


INSOLVENCY LAW

VARIOUS ASPECTS

Slides compiled by 

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EFFECTIVE CONSULTING

- ICE BREAKER (to get set the client at ease and open up consultation)
- GET FORMAL INFORMATION
- FORMALITIES
 - Confidentiality; Fica; Costs; Deposit; Mandate;
- THE STORY (Use open ended questions)
- FORMULATE THEORY OF THE CASE
- SPECIFIC QUESTIONS TO CLARIFY
- REVISE THEORY OF THE CASE
- ADVISE
- CONFIRM INSTRUCTIONS

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TAKING INSTRUCTIONS AND ADVISING

- FORMAL INFORMATION REQUIRED
 - CLIENT FULL PARTICULARS (USE STANDARD CLIENT INFO SHEET AT FIRST CONSULTATION)
 - MARITAL STATUS
 - ADVISABLE: POWER OF ATTORNEY
 - AUTHORIZING YOU/YOUR FIRM TO ACT
 - TARIFF APPLICABLE & INITIAL DEPOSIT
 - FICA (Financial Intelligence Centre Act)
 - Info
 - Warning?
 - IF LEGAL PERSON, WRITTEN RESOLUTION

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AT FIRST CONSULTATION

- **KNOW THE LAW**
- **LISTEN !!!!!**
- **GET AS MUCH INFO AS POSSIBLE**
- **COMMUNICATE THE PROCESS**
- **COMMUNICATE YOUR REQUIREMENTS**
 - HOW CLIENT SHOULD PAY
 - CONSEQUENCES IF CLIENT DOES NOT MAKE INTERIM PAYMENTS

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IDENTIFYING THE PROBLEM AND ADVISING

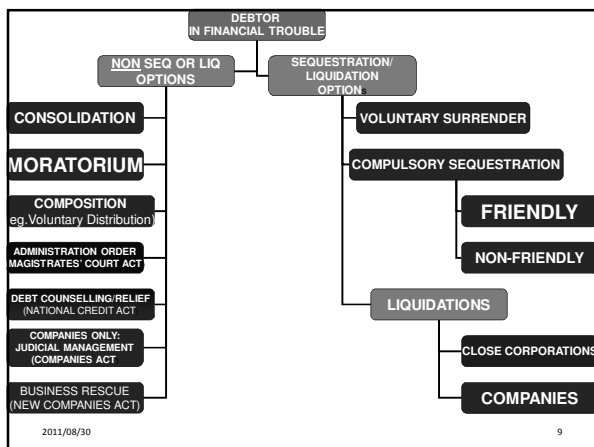
- **WHAT ?**
 - AFTER OBTAINING ALL THE FACTS, ID WHAT LEGAL AID THE CLIENT WANTS:
 - VOLUNTARY SURRENDER
 - COMPULSORY SEQUESTRATION
 - FRIENDLY
 - NOT-FRIENDLY
 - LIQUIDATION
 - REHABILITATION

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IDENTIFYING THE PROBLEM AND ADVISING-WHAT

- SETTING ASIDE IMPEACHABLE TRANSACTIONS
- COMPOSITIONS
- JUDICIAL MANAGEMENT
- BUSINESS RESCUE
- OFFERS OF COMPROMISE
- ADMINISTRATION OF INSOLVENT ESTATE
- OTHER FORM OF AID
 - CONSOLIDATION OF DEBT
 - AGREED MORATORIUM OF CREDITORS
 - NATIONAL CREDIT ACT Debt Relief (Debt Counselling)
 - VOLUNTARY DISTRIBUTION
 - ADMIN ORDER (Magistrates' Court)

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IDENTIFYING THE PROBLEM AND ADVISING

- **WHERE?**
 - HIGH COURT OR MAG COURT
 - WHAT DIVISION OR Jurisdiction
- **HOW?**
 - LONG FORM OF NOTICE OR
 - EX PARTE

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IDENTIFYING THE PROBLEM AND ADVISING

- **WHEN?**
 - WHEN DOES CLIENT NEED THE RELIEF
 - IS IT URGENT OR NOT?
 - REASONS FOR URGENCY
 - HIGH COURT UNIFORM RULE 6(12)
 - MAGISTRATES' COURT RULE 9(14)
 - LUNA MEUBELVERVAARDIGERS V MAKIN 1977(4) SA 135 W
 - » Rules compromise should be on proportion to urgency
 - Ex Parte Reasons
 - Giving of notice will defeat the purpose of relief sought

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ADVISE CLIENT AS TO HIS/HER/ITS INTEREST

- AT FIRST CONSULTATION, ADVISE CLIENTS OF CONSEQUENCES
 - ADVANTAGES
 - DISADVANTAGES
- INSOLVENCY AFFECTS STATUS
- IT DIVESTS INSOLVENT OF ESTATE
- OBLIGATIONS TO PAY BECOME VOID AND MAY BE RECOVERED BY TRUSTEE
- IF FREE RESIDUE INSUFFICIENT, CREDITORS WHO HAVE PROVED CLAIMS MUST PAY THE DEFFICIENCY

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ADVISE CLIENT AS TO HIS/HER/ITS INTEREST

- DIFFERS DEPENDING ON WHETHER CLIENT IS CREDITOR OR DEBTOR
 - eg CREDITOR WANTS TO COLLECT DEBT WHILE DEBTOR WANTS TO EXTINGUISH THE OBLIGATION
 - eg WARN CREDITOR THAT OBLIG. ENDED
 - eg WARN CREDITOR RE DANGER OF CONTRIBUTION
 - eg WARN CREDITOR THAT HE/SHE/IT MIGHT NOT RECOVER DEBT AND/OR COSTS
 - eg WARN DEBTOR RE STATUS CHANGE
 - eg WARN DEBTOR REHABILITATION MIGHT TAKE LONG

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ADVISE CLIENT ON WHAT "SEQUESTRATION COSTS" ARE

- SHERIFF'S CHARGES
- MASTER'S FEES
- COSTS OF SEQUESTER OR WINDING-UP
- + OF DRAFTING STATEMENT OF AFFAIRS
- REMUNERATION OF TRUSTEES/LIQUI.
- COSTS OF SECURITY BOND BY TRUSTEES OR LIQUIDATORS

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ETHICS IN INSOLVENCY LAW

- ATTORNEY HAS DUTY TO ADVISE CLIENT FRANKLY AND HONESTLY
- AVOID ASSISTING CLIENT TO BREAK THE LAW
- IMPRESS ON CLIENT THE NEED TO ABIDE BY THE LAW
- WARN CLIENT NOT TO BREAK THE LAW

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ETHICS IN INSOLVENCY LAW

- THE ATTORNEY IS AN OFFICER OF THE COURT
- IN DRAFTING DOCUMENTS FOR COURT
 - DUTY OF GOOD FAITH
- IN EX PARTE APPLICATIONS
 - DUTY OF **UTMOST GOOD FAITH**
- EXPLAIN THIS TO THE CLIENT

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ETHICS IN INSOLVENCY LAW

- UTMOST GOOD FAITH DUTY IMPLIES:
 - ALL MATERIAL FACTS TO BE DISCLOSED
 - NON-DISCLOSURE OR SUPPRESSION OF FACTS NEED NOT BE MALA FIDE TO INCUR THE PENALTY OF RESCISSION
 - COURT, ONCE INFORMED OF TRUE FACTS, HAS A DISCRETION TO PRESERVE OR SET ASIDE ORDER

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ETHICS IN INSOLVENCY LAW CASE LAW EXAMPLES

- SCHLESINGER V SCHLESINGER 1979 (4) SA 342 (D) AT 349 A_(EX PARTE APPLICATIONS)
- In re THE LEYDSDORP & PIETERSDORP (TVL) ESTATES LTD (IN LIQUIDATION) 1903 TS 254
- BARCLAYS BANK V GILES 1931 TPD 9

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ETHICS IN INSOLVENCY LAW “FRIENDLIES”

- THIS IS A COMPULSORY SEQUESTRATION WHERE OBJECT OF THE CREDITOR IS TO ASSIST DEBTOR
- PERMISSABLE **BUT** ATTORNEY SHOULD NOT ASSIST COLLUSION
- DO NOT ABUSE PROCESS OF COURT
- ATTORNEY SHOULD NOT BE A PARTY TO CREATING AN ACT OF INSOLVENCY

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INTRODUCTION TO INSOLVENCY LAW

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INTRODUCTION- SOURCES

- INSOLVENCY ACT 24 OF 1936 (NB CLS committee on revising)
- COMPANIES ACTS 61 OF 1973 & OF 2008
- CLOSE CORP ACT 69 OF 1984
- COMMON LAW (TEXT BOOKS)
- CASE LAW
- PRACTICE MANUALS OF HIGH COURT DIVISIONS
- BUILD UP INSOLV. PRECEDENTS FILE
- LSSA PLT PRACTICE MANUAL RE PROCEDURE
- CLS INSOLV. LAW COMMITTEE & WEBSITE (REQUEST TO BE LISTED AS A SPECIALIST)
- TEXT BOOKS

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INTRODUCTION- A FURTHER STEP IN DEBT COLLECTION

- AFTER JUDGEMENT CREDITOR HAS VARIOUS REMEDIES eg.
 - WRIT OF EXECUTION
 - GARNISHEE ORDERS
 - EMOLUMENTS ATTACHMENTS
 - ORDER OF PAYMENT BY INSTALMENTS
 - FINANCIAL ENQUIRY
- SEQUESTRATION/LIQUIDATION IS A FURTHER OPTION AVAILABLE TO THE CREDITOR

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INTRODUCTION- THE PURPOSE OF SEQUESTER/LIQUIDATION

- CONCURSUS CREDITORIUM ("COMING TOGETHER OF CREDITORS")+ FREEZING THE ESTATE
- EQUITABLE DISTRIBUTION IN LEGAL ORDER OF PREFERENCE
- MECHANISM FOR ORDERLY EFFICIENT COLLECTION AND REALIZATION
- TO INVESTIGATE IMPEACHABLE TRANSACTIONS (INTERROGATION POSSIBLE) +SET TRANSACTIONS ASIDE

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INTRODUCTION- Insolvency Affects Many Commercial Contracts

- EMPLOYMENT CONTRACT
- LEASES
- SALE OF BUSINESS
- SALE OF IMMOVABLE PROPERTY
- MORTGAGE BONDS
- CREDIT AGREEMENTS

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INTRODUCTION- DEFINITIONS

- **INSOLVENT=**
 - LIABILITIES EXCEED ASSETS
 - THE VALUES MUST BE FAIRLY ESTIMATED
 - THUS LIABILITIES, **FAIRLY ESTIMATED**
 - EXCEED ASSETS, **FAIRLY ESTIMATED**
 - ADVISABLE TO OBTAIN VALUATIONS PRIOR TO APPLICATION
 - FORCED SALE VALUES DIFFER
 - MASTER WILL REQUIRE VALUATIONS IN ANY EVENT cf Voluntary Surrender Example

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INTRODUCTION- DEFINITIONS

- **COMMERCIAL INSOLVENCY=**
 - INABILITY TO PAY DEBTS
 - A COMPANY MAY BE SOLVENT AS FAR AS ASSETS AND LIABILITIES ARE CONCERNED **BUT** IF IT HAS A CASH FLOW PROBLEM IT COULD BE COMMERCIALY INSOLVENT

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VOLUNTARY SURRENDER


AN APPLICATION BROUGHT BY THE DEBTOR HIM/HERSELF

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VOLUNTARY SURRENDER

ALTHOUGH THIS APPLICATION IS BROUGHT BY THE DEBTOR HIMSELF, THE PRIMARY PURPOSE OF SEQUESTRATION IS STILL THE **BENEFIT OF THE CREDITORS**



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VOLUNTARY SURRENDER—HOW IT IS PRESENTED TO COURT

- ALWAYS HIGH COURT
- BY MOTION PROCEEDINGS
- USUAL DOCUMENTS FOR MOTIONS:
 - NOTICE OF MOTION
 - AFFIDAVITS
 - RELEVANT ANNEXURES

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VOLUNTARY SURRENDER—HOW IT IS PRESENTED TO COURT

- AFFIDAVITS ARE THE WAY EVIDENCE IS
PLACED BEFORE COURT:
 - THUS THE RULES OF EVIDENCE APPLY (*eg CAVEAT UNSUPPORTED HEARSAY, ARGUMENTATIVE OR IRRELEVANT ALLEGATIONS*)
 - FOUNDING AFFIDAVIT *IS DEPOSED TO BY APPLICANT*
 - SUPPORTING AFFIDAVIT *IS DEPOSED TO BY PERSONS WITH PERSONAL KNOWLEDGE (WHO CAN CONFIRM)*

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VOLUNTARY SURRENDER

- APPLICANT MUST SHOW THAT
 - 1 APPLICANT IS **FACTUALLY INSOLVENT**
 - 2 SUFFICIENT ASSETS EXIST **IN THE FREE RESIDUE** TO DEFRAY THE COSTS OF THE SEQUESTRATION
 - 3 SEQUESTER. WILL BE TO **ADVANTAGE OF** THE APPLICANT'S **CREDITORS**
 - 4 COMPLIANCE WITH **FORMALITIES ITO SECT. 4 OF INSOLV. ACT 24/1936**
- THESE ARE IN ADDITION TO NORMAL MOTION REQUIREMENTS

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1 APPLICANT IS **FACTUALLY** **INSOLVENT**

- IDENTIFY APPLICANT BY STATING:
 - FULL NAMES
 - OCCUPATION
 - BUSINESS OR RESIDENTIAL ADDRESS
 - MARITAL STATUS
 - IF MARRIED IN COMMUNITY OF PROP:
 - BOTH SPOUSES JOINED; OR
 - ONE SPOUSE ACTS AS APPLICANT & OTHER GIVES WRITTEN CONSENT.
 - APPLICANT HAS PERSONAL KNOWLEDGE

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1 APPLICANT IS **FACTUALLY** **INSOLVENT**

- APPLICANT MUST PROVE INSOLVENCY ie :
- [Section 6(1) Insolvency Act]
 - LIABILITIES EXCEED ASSETS
 - (Commercial insolvency is not sufficient, but a factor the court may consider)
 - CANNOT RELY ON ACTS OF INSOLVENCY
 - STATEMENT OF AFFAIRS SHOULD SHOW INSOLVENCY (But summarize it in affidavit)

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1 APPLICANT IS **FACTUALLY** **INSOLVENT**

- CAUSES OF INSOLVENCY—SET OUT THE FACTS
 - NB MUST SHOW INSOLVENCY CAUSED BY MISFORTUNE AND **NOT FRAUD OR DISHONESTY OF INSOLVENT** (Court will not assist dishonest/reprehensible behavior)
- LIABILITIES INCLUDE OBLIGATIONS AS SURETY AND CO-PRINCIPAL DEBTOR
(Millman ...NNO v Master Bond Participation Bond Trust Managers (PTY) Ltd (under curatorship)... 1997 (1) SA 113 (C))

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2 SUFFICIENT ASSETS EXIST **IN FREE RESIDUE**

- Section 6(1) Insolvency Act
 - ALLEGE APPLICANT OWNS SUFFICIENT ASSETS TO PAY COSTS OF SEQUESTRATION
 - CAPE - THE VALUE OF FREE RESIDUE MUST BE MORE THEN R20 000
 - cf. Ex Parte Anthony & Others 2000(4) SA 116 (CPD)
 - Costs must be proved by expert
 - CAVEAT: PREFERENT CLAIMS eg SARS

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2 SUFFICIENT ASSETS EXIST **IN FREE RESIDUE**

- THE FREE RESIDUE IS THAT WHICH IS NOT SUBJECT TO ANY RIGHT OF PREF.
- PROOF OF LIMITING OF COSTS IF NECESSARY eg.
 - ATTORNEY LIMITING FEES; OR
 - SOMEONE ELSE CONTRIBUTING TO COSTS
- NB to apply local High Court PRACTICE MANUAL GUIDELINES or DIRECTIVES of WCHC Consolidated Practice Notes.

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3 **ADVANTAGE TO CREDITORS**

- ADVANTAGE=
 - REASONABLE PROSPECT THAT MONEY BENEFIT TO CREDITORS
- ACTUAL ADVANTAGE MUST BE MENTIONED (eg. Free residue will result in 60c in the Rand benefit)
- ACTUAL ADVANTAGE MUST BE EXPLAINED (eg. Show calculation)

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3 **ADVANTAGE TO CREDITORS**

- DISTINGUISH BETWEEN **ASSET HELD**
 - SECURED
 - PREFERENT & **LEGISLATION**
 - CONCURRENT CREDITORS **GENERAL**
- COURT WILL ONLY ACCEPT ADVANT. IS PRESENT WHERE IT IS CLEAR THAT **CONCURRENT CREDITORS** WILL ALSO BENEFIT
 - but see Fesi v Absa Bank 200(1) SA 116 CPD
 - (Majority creditor in value has strong influence.)

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ORDER OF PREFERENCE

- **INITIAL COSTS**
 - COSTS OF MAINTAINING & REALIZING ASSETS
 - TRUSTEES REMUNERATION IRO ASSET
 - (TARIFF in schedule 2)
 - TRUSTEES COSTS IN GIVING SECURITY
 - MASTER'S FEES
 - TAX ON IMMOVABLE PROPERTY DUE BEFORE SEQ OR UP TO TRANSFER

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ORDER OF PREFERENCE

- **SECURED**
 - ENRICHMENT LIENS
 - LIENS OVER IMMOVABLE PROPERTY
 - SPECIAL MORTGAGES OVER
 - BOND OVER LAND
 - NOTARIAL BOND OVER SPECIFIC GOODS (s1 of Security by Means of Movable Property Act 57/1993)
 - Not a General Notarial Bond
 - LANDLORD'S HYPOTHEC (period limited depending on circumstances-3 MONTHS IF RENT PAYABLE MONTHLY OR SHORTER)
 - PLEDGE
 - LIENS OVER MOVABLE PROPERTY (Including debtor and creditor lien)

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ORDER OF PREFERENCE

- **PREFERENT CLAIMS**
 - FUNERAL EXPENSES up to R300 (Insolvent if death before first account to Master; spouse or child if within 3 months of seq.)
 - DEATH-BED EXPENSES up to R300 (Insolvent if death before first account to Master; spouse or child if within 3 months of seq.)
 - COSTS OF SEQUESTRATION
 - TAXED COSTS OF EXECUTION
 - STATUTORY OBLIGATIONS
 - TAX RE EMPLOYEES REMUNERATION
 - SALARY OR AMOUNTS DUE TO EMPLOYEES
 - 2 MONTHS PRIOR TO SEQ.
 - BONUS OR LEAVE PAY FOR NOT MORE THAN 21 DAYS
 - INCOME TAX
 - CLAIM SECURED BY GENERAL BOND
- **CONCURRENT CLAIMS**

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Credit Agreements

- The role of the NCA can influence the court's discretion
 - See Ex Parte Ford 2009(3)SOUTH AFRICA WCHC
 - Duty of the court to have regard to the Public Policy reflected in the NCA
 - In the exercise of its discretion
- WHY?
- Compare
 - Investec Bank v Mutemeri & Anor SGHC 2010(1)SA265
 - Naidoo v Absa Bank 2010(4) SA 597 (SCA)
- What is the difference between Ex Parte Ford & Naidoo?

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Credit Agreements(2)

- NCA
 - S129(1)(b)
 - “may not commence any legal proceeding to enforce the agreement”
 - S130(1)&(2)
 - “...enforce the (agreement)...”
 - S130(3)
 - “proceedings commenced in a court in respect of a credit agreement to which this act applies”
 - S85
 - “any court proceeding in which a credit agreement is being considered”

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3 ADVANTAGE TO CREDITORS

- ADVANTAGES THAT CAN BE STATED:
 - ALL CREDITORS WILL RECEIVE MENTIONABLE DIVIDEND IF SURRENDER ACCEPTED WHEREAS BENEFIT DOUBTFUL IF NOT ACCEPTED (ie a comparison)
 - SEQ. WILL PREVENT ONE CREDITOR BENEFITTING TO THE PREJUDICE OF OTHER CREDITORS

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3 ADVANTAGE TO CREDITORS

- ADVANTAGES THAT CAN BE STATED:
 - IF DEBTOR UNDERTAKES TO MAKE PART OF HIS SALARY AVAILABLE FOR DISTRIBUTION TO CREDITORS (WHERE HE WILL HAVE A SURPLUS OF INCOME)
 - *Ex Parte Veitch 1965 (1) SA 667 (W) 668*
 - BOOK DEBTS OF INSOLVENT COULD BE COLLECTED MORE EFFECTIVELY BY THE TRUSTEE

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3 ADVANTAGE TO CREDITORS

- ADVANTAGES THAT CAN BE STATED:
 - INSOLVENCY WILL BRING CERTAINTY THAT INSOLVENT CANNOT CONTRACT INTO FURTHER DEBTS AND SO DIMINISH THE DEBTORS ESTATE
 - PROCESS OF ADMINISTRATION MIGHT LEAD TO RECOVERY OF ASSETS (cf VOIDABLE OR UNDUE PREFERENCES)

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3 **ADVANTAGE TO CREDITORS**

- ONUS TO PROVE ADVANTAGE IS MORE STRENUOUS FOR SURRENDER THAN FOR COMPULSORY SEQUESTRATION APPLICATION (where “reason to believe there will be adv. To creditors” is required)

Ex parte Steenkamp 1996(3)SA 822 (W)

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4 **FORMALITIES ITO SECT. 4** OF INSOLV.ACT 24/1936

- APPLICANT MUST SHOW COMPLIANCE WITH THE FOLLOWING FORMALITIES:
 - 1 PUBLICATION OF NOTICE OF SURRENDER IN GOV. GAZETTE AND NEWSPAPER [Section 4(1)] - Form A in Schedule 1 to the Act
 - 2 NOTICE TO CREDITORS - per registered post. [Section 4(2)] (Annex a confirmatory affidavit by applicant's attorney stating that this has been done) with documentary proof (registered slips thereof)

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4 **FORMALITIES ITO SECT. 4** OF INSOLV.ACT 24/1936

- 3 COMPLETION OF STATEMENT OF AFFAIRS TOGETHER WITH ITS ANNEXURES [Section 4(3)] and verified under oath by Applicant
- 4 LODGEMENT THEREOF WITH MASTER IN DUPLICATE (and Magistrate - where applicable) [Section 4(4) & (5)] to lie open for inspection for 14 ordinary days. (Forms B in Schedule 1 to the Act)
- 5 SWORN VALUATION OF PROPERTY

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4 **FORMALITIES ITO SECT. 4** OF INSOLV.ACT 24/1936

- 6 CERTIFICATE OF MASTER (AND MAGISTRATE) THAT STATEMENT OF AFFAIRS HAS LAIN OPEN FOR INSPECTION FOR A PERIOD OF 14 DAYS [Section 4(6)] with/without objection
- 7 Employment
- 8 SARS
- 9 NO SECURITY IS TO BE LODGED WITH THE MASTER

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OTHER NECESSARY COMPONENTS

- A STATEMENT OF APPLICANT'S
 - SALARY AND
 - OTHER INCOME
- THE PRAYERS REQUESTING THAT
 - VOLUNTARY SURRENDER BE ACCEPTED,
 - THE ESTATE SEQUESTERED &
 - PLACED IN THE HANDS OF THE MASTER
 - APPLICATION COSTS=COSTS OF THE SEQUESTRATION
- NB USUAL HIGH COURT PLEADINGS LAYOUT

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SUPPORTING DOCUMENTS

(Annexed to Founding Affid. OR Supporting affid. of attorney who attended to formalities)

- 1 **TEARSHEETS FROM GOVERNMENT GAZETTE AND NEWSPAPER** IN WHICH NOTICE OF SURRENDER WAS PUBLISHED - only the full page constitutes a “tearsheet”, the relevant part must be clearly marked.
- 2 COPY OF **STATEMENT OF AFFAIRS**
- 3 **AFFIDAVIT re NOTICE TO**
 - **CREDITORS**, INCLUDING REGISTERED SLIPS AND COPY OF NOTICE
 - SARS
 - LABOUR
 - Registered Trade Union
 - Notice board/front gate/door
- 4 **SWORN VALUATION** IF REQUIRED BY MASTER

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SUPPORTING DOCUMENTS

(Annexed to Founding Affid. OR Supporting affid. of attorney who attended to formalities)

- 5 **CERTIFICATE FROM MASTER AND, WHERE NECESSARY, FROM MAGISTRATE** STATING -
 - a statement of affairs has lain for inspection
 - b whether objections have been lodged
- 6 IF APPLICANT IS A PARTNERSHIP, **RESOLUTION** BY PARTNERS **OR VERIFYING AFFIDAVIT** BY EACH PARTNER
- 7 **REPORT FROM MASTER**, SHOULD HE WISH TO MAKE ONE (Cape Practice)NBNBNBNB

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SUPPORTING DOCUMENTS

(Annexed to Founding Affid. OR Supporting affid. of attorney who attended to formalities)

- 8 IF **FREE RESIDUE** CONSISTS OF **CASH, CERTIFICATE BY MASTER** THAT CASH DEPOSITED WITH HIM (FS practice)
- 9 **ANY OTHER DOCUMENT REFERRED TO** IN AFFIDAVIT eg.
 - Writ of execution, or
 - summons or
 - return of service

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VOLUNTARY SURRENDER PROCEDURE

1 TAKING INSTRUCTIONS

- DRAW UP **STATEMENT OF AFFAIRS**, VERIFIED UNDER OATH
- MAKE COPIES THEREOF FOR MASTER (in duplicate), MAGISTRATE (where applicable), COURT, COUNSEL OR ATTORNEY WITH RIGHT OF APPEARANCE AND TO KEEP
- NBNB DELIVER TO MASTER AND COURT PRIOR TO PUBLICATION

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VOLUNTARY SURRENDER PROCEDURE

2 COMPLY WITH STATUTORY FORMALITIES

- DRAFT NOTICE OF SURRENDER
- PUBLISH IT IN GOVERNMENT GAZETTE AND RELEVANT NEWSPAPER
- LODGE STATEMENT OF AFFAIRS IN DUPLICATE WITH MASTER AND MAGISTRATE (if necessary)

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VOLUNTARY SURRENDER PROCEDURE

- DELIVER OR POST BY REGISTERED POST COPIES OF NOTICE OF SURRENDER TO ALL KNOWN CREDITORS
- OBTAIN SWORN VALUATIONS IF REQUIRED BY MASTER
- AFTER 14 DAYS UPLIFT STATEMENT OF AFFAIRS TOGETHER WITH CERTIFICATE OF MASTER AND MAGISTRATE (where applicable)

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VOLUNTARY SURRENDER PROCEDURE

3 PREPARE EX PARTE APPLICATION

- DRAFT APPLICANT'S AFFIDAVIT AND ATTEND TO HIS SIGNATURE THEREON
- DRAFT SUPPORTING AFFIDAVIT DEALING WITH COMPLIANCE WITH FORMALITIES AND ATTEND TO SIGNATURE THEREOF
- ENSURE THAT ALL NECESSARY ANNEXURES ARE ANNEXED TO AFFIDAVIT

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VOLUNTARY SURRENDER PROCEDURE

- DRAFT NOTICE OF MOTION (No revenue stamp required any more)
- MAKE COPIES FOR MASTER, COUNSEL, TO KEEP (Court gets original)
- FILE APPLICATION WITH REGISTRAR AND SERVE COPY (with case number) ON MASTER

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VOLUNTARY SURRENDER PROCEDURE

- 4 PROCEDURES CONTINUED
- BRIEF ATTORNEY OR COUNSEL TO APPEAR
 - ATTEND COURT
 - UPLIFT COURT ORDER
 - ADVISE YOUR CLIENT AND RENDER YOUR ACCOUNT

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TIME LIMITS

[Section 4(1), 4(2), 4(6)]

- PUBLICATION OF NOTICE OF SURRENDER IN GG AND NEWSPAPER (circulating in district where applicant resides or, if a trader, district where principal place of business is or was situated)
- NOT MORE THAN 30 DAYS AND NOT LESS THAN 14 DAYS BEFORE THE DATE UPON WHICH APPLICATION WILL BE MADE TO COURT.

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TIME LIMITS

[Section 4(1), 4(2), 4(6)]

- 2 LODGEMENT STATEMENT OF AFFAIRS WITH MASTER AND MAGISTRATE **BEFORE OR ON DATE MENTIONED IN NOTICE**
- 3 STATEMENT MUST LIE OPEN FOR INSPECTION FOR AT LEAST 14 ORDINARY DAYS BEFORE HEARING

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TIME LIMITS

[Section 4(1), 4(2), 4(6)]

- 4 WITHIN 7 DAYS AFTER PUBLICATION IN GG THE NOTICE MUST BE DELIVERED/POSTED TO KNOWN CREDITORS PER REGISTERED POST
- 5 FILE AND SET DOWN APPLICATION ACCORDING TO EXISTING PRACTICE OF THE DIVISION

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GENERAL

- 1 CALCULATION OF TIME
- ...Section 4(1) "No more than 30 days and not less than 14 days before date of hearing" - **Count back from date of hearing, excluding date of hearing but including date of publication in GG,**
 - ordinary days, not Court days.
 - Date of Application is date stipulated in Notice to Surrender.

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GENERAL

- ...Section 4(2) "Within a period of 7 days" - Count on from date of publication in GG (not newspaper) including date of publication, ordinary days.
- ...Section 4(6) "for a period of 14 days" - Includes the first day mentioned in Notice of Surrender, as the date from which the statement of affairs will lie for inspection (ordinary days).

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TIME LIMITS

[Section 4(1), 4(2), 4(6)]

- A NOTICE NOT PUBLISHED WITHIN THESE TIME LIMITS, IS INVALID AND CONSEQUENTLY THE APPLICATION FOR VOLUNTARY SURRENDER WILL BE DISMISSED
- (cf Ex Parte Oosthuysen 1995 (2) SA 694 (T) - court refused application because notice was published 39 days before court date)

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FAILURE TO COMPLY WITH SECTION 4(1) AND 4(2)

- Sect4 PROVISIONS ARE PEREMPTORY
- BUT NON-COMPLIANCE CAN IN CERTAIN INSTANCES BE CONDONED ito SECTION 157(1):
 - IF A FORMAL DEFECT HAS NOT CAUSED A SUBSTANTIAL INJUSTICE, THE PROCEDURAL STEP IN QUESTION IS VALID. THE TEST IS 3 PRONGED:

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FAILURE TO COMPLY WITH SEC 4(1) AND 4(2)

- Did it cause prejudice to creditors?
- If so, can it be cured by an appropriate order of Court eg. Postponement linked to further publication of notice.
- If not, the defect is fatal and cannot be condoned

2011/08/30

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FAILURE TO COMPLY WITH SECT. 4(1)&(2)

- 2 With regard to the interpretation of section 157(1), Ex Parte Anderson 1995 (1) SA 40 (SECLD)
- 3 Contra: Kritzinger v Moreletta Motorhawe-Projek 1994(2) SA 717 (T) - the periods laid down by Section 4(1) are not peremptory.

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CONSEQUENCES OF PUBLICATION OF NOTICE OF SURRENDER

- 1 SALES IN EXECUTION OF PROPERTY OF APPLICANT'S ESTATE ARE STAYED - Section 5(1) - but a creditor may still attach the debtor's assets in execution. (The Master can authorise sale in execution of property worth under R5000-00. The Court can authorise sales of property worth in excess of R5000-00. The Court/Master will direct how the proceeds are to be applied.)

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CONSEQUENCES OF PUBLICATION OF NOTICE OF SURRENDER

- 2 ONCE PUBLISHED IN GG AND NEWSPAPER, NOTICE CANNOT BE WITHDRAWN WITHOUT WRITTEN CONSENT OF THE MASTER - Section 7(1)
- 3 IF DEBTOR DOES NOT PROCEED WITH VOLUNTARY SURRENDER OF HIS ESTATE, SUCH PUBLICATION IS REGARDED AS AN ACT OF INSOLVENCY Section 8(f)
- 4 MASTER CAN APPOINT A *CURATOR BONIS* TO TAKE CONTROL OF ASSETS OF APPLICANT - Section 5(2) (Although he is not obliged to do so)

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CONSEQUENCES OF PUBLICATION OF NOTICE OF SURRENDER

- 5 MASTER MAY DIRECT THAT A SWORN VALUATION OF ANY PROPERTY BE OBTAINED - Section 4(4)
- 6 NOTICE LAPSES IF THE COURT REFUSES TO ACCEPT THE SURRENDER OR IF THE NOTICE IS WITHDRAWN, OR IF THE DEBTOR FAILS TO APPLY FOR SURRENDER WITHIN 14 DAYS AFTER THE ADVERTISED DATE (Section 6(2))

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CHECK LIST OF MATTERS TO BE DEALT WITH IN FOUNDING AFFIDAVIT

- 1 APPLICANT
 - FULL NAMES
 - OCCUPATION
 - DOMICILE
 - MARITAL STATUS
- 2 INSOLVENCY
 - ACTUAL INSOLVENCY. (Section 6). GIVE SHORT RESUMÉ OF STATEMENT OF AFFAIRS

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CHECK LIST OF MATTERS TO BE DEALT WITH IN FOUNDING AFFIDAVIT

- 3 CAUSES OF INSOLVENCY
 - “By misfortune without fraud or dishonesty on my part”
 - Annexure VII of Statement of Debtor’s Affairs [Form B in First Schedule]
- 4 PUBLICATION OF NOTICE OF SURRENDER
 - Section 4(1) read with Form A in First Schedule:

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CHECK LIST OF MATTERS TO BE DEALT WITH IN FOUNDING AFFIDAVIT

- Government Gazette
 - Newspaper
- 5 NOTICE TO CREDITORS
 - [Section 4(2)]
 - Per registered post &
 - REMEMBER SARS & LABOUR
 - 6 STATEMENT OF AFFAIRS
 - Section 4(3)(5) read with Form B in First Schedule:

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CHECK LIST OF MATTERS TO BE DEALT WITH IN FOUNDING AFFIDAVIT

- Sworn valuation of property if required by Master [Section 4(4)]
- Lodged for inspection as required

7 CERTIFICATES BY

- Master
- Magistrate (if applicable)

8 SUFFICIENT FREE RESIDUE

- [Section 6(1)]
- In Western Cape at least R20 000-00 BUT see Ex Parte Anthony
- In Gauteng see Practice Rule F2

2011/08/30

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CHECK LIST OF MATTERS TO BE DEALT WITH IN FOUNDING AFFIDAVIT

9 ADVANTAGE TO CREDITORS

- [Section 6(1)]

10 PRAYERS

- [Section 6(1)]
Newspaper

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80

VOLUNTARY SURRENDER OF A **PARTNERSHIP**[Section 3(2) and Section 13 read with definition of "debtor" in Section 2]

1 ALL PARTNERS WHO RESIDE IN RSA MUST APPLY JOINTLY, EXCEPT PARTNERS EN COMMANDITE (ANONYMOUS PARTNERS)

2 EACH PARTNER MUST AT THE SAME TIME APPLY FOR THE ACCEPTANCE OF THE SURRENDER OF HIS PRIVATE ESTATE, EVEN IF IT IS NOT INSOLVENT

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VOLUNTARY SURRENDER OF A PARTNERSHIP[Section 3(2) and Section 13 read with definition of "debtor" in Section 2]

3 NOTICE OF INTENTION TO SURRENDER MUST BE GIVEN iro EACH PRIVATE ESTATE AS WELL AS THE PARTNERSHIP ESTATE

4 STATEMENTS OF AFFAIRS MUST BE PREPARED AND LODGED iro EACH PRIVATE ESTATE AND THE PARTNERSHIP ESTATE

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VOLUNTARY SURRENDER OF A PARTNERSHIP[Section 3(2) and Section 13 read with definition of "debtor" in Section 2]

5 ALL CREDITORS OF THE PARTNERSHIP AND OF EACH PARTNER MUST BE NOTIFIED OF THE APPLICATION

6 THE RELIEF SOUGHT MUST REFER TO THE SEQUESTRATION OF THE PARTNERSHIP ESTATE AS WELL AS THE SEPARATE ESTATES OF THE PARTNERS

2011/08/30

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VOLUNTARY SURRENDER OF A PARTNERSHIP[Section 3(2) and Section 13 read with definition of "debtor" in Section 2]

7 NO NECESSITY TO OBSERVE THE REQUIREMENTS FOR SURRENDER OF THE INDIVIDUAL PARTNERS' ESTATES, APART FROM THE PROCEDURAL ONES, SINCE THE SEQUESTRATION OF THEIR ESTATES IS IN ANY EVENT COMPULSORY UNDER THE ACT

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FLOW CHART

- 1 TAKE INSTRUCTIONS FROM CLIENT TO APPLY FOR THE VOLUNTARY SURRENDER OF HIS ESTATE
- 2 ADVISE CLIENT ON RISKS
- 3 TAKE DEPOSIT OF APPROXIMATELY R3000-00
- 4 COMPLETE DRAFT STATEMENT OF AFFAIRS
- 5 ASCERTAIN SUITABLE DATE FOR APPLICATION
- 6 PREPARE NOTICE OF SURRENDER FOR PUBLICATION IN
 - NEWSPAPER
 - GOVERNMENT GAZETTE

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FLOW CHART

- 7 ARRANGE FOR PUBLICATION OF NOTICE OF SURRENDER
- 8 FINALIZE STATEMENT OF AFFAIRS AND HAVE SAME SIGNED AND ATTESTED TO, AND MAKE COPIES THEREOF
- 9 HAND IN STATEMENT OF AFFAIRS AT MASTER'S OFFICE (duplicate) AND MAGISTRATES' OFFICE, if applicable
- 10 OBTAIN TEAR SHEETS OF NEWSPAPER AND GG PUBLICATION OF THE NOTICE OF SURRENDER

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FLOW CHART

- 1 1 MAIL COPIES OF NOTICE OF SURRENDER TO KNOWN CREDITORS PER REGISTERED POST
- 1 2 PREPARE FOUNDING AFFIDAVIT FOR APPLICANT IN SUPPORT OF APPLICATION
- 1 3 UPLIFT CERTIFICATE BY MASTER THAT THE STATEMENT OF AFFAIRS HAS LAIN OPEN FOR INSPECTION
- 1 4 UPLIFT SIMILAR CERTIFICATE BY MAGISTRATE, IF APPLICABLE
- 1 5 ARRANGE FOR SIGNING AND ATTESTING OF AFFIDAVIT

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FLOW CHART

- 1 6 COMPLETE NOTICE OF MOTION (Ex parte)
- 1 7 AFFIX REVENUE STAMPS
- 1 8 MAKE THREE COPIES OF COMPLETE APPLICATION WITH ANNEXURES
- 1 9 SERVE APPLICATION ON MASTER
- 2 0 FILE ORIGINAL WITH THE REGISTRAR
- 2 1 INSTRUCT COUNSEL OR ATTORNEY WITH RIGHT OF APPEARANCE TO MOVE AND ARGUE THE APPLICATION
- 2 2 ATTEND COURT

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FLOW CHART

- 2 3 REPORT TO CLIENT
- 2 4 UPLIFT BRIEF AND PAY COUNSEL
- 2 5 UPLIFT COURT ORDER
- 2 6 PREPARE BILL OF COSTS FOR TAXATION
- 2 7 ASCERTAIN WHO WAS APPOINTED TRUSTEE
- 2 8 DESPATCH CONSENT TO TAXATION (Rule 70(4)(b)) FOR SIGNATURE BY TRUSTEE
- 2 9 SUBMIT BILL OF COSTS FOR TAXATION TO TAXING MASTER
- 3 0 SUBMIT TAXED BILL TO TRUSTEE FOR PAYMENT

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- 3 1 ACCOUNT TO CLIENT WHEN PAYMENT IS RECEIVED

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ADMINISTRATION ORDER

- SECTION 74 of the Magistrates' Court Act contains a similar but less expensive procedure where the Applicants debts don't exceed R50 000-00.
- Draft Bill on Administration to replace section 74 under discussion.
- Debt Relief ito NCA also possible for credit agreements (Unlimited Jurisdiction)

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INSURANCE POLICIES

- SECTION 39(1) INSURANCE ACT : A LIFE POLICY 3 YEARS OR OLDER ON THE DATE OF SEQUESTRATION, DOES NOT FALL INTO THE ESTATE
- ONLY THE SURRENDER VALUE PORTION WHICH EXCEEDS R30 000 FALLS INTO THE INSOLVENT ESTATE

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INSURANCE POLICIES

- THE VALUE OF THE POLICY IS TO BE DETERMINED AS AT THE DATE OF SEQUESTRATION
 - Sackstein en 'n Ander NNO v Smith en 'n Ander 1995 (4) SA 1029 (O)
 - Brink v Kitshoff NO 1996(6) BCLR 752 (CC)
(sect 44(1)&(2) of Insurance Act invalid due to unconstitutionality)

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INSURANCE POLICIES

- REMEMBER INSURANCE POLICIES HAVE VALUE THAT COULD INFLUENCE ADVANTAGE TO CREDITORS

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IMPEACHABLE TRANSACTIONS

- 1 Section 26 - Dispositions without value
- 2 Section 27 - Antenuptial contracts
- 3 Section 29 - Voidable preferences
- 4 Section 30 - Undue preferences
- 5 Section 31 - Collusive dealings
- 6 Section 34 - Sale of Business

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COMPULSORY SEQUESTRATION

ON APPLICATION BY CREDITOR/S

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APPLICANT MUST SHOW

- He has an ESTABLISHED CLAIM against the debtor
- DEBTOR
 - Is actually INSOLVENT OR
 - Has committed an ACT OF INSOLVENCY
- REASON TO BELIEVE Sequestration will be to the ADVANTAGE OF CREDITORS

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ACTS OF INSOLVENCY

- SECTION 8(a)
 - MUST PROVE
 - Debtor ABSENCE/DEPARTURE from SA or dwelling
 - WITH INTENT TO EVADE/DELAY PAYM OF DEBTS
 - NB TO MEET ONUS
 - ALLEGE FULLEST POSSIBLE INFO ON DEBTOR
 - MOVEMENTS
 - INTENTION (eg Debtor taken large sum of money or disposed of assets or failed to keep appointment to pay)

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ACTS OF INSOLVENCY

- DEBTOR'S ORIGINAL DEPARTURE MAY BE INNOCENT, BUT HE MAY THEREAFTER FORM THE INTENTION TO STAY AWAY TO EVADE PAYMENT OF HIS DEBTS
- NOT ESSENTIAL FOR THE DEBTOR TO LEAVE THE RSA - SUFFICIENT IF HE "DEPARTS FROM HIS DWELLING" OR "OTHERWISE ABSENTS HIMSELF"
- THE WORDS "OTHERWISE ABSENTS HIMSELF" SUGGESTS THAT A DEBTOR CAN COMMIT THIS ACT OF INSOLVENCY BY RETIRING WITHIN HIS DWELLING AND REFUSING TO SEE HIS CREDITORS

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ACTS OF INSOLVENCY

- WHAT WOULD ONE DO ABOUT SERVICE OF THE APPLICATION ON THE DEBTOR WHERE ONE IS RELYING ON Sect8(a) AND ONE IS UNABLE TO DEBTOR HIM FOR THE PURPOSE OF SERVING THE APPLICATION?
 - Can ask the court to direct AN ALTERNATIVE MANNER OF SERVICE.
 - Can **satisfy the court** on affidavit that the respondent has been absent from his usual place of RESIDENCE and BUSINESS [See Section 11(2) - Court may direct that affixing to or near outer door is sufficient service]

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ACTS OF INSOLVENCY

- SECTION 8(b) (two separate acts)
 - 1 WRIT OF EXECUTION SERVED ON DEBTOR **PERSONALLY AND HE FAILS**
 - TO PAY THE JUDGMENT DEBT; **AND**
 - INDICATE SUFFICIENT DISPOSABLE PROPERTY TO SATISFY THE WRIT
 - 2 WRIT **NOT PERSONALLY** PRESENTED TO DEBTOR **BUT IT APPEARS** FROM THE SHERIFF RETURN OF SERVICE THAT SUFFICIENT DISPOSABLE PROPERTY NOT FOUND

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ACTS OF INSOLVENCY

- SECTION 8 [c]
 - WHERE DEBTOR
 - MAKES OR ATTEMPTS DISPOSITION OF ANY OF HIS PROPERTY
 - WHICH HAS OR WOULD HAVE THE EFFECT OF PREJUDICING CREDITORS
 - Thus intention not important as with 8[d]; OR
 - PREFERRING ONE CREDITOR ABOVE ANOTHER

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ACTS OF INSOLVENCY

- SECTION 8 (d)
 - WHERE DEBTOR
 - REMOVES OR ATTEMPTS REMOVAL OF ANY OF HIS PROPERTY
 - WITH **INTENT** OF PREJUDICING CREDITORS; OR
 - **INTENT** OF PREFERRING ONE CREDITOR ABOVE ANOTHER

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ACTS OF INSOLVENCY

- SECTION 8 (e)
 - WHERE DEBTOR
 - MAKES OR OFFERS TO MAKE ARRANGEMENT WITH **ANY** OF HIS CREDITORS FOR RELEASING HIM
 - WHOLLY OR
 - PARTIALLY

Application for Debt Review into National Credit Act 2005 might be a sec 8(e) act.

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ACTS OF INSOLVENCY

- SECTION 8 (f)
 - WHERE DEBTOR
 - AFTER PUBLISHING NOTICE OF SURRENDER
 - (WHICH HAS NOT LAPSED [ie within 14 days after advertised court date] OR BEEN WITHDRAWN ITO SECT 6 OR 7 eg consent of Master
 - FAILS TO LODGE THE STATEMENT OF AFFAIRS WITH THE MASTER; OR

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ACTS OF INSOLVENCY

- LODGES MATERIALLY INCORRECT/INCOMPLETE STATEMENT OF AFFAIRS; OR
- FAILS TO APPLY ON THE ADVERTISED DATE

- PROVIDED NOTICE OF SURRENDER HAS NOT LAPSED OR BEEN WITHDRAWN

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ACTS OF INSOLVENCY

- SECTION 8 (g)
 - WHERE DEBTOR
 - GIVES NOTICE IN WRITING TO
 - ANY ONE OF HIS CREDITORS
 - THAT HE IS UNABLE TO PAY ANY OF HIS DEBTS

OFTEN USED IN FRIENDLY SEQUESTRATIONS

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ACTS OF INSOLVENCY

- SECTION 8 (h)
 - WHERE DEBTOR **who is a TRADER**
 - GIVES NOTICE IN GOV GAZETTE ITO SECTION 34(1) OF SALE OF BUSINESS; **AND**
 - IS THEREAFTER UNABLE TO PAY ALL HIS DEBTS

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APPLICATION PAPERS

- NOTICE OF MOTION
- FOUNDING AFFIDAVIT (BY CREDITOR)
- CONFIRMATORY AFFIDAVITS
- CERTIFICATE OF TENDERED SECURITY BY THE MASTER
- MASTERS REPORT

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APPLICATION PAPERS

- MASTERS CONSENT (WHERE NECESSARY)
- ANY DOCUMENTARY PROOF OF ACT OF INSOLVENCY eg.
 - ORIGINAL NULLA BONA RETURN
 - WRITTEN NOTICE OF INABILITY TO PAY DEBTS
 - NOTICE OF ABORTED VOLUNTARY SURRENDER
- DRAFT COURT ORDER
- NB LABOUR(TUs & Employees)&SARS

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CONTENTS OF THE NOTICE OF MOTION

- 1 HEADING REFLECTING
 - RESPONDENT NAME, ID NO, DATE OF BIRTH, MARITAL STATUS, PARTICULARS OF SPOUSE
- 2 SHORT FORM NOTICE PORTION
 - “TAKE NOTICE THAT” OR “BE PLEASED TO...”
- 3 URGENCY PRAYER [RULE6(12)]
- 4 PROVISIONAL SEQUESTRATION

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CONTENTS OF THE NOTICE OF MOTION

- 5 RULE NISI “CALLING RESPONDENT TO SHOW CAUSE, ON A DATE TO BE DETERMINED BY THE COURT, WHY RESPONDENT’S ESTATE SHOULD NOT BE FINALLY SEQUESTERED”
- 6 SERVICE “THAT SERVICE OF THIS ORDER BE EFFECTED PERSONALLY UPON THE RESPONDENT BY THE SHERIFF OF THE COURT”
- 7 COSTS “THAT COSTS BE COSTS IN THE SEQUESTRATION”
- 8 FURTHER/ALTERNATIVE RELIEF

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CONTENTS OF THE NOTICE OF MOTION

- 9 EVIDENCE “TAKE FURTHER NOTICE THAT THE AFFIDAVIT OF... WILL BE USED IN SUPPORT OF THE APPLICATION”
- 10 ENROLL REQUEST “KINDLY PLACE THE MATTER ON THE ROLL ACCORDINGLY”
- 11 ENDING
 - DATE
 - ADDRESSED TO RESPONDENT
 - ADDRESSED TO REGISTRAR
 - ADDRESSED TO MASTER OF HIGH COURT
 - SIGNED BY/OBO APPLICANT

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CHECK LIST-AFFIDAVIT

- 1 THE APPLICANT
 - COMPANY OR OTHER LEGAL PERSON
 - NATURAL PERSON
- 2 PERSONAL KNOWLEDGE
- 3 THE RESPONDENT

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CHECK LIST-AFFIDAVIT

4 JURISDICTION

- RESPONDENT MUST AT DATE OF LODGING OF APPLICATION AT REGISTRAR
 - OWN OR BE ENTITLED TO PROPERTY
 - BE DOMICILED

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CHECK LIST-AFFIDAVIT

4 JURISDICTION

- RESPONDENT MUST AT DATE OF LODGING OF APPLICATION AT REGISTRAR
 - BE ORDINARILY RESIDENT OR HAVE BEEN SO RESIDENT AT ANY TIME DURING 12 MONTHS IMMEDIATELY PRECEDING THE DATE OF LODGEMENT OF APPLICATION
 - BE CARRYING ON BUSINESS (OR DURING 12 MONTHS BEFORE CARRIED ON BUSINESS)

WITHIN COURT’S JURISDICTION

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CHECK LIST-AFFIDAVIT

5 LOCUS STANDI -

- creditor,
- amount (LIQUIDATED CLAIM OF R100 OR MORE),
- cause,
- nature of claim

6 SECURITY FOR CLAIM (IF CREDITOR HAS ANY) SECURITY IS DEFINED IN SECTION 2

7 INSOLVENCY

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CHECK LIST-AFFIDAVIT

8 ADVANTAGE TO CREDITORS (“REASON TO BELIEVE”)

9 SECURITY FOR COSTS (MUST BE GIVEN NOT MORE TEN DAYS BEFORE DATE OF SIGNING Notice of motion)

10 COPY OF PAPERS TO THE MASTER


11 PRAYERS

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INSOLVENCY LAW

VARIOUS ASPECTS

Slides compiled by 

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FLOW CHART

A TAKE FULL INSTRUCTIONS FROM CLIENT TO APPLY FOR THIS SEQUESTRATION OF THE RESPONDENT’S ESTATE AND GIVE ATTENTION TO THE FOLLOWING:

- 1 WHETHER APPLICANT HAS LOCUS STANDI
- 2 WHETHER COURT HAS JURISDICTION OVER RESPONDENT
- 3 WHAT RESPONDENT’S MARITAL STATUS AND MATRIMONIAL PROPERTY SYSTEM IS
- 4 WHETHER THE APPLICANT HOLDS SECURITY FOR CLAIM
- 5 WHETHER THERE IS ANY ADVANTAGE TO CREDITORS
- 6 WHETHER THERE IS A SUFFICIENT FREE RESIDUE TO COVER THE COSTS OF SEQUESTRATION

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FLOW CHART

- B ADVISE CLIENT ON RISKS
- C TAKE DEPOSIT FROM CLIENT OF APPROXIMATELY R10 000-00 (Especially if your firm furnishes security on behalf of the Applicant)+THEN FURTHER AMOUNT FOR COSTS
- D GIVE SECURITY [Section 9(3)]
- E DRAFT AFFIDAVIT FOR APPLICANT WITH THE AID OF THE CHECK LIST

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FLOW CHART

- F ARRANGE FOR ATTESTING OF THE AFFIDAVIT
- G DRAFT NOTICE OF MOTION
- H UPLIFT CERTIFICATE BY MASTER THAT SECURITY HAS BEEN FURNISHED (Certificate to be dated not more than 10 days before date of Notice of Motion)
- I MAKE ADEQUATE COPIES OF APPLICATION AND ANNEXURES (original +4)

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FLOW CHART

- J AFFIX STAMPS TO ORIGINAL (R80)
- K ARRANGE FOR PERSONAL SERVICE ON RESPONDENT - SUBJECT TO AN ORDER AUTHORISING SUBSTITUTED SERVICE, PERSONAL SERVICE IS REQUIRED BECAUSE THE RELIEF CLAIMED WILL AFFECT THE RESPONDENT'S STATUS - [Practice Manual (TPD and WLD) par CB4]
- L SERVE ON MASTER

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FLOW CHART

- M FILE APPLICATION WITH REGISTRAR
- N ASCERTAIN THAT RETURN OF SERVICE IS CORRECT / DRAFT AFFIDAVIT OF SERVICE IF SOMEONE OTHER THAN THE SHERIFF SERVED THE APPLICATION ON RESPONDENT
- O UPLIFT MASTER'S REPORT AND FILE IT WITH REGISTRAR (if applicable)

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FLOW CHART

- P PAY DEPUTY SHERIFF FOR SERVICE (if applicable)
- Q GIVE INSTRUCTIONS TO COUNSEL AND DELIVER BRIEF
- R ENROL MATTER IF NO NOTICE OF INTENTION TO OPPOSE RECEIVED (Long Form)
- S SET THE MATTER DOWN THE DAY BEFORE BUT ONE (Cape practice)

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FLOW CHART

- T ATTEND COURT WHEN RULE NISI ISSUED - PROVISIONAL ORDER IS USUALLY GRANTED FOR A RETURN DAY +4 WEEKS AWAY
- U REPORT TO CLIENT
- V UPLIFT BRIEF AND PAY COUNSEL
- W UPLIFT PROVISIONAL SEQUESTRATION ORDER FROM REGISTRAR

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FLOW CHART

- X MAKE COPIES AND ARRANGE FOR SERVICE OF PROVISIONAL SEQUESTRATION ORDER ON RESPONDENT BY THE SHERIFF
- Y ASCERTAIN THAT RETURN OF SERVICE FOR PROVISIONAL SEQUESTRATION ORDER IS CORRECT AND PERUSE INVENTORY COMPLIED BY DEPUTY SHERIFF

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FLOW CHART

- Z IF THE COURT ORDERED NOTICE TO CREDITORS BY REGISTERED POST, MAKE SURE THIS IS DONE
- A A MAKE SURE THAT ORIGINAL PROVISIONAL SEQUESTRATION ORDER AND ORIGINAL RETURN ARE IN COURT FILE
- B B FILE AN AFFIDAVIT CONFIRMING NOTICE SENT TO CREDITORS. ANNEX REGISTERED POST SLIPS TO AFFIDAVIT

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FLOW CHART

- C C PAY DEPUTY SHERIFF FOR SERVICE
- D D GIVE INSTRUCTIONS TO COUNSEL TO APPEAR ON RETURN DATE AND DELIVER BRIEF
- E E ATTEND COURT WHEN PROVISIONAL ORDER IS CONFIRMED
- F F REPORT TO CLIENT
- G G UPLIFT ORIGINAL ORDER

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FLOW CHART

- H H UPLIFT COUNSEL'S BRIEF AND PAY HIM
- I I DRAFT BILL OF COSTS FOR TAXATION
- J J ASCERTAIN WHO WAS APPOINTED AS PROVISIONAL/FINAL TRUSTEE
- K K DISPATCH CONSENT TO TAXATION [Rule 70(4(b))] FOR HIS SIGNATURE
- L L SUBMIT BILL OF COSTS FOR TAXATION
- M M CLAIM COSTS FROM TRUSTEE AND ACCOUNT TO CLIENT

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Insolvency Practical re defendant and other creditors possibility

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COMPULSORY SEQUESTRATION WHAT CAN OPPOSING PARTIES DO RE RETURN DATE

- RESPONDENT MAY
 - OPPOSE the Application ON RETURN DATE
 - APPLY TO **ANTICIPATE THE RETURN DATE** ON 24 HOURS NOTICE TO THE "PETITIONING" CREDITOR
 - FOR THE PURPOSE OF DISCHARGING THE PROVISIONAL ORDER OF SEQUESTR.
- SECT 11(3)

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COMPULSORY SEQUESTRATION
WHAT CAN OPPOSING PARTIES DO RE
RETURN DATE

- OTHER CREDITORS MAY
 - INTERVENE ON THE RETURN DATE
 - WHY WOULD A CREDITOR WANT TO INTERVENE?
 - TO BRING ANY FACTS IT DEEMS NECESSARY TO THE COURTS ATTENTION
 - TO PROCEED WITH THE APPLICATION WHEN THE ORIGINAL APPLICANT WISHES TO WITHDRAW

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ATTORNEY AT LAW

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COMPULSORY SEQUESTRATION
WHAT CAN OPPOSING PARTIES DO RE
RETURN DATE

- INTERVENTION
 - INTERVENING CREDITOR MUST PROVE
 - CLAIM
 - REASON FOR INTERVENTION (“substantial”)
 - ADVANTAGE TO CREDITORS
 - HOW
 - REPRESENTATIVE APPEAR ON RETURN DATE AND ADVISE
 - CAN GIVE NOTICE OF INTENTION TO INTERVENE (IF ENOUGH TIME)

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CAUTIONARY NOTES ON PROCEDURE

- BE SURE TO CHECK THE COURT PRACTICE NOTES OF YOUR PARTICULAR DIVISION REGARDING:
 - MANNER AND TIMING OF SERVICE OF PROVISIONAL SEQUESTRATION
 - MANNER AND TIMING OF PUBLICATION OF PROVISIONAL ORDER IN NEWSPAPER/GOVERNMENT GAZETTE

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CAUTIONARY NOTES ON PROCEDURE

When you extend the Rule Nisi, you must give notice of the extended return day to the respondent and interest parties. Allow sufficient time for the sheriff to effect service. Stander vs Stander 1997 (3) SA 922 (c)

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COMPOSITIONS

- 1 WHEN
 - 1 COMMON LAW COMPOSITION
 - 2 COMPOSITION UNDER INSOLVENCY ACT
- 2 PROCEDURE
 - 1 TRUSTEE FEELS CONCURRENT CREDITORS WILL ACCEPT OFFER
 - 2 TRUSTEE FEELS CONCURRENT CREDITORS WILL NOT ACCEPT OFFER

ETTIEENNE BARNARD
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COMPOSITIONS

- 3 MEETING OF CREDITORS
- 4 MAJORITIES
- 5 EFFECTS

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REHABILITATION OF THE INSOLVENT

ENDING THE INSOLVENT STATUS

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AS IN MOST INSOLVENCY LITIGATION

DISCRETION
OF THE COURT
IS THE KEY FACTOR

EXCEPT ITO SECT127(A) WHICH CREATES AUTOMATIC REHABILITATION
AFTER 10 YEARS FROM PROVISIONAL DATE OF SEQUESTRATION
(UNLESS COURT HAS ON APPLICATION ORDERED OTHERWISE)

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JURISDICTION IS VESTED IN

- THE COURT OF THE MASTER WHO HAS CUSTODY OF THE INSOLVENT ESTATE RECORDS
- BASICALLY THIS MEANS THE COURT WHICH GRANTED THE SEQUESTRATION ORDER

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LOCUS STANDI

- APPLICATION TO COURT MAY BE MADE BY:
 - THE INSOLVENT PERSONALLY
 - DULY AUTHORIZED AGENT OF INSOLVENT (ONLY IF INSOLVENT RESIDES OUTSIDE RSA)
 - WIDOW/WIDOWER/FORMER SPOUSE OF AN INSOLVENT WHERE THEY WERE MARRIED IN COMMUNITY OF PROPERTY

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DURING CONSULTATION

- ADVISE CLIENT
 - THAT COURT HAS A DISCRETION
 - FULL DISCLOSURE SHOULD BE MADE
 - REPORTS USUALLY HAVE TO BE OBTAINED FROM
 - 1 THE MASTER WHO SUPERVISED THE INSOLVENCY
 - 2 THE TRUSTEE OF THE INSOLVENT ESTATE

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SIX SCENARIOS WHERE APPLICATION MUST BE MADE

- 1 AFTER CREDITORS HAVE ACCEPTED STATUTORY COMPOSITION [S124(1)]
 - MASTER MUST **CERTIFY** 75% OF ALL CREDITORS (ie includes creditors who did not prove claims) HAVE ACCEPTED A COMPOSITION OF
 - 50c IN THE RAND OR MORE OF EVERY CLAIM PROVED
 - BUT MASTER **NEED NOT RECOMMEND**

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SIX SCENARIOS WHERE APPLICATION MUST BE MADE

- ALL COSTS OF
 - SEQUESTRATION AND
 - ADMINISTRATION OF THE INS ESTATE
 MUST HAVE BEEN PAID OR SECURED TO THE SATISFACTION OF THE MASTER
- 3 WEEKS CLEAR NOTICE
 - IN GOV GAZETTE **AND**
 - TO TRUSTEE (BY REG POST OR BY HAND)
- FULL DETAILS OF COMPOSITION
- FULL DETAILS OF CREDITORS WHO DID NOT PROVE CLAIMS(NAMES;ADDRESSES;DETAILS OF CLAIMS)

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SIX SCENARIOS WHERE APPLICATION MUST BE MADE

- 2 [SECTION 124(2)(a)]
 - IF 12 MONTHS ELAPSED AFTER MASTER CONFIRMED FINAL L+D ACCOUNT **AND** INSOLVENT NOT PREVIOUSLY
 - SEQUESTERED
 - CONVICTED OF FRAUDULENT ACT RE EXISTING OR PREVIOUS INSOLVENCY OR ANY OTHER OFFENCE ITO S132-134

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SIX SCENARIOS WHERE APPLICATION MUST BE MADE

- 3 [SECTION 124(2)(b)]
 - IF 3 YEARS ELAPSED AFTER MASTER CONFIRMED FINAL L+D ACCOUNT **AND** INSOLVENT NOT PREVIOUSLY
 - CONVICTED OF FRAUDULENT ACT RE EXISTING OR PREVIOUS INSOLVENCY OR ANY OTHER OFFENCE ITO S132-134

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SIX SCENARIOS WHERE APPLICATION MUST BE MADE

- 4 [SECTION 124(2)(c)]
IF 5 YEARS ELAPSED AFTER INSOLVENT CONVICTED OF ANY FRAUDULENT ACT RE EXISTING OR PREVIOUS INSOLVENCY OR ANY OTHER OFFENCE ITO S132-134
- # IN ALL THE S124(2) SCENARIOS: 6 WEEKS NOTICE IN GOV GAZ & MASTER
- # MASTER RECOMMENDATION NEEDED IF APPLICATION BROUGHT WITHIN 4 YEARS OF SEQUESTRATION

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SIX SCENARIOS WHERE APPLICATION MUST BE MADE

- 5 [SECTION 124(3)]
WHERE NO CLAIMS ARE PROVED
- AFTER 6 MONTHS FROM PROVISIONAL SEQ.
 - PROVIDED NOT
 - PREVIOUSLY SEQUESTERED
 - CONVICTED OF AN INSOLVENCY OFFENCE
 - 6 WEEKS NOTICE IN
 - GOV GAZETTE + MASTER + TRUSTEE

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SIX SCENARIOS WHERE APPLICATION MUST BE MADE

- 6 [SECTION 124(5)]
AFTER FULL PAYMENT OF ALL **PROVED** CLAIMS
- 3 CLEAR WEEKS NOTICE TO MASTER+TRUSTEE WHICH MUST BE AFTER
 - MASTER HAS CONFIRMED FULL PAYMENT DISTRIBUTION PLAN
 - FULL PAYMENT OF SEQUESTRATION COSTS
 - PAYMENT OF INTEREST ON PROVED CLAIM
- NO NOTICE IN GOV GAZETTE REQUIRED

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Security for costs

- R500 for rehab application

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LIQUIDATION OF COMPANIES

- 1 INTRODUCTION
The Companies Act 61 of 1973 applies (Sections 337-426 NB)
- Section 339 states Law of Insolvency applies to the winding up of a company UNABLE TO PAY ITS DEBTS (commercial insolvency sufficient)
 - Section 340 applies the Insolvency Act **voidable dispositions and undue preferences sections** to companies.
 - For CCs see CC Act ss66 to 81
 - 2008 Co Act Incorporates 1973 Act procedure

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LIQUIDATION OF COMPANIES (INTRODUCTION)

- In sequestration proceedings of a natural person, **ACUAL INSOLVENCY** (or an **ACT OF INSOLVENCY**) is required,
- **COMMERCIAL INSOLVENCY** is all one has to prove for the liquidation company in financial trouble

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LIQUIDATION OF COMPANIES

³ WINDING-UP BY THE COURT

- JURISDICTION

- ONLY HIGH COURT
- FOR THE DISTRICT WHERE
 - THE REGISTERED OFFICE OF THE COMPANY IS
 - THE MAIN PLACE OF BUSINESS IS

eg. A company with registered address in Bloemfontein with head office at Bellville

Both High court of Bloemfontein and Cape Town

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LIQUIDATION OF COMPANIES

³ WINDING-UP BY THE COURT

- LOCUS STANDI

- THE APPLICATION MAY BE BROUGHT BY
 - THE COMPANY (SPECIAL RESOLUTION)
 - CREDITORS (INCLUDING PROSPECTIVE OR CONTINGENT CREDITORS)
 - MEMBERS/SHAREHOLDERS (WHO HAVE BEEN AT LEAST MEMBERS FOR 6 MONTHS)

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PRESUMPTION OF INABILITY TO PAY DEBT

- Sec 345 CO act/ sec 69 CC act states that a CO/CC is deemed unable to pay its debts if:
 - a creditor (by cession or otherwise)
 - with a claim of R100 or more
 - serves demand on co/cc to pay debt
 - and the company/CC fails to pay within 3 weeks

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PRESUMPTION OF INABILITY TO PAY DEBT

- CONTENTS OF THE LETTER:
 - Addressed to registered office of company
 - Specify amount owed
 - the cause of action/debt
 - the fact that the amount is due/ payable
 - It must be paid within 3 weeks(co)/21 days(cc)
 - Section 130 of National Credit Act?
 - (If Credit Agreement?)
 - Not applicable to Insolvency
 - Absa v Naidoo 2010(4) SA 597 (SCA)

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PRESUMPTION OF INABILITY TO PAY DEBT

- HOW TO USE THE LETTER:
 - Deliver to registered office of debtor co
 - Let the co acknowledge receipt and
 - date , time and sign for it on a copy
 - after 3 weeks(co)/(cc) draft application for liquidation and
 - annex letter as proof to the founding affidavit

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THANK YOU



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