



SCHOEMAN SEJWANE GROBLER INC.

Attorneys, Insolvency Practitioners and Administrators of Estates

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DECEASED ESTATE DEBT SOLUTIONS

NEWSLETTER

Insolvency vs Debt Review 2

Deceased Estate Debt Solutions 1

Commercial Debt Collections and Liquidations 1

Can you inherit if sequestrated? 1

Divorce followed by Sequestration. Can you still get assets as per divorce agreement? 2

The Bequest Foundation, Free Wills and Estate Planning 1

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Usually debt cannot be inherited. Creditors however have to be paid before heirs can inherit. There is a difference between a cash shortfall in an estate (which is solvent) and an insolvent deceased estate. Cash shortfalls occur when insufficient liquid assets exist to pay debt despite the estate's assets exceeding its liabilities. This position differs from that of insolvency. The problem is usually solved by using the immovable property in the estate to obtain funds to pay the estate debt. The property is transferred simultaneously with registration of a new mortgage bond, to the heir for which the

heir assumes responsibility.

Insolvent deceased estates, good news for spouses: If you were married in community of property you may not have to repay the debt. This is because the death terminates the marriage and assets or income acquired by the surviving spouse subsequently pertain to a new estate. The creditors of the joint insolvent deceased estate, if administered in terms of section 34 of the Administration of Estates Act, should not attach assets of the new estate or pursue the spouse for payment. Judgments or garnishee orders

against the spouse for debt before date of death should be opposed and rescinded. The assets of the joint estate will however have to be sold for the benefit of creditors but at least the spouse should not be burdened by any of the administration costs.



"It shouldn't take long to wind up your Aunt's estate. She only left you an alarm clock."

Commercial Debt Collections and Liquidations

Where Companies and Close Corporations (but not individual persons) owe money, application for the liquidation of the debtor can be made in certain circumstances. With the introduction of the new Companies Act the procedures were however complicated due to a court decision in *HBT Construction and Plant Hire CC v Uniplant Hire CC (2012)* which ruled that the applicant has to prove that the debtor is insolvent. This decision was however

overruled in *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and another (2013)* in terms of which it was decided that it was not required to prove that the respondent company was insolvent.

Implications: Applicants should be cautious of an abuse of court process but the procedure may be more effective than summons and litigation. Liquidators seeking new busi-

ness often call the debtors bankers, trade creditors and suppliers advising them of the pending application which could result in pressure to settle the debt immediately.

The Bequest Foundation



Can you inherit if you are sequestrated?

Usually if the actual right to inherit should accrue before the rehabilitation of the insolvent, such right immediately vests in the trustee of the insolvent estate and you cannot inherit (*Brown v Oosthuizen 1980*). If the last will and testament merely directs that a bequest shall not form part of an insolvent estate, without a further direction that on the beneficiary's insolvency the bequest shall pass to some other person, the direction is of no effect in law. A testator is however capable of including a direction in his will stipulating that in the event of the heir being an un-rehabilitated insol-

vent at the death of the testator, the bequest shall pass to some other person, or that the executors of the estate may in their discretion divert it to some other person. The effect is that the creditors will have no right to the inheritance (*Du Plessis v Pienaar NO 2003*).

Can an insolvent refuse to inherit? In *Wessels NO v De Jager NO 2000* the court held that before the acceptance of an inheritance the beneficiary had no rights to the benefits that can vest in the insolvent estate, but merely a "competence". The insolvent can refuse to inherit.

The Bequest Foundation has been established as a Non Profit Organization to assist other NPO's to obtain funding from legacies in Last Wills and Testaments. If you benefit a charity of your choice, the estate planning and the drafting of your Last Will and Testament will be done at no cost to you. The importance of revising your will is sometimes overlooked and should be done in particular at:

- * Birth of a child or grandchild
- * Divorce
- * Acquisition of immovable property
- * Insolvency of Heir

Visit www.thebequestfoundation.co.za or enquire with Schoeman Sejwane Grobler Inc.



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PAGE 2

Divorce followed by Sequestration. Can you still get assets as per divorce agreement?

A disposition (of an asset) made in compliance with an order of court, such as a divorce order, is excluded from the statutory impeachable dispositions if the insolvent personally effected such disposition in order to comply with the order of court. The effect of the divorce order incorporating an agreement for the distribution of assets is to distribute the assets, and a party is entitled to assets in terms of the divorce order even if the estate of the other party has been sequestered after the divorce (*Corporate Liquidators (Pty) Ltd v Wiggill 2007*)

FUN FACTS

- The longest will ever probated was 1,066 pages and 95,940 words. An English woman, Frederica Evelyn Stilwell Cook, holds this record
- The "will of Uah" is the oldest known will in existence, and it was found in a tomb in Egypt. It dates back to 2548 BC, and leaves all property to his wife, Teta

Insolvency vs Debt Review

Your personal circumstances will determine your best option. Circumstances to be taken into account include (1) your assets/liabilities (2) your monthly income/expenses (3) your occupation and (4) any other special circumstances.

The adverse or "negative" implications of both procedures are basically similar. The obtaining of credit during the time period of either procedure will be difficult (but not necessarily impossible). Other technical differences exist with regards to specific matters.

In insolvency, creditors usually have to write off a debt, but in debt review all debt together with interest and legal costs is to be paid, although over an extended time period.

Assets of commercial value have to be sold in insolvency. It may take some time to sell these assets. Assets are usually retained in debt review. You do however eventually have to settle the debt on these assets. Emotional attachment to material assets should be weighed up against moving on in a changing world with new assets.

Recovery time is usually much faster with insolvency as opposed to debt review.

Insolvency often, but not always, relate to business owners and debt review to employees.

In insolvency a Trustee is appointed to deal with the creditors in terms of the provisions of the Insolvency Act. With debt review a debt counsellor is appointed to deal with creditors in terms of the National Credit Act. The procedures, implications and results of the two options differ substantially.

Insolvency orders are obtained in the High Court only via a process of either voluntary surrender or sequestration. Debt Counsellors usually obtain consent orders in the Magistrates Court.

In debt review you pay a lump sum monthly to a Pay-

ment Distribution Agency who pays your creditors. Your monthly income in the future until settlement of the debt is affected. With insolvency after obtaining the court order, subject to certain exceptions, you don't have to pay anything.

The obtaining of an insolvency order usually entails and is subject to a benefit to creditors (with certain exceptions). This creditor's benefit is normally calculated at approximately 10 cents or 12 cents to the rand dividend to concurrent creditors, after full payment of secured and preferent creditors. Example: You owe Edgars R10 000, 00; Credit card R60 000, 00; Bank overdraft R30 000, 00-total concurrent claims R100 000, 00. Your insolvency application has to prove that you have at least R10 000, 00 or R12 000, 00 in asset value to provide for 10c or 12 c in the rand dividends, to obtain the court order. In addition to this benefit to creditors you have to prove that the administration costs of your insolvent estate have been paid or provided for.

The value of the assets do not have to be cash, it can consist of furniture, vehicles etc. Proper substantiating valuations have to be submitted with the insolvency application.

Once the sequestration order has been granted, the assets are sold in due course and dividends are paid to the creditors. The court order will not be rescinded if the projected dividends don't materialise. It is possible for insolvents to buy their assets from the Trustee.

Sequestration/insolvency applications are substantially more expensive than debt review procedures. There are additional costs not normally associated with debt review. Insolvency applications are normally more complex and legal procedure more time consuming.

The attorney's costs to obtain the insolvency order are usually

payable upfront. Depending on your personal circumstances certain payment options may however exist. Communications and harassing telephone calls from creditors can be directed away from you to your attorney immediately.

From a cost point of view insolvency should not be an option unless your total debt exposure is at least R150 000, 00. This is off course relative to your income potential and other factors such as contingent liabilities. Insolvency is however a much better option, as opposed to debt review, if your total debts are much more than R150 000, 00, again, relative to your income potential.

Credit bureaus in debt review procedures list you as "under debt counselling". Some debt counselors are of the opinion that this is not a blacklisting but a protection and can be removed completely once the debt is paid. The obtaining of credit will in any event be difficult.

With insolvency the Credit Bureaus will normally list the sequestration order and the obtaining of credit will be complicated. **The acquisition of debt without advising the lender of the insolvency order is a criminal offence and illegal.** Rehabilitation High Court orders can be obtained in insolvency approximately after 3 years (with various exceptions sooner or later) after the insolvency order which are noted by the Credit Bureaus and should have the effect of the removal of the insolvency order from your credit records.



"She left everything to her cats."

Schoeman Sejwane Grobler Inc (SSG Attorneys) consult in all aspects relating to Insolvency Law, Voluntary Surrender, Sequestration, Rehabilitation, Liquidations, Settlement, Proposals to Creditors, Comparisons with these Procedures to Debt Review, Clearing of Credit Records and related matters. In addition we offer specialised services in the Fiduciary industry, in particular Estate Planning, Administration of Deceased Estates, Insolvent Deceased Estates and Trusts.