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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.

INSOLVENCY AMENDMENT BILL, 2000

To amend the Insolvency Act, 1936, so as to further regulate the sequestration of employers; 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 5 of Act 62 of 1955 and section 1 of Act 49 of 1996

1. Section 4 of the Insolvency Act, 1936 (hereafter referred to as the principal Act), is hereby amended by the substitution for subsection (2) of the following subsection:
 - “(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.
 - (b) The petitioner must further, within the period referred to in paragraph (a), furnish a copy of the notice to -
 - (i) any registered trade union that, to the petitioner’s knowledge, represents any of the debtor’s employees;
and
 - (ii) the employees themselves by affixing a copy of the notice to any notice board inside the debtor’s premises used for that purpose, or by affixing a copy to the front door of the premises from which the debtor conducted any business immediately prior to the surrender.”.

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 principal Act is hereby amended by the insertion of the following subsection after subsection (4):
 - “(4A)(a) A debtor in respect of whom a petition in terms of this section is presented to court must, within five days of receiving notice of the petition, furnish a copy thereof-
 - (i) to any registered trade union that, to the debtor’s knowledge, represents any of the debtor’s employees; and

- (ii) to the employees themselves by affixing a copy of such petition to the notice board inside the debtor's business premises, or if there is no access to the premises by the employees, by affixing a copy to the front door or gate of any business premises.
- (b) A debtor who brings an application that a petition for the sequestration of that debtor's estate is malicious or vexatious is not required to comply with the provisions of 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 the provisions of paragraph (a) within five days of 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 principal Act:

"Service of rule nisi

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.
- (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 must be served -
- (a) on any trade union contemplated in section 4(2) or 9(4A); and
 - (b) on the debtor's employees in the manner contemplated in section 4(2).
- (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* referred to in subsection (2A), the sheriff must establish from the debtor whether the employees are represented by a registered trade union and determine whether there is a notice board inside the employer's premises for notice to employees."

Substitution of section 38 of Act 24 of 1936

4. The following section is hereby substituted for section 38 of the principal Act:

“Contract of employment suspended on insolvency of employer

- 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)-
- (a) an employee whose contract is suspended is not required to tender services in terms of the contract and is not entitled to any remuneration in terms of the contract;
- (b) no benefit in terms of the Basic Conditions of Employment Act, 1997, (Act No. 75 of 1997), accrues to an employee arising out of any contract of service that is suspended.
- (3) For purposes of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), an employee whose contract of service is suspended is deemed to be unemployed from the date of such suspension and, subject to the provisions of that Act, is entitled to receive unemployment benefits in terms of section 35 of that Act.
- (4) Nothing in this section shall be construed as precluding -
- (a) a trustee from engaging the services of any employee whose contract of service has been suspended in terms of subsection (1);
- (b) a trustee from concluding an agreement with an employee whose contract of service has been suspended in terms of subsection (1) to terminate that contract;
- (c) an employee whose contract of service has been suspended from terminating that contract;
- (d) an employee whose contract of service has been suspended or terminated in terms of this section from claiming 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 expiry.
- (5) A trustee appointed in terms of this Act may terminate the contracts of service of employees of the insolvent employer.
- (6) A trustee may not terminate a contract of service in terms of subsection (5) unless the trustee has consulted with -

- (a) any person who, immediately before the sequestration, the insolvent employer was required to consult with in terms of a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995);
 - (b) if there was no such collective agreement, a workplace forum as defined in section 213 of the Labour Relations Act, 1995, that existed immediately prior to the sequestration;
 - (c) if there was no such workplace forum, any registered trade union having members whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the proposed dismissal;
 - (d) if there is no such trade union, the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the proposed dismissal or their representatives nominated for that purpose.
- (7) The purpose of the consultations referred to in subsection (6) is to seek to reach consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer, whether by the sale of the whole or part of the business, a transfer as contemplated in section 197A of the Labour Relations Act, 1995, a scheme or compromise referred to in section 311 of the Companies Act, 1973 (Act No. 69 of 1973), or in any other manner.
- (8) A trustee must consult with any party that has a right to be consulted with in terms of subsection (6) if -
- (a) that party submits written proposals to the trustee concerning any matter contemplated in subsection (7);
 - (b) the trustee receives those proposals within 21 days of the appointment of a trustee in terms of section 55; and
 - (c) the trustee has not already initiated consultations in terms of subsection (6).
- (9) A creditor of the insolvent employer may, with the consent of the trustee, participate in any consultation contemplated in this section.
- (10) Unless otherwise agreed between a trustee and an employee, all contracts of service of employees of the insolvent employer suspended in terms of subsection (1) that have not already been terminated in terms of this section, subject to section 197A of the Labour Relations Act, 1995, terminate 21 days after the date of the appointment of a trustee in terms of section 55.
- (11) An employee whose contract of service 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).".

Amendment of section 98A of Act 24 of 1936

5. Section 98A of the principal Act is hereby amended by the substitution for paragraph (iv) of subsection (1) of the following paragraph:
“(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”.

Amendment of section 136 of Act 24 of 1936

6. Section 136 of the principal Act is hereby amended by the addition after paragraph (c) of the following paragraph:
“(d) if he or she fails to comply with the provisions of section 9(4A).”.

Short title and commencement

7. This Act shall be called the Insolvency Amendment Act, 2000, and shall come into operation on a date determined by the President by proclamation in the *Gazette*.

INSOLVENCY AMENDMENT BILL, 2000 EXPLANATORY MEMORANDUM

1. Introduction

- 1.1 Section 38 of the Insolvency Act, 1936, provides that the sequestration of an insolvent employer terminates all contracts of employment between that employer and the employer's employees. As a result, the failure of an employer's business leading to insolvency has drastic consequences for employees. In addition, employees are deprived of benefits such as severance pay in terms of the Basic Conditions of Employment Act, 1997 (Act 75 of 1997).
- 1.2 Despite the extreme consequences of an insolvency for employees, neither employees nor their trade unions have any rights to be notified of legal proceedings brought to sequester their employer.
- 1.3 The Insolvency Amendment Bill, 2000, addresses these shortcomings by -
- (a) giving procedural rights to employees of insolvent employers, or their representatives such as trade unions, to be notified of the institution of legal proceedings to sequester an employer;
 - (b) regulating the substantive consequences of insolvency for employees in a more equitable manner.

2. Service of petitions and rules in sequestration proceedings (amendments to sections 4, 9 and 11 of the Insolvency Act, 1936)

- 2.1 A series of amendments are made to sections 4, 9 and 11 of the Act. These changes create a right for employees (and their trade unions) of employers who are subject to voluntary or compulsory sequestration proceedings to receive notice of the proceedings and to be served with any orders issued by the court.
- 2.2 A person who voluntarily surrenders his or her estate for the benefit of creditors must serve a copy of the notice of surrender on any registered trade union that represents the employees of that employer and must also display a copy thereof at the employer's premises in a place to which employees will have access (Proposed new section 4(2) of the Act).
- 2.3 Since a person instituting "compulsory" sequestration proceedings against a debtor may often not be aware of the trade unions concerned, an obligation is placed on the employer (the debtor) to furnish a copy of any petition for such sequestration, within 5 days of receiving notice of the petition, to all registered trade unions that represent the employer's employees and to display it to the employees as well (Proposed new section 9(4A)). Likewise, a copy of the rule *nisi* granting a provisional sequestration order must be served on any relevant trade union and employees (Proposed new section 11(2A)).

- 2.4 The combined effect of these provisions is to give employees and their trade unions advance notice of any sequestration proceedings (voluntary surrender or compulsory sequestration).

3. Consequences of sequestration on contracts of employment

- 3.1 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).
- 3.2 Section 38 applies to both the insolvency of individual employers who trade in their personal name as well as to companies that are wound up because of insolvency.
- 3.3 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.
- 3.4 It is proposed that the insolvency of an employer should only suspend obligations between employers and employees in terms of their contracts of employment. (Proposed new section 38(1).) The effect of this would be that employees would not be required to tender their services in terms of their contracts and employers would not be obliged to remunerate them. (Proposed new section 38(2).) Despite the fact that contracts of employees are suspended, employees will be deemed to be unemployed for purposes of the Unemployment Insurance Act, 1966, and will therefore be entitled to register for unemployment benefits as if they had been dismissed. (Proposed new section 38(3).) A trustee may also engage the services of certain of the employees of the insolvent employer in order to continue running a business; this is provided for in the proposed new section 38(4)(a).
- 3.5 The trustee is given the power to terminate the contracts of service of the employer in terms of the proposed new section 38(5). 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. If the trustee does not elect to initiate these consultations, the trustee must, if required to do so by the employees or their representatives, enter into such consultations. A creditor of the insolvent employer may also participate in these consultations with the consent of the trustee. (See proposed new section 38(9).)

- 3.6 It is generally accepted that employees whose services are terminated as a result of insolvency are currently not entitled to the statutory severance benefits set out in section 41 of the Basic Conditions of Employment Act, 1997. 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.