

VOLUME: VIII

INSOLVENCY

Part ID: XIII Miscellaneous (ss 154-166)

CHAPTER: 42:02

154. Duty of trustee to assist in relation to prosecution of insolvent

(1) Among the duties of a trustee or assignee shall be included the investigation of the transactions of the insolvent or debtor who has assigned his estate prior to insolvency or assignment, and every trustee or assignee shall give such assistance in relation to the prosecution of any insolvent under this Act as the Master may direct and, if the trustee or assignee fails to perform that duty, the Master may disallow his remuneration either wholly or in part.

(2) It shall not be competent for any person without the leave of the court to bring an action for malicious prosecution against the trustee or assignee of his estate.

(3) The Master may at all times require a trustee or assignee to deliver to him any documents or assets belonging to the estate and to answer any inquiry made by him in relation to the estate under the administration of the trustee or assignee, and may, if he thinks fit, apply to the court to examine on oath the trustee, assignee or any other person concerned in the administration, and may also direct an investigation to be made of the books and vouchers of the trustee or assignee.

(4) The Master may cause an independent investigation to be made of the affairs of the debtor or insolvent at any time after publication of any notice of surrender or assignment of an estate or after a provisional order of sequestration has been granted as well as during the sequestration or assignment thereof.

(5) For the purpose of any such investigation as is described in subsection (1) every trustee and assignee shall be given by the Commissioner of Taxes and the officers under him access to any returns made by the insolvent and in the possession or custody of the Commissioner which show the amounts of gross income, income, taxable income and taxable amount in any year of an insolvent or debtor who has assigned his estate, and the sources of any such income.

(6) Such trustee or assignee shall be entitled to make copies of any such return so far as they indicate such amounts and sources of income.

(7) Such copies shall, at the request of the trustee, be certified as correct by the Commissioner, and, when so certified, shall on the production thereof be admitted in evidence in any proceedings, civil or criminal.

(8) The provisions of subsections (5) to (7) shall have effect, notwithstanding anything to the contrary in the Income Tax Act.

155. Evidence

(1) Any record purporting to be the minutes of a meeting under this Act or of proceedings under section 131 and purporting to be signed at the time thereof by any person describing himself as Master, magistrate or other presiding officer (as the case may be) shall upon production by any person be received as prima facie evidence of the proceedings therein.

(2) Until the contrary is proved, it shall be presumed that any meeting whereof a minute has been signed as above was duly convened and held and that all resolutions and proceedings at such meetings were in order.

156. Formal defects

(1) No proceedings in insolvency or under an assignment and nothing done under this Act shall be invalidated by a formal defect, unless such substantial injustice has been thereby done as in the opinion of the court cannot be remedied by any order.

(2) No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith.

157. Notices

(1) It shall be the duty of the insolvent or of a person who has assigned his estate to keep his trustee or assignee informed of his residential and postal address.

(2) Any notice under this Act required to be given to the insolvent or to be served upon him may be given or served by registered letter prepaid and put into the post directed to that postal address.

(3) Every person claiming to be a creditor of an estate may register his name and address within Botswana with the trustee upon payment to the trustee of a fee of 25t.

(4) Thereupon it shall be the duty of the trustee or assignee to send to that address due notice of every meeting which is about to be held, together with a copy of every liquidation account and plan of distribution, or contribution, about to be lodged with the Master.

(5) Failure on the part of the trustee or assignee to notify any such creditor as aforesaid shall be deemed a failure to

perform his duties but shall not invalidate anything done under this Act.

158. Proceedings against the trustee or assignee

(1) As often as the Master is by this Act required or allowed or any creditor is allowed to institute proceedings against a curator, trustee or assignee for his removal from office or for the purpose of compelling him to discharge any duty, such proceedings may be by motion to the court after notice to such curator, trustee or assignee.

(2) The costs of all proceedings which are caused by any act or omission of the trustee or assignee shall be payable by him personally, unless the court otherwise orders.

(3) Any costs ordered by the court to be paid by the trustee or assignee personally, shall, if not recovered from him, be payable out of the estate.

159. Fees

(1) The Master shall be and is hereby authorized and required to charge and recover and retain in respect of the several acts and things mentioned in the Third Schedule such fees as are therein specified.

(2) Any costs and expenses incurred by the Master or a presiding officer in the protection of assets of an insolvent estate or in carrying out any provision of this Act shall, unless the court otherwise orders, be regarded for the purposes of this Act as included in the costs of sequestration.

160. Custody of documents and admissibility of copies

(1) The Master shall have the custody of all documents relating to insolvent or assigned estates.

(2) A copy of or extract from any document or record of which the Master has the legal custody or control under this Act duly certified as true by the Master shall be receivable in evidence before any court, and shall be of like value and effect as the original document or record.

(3) Certified copies or extracts may be handed into court by the party who desires to avail himself of the same.

(4) It shall not be necessary for the Master himself, or for any officer under him, to produce any original document in the custody or control of the Master, but it shall be deemed sufficient if such document is produced by some person authorized by him to do so.

161. Destruction of documents

(1) After six months have elapsed from the confirmation of the final account and plan in any insolvent or assigned estate, the trustee or assignee may, unless the court otherwise orders, destroy all the books and documents in his possession relating to the estate other than those which he is required to lodge with the Master:

Provided that not less than six weeks before so doing he shall, by advertisement in the Gazette, give notice of his intention to do so; whereupon any creditor who has proved his claim against the estate may apply to the court by motion for an order prohibiting or delaying the destruction of those books and documents; and the court shall make such order thereon as to it may seem fit.

(2) After five years have elapsed from the rehabilitation of any insolvent or from the confirmation of the final account and plan of any assigned estate, the Master may destroy all records in his office relating to the estate.

162. Saving of law as to land settlement

Notwithstanding anything to the contrary contained in this Act, every trustee of an estate in which there appears as an asset any right under a lease, licence, purchase or allotment of land from the State shall, in his administration of the estate, act in accordance with those provisions (if any) which by the law under which the rights were acquired are expressed to apply in the event of the insolvency of the person who acquired those rights.

163. Special provision in case of sale of goods under a suspensive condition

(1) Whenever a claim against a sequestrated or assigned estate is in respect of the value of goods delivered to the debtor under an agreement which is a hire-purchase agreement in terms of the Hire-Purchase Act such agreement shall be regarded on the sequestration or assignment of the debtor's estate as creating in favour of the creditor a special pledge of such goods whereby the amount outstanding of such payments is secured.

(2) The trustee or assignee shall, if required by the creditor, deliver such goods to him, and thereupon the creditor shall be deemed to be a creditor holding movable property as security for his claim and section 78 shall apply.

(3) If after sequestration or assignment of the debtor's estate the trustee or assignee thereof ascertains that such goods have been returned by the debtor to the creditor within a period of one month prior to the sequestration or assignment, the trustee or assignee shall be entitled to demand that the creditor deliver to him such goods or the value thereof at the date when they were so returned to the creditor, subject to payment by the trustee or to deduction from the value (as the case may be) of the difference between the total amount payable under the said agreement and the total amount actually paid thereunder.

(4) In the event of the goods being delivered to the trustee or assignee subsection (1) shall apply.

164. Rights of purchaser of immovable property who has paid part of purchase price

(1) Every purchaser of immovable property who has under agreement of purchase undertaken to pay the purchase price thereof in instalments at specified periods and who has paid the vendor of the property in such instalments not less than 50 per cent of the agreed purchase price, shall be entitled to demand from the vendor transfer of that property on condition that, simultaneously with the registration of transfer, there shall be registered in favour of the vendor a first mortgage bond over the said property to secure the balance of the purchase price and interest in terms of the agreement of purchase.

(2) If the seller is unable or fails or refuses to give such transfer as soon as may be, and in any case not later than three months after receiving such demand, the purchaser may treat the contract as cancelled and may recover the purchase price paid by him together with such damages as he may have sustained.

(3) The provisions of this section shall not apply to an agreement for the purchase of property, whenever entered into, if the vendor is the Government of Botswana.

165. Deceased estates placed under sequestration

This Act shall apply in the case of a deceased person whose estate is after his death placed under sequestration as insolvent as if he were the insolvent and as if the date of his death were substituted for the date of the sequestration order.

166. Power of President to make regulations

The President may from time to time make regulations-

(a) for the management and good conduct of the business of and the practice and procedure to be observed in the Master's office;

(b) prescribing the form and manner of proceedings under this Act;

(c) prescribing the manner in which fees payable under this Act shall be brought to account; and

(d) for anything required to be prescribed.

FIRST SCHEDULE FORMS

(Section 4)

A. NOTICE OF SURRENDER

Notice is hereby given that application will be made to the court on the day of 20..... at o'clock in the forenoon or as soon thereafter as counsel can be heard for the surrender of the estate of [i]*A.B. of as insolvent and that his schedules will lie for inspection at the office of the Master at [ii]â€ (and at the office) for a period of 14 days from the day of to the day of 20.....

Applicant's Attorney.

B. DEBTOR'S SCHEDULES

Balance-sheet of [iii]*.....

Estate Dr.

Estate Cr.

To Debts, as per Annexure D

P

By Immovable Property, as per Annexure A

P

By Movable Property, Furniture, Stock-in-Trade, etc., as per Annexure B

Outstanding Debts, etc., as per Annexure C

Deficiency.....

Total

Total

ANNEXURE A PARTICULARS OF IMMOVABLE PROPERTY

Description of Property

Situation and Extent

Mortgages thereon

Estimated Value

Property situate in Botswana

P

Total

P

Property situate elsewhere

P

Total

P

ANNEXURE B PARTICULARS OF FURNITURE, STOCK-IN-TRADE, LIVESTOCK, HUSBANDRY, SHARES IN COMPANIES, INSURANCE POLICIES, ETC., AND ALL MOVABLE PROPERTY NOT INCLUDED IN ANNEXURE C.

Description of Property

Estimated Value

Property situate in Botswana

P

Total

P

Property situate elsewhere

P

Total

P

ANNEXURE COUTSTANDING DEBTS, BILLS, BONDS, AND OTHER SECURITIES

Name and Residence and Postal Address of the Debtor

Particulars of Debt

Amount Good

Amount Bad or Doubtful

In Botswana

P

P

Total

P

P

Elsewhere

P

P

Total

P

P

ANNEXURE D LIST OF CREDITORS

Name of Creditor and Address

Nature and Value of Security for Claim

Nature of Claim

Amount of Claim

P

Total

P

The foregoing balance-sheet shall be verified by affidavit, as near as may be in the subjoined form, of the debtor or some other person presenting the petition or executing the deed of assignment on behalf of the debtor.

AFFIDAVIT

I, declare under oath that to the best of my knowledge and belief the statement of affairs contained in the foregoing balance-sheet and the Annexures thereto marked A, B, C and D, is a true and complete statement of all assets and liabilities of (or my estate) and that every valuation therein contained is a fair and correct valuation, and that none of the assets therein appearing are mortgaged, pledged or under attachment, [iv]*except only those enumerated in the annexure hereto and that these are respectively mortgaged, pledged or taken in execution for the amounts set forth in the said annexure.[v] Further that the estate of (or my estate) has never previously been sequestrated or assigned for the benefit of my/his creditors or placed in bankruptcy either in Botswana or elsewhere. Sworn, etc.

C. AFFIDAVIT FOR THE PROOF OF AN OPEN ACCOUNT, ETC.

In the Assigned/Insolvent Estate of

Name of Creditor

Address in full

Total amount of claim P

..... declares under oath that A.B., whose estate has been assigned for the benefit of his creditors/placed under sequestration in the hands of the Master [vi]* was at the date of the assignment/issuing of the sequestration order thereof [vii]* and still is, justly and truly indebted to in the sum of for according to the account hereunto annexed and that the claim was not/was [viii]* acquired by cession or purchase since the institution of the proceedings whereby the estate was assigned/placed under sequestration.[ix]* And this deponent further says that no other person besides the said A.B. is liable for the said debt, or any part thereof, and that he has not, nor has any other person, to his knowledge for the use of deponent (or the said A.B.) received any security for the same or any part thereof save and except.

(Here insert nature, particulars and value of mortgage, pledge or other security).

[x] And this deponent says lastly that when the right of set-off claimed by him and appearing from the account hereto annexed accrued he did not know of any act of insolvency upon which the estate was afterwards sequestrated, or of the intention of the insolvent to surrender his estate, or that the insolvent's assets were insufficient to discharge his liabilities.

Sworn this day of at Before me.

D. AFFIDAVIT FOR THE PROOF OF DEBT ON A PROMISSORY NOTE OR BILL OF EXCHANGE

In the Assigned/Insolvent Estate of

Name of Creditor

Address in full

Total amount of claim Pmakes oath and says that A.B., whose estate has been assigned for the benefit of creditors/placed under sequestration in the hands of the Master/was at the assignment/issuing of the sequestration order thereof, and still is, justly and truly indebted to in the sum of for according to the account hereunto annexed and that the claim was not/was [xi]* acquired by cession or purchase since the institution of the proceeding whereby the estate was assigned/placed under sequestration. [xii]* And this deponent further says that he has not, nor has any other person to his knowledge, or for the use of received any security for the said debt, or any part thereof, except the following Promissory Note or Bill of Exchange:

Date of Bill or Promissory Note

By Whom Drawn or Made

By Whom Accepted

To Whom Payable and when

By Whom Endorsed

Amount

And this deponent further says, that besides the said A.B./Insolvent, the endorser above-mentioned is liable to this deponent for the amount of the Bill or Note endorsed by as aforesaid.

And this deponent further says, that the aforesaid Bill of Exchange or Promissory Note, produced by in proof of debt aforesaid,, is in all respects genuine and true.

[xiii] And this deponent says lastly that when the right of set-off claimed by him and appearing from the account hereto annexed accrued he did not know of any act of insolvency upon which the estate was afterwards sequestrated, or of the intention of the insolvent to surrender his estate, or that the insolvent's assets were insufficient to discharge his liabilities.

Sworn this day of at

Before me,

E. NOTIFICATION OF DEED OF ASSIGNMENT

To the Registrar of

Sir,

Please to take notice that a deed of assignment whereby A.B., of assigned his estate in my favour in trust for his creditors has been signed and executed by the said A.B. and C.D., of a creditor of the said A.B. and by me, E.F., of , the assignee under the deed, and that it appears from the debtor's schedules that the properties mentioned in the annexure hereto are assets of his estate.

Yours obediently, Assignee under the Deed.

N.B.-The notice must contain-

- (1) full name and address of the debtor (with the style or firm, if a partnership, and the full names of all the partners);
- (2) the full name, address and occupation of the assignee under the deed;
- (3) full particulars of the properties mentioned in the annexure.

F. NOTICE OF ASSIGNMENT

Notice is hereby given that [xiv]*A.B., of has made an assignment of his property in favour of C.D., of in trust for the creditors of the said A.B. if they accept the same, and that the schedules of the said A.B. will lie for inspection and the deed of assignment for inspection and signature by all creditors entitled to sign at the office of the Master, (and at the office [xv]â€), for a period of 14 days from the day of 20....., to the day of 20.....

It is further notified that if the said assignment is declined, application will be made to the court, on the day of 20 at o'clock in the forenoon or as soon thereafter as counsel can be heard for the surrender of the estate of the said A.B. as insolvent.

(Signature of the debtor or the person who executed the deed on his behalf.)

....., 20.....

G. CERTIFICATE OF APPOINTMENT

High Court of Botswana.

I certify that under and by virtue of a deed of assignment of the estate of registered by me in due course under the provisions of section 125 of the Insolvency Act on the day of 20..... , is/are the assignee(s) of the said estate are entitled and is as such to administer the estate in terms of the deed of assignment and in accordance with the provisions of the said Act.

Given under my hand in the Master's office, this day of 20.....

Master.

SECOND SCHEDULE
TARIFF ASheriff's Fees and Remuneration

For the execution of a writ of attachment against movable property found on the same premises, from P1,05 to

P2,10

For each separate premises beyond the first on which goods are attached, each 50t to

P1,05

For taking inventory, per 100 words, or portion thereof

50t

For copy thereof where necessary, per 100 words, or portion thereof

10t

For assistance (where necessary), in taking inventory-

(a) if within a radius of five km from the sheriff's office, per day (inclusive)

P1,05

(b) if beyond that radius, per day (inclusive)

P2,10

For notice of attachment of movable property where necessary

50t

For each separate possession, per day or portion thereof (board included), a reasonable fee not exceeding

P1,05

For removal and storage, the necessary costs of removal and storage.

For herding and preserving livestock, the necessary costs of herding and preserving the stock.

Travelling allowance, per km or fraction thereof

10t

Where the sheriff is necessarily accompanied by an officer or assistant, additional travelling allowance may be charged half the above rate.

RULES FOR THE CONSTRUCTION OF THE TARIFF AND THE GUIDANCE OF THE SHERIFF

1. In this tariff and rules "Sheriff" means the Deputy-Sheriff by whom the service in question is performed; and "possession" means the continuous and necessary presence on the premises and for the period in respect of which possession is charged of a person employed and paid by the Sheriff for the sole purpose of retaining possession.

2. The charge for herding and preserving livestock and the fee for possession shall not run concurrently in respect of the same property, but in addition to the said charge the Sheriff shall be entitled to a commission of not exceeding one and a half per cent on the value of the livestock.

3. Where there are more ways than one of doing any particular act, the least expensive way shall be adopted unless there is some reasonable objection thereto.

4. Travelling allowance shall not be payable unless it was necessary for the Sheriff to go beyond a radius of five km from his office, and when payable, shall be paid for the actual distance travelled in going from and returning to the office.

5. Travelling allowance shall include all expenses incurred in travelling, e.g. train fare.

6. Where more services than one may be done on the same journey the distance to the first place of service may be brought into account only once, and shall be apportioned equally to the respective services; and the distance from the first place of service to the remaining places of service shall similarly be apportioned equally to the remaining services.

7. (1) The Sheriff may not charge for an inventory for his own use.

(2) Where an execution has been stopped by publication of notice of surrender or by sequestration after an inventory has been made, no second inventory shall be made of the same goods, and the Sheriff's charges for making the inventory shall be payable by the estate, according to tariff, and not by the execution creditor unless the estate is unable to pay the same.

8. The Sheriff may pay rent if necessary to secure undisturbed possession of the premises on which goods have been attached for a period of one month or such longer period as the Master shall authorize.

9. The allowance for all work necessarily done for which no provision is contained in the tariff shall be assessed, and every question arising under or relative to such tariff shall be determined by the Master.

TARIFF B Remuneration of Trustees and Assignees subject to Taxation by the Master in terms of section 81(14)

Upon the proceeds of movables (other than shares or similar securities) sold, promissory notes, book debts, rent, interest, or other income collected

per cent 5

Upon the proceeds of immovables, shares and similar securities sold, life policies and mortgage bonds recovered

Upon the first P10,000 thereof

2 1/2

Thereafter upon each P200 thereof

1 1/2

Upon cash found in the bank or in the estate

1

Minimum remuneration:

In respect of any one estate, including remuneration under above heads, a minimum remuneration of from P6,30 to P10,50.

If the total remuneration of a trustee or assignee under this tariff is less than P80 in all, he shall be entitled, up to that amount, to remuneration at the rate of five per cent on the value of all the assets of the estate.

Remuneration of curator bonis and provisional trustees:

A reasonable remuneration to be taxed by the Master, not to exceed the above rates.

TARIFF C Costs of Assignment subject to Taxation by the Master in terms of section 129

Instructions for assignment, from P1,05 to

P4,20

Drawing deed of assignment, per folio

50t

For every necessary copy thereof, per folio

10t

Preparation of schedules and affidavit, according to length and complexity, from P2,10 to

P10,50

Drawing notices and all attendances where one legal practitioner employed, a fee in the discretion of the Master not to exceed

P6,30

Where two legal practitioners necessarily employed, a fee in the discretion of the Master not to exceed

P10,50

Necessary disbursements, including stamps, cost of publications, etc.

THIRD SCHEDULE FEES

For every certificate under the hand of the Master

50t

For every report in the discretion of the Master subject to taxation by the court, not less than

P1,00

For inspection of documents in any one estate excepting by or on behalf of trustee or assignee

25t

For binding documents in each estate according to the size of the estate, in the discretion of the Master, from 75t to

P3,05

For taxing trustee's or assignee's remuneration or bill of costs on every P2 or fraction of P2 of the amount taxed

10t

For every deed of assignment registered under this Act

P2,00

On the assets of any assigned or insolvent estate available for distribution, including any security taken over by a creditor under section 78:

Up to and including P10,000 (minimum P2)

1/4 per cent

Exceeding P10,000

1/8 per cent

For extracts or copies of documents made or certified in the office of the Master:

For the first 100 words

25t

For each subsequent 100 words or fraction thereof

10t

On dividends paid by the trustee or assignee for account of creditors to the Master, a commission upon the amount paid in of five per cent.

Upon every affidavit

30t

Upon every sequestration filed

P1,00

Upon every other order of court filed

30t

Upon every advertisement of meeting of creditors

50t

For every attendance at a meeting of creditors

P1,20

Upon every report of the filing of an account or of election of a trustee

P1,00

Upon every certificate of appointment of a trustee or of the confirmation of an account

50t

For each attendance in matters referred by the court

P2,50

For every report in the same not exceeding five folios of 100 words each

P1,00

Each additional folio

10t

Upon every application to search or inspect any account or document

10t

Upon certified copies of documents when not exceeding four folios of 100 words each

50t

Each additional folio

10t

Upon every order of rehabilitation or release from sequestration of an insolvent

P2,00

[i]Here insert the full name of the debtor (with the full style or firm if a partnership, and the full names of all the partners), his occupation and address.

[ii]If the schedules are to lie for inspection only at a place where there is a Master's office, omit the words in brackets.

[iii]Here insert the full name of the debtor.

[iv]If no assets are mortgaged, pledged or under attachment, strike out and initial the words following to the end of this paragraph.

[v]If the debtor has previously been insolvent or has previously assigned his estate, strike out this paragraph and state where and when, and whether and when it has since been released or the debtor rehabilitated.

[vi]Strike out and initial the alternative words not required.

[vii]Strike out and initial the alternative words not required.

[viii]Strike out and initial the alternative words not required.

[ix]When no compensation or set-off is claimed, strike out this clause.

[x]When no compensation or set-off is claimed, strike out this clause.

[xi]Strike out and initial the alternative words not required.

[xii]Strike out and initial the alternative words not required.

[xiii]When no compensation or set-off is claimed, strike out this clause.

[xiv]Here insert the full name of the debtor (with the full style or firm, if a partnership, and the full names of all the partners).

[xv]If the deed and schedules are to lie only at a place where there is a Master's office, omit the words in brackets.