

DISCUSSION PAPER ON
THE SHERIFF'S ROLE IN SEQUESTRATIONS & LIQUIDATIONS

1. **INTRODUCTION**

- a) As an introduction to this discussion paper, it is important to broadly define what insolvency means in South African law, what the main purpose of a sequestration order is, how such order is obtained and the effect it has on the assets of the insolvent. This will assist in understanding the practical problems that are created for the sheriffs to carry out their obligations thereunder and perhaps offer some solution in their resolution.
- b) **Insolvency in South African law** refers to a status of diminished legal capacity imposed by the courts on persons who, in broad everyday terms, are unable to pay their debts. In legal terms, however, the test utilised by the Court for insolvency is whether or not the debtor's liabilities, fairly estimated, exceed his assets, fairly valued. In addition, the Court must be satisfied that: -
- the debtor owns realisable assets of sufficient value to defray all costs of the sequestration, which, in terms of the Act, must be payable out of the free residue of his estate; and
 - the sequestration will be to the advantage of creditors or there is reason to believe that it will be.

However, a debtor is not treated as insolvent in law unless his estate has been formally sequestrated by an order of court. The order is granted either at the instance of the debtor himself (voluntary surrender) or at the instance of one or more of the debtor's creditors (compulsory sequestration).

- c) **The main purpose of a sequestration order** is to ensure that, when the debtor's assets are insufficient to meet the claims of all his creditors, legal machinery is set in motion that is designed to ensure that whatever assets the debtor has at the time of the order are liquidated and distributed among all his creditors in accordance with a predetermined (and fair) order of preference.

- d) The first step to be taken by a debtor who wishes to **voluntarily surrender** his estate is the publication of a notice of surrender in the Government Gazette and in a newspaper circulating in the magisterial district where he resides (or, if he is a trader, a newspaper circulating in the district where he has his principal place of business). The purpose of the notice is to alert all creditors of the intended application in case they should wish to oppose it. The notice must, *inter alia*, state
- the full names, address and occupation of the debtor;
 - the date upon which, and the particular division of the High Court before which, the application for acceptance of the surrender will be made; and
 - when and where the debtor's statement of affairs will lie for inspection as required by the Act.

Publication of the notice in the Government Gazette and newspaper must take place not more than thirty days, and not less than fourteen days, before the date stated in the notice as the date for the hearing of the application. The purpose of the fourteen-day time limit is to ensure that creditors have sufficient opportunity to peruse the statement of affairs and to decide whether or not to oppose the application. The legislature's objective in imposing the thirty-day limit was to ensure that debtors would not be able to give long notice, months beforehand, and in that way to keep creditors from levying execution and in the meantime dissipate all their assets.

- e) The second way in which a debtor's estate may be sequestrated is by **compulsory sequestration** on application by one or more of his creditors. To have the requisite standing to apply for such a sequestration, a creditor must have a liquidated claim of not less than R100 (or, where the application is by two or more creditors, not less than R200 in aggregate). The court may grant an application for the sequestration of a debtor's estate if it is satisfied, and the applicant creditor has proved
- that the applicant has established a claim which entitles him, in terms of section 9(1), to apply for sequestration of the debtor's estate;
 - that the debtor is in fact insolvent (which would require the applicant to have access to debtor's state of affairs), or has committed an "act of insolvency"; and

- that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

As the application for a sequestration order, the provisional sequestration order and the final sequestration order, affect the status of the debtor they have to be served personally, unless the court directs the sheriff otherwise.

- f) The **effect of sequestration on the assets of the insolvent** is that his assets vest in the Master from the date of sequestration until the trustee is appointed, whereafter the assets vest in the trustee [Section 20(1)(a) – Insolvency Act].

2. **PROBLEM STATEMENT**

- a) What is of concern to the office of the Chief Master is the **non-compliance of Sections 19 and 69 of the Insolvency Act** 24 of 1936. In practice sheriffs are hardly ever, if at all, provided with the sequestration order. It has become general practice that trustees take into possession the assets of the insolvent estate without the sheriff having the opportunity to act in terms of Section 19. The reason for this has to be ascertained. Even in circumstances where the Sheriff is asked to serve the order, the liquidator / trustee has already taken control of the assets and the Section 19 inventory becomes a notional issue. This has often led to a source of corruption in terms of which the costs of the insolvency process escalates alarmingly thereby flying in the face of the purpose of the enactment, namely that the insolvency being to the benefit of creditors.
- b) What is of concern to the Sheriffs is the Master's regular consent in allowing trustees to cancel a Sheriff's sale in execution of the execution debtor's immovable property which occurred prior to sequestration even though such cancellation might not be of benefit to creditors.
- c) The last source of major concern is the abuse of the voluntary notice of surrender by execution debtors in order to avoid the sale of their assets in

execution (especially immovable property) by virtue of the provisions of Section 5 of the Insolvency Act which prohibits the sale of such property in execution after publication of the notice.

Can the sheriff continue with a sale in execution after a notice to surrender an estate has been published in terms of section 5? The Eastern Cape judgment in the *Laetitia Ndema v Absa and Others* allowed the sale to proceed if a suspensive condition was included in the conditions of sale. This suspensive condition determined that the sale would be subject to the successful application to surrender a person's estate. This view was not shared by all the courts who mostly appear to follow the judgment in the matter of *Syfrets v the Sheriff Durban Central* which held that a sale in execution was a once-off occasion. However, the abuse carries on unabated.

3. **SUGGESTED SOLUTIONS**

As Sections 19 and 69(1) of the Insolvency Act as well as Rule 9 of the Rules regulating the conduct of proceedings of the Free State Provincial Division of the High Court are regularly referred in this paragraph, they are, for ease of reference, set out in full hereunder.

Section 19 of the Insolvency Act reads as follows: -

(1) As soon as a deputy-sheriff has received a sequestration order he shall attach, as provided and make an inventory of the movable property of the insolvent estate which is in his district and is capable of manual delivery and not in the possession of a person who claims to be entitled to retain it under a right of pledge or a right of retention or under attachment by a messenger, that is to say—

(a) he shall take into his own custody all books of account, invoices, vouchers, business correspondence, and any other records relating to the affairs of the insolvent, cash, share certificates, bonds, bills of exchange, promissory notes, and other securities, and remit all such cash to the Master;

- (b) he shall leave movable property other than animals in a room or other suitable place properly sealed up or appoint some suitable person to hold any movable property in his custody;*
 - (c) he shall hand to the person so appointed a copy of the inventory, with a notice that the property has been attached by virtue of a sequestration order. That notice shall contain a statement of the offence constituted by section one hundred and forty-two and the penalty provided therefor;*
 - (d) he shall make a detailed list of all such books and records and endorse thereon any explanation offered by the insolvent in respect thereof or in respect of any books or records relating to his affairs which the insolvent is unable to produce;*
 - (e) if the insolvent is present he shall enquire from him whether the list referred to in paragraph (d) is a complete list of the books and records relating to his affairs and record his reply thereto.*
- (1)bis If an insolvent has in reply to the deputy sheriff 's enquiry intimated that the list referred to in paragraph (d) of subsection (1) is a complete list of the books and records relating to his affairs, the books and records referred to in such list shall, unless the contrary is proved, in any criminal proceedings against him under this Act, be deemed to be the only books and records maintained by him.*
- (2) Any person interested in the insolvent estate or in the property attached may be present or may authorize another person to be present when the deputy-sheriff is making his inventory.*
 - (3) The deputy-sheriff shall—*
 - (a) immediately after effecting the attachment, report to the Master in writing that the attachment has been effected and mention in his report any property which to his knowledge is in the lawful possession of a pledgee or of a person who is entitled to retain such property by virtue of a right of retention and shall submit with such report a copy of the inventory made by him under subsection (1);*
 - (b) as soon as possible after the appointment of the trustee, submit a copy of such inventory to him.*
 - (4) A messenger shall transmit to the Master without delay an inventory of all property attached by him which he knows to belong to an insolvent estate.*

- (5) *The deputy-sheriff shall be entitled to fees taxed by the Master according to tariff A in the Second Schedule to this Act and the rules for the construction of that tariff.*
- (6) *The Minister may by notice in the Gazette amend the said tariff A and rules.*

Section 69(1) of the Insolvency Act reads as follows:

- (1) *A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.*

Rule 9 of the Rules regulating the conduct of proceedings of the Free State Provincial Division of the High Court (published under GN 820 in GG 30253 of 7 September 2007) which came into operation on the 1 August 2007 deals with sequestration applications and reads as follows: -

- 9.1 *All cash amounts paid by or on behalf of the respondent in an application for compulsory sequestration or by an applicant for voluntary surrender must be paid into the Guardian's Fund and the Master's report must state whether that has in fact been done.*
- 9.2 *No application for a final sequestration order will be heard unless the Master's report which shall be obtained specifically for such application, has been placed before the court.*

Note: The Master insists that the provisions of section 19(1) of the Insolvency Act regarding an inventory be properly complied with by Sheriffs, and such inventory must therefore be furnished to the Master as soon as possible. The Master will not issue a report before such inventory has been provided to him. If the absence of such inventory has the effect that the rule nisi is not confirmed, an explanation for the absence will have to be provided and a suitable costs order can be considered.

- 9.3 *Every rule nisi in a compulsory sequestration application shall be returnable after four weeks, unless the court otherwise directs.*

- 9.4.1 *All applications for provisional sequestration and voluntary surrender will be approached by this Court on the basis that the costs of sequestration and administration will amount to R20 000. (This amount may be adjusted from time to time.)*
- 9.4.2 *If the applicant is of the opinion that those costs will be less in a particular matter, an estimate thereof must be attached to the application papers and that estimate must be placed before the Master, who shall provide comments thereon to the Court.*
- 9.5 *In applications for rehabilitation all curators shall furnish a copy of their reports to both the Master and the Court, even if they have nothing to bring to the attention of the Master or the Court. In other words, even where they have nothing to report on, they must bring that fact to the attention of the Master or the Court.*

Section 19 is very clear as to the duty of the sheriff on receiving a sequestration order. **The sheriff must attach and make an inventory of the movable property of the insolvent estate:**

- which is in his district;
- which is capable of being delivered from hand to hand;
- which is not claimed by a third party to be held in pledge or in terms of a lien; or
- which has not been attached by a sheriff.

The suggestion by the Chief Master to involve the Sheriffs the moment that the first set of documents are filed with the Master's office, whether on a voluntary or compulsory sequestration, should hopefully ensure that the requirements prescribed under Section 19 are adhered to. The suggestion would be that: -

- a) The SABFS supply the offices of the Masters of the High Court with all the information of Sheriffs countrywide and regularly update it.
- b) The compulsory service, in voluntary sequestrations, of the notice of surrender on the Sheriff in whose jurisdiction the insolvency is going to take place.
- c) The Master of the High Court makes the papers available to the Sheriffs (perhaps electronically through a website?) to enable the Sheriffs to make daily searches and to enable the Sheriff in whose jurisdiction the insolvency is going to take place to immediately mobilise to the prescriptions of Section 19. Where the insolvent's assets are spread nationally, the Sheriff in whose jurisdiction the

insolvency is going to take place would be able to mobilise the Sheriffs of the other affected areas and co-ordinate cross-border co-operation between the affected Sheriffs. The list of assets and their valuation as recorded by the applicant would be of particular importance to the Sheriff as this would be one area where the Sheriff could compare this record with the reality of assets found in the possession or under the control of the insolvent.

- d) The Rules regulating the conduct of Insolvency proceedings of the Free State Provincial Division of the High Court (Rule 9) be adopted nationally, which Rules, *inter alia*, provide that a final sequestration order will not be granted unless the Master's report is placed before the Court and which report is not issued by the Master unless the Sheriff's report and his Section 19 inventory and valuation has been supplied to him.

The Sheriffs are well versed in searching for, inventorising (even by way of electronic recording), taking charge, securing, storing and insuring assets either in their possession or under their control and there appears to be no reason why they cannot perform their enacted role under Section 19.

It is suggested that introductory meetings between the Masters of the High Court and the Sheriffs be held to roll out this process at which: -

- a) The Masters would indicate what information and documentation would be made available to the Sheriffs, depending on the type of sequestration;
- b) The frequency and manner of the information searches to be conducted by the Sheriffs can be determined;
- c) It can be decided whether further provision needs to be made to assist the Sheriff in: -
- i. Searching and taking into custody "books and financial records" of the insolvent; and
 - ii. the attachment of the assets of the insolvent, the taking charge of these assets by way of any of the stipulations of the section, and, where necessary, securing and safeguarding the assets by removal, storage or placing a person in charge of the assets as required by Section 19 [1].
- d) The manner in which the Sheriffs could mentor insolvency practitioners in line with the Department of Justice's new appointment policy.

There is a strong argument for allowing the Sheriffs to get involved beyond the Section 19 implementation. Consideration should be given to curtailing the period between the time when the Sheriff takes possession of the assets and the actual selling process. This could be done by allowing the insolvency practitioner to leave the assets in the Sheriff's possession or control (thereby limiting the removal costs) and allowing the Sheriffs to alienate these assets which, with a capped commission, would be at a cost which is extremely competitive to those charged by the private auctioneers.

The fees to which the Sheriff would be entitled to are prescribed in Tariff A to the Second Schedule of the Insolvency Act. These would have to be revisited and bring them more in line with the prescribes of the "Bloom Report" submitted to the Rules Board which provides for an annual escalation formula. Either way, it is suggested that the Sheriff's insolvency costs must be a first charge on the estate and that they be guaranteed (perhaps by a security bond?) initially by the applicant and, once the order is granted, by the trustee or liquidator.

The SABFS should also give consideration to training Sheriffs to become qualified appraisers. Such qualification would, quite apart from being invaluable to their daily functions, also enable Sheriffs to perform the valuations prescribed under Section 69(1) of the Insolvency Act whilst the assets are, in any event, in the Sheriff's possession or control. This might necessitate revisiting Section 53 of the Sheriffs Act in order to ascertain whether it would require Ministerial approval.

The aforementioned suggestions can perhaps best be summarised by the "to do" lists that were put forward pursuant to the recent deliberations taking place between the Chief Master, the Masters of the various sub-divisions of the High Courts and the Sheriffs, in an attempt to pave the way for a more inclusive **development of the Section 19 procedure** by the role players. These are repeated herein for the purposes of this document: -

MATTERS TO BE ADDRESSED BY THE COURTS

- A. PROVISIONAL ORDERS WITH CLEAR AND UNAMBIGUOUS FORMULATION.
- B. PROPER IDENTITY NUMBERS OF INDIVIDUALS AS WELL AS CIPC REGISTRATION NUMBERS.

- C. IDENTIFIABLE DESCRIPTION OF ALL ALLEDGED ASSETS BELONGING TO THE INSOLVENT.
- D. PROPER IDENTIFIABLE FICA ADDRESSES OF PREMISES AND JURISDICTIONS WHERE ASSETS COULD BE FOUND, INCLUDING THE MOST RECENT FINANCIAL STATEMENTS IN THE APPLICATIONS FOR SEQUESTRATION / LIQUIDATION.
- E. THE NATIONAL IMPLIMENTATION OF PRACTICE RULE 9 OF THE FREE STATE PROVINCIAL DIVISION OF THE HIGH COURT DEALING WITH SEQUESTRATION APPLICATIONS AND, IN PARTICULAR DEALING WITH THE APPLICATION OF SECTION 19 OF THE INSOLVENCY ACT.
- F. PROVISIONAL SEQUESTRATION AND LIQUIDATION ORDERS SHOULD ENABLE SHERIFFS TO REQUEST ANY INFORMATION ON E -NATIS, CIPC, THE REGISTERED ACCOUNTANT OF THE PROVISIONALLY LIQUIDATED COMPANY AND / OR SEQUESTRATED ENTITY ETC.

MATTERS TO BE ADDRESSED BY THE MASTERS

- A. ELECTRONIC ON LINE AVAILABILITY OF INFORMATION TO SHERIFFS IN RESPECT OF UPCOMING INSOLVENCIES.
- B. AUTHORIZATION TO SHERIFFS TO SCRUTINIZE THE CONTENTS OF THE ALLEDGED ASSETS BY MEANS OF ITC SEARCHES AND OTHER RESOURCES TO COMPARE THE ALLEDGED ASSETS TO THE ACTUAL POSITION.
- C. OPEN AND DIRECT ACCESSIBILITY AND COMMUNICATION BETWEEN THE REGISTRARS OF THE DIFFERENT DIVISIONS OF THE HIGH COURTS AND THE SHERIFFS.
- D. FACILITATING THE NATIONAL IMPLIMENTATION OF PRACTICE RULE 9 OF THE FREE STATE PROVINCIAL DIVISION OF THE HIGH COURT DEALING WITH SEQUESTRATION APPLICATIONS AND, IN PARTICULAR DEALING WITH THE APPLICATION OF SECTION 19 OF THE INSOLVENCY ACT.
- E. THE MINUTES OF LIQUIDATION OF CLOSED CORPORATIONS IN THE MAGISTRATES COURTS BE OBTAINED FROM MAGISTRATES.
- F. THE CLARIFICATION ON THE ISSUES PERTAINING TO "DRAFT ORDERS".

MATTERS TO BE ADDRESSED BY THE SABFS

- A. THE TRAINING OF SHERIFFS TO BE SUPPORTIVE OF THE TRANSFORMATION INITIATIVES BY THE CHIEF MASTER IN THE FOLLOWING REGARD:
 - i. TRAIN THE TRAINER COURSE TO FACILITATOR ON THE OPERATIONAL REQUIREMENTS OF INSOLVENCY PRACTITIONERS.

- ii. TRAIN THE TRAINER TO FACILITATORS ON VALUATIONS OF MOVABLES, IMMOVABLES, SHARES, AND OTHER FORMS OF ASSETS BELONGING TO RESPONDENTS.
- B. CAPACITATING SHERIFFS WITH THE BUSINESS SKILLS AND MINDSET TO DEAL WITH LIQUIDATORS AND TRUSTEES.
- C. BROADENING THE COVER OF THE INDEMNITY INSURANCE TO COVER CLAIMS IN RESPECT OF THE SHERIFF'S EXPOSURE IN THE INSOLVENCY ENVIRONMENT.
- D. APPROACH THE HONOURABLE MINISTER OF JUSTICE UNDER SECTION 53 OF THE SHERIFFS ACT TO GET A CLEAR DECLARATION THAT SHERIFFS ARE ABLE TO CONDUCT INSOLVENCY SALES. IT MUST BE A CLEAR DECLARATION WITHOUT ANY POSSIBLE LEGAL DOUBT.
- E. APPROACH THE RULES BOARD ON AN URGENT BASIS TO REVISE THE FEE STRUCTURES PAYABLE TO SHERIFFS CONTAINED IN THE INSOLVENCY ACT IN CONCURRENCE WITH DR BLOOM'S RECOMMENDATIONS.
- F. SUPPLY THE DIFFERENT MASTERS WITH THE PROVINCIAL DEMARCATED APPOINTMENT AREAS OF SHERIFFS.
- G. PROVIDE THE CHIEF MASTER AND INSOLVENCY PRACTITIONERS WITH AN APPROPRIATE OPERATIONAL LEVEL AGREEMENT (OLE). THIS CAN BE NEGOTIATED WITHIN THE CONTEXT OF THE TRANSFORMATION REQUIREMENTS AND EXPECTATIONS OF THE CHIEF MASTER, THE SABFS, SASS AND SANAPS. WHILST THE INSOLVENCY ACT DIRECTS THE STATUTORY ROLE OF THE SHERIFF WITHIN THE INSOLVENCY ENVIRONMENT, THE OLE WILL COVER THE OPERATIONAL ENGAGEMENT OF THE SHERIFF IN THAT ENVIRONMENT.

MATTERS TO BE ADDRESSED BY SHERIFFS

- A. OBTAIN SUFFICIENT BROADBAND BANDWIDTH IN CONCURRENCE WITH ELECTRONIC COMMUNICATION SKILLS AS WELL AS LOGISTICS TO BE ABLE TO COMPLY TO THE LEVEL OF SERVICE DELIVERY TO THE MASTER OF THE HIGH COURT AS WELL AS INSOLVENCY PRACTITIONERS.
- B. LINK TO THE DEPARTMENT OF JUSTICE WEBSITE AND CHIEF MASTER TO SEARCH FOR INSOLVENCIES.
- C. FOLLOW THE CONSECUTIVE STEPS PRESCRIBED BY THE INSOLVENCY ACT ON LINE IN INSOLVENCY MATTERS ON THE SPREADSHEET BEING UPDATED BY THE MASTER.

- D. CLOSE COOPERATION BETWEEN SHERIFFS IS OF PIVOTAL IMPORTANCE IN LOCATING ASSETS IN DIFFERENT JURISDICTIONS BELONGING TO THE SAME INSOLVENT. IN SUCH INSTANCES, THE SHARING OF RESPONSIBILITIES AND / OR STORAGE FACILITIES AS WELL AS AUCTIONEERING SKILLS BECOME PARAMOUNT.
- E. PROVINCIAL SHERIFFS WITH APPOINTMENTS CLOSEST TO THE HIGH COURT SEATS SHOULD BE READILY AND WILLINGLY AVAILABLE TO ASSIST THE MASTER IN THE SORTING OUT THE TEETHING TROUBLES.
- F. INSPECT THE L&D ACCOUNTS BY LIQUIDATORS TO ENLIGHTEN THEMSELVES OF THE PROCEEDS AND NECESSITY OF DELIVERING EFFICIENT SERVICE TO THE LIQUIDATORS

THE LONGER TERM PLANNING OF THE ROLE PLAYERS INCLUDES ENGAGING IN THE LEGISLATIVE PROCESS OF WORKSHOPS ON PROPOSED AMENDMENTS TO VARIOUS PIECES OF LEGISLATION TO STREAMLINE AND HARMONIZE ALL THE RELEVANT ACTS PERTAINING TO INSOLVENCIES INTO A SINGLE ACT.

As regards the **cancellation of Sheriff's sales in execution that occurred prior to sequestration**, it is suggested that the Master's office should be more circumspect when allowing a trustee to cancel the sheriff's immovable sale. The Master should enquire from the trustee:

1. Whether a second or further sale would fetch a better price?
2. What benefit would the delay be to creditors?
3. Whether there would be an escalation of costs and interests on the capital?

If there is no benefit, the sheriff's sale should stand and the sheriff should then account to the trustee for the proceeds after the transfer has taken place. Again, it is suggested that guidelines be developed at the introductory meetings between the Masters of the High Court and the Sheriffs.

Section 5(1) of the Insolvency Act reads: "After the publication of a notice to surrender in the Gazette in terms of section four, it shall not be lawful to sell any property of the estate in question...". Execution debtors often abuse this process in order to avoid the sale of their assets in execution. However, the wording is so clear and direct that the inclusion of the suspensive condition as suggested in the Ndema

Judgment should be discouraged. In addition, the Consumer Protection Act defines a sale in execution as an absolute sale to be completed at the fall of the hammer. Rule 46 of the High Court Rules specifies that a sale in execution is a sale without reserve. The judgment in *Syfrets v the Sheriff Durban Central* was that a sale in execution was a once-off occasion and that the rules of court cannot be interpreted to allow a sheriff – conducting a sequence of sales at different times, under different permutations, extending a sale advertised at a stipulated time and a stipulated location – in pursuance of the conditions of sale, into a process of sale in perpetuity.

Even though the distribution of raw data between the Sheriff and the Master's office will reduce the incidence of collusion and envisages Sheriffs becoming actively involved in Court proceedings initiated by the Master's office where there is a possibility of collusion, it is suggested that the SABFS work with the Master's office towards a possible amendment of the Insolvency Act to prevent the persistent use by debtors of the provisions of Section 5 in order to prevent the sales in execution of the debtors' immovable property from taking place. This suggestion is made even though a debtor who fails to make application to court on the appointed day commits an act of insolvency which entitles a creditor to apply for the compulsory sequestration of his estate.