NATIONAL UNIVERSITY OF LESOTHO

The Complicated Personality of Joint-Ventures: The Interplay Between the Companies Act No. 18 of 2011 and the Partnerships Proclamation No. 78 of 1957 in the Context of the Insolvency of Partnerships under the Insolvency Act No. 9 of 2022

A mini-dissertation submitted in partial fulfilment of the requirements of the degree of Master of Laws (LL.M.) of the Faculty of Law of the National University of Lesotho

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Declaration:

I, Piti Jonas Lebakeng, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any other journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

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Dedication

This work is dedicated to my late mother, ‘Mapiti Julia Lebakeng, the first person to know that I passed my COSC and qualified to enroll at the National University of Lesotho (NUL) in 2009. That deep warm hug on that day kept me going even during the difficult times when I felt like quitting. Keep resting in peace Mohlakoana!

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Abstract

There is a need for collaboration and corporation in the business world in order to realise ultimate success. Companies are encouraged to join forces in order to maximize the utilization of their skills and capacities to complete the big development projects in the developing economies. The present study investigated the formation, regulation and ultimate dissolution of the business relations between the companies, which had grouped themselves and formed joint ventures in the performance of tendered projects in Lesotho. It has become evident that there are challenges with regard to the process of liquidation of the joint-ventures on account of insolvency. The main challenge is brought by some how complicated and not clearly determinable personality of the joint-ventures composed of incorporated companies. The law in Lesotho still recognizes partnerships as mere aggregation of the persons who formed such partnerships. The joint-ventures are considered as a species of partnerships. The study recommends that the law be amended and that partnerships be conferred independent legal personality in certain respects, which will make a process of liquidation of joint-ventures an easily manageable process whereby only the estate of the partnership shall be considered during the liquidation process. The study further revealed that the Insolvency Act of 2022 has not sufficiently addressed the problems associated with the aggregate personality theory accorded to the partnerships in Lesotho, which were encountered in the sequestration process under the repealed Insolvency Proclamation of 1957, and still to persist under the present legal regime. The study has further concluded that the extension of personal liability on the directors of companies in the joint-ventures is rather unjustifiably tramples on the notion of limited liability. It is recommended ultimately that culpable conduct on the part of the directors has to be main consideration for the extension of liability for damage or loss to the company on the directors.

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Chapter One: Introduction

1.0 Background

With the advent of major construction development projects in Lesotho the capacity of construction entities to carry through the work of construction of these major projects to finality has become a major challenge. It has also been introduced as a policy matter, that when such entities bid for work to perform this major development projects, they partner in order to get them favourable scores to secure work to perform such projects during bids evaluation. Mostly, it is advocated that the well-established international companies partner with local companies in bidding for these construction works, mainly for the purposes of skill transfer between the partners and pulling together the resources of the two entities to perform and complete the work at hand. Malcolm McKenzie Park[1] wrote on this point and stated as follows in the context of Australia:

> A final note on general semantics must record that the expression "joint venture" is sometimes used to describe co-operative undertakings between a foreign party and a domestic party where national and international policies dictate such co-operation, such policies being restrictions imposed on foreign ownership of domestic businesses and foreign assistance including the exporting of "know-how" to underdeveloped countries and the fostering of industrial growth in such countries.[2]

It is on account of the above stated policies that the companies providing construction work services partner with each other in the form of joint-ventures to perform and complete the given tendered project. The formation and or utilization of joint-ventures has been more common in most

[1] Park, Malcolm McKenzie, Joint Venture: North American Emigrant Possessing Skills Not Readily Available in Australia, Family Reunion Immigrant, or Native-Born Australian Unrelated to Foreigners of the Same Name? (1984)., a research paper for the subject Advanced Company Law (LLM) 730-659 submitted at the Faculty of Law, The University of Melbourne, Available at SSRN: https://ssrn.com/abstract=1566631 or http://dx.doi.org/10.2139/ssrn.1566631 accessed on the 21 June 2025.
[2] Ibid, 3.

developed economies, but has recently evolved in the developing world, with much of the construction work and investment shifting to the developing economies.[3] Lesotho, like many developing countries, especially in Africa received substantial development aid, from the Millennium Challenge Corporation (MCC), which resulted in big developmental projects being undertaken in Lesotho, such as the building of schools and health facilities to mention few.[4] The performance of work in respect of these big projects had forced many local and even international companies to form partnerships in the form of joint-ventures to perform and complete timeously the given tasks. The projects of Lesotho Highland Development Authority (LHDA) in construction of big dams in the Kingdom of Lesotho have also made the construction companies involved in those projects to form joint-ventures to perform and complete the undertaken construction work. [5]

[3] Dale Weigel, Foreign Direct Investment: The Role of Joint Ventures and Investment Authorities, https://www.elibrary.imf.org/downloadpdf/display/book/9781557751409/ch04.pdf accessed on the 03rd May 2025.

[4] *Trencon Building World Belela Joint Venture and Others v Anju Civils (Pty) Ltd and Others* LAC (2015-2016) 748 at page 753, paragraph [11], where the following is stated by the Court of Appeal of Lesotho, 'The Government of the Kingdom of Lesotho signed a Compact with the Government of the United States of America in terms of which the USA provided funding for development assistance to Lesotho. The funding was channelled through the Millennium Challenge Corporation of the United States of America. In Lesotho, this funding was given effect to by the enactment of the Millennium Challenge Account- Lesotho Authority Act. One of the programmes funded under the agreement was the Lesotho Health Infrastructure Program consisting of "Botsabelo Complex, fourteen Outpatient Departments and the construction of 137 Health Centres".

[5] Seven International Contractors, joined forces to build Katse Dam, from February 1991 to May 1997; those were Imbregilo (Italy), Bouygues (France), Hochtief (Germany), Stirling and Kier (United Kingdom), Concor and Group 5 (Republic of South Africa https://www.lhda.org.ls/projectphases/phasei#:~:text=The%20dam%20was%20built%20by,was%20completed%20in%20May%201997. Accessed on the 03rd May 2025. Three lead Companies have formed a Joint-Venture to build Polihali Dam and Transfer Tunnel; those are Sinohydro Bureau 8 (China), Synohydro Bureau 14 (China), Unick Civil Engineering (Republic of South Africa) and Nthane Brothers, referred to as SUN JOINT VENTURE (JV) chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/ https://www.lhda.org.ls/Uploads/documents/Press_Office/Press_releases/LHWP_Phase_II_main_works_construction_of_POB_dam_and_transfer_04_Nov_2022.pdf accessed on the 03rd May 2025.

Joint-Ventures are not strictly regulated in Lesotho, in the sense that there is no specific direct legislation specially regulating the formation, governance and or operations of the joint-ventures. One has to go to various pieces of legislation to get how the joint-venture is formed, regulated and dissolved. [6] Sometimes parties just come together and agree to join forces and work together to perform a given task, and what they would be having is only that joint-venture agreement, which only implicates the principles of the law of contract. It is therefore difficult to say with certainty as to what it is the legal nature of a joint-venture and as to whether the joint-ventures have independent legal personality or not.

But at the basic level joint ventures may be referred to as partnerships. This is because they can be formed by natural persons and juristic persons for the performance of a particular business venture.[7] Joint-venture being a form of partnership, is expected to have an agreement in the form of deed of partnership, signed by all the partners and be registered before a Notary Public or an administrative officer in terms of the Partnership Proclamation 1957.[8] A deed of Partnership has to state the date of formation of the partnership, the full names and addresses of the partners, the purpose of the partnership, the period for which the partnership is formed, the place where the partnership will carry out its business, 'the amount of or the nature and value of the services or assets brought into the partnership by every partner; and the duties and degree of participation of each partner in the business of the partnership'. [9]

[6] Partnership Proclamation 78 of 1957, Insolvency Proclamation 51 of 1957 (now repealed but will be referred to due to its relevance and importance in this research), Insolvency Act No. 9 of 2022, and Companies Act No. 18 of 2011.
[7]SA Leather Co (Pty) Ltd v Main Clothing Manufacturers (Pty) Ltd and Another 1958 (2) SA 118 (O); Purdon v Muller [1960] 2 ALL SA 607(E), 616; Pezzutto v Dreyer and Others [1992] 2 ALL SA 81(A), 91; Duyn v Shangming International (Pty) Ltd [2003] 1 ALL SA 173 (C), 179.
[8] Section 2(1) of the Partnership Proclamation 1957.
[9] Ibid, Section 5(1), referred to in the case of Lebusa Motlomelo v Lethabela Mathe and Others LAC (2005-2006) 143 at 145, paragraph [4]B-C.

Two or more people, but not exceeding twenty in number with an intention to carry out lawful business and with each contributing something and with intention to making profit and sharing it between them may form a partnership.[10] It is worth mentioning for the purposes of this study that the word person has not been defined in the Partnership Proclamation which leaves it open to the interpretation that it refers to both natural and juristic persons. It can therefore be argued that a joint-venture can be formed by natural persons, juristic persons and in other instances, juristic persons and natural persons.[11] It therefore becomes difficult to clearly ascertain as to which laws are applicable in the event of the dissolution of the relevant joint-ventures, or it becomes an extremely daunting task during the process of dissolution of the relevant joint-ventures when guidance is being sought from various pieces of legislation to complete the dissolution and ultimate winding up process.

It is perhaps prudent to state at this stage that natural and juristic persons had different laws that regulated their life affairs in Lesotho in the situation of insolvency, natural persons having been exclusively regulated in terms of Insolvency Proclamation of 1957, which specifically employed the word sequestration while the companies are dealt with under the current Companies Act of 2011, which uses the word liquidation. It is also important to state that the Insolvency Act 2022 which replaced the repealed Insolvency Proclamation brought some major changes to the status *quo* and in certain respects regulates the dissolution processes of the estates of both natural and juristic persons on account of insolvency and employs the term liquidation in respect of both

[10] Partnership Proclamation (n 6), Section 1; Motlomelo Case (n 9) 145, para [5]
[11] SA Leather Co (Pty) Ltd case (n 7).

natural and juristic persons' estates.[12] It therefore stands to reason that the Insolvency Act appears to have been promulgated to regulate the process of dissolution of partnerships, and in certain respects winding up of companies and natural persons' estates all through the process of liquidation, which was initially applicable to winding of companies' estates only. As is evident, the Insolvency Act is relatively new and has not been subject of much judicial scrutiny or put in practice in the process of administration of the insolvent estates. There are however, red flags from some of the provisions of that Act, which the current study seeks to expose, and suggest practical and suitable solutions.

1.1 Statement of the problem

There may arise situations where the joint-ventures face challenges to the extent that the life of such joint-venture has to be ended, and the relevant entity is dissolved. The challenge that arises when a joint-venture is dissolved has a lot to do with the personality of the entity itself and also personalities of the persons that are involved in the composition of the concerned joint-venture. It may be easier when the joint-venture is composed only of the natural persons, whereby at least single or two pieces of legislations may govern the process of dissolution.[13] It is evident that when the joint-venture is composed of a company or companies, with natural persons, as far as the company is concerned the provisions of the companies Act, will be implicated read together with the Partnerships Proclamation, and also the recently enacted Insolvency Act, whereas as far as the natural persons are concerned when the dissolution occurs the Partnerships Proclamation and the Insolvency Act referred to above are going to be utilised.

[12] Act No. 9 of 2022.
[13] Insolvency Act 2022 and Partnerships Proclamation 1957.

The problem associated with the joint-ventures in the situation of insolvency came to the attention of the Court of Appeal of Lesotho in the matter of *Trencon Building World Belela Joint Venture and Others v Anju Civils (Pty) Ltd and Others*.[14] This case was about an application for the sequestration of an estate of the joint-venture which was constituted by some companies registered in Lesotho, and others registered in the Republic of South Africa. The question was whether the sequestration of the estate of the relevant joint-venture could be ordered, as regards section 13 of the repealed Insolvency Proclamation 1957, which prescribed that if there is a call for sequestration of the partnership estate, there has to simultaneously be an order for sequestration of the estates of individual partner's estates, while there was no move to have estates of other partners in the joint-venture to be sequestrated, especially those companies registered in the Republic of South Africa.

The Court of Appeal was divided in its decision in the above-mentioned judgement. The minority decision held that the court could competently make an order for sequestration of the estate of the joint-venture despite there being no order or application for the sequestration of the individual partners' estates. The majority, on the other hand, held that the wording of section 13 was couched in mandatory terms, and that there was no way to go about it, an order for sequestration of the estate of the joint-venture should go hand in hand with an order for the sequestration of the individual partners' estates. It would appear that there would further be an impediment to the sequestration of the joint-ventures' estate and those of individual partners when there is a lawful bar to sequestration.[15] In the *Trencon* case referred to above, reference was made to South African

[14] LAC (2015-2016) 748.
[15] Ibid, page 751.

decision, where only the estate of the partnership was sequestrated where one of the partners was a bank and another partner was 'a local company whose estate could not be sequestrated under the Insolvency Act'.[16]

The Insolvency Act 2022 has repealed the Insolvency Proclamation of 1957, with drastic changes on both the nomenclature and effect on the insolvency processes in Lesotho. The Act employs the term liquidation for both companies and natural persons' estates as opposed to sequestration in respect of the natural persons' estates under the repealed law. Section 9 (4) provides in essence that the estates of the directors of juristic persons who are partners to the partnership or joint-venture maybe be regarded as estates under liquidation in the situation of liquidation of the estate of partnership involving a juristic person under certain circumstances.[17] This appears to present a legal problem of blurring the recognised independent legal personality of a company well-established in the company law.[18] The fact that the above-mentioned section appears to allow a situation whereby the director's personal properties may be considered in the event of liquidation of estate of the joint-venture to which the concerned company he is director in is a partner to the joint-venter raises a prejudicial risk to the directors who may be unaware of such risk when they accept the directorship in the concerned company. Such directors may also be unaware when they

[16] Ibid. The case from the Republic of South Africa that was referred to is, Commissioner, SARS v Hawker Aviation Partnership and Others 2006 (4) SA 292 (SCA)

[17] The relevant section is couched in the following terms, '[w]here there is no partner whose estate maybe liquidated as contemplated in subsection (3), the Court may nevertheless liquidate the partnership estate and in such event every director of a juristic person, which juristic person is a partner in the partnership in question and every natural person who is a partner but whose estate may not be liquidated, is, for the purpose of performing any statutory requirement in respect of the partnership estate, regarded as a person whose estate is under liquidation.'

[18] Salmon v Salmon & Co Ltd [1897] AC 22 (HL)., followed by the Appellate Division of the Republic of South Africa in the matter of Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 and the Court of Appeal of Lesotho in the matter of Lebohang Thotanyana v Nthabeleng Motsamai and Others C of A (CIV) NO. 62/2019 (unreported, available on Leslii) https://lesotholii.org/akn/ls/judgment/lsca/2020/30/eng@2020-10-30- accessed on the 03rd May 2025.

join a company to which they are directors in a proposed joint-venture that by so doing they are exposing their personal assets to the risk of being considered during the liquidation of the estate of the concerned joint-venture.[19]

The problem for investigation in the present research is mainly on the controversy surrounding the process of liquidation and or sequestration of the estate of the joint-venture as clearly encountered in the *Trencon* matter referred to above. The further problem connected with the first problem stated herein to be addressed by this study is as to whether section 9(4) of the Insolvency Act 2022 unjustifiably and unprocedurally compromises the concepts of independent legal personality of the companies and the limited liability in the situation of insolvency.

1.2 Hypothesis

The repealed Insolvency Proclamation 1957 had major deficiencies to address sequestration of a partnership estate, especially where juristic persons are involved in the composition of such partnership. The proclamation in section 13 prescribed that once the estate of the partnership has to be sequestrated, the estates of the individual partners in the partnership equally had to be sequestrated. The Insolvency Act 2022 which replaced the repealed Act maintains a similar provision to section 13 of the repealed proclamation in Section 9(3). Section 9(4) provides for instances whereby the estate of the director of a company which is part of the partnership may be considered during the liquidation process of the partnership in which the concerned company is a partner.[20]

[19] Section 9(4)(n 12)
[20] Ibid.

It is hypothesised that the sanctity of independent legal personality of the incorporated company despite it being a partner in a joint-venture should always be maintained, and that the liabilities of the company should be of that company alone as a legal person, not to be extended to its directors, unless the legal requirements for the extension of liability of the company to the directors have been satisfied. *Prima facie*, section 9(4) constitutes an inroad into the well-established principle that the assets or properties of the companies, shareholders, and the directors are kept separately and the property of either of the three actors mentioned herein cannot be used to make good, debts of another party. It is hypothesized that the nature of the personality of joint-ventures in Lesotho, especially in the context of liquidation under the current Insolvency Act, compromises the independent legal personalities of the companies, and the notion of limited liability

1.4 Significance of the research problem

The challenge associated with the dissolution of joint-ventures on account of insolvency in Lesotho was laid bare in the Court of Appeal of Lesotho in the *Trencon* matter referred to above, as the court could not reach a unanimous decision on how to go about the dissolution of that partnership in those circumstances. The minority followed the South African precedent, while the majority found the opposite route to be appropriate. This therefore still remains a controversy in our insolvency law worthy of investigation. The promulgation of Insolvency Act, especially with the introduction of section 9(4) of the Act, appears to go against the notion of limited liability in the company law by somehow rendering the estate of the director of a company in a joint-venture to be considered during liquidation of the joint-venture in particular circumstances.

It is therefore significant to investigate as to what extent the concepts of independent legal personality of the company and the limited liability have been compromised by the relevant section. The elucidation on this point will help enlighten the directors joining companies already in the joint-venture agreements, or those that are about to conclude such agreements what effect that could have in respect of their individual personal estates during the dissolution of the joint-ventures on account of insolvency.

1.5 Literature review

The main character of an incorporated company is the independent legal personality that comes with such incorporation. This was endorsed and confirmed centuries ago in the *locus classicus* decision on this subject of *Salmon v Salmon & Co Ltd,* [21]in which Mr. Aron Salomon had started a business of leather merchant and wholesale boot manufacturer as a sole trader.[22] Mr. Salomon later sold his business to the company in which his family and he were the shareholders. He was the controlling majority shareholder, a director and employee of the relevant company. He was also the creditor of the company for the debentures issued in his favour.

The company business later failed and the company had to be liquidated. Mr. Aron Salomon was the secured creditor and was entitled to be paid first, before other ordinary creditors in terms of the law. The assets of the company could not cover the debts of other creditors but only that of Mr.

[21] [1897] AC 22 (HL).
[22] Faraouk HI Cassim and Others, *Contemporary Company Law* (2nd edn, Juta & Co Ltd 2012) 33.

Salmon. The liquidator objected, arguing that the company was actually Mr. Salmon in another form. The matter went all the way to the House of Lords as the Court of Appeal had found in favour of the liquidator. On appeal to the House of Lords, the decision was reversed; it was held that, 'once the company was legally incorporated it was a completely different person with its own rights and liabilities'.[23]

As one of its characters associated with it being a separate and independent legal person, the company can also own property in its own name and right. This principle was stated in the leading case of *Dadoo Ltd v Krugersdorp Municipal Council*[24] in which on account of a particular legislation, Indians were prohibited from owning immovable property in the Republic of South Africa. [25] The persons of Indian origin incorporated a company by the names of Dadoo Ltd, which purchased immovable property in Krugersdorp. The Krugersdorp Municipality challenged that the company had violated the law prohibiting the Indians from holding immovable property. The Appellate Division held that the relevant law did not apply to the companies but the individuals, and that the property in issue vested in a company and not its shareholders.

Further associated with the character of independent legal personality of the company, is the notion of limited liability in the life of a company. The notion of limited liability means that 'the liability of the shareholders for the company's debts is limited to the amount they have paid to the company for its shares'.[26] Cassim[27] with reference to South African Companies Act[28], says, 'section 19(2)

[23] Ibid, 34.
[24] 1920 AD 530.
[25]Faraouk HI Cassim (n 22), 37.
[26] Ibid, 35.
[27] Ibid.
[28] No. 71 of 2008.

of the Act states that a person is not, solely by reason of being an incorporator, shareholder, or director of a company, liable for any liabilities or obligations of the company, except to the extent that the Act or company's Memorandum of Incorporation provides otherwise'.[29]

All the above stated characters of the company have been codified and or incorporated in section 9 of the Companies Act of 2011 of Lesotho. The relevant section provides that once the company is incorporated it assumes the independent legal personality from the persons who incorporated it; it can sue or be sued in its own name; it can acquire and hold property in its name and it assumes the power to conclude contracts and incur liabilities to mention few characters. It is therefore evident that the Lesotho company law is aligned to the well-established principle that once the company is incorporated it becomes an independent legal person, with full capacity.

For the fact that an incorporated company can contract and therefore form any business relationship with other persons, means that the companies are permitted to enter into or form joint-ventures. This point lends support from the learned researcher's writing, McKenzie[30] where the following is stated:

> In Australia there is no restriction on the definition and capacity of persons, both natural and corporate, to enter into a partnership unless such persons suffer disabilities preventing them from entering into valid and enforceable contracts. Pursuant to the Victorian *Companies Code*17 a company possesses the capacity to enter into a partnership. The position is the same in the other Australian states and the United Kingdom. There is no controversy in Australia regarding the capacity of a company to enter into a partnership and this point would not require consideration except for the fact that in another jurisdiction where joint ventures thrive, it is thought that a corporation cannot enter into a partnership. Similarly, a partnership or firm may be a partner in another partnership or firm.[31]

[29] Ibid.
[30] Park, Malcolm McKenzie (n 1).
[31] Ibid, 4.

The researcher herein could not find a definition of a term 'joint-venture' in any of the legislations in Lesotho. In the international literature the definition found of a joint-venture is:

> 'a common project between legally and commercially independent companies in which the parties jointly bear both the responsibility for management and the financial risk.'[32] For purposes here, they are also established as separate corporations in which the ownership interest is split between two or more partners who, in the typical case, are themselves corporate entities. The key, however, is that all partners in the JV are exposed to the same risks, although the way in which this responsibility is divided among the partners through their agreement is quite variable'.[33]

McKenzie with reference to decided case, concluded that the definition of a joint-venture is the following:

> In summary, then, a working definition of joint venture based on the actual judicial decision may be thus formulated: A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually *ad hoc* undertaking for joint profit by combining their respective resources, without however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.[34]

A joint-venture is classified as a partnership in Lesotho. Partnerships in Lesotho are formed and governed in terms of Partnership Proclamation 78 of 1957. Section 1 of the relevant Proclamation provides that partnership is 'any legal relationship between two or more persons, but not exceeding twenty persons, who carry on, or intend to carry on, any lawful business or undertaking to which each contributes something, with the object of making a profit and of sharing it between them'. In

[32]Rolf Weder, "Internationalization of Switzerland: Competitive Advantages of Joint Ventures and Other Cooperative Arrangements," in Joint Ventures and Collaborations, Hans Singer, N. Hatti and R. Tandon (eds.), New World Order Series, Volume 10 (New Delhi: Indus Publishing, 1991], pp. 197-217. Definition is included on p. 201.

[33] Rebert R.Miller, Jack D. Glen, Frederick Z and Jaspersen, Yannis Karmokolias, '*International Joint-Ventures in Developing Countries, Happy Marrieages?, International Finance Corporation*, Discussion Paper Number 29, The World Bank, Washington, DC, 1996. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents1.worldbank.org/curated/en/895971468765008903/pdf/m> accessed on the 03rd May 2025.

[34] Park, Malcolm McKenzie (n1) 21.

terms of section 2, of the Proclamation the terms of every partnership agreement have to be recorded in a deed of partnership, to be duly notarised.

It is evident that when one reads the case law of Lesotho that it has been held that joint-venture is a form of partnership, which owes its validity to the satisfaction of the formation and registration requirements provided for under sections 1 and 2 of the Partnerships Proclamation of 1957.[35] There are partnerships that are meant to operate for long periods, while others are meant to operate for a specified period of time. Partnership arrangements can therefore be dissolved due to the fact that the time for which the partnership was formed had lapsed,[36] that the purpose for which the partnership was formed had been served,[37] meaning that the task of the relevant partnership has been performed to finality and by mutual agreement of the partners,[38] in the event of death of one of the partners[39] and in the event of insolvency of one of the partners.[40] The manner of terminating the partnership agreement and thereby dissolving it through mutual consent of the parties, should be provided for in the deed of partnership.

[35] *Anju Civils (Pty) Ltd v Trencon Building World Belela Joint Venture and Others*- CCA/63/2013 (unreported) available on Leslii (https://lesotholii.org/akn/ls/judgment/lshc/2015/14/eng@2015-04-08/source.pdf) (accessed on the 09 March 2025.
[36] Liesl Hager, The Dissolution of universal partnerships in South African Law, 2019, 41, (dissertation submitted in fulfilment of the requirements for the degree, LLM at the Faculty of Law, University of Pretoria. blob:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/29ecc963-934b-47c7-bce6-4570e2ee233b, Accessed on the 30th May 2025.
[37] Robert Sharrok , Kathleen Van Der Linde and Alastair Smith, *Hockly's Insolvency Law* (9th edn, Juta & Co Ltd 2012) 223; Liesl Hager (n 36) 42.
[38] Liesl Hager (n 36) 45.
[39] Liesl Hager (n 36) 43.
[40] Liesl Hager (n 36).45.

However, there are instances where some of the above-mentioned situations of termination of partnership agreement would not apply but for that of insolvency of the partnership itself which would amount to forced dissolution. Forced dissolution of the partnership arrangements is usually ordered by a court of law. In the event of forced dissolution of the Partnership, the applicable current law is the Insolvency Act 2022.[41] Relevant to the present study is Section 9 of the Insolvency Act on the liquidation of the partnership estates. The concept of liquidation was initially used in respect of the companies only in terms of Section 125 of the Companies Act 2011.[42] The current Insolvency Act has employed the term 'liquidation', instead of 'sequestration' as used in the repealed Proclamation. In terms of Section 9(3) of that Act, once there is a call for liquidation of the estate of the partnership, there has to be simultaneous move for the liquidation of the estates of the individual partners. Section 9(4) of the Insolvency Act is rather controversial in the researcher's view, in providing that:

> [w]here there is no partner whose estate maybe liquidated as contemplated in subsection (3), the court may nevertheless liquidate the partnership estate and in such event every director of a juristic person, which juristic person is a partner in the partnership in question and every natural person who is a partner but whose estate may not be liquidated, is, for the purpose of performing any statutory requirement in respect of the partnership estate, regarded as a person whose estate is under liquidation.

The researcher shall investigate through this study the import of the above-mentioned section, and attempt to resolve the question as to whether the relevant section unjustifiably blurs the well-established independent legal personality notion of the incorporated companies, and suggest improvements to the law to keep intact the principle of independent legal personality of the company, even in the situations of dissolution of the joint-venture composed of incorporated

[41] Act No. 9 of 2022.
[42] Act No. 18 of 2011.

companies as partners. The researcher will further recommend measures that can be employed through the law, to maintain joint-ventures as viable business concerns until at least when they have completed their business venture as opposed to resorting to liquidation.

1.6 Scope of the study

The broader objective of the present study is to examine the true nature of the personality of joint-ventures in Lesotho; as to whether they possess independent legal personality, and if yes to what extent. Connected with the nature of the personality of the joint-ventures, the present study will seek to analyse the process of dissolution of the joint-ventures through liquidation under the present Insolvency Act of 2022. It is the purpose of this study that the hovering question as to whether Section 9(4) of the Insolvency Act constitutes an inroad into the well-established principle of independent legal personality of the company in making the assets of the director of the company in a joint-venture to be considered during the process of liquidation of the partnership in certain circumstances is answered. It is further the objective of the present study to propose that there be a model of law which shall specifically govern the formation and governance of the partnerships made of incorporated companies with a specific focus on whether the principle of limited liability is recognised or not in relation to the concerned joint-ventures and specifically regulates dissolution process of such partnerships on account of insolvency.

1.7 Methodology

The research will be conducted mainly through the qualitative research method. The researcher herein will engage in the analysis of applicable provisions of the relevant pieces of legislation on the formation, governance and dissolution of the joint-ventures. The researcher will make reference to legislation, books, articles and decided cases on the subject. There are exciting legislative developments on the process of sequestration in Scotland which has been identified as one of the commonwealth jurisdictions, and the researcher will draw some lessons from that jurisdiction in recommending how the liquidation process under the present Insolvency Act can be improved to effectively govern the process.

1.8 Chapters breakdown

Chapter One: Introduction/Background: In this chapter the researcher introduces the theme of the present study. Definition and short discussion of concepts involved in this study. Introduction to the problem to be investigated in the present study.

Chapter Two: (Nature of the personality of the Joint-Ventures in Lesotho): There is an elaborate discussion on the legal nature of the joint-ventures and or partnerships, with regard to how they are formed, regulated and dissolved.

Chapter Three: (Joint Ventures in Insolvency): In this chapter the researcher discusses elaborately the notion of sequestration under the repealed Insolvency Proclamation 51 of 1957, and how it applied to the estates of partnerships and individual partners, and further discusses the changes

that have been brought about by the Insolvency Act of 2022, with sharp focus on Section 9(4) of the Insolvency Act of 2022.

Chapter Four: (Liquidation of the estates of companies under the companies Act of 2011 and partnerships composed of incorporated companies): In this chapter study briefly interrogates the process of liquidation under the Companies Act of Lesotho read with and or in comparison to Insolvency Act of 2022, and investigate as to whether the liquidation of a company has any effect on the property of the directors of the company under liquidation, in doing so the researcher is trying address the import of Section 9(4) of the Insolvency Act 2022, in the context of insolvency of partnerships composed of incorporated companies.

Chapter Five: (Lessons from the Republic of South Africa and Scotland, conclusion and Recommendations): The researcher explores the developments of the insolvency law in the Republic of South Africa as brought about by the decisions of the courts, in relation to the joint-ventures which are composed of companies. The researcher further draws some lessons from the Scotland's Insolvency legal framework, make conclusion on the research question, and make recommendations on the identified deficiencies in the Insolvency law in Lesotho and the broad conclusion boils down to there being a piece of legislation which shall regulate specifically partnerships composed of incorporated companies, in conferring independent legal *persona* in such partnerships.

Chapter Two: Nature of the Personality of Joint-Ventures in Lesotho

2.0 Introduction

The formation of partnerships in Lesotho is exclusively governed by the Partnership Proclamation 1957.[43] The Proclamation permits persons of up to twenty in number to form a partnership with intention to do business for profit sharing.[44] The proclamation does not define the term 'person', which leaves it open that both natural and juristic persons are contemplated in section 1 of the proclamation, which might explain why the companies have been allowed to form partnerships in the form of joint-ventures in Lesotho. In this chapter the focus is on the formation of partnerships and the personality assigned to the partnerships. The chapter further reveals that although the issue of personality of the partnerships would appear to have been settled, that is not straight forwardly so, as the deliberations herein demonstrates that there are instances when the partnership is treated as an entity on its own and in other instances it is treated as simply an aggregate of those who formed the partnership.

[43] Partnership Proclamation (n 6).
[44] Ibid, Section 1.

2.1 Joint-Ventures in Lesotho

There is no specific legislation in Lesotho which specifically employs the terminology or the phrase 'joint-venture' as such, that term is not defined in any statute of Lesotho. However, for a long period of time now the companies have come together to partner in the execution of maybe tendered work and are regulated by a written agreement between them, which is usually referred to as a joint-venture agreement. The courts of Lesotho have decided that however this arrangement is branded it has all the necessary features of a partnership, and can be referred to as such. This was stated in the *Motlomelo case*[45] in which the following was stated:

> The appellant alleged facts in his founding affidavit which *prima facie* satisfy the requirements for a common law partnership i.e. a legal relationship between himself and the respondent to carry on a lawful undertaking to which each contributes something with the object of making, and sharing, profits (cf Purdon v Muller 1961 (2) SA 211 (A) at 217; Novick v Benjamin 1972 (2) SA 842 (A) at 851). The respondent in turn, in his answering affidavit, admitted to the existence of what he referred to as a "joint venture" between the parties, the terms of which he claimed differed in certain material respects from those alleged by the appellant. What is clear is that the parties were associated in a transportation undertaking the object of which was to make and share profits; the precise terms of their arrangement, however, are in dispute.[46]

That a joint-venture is a partnership was further restated in the High Court of Lesotho (Commercial Division) by His Lordship, Molete J in the matter of *Anju Civils (Pty) Ltd*[47] in the following terms:

> At first, the question of whether the joint venture was a registered partnership that could be sued seemed to present itself as an issue before me. It became so because the petitioner had cited 1st Respondent as an unregistered partnership; and a further development that was so called "Dissolution and Reconstitution of Joint Venture" that was agreed by the 2nd to 4th Respondents. The intended purpose of this document was to remove Belela Construction (Pty) Ltd from the Joint Venture and reconstitute it with only the two remaining partners. In answering the citation, the deponent on behalf of third Respondent; one Shameem Osman Moosa clarified that the second to fourth Respondents had entered into a written Joint Venture agreement; and registered their partnership which was done under number 29685 in the Deeds Registry. To my mind, that resolved the issue of the identity of the 1st Respondent. It was in fact and in law a Registered Partnership; and such statues it maintained whether or not the Petitioner was aware of it. It could not be changed merely by the incorrect citation.[48]

[45] *Motlomelo* case (n 7).
[46] Ibid, 144, para F-H.
[47] *Anju Civils (Pty) Ltd* case, (n 35), para 15-19.
[48] Ibid.

That the joint venture is recognised as a species of partnership in Lesotho attracts no debate; the jurisprudence in this jurisdiction has settled it. It will not really be wrong to conclude that a joint-venture is a form of partnership, when regard as had to what McKenzie concluded on the subject which is in the following terms:[49]

> Miller devotes a chapter to joint ventures noting that, although distinguished traditionally in Scots law from a partnership or firm, it is clearly a species of partnership because it remains in essence "the relation which subsists between persons carrying on a business in common with a view of profit". Miller also notes that the legal consequences do not entail any divergence in legal theory from that which governs partnership and that the joint venture is accorded recognition by § 32(b) of the 1890 Act.[50]

Having justifiably concluded as stated herein that a joint-venture is a species of partnership, the next topic discusses the personality of the joint-ventures. The discussion further elucidates as to whether the fact that the concerned partnership is composed of incorporated companies makes any difference in the eyes of the law.

2.2 Personality of the joint-ventures

The debate as to the nature of the personality of the registered partnership has troubled both the legal practitioners, judges and legal scholars for a long time, and does not seem that it will vanish any time soon. This is brought by varying decisions of the courts of law on this issue, both in Lesotho and the Republic of South Africa, as South African precedents yield much of persuasive

[49] Malcolm McKenzie (n1).
[50] Ibid, 18.

power to the courts of Lesotho. Therefore, the question as to the really nature of the personality of the partnerships attracts no straight answer as it will unravel below.

The answer to that question appears to depend on the particular situation of the partnership, in the sense that it appears that when the partnership is functioning properly and alive, it is being treated as an entity with all the powers of the juristic person, but when it cripples and fails to be a sustainable cause, it is considered to be a mere aggregation of those who formed it and without any independent legal personality. This is said from the background that section 4 of the Partnership Proclamation vests some characteristics of a natural or legal person on the partnership. It states that the partnership shall have the powers to sue or be sued in its own registered names and to hold property amongst other things.[51] Related to this seemingly independent legal personality of the partnership is the fact that the creditors of the individual partners are not automatically creditors of the partnership; when they pursue their debts in the normal course of business, they do so against the concerned individual partners, and the same applies to the creditors of the partnership, they remain so, and can only pursue the recovery of their debts against the partnership itself.

[51] Section 4 of Partnership Proclamation is couched in the following terms: 4. Nothing in this Proclamation contained shall confer upon any partnership the status of a body corporate: Provided that a partnership registered in terms of this Proclamation may, under the style or firm name under which the business of such partnership is registered-

(a) Sue and be sued;
(b) Hold property or assets;
(c) Hold certificates of allotment of rights to occupy land;
(d) Hold deeds relating to immovable property; and
(e) Be dealt with as though it were an entity distinct from the identity of the individual partners in terms of, and for the purposes of, any law requiring or authorizing partnerships to be so dealt with.

But it will be realised that the same section 4 of the Proclamation provides that 'nothing in this Proclamation contained shall confer upon any partnership the status of a body corporate…' which adds more challenge to the apparent complicated personality of the partnership when the relevant section is read in totality. This becomes more apparent in the situation of insolvency, where the law provides that if the estate of the partnership has to be liquidated, the estates of individual partners forming the partnership have to also be liquidated.[52] In the situation of insolvency, even though the Act recognizes that there is a specific estate belonging to the partnership, it cannot be liquidated alone, excluding those estates of individual partners, unless under the exceptions provided for in that section. It is in this situation in the researcher's view where the Act somehow treat a partnership as a recognized independent entity, but also immediately depriving it of that independence by making it to be dealt with together with the other partners' estates in the situation of insolvency and subsequent liquidation.

[52] Section 9 of the Insolvency Act. No. 9 of 2022 provides as follows: (1) Where an application is made to a court for the liquidation of the estate of the partnership, the application shall simultaneously be made for the liquidation of the individual estates of every partner, other than a partner who is not liable for partnership debts or a partner in respect of whom there is lawful bar to the liquidation of his estate.

(2) An application by the debtor for liquidation of estate of natural person in so far as it is applicable, applies in respect of an application submitted by members of a partnership for the liquidation of the partnership estate and application by creditor for liquidation of debtor's estate, in respect of application by a creditor of a partnership for the liquidation of the estate of the partnership.

(3) A Court granting a provisional or final order for the liquidation of the estate of a partnership shall simultaneously grant an order for the liquidation of the individual estates of every partner, except a partner who is not liable for partnership debts or a partner in respect of whom there is a lawful bar to the liquidation of his estate, but if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the Registrar, the individual estate of that partner shall not be liquidated by reason only of the liquidation of the estate of the partnership.

Liesl Hager[53] with reference to some literature on the personality of the partnerships as obtained under common law says the following; 'from early on, South African jurisprudence has mainly regarded a partnership as a mere aggregate or collection of individuals having no separate identity or existence apart from the partners composing it'. The learned scholar proceeds to observe that, the South African jurisprudence has somehow created what is termed the two theories to the approach to personality of the partnerships in that jurisdiction, which are entity theory and aggregate theory.[54] He states the following as constituting the meaning or the import of the relevant theories:

> According to this theory the partnership is a separate legal entity apart from those who compose it and it has rights and obligations distinct from the members that compose it. On the other hand, the aggregate theory looks only at the individual partners that compose the partnership, as the partners are the owners of the partnership property and the rights and liabilities of the partnership are indistinguishable from those of the partners.

The learned scholar then proceeds to conclude that the South African common law has always treated the partnership as aggregate of persons who formed it as opposed to the entity on its own.[55] This point lends support from what was ruled in the judgment in *Michalow No v Primier Milling Company Limited,*[56] where the following is stated:

> A partnership does not have an existence apart from the individuals constituting it and it cannot have assets and liabilities. The debts of the partnership are the debts of the partners and as far as the third parties are concerned the assets of the partnership are indistinguishable from the assets of the partners. The partnership debts are debts *in solidum* of all the partners. Any partner unable to meet the claim would be entitled to sue the other partners for *pro rata* payment of debts.

[53] Liesl Hager. (n 36).
[54] Ibid, 61.
[55] Ibid.
[56] 1960 (2) SA 59 (W) 61.

The position stated above, that the partnership has no legal *persona* independent from those who are constituting it has been accepted as the correct one in Lesotho, and has been followed ever since.[57] The Court of Appeal of Lesotho in the *Trencon case*[58] had the following to say about the personality of the partnerships:

> This means that once the requirements of s 12 of the Insolvency Proclamation have been fulfilled in respect of the partnership, those requirements are deemed to have been fulfilled in respect of the individual partners also. This to me is perfectly understandable because a partnership is not a legal *persona*. Its liabilities are liabilities of the partners jointly and severally. Section 4 of the Partnership Proclamation No. 78 of 1957 makes this perfectly clear.

Some scholars and authors in the Republic of South Africa, makes a case for the argument that, statute has somehow conferred a certain legal *persona* to the partnerships in the situation of insolvency. The argument is based on the fact that the definition section 2 of the the Insolvency Act 24 of 1936 when defining the debtor in the situation of insolvency includes a partnership. Liesl Hager concludes as follows, on this issue, 'as the definition of 'insolvent' includes the term 'debtor', a partnership may be an insolvent as well. These definitions are the first indication of the deemed separate legal personality of a partnership in terms of the Act'.[59] This argument is further subscribed to by the learned authors, Robbert Sharrok and others[60] in the following terms:

> Section 2 defines a 'debtor' as including a partnership or the estate of a partnership, and other provisions in the Act treat a partnership as an entity distinct from its members. A partnership, therefore, although not a separate juristic person in the eyes of the law, is regarded for the purposes of the Act as a separate entity with an estate which maybe sequestrated like that of the natural person.[61]

[57] *Motlomelo* case (n 9), *Trencon* Case (n 14).
[58] *Trencon* case (n 14) 758-759 para A-B.
[59] Liesl Hager, (n 36).
[60] Robert Sharrok and others (n 37).
[61] Ibid, 221.

2.3 Conclusion

Liesl Hager recognizing how the two theories or approaches, being an entity theory and aggregate theory towards the legal nature of the partnerships as discussed above, adds more to the already existing confusion about the personality of the partnership makes the following remarks on the matter:

> These two dissimilar concepts of partnerships operate in our mixed legal system and have undoubtedly created a lot of confusion and debate as to the exact legal nature of a partnership. A clear appreciation of these two theories and their appreciation consequently remains of utmost importance in order to comprehend the legal nature of a partnership. [62]

Be that as it may, one may conclude that generally, partnerships are considered to be having no independent legal personality of their own, from the partners who formed it. This position was prescribed by the common law and has been followed ever since at least in Lesotho. The further conclusion maybe that with the advent and introduction of legislative invention, the strict reference to the partnership as a non-legal entity was somehow relaxed, and a deemed legal personality of the partnership has somehow been conferred. This deemed independent legal personality of the partnership as introduced per the statute becomes more apparent and relevant in the situation of insolvency of the partnership and in the process of sequestration or liquidation. In the next chapter the discussion is on the sequestration and or liquidation of the partnerships on account of insolvency under the repealed Insolvency Proclamation and the changes that have been brought by Insolvency Act of 2022.

[62] Liesl Hager (n 53).

Chapter Three: Joint Ventures in Insolvency

3.0 Introduction

In chapter two, the researcher explored the real nature of the personality of joint-ventures in Lesotho, and concluded with reference to statute and case law, that they are species of partnerships. The generally accepted legal view at least in the context of Lesotho is that joint-ventures have no independent legal *persona* as partnerships, but are just an aggregate of the people who formed the relevant partnership. It has been found that during the process of sequestration as a result of insolvency the partnership estate should be sequestrated together with the estates of individual partners. In this chapter the notion of insolvency of the joint-ventures is discussed; as to how the process has to unfold under the repealed Insolvency Proclamation as compared to the present Insolvency Act. Having concluded in Chapter two that the companies are permitted under the Partnerships Proclamation to form partnerships, the present chapter discusses, the situation of insolvency and the ensuing sequestration or liquidation process in relation to partnerships composed of incorporated companies.

3.1 Insolvency in general

Robert Sharrok and others[63] define the term insolvency, in the following manner, '[i]n common parlance, a person is insolvent when he is unable to pay his debts. But the legal test of insolvency is whether the debtors liabilities, fairly estimated, exceed his assets fairly valued'.[64] It is not easy

[63] Robert Sharrok and Othes (n 37).
[64] Ibid, 3.

to conclude that one's liabilities exceed his assets, without concrete proof to that effect; one needs further information such as financial records to come to such conclusion, and such information may not easily be accessible to the third parties. The law has made it possible for people who are owed by the person who is alleged to be insolvent to apply to court for an order declaring such person insolvent even in the absence of conclusive proof that the concerned debtor's assets are less than his liabilities at least at the stage of application. [65] This is usually the case when the application for sequestration is brought to court by the creditor of the debtor, as opposed to the application brought by the debtor himself. In the first situation, the application is referred to as compulsory sequestration, whereas in the second scenario, where the debtor applies for surrender of his estate for sequestration, it is referred to as voluntary surrender.[66] Robert Sharrock and Others opine as follows on the standard of proof required and or information expected to be brought to court by the applicant in either of the two of the applications for sequestration, being voluntary surrender and compulsory sequestration:

> It must be noted that the debtor has to prove that sequestration will be to the advantage of the creditors whereas, in an application for the compulsory sequestration, the creditor has to show merely that there is a reason to believe that it will be. The onus, in other words is more strenuous in voluntary surrender than in compulsory sequestration. One reason for this is, no doubt, that the debtor can normally be expected to provide a detailed account of his own financial position, whereas a sequestrating creditor would generally not have access to this information….[67]

[65] Robert Sharrok and Othes (n 37) 18.
[66] Ibid, 17.
[67] Ibid (n 65).

However, for the court to order final sequestration order against the estate of an insolvent, the test of the debtor having liabilities that exceed his assets has to be conclusively passed and proven. If the test is not passed, it is clear that the application to declare the debtor insolvent and subsequent liquidation order cannot succeed. Robert Sharrok and Others[68] concludes as follows on this point:

> The extent of the debtor's assets and liabilities is generally by reference to the statement of affairs of which he is required to prepare and file (see 2.3.3), but the court is not bound by the valuations in the statement (Ex parte Van den Berg 1962 (4) SA 402 (O) 404) and may make a finding of insolvency even where the statement (or other evidence adduced by the debtor) indicates that his assets exceed his liabilities. The test is whether it is established that the debtor is without funds to pay his debts in full and it is improbable that the assets will realise enough for this purpose.

3.2 Insolvency under the repealed Insolvency Proclamation of 1957

It is perhaps prudent to state that, the repealed Insolvency Proclamation[69] employed the term 'sequestration' when referring to the process by which the estate of the debtor is declared insolvent and subsequently wound up. The Proclamation regulated the sequestration of the estates of only natural persons and those of the partnerships. This is evident from section 2 of the Proclamation, which defines the debtor in the following terms:

> 'debtor', in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies…

[68] Ibid.
[69] Insolvency Proclamation (n 6).

Companies and or body corporates were explicitly excluded from the application of the Proclamation. It is therefore a burning issue as to whether, when the above stated section 2 referred to partnerships, and or their estates, it anticipated a partnership which was composed of registered companies. This question is interrogated further in this chapter, as it forms the gravamen of the problem being investigated in this study. The Proclamation prescribed that if the debtor committed some specified acts, he or she commits an act of insolvency and the creditor may apply to court to have the concerned debtor declared insolvent.[70] It is perhaps prudent to state at this juncture that ultimately, it is a court of law that will declare a particular person insolvent. When the debtor had committed the Acts of Insolvency as contemplated in section 8 of the Proclamation, the creditor could apply to court in terms of section 9(1) of the Proclamation, which is couched in the following terms:

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

[70] Section 8 of the repealed Insolvency Proclamation 51 of 1957, provided as follows: A debtor commits an act of insolvency-

(a) if he leaves the Territory or being out of the Territory remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
(b) if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;
(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
(d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;
(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;
(f) if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of sub-section (3) of section four or lodges, in terms of that sub-section, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;
(g) if he gives a notice in writing to any one of his creditors that he is unable to pay any of his debts;
if, being a trader, he gives notice in the Gazette in terms of sub-section (1) of section thirty four, and is thereafter unable to pay all his debts.

As regards the sequestration of the estate of the partnership, the Proclamation provided as follows in section 13:

> (1) If a Court sequestrates the estate of a partnership (whether provisionally or finally or on acceptance of surrender) it shall simultaneously sequestrate the estate of every member of that partnership other than a partner *en commandite* who has not held himself out as an ordinary or general partner of the partnership in question; provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the Court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be sequestrated by reason only of any fact forming a ground for the sequestration of the estate of the partnership.
>
> (2) Save as in the last preceding sub-section provided, every fact which is a ground for the sequestration of a partnership shall be a ground for the sequestration of every partner other than a partner *en commandite*.

It is evident that section 13 of the Proclamation mandated a court sequestrating an estate of the partnership, to simultaneously order sequestration of individual partners, other than those excluded in terms of the relevant section. It has been held by the Court of Appeal in the *Trencon case*[71] that, the facts relied upon and established to prove the insolvency of the partnership, are the same facts to be considered for sequestration order of the estates of individual partners. The Court stated the principle in the following terms:

> The judge *a quo* did not make an order for the sequestration of the estates of the partners because "no real case was made for their sequestration or liquidation …" yet subsection (2) provides that every fact which is a ground for the sequestration of a partnership shall be a ground for the sequestration of every partner except a partner *en commandite* or a partner that has made an undertaking, and given security, to pay the debt. This means that once the requirements of s 12 of the Insolvency Proclamation have been fulfilled in respect of the partnership, those requirements are deemed to have been fulfilled in respect of the individual partners also. [72]

[71] *Trencon case* (n 14)
[72] Ibid, 758 para I-J

The same point can be made when regard is had to the judgement in the matter of *Stephen Fraser (Pty) Ltd v Ramla and Others*[73] in which only one member of the partnership had admitted in writing that the partnership was unable to pay its debts. The applicant who moved for the sequestration of the partnership only served the partner who had admitted to the insolvency of the partnership. The court granted a provisional sequestration order against the estates of the partnership and private partners with the *rule nisi* for the respondents to show cause 'why a final notice of sequestration should not be granted'.[74] It is significant to observe that the court did not order that there be separate independent applications for sequestration against the individual partners of the partnership. It is therefore safe to conclude that simultaneous sequestration order of the estates of the partnership and individual partners to the partnership can be made from single application.

3.3 The decision of the Court of Appeal in *Trencon Building World Belela Joint Venture and Others v Anju Civils (Pty) Ltd and Others*[75]

The question as to whether when the estate of a partnership is being sequestrated in line with section 13, the estates of the individual partners having to be sequestrated together with the partnership estate, included the partnerships composed of registered companies could have been finally settled in the *Trencon* matter, but that was not to be so, as the court could not reach a unanimous decision. Even though the decision was rendered under the repealed Proclamation, it

[73] 1961 (2) SA 554(W).
[74] Ibid, 554-555.
[75] *Trencon* case (n 14).

still remains relevant in the researcher's view, as the new Insolvency Act retains the provision similar to section 13, as discussed below.

Trencon World Belela Joint Venture was a partnership registered in terms of the Proclamation, and was composed of three companies being, Building World (Pty) Ltd, which was a Lesotho-registered company, and Trencon (Pty) Ltd and Belela Construction (Pty) Ltd, which were both registered in the Republic of South Africa.[76] The partnership had won a tender for construction of some 137 Health Centres in Lesotho.[77] During the progression of the work, the joint-venture faced some serious financial challenges which led to one of the companies, which was sub-contracted by the joint-venture, Anju Civils (Pty) Ltd, to institute sequestration proceedings against the joint-venture in the High Court of Lesotho.[78] The High Court had ordered that the partnership be sequestrated, having found that it was insolvent, but did not order that the estates of individual partners be sequestrated, and that prompted the joint-venture to appeal to the Court of Appeal.

One of the grounds raised on appeal was that the High Court had erred in ordering sequestration of the estate of the partnership alone to the exclusion of the estates of individual partners. It was also argued that, the High Court could not have legitimately ordered sequestration of the estate of the partnership as some of the partners were incorporated companies, not subject to sequestration in terms of the Insolvency Proclamation. This case made the Court of Appeal to be divided on the question as to whether the estate of the partnership alone could be legitimately sequestrated

[76] Ibid 753, para 12, H.
[77] Ibid 753, para F.
[78] *Anju* Case (n 35).

without the court ordering sequestration of the estates of the individual partners. The majority judgement was penned by His Lordship I. Farlam AP, and in disagreeing with the minority decision by His Lordship MH Chinhengo AJ, he ruled as follows:

> [2] In para [20] of his judgment my Brother refers to a point, which he says 'may be dispositive of the whole appeal', namely whether the order for the sequestration of the partnership should not be set aside because the estates of the members of the partnership were not also sequestrated, and he concludes that the point must be decided in favour of the respondents.
>
> [3] I do not agree. Two of the respondents, Trencon and Belela, being South African companies not registered in Lesotho, qualify, as my Brother points out in para 25 of his Judgment, as debtors under the Proclamation and can accordingly be sequestrated in terms of its provisions. No application has, however, been made for their sequestration and the first respondent, the petitioning creditor, has made it clear that it does not seek a sequestration orders in respect of at least one of them. It follows from the clear wording of section 13 of the Proclamation that the court cannot sequestrate the partnership either. In this regard I agree with what was said by Ogilvie Thompson J in **Cloete v Senekal and Roux 1950 (4) SA 132 (C) at 134E-F**, viz.: '(I)n terms of section 13 (1) of the Insolvency Act [which is virtually identical to our section] – and subject always to the proviso of that section – it is necessary, once it is decided to sequestrate the partnership estate, that the private estates of the partners should also be sequestrated.' (In that case it was not necessary to consider the decisions in which it was held that a partnership estate could be sequestrated without orders sequestrating the estates of individual partners where there was what was described as 'a lawful bar' to the sequestration of such estates: that factor was not present in the **Cloete** case nor, as I have said, does it exist as regards the estates of Trencon and Belela in this case. The decisions to which I refer are cited in **Commissioner**, **SARS v Hawker Aviation Partnership and Others 2006 (4) SA 292 (SCA)**, in which it was held that a sequestration order could be made for the sequestration of a partnership estate alone, where the partners were a bank, which was an *en commandite* partner, and two companies, one of which was liquidated in the same application and the other, a local company whose estate could not be sequestrated under the Insolvency Act.)[79]

The Learned Acting President of the Court of Appeal further found that it was not necessary in that case, that a decision be made as to whether the decision of the Supreme Court of Appeal of South Africa in *Commissioner, SARS v Hawker Aviation Partnership and Others*[80] was a good law to be followed in Lesotho, as the minority decision had found. This renders the decision in *Commissioner, SARS'* case to not be the approved precedent in Lesotho, although the same court

[79] *Trencon* case (n 14) 750 para E-H.
[80] 2006 (4) SA 292 (SCA).

left it open for that question to be revisited and decided upon when a proper case is brought to court for determination.

The majority decision, was, it is contended, unfortunate as it has left so many questions hanging, whereas it had the opportunity to clearly state the law. The first question that this decision left hanging is the main one being investigated in this study, as to whether section 13(1) when it refers to the estate of individual partners having to be sequestrated together with the estate of the partnership contemplated the estates of the partners which are registered companies. The second question is whether the companies registered in the Republic of South Africa and not so registered in Lesotho qualified as debtors under the repealed Proclamation, which could have their estates sequestrated. The court simply could not dwell on whether the proposition was right or not, but simply comforted itself by holding that since there was no application for sequestration of those companies, then sequestration order should not have been granted. This was in stark contrast to what section 2 of the Proclamation provided for, which is that companies are not subject to the Insolvency Proclamation. It is contended that the Court of Appeal avoided to make a decision in circumstances it was supposed to. The minority decision was clear and unequivocal on the subject, that when the partnership is composed of partners who cannot be sequestrated in terms of the Proclamation, then only the estate of the partnership shall be sequestrated as was decided in the Republic of South Africa, *Commissioner of SARs* case.[81] The minority judgement made its conclusion in the following terms:

[81] Ibid.

> [28] The general principle that comes out of **Hawker** is that it is possible and permissible to sequestrate the estate of a partnership without sequestrating the estates of the partners despite the apparently mandatory provisions of s 13. In a case such as the present where no application was made for the sequestration of Trencon and Belela, this general principle is also applicable. The judge in the court *a quo* was therefore correct to order the sequestration of the estate of the JV Partnership without simultaneously sequestrating the estates of the partners. In so far as Building World is concerned, there was a lawful bar to the sequestration of its estate. It is a company excluded by s 9 of the Proclamation as read with the definition of "debtor" in s 2. My conclusion on this aspect of the case is that the High Court order sequestrating the estate of the partnership without sequestrating the estates of the partners was in order. In this regard I embrace the decision in **Hawker** as good law and should be followed in Lesotho in respect of companies registered therein.[82]

The minority judgement having found as it did that Trencon and Belela being only registered as companies in South Africa, and no so in Lesotho, qualified to be debtors under the then Insolvency Proclamation, as according to the Learned Judge they were not excluded under the section 2 of the Proclamation, unfortunately created an opportunity for the majority court to decide the matter in the manner it did. This is so because having found that there was no legal impediment for the sequestration of Trencon and Belela, there would have been no justification, to allow the application where there was no order sought for their sequestration in line with section 13(1) of the Insolvency Proclamation. The majority judgment in that respect was justified.

The further challenge with the finding in the minority judgement regarding the status of Trencon and Belela in Lesotho is that once they are considered independently from them being registered companies in the Republic of South, they would not have any legal branding and therefore no legal personality in Lesotho. It is contended that despite the fact that the said two companies were not registered as such in Lesotho they remained companies excluded from application the Proclamation in terms of section 2 thereof. This is more so, when section 2 does not state that

[82] *Trencon* case (n 14) 761 para E-H.

companies referred to therein and the law relating to liquidation of companies should be that of Lesotho. It is contended that the legal impediment, to the sequestration of other partners to the partnership in that matter was simply that they were companies excluded from the application of proclamation in terms of section 2 thereof.

3.4 Insolvency under the Insolvency Act of 2022

With the controversy created by the decision in *Trencon Case* referred to above, and the manifest challenges brought about by the sequestration provisions in the Insolvency Proclamation, the legislature has decided to repeal the Proclamation and replaced it with the Insolvency Act of 2022.[83] The main change brought about by the Act is that it employs the term 'liquidation', as opposed to 'sequestration' under the repealed Proclamation. Furthermore, it applies to both natural, juristic persons and the partnerships. This is evident from section 2 which defines the 'debtor' as 'any person, or entity that has incurred a debt or whose estate has been liquidated'. The Act under the relevant section lists 'a natural person, a company, a partnership, a trust, an association, a cooperative', amongst others, as debtors for its purposes. Section 4(1) vests the power to administer the liquidation of the estates of natural persons in the office of the Master of the High Court, while the office of the Registrar of Companies is vested with the responsibility for the administration of the liquidation of trusts, companies or other debtors and business rescue in terms of section 4(2).

[83] Insolvency Act (n 6).

It will readily be realised that on this situation alone, the Act does not pay any particular attention to the estates of the partnerships, let alone those composed of registered companies. It is not so clear as to whether when section 4(2) refers to the office of Registrar of Companies being responsible for liquidation of 'other debtors', the partnerships are included or not. It can be argued that in finding what the phrase 'other debtors' in section 4(2) means one has to refer to section 2 on the definition of the debtor and look for those which have been excluded from the administration by the office of the Master of the High Court. Indeed partnership is listed in section 2 under the definition of debtor and since section 4(1) specifically empower the Master to administer only estates of natural persons, it can be argued that the partnership falls under the term 'other debtors' subject to administration by the Registrar of Companies. However the proposition will further be challenging in the situation of the partnership composed of only natural persons, but it can be justifiable if the partnership is composed of registered companies. The discussion herein is made merely to show that even the current Insolvency Act has not fully addressed matters pertaining to partnerships in insolvency. Liquidation of partnerships under the Act is dealt with later in this chapter.

One has to be careful when dealing with the provisions of this Act, as they may be dealing with both natural and juristic persons. However, like the repealed Proclamation, the liquidation of the estate of the insolvent has to be ordered by the court of law. It is submitted that section 5[84] of the

[84] Section 5 (1) of the Insolvency Act of 2022 provides as follows: 5 (1) A debtor is unable to pay its debts upon proof that the debtor is generally unable to pay debts which are due and payable or proof that the debtor's liabilities exceed the value of the debtor's assets.

(2) A debtor is unable is unable to pay its debts and maybe declared insolvent if-

(a) a creditor, by cession or otherwise, to whom the debtor is indebted an amount of not less than Fifteen Thousand Maloti or any other prescribed amount, has served on the debtor, a

Insolvency Act is the bedrock in liquidation applications; either for natural, partnerships and juristic persons, it has to be satisfied in all the applications to have the debtor declared insolvent. Section 8 of the Insolvency Act[85] permits a creditor who has a liquidated claim of no less than Fifteen Thousand Maloti against a debtor who is unable to pay his debts to apply to the High Court for an order of the liquidation of the estate of that debtor.[86] It is important to note further that the underlying consideration by the court in the determination of the application for liquidation is whether the concerned debtor is unable to pay his debts as contemplated in section 5 of the Act.

Section 6[87] of the Insolvency Act is applicable to liquidation of the natural persons, and, as far as is relevant to the present study, it provides in subsection 11[88] that the court considering the

letter of demand in a manner provided for in subsection (3) , for payment of the amount which is due and payable-

(i) to give security to the reasonable satisfaction of the creditor for such amount; or
(ii) to enter into a compromise, and the debtor has for twenty-one days, neglected to pay the sum to secure or compound for it to the reasonable satisfaction after a valid execution of the judgment.

(3) The letter of demand provided for in subsection (2) shall be in the form set out in Form G of Schedule 1 and served on the debtor in terms of subsection (2), by the sheriff, the creditor's attorney or the attorney's clerk by-
(a) leaving the notice at its registered office or main place of business in the case of a company debtor; or
(b) handing the notice to the debtor or leaving it at debtors main office or place of residence, or delivering it to the secretary or some director, manager or principal officer of such association of persons or body corporate or in such other manner as the court may direct, in the case of a debtor other than a company debtor.

(4) In determining whether debtor is unable to pay its debts, the Court shall take into account, the contingent and prospective liabilities of the debtor.

[85] Insolvency Act (n 6)
[86] Ibid, Section 8(1) (a)(b)(i), read with sections 11 and 12.
[87] Section 6(1) provides that, (1) 'A natural person, partnership, company or person who lawfully acts on behalf of a natural person who is incapable to manage his own affairs or an executor of the estate of a deceased person, may apply to Court for the liquidation of an estate of the debtor.'
[88] The relevant section states, (11) 'The Court may, after considering an application referred to in terms of subsection (5)-
(a) make an order contemplated in Section 12 if-
(h) the debtor is insolvent.

application for liquidation contemplated in that section, shall make an order liquidating the estate in terms of section 12,[89] if it finds that the debtor is insolvent amongst other considerations. In order for the court to determine the question as to whether the concerned debtor is insolvent, the statement of the affairs of the debtor which basically provides detailed financial report of the debtor's estate as provided for in Form A, schedule 1 to the Insolvency Act should be placed before the court.[90] The statement of affairs has to detail the total liabilities of the debtor as compared to the total assets and it is required to accompany the application for the liquidation of the debtor's estate in terms of section 6(4) of the Insolvency Act. It is not very clear how the applicant applying for the liquidation of the estate of the debtor in terms of section 6(1) of the Insolvency Act would have access to the information required under section 6(4), which is the statement of the affairs of the debtor.

The total conspectus of section 6 suggests that in the instance contemplated in that section, the application for liquidation might not necessarily be made by the creditor of the debtor, as that kind

[89] Section 12 provides as follows 12(1) The Court may make an order for the final liquidation of the estate of the debtor at the hearing of an application contemplated in section 6, 7 or 8 , or pursuant to a provisional liquidation contemplated in Section 11, if-

(a) the applicable requirements of section 6, 7, or 8, have been complied with;
(b) the debtor's liabilities exceed his assets , or the debtor is unable to pay its debts in terms of Section 5;
(c) in the case of a debtor who is a natural person, there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is liquidated; and
(d) any of the following , where applicable, are not more appropriate than issuing a liquidation order;
    (i) corporate rescue proceedings in terms of part 22;
    (ii) a compromise in terms of section 144 to 149 of the Companies Act, 2011; or
    (iii) a post liquidation composition in terms of Section 142.

(2) If the requirements of subsection (1) are not complied with, and a final order is not issued, the Court shall dismiss the application for the liquidation of the estate of the debtor and set aside any provisional liquidation order or post-pone the hearing for a reasonable period to a determined date so as to allow the applicant to furnish further proof.
(3) When a final liquidation order is granted, the Registrar shall ensure that the particulars which in terms of Section 6(2) and 8(6) appear in the heading of the application, also appear on the order.

[90] Insolvency Act (n 6) 886.

of application is clearly stipulated in section 8 of the Insolvency Act. Under section 8 it is not required that the debtor's statement of affairs in terms of Form A of Schedule 1 accompanies the application. It therefore stands to reason that the application contemplated in section 6 (1) is not necessarily made by the creditor to the debtor's estate, but it is more likely that the application contemplated therein is that of voluntary surrender[91] by the debtor himself or those with close relationship to or control of the debtor, who might have direct access to the information to be included in a statement of affairs of the debtor.

It will further be realised that with an application contemplated in section 6(1) of the Insolvency Act, there is no explicitly stated requirement that the notice of the application be served on the debtor, which is however strictly required in section 8 (3) of the Act that the notice for application of the liquidation of the debtor's estate be served on the debtor himself and his spouse in case of the natural person. From the reading of section 6 (11), the principal order that court should make in application for an order of liquidation is the final liquidation, which is provided for in section 12 of the Act. However the court is still left with some discretion under section 6(11)(b) to make any order as it deems fit under the circumstances of the case. The point being made here is that an application contemplated under section 6 has all the hallmarks of voluntary surrender. On the contrary when considering an application in terms of section 8 of the Act, the court may in terms of subsection 15 of the Act grant a provisional liquidation order.

[91] Robert Sharrok and Others (n 65).

The effect of the provisional liquidation order is that it may be confirmed or discharged on the return date depending on whether the debtor has been able to discharge the burden that he is not insolvent. It is therefore submitted that section 8 exclusively regulates applications for compulsory liquidation. It seems that for the fact that there is no provision that a provisional liquidation order be made in the application contemplated in section 6 of the Insolvency Act, it is contemplated that the applicant in that situation is by someone who is expected to bring conclusive proof that the debtor is indeed insolvent, whereas the applicant in terms of section 8 might not be expected to have conclusive proof that the debtor is insolvent. The applicant in terms of section 8 should strictly be a creditor of the debtor. It shall be realised that the creditor has to serve the debtor with a letter of demand, which is in terms of Form G of the Schedule 1 to Insolvency Act,[92] and that letter should state explicitly that the failure to comply with it may cause the creditor to apply to court for the liquidation of the debtors' estate. It is therefore evident that the applicant for the liquidation of the debtor's estate is not required at the inception to prove that the debtor's assets are exceeded by his liabilities, but simply that the debtor has committed acts contemplated in section 5(2) of the Insolvency Act causing the creditor to believe that the concerned debtor is insolvent.

3.5 Liquidation of the partnerships under the Insolvency Act of 2022

The Insolvency Act specifically provides for liquidation of partnerships under section 9 of the Act. In subsection (1) of that section, it is specifically provided that 'where an application is made to the court for the liquidation of the estate of the partnership, the application shall simultaneously

[92] Insolvency Act (n 6) 906-907.

be made for the liquidation of the individual estates of every partner…'. It is interesting that the relevant section provides that there has to be 'application' in respect of the liquidation of the estates of individual partners, as this was not the case in the repealed Insolvency Proclamation. The Insolvency Act in researcher's view explicitly contemplates two sets of applications, which was not clearly stated in the repealed proclamation. It stands to reason therefore that when one reads section 13(1) of the repealed proclamation, in one application the court could order sequestration of the estate of the partnership and those of the individual partners.

Section 9(3) of the Act provides as follows:

> A court granting a provisional or a final order for the liquidation of the estate of a partnership shall simultaneously grant an order for the liquidation of the individual estates of every partner, except a partner who is not liable for partnership debts or a partner in respect of whom there is lawful bar to the liquidation of his estate, but if a partner has undertaken to pay the debts of the partnership within a period determined by the Court and has given security for such payment to the satisfaction of the Registrar, the individual estate of that partner shall not be liquidated by reason only of the liquidation of the estate of the partnership.

It shall be observed that the above stated section is in material respects similar to the section 13(1) of the repealed Insolvency Proclamation. However, the present Section 9(3) goes further to state that there may be situation where there is a lawful bar to the liquidation of the individual estate of the partner in the partnership. In the context of South African section 13 of the Insolvency Act,[93] which is in all respects couched in the similar terms to Section 13 of the Insolvency Proclamation of 1957, it was decided that the phrase 'lawful bar' can have the following connotation in the matter of *Partridge v Harrison and Harrison*:[94]

[93] Act 24 of 1936.
[94] 1940 WLD 265 266-7.

> Notwithstanding that this is couched in imperative language, there are cases where it could not be carried out. For instance if a partner has been sequestrated and has not acquired an estate as against his trustee so as to allow a second sequestration, the Court could do no more than to sequestrate the partnership estate and the estates of the remaining partners. The same would probably be the case if one of the partners was a limited company. It would appear therefore that the section must at least be limited to cases where the estates of the partners can be sequestrated and does not apply where there is a lawful bar to such sequestration.

It is clear that the lawful bar to sequestration of the estate of the partner in the partnership could be that the partner was a limited company that is excluded from the process of liquidation in terms of the Insolvency Proclamation. It should be recalled that the Proclamation had specifically excluded incorporated companies from its application. The Insolvency Act, on the other hand, has included the incorporated companies in its application, and it therefore stands to reason that under the new Act it cannot be a lawful bar for the liquidation of the estate of an individual partner simply because that partner is a limited company. It is, however, evident that in terms of Section 9(1) there has to be specific independent application for the liquidation of the concerned partner which is a registered company. It should be readily discernible that when the liquidation of the company is applied for on account of the fact that a partnership in which it is partner is insolvent, the application might not succeed in respect of the concerned company, in the sense that the company which is the partner in the partnership might still be liquid, and when considered in its own right, it might have the value of its assets far exceeding its liabilities thereby passing solvency test which will make it impossible for the court to order liquidation of the concerned company which is a partner in the partnership.

The incorporated companies had been excluded specifically from application of the Insolvency Proclamation of Lesotho[95] and the Insolvency Act of South Africa.[96] It has specifically been stated in the two legislations that the companies are excluded because they are subject to the procedure of liquidation under the laws relating to the companies. The fact that the partner in the partnership was a registered company constituted a lawful bar to the sequestration of the estate of that partner together with the estate of the partnership.[97] It is contended that since the very reason that there is legal exclusion of the company from being subjected to sequestration under the Insolvency Proclamation that is enough for its exclusion, even if the concerned company has not undertaken to pay the partnership debts.

The opposite applies to partnerships composed of natural persons; the individual partners can only protect their estates from being sequestrated together with the estate of the partnership if they undertake to pay the partnership the debts.[98] It is therefore submitted that when the law stipulated that when the estate of the partnership had to be sequestrated under the repealed Insolvency Proclamation, the estates of the individual partners had to also be liquidated, it was not contemplated that the concerned partner might be a registered company. It appears that it really contemplated a partner who is a natural person.

[95] Section 2 of the Insolvency Proclamation (n 6).
[96] Section 2, of the Insolvency Act (n 87).
[97] SA Leather Co (Pty) Ltd case (n 7) 119.
[98] Section 13 (1) of the Insolvency Proclamation (n 6).

The recommendation is made in Chapter five, that the Insolvency Act has to be amended to provide that in the event of liquidation of the estate of the partnership composed of incorporated companies, the companies which are partners have to be ordered to present the evidence of their financial liquidity, and if they are found to be liquid, they be ordered to pay their proportion of a debt in the partnership, and if they are found to be insolvent, on that ground alone they be subjected to liquidation process.

Section 9(4) of the newly promulgated Insolvency Act drastically provides that the estate of a natural person who is a director of a company, which is partner in a partnership subject to liquidation process under the Act may under certain circumstances be considered as the estate under liquidation.[99] The section provides a qualification for this situation by providing that, that should happen if 'there is no partner whose estate maybe liquidated as contemplated in subsection 3', then the court may order liquidation of the estate of the partnership, and that in such situation and relevant to the present study the estate of the director of the company involved in the partnership shall be so regarded as estate in liquidation. It is the researcher's take on the matter that once the estate is considered to be an estate under liquidation, the owner of the estate cannot deal with it in the manner he likes, and ultimately its assets may be realised to satisfy the debts of the creditors of the insolvent estate. In the next chapter, the discussion centres on the liquidation of the companies in general under the Companies Act, with an attempt to find if section 9(4) can be defended, as it appears to go beyond the bounds of the recognised independent legal personality of the companies.

[99] Chapter One, page 14.

3.6 Conclusion

The Insolvency Act brought some major changes as opposed to what obtained under the repealed Insolvency Proclamation with both the nomenclature and procedure. The Act simply put in one piece, the process which originally was that of sequestration under the Insolvency Proclamation in relation to the natural persons and partnerships and that of liquidation under the Companies Act. The Act does not however address the pertinent issue of how the partnerships composed of incorporated companies have to be dealt with, and it seems that the problem that arose in the *Trencon* matter still persists, just that the Act has not been tested in the courts of law in this respect and this is in the light of the fact that the Act retained the terms of section 13 (1) of the repealed Insolvency Proclamation in its section 9(3).

Chapter Four: Liquidation of Estates of Companies under the Companies Act of 2011, Read with the Insolvency Act 2022 and Partnerships Composed of Incorporated Companies

4.0 Introduction

Section 9(4) of the Insolvency Act[100] has somehow subjected an estate of the director of a company which is a partner in a joint-venture to be a subject-matter of liquidation in particular circumstances. The section stipulates that the estate of the director of the company which is a partner in the partnership may be considered as an estate in liquidation 'for the purpose of performing any statutory requirement in respect of the partnership estate' if there is no partner whose estate maybe liquidated as contemplated in section 9(3) of the Act. Section 9(3) prescribes that when the court grants the provisional or final liquidation order in respect of the partnership estate, it must simultaneously order as such in respect of the estates of every individual partner of the partnership. It is therefore evident that the consideration of the estate of the director of the company which is a partner in the partnership subject to liquidation process shall only be considered under the condition that there is no partner whose estate may be liquidated. This qualification in section 9(4) of the Act begs the question as how it can happen and under what circumstances, there can be no partner whose estate may be liquidated in terms of the Act. This question is a subject of discussion in this chapter. The discussion on the liquidation of the companies under the Companies Act is important for this study as the current Insolvency Act also incorporate processes of the liquidation of the companies and the research will reveal how the two Acts are employed together in the process of liquidation of the companies in Lesotho.

[100] Insolvency Act (n 6).

The basis for the pursuit of discussion of liquidation of companies in this study is further premised on the fact that section 9(3) has also introduced the notion of 'the lawful bar' to liquidation of the estate of partner to the partnership. The concept of 'lawful bar' was discussed in chapter three, and it was concluded that one of the situations that can constitute 'a lawful bar' to sequestration of the estate of the partner, is when the partner is an incorporated company excluded from the application of the then Insolvency Proclamation. This becomes intriguing when the current Insolvency Act has subjected incorporated companies to the process of liquidation under that Act. Section 9(4) has further prompted the researcher herein to interrogate the process of liquidation of the incorporated companies, and the effect of the liquidation on the estates of directors of the companies in liquidation, if any. The discussion further interrogates if there can be circumstance in the liquidation process of an incorporated company where the estate of the director of that company may be considered as the estate under liquidation. This is done with the view to find if there can be any justification for section 9(4) which seemingly blurs established principle in the company law that the assets of the directors of the company and those of the company are kept separate in all the circumstances, unless there are good reasons to extend personal liability on the directors.

4.1 Liquidation of companies in general

Section 125 of the Companies Act[101] provides for two instances when the court may through an order put a company into liquidation. The first instance is when 'the Registrar, the company, a shareholder, a director or creditor of the company' applies to court and the court 'determines that

[101] Act No. 18 of the 2011.

the company is unable to pay its debts'.[102] The second instance is where the court 'is satisfied that 75 percent of the issued share capital of the company has been lost or has become useless for the business of the company'.[103] The term liquidation has not specifically been defined in the Act, but it has been defined in some legal writings as 'the process through which a company's assets are sold off to settle its debts when it can no longer continue its operations'.[104] It has further been defined as follows, in the context of Companies Act of the Republic of South Africa:

> The liquidation of a Company / Close Corporation is a legal process whereby the Company and its affairs are placed under the control of a liquidator who must realize the assets and divide the assets amongst creditors according to the stipulations in the Companies Act. The main aim of liquidation is to divide the yield from the sale of assets amongst creditors fairly and to dissolve the Company in an orderly manner.[105]

The above-stated definitions of liquidation are in consonance to the main duty of liquidator, in the liquidation process, which the authors, H.S. Cilliers and Another[106] put in the following terms:

> The liquidator takes control of the affairs of the company and must forthwith take the possession of the assets of the company; he collects the debts of the company, pays the costs connected with the liquidation, pays the creditors of the company (if not in full then in proportion to the amounts due to them, that is, so many cents in rand) and distributes any surplus *pro rata* among the shareholders.

[102] Ibid, section 125 (1) (a).
[103] Ibid, (n 101), section 125(b).
[104] https://generisonline.com/understanding-liquidation-and-insolvency-procedures-in-lesotho/ accessed on the 24/06/2025.

[105] https://www.bbv.co.za/listing/sequestration-and-liquidation accessed on the 25 June 2025.

[106] H.S. Cilliers and M.L. Benade, *Company Law, (Butterworths*, 1968) 342-343.

The learned authors, Derek French and others[107] writing in the context of the United Kingdom, state the following about the duties of the liquidators, which in researcher's view, informs what the term liquidation entails:

> The functions of a compulsory liquidator of a company are to secure that the assets of the company are got in, realised and distributed to the creditors and, if there is a surplus, to the persons entitled to it…. The compulsory liquidator of the company 'shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled….

The above stated definitions further correlate to what is provided for in section 134 (1) of the Companies Act of Lesotho, which is couched in the following terms:

> The primary duty of a liquidator is to take all reasonable steps necessary to take possession of, protect, realise and distribute the assets or the proceeds of the realisation of the assets of the company to its creditors, and if there are surplus assets, to distribute them or the proceeds of the realisation of the surplus assets in accordance with this Act and the articles of incorporation.

It is of utmost importance to state that in this study, the researcher is squarely focused on the first instance in which the court may place a company under liquidation, which is when it has been found by the court that the company is unable to pay its debts.[108] To establish that the company is unable to pay its debts, the following two considerations, are informative to the court dealing with the liquidation application; firstly if the creditor of the company 'by cession or otherwise has served on the company execution or other process issued in respect of the debt on a judgment or order of any court in favour of the creditor, or one or more of the creditors to whom the debt is owed, has been returned unsatisfied in whole or in part'.[109] The second consideration, is 'if it is

[107] Derek French, Stephen Mayson and Christopher Ryan, Mayson, *French & Ryan on Company Law*, (29th Edn, 2012-2013, Oxford University Press) 688.
[108] Ibid (n 102).
[109] Ibid, Section 125(2) (a).

proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether the company is unable to pay its debts, the Court shall take into consideration the contingent and prospective liabilities of the company'.[110] It is perhaps prudent to highlight that the Companies Act has placed threshold in the determination of the application for liquidation, which is merely on the company being unable to pay its debts, not factual insolvency of it having liabilities exceeding the value of its assets. The fact that the threshold is simply on the company being unable to pay its debts, which is referred to as 'commercial insolvency' as the consideration in liquidation applications is confirmed by Cassim and Others[111] writing in the context of the Companies Act of South Africa, and the principle is stated in the following terms:

> Thus a company is deemed by the court in these situations to be unable to pay its debts even if it is fully capable of paying them. In making the determination whether a company is unable to pay its debts as contemplated, the court must also take into account the contingent and prospective liabilities of the company. A company is unable to pay its debts within the meaning of s 345(1)(c) when it is 'commercially insolvent, ie when it is unable pay its debts as they fall due, in the course of business. The question is therefore not whether company is factually solvent in the sense of its assets exceed its liabilities, but whether it can meet its obligations and thereafter continue trading. This may be proved in any manner that satisfies the court.

In Lesotho, the principle stated above was confirmed as the primary consideration in the applications for the liquidation of companies in the matter of *MKM Marketing Ltd and Others v Commissioner of Insurance and Another*[112] where the court stated that, …'the intervening creditor is not asking for a winding up under s 47, which is something only the Commissioner of Insurance can do, but for the winding up under the Companies Act on the grounds that the appellant company is unable to pay its debts'.[113] The principle was stated in more clear and emphatic terms in the

[110] Ibid, Section 125(2) (b).
[111] Faraouk HI Cassim and Others (n 22) 919.
[112] LAC (2011-2012) 191.
[113] Ibid, 196.

matter of *Eldaro Trading (Pty) Ltd and Another v Meraka Lesotho (Pty) Ltd*,[114] where the following is stated:

> It seems to me that the real contest between the parties is not that the respondent is unable to pay its debts or is commercially insolvent. To the appellant it is really that the respondent breached the agreement between them and was now getting his supplies from another person for the reason that, according to the respondent the appellant was failing to meet its demand for livestock.

The Court went further and concluded the matter in the following terms:

> The learned judge *a quo* dealt with the evidence at paragraphs [26] to [28] and came to the conclusion that the appellant failed to prove that respondent was unable to pay its debts or that it was commercially insolvent. I am in broad agreement with the judge's reasoning and finding. She observed that no evidence had been put before the court to establish, not only the amount owed but also the fact that it had become due and payable. In my view, it cannot be denied that the appellant did not make a demand for the amount in the conventional way. Had it done so and at the same time engaged in an analysis of what amount or amounts were due and payable, it could easily have overcome the difficulty it faced in seeking to obtain the relief it wanted. I endorse the reasoning and conclusion of the judge a quo and for the reasons she gave I would dismiss the appeal.

4.2 Effect of liquidation on the duties of directors of the company

During the normal course of the business of the company all the affairs of the company are under the management, direction and supervision of the board of directors. [115] However, when the court places the company under liquidation in terms of section 125, it may appoint a liquidator subject to confirmation of the Master of the High Court in line with section 127 (2) (3) of the Companies Act or direct the Master to appoint the liquidator. The appointed liquidator 'shall have custody and control of the company's assets as stipulated in section 128 (a) of the Act. The Act in section

[114] Unreported, (available on leslii) https://lesotholii.org/akn/ls/judgment/lsca/2020/4/eng@2020-05-29/source. Accessed on the 25 June 2025.
[115] Section 59 of the Companies Act.

128(b) provides that 'the directors shall remain in office but cease to have powers, functions or duties other than those required or permitted under' the Act.

Derek French and others[116] opine as follows on the effect of liquidation on the duties of the directors:

> In a winding up by the court, the liquidator has the power to sell the company's property, use the company's seal ,draw cheques on its bank account…and, with the sanction of the court, carry on the business of the company so far as may be necessary for its beneficial winding up…. Clearly there is little for the companies director to do in these circumstances, but the Act never explicitly makes the important point that the powers of the directors cease on a compulsory winding as it does in relation to voluntary winding up.

4.3 The effect of liquidation on the director's estate

One of the fundamental attractions to the position of directorship in a company is that in the performance of their duties in the company the directors are shielded from incurring liabilities in respect of any damage occasioning the company out of performance of their duties. It has been established that 'the claims of creditors of the company are confined to the assets of a company'.[117] Cassim and Others[118] state further that '[t]here are three important methods that companies have relied on in the past in order to limit the extent to which their directors are exposed to personal liability for negligence, breach of fiduciary duty, breach of trust or other default in the performance of their duties'. These three measures employed by the companies include the insertion of provisions in the companies' constitutions, exempting directors from liability for negligence,

[116] Derek French and others, (n 107).
[117] Faraouk HI Cassim (n 22) 35.
[118] Ibid, 573.

breach of fiduciary duty or breach of trust.[119] Secondly, the companies may extend indemnities which protect directors 'from loss as a result of some default, breach of duty or negligence.' The third manner in which the companies protect the directors against liability in the performance of their duties, is said to be 'by paying directors' liability insurance' for indemnity in favour of the concerned director in respect of the performance of his work of as a director. [120]

The above discussion is simply related to show how much directors are protected against personal liability in the performance of their duties. This is done in order to attract best candidates to directorship positions in the companies, without any fear of any kind of loss in the performance of their duties.[121] The protection against personal liability means that the assets of directors will not be executed upon to satisfy the debts of the creditors of the company. It should further be noted that some of the above-mentioned protections are specifically conferred because in ordinary course of business of the company the breach of those duties may attract personal liability against the concerned director.[122] In a nutshell, the directors of the company may incur personal liability for damages occasioned by breach of fiduciary duties, failure to exercise due diligence and or act in the best interests of the company unless their liability had somehow been excluded.

[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Section 63 (1) (2) and (3) of the Companies Act No. 18 of 2011.

Relevant to this study, the Companies Act[123] of the Republic of South Africa, under section 22 (1), the company is prohibited from carrying on its business recklessly, with an intention 'to defraud any person or for any fraudulent purpose'. The same Act in section 77(3) provides that, the director who acquiesced to the company carrying business in contravention of section 22(1) will bear liability for the loss occasioned the company due to such trading. Section 424(1) of the same Act complements section 22 and provides in effect that the director if during the winding up of the company, it appears that the business of the company was being carried out 'recklessly or with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose, the court...may declare that any person who was knowingly a party to the carrying on business …shall be personally responsible without any limitation of liability…'.

Cassim and Others[124] writing on the import of sections 22 and 424, stated as follows:

> It is noteworthy at the outset that in a number of respects, s 22 is wider than s 424 of the 1973 Act, Section 22 of the Act, like s 424 of the 1973 Act, is not confined to a winding up of the company. It will apply to a company that is still a going concern, irrespective of whether it is being wound up or not. Section 424 of the 1973 Act applied to two types of wrongful trading, which may be referred to as fraudulent trading and reckless trading. Section 22 of the Act now adds a further type of wrongful trading, which is referred to as 'insolvent trading'. While both s 424 and s 22 are powerful weapons in deterring the abuse of limited liability, it remains essential to strike a balance between the risk of a company going insolvent and the need to promote the success of the company.

[123] Companies Act No. 61 of 1973.
[124] Faraouk HI Cassim (n 22), 588.

4.4 Changes brought by the Insolvency Act of 2022 in Lesotho

The Insolvency Act has combined the process which was initially referred to as sequestration under the Insolvency Proclamation[125] which related to the estates of natural persons and those of registered partnerships, and that of liquidation of companies under the Companies Act, which exclusively deals with liquidation of incorporated companies, in a single statute. It is important to highlight that the Act includes a company as a debtor under section 2. Section 3 provides that, '[n]otwithstanding the provisions of any other law relating to liquidation, the provisions of this Act shall supersede any such provisions'. It is clear from the reading of section 3 that, where the provisions of the Act relating to liquidation of the companies are at cross purposes with the provisions of the Insolvency Act, the provisions of the Insolvency Act shall prevail.

The significant change brought by the current Insolvency Act, is that it provides for business rescue procedure in terms of section 149, read with section 151, which is not available under the Companies Act. The procedure is meant to assist ailing companies due to financial distress to be alive again through some business expertise, as opposed to dissolution through the process of liquidation and winding up. Ntsane K. Lesenyeho and Anthony O. Nwafor[126] writing on the business rescue procedure under the Insolvency Act and adverting to the changes it brought as opposed to what obtained under the Companies Act, opine as follows:

> Lesotho has joined the existing trend by enacting the Insolvency Act of 2021, which provisions ensure the revival of ailing companies and prevent their liquidation. The Companies Act of 2011 inexplicably failed to address that issue. The Companies Act focused more on liquidation to satisfy the yearnings

[125] Insolvency Proclamation (n 6).
[126] Ntsane K. Lesenyeho and Anthony o. Nwafor, "Exploring the Goal of Corporate Rescue under the Lesotho Insolvency Act of 2022", *African Journal of Law and Justice System* (AJLJS) ISSN 2753-3115 (Print) ISSN 2753-3123 (Online) Indexed by IBSS, EBSCO and SABINET Volume 4, Number 1, April 2025 Pp 5-24

> of the creditors. The only provisions that target the revival of an ailing company are found in Part XVII, which provides for judicial management. Section 156(5) of the provisions in that part of the Companies Act empowers the court to "order judicial management if it is not satisfied that under proper management the company may be revived."

Consequent upon promulgation of the business rescue procedure provided for in the Insolvency Act, the corporate rescue practitioner of the company appointed during business rescue proceedings is given a standing to apply for the liquidation of the company 'on the grounds that there is no reasonable prospects of the company being rescued'.[127] The Registrar of Companies is also empowered to bring the liquidation proceedings against the company in terms of section 7(1)(d) 'on the grounds that the company, its directors , members, shareholders or officers of the company are acting or have acted in a manner that is fraudulent or…illegal as determined by an investigation conducted in terms of section 87(9) of the Companies Act…. Section 87(9) (a) gives the Registrar of Companies, the power to investigate the affairs of the company and inform the board and the shareholder if:

> (a) it appears that the business that the business of the company is being conducted with intent to defraud its shareholders or creditor or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose.
>
> (b) the persons concerned with its formation or the management of its affairs have in connection therewith been guilty or are suspected of being guilty of fraud or other misconduct towards its members; or
>
> (c) its members have not been given the information with respect to its affairs which they might reasonably expect.

[127] Section 7(1)(e).

The above stated section 87(9) in referring to fraudulent conduct of the director amongst other people in running the affairs of the company, is similar in other respects to the provisions of section 22 and 424 of the South African Companies Act discussed above. It is significant to state however that, section 89 of the Lesotho Companies Act does not impose personal liability of damages to those involved in the alleged fraudulent conduct as provided for in South African Companies Act but rather prescribe in section 87(10) that they may incur criminal liability.

The other instances provided in the Act on which an application for the liquidation of the company may be made in the Insolvency Act do not strictly relate to where there is a situation of insolvency in the company, and shall not be the subject of discussion in this study. The other change brought by the Insolvency Act is that it excludes administration of companies in liquidation from the office of the Master of the High Court as it obtained under Companies Act of 2011 and vests it in the office of the Registrar of Companies.[128] The office of the Master in terms of the Insolvency Act is explicitly left with the administration of the insolvent estates of the natural persons.[129]

Relevant to the present study, the major shift from what obtained in legislative scheme of things under repealed Insolvency Proclamation, and even the current Companies Act is the introduction of section 9(4) of the Insolvency Act, which prescribes that the estate of the director of a company which is a partner in a partnership shall be considered as the estate under liquidation for the purposes of performance of statutory 'requirements in respect of the partnership estate' when there

[128] Insolvency Act No. 9 of 2022, section 4(2).
[129] Ibid, section 4(1).

is no partner whose estate maybe liquidated in terms of subsection (3) of the Act. It is difficult to imagine instances where there may not be estate of the partner to liquidate as contemplated in that section. That might however be what obtained in the *Trencon case*[130] where one of the partners was a company not registered in Lesotho but registered in the foreign jurisdiction. It is clear however that what must trigger the application of section 9(4) of the Act is that 'there has to be no partner whose estate maybe liquidated as contemplated in subsection (3). As discussed above, the effect of liquidation on the estate under consideration is that it is placed in the possession and under the control of the liquidator, and it shall ultimately be realised to satisfy the debts of the creditors of the concerned insolvent. Robert Sharrock and Others[131]opine that:

> The law proceeds from the premise that, once an order (or provisional order) of sequestration is granted, a *concursus creditorum* ('coming together of creditors') is established , and the interests of the creditors as a group enjoy preference over the interests of individual creditors….The debtor is divested of his estate and cannot burden it with any further debts.

It is evident that the relevant section does not prescribe that the director has to have been guilty of breach of his duties towards the company, such as fiduciary duty, duty to exercise due diligence, care and skill amongst others, which are breaches that sometimes negate the application of the notion of limited liability. It seems that once they become directors in a company that is a partner to the partnership their personal estates are exposed to liquidation together with the estate of the partnership when the situation of insolvency arises. This is clearly in disparity to what happens to the directors of the companies which are not parties to any form of partnership, as they remain protected by limited liability other than due to their culpable conduct.

[130] *Trencon* case (n 14).
[131] Robert Sharrock and Kathleen Van Der Linde (n 37) 4.

4.5 Conclusion

Chapter four discusses liquidation of companies generally and its effect on the duties of the director of the companies under liquidation and their estates to find if there is justification for section 9(4). The disadvantage of the researcher herein is that the Act is relatively knew, and has not been put in practice, as to how the Master of High Court or Registrar of Companies operationalize some of its provisions, or how the courts interpret its provisions. The neighbouring Republic of South Africa has its Insolvency Act as old as from 1936 which evidently does not have provisions similar to section 9(4) of the Insolvency Act of Lesotho. Robert Sharrock and Others[132] write that:

> The South African Law Reform Commission has, for more than two decades, been engaged in a project for the revision of insolvency law. It has been considering, *inter alia*, the amalgamation into one enactment of the law governing the sequestration of individuals and the winding up of the companies, close corporations, and other juristic persons. So far, no fundamental changes have been made to the existing legislative framework, and none appears to be imminent.

It has however been established herein that under normal circumstances, the assets of directors of a company placed in liquidation, are generally shielded from being realised to satisfy debts of the company. That can be departed from under exceptional circumstances, when due to the breach of their fiduciary duties, failure to exercise care, skill and diligence and in the context of South Africa engaging in fraudulent and or reckless trading the directors may be personally held liable for damage caused to company and or the creditors of the company. Section 9(4) of the Insolvency Act appears to trample on the notion of limited liability protection given to the directors of the company without stringent justification. It is therefore difficult to support the section in its present state.

[132] Ibid, 13.

Chapter Five: Lessons from the Republic of South Africa and Scotland, Conclusion and Recommendations

5.0 Introduction

The present study has unravelled that the personality of the joint-ventures is not easily determinable. It will always depend on the governing legislation as to how a joint-venture is formed, regulated and finally dissolved in a particular jurisdiction as to what kind of personality may be attributed to a particular joint-venture. In Lesotho, it has been concluded that the joint-venture is a species of partnership, sourcing its validity to the satisfaction of formation and registration requirements provided for in the Partnership Proclamation.[133] It has further been established that registered companies are permitted by the law to form partnerships. The law in Lesotho does not recognise the partnership as independent legal person from the persons who formed it. It is for this reason that under the repealed Insolvency Proclamation, when the estate of the partnership is sequestrated, there had to also be an order for the sequestration of the estates of partners in the joint-venture.[134]

The main challenge identified in the present study relates to how joint-ventures are dissolved on account of insolvency when such joint-ventures are composed of registered companies. The issue being whether in line with section 13 (1) of the repealed Insolvency Proclamation the estate of a company which is partner in the joint-venture has to be liquidated together with the estate of the partnership on account of insolvency of the latter estate. The study has revealed that the companies

[133] Partnership Proclamation, (n 6).
[134] Section 13 of the Insolvency Proclamation (n 6).

had been excluded pursuant to section 2 of the Insolvency Proclamation which defines the term 'debtor'. It then justified the argument that the registered companies had been excluded from the application of the Insolvency Proclamation. The issue landed in the Court of Appeal of Lesotho in the *Trencon case,* which unfortunately could not make a definitive finding on the matter. The issue for determination in the researcher's view was whether in the light of section 2 of the Insolvency Proclamation, the estate of the joint-venture composed of three companies could lawfully be sequestrated, without simultaneous order for the sequestration of the estates of the partners. The majority judgement found that at least on the facts of that case the application for sequestration of the estate of the partnership could not succeed without the call for sequestration of individual partners' estates. The majority did not make any decision as to whether that application would be competent if one of the partners was a registered company.

The minority judgement on the other hand found that it was competent to order sequestration of the partnership estate alone, without simultaneously sequestrating the estates of individual partners, when there is a lawful bar to sequestration of the estate of the concerned partner. The present study has established that post the judgement in the *Trencon case,* there was legislative intervention, whereby the Insolvency Proclamation was repealed, and was replaced by the Insolvency Act of 2022.[135] The Act brought major changes, not only on nomenclature, but also on the substantive process of liquidation. What is of utmost peculiarity with the Act is that, the term 'sequestration' had been done away with, and the 'term' liquidation is employed in respect of the winding up of both the natural, partnerships and companies estates. The processes have effectively

[135] Insolvency Act (n 6).

been incorporated in one piece of legislation. The Act lists the company and partnership under section 2 when it defines a term 'debtor'. This effectively subjects a company to the process of liquidation as provided for under the Insolvency Act.

The process of liquidation under the Companies Act has been left intact, safe to state that section 3 of the Insolvency Act dictates that if any other law relating to the liquidation of the companies goes against the provisions of the Insolvency Act, the latter will take precedence. It is safe to conclude that the provisions of the Insolvency Act and the Companies Act effectively complement each other. It has been discovered in the present study that, the Insolvency Act has introduced the notion of business rescue, and that the business rescue practitioner appointed in the business rescue process has been vested with standing to apply for the liquidation of the company for the reason that the process could not help resuscitate the company. The intriguing aspect of the current Insolvency Act is that, it does not give any specific focus to the liquidation of the estates of the partnerships composed of companies. This could have been important to deal with in the Act, as the Partnership Proclamation still maintains the partnerships as having no legal *persona* of their own, independent from the parties who have formed it. Further compounding factor is the fact that the Act still provides that the partnership estate has to be liquidated together with the estates of the individual partners in the situation of insolvency.

The challenge revealed in this study is that it may well happen that the partnership is actually insolvent, but the individual companies which are partners to the joint-venture, may not be found to be insolvent if the application is brought independently for their liquidation. This is more so

when there is no provision in the Act that provides that the facts establishing insolvency in respect of the partnership shall automatically be considered for the liquidation of the individual partners as was the case with section 12 of the repealed Insolvency Proclamation. This in the researcher's view suggests that separate applications will have to be instituted for the liquidation of the company independent from the application instituted for the liquidation of the estate of the joint-venture. Further afield, even though the Act in section 9(3) provides just like the repealed section 13(1) of the Insolvency Proclamation that the estates of individual partners to the partnership have to be liquidated together with the partnership, still anticipates that, there might be a lawful bar to the liquidation of the estate of the partner to the partnership.

In the researcher's view, the problems that bedevilled the sequestration process in respect of the estates of the partnerships composed of incorporated companies under the repealed Insolvency Proclamation will still persist under the present Insolvency Act. This will be so because, although the Act has employed the term liquidation in respect of both natural and juristic persons, the problem had to do more with the personality of the partners forming the concerned partnership not necessarily the semantics. The study has revealed that with respect to the companies the threshold in deciding the success or otherwise of the liquidation application is that of commercial insolvency while the partnerships require that factual insolvency be established.

5.2 Recommendations

It is evident that there will always be challenges when the partnership composed of registered companies has to be liquidated on account of insolvency. The main challenge as it has been found in the body of this work lies mainly with the personalities of the bodies that compose a partnership, as the law admittedly allows both legal and juristic persons to form partnerships, although these different persons are differently regulated by different laws. The personality of partnerships in Lesotho, whether composed of natural or juristic persons, remains that of mere aggregation of the partners forming such a partnership, whereby a partnership is not being treated as a separate legal person from the partners. The juristic persons are enjoined by law to have board of directors managing their business affairs[136] while that is not a case with the natural persons who normally manage their own affairs in their own right. The partners in the partnerships are considered to be individually the agents of the partnership and collectively the management of the concerned partnership[137]. The irony is that the partnership, whether composed of natural or juristic persons, does not appear to be legally required to be managed by the board of directors.

The rhetorical question would then be how a juristic person who is partner in a partnership, act as an agent of the concerned partnership? The question is merely posed to show that the personality of the partnerships in its current form in Lesotho will always raise challenges for the management of the affairs of such partnership. The fact that the Insolvency Act simply subjected companies to the liquidation under the Insolvency Act does not resolve the impasse in the researcher's view.

[136] Section 59 of the Companies Act No. 18 of 2011.
[137] Liesl Hager (n 36) 54-55.

The solution in researcher's view has to do with conferring legal personality to the joint-ventures or partnerships composed of juristic persons. The following lessons from the Republic of South Africa and Scotland in the researcher's view provide some pragmatic solution to the impasse identified in this study, and it is recommended that Lesotho should move in a direction whereby both Scotland and South African models on the treatment of liquidation of partnerships are to the greater extend combined and thereby employed.

5.3 Lessons from the Republic of South Africa and Scotland

However old and perhaps outdated the South African Insolvency Act might seem, the courts in that jurisdiction at least pointed the clear path as to how sequestration of the joint-ventures composed of incorporated companies has to be dealt with in that jurisdiction. It was stated in the matter of *Commissioner, SARS v Hawker Aviation Partnership and Others*[138] that the fact that the partnership is composed of a partner which is a registered company and therefore not subject to sequestration processes under the Insolvency Act, constituted a lawful bar to the sequestration of the concerned estate, and as such only the estate of the partnership could be sequestrated. That decision effectively treated a partnership as an independent entity from the parties forming it under such circumstances. The decision in the *Commissioner, SARS* case was on the interpretation of section 13 of the Insolvency Act[139], which is word for word similar to the section 13 of the repealed Insolvency Proclamation of Lesotho. The facts in that particular case were in material respects similar to the facts in the *Trencon case*,[140] which could have only justified the Court of Appeal to have approved that decision as precedent and applicable law in Lesotho.

[138] 2006 (4) SA 292 (SCA).
[139] Insolvency Act 24 of 1936.
[140] *Trencon case* (n 14).

It is therefore recommended that the pragmatic way to deal with the liquidation of the joint-ventures composed of companies, is by first amending the Partnership Proclamation, and confer the independent legal personality to the partnerships composed of registered companies. This will be in line with what obtains in Scotland, whereby section 4(2) of the Partnership Act of 1890 in that jurisdiction confers an independent legal personality of the partnerships formed in that jurisdiction from the persons who formed it. The relative advantage is that once the partnership is viewed as legal *persona* independent from those who compose it, the liquidation process will relatively be easy as there will strictly be no need to deal with the estates of individual partners, and thereby complicate the process. It should be stated that the liquidation process of insolvent partnerships in Scotland is governed by Bankruptcy Act of 2016, section 6(4) thereof. Due to the independent legal personality conferred on the partnerships in that jurisdiction by the Partnership Act, there is no obligation, for the applicant seeking sequestration of the partnership estate to also seek an order for sequestration of the estates of individual partners.

It is however recognized that the blanket granting of independent legal *persona* to the partnerships composed of companies may defeat the whole purpose of establishing joint-ventures in the first place, which is to make them viable business forces for the successful completion of certain business ventures. The companies which are partners in the joint-venture which may well be liquid and able to assist the partnership which might be experiencing financial hardships perhaps because of bad management, may stand back while the partnership is dissolved yet they can be able to rescue it just on the ground that it is an independent legal entity. That happened in the *Trencon*

case[141] whereby some of the partners to the joint-venture even made common cause with the creditor who applied for the sequestration of the partnership, supporting that indeed the partnership had to be sequestrated. It is the researcher's contention that, that will be extremely detrimental to the business if allowed to happen unchecked. In line with the recommendation made above that the partnerships composed of juristic persons be conferred *legal persona*, it is further recommended that there has to be provision in the law that a joint-venture be managed by the board of directors-like management team, like an ordinary company, and consequently that such management team must bear all the fiduciary duties to the joint-venture as it is the case with directors of an ordinary company.

Having recommended that there be provision that the joint-ventures composed of registered companies be conferred *legal persona*, with management undertaken by a management team akin to a board of directors, section 9(4) of the Insolvency Act of 2022 has to be amended and qualified accordingly. It has been concluded that, even though that section provides for somehow circumscribed circumstances under which the estate of the director of a company which is a partner in joint-venture may be considered as estate under liquidation, it does not sufficiently justify the departure from the established notion of limited liability applied in favour of the directors of the companies. It appears that the section places directors of the companies in the joint-venture at worse position compared to the directors of the companies not in the partnerships, which cannot be justified in a democratic state. The fact that the section does not make it a condition for the

[141] *Trencon case* (n 14).

consideration of the director's estate as the estate in liquidation on account of the director's blameworthiness, in the researcher's view unjustifiably tramples the notion of limited liability.

The directors have to incur personal liability in respect of the performance of their directorship functions when they have breached their fiduciary duties, duty to act skilfully and diligently amongst others. As it has been discovered in chapter four, in South Africa the director may incur personal liability if found to have traded recklessly or fraudulently contrary to sections 22 and 424 of the Companies Act[142] of the Republic of South Africa. The same applies in Scotland, where the personal liability may be incurred by the director of a company, if found to have breached fiduciary duty in line with section 212 of the Insolvency Act of 1986, or where the director had aided the company to engage in fraudulent trading in terms of section 213 of the Insolvency Act, or where there has been wrongful trading in terms of section 214 of the same Act.

It is therefore recommended that section 9(4) of the Insolvency Act of Lesotho be amended in a manner that a person who is likely to incur personal liability for debts of the joint-venture be a management team member of a joint-venture in line with the model suggested above, where a joint-venture would be having its own board of directors-like governing structure. It is further recommended that in line with established common law position, later codified in the Companies Act, a concerned member should only incur personal liability upon establishment of blameworthiness on his part in the performance of management duties. It is therefore recommended that the directors of the companies which are partners in joint-venture be totally excluded in their capacity as such.

[142] Companies Act (n 123).

BIBILIOGRAPHY

Cases

Anju Civils (Pty) Ltd v Trencon Building World Belela Joint Venture and Others - CCA/63/2013 (https://lesotholii.org/akn/ls/judgment/lshc/2015/14/eng@2015-04-08/source.pdf) (accessed on the 09 March 2025.

Commissioner, SARS v Hawker Aviation Partnership and Others 2006 (4) SA 292 (SCA)

Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530

Duyn v Shangming International (Pty) Ltd [2003] 1 ALL SA 173 (C)

Eldaro Trading (Pty) Ltd and Another v Meraka Lesotho (Pty) Ltd https://lesotholii.org/akn/ls/judgment/lsca/2020/4/eng@2020-05-29/source. Accessed on the 25 June 2025.

Lebusa Motlomelo v Lethabela Mathe and Others LAC (2005-2006)

Lebohang Thotanyana v Nthabeleng Motsamai and Others C of A (CIV) NO. 62/2019, https://lesotholii.org/akn/ls/judgment/lsca/2020/30/eng@2020-10-30- accessed on the 03rd May 2025.

Michalow No v Primier Milling Company Limited 1960 (2) SA 59 (W)

MKM Marketing Ltd and Others v Commissioner of Insurance and Another LAC (2011-2012)

Partridge v Harrison and Harrison 1940 WLD 265

Pezzutto v Dreyer and Others [1992] 2 ALL SA 81(A)

Purdon v Muler [1960] 2 ALL SA 607(E).

SA Leather Co (Pty) Ltd v Main Clothing Manufacturers (Pty) Ltd and Another 1958 (2) SA 118 (O)

Salmon v Salmon & Co Ltd [1897] AC 22 (HL)

Stephen Fraser (Pty) Ltd v Ramla and Others 1961 (2) SA 554 (W)

Trencon Building World Belela Joint Venture and Others v Anju Civils (Pty) Ltd and Others LAC (2015-2016)

Statutes

Companies Act No. 18 of 2011

Insolvency Proclamation 51 of 1957

Insolvency Act No. 9 of 2022

Partnership Proclamation 78 of 1957

Scotland Bankruptcy Act of 2016

Scotland Insolvency Act of 1986

Scotland Partnership Act of 1890

South African Companies Act No. 71 of 2008

South African Companies Act No. 61 of 1973.

Books

Cassim F and Others, *Contemporary Company Law* (2nd edn, Juta & Co Ltd 2012)

Cilliers H.S and Benade M.L, *Company Law, (Butterworths*, 1968)

French D, Mayson S and Ryan C, Mayson, *French & Ryan on Company Law*, (29th Edn, 2012-2013, Oxford University Press)

Sharrok R , Linde K.V.D and Smith A, *Hockly's Insolvency Law* (9th edn, Juta & Co Ltd 2012)

Journal Articles

Lesenyeho N K. and Nwafor A O, “Exploring the Goal of Corporate Rescue under the Lesotho Insolvency Act of 2022”, [2025]

Weder R, "Internationalization of Switzerland: Competitive Advantages of Joint Ventures and Other Cooperative Arrangements," in Joint Ventures and Collaborations, Hans Singer, N. Hatti and R. Tandon (eds.), New World Order Series, Volume 10 (New Delhi: Indus Publishing, 1991], pp. 197-217

Websites

<https://www.bbv.co.za/listing/sequestration-and-liquidation> accessed on the 25 June 2025.

<chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.lhda.org.ls/Uploads/documents/Press_Office/Press_releases/LHWP_Phase_II_main_works_construction_of_POB_dam_and_transfer_04_Nov_2022> accessed 03rd May 2025

<https://www.lhda.org.ls/projectphases/phasei> Accessed 03rd May 2025

<https://generisonline.com/understanding-liquidation-and-insolvency-procedures-in-lesotho/> accessed on the 24/06/2025.

Online Journals

.Miller R, Jack D. Glen, Frederick Z and Jaspersen, Yannis Karmokolias, ‘*International Joint-Ventures in Developing Countries, Happy Marrieages?, International Finance Corporation*, Discussion Paper Number 29, The World Bank, Washington, DC, 1996. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents1.worldbank.org/curated/en/895971468765008903/pdf/m> accessed on the 03rd May 2025.

Weigel D, ‘Foreign Direct Investment: The Role of Joint Ventures and Investment Authorities’ <https://www.elibrary.imf.org/downloadpdf/display/book/9781557751409/ch04> accessed 03rd May 2025

Dissertations

Hager L, The Dissolution of universal partnerships in South African Law, 2019, 41, (dissertation submitted in fulfilment of the requirements for the degree, LLM at the Faculty of Law, University of Pretoria, 2019. blob:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/29ecc963-934b-47c7-bce6-4570e2ee233b, Accessed on the 30th May 2025.

McKenzie P M, Joint Venture: North American Emigrant Possessing Skills Not Readily Available in Australia, Family Reunion Immigrant, or Native-Born Australian Unrelated to Foreigners of the Same Name? (1984)., a research paper for the subject Advanced Company Law (LLM) 730-659 submitted at the Faculty of Law, The University of Melbourne, 1984, Available at SSRN: https://ssrn.com/abstract=1566631 or http://dx.doi.org/10.2139/ssrn.1566631 accessed on the 21 June 2025