

REPUBLIC OF SOUTH AFRICA

INSOLVENCY AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly)) (The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 14B—2002]

REPUBLIEK VAN SUID-AFRIKA

INSOLVENSIE- WYSIGINGSWETSONTWERP

*(Soos gewysig deur die Portefeuljekomitee oor Justisie en Staatkundige Ontwikkeling
(Nasionale Vergadering)) (Die Afrikaanse teks is die amptelike vertaling van die
Wetsontwerp)*

(MINISTER VIR JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 14B—2002]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Insolvency Act, 1936, so as to further regulate the effect of sequestration on employment contracts and claims for severance and retrenchment pay; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of section 38 of Act 24 of 1936

1. The following section is hereby substituted for section 38 of the Insolvency Act, 1936 (hereafter referred to as the principal Act):

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“Effect of sequestration on contract of service

38. (1) The contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order.

(2) Without limiting subsection (1), during the period of suspension of a contract of service referred to in subsection (1)—

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(a) an employee whose contract is suspended is not required to render services in terms of the contract and is not entitled to any remuneration in terms of the contract; and

(b) no employment benefit accrues to an employee in terms of the contract of service which is suspended.

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(3) An employee whose contract of service is suspended is entitled to unemployment benefits in terms of section 35 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), from the date of such suspension, subject to the provisions of that Act.

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(4) A trustee appointed in terms of section 56, or a liquidator appointed in terms of section 375 of the Companies Act, 1973 (Act No. 61 of 1973), or a liquidator who, in terms of section 74 of the Close Corporations Act, 1984 (Act No. 69 of 1984), remains in office after the first meeting and a co-liquidator, if any, appointed by the Master may terminate the contracts of service of employees, subject to subsections (5) and (7).

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(5) A trustee may not terminate a contract of service unless the trustee has consulted with—

(a) any person with whom the insolvent employer was required to consult, immediately before the sequestration, in terms of a collective agreement defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

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- (b) (i) a workplace forum defined in section 213 of the Labour Relations Act, 1995; and
(ii) any registered trade union whose members are likely to be affected by the termination of the contract of service, if there is no such collective agreement that existed immediately prior to the sequestration; 5
- (c) a registered trade union representing employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service, if there is no such workplace forum; or 10
- (d) the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose, if there is no such trade union.
- (6) The consultation referred to in subsection (5) must be aimed at reaching consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer— 15
- (a) by the sale of the whole or part of the business of the insolvent employer; or
- (b) by a transfer as contemplated in section 197A of the Labour Relations Act, 1995; or 20
- (c) by a scheme or compromise referred to in section 311 of the Companies Act, 1973; or
- (d) in any other manner.
- (7) If any party referred to in subsection (5) wishes to make proposals concerning any matter contemplated in subsection (6), that party must submit written proposals to the trustee or liquidator within 21 days of the appointment of the trustee in terms of section 56, or the appointment of the liquidator in terms of section 375 of the Companies Act, 1973, or the appointment of a co-liquidator in terms of section 74 of the Close Corporations Act, 1984, or if a co-liquidator is not appointed, the date of the conclusion of the first meeting, unless the trustee or liquidator and an employee agree otherwise. 25 30
- (8) A creditor of the insolvent employer may, with the consent of the trustee, participate in any consultation contemplated in this section. 35
- (9) Unless the trustee or liquidator and an employee have agreed on continued employment of the employee in view of measures contemplated in subsection (6), all suspended contracts of service shall terminate 45 days after—
- (a) the date of the appointment of a trustee in terms of section 56; or 40
- (b) the date of the appointment of a liquidator in terms of section 375 of the Companies Act, 1973; or
- (c) the date of the appointment of a co-liquidator in terms of section 74 of the Close Corporations Act, 1984, or if a co-liquidator is not appointed, the date of the conclusion of the first meeting. 45
- (10) An employee whose contract of service has been—
- (a) suspended in terms of subsection (1); or
- (b) terminated in terms of subsection (4) or (9), 50
- is entitled to claim compensation from the insolvent estate of his or her former employer for loss suffered by reason of the suspension or termination of a contract of service prior to its expiration.
- (11) An employee whose contract of service terminates or has been terminated in terms of this section is entitled to claim severance benefits from the estate of the insolvent employer in accordance with section 41 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997). 55

Amendment of section 98A of Act 24 of 1936

2. Section 98A of the principal Act is hereby amended by the substitution for paragraph (iv) of subsection (1)(a) of the following subparagraph:

“(iv) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, [or] wage-regulating measure, or as a result of termination in terms of section 38; and”.

Short title and commencement

3. (1) This Act shall be called the Insolvency Amendment Act, 2002, and shall come into operation on 1 January 2003 or such earlier date as the President may determine by proclamation in the *Gazette*. 5

(2) This Act applies in respect of estates which are sequestrated or provisionally sequestrated on or after the date of commencement of this Act.

MEMORANDUM ON THE OBJECTS OF THE INSOLVENCY AMENDMENT BILL, 2002

1. INTRODUCTION AND NEGOTIATION PROCESS

1.1 In 1999 the Department and the Minister of Labour conducted a review process of the labour law. This included comprehensive consultations with stakeholders. This process brought to light the fact that the policy fundamentals that shape the laws were sound but that adjustment and refinements were required to—

- * improve the sensitivity of our legal framework for the purpose of creating more jobs;
- * address unintended consequences of some provisions of our laws;
- * ensure the effective alignment of our laws with the changing labour market environment.

To give effect to the above, the Departments of Labour and of Justice and Constitutional Development prepared draft Amendment Bills in respect of the Labour Relations Act, the Basic Conditions of Employment Act and the Insolvency Act.

1.2 Cabinet approved these draft Amendment Bills on 26 July 2000 for public comment and negotiations at NEDLAC. They were published on 27 July 2000. Fifty four public comments were received, ten of which dealt with the draft Insolvency Amendment Bill.

1.3 The negotiations at NEDLAC began in September 2000 but were suspended after a short period, whereafter a process of bilateral engagement began. This included discussions between organised business and labour in the Millennium Labour Council (MLC).

1.4 Negotiations began again in NEDLAC in June 2001 after the MLC concluded discussions on key principles in respect of certain aspects of the Amendment Bills.

1.5 At the end of July 2001, agreement was reached at NEDLAC on the provisions of the draft Insolvency Amendment Bill.

2. THE INSOLVENCY AMENDMENT BILL, 2002

2.1 All but two of the clauses in the original draft Insolvency Amendment Bill, 2000, also required amendments to other legislation, such as the Companies Act and the Close Corporations Act. The Department of Justice and Constitutional Development is considering proposals by the South African Law Commission and the Standing Advisory Committee on Company Law for uniform legislation that deals with all corporate and individual insolvencies. The proposals in these clauses that require further legislation will be considered when a decision has been made on the uniform legislation.

2.2 The two clauses of the Insolvency Amendment Bill, 2002, deal with sections 38 and 98A of the Insolvency Act. These sections apply to both the insolvency of individual employers who trade in their personal name as well as to companies and close corporations that are wound up because of insolvency.

2.3 Section 38 of the Insolvency Act, 1936, presently provides that the sequestration of the estate of an employer terminates all contracts of employment between the employer and employees. (In contrast, section 37 of the Act provides that leases entered into by the employer continue in force for three months from the date of sequestration unless they are terminated earlier by the trustee.)

2.4 The termination of a contract of employment in terms of section 38 does not constitute a dismissal for purposes of labour law. It is classified as a termination of a contract by operation of law. Employees are consequently deprived of a range of protections such as the right not to be unfairly dismissed in terms of the Labour Relations Act, 1995, and the right to severance pay in terms of the Basic Conditions of Employment Act, 1997.

2.5 The Bill proposes that the insolvency of an employer should only suspend obligations between employers and employees in terms of their contracts of service. (Proposed new section 38(1).) The effect of this will be that employees will not be required to tender their services in terms of their contracts and employers will not be

obliged to remunerate them. (Proposed new section 38(2).) Despite the fact that contracts of service are suspended, employees will be entitled to unemployment benefits in terms of the Unemployment Insurance Act, 1966, subject to the provisions of that Act, and will therefore be entitled to register for unemployment benefits as if they had been dismissed. (Proposed new section 38(3).) In terms of existing law a trustee may engage the services of certain of the employees of the insolvent employer in order to continue running the business.

2.6 The final trustee is given the power to terminate the contracts of service of the employees in terms of the proposed new section 38(4). The trustee may, however, not exercise this power unless the trustee has entered into consultations regarding measures that could be adopted to save a whole or part of the business with the employees, their trade unions or any other representatives of the employees. (Proposed new section 38(5).) A creditor of the insolvent employer may also participate in these consultations with the consent of the trustee. (Proposed new section 38(8).)

2.7 Unless a trustee and an employee have agreed on continued employment, all contracts of service not already terminated, terminate 45 days after the appointment of the final trustee or the equivalent time in the case of a close corporation. (Proposed new section 38(9).)

2.8 It is generally accepted that employees whose services are terminated as a result of insolvency are currently not entitled to the statutory severance benefits provided for in section 41 of the Basic Conditions of Employment Act, 1997. The proposed new section 38(11) provides that, for purposes of severance benefits, these employees will be treated as employees who have been dismissed because of the employer's operational requirements. The claim for severance benefits will be against the estate of the insolvent employer, which is regulated in terms of the new section 98A, which is also being amended to reflect this change.

3. FINANCIAL IMPLICATIONS

None.

4. OTHER DEPARTMENTS CONSULTED

4.1 The following Departments were consulted on the proposed draft Amendment Bill by the Department of Labour:

- * The Presidency;
- * Treasury;
- * Department of Trade and Industry;
- * Department of Health;
- * Department of Public Service and Administration;
- * Department of Minerals and Energy.

4.2 The Department of Public Service and Administration and the Treasury were briefed and consulted about developments at NEDLAC and were furnished with various drafts by the Department of Labour.

5. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the view that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.