**INSOLVENT ESTATES IN A NUT SHELL - CREDITORS**

What does it mean to be declared insolvent or to surrender your estate? Exactly what happens in the event that you are actually declared insolvent or the application for the surrender of your estate is granted by the High Court? What happens after the Court Order is issued?

These, and a lot of other questions, are questions that a lot of people have no answers to.  The purpose of this article is to inform the public of the basic process that is followed in an insolvent estate.

First things first – how are you declared insolvent?  There are two ways:
1. Voluntary surrender of your estate – when you are factually insolvent (your liabilities/debts exceed your assets), you can lodge an Application with the High Court that has jurisdiction in your district, for the voluntary surrender of your estate. The High Court will, where it is to the benefit of the general body of creditors, issue a Final Order in terms whereof the surrender of your estate is accepted;
2. Compulsory Sequestration – a creditor of your estate may bring an Application with the High Court for the Compulsory Sequestration of your estate for the purpose of obtaining payment of his debt. The creditor's purpose may be to recover his debt; however the purpose of Sequestration Proceedings is in actual fact to ensure that the estate it is wound up in an orderly fashion and that creditors are treated equally. The High Court will, where it is to the benefit of the general body of creditors, first issue a Provisional Sequestration Order for Sequestration (Rule Nisi) and provide a return date. On the return date interested parties (you or other creditors) are entitled to object to the application and try to persuade the Court not to grant the Final Order for Sequestration. If no objections are lodges, or the Court is satisfied that the objections are not satisfactory to prove that the Order should not be granted, the Final Order for Sequestration will be granted.

It is important to know that when you are married in community of property, the joint estate of you and your spouse is sequestrated. When you are married out of community of property, only your separate estate is sequestrated.

Only the High Court has the authority to grant Sequestration Orders, because these Orders influence a person's status. Once the Order is granted; the insolvent estate vests in the Master of the High Court until such time that a Provisional Trustee is appointed. This means that all assets are deemed to be under the control of the Master until the Provisional Trustee is appointed (see below). The Master is a public servant with the responsibility to control the administration of insolvent, deceased and curatorship estates and trusts.

There are various formalities (requirements) that need to be met before the High Court will grant an Order for the Sequestration of a person's estate; however these will not be dealt with, as the purpose of this article is to explain what happens after you are declared insolvent.

The following process takes place once the High Court accepts the Voluntary Surrender of your estate, or a Provisional Order for Sequestration is granted in the case of a Compulsory Sequestration Application (This process is governed by the Insolvency Act, Act 24 of 1936):

1. Appointment of a Provisional Trustee
The Master has the authority to appoint a Provisional Trustee. Creditors, who have a claim against your estate for an outstanding debt, may recommend (nominate) a person (who is on the Master's panel of Insolvency Practitioners) for the appointment as Provisional Trustee.  This recommendation is lodge in the form of a Requisition.

The Master is not bound by the Requisition and therefore do not have to appoint the recommended Insolvency Practitioner. The Master will however in most cases appoint a Provisional Trustee or Trustees who is (are) nominated in these Requisitions. The Practitioners who are nominated by the majority of creditors in value (amount of the claim) and number (quantity of the nominations received in favour of a specific Practitioner) will be appointed.

2. Provisional Trustee's functions and duties
The Provisional Trustee must interview the insolvent to confirm that his personal details are correct and to determine exactly what the assets and liabilities are (if it was not set out in detail in the Application for Sequestration) and he must then take physical control or supervise the property and affairs of the estate until a Final Trustee is appointed.

The Provisional Trustee may not sell any assets without the authority of the Master or bring or defend legal proceedings without the authority of the Court.

3. The Master of the High Court convenes the First Meeting of Creditors
Upon receipt of the Final Sequestration Order, the Master will proceed to convene a First Meeting of Creditors by giving not less than ten (10) days notice of the Meeting in the Government Gazette.

At this Meeting:
• Any claims lodged by Creditors of your estate with the Provisional Trustee is proved;
• Based on the proven claims, voting can take place. In terms of the votes, a Final Trustee is elected. The Provisional Trustee can be elected to be the Final Trustee or another person can be voted in as the Final Trustee, or the Provisional Trustee, together with another person, can be elected as Final Co-Trustees of your insolvent estate. If no voting takes place, the Master will appoint the Provisional Trustee as the Final Trustee.

4. Appointment of Final Trustee
Once the First Meeting has been closed by the Master, he will proceed with the appointment of the Final Trustee based on the votes, or lack thereof, by issuing a Final Certificate of Appointment in favour of the Trustee(s).

5. Final Trustee convenes the Second Meeting of Creditors
The Final Trustee must convene the Second Meeting within three (3) months of his Final Appointment by giving notice in the Government Gazette and in an Afrikaans and English newspaper that circulates in the district where you live or work.

There is no requirement with regard to the period for which notice must be given, but at least fourteen (14) days before the date of the Meeting, the Trustee must send a Trustees Report, setting out the assets and liabilities of the insolvent estate, and resolutions which should be passed at the Meeting to all the known creditors by registered post.

At this Meeting:
• The Trustee's Report and Resolutions are received to enable the creditors to accept the Report and pass the Resolutions.  The Resolutions are basically passed to extend the Trustee's duties and authorities to enable him to proceed with for example the sale of assets.
• Further claims can be submitted for proof;
• Interrogations can be held in terms whereof you and other persons can be interrogated in order to find assets or more information that will assist the Trustee with the administration of your estate.

6. Assets are sold out of hand or by way of public auction and outstanding debtors are recovered
No assets can be sold before the Second Meeting of Creditors without the consent of the Master.  In the event that the urgent sale of assets is required, the Trustee may lodge an Application for the urgent sale of the assets. In the event that the Master grants his permission, assets may be sold before the Second Meeting in the manner for which the Trustee applied (accept an offer out of hand or sell by way of public auction).

In all other instances, the Trustee only has the authority to sell assets out of hand in the event that the Resolutions are passed at the Second Meeting.  In the event that the Meeting took place, but the Resolutions were not passed, the Trustee may only sell the assets by way of public auctions, unless he requests the Master to pass the specific Resolution that will enable him to accept an offer out of hand.

The assets are sold; the proceeds are collected and deposited into an interest bearing bank account opened in the name of the insolvent estate.

The Trustee also proceeds to collect debt owed to you by requesting the payment thereof in writing. In the event where the debtor does not pay, a Letter of Demand is issued. If he still does not pay, a summons is issued.  These funds are also deposited into the estate bank account as mentioned above.

7. Liquidation and Distribution Account is drafted and lodged with the Master of the High Court
After the sale of the assets and the collection of outstanding debtors, the Trustee proceeds to draft a Liquidation and Distribution Account.  The Account must be lodged within six months from his Final Appointment. In the event that he is not in a position to do so, he may apply for extension of time to lodge the Account.

The Account consists of various "smaller" Accounts and each one deals with something else:
• In the Liquidation Account, the Trustee will reflect the proceeds of each asset that was sold in either an "Encumbered Asset Account" or the "Free Residue Account".

Assets that are reflected in separate Encumbered Asset Accounts are assets that were for example financed by a bank. Certain expenses are deducted from the proceeds, including for example Trustee's Fees, Short Term Insurance, Master's Fees, Security Bond Premiums, advertisement costs, etc. The balance that remains is awarded in the form of a dividend to the specific secured creditor who financed that particular asset. He is referred to as a secured creditor because he has security for his claim in the form of a mortgage bond or instalment agreement, etc.

Assets that are reflected in the Free Residue Account are assets that were not financed. All these assets are reflected in this one Account, certain expenses are also deducted and the balance is awarded to preferent creditors (unsecured creditors who are preferred above other creditors because of a statutory provision, for example SARS) and concurrent creditors (creditors who are not preferent creditors and who do not have any security for their claim in the form of for example a mortgage bond).
• In the Distribution Account all the creditors who proved claims are listed. The amounts they claimed, as well as whether they are secured, preferent or concurrent creditors are reflected.  The dividends (if any) awarded to them in the Liquidation Account are finally reflected.
• In the Contribution Account all the creditors who proved claims are listed in the same way as in the Distribution Account.  The dividends awarded are however not reflected, but the contribution payable by that creditor is reflected.

There is a contribution payable in an estate where there are not enough (or any) assets that were not financed (assets reflected in the Free Residue Account as mentioned above) to cover the administration expenses of the estate. This shortfall amount is payable in the form of a contribution by proved creditors in proportion to the amount of their proved claims.

Concurrent Creditors are always liable to pay contribution.

Secured Creditors are always liable to pay contribution, BUT ONLY on the concurrent portion of their claim in the event where they did not rely solely on their security (mortgage bond). In other words, a Secured Creditor has a secured claim based on the security, and a concurrent claim for the balance of their claim where the value of the asset was not enough to pay their claim in full. It is on this concurrent portion that he is always liable.

Where a Secured Creditor relied on his security and the concurrent portion of his claim was not proved, he is only liable to pay contribution in the event that no concurrent creditors proved any claims and where the Applicant for the Sequestration is not liable or unable to pay his share of the contribution.

Preferent Creditors are liable to pay contribution in proportion to their claims only after all concurrent creditors have paid their contribution and there is still a deficiency and in the event where no Concurrent Creditors proved any claims.

The Creditor who applied for your sequestration is liable for the payment of a proportionate share of the contribution, even if he did not prove a claim.  Only in the event where the Application Creditor is a Secured or Preferent Creditor will he only be liable if no concurrent creditors proved any claims.

8. Liquidation and Distribution Account is advertised to lie open for inspection for a period of fourteen (14) calendar days
Once the Trustee answered any queries the Master might have with regard to the Account and the Master is satisfied with the Account, he will grant his permission and in terms thereof the Trustee will proceed to advertise the Account for a period of fourteen (14) calendar days. The advertisements appear in the Government Gazette and in an Afrikaans and English newspaper that circulates in the district where you live or work.
During this fourteen day period, the Account will lie open for inspection at the Master's Office where your estate is being administered, and the Magistrate's Court in your district.  You and your creditors may then inspect the Account and lodge objections with the Master, Magistrate or Trustee in the event that you or they are not satisfied with the Account.

9. The Master of the High Court confirms the Liquidation and Distribution Account
Only when the Trustee has answered any objections, as mentioned above, to the satisfaction of the Master and the fourteen day inspection period has lapsed, will the Master proceed to confirm the Account. In the event that no objections are lodge, the Master will immediately confirm the Account upon expiration of the inspection period.

10. Confirmation of the Liquidation and Distribution Account is advertised and payments are made and funds recovered in terms of the confirmed Account
Upon receipt of the Master's Confirmation Letter, the Trustee will proceed to advertise that the Account was confirmed and inform that dividends are being paid and contributions (if any) are being collected. The notice of the Confirmation appears only in the Government Gazette.

The Trustee will also immediately proceed to pay all the dividends that were awarded to creditors and any expenses incurred during the administration of the estate by cheque or electronic fund transfer. He will also proceed to send notices to the creditors who are liable to pay contribution requesting payment of the contribution. In the event that they do not make the payment, the Trustee may obtain a writ of execution and attach the creditor's assets to ensure payment of the contribution. The Trustee is only entitled to take his fees upon Confirmation of the Account.

After everything has been paid, the Trustee proceeds to close the estate bank account.

11. Certain post-confirmation requirements are lodged with the Master of the High Court
The Trustee must lodge a full set of bank statements, all paid cheques, as well as proof of payment of all dividends and expenses with the Master. This is to enable the Master to confirm that everyone has been paid and the estate has indeed been finalized.

12. The Master of the High Court issues his Discharge Certificate
Once the Master is satisfied that everything in terms of the confirmed Account has been paid, he will issue his Discharge Certificate.  This Certificate means the administration of the estate has been finalized.

This is a very basic overview of the procedure that is followed when an insolvent estate is administered and many of the insolvent estates are more complicated and there will then be extra procedures followed by the Trustees.  I trust however, that this information will help clarify the situation that arises when you are declared insolvent and help create a better understanding of the procedures that are followed.