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Acts of insolvency and the effect thereof:

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A debtor can commit eight (8) acts of insolvency which is stipulated in section 8 (a) to (h) of the Insolvency Act 24 of 1936 ("**the Act**"). Before considering the acts, it is important to understand who or what is classified as a debtor in terms of the Act and what does insolvency mean.

The word debtor is used in the ordinary sense and includes a person and a partnership, but excludes any persons which may be placed in liquidation under the law relating to companies.[1] Insolvent, when used as a noun, is when a debtor's estate is under sequestration.

The first act of insolvency is when the debtor leaves the Republic or his residence or stays outside the Republic with the intention to evade or delay the payment of his debt.[2] The intent of the debtor may be difficult to prove, due to it being a subjective test.

The second act of insolvency has three (3) criteria of which only one needs to be satisfied to be classified as an act of insolvency. The first criteria is where a Court has

[1] Act 24 of 1936 (Insolvency Act) definition "debtor".

[2] Section 8(a) of the Insolvency Act.

given judgment against a debtor and the debtor has failed to satisfy the debt, or secondly if the debtor fails to indicate to the sheriff disposable movable property sufficient to satisfy the order, or lastly if it appears from the return made by the sheriff that he has not found sufficient disposable assets to satisfy the judgment.[3] This is fairly easy to prove as the sheriff's return of service in itself constitutes *prima facie* evidence.

The third act of insolvency relates to the debtor's property. If the debtor makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his/her creditors or the disposition has the effect of preferring one creditor above another, it will amount to an act of insolvency.[4] This act can be difficult to prove because creditors as a rule do not necessarily have inside knowledge of a debtor's circumstances and conduct.

The fourth act of insolvency applies when the debtor removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another.[5] This act of insolvency may for the same reason as set out before be difficult to prove. Furthermore, the test for intent is a subjective one, which makes the onus of proof more difficult.

The fifth act of insolvency arises where the debtor makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts.[6] If the creditors are not aware of each other, it might be difficult to prove.

The sixth act of insolvency occurs after a debtor has published a notice for the surrender of his insolvent estate, which has not lapsed or been withdrawn in terms of section 6 or 7, and he fails to comply with the requirements of section 4(3). Also in terms of this subsection, he lodges a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice.[7]

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[3]Section 8(b) of the Act.
[4] Section 8(c) of the Act.
[5] Section 8(d) of the Act.
[6] Section 8(e) of the Act.
[7] Section 8(f) of the Act.

The seventh act of insolvency is when the debtor gives written notice to any of his creditors, informing them that he is unable to pay some or all of his debts be it by way of e-mail or a formal letter.[8]

The eighth act of insolvency is when a debtor, as a trader, gives notice in terms of section 34 of the Act and publish it in the Government Gazette, and despite such publication, is unable to pay all his debts.[9] Due to the notice being published in the Government Gazette it might be fairly easy to identify this act of insolvency by simply requesting the debtor to pay his debt after you have seen the notice.

A creditor only needs to prove one of the above-mentioned acts of insolvency to successfully apply for a debtor's sequestration.

Article by **Herman Janse van Rensburg (BCom, LLB)**, Candidate Attorney at Malan Lourens Viljoen Inc.

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[8] Section 8(g) of the Act.

[9] Section 8(h) of the Act.