

South Sudan Gazette Supplement No. 13 (Act No.13)

# **LAWS OF SOUTH SUDAN**

## **THE INSOLVENCY ACT, 2011**

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Act, 2011

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**THE INSOLVENCY ACT, 2011**

**ARRANGEMENT OF SECTIONS.**

**CHAPTER I  
PRELIMINARY PROVISIONS.**

Section.

1. Title and Commencement.
2. Repeals and Savings.
3. Purpose.
4. Authority and Application.
5. Interpretation.

**CHAPTER II  
INABILITY TO PAY DEBTS, CREDITORS' CLAIMS AND VOIDABLE TRANSACTIONS.**

6. Nature of Insolvency.
7. Inability to Pay Debts.
8. Statutory Demand.
9. Setting Aside a Statutory Demand.

*Creditor's Claims.*

10. Ascertaining Amount of Claim and Interest.
11. Fines and Penalties.
12. Claim of an Unascertained Amount.
13. Mutual Credit and Set-Off.
14. Claims by Unsecured Creditors.
15. Claims by Secured Creditors.
16. Preferential Debts.
17. Non-Preferential Debts.
18. Surplus Assets.

*Voidable Transactions.*

19. Preferences.
20. Transactions at Undervalue.
21. Voidable Charges.
22. Insider Dealings.
23. Procedure for Setting Aside Voidable Transactions.

**CHAPTER III  
INDIVIDUAL DEBTOR INSOLVENCY**

24. Petition for Bankruptcy.
25. Official Receiver's Notice of Commencement of Bankruptcy and Creditor's First Meeting.
26. Appointment of Trustee.
27. Trustee's Notice of Bankruptcy and Particulars.
28. Effect of Bankruptcy Order.
29. Special Manager of Bankrupt's Estate Etc.

*Scheme of Arrangement in Respect of a Bankrupt.*

30. Interim Order.
31. Application for an Interim Protective Order.
32. Duration of Interim Order.
33. Duties of a Debtor.
34. Report to Court.
35. Creditors' Meeting to Consider Proposed Scheme of Arrangement.
36. Scheme of Arrangement Order.
37. Notice of Scheme of Arrangement.
38. Effect of Scheme of Arrangement.
39. Function of a Supervisor.
40. Creditor's Meetings During Scheme of Arrangement.
41. Remuneration of Supervisor.
42. Vacation of the Office of Supervisor.
43. Variation of Scheme of Arrangement.
44. Termination of Scheme of Arrangement.
45. Termination of Scheme of Arrangement by Court.
46. Notice on Termination of Scheme of Arrangement.

*Supervision and Enforcement by the Court.*

- 47. Court Supervision of Supervisor.
- 48. Enforcement of Supervisor's Duties.
- 49. Duties of a Trustee.
- 50. Trustee's Notice to Creditors.

*Bankrupt's Estate*

- 51. Bankrupt's Estate.
- 52. Property Acquired After Commencement of Bankruptcy.
- 53. Charge on Bankrupt's Home.
- 54. Property Held on Trust for Another Person.
- 55. Money Due to the Bankrupt.
- 56. Joint Contractual Liability.

*General Powers of Trustee.*

- 57. Trustee's Power to Obtain Documents.
- 58. Trustee's Power to Allow Bankrupt to Manage Property.
- 59. Trustee's Power to Disclaim Onerous Property.
- 60. Trustee's Power of Sale.
- 61. Title of Purchaser From Trustee.
- 62. Official Name of Trustee.
- 63. Vacation of Office by Trustee.
- 64. Duties of a Bankrupt.
- 65. Statement of Affairs.
- 66. Compliance Order.
- 67. Public Examination of Bankrupt.
- 68. Inquiry into Bankrupt's Dealings and Property.
- 69. Search and Seizure.
- 70. Termination of Bankruptcy.
- 71. Discharge.
- 72. Power of Court to Reverse a Discharge.
- 73. Annulment, Revocation or Setting Aside of Bankruptcy Order.
- 74. Consequences of Bankruptcy.

*Rights of Creditors.*

- 75. Creditors' Meetings During Bankruptcy.
- 76. Committee of Inspection.

*Distribution of Bankrupt's Estate*

- 77. Declaration and Distribution Of Dividends
- 78. Final Distribution.
- 79. Second or Subsequent Bankruptcy.

*Supervision and Enforcement by the Court.*

- 80. Court Supervision of Trustee.
- 81. Enforcement of Trustee's Duties.

*Bankruptcy Offences.*

- 82. Absconding etc.
- 83. Bankrupt not to Obtain Credit or Engage in Business Without Disclosing Bankruptcy.
- 84. Failure to Keep Proper Accounts of Business.

**CHAPTER IV  
CORPORATE INSOLVENCY**

*Winding- Up.*

- 85. Application of Winding up Provisions to Foreign Companies.
- 86. Modes of Winding up.
- 87. Government Bound by Certain Provisions.
- 88. Liability as Contributories of Present and Past Members.
- 89. Nature of Liability of Contributory.
- 90. Contributories in Case of Death of Member.
- 91. Contributories in Case of Bankruptcy of Member.

*Winding up Subject to Supervision of Court.*

- 92. Power to Order Winding Up Subject To Supervision.
- 93. Effect of Application for Winding up Subject to Supervision.
- 94. Power of Court to Appoint or Remove Liquidators.
- 95. Effect of Supervision Order.

*Winding up by Court.*

- 96. Commencement of Winding up by Court.
- 97. Circumstances in Which the Court May Appoint Liquidator.
- 98. Provisional Liquidator.
- 99. Notice of Winding up.
- 100. Notice of Appointment And of Winding up.
- 101. Effect of Winding up.
- 102. Notification That a Company is in Liquidation.
- 103. Special Manager of Company.
- 104. Fundamental Duties of a Liquidator.
- 105. General Duties of Liquidator.

*General Provisions Relating to Winding up.*

- 106. General Powers of a Liquidator.
- 107. Liquidator's Preliminary Report.
- 108. Liquidator's Interim Report.
- 109. Liquidator's Final Report.
- 110. Liquidator's Power to Obtain Documents.
- 111. Liquidator's Power to Examine etc.
- 112. Liquidator's Power to Disclaim Onerous Property.
- 113. Pooling Of Assets of Associated Companies.
- 114. Vacation of the Office of Liquidator.
- 115. Duties of Directors, Secretary and Employees.
- 116. Compliance Order.
- 117. Search and Seizure.
- 118. Absconding, etc.
- 119. Completion of Winding Up.

*Rights of Creditors and Shareholders.*

- 120. Creditors' or Shareholders' Meetings During Winding Up.
- 121. Committee of Inspection During Winding Up.

*Supervision and Enforcement By The Court.*

- 122. Court Supervision of Winding Up.
- 123. Power of Court to Make Calls.
- 124. Power to Stay Winding Up.

125. Enforcement of Liquidator's Duties.

## **CHAPTER V ADMINISTRATION OF COMPANIES.**

126. Application of Administration Provisions to Foreign Companies.

### *Provisional Administration.*

127. Appointment of Provisional Administrator.

128. Fundamental Duties of Provisional Administrator.

129. General Duties of a Provisional Administrator.

130. Commencement of Provisional Administration.

131. Effect of Provisional Administration.

132. Notice of Provisional Administration.

133. Duration of Provisional Administration.

134. Creditor's Meeting to Consider Appointment of Provisional Administrator.

135. Provisional Administrator's Proposals.

136. Creditor's Meeting to Consider Proposals.

137. Requirements of an Administration Deed.

138. Execution of an Administration Deed.

139. Notice of Termination of Provisional Administration.

140. Transition to Winding up.

### *Conduct of Provisional Administration.*

141. Powers of a Provisional Administrator.

142. Provisional Administrator's Relationship with Third Parties.

143. Role of Directors and Secretary during Provisional Administration.

144. Compliance Order.

145. Disposal of Charged Property during Provisional Administration.

146. Liabilities of a Provisional Administrator.

147. Provisional Administrator's Right to Indemnity.

148. Relief from Liability for a Provisional Administrator.

149. Provisional Administrator's Reports to the Official Receiver.

### *Administration.*

150. Commencement of Administration.

151. Notice of Administration.

- 152. Effect of Administration.
- 153. Function of Administrator.
- 154. Creditor's Meetings during Administration.
- 155. Variation of the Administration Deed by Creditors.
- 156. Termination of Administration.
- 157. Termination of Administration by Court.
- 158. Notice on Termination of Administration.

*Provisional Administrators and Administrators.*

- 159. Remuneration of Provisional Administrator or Administrator.
- 160. Vacation of the Office of Provisional Administrator or Administrator.
- 161. Court Supervision of Provisional Administrator or Administrator.
- 162. Enforcement of Provisional Administrator's or Administrator's Duties.

**CHAPTER VI  
CORPORATE AND INDIVIDUAL RECEIVERSHIP.**

- 163. Application of Receivership Provisions to Foreign Companies.
- 164. Commencement of Receivership.
- 165. Liability for Invalid Appointment of Receiver.
- 166. Notice of Receivership.
- 167. Fundamental Duty of a Receiver.
- 168. General Duties of Receiver.
- 169. Powers of Receiver.
- 170. Receiver's Relationship with Third Parties.
- 171. Role of Grantor in a Receivership.
- 172. Rights and Obligations of a Grantor in Receivership.
- 173. Compliance Order.
- 174. Liabilities of Receiver.
- 175. Receiver's Right to Indemnity.
- 176. Relief from Liability for Receiver.
- 177. Receiver's Preliminary Report.
- 178. Receiver's Other Reports.
- 179. General Provisions on Reports.
- 180. Priorities for Application of Proceeds of Receivership.
- 181. Vacation of Office of Receiver.
- 182. Powers of Receiver on Winding up or Bankruptcy.
- 183. Court Supervision of Receiver.
- 184. Enforcement of Receiver's Duties.

**185.** Termination of Receivership by Court.

**CHAPTER VII  
OFFICIAL RECEIVER AND REGULATION OF INSOLVENCY PRACTITIONERS.**

**186.** Appointment of Official Receiver.

**187.** Powers and Functions of the Official Receiver.

**188.** Official Receiver's Seal.

**189.** Meaning of "Insolvency Practitioner".

**190.** Qualifications to Act as Insolvency Practitioner.

**191.** Acting as Insolvent Practitioner Without Qualification.

**192.** Persons Disqualified From Acting as Liquidators, Provisional Liquidators, Administrators or Provisional Administrators.

**193.** Persons Disqualified From Acting as Receiver.

**194.** Persons Disqualified From Acting as Trustee Or Supervisor.

**195.** Prohibition Order.

**196.** Appointment of Two or More Insolvency Practitioners.

**197.** Qualified Privilege in Respect of Proceedings for Defamation.

**CHAPTER VIII  
GENERAL PROVISIONS.**

**198.** Jurisdiction.

**199.** Validity of Action Notwithstanding Defect in Appointment or Qualification.

**200.** Public Notices.

**201.** Disposition of Property etc, After Commencement of Winding up by Court is Void.

**202.** General Penalty.

**203.** Regulations.

**204.** Minister's Power to Amend Schedules.

# **LAWS OF SOUTH SUDAN.**

## **THE INSOLVENCY ACT, 2011**

**In accordance with the provisions of Article 55 (2) (3) (b) read together with Article 85(1) of the Transitional Constitution of South Sudan, the National Assembly, with assent of the President of the Republic of South Sudan, hereby enacts the following:**

### **CHAPTER I PRELIMINARY PROVISIONS.**

#### **1. Title and Commencement.**

This Act may be cited as “The Insolvency Act, 2011” and shall come into force on the date of its signature by the President.

#### **2. Repeals and Saving.**

- (1)** Any provision of existing legislation in South Sudan, which are governed by this Act, are hereby repealed; provided that, all proceedings, orders and regulations taken or made thereunder, except to the extent they are cancelled by or are otherwise inconsistent with the provisions of this Act, shall remain in force or effect, until they are repealed or amended in accordance with the provisions of this Act.
- (2)** The rules of equity and common law applicable to individual and corporate insolvency, and receivership shall continue in force except as they are inconsistent with this Act.
- (3)** Where any case relating to receivership, winding up or bankruptcy was pending under the existing law, before any court prior to the coming into force of this Act that case shall continue to be heard by that court until completion.

#### **3. Purpose.**

The purpose of this Act is to provide for individual debtor and corporate insolvency, receivership, administration, scheme of arrangements, the regulation of insolvency practitioners and to provide for other related matters.

#### **4. Authority and Application.**

- (1) This Act is drafted in accordance with the provisions of Article 55 and paragraph 52 of Schedule A of the Transitional Constitution of South Sudan, which grants the national government the authority over incorporation of companies and to engage in the types of activities provided for in this Act.
- (2) The provisions of this Act shall apply throughout South Sudan in all matters related to individual debtor and corporate insolvency and matters related thereto.
- (3) The Act applies to every company incorporated under the Companies Act, 1925 the Companies Act, 2003, the Companies Act, 2011 and every foreign company registered under the Companies Act or other legislation in force, and, save as is otherwise provided under the Limited Partnership Act, 2008 to every limited partnership.
- (4) The provisions of this Act shall not apply to statutory corporations, dissolution of co-operatives or dissolution of partnerships.

## 5. Interpretation.

In this Act, unless the context otherwise requires, the following words and expressions shall have the meaning assigned to them respectively –

**“administrative receiver”** means –

- (a) a receiver appointed over the whole or substantially the whole of the property and undertaking of a grantor; or
- (b) a person who would be a receiver but for the appointment of some other person as the receiver of part of a grantor’s property;

**“associated company”** means a company or other business organisation in which the insolvent company holds majority or controlling shares;

**“bankrupt”** means an individual in respect of whom a bankruptcy order has been made under section 24;

**“bankruptcy”** means the state of an individual in respect of whom a bankruptcy order has been made;

**“bankruptcy debt”**, means any of the following –

- (a) a debt or liability to which the bankrupt is subject after the commencement of the bankruptcy;
- (b) a debt or liability to which the bankrupt may become subject after the commencement of the bankruptcy by reason of any obligation incurred before or after the commencement of the bankruptcy; and
- (c) any interest that may be claimed in the bankruptcy,

and in determining for the purposes of this Act whether a liability in tort is a bankruptcy debt, the bankrupt is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action arose;

**“bankruptcy order”** means an order declaring an individual to be insolvent;

**“charge”** includes a right or interest in relation to property owned by a debtor, by virtue of which a creditor of the debtor is entitled to claim payment in priority to other creditors, and includes a mortgage, a chattel paper, a document of title; goods; an intangible; money; or a negotiable instrument; but does not include a charge under a charging order issued by a court in favour of a judgment creditor;

**“committee of inspection”** means a committee of inspection appointed under sections 76, or 121;

**“company”** means a company within the meaning of the Companies Act, and includes a foreign company registered in South Sudan;

**“court”** means the High Court;

**“Debtor”** means one who owes a debt;

**“director”** –

- (a) in relation to a company, means any person occupying the position of director under any title;
- (b) in respect of a foreign company, includes an agent, officer or employee responsible for the business of the foreign company in South Sudan; and
- (c) in respect of any other body corporate, means a person with functions similar to those of a director, but does not include a receiver, provisional administrator or administrator;

**“document”** includes an invoice, order, letter, record, summons, notice, order other legal process, register, index, report, certificate or accounts, in any form, including any writing, material and information stored by means of any mechanical or electronic device and any material derived from the device;

**“estate”**, has the meaning in section 51;

**“foreign company”** means a company incorporated outside South Sudan and registered as a foreign company in South Sudan under the Companies Act;

**“Government”** means the Government of South Sudan;

**“grantor”** means a person in respect of whose property a receiver is or may be appointed;

**“individual”** with respect to Chapters II and III means a debtor in respect of whom a bankruptcy order is subsequently made;

**“insolvent”** has the same meaning as a bankrupt who is an individual person and is unable to pay his or her debts; or means a company which is unable to pay its debts, as they become due in the normal course of business; and **“insolvency”** accordingly means the status of being insolvent;

**“insolvency practitioner”** means a person who is not an official receiver, who is qualified to act as an insolvency practitioner within the meaning of section 189;

**“instrument of incorporation”** means the documents used to incorporate a company under the Companies Act;

**“lifting the veil”** means the power of the court to ignore the protection from liability offered by the corporate status of the company and make the shareholders, directors or other officers personally liable for debts, liabilities and obligations of the company, where the shareholders, directors or such other officers of the company in question or a person in a similar position have used the business to defraud creditors of the company or to do some other wrongful or illegal act;

**“liquidator”** means a liquidator of a company appointed under section 97; and includes a provisional liquidator;

**“Minister”** means the Minister responsible for Justice;

**“official receiver”** means a person appointed under section 186;

**“preferential debts”** means the debts referred to in section 16 (4), (5) and (6);

**“prescribed amount”** means the amount specified in the First Schedule;

**“proceeds”** means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with the collateral or proceeds of the collateral and includes –

- (a) a right to an insurance payment or any other payment as indemnity or compensation for loss or damage to the collateral or proceeds; and
- (b) a payment made in total or partial discharge or redemption of an intangible, a negotiable instrument, a security or chattel paper;

**“property”** means property of every kind, whether tangible or intangible, real or personal, and includes rights, interests and claims of every kind in relation to property however they arise;

**“property in receivership”** means property in respect of which a receiver is appointed;

**“provisional administrator”** means a provisional administrator appointed under section 127;

**“provisional liquidator”** means a provisional liquidator appointed under section 98;

**“public notice”** means notice given in accordance with section 200;

**“receiver”** means a receiver or a manager and includes a receiver and manager or administrative receiver in respect of any property and any person appointed as receiver –

- (a) by or under any document; or
- (b) by the court in the exercise of a power to make such an appointment given by any law or any rule of court or in the exercise of its inherent jurisdiction,

whether or not the person appointed is empowered to sell any of the property in receivership;

**“Registrar”** means the Registrar of Companies, Non-governmental Organizations, Societies and Associations appointed under the Companies Act;

**“scheme of arrangement”** means a composition in satisfaction of an individual’s debts or a scheme of arrangement of an individual’s affairs or other scheme of arrangement in respect of which a debtor agrees to pay all his or her creditors;

**“scheme of arrangement order”** means a composition in satisfaction of an individual;

**“secretary”** in relation to a company means a person appointed to perform the duties of secretary under the Companies Act;

**“secured creditor”** means a person entitled to a charge on or over property owned by a debtor;

**“shareholder”** has the same meaning assigned to it in the Companies Act;

**“special resolution”** means a resolution approved by a majority of 75 per cent or, if a higher majority is required by the articles of the company, that higher majority, of the votes of those shareholders entitled to vote and voting on the question;

**“statutory demand”** means a demand made in accordance with section 8;

**“transaction”** includes a gift, settlement, agreement or scheme of arrangement and references to entering into a transaction are construed accordingly;

“trustee”, in relation to bankruptcy means the trustee of the bankrupt’s estate;

“working day” means any day other than a Saturday, Sunday or a public holiday.

## CHAPTER II

### INABILITY TO PAY DEBTS, CREDITORS’ CLAIMS AND VOIDABLE TRANSACTIONS.

#### *Inability to Pay Debts.*

#### **6. Nature of Insolvency.**

For purposes of this Act, an individual or a company is taken to be insolvent where in case of –

- (a) an individual, who is unable to pay his or her debts; and
- (b) a company, which is unable to pay its debts.

#### **7. Inability to Pay Debts.**

- (1) Subject to subsection (2) and unless the contrary is proved, a debtor is presumed to be unable to pay the debts if –
  - (a) the debtor has failed to comply with a statutory demand;
  - (b) the execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part; or
  - (c) all or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property.
- (2) Where a petition to court for a bankruptcy order or for winding up of a company is presented, evidence of failure to comply with a statutory demand shall not be admissible as evidence of inability to pay debts unless the application is made within 30 working days after the last date for compliance with the demand.
- (3) Subsection (1) does not prevent proof of inability to pay debts by other means.
- (4) In determining whether a debtor is unable to pay the debts, contingent or prospective debts may be taken into account.
- (5) A petition to the court for a bankruptcy order or the winding up of a company on the ground of inability to pay debts may be made by a contingent or prospective creditor only with the leave of the court; and the court may give such leave, with or without conditions, only if it is satisfied that a prima facie case of inability to pay debts has been made out.

## **8. Statutory Demand.**

- (1)** A demand by a creditor in respect of a debt shall be made in accordance with this section, and shall constitute a demand notice, and shall be taken to be a statutory demand.
- (2)** A statutory demand shall –
  - (a)** be made in respect of a debt that is not less than the prescribed amount and in the case of a debt owed by –
    - (i)** an individual who is a judgment debtor; or
    - (ii)** a company, which has an ascertained debt, but need not be a judgment debt;
  - (b)** be in the prescribed form;
  - (c)** except where the debt is a judgment debt, be verified by a statutory declaration attached to the demand;
  - (d)** be served on the debtor; and
  - (e)** require the debtor to pay the debt or compound with the creditor or give a charge over property to secure payment of the debt, to the reasonable satisfaction of the creditor, within twenty working days after the date of service or a longer period as the court may order.

## **9. Setting Aside a Statutory Demand.**

- (1)** The court may, on the application of the debtor, set aside a statutory demand.
- (2)** An application under subsection (1) shall –
  - (a)** be made within ten working days after the date of service of the demand;
  - (b)** be supported by an affidavit; and
  - (c)** be served on the creditor with the affidavit within ten working days after the date of service of the demand.
- (3)** The court may, for sufficient cause, extend the time for making or serving an application to set aside a statutory demand and at the hearing of the application, the court may extend the time for compliance with the statutory demand.
- (4)** The court may grant an application to set aside a statutory demand if it is satisfied that –
  - (a)** the debtor appears to have a counterclaim, set-off or cross-demand and the amount specified in the demand is less than the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount;
  - (b)** that the creditor holds some property in respect of the debt claimed by the debtor and that the value of the security is equivalent to or exceeds the full

- amount of the debt; or
- (c) the demand ought to be set aside on such grounds as the court may deem fit.
- (5) On the hearing of the application, where the court is satisfied that there is a debt due by the debtor to the creditor that is not the subject of a substantial dispute or is not subject to a counterclaim, set-off or cross-demand, the court may –
- (a) order that the debtor pay the debt within a specified period and that, in default of payment, the creditor may immediately petition for a winding up or bankruptcy order; or
- (b) dismiss the application and immediately make an order under section 24 or 96, on the ground of inability to pay debts.
- (6) Where the court makes a winding up or bankruptcy order under subsection (5) (a), failure by the debtor to pay the debt within the specified period shall be presumed to be inability to pay debts.
- (7) A statutory demand shall not be set aside by reason only of a defect or irregularity unless the court considers that substantial injustice would be caused if it were not set aside.
- (8) For the purposes of subsection (7), ‘defect’ includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.
- (9) An order under this section may be made subject to conditions set by court.

*Creditor’s Claims.*

**10. Ascertaining Amount of Claim and Interest.**

- (1) The amount of a claim shall be ascertained as at the date of commencement of bankruptcy or the winding up.
- (2) Where a claim bears interest, the interest payable in respect of any period after the commencement of the winding up or bankruptcy shall not exceed the court rate.
- (3) The amount of a claim based on a debt denominated in a currency other than the South Sudanese Pound, shall be converted into South Sudanese Pound at the rate of exchange on the date of commencement of the winding up or bankruptcy or if there is more than one rate of exchange on that date, at the average of those rates.

**11. Fines and Penalties.**

A fine or other monetary penalty imposed, whether before or after the commencement of the winding up or bankruptcy, in respect of an offence committed before the commencement of the winding up or bankruptcy and costs ordered to be paid with respect to proceedings for the offence, is admissible in winding up or bankruptcy.

**12. Claim of an Unascertained Amount.**

- (1) Where a claim is subject to a contingency, is for damages or for some other reason the amount of the claim is not certain, the liquidator or trustee shall –
  - (a) make an estimate of the amount of the claim; or
  - (b) refer the matter to the court for a decision on the amount of the claim.
- (2) On the application of the liquidator, trustee or any claimant who is aggrieved by an estimate made by the liquidator or trustee, the court shall determine the amount of the claim, as it considers necessary.

**13. Mutual Credit and Set-off.**

- (1) Subject to section 21, where there have been mutual credits, mutual debts or other mutual dealings between a company or an individual debtor and a person who, but for the operation of this section, would seek to have a claim admitted –
  - (a) an account shall be taken of what is due from the one party to the other in respect of those credits, debts or dealings;
  - (b) an amount due from one party shall be set off against any amount due from the other party; and
  - (c) only the balance of the account may be claimed in winding up or bankruptcy or is payable to the company or the bankrupt's estate.
- (2) A person shall not be entitled, under this section, to claim the benefit of any set-off against the property of a debtor in any case where the person is reasonably expected to have foreseen that the debtor would be likely to be unable to pay his or her debts at the time of giving credit to the debtor.

**14. Claims by Unsecured Creditors.**

- (1) Unless otherwise required by the liquidator or trustee, an unsecured creditor may make a dated claim informally in writing.
- (2) Where the liquidator or trustee requires a claim to be made formally, the claimant shall submit a claim verified by a statutory declaration –
  - (a) setting out in full the particulars of the claim; and
  - (b) identifying documents, if any that evidence or substantiate the claim.

- (3) The liquidator or trustee may require the production of any document referred to in subsection (2) (b).
- (4) The liquidator or trustee may admit or reject any claim in whole or in part and if the liquidator or trustee subsequently considers that a claim was wrongly admitted or rejected in whole or in part, he or she may revoke or amend the decision.

## **15. Claims by Secured Creditors.**

- (1) A secured creditor shall, as soon as practicable after public notice has been given of the winding up or bankruptcy, deliver to the liquidator or trustee written notice of any debt secured by a charge over any asset, including particulars of the asset subject to the charge and the amount secured.
- (2) A secured creditor may –
  - (a) realise any asset subject to a charge, where he or she is entitled to do so;
  - (b) claim as a secured creditor; or
  - (c) surrender the charge for the general benefit of creditors and claim as an unsecured creditor for his or her whole debt.
- (3) A secured creditor who realises an asset subject to a charge –
  - (a) may claim as an unsecured creditor for any balance due, after deducting the net amount realised; and
  - (b) shall account to the liquidator or trustee for any surplus remaining from the net amount realised after satisfaction of the whole debt, including any interest payable in respect of that debt up to the time of its satisfaction and after making proper payments to the holder of any other charge over the asset subject to the charge.
- (4) Where a creditor claims as a secured creditor, the claim shall be verified by a statutory declaration which shall –
  - (a) set out in full the particulars of the claim;
  - (b) set out in full the particulars of the charge including the date on which it was given; and
  - (c) identify any documents that substantiate the claim and the charge and sections 10 and 12 shall apply to such a claim.
- (5) The liquidator or trustee may require production of any document referred to in subsection 4(c).
- (6) Where a claim is made by a creditor as a secured creditor, the liquidator or trustee shall –
  - (a) meet the claim in full and redeem the charge;

- (b) realise the asset subject to the charge and pay the secured creditor the lesser of the amount of the claim and the net amount realised taking into account the liquidator or trustees reasonable remuneration; or
  - (c) reject the claim in whole or in part, and where a claim is rejected in whole or in part, the creditor may make a revised claim as a secured creditor within ten working days of receiving notice of the rejection; and the liquidator or trustee may, if he or she subsequently considers that a claim was wrongly rejected in whole or in part, revoke or amend any such decision.
- (7) A creditor who claims as a secured creditor, may claim as an unsecured creditor for any balance due to him or her, after deducting any payment made under subsection (6).
- (8) The liquidator or trustee may at any time require a secured creditor by notice in writing to –
  - (a) take possession of any asset subject to a charge, if entitled to do so; or
  - (b) deliver a claim as a secured creditor in accordance with subsection (5), within twenty working days after receipt of the notice, if he or she intends to rely on the security.
- (9) A secured creditor who fails to comply with the notice served under subsection (8) shall be treated as having surrendered the security to the liquidator or trustee for the general benefit of the creditors and may prove as an unsecured creditor.

## **16. Preferential Debts.**

- (1) Subject to section 15, and to subsection (2), the liquidator or trustee shall apply the assets to the preferential debts listed in subsections (4), (5) and (6) of this section, which debts shall be paid in priority to other debts.
- (2) Where the assets are not sufficient to meet payment of debts, preferential debts shall have priority over the claims of secured creditors in respect of assets which are subject to a security interest; and become subject to that security interest by reason of its application to certain existing assets of the grantor and future assets which were after-acquired property or proceeds, and shall be paid accordingly out of those assets.
- (3) Preferential debts are as listed in subsections (4), (5) and (6) of this section and shall be paid in the order of priority in which they are listed.
- (4) First to be paid shall be –
  - (a) remuneration and expenses properly incurred by the liquidator or trustee;
  - (b) any receiver's or provisional administrator's indemnity under sections 164 or 192 and any remuneration and expenses properly incurred by any receiver, liquidator, provisional liquidator administrator, proposed supervisor; and

- (c) the reasonable costs of any person who petitioned court for a winding up or bankruptcy order, including the reasonable costs of any person appearing on the petition whose costs are allowed by the court.
- (5) After making the payments listed in subsection (4), next to be paid shall be –
  - (a) all wages or basic salary, wholly earned or earned in part by way of commission for four months;
  - (b) all amounts due in respect of any compensation or liability for compensation under the law governing workers compensation, accrued before the commencement of the winding up or bankruptcy, not exceeding the prescribed amount;
  - (c) all amounts that are preferential debts under section 57 or 112.
- (6) After paying the sums referred to in subsection (5), the liquidator shall then pay –
  - (a) the amount of any tax withheld and not paid over to the authority responsible for revenue collection in South Sudan, for twelve months prior to the commencement of insolvency ; and
  - (b) contributions payable under the law governing social security.
- (7) This section shall apply notwithstanding any other law to the contrary.

#### **17. Non-preferential Debts.**

- (1) After paying preferential debts in accordance with section 16, the liquidator or trustee shall apply the assets in satisfaction of all other claims.
- (2) The claims referred to in subsection (1) shall rank equally among themselves and shall be paid in full unless the assets are insufficient to meet them, in which case they abate in equal proportions.
- (3) Where, before the commencement of a winding up or bankruptcy, a creditor agrees to accept a lower priority in respect of a debt than that which the creditor would otherwise have under this section, nothing in this section shall prevent the agreement from having effect according to its terms.

#### **18. Surplus Assets.**

Where there is a surplus after making the payments referred to in section 17 –

- (a) in the case of a bankruptcy, the trustee in bankruptcy shall pay the surplus to the bankrupt; and
- (b) in the case of a winding up, the liquidator shall distribute the company's surplus assets in accordance with the memorandum and articles of association of the company.

*Voidable Transactions.*

**19. Preferences.**

- (1) A transaction involving a transfer of property by a company or individual, including things in action, and any transfer of shares or alteration in the status of the members of the company, as the case may be, made to, or for the benefit of, another person shall be voidable on the application of the creditor, receiver, liquidator or trustee where the transfer -
- (a) is made on account of an antecedent debt; at a time when the company or individual debtor was unable to pay the company's or individual's due debts; and within the year preceding the commencement of the winding up or bankruptcy; or
  - (b) enabled that person to receive more towards the satisfaction of the debt than the person would otherwise have received or be likely to receive in the winding up or bankruptcy,
- unless the debt was incurred in the ordinary course of the company's or individual's business and the transfer was made not later than forty-five working days after the debt was incurred.
- (2) A transfer made within the six months preceding the commencement of the winding up or bankruptcy is, unless the contrary is proved, presumed to have been made -
- (a) at a time when the company or individual debtor was unable to pay the company's or individual's due debts; and
  - (b) on account of a debt not incurred in the ordinary course of business.

**20. Transactions at Undervalue.**

A transaction entered into by a company or individual debtor is voidable on the application of the creditor, receiver, member or contributory, liquidator or trustee if -

- (a) it was entered into within one year preceding the commencement of the winding up or bankruptcy;
- (b) the value of the consideration received by the company or individual debtor is significantly less than the value of the consideration provided by the company or individual;
- (c) when the transaction was entered into, the company or individual debtor -
  - (i) was unable to pay the company's or individual's due debts;
  - (ii) was engaged or about to engage in transactions for which its, his or her financial resources were unreasonably small; or
  - (iii) incurred the obligation knowing that the company or individual debtor would not be able to perform the obligation when required to do so;
- (d) the company or individual debtor became unable to pay its, his or her due debts as a result of the transaction; or
- (e) the transaction was entered into to aid the insolvent to put the asset beyond the

reach of the creditors.

## **21. Voidable Charges.**

- (1) A transaction providing for or creating a charge over any property of a company or individual debtor in respect of any debt is voidable on the application of the creditor, receiver, member or contributory liquidator or trustee if the charge was given within the year preceding the commencement of the winding up or bankruptcy on account of the antecedent debt unless -
  - (a) the charge secures the actual price or value of property sold or supplied to the company or individual debtor or any other valuable consideration given by the person making the charge prior to the execution of the security and immediately after the charge was made, the company or individual debtor was able to pay its due debts; or
  - (b) the charge is in substitution for a charge given more than one year preceding the commencement of the winding up or bankruptcy.
- (2) Unless the contrary is proved, a company or individual debtor giving a charge within the six months preceding the commencement of the winding up or bankruptcy is presumed to have been unable to pay the company or individual's due debts immediately after giving the charge.

## **22. Insider Dealings.**

- (1) Subject to subsection (3), a transaction, entered into by a company or individual debtor relating to any asset of the insolvent is voidable on the application of the liquidator, receiver, member or contributory, trustee or creditor if the transaction involves –
  - (a) spouses, siblings, children of the insolvent or any person with a close social proximity to the insolvent;
  - (b) employees, officers, professional or other service providers of the insolvent;
  - (c) business associates, partners, shareholders, directors or other similar person.
- (2) Unless the contrary is proved, a transaction referred to in subsection (1), shall be taken to be a preference or a transaction aimed at aiding the insolvent to put the assets of the insolvent's estate beyond the reach of creditors.
- (3) This section applies to a transaction entered into within twelve months preceding the insolvency.

## **23. Procedure for Setting Aside Voidable Transactions.**

- (1) A liquidator, receiver, member or contributory, trustee or creditor who wishes to have a voidable transaction under sections 19, 20, 21 or 22 set aside shall –

- (a) file in court a notice to that effect, specifying the transaction to be set aside and the property or value which the liquidator or trustee wishes to recover and the effect of subsections (2) , (3) and (4); and
  - (b) serve a copy of the notice on the person with whom the transaction was entered into and on every other person from whom the liquidator, receiver or trustee wishes to recover.
- (2) A person –
  - (a) who would be affected by the setting aside of the transaction specified in the notice; and
  - (b) who considers that the transaction is not voidable under sections 19, 20, 21 or 22,

may apply to the court for an order that the transaction should not be set aside.

- (3) Unless a person on whom the notice was served has applied to the court under subsection (2), the transaction shall be set aside from the twentieth working day after the date of service of the notice.
- (4) Where one or more persons have applied to the court under subsection (2), the transaction shall be set aside from the day on which the last application is finally determined unless the court orders otherwise.
- (5) Where a transaction is set aside under this section –
  - (a) any person affected may, after giving up the benefit of the transaction, claim for the value of the benefit as a creditor in the winding up or bankruptcy;
  - (b) the court may make one or more of the following orders –
    - (i) an order requiring a person to pay to the liquidator, receiver or trustee, in respect of benefits received by that person as a result of the transaction, the sums which fairly represent those benefits;
    - (ii) an order requiring property transferred as part of the transaction to be restored to the company or the bankrupt's estate;
    - (iii) an order requiring property to be vested in the company or the trustee if the property which is in the hands of the person is either a result of the proceeds of sale of property or of money, so transferred;
    - (iv) an order releasing, in a whole or in part, a charge given by the company or individual;
    - (v) an order requiring security to be given for the discharge of an order made under this section;
    - (vi) an order specifying the extent to which a person affected by the setting aside of a transaction or by a declaration or order made under this section is entitled to claim as a creditor in the winding up or bankruptcy.

- (6) The setting aside of a transaction or a declaration or order made under this section shall not affect the title or interest of a person in property which that person has acquired –
  - (a) from a person other than the insolvent;
  - (b) for valuable consideration; and
  - (c) without knowledge of the circumstances of the transaction under which the person other than the insolvent acquired the property from the company or individual.
- (7) Recovery by the liquidator, receiver or trustee of any property or its value, under this section or any other section, or under any other enactment or in equity or otherwise, may be denied wholly or in part where the person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer or payment of the property to that person was validly made and would not be set aside; and in the opinion of the court it is inequitable to order recovery.
- (8) In this section, “transaction” includes –
  - (a) an execution under any judicial proceedings; or
  - (b) a payment, including a payment made in pursuance of a judgment or order of a court, in respect of any transaction to which sections 19, 20, 21 or 22 apply.

### **CHAPTER III INDIVIDUAL DEBTOR INSOLVENCY.**

#### **24. Petition for Bankruptcy.**

- (1) Upon failure by the individual debtor to satisfy the statutory demand made under section 8, a petition for bankruptcy may be presented by a creditor or a debtor and the court may make a bankruptcy order in respect of the debtor.
- (2) Any bankruptcy order made under subsection (1), shall declare the debtor bankrupt and shall appoint the official receiver as interim receiver of the estate, for the preservation of the estate of the bankrupt.
- (3) The official receiver shall have the powers to sell or otherwise dispose of any perishable and any other goods, the value of which is likely to diminish if they are not disposed of unless court limits the powers or places conditions on the exercise.
- (4) The bankruptcy shall commence on the date on which the bankruptcy order is made.

#### **25. Official Receiver’s Notice of Commencement of Bankruptcy and Creditor’s First**

## **Meeting.**

The official receiver shall, within fourteen working days after the commencement of the bankruptcy –

- (a) give public notice of the date of commencement of the bankruptcy; and
- (b) call the creditors' first meeting.

## **26. Appointment of Trustee.**

The creditors' first meeting shall appoint a trustee and vest the bankrupt's estate in the trustee.

## **27. Trustee's Notice of Bankruptcy and Particulars.**

The trustee shall, within five working days after his or her appointment, give public notice of –

- (a) the trustee's full name;
- (b) the trustee's physical office address, daytime telephone number and electronic email address; and
- (c) the date of commencement of the bankruptcy.

## **28. Effect of Bankruptcy Order.**

(1) Upon the making of a bankruptcy order –

- (a) the bankrupt's estate shall vest first in the official receiver and then in the trustee, without any conveyance, assignment or transfer; and
- (b) except with the trustee's written consent or with the leave of the court and in accordance with such terms as the court may impose, no proceedings, execution or other legal process may be commenced or continued and no distress may be levied against the bankrupt or the bankrupt's estate.

(2) Subject to compliance with section 15, nothing in this Act shall prevent the exercise of the power of enforcement of a charge over property in the bankrupt's estate.

## **29. Special Manager of Bankrupt's Estate etc.**

(1) The court may, on an application under this section, appoint any person to be a special manager of –

- (a) a bankrupt's estate;
- (b) the business of an un-discharged bankrupt; or
- (c) the property or business of an individual debtor where an interim receiver has been appointed.

- (2) An application under this section may be made by the trustee or interim receiver where it appears to him or her that the nature of the estate, property or business or the interests of the creditors generally, require the appointment of another person to manage the estate, property or business.
- (3) A special manager appointed under this section shall have such powers and duties as may be given by the court.

*Scheme of Arrangement in Respect of a Bankrupt.*

**30. Interim Protective Order.**

- (1) A debtor who intends to make any scheme of arrangement with his or her creditors may apply to court for an interim protective order.
- (2) During the period for which an interim protective order is in force –
  - (a) an application for an order of bankruptcy of the debtor shall not be made;
  - (b) a trustee shall not be appointed for any property of the debtor; and
  - (c) except with the leave of the court and in accordance with terms imposed by the court –
    - (i) no other steps to enforce a charge over any of the individual's property shall succeed;
    - (ii) no other proceedings, execution or other legal process shall be commenced or continued against the debtor or his or her property; and
    - (iii) no distress shall be levied against the debtor or his or her property.
- (3) Where the debtor is an undischarged bankrupt, the interim protective order may contain directions on the conduct of the bankruptcy and the administration of the bankrupt's estate, during the period for which the order is in force, including directions on staying proceedings in the bankruptcy.

**31. Application for an Interim Protective Order.**

- (1) Subject to subsection (2), the court may make an interim protective order under section 30 on the application of –
  - (a) the debtor or the trustee of his or her estate where the debtor is an undischarged bankrupt; or
  - (b) the debtor in any other case.
- (2) The court may make an interim protective order under section 30 if it is satisfied that –
  - (a) the debtor intends to make a scheme of arrangement and where the debtor is a discharged bankrupt, he or she has given notice of the intention to the trustee of his or her estate;

- (b) a named insolvency practitioner is willing to act as supervisor of the proposed scheme of arrangement, as a trustee or otherwise for the purpose of supervising its implementation;
  - (c) the debtor is an undischarged bankrupt or is able to petition for his or her own bankruptcy;
  - (d) a previous application has not been made by the debtor for an interim protective order in the last twelve months; and
  - (e) making the order is appropriate for the purpose of facilitating the consideration and implementation of the debtor's proposed scheme of arrangement.
- (3) Where an application for an interim order is pending, the court may stay any action, execution or other legal process against the property or person of the debtor.

### **32. Duration of Interim Protective Order.**

Subject to sections 34(2) and (3), an interim protection order ceases to have effect at the end of fourteen working days after the making of the order.

### **33. Duties of a Debtor.**

Upon the court making an interim order, the debtor shall submit to the proposed supervisor-

- (a) a document setting out the terms of the scheme of arrangement which the debtor is proposing; and
- (b) a statement of his or her affairs containing –
  - (i) particulars of the debtor's creditors, debts and assets; and
  - (ii) any other prescribed information.

### **34. Report to Court.**

- (1) The proposed supervisor shall, while the interim order has effect, give the court a report in writing stating whether, in his or her opinion, a creditors' meeting should consider the individual's proposed scheme of arrangement.
- (2) The court may, on an application made by the individual debtor in the case where the proposed supervisor has failed to submit the report required by subsection (1) –
  - (a) direct that the proposed supervisor be replaced by another named and consenting insolvency practitioner; or
  - (b) direct that the interim order continues or if it has ceased to have effect, be renewed, for a further period as the court may specify in the direction.
- (3) The court may, on the application of the proposed supervisor, extend the period for which the interim order has effect to give him or her more time to prepare the report.

- (4) After considering the report, the court may –
  - (a) order the proposed supervisor to call a creditors’ meeting to consider the proposed scheme of arrangement and for that purpose, extend the period for which the interim order has effect; or
  - (b) discharge the interim protective order if satisfied that –
    - (i) the individual debtor has failed to comply with his or her obligations under section 33; or
    - (ii) for any other reason it would be inappropriate to call a creditors’ meeting to consider the debtor’s proposed scheme of arrangement.

**35. Creditors’ Meeting to Consider Proposed Scheme of Arrangement.**

- (1) Where the court makes an order under section 34(4) (a) the proposed supervisor shall call a creditors’ meeting not later than fourteen working days after making the order.
- (2) The proposed supervisor shall give a general notice of not less than two working days, published in the Gazette and in the official language in a newspaper of wide circulation in South Sudan and written notices of the meeting to each known creditor of the debtor, indicating –
  - (a) the date of the order under section 34(4) (a);
  - (b) the proposed supervisor’s full name; and
  - (c) the proposed supervisor’s physical office address, electronic mail address and daytime telephone number.
- (3) The creditors of an undischarged bankrupt shall include –
  - (a) every creditor of the bankrupt in respect of a bankruptcy debt; and
  - (b) any person who would be a creditor if the bankruptcy had commenced on the day on which notice of the meeting is given.
- (4) The proposed supervisor shall be the chairperson of the creditors’ meeting, which shall consider the proposed voluntary scheme of arrangement and, subject to this section, the meeting shall be conducted in accordance with the Second Schedule.
- (5) Subject to subsection (6), the creditors may resolve to –
  - (a) approve the proposed scheme of arrangement; or
  - (b) approve the proposed scheme of arrangement with modifications, but may not do so unless the debtor consents to each modification.
- (6) Where the proposed scheme of arrangement or the proposed scheme of arrangement as modified, affects the right of a secured creditor to enforce his or her security, the creditors may only approve it with the consent of the secured creditor concerned.

- (7) The creditors' meeting shall not approve any proposed scheme of arrangement or proposed scheme of arrangement as modified, where –
- (a) any preferential debt is not to be paid in priority to the debts that are not preferential debts; or
  - (b) a preferential debt is to be paid in a smaller proportion than is paid to another preferential debt of the same proportion, except with the written consent of the preferential creditor concerned.

### **36. Scheme of Arrangement Order.**

- (1) Immediately after the creditor's meeting under section 35, the proposed supervisor shall report the result of the meeting to court.
- (2) Where the meeting declines to approve a proposed scheme of arrangement, the court may discharge, vary or extend the interim order or make any other appropriate order as it thinks fit and the debtor shall be given only one more opportunity to present a second proposal for scheme of arrangement.
- (3) Where the meeting approves a proposed scheme of arrangement, with or without modifications, the court may –
- (a) make a scheme of arrangement order;
  - (b) make such ancillary directions as it considers necessary; or
  - (c) where the individual is an undischarged bankrupt, give such directions on the conduct of the bankruptcy and the administration of the bankrupt's estate as it considers appropriate, for facilitating the implementation of the scheme of arrangement.

### **37. Notice of Scheme of Arrangement.**

Immediately after the scheme of arrangement order is made, the supervisor shall –

- (a) send to each known creditor a written notice showing that a scheme of arrangement has taken effect; and
- (b) give public notice that a scheme of arrangement has taken effect.

### **38. Effect of Scheme of Arrangement.**

- (1) Subject to subsection (3), a scheme of arrangement binds –
- (a) the individual debtor in respect of whom the scheme of arrangement order is made;
  - (b) the supervisor of the scheme of arrangement; and
  - (c) all the individual debtor's creditors for claims arising on or before the day specified in the voluntary scheme of arrangement.

- (2) Subject to subsection (3), a person bound by a scheme of arrangement shall not –
- (a) make an application for a bankruptcy order or proceed with an application made before the scheme of arrangement became binding on the person;
  - (b) appoint a receiver of any property of the individual debtor or commence or continue with an application to appoint a receiver; or
  - (c) except with the leave of the court and in accordance with the terms as the court may impose –
    - (i) take any other steps to enforce any charge over any of the individual's property; or
    - (ii) commence or continue other proceedings, execution or other legal process or levy distress against the individual debtor or his or her property.
- (3) Subsections (1) and (2) shall not prevent a secured creditor from realising or dealing with charged property except so far as the scheme of arrangement provides for the secured creditor who voted in favour of the resolution resulting in the scheme of arrangement.

### **39. Function of a Supervisor.**

The supervisor shall supervise the implementation of the scheme of arrangement and he or she shall on the day of his or her appointment notify the official receiver in writing of the appointment.

### **40. Creditor's Meetings During Scheme of Arrangement.**

- (1) The supervisor may call a creditors' meeting at any time.
- (2) The supervisor shall call a creditors' meeting if requested in writing by creditors, the value of whose claims against the individual debtor is not less than ten per cent of the value of all claims against the individual.
- (3) Subject to this section, the meeting shall be conducted in accordance with the Second Schedule.
- (4) A creditors' meeting has the power to call for reports on the progress of the scheme of arrangement from the supervisor.

### **41. Remuneration of Supervisor.**

A supervisor is entitled to –

- (a) the remuneration specified in the scheme of arrangement; or
- (b) such remuneration as the court may fix on application of the supervisor where no

remuneration is specified.

**42. Vacation of the Office of Supervisor.**

- (1) The office of supervisor shall become vacant if the person holding office is removed from office under section 48(1) or 195, resigns, dies or becomes unqualified under section 190.
- (2) A supervisor may resign from the office of supervisor by appointing, with the approval of the creditors and the insolvent, another insolvency practitioner as his or her successor and delivering notice of the appointment in writing, to the court.
- (3) The court, on the application of any creditor may review any appointment of a successor to a supervisor made under subsection (2) and if it considers necessary, appoint instead, any other insolvency practitioner.
- (4) Where, as a result of the vacation of office by a supervisor, no person is acting as supervisor, the official receiver shall act temporarily as supervisor and he or she may with the approval of the insolvent and his creditors, appoint an insolvency practitioner as successor.
- (5) A person vacating the office of supervisor shall give information and assistance on the conduct of the voluntary scheme of arrangement as his or her successor may reasonably require.

A person who contravenes sub-section (5) commits an offence.

**43. Variation of Scheme of Arrangement.**

- (1) On application of any person who is bound by a scheme of arrangement order, the court may vary the order in whole or in part and subject to such conditions as it thinks fit.
- (2) Where the supervisor discovers an asset after a scheme of arrangement order has been made, the asset shall be distributed using the scheme of arrangement agreed upon and the variation of the scheme of arrangement.

**44. Termination of Scheme of Arrangement.**

A scheme of arrangement terminates if –

- (a) the court makes an order terminating it under section 45; or
- (b) circumstances specified in the scheme of arrangement deed for terminating it, occur.

**45. Termination of Scheme of Arrangement by the Court.**

- (1) An application for the termination of a scheme of arrangement may be made to the court by any person who is bound by it and where the individual debtor is an undischarged bankrupt, by the trustee of his or her estate.
- (2) Subject to subsection (3), the court may make an order terminating the scheme of arrangement on such terms and conditions as it thinks fit.
- (3) The court may make the order under subsection (2), if it is satisfied that –
  - (a) the supervisor or creditors were given information about the individual’s property, affairs or financial circumstances that was false or misleading or that the information which can reasonably be expected to have been material to creditors in deciding whether to vote in favour of the scheme of arrangement was not given to them;
  - (b) the report made to the court under section 34 contained information which was misleading or omitted information which can reasonably be expected to have been material to creditors in deciding whether to vote in favour or against the scheme of arrangement;
  - (c) a person bound by the scheme of arrangement has failed to comply with his or her obligations under it;
  - (d) the individual debtor has failed to do anything under the scheme of arrangement reasonably required of him or her by the supervisor;
  - (e) the scheme of arrangement cannot be completed without injustice or undue delay;
  - (f) the scheme of arrangement is –
    - (i) oppressive or unfairly prejudicial or unfairly discriminatory against, one or more creditors; or
    - (ii) contrary to the interests of creditors as a whole; or
  - (g) the scheme of arrangement should be terminated for some other reason.
- (4) Except as otherwise ordered by the court, a copy of any application made under this section shall be served on the supervisor not less than five working days before the hearing of the application and the supervisor may appear and be heard at the hearing.

#### **46. Notice on Termination of Scheme of Arrangement.**

Where a scheme of arrangement is terminated, the supervisor shall –

- (a) send notice of the termination to each creditor;
- (b) give public notice of the termination; and
- (c) notify the official receiver in writing.

*Supervision and Enforcement by the Court.*

#### **47. Court Supervision of Supervisor.**

- (1) On the application of a supervisor, the court may give directives on any matter concerning the performance of functions of the supervisor.
- (2) During or after a scheme of arrangement, on the application of –
  - (a) the supervisor of the scheme of arrangement;
  - (b) a creditor of the individual; or
  - (c) any trustee of the individual’s estate,

the court may, review or fix the remuneration of the supervisor at a level which is reasonable in the circumstances.

- (3) Where the amount retained by the supervisor is found by the court to be unreasonable in the circumstances, the court may order the supervisor to refund the amount.
- (4) Subject to subsection (5), a supervisor who acts in accordance with a direction of the court with respect to a matter connected with the exercise of his or her powers or functions is entitled to rely on having so acted as a defence to any claim in respect of anything done or not done in accordance with the directive.
- (5) The court may order that, by reason of the circumstances in which a direction is obtained, the supervisor shall not have the protection given by subsection (4).

#### **48. Enforcement of Supervisor’s Duties.**

- (1) A supervisor, creditor of the individual debtor or a trustee of the individual’s estate may apply to court for an order –
  - (a) relieving the supervisor of the duty to comply, in whole or in part;
  - (b) directing the supervisor to comply to the extent specified in the order; or
  - (c) removing the supervisor from office and appointing someone else as supervisor where the supervisor fails to comply with a duty under the scheme of arrangement, this Act or any other law or any order or direction of the court other than an order to comply made under this section.
- (2) A copy of an application made under this section, if made by a person other than a supervisor, shall be served on the supervisor not less than five working days before the hearing of the application and he or she may appear and be heard at the hearing unless otherwise ordered by the court.
- (3) Where an order is made under subsection (1) (c), the court may make such order as is appropriate for the preservation of the company’s property, including an order requiring the removed supervisor to make available any accounts, records or other

information necessary for that purpose.

- (4) All proceedings relating to any application for an order under this section shall be served on the official receiver who shall keep a copy of the proceedings on a public file indexed by reference to the name of the supervisor concerned.
- (5) In this section, “failure to comply” includes a failure of a supervisor to comply with a duty under -
  - (a) the scheme of arrangement;
  - (b) this Act or any other law; or
  - (c) any order or direction of the court other than an order to comply made under this section.

#### **49. Duties of a Trustee.**

- (1) The fundamental duty of a trustee is to collect, realise as advantageously as is reasonably possible and distribute the bankrupt’s estate in accordance with this Chapter and Chapter II.
- (2) Without prejudice to subsection (1), a trustee shall –
  - (a) take custody and control of the bankrupt’s estate;
  - (b) register in his or her names all land and other assets forming part of the bankrupt’s estate at the making of the bankruptcy order notwithstanding any transactions that may have taken place and any other law;
  - (c) keep the bankrupt’s estate’s money separate from other money held by or under the control of the trustee;
  - (d) keep, in accordance with generally accepted accounting procedures and standards, full account and other records of all receipts, expenditures and other transactions relating to bankruptcy, and retain the accounts and records of the bankruptcy for not less than six years after the bankruptcy ends;
  - (e) permit those accounts and records to be inspected by –
    - (i) any committee of inspection unless the trustee believes on reasonable grounds that inspection would be prejudicial to the bankruptcy; or
    - (ii) if the court so orders, any creditor; and
  - (f) perform any other function or duty specified in this Act.

#### **50. Trustee’s Notice to Creditors.**

- (1) Within four working days after issuing the notice under section 27 or a further period as the court may allow, a trustee shall send written notice to every known creditor explaining the right of any creditor to require the trustee to call a creditors’ meeting under section 75.

- (2) In determining whether to permit an extension of time under subsection (1), the court shall take into account any non-compliance by the bankrupt with section 65.

**51. Bankrupt's Estate.**

- (1) Subject to subsection (2), a bankrupt's estate shall comprise –
- (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy;
  - (b) any property which by virtue of sections 19, 20, 21, 22 and 52 is treated as belonging to or vested in the bankrupt; and
  - (c) a portion of the debtor's salary as shall be determined by the court.
- (2) Subsection (1) does not apply to –
- (a) tools, books and other items of equipment which are necessary to the bankrupt for use personally by him or her in his or her employment, business or vocation;
  - (b) clothing, beddings and the provisions which are necessary for satisfying the basic domestic needs of the bankrupt and his or her family;
  - (c) matrimonial home where the bankrupt and his or her family reside;
  - (d) property held by the bankrupt in trust for any other person; and
  - (e) any other property that the court may exempt.

**52. Property Acquired After Commencement of Bankruptcy.**

- (1) Subject to subsections, (2) and (3) of this section, a trustee may by notice in writing claim for the bankrupt's estate any property, which has been acquired by or has devolved upon the bankrupt since the commencement of the bankruptcy.
- (2) Where, before or after service of a notice under subsection (1)-
- (a) a person acquires property or enters into a transaction in respect of property in good faith, for value and without notice of the bankruptcy; or
  - (b) a banker enters into a transaction in good faith and without notice of the bankruptcy,
- the trustee is not in respect of that property or transaction, entitled under this section to any remedy against that person or any person whose title to any property derives from that person.
- (3) Except with the leave of the court, a notice shall not be served under subsection (1), after thirty working days after the day on which it first came to the knowledge of the trustee that the property in question had been acquired by or had devolved upon, the bankrupt.
- (4) On the application of the trustee, the court may make an order claiming for the

bankrupt's estate, the income of the bankrupt during the period for which the order is in force as may be specified.

- (5) Where at any time after the commencement of the bankruptcy and before the final distribution under section 78, including after discharge, any property is acquired by or devolves upon the bankrupt or where there is an increase of the bankrupt's income, the bankrupt shall immediately give the trustee notice of the property or of the increase in income.
- (6) A person who contravenes subsection (5) commits an offence.

**53. Charge on Bankrupt's Home.**

Subject to any law to the contrary, where any property consisting of an interest in a dwelling house which is occupied by the bankrupt or by his or her spouse(s), former spouse or dependant children is comprised in the bankrupt's estate and the trustee is, for any reason, unable for the time being to realise that property, the trustee may apply to the court for an order imposing a charge on the property for the benefit of the bankrupt's estate.

**54. Property Held on Trust for Another Person.**

Any property, which the bankrupt holds on trust for another person, shall not form part of the bankrupt's estate.

**55. Money Due to the Bankrupt.**

- (1) The court may, on application by a trustee, order that any money due to the bankrupt or any money to become payable to the bankrupt be assigned or charged to or in favour of the trustee.
- (2) Where any assignment or charge is made under subsection (1) a person who pays the trustee is discharged.

**56. Joint Contractual Liability.**

Where a bankrupt is jointly liable under a contract with another person, that person may sue or be sued on the contract without the bankrupt being joined as a party to the proceedings.

*General Powers of Trustee.*

**57. Trustee's Power to Obtain Documents.**

- (1) A trustee may, subject to subsection (2), require any person, including the bankrupt, having possession of books or documents which relate to the bankrupt's estate or affairs, including any which would be privileged from disclosure in any proceedings, to deliver them to the trustee.
- (2) A person shall not withhold a document of the company from a trustee on the ground that possession of the document creates a charge over property of the bankrupt.
- (3) Subject to subsection (4), production of a document to the trustee does not prejudice the existence or priority of the charge and the trustee shall make the document available to any person otherwise entitled to it for the purpose of dealing with or realising the charge or the secured property.
- (4) A person shall not enforce a lien over any document of the bankrupt in respect of a debt for services rendered to the bankrupt before the commencement of the bankruptcy, but the debt shall be a preferential claim under section 16 to the extent prescribed at the commencement of the bankruptcy.

**58. Trustee's Power to Allow Bankrupt to Manage Property.**

A trustee may appoint the bankrupt –

- (a) to oversee the management of the bankrupt's estate or any part of it;
- (b) to carry on the bankrupt's business for the benefit of his or her creditors; or
- (c) in any other respect, to assist in administering the estate in a manner and on terms as the trustee may direct.

**59. Trustee's Power to Disclaim Onerous Property.**

- (1) A trustee may disclaim any onerous property, even if the trustee has taken possession of it, tried to sell it or otherwise exercised rights of ownership.
- (2) Where a trustee makes a disclaimer he or she shall, with fifteen working days, send a written notice of the disclaimer to every person whose rights are, to his or her knowledge affected by the disclaimer.
- (3) A disclaimer under this section –
  - (a) brings to an end the rights, interest and liabilities of the bankrupt, his or her estate and trustee in respect of the property disclaimed; but
  - (b) does not, except so far as necessary release the bankrupt, his or her estate and trustee from any liability or affect the rights or liabilities of any other person.
- (4) For the purposes of this section "onerous property" means –
  - (a) any unprofitable contract; or

- (b) any other property of the bankrupt which is not capable of being sold or not readily capable of being sold or which may give rise to a liability to pay money or perform any other onerous act.
- (5) A person suffering loss or damage as a result of a disclaimer made under this section may –
  - (a) apply to the court for an order that the disclaimed property be delivered to or vested in that person; or
  - (b) taking into account the effect of any order made by the court under paragraph (a), claim as a creditor in the estate for the amount of the loss or damage.

**60. Trustee’s Power of Sale.**

- (1) A trustee may, on terms he or she considers fit, after reasonable consideration –
  - (a) sell the whole or part of the bankrupts property by public auction;
  - (b) rescind or vary a contract for the sale of the bankrupts property; or
  - (c) surrender or transfer shares of a bankrupt.
- (2) A trustee shall not sell any of the bankrupts property until after the date fixed for the first creditors meeting unless –
  - (a) where the property is perishable or is likely to fall in value;
  - (b) the trustee is of the opinion that the sale of the property might be prejudiced by delay; or
  - (c) expenses will be incurred by the delay, and before selling the property, the trustee consults the creditor.

**61. Title of Purchaser from Trustee.**

The purchaser of the bankrupt’s property for value from a trustee acquires a good title and shall not be challenged except on grounds of fraud.

**62. Official Name of Trustee.**

The official name of a trustee in bankruptcy shall be “The Trustee of the Property of a Bankrupt”, with an insertion of the name of the bankrupt and by that name the trustee may exercise any of the trustee’s functions, powers and duties under this Act.

**63. Vacation of Office by Trustee.**

- (1) The office of trustee shall become vacant if the person holding office is removed from office under section 81 or 192, resigns, dies or becomes unqualified under section 190.

- (2) The court, on the application of any creditor or the bankrupt may review the appointment of a successor to a trustee made under this section and if considers necessary, may appoint instead any other insolvency practitioner or the official receiver.
- (3) Where as the result of the vacation of office by a trustee, there is no person acting as trustee, the official receiver shall act as trustee until a successor is appointed under subsection (2).
- (4) A person vacating the office of trustee shall give such information and assistance in the conduct of the bankrupt as the person's successor reasonably requires.
- (5) Any person who unreasonably refuses to give the information and assistance under subsection (5) commits an offence

#### **64. Duties of a Bankrupt.**

- (1) The bankrupt shall –
  - (a) give to the trustee information relating to his or her affairs;
  - (b) appear before the trustee at such times;
  - (c) assist the trustee in the realization of the property and distribution of the property to the creditors;
  - (d) on demand deliver to the trustee all property that is divisible amongst creditors;
  - (e) as soon as is practicable after acquisition of property notify the trustee; and
  - (f) do all such other things,as the trustee may reasonably require for the purposes of carrying out his or her functions under this Act.

A bankrupt who contravenes subsection (1) commits an offence.

#### **65. Statement of Affairs.**

- (1) Within twenty working days after the issue by the trustee of the notice under section 27 or a further period as the trustee or the court may allow, the bankrupt shall submit to the trustee a statement of his or her affairs including –
  - (a) particulars of the bankrupt's creditors, debts and assets; and
  - (b) such other information as may be prescribed.
- (2) A bankrupt who has filed a statement of affairs under subsection (1) may at any time file additional or amended statement.

A bankrupt who contravenes subsection (1) commits an offence.

**66. Compliance Order.**

Where a person does not comply with a requirement of the trustee under sections 57, or 64, the court may, on the application of the trustee, order the person to comply and may, after reasonable consideration, make ancillary orders as it thinks fit.

**67. Public Examination of Bankrupt.**

- (1) A trustee may at any time, in any case that he or she considers necessary, apply to the court for an order for the public examination of a bankrupt.
- (2) A trustee may make an application for the public examination if requested in writing to do so by any creditor who has a claim in the bankruptcy.
- (3) On an application under subsections (1) and (2), the court shall direct that a public examination of the bankrupt be held on a day appointed by the court and the bankrupt shall attend on that day and be publicly examined on his or her affairs, dealings and property.
- (4) The following persons may take part in the public examination of the bankrupt and may question him or her on his or her affairs, dealings and property and the causes of his or her failure to pay debts-
  - (a) the official receiver;
  - (b) the trustee;
  - (c) any person who has been appointed as special manager of the bankrupt's estate or business; and
  - (d) any creditor of the bankrupt who has claimed in the bankruptcy.

**68. Inquiry into Bankrupt's Dealings and Property.**

- (1) The court may require any person referred to in subsection (2) to submit an affidavit to the court containing an account of his or her dealings with the bankrupt or to produce any documents in his or her possession or under his or her control relating to the bankrupt or the bankrupt's dealings, affairs or property.
- (2) This section applies to –
  - (a) any person known or believed to have any property comprised in the bankrupt's estate in his or her possession or to be indebted to the bankrupt; or
  - (b) any person appearing before the court to give information concerning the bankrupt or the bankrupt's dealings, affairs or property.

**69. Search and Seizure.**

- (1) Where a bankruptcy order has been made or applied for and the court is satisfied, on the application of the trustee or interim receiver that there is, in or on any place or thing, any property, records or other documents in respect of which an offence under section 83 has been or is about to be committed, the court may issue a warrant, with reasonable conditions as it may deem fit, authorising the person named in the warrant to search for and seize property or documents in or on that place or thing and deliver them to the trustee.
- (2) Subject to any conditions specified in the warrant, the person named in the warrant may –
  - (a) enter and search a place or thing at anytime which is reasonable in the circumstances, within fourteen days after the date of issue of the warrant;
  - (b) use such assistance as is reasonable in the circumstances; and
  - (c) use reasonable force in the circumstances, to enter or break open anything in or on the place or thing.

#### **70. Termination of Bankruptcy.**

- (1) Bankruptcy terminates –
  - (a) when a bankrupt is discharged from bankruptcy under section 71; or
  - (b) when the bankruptcy order is annulled under section 73.
- (2) The court shall not grant any application for withdrawal under subsection (1)(c) if it is proved to the satisfaction of the court that rights and interests of other creditors are likely to be prejudiced.

#### **71. Discharge.**

- (1) Subject to subsection (2), a bankrupt shall be discharged from bankruptcy when the court on an application by the bankrupt makes an order discharging the bankrupt.
- (2) The court shall, while considering a bankrupt's application for discharge, take into consideration the official receiver's report on the bankruptcy and the conduct of the bankrupt during the bankruptcy proceedings and any other matters the court may consider pertinent.
- (3) The court may, as a condition for his or her discharge, require a bankrupt to consent to a decree being entered against him or her in favour of the official receiver or trustee for –
  - (a) any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of discharge; or
  - (b) the balance or part of any balance of the debts, to be paid out of the future earnings of the bankrupt or property acquired after the

bankruptcy, in such manner and subject to such conditions as the court may direct.

- (4) Execution shall not be issued on the decree without leave of court which leave may be given on proof that the bankrupt has since his or her discharge acquired property or income available towards the payment of his or her debts.

## **72. Power of Court to Reverse a Discharge.**

- (1) The court may on application by the trustee or creditor as it considers necessary, reverse a discharge order.
- (2) Subject to subsections (2), (3) of this section and section 71(3), a discharge order releases a bankrupt from all bankruptcy debts.
- (3) A discharge order does not affect-
  - (1) the functions of the trustee which remain to be carried out;
  - (2) the operation of this Act, for the purposes of carrying out the functions of a trustee;
  - (3) the right of any creditor of the bankrupt to claim in the bankruptcy for any debt from which the bankrupt is released; or
  - (4) the right of any secured creditor of the bankrupt to enforce his or her security for the payment of a debt from which the bankrupt is released.
- (4) A discharge order does not release the bankrupt from –
  - (a) any bankruptcy debt which he or she incurred or forbearance which was secured by means of any fraud or fraudulent breach of trust to which he or she was a party;
  - (b) any liability in respect of a fine imposed for an offence; or
  - (c) any other bankruptcy debts as the court may in its absolute discretion prescribe at the making of an order of discharge.
- (5) A discharge order does not release any other person, whether as partner or co-trustee of the bankrupt or otherwise other than the bankrupt from any liability incurred, from which the bankrupt is released by discharge or from any liability as surety for the bankrupt.

## **73. Annulment, Revocation or Setting Aside of Bankruptcy Order.**

- (1) The court may annul, revoke or set aside a bankruptcy order, whether or not the bankrupt has been discharged from the bankruptcy, or if at any time, it appears to the court that, basing on any grounds existing at the time the order was made, the order ought not to have been made.

- (2) The court may annul, revoke or set aside a bankruptcy order if it is satisfied that –
  - (a) the bankruptcy order should not have been made;
  - (b) the bankrupt's debts have been fully paid or satisfied;
  - (c) the liability of the bankrupt to pay his or her debts should be revived because there has been a substantial change in the bankrupt's financial circumstances since the date of the bankruptcy order; or
  - (d) the court has approved a scheme of arrangement made under section 36.
  
- (3) Where the court annuls, revokes or sets aside a bankruptcy order-
  - (a) the property of the bankrupt shall vest in a person appointed by the court or, in default of any appointment, it shall revert to the bankrupt on terms as the court may direct; and
  - (b) any sale or other disposition of property, payment made or other thing duly done by the trustee or other person acting under the trustee's authority or by the court is valid.
  
- (4) In order to remove any legal disqualification on account of bankruptcy which may be removed if the bankrupt obtains from the court a discharge and a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part, the court may, if it thinks fit, grant such a certificate and a refusal to grant the certificate shall be subject to appeal.
  
- (5) Where the court refuses to grant a certificate under subsection (3), the bankrupt may appeal to a higher court.

#### **74. Consequences of Bankruptcy.**

- (1) Where a debtor is adjudged bankrupt, he or she shall be disqualified from –
  - (a) being appointed or acting as a judge of any court in South Sudan; or
  - (b) being elected to or holding or exercising the office of the President, a member of Parliament, Minister, a member of a local government, board, authority or any other government body, or
  - (c) being appointed to an office in the public service.
  
- (2) Where a person holding the office of justice of the peace or any other public office is adjudged bankrupt, the office shall immediately become vacant.
  
- (3) The disqualifications to which a bankrupt is subject under this section shall not apply where –
  - (a) the adjudication of bankruptcy against the individual debtor is annulled;
  - (b) a period of five years elapses, from the date of discharge of the bankrupt; or
  - (c) the individual debtor obtains from the court his or her discharge with a certificate to the effect that the bankruptcy was caused by misfortune without

any misconduct on his or her part.

- (4) The court may grant or withhold the certificate in subsection 3(c) as it considers necessary, but any refusal to grant the certificate shall be subject to appeal.

*Rights of Creditors.*

**75. Creditors' Meetings During Bankruptcy.**

- (1) Subject to subsection (3), a trustee shall immediately call a creditors' meeting if so requested in writing by any two or more creditors to vote on a proposal that a committee of inspection be appointed to act with the trustee.
- (2) The trustee shall give not less than five working days notice of the meeting, which, subject to this section, shall be conducted in accordance with the Second Schedule.
- (3) A trustee may decline any request to call a meeting on the ground that –
  - (a) the request is frivolous or vexatious;
  - (b) the request was not made in good faith; or
  - (c) the costs of calling a meeting would be out of proportion to the value of the bankrupt's estate,and the decision of a trustee to decline a request to call a creditors' meeting may be reviewed by the court on the application of any one or more creditors.
- (4) The members of a committee of inspection chosen by any creditors' meeting shall take office immediately.

**76. Committee of Inspection.**

- (1) A committee of inspection shall consist of not less than three persons who are creditors or persons holding general powers of attorney from creditors or authorised directors of companies which are creditors of the bankrupt.
- (2) A committee of inspection has the power to –
  - (a) call for reports on the progress of the bankruptcy from the trustee;
  - (b) call a creditors' meeting;
  - (c) apply to the court for any order under sections 80 or 81 ; and
  - (d) assist the trustee as appropriate in the conduct of the bankruptcy.
- (3) Unless the court orders otherwise, the trustee shall pay the reasonable advocate and own client costs incurred by a committee of inspection in exercising its powers under subsection (2) (c) and those costs shall be taken to be expenses properly incurred in

the bankruptcy.

- (4) The following shall apply to proceedings of a committee of inspection -
- (a) the committee shall meet at least once a month and the trustee or any member of the committee may call a meeting of the committee as and when he or she considers necessary;
  - (b) the committee shall act by a majority of its members present at a meeting;
  - (c) a member of a committee may resign from his or her office in writing signed by him or her trustee;
  - (d) where a member of the committee appointed by the creditors becomes bankrupt, compounds, arranges with his or her creditors or is absent from five consecutive meetings of the committee without leave of the other members who also represent the creditors, his or her office shall immediately become vacant;
  - (e) a member of the committee may be removed by an ordinary resolution at a meeting of creditors for which fifteen day's notice stating the object of the meeting is given;
  - (f) where there is a vacancy in the committee, the trustee shall immediately call a meeting of creditors to fill the vacancy and the meeting may, by resolution, re-appoint the same person or appoint another creditor to fill the vacancy and the meeting may, by resolution, re-appoint another creditor or contributory to fill the vacancy unless the trustee is of the opinion that it is not necessary to fill the vacancy, in which case he or she may apply to the court for an order that the vacancy shall not be filled under the circumstances specified in the order; and
  - (g) where there is a vacancy, the remaining members of the committee, if not less than two, may continue to act as committee of inspection.

*Distribution of Bankrupt's Estate.*

**77. Declaration and Distribution of Dividends.**

- (1) Whenever the trustee has sufficient funds in hand for the purpose, the trustee shall, in accordance with this section and sections 78 and 79 and subject to retention of the sums which may be necessary for the payment of expenses of the bankruptcy, declare and distribute dividends among the creditors in respect of the bankruptcy debts which they have respectively claimed and the trustee has admitted.
- (2) The trustee shall give not less than five working days notice published in the official language in a widely circulating newspaper in South Sudan of his or her intention to declare and distribute a dividend.
- (3) A trustee shall declare a dividend by sending to all known creditors a statement of –
  - (a) the dividend;
  - (b) how it is proposed to distribute it; and
  - (c) any other prescribed matter.

- (4) In the calculation and distribution of a dividend the trustee shall make provision for –
  - (a) any bankruptcy debts which appear to be due to persons who, by reason of the distance of their place of residence, may not have had sufficient time to submit and establish their claims;
  - (b) any bankruptcy debts which are the subject of claims which have not yet been determined; and
  - (c) any disputed claims.
- (5) A creditor whose debt has not been admitted before the declaration of any dividend is entitled to be paid out of any money in the hands of the trustee, any dividend he or she may not have received, before that money is applied to the payment of any future dividend, but such a creditor is not entitled to disturb the distribution of any dividend declared before his or her debt was admitted where that creditor has not participated in the distribution.

## **78. Final Distribution.**

- (1) When the trustee has realised all the bankrupt's estate or so much of it as can in the trustee's opinion, be realised without needlessly protracting the trusteeship, he or she shall give written public notice and individual debtor notice to all known creditors-
  - (a) of his or her intention to declare a final dividend, or
  - (b) that no dividend or further dividend shall be declared.
- (2) The notice under subsection (1) shall-
  - (a) include a requirement that claims against the bankrupt's estate are to be made by a date called "the final date", specified in the notice, being not less than twenty working days after the giving of the notice; and
  - (b) in the case of individual notices, be accompanied by a report of the trustee's administration of the bankrupt's estate, including final bankruptcy accounts.
- (3) The court may, on the application of any creditor, postpone the final date.
- (4) Immediately after the final date, the trustee shall –
  - (a) defray any outstanding expenses of the bankruptcy out of the bankrupt's estate; and
  - (b) if the trustee intends to declare a final dividend, declare and distribute that dividend without regard to the claim of any person in respect of a debt not already admitted.
- (5) Within twenty working days from the date of the declaration and distribution of a final dividend, the trustee shall make a report to the official receiver stating that the trustee has realized all the bankrupt's estate or so much of it as can in the trustee's opinion be

realized without needlessly protracting the trusteeship.

- (6) The report under subsection (5) shall include all the final bankruptcy accounts.

**79. Second or Subsequent Bankruptcy.**

Where –

- (a) a second or subsequent bankruptcy order is made against a discharged bankrupt; or  
(b) an order is made for the administration in bankruptcy of the estate of a deceased bankrupt,

any property which immediately before the subsequent order was in the bankrupt's estate, shall vest in the trustee in the subsequent bankruptcy or administration in bankruptcy.

*Supervision and Enforcement by the Court.*

**80. Court Supervision of Trustee.**

- (1) On the application of the trustee, any member of the committee of inspection, the official receiver or with the leave of the court, any creditor or the bankrupt, the court may-
- (a) give directions in relation to any matter arising in connection with the bankruptcy;
- (b) confirm, reverse, vary or modify any act or decision of the trustee;
- (c) order an audit of the accounts of the bankrupt;
- (d) order the trustee to produce the accounts and records of the bankruptcy for audit and to provide the auditor with information concerning the conduct of the bankruptcy as the auditor may request;
- (e) in respect of any period, review or fix the remuneration of the trustee at a level which is reasonable in the circumstances and to the extent that an amount retained by the trustee is found by the court to be unreasonable in the circumstances, order the trustee to refund the amount; or
- (f) declare whether or not the trustee was validly appointed or validly assumed custody or control of any property; of the bankruptcy.
- (2) The powers of the court in subsection (1) are in addition to any other powers the court may exercise in its jurisdiction relating to trustees under this Act, and may be exercised in relation to any matter occurring either before or after the commencement of the bankruptcy and whether or not the trustee has ceased to act as trustee when the application or the order is made.
- (3) Subject to subsection (4), a trustee who has acted in accordance with a direction of the court in the exercise of his or her powers or functions, shall be entitled to rely on having so acted as a defence to any claim for anything done or not done in accordance

with the direction.

- (4) A court may order that, by reason of the circumstances in which a direction is obtained, the trustee shall not have the protection under subsection (3).

## **81. Enforcement of Trustee's Duties.**

- (1) Where a trustee fails to comply with any of his or her duties, a court may, on such terms and conditions as it sees fit –
  - (a) relieve the trustee of the duty to comply, wholly or in part;
  - (b) without prejudice to any other remedy which may be available in respect of any breach of duty by the trustee, order the trustee to comply to the extent specified in the order; or
  - (c) remove the trustee from office.
- (2) An application for an order under this section may be made by a trustee, a committee of inspection, any creditor, a receiver appointed in respect of any property of the bankrupt; or the official receiver.
- (3) Except as otherwise ordered by the court, a copy of any application made under this section shall be served on the trustee not less than five working days before the hearing of the application and the trustee may appear and be heard at the hearing.
- (4) Where an order is made under subsection (1) (c), the court may make such order as is appropriate for the preservation of the bankrupt's estate, including an order requiring the removed trustee to make available any accounts, documents or other information necessary for that purpose.
- (5) All proceedings relating to any application for an order under this section shall be served on the official receiver who shall keep a copy of the proceedings on a public file indexed by reference to the name of the trustee concerned.
- (6) In this section "failure to comply" means failure of a trustee to comply with any relevant duty arising under –
  - (a) this or any other law or rule of law or rules of the court; or
  - (b) any order or direction of the court other than an order made under this section.

### *Bankruptcy Offences.*

## **82. Absconding etc.**

- (1) A bankrupt or debtor in respect of whom a bankruptcy order is made shall not –

- (a) leave or attempt to leave South Sudan without the permission of the court; conceal or remove property with the intention of preventing or delaying the assumption of custody or control by the trustee;
- (b) destroy, conceal or remove documents with the intent of defrauding or concealing the state of his or her affairs; or
- (c) obstruct the trustee in his or her duties.

A person who acts in contravention of subsection (1) commits an offence.

**83. Bankrupt not to Obtain Credit or Engage in Business Without Disclosing Bankruptcy.**

- (1) A bankrupt shall not –
  - (a) alone or jointly with any other person, obtain credit to the extent of the prescribed amount or more without informing the person from whom he or she obtains it that he or she is an un-discharged bankrupt; or
  - (b) engage, directly or indirectly, in any business under a name other than that in which he or she was adjudged bankrupt without disclosing to all persons with whom he or she enters into any business transaction the name in which he or she was so adjudged.

A person who contravenes subsection (1) commits an offence.

**84. Failure to Keep Proper Accounts of Business.**

- (1) Where a bankrupt has been engaged in any business within two years before the petition, he or she commits an offence if he or she has not kept accounting records that give a true and fair view of the business' financial position and explain its transactions.
- (2) The bankrupt does not commit an offence under subsection (1), if he or she proves that in the circumstances in which he or she carried on business, the omission was honest and excusable.

**CHAPTER IV  
CORPORATE INSOLVENCY.**

*Winding up.*

**85. Application of Winding up Provisions to Foreign Companies.**

- (1) Sections 86 to 125 and the Third Schedule shall apply to the winding up of foreign companies.

- (2) For the purposes of this Chapter “company” includes a foreign company.

**86. Modes of Winding up.**

The winding up of a company may be –

- (a) by the court; or
- (b) subject to the supervision of the court.

**87. Government Bound by Certain Provisions.**

The provisions of this Chapter relating to the remedies against the property of a company, the priority of debts and the effect of a scheme of arrangement with creditors shall bind the Government.

**88. Liability as Contributories of Present and Past Members.**

- (1) In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to any amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of subsection (2) and the following qualifications –
- (a) a past member shall not be liable to contribute if he or she has ceased to be a member for one year or upwards before the commencement of the winding up;
  - (b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;
  - (c) a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;
  - (d) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member;
  - (e) in the case of a company limited by guarantee, no contribution shall, subject to the provisions of subsection (2), be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;
  - (f) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;
  - (g) a sum due to any member of a company, in his character of a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and

any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

- (2) In the winding up of a limited company, any director or manager, whether past or present, whose liability is, under the provisions of this Act, unlimited, shall, in addition to his liability, contribute as an ordinary member, be liable to make a further contribution as if he or she were at the commencement of the winding up a member of an unlimited company.
- (3) Notwithstanding subsection (2) –
  - (a) a past director or manager shall not be liable to make such further contribution if he or she has ceased to hold office for a year or upwards before the commencement of the winding up;
  - (b) a past director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he or she ceased to hold office;
  - (c) subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company and the costs, charges and expenses of the winding up.
- (4) In the winding up of a company limited by guarantee every member of the company shall be liable, in addition to the amount undertaken to be contributed by him or her to the assets of the company in the event of its being wound up.

## **89. Nature of Liability of Contributory.**

- (1) The liability of a contributory shall create a debt accruing due from him or her at the time when his liability commenced, but payable at the time when calls are made for enforcing the liability.
- (2) For purposes of this section “*contributory*” means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

## **90. Contributories in Case of Death of Member.**

- (1) Where a contributory dies before or after he or she has been placed on the list of contributories, his or her personal representatives shall be liable in due course of administration to contribute to the assets of the company in discharge of his or her liability and shall be contributories accordingly.

- (2) Where the personal representatives makes default in paying any money ordered to be paid by them, proceedings may be taken for administering the estate of the deceased contributory and for compelling payment thereof of the money due.

**91. Contributories in Case of Bankruptcy of Member.**

Where a contributory becomes bankrupt, or assigns his or her debt for the benefit of his or her creditors, either before or after he or she has been placed on the list of contributories –

- (a) his or her trustee in bankruptcy shall represent him or her for all the purposes of the winding up, and shall be a contributory accordingly, and may be called on to admit to his or her assets in due course of law, any money due from the bankrupt in respect of his or her liability to contribute to the assets of the company; and
- (b) there may be proved against the estate of the bankrupt the estimated value of his or her liability to future call as well as calls already made.

*Winding up Subject to Supervision of Court.*

**92. Power to Order Winding up Subject to Supervision.**

Where a company passes a resolution for voluntary winding up, the court may make an order that the voluntary winding up shall continue, subject to the supervision of court and with the liberty for the creditors, contributories or other interested persons, to apply to court and generally on such terms and conditions as the court may think just.

**93. Effect of Application for Winding up Subject to Supervision.**

An application for the continuance of a voluntary winding up subject to the supervision of the court shall, for the purpose of giving jurisdiction to the court over actions, be taken to be a petition for winding up by the court.

**94. Power of the Court to Appoint or Remove Liquidators.**

- (1) Where an order is made for a winding up subject to supervision, the court may by that order or any subsequent order appoint an additional liquidator.
- (2) A liquidator appointed by the court under this section shall have the same powers, be subject to the same obligations and in all respects be in the same position as if he or she had been duly appointed under this Act with respect to the appointment of liquidators in a voluntary winding up.
- (3) The court may remove any liquidator appointed by the court or any liquidator acting under the supervision order and fill any vacancy occasioned by the removal or by

death or resignation.

**95. Effect of Supervision Order.**

- (1) Where an order is made for winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the court, exercise all his or her powers without the sanction or intervention of the court, in the same manner as if the company were being liquidated voluntarily under the Companies Act.
- (2) Where the order for winding up subject to supervision is made in relation to a creditors' voluntary winding up in which a committee of inspection has been appointed under the Companies Act, the order shall be taken to be an order for winding up by the court for the purposes of this Act.

*Winding up by Court.*

**96. Commencement of Winding up by the Court.**

- (1) An application for winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors, a director of the company, a shareholder of the company, a creditor of the company, a contributory, or the official receiver or any of those parties, together or separately.
- (2) Where, before the presentation of a petition for the winding up of a company by the court, a resolution is passed by the company for voluntary winding up, the winding up of the company shall be deemed to commence when the resolution is passed and unless the court, on proof of fraud or mistake thinks fit and directs, all proceedings of the voluntary winding up shall be taken to be valid.
- (3) In all other cases, winding up of a company by the court shall be taken to commence at the time of presentation of the petition for winding up.

**97. Circumstances in Which the Court May Appoint Liquidator.**

- (1) Subject to subsection (2), the court may appoint a liquidator on the application of the company, a director of the company, a shareholder of the company, a creditor of the company, a contributory, or the official receiver.
- (2) The court may make an order under subsection (1), if it is satisfied that the company is unable to pay its debts within the meaning of section 8.
- (3) On hearing a winding up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it

thinks fit, but the court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.

**98. Provisional Liquidator.**

- (1) The order made under section 97 shall appoint the official receiver or any insolvency practitioner the court considers fit as provisional liquidator of the company, for the preservation of the value of the assets owned or managed by the company.
- (2) The provisional liquidator shall, have the powers to sell or dispose of any perishable and any other goods, the value of which is likely to diminish if they are not disposed of, unless court limits the powers or places conditions on the exercise of the powers.

**99. Notice of Winding up.**

The provisional liquidator shall, within fourteen days after the commencement of the winding up –

- (a) give public notice of the date of commencement of the winding up; and
- (b) call a shareholders' meeting.

**100. Notice of Appointment and of Winding up.**

- (1) The liquidator shall, within five working days after his or her appointment –
  - (a) give notice in the Gazette and a newspaper of wide circulation of –
    - (i) the date of commencement of the winding up;
    - (ii) the liquidator's full name;
    - (iii) the liquidator's physical office address and daytime telephone number;and
  - (b) deliver to the official receiver a copy of the notice.
- (2) A liquidator shall give notice of the winding up –
  - (a) on every invoice, order for goods or business letter issued by or on behalf of the company on which the company's name appears stating after the company's name the words "in winding up"; and
  - (b) otherwise, when entering into any transaction or issuing any document by or on behalf of the company.
- (2) Failure to comply with subsection (2) does not affect the validity of a document issued by or on behalf of the company.
- (3) A liquidator who does not comply with subsection (2) commits an offence.

## **101. Effect of Winding up.**

- (1) At the commencement of winding up –
  - (a) the liquidator shall take custody and control of the company's property;
  - (b) the officers of the company shall remain in office but cease to have any powers, functions or duties other than those required or permitted to be exercised by this Act;
  - (c) proceedings, execution or other legal process shall not be commenced or continued and distress shall not be levied against the company or its property;
  - (d) shares of the company shall not be transferred or other alteration made in the rights or liabilities of any shareholder and a shareholder shall not exercise any power under the company's memorandum and articles of association or the Companies Act; and
  - (e) the memorandum and articles of association of the company shall not be altered, except that the liquidator may change the company's registered office or registered postal address.
- (2) Nothing in this Act shall prevent the exercise of a power of enforcement of a charge over property, subject to compliance with section 15.

## **102. Notification That a Company is in Liquidation.**

- (1) Where a company is being wound up every invoice, order for goods or business letter issued by or on behalf of the company or a liquidator of the company or a receiver or manager of the property of the company, being a document on or in which the name of the company appears, shall have the words "in liquidation" added after the name of the company where it first appears therein.
- (2) Where default is made in complying with this section, the company, and every officer of the company or liquidator and every receiver or manager who knowingly and willfully authorizes or permits the default, commits an offence.

## **103. Special Manager of Company.**

- (1) The liquidator may appoint a suitable person to be special manager of the company.
- (2) The appointment under subsection (1) may be made by the liquidator in any case where it appears to him or her that the nature of the company's business or the interests of the creditors generally, require the appointment of another person to manage the company.
- (3) A special manager appointed under this section shall have the powers and duties as may be given by the liquidator.

**104. Fundamental Duties of a Liquidator.**

- (1) The fundamental duties of a liquidator are to take, in a reasonable and expeditious manner, all steps necessary to –
  - (a) collect;
  - (b) realize as advantageously as reasonably possible; and
  - (c) distribute,the assets or the proceeds of the assets of the company in accordance with this Chapter and Chapter VII.
- (2) The duties in subsection (1) are without prejudice to the liquidator’s power in section 127 to appoint a provisional administrator where the liquidator is of the view that the appointment is likely to result in a more advantageous realization of the company’s assets than would be effected in a winding up.

**105. General Duties of Liquidator.**

Without prejudice to section 104, a liquidator shall have all the other functions and duties specified in this Act and shall in particular –

- (a) take custody and control of all the company’s assets;
- (b) register his or her interest in all land and other assets belonging to the company notwithstanding any other;
- (c) keep company money separate from other money held by or under the control of the liquidator;
- (d) keep, in accordance with generally accepted accounting procedures and standards, full accounts and other records of all receipts, expenditure and other transactions relating to the winding up and retain the accounts and records of the winding up and of the company for not less than six years after the winding up ends; and
- (e) permit those accounts and records and the accounts and records of the company, to be inspected by any committee of inspection unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the winding up; or where the court so orders, any creditor or shareholder.

*General Provisions Relating to Winding up.*

**106. General Powers of a Liquidator.**

A liquidator shall have all the powers necessary to carry out the functions and duties of liquidator under this Act and may delegate the powers to his or her appointed agent.

### **107. Liquidators Preliminary Report.**

- (1) Before the expiry of forty working days after the commencement of the winding up or during a longer period as the court may allow, a liquidator shall prepare a preliminary report showing –
  - (a) the state of the company's affairs, proposals for conducting the winding up and the estimated date of its completion; and
  - (b) the right of any creditor or shareholder to require the liquidator to call a creditors' meeting under section 120,and shall make the report available at his or her address for inspection by every known creditor, shareholder or contributory.
- (2) The liquidator shall publish the notice given under subsection (1) in the official language in a newspaper of wide circulation in South Sudan and shall send a copy of the report to the Registrar.

### **108. Liquidator's Interim Report.**

- (1) A liquidator shall, within twenty working days after the end of every six months during the winding up, make an interim report and give public notice of the conduct of the winding up during the preceding six months period and the liquidator's further proposals for the completion of the winding up.
- (2) The liquidator shall make the report available at his or her address for inspection by every known creditor, shareholder or contributory.
- (3) The liquidator shall publish the notice given under subsection (1) in the official language in a newspaper of wide circulation in South Sudan and shall send a copy of the report to the Registrar and the official receiver.

### **109. Liquidator's Final Report.**

- (1) Before completion of the winding up, a liquidator shall give public notice of –
  - (a) the final report, final accounts and statement referred to in section 119; and
  - (b) the grounds on which a creditor or shareholder may object to the removal of the company from the register under the Companies Act.
- (2) The liquidator shall make the report available at his or her address for inspection upon payment of a prescribed fee, by every known creditor, shareholder or contributory.
- (3) The liquidator shall publish the notice given under section (1) in the official language in a newspaper of wide circulation in South Sudan and shall send a copy of the report

to the Registrar and the official receiver.

#### **110. Liquidator's Power to Obtain Documents.**

- (1) A liquidator may, subject to subsection (4), require a director, secretary or shareholder of the company or any other person in possession of books or documents of the company, to deliver them to the liquidator.
- (2) A person shall not withhold a document of the company from the liquidator on the ground that possession of the document creates a charge over property of the company.
- (2) Subject to subsection (4), production of a document to the liquidator shall not prejudice the existence or priority of the charge and the liquidator shall make the document available to any person entitled to it for the purpose of dealing with or realizing the charge or the secured property.
- (3) A person shall not enforce a lien over any document of the company in respect of a debt for services rendered to the company before the commencement of the winding up.
- (4) The debt referred to in subsection (4) shall be a preferential claim against the company under section 16 as may be prescribed by regulations.

#### **111. Liquidators power to examine etc.**

- (1) Where the liquidator has made a report under this Act stating that in his or her opinion-
  - (a) a fraud has been committed or that any material fact has been concealed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation; or
  - (b) that any officer of the company has failed to act honestly or diligently or has been guilty of an impropriety or recklessness in relation to the affairs of the company,

the court may, after consideration of the report, direct that the person or officer, or any other person who was previously an officer of the company, including any banker, solicitor or auditor, or who is known or suspected to have in his or her possession any property of the company or is supposed to be indebted to the company or any person whom the court considers capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company, shall attend before the court on a day appointed by the court and be publicly examined as to the promotion or formation or the conduct of the business of the company, or in the case of an officer or former officer as to his or her conduct and dealings as an officer thereof.

- (2) This section applies to –

  - (a) any director, secretary or shareholder of the company;
  - (b) any person who has been a director or secretary of the company;
  - (c) any person who is or has been an employee of the company; and
  - (d) receiver, administrator or provisional administrator, advocate, accountant, auditor, bank officer or any other person with knowledge of the financial affairs of the company.
- (3) A liquidator may require a person referred to in subsection (1) to –

  - (a) appear before the liquidator at a reasonable time;
  - (b) provide the liquidator with information concerning the business, accounts or other affairs of the company as the liquidator requests;
  - (c) take an affirmation or be examined on oath administered by the liquidator, on any of those matters; and
  - (d) assist in the winding up of the company to the best of his or her ability.
- (4) Any person required to appear before or assist the liquidator under subsection (1) (c) or (d) is entitled to reasonable remuneration unless that person is, at the time of the appearance or assistance, an employee of the company.
- (5) The remuneration referred to in subsection (3) shall be determined by the liquidator, but where a person considers that the remuneration is not reasonable, he or she may apply to the court, under section 122.
- (6) Notwithstanding section 122, leave of court shall not be required to make an application under subsection (4).
- (7) A person shall not be entitled to refuse to attend or assist the liquidator by reason that the remuneration to be received by him or her under subsection (3), has not been determined or paid in advance.
- (8) On application by the liquidator, court may order any person referred to in subsection (1) to appear before the court and to be examined on oath or affirmation by the court or the liquidator on any matter relating to the company.
- (9) A person examined under subsections (2) or (7) shall not be excused from answering any question on the ground that the answer may incriminate or tend to incriminate him or her.
- (10) The testimony of any person examined under subsections (2) or (7) is not admissible as evidence in any criminal proceedings against that person, except on a charge of perjury in respect of the testimony.

- (11) A person examined under subsections (2) or (7) may apply to the court to be exculpated from any allegation made against him or her and on the hearing of that application, the liquidator shall appear and bring to the attention of the court any matter which may appear to be relevant.

Any person who unreasonably refuses to cooperate with or assist the liquidator or interferes with the liquidator's powers commits an offence.

## **112. Liquidator's Power to Disclaim Onerous Property.**

- (1) The liquidator may disclaim any onerous property, even if the liquidator has taken possession of the property, tried to sell it or otherwise exercised rights of ownership.
- (2) A disclaimer under this section –
- (i) brings to an end the rights, interest and liabilities of the company in respect of the property disclaimed; and
  - (ii) shall not, except so far as necessary to release the company from any liability, affect the rights or liabilities of any other person.
- (3) A person who suffers loss or damage as a result of a disclaimer under this section may –
- (a) apply to court for an order that the disclaimed property be delivered to or vested in that person; or
  - (b) claim as a creditor of the company for the amount of the loss or damage taking into account the effect of any order made by the court under paragraph (a).
- (4) For the purposes of this section “onerous property” means –
- (a) any unprofitable contract; or
  - (b) any other property of the company which is not capable of being sold or not readily capable of being sold or which may give rise to a liability to pay money or perform any other onerous act.

## **113. Pooling of Assets of Associated Companies.**

On application of the liquidator or any creditor or shareholder, the court may, if satisfied that it is just and equitable to do so, lift the veil of any associated company on terms and conditions as it may consider fit to facilitate and ensure due completion of the winding up process in a just and equitable manner and may order that –

- (a) a company that is or has been an associated company of the company in winding up pays to the liquidator the whole or part of any or all of the claims made in the winding up; or
- (b) where two or more associated companies are in winding up, the winding up of each of the companies extends as far as the court orders and is subject to the terms and

conditions imposed by the court.

#### **114. Vacation of the Office of Liquidator.**

- (1) The office of liquidator shall become vacant if the person holding office is –
  - (a) removed from office under sections 125(1)(c) or 195;
  - (b) resigns;
  - (c) dies;
  - (d) becomes unqualified under section 193; or
  - (e) vacates office under an administration deed.
- (2) Where there is a vacancy in the office of the liquidator, except in the case of a vacancy arising under subsection (1) (e) and no person is acting as liquidator, the official receiver shall act as liquidator until a successor is appointed.
- (3) A liquidator vacating office, shall give the information and assistance in the conduct of the winding up as that liquidator's successor may reasonably require.

A person who unreasonably refuses to give information and or assistance required under sub-section (3) commits an offence.

#### **115. Duties of Directors, Secretary and Employees.**

- (1) Upon the commencement of the winding up of a company, every present or former director, secretary or employee of the company shall –
  - (a) disclose fully and truthfully to the liquidator all the property of the company and details of the disposal of any property by the company including property disposed of in the ordinary course of business; and
  - (b) deliver to the liquidator or in accordance with the liquidator's directions, all property of the company in or under his or her custody or control.
- (2) A person who contravenes subsection (1) commits an offence.

#### **116. Compliance Order.**

Where a person does not comply with a requirement of a liquidator under sections 109 or 115 the court may, on the application of the liquidator, after reasonable consideration, order the person to comply and make ancillary orders as it thinks fit.

## **117. Search and Seizure**

- (1) Where a company is in winding up or where a petition for winding up has been made to court and the court is satisfied, on the application of the liquidator, that there is, in or at any place or thing, any property, records or other documents of the company in respect of which an offence under sections 115 or 118 has been or is about to be committed, the court may issue a warrant with such conditions as it thinks fit, authorising the person named in the warrant to search for and seize property, books, documents or records of the company in or at that place or thing and to deliver them to the liquidator.
- (2) Subject to any conditions specified in the warrant under subsection (1), the person named in the warrant may –

  - (a) at all reasonable times, enter and search the place or thing, within fourteen days after the date of issue of the warrant;
  - (b) use assistance which is reasonable in the circumstances; and
  - (c) use reasonable force, both for making entry into the place and for breaking open anything in or at the place.

## **118. Absconding, etc.**

- (1) Where a company is in liquidation or where a petition for winding up has been made to court, a person shall not –

  - (a) leave or attempt to leave South Sudan, without leave of court with the intention of

    - (i) avoiding to make payment of money due to the company;
    - (ii) avoiding examination of the affairs of the company; or
    - (iii) avoiding compliance with an order of the court or some other obligation under this Act with respect to the affairs of the company;
  - (b) conceal or remove property of the company with the intention of preventing or delaying the assumption of custody or control of the property by the liquidator; or
  - (c) destroy, conceal or remove records or documents of the company.
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to imprisonment of not more than seven years.

## **119. Completion of Winding up.**

- (1) The winding up of a company shall be complete when the liquidator delivers to the official receiver a final report and final accounts of the liquidation and a statement

indicating that –

- (a) all known assets have been disclaimed, realized or distributed;
  - (b) all proceeds of realization have been distributed; and
  - (c) in the opinion of the liquidator, the company should be removed from the register.
- (2) On delivering to the official receiver the documents referred to in subsection (1), the liquidator shall cease to hold office, but this section does not limit the application of sections 122 or 125.

*Rights of Creditors and Shareholders.*

**120. Creditors' or Shareholders' Meetings During Winding up.**

- (1) Subject to subsection (3), a liquidator shall call a creditors' or shareholders' meeting if requested in writing by any two or more creditors or shareholders, to vote on a proposal that a committee of inspection be appointed to act with the liquidator.
- (2) The liquidator shall give not less than fourteen working days notice of the meeting which shall be conducted in accordance with the Second Schedule to the Companies Act, in the case of a shareholders' meeting or the Second Schedule to this Act, in the case of a creditors' meeting.
- (3) A liquidator may decline any request to call a meeting on the ground that –
  - (a) the request is frivolous or vexatious;
  - (b) the request was not made in good faith; or
  - (c) the costs of calling a meeting would be out of proportion to the value of the company's assets.
- (4) The decision of the liquidator to decline a request to call a creditors' or shareholders' meeting may be reviewed by the court on the application of one or more creditors or shareholders.
- (5) The members of a committee of inspection appointed by a creditors' or shareholders' meeting shall take office immediately, but where there is a difference between the decisions of meetings of creditors and meetings of shareholders on –
  - (a) the question of appointing a committee of inspection; or
  - (b) the membership of a committee of inspection,the liquidator shall refer the matter to the court for a decision.
- (6) A sole shareholder of a company may present to the liquidator a view on any matter which could have been decided at a meeting of shareholders under this section and the liquidator may for all purposes, treat that view as if it were a decision taken at a

meeting of shareholders.

## **121. Committee of Inspection During Winding up.**

- (1)** A committee of inspection shall consist of not less than five persons who shall be creditors or shareholders or persons holding powers of attorney from creditors or shareholders or authorised directors of companies which are creditors or shareholders of the company in winding up.
- (2)** A committee of inspection shall have the power to –
  - (a)** call for reports on the progress of the winding up from the liquidator;
  - (b)** call a creditors’ or shareholders’ meeting;
  - (c)** apply to the court under sections 122 and 125; and
  - (d)** assist the liquidator as appropriate in the conduct of the winding up.
- (3)** Unless the court orders otherwise, the liquidator shall pay the advocate and own client costs reasonably incurred by the committee of inspection in exercising its powers under subsection (2) (c) and those costs shall be deemed to be expenses properly incurred in the winding up.
- (4)** Where, by reason of vacancies in a committee of inspection, the committee is unable to act, the liquidator shall indicate this in the next six-monthly report prepared and sent under section 108.
- (5)** The following shall apply to proceedings of a committee of inspection -
  - (a)** the committee shall meet at least once a month and the trustee or any member of the committee may call a meeting of the committee as and when he or she considers necessary;
  - (b)** the committee shall act by a majority of its members present at a meeting;
  - (c)** a member of a committee may resign his or her office in writing signed by him or her trustee;
  - (d)** where a member of the committee appointed by the creditors becomes bankrupt, compounds, arranges with his or her creditors or is absent from five consecutive meetings of the committee without leave of the other members who also represent the creditors, his or her office shall be immediately become vacant;
  - (e)** a member of the committee may be removed by an ordinary resolution at a meeting of creditors for which fifteen day’s notice stating the object of the meeting is given;
  - (f)** where there is a vacancy in the committee, the trustee shall immediately call a meeting of creditors to fill the vacancy. The trustee may, by resolution, re-appoint the same person or appoint another creditor to fill the vacancy or re-appoint another creditor or contributory to fill the vacancy unless the trustee is of the opinion that it is not necessary to fill the vacancy, in which case he or

she may apply to the court for an order that the vacancy shall not be filled under the circumstances specified in the order; and

- (g) where there is a vacancy, the remaining members of the committee, if not less than two, may continue to act as committee of inspection.

*Supervision and Enforcement by the Court.*

**122. Court Supervision of Winding up.**

- (1) On the application of the liquidator, any committee of inspection, the official receiver, or, with the leave of the court, any creditor, shareholder or director of a company in winding up, the court may –
  - (a) give directions on any matter arising during the course of the winding up;
  - (b) confirm, reverse or modify any act or decision of the liquidator;
  - (c) order an audit of the accounts of the liquidation;
  - (d) order the liquidator to produce the accounts and records of the winding up for audit and to provide the auditor with information concerning the conduct of the winding up as the auditor may request;
  - (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances and where an amount retained by the liquidator is found by the court to be unreasonable in the circumstances, order the liquidator to refund the amount;
  - (f) declare whether or not the liquidator was validly appointed or validly assumed custody or control of any property; or
  - (g) make an order concerning the retention or the disposal of the accounts and records of the winding up or of the company.
- (2) The powers under subsection (1) are in addition to any other powers a court may exercise in its jurisdiction relating to liquidators under this Act and may be exercised in relation to any matter occurring before or after the commencement of the winding up or the removal of the company from the register whether or not the liquidator has ceased to act as liquidator when the application or the order is made.
- (3) Subject to subsection (4), a liquidator who has acted in accordance with a direction of the court in the exercise of his or her powers or functions, shall be entitled to rely on having so acted as a defence to any claim for anything done or not done in accordance with the direction.
- (4) A court may order that, by reason of the circumstances in which a direction is obtained, the liquidator shall not have the protection given by subsection (3).

**123. Power of Court to Make Calls.**

- (1) The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on all or any of the contributories for the time being on the list of the contributories to the extent of their liability, for payment of any money which the court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, and make an order for payment of any calls so made.
- (2) In making a call the court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

#### **124. Power to Stay Winding up.**

- (1) The court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court considers necessary.
- (2) On any application under this section the court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are, in his or her opinion, relevant.
- (3) A copy of every order made under this section and an office copy of such an order shall be lodged by the company with the Registrar and the official receiver, respectively, within fourteen days of the making of the order.
- (4) Any person who fails to comply with subsection (3) shall be guilty of an offence.

#### **125. Enforcement of Liquidator's Duties.**

- (1) Where the liquidator fails to comply with any of the duties of a liquidator, the court may, on such terms and conditions as it considers fit –
  - (a) relieve the liquidator of the duty to comply, wholly or in part;
  - (b) without prejudice to any other remedy which may be available in respect of a breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order; or
  - (c) remove the liquidator from office.
- (2) An application for an order under this section may be made by -
  - (a) a liquidator;
  - (b) a committee of inspection;
  - (c) any creditor, shareholder or director of the company in winding up; or

- (d) a receiver appointed in respect of any property of the company in winding up.
- (3) Except as otherwise ordered by the court, a copy of any application made under this section shall be served on the liquidator not less than five working days before the hearing of the application and the liquidator may appear and be heard at the hearing.
- (4) Where an order is made under subsection (1) (c), the court may make such order as is appropriate for the preservation of the company's property, including an order requiring the removed liquidator to make available any accounts, documents or other information necessary for that purpose.
- (5) All proceedings relating to any application for an order under this section shall be served on the official receiver who shall keep a copy of the proceedings on a public file indexed by reference to the name of the liquidator concerned.
- (6) In this section "failure to comply" includes a failure of a liquidator to comply with any relevant duty arising under –
  - (a) the appointing document;
  - (b) this or any other law or rule of law or rules of court; or
  - (c) any order or direction of the court other than an order made under this section.

## **CHAPTER V ADMINISTRATION OF COMPANIES.**

### **126. Application of administration provisions to foreign companies.**

- (1) Sections 127 to 162 shall apply to foreign companies.
- (2) In this Chapter, "company" includes a foreign company and "property" means property in South Sudan.

#### *Provisional Administration.*

### **127. Appointment of Provisional Administrator.**

- (1) A provisional administrator of a company shall be appointed by a special resolution of the board and a notice in writing under this section on the date of the interim protective order.
- (2) The notice appointing a provisional administrator shall include a certificate signed by the appointer certifying that, at the time of the appointment, there is reason to believe that the company is or will be unable to pay its debts within the meaning of section 7.

- (3) Before a company appoints a provisional administrator under this section the company must by special resolution agree that the company needs to make a settlement with the company's creditors.
- (4) The company shall after agreeing to make a settlement with its creditors petition the court for an interim order.
- (5) A provisional administrator may not be appointed under subsection (1) after the company has gone into winding up.
- (6) A provisional administrator appointed under subsection (1) may, with the leave of the court be appointed liquidator or provisional liquidator.

#### **128. Fundamental Duties of Provisional Administrator.**

- (1) The fundamental duties of a provisional administrator are –
  - (a) to investigate the company's business, property, affairs and financial circumstances; and
  - (b) to exercise his or her powers in a manner which he or she believes on reasonable grounds to be likely to achieve one or more of the following outcomes –
    - (i) the survival of the company and the whole or any part of its undertaking as a going concern;
    - (ii) the approval of an administration deed under section 134; and
    - (iii) a more advantageous realisation of the company's assets than would be effected in a winding up.
- (2) A provisional administrator shall not –
  - (a) act as the company's agent in defending any proceedings relating to any breach of duty under this section; or
  - (b) receive any compensation or indemnity from the company's property in respect of any liability incurred by him or her through any breach of duty under this section.

#### **129. General Duties of a Provisional Administrator.**

Without prejudice to section 128, a provisional administrator shall perform other functions and duties specified in this Act and shall –

- (a) take custody and control of all the property to which the company is or appears to be entitled;
- (b) keep company money separate from other money held by or under the control of the provisional administrator; and

- (c) keep, in accordance with generally accepted accounting procedures and standards, full accounts and other records of all receipts, expenditure and other transactions relating to the company and retain the accounts and records for not less than six years after the administration ends.

**130. Commencement of Provisional Administration.**

- (1) Provisional administration shall commence and the appointment of a provisional administrator shall take effect when an interim protective order is made.
- (2) Upon the appointment of a provisional administrator -
  - (a) a copy of the notice appointing the provisional administrator;
  - (b) a copy of the provisional administrator's consent to act as provisional administrator; and
  - (c) the written consent to the appointment of the provisional administrator by any secured creditor holding a charge over the whole or substantially the whole of the property and undertaking of the company,the provisional administrator shall be registered with the official receiver and Registrar.

**131. Effect of Provisional Administration.**

- (1) Subject to subsection (2), during a provisional administration –
  - (a) an application for the winding up of the company by the court shall not be commenced;
  - (b) an order for the winding up of the company may be made if the court is satisfied that it is in the interests of the company's creditors for the company to continue in provisional administration;
  - (c) the functions and powers of any liquidator shall be suspended;
  - (d) a resolution for the winding up of the company shall not be made, except in accordance with this section;
  - (e) a receiver of any property of the company shall not be appointed; and
  - (f) except with the provisional administrator's written consent or with the leave of the court and in accordance with such terms as the court may impose –
    - (i) steps shall not be taken to enforce any charge over any of the company's property;
    - (ii) proceedings, execution or other legal process shall not be commenced or continued and distress shall not be levied against the company or its property; and
    - (iii) no other transaction shall be carried out in respect of any registered or unregistered property of the company.
- (2) Subject to subsection (3), nothing in this Act shall prevent the continued exercise of a

power of enforcement of a charge over property where the power was exercised before the commencement of the provisional administration.

- (3) An administrative receiver may remain in office during a provisional administration, but his or her functions, powers and duties shall be suspended.

### **132. Notice of Provisional Administration.**

- (1) A provisional administrator shall give notice of the provisional administration-
  - (a) on every invoice, order for goods or business letter issued by or on behalf of the company on which the company's name appears, by stating after the company's name "in provisional administration"; and
  - (b) in every other case, in entering into any transaction or issuing any document by or on behalf of the company.
- (2) Failure to comply with subsection (1) does not affect the validity of a document issued by or on behalf of the company.
- (3) Where a company does not comply with subsection (1), the provisional administrator commits an offence.

### **133. Duration of Provisional Administration.**

- (1) A provisional administration shall terminate when –
  - (a) the period specified in the interim order lapses and the period shall not be more than thirty days;
  - (b) an administration deed is executed under section 135; or
  - (c) the provisional liquidator gives the notices required under section 136.
- (2) Subject to subsection (3), a provisional administrator shall call a creditors' meeting to end the provisional administration under section 135 not more than ten working days after the commencement of the provisional administration.
- (3) On application made by the provisional administrator, court may in exceptional circumstances extend the period specified in subsections (1) and (2).

### **134. Creditor's Meeting To Consider Appointment of Provisional Administrator.**

- (1) The provisional administrator shall call a creditors' meeting, not later than five working days after the commencement of the provisional administration.
- (2) The provisional administrator shall give public notice of not less than two working

days' public notice and individual written notice of the meeting to each known creditor of the company, indicating –

- (a) the date of the commencement of the provisional administration;
  - (b) the provisional administrator's full name; and
  - (c) the provisional administrator's physical office address and daytime telephone number.
- (3) Subject to this section, the meeting shall be conducted in accordance with the Second Schedule.
- (4) At the meeting the company's creditors may by a resolution made by the majority-
- (a) remove the provisional administrator from office; and
  - (b) appoint another person as provisional administrator of the company who shall on the day of his or her appointment, give notice of his or her appointment to court, the Registrar and the official receiver.

### **135. Provisional Administrator's Proposals.**

- (1) Within the time specified in section 131(2), a provisional administrator shall call a creditors' meeting to consider his or her proposals.
- (2) A provisional administrator shall give public notice of not less than five working days and a written notice of the meeting, to each known creditor.
- (3) The notice given under subsection (2) shall be accompanied by a copy of report by the provisional administrator about the company's business, property, affairs and financial circumstances; a statement of the provisional administrator's opinion and the reasons for the opinion on the interests of the company's creditors in the event of the company's execution of an administration deed, the creditor's interests on the termination of the provisional administration; and the creditor's interests in the event of the company's winding up; and a statement showing the details of the proposed deed, where an administration deed is proposed.

### **136. Creditor's Meeting to Consider Proposals.**

- (1) The provisional administrator shall be the chairman of the creditors' meeting to consider his or her proposals and subject to this section, the meeting shall be conducted in accordance with the Second Schedule.
- (2) A creditors' meeting under this section may be adjourned, but shall not be adjourned to a day that is more than seven days after the first day on which the meeting was held, even if a resolution under subsection (3) has not been passed.

- (3) The creditors may resolve –
  - (a) that the company executes an administration deed as specified in the resolution;
  - (b) that the provisional administration ends; or
  - (c) that the company be liquidated.

**137. Requirements of an Administration Deed.**

An administration deed shall specify –

- (a) the proposed administrator of the deed;
- (b) the property of the company available to pay creditors' claims;
- (c) the nature and duration of any moratorium period or which the deed provides;
- (d) the extent to which the company is to be released from its debts;
- (e) the conditions, if any required for the deed to come into operation and continue in operation;
- (f) the circumstances under which the deed terminates;
- (g) the order in which proceeds of realising the property referred to in paragraph (b) are to be distributed amongst the creditors bound by the deed; and
- (h) the date which shall not be later than the day the administration begins, on or before which claims that are admissible under the deed, shall have arisen.

**138. Execution of an Administration Deed.**

- (1) An administration deed shall be executed by the company and the proposed administrator.
- (2) Before execution, the persons listed in section 152 (1) shall be bound by the deed as if it had already been executed for a period of twenty one days after the meeting of creditors held under section 133 or a further period as the court may allow on application made within the twenty day execution period.

**139. Notice of Termination of Provisional Administration.**

Where –

- (a) the deed is not executed within the period of execution specified in section 136(3);
- (b) the creditors resolve that the provisional administration should end; or
- (c) the creditors don't pass a resolution under section 134,

the provisional administrator shall as soon as practicable give public notice and send notice to the official receiver, Registrar and court indicating that the provisional administration has ended without the execution of an administration deed.

**140. Transition to Winding up.**

- (1) The shareholders are deemed to have passed a special resolution for the winding up of the company where –
  - (a) the creditors resolve that the company be liquidated at a creditors' meeting under section 136; or
  - (b) an administration deed is not executed within the execution period in section 138.
- (2) In the case of a resolution referred to in subsection (1), the shareholders are deemed to have appointed the provisional administrator or administrator as liquidator.

*Conduct of Provisional Administration.*

**141. Powers of a Provisional Administrator.**

- (1) A provisional administrator may, in the performance of his or her duties,-
  - (a) carry on the company's business and manage the company's property and affairs;
  - (b) perform any function and exercise any power that the company or any of its directors or secretary would perform or exercise if the company was not in provisional administration;
  - (c) change the company's registered office or registered postal address;
  - (d) remove from office a director of the company;
  - (e) appoint a person as director, whether to fill a vacancy or not; and
  - (f) call any meeting of the shareholders or creditors of the company.
- (2) In exercising his or her powers the provisional administrator shall be deemed to act as the company's agent.

**142. Provisional Administrator's Relationship with Third Parties.**

A person paying money or giving other consideration to a provisional administrator shall not be required to enquire whether the provisional administrator was validly appointed or authorised to act as provisional administrator.

**143. Role of Directors and Secretary During Provisional Administration.**

- (1) During a provisional administration, a company shall not exercise any of its functions or powers and a company's directors and secretary shall not exercise any powers,

functions or duties as such, except with the administrator's approval which may be general or specific.

- (2) Every director and secretary of a company in administration shall make available to the administrator, the company seal, all documents and information relating to the company and give all assistance reasonably required by the provisional administrator.
- (3) Where required by the provisional administrator, the directors and secretary shall verify by statutory declaration that the material and information made available to the Provisional administrator is complete and correct.
- (4) Any director who contravenes this section commits an offence.

#### **144. Compliance Order.**

Where –

- (a) a director or secretary does not comply with section 138;
- (b) the provisional administrator makes a request under section 141; or
- (c) the provisional administrator makes an application to the court,

court may order the director or secretary to comply and may make ancillary orders as it considers necessary.

#### **145. Disposal of Charged Property During Provisional Administration.**

A provisional administrator shall not dispose of property subject to a charge unless –

- (a) the disposal is in the ordinary course of the company's business;
- (b) the provisional administrator has the written consent of the secured creditor; or
- (c) under an order of court, made if the court is satisfied that an adequate scheme of arrangement to protect the interests of the secured creditor has been made.

#### **146. Liabilities of a Provisional Administrator.**

- (1) Notwithstanding any agreement to the contrary, a provisional administrator is personally liable –
  - (a) for any contract entered into by him or her in the exercise of any of the provisional administrator's powers, but is not liable for the company's debts;
  - (b) for wages, salary and allowances including sickness and holiday pay but not payments in lieu of notice, incurred during the provisional administration, under a contract of employment adopted by the provisional administrator, and in respect of services rendered after the adoption of the contract.
- (2) For the purposes of subsection (1) (b) (ii), a provisional administrator shall not be

deemed to have adopted a contract of employment by reason of anything done or omitted to be done within ten working days of his or her appointment.

- (3) Where –
  - (a) a company continues to use, possess or occupy property under an agreement subsisting at the commencement of the provisional administration; and
  - (b) legal title to the property is not vested in the company,the provisional administrator shall be personally liable, to the extent specified in subsection(4), for rent and any other payments becoming due under the agreement.
- (4) A provisional administrator’s liability under subsection (3) is limited to that part of the rent or other payments which accrue in the period commencing seven days after the commencement of the provisional administration and ending on –
  - (a) the termination of the provisional administration; or
  - (b) the date on which the company ceases to use, possess or occupy the land,whichever is the earlier, but the court may further limit or excuse the liability of the provisional administrator.
- (5) Nothing in subsections (3) or (4) shall –
  - (a) be taken as an adoption by the provisional administrator of any agreement in subsection (3); or
  - (b) render the provisional administrator liable to perform any other obligation under the agreement.

#### **147. Provisional Administrator’s Right to Indemnity.**

- (1) A provisional administrator is entitled to indemnity out of the company’s property in respect of –
  - (a) any personal liability incurred under section 144; and
  - (b) any remuneration and expenses reasonably incurred.
- (2) Nothing in this section shall-
  - (a) limit any other right of indemnity to which a provisional administrator may be entitled;
  - (b) limit a provisional administrator’s liability on any contract entered into without authority; or
  - (c) confer on a provisional administrator any right to an indemnity in respect of liability on any contract entered into without authority.

#### **148. Relief From Liability for a Provisional Administrator.**

- (1) Court may relieve a provisional administrator from all or any personal liability

incurred in the course of the provisional administration if satisfied that –

- (a) the liability was incurred solely by reason of a defect in the appointment of the provisional administrator; or
  - (b) the provisional liquidator acted honestly and reasonably and ought, in the circumstances, fairly to be excused.
- (2) In exercising the powers under this section, the court may give directions and impose terms and conditions and apportion any liability as it thinks fit.

#### **149. Provisional Administrator's Reports to the Official Receiver.**

- (1) A provisional administrator shall make a report to the official receiver if it appears to him or her that –
- (a) a past or present director, secretary or shareholder may have committed an offence in relation to the company; or
  - (b) a person who took part in the formation, promotion, administration, management or winding up of the company may have misapplied, retained, become liable or accountable for money or property of the company or may have negligently committed a default, breach of duty or breach of trust in relation to the company and in such a case, the administrator shall give the official receiver the information and access to and facilities for inspecting and taking copies of documents as the official receiver may require.
- (2) The official receiver shall, upon receipt of the report, cause an investigation to be made and may then apply to court for a public examination of the director, secretary or any other person involved.
- (3) If the court is satisfied that the persons referred to in subsections (1) and (2) misapplied or retained the company's assets or caused loss to the company in any other way, it may order the person to restore the assets or pay their market value subject to an interest rate set by the court.
- (4) Notwithstanding the provision of this section, the official receiver may commence criminal proceedings against the persons referred to in subsections (1), (2) and (3).

#### *Administration.*

#### **150. Commencement of Administration.**

- (1) Administration commences with the execution of an administration deed by the company in a general meeting.
- (2) The appointment of the administrator shall take effect on the execution of the

administration deed.

**151. Notice of Administration.**

Immediately after the commencement of the administration, the administrator shall –

- (a) send to each creditor of the company a written notice of the execution of the deed;
- (b) give public notice of the execution; and
- (c) deliver written notice of the execution to the official receiver, court and the Registrar.

**152. Effect of Administration.**

- (1) An administration deed shall bind –
  - (a) the company;
  - (b) the company's directors and secretary;
  - (c) the company's shareholders;
  - (d) the administrator; and
  - (e) all the company's creditors in relation to claims arising on or before the day specified in the deed.
  
- (2) Subject to subsection (3), a person bound by a deed shall not –
  - (a) make an application for the winding up of the company or proceed with an application; and
  - (b) except with the leave of the court and in accordance with the terms as the court may impose –
    - (i) take steps to enforce any charge over any of the company's property; and
    - (ii) commence or continue execution proceedings or other legal process or levy distress against the company or its property.
  
- (3) Subsection (2) shall not prevent a secured creditor from exercising a power of enforcement of a charge over company property, except where the deed provides for it in relation to the secured creditor who voted in favour of the resolution for the execution of the deed.

**153. Function of Administrator.**

The administrator shall supervise the implementation of the administration deed.

**154. Creditor's Meetings During Administration.**

- (1) The administrator may call a creditors' meeting at any time during the administration.

- (2) The administrator shall call a creditors' meeting if requested in writing by creditors, the value of whose claims against the company is not less than ten per cent of the value of all claims against the company.
- (3) An administrator shall give not less than five working days notice of the meeting, which, subject to this section, shall be conducted in accordance with the Third Schedule.
- (4) A creditors' meeting shall have the power to call for reports on the progress of the administration from the administrator.

**155. Variation of the Administration Deed by Creditors.**

- (1) An administration deed may be varied by a resolution passed at a creditors' meeting.
- (2) Where an administration deed is varied under subsection (1), the court may, on the application of a creditor or the administrator, cancel or confirm the variation, in whole or in part and subject to conditions as it considers fit and may make any other order as it considers appropriate.
- (3) Any variation, cancellation, confirmation or order made under this section shall be filed with the Registrar and the official receiver within seven days.

**156. Termination of Administration.**

An administration shall be terminated where –

- (a) the court makes an order under section 157; or
- (b) circumstances occur, which are specified in the deed for terminating it.

**157. Termination of Administration by the Court.**

- (1) An application for the termination of an administration may be made to the court by –
  - (a) an administrator of the company;
  - (b) a creditor of the company; or
  - (c) any liquidator of the company.
- (2) Subject to subsection (3), of this section the court may make an order with respect to an administration that, on such terms and conditions as it sees fit, the administrator ceases to act from a specified date and may prohibit the appointment of another administrator or provisional administrator.
- (3) The court may make the order under subsection (2) if it is satisfied that –

- (a) the provisional administrator or creditors were given information about the company's business, property, affairs or financial circumstances that was false or misleading or information which can reasonably be expected to have been material to creditors in deciding whether to vote in favour of the administration, was not given to them;
  - (b) the report or a statement of the provisional administrator made under section 149 contained false or misleading information or omissions;
  - (c) a person bound by the administration deed has failed to comply with the deed or with his or her obligations under the deed;
  - (d) the company has failed to act as may have been reasonably required by the administrator, for purposes of the administration;
  - (e) the administration cannot be completed without injustice or undue delay;
  - (f) the administration is oppressive or unfairly prejudicial or unfairly discriminatory against a creditor; or contrary to the interests of the creditors of the company as a whole; or
  - (g) the administration should be terminated for any other sufficient reason.
- (4) Except if ordered by court or unless the administrator is making the application, a copy of any application made under this section shall be served on the administrator, not less than five working days before the hearing of the application and the administrator may appear and be heard at the hearing.

**158. Notice on Termination of Administration.**

Where an administration deed has been terminated the administrator shall –

- (a) give public notice of the termination;
- (b) send a written notice of the termination to each of the company's creditors;
- (c) send a written notice of the termination to the shareholders and Registrar; and
- (d) deliver a notice of termination to the official receiver.

*Provisional Administrators and Administrators.*

**159. Remuneration of Provisional Administrator or Administrator.**

A provisional administrator or administrator is entitled to –

- (a) the remuneration agreed upon; or
- (b) The court may, on the application of the provisional administrator or administrator, officer of the company, creditor or shareholder, review or fix the administrator's remuneration at a level that is reasonable in the circumstances.

**160. Vacation of the Office of Provisional Administrator or Administrator.**

- (1) The office of a provisional administrator or administrator shall become vacant where the person holding office is removed from office under section 181 or section 184(c) or where the provisional administrator or administrator resigns, dies or becomes unqualified to act as an insolvency practitioner under section 190.
- (2) Where a vacancy arises other than by resignation, the official receiver shall temporarily act as provisional administrator or administrator, and shall then appoint an insolvency practitioner as provisional administrator or administrator, with the approval of the creditors, the company and court.
- (3) Within five working days after the appointment, a provisional administrator or administrator shall call a creditors' meeting by giving not less than two days public notice and written notice to each creditor, to –
  - (a) confirm his or her appointment; or
  - (b) appoint another person as provisional administrator or administrator.
- (4) Subject to this section, the creditors' meeting shall be conducted in accordance with the Second Schedule.
- (5) A person vacating the office of provisional administrator or administrator shall give information and assistance necessary for the conduct of the provisional administration or administration, as that person's successor may reasonably require.

Any person who contravenes sub-section (5) commits an offence.

**161. Court Supervision of Provisional Administrator or Administrator.**

- (1) On the application of a provisional administrator or administrator, court may give directions on any matter concerning the functions of the provisional administrator or administrator.
- (2) Subject to subsection (3), a provisional administrator or administrator who acted in accordance with a direction of the court in the exercise of his or her powers or functions is entitled to rely on this as a defence for any claim in respect of the exercise of his or her powers or functions.
- (3) The court may order that, by reason of the circumstances in which a direction is obtained, the provisional administrator or administrator shall not have the protection given by subsection (2).

## **162. Enforcement of Provisional Administrator's or Administrator's Duties.**

- (1) A provisional administrator, administrator, creditor of the company or a liquidator or provisional liquidator of the company may apply to court for an order –

  - (a) relieving the provisional administrator or administrator of the duty to comply, in whole or in part;
  - (b) directing the provisional administrator or administrator to comply to the extent specified in the order; or
  - (c) removing the provisional administrator from office and appointing someone else as provisional administrator where the provisional administrator or administrator fails to comply with a duty under the scheme of arrangement, this Act or any other law or any order or direction of the court other than an order to comply made under this section.
- (2) A copy of an application made under this section, if made by a person other than a provisional administrator or administrator, shall be served on the provisional administrator or administrator not less than five working days before the hearing of the application and he or she may appear and be heard at the hearing unless otherwise ordered by the court.
- (3) Where an order is made under subsection (1) (c), the court may make such order as is appropriate for the preservation of the company's property, including an order requiring the removed provisional administrator or administrator to make available any accounts, records or other information necessary for that purpose.
- (4) All proceedings relating to any application for an order under this section shall be served on the official receiver who shall keep a copy of the proceedings on a public file indexed by reference to the name of the provisional administrator or administrator concerned.
- (5) In this section 'failure to comply' includes a failure of a provisional administrator or administrator to comply with a duty under –

  - (a) the notice of appointment, in the case of a provisional administrator;
  - (b) the administration deed, in case of an administrator;
  - (c) this Act or any other law; and
  - (d) any order or direction of the court other than an order to comply made under this section.

## **CHAPTER VI CORPORATE AND INDIVIDUAL RECEIVERSHIP.**

## **163. Application of Receivership Provisions to Foreign Companies.**

- (1) Sections 164 to 185 shall apply to foreign companies.
- (2) In this Chapter, “company” includes a foreign company and property includes property in South Sudan.

**164. Commencement of Receivership.**

- (1) Where the appointment of a receiver is made by court, the receivership shall commence and the appointment shall take effect as specified in the court order.
- (2) In all other cases, the receivership commences and the appointment takes effect when the receiver accepts the appointment in writing.

**165. Liability for Invalid Appointment of Receiver.**

- (1) Where the appointment of a person as receiver other than by a court order is found to be invalid, the court may on an application of an aggrieved person order the person by whom or on whose behalf the appointment was made to indemnify the person appointed against any liability which arises as a result of the invalidity of the appointment.
- (2) Notwithstanding subsection (1), the bona fide transactions of the person appointed as receiver shall not be affected.

**166. Notice of Receivership.**

- (1) Immediately after his or her appointment, a receiver shall give written notice of the appointment to the grantor.
- (2) A receiver shall, not later than fourteen working days after the commencement of the receivership, give public notice of –
  - (a) the date of the commencement of the receivership;
  - (b) the receiver’s full name;
  - (c) the receiver’s physical office address, electronic email address and daytime telephone number; and
  - (d) a brief description of the property under receivership which has come into his or her possession.
- (3) Where the grantor is a body corporate, the receiver shall, not later than fourteen working days after the commencement of the receivership, deliver to the Registrar and the official receiver a copy of the notice referred to in subsection (2).

- (4) A receiver shall give notice of the receivership –
- (a) where the receiver is an administrative receiver, on every invoice, order for goods or business letter issued by or on behalf of the grantor on which the company's name appears, by stating after the grantor's name "receiver appointed"; and
  - (b) in every other case, upon entering into any transaction or issuing any document in connection with the property in receivership.
- (5) Failure to comply with subsection (4) shall not affect the validity of the document.

A receiver who does not comply with subsection (4), commits an offence.

- (6) Where a receiver is charged with an offence under this section, it is a defence to show that –
- (a) he or she took all reasonable steps in the circumstances to ensure that the requirements are complied with.

#### **167. Fundamental Duty of a Receiver.**

- (1) The fundamental duty of a receiver is to exercise his or her powers in a manner which he or she believes on reasonable grounds to be in the best interests of all persons in whose interests the receiver is appointed.
- (2) Subject to subsection (1), a receiver shall have power over the property in receivership with reasonable regard to the interests of –
- (a) the grantor;
  - (b) any person claiming, through the grantor, an interest in the property in receivership;
  - (c) any unsecured creditor of the grantor; and
  - (d) any surety or guarantor who may be called upon to fulfill any obligation of the grantor to a person in whose interest the receiver was appointed, if that obligation is not satisfied by recourse to the property in receivership.
- (3) A receiver shall not –
- (a) defend any proceedings relating to any breach of duty under this section on the ground that the receiver was acting as the grantor's agent or under a power of attorney from the grantor; or
  - (b) receive compensation or indemnity from the property in receivership or the grantor in respect of any liability incurred by the receiver through any breach of a duty under this section.

#### **168. General Duties of Receiver.**

- (1) Without prejudice to section 167 a receiver shall perform other functions and duties

specified in this Act.

- (2) A receiver shall –
  - (a) take custody and control of all the property which is under receivership;
  - (b) register in his or her names all land and other assets under receivership;
  - (c) investigate the state of affairs of the property under receivership;
  - (d) give a general notice of his or her interest in all property that has not yet come to his or her knowledge;
  - (e) keep all money relating to the property in receivership separate from other money received in the course of, but not relating to, the receivership and separate from other money held by or under the control of the receiver;
  - (f) keep, in accordance with generally accepted accounting procedures and standards, full accounts and other records of all receipts, expenditure and other transactions of the company; and
  - (g) retain the accounts and records of the company for not less than six years after the receivership ends.
  
- (3) A receiver shall cause the Registrar of titles to have his or her name registered on any land forming part of an estate in receivership upon discovery or recovery of the land, notwithstanding any transfers or dealings which took place after the commencement of the insolvency or the provisions of any other law.

#### **169. Powers of Receiver.**

- (1) A receiver shall have the powers expressly or impliedly conferred by the appointing document and unless specifically provided to the contrary may –
  - (a) demand or recover, by action or any other means, all income of the property in receivership;
  - (b) issue receipts for income recovered;
  - (c) manage any of the property under receivership;
  - (d) inspect at any reasonable time any documents of the grantor or other records relating to the property under receivership, in the custody of the grantor or of any other person; and
  - (e) execute in the name and on behalf of the grantor all documents necessary or incidental to the exercise of the receiver's powers.
  
- (2) In addition, subject to the appointing document, a receiver who is an administrative receiver may –
  - (a) where the grantor is an individual, carry on any business of the grantor; or
  - (b) where the grantor is a company –
    - (i) carry on the company's business and manage the company's property and affairs;
    - (ii) perform any function and exercise any power that the company or any

- of its directors or secretary would perform or exercise if the company was not in receivership; and
- (iii) change the company's registered office or registered postal address.

(3) In exercising his or her powers a receiver is taken to act as the grantor's agent.

#### **170. Receiver's Relationship With Third Parties.**

A person paying money or giving other consideration to a receiver shall not be required to inquire whether the receiver was validly appointed or is authorised to act as a receiver.

#### **171. Role of Grantor in a Receivership.**

- (1) Where the grantor is a company in an administrative receivership, the company shall not exercise any of its functions or powers and a director or secretary shall not exercise his or her functions or powers, except with the administrative receiver's approval which may be general or specific.
- (2) The grantor shall make available to the receiver all documents and information relating to the grantor and to all the property under receivership and give all assistance reasonably required by the receiver.
- (3) If required by the receiver, the grantor shall verify by statutory declaration that the material and information made available to the receiver is complete and correct.
- (4) Where the grantor is a body corporate –
  - (a) it shall make the seal available for use by the receiver on any document required to be executed under the seal;
  - (b) each director and secretary shall comply with this section as if the director or secretary was the grantor.

A person who does not comply with this section commits an offence.

#### **172. Rights and Obligations of a Grantor in Receivership.**

- (1) The grantor may bring an action –
  - (a) against the receiver, secured creditor or appointees or any other person for wrongful appointment of the receiver, trespass and other unlawful acts which prejudice the rights and interests of the grantor;
  - (b) to preserve or protect the estate or interest in receivership where the receiver

does not take action; and

- (c) with the consent and approval of the receiver, in any other case.
- (2) The grantor shall in an action brought under subsection (1), establish a prima-facie case and furnish security for costs as court shall think fit on presentation of the action to court.
- (3) Where the court grants an *ex-parte* injunction or relief against the receiver or secured creditor in subsection (1), the injunction or relief shall lapse after fourteen days but the court may, in appropriate cases, entertain informal applications for relief *inter partes*.
- (4) Notwithstanding the law governing registration of land titles or any other law, a caveat, lien or other encumbrance placed on the assets forming part of the estate under insolvency shall not be sustained for more than thirty days unless the caveat or, claimant or person who placed an encumbrance on an asset obtains a court order to this effect.
- (5) Notwithstanding the provisions of the registration of land titles or any other law the court may grant an extension of a caveat, lien or other encumbrance on the application of the caveator, claimant or person who placed an encumbrance on an asset, upon establishment of a prima facie case and furnishing security for costs commensurate to the estimated loss and damages of the value of the subject matter of the dispute.
- (6) A person who, without sufficient cause publishes or causes to be published any notice, advert or publication which prevents or is likely to prevent the realisation, possession, recovery or control by the receiver, secured creditor or their agents or servants of any assets forming part of the estate under receivership shall be liable to pay compensation to the estate in receivership of any loss or injury suffered by the estate as a result of the notice, advert or publication.

Any person who contravenes sub-section (6) commits an offence.

### **173. Compliance Order**

Where a person does not comply with section 171 or with a request of the receiver made under that section, on the application of the receiver, the court may order the grantor or any director or secretary, to comply and may make ancillary orders as it considers necessary.

### **174. Liabilities of Receiver.**

- (1) Notwithstanding any agreement to the contrary, a receiver shall be personally liable –
- (a) for any contract entered into by the receiver in the exercise of any of the receiver's powers, but shall not be liable for the grantor's debts; and
- (b) for wages, salary and allowances including sickness and holiday allowances

but shall not be liable for payments in lieu of notice that are incurred during the receivership, under a contract of employment adopted by the receiver; and in respect of services rendered after the adoption of the contract.

- (2) For the purposes of subsection (1) (b), a contract of employment shall automatically lapse on commencement of the receivership.
- (3) Where –
  - (a) a grantor continues to use, possess or occupy property under an agreement subsisting at the commencement of the receivership; and
  - (b) legal title to the property is not vested in the grantor,a receiver shall be personally liable, to the extent specified in subsection (4) for rent and any other payments due under the agreement.
- (4) A receiver's liability under subsection (3) is limited to that part of the rent or other payments which accrue within seven days after the commencement of the receivership and end on –
  - (a) the termination of the receivership; or
  - (b) the date on which the grantor ceases to use, possess or occupy the land, whichever is the earlier, but the court may further limit or excuse the liability of the receiver.
- (5) Nothing in subsections (3) or (4) shall-
  - (a) be taken as an adoption by a receiver of any agreement referred to in subsection (3) ; or
  - (b) render a receiver liable to perform any other obligation under the agreement.

#### **175. Receiver's Right to Indemnity.**

- (1) A receiver is entitled to indemnity out of the property under receivership in respect of –
  - (a) personal liability incurred under section 174; and
  - (b) remuneration and expenses which are reasonably incurred.
- (2) Nothing in this section shall –
  - (a) limit any other right of indemnity to which a receiver may be entitled;
  - (b) limit a receiver's liability on any contract entered into without authority;
  - (c) confer on a receiver any right to an indemnity in respect of liability on any contract entered into without authority; or
  - (d) confer on a receiver any right to indemnity in respect of breach of duty or negligence.

## **176. Relief from Liability for Receiver.**

- (1)** Court may relieve a receiver from all or any personal liability incurred in the course of the receivership if satisfied that –
  - (a)** the liability was incurred solely by reason of a defect in the appointment of the receiver; or
  - (b)** the receiver acted honestly and reasonably and ought, in the circumstances, fairly to be excused.
- (2)** In exercising the powers conferred under this section, the court may give directions and impose terms and conditions and apportion any liability as it considers necessary.

## **177. Receiver's Preliminary Report.**

- (1)** Subject to the appointing document, a receiver shall, within forty working days after his or her appointment prepare and send to the persons referred to in section 179(2), a preliminary report on the state of affairs of the property in receivership including –
  - (a)** the particulars of the property under receivership;
  - (b)** the particulars of the debts to be satisfied from the property under receivership;
  - (c)** the names and addresses of all known creditors with an interest in the property under receivership;
  - (d)** the names and addresses of all known creditors of any associated company or other business organization or person;
  - (e)** the particulars of any charge over the property under receivership held by any creditor, including the date on which it was created;
  - (f)** particulars of any default by the grantor in making available any relevant information; and
  - (g)** any other information as the receiver may consider necessary.
- (2)** The preliminary report under subsection (1) shall include a description of –
  - (a)** the events within the receiver's knowledge leading up to the appointment of the receiver;
  - (b)** the disposal or proposed disposal of the property under receivership;
  - (c)** any associated company or business carried on or proposed to be carried on;
  - (d)** any amounts owing, at the date of appointment, to any person in whose interests the receiver was appointed;
  - (e)** any amounts owing, at the date of appointment, to the creditors of the grantor with preferential claims;
  - (f)** any amounts likely to be available for payment to creditors other than those referred to in paragraphs (d) and (e); and
  - (g)** where the grantor is a company, any circumstances which the receiver is aware of and which reveal that the company, a past or present director, secretary or

shareholder may have committed an offence; or a person who has taken part in the formation, promotion, administration, management or winding up of the company may have misapplied or retained or may have become liable or accountable for money or property of the company; or may have been negligent or committed a default, breach of duty or breach of trust in relation to the company.

#### **178. Receiver's Other Reports.**

A receiver shall, within twenty working days after –

- (a) the end of every six months during the receivership; and
- (b) the termination of the receivership,

prepare and send to the persons referred to in section 179(2) a further report with particular reference where relevant, to the matters required in the preliminary report, summarising the status of the property under receivership at the specified dates and the conduct of the receivership, including all amounts received and paid during the period to which the report relates.

#### **179. General Provisions on Reports.**

- (1) A receiver may omit from any report required under sections 177 or 178, any matter which, if included, would materially prejudice the exercise of the receiver's functions but the fact of the omission shall be stated in the report.
- (2) A receiver shall send a copy of the report to –
  - (a) the grantor;
  - (b) all persons in whose interests the receiver is appointed;
  - (c) where the receiver was appointed by the court, to the court; and
  - (d) the official receiver,within five working days after its preparation.
- (3) Within ten working days after receipt of a written request for a copy of any report prepared under this section, from –
  - (a) a creditor, director or surety of the grantor;
  - (b) any other person with an interest in any of the property under receivership; or
  - (c) the authorised agent of any of the persons referred to in paragraphs (a) and (b),the receiver shall send the copy of the report to the person requesting for it, upon payment of a prescribed fee to the receiver.
- (4) A receiver shall permit a person entitled to receive a copy of any report prepared under this section to inspect the report at the receiver's office during regular business hours.

**180. Priorities for Application of Proceeds of Receivership.**

- (1) Where –
  - (a) the grantor is not a company in winding up, an undischarged bankrupt; and
  - (b) the property under receivership includes property which is subject to a security interest; and became subject to that security interest by reason of its application to certain existing property of the grantor and those of its future assets which were property acquired after the receivership or proceeds,the receiver shall apply the property subject to the security interest at the date of the appointment of the receiver first, in respect of the receiver's indemnity in full under section 189, to the extent that full payment cannot be made out of other property forming part of the property in receivership.
- (2) Any claim specified in sections 16(4), (5) and (6), to the extent and in order of priority specified in those subsections shall be paid after the payment under subsection (1)(b), before paying any claim of the secured creditor.
- (3) For the purposes of this section, "proceeds" means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with the collateral or proceeds of the collateral, and includes –
  - (a) a right to an insurance payment or any other payment as indemnity or compensation for loss or damage to the collateral or proceeds; and
  - (b) a payment made in total or partial discharge or redemption of an intangible, a negotiable instrument, a security or chattel paper;
- (4) For the purposes of section 16 and subsection (1), all references to winding up or bankruptcy shall include receivership.
- (5) Payments made under this section may be recouped as an unsecured debt.

**181. Vacation of Office of Receiver.**

- (1) The office of receiver shall become vacant where the person holding office is removed from office under sections 185 or 197 resigns, dies or becomes unqualified under section 191.
- (2) A receiver may resign under subsection (1) by giving not less than five working days notice in writing of his or her intention to do so –
  - (a) to the appointer; or
  - (b) where the receiver was appointed in the interests of any person other than the appointer, to that person.
- (3) Where the office of receiver becomes vacant, another person shall be appointed as

receiver in the same manner as the original receiver and the official receiver shall act as a provisional receiver until a receiver is appointed.

- (4) A person vacating the office of receiver shall be required to give information and assistance in the conduct of the receivership as that person's successor reasonably requires.

Any person who unreasonably refuses to give information and assistance required for the conduct of the receivership commits an offence.

## **182. Powers of Receiver on Winding up or Bankruptcy.**

- (1) Subject to subsection (2) and unless the court orders otherwise, a receiver may be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of any property of-
  - (a) a company which has been put into winding up; or
  - (b) an individual debtor in respect of whom a bankruptcy order has been made.
- (2) A receiver holding office in respect of any property referred to in subsection (1) may act as the agent of the grantor only –
  - (a) with the approval of the court; or
  - (b) with the written consent of the liquidator or trustee.
- (3) A debt or liability incurred by a grantor through the acts of a receiver acting as the agent of the grantor in accordance with subsection (2) shall not be taken to be a cost, charge or expense of the winding up or the administration of the bankrupt's estate.

## **183. Court Supervision of Receiver.**

- (1) On the application of a receiver, court may give directions on any matter concerning the functions of the receiver.
- (2) On the application of –
  - (a) the receiver;
  - (b) a creditor of the grantor; or
  - (c) a liquidator, provisional liquidator, administrator or provisional administrator or trustee of the grantor,during or after receivership the court may –
  - (i) in respect of any period, review or fix the remuneration of the receiver at a level which is reasonable in the circumstances and to the extent that the amount of remuneration retained by the receiver is found by the court to be unreasonably excessive in the circumstance, order the receiver to refund the amount;

- (ii) determine whether the receiver was validly appointed; or
  - (iii) determine whether the receiver validly assumed control of any property.
- (3) Subject to subsection (4), a receiver who during the exercise of his or her powers, acted in accordance with a direction of the court, shall be entitled to rely on this as a defence for any claim in respect of the exercise of the powers.
- (4) The court may order that, by reason of the circumstances in which a direction is obtained, the receiver shall not have the protection given by subsection (3).

#### **184. Enforcement of Receiver's Duties.**

- (1) An application for an order under this section may be made to court by –
  - (a) a receiver;
  - (b) a creditor of the grantor; or
  - (c) a liquidator, provisional liquidator, administrator or provisional administrator or trustee in bankruptcy of the grantor.
- (2) Unless ordered by the court, a copy of any application made under this section shall be served on the receiver not less than five working days before the hearing of the application and the receiver may appear and be heard at the hearing.
- (3) Where a receiver fails to comply with the court order, the court may, on such terms and conditions as it sees fit –
  - (a) relieve the receiver of the duty to comply, in whole or in part;
  - (b) without prejudice to any other remedy which may be available in respect of any breach of duty by the receiver, order the receiver to comply to the extent specified in the order; or
  - (c) remove the receiver from office.
- (4) Where a receiver is removed from office under subsection (3) (c) above, court may make an appropriate order for the preservation of the grantor's property, including an order requiring the removed receiver to make available any documents and other information necessary for that purpose.
- (5) All proceedings relating to any application for an order under this section shall be served on the official receiver who shall keep a copy of the proceedings on a public file indexed by reference to the name of the receiver concerned.
- (6) In this section, "failure to comply" means a failure of a receiver to comply with a duty arising under –

- (a) the appointing document;
- (b) this Act or any other law; or
- (c) any order or direction of the court other than an order to comply made under this section.

**185. Termination of Receivership by the Court.**

- (1) An application for the termination of a receivership may be made to the court by a liquidator, administrator or provisional administrator, provisional liquidator or a trustee in bankruptcy of the grantor.
- (2) Subject to subsection (3) the court may make an order, on terms and conditions as it considers necessary, that –
  - (a) the receiver ceases to act as receiver from a specified date, and
  - (b) no other receiver shall be appointed in respect of the property under receivership, and order that a copy of the order be delivered to the official receiver.
- (3) The court may make an order under subsection (2) if it is satisfied that the purpose of the receivership has been fulfilled or that the circumstances no longer justify the continuation of the receivership.
- (4) Except as otherwise ordered by the court, a copy of any application made under this section shall be served on the receiver not less than five working days before the hearing of the application and the receiver may appear and be heard at the hearing.

**CHAPTER VII**

**OFFICIAL RECEIVER AND REGULATION OF INSOLVENCY PRACTITIONERS.**

**186. Appointment of Official Receiver.**

An official receiver shall be appointed by the Court to perform the functions of official receiver under this Act.

**187. Powers and functions of the official receiver.**

The official receiver shall –

- (a) investigate the directors, shareholders, contributories and all present and past officers of an insolvent company;
- (b) investigate the promotion, formation, failure and conduct of business of an insolvent company;
- (c) prosecute any person for offences committed under this Act or discovered to have a

- case to answer as a result of investigations carried out;
- (d) investigate the conduct of insolvency practitioners and to prosecute them for any offences committed;
  - (e) act during a vacancy in the office of an insolvency practitioner; and
  - (f) take all necessary steps and actions considered fit by the official receiver to fulfill the provisions of this Act.

**188. Official Receiver’s Seal.**

The official receiver shall have an official seal.

**189. Meaning of “Insolvency Practitioner”.**

- (1) Insolvency practitioner means a person who acts as receiver, a provisional administrator, an administrator, a provisional liquidator, a liquidator, a proposed supervisor of a voluntary scheme of arrangement, a supervisor of a voluntary scheme of arrangement, or a trustee in bankruptcy.

**190. Qualifications to Act as Insolvency Practitioner.**

- (1) A person is not qualified to be appointed or act as an insolvency practitioner unless –
  - (a) he or she is a member of a prescribed professional body or has other qualification as is prescribed; and
  - (b) there is in force at the relevant time, security or professional indemnity for the proper performance of his or her duties in accordance with the prescribed requirements.
  
- (2) The following are not qualified to be appointed or to act as insolvency practitioner –
  - (a) a person less than twenty five years old;
  - (b) a corporate body;
  - (c) an undischarged bankrupt;
  - (d) a person declared by a court of competent jurisdiction to be of unsound mind;
  - (e) a person who is the subject of a prohibition order under section 195;
  - (f) a person who is the subject of a disqualification under the Companies Act for fraudulent trading or who is disqualified from holding an office under the Companies Act;
  - (g) any person who has been convicted in the preceding five years of an offence under this Act; or a crime involving dishonesty or moral turpitude;
  - (h) a person disqualified from acting as liquidator, provisional liquidator, administrator or provisional administrator under sections 192 or receiver under section 193 or trustee or supervisor under section 194; or

- (i) a person subject to disciplinary proceedings or punishment under any law.

**191. Acting as Insolvent Practitioner Without Qualification.**

- (1) A person who acts in contravention of section 190 commits an offence and is liable on conviction, in addition to the penalty provided in section 203 to a civil penalty equivalent to two times the amount of the receipts by him or her while acting as an insolvency practitioner.
- (2) Anything done by a person who is not qualified to act as an insolvency practitioner while acting as an insolvency practitioner shall be valid unless the court orders otherwise.
- (3) Any civil penalty recovered by the official receiver shall be paid to the affected estate.

**192. Persons Disqualified From Acting as Liquidators, Provisional Liquidators, Administrators or Provisional Administrators.**

The following persons shall not be appointed or act as liquidators, provisional liquidators, provisional administrators or administrators –

- (a) a creditor of the company in winding up or under administration or of an associated company; or
- (b) a person who has, within the previous two years been a shareholder, director, auditor or receiver of the company in winding up or under winding up or of any associated company.

**193. Persons Disqualified From Acting as Receiver.**

The following persons shall not be appointed or act as receiver –

- (a) a chargee of the property under receivership;
- (b) a person who has, within the two years immediately preceding the commencement of the receivership, been a shareholder, director or auditor of any chargee of the property in receivership; or
- (c) a person who is disqualified from acting as a receiver by the appointing document.

**194. Persons Disqualified From Acting as Trustee or Supervisor.**

A creditor of an individual debtor may not be appointed or act as a supervisor of an individual's scheme of arrangement or as trustee of his or her estate.

**195. Prohibition Order.**

- (1) Where it is proved to the satisfaction of a court that a person is unfit to act as an insolvency practitioner by reason of –
  - (a) persistent failure to comply;
  - (b) the seriousness of a failure to comply; or
  - (c) any other sufficient cause, the court shall make a prohibition order with a duration of not more than five years or as the court considers necessary.
- (2) A person in respect of whom a prohibition order is made shall with immediate effect cease to act as an insolvency practitioner and shall be taken to have been removed from office for the duration of the prohibition order.
- (3) Where there is evidence that on two or more occasions within the preceding five years, while a person was acting as insolvency practitioner –
  - (a) a court has made an order to comply, in respect of that person; or
  - (b) an application for an order to comply has been made in respect of that person, and that in each case the person has failed to comply after the application has been made and before the hearing, in absence of any special reasons to the contrary, this shall be evidence of persistent failure to comply within the meaning of this section.
- (4) All proceedings relating to any application for an order under this section shall be served on the official receiver and registrar of the prescribed professional body who shall keep a copy of the proceedings on a public file indexed by reference to the name of the insolvency practitioner concerned.
- (5) In this section “failure to comply” means a failure of a receiver to comply with a duty arising under-
  - (a) the appointing document;
  - (b) this Act or any other law; or
  - (c) any order or direction of the court other than an order to comply made under this section.

**196. Appointment of Two or More Insolvency Practitioners.**

Where two or more insolvency practitioners are appointed, they may act jointly and severally to the extent that they share the same powers unless expressly provided to the contrary in the appointing document.

**197. Qualified Privilege in Respect of Proceedings for Defamation.**

An insolvency practitioner shall have qualified privilege in any proceedings for defamation in respect of any matter included in any report or other document prepared under this Act.

**CHAPTER VIII  
GENERAL PROVISIONS.**

**198. Jurisdiction.**

- (1) The High Court shall have jurisdiction over all matters concerning companies under this Act.

**199. Validity of Action Notwithstanding Defect in Appointment or Qualification.**

The acts of –

- (a) an insolvency practitioner;
- (b) the official receiver;
- (c) a creditors' committee; or
- (d) a committee of inspection,

shall be valid notwithstanding any defect in the appointment to office, election or qualifications of the person or any member of the committee as the case may be.

**200. Public Notices.**

A person required to give public notice of any matter shall do so by inserting notice of the matter –

- (a) in at least one issue of the *Gazette*; and
- (b) in at least two issues of a newspaper of wide circulation in South Sudan in the official language.

**201. Disposition of Property etc, After Commencement of Winding up by the Court is Void.**

In a winding up by the court, any disposition of the property of the company, including things in action and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up shall unless the court otherwise orders, be void.

**201. Regulations.**

- (1) The Minister may, by statutory instrument, make regulations for the better carrying into effect of the purposes of this Act.
- (2) Without prejudice to the general effect of subsection (1), regulations made under this section may –
  - (a) prescribe the procedure to be followed by courts in respect of proceedings

under this Act; and

- (b) fix fees to be paid for court proceedings under this Act.
- (3) Regulations made under this section may prescribe as a penalty for contravention of any provision of the regulations, a fine or imprisonment or both.

## **SCHEDULES.**

### **FIRST SCHEDULE**

**Sections 6, 8**

#### **PRESCRIBED AMOUNT**

The prescribed amount for the purposes of Section 8 is over one thousand South Sudanese Pounds in the case of an individual and two thousand South Sudanese Pounds in the case of a company.

## SECOND SCHEDULE

Sections 12, 35, 40, 75, 134, 136, 160.

### PROCEEDINGS AT MEETINGS OF CREDITORS.

1. A meeting of creditors may be held -
  - (a) by assembling together those creditors entitled to take part and who choose to attend at the place, date and time appointed for the meeting;
  - (b) by means of audio or audio and visual communication by which all creditors participating can simultaneously hear each other throughout the meeting; or
  - (c) by conducting a postal ballot in accordance with clause 5 of those creditors entitled to take part.
  
2. Written notice of –
  - (a) the time and place of every meeting to be held under paragraph 1(a);
  - (b) the time and method of communication for every meeting to be held under paragraph 1; and
  - (c) the time and address for the return of voting papers for every meeting to be held under paragraph 1(a) or (b) or (c),shall be given to every creditor entitled to attend the meeting and to any liquidator not less than ten working days before the meeting.
  
3. The notice shall –
  - (a) state the nature of the business to be transacted at the meeting in sufficient detail to enable a creditor form a reasoned judgement of the business;
  - (b) set out the text of any resolution to be submitted to the meeting; and
  - (c) include a voting paper in respect of each resolution and voting and mailing instructions.
  
4. Any irregularity in a notice for a meeting shall not invalidate anything done by that meeting if not material or where all the creditors entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity or where all creditors agree to waive the irregularity.
  
5. Where a meeting of creditors under paragraph 1(a) or (b) is adjourned for less than thirty days, it shall not be necessary to give notice of the time and place of the adjourned meeting other than by an announcement at the meeting which is adjourned.

- 6.** If a liquidator has been appointed and is present -
- (a)** he or she shall chair the meeting held in accordance with paragraph 1(a) or (b);
  - (b)** in any case where there is no liquidator or the liquidator is not present, the creditors participating shall choose from amongst themselves a person to chair the meeting.
- 7.** The person convening a meeting shall do all the necessary things that would otherwise be done by the person chairing a meeting.
- 8.** At any meeting –
- (a)** each creditor is entitled to cast a number of votes proportionate to the value which the amount of the debt owing to that creditor bears to the aggregate of the debts owing to all creditors or, if there is more than one class of creditors, to the aggregate of the debts owing to all creditors of the class to which that creditor belongs;
  - (b)** a resolution is adopted if it is approved by a majority of the votes cast, unless in the particular case a greater majority is required by this Act; and
  - (c)** a creditor chairing the meeting does not have a casting vote.
- 9.**
- (1)** Any creditor entitled to vote at a meeting of creditors held in accordance with paragraph 1(a), (b) or (c) may exercise the right to vote by casting a postal vote in respect of any matter to be decided at the meeting.
  - (2)** The notice of a meeting shall state the name of the person authorised to receive and count postal votes at that meeting.
  - (3)** Where no person has been authorised to receive and count postal votes at a meeting or where no person is named in the notice of the meeting as authorised, every director or if the company is in winding up, the liquidator is taken to be so authorised.
  - (4)** A creditor may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a marked voting paper to a person authorised to receive and count postal votes in respect of that meeting not later than twenty four hours before the start of the meeting or, if the meeting is held under paragraph 1(c), not later than the date named for the return of the voting paper.
  - (5)** It is the duty of a person authorised to receive and count postal votes in respect of a meeting-
    - (a)** to collect together all postal votes received by him or her or by any other authorised person; and
    - (b)** in respect of each resolution to be voted on, to count-
      - (i)** the number of creditors voting in favour of the resolution and the number of votes cast by each creditor in favour of the resolution; and
      - (ii)** the number of creditors voting against the resolution and the number of

votes cast by each creditor against the resolution;

- (c) to sign a certificate-
  - (i) that he or she has carried out the duties set out in paragraphs (a) and (b); and
  - (ii) stating the results of the counts required by paragraph (b);
- (d) to ensure that the certificate required by paragraph (c) is presented to the person chairing or convening the meeting.

(6) Where a vote is taken at a meeting held under paragraph 1(a) or (b) on any resolution on which postal votes have cast, the person chairing the meeting shall count the votes cast by each creditor who has sent in a voting paper duly marked as for or against the resolution.

(7) Any certificate given under paragraph (5) (c) in relation to the postal votes cast in respect of any meeting of creditors shall be annexed to the minutes of the meeting.

**10.** The person chairing a meeting of creditors or in the case of a meeting held under paragraph 1 (c), the person convening the meeting, shall ensure that full and accurate minutes are kept of all proceedings.

**11.** Minutes which have been signed correct by the person chairing or convening the meeting are prima facie evidence of the proceedings.

**12.** A body corporate which is a creditor may appoint a representative to attend a meeting of creditors on its behalf.

**13.** Except as provided above, a meeting of creditors may regulate its own procedure.

## **THIRD SCHEDULE.**

**Sections 85, 154.**

### **WINDING UP OF ASSETS OF FOREIGN COMPANIES.**

- 1.** This Act applies to winding up of property in South Sudan, of a foreign company, with the following modifications and exclusions:
  - (a)** all references to property or assets are to be taken as references to property or assets in South Sudan;
  - (b)** all references to a company are to be taken as references to a foreign company;
  - (c)** the provisions prohibiting a company to transfer shares or alteration of liabilities of any shareholder; and prohibiting a shareholder from exercising any power under the companies memorandum and articles of association shall not apply;
  - (d)** the provisions prohibiting alteration of a memorandum and articles of association of the company shall not apply;
  - (e)** the provision prohibiting officers and directors of a foreign company from having any powers, functions or duties in respect of property in South Sudan shall apply but this will not affect the tenure of the directors;
  - (f)** when the liquidator completes the liquidation, the liquidator shall make a statement that the company has ceased to carry on business in South Sudan and is ready to be removed from the register of South Sudan.
  
- 2.** Nothing in this Act shall be taken to exclude the right of a creditor of a foreign company in respect of the assets of which a liquidator has been appointed –
  - (a)** to bring any proceeding outside South Sudan against the foreign company in respect of any debt not claimed in the winding up or any balance of a debt remaining unpaid after the completion of a winding up; or
  - (b)** to bring an action in South Sudan in respect of any balance of a debt remaining unpaid after the completion of a winding-up.

**Assent of the President of the Republic of South Sudan**

In accordance with the provision of Article 85 (1) of the Transitional Constitution of the Republic of South Sudan, 2011, I, Gen. Salva Kiir Mayardit, President of the Republic of South Sudan, hereby Assent to the Insolvency Act, 2011 and sign it into law.

Signed under my hand in Juba, this 23<sup>rd</sup> day of the month of DEC in the year 2011.

A handwritten signature in black ink, consisting of a large, stylized loop at the top, followed by the letters 'K' and 'M' in a cursive script.

**Gen. Salva Kiir Mayardit**  
**President of the Republic of South Sudan**  
RSS/ Juba.