Short notes on

# CREDITORS HAVE BETTER MEMORIES THAN DEBTORS: WHAT HAPPENS AT THE SEQUESTRATION OF A DEBTOR'S ESTATE

## *Introduction*

The highlight of the sequestration process is to make provision for a "collective debt" collecting process that will ensure a fair distribution of the debtor's assets in circumstances where these assets are insufficient to satisfy all the creditors' claims. This is to ensure that the creditors' interests are protected and that one creditor is not favoured before another. Essentially, the sequestration is for the benefit of creditors and not for the relief of 'harassed debtors.'

## *What is a debtor?*

A debtor is a person or a partnership and, or, the estate of a person or partnership who is said to be insolvent; a natural person. It must be noted that a debtor's estate is sequestrated and not the debtor himself/herself. However, the word insolvent carries two meanings in cases where it is used to describe a debtor. Firstly, it refers to the fact that the debtor's estate has been sequestrated. Secondly, that his/her liabilities exceed his/her assets.

Therefore, the idea of becoming insolvent invokes a much broader meaning than that of just being sequestrated. According to the decision in *Venter v Volkas Ltd* the test for insolvency is whether "the debtor's liabilities, fairly estimated, exceed his/her assets, fairly valued." In other words when person's liabilities exceed his/her assets, in accordance with the test, he/she is financially insolvent.

Legally, a person whose liabilities exceed his/her assets will only be treated as insolvent when his or her estate has been sequestrated by a Court. This means, a person who has been sequestrated by a Court may be referred to as 'legally insolvent.'

## *Voluntary surrender versus compulsory sequestration*

A sequestration order is a formal declaration that the debtor is insolvent. The debtor himself/herself may apply to Court for a sequestration order known as voluntary surrender. In the alternative, the

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debtor's creditor (the person to whom the debtors owe money), can apply to court to sequestrate the debtor. This application is known as compulsory sequestration.

In both instances, a sequestration order will not be granted unless it is shown that the sequestration will be to the advantage of the creditors. The main difference between these two types of sequestration lies in the burden of proof. When a debtor applies for a voluntary surrender of his/her estate, he/she must show that he/she has enough assets that can be realised to pay for the costs of sequestration and most importantly that sequestration will be to the benefit of the creditors. In contrast to compulsory sequestration, the creditor needs to prove that there is reason to believe that sequestration will be to the advantage of the creditors.

### *Court process*

A Court will grant a provisional sequestration order before granting a final order. This means that the sequestrating creditor must approach the court twice. Firstly, to obtain the provisional order of sequestration and the secondly, to have the provisional order accepted and made final. At the first approach, the Court will grant a *rule nisi* calling upon the debtor to show reason why the estate should not be sequestrated finally.

On both occasions, the creditor must establish the requirements under different standards of proof. With the provisional order, the Court must be satisfied that the requirements of sequestration are met at first instance. However, at the final stage of sequestration the Court must be satisfied that the requirements have been proved on a balance of probabilities.

### *Conclusion*

It must be noted that a final order will not be granted without a provisional order being initially granted. As a result of this, should a provisional order that has been granted be nullified, then the final order will suffer the same fate.

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