

# The impact of voidable disposition laws on companies placed in liquidation after business rescue

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## OPSOMMING

### Die impak van vernietigbare transaksie-bepalings op maatskappye wat gelikwdeer word na besigheidsredding

Tydens die besigheidsreddingsproses is die voortsetting van die maatskappy se besigheid van kardinale belang ten einde die oogmerke van die proses te bereik. Die maatskappy mag, onder die toesig van die besigheidsreddingpraktisyn, verskeie besigheidstransaksies aangaan as deel van die reddingsproses. Hierdie transaksies mag, onder andere, die vervreemding van bates, die delging van skulde van sekere skuldeisers, skuldvergelyking, of die vervreemding van dele van die besigheid behels. Onder gewone omstandighede sal sulke transaksies nie met omsigtigheid benader word nie. Wanneer 'n maatskappy egter in finansiële verknorsing is, welke verknorsing vinnig in insolvensie mag oorgaan, mag hierdie transaksies egter heel moontlik as vernietigbaar beskou word indien die maatskappy uiteindelik in likwidasië geplaas word. Die transaksies mag as vernietigbare vervreemdings ingevolge insolvensie wetgewing beskou word indien daar aan die nodige vereistes voldoen is. Indien skuldeisers hiervan bewus is, mag dit ernstige implikasies vir die sukses van die besigheidsreddingsproses inhou. Indien betalings wat aan skuldeisers gemaak word gedurende die besigheidsreddingsproses tersydegestel mag word as vernietigbare vervreemdings, mag skuldeisers minder bereid wees om aan die proses deel te neem as gevolg van die onsekerheid rondom moontlike latere likwidasië van die maatskappy. In hierdie artikel word vernietigbare transaksies dus bespreek. Ons oorweeg die besigheidsreddingsproses om vas te bepaal of sekere transaksies wat gedurende besigheidsredding plaasvind, moontlik later deur die hof tersydegestel kan word tydens 'n daaropvolgende likwidasië van die maatskappy. Ons oorweeg ook tot watter mate, en indien enigsins, die besigheidsreddingsproses, waartoe die maatskappy verbind is, as 'n verweer teenoor sodanige aansprake deur die likwidateur, geopper mag word.

## 1 INTRODUCTION

Business rescue is a process aimed at rescuing a “financially distressed” company.<sup>1</sup> The process involves the investigation of the company and the development of a

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<sup>1</sup> S 128(1)(b) and (h) of the Companies Act 71 of 2008 (the 2008 Act). In this article, we shall not discuss close corporations but focus only on companies.

business rescue plan by a business rescue practitioner.<sup>2</sup> In line with the statutory aims of business rescue, the first objective of the plan is to enable the company to recover from financial distress and become a going concern again.<sup>3</sup> The second objective of the plan is to deal with the affairs of the company in such a manner so as to provide a better financial outcome for creditors or shareholders than the formal liquidation process under chapter 14 of the Companies Act of 1973.<sup>4</sup> A successful business rescue, where the company is rescued as contemplated in paragraphs (b) and (f) of section 128(1), may aim to achieve either one of the objectives of business rescue.<sup>5</sup>

A company is in financial distress if the company will be insolvent within six months.<sup>6</sup> Accordingly, in order to commence with business rescue proceedings, the company must foresee commercial or factual insolvency in the near future, and there must be a “reasonable prospect” of rescuing the company.<sup>7</sup> Business rescue proceedings may commence by way of a court order.<sup>8</sup> An affected person may apply to court to place a company in business rescue where the company is financially distressed, did not meet its commitments towards employees, did not observe its duties in terms of public regulations, or where it is “just and equitable ... for financial reasons” to place the company in business rescue.<sup>9</sup> However, a court order will be granted only if the applicant is able to show that “there is a reasonable prospect for rescuing the company”.<sup>10</sup> The board of directors may, by resolution, decide to place the company in business rescue and commence the proceedings by filing the resolution with the Companies and Intellectual Property Commission.<sup>11</sup> The requirements for commencing by way of resolution are that there must be “reasonable grounds to believe that the company is financially distressed” and “a reasonable prospect of rescuing the company”.<sup>12</sup>

Unfortunately, an attempt at business rescue does not always turn out as planned and the company may eventually be placed in formal liquidation. Affected persons may effectively challenge the directors’ resolution in court on grounds that include lack of a prospect of successful rescue,<sup>13</sup> or the creditors may further decide not to support the business rescue plan and no further steps are taken.<sup>14</sup> Although these instances will not result in the company being placed in liquidation immediately, the possibility exists that the dire financial state of the company, when business

2 Ss 128(1)(b)(iii) and 141(1) of the 2008 Act.

3 S 128(1)(b)(iii) of the 2008 Act.

4 Act 61 of 1973 (the 1973 Act); s 128(1)(b)(iii) of the 2008 Act. See also item 9(1) of sch 5 of the 2008 Act, in respect of which the provisions pertaining to the liquidation of companies in ch 14 of the 1973 Act remain in place irrespective of the repeal of the 1973 Act by the 2008 Act. The application of ch 14 differs depending on whether the company so liquidated is commercially solvent or insolvent (see it 9(2) and (3) of sch 5 read with *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 2 SA 518 (SCA) paras 21, 22).

5 *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) para 23.

6 S 128(1)(f) of the 2008 Act; *Boraine et al Meskin’s Insolvency law* para 18.3.2.

7 Ss 129(1)(b) and 131(4)(a) of the 2008 Act; *Meskin* para 18.3.5.

8 S 131(1) of the 2008 Act.

9 S 131(1) and (4)(a) of the 2008 Act.

10 S 131(4)(a) of the 2008 Act.

11 S 129(1) and (2)(b) of the 2008 Act.

12 S 129(1) of the 2008 Act.

13 S 130(1)(a)(ii) of the 2008 Act.

14 S 153(5) of the 2008 Act.

rescue proceedings come to an end, will allow these proceedings to be initiated by the company or other persons with *locus standi*.<sup>15</sup>

Liquidation may also be initiated by virtue of an application by the business rescue practitioner.<sup>16</sup> Once a company has entered business rescue proceedings and the business rescue practitioner has been appointed, the practitioner must review the company's financial situation and determine whether there is a reasonable prospect that the company may be rescued.<sup>17</sup> The reasonable prospect requirement remains imperative throughout the process, as section 141(2)(a) obligates the practitioner to obtain a court order that ceases the business rescue process and commences formal liquidation proceedings "[i]f, at any time during business rescue proceedings, the practitioner concludes that ... there is no reasonable prospect for the company to be rescued".

In *Smith NO v Malan NO*,<sup>18</sup> the company was placed in business rescue in 2018. The business rescue plan was approved by the creditors later that same year.<sup>19</sup> In 2019, an application for the liquidation of the company in business rescue was presented to the court and a provisional liquidation order granted later that same year.<sup>20</sup> The final liquidation order was granted in 2020.<sup>21</sup> The issue before the court was whether payment made to a creditor by the business rescue practitioner after the commencement of liquidation proceedings but before the granting of the court order should remain void in terms of section 341(2) or whether the court should order otherwise.<sup>22</sup>

Although the court decided to exercise its discretion and declare that the transaction was valid,<sup>23</sup> this judgment raises a number of important and practical questions that speak to the interaction between the provisions relating to business rescue in chapter 6 of the 2008 Act and the provisions relating to liquidation in chapter 14 of the 1973 Act. In particular, it highlights the lack of legislative guidance on how to resolve matters where business rescue fails.

Whether in anticipation of the adoption of a business rescue plan, or in terms of an adopted business rescue plan, it is essential for a company in business rescue to keep on trading in an attempt to meet the objectives of the process to which it is subjected.<sup>24</sup> During this post-commencement phase the company may, under the supervision of the business rescue practitioner, enter into various business transactions as part of the ongoing business.<sup>25</sup> These transactions may, for example, include the alienation of property, the settling of debts with some of the creditors

15 See s 344(a), (f) and (h) read with ss 345, 346(1), and 349 of the 1973 Act. As the s 133 moratorium apply to liquidation proceedings, a company must arguably first exit business rescue before an application for the liquidation of the company can be made (see *Hockly's law of insolvency winding-up and business rescue* 10 ed by Smith, Van der Linde & Calitz (2022) 336 and the case law cited by the authors).

16 S 141(2)(a) of the 2008 Act.

17 S 141(1) of the 2008 Act.

18 2024 4 SA 624 (FB).

19 Para 9.

20 Para 10.

21 Para 11.

22 Para 1.

23 Paras 45, 48.

24 See, for example, the facts of *Reiscor Two (Pty) Ltd t/a Bootleggers v Anheuser-Busch Inbev Africa (Pty) Ltd* [2024] 2 All SA 902 (GJ), esp paras 29, 104.

25 See, for example, the facts of *Reiscor* esp para 101.

of the company, set-off, or the disposition of a part of the business. Under normal circumstances, such transactions will not be viewed with circumspection. However, since the company is in financial distress, which may quickly progress to commercial insolvency, for example, these transactions may be impeached should the company ultimately be liquidated. The transactions may, in principle, be viewed as voidable transactions under insolvency law if the necessary requirements are met.

An awareness of the above among creditors voting on a business rescue plan may have severe implications for the success of business rescue. Where payments to creditors during the business rescue process may be set aside as voidable dispositions, the willingness of creditors to participate in the process and bear the uncertainty should the company be liquidated at a later stage may diminish. It further becomes a novel question to consider to what extent, if any, the business rescue procedure to which the company is subject may provide a defense against the claims of the liquidator.

In this article, we present two scenarios where impeachable transactions may become relevant should a company in business rescue be liquidated in terms of the 1973 Act. We focus on winding-up by way of court order as a result of commercial insolvency, as this is the most likely scenario where business rescue fails and liquidation follows.<sup>26</sup> We refer only to the terminology applicable to corporate insolvency and omit the original references to sequestration, insolvent, and trustee *mutatis mutandis* of the Insolvency Act by virtue of sections 339 and 340 of the 1973 Act. Thereafter, we discuss impeachable transactions and analyse the business rescue process to determine whether transactions made during business rescue are vulnerable to being set aside by the court during liquidation proceedings.

## 2 SCENARIOS

The first scenario concerns a debtor company that is in financial distress but not in liquidation. It sells assets in order to pay its creditors on Date 1. The company enters the business rescue process following a board resolution or a court order. For purposes of this scenario, business rescue commences on Date 2. During the business rescue process, the company sells assets. The company is later placed in liquidation, which commences on Date 3. The liquidator will consider possible voidable dispositions by the company prior to, or during, business rescue.

The second scenario concerns a debtor company that is placed in liquidation on Date 1 but the liquidation process is suspended<sup>27</sup> because of a successful application to place the company in business rescue. This occurs on Date 2. On Date 3, the same company is again placed in liquidation – effectively, the suspension of the initial liquidation is lifted. Under these circumstances, dispositions may have

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<sup>26</sup> Apart from voluntary winding-up in terms of s 80 of the 2008 Act or s 351 of the 1973 Act, companies may be liquidated by way of court order on the grounds set out in s 81 of the 2008 Act or the grounds set out in s 344 of the 1973 Act. The choice of legal framework depends on whether the company is commercially solvent (2008 Act) or commercially insolvent (1973 Act) (see n 4 above and the sources cited there). In this article, we focus on winding-up by way of court order on the basis of commercial insolvency, as this is the most likely scenario to take place where business rescue fails and liquidation follows.

<sup>27</sup> See s 131(6) of the 2008 Act.

taken place prior to the initial liquidation (prior to Date 1), or during the business rescue proceedings whilst the liquidation was suspended (between Date 2 and Date 3).

We shall not deal with scenario 2 in this article, as it involves a number of challenges that arise when the provisions of the 2008 Act and the provisions of the 1973 Act interact. We also deal only with formal liquidation under the 1973 Act and not with the situation where business rescue aims to achieve the second objective of section 128(1)(f)(iii). It is important to note that we consider the matter from the perspective of the liquidator where the company is already in liquidation (and not the business rescue practitioner) when it comes to impeachable transactions, because a provision similar to section 436 of the 1973 Act, in respect of which a judicial manager could rely on the statutory disposition provisions in the Insolvency Act, has been omitted from the 2008 dispensation. This also means that the objective of the process – whether restoration or profitable winding-down – is irrelevant for purposes of impeachable transactions as no provision is made for these transactions by the 2008 Act. Only in formal liquidation under the provisions of the 1973 Act will statutory impeachable transactions be relevant. However, in all instances, recourse to the *actio Pauliana* is theoretically possible.

The implications of the first scenario recently appeared in *Reiscor*. In this matter, the court was approached by the business rescue practitioners to set aside a vote rejecting the business rescue plan.<sup>28</sup> One of the creditors who dismissed the plan brought an application to have the company placed in liquidation.<sup>29</sup> Opperman J ultimately found for the applicant and set aside the vote of the respondents.<sup>30</sup> As this article does not deal with section 153, we refer only to the matters relevant to our discussion.

The business rescue practitioners continued with the business of the company and sold the business prior to the vote on the plan.<sup>31</sup> The main creditors were kept abreast of developments, including the sale, throughout the process.<sup>32</sup> After the sale of the business, the aim was to sell the remaining assets.<sup>33</sup> The business rescue plan provided for the second outcome of business rescue to be achieved – the company would not be restored to a going concern but the implementation of the plan would result in a return to creditors that would exceed the return received if the company were to be placed in formal liquidation.<sup>34</sup>

An interesting component of the business rescue plan was the following:

“The claims of creditors were not compromised and the rights of creditors to pursue recoveries available to them by bringing a liquidation application once the business rescue plan had been substantially implemented were preserved. The business rescue practitioners did not believe that the creditors would suffer any prejudice by adopting the business rescue plan, which facilitated a quicker payment to them from the assets realised and preserved their rights to pursue additional recoveries once the business rescue plan had been substantially implemented.”<sup>35</sup>

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28 Para 1 of *Reiscor*.

29 *Ibid*.

30 Para 111.

31 Paras 11–13, 29.

32 Para 10.

33 Para 49.

34 Paras 5, 6.

35 Para 49.

Creditors were, however, prohibited in terms of the plan from “tak[ing] steps to set aside the sale of the business for a period of 7 months after the effective date of the Sale of Business”.<sup>36</sup>

The plan thus envisaged the possibility of liquidation at a later stage but, without any assets to sell and distribute to creditors, the aim of the liquidation would be to obtain access to the remedies available to the liquidator – such as interrogations, dispositions, and personal action against directors for reckless trading.<sup>37</sup> In line with this strategy, the concern that arose related to the application of section 34 of the Insolvency Act, which would apply by virtue of section 339 of the 1973 Act.<sup>38</sup> Should section 34 of the Insolvency Act remain a matter of concern – in that “[s]ection 34 of the Insolvency Act [would] appl[y] to the disposal of a business by a company which is a general trader in terms of an approved business rescue plan”<sup>39</sup> – it would mean that the sale of the business as a going concern would be for naught.<sup>40</sup> The court concluded:

“The simultaneous application of section 34 of the Insolvency Act to a company in business rescue would lead to anomalies and absurdities that could not have been intended, and any reasonable and commercial construction leads one to conclude that it does not find operation in the context of a business rescue and business rescue practitioners are not constrained by section 34 of the Insolvency Act. ... I thus conclude that section 34 of the Insolvency Act does not pose an obstacle to the acceptance of the plan either because contracting out of the consequences of section 34 is competent where the necessary element of publicity required by section 34 is achieved via notice to affected parties in business rescue, or, because on a proper construction of the applicable legislation, section 34 does not apply to a company in business rescue.”<sup>41</sup>

The decision about section 34 constitutes the *ratio decidendi*. However, the court made an *obiter* remark on the application of section 29 of the Insolvency Act:

“Section 29 of the Insolvency Act deals with dispositions by an insolvent which are intended to prefer one creditor over another. A disposition lawfully undertaken with the requisite approval of creditors or a court’s approval can never be such a disposition. In any event, the essence of this and other Insolvency Act provisions is that disposal before the institution of the concursus creditorum precludes the distribution thereafter among all proved creditors of the insolvent’s property. This is in accordance with the design of the Insolvency Act to prevent a creditor from obtaining an undue preference over other creditors. But, if the object was not to confer a preference, then there was no intention to prefer. The provisions of section 29 of the Insolvency Act find no application since the sale of the business and the subsequent proceeds will effectively be paid in accordance with the waterfall of payments in terms of the business rescue which gives due expression to the hierarchy of creditors’ claims in insolvency. There can be no question of an unlawful preference, rendering any intention to prefer entirely absent.”<sup>42</sup>

The commercial sense that permeates the judgment is commendable. However, we submit that the comments of the court on sections 29 and 34 must be treated with

36 Para 37. This was probably also the reason why the creditors did not want to continue with business rescue but rather liquidate the company in terms of the 1973 Act (see paras 56, 71).

37 Paras 72–73.

38 *Ibid.*

39 Para 76.

40 Para 78.

41 Paras 83, 85.

42 Para 84.

circumspection. We analyse the court's reasoning in respect of the specific dispositions below but make the following preliminary comments. The court focused on the application of the provisions of the Insolvency Act to *business rescue* and applied the reasoning applicable to a *successful rescue* under the 2008 Act to the facts.<sup>43</sup> The reality is that once a company is placed in liquidation, the provisions of the 1973 Act and, by extension, the provisions of the Insolvency Act apply. In our view, the aims and approaches used to interpret the provisions of the 2008 Act in relation to business rescue do not find direct application once the business rescue process has ended and liquidation commenced, although some facts may remain relevant.<sup>44</sup> This does not constitute a conflict of laws and thus section 5(4) of the 2008 Act does not apply in deciding whether the legal framework allows for the liquidator to take action to set certain transactions aside. In our opinion, if liquidation after business rescue is aimed at using the tools available in liquidation (especially if these tools are not available in business rescue), the availability of these tools cannot be selectively based merely on the notion of commercial sense following business rescue.

In a nutshell, a court adjudicating a case concerning a statutory voidable disposition provided for in the Insolvency Act will apply the provisions of this Act and the jurisprudence that have developed over the years. A presiding officer deciding a matter while the company is in business rescue can but predict a possible outcome when implying that payments to a creditor made by reason of a business rescue plan lack the intent to prefer. All the elements of section 29 must be considered for a definite finding on the application of this section, which can be done only with certainty once another court – actually, the court approached to set aside the transaction once liquidation proceedings have commenced – considers all the relevant legal provisions and facts of the matter. Section 29 does not find application during business rescue, although pertinent facts during the business rescue procedure may be relevant when determining whether a transaction may be set aside during liquidation proceedings. It must also be borne in mind that payments to creditors may occur under an adopted business rescue plan or prior to the adoption of such a plan.

### 3 PRELIMINARY CONSIDERATIONS

#### 3.1 The meaning of “disposition”

Chapter 14 of the 1973 Act applies to companies liquidated due to commercial insolvency.<sup>45</sup> In terms of section 340(1), the provisions of the insolvency law relating to voidable and undue preferences become applicable where a company is liquidated due to commercial insolvency.<sup>46</sup> Section 2 of the Insolvency Act<sup>47</sup>

43 See paras 78–85.

44 See, for example, the discussion about interpretation in *Diener NO v Minister of Justice* 2018 2 SA 399 (SCA) paras 16–19.

45 See n 4 above.

46 S 340 of the 1973 Act deals with voidable and undue preferences but section 340(1) refers to dispositions. Nevertheless, s 339 of the 1973 Act refers to the law of insolvency, generally, which means that the provisions relating to dispositions without value – although it would be difficult to imagine a practitioner authorizing a no-value transaction (see *Strydom NO v Snowball Wealth (Pty) Ltd* 2022 5 SA 438 (SCA)) – may also be applied to companies in winding-up by reason of commercial insolvency.

47 Act 24 of 1936.

defines a disposition as “any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, deliver, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court”.<sup>48</sup> It is clear that these activities will take place once a company has been placed in business rescue.

The question that arises is whether a court order to commence with business rescue proceedings will meet the requirements of the exception that excludes a transaction from the ambit of a disposition – “a disposition in compliance with an order of the court”. This argument would, however, not apply where a company is placed in business rescue by virtue of a resolution taken by the board of directors in terms of section 129(1) of the 2008 Act.

In our view, the answer to the above lies in section 128(1)(b) read with section 131(1). Business rescue is defined as follows in section 128(1)(b) of the 2008 Act:

“**business rescue**’ means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for (i) the temporary supervision of the company, and of the management of its affairs, business and property; (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company”.

Subsections (1) and (4) of section 131 of the 2008 Act determine that the court grants an application by making “an order placing the company under supervision and commencing business rescue proceedings”. It can be argued that this means that the court authorises all steps to be taken in terms of the legislative framework pertaining to business rescue. On the one hand, any disposition of property made in line with the provisions of chapter 6 may then be said to have been made “in compliance with an order of the court” and would not be susceptible to impeachment under the provisions relating to dispositions in the Insolvency Act. There would then be a difference between procedures commenced by way of court order and procedures commenced by way of resolution. On the other hand, one has to ask whether dispositions can be read into this phrase as a natural result of an order commencing business rescue. We submit that the court order commencing business rescue may be too far removed from dispositions made by the company to place such order within the ambit of the court order exception of the definition of disposition.

Regarding the exception that a disposition following a court order is not a disposition, the court, in *Swadif (Pty) Ltd v Dyke*,<sup>49</sup> found that a settlement made into a court order may, in principle, comply with this exception. In *Dabelstein v Lane and Fey NNO*,<sup>50</sup> the court held that even a consent order stands until set aside for aspects such as fraud. However, in *Moreau v Murray*,<sup>51</sup> where a debtor and his spouse had tried to dispose of assets by means of a divorce settlement agreement,

48 See also the remarks in *Klerck NO v Kaye* 1989 3 SA 669 (C) 673E–675A which intimate that both the conclusion of a contract and performance in terms of the contract may qualify as “dispositions” (see also *Estate Jager v Whittaker* 1944 AD 246 250).

49 1978 1 SA 928 (A).

50 2001 1 SA 1222 (SCA).

51 2020 6 SA 55 (SCA) para 36.

the court found that the settlement amounted to a sham and that the disposition amounted to collusion – thus effectively overriding the court order exception to the definition of disposition. In light of these comments, one may ask whether the business rescue plan may, as a cautionary step, be made into a court order (or at least for those creditors who approved the plan) in order to bring any payments in terms of the plan within the ambit of the exception.<sup>52</sup> Of course, there are risks, especially if no payment is received in terms of the plan prior to the liquidation of the company. Also, the courts may follow the same approach as in *Moreau*, and view the matter as a form of collusion.<sup>53</sup> We are nevertheless of the view that where a *bona fide* attempt to rescue the company was made, the court would not easily find that collusion had taken place.

### 3.2 The commencement of liquidation

The commencement of liquidation remains important, as the statutory provisions relating to voidable dispositions are triggered by the formal commencement date of liquidation. Time periods must be calculated with reference to section 348 of the 1973 Act, which states that the “winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up”. In the event that a company is placed in liquidation after termination of business rescue proceedings for non-acceptance of the plan and by way of a special resolution taken by the shareholders of the company,<sup>54</sup> the date of commencement of the creditors’ voluntary winding-up is the date on which the resolution is registered with the Companies and Intellectual Properties Commission.<sup>55</sup> In the event that liquidation proceedings follow business rescue proceedings upon application by the business rescue practitioner to the court,<sup>56</sup> section 132(2)(a)(ii) of the 2008 Act states that “[b]usiness rescue proceedings end when the court has converted the proceedings to liquidation proceedings”. This seems to indicate that the date of commencement of liquidation cannot be earlier than the date of the court order. However, the decision of the Supreme Court of Appeal in *Diener*<sup>57</sup> suggested otherwise. In that matter, an application under section 141(1)(2) of the 2008 Act was brought. The court viewed the date of commencement of the liquidation in line with the provisions of section 348 of the 1973 Act – when the papers are filed.<sup>58</sup>

The commencement date is relevant and seemingly uncomplicated when considering scenario 1. However, where liquidation proceedings are suspended and continued either after a failed rescue attempt such as the rejection of the plan or by virtue of a section 141 application by the business rescue practitioner, two questions arise: the first is whether the commencement of the initial proceedings or the date of lifting the suspension on the liquidation proceedings is the relevant date from which to calculate the statutory timelines for impeachable transactions;

<sup>52</sup> Note that compromises are sanctioned by a court in terms of s 155(7) of the 2008 Act.

<sup>53</sup> The merits of the case will dictate whether this is so. Collusion is sometimes difficult to prove, as there must be active participation between the debtor and the other person (see the discussion in para 4.3.3 below).

<sup>54</sup> S 349 of the 1973 Act.

<sup>55</sup> Ss 351(1) and 352(1) of the 1973 Act.

<sup>56</sup> S 141(2)(a)(ii) of the 2008 Act.

<sup>57</sup> An application for leave to appeal to the Constitutional Court was denied (*Diener NO v Minister of Justice and Correctional Services* 2019 4 SA 374 (CC)).

<sup>58</sup> Paras 9, 54–56.

the second, whether section 341 applies to the period between Date 2 and Date 3, requiring court authorisation, as was seen in *Smith*, for the actions of the company to remain valid.

As indicated above, the behaviour of creditors during the process would be affected by the knowledge that all actions taken during business rescue may be set aside by the court as impeachable transactions. Although certain defences may be raised, sections 26, 29, 30, and 31 of the Insolvency Act and, by implication, section 340(1) of the 1973 Act, do not grant the court a discretion similar to the discretion granted in terms of section 341(1) of the 1973 Act.<sup>59</sup>

## 4 IMPEACHABLE TRANSACTIONS IN INSOLVENCY LAW

### 4.1 General<sup>60</sup>

Apart from statutory provisions, voidable transactions can also be challenged with the common-law *actio Pauliana*, should these transactions constitute fraudulent alienations.<sup>61</sup> This is irrespective of whether an order for sequestration (or liquidation as the law of insolvency applies) has been obtained.<sup>62</sup>

The Insolvency Act provides for a number of statutory remedies that enable the liquidator to approach the court to have pre-liquidation transactions set aside.<sup>63</sup> These provisions apply only where a sequestration (or liquidation) order have been obtained.<sup>64</sup> Under solvent circumstances, a debtor may dispose of its property and debts of creditors may be settled. However, when this is done in insolvent circumstances and the company is subsequently liquidated for its inability to pay its debts, the disposal may be scrutinised by the liquidator to protect the interests of the creditors.<sup>65</sup> It is important to note that for the statutory impeachments (sections 26 to 34) of the Insolvency Act to apply, there must be a liquidation order. This also means that a *concursum creditorum* is established.<sup>66</sup>

Some dispositions of property may diminish the value of the estate, such as when estate property is disposed of without receiving value in return.<sup>67</sup> An example is where the company stands surety for the debt of another.<sup>68</sup> In *Langeberg Ko-op Bpk v Inverdoorn Farming and Trading Co Ltd*,<sup>69</sup> the definition of “disposition” in section 2 of the Insolvency Act was found to be wide enough to include a suretyship as a form of payment.

59 S 341 of the 1973 Act is titled “Dispositions and share transfers after winding-up void”. S 341(2) states that “[e]very disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders”. For a list of factors that the court may consider when exercising its discretion, see *Smith* para 31.

60 See Meskin ch 5 para 31; *Mars: The law of insolvency in South Africa* 10 ed by Bertelsmann *et al* (2019) ch 13; *Hockly’s* ch 12.

61 See *Hockly’s* 177.

62 Barnard & Botha (eds) *Nagel’s commercial law* 7 ed (2019) 567.

63 *Hockly’s* 168.

64 *Nagel’s* 568.

65 For the purposes of the remedies, see *Nagel’s* 568–569: “to maintain equality amongst the creditors retrospectively up to the date of actual insolvency” and to address “a disturbance in the *concursum creditorum* or be prejudicial to creditors”.

66 *Hockly’s* 295.

67 *Hockly’s* 169; *Nagel’s* 568.

68 *Hockly’s* 170; *Nagel’s* 568.

69 1965 2 SA 589 (A).

In other instances, a particular creditor may be preferred above other creditors in that a pre-existing debt may be settled, or the position of such a creditor may be improved *vis-à-vis* other creditors by providing real security to elevate the ranking of such creditor to that of a secured creditor.<sup>70</sup> The first category is termed dispositions without value; the second, voidable preferences.<sup>71</sup> The aim of the first category of transactions is to prevent a dissipation of the assets of the estate that would be to the detriment of the creditors, whilst the second category is aimed at preventing some creditors from being preferred above other creditors.<sup>72</sup>

The main types of voidable transactions provided for by the Insolvency Act are based on dispositions that took place under the prescribed conditions, such as dispositions without value;<sup>73</sup> voidable and undue preferences;<sup>74</sup> and collusion.<sup>75</sup> There are also some statutory provisions dealing with related transactions such as set-off,<sup>76</sup> or where a trader transfers a business without complying with the prescribed publication of notices.<sup>77</sup>

The liquidator may initiate legal action to set such transactions aside with a view to reclaiming the disposed property for the benefit of the creditors.<sup>78</sup> Where the trustee or liquidator fails to take action in such instances, individual creditors may take action.<sup>79</sup> However, it must be noted that the disposition of property by the debtor prior to commencement of sequestration (or liquidation) remains valid until set aside.

Funding such litigation may be an issue given that the estate is insolvent. In some instances, creditors may fund the proceedings; or where the liquidator refuses to institute action, any creditor may institute such proceedings in name of the liquidator, on condition that the liquidator is indemnified against the legal costs of such proceedings.<sup>80</sup> Where such creditors are successful in the claim, they are, in principle, entitled to legal costs and may recover their claims from the proceeds of the reclaimed property.<sup>81</sup>

Since litigation may be time consuming and there may be a risk that the recipient of disposed property may further dispose such property, it is possible that the liquidator may have to apply for an interdict restraining the person who benefited

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70 *Hockly's* 170; *Nagels's* 568.

71 *Nagels's* 568–569.

72 *Nagels's* 568–569. The following passage in *Estate Jager v Whittaker* 1944 AD 246 250 highlighted the difference described in this passage: “[T]he words ‘disposition not made for value’ mean, in their ordinary signification, a disposition for which no benefit or value is or has been received or promised as a quid pro quo. The most obvious example of such a disposition is a donation. (This would amount to a disposition without value – own insertion.) If a lawful obligation to pay the money in fact exists, then the obvious benefit, which the payer receives in return for such payment, is a discharge from his liability to pay [this would amount to a preference]. Such payment decreases his assets, but at the same time it diminishes his liabilities, and in transactions which are entered into in the ordinary course of business, such a discharge would be value for the payment made.”

73 S 26 of the Insolvency Act.

74 Ss 29 and 30 of the Insolvency Act, respectively.

75 S 31 of the Insolvency Act.

76 S 46 of the Insolvency Act.

77 S 34 of the Insolvency Act.

78 S 32(1)(a) and (3) of the Insolvency Act.

79 S 32(1)(b) of the Insolvency Act.

80 S 32(1) of the Insolvency Act.

81 S 104(3) of the Insolvency Act.

from the disposition to part with the property.<sup>82</sup> When the court sets a disposition aside, the court order must entitle the liquidator to recover the property itself or the value of it, whichever is the greater, at the date of disposition or at the date on which the disposition was set aside in terms of section 32(3) of the Insolvency Act.<sup>83</sup>

Section 33(1) of the Insolvency Act provides a defence: if the recipient (defendant) acted in good faith and parted with any property or security, or lost any right against another person in return for any disposition which is liable to be set aside, the defendant does not have to restore the property or benefit received under the disposition, unless the liquidator has indemnified the defendant for such loss.

#### 4.2 The *actio Pauliana*

In terms of the common-law action, any transaction by the debtor aimed at defrauding the creditors by putting them out of pocket through the alienation of assets without receiving adequate value in return, can be set aside by the *actio Pauliana*. The transaction must indeed “defraud” the creditors in that the assets of the person alienating the property are diminished by such alienation.<sup>84</sup> Practical examples of such alienations are donations, or under-value transactions where the debtor, for example, sells assets below their market value.

The *actio Pauliana* can be instituted by the liquidator where the debtor is liquidated, as well as where the debtor has not been liquidated.<sup>85</sup> These common-law principles have not been substituted by the Insolvency Act.<sup>86</sup> The following elements must, however, be proved: (a) the alienation of property must have diminished the debtor’s assets; (b) the recipient must not have received his or her own property – in other words, not have received property to which he or she was entitled, such as in settlement of a due debt; (c) the debtor-alienator must have had the intention to defraud the creditors, but if he or she received (inadequate) value in return for the alienation, the recipient must have been part of, or at least aware of, such an intention to defraud;<sup>87</sup> and (d) the fraud must have caused the detrimental consequences for the creditors – in other words, the alienation must have caused a shortfall in the assets to meet the debt(s) of the debtor. If these elements are proved, the alienation of the property is voidable and the liquidator will be entitled to claim restitution of the alienated property.

82 See *Stern & Ruskin NNO v Appleson* 1951 3 SA 800 (W).

83 Payment of interest may be ordered from the date of the order setting aside the disposition, but not from the date of the demand for payment or the date of the disposition (*Griffiths v Janse van Rensburg NO* 2016 3 SA 389 (SCA) para 38; cf *Van Zyl NO v Turner NO* 1998 2 SA 236 (C)).

84 *Hockey v Rixom and Smith* 1939 SR 107; *Fenhalls v Ebrahim* 1956 4 SA 723 (D); *Commissioner of Customs and Excise v Bank of Lisbon* 1994 1 SA 205 (N).

85 *Fenhalls v Ebrahim*; *Commissioner of Customs and Excise v Bank of Lisbon* 1994 1 SA 205 (N).

86 *Cornelissen v Universal Caravan Sales* 1971 3 SA 158 (A); *Coetzer v Coetzer* 1975 3 SA 931 (EC); *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A).

87 *Scharff's Trustee v Scharff* 1915 TPD 476; *Trustees Estate Chin v National Bank of South Africa Ltd* 1915 AD 353 363. Intention to defraud on the part of the alienator must be proved, even if the alienator did not receive value (*Kommissaris van Binnelandse Inkomste v Willers* 1999 3 SA 19 (SCA) 29; see also *Pharmaceutical Enterprises (Pty) Ltd v Main Road Centurion* 30201 CC t/a *Albermarle Pharmacy* 2021 5 SA 246 (GJ) paras 14–25, 29–31).

The difference between the *actio Pauliana* and the statutory provisions discussed below is that liquidation of the debtor who made the alienation prior to liquidation is not a requirement for the application of this action. A creditor may thus use the *actio Pauliana* when enforcing a debt outside the ambit of the insolvency law, and a liquidator may use it after commencement of liquidation. It is, however, clear from the fourth requirement for the action that the alienation must have caused a shortfall in the estate.<sup>88</sup> The third requirement also requires the subjective intent of the alienator-debtor to defraud the creditors where no value is received in return for the alienation of estate property, and both the debtor and the recipient must have such an intent where such property is alienated on an under-valued basis.

### 4.3 Categories of statutory voidable dispositions

#### 4.3.1 Dispositions made not for value<sup>89</sup>

Any disposition of property made for no value can be set aside by the court if the liquidator can prove that the disposition was made more than two years before the liquidation of the company,<sup>90</sup> and it is proved that immediately after the disposition the company was insolvent according to a balance sheet test; or the disposition of property took place within two years of the liquidation of the company and the person who benefited from the disposition is unable to prove that, immediately after the disposition was made, the company was still solvent according to a balance sheet test.<sup>91</sup>

Although value is not defined in the Insolvency Act, it is clear that a donation is a disposition without value received by the debtor.<sup>92</sup> In the past, it was accepted that value includes a disposition where “inadequate” value – for example, in the case of the sale of an estate asset for less than its value – was received in return, since the debtor’s estate would also be diminished in such an instance.<sup>93</sup> Hence, it was understood that in order for the counter-performance to have qualified as

88 In *Commissioner of Customs and Excise v Bank of Lisbon*, for example, the *actio Pauliana* was applied in a situation where no proof existed that the debtor was actually insolvent. In *Nedkor Bank Ltd v ABSA Bank* 1995 4 SA 727 (W), Nugent J stated that he had considerable difficulty reconciling this decision with the principles underlying the *actio Pauliana*. This action is not a remedy for recovery by a claimant of property that he has lost as a result of fraud; it is a remedy to set aside a disposition of assets which a debtor has made for the purpose of avoiding the assets falling into his estate on insolvency and thereby becoming available for distribution to his creditors, thereby putting the creditors out of pocket.

89 S 26 of the Insolvency Act.

90 This would refer to the commencement date according to s 348 of the 1973 Act.

91 S 26 of the Insolvency Act.

92 See *Langeberg Kooperasie Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 2 SA 597 (A) 612 (Williamson JA dissenting but in agreement with the majority judgment insofar as the disposition was concerned): “For value to have been received some benefit must actually have accrued or at least have been likely to approve or at least have been likely to accrue in the future.”

93 Without value (*quid pro quo*) includes inadequate value – where either illusory or nominal value were given. However, merely less value than true value will not necessarily satisfy (*Terblanche No v Baxtrans CC* 1998 3 SA 912 (C)). See *De Jongh Ontwikkelings (Pty) Ltd v Kilotech Investments (Pty) Ltd* 2021 4 SA 492 (GP) para 6.3.9: “In the case of other dispositions where some value was given, it must be determined whether that value was illusory or nominal. If so, then ‘no value’ was given.”

“value”, the debtor must have received proper or adequate value in return.<sup>94</sup> However, in a recent judgment of the Supreme Court of Appeal in *Strydom NO v Snowball Wealth (Pty) Ltd*,<sup>95</sup> the court reconsidered the meaning of the term “value” in section 26 and concluded that it deals only with the situation where the debtor disposed of property and received absolutely no value in return. Where dispositions not made for adequate value have taken place, the *actio Pauliana* and collusion in terms of section 31 would be the correct actions to take to recover value for the estate.

Where the company’s liabilities exceeded its assets by less than the amount of the disposition, the extent to which it can be set aside is limited to the amount of such excess.<sup>96</sup> Further, where the disposition has been set aside, or where the company did not complete the disposition the recipient cannot compete with the creditors of the insolvent estate.<sup>97</sup> Section 26(2) of the Insolvency Act further provides that, where the disposition has neither been completed nor set aside in terms of section 26(1), and where it is in the form of a suretyship, guarantee, or indemnity, the recipient concerned may compete with other creditors for an amount not exceeding the amount with which the company’s assets, immediately preceding the disposition, exceeded its liabilities.<sup>98</sup>

#### 4.3.2 Preferences in terms of sections 29 and 30

A disposition of property made by the company within six months prior to the commencement of liquidation and which preferred one or more creditors above others<sup>99</sup> may be set aside as a voidable preference if the debtor-company was factually insolvent immediately after the disposition.<sup>100</sup> In the event that the liquidator proves the aforementioned in a court of law, preference actions become subject to a statutory good faith defence available to the beneficiary of the preference.<sup>101</sup> Specifically, a beneficiary of a preference may retain the property if it can be shown that the disposition was made in the ordinary course of business,<sup>102</sup> and that it was not intended to have the effect of a preference.<sup>103</sup>

94 For the former approach regarding inadequate value, see *Blooms Trustee v Fourie* 1921 TPD 599 601: “Value is ... the price which the property will command in the market ... otherwise a disposition ... could not be set aside if assets of large value are “sold” for entirely inadequate consideration or for merely trifling consideration”.

95 (356/2021) [2022] ZASCA 91 (15 June 2022).

96 S 26(1) of the Insolvency Act.

97 S 26(2) of the Insolvency Act.

98 The section was amended to exclude suretyships under these circumstances after it was held in *Inverdoorn Farming and Trading* that the term “dispositions” includes suretyships.

99 In *Standard Finance Corporation Ltd v Greenstein* 1964 (3) SA 573 (A), it was held that a disposition to a third party that benefitted the creditor may qualify as a preferential disposition.

100 S 29(1) of the Insolvency Act.

101 *Ibid.*

102 To consider if a disposition was in the ordinary course of business, an objective test is applied (see *Hendriks NO v Swanepoel* 1962 4 SA 338 (A)). In *Al-Kharafi & Sons v Pema NO* 2010 2 SA 360 (W) para 25 the court found that the term “in the ordinary course of business” was not limited to the particulars of the transaction but that there was a duty to look at “all of the relevant circumstances pertaining to the transaction”. The making and receiving of the disposition must be considered (*Gore NO v Shell South Africa (Pty) Ltd* 2004 2 SA 521 (C)).

103 For the subjective intention to prefer, the court will consider if the debtor contemplated sequestration at the time of the disposition (*Pretorius NO v Stock Owners’ Co-operative Co Ltd* 1959 4 SA 462 (A) 470–471: “[A] debtor contemplates sequestration, at any rate, if

An undue preference is not subject to a time limitation as is the case with a voidable preference and may also be set aside by the court. This is a preferential disposition of assets to a creditor, made at any time before sequestration and while the liabilities of the debtor-company exceeded its assets,<sup>104</sup> with the intention of preferring one creditor above others.<sup>105</sup>

#### 4.3.3 Collusion

When the debtor-company intentionally conspires with another person (be it a creditor or any other person) to prejudice the former's creditors or to prefer one above the other, and the company then disposes of its assets, such a disposition can be set aside by the court.<sup>106</sup> Any transaction entered into by a company before its liquidation, which involved collusion with another party to effect a preference or to prejudice creditors,<sup>107</sup> may be set aside by the court. The participating party is liable to make good any loss thereby caused to the insolvent estate; must pay a penalty to estate, as determined by court but not exceeding the benefit derived if transaction is not set aside; and where the party is a creditor, such creditor forfeits all claim(s) against the estate.<sup>108</sup>

## 5 RELATED REMEDIES

### 5.1 Void transfer of a business

If a trader transfers its business without prior publication of a notice (between 30 and 60 days prior to transfer) to that effect in the *Government Gazette* and in two issues in both an Afrikaans and an English newspaper circulating in the district in which the business is carried on, the transfer of the business shall be deemed to be void against the creditors and trustees of the estate in the event that the estate is sequestrated within six months from the date of such transfer.<sup>109</sup>

### 5.2 Set-off

It is possible to set off claims prior to liquidation. However, if the debtor becomes insolvent within one year of engaging in a set-off transaction, and the transaction was not effected in the ordinary course of business, the liquidator of the insolvent

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he knows that sequestration is 'substantially inevitable.'" But the question remains – "did he contemplate it" (*Goosen v Goosen* 1 Buch AC 414). See *Cooper NO v Merchant Trade Finance Ltd* 2000 3 SA 1009 (SCA) where the majority judgment found no intention to prefer when a debtor handed over movable property under a pre-existing obligation recorded in a general notarial bond (for case note on *Cooper*, see Burdette & Boraine 2000 *Obiter* 476).

104 See *Ensor NO v New Mayfair Hotel* 1968 4 SA 462 (N) where it was stated that the liabilities could be determined by reference to claims proved in the insolvency proceedings. See also *Venter v Volkskas Ltd* 1973 3 SA 175 (T) 179: the calculation of whether the projected liabilities exceed assessed assets (both projection and assessment must be done "fairly") is an objective determination.

105 S 30(1) of the Insolvency Act.

106 S 31 of the Insolvency Act.

107 *Gert de Jager (Edms) Bpk v Jones NO and McHardy NO* 1964 3 SA 325 (A). See also *Moreau v Murray* 2020 6 SA 55 (SCA) para 36 where the debtor and his spouse had tried to dispose of assets by means of a divorce settlement agreement. After considering all the facts, the court found that it amounted to a sham and that the disposition amounted to collusion (paras 33–35).

108 S 31(2) of the Insolvency Act.

109 S 34 of the Insolvency Act.

estate may, with the agreement of the Master, elect to ignore the set-off agreement.<sup>110</sup> In such circumstances, the other party shall be obliged to pay his or her debt to the liquidator and shall be required to prove the debt in insolvency.<sup>111</sup> No set-off can take place after commencement of liquidation unless mutuality of the respective claims existed at the time of commencement.<sup>112</sup>

### 5.3 Reclaim property after cancellation of an instalment agreement

The liquidator may reclaim goods returned to a credit provider where the instalment agreement in terms of the National Credit Act<sup>113</sup> has been cancelled and the goods returned within 30 days prior to the date of commencement of liquidation.<sup>114</sup>

### 5.4 Registered mortgage bonds not affording security

A mortgage bond that secures a debt which was initially existent but unsecured, and which was incurred more than two months prior to submission of the bond for registration in the Deeds Office, is of no effect if the estate of the mortgagor is liquidated within six months after lodging the bond for registration.<sup>115</sup> The security afforded by the bond will not be effective but the debt may still be enforceable otherwise.

## 6 APPLICATION WHERE COMPANY IN BUSINESS RESCUE DISPOSES OF PROPERTY

### 6.1 General

In liquidation, the liquidator acts on the instructions of the creditors.<sup>116</sup> This means that in order to initiate litigious action, the permission of the creditors given as a majority decision (where creditors vote according to the value of their claims) at a meeting of creditors, is needed.<sup>117</sup> The creditors that “remain” in liquidation would be those who did not receive payment or did not receive full payment in business rescue. Impeachable transactions would then relate to those creditors who had received payment in business rescue.

Two issues arise here. The first is whether the view of the court that “creditors can contract out of a section 34 claim”, and that this may be effected by adopting the business rescue plan, is correct and would apply to creditors who voted against the business rescue plan or who noted their opposition to the steps that the practitioner took when conducting the business of the company. The second relates to the claims of the creditors. If the business rescue plan is adopted, the creditors are unable to rely on the original debt but may recover only same in line with the business rescue plan.<sup>118</sup> The question is then whether the original amount or the

110 S 46 of the Insolvency Act.

111 *Ibid.*

112 *Thorne NO v The Government* 1973 4 SA 42 (T).

113 Act 34 of 2005.

114 S 84(2) of the Insolvency Act.

115 S 88 of the Insolvency Act.

116 S 386(3) of the 1973 Act.

117 Ss 386(4)(a) and 412 of the 1973 Act read with ss 52 and 53 of the Insolvency Act.

118 S 152(4) of the 2008 Act. See, for example, the facts of *Limbouris v Du Toit NO* (23112/2023) [2024] ZAWCHC 213 (16 August 2024) esp para 81: although the process was not terminated, it pointed to issues with the realisation of certain aspects of the business rescue plan. The binding nature of the plan was also discussed many times in the judgment.

amount recoverable in terms of the business rescue plan would be the debt considered in the subsequent liquidation, with the understanding that if payments had been made in terms of the business rescue plan that exceed the amounts recovered in liquidation, creditors may have to return those funds. The question is what the basis for the return would be if the liquidator is unable to have the transactions set aside as voidable preferences.

Reliance on the *actio Pauliana* is possible only if all the requirements are present for the alienation to be voidable. Although it is unlikely that a donation would occur, it is possible that an undervalued alienation may take place, in which case both the debtor and the recipient must have had the intent to prejudice the creditors.

In respect of dispositions without value, it is unlikely that a company will make a donation and section 26 does not apply to undervalue dispositions, as decided in *Snowball Wealth*.<sup>119</sup> However, it is possible that a company may stand surety, especially if a group of companies is involved. Since suretyship is a disposition<sup>120</sup> and usually without value, section 26 may apply. It is far more likely that payment to particular creditors may occur and that the provisions relating to preferences will apply. In addition, the business rescue practitioner may enable a post-commencement financier to obtain real security over an unencumbered asset of the company.<sup>121</sup> In this manner, the ranking of the creditor in liquidation may improve.<sup>122</sup> This improved ranking will remain even in liquidation, as the Insolvency Act does not distinguish between pre- and post-commencement secured creditors in the same manner as the 2008 Act.<sup>123</sup> The only requirement is for the security to conform to the definition in section 2 of the Insolvency Act.

## 6.2 Insolvency

Factual insolvency is the measurement found in most of the categories of statutory voidable dispositions.<sup>124</sup> “Factual” insolvency refers to “balance sheet” insolvency where the “liabilities [of the company] exceed [its] ... assets”.<sup>125</sup> In the cases of dispositions without value and voidable preferences, it must be shown that the company was factually insolvent immediately after the transaction took place in order to meet one of the requirements to have the transaction set aside.<sup>126</sup> In respect of an undue preference, the transaction must have taken place where the company is already factually insolvent.<sup>127</sup> Insolvency at the time of the disposition is not a requirement when considering collusion.<sup>128</sup>

Not all companies who enter business rescue are insolvent, although insolvency does not prevent a company from entering business rescue if the relevant entry requirements are met.<sup>129</sup> The criteria is financial distress, which has the following

119 See para 4.3.1 above.

120 See para 4.1 above.

121 S 135(2)(a) of the 2008 Act.

122 See para 4.1 above.

123 Compare s 95(1) of the Insolvency Act with s 135(3) of the 2008 Act. On the ranking of creditors in business rescue, see also the discussion in *Hockly's* 353–354; *National Union of Metalworkers of SA v VR Laser Services (Pty) Ltd* [2020] 2 All SA 536 (GJ) paras 40, 45.

124 See para 4.3 above.

125 *Nagel's* 515.

126 See paras 4.3.1 and 4.3.2 above.

127 See para 4.3.2 above.

128 See para 4.3.3 above; *Nagel's* 574.

129 See *Hockly's* 321 and the development of the principle in the case law discussed.

meaning “at any particular time”: (a) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or (b) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.<sup>130</sup>

In the event that a company enters business rescue and disposes of property prior to reaching a state of factual insolvency, and considering that the company may continue trading while the moratorium is in place, the liquidator may not be able to rely on the provisions of section 26, 29, or 30 as a result of an inability to show that the debtor was insolvent immediately after the transaction took place; alternatively in the case of section 26, the ability to show that the debtor was solvent after the transaction. Essentially, if such a company is put into liquidation and unable to pay its debts, each transaction prior to the commencement of liquidation will be considered through the lens of the requirements of each separate statutory cause of action. The question is whether that particular disposition meets the requirements for the specific section.

### 6.3 Ordinary course of business and intention

In the event that a company disposes of property in a manner that prefers one or more creditors over others, the company is factually insolvent immediately after the disposition, and in the event that this occurs within six months of the date of commencement of liquidation, the creditor(s) who received the benefit (whether in the form of payment or a form of security) will be able to prevent the disposition from being set aside by relying on the statutory defence.<sup>131</sup> The two requirements for the statutory defence that could be raised by the recipient-creditor are that the disposition occurred in the ordinary course of business, and that there was no intention on the part of the company to prefer the creditor(s) over others.<sup>132</sup> The presence or absence of the required intention may depend on whether the practitioner disposes of property of his own accord or in terms of an adopted business rescue plan.

It is plausible that the business rescue practitioner may have disposed of property or entered into contracts that meet the definition of a disposition,<sup>133</sup> and the company is shown to have been insolvent after the disposition.<sup>134</sup> This scenario becomes more relevant where the practitioner, shortly after the disposition, finds that the company is no longer capable of being rescued and applies to court to convert business rescue proceedings to liquidation proceedings.<sup>135</sup> Before discussing the statutory defence, a couple of remarks on the effect of prejudice on other creditors.

In respect of a voidable disposition, the liquidator shoulders the burden of proving that the effect of the disposition was to undermine the distribution provisions provided for under insolvency law – whether as a result of an increased dividend or premature payment when compared to what the creditor would receive in liquidation.<sup>136</sup> Interestingly, where the aim of business rescue is to provide a

130 S 128(1)(f) of the 2008 Act.

131 See para 4.3.2 above.

132 *Ibid.*

133 See, for example, *Jackson v Louw NO* [2019] 2 All SA 145 (ECG) para 33.

134 S 29(1) of the Insolvency Act.

135 S 141(2)(a)(ii) of the 2008 Act.

136 *Hockly's* 171–172.

better return to creditors than in liquidation, it seems that any creditor who receives payment under business rescue would receive an increased dividend *and* early payment – more than if payment were effected under liquidation. However, in *Smith NO v Magnus NO*,<sup>137</sup> a matter similar to *Smith NO v Malan*, the court stated that the actions of the practitioner benefitted the creditors as a group and ultimately did not void the transaction in accordance with section 341(2) of the 1973 Act.<sup>138</sup> Also, it has been held that a secured creditor “did not acquire more rights than he already had” where the secured asset generated funds to meet the claim of the creditor and in respect of which other creditors had no right.<sup>139</sup> This holistic view of the objective of impeachable transactions,<sup>140</sup> coupled with the procedural requirements set in 134(3) of the 2008 Act ought to provide some protection to the secured creditor receiving payment from the business rescue practitioner.

Two comments must be made in light of the above. In the first instance, it is important to remember that section 341 of the 1973 Act applies only to dispositions after the commencement of liquidation (which is retrospective once the liquidation order is granted) and only dispositions that took place in the period between the date of commencement and the granting of the liquidation order may be exempted from being “void” by the court. Secondly, the provisions of section 134 of the 2008 Act must be considered. Subparagraphs (i) and (ii) of section 134(1)(a) enable a practitioner, as the representative of the company,<sup>141</sup> to allow the company to trade with its assets as part of normal trading activities or in respect of an agreement made in good faith and “at arm’s length for fair value”. In addition, section 134(1)(a)(iii) allows dispositions by virtue of an approved business rescue plan.

Section 134(3)(a) provides for the protection of property rights by prohibiting any disposition relating to an asset without the consent of the holder of the property rights. Consent is not necessary where the secured creditor’s claim against the company is settled by the proceeds generated by the asset.<sup>142</sup> We submit that a transaction such as this would not activate the statutory disposition provisions if the company is liquidated at a later stage. In the first instance, the *concursum* would not be affected because secured creditors are entitled to the proceeds of the secured asset.<sup>143</sup> Secondly, we submit that a court will have to consider that the transaction sought to be impugned was made within the scope of what section 134(3) allows and within the authority granted to the business rescue practitioner. This may be viewed as a statutory authority to “protect” the validity of the transaction.

In respect of the ordinary course of business, the first question is whether the situation will be compared to normal business processes or business rescue processes, in effect in the ordinary course of business rescue. A company in business rescue is, objectively speaking, finds itself in a different set of circumstances. In *Jackson NO v Louw*, the court summarised the considerations as follows:

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137 (4220/2022; 4221/2022) [2023] ZAFSHC307 (4 August 2023).

138 Para 12.

139 See *Jackson* para 55 (paras 55–58 for the full reasoning of the court) and the authority quoted there. The court also considered the prerogatives of a secured creditor granted by virtue of s 83 of the Insolvency Act.

140 *Jackson* para 56.

141 See s 140(1)(a).

142 S 134(3)(a).

143 See s 95(1) of the Insolvency Act. See also the discussion of the case law relating to the protective measures of s 134 in *Hockly’s* 341.

“An objective test is applied in deciding whether a disposition was made in the ordinary course of business. The court must ask itself whether the disposition was one which would normally be entered into between solvent business persons, or put differently, whether the disposition conforms with ordinary business methods adopted by solvent businessmen, or whether it ‘would not to the ordinary man of business appear anomalous, un-businesslike or surprising’, and ‘it means that the transaction must fall into place as part of an undistinguished common flow of business done, so that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special situation’. Regard must be had to all the circumstances, including the terms of the disposition, the actions of the parties and the circumstances in which the disposition was made. The question of an intention to prefer, and whether the debtor’s liabilities exceeded his assets, are irrelevant.”<sup>144</sup>

As “all the circumstances including the terms of the disposition ... and the circumstances in which the disposition was made” should be considered, a court deciding on the matter must consider the fact that the disposition was made in the course of business rescue. On the one hand, where the conduct by the practitioner aligned with the processes envisaged by the 2008 Act, the court would be hard pressed to find that the disposition was not made in the ordinary course of business. On the other hand, the disposition must be viewed against the criteria of “solvent business persons” and “ordinary business methods adopted by solvent businessmen”.<sup>145</sup> Although section 134(1)<sup>146</sup> determines the standard of conduct regarding the disposition of property during business rescue, a business rescue plan will not necessarily meet the requirements as the aim is to rescue the company.<sup>147</sup> The business rescue takes place during a time that the company will shortly face, or already experiences, insolvent circumstances. It is accordingly difficult to see how normal business circumstances could be referenced – reference ought to be made to the ordinary course of business rescue. The approach or plans of the practitioner to meet the objectives of the specific rescue will affect the manner in which he will guide the business of the company.<sup>148</sup> Harvey writes that what is needed in order to achieve a successful turnaround is often much harsher than normal, because measures must now be taken to compensate for steps not taken in the past – “playing catch up”.<sup>149</sup> Dispositions have been touted as a turnaround strategy to increase cash-flow as “operations normally represent the most assets in a troubled business ... look for surplus assets to dispose of, for instance, excess fixed assets such as property, plant and equipment, and excess inventory, whether raw materials, work-in-progress or finished goods”.<sup>150</sup>

We submit that similar considerations in respect of the ordinary course of business would apply to section 34 and set-off discussed above. Dispositions in

144 Para 60.

145 *Jackson* para 60.

146 S 134(1)(a) states: “(1) Subject to subsections (2) and (3), during a company’s business rescue proceedings (a) the company may dispose, or agree to dispose, of property only (i) in the ordinary course of its business; (ii) in a *bona fide* transaction at arm’s length for fair value approved in advance and in writing by the practitioner; or (iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152”.

147 In respect of turnarounds, generally, see Harvey “How turnarounds differ from normal management” in Harvey (ed) *Turnaround management and corporate renewal: A South African perspective* (2011) 8–15.

148 See Van der Walt “Operations aspects of a turnaround” in Harvey (ed) 113–114.

149 Harvey “Turnarounds” 9.

150 Van der Walt 117.

the ordinary course of business together with a lack of intention to prefer a creditor constitute a statutory defence in terms of section 29 and we argue that, where the determination of “ordinary course of business” becomes relevant for sections 34 and 46, the same considerations apply as for section 29.

#### 6.4 Transfer of a business and claiming property

Section 34 is different in its application when compared to sections 26 to 31. Section 34 applies during ordinary debt enforcement and during formal sequestration (liquidation) proceedings – a court order for winding-up is accordingly not necessary for this section to find application. The implications of section 34 of the Insolvency Act for business rescue proceedings formed part of the issues under discussion in *Reiscor*.<sup>151</sup> We find the court’s argument that creditors do receive notice of the transfer of the business through compliance with the notification provisions and voting opportunity of the 2008 Act problematic in light of the section 133 moratorium also highlighted by the court.<sup>152</sup> The moratorium – considering the time limit application to section 34 – negates the purpose of the creditor to protect itself by taking steps to protect its interests.<sup>153</sup> As the moratorium applies to liquidation proceedings,<sup>154</sup> business rescue proceedings may prevent the circumstances envisaged in section 34(1) from realising, especially as the notice may not have been given in accordance with the requirements of section 34(1). Also, debts due and payable cannot be enforced as a result of section 133 of the 2008 Act, which renders the provisions of section 34(2) impractical.

An further question arises, which we do not deal with in this article: the interaction between section 34(3) of the Insolvency Act and section 152(4) of the 2008 Act. The question is whether the binding nature of an adopted business rescue plan would overrule the provision that the transfer of the business is void against a person who instituted enforcement action against the debtor in a High Court with jurisdiction, or where litigious action was instituted and the person to whom the business was transferred was aware of the ongoing litigation. Our interest lies in the risk that where a business is transferred in business rescue, claims may nevertheless arise that would negate the transfer.

In respect of reclaiming property, time is of the essence. In *Murray NO v Firstrand Bank Ltd t/a Wesbank*,<sup>155</sup> it was held that the section 133 moratorium does not apply to the cancellation of a contract. Should credit providers be of the opinion that business rescue will fail and wish to cancel the contract, and should the practitioner not view opposing a claim for the return of the property as worth the associated expenses, credit providers may wish to cancel contracts earlier rather than later in order to prevent the application of section 84(2) of the Insolvency Act. However, the conduct of the creditors may cause the reasonable prospect of rescue to fall away where goods, such as machinery or fleet used to continue trading, are returned. This may require the practitioner to apply to court to convert proceeding into liquidation in terms of section 141 of the 2008 Act.

151 *Reiscor* para 84.

152 Paras 79–82.

153 See the court’s reference to the protection in para 79.

154 See para 1 above.

155 2015 3 SA 438 (SCA) para 40.

The provisions of section 88 may be ameliorated as long as the practitioner and creditor ensure that the post-commencement debt is secured within two months of incurring the debt.<sup>156</sup>

## 7 CONCLUSION

This article is significant for determining whether the legal framework allows for the liquidator to rely on remedies relating to impeachable transactions once a company in business rescue is placed in liquidation. The overarching question is whether the business rescue practitioner and/or creditors should be wary of the possibility of having transactions that took place during business rescue set aside during subsequent liquidation proceedings. This would affect the enthusiasm of creditors to partake in business rescue proceedings and their willingness to work towards a successful rescue.

An awareness of the above among creditors voting on a business rescue plan may have severe implications for the success of business rescue. Where payments to creditors during the business rescue process may be set aside as voidable dispositions, the willingness of creditors to participate in the process and bear the uncertainty should the company be liquidated at a later stage may diminish. It further becomes a novel question to consider to what extent, if any, the business rescue procedure to which the company is subject may provide a defense against the claims of the liquidator.

It must also be borne in mind that payments to creditors may occur in terms of an adopted business rescue plan or prior to the adoption of such a plan. We submit that business rescue *per se*, or the binding nature of the plan once adopted, does not prevent a liquidator from approaching a court to set the transaction aside. On this point, we submit that it may be contentious whether the transaction occurred as a result of a court order.

A distinction may be made when it comes to the manner in which business rescue proceedings commence. We doubt whether all dispositions can be “read” into an order commencing business rescue and would encourage a better understanding of what is necessary for a successful rescue and a resultant wider interpretation of what is meant with an order commencing business rescue. In this regard, and with the knowledge that this authority must be properly delineated, the court may be requested to make an order specifically authorising the practitioner to dispose of property as part of the execution of his statutory duties when an order placing the company in business rescue is granted. Unfortunately, this would mean that business rescues initiated by way of resolution would not be privy to this protection. Ideally, a legislative amendment to section 2 of the Insolvency Act excluding transactions taken as part of business rescue proceedings from the definition of dispositions would be best suited to ensure that business rescue processes are not tainted by the fear of having transactions set aside. Briefly, the question is whether where business rescue is initiated by court order, this order would qualify as the exception to a “disposition” as defined in section 2 of the Insolvency Act.

An additional consideration is whether the transaction took place prior to the adoption of a business rescue plan, or in terms of an adopted plan. We submit that the decisions discussed show that the courts consider the merits of each case – all

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<sup>156</sup> S 135(2) of the 2008 Act.

relevant circumstances surrounding the transaction. The fact that the company is in business rescue is a relevant fact to consider when deciding whether a transaction took place in the ordinary course of business. The business rescue plan may further indicate a lack of intention to prefer on the side of the debtor.

We submit that the definition of financial distress and the moratorium works in favour of the process as some dispositions are dependent on the company being actually insolvent and are time sensitive. In respect of the issue of financial distress, it should be noted a company that enters business rescue early reduces the number of transactions that fall in the ambit of the statutory provisions as a company in true financial distress is not yet factually insolvent.

Although a risk may exist, a court adjudicating a case concerning a statutory or common-law voidable disposition will apply the provisions or requirements and the jurisprudence that have developed over the years. A presiding officer deciding a matter while the company is in business rescue can but predict a possible outcome when implying that payments to a creditor made by reason of a business rescue plan lack, for example, the intent to prefer. All the statutory or common law elements must be considered for a definite finding on the application of the particular transaction. This can be done with certainty only once another court – actually, the court approached to set aside the transaction once liquidation proceedings have commenced – considers all the relevant legal provisions and facts of the matter. At most, pertinent facts during the business rescue procedure may be relevant when determining whether a transaction may be set aside during liquidation proceedings. However, we submit that business rescue *per se* is not an acceptable defence to avoid any type of transaction being set aside as an impeachable transaction.

The courts will definitely have to consider the impact of a business rescue procedure on any potential voidable disposition – when company is subsequently in liquidation, the insolvency laws and principles will be the starting point. It is clear that the impact of business rescue will have to be assessed in line with the interpretations that were developed over many years – the indication in *Reiscor* is that courts may be sympathetic where it is deemed that dispositions were *bona fide* and in line with the provisions that govern business rescue. The observation made in *Reiscor* in respect of section 29 may be relevant to the statutory defence that payment during business rescue is in the ordinary course of business and there is no intention to prefer where the aim is to rescue the company. Nevertheless, we submit that, as part of the revision of the South African insolvency laws, specific exceptions should be designed to apply where dispositions take place during business rescue.



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The following contribution met these requirements and was published in 2025:

- J van Wyk & A Boraine "The impact of voidable disposition laws on companies placed in liquidation after business rescue" (2025) 88(3) *THRHR* 360–382

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