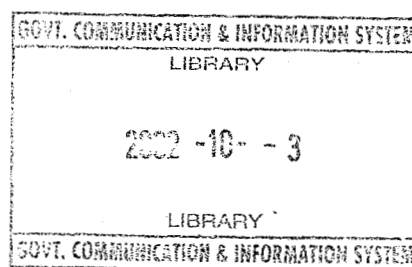


REPUBLIC OF SOUTH AFRICA

INSOLVENCY SECOND AMENDMENT BILL

(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No. 23860 of 19 September 2002) (The English text is the official text of the Bill)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)



[B 53—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 require notice of a petition for the sequestration of a debtor's estate to be given to employees of the debtor and registered trade unions representing such employees and to the South African Revenue Service; to provide for the service of sequestration orders on such employees and trade unions and on the South African Revenue Service; and to make further provision regarding a debtor's rights to compensation; to amend the Companies Act, 1973, so as to require notice of an application for the winding-up of a company to be given to employees of the company and registered trade unions representing such employees and to the South African Revenue Service; to provide for the service of winding-up orders on such employees and trade unions and on the South African Revenue Service; to provide for a penalty; and to provide for matters incidental thereto.

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

Amendment of section 4 of Act 24 of 1936, as amended by section 3 of Act 16 of 1943, section 19 of Act 62 of 1995 and section 1 of Act 49 of 1996

1. Section 4 of the Insolvency Act, 1936, is hereby amended by the substitution for subsection (2) of the following subsection: 5

“(2) (a) Within a period of seven days as from the date of publication of the said notice in the *Gazette*, the petitioner ~~[shall]~~ must deliver or post a copy of the said notice to every one of the creditors of the debtor in question whose address he or she knows or can ascertain. 10

(b) The petitioner must further, within the period referred to in paragraph (a), furnish a copy of the notice—

(i) by post to every registered trade union that, to the petitioner's knowledge, represents any of the debtor's employees; and

(ii) to the employees themselves— 15

(aa) by affixing a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or

(bb) if there is no access to the premises by the employees, by affixing a copy of the notice to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the surrender; and 20

(iii) by post to the South African Revenue Service.”.

Amendment of section 9 of Act 24 of 1936, as amended by section 6 of Act 16 of 1943, section 2 of Act 99 of 1965 and section 1 of Act 122 of 1993

2. Section 9 of the Insolvency Act, 1936, is hereby amended by the insertion after subsection (4) of the following subsection:

- “(4A) (a) A debtor in respect of whom a petition is presented to court in terms of this section must, within two days after receiving notice of the petition, furnish a copy of the petition—
- (i) to every registered trade union that, to the debtor’s knowledge, represents any of the debtor’s employees; and
 - (ii) to the employees themselves—
 - (aa) by affixing a copy of the petition to any notice board to which the employees have access inside the debtor’s premises; or
 - (bb) if there is no access to the premises by the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the presentation of the petition; and
 - (iii) to the South African Revenue Service.
- (b) A debtor who brings an application that a petition for the sequestration of the debtor’s estate is an abuse of the court’s procedures, or is malicious or vexatious, need not comply with paragraph (a) until such time as that application has been determined.
- (c) If a debtor’s application referred to in paragraph (b) is unsuccessful, the debtor must comply with paragraph (a) within two days after the date of the order dismissing the application.”

Substitution of section 11 of Act 24 of 1936

3. The following section is hereby substituted for section 11 of the Insolvency Act, 1936:

“Service of rule *nisi* [upon the debtor]

11. (1) If the court sequesters the estate of a debtor provisionally it [~~shall~~] must simultaneously grant a rule *nisi* calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestered finally.
- (2) If the debtor has been absent during a period of twenty-one days from his or her usual place of residence and of his or her business (if any) within the Republic, the court may direct that it [~~shall be~~] is sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the *Gazette*, or may direct some other mode of service.
- (2A) A copy of the rule *nisi* must be served on—
- (a) any trade union contemplated in section 4(2);
 - (b) the debtor’s employees in the manner contemplated in section 4(2);
 - and
 - (c) the South African Revenue Service.
- (3) Upon the application of the debtor the court may anticipate the return day for the purpose of discharging the order of provisional sequestration if twenty-four hours’ notice of such application has been given to the petitioning creditor.
- (4) For the purposes of serving the rule *nisi* in terms of subsection (2A), the sheriff must establish whether the employees are represented by a registered trade union and determine whether there is a notice board inside the employer’s premises to which the employees have access.”

Substitution of section 15 of Act 24 of 1936

4. The following section is hereby substituted for section 15 of the Insolvency Act, 1936:

“Compensation to debtor if petition is an abuse of court’s procedure or malicious or vexatious

15. Whenever the court is satisfied that a petition for the sequestration of a debtor’s estate is an abuse of the court’s procedure or is malicious or vexatious, the court may allow the debtor forthwith to prove any damage which he or she may have sustained by reason of the provisional sequestration of his or her estate and award him or her such compensation as it may deem fit.”. 5

Amendment of section 136 of Act 24 of 1936

5. Section 136 of the Insolvency Act, 1936, is hereby amended by the addition after paragraph (c) of the following paragraph: 10

“(d) if he or she fails to comply with the provisions of section 9(4A).”.

Amendment of section 346 of Act 61 of 1973 as amended by section 11 of Act 70 of 1984

6. Section 346 of the Companies Act, 1973, is hereby amended by the insertion after subsection (4) of the following subsection: 15

“(4A) (a) The directors of a company in respect of which an application is presented to court in terms of this section must, before the company makes the application or within two days after receiving notice of the application, furnish a copy of the application— 20

- (i) to any registered trade union that, to the knowledge of the directors, represents any of the employees of the company; and
- (ii) to the employees themselves— 25
 - (aa) by affixing a copy of the application to any notice board to which the employees have access inside the premises of the company; or
 - (bb) if there is no access to the premises by the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business immediately prior to the application; and 30
- (iii) to the South African Revenue Service. 30

(b) If a company brings an application that an application for the winding up of the company is an abuse of the court’s procedures, or is malicious or vexatious, the directors of the company need not comply with paragraph (a) until such time as that application has been determined.

(c) If an application by a company referred to in paragraph (b) is unsuccessful, the directors of the company must comply with paragraph (a) within two days after the date of the order dismissing the application. 35

(d) Any person who fails to comply with any requirements of this subsection, is guilty of an offence.”.

Insertion of section 346A in Act 61 of 1973 40

7. The following section is hereby inserted after section 346 of the Companies Act, 1973:

“Service of winding-up order

346A. (1) A copy of a winding-up order must be served on— 45

- (a) any trade union contemplated in section 346(4A);
- (b) the employees of the company in the manner contemplated in section 346(4A); and
- (c) the South African Revenue Service.

(2) For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a registered trade union and determine whether there is a notice board inside the premises of the company to which the employees have access.”. 50

Amendment of section 441 of Act 61 of 1973, as amended by section 30 of Act 111 of 1976, section 29 of Act 64 of 1977, section 27 of Act 59 of 1978, section 16 of Act 84 of 1980, section 30 of Act 83 of 1981, section 11 of Act 29 of 1985, section 15 of Act 31 of 1986, section 5 of Act 78 of 1989, section 7 of Act 69 of 1990, section 19 of Act 35 of 1998, section 21 of Act 37 of 1999 and section 27 of Act 35 of 2001

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8. Section 441 of the Companies Act, 1973, is hereby amended by the substitution in subsection (1) for paragraph (d) of the following paragraph:

“(d) in section 37, 140A, 143, 145, 145A, 146, 146A, 147(2)(a), 148, 149, 153(4), 156, 162, 169, 218, 219, 255, 256(5), 260, 284, 346, 424 or 440D(3) or (4), to a fine or to imprisonment for a period not exceeding two years or to both 10 [such] a fine and such imprisonment;”.

Short title and commencement

9. This Act is called the Insolvency Second Amendment Act, 2002, and shall come into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE INSOLVENCY SECOND AMENDMENT BILL, 2002

1. OBJECTS OF THE BILL

1.1 It is not uncommon that the first time that employees are informed about the insolvency of their employers, is when they find the premises closed and are informed of the insolvency by the trustee or liquidator of the employer. It is advisable that employees and their registered trade unions should be informed of insolvency at an earlier stage to enable them to assist in finding solutions to the financial difficulties of their employer and to warn them about the financial position of the employer.

1.2 The recently enacted section 197B of the Labour Relations Act, 1995 (Act No. 66 of 1995), provides that an employer who faces financial difficulties that may reasonably result in the winding-up or sequestration of the employer or who applies for sequestration or winding-up or receives an application for winding-up or sequestration, must advise the consulting parties contemplated in section 189 of the Labour Relations Act (the person designated by a collective agreement, or a workplace forum or a trade union or a representative nominated by employees).

1.3 It is proposed further that a petitioner for the voluntary surrender of an estate should furnish a copy of the notice of voluntary surrender to registered trade unions and employees. The notice to employees must be affixed to a notice board to which the employees have access inside the premises or, if there is no access to the premises by employees, the notice must be affixed to the front gate or door of the premises. (Proposed new section 4(2)(b) of the Insolvency Act, 1936 (Act No. 24 of 1936.)) In order to expedite the administration of estates and safeguard the interest of the State, it is further provided that a copy of the notice should be furnished to the South African Revenue Service.

1.4 A debtor who receives notice of an application by a creditor for the sequestration of the debtor's estate must notify employees, their registered trade unions and the South African Revenue Service of the application in a similar manner. (Proposed new section 9(4A)(a) of the Insolvency Act.) It is proposed that a debtor who fails to comply with this provision will upon conviction be guilty of an offence and liable to imprisonment for a period not exceeding three years. (Proposed new section 136(d) of the Insolvency Act.) Notice of insolvency to employees may have serious consequences if insolvency is not in fact imminent. A debtor need not give notice of an application for sequestration while an application is pending to have sequestration proceedings declared an abuse of the court's procedures or malicious or vexatious. (Proposed new section 9(4A)(b) and (c), read with proposed new section 15 of the Insolvency Act.)

1.5 It is proposed that a copy of a provisional sequestration order must be served on registered trade unions, employees and the South African Revenue Service. (Proposed new section 11(2A) of the Insolvency Act.) Service on employees must take place by affixing a copy of the order to a notice board on the employer's premises or, if there is no access to the premises by employees, a copy of the order must be affixed to the front gate or door of the premises. (Proposed new section 11(4) of the Insolvency Act.)

1.6 Section 339 of the Companies Act, 1973 (Act No. 61 of 1973), applies provisions of the Insolvency Act to companies unable to pay their debts, but only provisions dealing with the process of liquidation which commences once an order of winding-up has been granted and not to legal proceedings which lead to the granting or refusal of such an order. (*Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (AD) at 961.) Sections 4 and 9 of the Insolvency Act deal with procedures before the sequestration order is granted and do not apply to companies. The Bill includes provisions for companies similar to the proposed new sections 4(2) and 9(4A) of the Insolvency Act. (Proposed new section 346(4A) of the Companies Act.)

1.7 Section 11 of the Insolvency Act provides for the granting of a rule *nisi* (a provisional sequestration order) in the case of an application by a creditor for sequestration of a debtor's estate. The Companies Act provides for different procedures and there is no requirement for a rule *nisi* (although in practice a rule *nisi* is issued in most cases). It is proposed that a winding-up order for a company should be served in a manner similar to the proposed new section 11(2A) and (4) of the Insolvency Act. (Proposed new section 346A of the Companies Act.) In terms of the definition of "winding-up order" in section 1 of the Companies Act a winding-up order includes a provisional winding-up order for so long as it is in force.

1.8 It is proposed that, similar to the provisions of the proposed new section 136 of the Insolvency Act, directors who fail to give notice of an application for winding-up should upon conviction be guilty of an offence and liable to a fine or to imprisonment for a period not exceeding two years or both a fine and such imprisonment. (Proposed new section 441 read with proposed new section 346(4A)(d) of the Companies Act.)

1.9 In terms of section 66 of the Close Corporations Act 69 of 1984, the proposed sections 346(4A) and 346A of the Companies Act will apply to the liquidation of a close corporation. Any person who is convicted in respect of an offence under the proposed section 441(d) read with the proposed section 346(4A)(d) of the Companies Act, will, in terms of section 82(3) of the Close Corporations Act, be liable to be sentenced to the penalties which are provided for in respect of that offence by section 441(d) of the Companies Act.

2. DEPARTMENTS/BODIES/PERSONS CONSULTED

2.1 The following Departments were consulted on proposals similar to proposed sections 4(2), 9(4A), 11(2A) and (4) and 136(d) by the Department of Labour:

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

Similar provisions were published for comment in the *Government Gazette* of 27 July 2000.

2.2 The Department of Public Service and Administration and the National Treasury were kept briefed and consulted about developments at NEDLAC and furnished with draft provisions by the Department of Labour.

3. IMPLICATIONS FOR PROVINCES

None.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

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.