

# MEETING OF CREDITORS

An insolvent person, in layman's terms, is a person who is unable to pay his/her debts.

**The Insolvency Act, 24 of 1936**, (hereinafter referred to as "the Act") does not define the term "insolvency" specifically, however in terms of South African case law, the test for insolvency is whether the debtor's (which can be an individual, a company, or a close corporation), liabilities exceed their assets. A debtor may be called "insolvent" when his estate is under sequestration or liquidation.

In determining whether a debtor is, in fact, insolvent, the debtor's financial circumstances before sequestration or liquidation should be taken into regard and seen in perspective; the mere inability to pay debts is not necessarily indicative of a state of insolvency however it is an important factor to consider when proving whether the debtor is insolvent.

The term *sequestration* refers to the legal process whereby an individual is declared insolvent by an order of Court, as provided for in Section 8 of the Act.

Liquidation refers to and implies that a company or a close corporation is unable to pay its debts. Liquidation may result from a legal court process, a request by the business creditors, or the company or close corporation may voluntarily decide to be liquidated.

In this article, the writer will focus on the proceedings after an individual (the debtor) has been sequestered by means of a Court Order.

A sequestration order can be obtained by voluntary application to the court by the debtor, or an application can be brought by one or more of the debtor's creditors.

In terms of *Walker v Syfret NO 1911 AD 141 166* the court explained the underlying principle of a sequestration order as follows:

After the sequestration order has been granted it is sent to the Master of the High Court. The Master will arrange a meeting of creditors and will also appoint a provisional Trustee to administrate the insolvent estate and to collect, preserve and realise the assets of the insolvent estate.

The insolvent estate of the debtor vests firstly in the Master and then in the Trustee appointed as such by the Master. The debtor loses control of his estate and no longer has the right to enter into any transactions, which can have the result of prejudicing the estate.

In most circumstances, there will be at least two creditors meetings, which are more commonly known as the First and the Second meeting of creditors. In addition, a special meeting and/or a general meeting of creditors may be held.

### **First meeting**

In terms of section 40 (1) of the Act, on receipt of the sequestration order, the Master of the High Court is obligated to immediately, by way of a notice in the Government Gazette, inform the general public of the assembling of the first creditors meeting.

The main purpose of the first meeting is to provide the creditors an opportunity to prove their claims against the estate, nominate a trustee, give directions to the trustee, interrogate the insolvent and other persons and to consider an offer of composition by the insolvent.

### **Second meeting**

After the first meeting the Trustee, elected at the first meeting and appointed as such by the Master, will arrange the second meeting, and give proper notice. During this meeting, the creditors are requested to provide proof of collections regarding their claims. The trustee will provide a report on the state of affairs where after the creditors will give the trustee directions concerning sale or recovery of assets of the estate.

### **Special meetings**

The meeting is typically convened by the trustee by notice in the Government Gazette, whenever he is required to do so by any interested person, provided that such person tenders to the trustee payment of all expenses to be incurred in connection with any such meeting in order to obtain proof of claims or to question the debtor.

### **General meetings**

A general meeting is called by Trustee if he is required to do so by the Master or by a creditor or creditors representing one-fourth of the value of all the claims proved against the estate by giving notice thereof in the Government Gazette and in one or more local newspaper where the debtor resides or carries on business. The purpose of this meeting will be to obtain direction from creditors relating to any matter or question relating to the administration of the estate.

It is interesting to note that these formalities can be waived and an informal meeting can be held, on the condition that all parties agree thereto

The proceeds realised by property subject to guarantees or collaterals must first be applied to pay the cost of maintaining, conserving and realising that property. If such proceeds are insufficient to cover these costs, the deficiency must be paid into the estate by those creditors who have proved their claims and who rely on the particular security for payment.

The remaining proceeds of any property serving as a security must be applied to satisfy the claims of secured creditors in their order of preference with interest thereon from the date of sequestration to the date of payment.

Any remaining balance is used to pay the unsecured or otherwise non-preferential (concurrent) creditors in proportion to their claims.

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*Anyone with queries to the above can contact us for more information or assistance with cases relating to insolvencies, creditors meetings or sequestration orders.*

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