

**PRESENTATION TO AN AIPSA WORKSHOP  
IN ASSOCIATION WITH BOWMAN GILFILLAN,  
ATTORNEYS**

**SALE OF ASSETS BY A TRUSTEE/LIQUIDATOR**

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# ***METHODS OF SALE***

- Public Auction
- Private Treaty
- Public Tender

## *WHO, DULY AUTHORISED, MAY SELL*

- Provisional Trustee/Trustee
- Provisional Liquidator/Liquidator (in the case of a company)
- Liquidator (in the case of a close corporation)

# ***DEFINITIONS***

**As they appear in the Insolvency Act No. 24 of 1936  
(as amended) (“the Insolvency Act”)**

- **TRUSTEE**

Means the trustee of an estate under sequestration, and includes a provisional trustee

- **IMMOVABLE PROPERTY**

Means land and every right or interest in land or minerals which is registrable in any office in the Republic intended for the registration of title to land or the right to mine

- **MOVABLE PROPERTY**

Means every kind of property and every right or interest which is not immovable property

## **REQUIREMENTS OF A PROVISIONAL TRUSTEE TO HAVE HIS POWERS EXTENDED FOR THE SALE OF PROPERTY (BOTH IMMOVABLE AND MOVABLE)**

- **Section 69** – A Trustee (and in this case also a Provisional Trustee) must take charge of the property of the estate *but not before the Deputy Sheriff has made the inventory referred to in Section 19(1) of the Insolvency Act*
- A Provisional Trustee may not without the authority of the Court or Master sell any property belonging to the estate in question (*vide* Section 18(3))
- Any sale of property by the Provisional Trustee without the required authority is void

*Harrington v Fester and Others 1980 (4) SA 424 (C)*

*SAI Investments v Van der Schyff NO and Others 1999 (SA 340 (N))*

## **GENERAL REQUIREMENTS OF THE MASTER IN EXTENDING THE POWERS OF THE PROVISIONAL TRUSTEE TO DISPOSE OF ASSETS**

The process to be followed by the Provisional Trustee in seeking an extension of his powers is to apply to the Master of the High Court in the first instance and, only where the Master refuses such application, to make application to Court for an extension of his powers:

### **In the case of a sale by public auction:**

- A final order of sequestration is in place. In the event of there are only being a provisional order of sequestration the written consent of the insolvent to the sale of assets\*
- The status as regards the holding of a First Meeting of Creditors\*
- A detailed and accurate description of the property and confirmation that it constitutes an asset of the estate\*
- Details of the costs of maintaining and conserving the property\*
- Cogent reasons as to why the asset ought to be disposed of at an early stage rather than awaiting the Trustee to be authorised to do so at the Second Meeting of Creditors\*

## ***GENERAL REQUIREMENTS(CONTINUED)***

- Conditions of Sale
- Advertisements
- Advertising budget
- *Curriculum Vitae* of the auctioneer. (The right of a creditor to direct a Trustee to employ a particular auctioneer in connection with the administration of the estate should be noted (*vide* Section 53(5))
- Affidavit by the Provisional Trustee to the effect that he has no pecuniary interest in the Auctioneer
- The written consent of the secured creditor in the event of the property being subject to an encumbrance (alternatively confirmation by the Provisional Trustee to the effect that he has guaranteed such creditor against any loss arising from the sale)\*
- Consultation with the employees regarding the sale of the whole or part of the business of the insolvent employer (*vide* Section 38(6))\*
- Such other conditions as the Master may direct\*
- In the event of there being more than one Provisional Trustee appointed each appointee is to be a party to the application\*

## ***GENERAL REQUIREMENTS(CONTINUED)***

### **In the case of a sale by private treaty:**

- All requirements marked \* above together with:
- Reasons why the property ought to be sold by Private Treaty rather than Public Auction
- Notice to the general body of creditors of the intention of the Provisional Trustee to seek an extension of his powers to dispose of the assets

## **GENERAL REQUIREMENTS BY A TRUSTEE IN OBTAINING THE NECESSARY POWER TO DISPOSE OF ASSETS**

- **Prior to the Second Meeting of Creditors the Trustee may sell property of the estate if authorised thereto by the Master (*vide* section 80*bis*)**
- **The requirements for obtaining an extension of his powers would be the same as those of a Provisional Trustee**
- **In selling immovable property the Trustee ought also to be mindful of the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act No. 19 of 1998 in order to give the purchaser occupation thereof (*ABSA Bank Ltd v Murray and Another 2004 (2) SA 15 (C)*)**

There are several authorities prohibiting the Trustee from selling assets of an estate, inter alia:

- In the case of all proved creditors having been paid in full from the proceeds of the realisation of other assets
- A statutory prohibition on the sale of property where the Legislature intends that it should
- A property which consists of a right acquired from the state under a lease, licence, etc
- Property which is entitled to be retained by the insolvent for his own use

**Unlike a Provisional Trustee who is empowered by Section 18(3) to approach the Court for an extension of his powers should the Master refuse same, such authority does not devolve upon a Trustee (*vide* Section 80*bis*). Were the Master to refuse his application for an extension of powers, the Trustee's only remedy would be a review of the Master's decision**

## **SALE OF PROPERTY AFTER THE SECOND MEETING OF CREDITORS**

- Subject to the provisions of Sections 83 and 90 of the Insolvency Act a Trustee shall, as soon as he is authorised to do so at the Second Meeting of Creditors, sell all the property of the estate in such manner and upon such conditions as the creditors may direct
- A typical Resolution passed at a Second Meeting of Creditors usually reads as follows:

*“THAT the Trustee be and is hereby authorised to dispose of the immovable and/or movable assets of the estate either by public auction and/or public tender and/or private treaty, the mode of sale for any one or more of the assets to be at the discretion of the Trustee, and that all costs incurred in relation thereto be costs in the sequestration of the estate”*

- A Resolution such as the one in above would empower the Trustee to proceed with the realisation of assets without further reference to any creditor, including any creditor holding a right of encumbrance

## ***SALE OF PROPERTY(CONTINUED)***

- If at the conclusion of the Second Meeting of Creditors there has been no direction given to the Trustee in relation to the sale of property the Trustee is then obligated to dispose of the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the Government Gazette and after such other notices as the Master may direct and upon such other conditions as the Master may direct (*vide* Section 82(1))
- Section 81(3)(b) provides that in the event that no directions have been given by the creditors at the Second Meeting of Creditors, any Resolution or direction alleged in the affidavit referred to in paragraph (a) of sub-section (1)*bis* to have been recommended to the creditors of the estate and which could lawfully have been passed or given by the creditors at such meeting shall, if the Master so approves, be deemed to have been passed or given, as the case may be, by the creditors at such meeting

## **MISCELLANEOUS MATTERS RELATING TO THE SALE OF IMMOVABLE PROPERTY SUBJECT TO A LEASE**

- Where a lease is concluded in respect of the property prior to the registration of a mortgage over such property the property may be sold only subject to the lease and the terms of the lease are therefore binding on the purchaser

*Timm v Kay and Another 1954 4 SA 585 (T), United Building Society and Another NO v Du Plessis 1990 3 SA 75 (W)*

- Where the lease was concluded subsequent to the registration of a mortgage bond the procedure then to be adopted would be to offer the property for sale with the lease and in the absence of a satisfactory bid to discharge the mortgagee's secured claim in full, to declare the lease to be at an end and to thereafter sell the property free of the lease. If the mortgagee does not demand that the property be sold free of the lease then the lease continues to operate
- Upon termination of the lease the lessee would have a concurrent claim for damages

## **MISCELLANEOUS MATTERS(CONT)**

- **Where the property is leased but not mortgaged and the Trustee is unable to sell the property either by public auction or private treaty with the lease, it is submitted that the Trustee has an election to terminate the lease and to thereafter sell the property free of the lease. In this case, too, the lessee would have a concurrent claim for damages. According to Meskin the principle in these circumstances is one of *huur gaat voor koop***
- **In selling immovable property the Trustee ought also to be mindful of the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act No. 19 of 1998 in order to give the purchaser occupation thereof (*ABSA Bank Ltd v Murray and Another 2004 (2) SA 15 (C)*)**
- **Where the sale of an immovable property takes place and the highest bid received thereat is not to the satisfaction of the bondholder the Trustee ought to exercise extreme caution in concluding a sale with the bondholder at an amount less than the highest bid received at the auction sale**  
***Hillcrest Village (Pty) Ltd & Others (judgment delivered on 18 April 2008 – at present unreported)***

## **MISCELLANEOUS MATTERS(CONT)**

- **In selling immovable property the Trustee ought also to be mindful of the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act No. 19 of 1998 in order to give the purchaser occupation thereof (*ABSA Bank Ltd v Murray and Another 2004 (2) SA 15 (C)*)**

## ***SALE OF PROPERTY NOT BELONGING TO ESTATE***

Property in the possession of the insolvent at the time of his sequestration and which is thereafter sold by the Trustee in good faith shall not entitle the owner thereof to recover that property unless he had by notice in writing before the sale to the Trustee, or if no Trustee is appointed, to the Master, and demanded a return of the property.

Failing such demand his rights would be limited to receiving the nett proceeds thereof thereupon losing his right to recover the property itself from the purchaser (*vide* Section 36(5) &(6))

## ***DISQUALIFICATIONS BY TRUSTEE & AUCTIONEER RELATING TO THE PURCHASE OF ASSETS***

A Trustee himself is disqualified from purchasing property of an estate of which he is the Trustee without his action being confirmed by an order of the Court. This would apply whether he were to purchase the property either in a personal or any other capacity and extends to his spouse, partner, employer, employee or agent and likewise applies to an auctioneer or any party associated with him as in the case of the Trustee

## ***REALISATION OF SECURITIES FOR CLAIMS (Section 83)***

- A creditor holding as security for his claim movable property shall, before the Second Meeting of Creditors of the estate, give notice of the fact in writing to the Master and to the Trustee if one has been appointed
- Property consisting of a marketable security has to be sold through a stockbroker as defined in the Financial Markets Control Act, 1989
- Where the property (Meskin refers to both movable and immovable) has not been realised by the creditor himself then the Trustee may, with the creditor's authorisation and if the creditor has valued his security when proving his claim, allow the creditor to "take over" the property at such value within three months from the date of his appointment or from the date of the proof of the claim whichever is the later. "Take over" in this context means a purchase and sale. VAT implications in regard to a transaction of this nature ought always to be considered. The subsequent proceeds of the sale (the difference between the realisable value and the "take over" value will accrue for the benefit of the general body of creditors)

## ***REALISATION OF SECURITIES(CONTINUED)***

- If the Trustee does not “take over” the property he must realise same. The proceeds will be applied in the payment of the creditor’s claim after deducting the costs of maintaining, conserving and realising the property. If the creditor has not relied on his security he may rank as a concurrent creditor for the shortfall
- Movable property held as security may be realised by the creditor himself but only before the Second Meeting of Creditors. The realisation thereof is to be in a specific manner, i.e. marketable security by way of a stockbroker, a right of action in a specific manner but not without the prior approval of the Trustee, or if the property is not a right of action, by public auction after affording the Trustee a reasonable opportunity of inspecting the property. The Trustee is obliged to give notice to all other creditors of the date, time and place of the proposed sale
- When a creditor has realised movable property he shall, as soon as possible thereafter, prove his claim and attach to the affidavit in proof thereof a statement of the proceeds. He must similarly pay over the proceeds of the realisation of the property to the Trustee
- Should he not have realised the property before the Second Meeting of Creditors the creditor shall deliver it to the Trustee who shall thereafter realise it

## ***SPECIAL PROVISIONS FOR GOODS SOLD IN TERMS OF AN INSTALMENT SALE AGREEMENT (Section 84)***

- Where goods are sold subject to an instalment sale agreement the property forming the subject thereof shall, on the sequestration of the estate of the debtor, create in favour of the other party to the transaction a hypothec over that property in respect of the amount still due under the transaction. The instalment sale creditor is entitled to delivery of the property to him whereupon he shall be deemed to be holding the property as security for his claim
- In the event of property being returned by the debtor to the creditor within a period of one month prior to sequestration the Trustee may demand delivery of the property or the value thereof to him at the date when it was so returned subject to payment to the creditor 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 transaction and the total amount actually paid thereunder

## ***SALE OF ASSETS BY A PROVISIONAL LIQUIDATOR/LIQUIDATOR***

Section 386 of the Companies Act No. 61 of 1973 (as amended) sets out the powers of a Liquidator. In the case of a Provisional Liquidator his powers are often restricted and in seeking an extension to dispose of immovable or movable property he would invoke the provisions of Section 2A. Section 2B entitles the Master to authorise the sale of such property or any portion thereof on such terms and in such manner as he may determine; provided that if such property or portion thereof is subject to a preferential right the Master shall not authorise the sale of such property or portion thereof unless the person entitled to such preferential right has given his consent in writing. The requirements of the Master in an application by a Provisional Liquidator/Liquidator are the same as in the case of a Provisional Trustee/Trustee.

Once a Liquidator has been appointed his power to dispose of assets are embodied in Section 4(h) subject to the provisions of Section 3A which state that:

“In a winding up by the Court with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under Section 387”

## ***SALE OF ASSETS OF A CLOSE CORPORATION***

The powers conferred on the Liquidator of a close corporation are the selfsame powers afforded the Liquidator in a winding up given the provisions of Section 66 of the Close Corporations Act No. 69 of 1984 (as amended)

*THANK YOU FOR YOUR PARTICIPATION*

I TRUST THAT YOU HAVE DERIVED A  
BENEFIT FROM THIS PRESENTATION  
AS MUCH AS I HAVE FROM ITS  
PREPARATION

Selwyn Trakman