

- (b) If a person other than the liquidator is summoned in terms of that subsection, the liquidator or his or her representative may cross-examine that person in regard to evidence given by that person.
- (c) To the extent that the presiding officer allows any person having an interest in the insolvent estate or its administration or his or her representative may question the person summoned.
- (d) The reasonable costs of such questioning are, unless the Court otherwise orders, regarded as part of the costs of liquidation.
- (e) If the liquidator is removed from office consequent upon such a questioning, those costs must be paid by the liquidator in his or her personal capacity.

(6) The provisions of **section 87(3), (5), (6), (7), (8) and (9)** with the changes necessitated by the context apply to a questioning in terms of this section subject thereto that the liquidator of the insolvent estate is not be entitled to witness fees.

(7) Proceedings under this section are private and confidential and without the permission of the presiding officer at the proceedings-

- (a) no person whose attendance thereat is not necessary may be present at the proceedings; and
- (b) no publication of the proceedings may take place.

### **Enforcing summonses and giving of evidence**

**91.** (1) If-

- (a) a person summoned under **section 86, 87, 88 or 90** fails to appear at a meeting of creditors or questioning in answer to the summons; or

- (b) an insolvent fails to attend a hearing in terms of **section 29(6)(a)** or a meeting of creditors in terms of **section 85**; or
- (c) that person or insolvent fails to remain in attendance at that meeting, questioning or hearing,

any magistrate for the district where the meeting, questioning or hearing was scheduled to be held who may hold a court under the Magistrates' Courts Act, may issue a warrant, authorizing any member of the Namibian police to apprehend the person summoned or the insolvent, as the case may be, and to bring him or her before that magistrate.

- (2) (a) Unless the person summoned or the insolvent, as the case may be, satisfies the magistrate referred to in subsection (1) that he or she had a reasonable excuse for his or her failure to appear at or attend the meeting, questioning or hearing, or for absenting himself from the meeting, hearing or questioning, referred to in that subsection, that magistrate may commit him or her to prison to be detained there until such time as the magistrate may determine.
- (b) The officer in charge of the prison to which that person or insolvent was committed, must detain him or her and produce him or her at the date, time and place determined by that magistrate for his or her production.
- (3) If-
  - (a) a person summoned in terms of this section, appears in answer to the summons but fails to produce any book, document or record which he or she was summoned to produce;
  - (b) any person who may be questioned at a meeting of creditors in terms of **section 87** or during a questioning in terms of **section 88 or 90** or a hearing in terms of **section 29(6)(a)** refuses to be administered the oath or make an affirmation to speak the truth at a meeting of creditors,

questioning or hearing at which he or she is called upon to give evidence;

- (c) refuses to answer any question lawfully put to him or her under those sections; or
- (d) does not answer the question fully and satisfactorily,

the magistrate referred to in subsection (1) may issue a warrant committing that person to prison, where he or she must be detained, subject to the provisions of subsection (5), until he or she has undertaken to do what is required of him or her.

(4) If a person who has been released from prison after having undertaken in terms of subsection (3) to do what is required of him or her, fails to fulfil his or her undertaking, the magistrate referred to in subsection (1) may commit the person to prison as often as may be necessary to compel him or her to do what is required of him or her.

(5) Any person committed to prison under this section may apply in accordance with the Rules of Court on an urgent basis to the Court for his or her discharge from custody and the Court must order the discharge if the Court finds that the person was wrongfully committed to prison or is being wrongfully detained.

(6) In connection with the apprehension of a person or with the committal of a person to prison under this section, the magistrate who issued the warrant of apprehension or committal to prison enjoys the same immunity which is enjoyed by a judicial officer in connection with any act performed by him or her in the exercise of his or her functions.

(7) The magistrate referred to in subsection (1) may upon the request of a liquidator, the Commissioner, an estate representative or a proved creditor and after giving the witness or the insolvent the opportunity to be heard, order the witness or the insolvent to pay-

- (a) the costs in the amount determined by the magistrate occasioned by any failure contemplated in that subsection; and
- (b) the costs to have him or her brought before the magistrate.

### **Suspected commission of offence to be reported to Commercial Branch**

**92.** (1) If it appears from an answer or statement given by a person who is questioned in terms of **section 87, 88, 89 or 90**, that there are reasonable grounds for a suspicion that any person has committed an offence, the presiding officer at the proceedings, or the liquidator in the case of proceedings in terms of **section 89**, must-

- (a) report such suspicion and submit the answer or statement or a certified copy thereof with supporting documents, if any, to the Regional Commander of the Commercial Branch of the Namibian Police; and
- (b) set out the grounds on which the suspicion rests.

(2) If the presiding officer referred to in subsection (1) is not the Commissioner, a copy of the answer or statement and supporting documents, if any, and the report to the Regional Commander referred in that subsection must be sent by standard notice to the Commissioner.

(3) The Regional Commander referred in subsection (1) must cause the Commercial Branch with due consideration to the provisions of **section 87(6)** to investigate whether criminal proceedings should be instituted in the matter.

### **Proof of record of proceedings of meetings of creditors**

**93.** (1) Any record purporting to be a record of the proceedings at a meeting of the creditors of an insolvent estate or a questioning held under this Act and purporting to have been signed by a person describing himself or herself as Commissioner or magistrate or other presiding officer or estate representative is, upon

its mere production in judicial proceedings, *prima facie* proof of the proceedings recorded therein.

(2) Unless the contrary is proved, it is presumed that any meeting of creditors or any questioning referred to in subsection (1) was duly convened and held and that all acts performed thereat were validly performed.

## **PART 12**

### **CLAIMS**

#### **Claim by partnership creditor against estate of insolvent partner**

**94.** When the estate of a partner in a partnership is liquidated without the partnership being placed under liquidation-

- (a) the partnership is dissolved; and
- (b) until the debts of the partnership have been settled in terms of the dissolution of the partnership, any claim by a creditor of the partnership against the estate of the insolvent partner must be tendered as an unliquidated claim in terms of **section 96(11)**.

#### **Claims against partnerships**

**95.** When the estate of a partnership and the estates of the partners in that partnership are under liquidation-

- (a) any claim for a partnership debt must be proved against the partnership estate, despite liability of a partner for such debt;
- (b) a shortfall on the claim against the partnership is admitted without formal proof as a claim against each of the estates of the partners which is liable for the debt; and

- (c) any balance in the partnership estate after payment of the debts is distributed amongst the estates of the partners in so far as the partner would have been entitled to such a balance upon the dissolution of the partnership.

### **Proof of claims**

**96.** (1) Any person who has a liquidated claim against an insolvent estate, the cause of which arose on or before the commencement of liquidation of the estate, or the authorised agent of that person, may at any time before the final distribution of the estate, but subject to the provisions of **section 98**, prove that claim against the estate.

(2) A claim against an insolvent estate must be admitted at a meeting of creditors of the estate if the claim has been proved to the satisfaction of the presiding officer on-

- (a) the face of the claim form;
- (b) documents in connection with the claim submitted by the creditor or another person, if any; and
- (c) the evidence, if any, by the creditor.

(3) If the claim has not been proved in accordance with subsection (2), the presiding officer must reject it.

(4) A creditor who holds security for the creditor's claim must place a monetary value on his or her security, or have his or her voting rights limited in terms of **section 84(5)**.

(5) Subject to **section 28**, the rejection of a claim does not debar the claimant from proving the claim at a later meeting of creditors or by an action at law.

(6) Every claim must be proved by an affidavit in a form corresponding substantially with **Form B or C of Schedule 1** and, subject to subsections (11) and (12) no oral evidence may be received in support of any claim.

(7) The affidavit contemplated in subsection (6) and all documents submitted in support of the claim or a copy thereof must be lodged before the time of day advertised for the commencement of the meeting of creditors on or before the second working day before the date of the meeting, with the presiding officer of that meeting, failing which the claim may not be admitted at that meeting unless the presiding officer is of the opinion that the creditor had a reasonable excuse for the creditor's failure to lodge the claim with the presiding officer within the said time.

(8) Where appropriate the amount of a claim may be expressed in a foreign currency, but all claims in a foreign currency must be paid in its equivalent in Namibian dollar and the date of commencement of liquidation is the conversion date of Namibian dollar to a foreign currency.

(9) A claimant who has proved a claim which is deficient in any respect may at a subsequent meeting of creditors prove a corrected claim.

(10) (a) The documents referred to in subsection (7) may be perused free of charge by the liquidator, the insolvent and any creditor of the insolvent estate or the representative of any of them during office hours at the office of the presiding officer of the meeting of creditors.

(b) The liquidator, insolvent, or creditor may submit motivated objections to prove a claim at the meeting where the claim is lodged for proof or with the presiding officer before that meeting.

(11) (a) Any person who has an unliquidated claim against an insolvent estate may tender such claim for proof at a meeting of creditors, but such claim may not be admitted to proof until the claim-

(i) has been accepted by the liquidator by way of compromise; or

- (ii) is proved in an action at law.
  - (b) When such claim is compromised or proved in an action at law the claim is deemed to have been proved and admitted against the insolvent estate at the meeting where it was lodged for proof, unless the creditor informs the liquidator by standard notice within seven days of the compromise or judgment that the creditor abandons the claim.
- (12) (a) The presiding officer at the meeting of creditors of an insolvent estate may-
- (i) of his or her own motion;
  - (ii) at the request of the liquidator or his or her representative; or
  - (iii) at the request of any creditor who has proved a claim at a meeting of creditors or the representative of such creditor,
- call upon any person present at the meeting who wishes to prove a claim or who has proved a claim against the estate to submit to questioning by the presiding officer, the liquidator or his or her representative or any such creditor or his or her representative in regard to such claim.
- (b) For purposes of such questioning the presiding officer must administer to that person an oath or affirmation to speak the truth.
  - (c) Notwithstanding paragraph (a), a creditor who has proved a claim at a meeting of creditors may not be permitted to question a creditor who wishes to prove a claim at the same meeting before the claim of such creditor has been admitted or rejected.
- (13) (a) Any person who wishes to prove or who has at any time proved a claim against an insolvent estate and who is absent from a meeting of creditors

may be summoned in writing by the presiding officer in a summons substantially in the form of **Form E2 of Schedule 1** to appear before him or her at a place and time stated in the summons for the purpose of being questioned by the presiding officer, the liquidator or a creditor who has proved a claim against the estate, or the representative of the liquidator or such creditor in regard to such claim.

(b) The provisions of subsection (12) with regard to the administering of the oath or the taking of a solemn declaration apply with the changes necessitated by the context with regard to the giving of evidence by such person.

(14) The claim of a person who wishes to prove such claim and is called upon to be questioned as contemplated in subsection (12) and who-

- (a) fails without reasonable excuse to appear;
- (b) refuses to take the oath or make an affirmation;
- (c) refuses to submit to questioning; or
- (d) refuses to answer fully and satisfactorily any lawful question put to him or her,

may be rejected.

### **Liquidator to examine claims**

**97.** (1) The person who presided at a meeting of creditors of an insolvent estate must, if he or she is not the liquidator, after the meeting deliver to the liquidator every claim proved against the insolvent estate at that meeting and every document submitted in support of any claim.

(2) (a) The liquidator must examine the claims and supporting documents referred to in subsection (1) and all available books, documents or records relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed.

(b) The liquidator may require the claimant to submit additional supporting proof of his or her claim and, in the case where the claim is based on an estimate, the basis on which the estimate was arrived at.

(3) (a) If the liquidator disputes a claim after it has been proved at a meeting of creditors, he or she may, with the authority of the Commissioner or creditors in terms of **section 66(4)** and after having afforded the claimant the opportunity of substantiating the claimant's claim or any part thereof, reduce or disallow the claim.

(b) The liquidator must forthwith by standard notice notify the claimant and the Commissioner in writing of such reduction or disallowance of the claim.

(4) Subject to the provisions of **section 28(5)**, the reduction or disallowance of a claim as contemplated in subsection (3) does not debar a claimant from establishing his or her claim by means of an action at law.

### **Late proof of claims**

**98.** (1) Subject to the provisions of **section 75(8)** and subsection (2), a creditor of an insolvent estate who has not proved his or her claim against the estate before a date fixed in terms of **section 82** is not entitled to share in the distribution of the assets reflected in an account lodged with the Commissioner within two weeks after that date.

(2) Notwithstanding subsection (1), if the Commissioner is satisfied that a creditor referred to in subsection (1) has a reasonable excuse for the delay in proving his or her claim, the Commissioner may-

- (a) permit that creditor to prove the creditor's claim before the confirmation of the account contemplated in subsection (1); and
- (b) order the liquidator to draw up a new account in which provision is made for the claim so proved, provided that the creditor tenders all costs in connection with the drawing-up of the new account, including wasted advertisement costs, if any.

(3) A creditor of an insolvent estate who has proved a claim against the estate and who was not in terms of subsection (1) permitted to share in the assets reflected in an account, is, in so far as available funds allow, entitled to be awarded out of any subsequent distribution account the amount to which that creditor would have been entitled under the earlier distribution account if the creditor had proved the creditor's claim in time.

- (4) A creditor who delayed proving that creditor's claim pending-
  - (a) the outcome of proceedings for the setting aside of any disposition of property made by an insolvent; or
  - (b) the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of an insolvent estate,

is not entitled to share in the distribution of any money or the proceeds of property recovered as a result of such proceedings.

### **Conditional claims**

**99.** (1) A creditor who has a claim against an insolvent estate which is dependent upon the fulfilment of a condition, may request the liquidator to place a value on the claim.

(2) If a liquidator places a value on a claim referred to in subsection (1), he or she must in writing indicate the grounds on which he or she arrived at the valuation.

(3) The valuation of a conditional claim by a liquidator is subject to review by the Court on application of the creditor concerned.

(4) After a conditional claim has been valued as contemplated in this section, the claim may be proved by the creditor for the amount of the valuation.

(5) (a) If the condition upon which a claim is dependent is fulfilled before the inclusion of the amount referred to in subsection (4) in a proposed distribution account, the claim may be proved in full.

(b) If that condition is fulfilled after provision had already been made in a distribution account for the claim contemplated in subsection (4), the balance of the claim may be proved, subject to the provisions relating to the late proof of claims.

(6) A claim for severance pay or retrenchment pay which is subject to a condition that the contract of service has been terminated may be proved for the full amount of the claim, but until the contract of service has been terminated-

(a) no award is paid on the claim; and

(b) the creditor has no vote on the claim.

### **Arrear interest and debt due after liquidation**

**100.** (1) A creditor may prove a claim against an insolvent estate in respect of a capital debt and interest thereon which has accrued at the commencement of liquidation.

(2) No claim may be proved for interest which accrues after the commencement of liquidation, but such interest is payable in the circumstances set out in **sections 69(8) and 75(15)**.

(3) The capital amount of a debt which becomes payable after the commencement of liquidation must be reduced by the prescribed percentage of that amount per annum compounded monthly on completed months from the commencement of liquidation to the date on which the debt becomes payable.

### **Withdrawal of claim**

**101.** (1) A creditor who has proved a claim against an insolvent estate may withdraw his or her claim by standard notice to the liquidator.

(2) A liquidator who receives a notice of withdrawal of a claim must give standard notice to the Commissioner of the withdrawal.

(3) A creditor who has withdrawn his or her claim remains liable for his or her proportional share of the costs of liquidation up to the date when the notice of withdrawal was received by the liquidator.

(4) A creditor who has withdrawn that creditor's claim may by standard notice to the liquidator cancel such withdrawal, in which event that creditor is not be entitled to payment of the creditor's claim out of the estate until all other creditors who have proved claims have been paid in full.

(5) If a creditor cancels the withdrawal of a claim as contemplated in subsection (4), that creditor is not liable for liquidation costs for which that creditor was not liable at the time of the cancellation of the withdrawal of that claim.

### **Recovery of debt from insolvent estate where creditor recovered from another source**

**102.** (1) A creditor who has proved a claim against an insolvent estate and who, after the commencement of liquidation of the insolvent estate, has received payment of that debt in whole or in part, from a source other than the insolvent estate, must notify the liquidator by standard notice of such payment within 60 days from receiving payment.

(2) If the creditor fails to act as set out in subsection (1), double the amount to which that creditor was not entitled to and which was paid to that creditor out of the insolvent estate, may be recovered from the creditor.

## **PART 13**

### **BANKING ACCOUNTS, INVESTMENTS AND MONEYS BELONGING TO THE INSOLVENT ESTATE**

#### **Banking accounts and investments**

- 103.** (1) The liquidator of an insolvent estate -
- (a) must open a cheque account in the name of the estate with a bank within Namibia and deposit therein all moneys received by him or her on behalf of the estate;
  - (b) may open a savings account in the name of the estate with a bank within Namibia and may transfer thereto from the account referred to in paragraph (a) moneys not immediately required for the payment of any claim against the estate;
  - (c) may place moneys deposited in an account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate, on an interest-bearing deposit account with a bank within Namibia.

(2) Whenever required by the Commissioner to do so, the liquidator must-

- (a) notify the Commissioner by standard notice of the bank and the office, branch office or agency thereof with which he or she has opened an account or placed a deposit referred to in subsection (1); and
- (b) furnish the Commissioner with a bank statement or other sufficient evidence of the status of the account.

(3) The liquidator must as far possible transfer any payments from any account referred to in subsection (1) electronically to the intended beneficiary provided that all payment instructions drawn upon such account must-

- (a) contain the name of the payee and the cause of payment;
- (b) be drawn to order; and
- (c) be authorised in writing by every liquidator or his or her authorised agent.

(4) The Commissioner and any surety for the liquidator, or any person authorised by such surety, have the same right to information in regard to an account referred to in subsection (1) as the liquidator himself or herself has, and may examine all vouchers relating thereto, whether in the hands of the bank or the liquidator.

(5) The Commissioner may, after direct notice to the liquidator, direct the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, by standard notice to pay over into the Guardian's Fund-

- (a) all moneys standing to the credit of that account at the time that manager receives that direction; and

- (b) all moneys which may thereafter be paid into that account,

and that manager must carry out that direction.

### **Recording of receipts by liquidator**

**104.** (1) The liquidator of an insolvent estate must immediately after his or her appointment open a record in which all moneys, goods, accounts and other documents received by him or her on behalf of the estate are recorded.

(2) The Commissioner may at any time direct the liquidator in writing to produce the said record for inspection and every creditor who has proved a claim against the estate and, if the Commissioner so orders, every person claiming to be a creditor or surety for the liquidator, may inspect the said record at all reasonable times.

### **Unlawful retention of moneys or use of property by liquidator**

**105.** (1) A liquidator who-

- (a) without lawful cause, retains any money exceeding N\$100 belonging to the insolvent estate of which he or she is liquidator;
- (b) knowingly permits his or her co-liquidator to retain such a sum of money longer than the earliest day after its receipt on which it was possible for him or her or his or her co-liquidator to pay that money into a bank; or
- (c) who uses or knowingly permits his or her co-liquidator to use any property of the insolvent estate, except for the benefit of the estate,

is, in addition to any other penalty to which he or she may be liable, liable to pay into that estate an amount equal to double the amount so retained or double the value of the property so used.

- (2) The amount which a liquidator is liable to pay in terms of subsection (1) may -
- (a) be deducted from any remuneration to which he or she is entitled out of the insolvent estate; or
  - (b) may be recovered from him or her by action in a court of law at the instance of his or her co-liquidator or the Commissioner or any creditor who has proved a claim against the estate.

## **PART 14**

### **ESTATE ACCOUNTS, DISTRIBUTION AND CONTRIBUTION**

#### **Estate Accounts**

**106.** (1) Subject to subsections (5), (7) and (8), a liquidator must within a period of six months from the date of his or her appointment as final liquidator in terms of **section 53(1)**-

- (a) lodge with the Commissioner a liquidation account and a distribution account of the proceeds of the property in the insolvent estate available for payment to creditors; or
- (b) if all realisable property in the insolvent estate has been realised and brought into account and the proceeds are insufficient to cover the costs and charges referred to in **section 74** a contribution account apportioning the liability for the deficiency among creditors who are liable to contribute.

(2) The accounts referred to in subsection (1) must be substantially in the form set out in **Form D of Schedule 1**: Provided that the Commissioner may insist on strict compliance with any item of that Form.

(3) If a liquidation account is not a final account, the liquidator must from time to time as the Commissioner may direct, but at least every six months unless he or she has received an extension of time as contemplated in subsections (5), (7) or (8), lodge with the Commissioner periodical accounts in the form and in all other respects similar to the accounts mentioned in subsection (2).

(4) If the estate of a partnership is under liquidation, separate accounts must be lodged in respect of the partnership and the estate of each partner whose estate is under liquidation.

(5) If a liquidator is unable to lodge an account with the Commissioner within the period of six months as required by subsection (1) or (3), he or she must before the expiration of such period or within the further period that the Commissioner may allow, send to the Commissioner by standard notice an affidavit in which he or she must state -

- (a) the reasons for his or her inability to lodge the account concerned;
- (b) those affairs, transactions or matters relating to the insolvent or the insolvent estate as the Commissioner may require; and
- (c) the amount of money available for payment to creditors or, if there is no free residue or the free residue is insufficient to meet all costs referred to in **section 74**, the deficiency the creditors are liable to make good,

and the Commissioner may thereupon extend such period to a date determined by him or her.

(6) If the Commissioner extends the period in terms of subsection (5) the liquidator must inform proved creditors of the extension by liquidator's notice and enclose a copy of the affidavit in terms of that subsection.

(7) Subject to subsection (8), if a liquidator fails to lodge an account within the period required by subsection (1) or before the date determined by the

Commissioner in terms of subsection (5), the Commissioner may send a standard notice to the liquidator in which he or she is required to lodge-

- (a) the account concerned with the Commissioner; or
- (b) if he or she is unable to lodge such account, send an affidavit as contemplated in subsection (5) to the Commissioner,

within a period of 14 days from the date of the notice and the Commissioner may, if the account concerned or the said affidavit is not lodged with him or her after the expiration of the 14 days extend such period to a date determined by him or her.

(8) If the Commissioner refuses to extend the period as contemplated in subsection (7), the liquidator may apply by motion to the Court, after having given the Commissioner direct notice of his or her intention to make the application, for an order extending the said period and the Court may thereupon make such order as it deems just.

(9) If before the expiration of the period contemplated in subsection (1) or (3) a liquidator has funds in hand which in the opinion of the Commissioner ought to be distributed and the liquidator has not lodged with the Commissioner a plan for the distribution of those funds, the Commissioner may direct him or her by standard notice to lodge to the Commissioner a plan for the distribution of those funds.

- (10) If any liquidator fails-
  - (a) to lodge any account to the Commissioner as and when required by or under this Act;
  - (b) to lodge any vouchers in support of such account upon the request of the Commissioner;
  - (c) to perform any other duty imposed upon him by this Act; or

- (d) to comply with any reasonable demand of the Commissioner for information or proof required by him in connection with the liquidation or distribution of an estate,

the Commissioner or any person having an interest in the liquidation or distribution of an insolvent estate may, after giving the liquidator not less than 14 days' standard notice, apply to the Court for an order directing the liquidator to lodge such account or any vouchers in support thereof or to perform such duty or to comply with such demand.

(11) Any costs awarded to the Commissioner or to such person as a result of an application referred to in subsection (10) must, unless otherwise ordered by the Court, be payable by the liquidator in his her personal capacity.

#### **Copies of liquidator's accounts to be open for inspection**

**107.** (1) (a) The liquidator must as soon as possible after he or she has lodged an account with the Commissioner as contemplated in **section 106** lodge a copy of the account with a magistrate of the district in which the insolvent resided or carried on business before his or her liquidation if the Commissioner does not have an office in that district.

(b) If the insolvent resided or carried on business in a portion of a district in respect of which an additional magistrate or assistant magistrate permanently carries out the functions of the magistrate of the district at a place other than the seat of the magistracy of that district, the liquidator must lodge a copy of the account with that additional magistrate or assistant magistrate.

(2) The liquidator must-

(a) give notice in the *Gazette* that the account will lie open for inspection by any person having an interest in an insolvent estate at the place and during the period stated in the notice; and

- (b) give liquidator's notice to each creditor who has proved a claim against that estate.

(3) Every such account and every copy thereof lodged with a magistrate must be open for inspection by any person having an interest in the insolvent estate at the office of the Commissioner and of such magistrate during a period of 14 days as from the date of the publication of the notice in the *Gazette*.

(4) A magistrate who has received a liquidator's account must cause a notice to be affixed in a public place in or about his or her office notifying that the account will lie open for inspection at his or her office during the period stated in the notice.

(5) After the expiration of the period referred to in subsection (4) the magistrate must-

- (a) endorse upon the account a certificate that the account was open for inspection at his or her office as provided in this section; and
- (b) send the account by standard notice to the Commissioner.

### **Objections to liquidator's account**

**108.** (1) The insolvent or any person having an interest in the estate may at any time after the commencement of the period contemplated in **section 107** until the liquidator's account is confirmed in terms of **section 109** lodge with the Commissioner in writing any objection to that account, stating the reasons for such objection.

(2) If the Commissioner is of the opinion-

- (a) that any such objection is well founded;

- (b) apart from any objection, that the account is in any respect incorrect;
- (c) that the account contains any improper charge; or
- (d) that the liquidator acted in bad faith, negligently or unreasonably in incurring any costs included in the account and that the account should be amended,

he or she may direct the liquidator to amend the account or may give such other direction in connection therewith as he or she may think fit.

(3) Any person, including the liquidator, who feels aggrieved by any direction of the Commissioner or by the Commissioner's refusal to sustain an objection so lodged, may within 14 days as from the date of the Commissioner's direction apply to the Court for relief and the Court has the power to consider the merits of any such matter, to hear evidence and to make any order it deems just.

(4) When any direction by the Court affects the interests of a person who has not lodged an objection the account so amended must again lie open for inspection by creditors in the manner and with the notice stipulated by **section 107**, unless the person affected as aforesaid consents in writing to the immediate confirmation of the account.

### **Confirmation of liquidator's accounts**

**109.** (1) The Commissioner must confirm a liquidator's account which has been open to inspection as stipulated by this Act, if-

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Commissioner and has again been open for inspection, if necessary, and no application for relief has been made to the Court in terms of **section 108(3)**; or

- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to Court for relief.

(2) The Commissioner's confirmation is final notwithstanding mistakes in the account, except against a person who may have been permitted to reopen it by the Court before any dividend has been paid under the account.

### **Distribution of estate and collection of contributions**

**110.** (1) Immediately after the confirmation of a liquidator's account the liquidator must-

- (a) give notice of that confirmation in the *Gazette*; and
- (b) state in that notice that-
  - (i) a dividend to creditors, is being processed for payment; or
  - (ii) a contribution is in the course of collection from creditors, and that every creditor liable to contribute is required to pay to the liquidator the amount for which that creditor is liable.

(2) If any contribution is payable the liquidator must-

- (a) specify fully in that notice the address at which payment of the contribution is to be made; and
- (b) send a copy of the notice by liquidator's notice to every creditor who is liable to contribute.

(3) Immediately after the confirmation of a liquidator's account but not later than two months after such confirmation the liquidator must in accordance therewith-

- (a) distribute the insolvent estate; or
- (b) collect from each creditor who is liable to contribute, the amount for which he or she is liable.

**Liquidator to produce receipts for dividends or pay over unpaid dividends to Commissioner**

**111.** (1) The liquidator must within three months after the confirmation of the account lodge with the Commissioner the receipts for dividends paid to creditors or other persons and if there is a contribution account, the vouchers necessary to complete the account: Provided that-

- (a) a cheque purporting to be drawn payable to a creditor or other person in respect of a dividend due to him or her and paid by the banker on whom it is drawn; or
- (b) a statement by a bank that the bank of the creditor has credited or has been instructed to credit the account of the creditor with the amount of the dividend,

must be accepted by the Commissioner in lieu of any such receipt.

(2) If any dividend has at the expiration of a period of two months from the confirmation of the account under which it was payable, not been paid to the creditor or other person who is entitled thereto, the liquidator must within three months after confirmation of the account pay the dividend over to the Master who must deposit it in the Guardian's Fund on account of the creditor or other person.

**Surplus to be paid into Guardian's Fund**

**112.** (1) Subject to subsection (2), if after the confirmation of a final account there is any surplus in an insolvent estate which is not required for the payment

of claims, costs, charges or interest, the liquidator must after the confirmation of that account pay the surplus over to the Master who must-

- (a) deposit that surplus in the Guardian's Fund; and
  - (b) after the rehabilitation of the insolvent must at the insolvent's request pay that surplus to the insolvent.
- (2) Where the insolvent estate is that of a partnership, **section 95** applies.

### **Contribution by creditors towards cost of liquidation**

**113.** Where there is no free residue in an insolvent estate or where the free residue is insufficient to meet all the costs mentioned in **section 74** the following rules apply with regard to the liability of creditors to pay contributions towards defraying any such deficiency:

- (a) The creditor upon whose application the liquidation order was made, whether or not he or she has proved a claim against the estate, is liable to contribute not less than the amount he or she would have had to contribute if he or she had proved a claim for the amount stated in his or her application for liquidation and where he or she is a secured creditor, without reliance on his or her security;
- (b) each concurrent creditor is be liable to pay a contribution in proportion to that creditor's concurrent claim;
- (c) if a creditor has withdrawn his or her claim, that creditor is liable to pay a contribution only so far as is provided in **section 101** and if a creditor withdraws his or her claim within 5 days after the date of any resolution of creditors, that creditor is be deemed to have withdrawn the claim before anything was done in pursuance of that resolution;

- (d) if a claim has been reduced or disallowed by a liquidator in terms of **section 97(3)** the creditor is, unless the claim is subsequently admitted by means of compromise or proved in action at law, liable to pay-
  - (i) a contribution in respect of costs incurred before the date of notice referred to in the said subsection on the amount of the claim before the claim was reduced or disallowed; and
  - (ii) in the case of a reduced claim in respect of costs incurred after the date of the said notice, on the amount to which the claim was reduced by the liquidator.

### **Enforcing payment of contribution**

**114.** (1) If a creditor who is liable to contribute under an account has failed to pay the amount of his or her liability within a period of 30 days after the date of the sending or delivery to that creditor of a notice referred to in **section 110(1)** the liquidator may take out a writ of execution for the amount of the creditor's liability in the magistrate's court in which the creditor could be sued for the contribution in question.

- (2) Whenever-
  - (a) a creditor who is liable to contribute under an account is in the opinion of the Commissioner and of the liquidator unable to pay the contribution for which that creditor is liable; or
  - (b) the liquidator has incurred expenses in connection with the recovery of any contribution, which expenses are in the opinion of the Commissioner and the liquidator irrecoverable,

the liquidator must as soon as practicable and in any event within such period as the Commissioner may determine therefor, frame and lodge with the Commissioner a supplementary contribution account wherein he or she must apportion the share of the

creditor who is unable to pay or the expenses in question among the other creditors who are in the opinion of the Commissioner and the liquidator able to pay.

(3) The provisions of subsection (2) with the changes necessitated by the context apply-

(a) whenever a creditor who is liable to contribute under a first or further supplementary account is, in the opinion of the Commissioner and the liquidator, unable to pay the contribution for which he or she is liable; or

(a) whenever the liquidator has incurred expenses in connection with the recovery of a contribution under a first or further supplementary account which are, in the opinion of the Commissioner and the liquidator, irrecoverable by the liquidator.

(4) The liquidator may in lieu of complying with the requirements of **section 107** in connection with any supplementary contribution account, furnish a copy of that account to every creditor who is liable to contribute thereunder and thereupon the provisions of subsection (1) apply with the changes necessitated by the context.

## **PART 15**

### **REHABILITATION OF INSOLVENT**

#### **Rehabilitation**

**115.** (1) An insolvent may, subject to the provisions of subsection (2), apply to the Court for an order for his or her rehabilitation -

(a) at any time after the confirmation by the Commissioner of a distribution account providing for the full payment of all claims proved against that insolvent's estate, with interest thereon from the commencement of liquidation, calculated in terms of **section 75(14) and (15)** and all costs of liquidation; or

- (b) at any time after the Commissioner has issued a certificate of acceptance of a composition as contemplated in **section 177**; or
- (c) in any other case, but subject to subsection (2), after the expiration of four years from the date of the confirmation by the Commissioner of the provisional liquidation account in the estate.

(2) If an insolvent has been convicted in respect of the existing or any prior insolvency for an offence referred to in section **213(1)(a), (b), (d), (e) or (g) or (2)(e) or (f)** or for any other fraudulent act, the insolvent may not apply to the Court for an order for his or her rehabilitation before a period of five years has elapsed from the date of the conviction concerned.

(3) The Commissioner may on the request of the insolvent recommend to the Court that an application referred to in subsection (1)(c) may be made before the expiration of the period of four years referred to in that subsection but no such application may be made-

- (a) within a period of 12 months; or
- (b) in the case where the insolvent's estate was liquidated prior to the liquidation in respect of which he or she applies for rehabilitation, within a period of three years,

from the date referred to in that subsection.

(4) An insolvent who wishes to apply for a rehabilitation order must send a standard notice of his or her intended application-

- (a) not less than four weeks before the date of the intended application in the case of an application contemplated in subsection (1)(a), to the Commissioner and the liquidator (if there is one); or

(b) in the case of an application contemplated in subsections (1)(b), (c) or (2)-

(i) not less than six weeks before the date of the intended application to the Commissioner, the liquidator (if there is one) and to every creditor of the insolvent estate whose name and address is known to him or her or which he or she can readily obtain; and

(ii) notify such application by notice in the *Gazette*.

(c) furnish security to the Registrar of the Court in the amount of or to the value of the prescribed amount in respect of the costs of any person who may oppose the application for rehabilitation and who may be awarded costs by the Court.

(5) The Minister may amend the amount mentioned in subsection (4)(c) by notice in the *Gazette* so as to take account of subsequent fluctuations in the value of money.

(6) The notice referred to in subsection (4)(a) or (b) must state the estimated value and reflect full details of the assets of the insolvent at the time of the application.

(7) (a) An insolvent must in support of his or her application for rehabilitation-

(i) submit an affidavit that he or she has made a complete surrender of his or her estate;

(ii) that he or she has not granted or promised any benefit to any person or entered into any secret agreement with intent to induce the liquidator of the estate or any creditor not to oppose the application for rehabilitation.

- (b) That affidavit must contain a statement of-
  - (i) the insolvent's assets and liabilities;
  - (ii) his or her earnings; and
  - (iii) his or her own as well as his or her spouse's contribution to his household,  
on the date of the application.
  
- (c) The Court must be apprised of-
  - (i) the dividend (if any) paid to that insolvent's creditors;
  - (ii) what further assets in the insolvent estate are available for realisation and the estimated value thereof;
  - (iii) the total amount of all claims proved against the estate; and
  - (iv) the total amount of his or her liabilities at the commencement of liquidation of his or her estate.
  
- (d) If application is made for rehabilitation pursuant to subsection (1)(b), the insolvent must-
  - (i) set out the particulars of the composition;
  - (ii) state whether there are or are not creditors whose claims against the estate have not been proved, and if there are such creditors, state their names and addresses and particulars of their claims.

(8) A liquidator who has received a notice contemplated in subsection (4)(a) or (b) must report to the Commissioner any facts which in his or her opinion would warrant the court to refuse, postpone or qualify the insolvent's rehabilitation.

(9) A partnership whose estate has been sequestrated may not be rehabilitated.

### **Opposition to rehabilitation or refusal of rehabilitation by court**

**116.** (1) (a) The Commissioner must report to the Court on the merits of the application and furnish a copy of the report to the applicant or the applicant's legal practitioner.

(b) The Commissioner, the liquidator or any other person having an interest in the insolvent estate may appear in person or through a legal representative to oppose the application.

(2) If the Court is satisfied on the strength of a certificate by the Commissioner or on any other evidence that the insolvent has intentionally impeded, obstructed or delayed the administration of his or her insolvent estate -

(a) through failure to submit a statement of affairs in accordance with the requirements of the Act; or

(b) through failure to make available to the liquidator of the estate in accordance with written directives by the liquidator or the Commissioner property belonging to the insolvent estate which was in his or her possession or custody or under his or her control or any book, document or record relating to his or her affairs which was in his or her possession or custody or under his or her control; or

(c) through failure to notify the liquidator of the estate of the existence of any book, document, or record relating to his or her affairs which was not in his or her possession or custody or under his or her control, and

as to where such book, document, or record could be found, or of any property belonging to his or her insolvent estate which was not mentioned in his or her statement of affairs, and as to where such property could be found; or

- (d) through failure to keep the liquidator of the estate informed of any change of his or her address during the period of three years after the liquidation of his or her estate; or
- (e) through failure to comply with **section 29(4)**; or
- (f) through any other act or omission,

the Court must refuse to grant a rehabilitation order until the expiry of a period of 10 years after the commencement of liquidation that insolvent's estate.

- (3) (a) The Court may refuse the application or postpone the hearing of the application or grant the application for rehabilitation subject to any condition the Court finds to be just.
- (b) The Court may order the insolvent to consent to judgment against him or her for the unpaid portion of a debt proved against the estate or which could have been proved against the estate, or for such lesser amount that the Court may determine.
- (c) If the Court made a judgment contemplated in paragraph (b) no execution may take place in terms of the judgment save with permission of the Court and after proof that the insolvent has since the commencement of liquidation of the estate acquired property or income which is available for the payment of his or her debts.
- (c) Apart from such judgment the Court may impose any other condition with regard to any property or income which may in future accrue to the insolvent, the Court may order the insolvent to pay the costs of any

opposition to the application for rehabilitation, unless the Court is satisfied that the opposition is vexatious.

(4) When granting an order for rehabilitation in respect of an application made in terms of **section 115(1)(b)**, the Court may order that any obligation incurred by the applicant on or before the date that applicant's estate was liquidated and which, but for the order, would be discharged as a result of the rehabilitation, remains of full force and effect notwithstanding the rehabilitation.

(5) The Registrar of the Court must forthwith give standard notice to the Commissioner of every order for rehabilitation which is granted by the Court.

### **Rehabilitation by effluxion of time**

**117.** (1) Any insolvent not rehabilitated by the Court within a period of ten years from the commencement of liquidation of his or her estate, is deemed to be rehabilitated after the expiry of that period unless a Court upon application by an interested person after standard notice to the insolvent orders otherwise prior to the expiration of the said period of ten years.

(2) If a Court makes an order under subsection (1), the Registrar of the Court must by standard notice send a copy of the order to the Commissioner and to the Registrar of Deeds and the Commissioner must send a copy of the order by standard notice to the liquidator.

(3) Whenever the Registrar of Deeds receives such order he or she must enter a caveat against the transfer of all immovable property and the cancellation of every bond registered in the name of the insolvent or which belongs to the insolvent.

(4) The caveat referred to in subsection (3) remains in force until the date on which the insolvent is rehabilitated.

### Effect of rehabilitation

**118.** (1) Subject to the provisions of subsection (2) and any conditions which the Court may have imposed when granting an order for rehabilitation, the rehabilitation of an insolvent has the effect of-

- (a) putting an end to the liquidation;
  - (b) discharging all debts of the insolvent which were due, or the cause of which had arisen, on or before the commencement of liquidation, and which did not arise out of any fraud on his or her part or the commission by him or her of any offence referred to in **section 213(1)(e) or section 213(1)(c)** in respect of a previous liquidation; and
  - (c) relieving the debtor of every disability resulting from the liquidation.
- (2) The rehabilitation of an insolvent does not affect -
- (a) the rights of a liquidator or of creditors under a composition;
  - (b) the power or duties of the Commissioner or the duties of the liquidator in connection with a composition;
  - (c) the right of the liquidator or of creditors to any part of the insolvent's estate which is vested in the liquidator but as yet not distributed by him or her;
  - (d) the liability of a surety for the insolvent;
  - (e) the liability of any person to pay any penalty or suffer any punishment under any provision of this Act.

(3) Evidence of a conviction on any offence contemplated in subsection (1)(b) is admissible in subsequent civil proceedings as *prima facie* evidence that the insolvent committed the offence in question.

**Penalties for unlawful inducement to accept compromise or in connection with rehabilitation**

- 119.** (1) (a) It is unlawful for any person to offer or promise to any other person any benefit in order to-
- (i) induce that person to accept an offer of composition;
  - (ii) agree to or refrain from opposing an application for the rehabilitation of an insolvent;
  - (iii) as a consideration for his or her acceptance of an offer of composition; or
  - (iv) for supporting or refraining from opposing an application for the rehabilitation of a debtor.
- (b) Any person who has accepted or agreed to accept any such benefit, whether for that person or for any other person, is liable to pay, by way of penalty, for the benefit of the other creditors of the insolvent estate -
- (i) a sum equal to the amount of any claim proved by that person against the estate; and
  - (ii) the amount or value of the benefit promised or given; and
  - (iii) in the case of a composition, the amount paid or to be paid to that person under the composition.

(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;