



INSOLVENCY / LIQUIDATION WORKSHOP
BACK TO BASICS

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CLAIMS & PROOF OF CLAIMS - PRESENTED BY JASON SMIT

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1. CLAIMS CAPABLE OF BEING PROVED:

1.1 LIQUIDATED CLAIMS

- A liquidated claim, is a claim for a determinable amount, i.e. an **amount which is certain**. Section 44(1) of the Insolvency Act – conventional money claims are the most common
- Also consider: damages claims for post-insolvency termination of contracts
- Proof of unliquidated claims?
 - Admitted or compromised by trustee?
 - Settled by a court judgment?
- Claims acquired by cession?

1.2 KINDS OF LIQUIDATED CLAIMS

- 1.2.1 Secured Claim;
- 1.2.2 Preferent Claim;
- 1.2.3 Concurrent Claim and
- 1.2.4 Conditional Claim.

- The Insolvency Act NO. 24 OF 1936 “The Act”, does not define the term secured claims. However, it is clear that a secured creditor is a creditor who holds a security for his claim which is acknowledged by the Act. Section 2 of the Act inter alia defines the following core terms in this respect:

“preference”, in relation to any claim against an insolvent estate, means the right to payment of that claim out of the assets of the estate in preference to other claims;

“security”, in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage (including a notarial bond), landlord’s legal hypothec, pledge or right of retention.

- Accordingly, a creditor with a secured claim is one in respect of which the creditor holds security, i.e. has a “preferent” right over property of the insolvent estate.
- This right ranks before the right to payment of any other creditor of the estate. Payment of this creditor would be out of the proceeds (including fruits derived from the property after the date of sequestration) of the realization thereof by the trustee in the course of his administration subject to the provisions of the Act.

- Where a creditor has a preferent claim, there is a right to payment out of the property of the estate which is enforceable before other (concurrent) creditors' rights.
- This claim may also be secured. If it is not, it ranks for payment out of the free residue before the claims of non-preferent claims, i.e. concurrent creditors.
- A bond holder under a general notarial bond who is not in possession of any movable property, is entitled (although not a secured creditor) to payment out of such property before any concurrent creditors. Where there is multiple notarial bonds enjoying this preference, and no bondholder has possession of any of the movable property of the debtor, priority is regulated by the date of registration.
- Payment takes place prior to concurrent creditors, but after the payment of the costs of sequestration and certain additional statutory costs

- A concurrent Claim is one which is neither secured nor preferent in terms of the Insolvency Act.
- Concurrent claims, being neither secured nor preferent, are payable, if proved, from the free residue after all other claims (including, where payable, interest) and costs have been paid.

- This claim is dependant on a condition. Therefore, pending the fulfillment of such a condition, the claim is unenforceable.
- The condition must still be capable of fulfillment at the institution of the claims of the creditors.
- Eg: surety who wants to recover amount paid on behalf of insolvent

2 PROCEDURE FOR PROOF OF CLAIM:

2.1 TIME FOR PROOF – Don't be late!

- Proof may be effected any time before the final distribution of the estate. But if it is not effected at the first or second meeting of the creditors, or at their special meeting, during the period of three months after the conclusion of the second meeting, it may occur only at a special meeting if the Master or the Court accords leave accordingly and on payment of an amount to cover the cost occasioned by the late proof.
- What about risk of contribution?

2.2 VENUE FOR PROOF

- At the meeting of the creditors of the estate, i.e. the first or second or special meeting.

2.3 AFFIDAVIT FOR PROOF

- The proof is possible by way only of an affidavit lodged, together with the documents supporting the claim with the officer who is presiding at the meeting. The creditor or his agent must set forth, therein, the facts upon which his knowledge of the claim is based and the nature and particulars thereof. A document on which a claim is based must be attached to the affidavit.
- **Prescription?**
- **Security?** Realisation solely from secured property?

2.4 LODGMET OF AFFIDAVIT AND DOCUMENTS

- The affidavit and other documents e.g. a special power of attorney to the creditor's agent to vote on behalf of the creditor, must be lodged t the office of the officer who is to preside at the meeting. The lodgment must occur not later than 24 hours before the advertised period of such meeting.
- Late submission – discretion of presiding officer?

2.5 ADMISSION OR REJECTION OF CLAIM

- The Act provides that a claim must be **proved to the satisfaction of the officer presiding at the meeting** who shall admit or reject the claim. The officer should examine the proof of claim documents to decide whether they disclose a *prima facie* existence of an enforceable claim.
- Claimant can give oral evidence – when does this occur?
- Presiding officer exercises a *quasi-judicial function*

INSOLVENT ESTATE

Procedure for proof of claim

Admission or rejection of claim cont.

- The presiding officer's decision to reject a claim does not preclude its proof by the claimant at a subsequent meeting of creditors. Alternatively, the claimant may take the proceedings to review the presiding officer's decision.
- A trustee has no power to reject a claim. The power of rejection lies exclusively with the presiding officer, the Master or the Court.
- A creditor objecting unsuccessfully to a claim which is admitted by the presiding officer can apply to have the decision reviewed
- The Act envisages that a claimant seeking payment should endeavour to prove a liquidated claim rather than institute legal proceedings. That resort should be had only if the claim is rejected by the presiding officer, or having been admitted by him, is disputed by the trustee and expunged or reduced by the Master.

2.6 AMENDMENT OF PROOF OF CLAIM AFFIDAVIT

- The Act does not preclude a creditor from withdrawing a claim prior to the admission thereof, whatever the reason may be and even if such reason is the amendment of the claim.
- A creditor may then correct the incorrect claim or submit a fresh one if the Master consents thereto, in writing.

2.7 WITHDRAWAL OF PROVED CLAIM

- A creditor may withdraw his claim or part thereof at any time, by notifying the Master and the trustee by registered post. The trustee will then notify the other creditors.

2.8 CANCELLATION OF WITHDRAWAL OF PROVED CLAIM

- Should a creditor wish to cancel the withdrawal, s/he may do so, by notification via registered post to the Master and the Trustee.

3. INVESTIGATION OF PROVED CLAIM

3.1 INVESTIGATION BY TRUSTEE

- The Trustee is obliged to ascertain whether the estate in fact owes the claimant who has proved a claim the amount claimed. S/he may seek further information from the claimant or anyone else and also he may resort to interrogation.
- Where a trustee is satisfied with regard to all aspects thereof, he must account to the Master. If his decision is that he disputes the claim, the facts and reasons for disputing the claim, must be reported to the Master. The trustee ought not to dispute a claim on the basis of suspicion. The reasons for disputing a proved claim must be furnished to the claimant with a notification to within 14 days show cause in writing why the claim should not be disallowed or reduced.

3.2 MASTER'S RULING ON DISPUTE AS TO PROVED CLAIM

- The Master may confirm the claim. Where however, his decision is to disallow the claim, or reduce it, he must notify the claimant in writing. The claimant then may review the decision or continue with legal proceedings.

3.3 DISREGARD OF PRE-SEQUESTRATION SET-OFF

- The trustee may with the approval of the Master disregard a set-off not effected within the ordinary course of business which occurred between debts reciprocally due to the insolvent and X within 6 months prior to the date of sequestration, or where X's related claim was ceded to him by Y, and the insolvent's related claim existed at the date of such cession and the sequestration was within one year after such date.
- The trustee must in either case, require X to pay the debt to the estate which but for the set-off he would owe.
- Most important principle is the ordinary course of business idea

3.4 DENIAL OF PREFERENCE UNDER MORTGAGE BOND

- Where the proved claim is secured in terms of a special or general mortgage bond, the preference afforded thereby would be nullified if:
- The sequestration of the estate was within six months after the lodging of the bond for registration;
- The purpose for which the bond was passed was to secure a previously unsecured debt which was incurred more than 2 months prior to such lodging;

3.5 LIQUIDATION OF UNLIQUIDATED CLAIMS

- Where proof of an unliquidated claim is tendered at a meeting of creditors for proof of claims, the presiding officer must deliver the documents to the trustee.

- The Trustee may then compromise or admit the claim, (thereby rendering it liquidate) if authorized by the creditors or the Master where no creditor has proved a claim.
- This would serve to prevent incurring litigation costs to establish a claim.

1. CLAIMS CAPABLE OF BEING PROVED

- The relevant law relating to insolvent estates also applies in relation to claims capable of being proved in the winding-up of a company.

2. PROCEDURE FOR PROOF OF CLAIM

- Again, the relevant law relating to insolvent estates applies to the procedure for proof of claims herein.
- The liquidator may apply to the Master to fix a time within which creditors are to prove their claims. The Master may also extend the fixed time.

INVESTIGATION OF PROVED CLAIM

- The relevant law relating to insolvent estates applies herein.
- The Liquidator must furnish the Master with written reasons (duplicate) for his decision to dispute a proved claim, and forward a copy of such reasons to the claimant.
- In addition thereto, the Liquidator must also request the claimant to furnish reasons to the Master why the claim should not be expunged or reduced within 14 days.
- The liquidator's power to compromise or admit a claim, whether liquidated or unliquidated derives not from the Act (Insolvency Act) but from the Companies Act itself.

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- The relevant law relating to insolvent estates also applies in relation to claims capable of being proved in the winding-up of a corporation.

2. PROCEDURE FOR PROOF OF CLAIM

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3. INVESTIGATION OF PROVED CLAIM

- The relevant law relating to Companies applies herein as well regarding investigations of proved claims.

1. INSOLVENT ESTATES;
2. COMPANY IN LIQUIDATION &
3. CLOSE CORPORATION IN LIQUIDATION

- Claims capable of being proved:

- Kinds of liquidated Claims:

- ❖ Secured Claims;
 - ❖ Preferent Claims;
 - ❖ Concurrent Claims &
 - ❖ Conditional Claims

- Procedure for Proof of Claim:

- ❖ Time;
 - ❖ Venue;

- ❖ Affidavit;
- ❖ Lodgment of affidavit & other documents;
- ❖ Admission or rejection of Claim;
- ❖ Amendment of proof of Claim;
- ❖ Withdrawal of proved Claim;
- ❖ Cancellation of withdrawal of proved claim.

- Investigation of proved claim:
 - ❖ Investigation by trustee (or liquidator in case of Companies & Close Corporations);
 - ❖ Master's ruling on dispute as to proved claim;
 - ❖ Disregard of pre-sequestration set-off;
 - ❖ Denial of preference under mortgage bond and
 - ❖ Liquidation of unliquidated claim