

REPUBLIC OF SOUTH AFRICA

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# **INSOLVENCY SECOND AMENDMENT BILL**

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

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B 53B—2002]**

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

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

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, registered trade unions representing such employees, the South African Revenue Service and the debtor; to provide for the service of sequestration orders on such employees, trade unions and 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, registered trade unions representing such employees, the South African Revenue Service and the company; to provide for the service of winding-up orders on such employees, trade unions, the South African Revenue Service and the company; to make provision regarding a company's rights to compensation; and to provide for matters incidental thereto.

**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**

“(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.

(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—

(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

(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) When a petition is presented to the court, the petitioner must  
furnish a copy of the petition— 5
- (i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor’s employees; and
  - (ii) to the employees themselves— 10
    - (aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor’s premises; or
    - (bb) if there is no access to the premises by the petitioner and 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 at the time of the presentation of the petition; 15
  - (iii) to the South African Revenue Service; and
  - (iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it. 20
- (b) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph (a) was complied with.”. 25

**Substitution of section 11 of Act 24 of 1936**

3. The following section is hereby substituted for section 11 of the Insolvency Act, 1936: 25

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

11. (1) If the court sequestrates 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 sequestrated finally. 30

(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. 35

(2A) A copy of the rule *nisi* must be served on—

- (a) any trade union referred to in subsection (4);
- (b) the debtor’s employees by affixing a copy of the petition to any notice board to which the employees have access inside the debtor’s premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition; and 40
- (c) the South African Revenue Service. 45

(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. 50

(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 estate]** presentation of the petition and award him or her such compensation as it may deem fit."

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

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

"(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application—

(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves—

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and 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 at the time of the application;

(iii) to the South African Revenue Service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with."

# Insertion of section 346A in Act 61 of 1973

6. 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—**

(a) every trade union referred to in subsection (2);

(b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;

(c) the South African Revenue Service; and

(d) the company, unless the application was made by the company.

(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."

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#### **Amendment of section 347 of Act 61 of 1973**

7. Section 347 of the Companies Act, 1973, is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) Whenever the court is satisfied that an application for the winding-up of a company is an abuse of the court's procedure or is malicious or vexatious, the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and award it such compensation as the court may deem fit."

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#### **Short title and commencement**

8. This Act is called the Insolvency Second 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*.

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## 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 creditor who applies for the sequestration of a debtor's estate must notify employees, their registered trade unions and the South African Revenue Service of the application in a similar manner. For the sake of uniformity, it is further provided that a copy must be furnished to the debtor unless the court dispenses with notice. (Proposed new section 9(4A)(a) of the Insolvency Act.) Notice of insolvency to employees may have serious consequences if insolvency is not in fact imminent. It is provided that the court may award compensation to a debtor if a petition for sequestration is an abuse of the court's procedure or it is malicious or vexatious (Proposed new section 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 employers' premises to which the employees have access inside the 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.) The Bill also provides for compensation if an application is an abuse of the court's procedure or is malicious or vexatious. (New section 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 In terms of section 66 of the Close Corporations Act 69 of 1984, the proposed sections 346(4A), 346A and 347 (1A) of the Companies Act will apply to the liquidation of a close corporation.

## **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.