



**Sections 26, 29, 30, 31 and 34 of the  
Insolvency Act (impeachable dispositions, the  
voidable sale of a business) and the Actio  
Pauperie**

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## CONTEXT: The Insolvency Act on impeachable transactions

- certain transactions entered into by the insolvent prior to the sequestration of his estate may be set aside at the instance of the trustee;
- the trustee is given the tools to recover certain property alienated by the insolvent before his sequestration.

### **The sections of the Insolvency Act that allow dispositions to be set aside are:**

- Section 26 (dispositions without value);
- Section 29 (voidable preferences);
- Section 30 (undue preferences);
- Section 31 (collusive dealings before sequestration);
- Section 34 (voidable sale of business).

### Section 34 exists to protect a trader's creditors in the following situations

A businessman in distress may decide to:

- sell the company that owns the business or assets; or
  - sell just the business or assets.
- If the latter (sale of just the business or assets) then:
    - the buyer:
      - receives the assets;
      - but is not liable for the past debts.
    - the seller:
      - remains liable for the past debts;
      - but no longer owns the assets.

## SECTION 34: Overview – the purpose of section 34?

### **The problem:**

- The person or entity that has sold the business or assets:
  - may still be indebted to a creditor;
  - may have offloaded all its assets.

### **The solution:**

- Section 34 ensures that creditors who might be prejudiced by the sale:
  - are notified;
  - can bring proceedings to block it or to set the sale aside.

## SECTION 34: Overview – the purpose of section 34?

### Meskin on the thinking behind s34

- “The policy of the law is to afford protection to a trader’s creditors against his dispossessing himself of his property without paying his debts before the disposition or from the proceeds thereof. The provisions of section 34 of the Insolvency Act are intended to give effect to such policy.”

### To sum up

- Section 34 is intended to prevent traders from seeking to evade their business debts by:
  - disposing –
    - of the business to a third party who is not liable for their debts, and/or
  - dissipating –
    - the price paid or using it to prefer some creditors over others.

## SECTION 34(1): The contents of s34(1)

- *“(1) If a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt), and such trader has not published a notice of such intended transfer in the Gazette, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than thirty days and not more than sixty days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period.”*

# SECTION 34(1): The elements of s34(1)

## IF a trader transfers:

- WHAT?
    - any **business** belonging to him; or
    - the **goodwill** of such business; or
    - any **goods** or **property** forming part thereof
      - except:
        - in the ordinary course of that business; or
        - for securing the payment of a debt
  - HOW?
    - in terms of a **contract**
    - **without publishing**
      - a notice of such intended transfer
        - in:*
          - the **Gazette**; and
          - a **newspaper** circulating in the district in which that business is carried on
            - » (two issues of an **Afrikaans** newspaper); AND
            - » (two issues of an **English** newspaper)
        - within:*
          - a period before the date of such transfer
            - » not less than **thirty** days; and
            - » not more than **sixty** days ...
- .....(cont)

### ... IF a trader transfers (cont):

- THEN?
  - the said transfer shall be **void**:  
*for*
    - a period of **six months** after such transfer  
*as against*
    - his **creditors**:
    - the **trustee** of his estate (if his estate is sequestrated at any time within the said period)

## SECTION 34(1): The five elements of the s34 remedy

**A creditor or a liquidator who wants to rely on s34(1) needs to prove:**

- 1. Trader:**
  - the debtor qualifies as a trader;
- 2. Business assets:**
  - the assets can be construed as forming part of the trader's business;
- 3. No ordinary course:**
  - the transfer of the business or goods fell outside of the ordinary course of that debtor's business;
- 4. No publication:**
  - the transfer was not properly advertised i.t.o. s34 requirements;
- 5. Transfer:**
  - there was a transfer (as per s34(3)).

## SECTION 34(1): PART 1 (the trader) – what is a trader?

- **To whom does section 34 apply?**
  - Section 34 applies only in relation to a “trader” as defined in section 2 of the Insolvency Act
  - Result is that there is no protection for creditors of a person who is not a trader.

## SECTION 34(1): PART 1 (the trader) – the s2 definition

### The contents of section 2

- *“trader” means any person who carries on any trade, business, industry or undertaking in which property is sold, or is bought, exchanged or manufactured for purpose of sale or exchange, or in which building operations of whatever nature are performed, or an object whereof is public entertainment, or who carries on the business of an hotel keeper or boarding-house keeper, or who acts as a broker or agent of any person in the sale or purchase of any property or in the letting or hiring of immovable property; and any person shall be deemed to be a trader for the purpose of this Act (except for the purposes of subsection (10) of [section twenty-one](#)) unless it is proved that he is not a trader as hereinbefore defined: Provided that if any person carries on the trade, business, industry or undertaking of selling property which he produced (either personally or through any servant) by means of farming operations, the provisions of this Act relating to traders only shall not apply to him in connection with his said trade, business, industry or undertaking;”*

## SECTION 34(1): PART 1 (the trader) – the s2 definition

### Section 2 defines a trader as:

#### ANY PERSON:

- who carries on:

*any*

- trade;
- business;
- industry; or
- undertaking

*in which*

- property is
  - sold; or
  - (for the purpose of sale or exchange)
    - is bought, exchanged, manufactured;
- building operations of whatever nature are performed; or
- an object whereof is public entertainment.

.....cont

## SECTION 34(1): PART 1 (the trader) – the s2 definition (cont)

### Section 2 defines a trader as ...(cont):

#### ANY PERSON:

- who carries on:
  - the business of an
    - hotel keeper or
    - boarding-house keeper,
- who
  - acts as a broker or agent of any person in the:
    - sale or purchase of any property; or
    - letting or hiring of immovable property;

**What have the courts said about the interpretation of this definition?**

- In *Kevin and Lasia Property Investment CC v Roos NO3* it was held that each clause in section 2 of the Act is separate and distinct from the other:
  - *“The definition commences with the words “trader” means any person’. There follows a number of clauses which commence with the word ‘who’ and thereafter, the words ‘or who’, ie ‘who carries on any trade . . . or who carries on the business . . . or who acts as a broker’. Each clause is separate and distinct from the others.”*

## **GORE V MCCARTHY AT THE CAPE HIGH COURT**

### **An outline of the facts**

- The company:
  - Ramsauer Transport (Pty) Limited.
- The transfer:
  - less than two weeks before Ramsauer' liquidation, 28 trailers were sold to McCarthy –
    - solely for the purpose of raising funds for another company;
    - for an amount below their market value;
    - not in the ordinary course of its business;
    - without publication of notices in the Gazette and newspapers.
- The liquidator:
  - Gore sought the recovery of an amount equivalent to the value of the vehicles from the purchaser, the respondent.

## **GORE V MCCARTHY AT THE CAPE HIGH COURT**

### **The issue to be decided**

- Was the company “a trader”?:
  - The only dispute:
    - was whether Ramsauer could be classified as a "trader" for the purposes of section 34(1).
  - Common cause:
    - should the transfer of the trailers to McCarthy be declared void, the latter would have to pay the liquidator an amount of R2,052 million, being the value of the trailers, plus VAT.

## **GORE V MCCARTHY AT THE CAPE HIGH COURT**

### **The parties' arguments**

- McCarthy:
  - opposed the application on the basis that the company, having been a transport contractor, had not been a “trader” as defined in terms of s2;
  - contended that the general phrase "carries on trade, business industry undertaking" refers to buying and selling that takes place in the ordinary course of business (the company was a transport contractor – hence only transactions that fell directly within the description of transport contracting would qualify).
- Gore:
  - argued that because McCarthy had as part of its normal trading activities the purchase and sale of vehicles and trailers, it qualified as a “trader”.

## **GORE V MCCARTHY AT THE CAPE HIGH COURT**

### **Held by the Cape High Court (Davis, J):**

- The purpose of section 34 is to prevent traders in financial difficulties:
  - from disposing of their businesses to third parties who are not liable for the debts of the business without due advertisement to all their creditors,
  - (and in so doing) from dissipating the purchase price by using it to pay certain creditors regardless of the claims of others.
- In order for the company to have been a “trader”;
  - it was not necessary that the transaction had been concluded in the ordinary course of its primary haulage business
  - it was sufficient that the transaction had been concluded in the ordinary course of a business ancillary to its (primary) haulage business.

## **GORE V MCCARTHY AT THE CAPE HIGH COURT**

### **Outcome in the Cape High Court**

- The transaction in question fell outside of the ordinary course of its business as:
  - *“a transaction by which vehicles of the company were sold less than two weeks before liquidation solely for the purpose of raising funds for Roadfin, from which the company derived no economic benefit ... was manifestly a transaction which was not conducted in the ordinary course of the company's business.”*
- The transfer:
  - declared void as there had been no compliance with the provisions of section 34(1).
- The defendant:
  - ordered to pay back the sum it had received.

## **MCCARTHY V GORE AT THE SCA**

### **Route to the SCA**

- McCarthy took the Cape High Court judgement on appeal

### **Issue on appeal**

- What is a “trader”?
  - Would the company qualify as a “trader” when section 34(1) was read with definition in section 2 the Act?

## SECTION 34(1): PART 1 (the trader) – the Gore v McCarthy cases

### MCCARTHY V GORE AT THE SCA

#### The SCA held

- Test for a trader:
  - Because a transport haulier is not included in the s2 definition, “the only category which could possibly be relevant” was the first – namely that the company was a person carrying on a business “in which property is sold”.
  - Regard had to be had to the nature of the undertaking (the sale of book debts and vehicles) , and whether such undertaking was:
    - part of the core business (transport haulier) of the company; or
    - incidental to the core business.
- A broader view of the word “trader” (contended for by the liquidator) would:
  - apply to any business in which property is sold for whatever reason;
  - defeat the point of having a definition of “trader” that identifies those types of trade, business, industry or undertaking which, “by reason of the fact that they engage in specified activities”, attract the obligations of traders in terms of the Act.
  - mean that the court would be extending the list created by the legislature.

## **MCCARTHY V GORE AT THE SCA**

### **To sum up**

- SCA held that the definition of a “trader”:
  - is limited to primary business activities;
  - does not extend to incidental activities.
- The appeal upheld
- Plaintiff’s claim dismissed with costs.

## SECTION 34(1): PART 1 (the trader) – when does a trader cease to be one?

### Closing up shop: doesn't count as ceasing to trade:

- A trader remains a trader:  
*despite* -
  - ceasing to trade  
*if* -
  - he owns:
    - the business; or
    - its assets; AND
  - he owes
    - debts in respect of it.

## SECTION 34(1): PART 1 (the trader) – how do you prove someone is a ‘trader’?

### The presumption that you are a trader – shift of onus

- If it is disputed whether a person is a trader or not, it is assumed
  - *that* – he is a trader
  - *until* – the opposite is proved
    - » (ie “unless it is proved that he is not a trader as hereinbefore defined”)

### Onus of proof

- If a buyer disputes a trustee’s claim on the grounds that the seller was not a trader:
  - he must discharge the onus of proving same.
- If the trustee sues to recover the assets or their value:
  - he must prove that the transfer was not in the ordinary course of business.

## SECTION 34(1): PART 2 (the business) – what comprises the business?

### Would s34 apply if mere components of a business are transferred?

- Section 34 will apply to the transfer of a business
  - in whole; or
  - in part.
- In Joosab v Ensor, NO 1966 (1) SA 319 (A) it was held that
  - it was undesirable to lay down any definite criterion to determine whether particular goods formed part of a business for the purposes of s34(1)
  - the section was clearly designed to protect creditors, therefore:
    - any goods purchased and received by a trader ostensibly for his business must be regarded as forming part of that business;
    - the fact that the goods acquired by a general dealer's business have not been physically appropriated as part of its stock in trade is not necessarily decisive;
    - the test was whether the alienation was a normal transaction for a solvent businessman carrying on a business of that kind.

## SECTION 34(1): PART 2 (the business) – different from the insolvent’s assets?

### But is there not a distinction between business goods and the insolvent’s assets?

- The party seeking relief under s34 must show that the goods:
  - form part of the insolvent’s business;
  - are not just part of the insolvent’s assets.
- For example, in *Bruyns, NO v Aerogrande (PTY) LTD [1964] 3 All SA 525 (W)*
  - a trustee claimed that the alienation of a certain aircraft was void and alleged that the aircraft formed part of the assets of the insolvent trader
  - the court held that:
    - *“The argument was that it is not alleged that the aircraft formed goods or property forming part of the business and that this was a material and indispensable allegation to found a cause of action. It was said that so far as the declaration was concerned the aircraft, although an asset of the Company, was not necessarily property forming part of the business. I think that this contention is well founded. Accordingly the exception is upheld with costs.”*

## SECTION 34(1): PART 3 (ordinary course) – what's not in the ordinary course?

### Test rooted in nature of the business being carried on

- The essence of the test is to ask what would have been done:
  - *by* – a similar business
  - *in* – similar circumstances
- The AD held in *Ensor NO v Rensco Motors (PTY) LTD 1981 ( 1 ) SA 815 (A)* that there were two equally important elements in the critical phrase "except in the ordinary course of that business" – namely:
  - "the ordinary course", and
  - "of that business".
- Read together, they pose the objective test:
  - "whether, having regard to all the circumstances, the alienation was one that would normally have been transacted by:
    - a solvent businessman;
    - carrying on a business of that kind".

## SECTION 34(1): PART 3 (ordinary course) – what's not in the ordinary course?

### A case with a different result

- The outcome was different in [\*Gore and Another Nno v Saficon Industrial \(Pty\) Ltd \[1994\] 4 All SA 48 \(W\)\*](#)
  - Facts
    - Surequip (Pty) Ltd was a company in the business of selling and servicing forklifts.
    - It sold 90 percent of its assets in an attempt to stave off the liquidation of the group of companies of which it was part.
  - Held
    - Even if such a sale could be said to fall within the ordinary course of business of that group as a whole, that did not mean that the sale was in the ordinary course of Surequip (Pty) Ltd's business.

## SECTION 34(1): PART 4 (publication) – when must publication occur?

### What would this look like on a calendar?

- On the Thursday:
  - the first two advertisements appear on a Thursday in an Afrikaans and English newspaper.
- On the Friday:
  - the next day, ie. the Friday of that week, the second advertisements appear in:
    - the same newspapers; and
    - the Government Gazette.
- After 30 calendar days:
  - The transfer may be effected.
- After another 30 calendar days:
  - The transfer must have been effected by now
    - (i.e. before 60 calendar days have expired after the last of the advertisements appeared).

## SECTION 34(1): PART 4 (publication) – What counts as proper publication?

### Format

- A notice:
  - need not appear in any particular form;
  - must just indicate that the trader intends to transfer his business.

### Accuracy:

- A notice:
  - must provide accurate information about the transfer;
  - is invalid if it, for example, states the wrong date.

### Timing

- A notice:
  - is invalid if published after the date of transfer.

## SECTION 34(1): PART 4 (publication) – What counts as proper publication?

### How strict is the observation of the time periods?

- See Simon v DCU Holdings (Pty) Ltd And Others 2000 (3) SA 202 (T) where the court said:
  - *Meskin Insolvency Law at 5 - 125 to my mind correctly submits that if the notices contain inaccurate information as to the date of transfer, the notices are invalid and that in any proceedings predicated on the section no one would be precluded merely by its provisions from relying on the true date of the transfer. Since the notices were published on 7 November 1997 and the actual transfer of possession took place on 1 December 1997, the notices are invalid. They were not published 'not less than 30 days . . . before the date of such transfer'.*

# SECTION 34(1): PART 4 (publication) – What does the notice look like?

## Some examples of s34 notices

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MUNICIPALE  
BESTUURDER  
STADSAAL  
PIETERMARITZBURG

### NOTICE OF SALE OF BUSINESS

Notice is hereby given in terms of Section 34(1) of the Insolvency Act No. 24 of 1936 that Cecile Marcia Botha, Identity Number 710412 0260 081 via Pizza Chicken Perfect Howick which carries on the business as a consumable take-away, intends to sell and transfer her one half share in the aforesaid business comprising the assets and stock to Cornelius Andries Raubenheimer, Identity Number 410331 5042 083, with effect from thirty (30) days after the last publication of this notice, whereafter the purchaser will carry on the business for his own account and benefit at the same address.

Signed at Howick this 14th day of July 2008.  
-MG OLDFIELD  
ATTORNEYS PO Box 323  
Howick 3290 Ref: Mr M G  
Oldfield Tel: 033 330 5430.

Province of KwaZulu-Natal  
in extent 429 square metres  
held by the defendant  
Deeds of Transfer No. 48857/2004

The following information regarding the property is furnished for your information:  
1. The property is situated at 510 Bc Northdale Pietermaritzburg, KwaZulu-Natal.

2. The property consists of a freestanding building constructed of brick consisting of bedrooms, kitchen, scullery, 6 bathrooms, 6 showers and 6 toilets. The property is fenced.

3. The town plan of the property is Residential. The full conditions of sale may be inspected at the office of the Sheriff, at 17 D Street, Pietermaritzburg, Province of KwaZulu-Natal. Dated at Pietermaritzburg this 02 July 2008.  
-VENN NEMET  
INC 281 Pietermaritzburg  
Hilapoulosa/381  
/Amanda

In the High Court of South Africa

the lowest or any  
hole or in part, at

Case No: 50/2008.

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J. Leslie Smith & Company  
(Incorporated in South Africa)  
**NOTICE OF SALE OF BUSINESS**

Notice is hereby given in terms of Section 34(1) of the Insolvency Act No 24 of 1936 as amended, that Quipsell 1028 (PTY) Ltd, trading as Nevada Spur at Cascades Centre McCarthy Avenue, Pietermaritzburg, intends selling such business to Glen Edén Trading 251 CC who will henceforth conduct such business at the same address for its own account with effect from 1st August 2008.

Dated at Pietermaritzburg on this 14th day of July 2008.  
-J LESLIE SMITH & CO  
ATTORNEYS 332 Jabu Ndlovu Street Pietermaritzburg 3201



In the High Court of South Africa (National Division)  
In the matter of  
**NEDBAN**

as aforesaid  
**ASHIL**  
Id No: 7802  
Bond Account No: 8149 00

**SALE IN EXECUTION**

A sale in execution in terms of the provisions of the Companies Act No. 71 of 1973, to be held at the office No. 1 Street, Pietermaritzburg, at 10 o'clock on Friday 25 July 2008. Full conditions of sale may be inspected at the office of the Sheriff of Pietermaritzburg, 25 D Street, Pietermaritzburg 3201 and at the office of the Sheriff of Pietermaritzburg, 25 D Street, Pietermaritzburg 3201, prior to the date of the sale. No improvements or alterations shall be made to the property without the written consent of the Sheriff. Description of the property: Registered as a residential property, Erf No. 2157, Pietermaritzburg, KwaZulu-Natal.

## SECTION 34(1): Remedies available to the trustee

### Trustee's options

- Disregard & sue:
  - disregard purported transfer;
  - sue buyer of assets for their return.
- Court order:
  - ask the court for:
    - a declaratory order that the transfer is void; and
    - an order that the buyer hand over the assets.
- *Actio ad exhibendum*
  - sue for the value of the assets if the buyer:
    - has disposed of them; or
    - cannot return them.
- Abide
  - abide by the contract.

## SECTION 34(1): Remedies available to the trustee

### What if the trustee suspects that the purchaser is about to part with the assets?

- Interdict:
  - the court can grant an interdict restraining the purchaser of the business from parting with assets that formed part of the business pending action by the trustee for their recovery.

## SECTION 34: Example of creditor's claim to void the transfer

### What must a creditor allege?

- Amlers Precedents of Pleadings proposes the following as a precedent for a claim relating to voidable sale of business.
  1. On [date] and in the high court of [province], the estate of [X] was finally sequestrated.
  2. On [date], the insolvent sold his retail butcher's shop carried on by him at [address], including the fixtures and fittings therein, to defendant for the sum of [amount] under a written agreement, Annexure "A" attached hereto, and transferred it to defendant on [date].
  3. The insolvent at no time published any notice of the transfer of the business in the Government Gazette or in a newspaper as provided for in section 34(1) of Act 24 of 1936.
  4. The transfer, having taken place within six months of the sequestration of the insolvent, is voidable by the plaintiff in his capacity as trustee of the insolvent estate.

## SECTION 34: Example of creditor's claim to void the transfer

### What must a creditor allege... (cont).

5. Plaintiff has elected to void the transfer.
6. Defendant refuses to vacate the business or to deliver to plaintiff the fixtures and fittings therein.

### WHEREFORE plaintiff claims:

- (a) An order declaring the transfer of the business and fixtures and fittings by the insolvent to the defendant to be void.
- (b) An order directing the defendant to vacate the business and to hand the fixtures and fittings therein to the plaintiff.

## SECTION 34(2): Once the notice has been published

### The contents of section 34(2)

- *“(2) As soon as any such notice is published, every liquidated liability of the said trader in connection with the said business, which would become due at some future date, shall fall due forthwith, if the creditor concerned demands payment of such liability: Provided that if such liability bears no interest, the amount of such liability which would have been payable at such future date if such demand had not been made, shall be reduced at the rate of eight per cent per annum of that amount, over the period between the date when payment is made and that future date.”*

## SECTION 34(2): The elements of s34(2) in digestible pieces

### The effects of the notice: breaking down the elements

- Publishing the notice results in the falling due of every liquidated liability:
  - *of* – the trader;
  - *in connection with* – the said business;
  - *which* – would become due at some future date;
  - *if* – the creditor demands payment
    - » provided that if such liability bears no interest, the amount of such liability which would have been payable at such future date if such demand had not been made, shall be reduced at the rate of eight per cent per annum of that amount, over the period between the date when payment is made and that future date.)

## SECTION 34(2): Another consequence of publication

### **Act of insolvency**

- A trader commits an act of insolvency if he:
  - gives notice in the Government Gazette of the intended transfer of his business; and
  - is subsequently unable to pay all his debts.

## SECTION 34(3): When a creditor institutes proceedings before transfer

### The contents of section 34(3)

*“(3) If any person who has any claim against the said trader in connection with the said business, has before such transfer, for the purpose of enforcing his claim, instituted proceedings against the said trader—*

*(a) in any court of law, and the person to whom the said business was transferred knew at the time of the transfer that those proceedings had been instituted; or*

*(b) in a Division of the Supreme Court having jurisdiction in the district in which the said business is carried on or in the magistrate’s court of that district,*

*the transfer shall be void as against him for the purpose of such enforcement.”*

## SECTION 34(3): The elements of s34(3) in digestible pieces

- IF any person  
WHO – has any claim
  - *against* – the said trader
  - *in connection with* – the said business,
  
- HAS – instituted proceedings
  - *against* – the said trader
  - *before* – such transfer
  - *for* – the purpose of enforcing his claim—
  - *in*
    - (a) any court of law
      - » + and the person to whom the said business was transferred knew at the time of the transfer that those proceedings had been instituted; or
    - (b) the Supreme Court magistrate’s court in the district in which the business is carried
  
- THEN – the transfer shall be void:
  - *as* – against him
  - *for* – the purpose of such enforcement.

## SECTION 34(4): The contents of s34(4)

- *“(4) For the purposes of this section “transfer”, when used as a noun, includes actual or constructive transfer of possession, and, when used as a verb, has a corresponding meaning.”*

## SECTION 34(4): How far does the concept 'transfer' go?

### What would qualify as a “transfer”?

- A “transfer” can be:
  - transferring ownership;
  - transferring possession (the trader need not have transferred ownership to the other party: as the actual or constructive transfer of possession suffices).
- Mars notes that section 34 applies regardless of:
  - the way the transfer was effected;
  - the nature if the relevant contract.

### What does not count as a “transfer”?

- Section 34 does not apply where the transfer is to secure the payment of a debt
  - » (eg: the pledge of a movable).

### What criticism has been levelled at section 34?

- Definition of “trader”
  - Why shouldn’t the creditors of other business people also be protected?
  - Why should creditors of “traders” as defined have measures available to them while creditors of other types of businesses be denied?
  - Since the purpose of s34 is to protect creditors from people or companies carrying on a business from disposing of their business assets, it is difficult to see why the distinction was made.
- Efficacy of publication requirements
  - One has to wonder how many creditors have, on chancing upon a notice in a local newspaper, launched proceedings to block a sale?

## Other Dispositions that can be set aside

- Insolvency Act has a series of sections
  - Designed to safeguard interests of creditors
  - Of a debtor whose estate has been sequestrated
  - Allowing the Trustee to apply to Court for Order setting transactions aside

## SECTION 26: Overview – the purpose of s26

Aim of section 26: “Dispositions without value”

Prevent a person from impoverishing his/her estate by giving assets away without receiving a concomitant advantage in return

Distinguishing feature – no obligation on part of insolvent to have made the disposition;

Shift of onus

## Section 26: contents

- Insert wording of section

### **Aim of section 29: “Voidable preferences”**

- To prevent a person on the brink of insolvency from:
  - selecting
    - one or a few creditors for full payment;
  - disregarding
    - the rest.
- To secure a distribution of estate assets according to the prescribed legal order of preference.
- To allow the trustee to set aside dispositions made by the insolvent while contemplating or on the brink of insolvency.

## SECTION 29(1): The contents of s29(1)

- *“(1) Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.”*

## SECTION 29(1): Elements of s29(1) in digestible pieces

### A court may set aside:

WHAT – every disposition made

- *by* – a debtor
- *of* – his property
- *in* – the six months before:
  - » the sequestration of his estate
  - » his death (if the deceased estate = insolvent)
- *which* – has had the effect of preferring one of his creditors above another,

IF – the debtor's liabilities exceed assets immediately after the disposition

UNLESS – the person in whose favour the disposition was made proves:

- the disposition was:
  - made in the ordinary course of business; AND
  - not intended to prefer one creditor above another.

## SECTION 29(1): Meeting the requirements of s29(1)

To have a disposition set aside as a voidable preference, the trustee must prove:

1. There was a disposition by the debtor to:
  - a creditor; or
  - a third party (including a debtor's surety and an analogous person)... in such a way that a creditor would benefit from the disposition.
2. The debtor made the disposition not more than six months before:
  - the sequestration of his estate; or
  - his death (if the debtor is deceased and his estate is insolvent).
3. On the objective test, the disposition had the effect of preferring one of the debtor's creditors above another (in that if a debtor pays a creditor at a time when his liabilities exceed his assets, the effect is to prefer that creditor above other creditors by defeating the proportional distribution of the debtor's estate).
4. Immediately after the debtor made the disposition, his liabilities exceeded the value of his assets.

## SECTION 29(1): The onus of proof

### Onus

- The trustee bears the onus of proving all of the requirements.
- Once the trustee has proved the four requirements listed above, the disposition may be set aside by the court – but the person in whose favour the disposition was made to resist the setting aside of the disposition by proving the elements of the proviso in s29(1).

## SECTION 29(1): the kinds of dispositions that would qualify

### **Manner of the disposition**

- The disposition:
  - need not have been direct;
  - need merely have had the effect of preferring.

## SECTION 29(1): the test for preference

### **Test for preference**

- Has the proper distribution of assets as envisaged by the Act been defeated?
- In other words:
  - has the creditor, when compared with the position in which he would have been had a dividend been paid in accordance with the Act:
    - benefited more; or
    - been paid earlier.

### **How to put a number on the liabilities at the date of sequestration?**

- Claims proved against estate provide prima facie proof of insolvent's liabilities at date of sequestration.
- Assets are to be assessed at market value (price willing seller would obtain from willing buyer).

## SECTION 29(1): The proviso to s29(1)

### **Purpose of the proviso**

- Allow business person to overcome financial difficulties by carrying on business in the usual way (ie to prevent paralysis in the face of the s29 voidability threat).

### **How the proviso functions**

- To stop the court setting aside a disposition the beneficiary must prove:
  - it was made in the ordinary course of business;
  - it was not intended to prefer one creditor above another.

### What is in the “ordinary course of business”?

- A court will look at factors such as:
  - Is the disposition one that would normally be entered into between solvent business persons – or is it anomalous and surprising?
  - What were the circumstances of the transaction and the actions of both parties?
  - What are the customs that apply in that particular field of business?
  - Was the making and receiving of the disposition lawful?

## SECTION 29(1): The proviso to s29(1)

### **When is there “no intention to prefer”?**

- A court will look at factors such as:
  - Was it the insolvent’s primary or dominant intention to disturb the proper distribution of assets on insolvency?
  - Did the insolvent contemplate or expect sequestration when he made the disposition?
  - Was his main motive something other than the conferring of advantage?
  - What are the customs that apply in that particular field of business?
  - Was the making and receiving of the disposition lawful?

## SECTION 30: Overview: The purpose of sect 30

- “Undue preference to Creditors”
- No time limit applies
- Must have been with the **intention** (ie not merely the **effect**) of preferring one creditor above another

## SECTION 30: What the Trustee must prove

- To succeed in setting aside the disposition, the Trustee must prove:
  - Disposition, as defined in section 2
  - At the time of the disposition, debtor's liabilities exceeded his assets
  - Disposition in such a way that creditor would benefit
  - That the debtor intended to prefer one of his creditors above another
  - That the debtor's estate was thereafter sequestrated

## SECTION 31: Collusive dealings before sequestration

- Essential feature is element of collusion