

VOLUME: VIII

INSOLVENCY

Part ID: II Sequestration and Attachment of Estate (ss 3-19)

CHAPTER: 42:02

A. Voluntary Surrender (ss 3-7)

3. Circumstances under which an estate may be surrendered

(1) The surrender of an estate may be accepted by the court-

- (a) upon the petition in writing of the debtor, or of his duly authorized agent, setting forth that the debtor is insolvent and tendering the surrender of his estate for the benefit of his creditors;
- (b) upon the like petition of any person in whom is legally vested the administration of the estate of-
 - (i) any deceased debtor; or
 - (ii) any debtor incapable of administering his estate; or
- (c) upon the like petition presented on behalf of a partnership estate and made by the greater number of the partners present or represented in Botswana.

(2) Before accepting the surrender the court may direct the petitioner or any other person to appear and be examined before the court or before a magistrate appointed by the court; and all opposed cases of voluntary surrender shall be heard in the first instance by a magistrate in the district where the parties reside, and the said magistrate shall transmit the sworn evidence taken in such case, together with his report thereon for the consideration of the court.

4. Publication of notice of surrender and lodging of debtor's schedules or statement at Master's office

(1) Before presenting any such petition the petitioner shall cause due notice of surrender, as nearly as may be in the Form A in the First Schedule, to be published in the Gazette, and in any newspaper circulating in the district in which the debtor resides, or, if the debtor is a trader, in the district in which he has his principal place of business, and by means of a notice published at the office of a magistrate in the district in which the debtor resides or has his principal place of business.

(2) Every such publication shall be not less than 14 days prior to the hearing of the petition.

(3) The petitioner shall lodge in duplicate at the office of the Master the debtor's schedules or statement of his affairs.

(4) If the debtor resides or is a trader carrying on business in any district other than the South East District, the petitioner shall also lodge a copy of those schedules at the office of a magistrate of the district.

(5) The schedules referred to in subsection (4) shall be open to the inspection of any creditor at all times during office hours for a period of 14 days from a date to be mentioned in the notice of surrender and, upon the expiration of the notice, the Master shall transmit one set of the schedules to the court.

(6) The schedules referred to in subsection (4) shall be supported by a valuation under oath of the assets of the estate, and that valuation shall, if the Master so directs, be verified by an independent valuation made by a sworn appraiser or such other person as the Master may appoint.

(7) The schedules shall be framed as nearly as may be in the Form B in the First Schedule and shall contain the particulars and shall be verified by the affidavit thereby required, and shall be accompanied by a certificate from a magistrate of the district in which the petitioner resides, other than the South East District, to the effect that the preceding provisions of this have been complied with.

5. Making of sequestration order by the court

The court, on being satisfied that the provisions of section 4 have been complied with and that there are available assets of the estate to an amount sufficient to defray all such costs of sequestration as are by this Act payable out of the free residue, may grant an order placing the estate under sequestration in the hands of the Master.

6. Prohibition of sale of property of estate after publication of notice of surrender

(1) After the publication of the notice of surrender in the Gazette, it shall not be lawful to sell any property of the estate which has been attached under writ of execution or other process in the nature of an attachment, unless the person charged with the execution of the same could not have known of the publication:

Provided that-

(i) the Master, if in his opinion any such property does not exceed P400 in value, or the court, if it exceeds that amount, may order the sale to be proceeded with and direct how the proceeds of the sale shall be applied, and

(ii) the proceeds of any such property already sold shall be retained by the officer charged by law with the execution of legal process and shall not be paid out by him before the application for surrender of the estate has been made and adjudicated upon except upon an order of the court or unless the notice of surrender has been withdrawn under section

7.

(2) After publication of the said notice of surrender in the Gazette, the Master may, upon the request in writing of any creditor who has to his satisfaction guaranteed the additional costs to be incurred, instruct the sheriff or the bailiff to attach the estate of the debtor.

(3) If the notice of surrender is withdrawn, the attachment shall determine and the costs thereof shall be included in the costs of such notice, and all rights of or against the estate shall revive as if such notice had not been given.

(4) After publication of the notice of surrender in the Gazette the Master may-

(a) appoint a curator bonis to take and have the custody of the estate and to exercise in regard to the conduct of any business or undertaking of the debtor such powers of control as may appear to the Master to be desirable; and

(b) direct the sheriff or the bailiff of a magistrate's court to attach the estate of the debtor as if it were an estate under sequestration.

(5) If the court does not accept the surrender, or if the notice of surrender is withdrawn under section 7, then as soon as the Master has certified that provision has been made for the payment by the debtor of all costs and expenses arising out of the exercise of the powers of subsection (4) or of any other provision of this Act, full control of the estate shall be restored to the debtor.

7. Notice of surrender not to be withdrawn without the consent of the Master

(1) No notice of surrender published in the Gazette may be withdrawn without the written consent of the Master.

(2) If it appears to the Master that such notice was published in good faith, and that there is good cause for its withdrawal, he shall certify his consent thereto on payment of the costs of the notice; and notice of the withdrawal and of the consent of the Master thereto shall thereupon be published by the debtor at his own expense in the Gazette and in the newspaper in which the notice of surrender appeared, and thereupon the notice of surrender shall be deemed to have been withdrawn.

(3) If, within 14 days after the date specified in the notice of surrender as the date on which application will be made to the court for the surrender of the estate, the debtor has failed to make application, the Master may publish a notice in the Gazette at the expense of the debtor, cancelling the notice of surrender and as from the date of such publication the notice of surrender shall be deemed to have been withdrawn, and a copy of such notice of withdrawal shall be published at the office of a magistrate in the district in which the debtor resides or has his principal place of business.

B. Compulsory Sequestration (ss 8-16)

8. Acts of insolvency

A debtor commits an act of insolvency-

(a) if, having any property within Botswana, he departs therefrom, or being out of Botswana remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;

(b) if, having against him the sentence of any competent court, and being thereto required by the officer charged with the execution of the same, he does not satisfy the same or point out to that officer sufficient disposable property to satisfy the same, or if it appears from the return made by such officer that he has not found sufficient disposable property;

(c) if he makes any disposition of any of his property which has the effect of prejudicing his creditors or of preferring one creditor above another;

(d) if he removes any of his property with intent to prejudice his creditors or to prefer one creditor above another;

(e) if, except as provided in this Act, he agrees or offers to assign his estate for the benefit of his creditors or any of them, or makes or offers to make any arrangements with his creditors for releasing him wholly or partially from his debts;

(f) if, having published a notice of surrender which has not been withdrawn in the manner aforesaid, he omits to lodge his schedules as required by law, or lodges schedules containing material misrepresentations or omissions, or fails to present his petition to the court within 21 days from the publication in the Gazette of that notice;

(g) if he gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts or if he has suspended payment of his debts;

(h) if he makes default in publishing the notice required by section 121 or if his creditors have, in terms of section 124, declined the assignment of his estate;

(i) if, being a trader, he gives notice in the Gazette in terms of section 34 and is unable to meet the liabilities of his business;

(j) if, a notice of assignment having been published, he omits to lodge his schedules as by law required or his schedules do not fully disclose his debts or property and that omission is material.

9. Petition for sequestration of estate

(1) A creditor (or his agent) who has a liquidated claim for not less than P100, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than P200 against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.

(2) A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition shall be reckoned as a liquidated claim for the purposes of subsection (1).

(3) Every such petition shall contain the following facts-

(a) the amount involved;

(b) the cause and nature of the claim in question;

(c) a statement as to whether the claim is or is not secured, and, if it is, the nature and value of the security; and

(d) the debtor's act of insolvency upon which the petition is based or otherwise the allegation that the debtor is in fact insolvent.

(4) The facts stated in the petition in accordance with subsection (3) shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than 10 days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or, if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

(5) Before any petition is presented to the court in accordance with the provisions of this section, a copy of the petition and of every affidavit confirming the facts stated in the petition shall be lodged with the Master, or, if there is no Master at the seat of the court, with an officer in the public service designated for that purpose by the Master by notice published in the Gazette (in this section referred to as the "designated officer"), and the Master or such designated officer may report to the court any facts ascertained by him which would appear to him to justify the court in postponing the hearing or in dismissing the petition.

(6) The Master or the designated officer, as the case may be, shall transmit a copy of the report referred to in subsection (5) to the petitioning creditor or his agent.

(7) The court may, on consideration of the petition and the Master's or the designated officer's report thereon and of any further affidavit by the petitioning creditor in answer thereto, deal with the petition in accordance with the provisions of section 10 or dismiss the petition or postpone its hearing or make such other order in the matter as in the circumstances appears to be just.

10. Provisional sequestration

Where the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie-

(a) the petitioning creditor has established a claim in accordance with the provisions of section 9(1) against the debtor;

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make a provisional order sequestrating the estate of the debtor.

11. Order of sequestration of estate of individual and of partnership

(1) It shall be competent for the court to include in one sequestration order the estate of a partnership, and the separate estates of the partners; and every fact which is a ground for the sequestration of the estate of a partnership shall be a ground for the sequestration of the separate estate of every partner:

Provided that if the court is satisfied that a partner is willing and able to satisfy the debts of the partnership within a time to be determined by the court, the separate estate of that partner shall not be placed under sequestration by reason only of any fact forming a ground for the sequestration of the estate of the partnership.

(2) Nothing contained in this Act shall affect the rights or liabilities under Roman-Dutch law of partners en commandite or anonymous or other partners who have not held themselves out as ordinary or general partners.

12. Making of provisional order and service of rule nisi upon the debtor

(1) If the court grants a provisional order of sequestration, it shall at the same time grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and to show cause why a final order of sequestration should not be made against his estate.

(2) If the debtor has been absent for 21 days from his usual place of residence and of his business (if any) within Botswana, the court may direct that it shall be sufficient service of that rule if a copy thereof is affixed to the outer door of the building where the court sits and published in the Gazette, or may direct some other mode of service.

(3) Upon the application of the debtor the court may anticipate the return day for the purpose of discharging the order if 24 hours' notice of such application has been given to the petitioning creditor.

13. When provisional order may be set aside or petition dismissed

If, upon the hearing, the petitioning creditor fails to prove his claim or if he fails to prove the act of insolvency with which the debtor is charged, or the court is not satisfied that the estate is insolvent or that it will be to the advantage of the creditors that the estate be placed under sequestration, it may set aside the provisional order and dismiss the petition or require further proof of the matters therein set forth and postpone the hearing for any reasonable time, but not sine die.

14. Petitioning creditor to prosecute sequestration proceedings until trustee appointed

(1) The creditor upon whose petition a sequestration order is made shall, at his own cost, prosecute all the proceedings in the sequestration until the appointment of a trustee.

(2) The taxed costs shall be paid to him out of the first funds of the estate available for the purpose under section 83, but shall not be provable against the estate.

(3) In the event of a contribution under section 92, the petitioning creditor, whether or not he proves a claim, shall have no smaller liability to contribute than if he had proved his claim as stated in the petition.

15. Compensation to debtor if petition unfounded and vexatious

Whenever it appears to the court that the petition was unfounded or vexatious, the court may allow the debtor forthwith to prove any damage sustained by him by reason of the provisional sequestration and award him such compensation as it may deem fit; or the debtor may bring an action for damages so sustained by him.

16. Lodging by insolvent of schedules or statement with Master

(1) Whenever a final order of sequestration has been made upon the petition of a creditor, the insolvent shall, within seven days of the service of that order, lodge with the Master his schedules or statements of affairs in duplicate framed as nearly as may be in the Form B in the First Schedule, containing the particulars and verified by the affidavit thereby required.

(2) No stamp duty shall be payable in respect of that affidavit.

C. Attachment and Custody of the Estate (ss 17-19)

17. Transmission of sequestration order by Registrar to Master and other officers

(1) The Registrar shall without delay transmit-

(a) a duplicate original of every sequestration order, and of every order amending or setting aside the same, to the Master;

(b) a duplicate original of every provisional order of sequestration and, where there has been no provisional order, of every final order of sequestration, and of every order amending or setting aside the same-

(i) to the sheriff;

(ii) to every officer charged with the registration of title to any immovable property or interest in minerals within Botswana which appears to be an asset of the insolvent's estate;

(iii) to every bailiff of the magistrate's court to whom it appears that the property of the insolvent is under attachment:

Provided that when the value of an estate is under P400 and the court so orders, the movable assets may remain in the custody of the insolvent or any other person upon such terms as to security as the court may direct, and in that case it shall not be necessary to transmit the order of sequestration to any sheriff or bailiff.

(2) Every officer shall register every order so transmitted to him and note on the order the day and hour when it is received.

(3) Upon the receipt of any sequestration order the Master shall give notice thereof in the Gazette.

18. Appointment of curator bonis by Master for temporary custody of estate

(1) Whenever it seems necessary or expedient to the Master, he may appoint a curator bonis to take and have custody of any estate under sequestration until the appointment of a trustee.

(2) Every such curator bonis shall find security to the satisfaction of the Master and thereafter may collect such debts and may sell or dispose of such property and carry on such business in connection with the estate as the Master may authorize.

19. Mode of attachment by sheriff

(1) As soon as the sheriff has received the sequestration order, he shall proceed by his deputy or by a bailiff to attach and make an inventory of the movable property of the estate capable of manual delivery and not in lawful possession of a pledgee or under attachment by a bailiff, in the following manner-

(a) he shall take into his own custody all cash, share certificates, bonds, bills of exchange, promissory notes, deeds and other securities and he shall remit all such cash to the Master, unless otherwise directed by the Master;

(b) he shall leave all books of account, invoices, vouchers and business correspondence in a room or other suitable place properly sealed up;

(c) he shall leave any other movable property in a room or other suitable place properly sealed up or appoint some suitable person, either the person in whose care it was at the time of attachment or some other person, to hold the same in his custody; and

(d) he shall leave with the person so appointed a copy of the inventory with a notice that the property has been attached by virtue of a sequestration order; and that notice shall contain a statement of the offence constituted by section 148 and of the penalties provided therefor.

(2) Any person interested in the estate may be present or may authorize some person to represent him when the sheriff is making his inventory.

(3) The sheriff or bailiff shall forthwith report to the Master in writing the fact of the attachment, and shall transmit with the report a copy of his inventory and a list of any property which to his knowledge is in the lawful possession of a

pledgee.

(4) Every bailiff shall transmit to the Master without delay an inventory of all property attached by him and known to belong to an insolvent.

(5) The sheriff or bailiff shall be entitled to fees and remuneration taxed by the Master according to Tariff A in the Second Schedule.