INSOLVENCY LAW*

In *Gilbert v Bekker & Another* 1984 (3) SA 774 (W) at 777G-H, Coetzee J made the important observation that: '[o]ur courts are not entrusted with insolvency administration as in England. The Court, when called upon to do so, merely applies the law to a given situation'. The Insolvency Act is the principal source of our Insolvency Law. So too the Companies Act and Close Corporations Act, which contain provisions for the liquidation of companies and close corporations.

The essential philosophy of the law of insolvency is to regulate the relationship between and consequently the rights and responsibilities of debtors and creditors. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. The test for insolvency in our law is whether the liabilities of a debtor fairly valued exceed his liabilities. An inability to pay one's debts is not necessarily an indicator of insolvency. Although the inability to pay may cast something in the nature of an evidentiary burden on a debtor to establish that in the particular circumstances the debtor's assets exceed his or her liabilities.

The word 'insolvent' must be taken to mean that the liabilities of his debt fairly estimated, exceed the value of his assets, fairly valued. This was the definition applied by Wessels J in *Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50. Actual insolvency needs be distinguished from commercial insolvency. Actual insolvency is where a debtor's liabilities exceed his assets, whereas commercial insolvency is where a debtor is unable to pay his debts (due by way of example to a temporary cash flow problem), but his assets do indeed exceed his liabilities. The fact that someone is unable to pay his debts or that his assets exceed his liabilities may mean that he is factually insolvent, but that does not mean that he is insolvent for legal purposes. Legally a person is only insolvent if his estate has been sequestrated by an order of court.

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* Justice V Ponnan (Supreme Court of Appeal)
SAJEI - Thursday, 4 July 2024.

An order of sequestration is not an ordinary judgment of the court, but is rather a species of arrest or execution, affecting not only the rights of the two litigants but also third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent (*Hassan v Berrange* 2012 (6) SA 329 (SCA)). The main aim of insolvency is to ensure an orderly and fair distribution of the assets of the debtor in circumstances where those assets are insufficient to satisfy the claims of the creditors. The effect is that the rights of the creditors as a group are preferred to those of the individual. That is the essence of a concursus creditorum, which comes into being once a sequestration order issues. This means that a single creditor can no longer, by means of execution, obtain full payment of his claim at the expense of the other creditors. Correspondingly, a debtor's capacity is also limited – the debtor may no longer alienate or burden his assets.

The primary object of the Insolvency Act is not to grant debt relief to harassed debtors – that result may ensue – but it is important to appreciate that the Act was passed for the benefit of creditors. That is why advantage to creditors is a necessary ingredient of sequestration applications. A debtor's estate may be sequestrated at his own instance by way of a voluntary surrender of his estate or at the instance of one or more of his creditors by way of a compulsory sequestration. The commission by a debtor of any of the acts of insolvency, entitles a creditor to apply for the compulsory sequestration of the debtor's estate, without having to prove actual insolvency. Upon the granting of a sequestration order, the insolvent loses control over his estate, which vests in the Master, until the appointment of a trustee, whereafter the estate vests in the trustee. After the appointment of the trustee, the administration of the insolvent's estate commences. The trustee realizes the assets of the insolvent estate and proceeds to distribute in accordance with the order of preference provided for in the Act.

There are detailed provisions in the Act regarding meetings of creditors and their voting power – at which directions are given to the trustee regarding the administration of the estate. Creditors also prove their claims against the estate at a meeting of creditors.

Jurisdiction (section 149) – the determinative date is when the petition is lodged with the registrar of the court – it is founded on the debtor's presence or his ownership or right to property situated within the jurisdiction of the court. Presence encompasses both residence and domicile:

Domicile – the intention to continue to remain there permanently or indefinitely. Residence – ordinarily resident or carrying on business at any time within 12 months preceding the lodgment of the petition – it is not necessary for the debtor to have done so for the whole of that period it suffices if he has done so during that period.

It should be readily apparent from this that more than one court could have jurisdiction e.g. a debtor residing in Cape Town may have property in Durban or Johannesburg – each of those courts would notionally have jurisdiction. To prevent the simultaneous exercise of concurrent jurisdiction, courts should be guided by considerations of convenience – not necessarily by which court is the most convenient court to make the order, but what can be expected to happen after the order has been granted. To that end, a court may transfer the proceedings to another court having jurisdiction.

An applicant must establish a prima facie case in order to obtain a provisional sequestration order, and on the return date, must satisfy the court on a balance of probabilities that he has established a claim that enables him to bring the application that the respondent is factually insolvent or has committed an act of insolvency, and there is reason to believe that sequestration will be to the advantage of the respondent's creditors. Inasmuch as sequestration proceedings involve status and because rights are fixed by a sequestration order, the creditor must clearly establish his claim, prima facie – this means setting out his claim with sufficient particularity. In the absence of opposition, he need not, when applying for a final order adduce any further proof of his debt in addition to that submitted when obtaining the provisional order. If there is a genuine dispute in respect of the existence of the debt upon which the applicant relies, the court will usually refuse the sequestration application. A bare denial by the debtor that the debt is owing may not be sufficient to justify the refusal of the application.

An applicant prosecutes a sequestration application at his own expense until a trustee or provisional trustee is elected. That being so, he must deposit with the Master

security for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of the costs of administering the estate until the election of a trustee. In terms of s 9(3), a certificate from the Master, given not more than 10 days before the date of the application, that he has done so must be attached to the application. The relevant date is the date of the notice of motion. The certificate of the Master may be dated after the date of the application, but must accompany the application when it is lodged with the court.

The notice of motion must comply with the prescribed form (Form 2a) and must be accompanied by the applicant's founding affidavit and the Master's certificate. Section 9 specifies the information that the application must contain. These include: the personal particulars of the debtor; and, if married, the personal particulars of the debtor's spouse; the amount, cause and nature of the claim and whether or not the claim is secured, and, if so, the nature of the security; and, that the debtor has committed one or more of the various acts of insolvency or the debtor's estate is in fact insolvent.

The creditor may rely on either or both of the above grounds. The applicant must also allege in his affidavit that it would be to the advantage of creditors that the debtor's estate should be sequestrated. The facts from which the existence of the advantage to creditors emerges or can clearly be inferred should be set out with sufficient particularity. In addition to the specific statutory requirements, the founding affidavit should disclose all relevant information which may influence the court to either grant or refuse the application, this is especially so when the application is brought ex parte. Before an application can be presented to court, a copy must be lodged with the Master. The Master can then report to the court any facts ascertained that would be of assistance to the court. A copy of that report must be transmitted to the sequestration creditor, who may file an answering affidavit, if so advised. In practice, the Master hardly ever files a report at this stage of the proceedings.

In 2002, the legislature sought to standardize the procedure by amending section 9 of the Act, with the introduction of subsection 4A, which sets out the persons on whom a copy of the application must be served. These include: every registered trade union representing employees of the respondent (to the extent that the applicant can

establish that information); upon the employees themselves, including any domestic employees; on the South African Revenue Services; and, the debtor, unless the court directs otherwise. The applicant must before the hearing of the application file an affidavit by the person responsible (usually the applicant's attorney) setting out the manner in which the section was complied with. The purpose is to inform the court as to the manner in which the petition was 'furnished' to the listed parties. The legislature employs the word 'furnish' in the subsection, which has been held to mean that the application must be made available in a manner reasonably likely to make them accessible to the listed persons. It has been held that the provision is peremptory in respect of SARS (*Chiliza v Govender and Another* (20837/14) [2016] ZASCA 47; 2016 (4) SA 397 (SCA)).

In *Stratford and Others v Investec Bank Limited and Others* (CCT 62/14) [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC), the Constitutional Court referred to the judgment of the Supreme Court of Appeal in the *EB Steam Company* matter, which dealt with section 346(4A) of the old Companies Act – a section almost identical to section 9(4A) of the Insolvency Act. The SCA there held that compliance with section 346(4A) is peremptory, whilst the method in which a creditor furnishes the application to the employees is directory. The fact that 'furnish' is used in section 9(4A) and the word 'serve' is used in section 11(2A) of the Insolvency Act, indicates that the legislation envisaged a lower threshold for notifying the employees than service in respect of section 11(2A). 'Furnish' was interpreted to mean 'must be made available in a manner reasonably likely to make them accessible to the employees'.

In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* ([2014] 1 All SA 294 (SCA); 2015 (2) SA 526 (SCA)) [2013] ZASCA 209; [2013] ZASCA 167, the SCA stated

'It cannot, however, be the case that courts are hamstrung and precluded from dealing with applications for winding-up or sequestration because they are uncertain whether the application has in fact come to the attention of all employees. That is not a sensible construction of this requirement. Were that the case the statutory methods of placing the application papers on a notice board to which the employees have access, or fastening them to the gates of premises where the employees work, could never be accepted as sufficient. The usual way of achieving certainty in regard to the receipt of documents is by requiring

service in accordance with the rules of court, but that is not what the section demands. In my view the proper interpretation of the requirement that the application papers be 'furnished' to the identified persons is that they must be made available in a manner reasonably likely to make them accessible to the employees. It is not a requirement that the court must be satisfied that the application papers have, as a matter of fact, come to the attention of those persons. It is in that sense that I refer hereafter to furnishing the application papers to employees.

The point has already been made that it is obligatory for the applicant for a winding-up order (or a sequestration order) to furnish a copy of the application papers to the persons mentioned in s 346(4A). When dealing with employees the section refers to three possible ways of doing this. The one is by placing the papers on a notice board at the premises where they work and to which they have access. The second and third are by affixing a copy of the application papers to the front gate of the premises where the employees work, if access to the premises cannot be obtained, or to the front door of the premises from which the business was conducted at the time of the application. Manifestly none of these methods may result in the application papers actually coming to the attention of the employees. If the business has closed down none of them may serve to inform the employees of the application for winding-up. However, there may be other means of doing so, as in *Hendricks*, where personal service on the employees was feasible. What this suggests is that, whilst the obligation to furnish the application papers to the employees is peremptory, the modes of doing so indicated in the section are directory and alternative effective means may be adopted. In other words, the methods for furnishing employees with the application papers as set out in s 346(4A)(*a*)(ii) are no more than guides. If other more effective means are adopted and reflected in the affidavit filed in terms of s 346(4A)(*b*) then, provided the court is satisfied that the method adopted was reasonably likely to make the application papers accessible to the employees, there has been compliance with the section.'

The court must have before it:

(a) The notice of motion with founding affidavit.

(b) The Masters certificate that security has been furnished.

(c) The report made by the Master, if any.

(d) The sequestrating creditor's affidavit, if any, in response to the above report.

(e) A draft of the provisional order of sequestration, if that is required by the relevant practice directive of the division.

(f) Proof that the papers were 'furnished' to the Master, SARS, the debtor's employees and any trade union representing those employees.

(g) Proof of service upon the debtor himself.

The court, on consideration of the papers, may in terms of section 9(5) make an order sequestrating the estate of the debtor provisionally, dismissing the application, postponing the hearing or it may make such other order as to it in the circumstances appears just.

The court has a discretion whether or not to grant a provisional sequestration order. If the court is of the opinion that prima facie:

(a) a claim as defined in section 9(1) has been established;

(b) the debtor has committed an act of insolvency or is insolvent;

(c) there is reason to believe that the sequestration will be to the advantage of creditors.

If the court grants a provisional order of sequestration, it does so by issuing a rule nisi, requiring the debtor to show cause on a date fixed why his estate should not be finally sequestrated. The *ex parte* procedure linked to a rule *nisi* is well entrenched in our High Court practice and has received the Constitutional Court's approval in *NDPP v Mohamed NO* (*Hassan v Berrange* 2012 (6) SA 329 (SCA)).

The rule must be served on the debtor in accordance with the Uniform Rules of Court. In general, service must be effected upon the debtor personally, unless the court authorizes substituted service or service by edictal citation. If there is opposition, the matter will invariably have to be postponed to the opposed roll and the rule extended. The court may, on the application of the debtor, anticipate the return day for the purposes of discharging the rule. (s 11(*f*)), on 24 hours' notice to the sequestrating – as well as all the other – creditors. The court may in that event also interdict persons from acting in terms of the provisional order.

The court may allow an application to be withdrawn after the grant of the provisional order. But because the provisional order brings about a concursus, all known creditors must be informed of the impeding approach to the court seeking to withdraw the application. If the application is withdrawn the rule would usually be discharged and the original sequestrating creditor would fall out of the picture. Another creditor may seek leave to intervene. However, the provisional order cannot be confirmed at the

instance of an intervening creditor. If the original applicant does not wish to proceed with the application, the intervening creditor does not merely enter the fray as a co-applicant, so to speak. The intervening applicant must make out a case for sequestration, furnish security etc. So the intervention is not the usual intervention or substitution. It is rather in the nature of an independent application. Courts should take a practical view bearing in mind the interests of the creditors.

On the return day, the debtor or any other creditor may appear to either support or oppose the granting of the final order. A secured creditor, by way of example, may oppose on the basis that there would be no advantage to creditors and that once they have executed upon their security, and taking into account the costs of the sequestration, if anything, their security may be diminished. In the event of opposition, an affidavit setting forth the grounds of such opposition should be lodged to enable the sequestrating creditor to respond thereto. In the event of the application becoming opposed on the return day, the usual provisions of the Rules of Court governing opposed applications will apply. As a matter of course, in the event of opposition the rule would inevitably have to be extended to allow the parties to finalize and file their papers to enable full argument of the matter on the opposed roll.

In addition to the papers that were before court when the rule issued, the court will also have the sheriff's return of service of the rule nisi and, if the application is opposed, the opposing affidavits and the affidavits replying thereto. The provisional trustee may also file a report with the court. The trustee should only do so with a view to assisting the court. The provisional trustee should not actively participate in the matter either by supporting or opposing the grant of the relief sought or even appointing counsel or becoming a party to the proceedings. The court would likely disallow any costs incurred in that regard by the trustee over and above those incurred in the preparation of the report.

Although oral evidence, at the provisional stage, will only be heard in exceptional circumstances, the court may on the return day, direct that oral evidence be heard on specified issues with a view to resolving certain disputes of fact.

Sequestration proceedings are designed to bring about a *concursus creditorum* to ensure an equal distribution between creditors, and are inappropriate to resolve a dispute as to the existence or otherwise of a debt. In *Exploitatie en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) SA 247 (SCA), where Leach JA had this to say – where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant, the court should as a general rule dismiss the application. This is the so- called '*Badenhorst rule*'. Named after the decision in *Badenhorst v Northern Construction Enterprises Ltd.* This principle was reaffirmed by the SCA in *Kalil v Decotex (Pty) Ltd & another* and applies equally in both winding up and sequestration proceedings. As *Kalil v Decotex* makes plain it is not necessary for a respondent to show that he is not indebted to the applicant: it is merely for him to show that the indebtedness is disputed on *bona fide* and reasonable grounds. It must follow that where the claim is not capable of easy and speedy proof or where the issues require a great deal of evidence to be led, the provisional order should be set aside instead of a referral to oral evidence.

If the debtor dies after the granting of the provisional order, but before confirmation of the rule on the return day, the matter will have to be postponed and the rule extended to enable an executor to be appointed to the estate of the debtor, who would have to be substituted for the debtor.

A creditor may bring sequestration proceedings only if he has a liquidated claim against the debtor. A liquidated claim is a claim for an amount which is fixed, either by agreement or by an order of court or that is capable of easy and speedy proof. The fact that the claim is disputed, does not render it unliquidated if it is capable of easy and speedy proof. If the claim is disputed, the court may in exceptional circumstances permit the hearing of evidence.

A provisional order cannot be extended to an indeterminate date and may thus not be postponed sine die. It is operative only until the return day and requires a further extension to a fixed date in order to be effective. On the return day, the court may either confirm or discharge the provisional order or postpone the hearing for a reasonable time by extending the rule to enable the creditor to produce further proof

of the allegations made in the application. A postponement may be granted in cases where the court takes the view that the sequestrating creditor would be in a position to supplement the allegations already made on the papers. A debtor may also request a postponement. He must provide a reasonable explanation and that he has a bona fide defence, which he will be able to advance if the postponement is granted. A postponement cannot be claimed as of right, but is an indulgence to be granted on good cause shown.

In *Firstrand Bank v Evans* [2011] ZAKZDHC 21; 2011 (4) SA 597 (KZD), Wallis J described the exercise of the court's discretion to grant or refuse a provisional order of sequestration once the applicant had established that an act of insolvency had been committed, that the creditor had a liquid claim and that there was advantage to creditors, as an aspect on which there is little authority on how it should be exercised, pointing to the fact that it is seldom invoked in the debtor's favour. He observed: 'if the conditions are satisfied then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour'.

The onus throughout rests on the sequestrating creditor. At no stage of the proceedings is there a shifting of the onus to the debtor of disproving any of the essential requirements. The degree of proof for the grant of a final order is higher than at the provisional stage. At the provisional stage, the sequestrating creditor need only adduce prima facie proof. When a final order is sought, proof on a balance of probabilities is required. The fact that the court granting a provisional order has already held that an act of insolvency was prima facie committed or that the debtor was prima facie actually insolvent, does not absolve the court on the return day of satisfying itself that these requirements have in fact been established on a balance of probabilities before a final order is granted.

Determining whether a debtor is in fact insolvent is often a difficult task, especially as this is usually on affidavits without the advantage of oral evidence. To establish insolvency, it must be shown that the debtor's liabilities as a fact exceed his assets and not merely that they might do so. Thus, clear proof must be adduced. Such proof

need not be direct. It suffices, if facts are adduced upon which an inference can fairly be drawn. In this regard, the failure on the part of a debtor to pay, particularly a judgment debt, is significant. That a debtor has failed to pay installments or interest or has asked for time to pay, may shift the evidential burden to him to prove that his assets exceed his liabilities. If he does so, it may then fall to the sequestrating creditor to furnish a sworn appraisement of assets and liabilities. All assets of the insolvent that are to be liquidated in the process of obtaining a dividend for the creditors must be valued on the basis that they will be disposed of at a forced sale. Valuations must be effected by a qualified valuator, who must be independent and present such valuations under oath.

Before granting a final order of sequestration, the court must be satisfied that there is reason to believe that it will be to the advantage of creditors that the debtor's estate be sequestrated. The application must state why this will be so. Advantage to creditors is a relative concept. The notion being that the interests of the creditors would be better served by the grant of the order than any other alternative course available to them in obtaining satisfaction of their claim. A court will consider so-called friendly sequestrations rather more carefully to ensure that the application was not brought solely with a view to aiding the debtor in disregard of the interests of the creditors. Often, particularly in friendly sequestrations, the true state of the debtor's affairs remains shrouded in secrecy. The expression advantage to creditors means the advantage of all or at least the general body of creditors and not just merely some of them. There must be a reasonable prospect (not merely a likelihood) of a not negligible dividend – in other words a prospect that is not too remote.

In regard to a likely dividend, there is no absolute rule that a sequestration will not be to the advantage of creditors if it is below a certain amount in the rand. Where there are a number of creditors and the estate is relatively modest, a dividend of only a few cents in the rand may well not be sufficiently advantageous to creditors to warrant a sequestration order. In such cases, there is often a risk that the free residue will not cover the costs of sequestration. Such a risk may be a disincentive to creditors to prove their claims. Each case must, however, be assessed on its own particular facts.

In *Industrial Development Corporation of South Africa Ltd v Burger and Another, InRe; Industrial Development Corporation of South Africa Ltd v Burger and Another* [2014] ZAWCHC 23, Rogers J pointed out that:

'In regard to the requirement of advantage to creditors, the test at the provisional stage is whether the court is 'of the opinion that *prima facie*' there is 'reason to believe' that it will be to the advantage of creditors if the estate is sequestrated. For a final sequestration order, the test is whether the court 'is satisfied' that there is 'reason to believe' that it will be to the advantage of creditors if the estate is sequestrated. It is not necessary to find that on a balance of probability advantage will accrue. The court must simply be satisfied that there is reason to believe that an advantage will accrue, which is a considerably lower threshold (see *Amod v Khan* 1947 (2) SA 432 (N) at 437-438; *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) at 592C-H; *Hillhouse v Stott & others cases* 1990 (4) SA 580 (W) at 585C-F; *Epstein v Epstein* 1987 (4) SA 606 (C) at 609B-D). The attitude of creditors, where there is consensus, can be taken into account in assessing the question of advantage to creditors (see, for example, *Kempff v Amod Essa & Co* 1934 TPD 139 at 141-2; *Geo Browne & Son v McFarlane* 1936 NLR 268 at 273-4). The prospect of a not insubstantial monetary dividend (albeit a very small dividend in the rand), coupled with the not too remote prospect of the recovery of further assets through a process of inquiry into the affairs of the insolvent estate (see *Commissioner, SARS v Hawker Air Services (Pty Ltd* [2006] ZASCA 51; 2006 (4) SA 292 (SA) para 29)), may be sufficient to tip the scales in favour of the grant of the order.'

In *Stratford and Others v Investec Bank Limited and Others* [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC), the Constitutional Court referred with approval to the following from *Friedman Meskin & Co v Friedman* 1948 (2) SA 555 (W) (*Friedman*) at 559:

'[T]he facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient.'

The Constitutional Court added:

'The meaning of the term "advantage" is broad and should not be rigidified. This includes the nebulous "not-negligible" pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or "not-negligible" benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state that:

"the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestration, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order."
The correct approach in evaluating advantage to creditors is for a court to exercise is discretion guided by the dicta outlined in *Friedman*. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment except through sequestration; or that some pecuniary benefit will result for the creditors.'

'In determining whether there is a genuine dispute of fact, it is important to appreciate the distinction between an enquiry into objective facts such as whether the petitioning creditor has a claim and whether the debtor has committed an act of insolvency, and an enquiry into whether there is reason to believe that sequestration will be to the advantage of creditors. The latter enquiry calls for a value judgement.' (*Industrial Development Corporation of South Africa Ltd v Burger and Another, InRe; Industrial Development Corporation of South Africa Ltd v Burger and Another* [2014] ZAWCHC 23)

In *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1055 (N) at 1070C, Didcott J expressed himself as follows:
'(T)he notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditors advantage unless it suited them better than any feasible and reasonably available alternative course. It follows that the enquiry postulates a comparison.'

Where the object of the sequestration appears solely to be to grant the debtor debt relief or where the application is brought with some ulterior purpose and not truly for the benefit of the general body of creditors, or where the sequestrating creditor is acting collusively with the debtor, the court should refuse the application. The onus will rest on the party asserting same. However, as Makgoka J pointed out in *De Beer v*

Coverdale and Others (https://wwwsaflii.org/za/cases/ZAGPPHC/2010/9.rtf.), there is a difference between a 'friendly' sequestration and collusion. Makgoka J added:

'There is not necessarily anything sinister in a 'friendly' sequestration and an order should not be refused merely because of 'goodwill between the parties'. (See *Beinash & Co v Nathan (Standard Bank of South Africa Ltd Intervening)* 1998 (3) SA 540 (W).)

What is of concern is the prospect of collusion in the sense attributed thereto by Curlewis J in *Sevan v Sevan and Ward* 1908 TH 193 at 197:

"In our law, ordinarily speaking, collusion is akin to connivance, and means an agreement or mutual understanding between the parties that the one shall commit or pretend to commit an act in order that the other may obtain a remedy at law as for a real injury";

And, Roper J in Kuhn v Karp 1984 (4) SA 825 (T) at 827:

"In my view collusion consists in our law in an agreement between the parties to a suit to suppress facts, or to put false evidence before the Court or to manufacture evidence, in order to make it appear to the Court that one of the parties has a cause of action, or ground of defence, which in fact has not

. . .

The collusion is frequently found in the following pattern of behaviour or *modus operandi:*

A debtor owes money, frequently in significant amounts(s). to creditors(s)who expect and rely upon the anticipated repayments of this outstanding debt. The debtor cannot make payment of the debt.

a) He seeks the assistance of a third party who agrees to initiate sequestration proceedings to 'aid or shield [the] harassed debtor' from his genuine and perhaps demanding creditors(s). *(Epstein v Epstein* 1987 (4) SA 606 (C).)

A friend or relative masquerades as a creditor and alleges that a (non-existent debt is owed by the "debtor". The "creditor" then avers that the "debtor" has not only failed or refused to repay this debt but has written a letter advising of his inability to pay the debt.

An act of insolvency in terms of s 8(*g*) of the Insolvency Act 24 of 1936 has now purportedly been committed and the creditor proceeds with sequestration proceedings against the "debtor".

This "friendly" application (or sequestration) procures an order declaring the respondent insolvent. The respondent is then relieved of his or her legal, financial and moral obligations to the original and genuine creditor(s) save to the extent that the insolvent estate is able to satisfy such debt(s). The balance of the genuine indebtedness remains unsatisfied

and. with the connivance of another, the insolvent has been “enabled to escape payments of his just debts”. *(Kerbel* ssupra).’”

In Ex *Parte van den Berg* 1950 (1) SA 816 (W) at 817, Ramsbottom J emphasised that ‘. . . (T)o use the machinery of sequestration to distribute amongst these concurrent creditors the small amount which might be available from the sale of immovable property after paying the costs of realization and the costs of administration of the estate is really to use a sledge hammer to break a nut.’

In a similar vein in *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1055 (N) at 1069H-1070A, Didcott J pointed out that ‘a single creditor who uses sequestration proceedings as a mode of execution, must also demonstrate some reasonable expectation that an amount recovered under sequestration will exceed the likely proceeds of ordinary execution. Unless he does that, the “laborious and substantially more expensive” remedy of sequestration can hardly be thought advantageous.

There is no provision in the Act for the abandonment of either a final or provisional order of sequestration. Such an order can only be rescinded, altered or set aside by order of court. An order may be rescinded or varied in terms of s 149(2). According to the authors of Mars – exceptional circumstances must exist to justify the relief sought. Where the relief is sought on the basis that the order should never have been granted in the first place, the facts must at least support a rescission. The effect would be that the court would restore the status quo. The court has a wide discretion under this section and in appropriate circumstances, it may set aside a final order and reinstate the provisional order making it returnable at a later date. A court will not set aside the order in circumstances where the appropriate course is for an insolvent to apply for his rehabilitation. As a sequestration order has important consequences, the court will set it aside only for sound reasons. Where the circumstances so require, the court may order publication in a newspaper or service in some other specified manner of a rule nisi calling upon interested persons to show cause why the sequestration order should not be set aside. A court will generally not entertain an application for the setting aside of a sequestration order unless all known creditors have been informed.

Any person aggrieved by a final order (there is no appeal against a provisional order) or by an order setting aside a sequestration order may appeal against such order. In terms of s 20(1) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee. One of the consequences of this is that '. . . the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent' (*Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA)). In *Aboo v Firstrand Bank Ltd*, Streicher JA observed: '. . . after the sequestration of the appellant, the right that he acquired to appeal against the judgment of De Jager AJ no longer vested in him but vested first in the Master and upon the appointment of a trustee in his estate. The appellant therefore had no right to proceed with the appeal to the court *a quo* and with a further appeal to this court.'

However, an insolvent retains a reversionary interest in the insolvent estate. As Innes CJ pointed out in *Mears v Rissik, MacKenzie NO and Mears Trustee*1905 TS 303 at 305:

'Now, no doubt the general rule is that an unrehabilitated insolvent cannot, over the head of his trustee, bring actions connected with his estate . . . The reason of the rule is that his estate has been taken out of him and vested in his trustee; and that therefore the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent. But from the fact that the insolvent is under this disability, it does not follow that he has no rights whatever regarding the estate. In my opinion he has a very real reversionary interest in it. The law provides that if there is any residue after paying the debts it is to be handed to the insolvent. Not only so, but it is to his interest that as many assets as possible shall be brought into the estate, and the debts reduced to their proper limits. He has an interest in seeing that that is done. An asset may suddenly become valuable which has been considered worthless, or he may have a legacy left to him which may enable him to clear off all his liabilities. Apart from that it is to the interests of the insolvent that his assets should be increased and his liabilities reduced, because in that way the stigma of insolvency rests less heavily upon him; and when he applies for his rehabilitation he is in a better position than if he had a very large margin of unpaid debts. Therefore, from whatever standpoint we regard it the insolvent has a very real interest in the administration of his estate.

As I have said, generally the trustee is the person to take action in matters connected with the estate; but if the trustee will not do so, or whether bona fide or mala fide does not see his way to take action, is the insolvent on that ground to be without remedy? I should say upon general principles he ought not to be; the law should provide some remedy.'

And, as Jansen JA pointed out in *Sassoon Confirming and Acceptance CO (Pty) Ltd v Barclays National Bank Ltd*:

'. . . Any residual right the insolvent may have to the estate, must necessarily be subject to the due exercise of the trustee's powers during his regime. Should there in fact be a residue, the insolvent will, in effect, be a successor to the trustee – and, therefore, subject to judgments given against the trustee as representing the estate, which judgments will then be *res judicata* against the insolvent.'

In *Liberty Group Limited v Moosa* (126/2021) [2023] ZASCA 52; 2023 (5) SA 126 (SCA), the question that the SCA was required to consider was whether an appeal against the refusal of a provisional order of sequestration is precluded by s 150(5) of the Act, which reads:

'There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section'.

In terms of s 150(1):

'Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20 (4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959), appeal against such order.'

In arriving at the conclusion that such an order was indeed appealable, the SCA overturned a long-line of authorities to the contrary.

Once the estate is provisionally or finally sequestrated, the Master appoints a provisional trustee, who would then hold office until the appointment of a trustee. Only the Master has the statutory power to appoint a trustee. In *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA), SCA held that an order interdicting the Master from appointing provisional judicial managers save in terms of a court order, was not a competent order. The SCA took the view that in granting the order that it did, the high had usurped a power that had been reserved to the Master by the Legislature. That being so, the order of the high court was a nullity and it was unnecessary for the order to first be set

aside by a court. *Motala* was confirmed in *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others* [2017] ZASCA 177; 2018 (4) SA 71 (SCA) and *Knoop and Another NNO v Gupta (Tayob Intervening)* [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA).

Recently in *Eamonn Courtney v Izak Johannes Boshoff NO* and Others [2024] ZASCA 104, the SCA had to consider whether the grant of a final order of sequestration was a nullity *a' la Motala*. The final order was not preceded by the grant of an order in terms of s 10 of the Act, sequestrating the estate of Mr Courtney provisionally. Nor, did the court issue a rule *nisi* under s 11(1) of the Act, calling upon the debtor to appear on a day mentioned in the rule to show cause why his estate should not be finally sequestrated. The SCA held that reliance on *Motala* and *Knoop* is misplaced. As in *Motala*, the high court in *Knoop*, had made an order contrary to the express provision of a statute. Thus, like *Motala*, the order in *Knoop* was a nullity. In *Courtney,* it was only a court that could issue a sequestration order, whether provisional or final. The complaint, in essence thus boiled down to one of timing, namely that it was not competent for the high court to have issued a final order when it did, inasmuch as it was not preceded by a provisional order. The complaint therefore, properly understood, was that although the high court was empowered to issue the order that it did, it did so too early. Unlike *Motala* and *Knoop,* the high court did not appropriate to itself a power that had been expressly reserved to the Master. That distinguished the matter from those two cases. Having chosen not to oppose the application for his sequestration, Mr Courtney was not free to thereafter ignore the order that issued. This, because even an incorrect judicial order exists in fact and may have legal consequences until a court sets it aside. Therefore, unlike *Motala* and *Knoop*, the final order of sequestration continued to operate and had force and effect. Pursuant to that order, the trustees were appointed and continued to discharge their function thereafter.

Criminal proceedings are in no way affected by the sequestration of an accused's estate. But civil proceedings, whether instituted by or against the insolvent are generally stayed until a trustee has been appointed. A provisional trustee may bring or defend proceedings on behalf of the insolvent's estate, if authorised to do so by the court. The prohibition in the Act against the continuation of civil proceedings is imperative and it is not competent for the court to give judgment in such proceedings

against the debtor after sequestration of his estate but before the election of a trustee. If civil proceedings against the estate have been stayed, it is the duty of the plaintiff who intends to continue with such proceedings, within three weeks after the first meeting of creditors to give the trustee not less than three weeks' notice in writing of such intention. Failure to prosecute the proceedings with reasonable expedition, may result in the lapsing of such proceedings. Before the stayed proceedings can be continued the trustee must be substituted for the insolvent.

Sequestration has the effect that certain transactions entered into by the insolvent prior to the sequestration of his estate may be set aside at the instance of the trustee. Transactions which may be impeached in terms of the Act include dispositions made without value, voidable and undue preferences, collusive dispositions, alienation of a trader's business without publication of the required notices. A trustee occupies a position of trust in relation both to the creditors as well as the insolvent. He does not act in the public interest but in the interests of creditors. Usually a trustee is elected at the first meeting of creditors by a majority of votes both number and value. Only proved creditors are entitled to vote.

In section 8 of the Act, the legislature has designated certain conduct by a debtor as constituting acts of insolvency. The intention is that proof of any such act, as distinct from proof of actual insolvency, would constitute a sufficient ground for the purpose of obtaining a sequestration order provided of course the other requirements for the grant of the relief are established. In this the legislature recognises that in practice a creditor seldom has sufficient evidence available to prove that a debtor is actually insolvent, accordingly the estate of the debtor who has committed an act of insolvency may be sequestrated even though his estate is technically solvent.

In terms of section 8(*a*), a debtor commits an act of insolvency – if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts. Mere absence itself is not necessarily sufficient proof of the intention to evade or delay payment. Evidence of an intention to evade creditors must be established. Such intention is established by a process of inferential reasoning. The court must weigh up all of the relevant factors and circumstances in order to determine

what, on a balance of probabilities, was the intention in substance. Thus, if the debtor's departure or absence itself causes delay in payment, a presumption may arise, which may call for a rebuttal from the debtor.

According to section 8(*b*), a debtor commits an act of insolvency – if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment. Two distinct acts of insolvency are constituted by the subsection. The first is where the debtor is actually served with the writ of execution and fails to satisfy the judgment or to indicate sufficient disposable property. The second is where the execution officer is unable to serve the writ upon the debtor and is unable himself to find sufficient disposable property to satisfy the judgment. While the debtor's failure to satisfy the judgment upon demand and the debtor's failure to indicate disposable property sufficient to satisfy the judgment are essential elements of the first act of insolvency, the second cannot be committed unless the execution officer has endeavored to effect personal service of the writ on the debtor and has failed in such endeavor. Thus, where the execution officer makes no attempt to serve the writ on the debtor personally and there is nothing to indicate that the debtor could not be served or is evading service, a return stating that no disposable property could be found does not disclose an act of insolvency. The onus is, of course, on the creditor to establish either of the relevant acts of insolvency. The creditor discharges the onus prima facie where the return adequately establishes the commission of such act. It would then fall to the debtor, if he wishes to impeach the return. The creditor is entitled to rely on the content of the return - it constituting prima facie proof of the facts stated therein. Obviously, if the return itself fails to establish the commission the act of insolvency, the creditor who relies thereon must fail. Where the debtor indicates disposable property, which is then sold in execution for an amount which is insufficient to satisfy the judgment, the first of the acts of insolvency will have been committed.

A *Nulla Bona* return should state that: the execution officer explained the nature and exigency of the warrant; the person to whom he explained it; he demanded payment; the defendant failed to satisfy the judgment; the defendant failed to indicate sufficient disposable property to satisfy the judgment; and, despite diligent search and inquiry,

he did not find sufficient disposable property to satisfy the judgment. Where the creditor relies on a *nulla bona* return, which on the face of it is valid, the debtor must adduce evidence to the contrary. Service of the writ by the Sheriff must comply with the rules of court. It is not the execution officer's duty to set about looking for the debtor's property. Indicating property in this context, means actually pointing it out or if that is not possible at the time, informing the officer of its existence with sufficient to particularity so that he may be able to identify and attach it. The debtor need not necessarily take the officer to the actual property it suffices for the debtor to indicate the nature of the asset and its whereabouts. This is especially so in relation to assets that can be freely moved. The expression 'sufficient disposable property' is not entirely free of difficulty. The true test seems to be whether the property may be validly attached and sold in execution. Not only must the property indicated be disposable, but it must prima facie be sufficient in value to satisfy the full amount of the judgment debt, because if the judgment is only partially satisfied the debtor nevertheless commits an act of insolvency.

Section 8(*c*) provides that a debtor commits an act of insolvency – if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another. Subsection c envisages two sets of circumstances: an actual or an attempted disposition of property. An actual disposition must have the effect of prejudicing the debtor's creditors or preferring one creditor above another. Insofar as an attempted disposition is concerned, the subsection is applicable if it would have that effect, had the disposition been completed. Effect in this context means result or consequence. The disposition must thus have preference or prejudice as an actual result or consequence. Only the effect is relevant, not the intention of the disposition. The bona fides of the debtor, when making the disposition is also irrelevant.

A debtor commits an act of insolvency, in terms of section 8(d), if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another. This act of insolvency differs from the preceding one in that an actual disposition of property is not required – mere removal is sufficient. Four scenarios are envisaged – a removal with intent to prejudice; a removal with intent to

prefer or an attempt to do either of the two. Section 2 of the Act defines property as encompassing both movable and immovable property situated in the Republic.

In *Hassan v Berrange* [2006] ZASCA 79; 2012 (6) SA 329 (SCA), Zulman JA stated:
'Both subsections 8(*a*) and 8(*d*), in setting out acts of insolvency, refer to an intent on the part of the debtor. In the case of section 8(*a*) the intent is one to evade or delay the payment of debts, while in section 8(*d*) the intent on the part of the debtor is to prejudice his creditors or to prefer one creditor above another. The test of intention on the part of the debtor is a subjective one (cf *De Villiers NO v Maursen Properties (Pty) Ltd*). Intention is established by a process of inferential reasoning and is not dependent upon the mere *ipse dixit* of the debtor who may well deny that he has any such intention. A court, in considering whether there was such an intention is required to weigh up all the relevant facts and circumstances in order to determine what, on the probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of the debtor.

. . .

In dealing with s 8(*d*), after stating that the test of intention is subjective Mars – states that:

"It is difficult, however, to see how, without in effect making a disposition, a debtor can remove his property with the intention to prefer a creditor, but a removal with intent to prejudice creditors can easily be imagined and may be illustrated by the case, by no means rare in practice, of a debtor sending money or goods to a foreign country so as not to be available for settlement of his creditors' claims."

Meskin – in dealing with s 8(*d*) states:

"It is submitted that the word 'removes' and the word 'remove' have their ordinary meanings and affect the meaning to be assigned, in this context, to the word 'property'. By the use of the latter word it is submitted, the intention is to refer only to corporeal movables, ie, property capable of being moved physically from one place to another. The intention is to hit a debtor's physical moving or attempted moving of any of his corporeal movables from one place to another (whether or not such moving constitutes also a disposition (as defined in section 2 of the Insolvency Act) which occurs with the requisite intent. To speak of a 'removable' in the context of immovable property or of an incorporeal right is, it is submitted, giving language its ordinary meaning, notionally unsound."'

Zulman JA took the view that it was not necessary to decide in that case whether the learned author was correct in restricting the meaning of the word 'property' in section 8(*d*) to corporeal property. However, Lewis JA took a different approach to the meaning

of ‘property’ in s 8(*d*) in a minority judgment in *Hassan v Berrange.* In her view, the term ‘property’ referred also to incorporeal property. The authors of *Meskin Insolvency Law* were thus ‘quite wrong in suggesting that the word “removes” in s 8(*d*) indicates that the property removed by the debtor is corporeal alone’.

Section 8(*e*) reads: ‘a debtor commits an act of insolvency if he makes or offers to make an arrangement with any of his creditors for releasing him wholly or partially from his debts.’ This subsection creates two acts of insolvency: the first is the actual making of the envisaged arrangement; the second is the debtor merely offering to make such an arrangement. The making of an offer by the debtor to his creditors which entails their releasing him wholly or partially from his debts is an act of insolvency provided it involves, either expressly or impliedly, an acknowledgment by the debtor that he is unable to pay such debts in full.

In *ABSA Bank Limited v Hammerle Group (Pty) Ltd* [2015] ZASCA 43; 2015 (5) SA 215 (SCA), the SCA stated:

‘it is true that as a general rule, negotiations between parties that are undertaken with a view to a settlement are privileged from disclosure . . . Regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made even on a ‘without prejudice’ basis is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency . . . Public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding up proceedings even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings is a matter which by its very nature involves the public interest. A concursus creditorum is created and the public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency whether made in confidence or otherwise cannot be considered privileged.’

In terms of section 8(*f*), ‘a debtor commits an act of insolvency – if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of subsection (3) or section four or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on

which such application is to be made.' The intention of the legislature, so it would seem, is to thwart a debtor who publishes a notice of surrender for some ulterior purpose, such as to achieve a stay of a sale in execution of his property, without any real intention of applying for the surrender of his estate. Several acts of insolvency are contemplated by the subsection. In each instance the debtor must have published a notice of surrender, which has not been withdrawn and which has not lapsed - the acts contemplated are: (i) the debtor fails to lodge a statement of affairs with the Master; (ii) the debtor files an incorrect or incomplete statement of affairs; and, (iii) the debtor fails to apply for acceptance of the surrender on the specified date.

In *Ex parte: Cloete* [2013] ZAFSHC 45, Daffue J observed:

'In terms of section 8(*g*), an act of insolvency is committed where a debtor notifies his creditor in writing that is unable to pay all his debts or any one of his debts. The notice must be one indicating an inability as distinct from an unwillingness to pay or a refusal to pay or of an intention to suspend payment. The question is how a reasonable person receiving such a notice would understand it and in answering such a question the court must have regard not only to the language of the notice but also to the matters bearing on the debtor's state of mind which were known to the debtor and the recipient of the notice at the time of the receipt thereof. A request for time to pay a debt which is due will ordinarily give rise to an inference that the debtor is unable to pay. This is especially so where the debtor in addition requests the indulgence of paying by way of instalments. The giving of the notice of inability to pay debts is frequently the means used for the purposes of obtaining a friendly sequestration. That is the notice deliberately given in order to furnish the friendly creditor with an act of insolvency for the purpose of sequestration proceedings to be brought by the latter. Such a notice is indeed an act of insolvency provided the application for the sequestration does not constitute an abuse of the process of court. When an application is brought by a party who does not appear to be acting at arm's length, the court should pay special attention to the interests of creditors. A friendly sequestration is usually motivated by the debtor's desire to put an end to his financial woes. The court must therefore apply the same yardstick to such an application as would apply to a voluntary surrender. The notice must amount to an unequivocal communication and must relate to the circumstances prevailing at the time it is given; subsequent events are irrelevant to the interpretation of the notice. It is not the subjective intention that is important, but the intention as can be gleaned from the words used in the notice. The notice must be of recent origin and must relate to the current financial situation of the debtor. The notice must also be given to someone who is actually a creditor at the time.'

A debtor commits an act of insolvency, in terms of section 8(h), if, being a trader, he gives notice in the Gazette in terms of section 34(1) and is thereafter unable to pay all his debts. The relevant time is the time of the giving of notice. A consequence of the publication of a notice as envisaged by section 34(1) is that every liquidated liability of trade in connection with the business, which would become due at some future date, shall forthwith become due, if the creditor concerned demands payment of such liability.

Voluntary surrender – a debtor in financial difficulty may wish to surrender his estate as insolvent, that is to procure the sequestration of his estate by the court independently of proceedings therefor by a creditor. The requirements that must be observed before the court may accept the surrender of a debtor's estate are both procedural and substantive. The substantive requirements are that the debtor is insolvent; that he owns realisable property of a sufficient value to defray all costs of the sequestration, which will in terms of the Act be payable out of the free residue of his estate; and, that it will be of advantage to his creditors if his estate were to be sequestrated. The onus of establishing these requirements is upon the debtor.

The insolvency envisaged in this context is actual insolvency. The reference to 'realizable property' is a reference to any property owned by the debtor whether or not encumbered which will be capable of being sold in the administration of the estate. The court must be satisfied that the value of such property is sufficient to ensure that after allowing for any claims and costs which may constitute a prior charge, there will be an amount available to discharge the costs of sequestration payable out of the free residue. If the free residue is insufficient to cover the administration costs, the court must refuse the application.

The requirement that the court must be satisfied that it will be to the advantage of creditors, may be contrasted with the equivalent requirement in the case of a compulsory sequestration – that the court should be satisfied only that there is reason to believe that such advantage will exist. The fact that the latter requirement is less onerous is perhaps because a creditor may not have sufficient information as to the debtor's financial position at the time of bringing the sequestration application. When a debtor himself seeks to surrender, he is bound fully to disclose his property and his

financial position and accordingly he must prove on a balance of probabilities that in fact there will be the requisite advantage to creditors.

The application to court must be preceded by the publication by the debtor of a notice of surrender in a form corresponding substantially with Form A in the first schedule to the Act. There must be publication in the Gazette and in a newspaper circulating in the district in which he resides or, in the case of a trader, in the district in which his principal place of business is situated. The publication must be effected not more than 30 days and not less than 14 days before the date on which the application is to be made. The purpose of this notice is to ensure that creditors receive timeous notice of the debtor's intention to make application to court. The notice must describe the debtor, and his or her spouse if married in community of property, with sufficient particularity to enable his creditors to identify the debtor with as much accuracy as is reasonably possible. A court faced with a failure on the part of an applicant to comply strictly with the statutory provisions relating to publication will generally only grant condonation for noncompliance if there is no risk that such failure could prejudice the creditors in whose interest the publication is required. Service of the notice must also be effected by registered post upon all creditors. The number of days (30 and 14) is counted back from and excludes the date advertised for the hearing of the application, but includes the date of the publication.

The notices must be proved by filing with the court copies of the relevant Gazette, newspaper or copies therefrom attached to an affidavit. The tear sheets of the newspaper and Gazette are usually attached to an affidavit sworn to by the applicant's attorney of record, who attended to the filing of the notices. It is for the applicant's attorney to ensure that the correct day and date upon which the application will be enrolled for hearing appears in the notice of surrender. The importance of advertising the correct date arises from the fact that the debtor's creditors, his employees and their trade unions as well as SARS are entitled as a matter of law to be informed of his intention to apply. The publication of any such notice, stays the sale of any assets that have been attached and any writ of execution or other process. All execution sales of the debtor's assets are prohibited after publication of the notice of surrender.

Within a period of seven days from the date of publication of the notice in the Gazette, the applicant must deliver a copy of the notice to all of his creditors. The copies must be sent by registered post. The notice of surrender must state where and the date from which the debtor's statement of affairs will lie for inspection – usually at the Master's office or office of the Magistrate of the district in which he resides or carries on business. The balance sheet with its annexures comprising the statement of affairs must be verified by affidavit The statement of affairs with the supporting documents must be lodged in duplicate.

In considering section 4(1) of the Act, a Full Court in *Ex Parte Oosthuysen* [1995] 1 All SA 276 (T), per Nugent J (Eloff JP and Streicher J concurring) had this to say:

'To establish its purpose, section 4(1) must be read together with section 5, which deals with the legal effect of publishing a notice of surrender. Once a notice of surrender has been published in the Gazette, it becomes unlawful to "sell any property of the estate in question which has been attached under writ of execution or other process . . ."and the Master becomes entitled, though not obliged, to appoint a curator bonis to "take the estate into his custody and take over the control of any business or undertaking of the debtor . . .". By the petitioner's act alone in publishing a notice of surrender, creditors are deprived of their right to execute against the debtor's property. It is to ensure that this interference with creditors' rights, with the attendant potential for abuse, does not endure for too long that a maximum interval between publication of the notice and the hearing of the application is provided for. As pointed out in *Ex Parte Meyer*, supra: "The sub-section has been passed with a definite object which is sought to be obtained, viz, the debtor should not be able to give long notice, months beforehand, and in that way keep creditors from levying execution and in the meantime dissipate all the assets".

. . .

The period which the legislature has thought fit to allow is clearly somewhat arbitrary. What is more important than the precise number of days, however, is that once the notice has been published there should be certainty as to its effect. It would be untenable if creditors were left in doubt as to whether a proposed sale would be lawful, or if the Master was left in doubt as to whether he was entitled to appoint a curator. To construe section 4(1), read with section 157, as meaning that a notice of surrender published more than 30 days before the relevant date is valid, provided that a court does not in due course find that a substantial injustice has occurred, would not only create uncertainty but would enable a debtor to effectively secure a suspension of execution for a period of his choosing. That was clearly not what the legislature intended. In my view it is clear from this, as well as from the language used, that the legislature intended a notice of surrender published more than 30 days before the date stated therein as

the date upon which the application will be made for the acceptance of the surrender to be invalid.'

In *Ex Parte Harmse* [2004] 1 All SA 626 (N), a Full Court of the then Natal Provincial Division, disagreed with *Oosthuysen.* Magid J, with Tshabalala JP and Van Der Reyden J concurring, stated (paras 16 – 19):

'If, as was held in Oosthuysen, a notice of surrender published more than 30 days before the date upon which the court is debtor fails to lodge a statement of affairs with the Master or fails to apply on the specified date for the acceptance of the surrender. That, with respect, cannot possibly have been the intention of the Legislature. It would mean that an insolvent could, with impunity, deliberately publish a notice of surrender more than 30 days before the application is to be heard knowing that his creditors could not rely thereon as an act of insolvency. It is, in my view, significant that although a debtor has, in terms of section 6(2) of the Act, fourteen days' grace within which to bring his application for surrender before his notice of surrender lapses, nevertheless he commits an act of insolvency if his application is not brought before the court on the date specified in the notice.

Indeed, it seems to me, again with the greatest of respect, that to hold that such a notice of surrender is "invalid" without deciding whether it amounts to "a formal defect or irregularity" is to accord no weight to the explicit language of section 157(1) of the Act. In enacting section 157(1) of the Act, the Legislature has in my opinion, clearly directed that a formal defect was not to render invalid the conduct to which the defect relates unless the court holds that it has caused a substantial injustice which cannot be remedied by the court's order. The injustice contemplated must be "substantial" which, in my view, must relate to actual rather than potential, injustice and certainly not to speculative injustice. I am therefore of the opinion that to analyse a potential for injustice in relation to section 5 of the Act and hence conclude that a failure to comply timeously with section 4(1) visits the notice of surrender with invalidity, begs the question. It is essential in the first instance to decide whether the premature advertising of the notice of surrender is a "formal defect or irregularity".

In my view a formal defect is one which relates to form or procedure rather than substance (*Ex parte Helps* 1938 NPD 143; Meskin op cit paragraph 15.1.6.4).

. . .

I agree with those judgments which have held that the premature publication of a notice of surrender is a formal defect or irregularity within the meaning of that phrase as used in section 157(1) of the Act. But that fact does not mean that the court must ignore the defect. Section 157(1) of the Act does not so provide. All it says is that what has been done defectively is not rendered invalid by the defect. But, bearing in mind that section 6(1) of the Act confers on the

court a discretion whether or not to accept a surrender, I consider that the extent to which the applicant has complied with, or deviated from, the procedural requirements of the Act, is a factor to be taken into account in exercising that discretion.'

The Editors of the All South African Law Reports wrongly state in the headnote of the *Harmse* judgment that overturned *Oosthuysen.*

As it was put in *Hassan v Berrange* 2012 (6) SA 329 (SCA), it is plain from cases such as *Schlesinger v Schlesinger* that in an ex parte application all facts must be disclosed by the applicant which might influence the court in coming to a decision and a failure to do so may be visited by a court subsequently setting aside the ex parte order (see also *Phillips v National Director of Public Prosecutions*).*'*

In the Ex Parte application of: Arntzen [2012] ZAKZPHC 66; 2013 (1) SA 49 (KZP), Gorven J expressed the view that:

'Just over a decade ago, the various divisions of the High Court 'cracked down' or 'tightened up' on so-called friendly sequestration applications which were described as beginning to constitute a 'cottage industry'. In *Mthimkhulu* it was said that, in many cases, there was 'a very grave suspicion of collusion'. As a result, practice guidelines were laid down in this division for such applications. In essence what was required was full and frank disclosure along with clear proof of the necessary facts. The proof of the indebtedness giving the applicant *locus standi* generally required documentary proof. In addition, a full and complete list of the assets of the respondent was required, including a valuation by a qualified person containing cogent reasons for arriving at the valuation, both for movable and immovable property. As was commented at the time, the claimed value of household furniture and effects and second hand motor vehicles, which were often relied upon to constitute an advantage to creditors, often bore 'no relationship to their true value'.

. . .

Voluntary surrender applications have begun to proliferate in this division. A fledgling cottage industry has reared its head. As was the situation with 'friendly' sequestrations in *Mthimkhulu*, many of these take a standard form with almost identical averments and are drafted by a small set of attorneys who have chosen to specialise in such applications. In most cases the estate is small, as is the case in the present application. In many of them, confronted by the requirement that all the costs of sequestration must be defrayed from the estate and it must still be shown that sequestration would be to the advantage of creditors, a formula has arisen to reduce these costs. The applicant states that a friend or relative has undertaken to pay the

costs of the applicant's attorney and that the attorney concerned will not look to the estate for his or her costs. Just such an averment is made in the present application.

I take the view that there is an even greater risk of abuse and a risk that the interests of creditors will be undermined in voluntary surrender applications than in 'friendly' sequestration applications. Therefore the need for full and frank disclosure and well-founded evidence concerning the debtor's estate is even more pronounced. There are a number of reasons for this, some of which have been foreshadowed in the discussion above. I shall mention only some. First, the applicant tends to focus on the formal requirements of s 4 of the Act and does not seem to appreciate the need to satisfy a more rigorous test than for sequestration applications at both provisional and final stages as regards advantage to creditors. Secondly the court must perforce, in most instances, rely on the founding papers. This brings into play the peculiar characteristics mentioned above of voluntary surrenders being brought as *ex parte* applications. Thirdly, no collusion between friendly creditor and debtor is necessary since it is the debtor who is the applicant and has a more direct interest in the application succeeding and understanding of the genuine position than the friendliest of creditors. Voluntary surrender applications therefore require an even higher level of disclosure than do 'friendly' sequestrations if the court is to be placed in a position where it can arrive at the findings and exercise the discretion set out in s 6(1) of the Act'.

In *Ex parte: Cloete* [2013] ZAFSHC 45, Daffue J considered in some detail both the procedural and substantive requirements for a voluntary surrender. He emphasised that as the application was essentially an ex parte application, full and frank disclosure and the utmost good faith was required. After referring to several judgments in other divisions, including *Mthimkulu v Rampersadh (BOE Bank Ltd Intervening* [2003] 3 All SA 512 and *Aretnzen* (above) that pointed to an abuse of process pertaining to friendly sequestrations as well as applications for voluntary surrender, thought it necessary to add the voice of the Free State High Court to those in the other divisions.
Daffue J added:
(At para 20) – 'In *Ex parte Ogunlaja and others* [2011] JOL 27029 (GNP), Bertelsmann J endorsed the approach by Levenson J in *Nel v Lubbe* . . .
" . . . valuators should certify under oath that they prepared every valuation without any knowledge of the facts of the relevant application. In addition, proof of physical inspections of immovable properties ought to be provided by way of photographs and a detailed description of the physical condition in which each property was found, as well as the effect that the physical appearance of the property has upon the valuation thereof.

The applicants themselves and the attorney acting for them should likewise confirm that the valuator was not made privy to the value that the assets in the estate must realise in order to constitute an advantage to creditors."

Although the learned Judge referred to valuation of immovable properties only, I am of the view that photographs and a detailed description of the physical condition of movable property and motor vehicles in particular, property that are used on a daily basis, should be obtained as well.'

(At paras 22 – 23) – 'For several years it has been accepted as a rule of practice in the Free State High Court that sequestration and administration costs as a general rule be accepted in the amount of R20 000,00 in order to calculate the concurrent dividend payable to concurrent creditors. This has to be reconsidered as I have recently established from the Registrar that taxed sequestration costs in unopposed sequestration applications vary between R18 000 and R21 000,00. Further enquiries indicated that it can be as high as R25 000.00 and that the costs of voluntary surrender applications are in line with these costs. Obviously if more than one firm of attorneys is involved, which is often the case, the costs are higher. In order to establish the total costs to be paid out of the free residue of an insolvent estate, (that is including the costs of administration of the insolvent estate), the trustee's and Master's fees, advertising costs, security costs, the auctioneer's fees and expenses, postage and diverse items must be added. The administration costs of a small estate with unencumbered movable assets of R200 000.00 can be as high as R35 000.00 to R40 000.00 if the trustee's fees of 10% on R200 000.00 plus VAT and the other costs referred to above are added. If taxed sequestration costs of R22 000.00 only is added, the total costs to be paid from the free residue may be as high as R62 000.00 in this example which is much higher that the amount accepted as a general rule in this division. Obviously, this will have a huge effect on the dividend payable.

There has been a further long standing practice in this division pertaining to advantage to creditors. Once it is established that a dividend of 10 cents in the Rand will be payable to concurrent creditors in so-called "friendly sequestrations" or applications for voluntary surrender, an advantage to creditors has been proven. If the position in the North Gauteng High Court is considered it appears as if a dividend of 10 cents in the Rand is too negligible a dividend. I am fortified in my view if applications for rehabilitation are considered. It is too frequently evident from these applications that no or much smaller dividends than anticipated were paid out to concurrent creditors notwithstanding the fact that many concurrent creditors often do not even prove claims against insolvent estates. I am of the view that this division should follow the guidelines in North Gauteng where the court has laid down that advantage to creditors requires a dividend of at least 20 cents in the Rand. See Smit v Absa Bank Ltd*loc cit* para [3] and Ex ParteOgunlaja and others *loc cit* at para [9]. In the last mentioned judgment,

the minimum dividend of 10 cents in the Rand has been regarded as insufficient and a dividend of 20 cents in the Rand was regarded as the minimum benefit that would have to be established before an application for surrender of an estate or compulsory sequestration will be granted.'