The Meaning of Advantage to Creditors under Voluntary, Compulsory and Friendly Sequestration in South Africa

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Abstract: The article discusses the advantage to creditors' requirement in voluntary surrender, friendly and compulsory sequestration in South Africa. This is done to, *inter alia*, examine the meaning and application of the advantage to creditors' requirement in sequestration proceedings in South Africa. It is also done to comparatively discuss the burden of proof and the court's discretion in relation to the advantage to creditors' requirement in voluntary surrender, friendly and compulsory sequestration proceedings. To this end, the article provides an overview analysis of the meaning and interpretation of the advantage to creditors' requirement, the burden of proof and the possible differences in the application of this requirement in the relevant sequestration proceedings. Accordingly, the article provides a discussion of the possible challenges and the court's discretion in the adjudication and application of the advantage to creditors' requirement in all sequestration proceedings in South Africa.

Keywords: Voluntary surrender; compulsory sequestration; friendly sequestration; advantage to creditors; court's discretion

1. Introductory Remarks

Insolvency-related matters and all sequestration proceedings are regulated by the Insolvency Act 24 of 1936 ("Insolvency Act", see ss 3-25) in South Africa. No application for the sequestration of the debtor or insolvent's estate will be granted unless if it is to the advantage of all creditors (ss 3; 6(1); 10(c) and 12(1)(c) of the

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Insolvency Act). This clearly shows that the advantage to creditors' requirement is crucially applicable to all sequestration proceedings in South Africa. Put differently, the debtor in voluntary surrender and the sequestrating creditor or friendly creditor in compulsory or friendly sequestration respectively, are obliged to prove that the sequestration of the debtor and/or insolvent's estate will be to the advantage of creditors before the sequestration is granted by the courts (ss 6(1); 10(c); 12(1) (c) read with s 9 of the Insolvency Act). This indicates that the advantage to creditors' requirement plays a pivotal role in the preliminary consideration and final adjudication of any application for the sequestration of the debtor's estate in South Africa (Loubser, 1997, p. 325; *Amod v Khan* 1947 2 SA 432 (N) 438, "*Amod* case"). Thus, the courts will not grant a sequestration order that is inspired by other ulterior motives on the part of the applicant (*Cohen v Mallinick* 1957 1 SA 615 (C) 621; *R v Meer* 1957 3 SA 641 (N) 619A).

In voluntary surrender, the debtor must prove to court that the sequestration will actually be to the advantage of creditors (s 6(1) read with ss 3(1); 10(c) & 12(1)(c) of the Insolvency Act; Burdette, 2002, p. 218). On the other hand, the sequestrating creditor only needs to furnish proof to the court that there is a reason to believe that the sequestration will be to the advantage of the general body of creditors in compulsory sequestration (s 9(1) read with ss 8; 10(c) & 12(1)(c) of the Insolvency Act; see further Pepler, 2013, pp. 15; 21–26; *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N) (*Naidoo* case)). Likewise, under friendly sequestration, the debtor usually commits an act of insolvency and request a family member, friend or an amicable creditor to apply for its compulsory sequestration. Accordingly, the applicant or petitioning creditor in friendly sequestration needs only to prove that there is a reasonable belief that the sequestration will be to the advantage of creditors (s 9(1) read with ss 8; 10(c) & 12(1)(c) of the Insolvency Act; *Klemrock (Pty) Ltd v De Klerk* 1973 3 SA 925 (W) 927 (*Klemrock* case); *Epstein v Epstein* 1987 4 SA 606 (C) 610; *Streicher v Viljoen* 1999 3 All SA 257 (NC) 258; *Van Rooyen v Van Rooyen* 2000 2 All SA 485 (SE) 490; Asheela, 2012, pp. 33-37). It is evident that the advantage to creditors' requirement is similarly applied in compulsory and friendly sequestration (Asheela, 2012, pp. 33-37; Pepler, 2013, pp. 15, 19, 21–26). It is further indisputable that the advantage to creditors requirement is more stringently applied in voluntary surrender than it is in compulsory and friendly sequestration (Asheela, 2012, pp. 23-37; Temperman, 2014, p. 21; Pepler, 2013, pp. 11-21; Boraine, & Roestoff, 2000, pp. 241-270). For instance, the debtor is required to establish that there is actual advantage to creditors before the application for voluntary surrender is accepted by the courts. On the contrary, the

petitioning creditor is merely required to prove that there is reason to believe that the sequestration will be to the advantage of creditors in both compulsory and friendly sequestration. Accordingly, proving advantage to creditors has continued to be a stumbling block to some debtors wishing to apply for voluntary surrender in South Africa (Roestoff & Coetzee, 2012, pp. 58-59). This follows the fact that many debtors do not usually have sufficient assets to, *inter alia*, prove that their application for voluntary surrender will actually yield some advantage to creditors. Consequently, some debtors cannot successfully apply for the voluntary surrender of their insolvent estates while on the other hand, it is relatively easy for creditors to merely prove, on a balance of probabilities, that there is "reason to believe" that the compulsory or friendly sequestration of the debtor's estate will be to the advantage of creditors.

As indicated above, it appears that the Insolvency Act is mainly creditor-oriented and relatively harsher on debtors in relation to the application and proving of the advantage to creditors' requirement in all types of sequestration proceedings (Evans, 2001, pp. 485-508). Consequently, overburdened debtors seeking debt relief that cannot prove advantage to creditors are not considered for voluntary surrender and/or adequately protected under the Insolvency Act. This is also evidenced in the wording of most provisions of the Insolvency Act that covers different classes of creditors while there is no provision for the different classes of debtors, especially, those that can and those that cannot prove or satisfy the advantage to creditors requirement (Asheela, 2012, pp. 23-37; Evans, 2001, p. 508). This indicates that there are various disparities and/or challenges on the protection of the creditors and debtors' interests under the Insolvency Act (Roestoff & Coetzee, 2012, pp. 58-60). These challenges and disparities in the establishment and application of the advantage to creditors' requirement are *prima facie* proof that the Insolvency Act mainly protects creditors but does not equally do the same in respect of the debtors' own interests, especially, in respect of the stricter voluntary surrender application requirements as opposed to those of compulsory and friendly sequestration (Boraine & Van Heerden, 2010, pp. 87-92). Given this background, it appears that the advantage to creditors' requirement creates undue hardship on legitimate insolvent debtors that take the initiative of surrendering their estates for sequestration *bona fide* but cannot establish or successfully prove the advantage or benefit that must be received by the creditors from such sequestration. This is a clear indication that the South African insolvency law is too creditor-oriented.

In light of the above, the article discusses the advantage to creditors' requirement in voluntary surrender, friendly and compulsory sequestration in South Africa. This is done to, *inter alia*, examine the meaning and application of the advantage to creditors' requirement in sequestration proceedings in South Africa. It is also done to comparatively discuss the burden of proof and the court's discretion in relation to the advantage to creditors' requirement in voluntary surrender, friendly and compulsory sequestration proceedings (Asheela, 2012, pp. 23-37; Temperman, 2014, p. 21; Pepler, 2013, pp. 11-21; Boraine & Roestoff, 2000, pp. 241-270). To this end, the article provides an overview analysis of the meaning and interpretation of the advantage to creditors' requirement, the burden of proof and the possible differences in the application of this requirement in the relevant sequestration proceedings. Accordingly, the article provides a discussion of the possible challenges and the court's discretion in the adjudication and application of the advantage to creditors' requirement in all sequestration proceedings in South Africa.

2. Meaning of Advantage to Creditors under the Insolvency Act

The term "advantage to creditors" is not expressly defined under the Insolvency Act (Roestoff & Coetzee, 2012, pp. 55-57). Additionally, other related key terms such as "sequestration", "winding up" and "*concursus creditorum*" are not defined in both the Insolvency Act and the Companies Act 71 of 2008 (Companies Act 2008). It appears that the meaning and interpretation of these terms was discretionary left to the courts. Nonetheless, the term "sequestration order" is widely defined as an order of the court, including a provisional sequestration order that is not set aside, that enables the debtor or insolvent's estate to be sequestrated (s 2 of the Insolvency Act).

The Insolvency Act provides that the applicant must comply with the advantage to creditors' requirement in voluntary, friendly and/or compulsory sequestration proceedings before such application is granted (ss 3(1); 6(1); 8 & 9(1) read with ss 10(c) & 12(1)(c) of the Insolvency Act). Nevertheless, unlike the position under voluntary surrender and compulsory sequestration, the Insolvency Act is silent on the requirements for friendly sequestration (ss 3(1); 6(1); 8 & 9(1) read with ss 10(c) & 12(1)(c)).

It is, however, important to note that no provisional or final order of sequestration is granted by the relevant courts in South Africa unless the advantage to creditors'

requirement is satisfied by the applicant in respect thereof. To this end, the courts' interpretation of the advantage to creditors' requirement is considered to understand the meaning of the term "advantage to creditors" (Roestoff & Coetzee, 2012, pp. 55-57). For instance, *Naidoo* case 18, held that the advantage to creditors requirement entails that there must be a reasonable prospect of some pecuniary benefit to the general body of creditors. The approach followed in this case is correct in as far as the benefit to the general body of creditors is concerned. Put differently, the *Naidoo* case correctly held that the advantage to creditors' requirement may only be established if some pecuniary benefit accrue to the general body of creditors as opposed to an individual creditors' own benefit. Be that as it may, the mere fact that a surplus is left after the sequestration expenses are recouped does not always suggest that the final sequestration of the debtor's estate will actually give rise to the advantage of creditors (*Naidoo* case 18; Pepler, 2013, pp. 21–26). It is submitted that the advantage to creditors is easily established where there is a positive change in the position of the creditors before and after the sequestration of the debtor's estate.

The advantage to creditors requirement entails that sequestration should yield some benefit to all the creditors of the insolvent debtor. This was echoed in *Lotzof v Raubenheimer Lotzof v Raubenheimer* 1959 1 SA 90 (O) 94 (*Lotzof* case), which held that the term "advantage of creditors" meant an advantage of all or at least the general body of creditors (Smith, 1985, pp. 27-32). This approach appears to be similar to the one employed in the *Naidoo case*. In this regard, the term "advantage to creditors" refers to the benefit given to the general body of creditors as opposed to an individual benefit for a particular creditor. Accordingly, it is usually presumed that creditors know what is in their commercial and/or economic benefit during sequestration proceedings (*Ex parte Gardener* 1927 CPD 452). This means that the creditors are usually in the better position than any other party to determine what is to their advantage. The general rule is that no creditor should be enriched at the expense of other creditors during any sequestration proceedings. The Insolvency Act expressly provides that no creditor should obtain any undue advantage over other creditors during and after the final sequestration of the insolvent debtor's estate (ss 26; 27 & 29-31 of the Insolvency Act; Smith, 1985, pp. 27-32). In this regard, the term "advantage to creditors" refers to the orderly and equitable sharing and distribution of all the insolvent debtor's assets to all the creditors on a just basis (Smith, 1985, pp. 27-32).

As indicated earlier, the courts usually compare the position of the creditors, before and after the sequestration of the debtor's estate, in order to establish if the sequestration in question will be to the advantage of all creditors (Sharrock, Van Der Linde & Smith, 2012, p. 39; South African Law Commission, 1989, p. 112). In *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D) 593 (*London Estate* case), the court held that the sequestration of the debtor's estate will be to the advantage of creditors only when it results in some payment or not negligible dividend to accrue to all creditors in respect of their proved liquidated claims as stipulated in section 9(1) and (2) of the Insolvency Act. However, the authors submit that the sequestration of the debtor's estate could still be to the advantage of creditors if it appears that the payment which will accrue to all the creditors is less than the actual debt owed therein. The rationale for this assertion is that despite failing to fully recover their debts, all the creditors would have at least received something out of the debtor's estate after its final sequestration. Additionally, the authors submit that the period for which the debt subsisted should also be considered by the courts when determining whether the final sequestration order will be to the advantage of creditors.

In *ABSA Bank Ltd v De Klerk* 1999 4 SA 835 (E) 870 (*De Klerk* case), the court provided that prospective dividends of five and/or six cents in the rand were not negligible and/or not too small to establish the advantage to creditors requirement in the sequestration of the debtor's estate. However, in *Nieuwenhuizen v Nedcor Bank Ltd* [2001] 2 All SA 364 (O) 367, the court held that a not negligible dividend must amount to a minimum of ten cents in the rand. The authors concur with the latter view and argue further that the relevant dividend should differ in respect of different debts owed by the debtor to creditors and in accordance with ranking of such creditors.

Fesi v ABSA Bank Ltd 2000 1 SA 499 (C) 505–506 (*Fesi* case), held that the advantage to creditors requirement should be tested in respect of the body of creditors as a whole not the individual applicant or minority of creditors. It is, however, not necessary to merely prove that the debtor has some assets during sequestration proceedings (Visser, Pretorius, Sharrock & Van Jaarsveld, 2004, p. 547). Failure to satisfy the advantage to creditors' requirement results in the refusal of the application for sequestration by the courts in South Africa (Govindjee, *et al*, 2007, p. 80). In other words, although there are other statutory requirements that must be complied with by the applicant under voluntary surrender, compulsory sequestration and friendly sequestration (see discussions in sub-headings below),

no sequestration order is granted by the courts until the advantage to creditors' requirement satisfactorily met by the applicant (ss 3(1); 6(1); 8 & 9(1) read with ss 10(c) & 12(1) (c) of the Insolvency Act). The court must be satisfied whether creditors will receive some pecuniary benefit when establishing the advantage to creditors' requirement (*Naidoo* case 59-68). However, it remains difficult to ascertain whether all types of creditors will receive their dividends *pari passu* (Cisse, Madhava Menon, Cordonier Segger & Nmehielle, 2014, pp. 94-96). In light of this, the *pari passu* principle could suggest that if the debtor's estate has insufficient assets to meet all the creditor's claims, the creditors' claims or dividends must abate rateably among themselves. This could also imply that the debtor's assets are distributed to its unsecured creditors in proportion to the size of their respective claims and each of the creditors must bear a proportionate share of the shortfall (Ferran & Ho, 2014, p. 301). The courts may consider other factors in respect of the advantage to creditors' requirement such as whether the trustee will be able to unearth other assets and whether there are alternative repayment measures. Thus, if there is a possibility that the trustee might discover other assets in respect of the debtor's estate through an enquiry, there could be advantage to creditors. Moreover, the courts may also consider factors such as an administration order under the Magistrate Courts Act 32 of 1944 (see generally s 74) and debt review under the National Credit Act 34 of 2005 (s 3; also see Smith, 1985, pp. 27-32; Boraine & Van Heerden, 2010, pp. 87-92). Accordingly, the courts will determine whether the insolvent estate should be placed under an administration order or whether the insolvent debtor should be placed under debt review.

In *CSARS v Hawker Aviation Partnership* 2006 4 SA 292 (SCA) 29 (*Hawker Aviation Partnership* case), Cameron JA submitted that the Commissioner was obliged to establish whether the sequestration would provide some benefit to creditors given the fact that the partnership was no longer functional. Additionally, the court held that the Commissioner only needed to indicate whether there was reason to believe, not a mere likelihood but a prospect that was not too remote that the sequestration will be to the advantage of creditors (*Hawker Aviation Partnership* case para 29). Cameron JA correctly submitted that the sequestration was likely to be to the advantage of creditors if it was established that the transfer to the new partnership involved a voidable disposition or disposition for no value (*Hawker Aviation Partnership* case para 30).

Gardee v Dhanmanta Holdings 1978 1 SA 1066 (N) 1070, held that the advantage to creditors requirement is a relative and not an absolute one. The authors concur

with this view and submit further that the sequestration will not be to the advantage of creditors unless it suits them better than any other alternative measures such an administration order and/or debt review. As stated above, if there are reasons to believe that the debtor's additional money or property could be recovered through an enquiry under the Insolvency Act, the advantage to creditors' requirement will be satisfied. Accordingly, the applicant should place such facts before the court to show that there is a reasonable prospect of a pecuniary benefit to be realised by creditors after such enquiry (Visser, Pretorius, Sharrock & Van Jaarsveld, 2004, p. 547; *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 1 SA 717 (O); *LTR Beleggings (Edms) BPK v Hechter* 1977 1 SA 22 (NC)). If the debtor has no assets and the application is justified by reason of salary, the burden rests upon the applicant to prove that there is a reasonable likelihood of some monies and/or benefit to become available to the creditors (Visser, Pretorius, Sharrock & Van Jaarsveld, 2004, p. 547).

In *Stratford v Investec Bank Limited* 2014 ZACC 38 and *Stratford v Investec Bank Ltd* 2015 3 SA 1 (CC) 44–45) (*Stratford* case), the Constitutional court held that in light of the appellant's recognisable assets and other potential impeachable transactions laid as evidence by the respondent, there was reason to believe that the sequestration of the appellant or debtor's estate will be to the advantage of creditors. The Constitutional court affirmed that where there is evidence that the debtor recently possessed cash or assets after an enquiry, the requirement of advantage to creditors will be satisfied. (*Stratford* case 11-12 & 44-46). In this regard and for the purposes of the advantage to creditors' requirement, it should be noted that: (a) creditors in this regard means the body of creditors viewed as a whole or a single entity (Sharrock, 2007, pp. 700-740, 791); (b) the court is likely to be satisfied if there is a reasonable prospect or reason to believe that the sequestration will be to the advantage of creditors.

In *Botha v Botha* 1990 4 SA 580 (W) 2, Leverson J held, *inter alia*, that the debtor must prove that the sequestration of his or her estate will be to the advantage all the creditors, especially, in voluntary surrender. Furthermore, a proper valuation of the applicant's immovable property should be conducted in order to determine whether the sequestration in question have the prospects of a pecuniary benefit for all the creditors. This applies in respect of a voluntary surrender while the sequestrating creditor is presumed to know what constitutes advantage to creditors in compulsory and friendly sequestration as discussed below.

2.1. The Advantage to Creditors Requirement in Voluntary Surrender

Voluntary surrender occurs when a debtor or its agent knowingly and intentionally applies to the court for the sequestration of its estate (ss 3(1) & 6(1) read with ss 4; 7; 8; 9(1) & (2); 10(c) & 12(1) (c) of the Insolvency Act; Haupt, *et al*, 2009, pp. 122-127). It must be noted that a natural person (a debtor himself or herself or his or her duly authorised agent (*Ex parte Brown* 1951 4 SA 246 (N)); an executor of a deceased debtor's estate and a curator *bonis* of a prodigal's estate may apply for voluntary surrender (s 3(1) of the Insolvency Act; see further *Ex parte Houston* 1958 1 SA 448 (N)). Furthermore, members of a partnership's estate (s 3(2) of the Insolvency Act; also see *Ex parte Bester* 1937 CPD 45) and both spouses of a joint estate of spouses married in community of property may also apply for voluntary surrender.

An applicant for voluntary surrender must comply with three requirements under the Insolvency Act (s 6(1)). Firstly, the applicant must prove that the debtor's estate is actually insolvent (s 6(1) of the Insolvency Act; Van der Merwe & du Plessis, 2004, pp. 353-357). This could indicate that the applicant must prove on a balance of probabilities that the debtor's estate is factually insolvent. Factual insolvency occurs when the liabilities of a natural or juristic person as fairly assessed, exceed the value of its assets leading to its inability to pay all the debts and/or subordinated debts of the relevant creditors as they fall due (Luiz & Van der Linde, 1993, p. 231). Accordingly, it seems that proving that the debtor is commercially insolvent does not suffice for the purposes of voluntary surrender which requires actual or factual insolvency on the part of the applicant. Commercial insolvency occurs when an individual, entity or company fails to pay its debts when they fall due despite the fact that its assets might still be exceeding its liabilities. Secondly, the applicant must prove that the debtor owns property of sufficient value to cover the costs of the sequestration process, payable from the free residue of the insolvent estate (s 6(1) of the Insolvency Act). Notably, free residue is a portion of the insolvent estate which is not subject to a special mortgage, legal hypothec, pledge or right of retention, that remains in the estate after all the administration costs, sequestration costs and creditors' claims have been paid in full (s 2 read with s 97 of the Insolvency Act; *Ex parte Van Heerden* 1923 CPD 279). It is submitted that any assets bought by the debtor on instalments fall under free residue to the extent that their actual market value exceeds the outstanding balances or money owed to creditors (*Mindel v Shaer* 1937 TPD 378). Lastly, the applicant must prove that the sequestration of the debtor's estate will be

to the advantage of creditors (s 6(1) of the Insolvency Act; Van der Merwe & du Plessis, 2004, pp. 353-357). As indicated earlier (see paragraph 1 above), the applicant or the debtor must prove on a balance of probabilities that the sequestration will bring actual advantage to all the affected creditors (s 6(1) read with ss 3(1); 10(c) & 12(1) (c) of the Insolvency Act; Boraine & Van Heerden, 2010, pp. 87). This implies that proof of the actual advantage to be realised by creditors after the sequestration of the insolvent estate suffices for voluntary surrender (Temperman, 2014, p. 21).

The applicant or debtor is further obliged to comply with certain formalities stipulated in the Insolvency Act. For instance, the debtor must publish his or her notice of intention to surrender in a Government Gazette and newspaper which circulates where he or she resides or at his or her place of business (s 4 of the Insolvency Act). The publication of the notice of surrender must be done not more than 30 days but not less than 14 days before the date of the hearing and/or the date stipulated in that notice as the date upon which the application will be made to the court for the acceptance of the surrender of the debtor's insolvent estate (s 4(1) of the Insolvency Act). The notice of surrender must provide full names, address, occupation of debtor, date of acceptance of the application and the court which accepted it. The notice of surrender must also indicate where the debtor's statement of affairs will be inspected. This is done to ensure that all affected creditors and other interested parties will have a chance to access and scrutinise the cause and correctness of the debtor's financial position prior to the sequestration (*R v Lewin* 1930 AD 344 par 349; *Ex parte Goldman* 1930 WLD 158).

The applicant or debtor must also furnish the notice of surrender to creditors and other interested parties within seven days of the publication date of that notice. This could be done via an affidavit of the debtor's attorney (*Ex parte Harmse* 2005 1 SA 323 (N) 331). Accordingly, the debtor may furnish a copy of notice of surrender to each creditor (s 4(2) (a) of Insolvency Act; *Ex parte Wassenaar* 1968 (2) SA 726 (T) 727). Where a debtor is a juristic person, it may furnish the copy of the notice of surrender to trade unions and employees, especially those that represent the affected employees (s 4(2) (b)(i) & (ii) *(aa)* & *(bb)* of the Insolvency Act). Such notice must be posted on a notice board, gate or place where the affected employees have access to see it. The debtor must also furnish a copy of the notice of surrender to the South African Revenue Service (SARS) (s 4(2) (b)(iii) of the Insolvency Act).

Moreover, the applicant or debtor must prepare and lodge a statement of his or her affairs in accordance with form B. The statement of his or her affairs must provide a balance sheet, a list of immovable assets and their estimated value. This statement must also provide a list of movable property assets and their estimated value (*Ex parte Nel* 1954 2 SA 638 (O)) as well as a list of debtors and their postal and residential addresses (*Ex parte Silverstone* 1968 2 SA 196 (O) 198). The statement of affairs should also include a list of sundry debts (*Ex parte Murphy* 1929 EDL 168 at 171), list of creditors and their postal and residential addresses (*Cumes & Co v Sacher* 1932 WLD 213) and a list of movable assets pledged, hypothecated and/or subject to a lien**.**

In *Ex parte Pillay* 1955 2 SA 309 (N) 311 (*Pillay* case), the court held that the requirements and formalities of voluntary surrender were primarily aimed at benefiting all affected creditors (Visser, Pretorius, Sharrock & Van Jaarsveld, 2004, p. 543). This follows the fact that even if the debtor has proved other requirements as indicated above on a balance of probabilities, the court will not grant an application for voluntary surrender if the advantage to creditors' requirement is not proved. Consequently, if the voluntary surrender is likely to provide little or no benefit to the creditors, the courts have the discretion and powers to reject it (*Ex parte Bergh* 1938 CPD 132). The court will not grant the application for voluntary surrender if the applicant or debtor only furnishes it with mere allegations that are not supported by actual evidence or real facts that the sequestration of the debtor's estate will be to the advantage of all creditors (*Ex parte Smith* 1958 3 SA 568 (O) 371). This clearly shows that voluntary surrender requires unmistakable proof on the part of the debtor or applicant that the sequestration will be to the advantage of creditors (Rampersad, 2013, pp. 7-19). In this regard, a sworn valuation of the debtor's assets is often required to determine whether the final sequestration will be to the advantage of creditors (Visser, Pretorius, Sharrock & Van Jaarsveld, 2004, p. 553; *Ex parte Mattysen et Uxor* 2003 2 SA 308 (T)). Although proof of assets is not necessary where it can be easily proved that a debtor has adequate assets from the free residue that are likely to cover his or her debts, the valuation process of the debtor's assets enables the courts to determine the value of the debtor's assets that belong to his or her insolvent estate. In light of this, it is clear that the advantage to creditors' requirement will be satisfied in voluntary surrender by the applicant or debtor where the sequestration of the debtor's estate actually yields some dividend to the general body of creditors (*concursus creditorum*).

2.2. The Advantage to Creditors Requirement in Compulsory Sequestration

Compulsory sequestration occurs when one or more aggrieved creditors of a debtor applies to court for the sequestration of that debtor's estate (Sharrock, Van Der Linde & Smith, 2012, p. 33). This normally occurs when a debtor commits an act of insolvency as stipulated in section 8 of the Insolvency Act. The courts may grant a provisional and/or final order for compulsory sequestration if the creditor complies with all the relevant requirements as stipulated in the Insolvency Act (ss 9; 10(c) & 12(1) (c); see further Pepler, 2013, pp. 15-20; Mabe & Evans, 2014, pp. 651-667). The sequestrating creditor or his or her agent must comply with three main requirements and related formalities (ss 9; 10(c) & 12(1) (c)). For instance, the creditor must prove that he or she has established a liquidated claim which entitles him or her to apply for the compulsory sequestration of the debtor's insolvent estate (s 9(1) of the Insolvency Act). Thus, the creditor or his or her agent must prove that he or she has a liquidated claim against the debtor's insolvent estate for not less than R100. Furthermore, if there are two or more creditors or their agents, they must prove that they have liquidated claims against the debtor's insolvent estate for not less than R200 (s 9(1) of the Insolvency Act).

The sequestrating or petitioning creditor and/or his or her agents must prove that the debtor committed an act of insolvency or is insolvent (s 9(1) read with s 8 of the Insolvency Act). Although the Insolvency Act is silent on the type of insolvency that must be proved, it appears that the petitioning creditor must prove that the debtor is factually insolvent. In this regard, it appears that proof that the debtor is commercially insolvent might not suffice for the purposes of compulsory sequestration.

Moreover, the court may grant a compulsory sequestration order against the debtor's estate if the creditor proves that there is a reason to believe that it will be to the advantage of all creditors (s 9 read with ss 10(c) & 12(1) (c) of the Insolvency Act; see further Temperman, 2014, pp. 23-26). Put differently, the creditor must prove that there is reason to believe that the sequestration of the debtor's insolvent estate will be to the advantage of the whole body of creditors as opposed to individual creditor benefits.

In addition, the creditor must comply with the relevant preliminary formalities such as proof of sufficient security for costs for his or her liquidated claim to the Master (s 6(1) & 9(1) of the Insolvency Act; also see *R v Hohls* 1959 2 SA 656 (N)). A liquidated claim includes a monetary claim for the goods sold and delivered by the seller to the purchaser. On the other hand, an unliquidated claim includes a claim

for damages against one's failure to undertake their contractual obligations as previously agreed. Accordingly, a claim for the transfer of property does not suffice but a claim that accrued to a creditor although it was not yet due when the compulsory sequestration application in question was made is normally regarded as already liquidated (s 9(2) of the Insolvency Act). Nonetheless, this excludes contractual claims (s 9(2) of the Insolvency Act, see further *Sanddune CC v Catt* 1998 2 SA 461 (SE); *Paizes v Phitides* 1940 WLD 189). The creditor must get a certificate from the Master to prove that he or she has sufficient security for costs (s 9(3) (b) of the Insolvency Act). Failure to provide sufficient proof of security for costs until the trustee is appointed could result in the rejection of the creditor's compulsory sequestration application (s 9(3)(b) read with s 14(1) of the Insolvency Act).

The creditor's application for compulsory sequestration must comply with the prescribed form and content that must be filed in a notice of motion and a supporting affidavit of a creditor or any other affected person. The affidavit must contain full names, status, occupation and addresses of debtors and sequestrating creditors or their agents that are eligible to apply or support that application for compulsory sequestration (s 9(3) of the Insolvency Act; *Thorne NO v Sinclair* 1930 EDL 409). The creditor must also comply with formalities such as search of Master's records (*In re Hugo* 1921 CPD 742), submitting relevant information for the Master's report (s 9(4) & (5) of the Insolvency Act), furnishing the debtor and interested parties with copies of the application, provisional sequestration, service of rule nisi, opposition to application, anticipation of return day, intervention by another creditor and final sequestration.

As indicated earlier, the petitioning creditor need not prove actual advantage that accrues to the body of creditors. Nevertheless, the petitioning creditor merely needs to prove that there is a *prima facie* reason to believe that the sequestration will be to the advantage of all creditors (Temperman, 2014, pp. 23-26). In other words, the petitioning creditor must adequately prove to the courts, on a balance of probabilities, that the final order for compulsory sequestration will be advantageous to all the affected creditors for such order to be granted by the courts (ss 10(c) & 12(1) (c) of the Insolvency Act). The courts must be satisfied that the majority of the creditors will benefit from the compulsory sequestration of the debtor's estate before they grant a provisional and/or final sequestration order (*Fesi* case para 505).

The advantage to creditors' requirement is satisfied where both the provisional and final sequestration orders for compulsory sequestration of the debtor's estate are likely to yield some dividends to all the types of affected creditors (ss 10(c) & 12(1) (c) of the Insolvency Act). *Amod* case para 438, held that the sequestrating creditor usually has little knowledge of the debtor's estate, hence it is difficult for that creditor to provide satisfactory proof that the sequestration will bring some advantage to the body of creditors. This case shows that the advantage to creditors' requirement is too onerously enforced in compulsory sequestration than in voluntary surrender.

In *Meskin & Co v Friedman* 1948 2 SA 555 (W) 558-559 (*Friedman* case), Roper J submitted, *inter alia*, that the term "reason to believe" entails that the creditor need to positively submit to the court that the sequestration will be to the advantage of creditors. The courts only grant the compulsory sequestration order if there is an objective reason to believe that it will be to the advantage of all creditors. A reasonable prospect which is not too remote, proving that some pecuniary benefit will be obtained by affected creditors suffices for the purposes of the advantage to creditors' requirement in compulsory sequestration (*Friedman* case 558-559).

Notably, the belief on the part of the petitioning creditor that the sequestration will be to the advantage of creditors ought to be rational and reasonable enough for it to be accepted by the courts. Accordingly, all relevant information and facts must be furnished to the courts by the petitioning creditor to support such belief (*Dunlop Tyres (Pty) Ltd v Brewitt* 1999 2 SA 580 (W) 585). The advantage to creditors' requirement is established if such facts are satisfactorily proved by the creditor to indicate a reasonable prospect that all creditors will receive some benefit after compulsory sequestration proceedings. Additionally, in compulsory sequestration, the advantage to creditors' requirement satisfied if a substantial proportion or the majority of the creditors are likely to receive some dividends from the final sequestration proceedings (Sharrock, Van Der Linde & Smith, 2012, pp. 15; 39; 237–274). This implies that the advantage to creditors' requirement is not satisfied if only a few or no creditors will receive their dividends after the final compulsory sequestration order is granted (*London Estate* case para 593; *Braithwaite v Gilbert* 1984 4 SA 717 (W) 717) & *Lotzof* case paras 93-94).

2.3. The Advantage to Creditors Requirement in Friendly Sequestration

As stated above (see paragraph 1), friendly sequestration occurs when a debtor agrees with a family member, friend or an amicable creditor that has a liquidated claim against his or her estate to apply for its compulsory sequestration. This

normally occurs when the insolvent debtor deliberately commits an act of insolvency and request a creditor to apply for compulsory sequestration on the basis thereof. The debtor relies mostly on section 8(g) of the Insolvency Act to enable an amicable creditor to apply for compulsory sequestration in order to get debt relief (Sharrock, Van Der Linde & Smith, 2012, pp. 45-47; Asheela, 2012, pp. 33-37; Pepler, 2013, pp. 19–20). Affected debtors usually resort to friendly sequestration in a bid to evade the onerous requirements for voluntary surrender which, *inter alia*, require the debtor to provide actual proof that the sequestration will bring actual advantage to all creditors.

Notably, like the position under compulsory sequestration, the petitioning creditor needs only to prove that there is a reasonable belief that the sequestration will be to the advantage of creditors in friendly sequestration (s 9(1) read with ss 8(g); 10(c) & 12(1) (c) of the Insolvency Act; *Smith v Porrit* 2008 6 SA 303 (SCA) 308). There will be no advantage to creditors where nothing or insufficient dividends are realised by all the affected creditors (*Ex parte Ogunlaja* [2011] JOL 2709 (GNP) para 9 "*Ogunlaja* case"). *Vermeulen v Hubner* Case number 1165/1990 (T), held that a friendly sequestration remains a compulsory sequestration which should, however, be treated as a form of voluntary surrender. The authors do not agree that a friendly sequestration application should be subjected to the onerous requirements of voluntary surrender since it commonly takes the form of a compulsory sequestration. In this regard, the authors concur with the argument in *Sellwell Shop Interiors CC v Van der Merwe Case number* 27527/1990 (W), that the creditor's intention to co-operate with the debtor does not in itself constitute an abuse of the legal process through a friendly sequestration of the debtor's estate. Such co-operation between the debtor and the petitioning creditor should not affect the granting of a compulsory sequestration order when all the requirements are satisfied (*Jhatam v Jhatam* 1958 4 SA 36 (N) 39-40; *Beinash & Co v Nathan* 1998 3 SA 540 (W) 541; *Yenson & Co v Garlick* 1926 WLD 53 para 57). Moreover, *Klemrock* case para 927, rightly held that there was no specific requirement that obliges a petitioning creditor in friendly sequestration to comply will all the requirements of section 4 of the Insolvency Act).

The mere fact that a compulsory sequestration application was made by a creditor who is willing to co-operate with the debtor does not automatically give rise to a friendly sequestration (*Esterhuizen v Swanepoel & Sixteen other cases* 2004 4 SA 89 (W) 91). Consequently, the courts must be careful of malpractice and collusion between the amicable creditor and the debtor (*Kuhn v Karp* 1948 4 SA 825 (T)

827). The courts must, *inter alia*, verify: (a) the *locus standi* of creditor; (b) whether the creditor has provided sufficient security for costs; (c) all documentary evidence provided by the creditor; and (d) details of the debtor's realisable assets (*Nel v Lubbe* 1999 3 SA 109 (W) 111), to detect collusion and other malpractices in friendly sequestration. As in compulsory sequestration, the petitioning creditor need only to prove to the courts that there is an objective reason and prospect to believe that the sequestration of the debtor's estate could yield some dividends or pecuniary benefits to all affected creditors in friendly sequestration. This advantage to creditors' requirement remains relatively less onerous to comply with than in voluntary surrender (Evans & Haskins, 1990, pp. 246-251).

3. The Required Burden of Proof and the Court's Discretion

The burden of proof for the advantage to creditors' requirement is applied differently in voluntary surrender as well as in friendly and compulsory sequestration. In voluntary surrender, the debtor bears the onus to prove to the court on a balance of probabilities that the sequestration will be to the advantage of all creditors (s 6(1) read with ss 3(1); 10(c) & 12(1) (c) of the Insolvency Act; Nagel, 2000, p. 481). The debtor is generally expected to know his or her own financial position well such that he or she can easily prove whether the voluntary surrender will actually bring some advantage to all the creditors (*Ogunlaja* case para 9; *Trust Wholesalers and Woolens (Pty) Ltd v Mackan* 1954 2 SA 109 (N)). Additionally, the debtor must prove to the court on a balance of probabilities that his or her insolvent estate has sufficient assets to cover the costs of sequestration. The courts will only grant a sequestration order for voluntary surrender if the debtor has proved satisfactorily on a balance of probabilities that: (a) he or she is actually insolvent; (b) the sequestration will be to the advantage of creditors; and (c) his or her insolvent estate has sufficient assets to cover the costs of sequestration (s 6(1) read with ss 3(1); 10(c) & 12(1) (c) of the Insolvency Act).

In compulsory sequestration, the sequestrating creditor bears the onus to prove on a balance of probabilities to the court that there is a reason to believe that the sequestration will be to the advantage of the general body of creditors (ss 9; 10(c) & 12(1) (c) of the Insolvency Act). Thus, unlike the position under voluntary surrender, the sequestrating creditor needs only to prove that there is reason to believe that the compulsory sequestration will be to the advantage of all the

affected creditors (Sharrock, Van Der Linde & Smith, 2012, p. 33; *Hillhouse v Stott* 1990 4 SA 580 (W) 2).

Likewise, in friendly sequestration, the amicable sequestrating creditor bears the onus to prove on a balance of probabilities that there is a *prima facie* reason to believe that the sequestration will be to the advantage of all creditors. The sequestrating creditor must prove that the debtor committed an act of insolvency and was insolvent (Evans & Haskins, 1990, pp. 249-251; Pepler, 2013, p. 19). Notably, the amicable creditor need not prove actual advantage but must merely prove to the court on a balance of probabilities that there is a reason to believe that the friendly sequestration will be to the advantage of all creditors. This burden of proof is similar to that of compulsory sequestration.

The courts have discretionary power to grant or reject an application for voluntary surrender, compulsory sequestration and friendly sequestration even if all the requirements and formalities as discussed above are satisfactorily met on a balance of probabilities by the applicant (*Berrange NO v Hassan* 2009 2 SA 339 (N) 368; Evans & Haskins, 1990, p. 248). This is discretionary done by the courts when it is deemed just and equitable in light of the interests of all the affected parties, especially, creditors. Any person aggrieved by the final compulsory sequestration order or by an order setting aside a provisional sequestration order may obtain the leave to appeal from the relevant court (ss 150(1) & 20(4) of the Supreme Court Act 59 of 1959; *Louw v WP (Kooperatief) Bpk* 1998 2 SA 418 (SCA)). Nonetheless, no appeal is allowed against a decision to grant or not to grant a provisional sequestration order (*Gottschalk v Gough* 1997 4 562 (C) 568). The courts have discretion to grant or not grant the leave to appeal. In light of this, it must be noted that each case should be discretionary adjudicated by the courts on the basis of its own circumstances and merits.

4. Concluding Remarks

As highlighted in this article, it is evident that the advantage to creditors' requirement plays an important role in the interpretation and adjudication of all sequestration proceedings in South Africa. The article has usefully discussed the advantage to creditors' requirement, the required burden of proof and the court's discretion in such sequestration proceedings in South Africa. The article also exposed the differences in the application of the advantage to creditors' requirement in all South African sequestration proceedings. In this regard, it was

noted that the advantage to creditors' requirements are more onerously applied in voluntary surrender than in compulsory and friendly sequestration. This status *quo* has at times, culminated into various challenges for *bona fide* debtors that struggle to prove the advantage to creditors' requirement in order to surrender their insolvent estates in terms of the Insolvency Act (s 6(1) read with ss10(c) & 12(1)(c)). Moreover, in compulsory and friendly sequestration, the sequestrating creditor also struggle to prove that there is an objective reason to believe that the sequestration will be to the advantage of the general body of creditors. For instance, it is very difficult for creditors to satisfy this requirement in compulsory and friendly sequestration since they might not know the actual financial position of debtors than the debtors themselves prior to sequestration proceedings. These problems have been exacerbated by the fact that various Insolvency Bills such as the Draft Insolvency Bill of 2000 (clause 8(1) (c)) and Draft Insolvency Bill of 2015 have to date all retained the advantage to creditors' requirement without addressing the aforesaid challenges and other related problems. In light of this, it is submitted that the Insolvency Act should be carefully amended to completely remove or relax the advantage to creditors' requirement in all types of sequestration proceedings in South Africa. This could enhance the adjudication of sequestration proceedings and encourage debtors, creditors and all affected persons to utilise such proceedings to recover their owed monies, settle their debts and easily get debt relief.

The Insolvency Act should be also amended to move away from its creditor-oriented approach and ensure that both creditors and debtors' interests are adequately, equally and fairly protected during and after sequestration proceedings. In this regard, it is recommended that the advantage to creditors' burden of proof and requirements in voluntary surrender should be equated to those in compulsory and friendly sequestration. In other words, the debtors in voluntary surrender should also be required to merely prove on a balance of probabilities that there is a reason to believe that the sequestration will be to the advantage of creditors. This could help overburdened debtors to lawfully utilise sequestration proceedings under the Insolvency Act to get debt relief (Evans, 2001, pp. 485-508).

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