

(2) The liquidator is competent to enforce the penalty referred to in subsection (1) and if he or she fails to do so any creditor of the estate may enforce the penalty in the name of the liquidator, if that creditor indemnifies the liquidator against all costs in connection with such action.

CHAPTER 4 REORGANIZATION PROCEEDINGS

PART 1 DEFINITIONS

Definitions

120. (1) For purposes of this Chapter-

"interim order" means an order made under **section 125**;

"proposal" means a proposal made by a debtor to the debtor's creditors for a composition in satisfaction of the debtor's debts or a scheme of arrangement of the debtor's financial affairs;

"provisional supervisor", in relation to a proposal, means the person designated as referred to in **section 125(1)(d)**;

"statement" means the prescribed sworn statement referred to in **section 121** which a debtor must submit to the court together with his or her offer of a composition;

"supervisor", in relation to a voluntary arrangement, means the person who is for the time being performing the functions imposed as a result of the approval of the arrangement by the creditors of the debtor under the arrangement;

"the court", for purposes of **section 121** means the Magistrate's Court of the district where a debtor normally resides, carries on business or is employed;

"voluntary arrangement", in relation to a debtor, means a proposal that has taken effect in accordance with **section 130(1)**.

PART 2

PRE-LIQUIDATION COMPOSITION

Pre-liquidation composition with creditors: magistrate's court

121. (1) Any debtor who cannot pay his or her debts less than the prescribed amount and who wants to offer his or her creditors a composition, may lodge a signed copy of the offer of composition and a sworn statement with the court in the form set out in **Schedule 4**.

(2) If the offer of composition provides for the immediate payment of a cash amount for distribution among creditors, the amount must, pending the outcome of the offer of composition, be invested in an interest-bearing savings account in trust with a legal practitioner or someone else whom the court approves, whereupon the debtor must offer proof that the cash amount has been invested in this manner.

(3) (a) If a debtor incurs debt during the period from lodging the offer of composition with the court until creditors have voted on the offer, the debtor must inform the creditor who offers him or her credit of the pending offer of composition and at the first appearance before the court in connection with the offer of composition, the debtor must provide full particulars concerning any such debt incurred by him or her.

(b) During the period contemplated in paragraph (a) or after an offer of composition has been accepted, a debtor may not alienate, encumber or voluntarily dispose of any property which must be made available to creditors in terms of the offer of composition or do anything which can impede compliance with that offer.

- (c) A debtor who contravenes these provisions is guilty of an offence and upon conviction is liable to a fine or to imprisonment not exceeding six months or to both such fine and such imprisonment.

- (4) (a) On receipt of the offer of composition and the statement, the court must determine a date of hearing for the questioning of the debtor and the consideration by the creditors of the offer of composition of the debtor, if it appears to the court that no such date has been determined during the preceding six months.

- (b) The date determined by the court must give the debtor sufficient time to notify creditors of the hearing, in accordance with subsection (5).

- (5) (a) The debtor must at least 14 days before the date determined for the hearing send by standard notice to each of his or her creditors a copy of the offer of composition and of the sworn statement and a prescribed notice with the case number and the place and date of the hearing.

- (b) The debtor must before the date of the hearing offer proof to the court that he or she gave notice in the manner contemplated in paragraph (a).

- (6) At the hearing -
 - (a) a creditor may, whether the creditor has received notice or not, prove the debt and object to a debt listed in the statement by the debtor;
 - (b) every debt listed by the debtor in the statement must, subject to any amendments to it by the court, be deemed to be proved, unless a creditor objects to it or the court rejects it or requires that it be corroborated by evidence;
 - (c) a creditor whose debt is being objected to by the debtor or another creditor or who is required by the court to corroborate that debt with evidence, must prove such debt;

- (d) the court may defer the proving of a debt and the consideration of the offer of composition, or allow the other creditors to vote on the composition, and if an offer of composition is accepted, an unproven debt is added to the listed debts at the stage when it is proved;
- (e) the debtor may be questioned by the court and by any creditor whose debt has been acknowledged or proved, or by any other interested party with the permission of the court, about -
 - (i) his or her assets and liabilities;
 - (ii) his or her present and future income and that of his or her spouse living in with him or her;
 - (iii) his or her standard of living and the possibility of living more frugally; and
 - (iv) any other matter which the court considers to be relevant.

(7) If it appears to the court at the hearing that a debt, other than a debt which is based upon or derives from a judgment debt, is disputed between the debtor and the creditor or between the creditor and another creditor of the debtor, the court may, after it has investigated the objection, admit or disallow the debt or part thereof.

(8) Any person whose debt has been disallowed in terms of subsection (7) may institute an action or continue with an action which has already been instituted in respect of such debt.

(9) If a person contemplated in subsection (8) obtains judgment in respect of a debt contemplated in that subsection, the amount of the judgment is added to the list of proved debts referred to in subsection (6).

(10) A creditor may by written power of attorney authorise any person to appear at a hearing on that creditor's behalf and to do everything at such hearing which the creditor would have been entitled to do.

(11) The hearing may be deferred by the court and the proposed offer of composition may be amended or revoked with the permission of the debtor.

(12) A composition may not be accepted if a creditor demonstrates to the satisfaction of the court that it accords a benefit to one creditor over another creditor to which he or she would not have been entitled on liquidation of the debtor's estate.

(13) If the composition is accepted by the majority in number and two-thirds in value of the concurrent creditors who vote on the composition, the court must certify that the composition is accepted as such and thereafter the composition is binding on all creditors who have been informed of the hearing or appeared at the hearing, but the right of a secured or otherwise preferent creditor may not be prejudiced by the composition, unless that creditor consents to the composition in writing.

(14) (a) If the composition provides for payments by the debtor in determined instalments or otherwise, the acceptance of the offer of composition has the effect of a judgment in terms of section 65 of the Magistrates' Courts Act in respect of the payments.

(b) Any person who in terms of the composition may receive the payments on behalf of creditors, or if there is no such person, any creditor who is in terms of the composition is entitled to a benefit out of the payments, has the rights which a judgment creditor would have in terms of the section.

(c) If any person is appointed in terms of the composition to execute the composition, that person is entitled to the remuneration which is payable in terms of the composition.

(15) (a) The court may at any time on application of the debtor or an interested person direct the debtor to appear for any further questioning as the court may deem necessary, after at least 14 days' standard notice to creditors by the debtor or the interested person, as the case may be.

(b) The court may -

(i) revoke the composition for cogent reasons; and

(ii) authorise a debtor who on reasonable grounds is not able to comply with his or her obligations in terms of the composition to lodge an amended offer of composition to creditors in the manner and with the consequences contemplated in subsection (1).

(c) Without limiting the phrase "cogent reasons" in paragraph (b)(i), it includes the following:

(i) the debtor does not comply with his or her obligations in terms of the composition;

(ii) the debtor renders false information in his or her statement or in the course of the questioning; or

(iii) the debtor gives a benefit in respect of a claim which falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.

(16) (a) Any creditor who is entitled to a benefit in terms of the composition can, notwithstanding subsection (15), after 14 days' standard notice to the debtor apply to the court to revoke the composition if the debtor does not comply with his or her obligations in terms of the composition.

- (b) The creditor must lodge an affidavit in support of his or her application.
- (c) The court must order that the composition be revoked if the debtor did not substantially comply with his or her obligations.

(17) If the composition is revoked, or if the estate of a debtor has been liquidated in terms of this Act before he or she complied with his or her obligations in terms of the composition, the claim of a creditor is restored to the extent that the claim has not been satisfied in terms of the composition.

(18) If a composition is not accepted by the required majority, and the court is of the opinion that the debtor is unable to make available to creditors substantially more than that which he or she offered in the proposed composition, the court may either:

- (a) declare that the proceedings in terms of this section have ceased and that the debtor is once again in the position he or she was prior to the commencement thereof; or
- (b) determine whether or not section 74 of the Magistrates Court Act, 1944 (Act No. 32 of 1944) can be applied to the debtor in question and, if so, apply that section accordingly and within the discretion of the court.

(19) Between the determination of a date for a hearing and the conclusion of the hearing in terms of this section no creditor with a claim the cause of which arose before the determination of the date, may without the permission of the court institute any action against the debtor or apply for the liquidation of the estate of the debtor.

PART 3

VOLUNTARY ARRANGEMENTS: ORDINARY PROCEEDINGS IN HIGH COURT

Voluntary arrangement not fully implemented

122. For the purposes of this Part, a voluntary arrangement approved by a creditors' meeting convened under **section 127** ends prematurely if, when it ceases to have effect, it has not been fully implemented in respect of all persons bound by the arrangement because of **section 130(2)(b)**.

Application for interim order

123. (1) An application to the Court for an interim order may be made if the debtor intends to make a proposal to the debtor's creditors under this Part for a composition in satisfaction of the debtor's debts or a scheme of arrangement of the debtor's financial affairs.

(2) The debtor must ensure that the proposal provides for a person to act as supervisor of the voluntary arrangement to which the proposal relates.

(3) Only an insolvency practitioner registered under this Act is eligible to act as supervisor of a voluntary arrangement.

(4) Subject to subsection (2), the application referred to in subsection (1) may be made –

(a) by the debtor, the liquidator of an insolvent estate or the Commissioner if the debtor is an unrehabilitated insolvent; or

(b) by the debtor in every other case.

(5) An application may be made by a debtor who is an unrehabilitated insolvent only if the debtor has given notice of the proposal to the Commissioner and the liquidator, if any, of the debtor's estate.

Effect of application for interim order

124. (1) While an application under **section 123** for an interim order is pending, the following provisions apply:

- (a) a landlord or other person to whom rent is payable by the debtor may exercise a right of forfeiture in relation to premises let to the debtor for a failure of the debtor to comply with a term of the tenancy –
 - (i) only with the approval of the Court; and
 - (ii) if in giving approval the Court has imposed conditions, only if those conditions are complied with;
- (b) the Court –
 - (i) may prohibit any claim from being executed on the debtor's property or its subsequent sale, or both; and
 - (ii) may stay any action, execution or other legal process against the property or person of the debtor.

(2) Any Court, including a magistrate's court in which proceedings are pending against a debtor may, on proof that an application has been made under **section 123** in respect of the debtor, either stay the proceedings or allow them to continue on such terms as the Court considers appropriate.

Power of Court to make interim order

125. (1) On the hearing of an application made under **section 123**, the Court may make an interim order if satisfied -

- (a) that the debtor intends to make a proposal under this Chapter;
- (b) that on the day of the making of the application the debtor was an unrehabilitated insolvent or was able to make an application for the liquidation of the debtor's estate;

- (c) that no previous application has been made by the debtor for an interim order during the 12 months immediately preceding the day of the making of the application; and
- (d) that the supervisor designated under the debtor's proposal is willing to act in relation to the proposal.

(2) The Court must make an interim order if satisfied that it would facilitate the consideration and implementation of the debtor's proposal.

(3) If the debtor is an unrehabilitated insolvent, the interim order may contain provisions as to the conduct of the insolvency, and the administration of the insolvent's estate, during the period for which the order is to have effect.

(4) An interim order may, in relation to a debtor who is an unrehabilitated insolvent, include a provision relaxing or removing a requirement of **Chapter 3** or of this Part, or of any prescribed requirement, only if the Court is satisfied that the inclusion of the provision would be unlikely to result in a significant diminution in, or in the value of, the debtor's estate in relation to the conduct of the insolvency.

(5) Except as otherwise provided by this Part, an interim order as a result of an application made under **section 123** ceases to have effect at the end of 30 days or any longer prescribed period from the date on which the order was made.

(6) On the making of an interim order, the designated supervisor referred to in subsection (1)(d) becomes the provisional supervisor.

- (7) While an interim order has effect in respect of a debtor –
 - (a) an application for the liquidation of that debtor's estate may not be made or proceeded with;
 - (b) a landlord or other person to whom rent is payable may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the

debtor if the debtor failed to comply with a term or condition of the debtor's tenancy of the premises only with the approval of the Court; and

- (c) any other proceedings (including execution or other legal process) may be begun or continued, and distress may be levied, against the debtor or the debtor's property only with the approval of the Court.

Provisional supervisor's report on debtor's proposal

126. (1) As soon as practicable after the making of an interim order, the provisional supervisor must, before the order ceases to have effect, submit a report to the Court stating -

- (a) whether, in that supervisor's opinion, the proposal has a reasonable prospect of being approved and implemented;
- (b) whether, in that supervisor's opinion, a meeting of the debtor's creditors should be convened to consider the proposal; and
- (c) if that supervisor's opinion is that a meeting referred to in paragraph (b) should be convened, the proposed date, time and place to hold the meeting.

(2) For the purpose of enabling the provisional supervisor to prepare that supervisor's report, the debtor must submit to that supervisor -

- (a) a document setting out the terms of the proposal; and
- (b) a statement of the debtor's financial affairs containing -
 - (i) particulars of the debtor's creditors and of the debtor's debts and other liabilities and of the debtor's assets as may be prescribed; and

(ii) any other information as may be prescribed.

(3) If the provisional supervisor has failed to submit the report required by this section or has died, the Court may, on an application made by the debtor, make an order directing that supervisor to be replaced by another insolvency practitioner.

(4) If it is impracticable or inappropriate for the provisional supervisor to continue to act as such, the Court may, on an application made by the debtor or that supervisor, make an order directing that supervisor to be replaced by another insolvency practitioner.

(5) If the provisional supervisor has failed to submit the report as required by this section, the Court may, on an application made by debtor, make an order directing the interim order to continue, or for the interim order to be renewed if it has ceased to have effect, for such further period as the Court may specify in the order.

(6) On the hearing of an application made by the provisional supervisor, the Court may make an order extending the period for which the interim order has effect so as to enable that supervisor to have more time to prepare his or her report.

(7) If, on receiving the provisional supervisor's report, the Court is satisfied that a meeting of the debtor's creditors should be convened to consider the debtor's proposal, the Court must make an order directing the extension of the period for which the interim order has effect for such further period as the Court may specify in the order so as to enable the debtor's proposal to be considered by the debtor's creditors in accordance with this Part.

(8) The Court may discharge the interim order if it is satisfied, on the application of the provisional supervisor -

(a) that the debtor has failed to comply with the debtor's obligations under subsection (2); or

- (b) that for any other reason it would be inappropriate for a meeting of the debtor's creditors to be convened to consider the debtor's proposal.

Creditor's meeting to consider debtor's proposal

127. (1) If it has been reported to the Court under **section 126** that a meeting of the debtor's creditors should be convened, the provisional supervisor must, unless the Court otherwise directs, by personal notice to every creditor whose name and address are known to that supervisor or which he or she can reasonably obtain send a copy thereof together with his or her report thereon and notice of the date, time and the place of the meeting at which the proposal will be considered.

(2) For the purpose of this section, the creditors of a debtor who is an unrehabilitated insolvent include -

- (a) each person who is a creditor of the debtor; and
- (b) each person who would be such a creditor if the liquidation had commenced on the date on which notice of the meeting referred to in subsection (1) was given.

Consideration of debtor's proposal at creditors' meeting

128. (1) The main purpose of a creditors' meeting convened under **section 127** is to decide whether to approve the debtor's proposal, with or without modifications.

(2) At the beginning of the meeting, the creditors present must elect one of their number to be the chairperson of the meeting.

(3) The chairperson must then divide the meeting into three groups for voting purposes, with the first group comprising secured creditors (if any), the second group comprising preferential creditors (if any) and the third group comprising unsecured creditors.

(4) Subject to subsection (6), a modification to the debtor's proposal may be approved only if the debtor consents to it.

(5) A modification to the debtor's proposal may be one that provides for the provisional supervisor to be replaced by another insolvency practitioner to perform the functions of supervisor of that proposal if it is approved and takes effect as a voluntary arrangement.

(6) Notwithstanding subsection (4), a modification to the debtor's proposal may not have the result that the proposal no longer qualifies as a proposal as defined in **section 120**.

(7) If the proposal or a modification to it affects the right of a secured creditor of the debtor to enforce the creditor's security, the proposal or modification may not be approved unless -

- (a) that secured creditor consents to the proposal; or
- (b) if that secured creditor does not consent to the proposal, the creditor -
 - (i) would be in a position no worse than if the debtor's estate were liquidated;
 - (ii) would receive no less from the assets to which that creditor's security relates, or from their proceeds of sale, than any other secured creditor having a security interest in those assets that has the same priority as the creditor's; and
 - (iii) would be paid in full from those assets, or their proceeds of sale, before any payment from them or their proceeds is made to any other creditor whose security interest in them is ranked below that of the creditor, or who has no security interest in them.

(8) Subject to this section, the meeting referred to in subsection (1)-

(a) must be conducted in accordance with rules (if any) as prescribed.

(b) may at any time resolve that it be adjourned, or further adjourned.

(9) As soon as practicable after the conclusion of that meeting, the provisional supervisor -

(a) must report the result of the meeting to the Court; and

(b) immediately after doing so, must give notice of the result of the meeting to all persons to whom the notice convening the meeting was sent.

(10) If the report is to the effect that the meeting has decided not to approve the debtor's proposal, the Court must discharge any interim order that has effect in relation to the debtor.

Approval of debtor's proposal

129. (1) A debtor's proposal, including any modifications is deemed to be approved if that proposal is supported by a majority in number and value of the creditors of each group of creditors present at the meeting of creditors, either in person or by proxy.

(2) For the purposes only of deciding whether the requisite majority by value has voted in favour of a resolution to approve the debtor's proposal, the following provisions apply:

(a) the chairperson of the meeting of creditors referred to in subsection (1) may -

(i) admit or reject proof of any claim against the debtor's estate and the provisions of **section 96** apply with the changes necessitated by the context to any proof of claims at that meeting; and

(ii) adjourn the meeting in order to admit or reject proof of a claim;

(b) a person whose claim is admitted is a creditor.

(4) At any time before the deadline for making an application under this subsection, the debtor or any of the debtor's creditors who attended or was entitled to attend the meeting may make an application to the Court for an order under subsection (8).

(5) The deadline for making an application under subsection (4) is -

(a) the expiry of 30 days after the date on which the meeting of creditors was held; or

(b) if the Court extends that period, the expiry of the extended period.

(6) The debtor and any creditor who attended or was entitled to attend the meeting of creditors is entitled to appear and be heard at the hearing of the application even if not the applicant.

(7) The right conferred by subsection (6) may be exercised by such a creditor irrespective of whether the creditor supports or has an interest in the implementation of the proposal.

(8) On the hearing of an application made under subsection (4), the Court may -

(a) make an order approving the proposal, with or without the modifications, put to the meeting of creditors in accordance with **section 128**; or

- (b) make such other order as the Court finds to be just,

but only if the Court considers that it would be in the best interests of both the debtor and the debtor's creditors to so.

(9) The Court may make an order under subsection (8)(a) even if the debtor's proposal (or a modification to it) was not approved at the creditors' meeting by a majority in number and value of the preferential creditors' group or the unsecured creditors' group, but may do so only if the proposal (or modification)-

- (a) has been approved by a majority of the secured creditors' group;
- (b) does not discriminate among the members of the dissenting group or groups of creditors and ensures that they will be no worse off than they would have been if the debtor's estate had been liquidated; and
- (c) respects the priorities of preferential creditors over unsecured creditors.

(10) If a provisional supervisor or creditor alleges that a resolution of the creditors made in terms of this section-

- (a) conflicts with this or any other Act or any rule of law; or
- (b) is unfair,

that supervisor or creditor may apply to the Court for an order under subsection (11).

(11) If, on the hearing of an application made under subsection (10), the Court finds that the allegation is substantiated, the Court may make such order, and give such directions, as the Court considers appropriate to address the conflict or unfairness.

Effect of approval of debtor's proposal

130. (1) A debtor's proposal, with or without modifications, takes effect as a voluntary arrangement by the debtor on the day after the date on which it is approved by the Court by order made under **section 129(8)(a)** or on such later date as may be specified in the order.

(2) On taking effect as a voluntary arrangement, the approved proposal binds every person (including a secured creditor and a preferential creditor) who -

- (a) was entitled to vote at the meeting (whether present or represented at the meeting or not); or
- (b) would have been so entitled to vote if the person had received notice of the meeting,

as if the person were a party to the arrangement.

(3) On the approved proposal taking effect as a voluntary arrangement, the provisional supervisor becomes the supervisor of the arrangement unless that supervisor has been replaced in accordance with **section 128(5)**.

(4) If -

- (a) the voluntary arrangement ends and any amount payable under that arrangement to a person bound because of subsection (2)(b) has not been paid; and

- (b) that arrangement did not come to an end prematurely,

the debtor must pay to that person the amount payable under that arrangement.

(5) An interim order having effect in relation to the debtor immediately before the expiry of 30 days from and including the date on which the report with respect to the

creditors' meeting was made to the Court in accordance with **section 128(9)** ceases to have effect at the end of that period.

(6) Subsection (5) applies except to the extent that the Court may direct for the purposes of any application made under **section 132**.

(7) If proceedings in respect of a liquidation application have been stayed by an interim order that has ceased to have effect, the application is, unless the Court otherwise orders, deemed to have been dismissed.

Additional effect of approved debtor's proposal on unrehabilitated insolvent

131. (1) If the Court has approved a debtor's proposal in accordance with **section 129(8)(a)** and the debtor is an unrehabilitated insolvent -

- (a) the insolvent; or
- (b) if the insolvent has not made an application within the period prescribed for the purposes of this section, the Commissioner,

may make an application to the Court for an order under subsection (3).

- (2) The application referred to in subsection (1) may not be made -
 - (a) during the period within which the decision of the creditors' meeting can be challenged by an application made under **section 132(1)**;
 - (b) while an application under **section 132(1)** is pending;
 - (c) while an appeal in respect of an order made under **section 230** is pending; or
 - (d) during the period within which such an appeal may be made.

(3) On the hearing of an application made under subsection (1), the Court must, subject to subsection (2), set aside the liquidation order, unless the Court is of the opinion that there are compelling reasons not to do so.

(4) In making an order under subsection (3), the Court may give such directions about the conduct of the liquidation and the administration of the insolvent's estate as it considers appropriate for facilitating the implementation of the approved proposal.

Right to challenge decision taken at creditors' meeting

132. (1) Subject to subsection (3), any of the persons specified in subsection (2) may make an application to the Court-

- (a) that a debtor's proposal approved by a meeting of creditors held in accordance with **section 127** unfairly affects the interests of a creditor of the debtor; or
- (b) that a material irregularity occurred at or in relation to a meeting of creditors.

(2) The persons who may make an application referred to in subsection (1) are -

- (a) the debtor;
- (b) a person who-
 - (i) was entitled to vote at the meeting of creditors; or
 - (ii) would have been so entitled if the person had notice of it;
- (c) the provisional supervisor or, if the proposal has taken effect as a voluntary arrangement, the supervisor of the arrangement; and

- (d) if the debtor is an unrehabilitated insolvent, the liquidator of that debtor's estate; or
 - (e) the Commissioner.
- (3) An application referred to in subsection (1) may not be made -
- (a) after the end of 30 days from and including the date on which the result of the meeting of creditors was reported to the Court in accordance with **section 128(9)**; or
 - (b) in the case of a person who was not given notice of the meeting of creditors, after the end of 30 days from and including the date on which the person first became aware that the meeting had taken place:

Provided that such application made by a person referred to in subsection (2)(b)(ii) on the ground that the voluntary arrangement unfairly affects that person's interests may be made even after that arrangement has ended, unless it has ended prematurely.

(4) If, on the hearing of an application referred to in subsection (1), the Court is satisfied as to either of the grounds referred to in that subsection, the Court may-

- (a) make an order revoking or suspending an approval given by the meeting of creditors in question;
- (b) give a direction to any person for the convening of a further meeting of the debtor's creditors to consider any revised proposal the person may make; or
- (c) in a case to which subsection (1)(b) applies direct that meeting of creditors to reconsider the debtor's original proposal.

(5) If, at any time after giving a direction under subsection (4)(b) for convening a meeting to consider a revised proposal, the Court is satisfied that the debtor does not intend to submit such a proposal, the Court must revoke the direction and revoke or suspend any approval given at the previous meeting.

(6) If the Court gives a direction under subsection (4)(b) or (c), the Court may also give a direction continuing or, as the case requires, renewing, for such period as may be specified in the direction, the effect in relation to the debtor of any interim order made under this Part.

(7) If, on the hearing of an application referred to in subsection (1) with respect to a meeting of creditors, the Court gives a direction under subsection (4)(b) or (c) or revokes or suspends an approval under subsection (4)(a) or (5), the Court may give such ancillary directions as the Court considers appropriate and, in particular, directions with respect to -

- (a) action taken since that meeting under any voluntary arrangement approved by the meeting; and
- (b) action taken since the meeting as could not have been taken if an interim order had effect in relation to the debtor when it was taken.

(8) Except as otherwise provided by this section, an approval given at a meeting of creditors held in accordance with **section 127** is not invalidated by any minor irregularity occurring at or in relation to the meeting.

Implementation and supervision of debtor's proposal

133. (1) The supervisor is responsible for implementing and supervising a voluntary arrangement that has taken effect in terms of **section 130 or 137** and has such powers as are necessary to enable that responsibility to be carried out.

(2) If a voluntary arrangement has effect in terms of **section 130 or 137**, a debtor or a creditor of the debtor or any other person who is dissatisfied by any act, omission or decision of the supervisor may apply to the Court for an order under subsection (3).

(3) On the hearing of an application made under subsection (2), the Court-

(a) must -

(i) if the Court finds the action or decision of the supervisor to have been unfair or unjustified, make an order quashing or modifying the act or decision; or

(ii) if it does not so find, make an order confirming the act or decision; and

(b) if the Court makes an order under paragraph (a)(i), may -

(i) give such directions to the supervisor as it considers appropriate; and

(ii) make such ancillary order as the Court considers appropriate.

(4) On the application of the supervisor to the Court for directions in relation to any particular matter arising under the voluntary arrangement, the Court may give such directions in relation to the matter as it considers appropriate.

(5) Whenever -

(a) it is desirable to appoint a person to perform the functions of the supervisor; and

(b) it is difficult or impracticable for an appointment to be made without the assistance of the Court,

the Court may make an order appointing an insolvency practitioner to act as supervisor in relation to the voluntary arrangement, either in substitution for the existing supervisor or to fill a vacancy.

(6) The power conferred by subsection (5) is exercisable so as to increase the number of persons performing the functions of supervisor or, if there is more than one person performing those functions, so as to replace one or more of those persons.

PART 4

VOLUNTARY ARRANGEMENTS: EXPEDITED PROCEDURE

Expedited voluntary arrangement

134. (1) This section applies if a debtor intends to make a proposal to the debtor's creditors for a voluntary arrangement and -

- (a) the Commissioner is specified in the proposal as the provisional supervisor in relation to the proposal; and
 - (b) no application for an interim order has been made under **section 123**.
- (2) If this section applies, the debtor may submit to the Commissioner -
- (a) a document setting out the terms of the debtor's proposal; and
 - (b) a statement of the debtor's financial affairs containing -
 - (i) particulars of the debtor's creditors, debts, other liabilities and assets as may be prescribed for the purposes of this section; and
 - (ii) any other prescribed information.

(3) If satisfied that the proposal has a reasonable prospect of being approved and implemented, the Commissioner may make arrangements to secure the attendance at a meeting of the debtor's creditors to decide whether to approve such proposal.

(4) For the purposes of subsection (3), a person is a creditor only if -

(a) the person is a creditor of the debtor in respect of a insolvency debt; and

(b) the Commissioner is aware of the person's claim and the person's address.

(5) In making arrangements under subsection (3), the Commissioner must ensure that -

(a) each creditor is provided with a copy of the debtor's proposal; and

(b) each creditor is provided with information about the criteria by reference to which the Commissioner will determine whether the creditors approve or reject that proposal.

(6) If a debtor submits documents to the Commissioner in accordance with subsection (2), an application under **section 123** for an interim order may not be made in respect of the debtor unless the Commissioner -

(a) has made the arrangements referred to in subsection (3); or

(b) has informed the debtor that the Commissioner does not intend to make such arrangements because the Commissioner is not satisfied that the proposal has a reasonable prospect of being approved and implemented or for any other reason.

(7) If a meeting of creditors is convened for the purpose of subsection (3), the provisions of **section 128** apply to the holding and conduct of the meeting.

Duty of Commissioner to report to Court

135. As soon reasonably practicable after the arrangements under **section 134** have been implemented, the Commissioner must report to the Court whether the proposed voluntary arrangement has been approved or rejected.

Approval of expedited voluntary arrangement

136. (1) If the Commissioner reports to the Court that the debtor's proposal has been approved, the proposal takes effect as a voluntary arrangement.

(2) On taking effect as a voluntary arrangement, the proposal binds -

- (a) the debtor; and
- (b) binds every person including a secured creditor and a preferential creditor who was entitled to participate in the arrangements made in accordance with **section 134(3)**,

as if each of them were a party to the arrangement.

(3) In addition to submitting the report, the Commissioner may make an application to the Court to make an order under subsection (5).

(4) An application referred to in subsection (3) may not be made -

- (a) during the period within which the voluntary arrangement can be challenged by an application under **section 132**;
- (b) while an application made under that section is pending;
- (c) while an appeal in respect of an application made under that section is pending; or

(d) during the period within which such an appeal may be made.

(5) On considering an application made under subsection (2), the Court must, subject to subsection (4) set aside a liquidation order in respect of the debtor unless the Court is of the opinion that there are compelling reasons not to do so.

(6) The Court may give such directions about the conduct of the liquidation and the administration of the insolvent's estate as the Court considers will facilitate the implementation of the approved voluntary arrangement.

Commissioner may apply to Court if debtor is unrehabilitated insolvent

137. (1) In addition to making the arrangements under **section 134(3)**, the Commissioner may, if the debtor is an unrehabilitated insolvent, make an application to the Court to make an order under subsection (3).

(2) Such an application may not be made -

(a) while an application for an order under **section 129(7)** is pending;

(b) during the period within which a voluntary arrangement can be challenged by an application made under **section 132**;

(c) while an application made under **section 132** is pending; or

(d) while an appeal in respect of an order made under that section is pending; or

(e) during the period within which such an appeal may be made.

(3) On considering an application made in terms of subsection (1), the Court must set aside the liquidation order in respect of the debtor unless the Court is of the opinion that there are compelling reasons not to do so.

(4) The Court may give such directions about the conduct of the liquidation and the administration of the insolvent's estate as the Court considers will facilitate the implementation of the voluntary arrangement.

Revocation of expedited procedure

138. (1) The Court may make an order revoking a voluntary arrangement that has effect because of **section 136(1)** if -

- (i) that order unfairly affects the interests of a creditor of the debtor;
or
- (ii) a material irregularity occurred in relation to the arrangements made under **section 134(3)**.

(2) An order in terms of subsection (1) may be made only on the application of-

- (a) the debtor;
- (b) a person who was entitled to participate in the arrangements made under **section 134(3)**;
- (c) the liquidator of an insolvent estate (if any); or
- (d) the Commissioner.

(3) (a) An application under subsection (2) may not be made after the expiry of 30 days from and including the date on which the Commissioner has reported to the Court as required by **section 135**.

(b) Notwithstanding paragraph (a), a creditor who was not made aware of the arrangements under **section 134(3)** at the time when they were

made may make an application under subsection (2) during the 30 days from and including the date on which the creditor first became aware of the voluntary arrangement.

PART 5

SUMMARY INSTALMENT ORDERS

Purpose of summary instalment order

139. A summary instalment order is an order made by the Commissioner directing the debtor to pay the debtor's debts -

- (a) in instalments or in some other way; and
- (b) in full or to the extent that the Commissioner considers practicable in the particular circumstances of the case.

Application for summary instalment order

140. (1) The Commissioner may make a summary instalment order on the application of-

- (a) a debtor; or
- (b) a creditor with the debtor's consent.

Requirements for summary instalment order

141. (1) The Commissioner may refuse an application for a summary instalment order if the application does not comply with subsection (2).

- (2) An application does not comply with this subsection unless it -
 - (a) is in the prescribed form for the purposes of this section;

- (b) states-
 - (i) that the debtor proposes to pay the creditors in full; or
 - (ii) the proportion of the outstanding debt that the debtor proposes to pay;
- (c) states the total amount of the weekly or other instalments that the debtor proposes to pay;
- (d) states-
 - (i) the name and address of the debtor's proposed supervisor and annex the written consent of that person to be supervisor; or
 - (ii) if the debtor claims that a supervisor is not necessary, the debtor's reasons for making that claim; and
- (e) includes the following information-
 - (i) the debtor's full name and address;
 - (ii) details of the debtor's property;
 - (iii) the names and addresses of each of the debtor's creditors;
 - (iv) the amount and nature of each of the creditors' debts;
 - (v) whether any of the debts are secured and the value of the charge;
 - (vi) whether any of the debts are guaranteed by any person;
 - (vii) the amount of the debtor's earnings;

- (viii) the name and address of the debtor's employer (if any);
- (ix) any other matter that may be prescribed for the purposes of this subsection.

Summary instalment order

142. (1) The Commissioner may make a summary instalment order if satisfied that -

- (a) the debtor's total unsecured debts that would be provable in the debtor's liquidation do not exceed the amount prescribed for the purpose of this section; and
- (b) the debtor is unable immediately to pay those debts.

(2) The Commissioner may not make such an order without having given the debtor and the creditors an opportunity to make representations with respect to whether or not to grant such order.

(3) A summary instalment order is not invalid merely because the total amount of the debts proved exceeds the amount specified in subsection (1)(a), but if it does, the supervisor appointed under **section 144** must refer the matter to the Commissioner, in which case the Commissioner must cancel that order.

Commissioner may make additional orders

143. In addition to an order for the payment of the debts in instalments, the Commissioner may make all or any of the following orders:

- (a) an order regarding the debtor's future earnings or income;

- (b) an order regarding the disposal of goods that the debtor owns or possesses;
- (c) an order giving the supervisor appointed under **section 144** power-
 - (i) to direct the debtor's employer to pay such part of the debtor's earnings to the supervisor as prescribed; and
 - (ii) to supervise payment, out of the debtor's earnings or income, of the reasonable living expenses of the debtor and the debtor's relatives and dependants.

Appointment of supervisor

144. (1) Except as provided by subsection (2), a summary instalment order is ineffective if it does not provide for the appointment of a suitable and willing person to supervise compliance by the debtor with the terms of the order.

(2) The Commissioner may dispense with the appointment of a supervisor if the Commissioner considers it appropriate to do so.

(3) If the Commissioner dispenses with the appointment of a supervisor

-

(a) the provisions of this Part apply as if the debtor was the supervisor, except for **section 145**; and

(b) that section applies as if the Commissioner was the supervisor.

(4) The Commissioner may require a supervisor to provide a security acceptable to the Commissioner to secure the supervisor's performance of the supervisor's obligations under this Act.

(5) In imposing a requirement referred to in subsection (4), the Commissioner must specify the amount of the security and the person to whom it is to be given.

Role of supervisor

145. (1) The supervisor is responsible for supervising the debtor's compliance with the terms of the summary instalment order and any other orders made under **section 143**.

(2) The supervisor may charge the debtor remuneration for carrying out the supervisor's responsibilities as supervisor at the amount or rates not exceeding the prescribed amount or rates.

Commissioner may require supervisor or past supervisor to provide documents

146. (1) The Commissioner may, by notice, require a supervisor or a past supervisor to provide the Commissioner, within not less than seven days from the date of the notice, with any specified documents, or any documents of a specified class, that relate to the debtor's property, conduct or dealings during the tenure of that supervisor or past supervisor, as the case may be.

(2) A supervisor or past supervisor who fails to comply with a notice given to him or her under subsection (1) commits an offence and on conviction is liable to a fine not exceeding N\$75,000 or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

Termination of supervisor's appointment

147. (1) If the Commissioner is of the opinion that the supervisor has failed to supervise the debtor's compliance adequately, the Commissioner must terminate the supervisor's appointment and appoint a replacement supervisor.

(2) The Commissioner may only act in accordance with subsection (1) if the Commissioner has given that supervisor an opportunity to be heard.

Period of payment of instalments

148. The payment of instalments under a summary instalment order can be spread over a period not exceeding -

- (a) three years; or
- (b) if justified by special circumstances acceptable to the supervisor, five years.

Variation or discharge of summary instalment orders

149. (1) The debtor, any creditor or the supervisor may at any time apply in writing to the Commissioner to vary or discharge a summary instalment order.

(2) After considering an application made under subsection (1), the Commissioner must vary or discharge the order as the Commissioner considers appropriate.

Effect of summary instalment orders

150. (1) The debtor must pay all instalments payable under a summary instalment order in the prescribed manner.

(2) The Commissioner must cancel a summary instalment order on being satisfied on reasonable grounds that the debtor has failed to comply with subsection (1).

Restrictions on bringing proceedings against a debtor while summary instalment order is in force

151. (1) In this section, "proceedings", in relation to a debtor in respect of whom a summary instalment order has been made, means proceedings brought against the person or property of the debtor in respect of a debt that has been -

- (a) shown in the debtor's application for the summary instalment order;
- (b) included in the summary instalment order; or
- (c) notified to the supervisor.

(2) While a summary instalment order has effect, a person may not begin or continue proceedings against the debtor unless -

- (a) the Commissioner has given prior written approval for a creditor to begin or continue the proceedings; or
- (b) the debtor is in default under the order.

(3) In giving any such approval, the Commissioner may impose such conditions as appear to the Commissioner to be fair and reasonable.

(4) In the case of proceedings that are pending before a court at the time when the summary instalment order is made, the Court, unless the conditions specified in subsection (2)(a) or (b) apply —

- (a) must stay the proceedings on receiving notice of the order; and
- (b) may award all or part of the creditor's costs incurred up to the time of the Court's notification, and may certify accordingly for the purpose of the creditor proving the debt under this Part.

Supervisor to give notice of summary instalment order

152. (1) The supervisor must send a notice of the summary instalment order to every creditor -

- (a) who is known to the supervisor;
- (b) whose name is shown on the debtor's application for the order; or
- (c) who has proved a debt under **section 156**.

(2) A supervisor who, without reasonable excuse, fails to comply with subsection (1) commits an offence and on conviction is liable to a fine not exceeding N\$75,000 or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

Public register of debtors subject to summary instalment orders

153. (1) The Commissioner must establish and maintain a public register of persons who are subject to current summary instalment orders.

(2) The Commissioner must maintain the register in accordance with **Chapter 7**.

When summary instalment order not current

154. A summary instalment order is not current if it has been discharged or all the instalments required to be paid under the order have been paid in accordance with the order.

Claims of creditors when summary instalment order has effect

155. (1) A creditor who has proved the creditor's claim to the satisfaction of the supervisor is entitled to be included as a creditor in the administration of the debtor's estate under the summary instalment order for the amount of the debt.

(2) A creditor may object to the supervisor's acceptance or rejection of any creditor's claim by applying to the Commissioner.

(3) If a creditor objects under subsection (2), the Commissioner may give any directions that the Commissioner considers appropriate regarding the acceptance or rejection of the claim.

Payment of debtor's earnings to supervisor

156. (1) This section applies if the supervisor, under a power conferred by a summary instalment order made by the Commissioner, directs the debtor's employer to pay part of the debtor's earnings to the supervisor.

(2) The amounts that the employer must pay to the supervisor are recoverable as a debt from the employer, and the supervisor's receipt is a complete discharge to the employer for the debt.

(3) Payment by the employer in contravention of the supervisor's direction to pay the supervisor discharges the liability of the employer to the supervisor for the amount of the payment only if the payment is made -

- (a) with the consent of the supervisor or the Commissioner; or
- (b) to a person who is not the debtor and who has a better legal claim to it than the debtor.

Default by debtor to pay instalments

157. (1) A debtor who fails to pay an amount due under a summary instalment order is presumed, unless the contrary is proved -

- (a) to have been able to pay the amount from the date of the order; and
- (b) to have refused or neglected to pay it.

(2) Subject to subsection (3), if the debtor fails to make a payment in accordance with the order -

- (a) proceedings that have been stayed under **section 151** may begin or continue;
- (b) any period during which a proceeding was stayed under that section are to be added to any period of limitation that applies to the proceeding in terms of the Prescription Act, 1969 (Act No. 68 of 1969) or any similar Act.
- (3) Subsection (2) is subject to any order of the Court to the contrary.

(4) As soon as practicable after a debtor fails to make a payment in accordance with a summary instalment order, the supervisor must give notice of the failure to the Commissioner.

Offence for debtor to obtain credit when summary instalment order in force

158. (1) A debtor in respect of whom a summary instalment order is in effect commits an offence if, before all creditors have been paid the amounts to which they are entitled under the order, the debtor-

- (a) alone or jointly with another person, obtains credit of N\$20,000 or more;

- (b) incurs a liability to another person for N\$20,000 or more for the purpose of obtaining credit for another person; or
 - (c) enters into a credit purchase transaction under which the debtor is liable to pay N\$20,000 or more.
- (2) In proceedings for an offence under subsection (1), it is a defence to prove -
- (a) in a case to which subsection (1)(a) applies, that, before obtaining the relevant credit, the debtor informed the credit provider that the debtor was subject to a summary instalment order;
 - (b) in a case to which subsection (1)(b) applies, that, before the defendant incurred the relevant liability, the credit provider was informed that the defendant was subject to a summary instalment order; or
 - (c) in a case to which subsection (1)(c) applies, that, before the defendant entered into the relevant agreement, the other parties to the agreement were informed that the defendant was subject to a summary instalment order.
- (3) A person who is found guilty of an offence under this section is liable on conviction to a fine not exceeding N\$150,000 or to imprisonment for a term not exceeding twelve months, or to both such fine and such imprisonment.

PART 6

NO-ASSET PROCEDURE

Debtor with no realizable assets

159. This Part applies to a debtor who has no realisable assets.

Eligibility for admission to no-asset procedure

160. (1) A debtor who meets the criteria set out in **section 161** may apply to the Commissioner for admission to the no-asset procedure.

(2) A debtor can apply to the Commissioner for admission to the no-asset procedure by completing-

- (a) an application in the prescribed form for the purpose of this section;
- (b) a statement in the prescribed form setting out the debtor's financial position;

(3) The Commissioner may require the debtor to furnish the Commissioner with any other information, documents, books, records or statements, which the Commissioner may require to assess the debtor's application in terms of subsection (1).

(4) The Commissioner may reject the debtor's application if the application or statement of the debtor's financial position is, in the Commissioner's opinion, incorrect or incomplete.

Criteria for admission to no-asset procedure

161. (1) Subject to subsection (3), the Commissioner must admit a debtor to the no-asset procedure if satisfied on reasonable grounds that -

- (a) the debtor has no realisable assets;
- (b) the debtor has not previously been admitted to the no-asset procedure;
- (c) the debtor's estate has not previously been liquidated;
- (d) the debtor has total debts that are not more and not less than the prescribed amount; and

- (e) the debtor does not have the means to repay any amount towards those debts.

(2) In this section, "realisable assets" excludes any assets that an insolvent is allowed to retain under **section 27(7)**, but includes assets including gifted assets that might be recoverable by the Commissioner -

- (a) if the liquidation of a debtor's estate was to commence on the date of application for admission to the no-asset procedure; and
- (b) if **Part 4 of Chapter 3** applied.

(3) The admission of a debtor to the no-asset procedure does not take effect unless approved by the Court upon application by the Commissioner or the debtor.

Debtor disqualified in certain cases

162. The Commissioner may not admit a debtor to the no-asset procedure if satisfied, on reasonable grounds, that -

- (a) the debtor has concealed assets with the intention of defrauding the debtor's creditors (such as by transferring property to a trust);
- (b) the debtor has engaged in conduct that would, if the debtor were declared insolvent, constitute an offence under this Act;
- (c) the debtor has incurred a debt or debts knowing that the debtor does not have the means to repay them; or
- (d) a creditor intends to apply for the debtor to be declared insolvent and it is likely that, if the debtor were to be declared insolvent, the

outcome for the creditor would be materially better than if the debtor were admitted to the no-asset procedure.

Notification to creditors

163. As soon as practicable after receiving an application from a debtor for admission to the no-asset procedure, the Commissioner must send a summary of the debtor's assets and liabilities to each known creditor of the debtor.

Restrictions on debtor obtaining credit

164. (1) A debtor who has applied for admission to the no-asset procedure may not obtain credit, including credit under a credit purchase transaction, either alone or jointly with another person, of more than N\$5,000 without first informing the credit provider that the debtor has applied for admission to the no-asset procedure.

(2) A debtor who contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding N\$75,000 or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

Debtor admitted to no-asset procedure

165. (1) A debtor is admitted to the no-asset procedure when the Commissioner sends the debtor a notice in the form prescribed for the purposes of this section.

(2) As soon as practicable after a debtor is admitted to the no-asset procedure, the Commissioner must -

- (a) notify that fact to each creditor of the debtor of whom the Commissioner is aware; and
- (b) publish notice thereof in a publication and in the prescribed manner.

Public register of persons admitted to no-asset procedure

166. (1) The Commissioner must establish and maintain a public register of persons admitted to the no-asset procedure and persons discharged from that procedure in terms of **section 174**.

(2) The Commissioner must maintain the register in accordance with **Chapter 7**.

Creditors may not enforce debts of debtor admitted to no-asset procedure

167. (1) A creditor of a debtor may not, after the debtor has been admitted to the no-asset procedure, begin or continue any step to recover or enforce a debt -

- (a) that the debtor owes to the creditor at the time when the debtor applies for entry to the no-asset procedure; and
 - (b) that would be provable in the debtor's insolvency if the debtor were to be declared insolvent.
- (2) Despite subsection (1), the following debts remain enforceable-
- (a) amounts payable under a court order made under the Maintenance Act, 2003 (Act No. 3 of 2003);
 - (b) amounts payable under the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003);
 - (c) amounts payable under a divorce order by the Court;
 - (d) amounts owed in respect of a loan to secure the education of a dependent child or step-child of the debtor.

Debtor's duties after admission to no-entry procedure

168. (1) On being required by the Commissioner to do so, the debtor must provide the Commissioner with such assistance, documents and information as are reasonably necessary in order to apply the no-asset procedure to the debtor.

(2) As soon as practicable after any change occurs in the debtor's circumstances that would allow the debtor to repay an amount towards the debts referred to in **section 166(1)**, the debtor must give written notification of such change to the Commissioner.

(3) The debtor may not obtain any credit, either alone or jointly with another person, of more than N\$ 20 000 without first informing the credit provider that the debtor is subject to the no-asset procedure.

Offence to obtain credit while under no-asset procedure

169. (1) A person commits an offence who, while admitted to the no-asset procedure -

- (a) alone or jointly with another person, obtains credit of one N\$20,000 or more;
- (b) incurs liability to a credit provider for N\$20,000 or more for the purpose of obtaining credit for another person; or
- (c) enters into a credit purchase transaction under which the person is liable to pay N\$20,000 or more.

(2) In criminal proceedings under subsection (1), it is a defence to prove -

- (a) in a case to which subsection (1)(a) applies, that, before obtaining the relevant credit that the credit provider was informed that the defendant was admitted to the no-asset procedure;
- (b) in a case to which subsection (1)(b) applies that, before the defendant incurred the relevant liability, the credit provider was informed that the defendant was admitted to the no-asset procedure; or
- (c) in a case to which subsection (1)(c) applies that, before the defendant entered into the relevant agreement, the other parties to the agreement were informed that the defendant was admitted to the no-asset procedure.

(3) A person who is found guilty of an offence under this section is on conviction liable to a fine not exceeding N\$150,000 or to imprisonment for a term not exceeding twelve months, or to both such fine and such imprisonment.

Termination of debtor's admission to no-asset procedure

170. A debtor's participation in the no-asset procedure terminates when -

- (a) the Commissioner causes such termination in terms of **section 171**;
- (b) the debtor is discharged under **section 175**;
- (c) the debtor applies for his or her liquidation; or
- (d) a creditor who is entitled to do so applies for the debtor's liquidation and the debtor is declared insolvent.

Commissioner may cause termination of no-asset procedure

171. (1) The Commissioner must serve in accordance with subsection (2) on a debtor a notice of intention to cancel that debtor's

participation in the no-asset procedure if the Commissioner is satisfied on reasonable grounds -

- (a) that the debtor was wrongly admitted to the no-asset procedure or misled the Commissioner; or
- (b) that the debtor's financial circumstances have changed sufficiently to enable the debtor to repay an amount towards the debtor's debts.

(2) The Commissioner must serve on the debtor, in accordance with the Rules of the Court the notice referred to in subsection (1) containing the reasons relied upon by the Commissioner for issuing such notice.

(3) A debtor's termination in the no-asset procedure comes into effect when the Court upon application by the Commissioner sets aside the order granted in terms of **section 161(3)**.

(4) As soon as practicable after the termination of a debtor's participation in the no-asset procedure, the Commissioner must send a notice of the termination to each creditor of the debtor known to the Commissioner.

Commissioner may apply for preservation order

172. (1) If the Commissioner, in accordance with **section 171** cause the termination of a debtor's participation in the no-asset procedure on the ground that the debtor has concealed assets or misled the Commissioner, the Court may, on the application of the Commissioner, make an order for the preservation of the debtor's assets pending an application for the debtor's estate to be liquidated.

(2) The Court may make an order under subsection (1) on the terms that the Court considers appropriate.

Effect of termination of debtor's participation in no-access procedure

173. (1) On termination of the debtor's participation in the no-asset procedure -

- (a) the debtor's debts that became unenforceable on the debtor's entry to the no-asset procedure become enforceable; and
- (b) the debtor becomes liable to pay any penalties and interest that may have accrued.

(2) Subsection (1) does not apply if the debtor's admission to the no-asset procedure is terminated by discharge under **section 174**.

Creditor may apply to Commissioner for termination of debtor's participation in no-asset procedure

174. A creditor may apply to the Commissioner for termination of the debtor's participation in the no-asset procedure on the ground –

- (a) that the debtor did not meet the criteria for admission to the no-asset procedure; or
- (b) that there are reasonable grounds for the Commissioner to conclude that the debtor was disqualified under **section 162**.

Automatic discharge of debtor from no-asset procedure

175. (1) A debtor who is participating in the no-asset procedure is automatically discharged from that procedure at the end of 12 months after the date when the debtor was admitted to it.

- (2) Subsection (1) does not apply if the Commissioner -
 - (a) upon application by the debtor or at the Commissioner's volition is satisfied that the 12-month period should be extended for the purpose of

properly considering whether the debtor's participation in the no-asset procedure should be terminated; and

(b) serves a written deferral notice in accordance with the Rules of the Court at the debtor's last known address before the end of that period.

(3) The Commissioner must specify in the deferral notice an alternative date for automatic discharge, which may be not later than 60 days after the end of the 12-month period.

(4) As soon as practicable after sending a deferral notice to a debtor, the Commissioner must send a copy of that notice to each creditor of the debtor known to the Commissioner.

(5) The debtor is automatically discharged from the no-asset procedure on the date specified in the deferral notice.

(6) The Commissioner may revoke a deferral notice in the same way in which it was sent, in which case, the debtor is automatically discharged from the no-asset procedure –

(a) if the notice is revoked on or before the end of the 12-month period specified in subsection (1), at the end of that period; or

(b) if it is revoked after the end of that period, on the date of revocation.

Discharge of debtor's participation in no-asset procedure

176. (1) On discharge under **section 175-**

(a) the debtor's debts that became unenforceable on the debtor's admission to the no-asset procedure are cancelled; and

(b) the debtor is no longer liable to pay any part of the debts, including any penalties and interest that may have accrued.

(2) Subsection (1) does not apply -

(a) to any debt or liability incurred by fraud or fraudulent breach of trust to which the debtor was a party; or

(b) any debt or liability for which the debtor has obtained leniency through fraud to which the debtor was a party.

(3) The debts and liabilities referred to in subsection (2) again become enforceable on discharge under **section 175**, and the debtor is liable to pay any penalty or interest that may have accrued.

Discharge does not release debtor's business partners and others

177. A discharge under **section 175** does not release a person who, at the date of discharge, was –

(a) a business partner of the discharged debtor;

(b) a co-trustee with the discharged debtor;

(c) jointly bound or had made any contract with the discharged debtor; or

(d) a guarantor or in the nature of a guarantor of the discharged debtor.

PART 7

POST-LIQUIDATION COMPOSITION

Post-liquidation composition

178. (1) Any debtor, may at any time after the issuing of the provisional liquidation order but after he or she has sent his or her statement of affairs by standard notice as required by **section 17(3)**, lodge with the liquidator of his or her estate a written offer of composition.

(2) (a) If the liquidator is of the opinion that there is a likelihood that the creditors of the estate will accept the offer of composition, he or she must as soon as possible after the receipt of the offer sent a copy thereof together with his or her report and notice of the date, time and the place of the meeting at which the offer of composition will be considered by standard notice to every creditor whose name and address are known to the liquidator or which he or she can reasonably obtain.

(b) If a special meeting is convened to consider an offer of composition a notice in the *Gazette* must be published not less than 14 days and not more than 21 days before the date fixed for the meeting.

(3) (a) If the liquidator is of the opinion that there is no likelihood that creditors will accept the offer of composition, he or she must inform the debtor that the offer is unacceptable and that he or she does not propose to send a copy thereof to the creditors.

(b) The debtor may thereupon require the Commissioner to review the liquidator's decision and the Commissioner may, after having considered the offer and the liquidator's report thereon, direct the liquidator to submit the offer to the creditors of the estate in the manner provided in subsection (2).

(4) If the offer is accepted by a majority in number and two-thirds in value of the concurrent creditors who have voted on the offer and payment under the composition has been made or security for such payment has been given as specified in the composition, the debtor is, subject to subsection (5), (6) and (7), entitled to a certificate under the hand of the Commissioner of the acceptance of the offer.

(5) An offer of composition is invalid if it contains any condition under which any creditor would obtain as against another creditor any benefit to which he or she would not have been entitled upon the distribution of the estate in the ordinary manner.

(6) Subject to subsection (5), a condition providing for the discharge of a provisional liquidation order or the setting aside of a final liquidation order upon the acceptance of an offer of composition is valid.

(7) If the composition provides for the giving of security, the nature of the security must be fully specified and if it consists of a surety bond or guarantee, every surety must be named.

(8) Despite the absence of a resolution of creditors authorising him or her to do so, the liquidator may approach the Court for-

- (a) the cancellation of a composition;
- (b) the setting aside of an order providing for the discharge of a provisional liquidation order;
- (c) an order setting aside a final liquidation order; or
- (d) for other relief,

if-

- (i) the debtor or any other person has failed to give effect to the terms of the composition or to comply with the provisions of this section; or
- (iii) the offer of composition contained incorrect information which caused a majority of of creditors voting in favour of its acceptance.

(9) An offer of composition which has been accepted as aforesaid is binding upon the debtor and upon all creditors of the insolvent estate in so far as their claims are not secured or preferent but the right of any secured or preferent creditor may not be prejudiced thereby, except in so far as the secured or preferent creditor waived such preference or security in writing.

(10) If the composition is subject to the condition that any property in the insolvent estate must be restored to the debtor, the acceptance of the composition divests the liquidator of such property and vests such property in the debtor as from the date on which such property is in pursuance of the composition to be restored to the debtor, but subject to any condition provided for in the composition.

(11) A composition does not affect the liability of a surety for the debtor or any liability regarding transactions that are invalid or liable to be set aside.

(12) (a) When the estate of a partnership and the estate of a partner in that partnership are simultaneously under liquidation, the acceptance of an offer of composition by the separate creditors of the partner does not take effect until the expiration of a period of six weeks as from the date of a standard notice in writing of that acceptance given by the liquidator of the partner's separate estate to the liquidator of the partnership estate, or if the liquidator of the partner's estate is also the liquidator of the partnership estate, as from the date of the acceptance of the composition.

(b) The notice referred to in paragraph (a) must be accompanied by a copy of the deed embodying the composition.

(13) At any time during the period of six weeks referred to in subsection (12) the liquidator of the partnership estate may take over the assets of the estate of the insolvent partner if he or she fulfils the obligations of the insolvent partner in terms of the composition, other than obligations to render any service or obligations which only the insolvent partner can fulfil: Provided that if the composition provides for the giving of any specific security, the Commissioner must determine what other security the liquidator of the partnership estate may give in lieu thereof.

(14) Subject to subsection (15), any moneys to be paid and anything to be done for the benefit of creditors in pursuance of a composition must be paid and must be done, as far as practicable, through the liquidator:

(15) Notwithstanding the provisions of subsection (14), any creditor who has failed to prove that creditor's claim before the liquidator has made a final distribution among those creditors who have proved their claims, is entitled within six months from the confirmation by the Commissioner of the account under which the distribution was made, to recover directly from the debtor any payments to which that creditor may be entitled under the composition and the liquidator has no duty in regard thereto.

(16) After the liquidator has made a final distribution as contemplated in subsection (15), the creditor referred to in that subsection has no claim against the insolvent estate.

(17) (a) When a composition has been entered into between a debtor and the creditors of his or her estate and the liquidation order has not been discharged or set aside, the liquidator of that estate must frame a liquidation account and distribution account of the assets which are or will become available for distribution among the creditors in terms of the composition.

(b) All the provisions of this Act which relate to a liquidation account and distribution account of assets among creditors apply in connection with the liquidation account and distribution account referred to in paragraph (a).

PART 8

CRIMINAL CONDUCT UNDER THIS CHAPTER

False declaration to obtain creditors' approval

179. (1) A debtor commits an offence, if for the purpose of obtaining approval to a proposal for a composition in terms of Part 2 or a voluntary arrangement in terms of Part 3 or 4 (hereafter jointly referred to as “a proposal”), the debtor -

- (a) makes a representation knowing it to be false or misleading; or
- (b) fraudulently does, or omits to do, any act.

(2) In subsection (1), the reference to obtaining approval to a proposal relates to obtaining -

- (a) the approval of a proposal for an offer of pre-liquidation composition held in accordance with **section 121**;
- (b) the approval of a proposal for an offer of post-liquidation composition held in accordance with **section 177**;
- (c) the approval of a proposal for a voluntary arrangement presented to a meeting of the debtor's creditors held in accordance with **section 128**;
or
- (d) the approval of a proposal for a voluntary arrangement submitted to the Commissioner in accordance with **section 134**.

(3) Subsection (1) applies even if the proposal is not approved.

(4) A person found guilty of an offence under subsection (1) is liable on conviction to a fine not exceeding N\$250,000 or to imprisonment for a term not exceeding five years, or to both such fine and such imprisonment.

Prosecution of delinquent debtors

180. (1) This section applies to a proposal that has taken effect in accordance with **section 121, 177, 130(1) or 137(1)**.

(2) As soon as practicable after forming a reasonable suspicion that a debtor has committed an offence in connection with a proposal to which this section applies, the court referred to in **section 121**, the liquidator referred to in **section 177** or a supervisor of a voluntary arrangement must report the matter to the Prosecutor General.

(3) On receiving the report contemplated in subsection (2), the Prosecutor General may request the person who made the report to provide -

- (a) such information as is specified in the request; and
- (b) access to, and facilities for inspecting and taking copies of, such documents as are so specified.

(4) The person who made the report must comply with such a request to the extent that the information or documents are under the debtor's control and relate to the matter concerned.

(5) If the Prosecutor General takes criminal proceedings following a report made under subsection (2), the person who made the report must provide the Prosecutor General with all assistance in connection with the prosecution that that person is reasonably able to provide.

(6) If the person who made the report fails to comply with subsections (3), (4) or (5) the Prosecutor General may apply to the Court for an order under subsection (7).

(7) On the hearing of an application made under subsection (6), the Court may make an order directing the person who made the report to comply with subsection (3) or (4), as appropriate.

CHAPTER 5

CROSS-BORDER INSOLVENCIES