

binds the liquidator of such person's insolvent estate.

## **PART 8**

### **RIGHTS AND DUTIES OF CREDITORS**

#### **Realization of security**

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

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

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

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

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

- (4) (a) A secured creditor with security other than property contemplated in subsection (2) must as soon as possible after commencement of liquidation place the liquidator in possession of the security.
- (b) A secured creditor with security contemplated in subsection (2) which has not been realized by the creditor before the first meeting of creditors of the insolvent estate, must within five days after the commencement of that meeting or within such longer period as the liquidator may allow, place the liquidator in possession of that security.
- (c) The liquidator must cause the security referred to in paragraphs (a) and (b) to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, or a suitably qualified person approved by the Commissioner, who must submit to the Commissioner a valuation report.
- (5) A creditor who has placed the liquidator in possession of property held by that creditor as security, does not thereby lose the security the creditor is entitled to in respect of such property.
- (6) Subject to subsection (7) and **section 66(4)**, the liquidator must realize the property made available to him or her pursuant to subsection (5) for the benefit of a creditor whose claim is secured by such property.
- (7) If authorised thereto by the Commissioner or by resolution at a meeting of creditors of an insolvent estate, the liquidator may sell property constituting the security of a creditor -
- (a) whose claim ranks first in preference; and
- (b) who has proved the creditor's claim against the estate,
- to that creditor at a value agreed upon between the liquidator and the creditor.

(8) After proof of his or her claim and the realisation of the security, any secured creditor is entitled to payment of his or her secured claim if that creditor has furnished security to the satisfaction of the liquidator for the repayment of such payment with interest at the rate prescribed in terms of the Prescribed Rate of Interest Act, if according to the liquidator's confirmed account the creditor is not entitled to the payment or a part thereof.

(9) A secured creditor may request the court to grant permission to sell security for the claim subject to proper accounting to the liquidator for the sale on grounds that-

- (a) the security is not necessary to a prospective reorganization or sale of the debtor's business;
- (b) the value of the security is diminishing as a result of the commencement of insolvency proceedings; and
- (c) the secured creditor is not protected against that diminution of value.

#### **Attachment of property upon failure to deliver to liquidator**

- 68.** (1) (a) If a creditor has not in accordance with **section 67(5)**, placed the liquidator in possession of the property constituting that creditor's security the liquidator must send to that creditor a demand by direct notice to place the liquidator in possession within seven days after such demand.
- (b) If the creditor fails to place the liquidator in possession of the property within seven days after such demand was delivered or sent to that creditor, the liquidator may obtain from a magistrate of the district where the property is or is situated a warrant directing the sheriff to attach such property and to place the liquidator in possession of the property.

(2) The creditor referred to in subsection (1) is liable for all costs resulting from that creditor's failure to place the liquidator in possession of the property and if such costs cannot be recovered from the said creditor they form part of the costs of realizing the security in terms of **section 69(4)**.

### **Application of proceeds of security**

**69.** (1) A secured creditor is entitled to share in the distribution of the proceeds of that creditor's security only if he or she has proved a claim against the insolvent estate.

(2) Any interest due in respect of a secured claim in respect of any period not longer than two years before the commencement of liquidation must be secured as if that interest were part of the capital debt.

(3) If the claim of a secured creditor exceeds the sum payable to that creditor in respect of the creditor's security, the creditor is entitled to rank against the insolvent estate in respect of the excess as a concurrent creditor, unless when proving the creditor's claim the creditor indicated that the creditor relied solely on the creditor's security for the fulfilment of that claim.

(4) The costs of maintaining, conserving and realizing any security must be paid out of the proceeds of that security if sufficient and, if insufficient, the costs must be paid by the secured creditor who would have been entitled, in priority to other creditors, to the proceeds if it had been sufficient to cover those costs.

(5) The costs of realization of a security must include-

(a) the liquidator's remuneration in respect of any security and a proportionate share of any excess of minimum liquidator's remuneration over the ordinary tariff;

- (b) a proportionate share of the costs incurred by the liquidator in giving security for his or her proper administration of the estate;
- (c) a proportionate share of the Commissioner's fees, calculated on the proceeds of the security;
- (d) if the property is immovable, any assessment rates as defined in subsection (7) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the liquidation and in respect of the period from that date to the date of the transfer of that property by the liquidator of that estate, with any interest or penalty which may be due on the said assessment rates in respect of any such period.

(6) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any assessment rates as defined in subsection (7) or other amounts due thereon have been paid, that law does not debar the liquidator of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if the liquidator has paid or offered reasonable security for payment of the assessment rates which may have been due on that property in respect of the periods mentioned in subsection (5) and no preference, either as costs of liquidation or otherwise, may be accorded to any claim for such assessment rates or such other amounts.

(7) For the purposes of subsections (5) and (6) "assessment rates" in relation to immovable property means any amount payable periodically in respect of that property to-

- (a) the State; or
- (b) a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incidence of the ownership of that property,

but excludes any payment for services rendered in respect of such property.

(8) After payment of the costs referred to in subsection (4), the balance of the proceeds of the security must be applied in satisfying, in order of preference of secured creditors-

- (a) first the capital sums of claims secured by the said security; and
- (b) thereafter simple interest on those capital sums at the rate prescribed in terms of the Prescribed Rate of Interest Act, or a higher rate of interest by virtue of a lawful stipulation in writing, from commencement of liquidation to the date of payment.

(9) Any balance of the proceeds of the security remaining must be added to the free residue of the insolvent estate.

(10) (a) If a creditor (herein and in subsection (10) referred to as the “mortgagee”) whose claim is secured by a special mortgage over immovable property belonging to the insolvent estate has not proved that creditor’s claim and the liquidator is not satisfied that the debt in question has been discharged or abandoned, the liquidator must deposit with the Master for payment into the Guardian’s Fund the proceeds of the sale of the former mortgagee's security.

(b) The amount which the liquidator must deposit in terms of paragraph (a) must not exceed the capital amount of the special mortgage and such arrears of interest for which the mortgagee would have been a secured creditor, after deduction of an amount equal to the costs which the mortgagee would have had to pay if the mortgagee had proved a claim and had stated in the affidavit lodged in support of that claim that the mortgagee relied for the satisfaction of that claim solely on the proceeds of the sale of the said property.

- (c) The amount so deposited or the part thereof to which the mortgagee may be entitled must be paid to that mortgagee if, within a period of one year after confirmation in terms of **section 109** of the distribution account under which the money is distributed, the mortgagee applies therefor to the Commissioner and the Commissioner is satisfied after proof of the mortgagee's claim, that the mortgagee is entitled to the amount or part thereof.

(11) Any amount deposited into the Guardian's Fund in terms of subsection (10) which has not been paid out to the mortgagee, as in that subsection provided, must after the expiry of the year mentioned in that subsection be distributed among the creditors who have proved claims against the insolvent estate prior to the confirmation of the said distribution account, as if the amount had, at the time of such confirmation, been available for distribution among them.

(12) Any creditor claiming to be entitled to share in the said distribution must apply in writing to the Commissioner for payment of that creditor's share, and the Commissioner may-

- (a) cause the payment to such creditor or hand the money to the liquidator, if any, for distribution among the creditors entitled thereto; or
- (b) if there is no liquidator, appoint a liquidator on such conditions as the Commissioner may think fit to impose for the purpose of making such distribution.

(13) Any liquidator charged with the duty of making a distribution contemplated in subsection (12) must lodge with the Commissioner a supplementary account in respect thereof and the provisions of this Act relating to an account apply to such supplementary account.

### **Security in respect of reserved ownership or financial lease**

**70.** (1) If a creditor could immediately before the commencement of liquidation assert that creditor's ownership to property delivered to an insolvent under a reservation of ownership contract or a financial lease the property is, subject to the rights of other secured creditors, upon the liquidation of the insolvent estate deemed to be held by that creditor or that creditor's successor in title (herein referred to as "the creditor") as security for the amount outstanding in respect of the purchase price of the property or the balance owing on the financial lease.

(2) If property referred to in subsection (1) was returned by the debtor to the creditor within three months before the commencement of liquidation of that debtor's estate, the liquidator may demand from the creditor that the creditor deliver to the liquidator the property or its value at the date when it was returned to the creditor, subject to payment to the creditor by the liquidator or to deduction from the value, as the case may be of the difference between the total amount payable under the transaction and the total amount actually paid.

#### **Security in respect of landlord's hypothec**

**71.** (1) A landlord's hypothec confers a preference with regard to the property which is subject to the hypothec, for rent due in respect of the period immediately prior to the commencement of liquidation, but not exceeding rent for a period of -

- (a) three months, if the rent is payable monthly or at shorter intervals than one month; or
- (b) six months, if the rent is payable at intervals exceeding one month but not exceeding three months; or
- (c) nine months, if the rent is payable at intervals exceeding three months but not exceeding six months; or
- (d) fifteen months, if the rent is payable at intervals exceeding six months.

(2) A tacit or legal hypothec other than a landlord's hypothec in subsection (1) does not confer any preference against an insolvent estate.

### **Special notarial bond over movable property**

**72.** (1) If a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognizable, is registered after the commencement of this Act in accordance with the Deeds Registries Act such property is –

- (a) subject to any encumbrance resting upon it on the date of registration of the bond; and
- (b) notwithstanding the fact that it has not been delivered to the mortgagee,

deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee.

(2) Upon the discharge of the debt secured by a bond mentioned in subsection (1) the mortgagee must, at the request of the mortgagor, furnish to the mortgagor, free of charge, proof of such discharge in the form required for the cancellation of the bond.

(3) Subject to the provisions of subsection (4) a notarial bond contemplated in subsection (1), which was registered before the commencement of this Act, upon the insolvency of the mortgagor before or after such commencement, confers on the mortgagee the same preference in respect of the entire free residue of the insolvent estate as that conferred on a mortgagee by a general bond in terms of **section 75(12)**.

(4) The provisions of subsection (3) does not apply if any part of such free residue was, before the commencement of this Act, paid out to concurrent creditors in terms of a confirmed account.

(5) If, at the commencement of this Act, an account has been confirmed but dividends have not yet been paid out as contemplated in subsection (4), such account must be reopened so as to give effect to the provisions of subsection (3) without requiring the permission of the Court contemplated in **section 109**.

(6) Notwithstanding anything to the contrary in the common law or in any other law, movable property-

- (a) which, while hypothecated by a notarial bond mentioned in subsection (1), is in the possession of a person other than the mortgagee; or
- (b) to which an instalment agreement as defined in section 1 of the Credit Agreements Act, 1980 (Act No. 75 of 1980) relates,

may not be subject to a landlord's tacit hypothec.

(7) The provisions of subsection (6) in respect of movable property hypothecated by a notarial bond mentioned in subsection (1) does not apply if such bond is registered after the landlord's hypothec has been perfected.

(8) Nothing in this section affect any mortgage, hypothecation, pledge, tacit hypothec, preference, lien or right of retention acquired by or in accordance with any law by the State or by-

- (a) any body corporate; or
- (b) any association of persons,

constituted or established by or under any law and supported wholly or partly by public funds.

### **Certain mortgages afford no security or preference**

**73.** With the exception of a kustingsbrief, no special bond or a general bond over movables, or a general clause in a special bond over movables passed for the purpose of-

- (a) (i) securing the payment of an existing unsecured debt; or
- (ii) obtaining a preference for an existing concurrent debt,

which was incurred more than two months prior to the lodging of the bond with the Registrar of Deeds for registration; or

- (b) securing the payment of a debt or obtaining a preference for a debt incurred in novation of or substitution for that first-mentioned debt,

confers any security or preference if the application for the liquidation of the estate of the debtor is lodged with the Registrar of the Court within nine months after the lodging of that bond with the Registrar of Deeds: Provided that a bond is deemed not to have been lodged if it was at any stage withdrawn from registration.

## **PART 9**

### **COSTS OF LIQUIDATION AND APPLICATION OF FREE RESIDUE**

#### **Costs of liquidation**

- 74.** (1) The costs of liquidation in respect of an insolvent estate include-
- (a) the sheriff's charges incurred since the commencement of liquidation;
  - (b) fees payable to the Commissioner in connection with the liquidation;
  - (c) the costs, as taxed by the Registrar of the Court, incurred in connection with the application by a debtor or of a creditor for the liquidation of that debtor's estate, excluding the costs of opposition to such

application, unless the Court has ordered that such costs must be included in the costs of liquidation;

- (d) the amount determined by the Commissioner for the preparation of a statement of a debtor's affairs by the debtor in accordance with **section 60**;
- (e) the remuneration of an interim liquidator appointed in terms of **section 50** and of the liquidator, including the costs incurred by the liquidator in giving security for the proper administration of the estate;
- (f) any expenses incurred by the Commissioner or by a presiding officer in carrying out the provisions of this Act, unless otherwise ordered by the Commissioner or the Court and subject to the provisions of **section 90(3)(b)**;
- (g) the salary, wages or fees of any person who was engaged or appointed by the liquidator in connection with the administration of the estate;
- (h) costs incurred in the administration of a deceased estate before the liquidation of the estate as the Commissioner may allow;
- (i) all other costs of the administration and the liquidation of an insolvent estate.

(2) The taxed fees of the sheriff in connection with proceedings stayed in terms of **section 28** must be regarded as costs of liquidation of the estate;

(3) The costs of liquidation referred to in subsections (1) and (2) rank on equal footing and abate in equal proportion, if necessary.

### **Application of the free residue**

75. (1) The free residue of an insolvent estate must be applied in the first place in defraying the costs of liquidation contemplated in **section 74**, but excluding the costs referred to in **section 69(4)**.

(2) In the second place the balance of the free residue must, subject to subsection (4) be applied in paying-

- (a) to an employee who was employed by the insolvent-
  - (i) any salary or wages, for a period not exceeding four months, due to an employee;
  - (ii) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the insolvent in the year in which liquidation occurred and the preceding year, whether or not payment thereof is due at the commencement of liquidation;
  - (iii) any payment due in respect of any other form of paid absence for a period not exceeding three months immediately prior to the commencement of liquidation of the estate;
  - (iv) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, wage-regulating measure or as a result of termination in terms of **section 49**; and
- (b) any contributions which were payable by the insolvent, including contributions which were payable in respect of any of his or her employees, and which were, immediately prior to the liquidation of the estate, owing by the insolvent, in his or her capacity as employer, to any pension, provident, medical aid, sick pay, holiday, unemployment or

training scheme or fund, or any similar scheme or fund under the provisions of any law.

(3) For the purposes of subsection (2) –

“salary and wages” includes all cash earnings which the employee is entitled to receive from the employer, but excludes other benefits.

(4) (a) The claims in subsection (2) may not exceed the amounts prescribed in respect of each category of payment contemplated in that subsection.

(b) The Minister-

(i) may after consultation with the Minister responsible for Labour amend an amount mentioned in subsection (2) by notice in the *Gazette*;

(ii) must consider amendments to the amounts at least once in every three years after the commencement of this Act in order to take account of the fluctuation in the value of money and other changed circumstances.

(5) (a) The claims referred to in subsection (2)(a)(i) enjoy preference above the claims referred to in subsections (2)(a)(ii), (iii) and (iv) and (2)(b) and must rank equally and abate in equal proportions, if necessary.

(b) The claims referred to in subsection (2)(a)(iv) must be preferred to the claims referred to in subsections (2)(a)(ii), (iii) and (2)(b) and must rank equally and abate in equal proportions, if necessary.

(c) The claims referred to in subsection (2)(a)(ii), (iii) and (iv) enjoy preference above the claims referred to in subsection (2)(b) and rank equally and abate in equal proportions, if necessary.

- (c) The claims referred to in subsection (2)(b) rank equally and abate in equal proportions, if necessary.

(6) The Minister may after consultation with the Minister responsible for Labour by notice in the *Gazette* exclude from the operation of the provisions of this section a category of employees, schemes or funds specified in the notice by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in this section.

(7) A director of a liquidated company employed by the company or a member of a liquidated close corporation employed by the corporation is not entitled to payment in terms of this section.

(8) (a) In the third place after the free residue has been applied as set out in subsections (1) and (2), any balance of the free residue must be applied in paying maintenance due by the insolvent in terms of a court order including maintenance in arrears at the commencement of liquidation of the estate, for a period not exceeding three months subject to the maximum amount as prescribed.

(b) The Minister-

- (i) may after consultation with the Minister responsible for Labour amend an amount mentioned in subsection (2) by notice in the *Gazette*;
- (ii) must consider amendments to the amounts at least once in every three years after the commencement of this Act in order to take account of the fluctuation in the value of money and other changed circumstances.

(9) In the fourth place any balance of the free residue must be applied in paying simple interest from the commencement of liquidation to the date of payment

on the claims paid in terms of subsections (1) to (8) in their order of preference at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act.

(10) In the fifth place any balance of the free residue must be applied in paying-

- (a) any amount which in terms of the Employee's Compensation Act, 1941 (Act No. 30 of 1941), was, immediately prior to the commencement of liquidation due to the Social Security Commission defined by section 1 of that Act by the insolvent in his or her capacity as an employer, in respect of any assessment, penalty or fine, or the compensation then due in respect of any employee, including in the case of a continuing liability, also the capitalized value, as determined by that Commission, of the pension (irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 49 of that Act), periodical payment or allowance, as the case may be, which constitutes the liability;
- (b) any amount which the insolvent-
  - (i) has under the provisions of section 35 of the Income Tax Act, deducted or withheld as a withholding tax on royalties from any amount referred to in that section;
  - (ii) is under the provisions of the Income Act required to pay in respect of any tax due by any other person and has deducted or withheld from any moneys, including pensions, salary, wages, remuneration and amounts of any other nature, held by him for or due by him to such person; or
  - (iii) has under the provisions of the Second Schedule to that Act deducted or withheld by way of employees' tax from remuneration or any other amount paid or payable by him or her to any other person prior to the commencement of liquidation,

but did not pay to the Commissioner of Inland Revenue prior to the commencement of liquidation, and any interest or penalty payable under that Act in respect of such amount for any period prior to the commencement of liquidation;

- (c) the amount of any customs or excise duty, forfeiture, interest, fine or penalty which in terms of the Customs and Excise Act, 1998 (Act No. 20 of 1998), was, immediately prior to the commencement of liquidation, due by the insolvent; and
- (d) the amount of value-added tax, additional tax, interest, fine or penalty which in terms of the Value-Added Tax Act, 2000 (Act No. 10 of 2000), was due by the insolvent immediately prior to the commencement of liquidation.

(11) The claims referred to in subsection (10) rank equally and abate in equal proportions, if necessary.

(12) In the sixth place, after the free residue has been applied as set out in subsections (10) and (11) the balance thereof must be applied in paying –

- (a) any tax on persons or the incomes or profits of persons for which the insolvent was liable under any Act of Parliament in respect of any period prior to the commencement of liquidation, whether or not that tax has become payable after that date;
- (b) any amount payable by the insolvent under any Act of Parliament by way of interest, in respect of any period prior to the commencement of liquidation, in respect of any tax referred to in paragraph (a);
- (c) in the case of an insolvent partnership, so much of any tax due and payable by any partner as is referable to the taxable income derived by him or her from the partnership, the amount so referable being deemed

to be a sum which bears to the total amount due by him as tax the same ratio as his or her taxable income derived from the partnership bears to his total taxable income.

(13) In the seventh place the balance of the free residue must, subject to any maximum amount in terms of a bond, be applied in payment of the proved claims of creditors who are holders of a general bond over movables or a special bond over movables with a general clause, registered by Registrar of Deeds, in their order of preference with simple interest from the commencement of liquidation to the date of payment at the rate of interest prescribed in the Prescribed Rate of Interest Act, or a higher rate of interest by virtue of a lawful stipulation agreed upon in writing.

(14) In the eighth place any balance of the free residue must be applied in payment of the concurrent claims of creditors proved against the estate, in proportion to the amount of each claim.

(15) When the concurrent claims have been paid in full, any balance of the free residue must be applied in payment of simple interest on such claims from the commencement of liquidation to the date of payment, in proportion to the amount of each such claim.

(16) The interest referred to in subsection (14) must be calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act, unless the amount of the claim bears interest at a higher rate of interest by virtue of a lawful stipulation agreed upon in writing.

(17) An employee of the debtor is entitled to payment in terms of subsection (2)(a) even though he or she has not proved a claim against the insolvent estate in respect thereof, but the liquidator may require the employee to submit an affidavit indicating the amount due to him or her.

### **Costs incurred in respect of legal services**

**76.** (1) Subject to the provisions of subsection (2), costs incurred to engage the services of legal practitioners to perform legal work on behalf of the estate except costs awarded against the estate in legal proceedings, is not subject to taxation by the Taxing Master of the Court if the liquidator has entered into any written agreement in terms of which the fees of any legal practitioner will be determined in accordance with a specific tariff.

(2) Notwithstanding subsection (1), if –

- (a) the liquidator has not entered into an agreement under subsection (1); or
- (b) there is any dispute as to the fees payable in terms of such an agreement,

the costs must be taxed by the Taxing Master of the Court or, where the costs are not subject to taxation by that Taxing Master, such costs must be assessed by the Council of the Law Society defined in section 1 of the Legal Practitioners Act, 1995 (Act No. 15 of 1995).

(3) No bill of costs based upon an agreement entered into under subsection (1) may be accepted as cost of liquidation of the estate, unless such bill is accompanied by a declaration under oath or affirmation by the liquidator stating that–

- (a) he or she had been duly authorized by either the creditors or the Commissioner, as the case may be, to enter into such an agreement;
- (b) any legal work specified in such bill has been performed to the best of his or her knowledge and belief;
- (c) any disbursements specified in such bill have been made to the best of his or her knowledge and belief; and
- (d) to the best of his or her knowledge and belief, the legal practitioner concerned has not overreached him or her.

(4) Notwithstanding anything to the contrary contained in this Act, the Commissioner may disallow any costs incurred under this section if the Commissioner is of the opinion that any such costs are excessive, unnecessary, incorrect or improper or that the liquidator acted in bad faith, negligently or unreasonably in incurring any such costs.

(5) If it appears to the Court that a legal representative or legal adviser has, with intent to benefit himself or herself, improperly given legal advice or acted with intent to benefit himself or herself, whether for or against an insolvent estate, or has caused any unnecessary expense in that regard, the Court may order that such expense or any part thereof must be borne by that legal representative or legal adviser personally.

## **PART 10**

### **SPECIAL PROVISIONS RELATING TO THE SALE OF PROPERTY BELONGING TO THE INSOLVENT ESTATE**

#### **Non-compliance with provisions of Act in sale of property of insolvent estate**

**77.** (1) If property of an insolvent estate is sold without the provisions of this Act having been complied with, the sale is void unless the purchaser proves that he or she acquired the property in good faith and for value and, where applicable, that a court order authorising the sale was not a prerequisite.

(2) Any person who disposes of property of an insolvent estate contrary to the provisions of this Act is liable to make good to the estate twice the amount of the loss which the estate might have sustained as a result of any such disposition.

#### **Bona fide sale of property in possession of debtor**

**78.** (1) Subject to the provisions of **section 70**, the owner of movable property which was in the possession or custody of a debtor at the commencement of liquidation of that debtor's estate is not entitled to recover that property if it has, in good faith, been sold as part of that debtor's insolvent estate, unless the owner has, by

standard notice given to the liquidator or the Commissioner before the sale, demanded the return of that property.

(2) If property contemplated in subsection (1) has been sold as part of the insolvent estate, the former owner of the property may recover from the liquidator, before the confirmation of the liquidator's account as contemplated in **section 109** the net proceeds of the sale of that property, unless he or she has recovered that property from the purchaser, and thereupon he or she loses any right to reclaim the property as contemplated in subsection (1).

### **Persons incompetent to acquire property from insolvent estate**

**79.** The liquidator or an auctioneer employed to sell property of the insolvent estate or an employer, employee or associate of such liquidator or auctioneer may not acquire any property of the insolvent estate unless the acquisition is authorised by an order of the Court.

## **PART 11**

### **MEETINGS AND QUESTIONING OF INSOLVENT AND OTHER PERSONS**

#### **First meeting of creditors**

**80.** (1) A liquidator of an insolvent estate appointed in terms of **section 50** must convene by notice in the *Gazette* a first meeting of creditors of that estate to be held within 60 days of his or her appointment.

- (2) (a) The notice referred to in subsection (1) must-
- (i) state the date, time and place of the meeting;
  - (ii) state the matters that will be dealt with; and
  - (iii) be published in the *Gazette* not less than 14 days before the date fixed for the meeting.

(3) The liquidator must, at least 14 days before the date fixed in the *Gazette* for the holding of the first meeting of creditors of the insolvent estate-

- (a) give notice of the first meeting of creditors to the employees, if any of the debtor-
  - (i) by affixing a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or
  - (ii) if there is no access to the premises by the employees, by affixing a copy to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the date of the application;
- (b) send by liquidator's notice to the insolvent, to every creditor of the debtor whose name and address is known to the liquidator or which he or she can reasonably obtain and to the head office of every trade union which has notified the liquidator that it represents employees of the debtor-
  - (i) a copy of the inventory contemplated in **section 59(6)**;
  - (ii) a copy of the valuation contemplated in **section 59(11)**;
  - (iii) a copy of the report contemplated in **section 63(1)**;
  - (iv) a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting;
  - (v) a copy of the notice contemplated in subsection (1);
  - (vi) any composition which is to be considered.

(4) The liquidator must on or before the second working day before the date determined for the meeting of creditors lodge with the Commissioner or a magistrate who is to preside at the meeting -

- (a) a copy of the report contemplated in **section 63(1)**;
- (b) a copy of the documents referred to in subsection (3); and
- (c) an affidavit containing a list of the names and addresses of the creditors to whom the documents referred to in subsection (3) have been sent.

(5) The first meeting of creditors may deal with any one or more of the following -

- (a) proof of claims against the estate;
- (b) questioning of any person in terms of the Act;
- (c) considering of the report of the liquidator;
- (d) nomination and appointment of one or more co-liquidators;
- (e) considering of a composition;
- (f) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the estate.

(6) If the liquidator is unable to convene a meeting in the manner contemplated in subsection (1) he or she must obtain the Commissioner's permission to convene the meeting within the time determined by the Commissioner.

(7) If the liquidator fails to convene a meeting as contemplated in subsections (1) or (6), the Commissioner may take any steps he or she deems necessary to force the liquidator to convene a meeting of creditors of the insolvent estate.

(8) If the majority in value or number of creditors voting at the meeting rejects the liquidator's report the liquidator must submit a report to an adjourned or subsequent meeting or refer the report to the Commissioner who may give such directions with regard to the report as he or she deems appropriate.

### **Special meeting of creditors**

**81.** (1) The liquidator may at any time but must convene a special meeting of creditors of the insolvent estate-

- (a) if requested thereto by not less than one fourth in value of creditors who have proved claims against the estate;
- (b) on request of the Commissioner;
- (c) whenever a composition has to be considered; or
- (d) for the proof of claims if requested to do so by a creditor who tenders payment of the costs occasioned by the meeting.

(2) Any one or more of the following matters may be dealt with at a special meeting of creditors:

- (a) The proof of claims against the insolvent estate;
- (b) the questioning of any person in terms of the Act;
- (c) considering of a composition;
- (d) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the insolvent estate.

(3) The liquidator must not less than 14 days before the date set for the meeting referred to in subsection (1) publish in the *Gazette* a notice of the date, time and place of the meeting and the matters to be dealt with.

(4) The liquidator must at least 14 days before the date determined in the *Gazette* for the holding of the meeting-

(a) give notice of the first meeting of creditors to the employees, if any of the debtor-

(i) by affixing a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or

(ii) if there is no access to the premises by the employees, by affixing a copy to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the date of the application;

(b) send by liquidator's notice to every creditor whose name and address are known to him or her or which he or she can reasonably obtain and to the head office of every trade union which has notified the liquidator that it represents employees of the debtor, the following documents, namely-

(i) a copy of any composition which is to be considered;

(ii) a copy of any report contemplated in **section 63(1)** to be considered at the meeting;

(iii) a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting;

(iv) a copy of the notice contemplated in subsection (3).

(5) The liquidator must on or before the second working day before the date set for the meeting lodge with the person who is to preside at the meeting copies of the documents sent to creditors in terms of subsection (4) together with a list of the names and addresses of the persons to whom they were sent.

### **Notice to creditors who have not proved claims**

**82.** (1) The liquidator may at any time after his or her report in terms of **section 63(1)** has been accepted by creditors or the Commissioner by notice in the *Gazette* and in any newspaper with national circulation fix a date after which creditors who have not proved claims against the estate will be excluded from participation in any distribution in terms of an account which will be submitted to the Commissioner within two weeks after that date.

(2) The notice referred to in subsection (1) must be published not less than four weeks before the date so fixed and before such publication a copy thereof must be sent by liquidation's notice to each unproved creditor whose name and address are known to the liquidator or which he or she can reasonably obtain.

### **General provisions relating to meetings of creditors**

**83.** (1) A meeting of creditors must, subject to subsection (9), be convened-

- (a) in the magisterial district where the insolvent had the insolvent's main place of business at the time of liquidation, or
- (b) if the insolvent did not carry on a business or if it is unclear where the insolvent's main business was situated, in the magisterial district where the insolvent had his ordinary residence at the commencement of liquidation; or

(c) if the debtor did not have his ordinary residence within Namibia or it is unclear where he had his ordinary residence, within the magisterial district of the court which issued the liquidation order.

(2) The Commissioner or an officer of his or her office appointed by him or her must, subject to subsection (4), preside at a meeting of creditors convened within a magisterial district in which the Commissioner has an office.

(3) If a meeting of creditors is to take place in a magisterial district where the Commissioner has no office, the magistrate of the district concerned or a person appointed by him or her must, subject to subsection (4), preside at the meeting.

(4) The Minister must ensure that sufficient magistrates who may hold court under the Magistrates' Courts Act, are available to preside over creditors' meetings to be held before the Commissioner or a magistrate, where such a magistrate is required to consider the incarceration of recalcitrant witnesses.

(5) (a) A liquidator may convene any meeting to be held before himself or herself at any place within the magisterial district contemplated in subsection (2).

(b) No questioning may take place at such a meeting and if a questioning must be held or if any person who avers that he or she is a creditor of the insolvent estate demands, before or during the meeting, that the meeting must be held or continued before the Commissioner or a magistrate, the meeting must be held or continued before the Commissioner or the magistrate contemplated in subsection (1).

(c) The liquidator must announce at the meeting when and where the meeting will be continued or convene the meeting to be held before the Commissioner or the magistrate.

(6) The presiding officer at a meeting of creditors must-

- (a) keep a record of the proceedings, which he or she must certify at the conclusion of the meeting; and
  - (b) if he or she is not the Commissioner, send the record by standard notice to the Commissioner.
- (7) A meeting of creditors may, if necessary, be adjourned from time to time.
- (8) A meeting may after an adjournment be presided over by a different presiding officer and a meeting before the Commissioner may be adjourned to take place before a magistrate.
- (9) With the consent of the Commissioner-
- (a) a meeting may be convened in a magisterial district other than the district contemplated in subsection (1); and
  - (b) a meeting may after an adjournment take place at a different place, including a place in another magisterial district.
- (10) The place where a meeting of creditors is held must, subject to **section 87(4)**, be accessible to the public.
- (11) The publication of any statement made by any person or any evidence given at a meeting of creditors is privileged to the same extent as the publication of evidence given in a court of law.
- (12) A meeting of creditors, if duly convened in terms of this Act is deemed to be a meeting of creditors although no creditor or only one creditor or his or her representative attended the meeting personally.

#### **Voting at meeting of creditors**

**84.** (1) Every creditor of an insolvent estate who has proved a claim against the estate is, subject to subsection (3), entitled to vote at a meeting of creditors of the estate.

(2) A creditor may vote on all matters relating to the administration of the estate, but not on matters relating to the distribution of the assets of the estate or the payment of costs of liquidation.

(3) A creditor may not vote -

(a) in respect of any claim which was ceded to that creditor after commencement of the proceedings for the liquidation of the insolvent estate; or

(b) on the question as to whether steps should be taken to contest the creditor's claim or preference.

(4) (a) Voting by creditors takes place according to value except where this Act provides that voting must take place according to number and value.

(b) (i) In the case of voting according to number the number of votes brought out in favour of a resolution and those brought out against the resolution are determined, without taking into account the value represented by the votes.

(ii) In the case of voting according to value the aggregate value of votes brought out in favour of a resolution and the aggregate value of votes brought out against the resolution are determined, without taking into account the number of votes for or against the resolution.

- (5) (a) A secured creditor is entitled to vote on the full value of his or her claim in respect of any matter affecting his or her security or on the election of a liquidator.
- (b) On a matter other than those mentioned in paragraph (a)-
  - (i) a secured creditor may vote only if that creditor had placed a monetary value on his or her security when the creditor proved the creditor's claim or the liquidator has obtained a valuation of the security or the security has been realised.
  - (ii) a secured creditor may vote on the amount (if any) by which the creditor's claim exceeds the proceeds of the realization of the security if that creditor's security has been realized.
  - (iii) if a secured creditor's security has not been realized, that creditor may vote on the amount (if any) by which the creditor's claim exceeds-
    - (aa) the value placed by that creditor on the security; or
    - (bb) the valuation of the security obtained by the liquidator,whichever is the greater.
- (6) A creditor may vote personally or through an agent appointed thereto by that creditor by power of attorney.
- (7) No person may vote as an agent of a creditor, unless that person submits proof of his or her mandate.
- (8) Every resolution taken at a meeting of creditors and the result of the voting on any matter must be recorded in the minutes of the meeting and in so far as a

resolution contains a directive to a liquidator, the resolution is binding upon the liquidator.

(9) The Court may set aside any directive of creditors which infringes the rights of any creditor on application by that creditor, or the liquidator with the consent of the Commissioner, within 90 days of the date of the resolution or such further period as the Court upon good cause shown may allow.

(10) No resolution of creditors that a specific legal practitioner, auctioneer or any other person be employed in connection with the administration of an insolvent estate is binding upon the liquidator, but creditors may by resolution recommend the employment of any such person and if the liquidator does not accept the recommendation the Commissioner's decision in respect of such employment is final.

### **Insolvent to attend meetings of creditors**

**85.** An insolvent must attend all meetings of creditors of his or her insolvent estate of which he or she is notified in writing by the liquidator by standard notice or an adjourned meeting which he or she is directed by the presiding officer to attend, unless he or she is excused in writing by the liquidator, the Commissioner or the person who is to preside at such meeting from attending such meeting or the resumption of such adjourned meeting.

### **Summons to attend meeting of creditors and notice to produce document**

**86.** (1) If the officer who presides or is to preside at a meeting of creditors of an insolvent estate or the Commissioner or magistrate has reasonable ground for believing that a person -

- (a) has or had in his or her possession or custody property belonging to that estate;
- (b) is indebted to that estate;

- (c) is able to give material information on any matter relating to the insolvent or his or her business or affairs, whether before or after the liquidation of his or her estate, or concerning any property which at any time belonged to that estate; or
- (d) has in his or her possession or custody any book, document, or record relating to the insolvent's affairs or his or her property,

he or she may summon that person to appear at a meeting of creditors of the insolvent estate at a time stated in the summons, in order to be questioned in terms of **section 87** and, where applicable, to produce the books, documents, or records specified in the summons.

(2) A summons referred to in subsection (1) must be substantially in the form of **Form E3 of Schedule 1**.

### **Questioning of insolvent and other persons**

- 87.** (1) (a) The presiding officer at a meeting of creditors of an insolvent estate may call upon the insolvent or any person summoned for questioning or the production of any book, document or record in terms of **section 86**, or any other person who is present and who possesses relevant information, to-
- (i) appear before him or her and give evidence;
  - (ii) be questioned on all matters relating to the insolvent or his or her business or affairs, whether before or after the liquidation of the estate, and concerning any property which at any time belonged to the insolvent estate; or
  - (iii) to produce a book, document or record.

- (b) That presiding officer must administer to such person the oath or an affirmation to speak the truth.
- (2) (a) The presiding officer referred to in subsection (1), the liquidator of that estate or a proved creditor on whose request a person was summoned or called upon to testify, or the representative of any of them may question a person who, in terms of subsection (1), is called upon to testify or to produce a book, document, or record.
- (b) The presiding officer in his or her discretion may allow any other creditor to put questions to that person through the presiding officer.
- (3) A person called upon in terms of subsection (1) to testify may be assisted by a representative and that representative may question that person only in so far as it is necessary to clarify answers given by him or her.
- (4) The place where proceedings under this section takes place must be accessible to the public: Provided that if in the opinion of the presiding officer it is necessary for the effective questioning of a person or for the maintenance of good order or the protection of the public interest, the presiding officer may order that-
- (a) the proceedings or any part thereof takes place behind closed doors;
  - (b) any particular person or persons may not be present during any stage of the proceedings; or
  - (c) the proceedings or any part thereof may not be published.
- (5) If a banker is summoned in terms of **section 86** or ordered in terms of **section 89** to produce documents, books or statements or give information, such banker must, notwithstanding the law relating to privilege or confidentiality, produce such documents, books or statements or give such information.

(6) Notwithstanding the provisions of any other law or the common law, but subject to the Court's power to avoid questioning being conducted in an oppressive, vexatious or unfair manner, no person questioned in terms of this section may-

- (a) refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or her; or
- (b) apply for a postponement of the questioning until the criminal or disciplinary proceedings have been finalised:

Provided that evidence given by a person in terms of this section is not admissible against him or her in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged in connection with evidence given during the questioning -

- (i) with perjury;
- (ii) the giving of false evidence under oath or affirmation; or
- (iii) a contravention of **section 91(3)** for refusal or failure to answer lawful questions fully and satisfactorily.

(7) The insolvent must at a questioning under this section be required to declare that he or she has disclosed all his or her affairs fully and correctly.

- (8) The presiding officer at proceedings in terms of this section must-
  - (a) disallow all questions that are irrelevant and may disallow questions that would prolong the proceedings unnecessarily;
  - (b) record the proceedings or cause them to be recorded.

(9) A person who in answer to a summons issued in terms of **section 86** attends a meeting of creditors or a person called upon in terms of this section to testify at such meeting or to produce books, documents, or records including the insolvent, is entitled to the witness fees to which he or she would have been entitled if he or she were a witness in civil proceedings before a court of law.

(10) Subject to the proviso to subsection (6), any evidence given under this section is admissible in any proceedings instituted against the person who gave such evidence and any record of a questioning introduced in such proceedings forms part of the record of the proceedings.

(11) (a) The liquidator may in terms of an agreement with a creditor repay the creditor's costs and expenses in connection with questioning conducted by the creditor if sufficient money is recovered as a result of the investigation.

(b) In the absence of such an agreement the Court or the Commissioner may order that the whole or any part of such costs or expenses form part of the costs of liquidation.

### **Questioning by estate representative**

**88.** (1) The liquidator or any creditor of an insolvent estate may at any time after the liquidation of the debtor's estate apply to the Court or the Commissioner-

(a) that a person known or suspected to-

(i) have in his or her possession any property belonging to the insolvent estate; or

(ii) be indebted to the insolvent estate; or

(iii) be able to give material information regarding the affairs of the insolvent or of his or her property,

be summoned to appear before an estate representative for questioning; and

(b) that a suitable person be appointed as estate representative to carry out the questioning contemplated in paragraph (a).

(2) A creditor who makes an application contemplated in subsection (1) must furnish security to the satisfaction of the Court or the Commissioner for all costs in connection with the questioning.

(3) If the Court or the Commissioner grants an application referred to in subsection (1) the Court or the Commissioner-

(a) must appoint a magistrate or any other person the Court or the Commissioner deems suitable, as estate representative with the assignment to carry out the questioning in terms of this section; and

(b) may summon a person referred to in subsection (1)(a) to appear at a date, time and a place stated in the summons before that estate representative and to produce any books, documents or records in his or her custody or under his or her control relating to the insolvent in order to be questioned with regard to the affairs of the debtor.

(4) A summons referred to in subsection (3) must be substantially in the form of **Form E4 of Schedule 1**.

(5) An estate representative appointed in terms of subsection (3) must administer the oath an affirmation to speak the truth to the person who appears before him or her for questioning.

(6) An estate representative has the power to summons witnesses and to question them and to require the production of documents.

(7) If an estate representative -

- (a) has been appointed by the Commissioner, that representative must, in such manner as the Commissioner may direct, report to the Commissioner; or
- (b) has been appointed by the Court, that representative must, in such manner as the Court may direct, report to the Commissioner and the Court,

on any questioning referred to him or her.

(8) The provisions of **subsections (2), (3), (5), (6), (7), (8) and (9) of section 87** apply with the changes necessitated by the context with regard to the giving of evidence and the production of documents in terms of this section.

(9) A witness who gave evidence in terms of this section is at his or her own cost entitled to a copy of the record of his or her evidence.

(10) A creditor at whose request a questioning is carried out in terms of this section is liable for all costs and expenses incurred in connection with the questioning: Provided that the Court or the Commissioner may order that the whole or any part of such costs or expenses must be reckoned as costs of the liquidation.

(11) A questioning in terms of this section and any application therefor is private and confidential, unless the Court or the Commissioner, either generally or in respect of any particular person, directs otherwise.

**Liquidator may put written questions or call for accounts, books, documents, records or information**

**89.** (1) If in the opinion of a liquidator it would be convenient to obtain information concerning the affairs of the insolvent by means of written questions and answers instead of oral evidence given at a meeting of creditors of the insolvent estate contemplated in **section 86** or a questioning in terms of **section 87** or **section 88**, as the

case may be, the liquidator may by standard notice send such written questions to the insolvent or a creditor of the insolvent estate or to any other person to be answered by him or her.

(2) (a) Questions contemplated in subsection (1) may be put to the insolvent with regard to all matters relating to his or her business or affairs, whether before or after the liquidation of the insolvent's estate, and with regard to any property which at any time belonged to the insolvent estate.

(b) Questions may be put to a creditor of an insolvent estate with regard to a claim proved by that creditor against the estate or a claim offered for proof.

(c) Questions may be put to any other person with regard to -

(i) any transaction which that person had with the insolvent, or

(ii) any property, books, documents or records of the insolvent which such person had in his or her possession within 36 months before the commencement of liquidation of the estate of the insolvent.

(3) (a) Standard notice of the questions contemplated in subsection (1) must be given to the person to whom they are put.

(b) The written answers to the questions must be sworn to or affirmed and sent to the liquidator by standard notice within 14 days after receipt of the questions.

(4) The provisions of subsections (5) and (6) of **section 87** are with the changes necessitated by the context applicable with regard to the written answers to questions referred to in this section.

(5) The answers to questions referred to in this section are regarded as evidence given in terms of **section 87**.

(6) The giving of answers to questions referred to in this section or a refusal to give such answers does not prevent a person from being summoned in terms of **section 86** or from being questioned in terms of **section 87, 88 or 90** and does not absolve a person from the obligation to give evidence when called upon to do so.

(7) A liquidator of an insolvent estate may by standard notice order any person with whom the insolvent or his or her spouse had an account or transactions within 12 months before the date of the liquidation of that insolvent's estate to furnish the liquidator within seven days or such longer period as the liquidator may allow with a statement reflecting-

- (a) the state of the said account; or
- (b) the debits, credits and balance due in respect of the transactions,

during that period of 12 months.

(8) A liquidator may by standard notice order any person whom he or she has reason to believe to be in possession or control of -

- (a) any book, document, record or material information relating to the affairs of the insolvent or his or her spouse, before or after the liquidation of the insolvent's estate; or
- (b) property which belong or had belonged to the insolvent or his or her spouse,

to make the book, document, record information or property specified in the said notice available to the liquidator within seven days of the date of that notice or within such longer time as the liquidator may allow and that person must allow the liquidator or

someone on behalf of the liquidator to make copies of or extracts from any such book, document or record.

### **Questioning by or on behalf of the Commissioner**

**90.** (1) If at any time after the liquidation of an insolvent's estate and before his or her rehabilitation, the Commissioner is of the opinion that the insolvent or a liquidator or any other person -

- (a) is able to give information; or
- (b) is in possession of books, documents or records which the Commissioner considers desirable to obtain,

concerning-

- (i) the insolvent or his or her estate;
- (ii) the administration of that estate; or
- (iii) any demand made against that estate,

the Commissioner may by notice in writing delivered to the insolvent or the liquidator or such other person, summon him or her to appear before the Commissioner or before a magistrate at a place and on a date and time stated in the notice, and to-

- (aa) furnish all the information within his or her knowledge concerning the insolvent or his or her estate; or
- (bb) the administration of that estate; and
- (cc) produce the books, documents or records specified in the notice.

(2) The notice referred to in subsection (1) must be substantially in the form of **Form E5 of Schedule 1**.

(3) (a) The Commissioner may at any time-

(i) appoint a person to investigate the books, documents, records and vouchers of the liquidator; and

(ii) direct the liquidator to deliver to that person or to the Commissioner any book, document, or record relating to or property belonging to the insolvent estate of which he or she is the liquidator.

(b) The reasonable costs incurred in performing such an investigation are, unless the Court otherwise orders, regarded as part of the costs of liquidation.

(c) If the liquidator is removed from office consequent upon such an investigation, those costs must be paid by the liquidator in his or her personal capacity.

(4) After having questioned a person summoned in terms of subsection (1), the Commissioner or the magistrate may deliver to that person a notice to-

(a) appear again before the Commissioner or the magistrate at a place and time stated in that notice; and

(b) furnish such further information or to produce any book, document or record specified in that notice.

(5) (a) A person summoned in terms of subsection (1) may be questioned by the Commissioner or the magistrate presiding at the proceedings.

- (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