the case may be.

(5) Except as provided in this section, a seller is not entitled to recover any property which he or she sold and delivered to a purchaser whose estate was liquidated after the sale, only by reason of the fact that the purchaser failed to pay the purchase price.

Effect of liquidation upon lease

48. (1) This section does not apply to a financial lease.

(2) A lease of movable or immovable property does not terminate by the liquidation of the estate of the lessee, but the liquidator of the insolvent estate may, without prior notice, terminate the lease by standard notice to the lessor-

- (a) with the approval of the Commissioner; or
- (b) in terms of a resolution of creditors taken at a meeting of creditors of the insolvent estate.

(3) The lessor may claim from the insolvent estate compensation for any loss which the lessor may have sustained by reason of the non-performance of the terms of the lease.

(4) If the liquidator does not within three months of his or her appointment notify the lessor by standard notice that he or she elects to continue the lease on behalf of the insolvent estate, the liquidator is deemed to have terminated the lease at the end of the three months.

(5) The rent due in terms of the lease from the commencement of liquidation of the estate of the lessee to the termination or cession of the lease by the liquidator, must be included in the cost of the liquidation.

(6) The termination of the lease by the liquidator in terms of this section deprives the insolvent estate of any right to compensation for improvements, other than improvements made in terms of an agreement with the lessor, made to the leased property during the period of the lease.

Effect of liquidation on contract of service

49. (1) The contracts of service of employees whose employer has been liquidated are suspended with effect from the commencement of liquidation.

(2) Without limiting subsection (1), during the period of suspension of an employee's contract of service referred to in subsection (1), the employee—

- (a) is not required to render services;
- (b) is not entitled to any remuneration; and
- (c) is not entitled to any employment benefit,

in terms of that contract.

(3) An employee whose contract of service is suspended is entitled from the date of such suspension to any unemployment benefits determined by any law.

(4) Subject to subsections (5) and (8), a liquidator appointed in terms of **section 53** may terminate the contracts of service of employees,.

(5) A liquidator who has received proposals referred to in subsection (8) or who intends to terminate the contracts of service of employees must consult with –

(a) any person who the insolvent employer was required to consult with immediately before the liquidation, in terms of a collective agreement defined in section 1 of the Labour Act;

(b) (i) a workplace representative elected in terms of section 67 of the Labour Act; and

(ii) any trade union whose members are likely to be affected by the termination of contract of service,

if there is no such collective agreement, that existed immediately prior to the commencement of liquidation;

(c) the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose, if they do not belong to a trade union.

(6) The liquidator must disclose to the consulting parties all relevant information that will allow the parties to consult effectively.

(7) The consultation referred to in subsection (5) must be aimed at reaching consensus on appropriate measures to sell, save or rescue the whole or part of the business of the insolvent employer in any manner authorised by law.

(8) If any party referred to in subsection (5), wishes to make proposals concerning any matter contemplated in subsection (6), that party must lodge written

proposals to the liquidator within 21 days after the appointment of the liquidator in terms of **section 53**, unless the liquidator or such party agree otherwise.

(9) A creditor of the insolvent employer may, with the consent of the liquidator, participate in any consultation contemplated in this section.

(10) Unless the liquidator and an employee have agreed on continued employment of the employee in view of measures contemplated in subsection (7), all suspended contracts of service terminates 45 days after the date of the appointment of a liquidator in terms of **section 53**.

(11) An employee whose contract of service has been –

(a) suspended in terms of subsection (1); or

(b) terminated in terms of subsection (10),

is entitled to claim compensation from the insolvent estate of his or her former employer for any loss he or she may have sustained by reason of the suspension or termination of a contract of service prior to its expiration.

(12) An employee whose contract of service terminates or has been terminated in terms of this section is entitled to claim severance benefits from the estate of the insolvent employer in accordance with section 35 of the Labour Act.

PART 6

PROVISIONAL APPOINTMENT, ELECTION, APPOINTMENT AND DISQUALIFICATION OF LIQUIDATORS

Appointment of provisional liquidator

50. (1) A creditor of an insolvent estate with a liquidated claim, the cause of which arose before liquidation and who will after proof of the claim have the right to vote for a liquidator at a meeting of creditors, and a trade union which

represents employees of the insolvent may in writing nominate a person to be appointed by the Commissioner as liquidator.

- (2) The Commissioner must as soon as possible-
 - (a) after the granting of the provisional liquidation order; or
 - (b) after the time when a liquidator ceases to function as liquidator according to the provisions of **section 55**,

appoint the liquidator or liquidators nominated in accordance with subsection (1):
Provided that-

- (i) the Commissioner may reject a nomination or amend the amount of a claim in a nomination if it appears from the information in a nomination that the creditor's claim cannot be proved at a meeting of creditors or cannot be proved for the amount reflected in the nomination;
- (ii) an employee who has lodged a declaration that he or she was employed by the debtor at the date of liquidation and who has not lodged a nomination as a creditor, will be counted as a vote in number;
- (iii) the nomination of a trade union will be counted in number for the employees represented by the union and that the nomination by the union prevails if the nomination by an employee conflicts with a nomination of a union of which the worker is a member;

(3) If the Commissioner deems it necessary for the proper administration of an insolvent estate he or she may at any time, in accordance with policy determined by the Minister, appoint one additional liquidator by direct notice of the reasons for an additional appointment to each liquidator appointed or to be appointed in terms of subsection (2).

(4) If the appointment of a liquidator is so urgent that it cannot be delayed until the second working day after the granting of the provisional liquidation order the Court may when granting the order simultaneously appoint a provisional liquidator for the preservation of the estate on such conditions regarding the giving of security or otherwise the Court finds to be just.

(5) The provisional liquidator referred to in subsection (4) must forthwith-

(a) after his or her appointment proceed to recover and take into possession all the assets and property of the insolvent estate; and

(b) give effect to any directions by the Court.

(6) If the provisional liquidator referred to in subsection (4) is not appointed in terms of subsection (2) or (8), the provisional liquidator must-

(a) vacate his or her office when a liquidator is appointed in terms of those subsections; and

(b) deliver the assets, property and books of the insolvent estate to the liquidator and render an account to the liquidator.

(7) The provisional liquidator is entitled to remuneration taxed by the Commissioner in accordance with **Tariff B in Schedule 2**.

(8) Failing any valid nomination for the appointment of a liquidator in terms of subsection (1), the Commissioner must appoint a person of his or her choice as liquidator.

(9) If in the case of a liquidation by the Court the Commissioner is unable to appoint a liquidator he or she must, after the issue of a final order and after giving direct notice to the person who applied for liquidation and notice by publication in the *Gazette*, report to the Court with or without any formal application and request the Court to set aside the liquidation order.

(10) The Court may on receipt of the Commissioner's report referred to in subsection (9) –

- (a) set aside the liquidation order;
- (b) refer the report back to the Commissioner and direct the Commissioner to proceed by way of formal application at the cost of the estate; or
- (c) make any other order the Court finds to be just.

(11) The written nomination referred to in subsection (1) must be substantially in the form of **Form A2 of Schedule 1** for a creditor and **Form A3 of Schedule 1** for a trade union.

(12) No person may be appointed in terms of subsection (2) or (8) unless-

- (a) that person has given security to the satisfaction of the Commissioner for the proper exercise of his or her powers and performance of his or her duties as liquidator; and
- (b) has lodged an affidavit stating that he or she is not disqualified in terms of **section 10(2)**.

(13) A liquidator appointed in terms of subsection (2) or (8) must, before the first meeting of creditors of the insolvent estate, give effect to any direction the Commissioner gives to him or her.

(14) The Commissioner must keep a public record, which must be updated at least every 30 days, of appointments in terms of subsection (3) or **section 51(4)** which must reflect the name and reference number of the estate, the name and address of the person appointed, the amount of security called for and the reasons for the appointment.

Election of liquidator

51. (1) Any-
- (a) creditor of an insolvent estate who has proved claims against the estate may vote for one liquidator at the first meeting of creditors or a subsequent meeting convened to elect a liquidator; and
 - (b) employee who has not voted as a creditor and who has lodged a declaration that he or she was employed by the debtor at the date of liquidation may vote in number.
- (2) (a) A liquidator is elected by the majority in number and in value of the votes of creditors who are entitled to vote and who voted at such meeting.
- (b) If no candidate for the office of liquidator has obtained a majority in number and in value of the votes, the candidate who has obtained a majority of votes in number is deemed to be elected as liquidator if no candidate has obtained a majority of votes in value, and the candidate who has obtained a majority of votes in value is deemed to have been so elected if no candidate has received a majority of votes in number.
- (c) If one candidate obtained a majority of votes in value and another a majority in number, both such candidates are deemed to be elected as liquidators, and if either of them declines to share the office of liquidator with the other, the other candidate is deemed to be the sole elected liquidator.
- (3) If no liquidator is elected at a meeting of creditors the liquidator appointed by the Commissioner in terms of **section 50** must be the liquidator of the estate.

(4) If the Commissioner deems it necessary for the proper administration of an insolvent estate he or she may at any time, in accordance with policy determined by the Minister, appoint one additional liquidator after 48 hours' direct notice to each liquidator appointed or to be appointed in terms of subsection (2) or (3) of the reasons for an additional appointment.

Commissioner may refuse to appoint elected liquidator

52. (1) The Commissioner may refuse to appoint as liquidator a person elected in terms of **section 51**, on any one or more of the following grounds namely, that the person -

- (a) was not properly elected;
- (b) is in terms of **section 10(2)** disqualified from being appointed as a liquidator or as liquidator of the insolvent estate in question;
- (c) has failed to give security, within seven days after his or her election or within such longer period as the Commissioner may allow, to the satisfaction of the Commissioner for the proper performance of his or her duties as liquidator.

(2) If the Commissioner refuses to appoint a person elected as as liquidator, he or she must notify that person by direct notice of the reason for his or her refusal.

- (3) (a) Any person aggrieved by the appointment of a liquidator or the refusal of the Commissioner to appoint a person elected as liquidator, may within a period of ten days from the date of such appointment or refusal submit his objections to the Commissioner in writing.
- (b) The Commissioner must within seven days of the receipt by him of the objections inform the objector and the person elected, if applicable, of his or her decision.

- (c) Any interested party may apply to the Court for a review of the Commissioner's decision within 14 days after the Commissioner has informed the objector and the person elected, if applicable, of his or her decision.

(4) Whenever the Commissioner refuses to appoint as liquidator a person elected as such, or the Court has set aside an appointment of a liquidator by the Commissioner, the Commissioner must direct the liquidator appointed in terms of **section 53** to convene a meeting of creditors of the insolvent estate for purposes of electing another person as liquidator in the place of such person or liquidator.

- (5) The notice of the meeting referred to in subsection (4) must-

- (a) state that the purpose of the meeting is to elect a liquidator;
- (b) set out the reason in subsection (1) (a), (b) or (c), why the Commissioner has refused to appoint the person elected as liquidator, or state that the appointment of the liquidator has been set aside by the Court;
- (c) be published in the *Gazette* not less than 14 days and not more than 21 days before the date fixed for the meeting;
- (d) be sent by liquidator's notice to every creditor who has proved a claim against the estate.

(6) The meeting mentioned in subsection (4) must be held as if it were the continuation of a first meeting of creditors held after an adjournment thereof.

(7) If the Commissioner refuses to appoint as liquidator a person elected at a meeting convened in terms of subsection (4), he or she must notify such person by direct notice and state the reason for his or her refusal, as contemplated in subsection (2), whereupon the Commissioner may, if he or she deems it necessary for the proper administration of the estate, in accordance with policy determined by the Minister

appoint as liquidator any person whom he or she regards as a suitable person for appointment.

(8) All the provisions of this Act relating to a liquidator applies to a liquidator appointed by the Commissioner under this section.

Appointment of liquidator and security

53. (1) When-

- (a) a final liquidation order has been made;
- (b) a person elected as liquidator has given security to the satisfaction of the Commissioner for the proper performance of his or her duties; and
- (c) lodged an affidavit stating that he or she is not disqualified in terms of **10(2)**,

the Commissioner must, subject to **section 52**, appoint him or her as liquidator and issue him or her with a letter of appointment, which is valid throughout Namibia.

(2) After the receipt of his or her letter of appointment the liquidator must notify his or her appointment and his or her address by notice in the *Gazette*.

(3) The costs to the liquidator of giving security must, up to a maximum amount which the Commissioner deems reasonable, be included as part of the costs of the liquidation.

(4) The Commissioner may-

- (a) for good cause at any time call for additional security; or
- (b) reduce the security given by the liquidator if the liquidator has-

- (i) to the satisfaction of the Commissioner accounted for any property in the estate; and
- (ii) the Commissioner is of the opinion that the reduced security is sufficient to indemnify the insolvent estate or its creditors against any maladministration by the liquidator of the remaining property in that estate.

Joint liquidators to act jointly

54. (1) When more than one liquidator has been appointed for an insolvent estate all those liquidators-

- (a) must act jointly in performing their functions as liquidators; and
- (b) each of them is jointly and severally liable for every act performed by them jointly.

(2) Whenever liquidators of an insolvent estate disagree on any matter relating to the estate, the matter must be referred to the Commissioner to-

- (a) determine the question in issue; or
- (b) give directions as to the procedure to be followed for the determination thereof.

Vacation of office of liquidator

55. (1) A liquidator vacates his or her office -

- (a) if his or her estate is liquidated;
- (b) if he or she is in terms of the Mental Health Act, 1973 (Act No. 18 of 1973), received and detained in an institution contemplated in the said

Act or if he or she is declared by a competent Court to be incapable of managing his or her own affairs;

- (c) if he or she is convicted in Namibia or elsewhere of an offence of which dishonesty is an element and is sentenced to imprisonment without the option of a fine or to a fine of at least N\$1000.

(2) Whenever a liquidator of an insolvent estate vacates his or her office for whatever reason, any legal proceedings pending against the estate-

- (a) does not lapse merely by reason of the vacating of office; and
- (b) may, with the permission of the Court, be continued in the name of any remaining or newly appointed liquidator.

Removal of liquidator from office by the Commissioner

56. (1) The Commissioner must remove a liquidator from office -

- (a) if he or she was not qualified for appointment as liquidator or if his or her appointment was unlawful;
- (b) if the majority in value and the majority in number of the creditors who have proved claims against an insolvent estate -
 - (i) have requested the Commissioner in writing to do so; or
 - (ii) have at a meeting of creditors of the estate, after notice of the intended resolution was given, resolved, that the liquidator must be removed from office;
- (c) if he or she resigns from the office of liquidator;

- (d) if he or she is temporarily absent from Namibia for a period longer than 60 days without the permission of the Commissioner, or contrary to the conditions, if any, set by the Commissioner when the Commissioner gave permission;
- (e) if after his or her appointment he or she becomes disqualified from being a liquidator;

(2) The Commissioner may remove a liquidator from office on the ground that he or she has failed to -

- (a) perform satisfactorily any duty imposed upon him or her by this Act; or
- (b) comply with a lawful demand of the Commissioner.

(3) The Commissioner may-

- (a) when a liquidator has been formally charged with the commission of an offence;
- (b) on the strength of a complaint made to him or her on affidavit; or
- (c) on evidence given at a questioning in terms of **section 87, 88 or 90** or written answers in terms of **section 89**; and
- (d) pending an investigation by him or her into the suitability of a liquidator to remain in office,

suspend the liquidator from office and, if necessary, appoint an interim liquidator for the preservation of the estate: Provided that the Commissioner must in the case of a-

- (i) complaint, evidence or written answers contemplated in this subsection, without delay carry out the necessary investigation and either remove the liquidator from office or set aside the suspension;

- (ii) liquidator charged with an offence remove the liquidator from office or set aside the suspension as soon as the prosecution has been finalised.
- (4) No person may be appointed as interim liquidator in terms of subsection
- (2) unless that person has-
 - (a) given security to the satisfaction of the Commissioner for the proper exercise of his or her powers and performance of his or her duties as interim liquidator; and
 - (b) lodged an affidavit stating that he or she is not disqualified in terms of **section 10(2)**.
- (5) The interim liquidator -
 - (a) must after his or her appointment proceed to recover and take into possession-
 - (i) all the assets and property of the insolvent estate;
 - (ii) all books of account, invoices, vouchers, business correspondence and any other records relating to the affairs of the insolvent; and
 - (b) may apply for a search warrant in terms of **section 61**.
- (6) The interim liquidator-
 - (a) must give effect to any directions by the Commissioner; and
 - (b) may without the authorisation of the Commissioner as contemplated in **section 66** perform any act which is necessary for the preservation of

the estate until the suspension of the liquidator is set aside or another liquidator is appointed.

(7) The interim liquidator is entitled to remuneration taxed by the Commissioner in accordance with **Tariff B in Schedule 2**.

(8) The interim liquidator-

(a) vacates his or her office when the suspension of the liquidator is set aside or a liquidator is appointed in the place of the removed liquidator; and

(b) must deliver the assets, property, books, documents or records to the liquidator and render an account to the liquidator.

Court may declare liquidator disqualified or remove liquidator

57. If in the opinion of the Court it is in the interests of the proper administration of an insolvent estate, the Court may, on the application of the Commissioner or any other interested party -

(a) declare any person disqualified from being a liquidator of the estate; or

(b) remove from office any person who has been appointed as liquidator; and

(c) declare such a person incapable of being elected or appointed as liquidator under this Act during his or her lifetime or for such other period as determined by the Court.

Election of new liquidator

58. (1) (a) When one of two or more joint liquidators of an insolvent estate-

- (i) has vacated his or her office;
- (ii) has been removed from office by the Commissioner or the Court;
or
- (iii) has resigned or died,

the Commissioner must direct the remaining liquidator or liquidators to convene a meeting of creditors of the estate for the purpose of electing a new liquidator in the place of the one who vacated his office.

- (b) When a majority of proved creditors in value of an insolvent estate at any time requests it the Commissioner must direct the liquidator or liquidators to convene a meeting for the election of a further liquidator.
- (2) When every liquidator or the sole liquidator of an insolvent estate-
- (a) has vacated his or her office;
 - (b) has been removed from office by the Commissioner or the Court; or
 - (c) has resigned or died,

the Commissioner must direct the liquidator appointed in terms of **section 50** to convene a meeting of creditors of that estate for the purpose of electing a liquidator.

(3) The provisions of **section 80(2)** must with the changes necessitated by the context apply to a meeting referred to in subsections (1) or (2).

PART 7

POWERS AND DUTIES OF LIQUIDATORS

Service of provisional liquidation order on debtor and attachment of property belonging to insolvent estate

59. (1) (a) The liquidator must immediately after his or her appointment serve a copy of the provisional liquidation order on the insolvent and if the name of the insolvent's spouse appears on the order he or she must serve a copy of the order also on that spouse.

(b) When a copy of a provisional liquidation order is served on an insolvent or his or her spouse he or she must be supplied with two copies of the form referred to in **section 60(1)(b)**.

(2) When serving the provisional liquidation order the liquidator must ensure in so far as it is possible, that the following particulars in respect of the insolvent and his or her spouse, if applicable, is obtained namely -

(a) the full name, date of birth and identity number or registration number of the insolvent;

(b) where applicable, the insolvent's marital status and, if he or she is married in community of property, the full name, date of birth and identity number of his or her spouse.

(c) if the insolvent is an employer, whether his or her employees are represented by a trade union and whether there is a notice board inside the employer's premises for notice to employees.

(3) If-

(a) the name, date of birth or identity number of the insolvent or his or her spouse which appears on the provisional liquidation order is incorrect;
or

(b) if any of these particulars are not stated,

the liquidator must -

- (i) ensure that that the correct particulars are noted on the copy of the provisional liquidation order;
- (ii) send a copy of that provisional liquidation order by standard notice to the registrar of every deeds registry in Namibia together with a copy of his or her letter of appointment; and
- (iii) send a copy of the order on which the particulars have thus been noted by standard notice to the applicant in the liquidation proceedings, the Commissioner and to the Registrar of the Court.

(4) Service of a copy of a liquidation order may be effected by the liquidator's clerk or by the sheriff, if requested thereto by the liquidator, in which event the provisions of subsections (2) and (3) relating to the particulars which must be endorsed on the copy of the order apply to that clerk or sheriff, as the case may be.

(5) Service of a copy of a liquidation order must be carried out in accordance with the Rules of Court: Provided that if the insolvent has been absent from his or her usual place of residence or his or her business in Namibia during a period of at least 21 days, the Court may be approached for directions with regard to some other mode of service.

- (6) (a) The liquidator must forthwith after his or her appointment, attach all the movable property in the possession of the insolvent and compile a full inventory thereof.
- (b) Property in respect of which a person allegedly has a right of pledge or a right of retention or which is under judicial attachment may not be attached but must be shown on the inventory.

(7) The liquidator must -

- (a) take into his or her personal custody all books of account, invoices, vouchers, business correspondence and any other records relating to the affairs of the insolvent and make a specified list of all such books, documents and other records;
- (b) if the insolvent is present, ask him or her whether the list referred to in paragraph (a) is a complete list of all books and records relating to his or her affairs and note his or her reply on the list;
- (c) note on the list any explanation which the insolvent gives with regard to the books, documents and other records relating to his or her affairs or in respect of any books, documents or other records which he or she is unable to supply;
- (d) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;
- (e) without delay deposit in a banking account as contemplated in **section 103(1)(a) or (b)** all cash which he or she has taken into his or her custody;
- (f) in so far as is possible-
 - (i) leave all other movable property which he or she has attached, other than animals, in a properly locked storage place; or
 - (ii) appoint a suitable person to keep the said property in his or her custody, in which case he or she must hand to such person a copy of an inventory of the property left in his or her custody and he or she must draw that person's attention to the offence contemplated in **section 213(2)(f)** in respect of the unauthorised disposition of property under attachment.

- (8) (a) The liquidator may perform the attachment himself or herself or he or she may cause the attachment to be performed in whole or in part by the sheriff.
- (b) The sheriff is entitled to fees taxed by the Commissioner according to **Tariff A in Schedule 2** and the rules for the construction of that tariff.
- (9) (a) Any person who has an interest in the insolvent estate or in any property which is attached is entitled to be present or may authorise a person to be present on his or her behalf when property of the insolvent estate is attached and when an inventory in respect thereof is compiled.
- (b) If the insolvent or his or her representative is present, he or she must sign the inventory and a copy thereof must be handed to him or her and any comment which he or she may have with regard to the inventory or with regard to any assets, books or records of the insolvent not included in the inventory must be attached to the inventory.
- (10) The liquidator must by standard notice send a copy of the inventory to the Commissioner.
- (11) The liquidator must-
 - (a) cause the attached property of the insolvent to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, or a suitably qualified person approved by the Commissioner, who must submit to the liquidator a valuation report; and
 - (b) by standard notice send the Commissioner a copy of the valuation report.

Debtor to hand over books to liquidator and submit statement of affairs to Commissioner and liquidator

60. (1) When a liquidation order is served in accordance with **section 59(1)**, upon an insolvent, the insolvent must -

- (a) immediately hand over to the liquidator all books of account, invoices, vouchers, business correspondence and any other records relating to that insolvent's affairs and obtain from the insolvent a specified receipt in respect thereof;
- (b) within 7 days after the service of the said order send by standard notice to the Commissioner and the liquidator one copy each of a statement of affairs as on the commencement of liquidation, compiled in a form substantially corresponding to **Form A1 of Schedule 1** containing the particulars required in that Form, which particulars are confirmed by affidavit.

(2) All stock in trade enumerated in the statement of affairs referred to in subsection (1) must be valued at cost price or at the market value thereof at the time of the making of affidavit referred in that subsection, whichever value is the smallest.

(3) If the Commissioner is satisfied that the insolvent or his or her spouse was unable to draw up the statement of affairs referred to in subsection (1)(b) without assistance, the person who assisted the insolvent or such spouse with the preparation of the statement is entitled to a reasonable fee determined by the Commissioner, which fee is deemed to be part of the costs of the liquidation.

Liquidator may obtain search warrant

61. (1) If the liquidator on reasonable grounds suspects that any book, document or record relating to the affairs of the insolvent or any property belonging to the insolvent is being concealed or otherwise unlawfully withheld from the liquidator, he or she may apply to the magistrate within whose area of jurisdiction such book, document, record or property is suspected to be or a magistrate who presided at a questioning in terms of **sections 87, 88 or 90**, for a search warrant.

(2) If it appears to a magistrate to whom an application referred to in subsection (1) is made on the basis of facts in an affidavit, or evidence given at a questioning in terms of **sections 87, 88 or 90** or answers to questions contemplated in **section 89(3)(b)** that there is substantiated reason to suspect that a book, document or other record relating to the affairs of the debtor or property belonging to the insolvent estate is being concealed in possession of a person or at a place or on a vehicle or vessel or in a container of whatever nature or is otherwise unlawfully withheld from the liquidator, within the area of jurisdiction of the said magistrate, he or she may issue a warrant authorising the liquidator or a police officer to search a person, or place or vehicle, vessel or container mentioned in the warrant and to take possession of such book, document, record or property.

(3) The provisions of sections 21, 27 and 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) in so far as they are applicable, apply with the changes necessitated by the context to the execution of a warrant referred to in subsection (2).

Registration of name and address with liquidator

62. (1) Any person who claims to be a creditor of an insolvent estate may-

- (a) register his or her name and address in Namibia with the liquidator of that estate upon payment to the liquidator of the prescribed fee; and
- (b) indicate property which he or she claims to hold as security for a claim.

(2) The liquidator must by liquidator's notice send to the name and address of a creditor registered in terms of subsection (1)-

- (a) a notice of every meeting of creditors of the insolvent estate;
- (b) a copy of every report contemplated in **section 63(1)**;

- (c) a copy of every notice in terms of **section 107(2)** that an account will lie open for inspection; and
- (d) a notice of the date, time and place of the sale of any property which a person claims to hold as security in terms of subsection (1).

(3) The liquidator must by standard notice send a copy of an account which has been advertised to lie open for inspection to a creditor registered in terms of subsection (1) upon that creditor's request and payment of the reasonable costs of making a copy of the account.

(4) Failure on the part of the liquidator to comply with a provision of this section constitutes a failure to perform his or her duties but does not invalidate anything done under this Act.

Liquidator's report

- 63.** (1) (a) The liquidator must investigate the affairs of the insolvent and the business transactions entered into by him or her before the liquidation of his or her estate.
- (b) At the first meeting of creditors of the insolvent estate, or in so far as he or she is then not ready to do so, at a special meeting of creditors the liquidator must submit-
- (i) a full written report on those affairs and transactions; and
 - (ii) on any matter of importance relating to the insolvent or the insolvent estate.
- (2) The liquidator must in particular report on -
- (a) the assets and liabilities of the insolvent estate;

- (b) whether, in his or her opinion, there is a risk of a contribution by creditors in terms of **section 113**, or indicate why he or she is unable to express an opinion on the matter;
- (c) the cause of the insolvent's insolvency;
- (d) the bookkeeping relating to the insolvent's affairs, the question whether proper bookkeeping in respect of his or her business transactions was carried out and if not, in what respect it is defective, insufficient or incorrect;
- (e) the question whether the insolvent -
 - (i) appears to have contravened any provision of this Act;
 - (ii) appears to have committed any other offence or contravened the provisions of any law;
 - (iii) has failed to submit a statement of affairs and of his or her income and expenses as required by this Act;
- (f) where applicable, the monthly income and expenses of the insolvent, any allowance made by the liquidator to the insolvent by way of maintenance for the insolvent and his or her family, and the assistance given to the liquidator during the period for which the allowance was paid;
- (g) any-
 - (i) legal proceedings instituted by or against the insolvent which were suspended by the liquidation of the estate; and
 - (ii) other legal proceedings which are pending or may be instituted against the insolvent estate;

- (h) any business conducted on behalf of the insolvent estate and the result thereof;
- (i) any transaction entered into by the insolvent before the liquidation of his or her estate in respect of the acquisition of immovable property which was not transferred to him or her or any transaction entered into by the insolvent as lessee;
- (j) the names of secured creditors with the amounts of the secured claims and steps taken or envisaged to investigate the validity of security;
- (k) whether or not further enquiry is in his or her opinion desirable in regard to any matter relating to the insolvent or the conduct of the insolvent's business;
- (l) any other matter relating to the administration or the realisation of the insolvent estate requiring direction of the creditors.

(3) If the liquidator's report is to be submitted as envisaged under subsection (1) before a final order is made, the liquidator must further report on whether any of the following, where applicable, are more appropriate than liquidation of the debtor-

- (a) reorganization proceedings in terms of Chapter 4; or
 - (b) an administration order in terms of section 74 of the Magistrates' Courts Act;
- (4) The liquidator must-
- (a) supply the Regional Commander of the Commercial Branch of the Namibian Police, or a similarly ranked law enforcement official with an

affidavit containing a report relating to any offence which the insolvent in his or her opinion committed;

- (b) on request of that Commander or official supply any further particulars as may be required; and
- (c) by standard notice send a copy of that affidavit and report to the Commissioner.

Recovery of debts due to estate

64. (1) The liquidator of an insolvent estate must, in the notification of his or her appointment by notice in the *Gazette*, call on all persons indebted to that estate to pay their debts within a period and at a place stated in the notice.

(2) If any person referred to in subsection (1) fails to pay their debts to the estate, the liquidator must recover payment thereof from him or her, by legal process, if necessary.

Remuneration of liquidator

65. (1) A liquidator is entitled to a reasonable remuneration for his or her services and for expenses incurred by him or her in the administration of an insolvent estate.

(2) The Commissioner must tax the remuneration and expenses referred to in subsection (1) in accordance with **Tariff B in Schedule 2**.

(3) The liquidator may apply to the Commissioner for an increase in remuneration after giving at least 14 days' liquidator's notice to creditors registered in terms of **section 62** who will be affected by such increase.

(4) The Commissioner may for good cause-

- (a) increase a liquidator's remuneration in particular to compensate him or her for the time spent in assisting with criminal prosecutions or investigating the affairs of a debtor; or
- (b) disallow his or her remuneration, either wholly or in part, by reason of
 - (i) any failure of or delay in the discharge of his or her duties; or
 - (ii) on account of any improper performance of his or her duties.

(5) (a) Any person who employs a liquidator, is a fellow employee of a liquidator or is ordinarily in the employment of a liquidator, is not entitled to any remuneration out of the insolvent estate for services rendered to the estate.

(b) A liquidator or his or her partner is not entitled to remuneration out of the estate for services rendered to the estate, except the remuneration to which he or she is entitled to as a liquidator in terms of this Act.

(6) A liquidator is not entitled to receive any remuneration before the liquidation account making provision for the remuneration has been confirmed in terms of **section 109**.

General duties and powers of liquidator

- 66.** (1) The liquidator of an insolvent estate must -
- (a) forthwith recover and take into his or her possession all the assets and property of the insolvent estate;
 - (b) apply those assets and property, as far as they extend, in satisfaction of the costs of the administration of the estate and the claims of creditors of the estate; and

- (c) if any cash balance remains, deal therewith in accordance with the provisions **of section 112**.

(2) The liquidator, in addition to any powers that he or she has in terms of this Act, has the power to perform any act which is necessary for the proper administration and distribution of the estate and, except where otherwise provided by this Act, he or she need not obtain formal authorisation for the performance of any such act.

(3) In particular, without detracting from the generality of subsection (2), the liquidator has the power to -

- (a) execute in the name of and on behalf of the insolvent estate all deeds, receipts and other documents;
- (b) prove a claim in the estate of any debtor of the insolvent estate and to receive payment or a dividend in respect thereof;
- (c) draw, accept, make or endorse any bill of exchange or promissory note in the name of or on behalf of the insolvent estate: Provided that any such act by which the estate is burdened with additional liabilities requires the authorisation of the Commissioner or the creditors of the estate;
- (d) conduct, with the authorisation of the Commissioner or the creditors of the estate the business of the insolvent or any part thereof, subject thereto that the liquidator may, pending the obtaining of authorisation thereto, only carry on the business of the insolvent in so far necessary to pay expenses of the estate or incur necessary expenses to avoid loss;
- (e) obtain credit for the payment of necessary expenses which he or she is obliged to incur before funds for the payment thereof are available;
- (f) convene a meeting of creditors of the estate;

- (g) take all necessary measures for the protection and the administration of the estate.
- (4) A liquidator, if authorised thereto by the Commissioner or by resolution of a meeting of creditors of the estate, has the power to -
- (a) institute or defend any legal steps in civil proceedings by or against the insolvent estate and to settle such proceedings;
 - (b) submit to determination of arbitrators any dispute concerning the insolvent estate;
 - (c) compromise or admit any claim lodged for proof at a meeting of creditors of the insolvent estate, including any unliquidated claim,
 - (d) disallow or reduce a claim in terms of **section 97(3)**;
 - (e) carry on the business or part of the business of the insolvent in accordance with the authorisation and directions of the Commissioner or the creditors of the insolvent estate;
 - (f) exercise his or her election in respect of contracts entered into before liquidation, including his or her election in terms of **section 43** or **48**;
 - (g) sell or alienate property of the insolvent estate, subject to the directions of the Commissioner or the creditors of the estate: Provided that if such property or a portion thereof is subject to rights of a secured creditor the secured creditor must give his or her consent in writing and provided further that the liquidator must endeavour to sell any property as a going concern where practical or appropriate;

- (h) engage the services of a legal practitioner or any other professional person or employ any other person to render services on behalf of the insolvent estate;
- (i) dispose of a debt owing to the insolvent estate or to accept payment of a reasonable part of a debt in full settlement of the debt or to give a reasonable extension of time for payment of a debt or part thereof;
- (j) draw, accept, make or endorse any bill of exchange or promissory note by which the insolvent estate is burdened with liabilities;
- (k) make available to the insolvent or his or her dependants a sum of money or assets for his or her maintenance or that of his or her dependants;
- (l) make available to the insolvent assets of the insolvent estate in excess of the amounts prescribed in terms of **section 27(7)**;
- (m) if the liquidator determines that the continued operation of the business of an insolvent as a going concern will benefit creditors, obtain finance for the continuation of the business -
 - (i) payable as costs of liquidation; or
 - (ii) payable with security over the assets of the estate without priority ahead of any existing security interest over the same assets, unless the liquidator obtains the agreement of the existing secured creditor that such security over the assets of the estate will enjoy such priority.

(5) The Master must authorise the liquidator to act in accordance with subsection (4) only if the authority is required so urgently that the liquidator cannot obtain a resolution at a first meeting of creditors of the insolvent estate.

(6) Before the issue of a final liquidation order, the powers set out in subsection (4) may only be exercised with the consent of the insolvent or the Court.

(7) A liquidator or an insolvent who disagrees with the assets made available in terms of subsection (4)(1) may refer the matter to the Commissioner for his or her decision.

(8) A liquidator may at any time, approach the Court in regard to any matter arising from the liquidation and the Court may give directions or grant the liquidator all powers that in its opinion are necessary for the proper administration, liquidation and distribution of the insolvent estate in question.

(9) Notwithstanding the provisions of any law relating to tax or duties a liquidator of an insolvent estate is entitled to -

- (a) inspect any return or other document submitted by or on behalf of an insolvent or the spouse of an insolvent, where applicable, in connection with tax or duties to the Commissioner of Inland Revenue;
- (b) make copies of any such return;
- (c) have any such copy, certified as correct by or on behalf of that Commissioner;
- (d) at his or her request be apprised in writing by or on behalf of that Commissioner of the basis for any estimated assessment made in terms of any such law relating to tax or duties.

(10) A liquidator may, in respect of immovable property or a bond registered in the name of an insolvent, or his or her spouse if he or she is married in community of property -

- (a) before or after the rehabilitation of an insolvent;

- (b) with the written consent of the Commissioner; and
- (c) by standard notice to the Registrar of Deeds,

cause a caveat to be entered against the transfer of the immovable property or the cancellation or cession of the bond referred to in that notice.

(11) The notice referred to in subsection (10)(c) must-

- (a) be accompanied by the written consent of the Commissioner indicating the date the caveat referred to in that subsection remains in force; and
- (b) identify sufficiently the person in respect of whom and the property or bond in respect of which the caveat is to be registered so as to enable the Registrar of Deeds to enter the caveat as contemplated in that subsection.

(12) The caveat referred to in subsection (10) remains in force until the date indicated by the Commissioner in his or her consent.

(13) If any entry in a return contemplated in subsection (9) is relevant in any civil or criminal proceedings in which the insolvent or the insolvent estate is involved, that return or a copy thereof, purporting to be certified as contemplated in subsection (9)(c), is admissible in those proceedings on its mere production by any person and such certified copy has the same evidentiary value as the original return.

(14) No provision in any contract, including the Memorandum or Articles of Association of a company, which-

- (a) purports to regulate the manner in which property belonging to a person must be disposed of on or after his or her insolvency; or
- (b) on his or her insolvency limits a person's power to dispose of his or her rights to property as he or she wishes,

binds the liquidator of such person's insolvent estate.

PART 8

RIGHTS AND DUTIES OF CREDITORS

Realization of security

67. (1) A secured creditor of an insolvent estate must as soon as the creditor becomes aware of the liquidation of the estate notify the liquidator in writing, of the-

- (a) nature and extent of that creditor's security; and
- (b) amount of that creditor's claim.

(2) If such property consists of securities as defined in section 1 of the Stock Exchanges Control Act the creditor may, subject to the provisions of subsection (5), after giving the notice mentioned in subsection (1), realize the property forthwith, if the property is of a class ordinarily sold through a stockbroker as defined in section 1 of the Stock Exchanges Control Act, subject to the provisions of the said Act and (where applicable) the rules referred to in section 12 of that Act, by selling it through a stockbroker, or if the creditor is a stockbroker, also to another stockbroker.

(3) A creditor who has realized property contemplated in subsection (2) must forthwith-

- (a) pay over to the liquidator the proceeds after deduction of the reasonable costs of realization; and
- (b) furnish the liquidator with vouchers in support of the realization of the property and the costs of realization.