

**CHAPTER 42:02**  
**INSOLVENCY**  
ARRANGEMENT OF SECTIONS

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**An Act to make provision for the administration of insolvent and assigned estates and for matters incidental thereto.**

*[Date of Commencement: 23rd August, 1929]*

**PART I**  
***Preliminary (ss 1-2)***

**1. Short title**

This Act may be cited as the Insolvency Act.

**2. Interpretation**

In this Act, unless the context otherwise requires-

**"account"** means liquidation account and plan of distribution or of contribution, or of distribution and contribution, as the case may require;

**"bailiff"** means any bailiff of a magistrate's court, or any official lawfully acting as such, and includes any duly appointed deputy bailiff;

**"court"** means the High Court of Botswana but, in sections 25, 28, 29, 30 and 32 includes a magistrate's court acting within its jurisdiction, and in relation to any offence against this Act the term "court" or "the court" means a magistrate's court having jurisdiction in respect of that offence within Botswana;

**"creditor"** includes any person who or any estate of a person which, is a creditor in the usual sense of the word;

**"debtor"**, when used in connection with an estate which is about to be sequestrated or assigned, includes any person who, or any estate of a person which, is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law for the time being in force relating to the winding up of companies;

**"disposition"** means any transfer or abandonment of rights to property and includes sale, lease, mortgage, pledge, conveyance, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court;

**"free residue"**, in relation to an estate, means that portion of the estate under sequestration which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention;

**"good faith"**, when used in connection with dispositions of property, means the absence of any intention to prejudice creditors in obtaining payment of their debts or to prefer one above another;

**"immovable property"** means land and every right or interest in land or minerals which is registrable under the Laws of Botswana in any deeds or other registration office wherein title to immovable property or mining title may be registered;

**"insolvent"** means a debtor whose estate is under sequestration;

**"marketable security"** means any stock, debenture, share or any other interest whatever capable of being sold in a share market or exchange and includes also the scrip, certificate, warrant or other instrument by which the title to such stock, debenture, share or other

interest is represented;

**"Master"** means the Master of the High Court and includes, to the extent to which he is empowered to act, any Assistant Master;

**"movable property"** means every kind of property and every right or interest which is not immovable property;

**"preference"**, in regard to any claim in an estate under sequestration, means the right to have assets of the estate applied in satisfaction of that claim in preference to other claims;

**"property"** includes movable or immovable property wherever situate within Botswana and includes contingent interests in property;

**"provisional order"** means an order whereby an estate is placed under sequestration provisionally;

**"qualified accountant"** means an accountant holding such qualifications as may be prescribed;

**"Registrar"** means the Registrar of the High Court;

**"security"** as distinguished from "marketable security", in relation to the claim of a creditor, means property of the insolvent over which the creditor has a preference right by virtue of any special mortgage, legal hypothec, pledge or right of retention, but does not include property over which the creditor has, or purports to have, a preferent right by reason of a mortgage or pledge of the general assets of the estate or of the general assets of any business belonging to the estate;

**"sequestration order"** means any order whereby an estate is placed under sequestration or under provisional sequestration, when such order for provisional sequestration has not been set aside;

**"sheriff"** means any person appointed in that capacity by the Minister or any person lawfully acting as such and includes any duly appointed deputy sheriff;

**"special mortgage"** does not include any document which, having been executed after the coming into effect of this Act, purports to pledge as security for a debt movable property which has not been delivered to and retained by the pledgee;

**"trader"** means any person who carries on any trade, business, industry, or undertaking in which goods are sold, bought, exchanged, or manufactured for the purpose of sale or exchange;

**"trustee"** means the trustee in any estate under sequestration, and includes a provisional trustee;

**"unliquidated claim"** means a claim the amount of which has not been determined by agreement or by a judgment of a court or otherwise and includes a claim for damages or for an interdict.

## **PART II**

### ***Sequestration and Attachment of Estate (ss 3-19)***

#### ***A. Voluntary Surrender (ss 3-7)***

#### **3. Circumstances under which an estate may be surrendered**

- (1) The surrender of an estate may be accepted by the court-
  - (a) upon the petition in writing of the debtor, or of his duly authorized agent, setting forth that the debtor is insolvent and tendering the surrender of his estate for the benefit of his creditors;
  - (b) upon the like petition of any person in whom is legally vested the administration of the estate of-
    - (i) any deceased debtor; or
    - (ii) any debtor incapable of administering his estate; or
  - (c) upon the like petition presented on behalf of a partnership estate and made by the greater number of the partners present or represented in Botswana.
- (2) Before accepting the surrender the court may direct the petitioner or any other

person to appear and be examined before the court or before a magistrate appointed by the court; and all opposed cases of voluntary surrender shall be heard in the first instance by a magistrate in the district where the parties reside, and the said magistrate shall transmit the sworn evidence taken in such case, together with his report thereon for the consideration of the court.

#### **4. Publication of notice of surrender and lodging of debtor's schedules or statement at Master's office**

(1) Before presenting any such petition the petitioner shall cause due notice of surrender, as nearly as may be in the Form A in the First Schedule, to be published in the *Gazette*, and in any newspaper circulating in the district in which the debtor resides, or, if the debtor is a trader, in the district in which he has his principal place of business, and by means of a notice published at the office of a magistrate in the district in which the debtor resides or has his principal place of business.

(2) Every such publication shall be not less than 14 days prior to the hearing of the petition.

(3) The petitioner shall lodge in duplicate at the office of the Master the debtor's schedules or statement of his affairs.

(4) If the debtor resides or is a trader carrying on business in any district other than the South East District, the petitioner shall also lodge a copy of those schedules at the office of a magistrate of the district.

(5) The schedules referred to in subsection (4) shall be open to the inspection of any creditor at all times during office hours for a period of 14 days from a date to be mentioned in the notice of surrender and, upon the expiration of the notice, the Master shall transmit one set of the schedules to the court.

(6) The schedules referred to in subsection (4) shall be supported by a valuation under oath of the assets of the estate, and that valuation shall, if the Master so directs, be verified by an independent valuation made by a sworn appraiser or such other person as the Master may appoint.

(7) The schedules shall be framed as nearly as may be in the Form B in the First Schedule and shall contain the particulars and shall be verified by the affidavit thereby required, and shall be accompanied by a certificate from a magistrate of the district in which the petitioner resides, other than the South East District, to the effect that the preceding provisions of this have been complied with.

#### **5. Making of sequestration order by the court**

The court, on being satisfied that the provisions of section 4 have been complied with and that there are available assets of the estate to an amount sufficient to defray all such costs of sequestration as are by this Act payable out of the free residue, may grant an order placing the estate under sequestration in the hands of the Master.

#### **6. Prohibition of sale of property of estate after publication of notice of surrender**

(1) After the publication of the notice of surrender in the *Gazette*, it shall not be lawful to sell any property of the estate which has been attached under writ of execution or other process in the nature of an attachment, unless the person charged with the execution of the same could not have known of the publication:

Provided that-

- (i) the Master, if in his opinion any such property does not exceed P400 in value, or the court, if it exceeds that amount, may order the sale to be proceeded with and direct how the proceeds of the sale shall be applied, and
- (ii) the proceeds of any such property already sold shall be retained by the officer charged by law with the execution of legal process and shall not be paid out by him before the application for surrender of the estate has been made and adjudicated upon except upon an order of the court or unless the notice of surrender has been withdrawn under

section 7.

(2) After publication of the said notice of surrender in the *Gazette*, the Master may, upon the request in writing of any creditor who has to his satisfaction guaranteed the additional costs to be incurred, instruct the sheriff or the bailiff to attach the estate of the debtor.

(3) If the notice of surrender is withdrawn, the attachment shall determine and the costs thereof shall be included in the costs of such notice, and all rights of or against the estate shall revive as if such notice had not been given.

(4) After publication of the notice of surrender in the *Gazette* the Master may-

- (a) appoint a *curator bonis* to take and have the custody of the estate and to exercise in regard to the conduct of any business or undertaking of the debtor such powers of control as may appear to the Master to be desirable; and
- (b) direct the sheriff or the bailiff of a magistrate's court to attach the estate of the debtor as if it were an estate under sequestration.

(5) If the court does not accept the surrender, or if the notice of surrender is withdrawn under section 7, then as soon as the Master has certified that provision has been made for the payment by the debtor of all costs and expenses arising out of the exercise of the powers of subsection (4) or of any other provision of this Act, full control of the estate shall be restored to the debtor.

#### **7. Notice of surrender not to be withdrawn without the consent of the Master**

(1) No notice of surrender published in the *Gazette* may be withdrawn without the written consent of the Master.

(2) If it appears to the Master that such notice was published in good faith, and that there is good cause for its withdrawal, he shall certify his consent thereto on payment of the costs of the notice; and notice of the withdrawal and of the consent of the Master thereto shall thereupon be published by the debtor at his own expense in the *Gazette* and in the newspaper in which the notice of surrender appeared, and thereupon the notice of surrender shall be deemed to have been withdrawn.

(3) If, within 14 days after the date specified in the notice of surrender as the date on which application will be made to the court for the surrender of the estate, the debtor has failed to make application, the Master may publish a notice in the *Gazette* at the expense of the debtor, cancelling the notice of surrender and as from the date of such publication the notice of surrender shall be deemed to have been withdrawn, and a copy of such notice of withdrawal shall be published at the office of a magistrate in the district in which the debtor resides or has his principal place of business.

#### ***B. Compulsory Sequestration (ss 8-16)***

#### **8. Acts of insolvency**

A debtor commits an act of insolvency-

- (a) if, having any property within Botswana, he departs therefrom, or being out of Botswana remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
- (b) if, having against him the sentence of any competent court, and being thereto required by the officer charged with the execution of the same, he does not satisfy the same or point out to that officer sufficient disposable property to satisfy the same, or if it appears from the return made by such officer that he has not found sufficient disposable property;
- (c) if he makes any disposition of any of his property which has the effect of prejudicing his creditors or of preferring one creditor above another;
- (d) if he removes any of his property with intent to prejudice his creditors or to prefer one creditor above another;
- (e) if, except as provided in this Act, he agrees or offers to assign his estate for the benefit of his creditors or any of them, or makes or offers to make any arrangements with his

- creditors for releasing him wholly or partially from his debts;
- (f) if, having published a notice of surrender which has not been withdrawn in the manner aforesaid, he omits to lodge his schedules as required by law, or lodges schedules containing material misrepresentations or omissions, or fails to present his petition to the court within 21 days from the publication in the *Gazette* of that notice;
  - (g) if he gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts or if he has suspended payment of his debts;
  - (h) if he makes default in publishing the notice required by section 121 or if his creditors have, in terms of section 124, declined the assignment of his estate;
  - (i) if, being a trader, he gives notice in the *Gazette* in terms of section 34 and is unable to meet the liabilities of his business;
  - (j) if, a notice of assignment having been published, he omits to lodge his schedules as by law required or his schedules do not fully disclose his debts or property and that omission is material.

### **9. Petition for sequestration of estate**

(1) A creditor (or his agent) who has a liquidated claim for not less than P100, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than P200 against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.

(2) A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition shall be reckoned as a liquidated claim for the purposes of subsection (1).

(3) Every such petition shall contain the following facts-

- (a) the amount involved;
- (b) the cause and nature of the claim in question;
- (c) a statement as to whether the claim is or is not secured, and, if it is, the nature and value of the security; and
- (d) the debtor's act of insolvency upon which the petition is based or otherwise the allegation that the debtor is in fact insolvent.

(4) The facts stated in the petition in accordance with subsection (3) shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than 10 days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or, if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

(5) Before any petition is presented to the court in accordance with the provisions of this section, a copy of the petition and of every affidavit confirming the facts stated in the petition shall be lodged with the Master, or, if there is no Master at the seat of the court, with an officer in the public service designated for that purpose by the Master by notice published in the *Gazette* (in this section referred to as the "designated officer"), and the Master or such designated officer may report to the court any facts ascertained by him which would appear to him to justify the court in postponing the hearing or in dismissing the petition.

(6) The Master or the designated officer, as the case may be, shall transmit a copy of the report referred to in subsection (5) to the petitioning creditor or his agent.

(7) The court may, on consideration of the petition and the Master's or the designated officer's report thereon and of any further affidavit by the petitioning creditor in answer thereto, deal with the petition in accordance with the provisions of section 10 or dismiss the petition or postpone its hearing or make such other order in the matter as in the circumstances appears to be just.

### **10. Provisional sequestration**

Where the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie*-

- (a) the petitioning creditor has established a claim in accordance with the provisions of section 9(1) against the debtor;
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make a provisional order sequestrating the estate of the debtor.

#### **11. Order of sequestration of estate of individual and of partnership**

(1) It shall be competent for the court to include in one sequestration order the estate of a partnership, and the separate estates of the partners; and every fact which is a ground for the sequestration of the estate of a partnership shall be a ground for the sequestration of the separate estate of every partner:

Provided that if the court is satisfied that a partner is willing and able to satisfy the debts of the partnership within a time to be determined by the court, the separate estate of that partner shall not be placed under sequestration by reason only of any fact forming a ground for the sequestration of the estate of the partnership.

(2) Nothing contained in this Act shall affect the rights or liabilities under Roman-Dutch law of partners *en commandite* or anonymous or other partners who have not held themselves out as ordinary or general partners.

#### **12. Making of provisional order and service of rule nisi upon the debtor**

(1) If the court grants a provisional order of sequestration, it shall at the same time grant a rule *nisi* calling upon the debtor upon a day mentioned in the rule to appear and to show cause why a final order of sequestration should not be made against his estate.

(2) If the debtor has been absent for 21 days from his usual place of residence and of his business (if any) within Botswana, the court may direct that it shall be sufficient service of that rule if a copy thereof is affixed to the outer door of the building where the court sits and published in the *Gazette*, or may direct some other mode of service.

(3) Upon the application of the debtor the court may anticipate the return day for the purpose of discharging the order if 24 hours' notice of such application has been given to the petitioning creditor.

#### **13. When provisional order may be set aside or petition dismissed**

If, upon the hearing, the petitioning creditor fails to prove his claim or if he fails to prove the act of insolvency with which the debtor is charged, or the court is not satisfied that the estate is insolvent or that it will be to the advantage of the creditors that the estate be placed under sequestration, it may set aside the provisional order and dismiss the petition or require further proof of the matters therein set forth and postpone the hearing for any reasonable time, but not *sine die*.

#### **14. Petitioning creditor to prosecute sequestration proceedings until trustee appointed**

(1) The creditor upon whose petition a sequestration order is made shall, at his own cost, prosecute all the proceedings in the sequestration until the appointment of a trustee.

(2) The taxed costs shall be paid to him out of the first funds of the estate available for the purpose under section 83, but shall not be provable against the estate.

(3) In the event of a contribution under section 92, the petitioning creditor, whether or not he proves a claim, shall have no smaller liability to contribute than if he had proved his claim as stated in the petition.

#### **15. Compensation to debtor if petition unfounded and vexatious**

Whenever it appears to the court that the petition was unfounded or vexatious, the court may allow the debtor forthwith to prove any damage sustained by him by reason of the provisional sequestration and award him such compensation as it may deem fit; or the debtor may bring an action for damages so sustained by him.

#### **16. Lodging by insolvent of schedules or statement with Master**

(1) Whenever a final order of sequestration has been made upon the petition of a

creditor, the insolvent shall, within seven days of the service of that order, lodge with the Master his schedules or statements of affairs in duplicate framed as nearly as may be in the Form B in the First Schedule, containing the particulars and verified by the affidavit thereby required.

(2) No stamp duty shall be payable in respect of that affidavit.

### ***C. Attachment and Custody of the Estate (ss 17-19)***

#### **17. Transmission of sequestration order by Registrar to Master and other officers**

(1) The Registrar shall without delay transmit-

- (a) a duplicate original of every sequestration order, and of every order amending or setting aside the same, to the Master;
- (b) a duplicate original of every provisional order of sequestration and, where there has been no provisional order, of every final order of sequestration, and of every order amending or setting aside the same-
  - (i) to the sheriff;
  - (ii) to every officer charged with the registration of title to any immovable property or interest in minerals within Botswana which appears to be an asset of the insolvent's estate;
  - (iii) to every bailiff of the magistrate's court to whom it appears that the property of the insolvent is under attachment:

Provided that when the value of an estate is under P400 and the court so orders, the movable assets may remain in the custody of the insolvent or any other person upon such terms as to security as the court may direct, and in that case it shall not be necessary to transmit the order of sequestration to any sheriff or bailiff.

(2) Every officer shall register every order so transmitted to him and note on the order the day and hour when it is received.

(3) Upon the receipt of any sequestration order the Master shall give notice thereof in the *Gazette*.

#### **18. Appointment of *curator bonis* by Master for temporary custody of estate**

(1) Whenever it seems necessary or expedient to the Master, he may appoint a *curator bonis* to take and have custody of any estate under sequestration until the appointment of a trustee.

(2) Every such *curator bonis* shall find security to the satisfaction of the Master and thereafter may collect such debts and may sell or dispose of such property and carry on such business in connection with the estate as the Master may authorize.

#### **19. Mode of attachment by sheriff**

(1) As soon as the sheriff has received the sequestration order, he shall proceed by his deputy or by a bailiff to attach and make an inventory of the movable property of the estate capable of manual delivery and not in lawful possession of a pledgee or under attachment by a bailiff, in the following manner-

- (a) he shall take into his own custody all cash, share certificates, bonds, bills of exchange, promissory notes, deeds and other securities and he shall remit all such cash to the Master, unless otherwise directed by the Master;
- (b) he shall leave all books of account, invoices, vouchers and business correspondence in a room or other suitable place properly sealed up;
- (c) he shall leave any other movable property in a room or other suitable place properly sealed up or appoint some suitable person, either the person in whose care it was at the time of attachment or some other person, to hold the same in his custody; and
- (d) he shall leave with the person so appointed a copy of the inventory with a notice that the property has been attached by virtue of a sequestration order; and that notice shall contain a statement of the offence constituted by section 148 and of the penalties provided therefor.

(2) Any person interested in the estate may be present or may authorize some person to

represent him when the sheriff is making his inventory.

(3) The sheriff or bailiff shall forthwith report to the Master in writing the fact of the attachment, and shall transmit with the report a copy of his inventory and a list of any property which to his knowledge is in the lawful possession of a pledgee.

(4) Every bailiff shall transmit to the Master without delay an inventory of all property attached by him and known to belong to an insolvent.

(5) The sheriff or bailiff shall be entitled to fees and remuneration taxed by the Master according to Tariff A in the Second Schedule.

### **PART III**

#### ***Effects of Sequestration (ss 20-38)***

#### ***Effect upon the Insolvent and his Property (ss 20-24)***

#### **20. Effect of sequestration on insolvent's property**

(1) The effect of a sequestration order shall be-

- (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;
- (b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent except such proceedings as may, in terms of this Act, be instituted by the insolvent for his own benefit or be instituted against the insolvent:

Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of this Act, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate;

- (c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs;
- (d) to enable the insolvent, if in prison for debt, to apply to the court for his release, after notice to the creditor at whose suit he is so imprisoned.

(2) For the purposes of subsection (1) the estate of an insolvent shall comprise-

- (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment; and
- (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section 22: Provided that any moneys or policy of life insurance or asset or, as the case may be, any moneys or proceeds in realization of any policy of life insurance or of any asset in respect of which protection is afforded by virtue of any provision of Part VIII of the Insurance Industry Act to the extent of that protection, shall be excluded from the estate.

(3) The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a notarial deed of separation or a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property of the spouse whose estate has not been sequestrated (hereinafter referred to as "the solvent spouse") as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section.

(4) The trustee shall release any property of the solvent spouse which is proved-

- (a) to have been the separate property of that spouse immediately before the marriage to the insolvent;
- (b) to have been acquired by that spouse under a marriage settlement;
- (c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent;

- (d) to be protected by section 27; or
- (e) to have been acquired with any such property or with the income or proceeds thereof.

(5) The trustee of the insolvent estate shall not, except with the leave of the court, realize property which ostensibly belonged to the solvent spouse, until the expiry of six weeks' written notice of his intention to do so, given to that spouse.

(6) Such notice shall also be published in the *Gazette* and in a newspaper circulating in the district in which the solvent spouse resides or carries on business, and a copy of such notice shall be published at the office of a magistrate in the district in which such solvent spouse resides and shall call upon all separate creditors for value of that spouse to prove their claims as provided in subsection (8).

(7) The solvent spouse may apply to the court for an order releasing any property vested in the trustee of the insolvent estate under subsection (3) or for an order staying the sale and releasing the property and at any time before distribution of the proceeds thereof for an order declaring the applicant to be entitled to those proceeds; and the court may make such order on the application as it thinks just.

(8) Subject to any order made under subsection (7) any property of the solvent spouse realized by the trustee shall bear a proportionate share of the costs of the sequestration as if it were property of the insolvent estate but the separate creditors for value of the solvent spouse having claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, shall be entitled to prove their claims against the estate of the insolvent spouse in the same manner and, except as is otherwise provided in this Act, shall have the same rights and remedies and be subject to the same obligations as if they were creditors of the insolvent estate; and the creditors who have so proved claims shall be entitled to share in the proceeds of the property so realized according to their legal priorities *inter se* and in priority to the separate creditors of the insolvent estate, but shall not be entitled to share in the separate assets of the insolvent estate.

(9) If any property of the solvent spouse has been released by virtue of subsection (4) or (7) the separate creditors of that spouse shall only be entitled to a share in the proceeds of any property of the solvent spouse which has been realized by the trustee, after the property so released and any property of that spouse acquired by him since the sequestration, have been excused.

(10) Before awarding any such creditor a share in such proceeds, the trustee may require the creditor to lodge with him, within a period to be determined by the Master, an affidavit, supported by such evidence as may be available, setting forth the result of such excussion and disclosing the balance of his claim which remains unpaid, and he shall then be entitled to share as aforesaid in respect of that balance only:

Provided that any creditor who has incurred costs in excussing the separate property of the solvent spouse and has been unable to recover those costs from the proceeds of that property shall be entitled to add the amount of those costs to the amount of his claim as proved.

(11) If, during the period determined by the Master, any such creditor has failed either to lodge with the trustee such an affidavit as aforesaid, or to excuss any separate property of the solvent spouse available for the satisfaction of his claim, he shall be debarred from sharing as aforesaid unless the court otherwise orders.

(12) A creditor of the solvent spouse who has proved a claim as provided in subsection (8) shall not be liable to make any contribution under section 92 and shall not be entitled to vote at any meeting of the creditors of the insolvent estate; but any direction of the creditors of the insolvent estate which interferes with the just rights of any such creditor may be set aside by the court on application of such creditor.

(13) If the solvent spouse is carrying on business as a licensed trader apart from the insolvent spouse or if it appears to the court that the solvent spouse is likely to suffer serious prejudice through the immediate vesting of the property of that spouse in the Master or the

trustee, and the court is satisfied in either case that the solvent spouse is willing and able to make arrangements whereby the interest therein of the sequestrated estate will be safeguarded without such a vesting, the court, either when making the sequestration order or at some later date, but subject to the immediate completion of such arrangement as aforesaid, may exclude that property or any part thereof from the operation of the order, for such period as it thinks fit.

(14) During that period the solvent spouse shall lay before the trustee the evidence available in support of his claim to such property and within that period the trustee shall notify the solvent spouse in writing whether or not he will release such property in accordance with subsection (4).

(15) If the property has not been so released, then upon the expiry of the said period that property shall vest in the Master or in the trustee, but subject to the provisions of this section.

(16) If application is made to the court for the sequestration of the estate of the solvent spouse on the ground of an act of insolvency committed by that spouse since the vesting of his property in the Master or the trustee of the insolvent estate, and the court is satisfied that the act of insolvency alleged in that application was due to such vesting, then if it appears-

- (a) that an application is being or, if necessary, will be made under subsection (7) for the release of any property of the solvent spouse; or
- (b) that any property of the solvent spouse has been released since the making of the sequestration order, and that the solvent spouse is now in a position to discharge his liabilities,

the court may postpone the hearing of the said application or may make such interim order thereon as to it may seem just.

(17) If the trustee has in accordance with the preceding provisions of this section released any property alleged to belong to the solvent spouse, he shall not be debarred thereby from proving that it belongs to the insolvent estate and from recovering accordingly.

## **21. Payment of debts after sequestration**

Every payment or other satisfaction in whole or in part of any debt or claim which was due or the case of which arose before the sequestration shall, if made to the insolvent after such sequestration, be void, unless the debtor proves that the same was made in good faith and without knowledge of the sequestration.

## **22. Powers, duties and privileges of the insolvent during sequestration**

(1) Except as is provided in this section the insolvent shall not be able during the sequestration to enter into any contract without the consent in writing of his trustee.

(2) The insolvent shall be entitled for the support of himself and those dependent upon him to follow any profession or occupation or to enter into any service, but he shall not, during the sequestration of his estate, be entitled, without the consent in writing of the trustee, either to carry on, or to be employed or engaged in any capacity in, the business of a trader:

Provided that-

- (i) any of the creditors or the insolvent may, if the trustee gives or refuses such consent, appeal to the Master, whose decision shall be final; and
- (ii) the insolvent shall keep a detailed record of all assets received by him from whatever source and of all disbursements made by him in the course of his profession, occupation or employment and, if required thereto by the trustee, shall transmit to the trustee in the first week of every month a statement verified by affidavit of all such assets and of all disbursements whatsoever made by him. The trustee may inspect any such record at all reasonable times and may demand the production of reasonable vouchers in support of any item in such accounts of the expenditure of the insolvent for the support of himself and those dependent upon him. Such moneys received or to be received by the insolvent in the course of his profession, occupation or other employment as in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him shall vest in and be paid by the

employer to the trustee.

(3) The insolvent shall be entitled to sue or be sued in his own name for any claim due to or against him under subsection (2) but no cession of the insolvent's salary or earnings thereunder made either before or after the sequestration of his estate shall be of any effect so long as his estate is under sequestration.

(4) The insolvent shall also have the right in his own name to sue for and for his own benefit to receive any pension to which he may be entitled for work and services:

Provided that, notwithstanding anything contained in any law governing the pensions of public or railway servants, any portion of a pension paid to or for the benefit of an insolvent and those dependent on him, which in the opinion of the Master is not necessary for the support of the insolvent and those dependent on him, shall vest in the trustee.

(5) The insolvent shall also be entitled in his own name to sue for and receive for his own benefit any damages claimable by him by reason of any insult or personal injury, and he may continue in his own name and for his own benefit any action which may have been commenced by him in respect of such claims previous to the sequestration; and all goods purchased with the moneys so received shall be free from the control of the trustee.

(6) The insolvent shall also be entitled in his own name to sue for and receive for his own benefit, subject to this section, the wages or reward for work or labour done or for professional service rendered by or on his behalf after the sequestration of his estate.

(7) The insolvent may also be sued in his own name for any delict committed by him after the sequestration of his estate.

(8) All moneys or property claimable by the trustee under this section may be recovered from the insolvent by writ of execution to be issued by the Registrar upon the production to him of a certificate by the Master as to the amount so claimable.

### **23. Power of Master to have movable property sold when not over P400 in value**

If it appears to the Master that the value of all the movable property of an estate under sequestration vested in him does not exceed P400 and that it is in the interest of the creditors that such property or any part thereof be sold forthwith, he may direct the sale thereof to take place on such conditions and in such manner as he may think fit:

Provided that, if he has received timely notice that any such property or any portion thereof is subject to any right of preference, it shall not be sold without the consent in writing of the person in whose favour such right of preference exists.

### **24. Estate to remain vested in trustee until rehabilitation**

(1) The estate of the insolvent shall remain vested in the trustee until the insolvent is reinvested therewith pursuant to a composition under section 107, or until the rehabilitation of the insolvent:

Provided that any property which immediately before the rehabilitation was vested in the trustee shall remain vested in the trustee after rehabilitation for the purposes of realization and distribution.

(2) On the death or removal of a trustee the estate shall vest in the remaining trustee if any; otherwise it shall vest in the Master.

### ***Effect upon Antecedent Transactions (ss 25-38)***

### **25. Dispositions without value**

(1) Every disposition of property not made for value may be set aside by the court where such disposition was made by the insolvent-

- (a) more than two years before the sequestration of his estate, if it is shown that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
- (b) within two years of the sequestration of his estate, if the party claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is shown that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the disposition, it may set aside only to the extent of the excess.

(2) A disposition of property not made for value shall not, if set aside under this section or if uncompleted by the insolvent, give rise to any claim in competition with the creditors of the insolvent.

## **26. Antenuptial contracts**

(1) No immediate benefit under a duly registered antenuptial contract given in good faith by a person to his wife or child to be born of the marriage shall be liable to be set aside as a disposition without value, unless the sequestration of his estate took place within two years of the registration of that antenuptial contract.

(2) For the purposes of this section an "immediate benefit" means a benefit given by transfer, conveyance, delivery, payment, cession, pledge, or special mortgage of property completed within three months immediately after the date of the marriage.

## **27. Life insurance policies**

(1) When a person before or during marriage has effected in favour of or ceded to or for the benefit of his wife any policy or policies of life insurance, the policy or policies to an amount not exceeding P4000, together with any bonus claimable in respect thereof, shall be excluded from her estate, if she become insolvent.

(2) When a person before or during marriage has in good faith effected in favour of or ceded to or for the benefit of his wife or child, or both, a policy or policies of life insurance at any time more than two years before the sequestration of his estate, the policy or policies, if they are not an immediate benefit within the meaning of section 26, whether to a wife or child or both, shall to an amount not exceeding P4000, together with any bonus claimable in respect thereof, be excluded from his insolvent estate, and, if the insolvent is married in community of property, from the joint estate of the insolvent and his wife:

Provided that-

- (i) every policy which, at the time of the sequestration of the estate, was ceded or pledged to any person (other than the wife or child of the insured, or a trustee for such wife or child) shall not, to the extent of the cession or pledge, fall under the protection of this section;
- (ii) when any policy is protected as to a part only, the person entitled to the protected part may apply to the company by whom such policy was granted for the issue of two policies in the place of such policy, one for the unprotected part and the other for the protected part, in favour of the parties respectively entitled thereto; and the company shall thereupon issue such policies at the expense of the applicant, and the original policy shall thereupon become void; and
- (iii) for the purposes of this section, the expression, "policy of life insurance" includes a contract for securing an insurance endowment, bonus, or annuity upon the death of the insured, or on the expiration of any period, or on the happening of any event, as well as a fully paid-up policy granted for the surrender or exchange of a policy of an equivalent value, but does not include any other property acquired in consideration of the surrender, pledge or cession of a policy.

(3) A policy of life insurance effected by a person on his own life which has endured for three years from the date of payment of the first premium shall not, during the lifetime of the insured, vest upon the sequestration of the estate of the insured or the assignment thereof under this Act in the trustee or assignee of the estate:

Provided that-

- (i) the protection afforded to a debtor under this section shall not exceed P4000 together with any bonus claimable in respect thereof;
- (ii) a policy which is pledged, to the extent to which it is pledged, and the proceeds of a

policy which is surrendered shall not be protected by this section, but nothing in this Act shall be construed as preventing the insured from agreeing with an insurance company for the surrender or exchange of his existing policy to the extent to which it is protected by this section for a fully paid-up policy, and such last-mentioned policy shall be wholly protected.

(4) A policy protected under subsection (3) shall, to the extent to which it is protected, not be available on the death of the insured for the payment of creditors as against the claims of-

- (a) the surviving spouse of the insured, if the marriage was in community of property, to one-half the protected portion of the policy;
- (b) the surviving spouse or any parent, child or step-child of the insured, under the will of the insured; or
- (c) any parent or child of the insured by right of succession *ab intestato*.

(5) Notwithstanding anything in this section, if in any case it is proved that any policy was effected, or that the premiums upon any policy were paid, with intent to defraud creditors, the court may order a sum equal to the premiums so paid, with interest thereon, to be a charge upon the policy and to be payable out of the proceeds of such policy.

### **28. Voidable preference**

(1) Every disposition of property made by an insolvent within six months of the sequestration of his estate, which has had the effect of preferring one creditor above another, may be set aside by the court if it is shown that immediately after the making of such disposition the liabilities of the insolvent exceeded his assets, unless it is shown by the person benefited by the disposition that the disposition was in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

(2) Every disposition of property made under a power of attorney of the insolvent, whether revocable or irrevocable, shall for the purposes of this and section 29, be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place.

### **29. Undue preferences**

(1) Every disposition of his property made by an insolvent at a time when his liabilities exceeded his assets with the intention of preferring one creditor above another, may be set aside by the court.

(2) A disposition which may be set aside under this section is called "an undue preference".

(3) For the purposes of this section and section 28 the expression "creditor" shall include a surety for the insolvent and a person in a position by law analogous to that of a surety.

### **30. Collusive dealings**

(1) Every collusive dealing with his property between the insolvent and any other person, having the effect of prejudicing his creditors or by preferring one creditor above another, may be set aside by the court; and the person so dealing collusively with the insolvent shall be liable for damages in respect of any loss thereby caused to the estate.

(2) Any person who was a party to such collusive dealing shall be liable to pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.

(3) Such penalty may be recovered in any action to set aside such dealing; and, if no such action has been instituted, the trustee or any creditor may recover such penalty by action.

### **31. Liability of the legal representative of an estate**

The legal representative of an estate who has been a party to any collusive dealing referred to in section 30 shall be jointly and severally liable with the estate represented by him for the damages suffered by the insolvent estate by reason of such collusive dealings.

### **32. Proceedings to set aside antecedent transactions**

(1) Proceedings to set aside any disposition under section 25, 28, 29 or 30, or for the recovery of damages under section 30, shall be taken by the trustee.

(2) If the trustee refuses or neglects to take such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.

(3) In any such proceedings the insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he may be called by the court to give evidence.

(4) When giving such evidence he may not refuse to answer any question on the ground that the answer may tend to incriminate him or on the ground that he is about to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

(5) When any disposition of property is set aside under any of the said sections, the court by which it is set aside shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition.

### **33. Indemnification by trustee of creditors**

(1) No person who, in return for any disposition by the insolvent which is liable to be set aside under this Act has parted with any property or security that he held or who has lost any rights or recourse against third parties, shall, if he acted in good faith, be obliged to restore any money or property or other benefit received under such disposition, unless the trustee has indemnified him for parting with such security or for losing such rights, property, security, or recourse.

(2) Nothing in section 25, 28, 29 or 30 shall affect the rights of any person acquiring property in good faith and for value from any person other than the insolvent.

### **34. Sales of a business**

(1) Every sale or alienation by a trader of any business or of the goodwill, book-debts, or assets of that business other than sales of stock in the ordinary course of his trade, shall upon the sequestration of his estate within six months after the sale or alienation be void against the trustee, unless the seller had previously given 14 days' notice of such intended sale or alienation by advertisement twice in the *Gazette* and twice in a newspaper circulating in the district in which that business is carried on.

(2) On the first publication of that notice in the *Gazette* every liquidated claim against the business shall become payable at the option of the payee, subject in the case of such amounts, as would otherwise not have become payable until some later date to a rebate of six per cent per annum as from such later date.

### **35. Contracts to buy immovable property**

(1) If the insolvent, before the sequestration of his estate has contracted to buy or receive in exchange any immovable property, transfer of which has not been effected in his favour, the trustee may elect to adopt or to abandon the contract.

(2) If the trustee does not make his election within six weeks after being required in writing to do so, the person entitled under the contract may apply by motion to the court for the cancellation of the contract and delivery of the possession of the immovable property and the court may make such order as it thinks fit:

Provided that nothing in this section shall affect any concurrent claim against the estate for damages for non-fulfilment of the contract.

### **36. Sales for cash**

(1) When any person has, before the sequestration of the insolvent's estate, sold and delivered for cash to the insolvent any movable property and has not received full payment for the same, the seller may only reclaim that property if within 30 days after the delivery thereof he gave notice in writing to the insolvent or the legal representative of the estate that he reclaims that property:

Provided that if the trustee disputes the seller's right thereto, the seller shall take

proceedings to enforce that right within seven days after the trustee has given notice that he disputes such right.

(2) The trustee shall not be obliged to restore that property, unless the seller refunds all moneys received by him on account of the purchase price.

(3) A sale shall be deemed to be for cash, unless the seller has expressly or tacitly agreed that any part of the purchase price shall not be claimable at the time of delivery of the property sold.

(4) Except as aforesaid, no seller shall be entitled to redelivery or retransfer of any property sold and delivered or transferred to the insolvent by reason only that the insolvent has failed to make due payment of the purchase price.

(5) When property belonging to any person other than the insolvent is in the possession of the insolvent at the time of the sequestration of his estate, that person shall give notice in writing thereof to the legal representative of the estate within 14 days of the sequestration, and, if he fails to do so, shall lose all right to recover that property, if the same has in good faith been sold as part of the insolvent's estate, but shall be entitled to recover the net proceeds of that property from the trustee.

### **37. Leases**

(1) No lease entered into by the insolvent as lessee shall be terminated merely by reason of the sequestration of his estate but the trustee may determine the same by notice in writing to the lessor, subject to a concurrent claim by the lessor against the estate for any damages he may have sustained by reason of the non-performance of the terms of such lease.

(2) If the trustee does not within three months of his appointment notify the lessor that he is prepared to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such three months.

(3) The rent due under any lease so determined, from the date of the sequestration of the estate of the lessee to the determination or the sale thereof by the trustee, shall be included in the costs of administration.

(4) The fact that a lease has been determined by the trustee shall deprive him of any right to compensation for improvements made during the period of that lease.

### **38. Effect of sequestration on apprenticeship agreements**

(1) The sequestration of an estate shall be a complete discharge of the indenture of apprenticeship or articles of agreement of any person then apprenticed or articed to the insolvent if that person gives notice in writing to the trustee to that effect.

(2) Upon application made by that person the trustee may consent to his proving a concurrent claim against the estate for such of any money paid by him or for him to the insolvent as a fee as the trustee, subject to an appeal to the court, thinks reasonable, regard being had to the amount of the fee, the unexpired term of the indenture or articles, and the other circumstances of the case.

## **PART IV**

### ***Meetings of Creditors (ss 39-57)***

#### ***Meetings: How Convened and When (ss 39-42)***

### **39. Time and place of meetings of creditors**

(1) Whenever the Master appoints any meeting of creditors under this Part, he shall appoint it to be held at such time and place as appears to him to be most convenient for all parties concerned and may, if necessary, alter the time and place of any such meeting:

Provided that notice of the alteration shall be given in the *Gazette*.

(2) All meetings of creditors held in the South East District shall be presided over by the Master, and such meetings of creditors as are held in any other district shall be held in accordance with the direction of the Master and presided over by a magistrate of the district, or by an officer holding the rank of chief or principal clerk appointed by him for that purpose. (3) Every such magistrate or other officer shall certify the proceedings and transmit the same to the

Master as soon as the meeting is closed.

(4) If the magistrate has not presided at any meeting, the reason of his absence shall be recorded in the minutes by the presiding officer.

(5) Every meeting of creditors may be adjourned by the officer presiding thereat for good and sufficient reasons.

#### **40. First and second meetings**

(1) On the receipt of an order placing an estate finally under sequestration the Master shall immediately convene a first meeting of creditors for the proof of claims and for the election of a trustee.

(2) The Master shall give not less than 10 days' notice of the time and place of the first meeting by advertisement in the *Gazette*.

(3) After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting for the proof of claims against the estate, and for the purpose of receiving the trustee's report as to the affairs and condition of the estate, and of giving the trustee directions concerning the sale or recovery of any part of the estate or concerning any matter relating to the administration thereof.

(4) The trustee shall give, by advertisement in the *Gazette*, not less than 10 days' notice of the second meeting and of the time and place thereof.

#### **41. When further meetings to be called and notice of same**

(1) The trustee may at any time and shall, whenever he is thereto required by the Master or by creditors representing one-fourth in value of all the claims proved against the estate, call a meeting of creditors (hereinafter called "a general meeting"), to receive directions concerning the sale or recovery of any part of the estate or concerning any matter or question relating to the administration thereof.

(2) At least 10 days' notice of the time and place of the meeting and of the matters or questions to be submitted thereat shall be given by advertisement in the *Gazette*.

#### **42. Special meetings**

(1) At any time after the second meeting the trustee shall call a special meeting for the proof of claims whenever he is thereto required by any person who at the time tenders to the trustee all fees, costs, and expenses incidental to such a meeting.

(2) At least 10 days' notice of any special meeting and of the time and place thereof shall be given by the trustee by advertisement in the *Gazette*.

#### ***Proof of Debts (ss 43-5)***

#### **43. Proof of liquidated claims**

(1) Every claim against an estate, not being conditional or unliquidated, which was due or the cause of which arose before the sequestration of the estate, may be proved by the creditor or by any person authorized thereto at any time before the final distribution of the estate.

(2) It shall be the duty of a trustee after examining the books of an insolvent to send notices of the insolvency to any creditor whose name is on the books, who has not proved a claim against the estate, in order to give him an opportunity to do so.

(3) Every such claim shall be proved at a meeting of creditors to the satisfaction of the presiding officer who shall admit or reject the same.

(4) Every such claim shall be proved by affidavit as nearly as may be in the Form C or D set out in the First Schedule and that affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall state in the affidavit his means of knowledge and shall set forth, subject to section 78, the nature and particulars of the claim, whether the same was acquired by cession or purchase after the institution of the proceedings by which the estate was placed under sequestration, and if the creditor holds security therefor, the nature, particulars, and value of that security.

(5) The vouchers and documents in support thereof and the affidavit or a copy thereof

shall be delivered at the office of the presiding officer not less than 24 hours before the advertised time of the meeting at which it is intended to prove the claim, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidence of his claim within the prescribed period.

(6) Any document required by this section to be delivered before the meeting at the office of the presiding officer shall be open for inspection at such office during office hours free of charge by any creditor, the trustee, or the insolvent.

(7) Notwithstanding anything in this Act, if a claim against an estate is in respect of liability for payment on open account for goods sold and delivered after the taking effect of this Act, such claim shall not be admitted to proof unless there have been dispatched to the debtor, not later than three months after the opening of the account, detailed statements thereof, and thereafter at intervals not exceeding three months detailed statements of account from the date up to which the last statement was dispatched.

(8) The presiding officer or the trustee may at any meeting examine any creditor seeking to prove a claim against the estate, and the presiding officer may for that purpose administer an oath to him.

(9) The Master, at the request of the trustee, may require any creditor who has proved a claim to submit to examination in regard thereto by the trustee or his agent, and for that purpose the Master or a magistrate authorized by him may administer an oath to the creditor.

#### **44. Duty of the trustee upon delivery of claims to him**

(1) Every claim proved against the estate and the vouchers and documents in support thereof shall be delivered to the trustee by the presiding officer, and it shall be the duty of the trustee forthwith to examine all available books, documents, and vouchers in connection with every claim, and to satisfy himself that the estate is indebted to the creditor in the amount of the claim.

(2) If he disputes the claim he shall report to the Master in writing his reasons for so doing and the Master, after notice to the creditor, may reduce or expunge the claim, but if he does so shall notify the creditor in writing forthwith.

(3) No account already confirmed and no dividend already paid shall be disturbed by reason of anything done under this section.

#### **45. Mutual dealings and set-off**

Where there has been before the sequestration of the estate a right of compensation or set-off between the insolvent and any creditor, that creditor shall annex to his claim and affidavit, so far as may be possible, a detailed statement of the mutual indebtedness of himself and the insolvent, and shall prove and rank in respect of such balance as may be found to be in his favour:

Provided that a creditor claiming the benefit of the set-off did not, at the time when the right of set-off accrued, know of-

- (i) any act of insolvency upon which the estate was subsequently sequestrated;
- (ii) the intention of the insolvent to surrender his estate; or
- (iii) the fact that the insolvent's assets were insufficient to discharge his liabilities.

#### **46. Particulars of tacit hypothec or right of retention to be specially mentioned**

(1) No right of retention or tacit hypothec shall give any preference to any claim, unless the creditor claiming the right of retention or tacit hypothec has set forth the particulars thereof in the affidavit made in proof of his claim or in any amendment of that affidavit which he may make.

(2) No creditor shall lose the right of any retention or tacit hypothec by delivering to the trustee on demand the property subject to such right of retention or tacit hypothec, if, when delivering the property, he notifies the trustee, in writing, of his rights and in due course proves his claim against the estate.

(3) On demand the creditor shall deliver the property to the trustee:

Provided that no person shall be entitled to any preference by virtue of the retention of any books of account belonging to the insolvent or having reference to his business affairs.

#### **47. Proof of conditional claim**

A creditor whose claim is dependent on a condition may prove that claim in the manner set forth in section 43 subject to the following provisions-

- (a) if the condition is of such a nature that it will be fulfilled, if at all, within a year of the sequestration, that creditor may prove his claim, but may not vote in respect thereof; and any dividend awarded on such a claim shall be paid by the trustee to the Master, who shall pay the same to the creditor, if the condition has been fulfilled, and otherwise shall return the same to the trustee for distribution among the other creditors;
- (b) if the condition is not such as is described in paragraph (a), the creditor may call upon the trustee to place a value upon the claim and the trustee shall lay before the presiding officer a certificate of his valuation of the claim with the reasons therefor, and the presiding officer shall admit that claim to proof at such value as he may determine or may reject the same:

Provided that when the condition has been fulfilled, the creditor may prove his claim as if it had been unconditional.

#### **48. Provisions in case of simultaneous sequestration of partnership estate and estate of a partner**

When the estate of a partnership and the estate of a partner are under sequestration simultaneously, the creditors of the partnership shall not be entitled to prove claims against the estate of the partner nor the creditors of the partner against the estate of the partnership; but the trustee of the partnership shall be entitled to any balance of the partner's estate that may remain over after satisfying the claims of the creditors of the partner's estate in so far as the same is required to pay the partnership's debts and the trustee of the partner shall be entitled to any balance of the partnership's estate that may remain over after satisfying the creditors of the partnership estate, so far as that partner would have been entitled thereto, if he had not been insolvent.

#### **49. Mode in which claims to be made up**

(1) When a debt due by the insolvent was payable before the sequestration and interest was payable thereon, the claim shall consist of the principal sum with arrears of interest to the date of sequestration added thereto.

(2) When a debt which was owing by the insolvent before the sequestration is payable after the sequestration, the claim shall consist of the amount of that debt with a rebate at the rate of six per cent per annum from the due date to the date of sequestration.

#### **50. Withdrawal of claim and conditions thereof**

Every claim which has been proved against an estate may be withdrawn by letters addressed to the Master and to the trustee and the latter shall in writing notify the other creditors of the withdrawal:

Provided that-

- (i) the creditor so withdrawing his claim shall remain liable for his *pro rata* share to the date of the receipt of the withdrawal by the trustee of costs of sequestration and of such other costs as the trustee is entitled to incur without the authority of a resolution of creditors or has already incurred in pursuance of such a resolution; and
- (ii) a creditor so withdrawing shall not be entitled, if he proves again, to share in the distribution of the estate until all the other creditors have been paid in full.

#### ***Voting at Meetings: Recording Resolutions (ss 51-52)***

#### **51. Right to vote and reckoning of votes**

(1) Except as provided in this section and in section 47, every creditor shall be entitled to vote at any meeting of creditors as soon as his claim has been proved against the estate.

(2) The vote of any creditor shall be reckoned according to the value of his claim, except when it is provided in this Act that votes shall be reckoned in number.

(3) The vote of a creditor shall in no case be reckoned in number, unless his claim is one of the value of at least P60.

(4) No creditor may vote in respect of any claim acquired by cession or purchase by him from any person after the institution of the proceedings by which the estate was placed under sequestration.

(5) Any creditor holding any security shall, except in the election of a trustee and upon any question affecting his security, only be entitled to vote in respect of the balance of his claim after deducting-

(a) if he has realized his security, the net proceeds thereof; or

(b) if he has not realized his security, the value placed thereon by him when the debt was proved.

## **52. Questions upon which creditors may vote**

(1) A creditor may vote upon all questions affecting the administration of the estate, but may not vote in regard to questions affecting the distribution, except for the purpose of directing the trustee to contest, compromise or admit any claim against the estate.

(2) Every question upon which a creditor may vote shall be determined by the majority of votes, and every creditor may vote either personally or by an agent specially authorized thereto or acting under a general power of attorney.

(3) Every resolution of creditors and the result of the voting thereon as declared by the presiding officer shall be recorded upon the minutes of the meeting and shall be binding upon the trustee in so far as it is a direction to him; and no other direction of creditors shall be binding upon him.

(4) Any direction by creditors which interferes with or injures the just rights of any creditor who holds any preferent right or lien upon any part of the insolvent estate, may be set aside on application to the court by any person interested.

(5) Nothing in this section shall be construed as authorizing the creditors to give directions, by resolution, to the trustee as to the employment of a particular attorney or auctioneer, but the creditors may, by resolution, recommend the employment of a particular attorney or auctioneer and if the recommendation is not accepted by the trustee, any creditor may submit the matter to the Master whose decision, after hearing the trustee, shall be final.

### ***Election of Trustee (ss 53-54)***

## **53. Time of election of trustees and number to be elected and manner of election**

(1) At the first meeting of creditors a trustee or trustees, not exceeding two in number, shall be elected by a majority in number and value of the votes of the creditors.

(2) If the result is not attained, then-

(a) the person who has obtained a majority in number, when no other person has obtained a majority in value, or has obtained a majority in value, when no other person has obtained a majority in number, shall be deemed to be elected sole trustee;

(b) when one person has obtained a majority in value and another a majority in number, both such persons shall be deemed to be elected trustees, and if either person decline a joint trusteeship the other shall be deemed to be elected sole trustee.

(3) For the purposes of this section "majority in number" means a greater number of votes than is given to any other competitor and "majority in value" means votes representing a greater value than the votes given to any other competitor.

(4) Where two trustees have been appointed every act in law connected with the estate shall be done by both of them, but each shall be jointly and severally liable for every such act.

## **54. Provisions in case no trustee elected at any meeting**

If at any meeting appointed for the purpose of electing a trustee no trustee is elected and the estate is not vested at the time of that meeting in a provisional trustee, the Master may elect

a trustee, or apply, at the cost of the estate, to the court, by petition to set aside the sequestration, and the court may make such order thereon as it thinks fit.

***Examination of the Insolvent (ss 55-57)***

**55. Insolvent to attend without notice first and second meetings of creditors**

(1) The insolvent shall attend the first and second meetings of creditors and every adjournment thereof unless he has previously obtained written permission from the presiding officer to absent himself.

(2) He shall attend any other meeting, if required to do so by written notice from the trustee.

(3) For the purpose of securing the attendance of the insolvent and any such person as may be examined under section 56 at any meeting mentioned in this section, and for the purpose of securing the production of any books or other documents at such meeting, the presiding officer shall have all the powers vested in the court or a magistrate by section 133, for the purpose of securing the attendance of a person duly summoned under section 131.

(4) The presiding officer may summon for examination under section 56 any person who in his opinion may be able to afford any information as to the state of the affairs of the insolvent.

**56. Examination of insolvent**

(1) At any such meeting as is mentioned in section 55 the officer presiding, the trustee or any creditor or an agent of any of them may examine, and take the evidence on oath of, the insolvent, his wife (or her husband, as the case may be), any relative of the insolvent within the fourth degree of consanguinity or affinity, any person who was, within the two years preceding the sequestration of the estate, in the employment of the insolvent, any person who has during that period or since the sequestration had any dealings whatsoever with the insolvent or taken any part in any transactions affecting the insolvent or the insolvent's affairs, and any such person who is referred to in section 55.

(4) on the matters specified in paragraphs (i), (ii) and (iii) of the proviso hereof:

Provided that the presiding officer may disallow any question which appears to be irrelevant or which tends to prolong the examination unnecessarily, and shall disallow any question falling outside matters described in this subsection-

- (i) concerning all matters relating to the insolvent's trade dealings, or estate, wherever the same may be situate or which may tend to disclose the existence of any assets, or any secret alienation, or concealment of his estate, or any preference given by the insolvent, or any other transaction which, under this Act, may be set aside by the trustee;
- (ii) concerning all books of account, entries, documents, papers, or vouchers, relating or suspected of relating to the business of the insolvent or the administration of the estate, whether or not the same have been produced at such examination;
- (iii) concerning the cause of the insolvency, the state of the insolvent's affairs, the nature and condition of his employment or occupation, the amount of his income or profits since the date of the sequestration order, the acquisition by him of any property or rights to property since the date of the sequestration order, or his prospect of acquiring any property in the future.

(2) The presiding officer shall cause the statement of any person giving evidence under this section to be reduced to writing and to be read over to and signed by him, and shall certify the same and annex it to the proceedings in the estate:

Provided that any statement by a person who may be required to give evidence under this section which has been made to the trustee, and reduced to writing, may be read over to that person when giving such evidence and if adhered to and signed by him shall be certified by the presiding officer and annexed to the proceedings, and shall be deemed to be evidence given under this section; and any such statement shall be admissible in evidence in any proceedings instituted against the person making it.

(3) A person examined under subsection (1) shall not be entitled at any such examination to refuse to answer any question upon the ground that the answer would tend to incriminate him.

(4) If the person examined under subsection (1) refuses to answer any question put to him under this section, or does not answer the question to the satisfaction of the presiding officer, the presiding officer shall have the like power and protection as a magistrate under sections 134 and 136, and such person shall have the right of appeal described in section 135; such person may be represented at such examination by a legal practitioner.

(5) Any person summoned to attend a meeting of creditors for the purpose of being examined under this section (other than the insolvent and his wife or her husband, as the case may be) shall be entitled to be paid as witness fees out of the estate such amount as would be paid if such person were a witness in any civil proceedings.

**57. Steps to be taken on suspicion of an offence** (1) If it appears from any such statement that there are reasonable grounds for suspecting that the insolvent has been guilty of any offence against this Act, the Master shall transmit the said statement, or a duly certified copy thereof, and all necessary documents to the Director of Public Prosecutions, in order that such criminal proceedings may be instituted as the Director of Public Prosecutions may think fit.

(2) When any such statement has been made otherwise than at a meeting at which the Master presides, the presiding officer, when transmitting the minutes of the meetings to the Master, shall direct the attention of the Master to what appear to him to be reasonable grounds for suspecting that the insolvent has been guilty of an offence under this Act.

(3) For the purposes of this section and sections 55 and 56 the insolvent will include the legal representative of an estate before sequestration.

## **PART V**

### ***Liquidation and Distribution of Estate (ss 58-81)***

#### ***Appointment and Removal of Trustees and Provisional Trustees (ss 58-65)***

#### **58. Power of court to appoint provisional trustee**

(1) Before a trustee has been appointed to an estate under sequestration, or when a trustee has been removed or is not acting as such, the court, on the petition of the Master or a creditor, may appoint a provisional trustee who shall hold office until the appointment of a trustee by the Master.

(2) A provisional trustee shall find security to the satisfaction of the Master and shall, immediately after his appointment, lodge with the Master an inventory, under oath, of the estate and a valuation thereof, and, if the Master so directs, that valuation shall be made by a sworn appraiser or by such other person as the Master may appoint.

(3) A provisional trustee shall have the powers and be subject to the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings, and that without the authority of the court or Master he shall not sell any portion of the estate.

(4) When a meeting of creditors for the election of a trustee has been held and no trustee has been elected, and the estate is vested in a provisional trustee, he shall, subject to a further appointment by the Master and on his finding such additional security as the Master may require, have all the powers and be subject to all the duties of a trustee under this Act.

#### **59. Persons disqualified from being elected trustees**

Any of the following persons shall be disqualified from being elected a trustee-

- (a) an insolvent;
- (b) a person related to the insolvent by consanguinity or affinity within the third degree;
- (c) a minor or any other person under legal disability;
- (d) a person who resides outside Botswana;
- (e) a person having an interest opposed to the general interest of the creditors of the insolvent estate;

- (f) a former trustee disqualified under section 67;
- (g) a person declared under section 60 to be incapacitated for election as trustee, while any such incapacity lasts, or a person removed by the court on account of misconduct from an office of trust;
- (h) a company or corporation;
- (i) a person who has at any time been convicted (whether in Botswana or elsewhere) of theft or fraud:

Provided that-

- (i) notwithstanding anything contained in paragraph (d) a person who is-
  - (a) a legal practitioner entitled to practise in the courts of Botswana; or
  - (b) a qualified accountant having a place of business in Botswana,
 may, though not resident therein, be elected as trustee of any insolvent estate which has been placed under sequestration by order of the court;
- (ii) such person is not disqualified for election on any other ground;
- (iii) any such person who is elected as trustee of any such insolvent estate shall immediately after his election choose for the purpose of his administration of the estate a *domicilium citandi et executandi* within Botswana which shall be notified by him in the *Gazette*.

#### **60. Power of court to declare a person disqualified from being a trustee**

The court, on the application of any person interested, may, either before or after the appointment of a trustee, declare that the person appointed or proposed is disqualified from holding the office of trustee, and, if he has been appointed, may remove him from office if it so thinks fit, and may in either case declare him incapable of being elected trustee under this Act during the period of his life or such other period as it may determine, if-

- (a) he has accepted or offered or agreed to accept from any auctioneer, agent, or other person, employed on behalf of the estate, any share of the commission or remuneration of, or any other benefit whatever from, that auctioneer, agent or other person; or
- (b) in order to obtain or in return for, the vote of any creditor, or in order to exercise any influence upon his election, he has-
  - (i) procured or been privy to the wrongful omission of the name of a creditor from any list or schedule required by this Act;
  - (ii) directly or indirectly given or offered or agreed to give to any person any consideration;
  - (iii) offered or agreed with any person to abstain from investigating any previous transactions of the insolvent; or
  - (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

#### **61. Grounds for removal of trustee**

(1) The court, upon the application of the Master, the trustee himself, or any other person interested, may remove any trustee on any of the following grounds-

- (a) his desire to resign his office, subject to the production of the certificate mentioned in section 62, absence from Botswana, ill-health, or any fact tending to interfere with the performance of his duties as trustee;
- (b) insolvency or other legal disability;
- (c) misconduct as trustee, including any failure to satisfy the lawful demand of the Master, or a magistrate, or to perform any of the duties imposed upon him by this Act;
- (d) illegality in his election or appointment, or disqualification for any of the reasons mentioned in section 59.

(2) The court may remove any provisional trustee on any ground that it may deem sufficient.

**62. Circumstances under which a trustee may resign from office or absent himself from Botswana**

(1) Every trustee desiring to resign his office may, after notice in the *Gazette*, apply to the court by petition for his removal.

(2) He shall at the same time lay before the court a certificate from the Master to the effect that he has rendered an account of his administration of the insolvent estate until the date of his application, and that the Master is not aware of any reason why his application for removal should not be granted.

(3) Every trustee intending to absent himself from Botswana shall give notice in the *Gazette* of such intention, stating in that notice the name, occupation, and address of the person who will act for him during his absence, and the period of his absence:

Provided that the Master or any person interested in the estate may apply to the court for the removal of the trustee on the ground that the interests of the estate will be prejudiced by his absence, and the court may make such order upon the application as it deems fit.

(4) Every trustee who has been removed by the court on his own application shall give notice thereof in the *Gazette*, and the Master shall in like manner give notice of the removal of any trustee upon the application of any other person.

**63. Election of new trustee on resignation or removal of a trustee**

(1) Upon the removal of a trustee the court may, in place of appointing a provisional trustee as hereinbefore provided, order a new trustee to be elected and at the same time may make such order for the preservation of the estate in the meanwhile as it may deem fit.

(2) A new trustee shall be entitled to demand from his predecessor an account of his administration up to the date of his removal.

**64. Election of new trustee on death of trustee**

Upon the death or removal of a trustee or of a provisional trustee having the full powers of a trustee, if there is no trustee or provisional trustee left in office, the Master shall, either himself or upon the request of any person interested in the estate, convene a meeting for the purpose of electing a new trustee in the manner provided in section 53.

**65. Confirmation of election of trustee by court or Master**

(1) If the decision of the presiding officer as to the election of a trustee has been brought under review by the court, the election shall be subject to confirmation by the court; otherwise the election shall be subject to confirmation by the Master.

(2) Upon the trustee finding security to the satisfaction of the Master and paying all fees due, and choosing *domicilium citandi et executandi* within the jurisdiction of the court, if he is not resident within the same, the Master shall appoint the trustee by delivering to him a certificate of appointment, which shall be of full force and effect throughout Botswana.

(3) The Master shall allow against the estate such costs of finding security as he may consider reasonable.

(4) If the trustee who has been elected is ineligible or fails to find security to the satisfaction of the Master within seven days after his election or within such further period as the Master having regard to all the circumstances may allow, the Master shall declare that no trustee has been elected and shall himself nominate and appoint a trustee:

Provided that when a trustee, who has given security to the Master, has accounted to the Master by means of an account supported by vouchers, as required by this Act, for any assets the value of which was taken into account by the Master when the security was assessed, the Master upon that account being confirmed and filed with all the vouchers and acquittances may, if he is satisfied that the security thereafter remaining will be sufficient to cover the value of the assets remaining to be accounted for, reduce the amount of the security by any sum not exceeding the value as it appeared to him when the security was assessed of the assets brought to account as aforesaid.

(5) On receipt of the certificate aforesaid the trustee shall notify his appointment and full

address by advertisement in the *Gazette*.

(6) The Master, whenever it appears to him to be desirable, may appoint a person not disqualified from holding the office of trustee, to be co-trustee with the trustee or trustees of any estate under sequestration.

(7) When so appointed all the provisions of this Act conferring powers and rights or imposing duties and obligations on a trustee shall apply to such co-trustee.

(8) In the event of any difference arising between such a co-trustee and the other trustee or trustees as to the administration of the estate, the Master may, if the difference is referred to him, determine the matter.

(9) The Master may similarly determine any difference arising between any trustees.

#### ***Duties and Powers of Trustees in the Liquidation of the Estate (ss 66-81)***

### **66. Opening of banking account and books**

(1) The trustee shall open an account in the name of the estate with a bank, and shall deposit to the credit of the estate from time to time all sums received by him on behalf of the estate.

(2) All cheques or orders which may be drawn upon that account shall contain the name of the payee and the cause of payment and shall be drawn to order and signed by every trustee of the estate or by his duly authorized agent.

(3) Immediately after his appointment the trustee shall open a book wherein he shall enter from time to time a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the estate.

(4) The Master may at any time in writing order the trustee to produce the said book for inspection, and every creditor who has proved his claim against the estate and, if the Master so orders, every person claiming to be a creditor may inspect the said book at all reasonable times.

(5) Within 14 days after his appointment the trustee shall give the Master notice in writing of the bank and branch thereof with which the said account has been or will be opened, and shall not, without the written permission of the Master, remove that account from that branch.

(6) The Master and any surety for the trustee, or any inspector appointed by such surety, shall, at all times, be entitled to the same right to information in regard to that account as the trustee himself possesses, and to inspect and examine all vouchers in relation thereto, whether in the hands of the bank or of a trustee.

(7) The Master may, after notice to the trustee, direct at any time, by letter addressed to the manager of the said branch of the bank, that the trustee shall not be permitted to operate on the said account and that the said manager shall pay over the balance thereof to him; and the said manager shall carry out any such direction.

### **67. Retention of moneys or employment of assets by trustees**

(1) Every trustee who, without good and lawful cause, retains any money belonging to the estate exceeding P40, or knowingly permits his co-trustees to retain such sum of money longer than the earliest day after its receipt on which it is possible for him or his co-trustee to pay that money into the bank, or who uses or knowingly permits his co-trustee to use any assets of the estate except for the benefit of the estate, shall, in addition to any other penalty to which he may be liable, be liable to pay into the estate an amount not exceeding double the amount so retained or double the value of the assets so used.

(2) The amount which the trustee is so liable to pay may be deducted out of any claim that the said trustee may have against the said estate or may be recovered by action in any competent court at the instance of his co-trustee, the Master or any creditor.

(3) Every person who, being a trustee, himself becomes insolvent while indebted to the insolvent estate as is specified in subsection (1), for any sum of money belonging to the estate, shall be for ever incapable of holding the office of trustee, provisional trustee, liquidator, curator dative, tutor dative, *curator bonis*, or executor dative.

#### **68. Legal proceedings against the estate**

Every person who, having instituted legal proceedings against the insolvent which were suspended by the sequestration, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the estate which arose before the sequestration shall, within three weeks after the first meeting of creditors, give the trustee not less than three weeks' notice in writing before continuing or commencing those proceedings; in default thereof the proceedings shall be considered to be abandoned, unless the court finds that there was a reasonable excuse for the default and allow the proceedings to continue or be commenced on terms or otherwise, as it may think fit.

#### **69. Power of trustee to take legal advice**

(1) The trustee may take legal advice on any question of law affecting the administration or distribution of the estate, and may employ a legal practitioner for the conduct or defence of legal proceedings on behalf of or against the estate, and all costs incurred under this section since the commencement of the sequestration, as well as costs awarded against the estate in those legal proceedings, shall be included under the costs of administration.

(2) The costs incurred in obtaining a sequestration order shall be taxed according to the tariffs used in the court, unless the court otherwise orders.

(3) All costs which are not the subject of taxation by the taxing officer of the court shall be taxed by the Master.

#### **70. Improper advising or conduct of legal proceedings**

If it appears to the court that any legal practitioner has, with intent to benefit himself, improperly advised the institution, defence or conducting of legal proceedings or has incurred any unnecessary expense therein, the court may order the whole or part of the expense thereby incurred to be borne by that legal practitioner personally.

#### **71. Recovery of debts due to estate**

Immediately after his appointment the trustee shall proceed to recover (if need be by legal proceedings) the debts due to the estate, and for that purpose and in the same notice in which he advertises his appointment as trustee, he shall call upon all persons indebted to the estate to pay their debts at such reasonable time and place as he may in that notice appoint.

#### **72. Subsistence allowance for insolvent and family**

(1) At any time before the second meeting of creditors the trustee may allow the insolvent such moderate sum out of the estate as may appear to the trustee to be necessary for the support of the insolvent, his wife and minor children.

(2) The amount of any such allowance to the insolvent and the grounds for making the same shall forthwith be reported in writing to the Master by the trustee and shall be subject to review by the court upon the application of the Master or any person interested.

#### **73. Sale of movable property on authorization of Master**

(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable property of the estate ought forthwith to be sold, recommend to the Master in writing that any such property be sold and shall state his reasons for such recommendation.

(2) The Master, if satisfied that any such property ought to be sold, shall authorize its sale, and the same shall thereupon be sold on such conditions and in such manner as the Master may direct:

Provided that, if the Master has notice that any such property or a portion thereof is subject to a right of preference, he shall not authorize the sale unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale.

#### **74. Continuation of insolvent's business**

At any time before the second meeting of creditors the trustee may carry on or discontinue any part of the business of the insolvent in so far as may be necessary for the beneficial winding up thereof:

Provided that, if he carries on the business, it shall not be competent for the trustee as between himself and the creditors to charge the estate with the cost of any goods purchased by him, unless the same have been necessary for the immediate purpose of carrying on that business and there are funds available for payment of the same after providing for the cost of sequestration.

**75. Duty of trustee at second meeting to report and take instructions in certain matters**

(1) At the second meeting of creditors the trustee shall report to the creditors upon and receive their directions as to the following matters-

- (a) any allowance he has made to the insolvent and the reasons therefor;
- (b) any business he may have been carrying on for the estate, any goods he may have purchased for that business, and the result of so carrying on that business;
- (c) any legal proceedings by or against the estate which were suspended by the sequestration or may be pending or threatened;
- (d) any such matters or questions as are referred to in sections 35 and 37; and
- (e) any matter in regard to the administration or realization of the estate requiring the direction of the creditors.

(2) The trustee may thereafter exercise his discretion in those matters in so far as the creditors have failed to give him directions:

Provided that, in the absence of authority from the creditors, he may only purchase goods for such business for cash, and as between himself and the creditors he shall be personally liable for the costs of any legal proceedings instituted or defended by him without directions from the creditors in so far as the estate is unable to meet the same, unless the court otherwise orders.

**76. What reports to be made at second meeting of creditors**

At the second meeting of creditors the trustee shall report fully as to the circumstances of the estate, and more especially as to-

- (a) the assets and liabilities thereof;
- (b) the cause of insolvency;
- (c) the books of the insolvent; stating whether he appears to have kept a proper record of his transactions and, if not, in what respect the record is defective or irregular; and
- (d) the transactions of the insolvent previous to the sequestration, and what reason (if any) there is for supposing that he is guilty of any contravention of this Act.

**77. Sale of property after second meeting and manner of sale**

(1) Except as provided in section 73 or 78, the trustee shall proceed after the second meeting of creditors, and not before, to sell all the property in the estate in such manner and upon such conditions as the creditors at the second or any subsequent meeting may direct.

(2) In default of directions by the creditors the trustee shall sell the property by public auction or public tender.

(3) A sale by public auction or public tender shall be after notice published in the *Gazette* and after such other notices as the Master may direct and, in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct.

(4) When the sale is by public tender, each tender shall be transmitted by the tenderer in duplicate in a sealed cover to the Master, or if the Master so directs to a magistrate specified by him.

(5) The Master or such magistrate shall keep each tender so sealed until the expiry of the period for lodging of tenders.

(6) He shall then open the sealed covers, and, in the case of the Master, file one duplicate of each tender or, in the case of a magistrate, transmit one duplicate of each tender to the Master, who shall file it.

(7) The Master or the magistrate (as the case may be) shall forthwith transmit the other duplicate of each tender to the trustee.

(8) The trustee or his representative shall have the right to be present when the Master or the magistrate opens the tenders.

(9) In the case of a marketable security the creditors may give directions for the sale thereof through a broker without publication.

(10) Every other sale by private treaty shall be for an amount of not less than an amount fixed by the creditors in the resolution authorizing the sale; and such sale shall not otherwise be complete until ratified by a resolution of the creditors.

(11) From any such sale there shall be excepted all outstanding accounts and other rights of action which shall, subject to section 75, be realized in the ordinary course of business, unless the creditors otherwise direct.

(12) From the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture and tools as the creditors determine, and the insolvent shall be allowed to retain for his own use any property so excepted from the sale.

(13) The insolvent shall, if he is at any time before the second meeting of creditors called upon by the trustee, assist him to the best of his ability in collecting, taking charge of, and realizing the assets in the estate:

Provided that the trustee shall, during the period of such assistance, pay to the insolvent out of the estate such allowance in money or in kind as may appear to the Master to be necessary for the support of the insolvent, his wife (or her husband, as the case may be) and his minor children.

(14) The trustee or the auctioneer employed to sell, the trustee's or auctioneer's spouse or partner, or an employer or employee or agent of the trustee or of such auctioneer shall not be able to acquire by purchase or otherwise any property of the estate unless the acquisition is confirmed by an order of the court.

(15) Nothing in this section shall be construed as affecting the rights of any person who acquires title in good faith and for value from any person described in subsection (14); but the trustee shall be personally liable to the creditors for any loss sustained by them by reason of his wrongful action in selling any property of the estate.

#### **78. Realization of securities**

(1) Every creditor who holds as security for his claim any movable property shall, before the second meeting of creditors, give notice in writing of that fact to the Master, and to the trustee if appointed, and, when he has given such notice, he shall be entitled at any time before that meeting to realize in the manner and on the conditions provided in this section the movable property which he so holds.

(2) He shall as soon as possible after he has realized such property, prove the claim thereby secured but without placing a value on the security, but he shall attach to the proof a statement of the proceeds of the realization and of the facts on which he relies for any preference.

(3) If he does not elect to realize such property, he may prove his claim and place a value on such security as provided in section 43.

(4) If after the expiry of four weeks after the said second meeting, the creditor has not so proved his claim, the trustee shall be entitled to demand from him delivery of such security and to realize it subject to the right of the creditor to prove his claim.

(5) If the creditor fails to comply with such demand of the trustee, the Master, on the application of the trustee and after notice to the creditor, shall direct the sheriff or bailiff to attach the security and to deliver it to the trustee, who shall be entitled to deduct the sheriff's or bailiff's costs, as taxed and allowed by the Master, from the proceeds of the realization of the security or from any dividend which may be awarded to the creditor.

(6) Such security may be realized in the manner and on the following conditions, that is to say-

- (a) if it is a marketable security, the creditor may forthwith sell it through a broker;
- (b) if it is a bill of exchange, the creditor may realize it in the ordinary course of business;
- (c) in the case of outstanding accounts and other rights of action, the creditor shall not realize them except in the ordinary course of business and with the approval of the Master;
- (d) in the case of any other security, it shall not be sold before the appointment of the trustee without the written permission of the Master or, after the appointment of the trustee, without giving him reasonable notice of the time and place of the sale and a reasonable opportunity to inspect the security.

(7) If the trustee does not then take over the security at a value agreed between him and the creditor or at the full amount of the claim, the creditor may sell the security by public auction after notice published as directed by the trustee.

(8) The trustee shall, when giving directions as to publication, give written notice to the other creditors of the date, hour and place of the sale.

(9) Whenever a creditor realizes a security under subsection (6) he shall pay the net proceeds of the realization to the trustee, if any, or if there is no trustee, to the Master on the trustee's account; but the creditor shall be entitled out of such proceeds to be paid forthwith his preferent claim if such claim is duly proved as provided by section 43 and the trustee is satisfied that the claim was duly secured by the property so realized.

(10) If the trustee disputes the preference the creditor shall be entitled either to lay before the Master an objection under section 98 to the trustee's account, or to the court, after notice of motion to the trustee, for an order compelling the trustee to pay him forthwith.

(11) Upon such application the court may make such order as to it seems just.

(12) Whenever any creditor in proving his claim has placed a value upon the security held by him or in respect of which a special mortgage exists in his favour, the trustee, if authorized at any meeting of creditors, may, within six weeks after the trustee has been appointed or after the claim has been proved (whichever is the later), take over that security at the value placed thereon by the creditor when his claim was proved.

(13) If the trustee does not, within the period specified in subsection (12), take over the security, he shall proceed to realize the property for the benefit of all creditors according to their legal rights:

Provided that where two or more creditors have a pledge or mortgage of the same property a creditor who has valued his security shall be deemed to have valued, and the trustee shall be entitled to take over only the preferent rights of the creditor in respect of the property, and not the property itself.

(14) If the claim of a secured creditor exceeds the amount payable to him in respect of his security he shall be entitled to rank against the estate in respect of the difference.

(15) For the purpose of realizing the property in accordance with subsection (13), the trustee shall be entitled to demand from the creditor delivery of the property, and if the creditor fails to comply with the demand the trustee shall have the same rights and remedies as he has under subsections (4) and (5).

(16) A creditor who holds as security for his claim any movable property and who fails to notify the Master or the trustee of the security which he holds or who, after realizing his security, fails to pay over the net proceeds thereof to the trustee or to the Master, on the trustee's account, shall be guilty of an offence and liable to the penalties provided for an offence against section 148(2).

(17) The provisions of this section shall apply *mutatis mutandis* in respect of any creditor for value of a solvent spouse for whom provision is made in section 20 and who holds movable property of that spouse as security for his claim as if such security were property of an insolvent over which the creditor had a preferent right by virtue of any special mortgage, legal hypothec, pledge or right of retention.

**79. Power to compound for debts due to the estate and to submit matters in dispute to arbitration**

(1) The trustee may (subject to the approval of the creditors where the debt exceeds P100) agree to any offer of composition made to the insolvent estate by any debtor and take any reasonable part of the debt in discharge of the whole or may give reasonable time, regard being had to section 93.

(2) If specially authorized by a resolution of creditors, the trustee may submit to the determination of arbitrators any dispute concerning the estate or any claim or demand upon the estate, when the opposite party consents to arbitration.

(3) If specially authorized by a resolution of creditors, the trustee may compromise or admit any claim or demand against the estate, including an unliquidated claim.

(4) When an unliquidated claim has been so compromised or admitted, or when it has been settled by a judgment of a court, the same may be proved against the estate in the manner set forth in section 43.

**80. Continuance of pending legal proceedings by surviving or new trustee**

(1) Whenever a trustee dies or is removed, no legal proceedings relative to the insolvent estate shall lapse by reason of the death or removal.

(2) The court in which any such proceedings are pending may, upon receiving notice of the death or removal, allow the name of the surviving or new trustee to be substituted in the place of the former; and the proceedings shall continue as if the surviving or new trustee had been a party to the same.

**81. Remuneration of trustee or *curator bonis***

(1) Every trustee or *curator bonis* shall be entitled to a reasonable remuneration for his services, to be taxed by the Master according to tariff B set out in the Second Schedule:

Provided that-

- (i) the Master may, for good cause, reduce or increase his remuneration; and
- (ii) the Master may disallow his remuneration either wholly or in part on account of any failure or delay in the discharge of his duties.

(2) No person who employs, or is a fellow employee of, or is in the ordinary employment of, the trustee shall be entitled to receive any remuneration out of the estate for services rendered to the estate, and no trustee shall be entitled either by himself or by his partner to receive out of the estate any remuneration for services rendered to the estate, except the remuneration to which under this Act he is entitled as trustee.

**PART VI**

***Application of Assets (ss 82-92)***

***Costs and Preferent Claims (ss 82-86)***

**82. Funeral expenses; deathbed expenses**

(1) In priority to all other claims or charges against the estate under sequestration there shall be paid out of the free residue of the estate, and if the free residue is insufficient, out of the remaining assets in proportion to their value, in the order of preferences herein set forth-

- (a) the funeral expenses of the insolvent or, if they were incurred within three months prior to the sequestration, the funeral expenses of his wife or minor child, but the amount payable under this paragraph shall not exceed P50 in all;
- (b) the death-bed expenses of the insolvent, or, if they were incurred within the three months prior to the sequestration, the death-bed expenses of his wife or minor child, but the amount payable under this paragraph shall not exceed P50 in all.

(2) Death-bed expenses shall include medical attendances, nursing, drugs and medical necessities, which shall rank *pari passu*.

**83. Costs of sequestration**

(1) Subject to section 82, there shall be paid out of the free residue of the estate, in priority to all claims, the costs of sequestration with the exception of those specified in section

89.

(2) The costs of sequestration shall be paid in the following order-

- (a) the sheriff's or bailiff's costs incurred since the date of the sequestration order, or under section 6(2) and (3);
- (b) fees payable to the Master in respect of the sequestration;
- (c) the following costs and charges which shall rank *pari passu* and abate in equal proportions if necessary, that is to say, the taxed costs of sequestration, the remuneration of the *curator bonis* and of the trustee, and all other costs of administration and liquidation including the wages of any such servants of the insolvent as on engagement by the legal representative of the estate continue in the service of the estate.

(3) For the purposes of this section "taxed costs of sequestration" shall include costs incurred upon the petition of the insolvent or a creditor in so far as any such costs have been necessarily or rightly incurred, but shall not include costs of opposition, unless the court so orders.

#### **84. Costs of execution**

(1) Subject to sections 82 and 83 there shall be paid out of the free residue of the estate, in priority to other claims, all taxed costs of any execution upon the estate of the insolvent in operation at the date of the sequestration order, to an amount not exceeding the proceeds of the property taken in execution.

(2) No one shall have any further or other preference by reason of an attachment on any property of the insolvent.

#### **85. Servants' wages**

(1) Subject to the three preceding sections there shall be paid out of the free residue of the estate, in priority to other claims, but to an amount not exceeding P100 to any one servant, the arrear of wages for one month and the wages for the month current with the sequestration of any servant of the insolvent who is engaged by the month or by some longer period, and the arrear of wages for one week and the wages for the week current with the sequestration of any servant of the insolvent who is engaged by the week.

(2) The wages specified in this section shall be paid by the trustee so far as there are assets available for that purpose without requiring that claims for the same be proved in the estate in the manner set forth in section 43, but the trustee may require from the person claiming an affidavit that the wages are actually owing.

(3) Any servant claiming a preference for his wages for the month or week current with the sequestration shall be obliged to continue in the service of the estate during the remainder of such month or week and at the end thereof his contract shall be determined unless he is required by the legal representative of the estate to remain longer in the service of the estate.

(4) Nothing in this section shall deprive any servant whose contract is determined thereunder of his right to damages.

#### **86. Preference in regard to taxes on income**

Subject to the four preceding sections, any balance of the free residue shall be applied in paying-

- (a) any tax on the income of the insolvent levied under any written law relating to income tax or to any other tax upon income or profit or any part thereof, in respect of any period prior to the date of the sequestration of his estate, whether or not that tax has become payable after that date;
- (b) in the case of an insolvent partnership, so much of any tax due and payable by any partner as is referable to the taxable income derived by him from the partnership; and the amount to be deemed to be so referable shall be a sum which bears to the total amount due by him as tax the same ratio that his taxable income derived from the partnership business bears to his total taxable income from all sources in Botswana.

## **Secured Claims (ss 87-89)**

### **87. Landlord's hypothec**

No tacit or legal hypothec (under which shall not be included any right of retention) shall give any preference on the estate of the insolvent except the landlord's hypothec; and that hypothec shall give a preference for all rent in respect of the period current with and up to the sequestration and arrear of rent, not exceeding three months, in respect of a period immediately prior thereto.

### **88. Effect of general bond and general clause; mortgages for future advances**

(1) No registered general bond shall confer any preference in respect of immovable property, and no general clause in a registered special mortgage shall confer any preference in respect of immovable property or of movable property which was not delivered to the mortgagee at the time of the mortgage and retained by him during the term thereof:

Provided that nothing in this section shall affect any preference conferred by a general clause in any mortgage bond passed in favour of a Master in terms of any law for the time being in force in Botswana relating to the administration of the estates of deceased persons.

(2) On the commencement of this Act, priority under any mortgage for future advances shall be deemed to depend on the date of the registration of that mortgage and not on the date of any advance made under the same.

### **89. Costs to which securities are subject**

(1) The cost of maintaining, conserving, and realizing any property which is subject to any special mortgage, legal hypothec, pledge or right of retention shall be paid out of the proceeds of that property, if sufficient, and if insufficient, by those creditors *pro rata* who are entitled to rank against those proceeds in priority to other persons.

(2) The trustee's remuneration in respect of that property and all rates, taxes, licences and other payments due in respect thereof at the date of sale and necessary to be paid in order to enable the trustee to give transfer thereof shall form part of the costs of realization.

(3) If a secured creditor, when proving his claim, states in his affidavit that he relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not, except as is prescribed in the first and third provisos to section 92, be liable for any other costs of sequestration than the costs specified in this section.

(4) Interest on a secured claim for the year preceding the year current with the sequestration and for the year current with the sequestration shall have the like preference as the capital sum.

(5) Notwithstanding any written law prohibiting the transfer of property on which there are unpaid rates, taxes or licences, no trustee shall be prevented from transferring any property by reason of any unpaid rates, taxes or licences thereon which at the date of sequestration had been in arrear for longer than the calendar year current with the sequestration and the calendar year preceding.

## **Distributions (ss 90-91)**

### **90. Distribution to creditors**

(1) After payment of the costs and charges mentioned in section 89(1) and (2) the proceeds of any property subject to a special mortgage, legal hypothec, pledge or right of retention shall be applied in payment of the claims thereby secured in their legal order of preference with interest from the date of sequestration to the date of payment:

Provided that whenever no claim has been proved in respect of a debt secured by a special mortgage over immovable property of the insolvent and the trustee is not satisfied that such debt has been discharged, the trustee shall deposit with the Master for payment into a special account to be kept by the Master for the purpose, the proceeds of the sale of such property, not exceeding such capital amount of the said special mortgage and such arrears of interest as the mortgage would have had a preferent right to claim; and the amount so deposited or any part thereof shall be paid to the mortgagee if, within a period of one year after

confirmation of the distribution account under which the money is distributed he applies to the Master and the Master is satisfied, by a certificate of the trustee or other evidence deemed by him sufficient, that the mortgagee is entitled to the amount or part thereof.

(2) If the last known address of the mortgagee is ascertainable by the trustee, he shall transmit to the mortgagee at that address by registered post not less than three months before lodging the said account with the Master notice of the sequestration of the mortgagor's estate.

(3) Any amount which is not paid to the said mortgagee after the expiry of that period shall be distributed amongst the creditors who have proved claims in the insolvent estate prior to the confirmation of the said distribution account, as if the amount had, at the date of such confirmation, been available for distribution among them.

(4) Any creditor claiming to be entitled to a share in the distribution, shall make written application to the Master for payment of his share, and the Master may pay out to such creditor or may hand the money to the trustee, if any, for distribution amongst the creditors entitled thereto, or, if there is no trustee, may appoint a trustee for the purpose of making such distribution.

(5) Any trustee charged with the duty of making such a distribution shall lodge a supplementary account in respect thereof and sections 97 to 103 relating to the confirmation of accounts and the distribution and payment of dividends shall apply in respect of such supplementary account.

(6) After payment of the costs of the sequestration and in so far as the same shall be preferent upon the free residue all preferent claims with interest thereon from the date of sequestration to the date of payment, the free residue shall be applied-

- (a) in the payment of the concurrent claims in proportion to the amount of the same; and
- (b) if the concurrent claims have been paid in full, in the payment thereafter of interest on the concurrent claims from the date of sequestration to the date of payment in proportion to the amounts thereof.

(7) Interest on all claims shall be calculated at the rate of six per cent per annum unless otherwise lawfully stipulated in writing, when it shall be calculated at the stipulated rate.

#### **91. Equalizing dividends in case of late proof**

Any creditor who has not received a dividend under a distribution of assets by reason of his not having proved his claim before that dividend was paid, shall be entitled on any further distribution after he has proved his claim, to receive the amount that he would have received under the previous distribution if he had so proved so long as such creditor satisfies the Master that his delay in proving was due to some reasonable cause:

Provided that any creditor who had knowledge of proceedings having been taken under sections 25, 28, 29 or 30, and who delayed proving his claim until after the court had given judgment in such proceedings, shall not be entitled to share in the distribution of the proceeds of any assets or of any moneys recovered in such proceedings.

#### **Contributions (s 92)**

#### **92. Contributions by creditors towards costs of sequestration when free residue insufficient**

(1) When the free residue of the estate is insufficient to pay all the costs in the sequestration hereinbefore declared to be a charge against the same, all creditors who have proved their claims against the estate shall be personally liable to make good any deficiency, the concurrent creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any:

Provided that-

- (i) where all the creditors who have proved claims against the estate are secured creditors who would not have ranked upon the surplus of the free residue, if there had been any, such creditors shall be liable to make good the whole of the deficiency, each in

- proportion to the amount of his claim;
- (ii) where a creditor has withdrawn his claim he shall be liable to contribute in respect of any deficiency only so far as is provided in section 50, and if a creditor has withdrawn his claim within five days after the date of any resolution, he shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution; and
  - (iii) where all the creditors who would have ranked upon the surplus of the free residue, if there had been any, have withdrawn their claims and, after payment of their contribution in terms of proviso (ii), there is still a deficiency, the remaining creditors whose claims have been proved against the estate shall, notwithstanding the fact that they would not have ranked upon the surplus of the free residue, if there had been any, be liable to make good such deficiency, each in proportion to the amount of his claim.

(2) Whenever any creditor who is liable to contribute as aforesaid or under any such supplementary account as is hereinafter provided for is in the opinion of the Master and of the trustee unable to pay the contribution or if costs have been incurred in connection with the recovery of any contribution and are in the opinion of the Master and of the trustee irrecoverable by the trustee, the trustee may within six months after the confirmation of the account or after the date when the amount of such costs has been ascertained or within such further period as the Master may allow, frame a supplementary account-

- (a) in the case of a creditor who is unable to pay the contribution, apportioning liability therefor among the other creditors; or
- (b) in the case of costs so incurred and irrecoverable, apportioning liability therefor among the creditors or among such of them as are able to pay.

(3) Any creditor contributing to the liability of a defaulting creditor shall be entitled to recover the amount so contributed from that defaulting creditor.

(4) Sections 97, 98, 99, 100(2) and 101(1) shall apply in respect of such supplementary account.

(5) The said supplementary account shall be lodged and due notice thereof published in the *Gazette* within the six months aforesaid or within such further period as the Master may have allowed.

## **PART VII**

### ***Trustee's Accounts (ss 93-105)***

#### ***Form of Accounts (ss 93-96)***

### **93. Liquidation account and plan of distribution**

(1) The trustee of every insolvent estate shall, not later than six months after his appointment, if the gross value of the estate is P500 or more, or in any other case not later than three months after his appointment, frame and lay before the Master, a liquidation account and a plan of distribution of the proceeds of property of the estate (if any) available for payment to creditors, or if all realizable assets of the estate have been realized and brought to account and the proceeds are insufficient to cover the costs of the sequestration mentioned in section 83, a plan of contribution apportioning the liability for the deficiency among the creditors who are liable to contribute.

(2) The liquidation account shall contain an accurate record of all moneys received and of all moneys disbursed by the trustee otherwise than in the course of a business which he carried on for the insolvent estate in question.

(3) The record of each such receipt and disbursement shall set forth the amount and date thereof and sufficient particulars to explain its nature.

(4) The liquidation account shall be accompanied by the trustee's pass book and by vouchers in support of the record of receipts and disbursements.

(5) If the trustee has carried on any business on behalf of the estate, he shall submit to the Master, in addition to the liquidation account, a trading account containing the following data and no others, namely-

- (a) a record of the value of the stock on hand at the date of sequestration;
- (b) a record of the value of the stock on hand on the date up to which the account is made up;
- (c) the daily totals of receipts and payment in connection with the business;
- (d) the results of his conduct of the business.

(6) If the estate of a partnership and of a partner are under administration simultaneously, separate accounts shall be framed in the estate of that partnership and in the estate of the partner.

**94. Manner in which plan of distribution and plan of contribution to be prepared**

(1) The plan of distribution shall show in parallel columns under separate headings-

- (a) such claims or portions of any claims as are preferent or secured;
- (b) such claims or such portions of any claims as are concurrent;
- (c) the dividends severally awarded under that account and under previous accounts, if any; and
- (d) the deficiency in respect of each claim.

(2) The plan of contribution shall show in parallel columns-

- (a) the claim of each creditor in respect of which he is liable to contribute; and
- (b) the amount which he is liable to contribute.

(3) If the liquidation account is not the final liquidation account, the trustee shall further set forth therein-

- (a) all property still unrealized;
- (b) all outstanding debts due to the estate;
- (c) the reasons why that property or those debts have not been realized or collected, as the case may be,

and in that event the trustee shall, from time to time as the Master may direct, but at least once in every six months, unless he has been granted an extension of time as hereinafter provided, frame and lay before the Master the periodical accounts in form and in all other respects similar to the account mentioned in this section and section 93.

(4) Every account lodged by a trustee shall be signed by him, and verified by his affidavit that the account is a full and true account of the administration of the estate up to the date of the account and that, so far as he is aware, all the assets of the estate have been disclosed in the account.

(5) No stamp duty shall be payable in respect of such affidavit.

**95. Power to apply to the court for an order on the trustee to lodge liquidation account**

The Master, at any time when he considers that the trustee of an estate has funds in hand that ought to be distributed, and the Master or any person interested in the estate when a full and true account has not been lodged within the periods specified for the lodging of such an account in sections 93 and 94, may apply to the court for an order compelling the trustee to lodge his account:

Provided that-

- (i) the Master or that other person shall, not later than 14 days before making this application, transmit a letter to the trustee in default requiring him to lodge his account in accordance with this Act;
- (ii) any trustee receiving such letter shall lay before the Master in writing his reasons for not having lodged his accounts and the grounds upon which he claims an extension of time to do so, and thereupon the Master may grant to the trustee such extension of time as in the circumstances he may think fit;
- (iii) if the period specified in section 94 for lodging an account has expired, or, if it will expire within the time for which an extension is sought, the Master shall not grant an extension unless the trustee has previously given, by advertisement in the *Gazette*, not less than 14 days' notice of his intention to apply for an extension;

- (iv) any trustee who fails to satisfy the Master that he ought to receive an extension of time may apply by motion to the court, after notice to the Master and that other person, for an order granting to that trustee an extension of time within which to lodge his account.

**96. Costs where Master has refused to grant trustee extension of time**

Upon an application by the Master under section 95 the court, although it may be of opinion that the reasons laid before the Master by the trustee were such as would have justified the Master in granting an extension of time to lodge an account, shall order the trustee to pay the costs of the Master, if before making his application, the Master allowed the trustee sufficient time for applying to the court for an extension of the period for lodging his account.

***Confirmation of Account: Dividends and Contributions (ss 97-104)***

**97. Inspection of account: places for and period of**

(1) Every trustee's account shall lie open at the office of the Master, and where the insolvent resided or carried on his business at the time of sequestration in any district other than the South East District a duplicate thereof shall lie open at the office of a magistrate in that district, for inspection by creditors for such reasonable time, not being less than 14 days, as the Master may determine.

(2) The trustee shall give due notice thereof by advertisement in the *Gazette* and shall state in that notice the period during which and the place or places at which the account will lie open for inspection as aforesaid.

(3) The magistrate shall cause to be affixed in some public place in or about his office a list of such accounts as have been lodged in his office and the respective dates on which they will be transmitted to the Master; and upon the expiry of the period so advertised he shall endorse on each account his certificate that the account has been open in his office for inspection in terms of this section and shall transmit the account to the Master.

(4) No stamp duty shall be payable in respect of such certificate.

**98. Objections by insolvent or other interested parties to account**

(1) The insolvent or any person interested in the estate may, at any time before the confirmation of an account, lay before the Master in writing any objection, with the reasons therefor, to that account.

(2) If the Master is of opinion that any such objection ought to be sustained, he shall direct the trustee to amend that account or shall give such other directions as he may think fit.

(3) Notwithstanding that an objection has not been lodged and notwithstanding anything contained in section 99, if the Master is of opinion that any improper charge has been made against the assets or that the account is in any respect incorrect and should be amended, he may direct the trustee to amend the account or may give such other directions as he may think fit:

Provided that-

- (i) any person aggrieved by any such direction of the Master or by the refusal of the Master to sustain an objection so lodged may apply by motion to the court within 14 days after the date of the Master's direction, after notice to the trustee, for an order to set aside the Master's decision, and the court may confirm the account or make such order as it thinks fit; and
- (ii) when any such direction affects the interests of a person who has not lodged an objection with the Master, the account so amended shall again lie open for inspection by creditors in the manner and with the notice hereinbefore prescribed, unless the person affected as aforesaid consents in writing to the immediate confirmation of the account.

**99. Confirmation of account**

(1) When an account has been open to inspection by creditors as hereinbefore prescribed and-

- (a) no objection has been lodged;

- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been open for inspection if necessary as prescribed in section 98(3)(ii) and no application has been made to the court within the prescribed time to set aside the Master's decision; or
- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to the court within the time prescribed in section 98,

the Master shall confirm the account and his confirmation shall have the effect of a final sentence, except as against such persons as may be permitted by the court to re-open the account before any dividend has been paid thereunder.

(2) On the application of the trustee the Master shall forthwith, after the second meeting of creditors, fix a period or periods within which creditors shall prove their claims and, on the expiry of any period so fixed, creditors who have not proved shall, without prejudice to the rights of any mortgagee under the proviso to section 90(1), be excluded from the benefit of any distribution under any account lodged with the Master before their claims are proved.

(3) The Master shall give directions to the trustee as to the publication of a notice fixing such period or periods.

#### **100. Distribution of estate and collection of contributions from creditors**

(1) Immediately after the confirmation of any account the trustee shall proceed to distribute the estate in accordance therewith or to collect from the creditors liable to contribute thereunder the amounts for which they may be liable respectively.

(2) The trustee shall give notice of the confirmation of the account in the *Gazette* stating, if it be the case, that a dividend is in the course of payment or, if it be the case, that a contribution is in course of collection and that every creditor liable to contribute is required to pay to the trustee the amount for which he is so liable.

(3) That notice shall specify fully the address at which the payment of the contribution is to be made.

#### **101. Trustee to produce acquittances for dividends or to pay over unpaid dividends**

(1) The trustee shall without delay lodge with the Master the receipts for dividends and if there is a contribution account the vouchers and acquittances necessary to complete the account.

(2) If any such dividend remains unpaid for a period of three months after the confirmation of the account the trustee shall immediately pay the same to the Master for the account of the creditor.

(3) If the trustee, at the expiry of the said period of three months, has failed to furnish the Master with a proper receipt for any dividend which has not been deposited as aforesaid, his failure shall be *prima facie* evidence that such dividend is still in his hands and the Master may institute proceedings against that trustee to answer for his default.

(4) The court at the hearing of those proceedings may order the trustee to pay by way of penalty such sum not exceeding the amount of any dividend which has been unduly detained as it may think fit.

#### **102. Application to court for an order to pay dividend**

If a trustee delays payment of any dividend, any creditor entitled thereto may, after notice to the trustee, apply to the court for an order compelling the trustee to pay him that dividend.

#### **103. Surplus money to be paid to Master**

(1) Immediately after the confirmation of the final account the trustee shall pay into the hands of the Master any surplus moneys not required for payment of claims, charges and interest.

(2) Those surplus moneys shall be held by the Master to the credit of the estate and repaid to the insolvent after his rehabilitation upon his request.

(3) The Master or the insolvent may proceed by motion against any trustee who, being

thereunto required in writing, fails to deposit those surplus moneys in accordance with this section; and the court may order that trustee to pay by way of penalty such sum, not exceeding the amount which has been unduly detained, as to the court may seem fit.

(4) If a trustee fails to comply with any order of the court made under the provisions of any of the preceding sections, the court may order that any sum which that trustee was condemned to pay be recovered by attachment and sale of the goods of the trustee and may further commit him for contempt.

#### **104. Enforcing payment of contributions of creditors by writ of execution**

At any time after the expiry of 60 days from the publication in the *Gazette* of the notice under section 100, the trustee may take out a writ of execution against any creditor who, being liable to contribute under the plan of contribution, has failed to satisfy the amount of his liability.

#### ***Authentication of Accounts (s 105)***

#### **105. Authentication of confirmed accounts by Master and transmission to magistrate and local inspection of same**

(1) After the confirmation of any account the Master shall authenticate every duplicate transmitted to him by a magistrate, as hereinbefore provided, by affixing his signature thereto, and shall endorse thereon the date upon which the account has been confirmed.

(2) He shall transmit to the magistrate from whom the same has been received the duplicate of every account confirmed.

(3) Every such duplicate shall, upon receipt thereof by the magistrate, be filed in his office and every person shall be at liberty to inspect and take copies thereof without charge at any time during office hours.

### **PART VIII**

#### ***Compositions and Rehabilitations (ss 106-115)***

#### ***Compositions (ss 106-108)***

#### **106. Offer of composition or security for composition by insolvent**

(1) At any meeting of creditors, other than the first meeting, the insolvent may make an offer of composition or security for composition:

Provided that notice of the intention to make that offer and the nature thereof has been published in the *Gazette* not less than 10 days before the meeting or adjourned meeting at which the offer is considered.

(2) If the offer is accepted by creditors whose votes amount to not less than three-fourths in value and three-fourths in number of the votes of all the creditors whose claims have been proved against the estate, the insolvent shall, as soon as the payment under the composition has been made or security given to the satisfaction of the trustee, be entitled to a certificate under the hand of the Master of the acceptance of the offer:

Provided that-

- (i) no offer may be so accepted which contains any condition whereby any creditor would obtain as against another creditor who has not expressly agreed thereto in writing any benefit to which he would not have been entitled upon the distribution of the estate in the ordinary way; and
- (ii) any condition purporting to make the offer of composition or the fulfilment thereof or of any part thereof subject to the rehabilitation or to the consent of the creditors to the rehabilitation of the insolvent shall be of no effect.

#### **107. Effect of acceptance of offer of composition**

(1) An offer of composition which has been accepted as aforesaid shall be binding upon the insolvent and upon all the concurrent creditors of the estate; but the right of any creditor entitled to be paid in preference shall not be prejudiced thereby, except in so far as that creditor has expressly consented in writing to surrender his preference.

(2) If it is a condition of the composition that any property of the insolvent shall be restored to the insolvent, the acceptance of the composition shall divest the trustee of such

property and re-invest the insolvent therewith as from the date and subject to the conditions from and subject to which such property is in pursuance of the composition to be restored to the insolvent.

(3) The acceptance of an offer of composition shall not affect the liability of any person who is a surety for the insolvent.

(4) Whenever the estate of a partnership and the estate of a partner have been sequestrated simultaneously, the acceptance of an offer of composition in the separate estate of the partner shall not divest the trustee of any property of the insolvent or re-invest the insolvent therewith until after the expiry of a notice stating the terms of the offer and given six weeks previously, to the trustee of the partnership estate.

(5) At any time during that period of six weeks the trustee of the partnership estate may elect to take over the assets of the estate of the partner on payment to the trustee thereof of any money immediately payable under the offer of composition and on an undertaking that he will carry out all the conditions of such offer:

Provided that if it is a condition of such offer that any specific security shall be given for carrying it out, the Master shall, having regard to all the circumstances, determine the security which the trustee of the partnership estate shall give.

(6) The acceptance of an offer of composition by the creditors of an insolvent spouse shall not be binding on the separate creditors of the solvent spouse who have proved claims under section 20(3) to (12); but upon the acceptance of the offer of composition the property or, if it has been realized, the proceeds of the property of the solvent spouse, shall be restored to the solvent spouse without prejudice to the claims of the creditors of that spouse or to any right of preference enjoyed by any of them at the time when the property was vested in the trustee:

Provided that-

- (i) any movable property held as security by any such creditor when the property was vested in the trustee shall be restored to that creditor; and
- (ii) the proceeds of any security whatsoever which has been realized shall be paid to the party or parties entitled thereto according to their legal rights.

#### **108. Payment of moneys in pursuance of offer of composition to be made through trustee**

Any moneys paid and anything done for the benefit of creditors in pursuance of an offer of composition shall be paid and shall be done, as far as practicable, through the trustee, who shall frame an account and lay it before the Master, and all the provisions of this Act with regard to trustees' accounts and the confirmation thereof and the distribution of dividends thereunder shall, as far as may be applicable, continue to apply after an acceptance of an offer of composition:

Provided that any creditor who has failed to prove his claim before the trustee has made a final distribution among those creditors who have proved, shall be entitled to recover direct from the insolvent within six months after the confirmation of the account under which the distribution was made, any payments to which he may be entitled under the composition and the trustee shall have no duty in regard thereto and thereafter the creditor shall have no claim in respect thereof.

#### ***Rehabilitations (ss 109-115)***

#### **109. Application for rehabilitation and conditions of making the same**

(1) An insolvent who has obtained from the Master the certificate mentioned in section 106 may apply to the court for an order for his rehabilitation:

Provided that-

- (i) he has previously given, by advertisement in the *Gazette*, not less than three weeks' notice of his intention to make the application, and
- (ii) the said certificate shows that payment has been made or security to the satisfaction of the trustee given for payment of not less than 50 thebe for every P2 of every claim

proved or to be proved in the estate.

(2) An insolvent who is not entitled to apply to the court under subsection (1) and who has previously given to the Master and to the trustee in writing and by advertisement in the *Gazette* not less than six weeks' notice of his intention to apply for his rehabilitation may so apply-

- (a) after 12 months have elapsed from the confirmation of any liquidation and distribution account in his estate, unless he falls within the provisions of paragraph (b) or (c);
- (b) after three years have elapsed from the confirmation of such account if his estate has either under this Act or a prior written law been sequestered prior to the sequestration to which he desires to put an end and if he does not fall within the provisions of paragraph (c); or
- (c) after five years have elapsed from the date of his conviction of any fraudulent act in relation to his existing or any previous insolvency or of any offence under section 137, 138 or 139 or any other corresponding provision of a prior written law.

(3) An insolvent in whose estate no claim has been proved and no trustee has been appointed may apply for his rehabilitation after six months have elapsed from the date of sequestration:

Provided that he has previously given to the Master and his creditors in writing and by advertisement in the *Gazette* not less than six weeks' notice of his intention to make the application.

(4) A trustee receiving the notice mentioned in subsection (2) shall report to the Master any facts which in his opinion would justify the court in refusing, suspending or qualifying an order for the insolvent's rehabilitation.

#### **110. Security to be furnished prior to application for rehabilitation**

Not less than three weeks before making any such application as is mentioned in section 109, the insolvent shall furnish to the Registrar security, to the amount or value of P50, for the payment of costs of any person who may appear to oppose the rehabilitation and be awarded costs by the court.

#### **111. Facts to be averred by insolvent on application for rehabilitation**

(1) Every insolvent making an application for the rehabilitation of his estate shall make and submit an affidavit that he has made a full and fair surrender of his estate and has not granted or promised any preference or security or made or promised any payment or entered into any secret or collusive agreement with intent to induce his trustee or any creditor not to oppose his rehabilitation.

(2) Such affidavit shall include a statement of his assets and liabilities and of his earnings at the date of application.

(3) Information shall also be laid before the court as to what dividend was paid to his creditors, what further assets are available for realization and the estimated value thereof, the total amount of all claims proved against the estate, and the total amount of his liabilities at the date of the sequestration of the estate.

(4) Where application is pursuant to section 109(1) the insolvent shall set out the particulars of the offer of composition and shall state whether there are or are not any other creditors whose claims have not been proved in the estate and if there are shall state their names and addresses and particulars of their claims.

#### **112. Opposition to or refusal by court of rehabilitation**

(1) Upon the day fixed for the hearing of any such application the Master shall report thereon to the court and the trustee or any of the creditors or other persons interested in the estate may appear in person or by counsel to oppose the grant of the application.

(2) Whether the application be opposed or not, the court may refuse to grant an order of rehabilitation and may suspend the grant of the same or may attach such conditions thereto as it may think fit and may order the applicant to pay the costs of any opposition thereto if it is

satisfied that the opposition was not vexatious.

(3) If the circumstances disclosed in the Master's report or otherwise brought to the notice of the court are such that the court requires the Master to appear by counsel or to incur expenditure in making any inquiry or investigation, the costs of such appearance or investigation shall be borne by the insolvent and shall be a first charge upon the security furnished to the Registrar.

(4) Among the conditions referred to in subsections (2) and (3) the court may for special reasons require the insolvent to consent to judgment being entered against him for any unsatisfied balance of the debt provable under the insolvency, or such lesser sum as the court may direct, but in such case execution shall not be issued on the judgment except with leave of the court and on proof that the insolvent has since his discharge acquired property or income available for the payment of his debts or the court may make any other condition with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property.

(5) Notwithstanding any written law requiring the officer in whose office is registered any obligation of the insolvent, upon notice of that insolvent's rehabilitation, to cancel that obligation, it shall be competent for the court where application for rehabilitation is granted in pursuance of an offer of composition, to order that any of the insolvent's registered obligations shall, notwithstanding the rehabilitation, remain of full force and effect.

(6) The Registrar shall forthwith give notice to the Master of every rehabilitation of an insolvent granted by the court.

### **113. Effect of order of rehabilitation**

(1) An order of rehabilitation shall not affect-

- (a) the rights of the trustee or creditors under any composition duly accepted by the creditors;
- (b) the rights, powers or duties of the Master or the duties of the trustee in regard to any such composition;
- (c) the right of the trustee or creditors to any part of the insolvent's estate which is vested in but has not yet been distributed by the trustee;
- (d) the liability of any surety for the insolvent; or
- (e) the liability of any person to pay any penalty or suffer any punishment under this Act.

(2) Subject to subsection (1), and subject to such conditions as the court may attach to the order, an order of rehabilitation shall have the effect-

- (a) of putting an end to the sequestration;
- (b) of discharging all debts of the insolvent, not arising out of a fraudulent breach of trust, which were due, or the cause of which had arisen, before the sequestration; and
- (c) of relieving the insolvent of every disability imposed on him by the sequestration.

(3) Notwithstanding anything contained in this section an order of rehabilitation granted on an application made in circumstances described in section 109(3) shall have the effect of re-investing the insolvent with his estate.

### **114. Illegal inducements to vote for composition or not to oppose rehabilitation**

(1) Every benefit given or promised by the insolvent or on his behalf, and every agreement entered into with any person to obtain his consent to or induce him to abstain from opposing his rehabilitation, shall be void.

(2) Any person who accepts any such benefit or promise or enters into any such agreement shall be liable to pay by way of penalty for the benefit of the creditors of the estate-

- (a) a sum equal to the whole of the claim (if any) which he originally proved against the estate;
- (b) the amount or value of any benefit given or promised; and
- (c) in the case of a composition, the amount paid or secured to him by the composition.

### **115. Proceedings to recover penalty**

- (1) Proceedings to enforce and recover any such penalty may be taken by the trustee.
- (2) If the trustee refuses, or neglects, to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.

## **PART IX**

### **Assignments (ss 116-129)**

#### **116. Voluntary assignments not affected**

Nothing in this Act shall apply to a voluntary assignment entered into by a debtor with the consent of all his creditors.

#### **117. Meaning of assignment of estate by debtor**

(1) An assignment under this Act (hereinafter called "an assignment") shall mean an agreement whereby a debtor transfers or agrees to transfer his property to a person (hereinafter called "assignee") for the benefit of his creditors.

(2) The instrument in which such an agreement is contained (is hereinafter called "the deed").

#### **118. Debtor may assign his estate**

Any debtor who is not an insolvent may assign his estate in the manner hereinafter prescribed.

#### **119. Who may execute deed of assignment**

(1) A deed of assignment may be signed and executed-

- (a) by the debtor or by any person who might under the like circumstances present a petition, in terms of section 3, on behalf of the debtor;
- (b) by any creditor whose claim, not being a conditional claim, would be provable under this Act at a meeting of creditors, if the debtor were insolvent (hereinafter referred to as a "creditor entitled to sign"); and
- (c) by assignees not exceeding two in number, designated as such in the deed and not disqualified under this Act for election as trustees.

(2) There shall be annexed to the deed the debtor's schedule which shall be framed as nearly as may be in the Form B set out in the First Schedule and shall contain the particulars and shall be verified by the affidavit thereby required.

#### **120. Effect of execution of deed of assignment**

(1) Upon the execution of the deed of assignment by the debtor, by the assignee, and by at least one creditor having a liquidated claim of not less than P100 or by creditors having liquidated claims in the aggregate of not less than P200 against the debtor, the assignee shall take immediate possession, as against the debtor, of all movable property of which the debtor can give or order possession, and shall retain that property as against the debtor until the assignment is set aside or the Master certifies that the assignment has been declined by the creditors.

(2) The assignee shall immediately transmit to every officer charged with the duty of registering title to any immovable property or interest in minerals in Botswana appearing in the debtor's schedules of his property a notice in the Form E set out in the First Schedule, which shall be notice to every such registering officer that the debtor is unable in any way to deal with the said property or interest until the assignment is set aside or the Master certifies that the assignment has been declined by the creditors.

#### **121. Duties of debtor assigning estate to transmit schedules and give notice**

(1) Immediately upon the execution as aforesaid of the deed of assignment the debtor or the person who executed the deed on behalf of the debtor shall transmit the deed and the schedules of the debtor to the Master and shall publish in the manner hereinbefore provided for the publication of notice of surrender a notice in the Form F set out in the First Schedule (hereinafter called a "notice of assignment").

(2) The deed and schedules and, if need be, a duplicate of the deed and schedules,

shall lie for the inspection of creditors for such time and at such place or places as is prescribed by this Act in cases where a debtor is about to surrender his estate under the provisions thereof.

#### **122. Effect of publication of notice of assignment**

(1) The publication of the notice of assignment in the *Gazette* shall have the following effect-

- (a) it shall have the same effect as the publication of notice of surrender in regard to property and the proceeds of property of the debtor in the hands of the sheriff or bailiff; and
- (b) except as hereinafter provided, it shall have the effect of staying all proceedings for the sequestration of the debtor's estate, whether on his own petition or the petition of a creditor:

Provided that any creditor may, at any time after the publication of the notice of assignment and before registration of the deed as hereinafter provided, apply to the court, after notice to the Master, for the sequestration of the debtor's estate on the ground that the schedules of the debtor do not fully disclose the debts or the property of the debtor, or, if the court so allows, on any other ground.

(2) The court may supersede the assignment and place the estate under sequestration provisionally or may set aside the assignment altogether, or may make such order as it may deem fit.

#### **123. When deed may be signed by creditors entitled to sign**

(1) The deed or the duplicate thereof may be signed by creditors entitled to sign, at any office in which that deed or duplicate is advertised to be open for inspection of creditors and at any time during office hours and before the expiry of the period for which it is advertised.

(2) Every such duplicate which has been open for inspection at the office of a magistrate shall, on the expiry of the period aforesaid, be transmitted by the magistrate to the Master, together with his certificate that it has been open for inspection as advertised.

(3) No stamp duty shall be payable in respect of such certificate.

#### **124. When deed not signed**

(1) If, within the period during which the deed has been open for inspection, that deed, or that deed and the duplicate thereof together, have not been signed by creditors representing at least three-fourths in value of the claims and three-fourths in number of the creditors entitled to sign and disclosed in the schedules, the creditors shall be deemed to have declined the assignment, and the notice of assignment shall be deemed to be a notice of surrender.

(2) If, however, a sequestration order is not lodged with the Master within 14 days after the expiry of the period aforesaid, the Master shall notify the assignee under the deed and every officer who has been notified of the assignment that the assignment has been declined; and thereupon the debtor and his estate shall be released from all the effects of the assignment and of the notice of the assignment.

#### **125. Duty of Master if creditors do or do not take action to set aside assignment or place estate under sequestration**

(1) If no creditor has given to the Master notice in writing that he intends to make application to the court to set aside the assignment or place the estate under sequestration, or if a creditor, having given such notice, has failed within seven days thereafter to obtain and lodge with the Master an order placing the estate under provisional sequestration or setting aside the assignment, then, upon the expiry of the period during which the deed was advertised to be open for inspection or of the said period of seven days (whichever be the later), the Master shall satisfy himself that the deed and schedules and the duplicate thereof (if there be such) have been advertised and have been open for inspection as aforesaid, and that the deed or the deed and the duplicate thereof together have been signed by creditors representing not less than three-fourths in value of the claims and three-fourths in number of all creditors entitled to sign and disclosed in the schedules.

(2) When the Master is satisfied that the conditions specified in subsection (1) have been complied with he shall register the deed and deliver to the assignee, upon his finding security to the satisfaction of the Master for the full value of the estate and upon payment of fees payable by him, a certificate of appointment in the Form G set out in the First Schedule.

(3) The certificate or a duly certified copy thereof shall be the only admissible evidence of the assignee's appointment.

(4) The date of the registration of the deed shall be the date of the assignment.

(5) Every act purporting to have been done by the assignee in terms of the deed before delivery to him of that certificate, except in so far as that act was done under this Act or was necessary for the better preservation of the debtor's property, shall be of no effect and the assignee shall be personally liable for the consequences thereof.

(6) For the purposes of this section and section 124 no creditor shall be reckoned in number unless his claim amounts to at least P60, and in computing the value of the claim there shall be reckoned only the amount due after deducting the value of any security which the creditor may hold for his claim.

#### **126. Attestation of signatures to deed of assignment**

(1) The execution of the deed by the debtor and by the assignee under the deed shall be attested by a legal practitioner, notary, justice of the peace, commissioner of oaths or a police officer of or above the rank of sub-inspector.

(2) All other signatories to the deed shall be attested by at least one witness.

(3) Any person executing a deed on behalf of a creditor shall lodge with the Master the power of attorney, or other evidence of authority, or a duly certified copy thereof, whereby he is authorized to sign; otherwise he shall be deemed not to have executed the deed.

#### **127. Effect of registration of deed of assignment**

(1) From and after registration as aforesaid the deed shall be binding upon all creditors of the debtor (whether they have assented thereto or not) whose claims were due or the cause of whose claims arose before the date of the assignment; but no condition shall be inserted in the deed whereby any creditor may obtain, as against a creditor who has not executed the deed, any advantage or benefit to which he would not be entitled if the estate of the debtor were to be placed under sequestration.

(2) If any such term or condition is inserted in the deed it shall be of no effect.

(3) The immediate effect of the registration of the deed shall be-

- (a) to vest in the assignee the estate of the debtor as fully and effectually as if the estate were under sequestration;
- (b) to relieve the debtor from every debt which was due or the cause of which arose before the date of the assignment, but subject always to the deed of assignment:  
Provided that the registration of the deed shall not affect the liability of any person who is a surety for the debtor;
- (c) to stay all legal proceedings against the debtor for any liquidated claim provable against the estate; whereupon the taxed costs of such proceedings by the plaintiff may be added to his claim provable against the estate;
- (d) to suspend every other action and all proceedings therein by or against the debtor, except such as, if he were insolvent, he would be entitled to commence or continue for his own benefit; every action so suspended may be continued by or against the assignee in like manner and upon the like terms as to notice as if he were the trustee of an insolvent estate;
- (e) to enable the debtor, if in prison for debt, to apply to the court for his release after notice to the creditor at whose suit he is so imprisoned.

(4) The additional effect of the registration of the deed of assignment of the estate of one of two spouses shall be to vest in the assignee all the property of the spouse whose estate has not been assigned, *mutatis mutandis*, in the same manner, to the same extent, subject to the

same conditions and with the same rights, remedies and obligations in and on the part of the assignee, the spouse whose estate has not been assigned and the creditors of both spouses as is by this Act in the trustee of the estate of an insolvent spouse.

(5) The provisions of section 78(16) and (17) shall also apply *mutatis mutandis* in respect of property of a spouse whose estate had not been assigned but which under this section is vested in the assignee.

(6) For the purposes of this section the estate shall consist of all the property of the debtor at the date of the registration of the assignment, including property or the proceeds thereof which is in the hands of the sheriff or a bailiff under a writ of attachment, except such property as would be reserved to the debtor, if he were insolvent, and such further property as might by the deed be reserved to him.

(7) Nothing contained in this section shall be construed as affecting the capacity of the debtor to acquire property, or to bind himself by contract, after the assignment, or to sue on any debt the cause of which arose after the assignment; and nothing contained in this section shall be construed as affecting any claim against the debtor which accrued after the assignment.

#### **128. Supervision of assigned estate by Master**

(1) From and after the date of the assignment, the estate of the debtor shall be administered and distributed under the supervision of the Master, and all proceedings in relation thereto shall as far as possible be had and taken in the like manner as if the debtor were an insolvent and the date of the assignment were the date of the sequestration.

(2) The assignee shall have, as against the debtor and as against third persons, the same powers, rights and remedies with regard to the acts of the debtor and with regard to the collection and recovery of the estate of the debtor as may be exercised by the trustee of an insolvent estate with regard to the acts of the insolvent and with regard to the collection and recovery of the estate of the insolvent.

(3) The assignee shall have, as between the creditors and himself, in addition to any powers expressly granted to him under the deed, the same powers, rights and remedies and shall be subject to the same duties in regard to the administration and distribution of the estate and all proceedings in connection therewith as the trustee of an insolvent estate has and is subject to in regard to the administration and distribution of an insolvent estate.

(4) Every question of preference or priority and all matters whatsoever arising out of the assignment shall be determined according to the law and practice for the time being relating to insolvency as far as they may be applicable.

(5) Except as to property acquired by the debtor after the date of the assignment, the court shall have power to make all such orders as it would have power to make if the debtor were an insolvent and his estate had been under sequestration from the date of the assignment.

(6) The Master, if it appears to him to be desirable, may appoint a person not disqualified from being elected a trustee of an insolvent estate to be co-assignee with the assignee or assignees designated in the deed of assignment.

(7) When a person referred to in subsection (6) is so appointed, all the provisions of this Act, conferring any powers or rights or imposing any duties on an assignee, shall apply to such co-assignee.

(8) In the event of a difference arising between the co-assignee so appointed by the Master and the assignee or assignees so designated as to the administration of the estate or the carrying out of the deed of assignment, the Master may, if the difference is referred to him, determine the matter.

(9) The Master may similarly determine any difference between any assignees.

#### **129. Costs of assignment**

(1) The costs of the assignment shall be taxed by the Master according to Tariff C set out in the Second Schedule, and upon the registration of the deed shall be paid in preference in like manner as if they were taxed costs of sequestration.

(2) There shall be added thereto and paid in the like order of preference such taxed costs of any application to the court as it may order.

#### **PART X**

### ***Search Warrants and Examinations (ss 130-136)*** ***Concealed Property (s 130)***

#### **130. Search warrants**

(1) If it appears from any statements made upon oath that there is reason to believe that property (including books and accounts) belonging to an insolvent or assigned estate is concealed upon any premises a magistrate may, upon the application of the legal representative of the estate, issue a warrant to search for and take possession of that property.

(2) Any such warrant shall be executed in the like manner as a search warrant for property suspected of being stolen or concealed.

#### ***Examination of Insolvent and other Persons by Order of Court (ss 131-136)***

#### **131. Examination of insolvent and other persons and production of books and documents**

(1) The court may, at any time, upon the application of the trustee or of the assignee or of any creditor who has proved his claim against the estate and has found security to the satisfaction of the Registrar for all costs to be incurred under this section, summon any insolvent or any person who has assigned his estate to appear before the court or a magistrate, as directed by the court, to be examined upon oath touching all such matters and things as are referred to in section 56, and may summon the wife of the debtor, or any person known or suspected to have been in possession of any property of the debtor or to be indebted to the debtor, or any person, other than his legal practitioner, who the court has reason to believe is capable of giving any material information concerning the person, property or affairs of the debtor, to appear before the court or that magistrate to be examined upon oath touching on the matters aforesaid and to produce such books or documents in his custody or under his control as the court or magistrate may order him to produce.

(2) Any statement made in the course of such examination may thereafter be used as evidence against the person making the same.

(3) Every such examination shall be reduced to writing and signed by the person examined and shall be transmitted to the Master to be annexed to the documents relating to the estate.

(4) No person examined under this section shall be entitled at any such examination to refuse to answer any question upon the ground that the answer may tend to incriminate him.

#### **132. Expenses of person examined**

(1) The insolvent or any other person summoned to undergo examination as aforesaid shall be entitled to all such expenses out of the estate as a witness in civil proceedings is entitled to.

(2) The insolvent shall also be entitled to expenses out of the estate for his attendance at any meeting after the second meeting of creditors.

#### **133. Apprehension of persons failing to appear to undergo examination**

(1) If any person, duly summoned to undergo examination or to produce books and documents as aforesaid, fails to appear at the time and place appointed in the summons, the court or magistrate may grant a warrant authorizing any officer of the law or other person to apprehend the person so summoned and bring him before the court or magistrate.

(2) Unless the person so summoned satisfies the court or magistrate that he was prevented from complying with the summons by good cause, the court or magistrate may commit him to prison to be detained until such time as the court or magistrate may appoint anew for his examination or the production of books and documents.

(3) The gaoler of the prison shall produce that person before the court or the magistrate at the time so appointed.

**134. Committal to prison of persons refusing to answer questions or produce documents, etc., and bankers' evidence**

(1) If any person, who has been summoned to appear as aforesaid, refuses when required to answer any lawful question or to sign his examination or to produce any such books or documents as aforesaid, the court or magistrate before whom the examination is held may issue a warrant for the committal of that person to prison, and, subject to section 135, he shall remain there without bail until he has undertaken to do what is required.

(2) Any such warrant shall state fully the grounds on which it was issued.

(3) The books or documents referred to in sections 131, 133 and in this section shall include such books and documents in the possession of any banker as will show the name of every person in whose favour any cheque has within one year prior to the order of sequestration or date of assignment been drawn by a debtor upon his account with such banker.

**135. Appeal to court against such order of committal**

Any person so committed to prison may apply to the court for his discharge from custody, and the court may order his discharge on the ground either of any illegality or informality in the warrant, or that he had a lawful reason for his refusal, or on any other ground that it may think fit.

**136. Limited protection of magistrate for warrant illegally issued by him**

(1) If any proceedings are instituted against a magistrate by reason of any such committal, he shall have, in respect of those proceedings, the same protection as is by law allowed to judicial officers for anything done by them in the execution of their office.

(2) The court in considering the refusal of the plaintiff to answer any question shall have regard to the whole examination of which that question formed part.

**PART XI**

**Offences (ss 137-150)**

***Offences Prior to Sequestration or Assignment (ss 137-140)***

**137. Concealing, etc., books, assets, or destruction or disposition of same**

A person shall be guilty of an offence and liable to imprisonment for a term not exceeding three years if at any time before or after the sequestration or assignment of his estate he does any of the following acts, unless he satisfies the court that he had no intention to defraud, that is to say, if he-

- (a) conceals, parts with, destroys, mutilates, falsifies or makes any false entry or erasure in any book or other document relating to his business, property or affairs or permits any other person to commit any such act in regard to any such book or document;
- (b) conceals or permits the concealment of any assets which ought to be placed at the disposal of the trustee or assignee;
- (c) otherwise than in the ordinary course of business makes, or permits the making of, a disposition of any property which he has obtained on credit and has not paid for; or
- (d) otherwise than in the ordinary course of business destroys, damages, removes, or makes a disposition of, or permits the destruction, damage, removal or the making of a disposition of, any assets in his estate if such destruction, damage, removal, or disposition has prejudiced or is calculated to prejudice his creditors:

Provided that-

- (i) whenever in any proceedings for a contravention of paragraph (a) any act described in that paragraph is proved to have been committed in regard to any book or other document relating to the business, property or affairs of the insolvent or debtor who has assigned his estate, he shall be deemed to have committed or permitted such act unless he satisfies the court that he neither committed it nor could have prevented the commission;
- (ii) in any proceedings for a contravention of paragraph (c) or paragraph (d) any disposition, destruction, damage or removal of assets proved to have been committed

shall, unless the contrary is proved, be deemed to have been otherwise than in the ordinary course of business;

- (iii) if it appears by reference to any book or document relating to the business, property or affairs of the insolvent, or debtor who has assigned his estate, or if it is proved in any other manner whatsoever that, in the assets found in the estate by the trustee or assignee, there is a general deficiency not clearly and fully accounted for, of one-tenth or more of the total value of assets so found in the estate, such insolvent or debtor shall be deemed to have removed or made a disposition of assets to the value of such deficiency in contravention of paragraph (d) unless he fully and accurately accounts for or explains the deficiency and satisfies the court that the deficiency was not caused by his action and that he could not have prevented it.

### **138. Concealment of liabilities or pretence to existence of assets**

A person shall be guilty of an offence and liable to imprisonment for a term not exceeding three years if, within two years immediately preceding the sequestration or assignment of his estate, when making any statement either verbally or in writing in regard to his business, property or affairs to any person who is a creditor or to any person who has become his creditor on the faith of such a statement he conceals any liability present or future, certain or contingent, which he may then have contracted, or fails to disclose the full extent of his liability, or mentions, as if it were an asset, any right or property which at the time is not an asset, or represents that he has more assets than he in fact has, or makes any false statement in regard to the amount, quality or value of his assets, or in any way conceals or disguises or attempts to conceal or disguise any loss which he has sustained, or gives any incorrect amount thereof, unless he satisfies the court that he had no intent to defraud.

### **139. Failure to keep proper records**

(1) A person shall be guilty of an offence and liable to imprisonment for a term not exceeding one year if, being an insolvent or having assigned his estate, and his occupation or transactions having been such that he might reasonably be expected to keep a record of his transactions, he has failed to keep a proper record of his transactions in the English language.

(2) For the purposes of this section a proper record of transactions includes all such books containing entries which set forth clearly the nature of all such person's transactions as (regard being had to his occupation) he can reasonably be expected to have kept.

(3) A trader shall not be deemed to have kept a proper record unless it includes-

- (a) detailed stock-sheets and balance-sheets completed for each of his three financial or business years immediately preceding the sequestration or assignment of his estate or, if he commenced business less than three years before the sequestration or assignment of his estate, completed at the commencement of his business and thereafter for each financial or business year preceding the sequestration or assignment;
- (b) books exhibiting for the period since the commencement of business or since the commencement of the financial or business year next but one before the financial or business year current with the sequestration or assignment (whichever period is the less) the following particulars-
  - (i) all goods or property purchased in the course of the business duly supported by the original invoices;
  - (ii) all cash receipts and disbursements and the dates thereof;
  - (iii) a daily record of all goods or property sold on credit, and such a continuous record of all transactions as a trader may be expected to keep in the ordinary course of business; and
  - (iv) in addition to the other particulars usually contained in a ledger the name and address of every person indebted to the trader at the time when he became so indebted; and

- (c) all cheques drawn during the period mentioned in paragraph (b) in payment of disbursements, showing clearly, in the case of each cheque, the name of the payee and the date thereof, together with the counterfoils of all cheques, such counterfoils showing in each case the name of the payee, the amount of the cheque, and the date thereof:

Provided that a trader whose turnover for the two years immediately preceding the sequestration or assignment of his estate or since the commencement of the business (whichever period is the less) was at the rate of less than P2000 per annum shall be deemed to have kept a proper record, if the court, having regard to the nature and circumstances of the business, is satisfied that he had kept a sufficient record of his transactions, including a list of his debtors and creditors and their addresses.

**140. Undue preferences, contracting debts without expectation of ability to pay, etc.**

(1) An insolvent or a debtor who has assigned his estate shall be guilty of an offence and liable to imprisonment for a term not exceeding one year if, prior to the sequestration or assignment of his estate, he made a disposition of any part of his property so as to cause an excess of his liabilities over his assets, or a greater excess of his liabilities over his assets than existed prior to the making of the disposition, with the intention of preferring one or more of his creditors above the others or any other:

Provided that-

- (i) any such disposition which had the effect of preferring, or was calculated to prefer one or more creditor above the others or any other shall, unless the contrary is proved, be deemed to have been made with the intention of preferring such creditor or creditors above the others or any other;
- (ii) any such disposition made within a period of six months immediately preceding the sequestration or assignment shall, unless the contrary is proved, be deemed to have caused such excess or greater excess; and
- (iii) for the purposes of this subsection "creditor" includes a surety for the insolvent or debtor as well as a person who in law is in a position analogous to that of a surety.

(2) An insolvent or a debtor who has assigned his estate shall be guilty of an offence and liable to imprisonment for a term not exceeding two years if, prior to the sequestration or assignment of his estate-

- (a) he contracted any debt of P30 or more or debts in the aggregate of P100 or more without any reasonable expectation of being able to discharge such debt or debts; or
- (b) at a time when his liabilities exceeded his assets or during the period of six months immediately preceding the sequestration or assignment of his estate, he diminished his assets by gambling, betting, hazardous speculations or expenditure not reasonably necessary in connection with the business or vocation or for the maintenance of himself and his dependants:

Provided that in any proceedings for a contravention of paragraph (a), the insolvent or debtor shall, unless the contrary is proved, be deemed to have contracted the debt or debts without having had a reasonable expectation of discharging the same, if the debt or debts were contracted-

- (i) at a time when his liabilities exceeded his assets; or
- (ii) within a period of six months immediately preceding the sequestration or assignment of his estate.

***Offences after Sequestration or Assignment (ss 141-150)***

**141. Failure to give information as to or delivery of assets, books, etc.**

A person shall be guilty of an offence and liable to imprisonment for a term not exceeding three years-

- (a) if at any time during the sequestration or assignment of his estate, he, knowing or suspecting that a false debt has been or is about to be proved against his estate, fails

- for a period of seven days to inform in writing the Master and his trustee or assignee;
- (b) if within 14 days after the appointment of the trustee or assignee-
    - (i) he fails to deliver to the trustee or assignee, or as the trustee or assignee may direct, any such assets of whatever nature in the estate as may be in his possession or custody or under his control;
    - (ii) he fails to inform the trustee or assignee of the existence and whereabouts of any asset in the estate (other than an asset referred to in subparagraph (i)), which is not fully disclosed in his schedules framed under this Act, or which is not already in the possession of the trustee or assignee;
    - (iii) he fails to deliver to the trustee or assignee or sheriff or bailiff or as any of them may direct, all books, documents, papers and writings in his possession or custody or under his control, relating to his assets or affairs; or
    - (iv) he fails to inform the trustee or assignee of the existence or whereabouts of any such book, document, paper or writing not in his possession or custody or under his control, if the same is not already in the possession of the trustee or assignee, unless, in any such case, he satisfies the court that he had a lawful excuse for the failure; or
  - (c) if, at any time after the sequestration or assignment of his estate, he fails to furnish at the request of the trustee or assignee complete and truthful information regarding any asset in his possession or custody or under his control or which was at any time in his possession or custody or under his control, or regarding the time when or the manner or circumstances in which he disposed of such assets or ceased to be in possession, custody or control thereof, unless he satisfies the court that he had a lawful excuse for such failure.

#### **142. Obtaining credit during insolvency, offering inducements, etc.**

A person shall be guilty of an offence and liable to imprisonment for a term not exceeding one year-

- (a) if, during the sequestration or after the assignment of his estate, he obtains credit to an amount exceeding P20 without previously giving information to the person from whom he obtains credit that he is insolvent or has assigned his estate, unless he satisfies the court that such person had knowledge of that fact;
- (b) if he grants, promises, or offers any gift, payment or security or any consideration whatever in order to procure the consent of any creditor to an assignment or offer of composition or to prevent opposition to a rehabilitation or, during the sequestration or after the assignment of any estate, to induce any person to refrain from investigating any matter relating to that estate or from disclosing any information in regard thereto;
- (c) if he contravenes the provisions of section 16, 22(2) and (3) or 77(11), unless he satisfies the court that he had a lawful excuse for such contravention; or
- (d) if he makes any false statement in the schedules or statement referred to in section 4(2) and (3), 16 or 119, or in the statement referred to in proviso (ii) to section 22(2):

Provided that in any proceedings for an offence against paragraph (c) for failure to comply with section 16, a certificate under the hand of the Master to the effect that the accused has failed to lodge with the Master his schedules or statement of his affairs, as required by the said section 16, shall be *prima facie* evidence of such failure.

#### **143. Failure to attend meetings or give explanation of insolvency**

A person shall be guilty of an offence and liable to imprisonment for a term not exceeding six months-

- (a) if, being by this Act required to attend at the first or second meeting of creditors in an estate or an adjournment thereof, or, in the case of a further meeting, being duly required in writing by the trustee or assignee to attend, he absents himself without the written permission of the presiding officer;

- (b) if, being an insolvent or having assigned his estate and being thereto required by the trustee or assignee, he fails to give a true, clear and detailed explanation of his insolvency or assignment or fails to account correctly and in detail for the excess of his liabilities over his estate;
- (c) if, being an insolvent or having assigned his estate and being under examination at a meeting and being thereto required by the trustee, the assignee or the officer presiding, or any creditor or by the agent of any of them, he fails to account for, or to disclose what has become of, any of his property which is proved to have been in his possession so recently before the sequestration or the assignment that in the ordinary course he ought to be able to account for the same; or
- (d) if, being an insolvent or having assigned his estate, he fails to keep the trustee or assignee informed of his residential address.

#### **144. False answers on oath while under examination**

A person shall be guilty of an offence and liable to the punishment provided by law for the crime of perjury if, when being examined on oath under this Act, he makes a false answer to any lawful question, knowing such answer to be false, or he makes any false statement whatever relative to the subject matter of the inquiry knowing such statement to be false.

#### **145. Failure to appear before meeting of creditors or before the court or a magistrate**

Any person referred to in section 56 or in section 131 and any person who has assigned his estate shall be guilty of an offence and liable to imprisonment for a term not exceeding six months, if, being summoned to appear at a meeting of creditors or before the court or any magistrate under either of those sections, he conceals himself or quits Botswana, or without reasonable excuse fails to appear.

#### **146. Failure of debtor or spouse to appear to give evidence in proceedings**

Any person who is insolvent or has assigned his estate and the spouse of any such person shall be guilty of an offence and liable to imprisonment for a term not exceeding six months if, being duly summoned to give evidence in any proceedings either for or against the trustee or assignee he conceals himself or herself or quits Botswana or without reasonable cause fails to attend those proceedings or refuses to answer any question which may lawfully be put to him or her.

#### **147. Inducement by consideration or promise to do or omit certain acts in relation to insolvent estate**

A person shall be guilty of an offence and liable to imprisonment for a term not exceeding six months if he suffers himself to be induced by any gift, payment, security or any consideration whatever or by any promise or offer of any gift, payment, security or consideration to discontinue or abstain from any proceedings for the sequestration of an estate or to agree to or not to oppose any composition in an estate or the discharge or rehabilitation of an insolvent or to refrain from investigating any matter relating to an insolvent or assigned estate or from disclosing any information in regard thereto.

#### **148. Removing or concealing property to defeat an attachment or failure to give information**

(1) A person shall be guilty of an offence and liable to imprisonment for a term not exceeding three years if, either before or after the sequestration or assignment of any estate, he removes, conceals, disposes of, deals with or receives any asset belonging to that estate with intent to defeat an attachment under section 6, or by virtue of a sequestration order, or with the intent to defraud the creditors in the estate:

Provided that in any proceedings for an offence under this subsection any such removal, concealment, disposal of, dealing with or receipt of assets which has the effect of defeating or is calculated to defeat such attachment or which prejudices or is calculated to prejudice the creditors in that estate, shall, unless the contrary is proved, be deemed to have been committed with intent to defeat the attachment or (as the case may be) to defraud those creditors.

(2) A person who has in his possession or custody or under his control any asset belonging to an insolvent or assigned estate shall be guilty of an offence and liable to a fine not exceeding P600 or to imprisonment for a term not exceeding one year if, knowing of the sequestration or assignment of the estate and that the asset belongs to it, he fails to inform the trustee or assignee of the estate as soon as possible of the existence and whereabouts of the asset and to deliver it to, or place it at the disposal of, the trustee or assignee.

(3) The provisions of this section shall not apply to the insolvent or debtor who has assigned his estate, but nothing in this subsection shall prevent the application of the section to an insolvent or such a debtor in respect to assets belonging to another estate which has been sequestrated or assigned.

#### **149. Liability of partners or administrators**

A partner who does, or omits to do in relation to the property or affairs of the partnership, and any person charged by law with the administration of an estate who does, or omits to do, in relation to the affairs of that estate, any act which if done or omitted by him under the like circumstances in relation to his private estate would have been punishable under this Act, shall be guilty of the same offence.

#### **150. Liability of agents and managers and evidence of liability or date thereof**

(1) Any servant, agent or manager having the sole or practical control of the affairs of his employer or principal shall, upon the sequestration or assignment of the estate of his employer or principal, be liable to criminal proceedings and punishment for all offences under this Act to the same extent as if that servant, agent or manager were the insolvent or the debtor whose estate has been assigned:

Provided that the liability of the insolvent or debtor to criminal proceedings for any such offence shall not thereby be affected.

(2) Whenever in any criminal proceedings under this Act any liability incurred by the insolvent or by a debtor who has assigned his estate, or the date or time when the debt or liability was incurred, is in issue or relevant to the issue, proof that liability has been admitted under any of the provisions of sections 43 to 49 shall be sufficient evidence of the existence of the liability and the liability shall be deemed to have been incurred upon the date or at the time alleged in any document submitted in accordance with the provisions of any of those sections in support of any claim in respect of the liability:

Provided that any party to such criminal proceedings may prove that no such liability or that a lesser or a greater liability was incurred or that it was incurred on a date or at a time other than as so alleged.

### **PART XII**

#### ***Judicial (ss 151-153)***

#### **151. Jurisdiction of the court**

The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who-

- (a) at the date of the presentation of a petition for the sequestration of his estate, is-
  - (i) possessed of or entitled to property within the jurisdiction of the court;
  - (ii) domiciled or resides or has a dwelling-house or place of business or carries on business within the jurisdiction of the court;
- (b) at any time within 12 months immediately preceding the presentation of the petition has ordinarily resided or had a dwelling-house or place of business or carried on business within the jurisdiction of the court;
- (c) has assigned that portion of his estate which lies within the jurisdiction of the court:

Provided that when it appears to the court equitable or convenient that the estate of a person not domiciled in Botswana should be sequestrated elsewhere the court may refuse or postpone the sequestration.

#### **152. Review by and appeal to the court**

(1) The court may rescind, vary or amend any order made by it under this Act.

(2) Every person aggrieved by any decision, order, ruling, appointment, or taxation of the Master under this Act may bring the same under review by the court, and to that end may apply to the court by motion, due notice whereof shall be given to the Master and to any person whose interests are affected:

Provided that where a general body of creditors is affected, notice to the trustee or assignee shall be notice to all such creditors.

(3) Every person aggrieved by any decision, ruling or order of the officer presiding at a meeting of creditors, may bring the same under review by the court in the manner hereinbefore prescribed for the review of any decision, ruling or order of the Master and upon giving the like notice to the presiding officer and persons affected.

(4) Nothing contained in this section shall authorize the court to reopen any duly confirmed account or plan of distribution or of contribution otherwise than as is provided in section 99.

### **153. Power of the President to make rules**

The President may make rules regulating the procedure to be followed under this Act by any court or any person appointed by the court.

## **PART XIII**

### ***Miscellaneous (ss 154-166)***

### **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 <sup>i</sup>\*A.B. of ..... as insolvent and that his schedules will lie for inspection at the office of the Master at ..... <sup>ii</sup>† (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 <sup>iii</sup>\* .....

<i>Estate Dr.</i>		<i>Estate Cr.</i>	
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				P

elsewhere .....			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 C  
OUTSTANDING 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, <sup>iv\*</sup>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.

<sup>v†</sup>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 <sup>vi\*</sup> was at the date of the assignment/issuing of the sequestration order thereof <sup>vii\*</sup> 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 <sup>viii\*</sup> acquired by cession or purchase since the institution of the proceedings whereby the estate was assigned/placed under sequestration. <sup>ix\*</sup> 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).*

<sup>x†</sup>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 sequestered, 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 ..... P .....

makes 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 <sup>xi\*</sup> acquired by cession or purchase since the institution of the proceeding whereby the estate was assigned/placed under sequestration. <sup>xii\*</sup> 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.

<sup>xiii†</sup>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 sequestered, 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 <sup>xiv</sup>\* 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 ..... <sup>xv</sup>†), 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 A**

***Sheriff'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	21/2
Thereafter upon each P200 thereof	11/2
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
<i>For extracts or copies of documents made or certified in the office of the</i>	
<i>Master:</i>	
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	50t
of an account	
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	50t
words each	
Each additional folio	10t
Upon every order of rehabilitation or release from sequestration of an	P2,00
insolvent	

<sup>i</sup>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.

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

<sup>iii</sup>Here insert the full name of the debtor.

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

<sup>v</sup>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.

<sup>vi</sup>Strike out and initial the alternative words not required.

<sup>vii</sup>Strike out and initial the alternative words not required.

<sup>viii</sup>Strike out and initial the alternative words not required.

<sup>ix</sup>When no compensation or set-off is claimed, strike out this clause.

<sup>x</sup>When no compensation or set-off is claimed, strike out this clause.

<sup>xi</sup>Strike out and initial the alternative words not required.

<sup>xii</sup>Strike out and initial the alternative words not required.

<sup>xiii</sup>When no compensation or set-off is claimed, strike out this clause.

<sup>xiv</sup>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).

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