

## **ANNEXURE A**

### **SUMMARY**

South Africa has a dualistic system of insolvency law, which means that individual and corporate insolvency are dealt with in separate statutes. The purpose of this study is propose a framework for corporate insolvency law reform, with a view to introducing a single insolvency statute in South Africa.

In determining why individual and corporate insolvency experienced separate development in South Africa, research was conducted into the historical development of both individual and corporate insolvency law. The research revealed that while South African individual insolvency law is based on a hybrid between Roman-Dutch law and English law, corporate insolvency law originated from the English statutes that were introduced into South Africa from the mid-nineteenth century. Although corporate insolvency is supplemented by the substantive rules of individual insolvency, the existence of separate statutes regulating individual and corporate insolvency has resulted in the separate development, and resultant fragmentation, of South African insolvency law.

In determining why some countries have been more successful than others in introducing a unified insolvency statute, a brief comparative study was undertaken in respect of the insolvency regimes that apply in England, Australia, Germany and the United States. The research revealed that two main factors were responsible for Germany and the United States having succeeded in unifying their insolvency laws, namely a debtor-friendly insolvency regime and a federal court system with specialist bankruptcy courts. Although England introduced a single insolvency statute in 1986, the statute still distinguishes between individual and corporate insolvency and cannot be said to be genuinely unified. Australia also follows a dualistic insolvency regime and, despite having had the opportunity of unifying of their insolvency laws, elected not to do so.

With the benefit of lessons learnt by other jurisdictions, research was conducted into the possibility of introducing a unified insolvency statute in South Africa. In doing so, the current problems experienced with a dualistic system of insolvency law were explored. Having determined that the underlying problem of a dualistic system is the fragmentation of the regulatory statutes, the remainder of the thesis was devoted to making proposals for the introduction of a unified statute.

In proposing a unified insolvency statute the following critical issues were addressed: the definition of “debtor” for the purposes of a unified statute; whether a unified statute should also address the liquidation of specialised institutions such as banks; liquidation applications; the commencement of liquidation; the vesting of the insolvent estate; whether ancillary matters such as alternatives to liquidation, insolvent deceased estates, business rescue provisions, compromises, personal liability provisions and cross-border insolvencies should be included in a unified statute; and revised provisions regarding voluntary liquidations by resolution.

The conclusion reached was that it is possible to substantially unify all the provisions relating to individual and corporate insolvency law in South Africa, in a single statute. This conclusion is reflected in a draft Insolvency and Business Recovery Bill, and is included as part of the conclusion to this thesis.

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| <i>The Cape of Good Hope Bank, In Liquidation v Belson</i> (1891) 1 CTR 183 . . . . .  | 187          |
| <i>The Cape of Good Hope Bank (in liquidation) v East, Runciman and Others</i> (1891) 1 CTR 75;<br>(1891) 8 SC 157 . . . . . | 187          |
| <i>The Committee of the Johannesburg Public Library v Spence</i> 5 OR 84 . . . . .   | 176          |
| <i>The MV Nantai Princess: Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess</i> 1997<br>2 SA 580 (D) . . . . .     | 279, 282     |
| <i>The Union Bank, In Liquidation v Uys</i> (1891) 1 CTR 119 . . . . .   | 187          |
| <i>The Wellington Bank, In Liquidation</i> (1891) 1 CTR 181 . . . . .  | 187          |
| <i>Timmers v Spansteel (Pty) Ltd</i> 1979 3 SA 242 (T) . . . . .   | 241          |
| <i>Tobacco Auctions Ltd v AW Hamilton (Pvt) Ltd</i> 1966 2 SA 451 (R) . . . . .  | 350          |
| <i>Townsend v Barlows Tractor Co (Pty) Ltd</i> 1995 1 SA 159 (W) . . . . .   | 72, 147, 150 |
| <i>Trakman v Livschitz: In re Livschitz v Trakman</i> 1996 2 SA 384 (W) . . . . .  | 146          |
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| <i>UDC Bank Ltd v Seacat Leasing and Finance Co (Pty) Ltd</i> 1979 4 SA 682 (T) . . . . .                                    | 147          |
| <i>Union Bank (in liquidation) v Watson's Heirs</i> (1891) 1 CTR 72 . . . . .  | 187          |
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| <i>Van der Byl v Trustees, Jewish Foreign Society</i> 20 CTR 774 . . . . .   | 172, 176     |
| <i>Van Zyl v Bolton</i> 1994 4 SA 648 (C) . . . . .  | 147          |
| <i>Venter v Avfin (Pty) Ltd</i> 1996 1 SA 826 (A); [1996] 1 All SA 173 (A) . . . . .   | 146          |
| <i>Venter v Farley</i> 1991 1 SA 316 (W) . . . . .   | 241, 279     |

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| <i>Vermeulen v CC Bauermeister (Edms) Bpk</i> 1982 4 SA 159 (T) .....                          | 279              |
| <i>Viljoen v Venter</i> 1981 2 SA 152 (W) .....  | 368              |
| <i>Visser v Coetzer</i> 1982 4 SA 805 (W) .....  | 231              |
| <i>Vize v Wilmans</i> 2001 4 SA 1114 (NC) .....  | 154, 156         |
| <i>Volkscas ('n Divisie van Absa Bank Bpk) v Pietersen</i> 1993 1 SA 312 (C) .....             | 323              |
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| <i>Walker v Syfret</i> 1911 AD 141 .....   | 278, 280, 281    |
| <i>Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd</i> 1998 3 SA 175 (SCA) .....      |                  |
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| <i>Waste-Tech (Pty) Ltd v Van Zyl and Glanville</i> 2002 1 SA 841 (E) .....                    | 142              |
| <i>Wilson v American Methodist Episcopal Church</i> 15 CTR 413 .....                           | 172              |
| <i>Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd</i> 1983 3 SA 815 (O) ..... |                  |
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| <i>Woodley v Guardian Assurance Co of SA Ltd</i> 1976 1 SA 758 (W) .....                       | 8, 136, 141, 414 |
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#### 4 UNITED STATES CASE LAW

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| <i>Hanover National Bank v Moyses</i> 186 US 181 (1902) .....   | 122      |
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*Wright v Union Cent Life Ins Co* 311 US 273 61 S Ct 196 85 L Ed 184 (1940) . . . . . 119





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- Albergotti RD                      *Understanding Bankruptcy in the US: A Handbook of Law and Practice* (1992)
- Ayers RG                              “Commencing a Case Under the Bankruptcy Reform Act of 1978: A Primer” 1981 51 *Mississippi Law Journal* 639
- Bailey E, Groves H,  
Smith C                                *Corporate Insolvency – Law and Practice* (1992)
- Beaves AW                            “International Bank Insolvencies: A Central Bank Perspective” 1998 12 *International Banking, Finance and Economic Law* 237
- Beuthin RC                            *Basic Company Law* (1992)
- Blackman MS                        *Lawsa* (1996) Vol 4
- Boraine A                              *Die Leerstuk van Vernietigbare Regshandelinge in die Insolvensiereg* (unpublished LLD thesis, University of Pretoria, 1994)

- 
- Boraine A, Roestoff M “Developments in American Consumer Bankruptcy Law: Lessons for South Africa” 2000 *Obiter* (Part1 Vol 1) 33 and (Part 2 Vol 2) 241
- Boraine A, Roestoff M “Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law” 2002 *International Insolvency Review* Vol 11 1
- Boraine A, Roestoff M “Vriendskaplike Sekwestrasies - ‘n Produk van Verouderde Beginsels” 1993 *DJ* 229
- Boraine A,  
Van der Linde KE “The Draft Insolvency Bill - an Exploration (Part 1)” 1998 4 *TSAR* 621
- Braucher J “Harmonizing the Business Bankruptcy Systems of Developed and Developing Nations: Some Issues” 1997 17 *New York Law School Journal of International and Comparative Law* 473
- Buchanan DM *Buchanan’s Decisions in Insolvency* 4th ed (1906)
- Burdette DA “Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process” 1999 *DJ* 44
- Burdette DA “Selected Aspects of the Administration of Insolvent Deceased Estates” 2001 2 *SA Merc LJ* 211-225

- Cilliers HS, Benade ML,  
Henning JJ,  
Du Plessis JJ, Delpport PA     *Close Corporations - A Comprehensive Guide* (1993)
- Cilliers HS, Benade ML,  
Henning JJ,  
Du Plessis JJ, Delpport PA     *Close Corporations Law* 3rd ed (1998)
- Cilliers HS, Benade ML,  
Henning JJ, Du Plessis JJ,  
Delpport PA, De Koker L,  
Pretorius JT                     *Corporate Law* 3rd ed (2000)
- Cilliers HS, Benade ML         *Maatskappyereg* (1968)
- Cilliers HS, Benade ML         *Maatskappyereg 1985/86-Noteerder*
- Coleman PJ                        *Debtors and Creditors in America* (1974)
- Comment B                         “*Involuntary Bankruptcy: The Generally Not Paying Standard*”  
1982 33 *Mercer Law Review* 903

- 
- Dal Pont G, Griggs L      “The Journey from Ear-cropping and Capital Punishment to the Bankruptcy Legislation Amendment Bill 1995” 1988 8 *Corporate and Business Law Journal* 155
- Dalhuisen JH      *Dalhuisen on International Insolvency and Bankruptcy* (1986)  
Vol 1
- Davis DM      *Gordon and Getz on the South African Law of Insurance* 4th ed  
(1993)
- De Groot H      *Inleidinge tot de Hollandsche Rechts-geleerdheid* updated by Van  
Groenewegen van der Made and Schorer (1767)
- De Koker L      *Die Roekelose en Bedrieglike Dryf van Besigheid in die Suid-  
Afrikaanse Maatskappyereg* (LLD thesis 1996 UOFS)
- De Koker L      “Personal Liability and Disqualification - Sanctioning Insolvent  
Trading by Companies” unpublished paper delivered at a  
symposium on corporate insolvency law reform held in Pretoria on  
23 Oct 1998
- De la Rey EM      “Beslote Korporasies. Probleme in verband met Likwidasie en  
Akkoord” 1990 3 *Tran CBL* 107
- De la Rey EM      “Aspekte van die Vroeë Maatskappyereg: ‘n Vergelykende Oorsig  
(Slot)” 1986 *Codicillus* Vol 27 No 2 24
- De la Rey EM      “Creditors’ Voluntary Liquidation: Theoretical Analysis and  
Practical Guide” 1980 *DJ* 47

- 
- De la Rey EM                                 *Mars, The Law of Insolvency in South Africa* 8th ed (1988)
- De la Rey EM                                 “Aspekte van die Vroeë Maatskappyereg: ‘n Vergelykende oorsig (Deel 1)” 1986 *Codicillus* Vol 27 No 1 4-15
- De la Rey EM                                 “Aspekte van die Vroeë Maatskappyereg: ‘n Vergelykende Oorsig (Slot)” 1986 *Codicillus* Vol 27 No 2 18-24
- De la Rey EM,  
Ferreira NM                                 *Companies Legislation and Related Statutes Prior to 1910* (1987)  
unpublished collection of statutes, Unisa
- De Villiers W                                 *Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (published Doctoral Thesis, Leiden, 1923)
- Delpont PA, Pretorius JT                 *Introduction to the Close Corporations Act* (1989)
- Duns J, Mason R                                 “Consumer Insolvency in Australia: Current Regulation and Proposed Reforms”, paper presented at the Academics’ Meeting of the INSOL Sixth World Congress in London on 17 July 2001

- 
- Earnshaw JP                      *Voluntary Liquidation of Companies in the Transvaal* (1912)
- Evans R                              “Friendly Sequestrations, the Abuse of the Process of Court, and Possible Solutions for Overburdened Debtors” 2001 *SA Merc LJ* 485
- Evans R                              “Who Owns the Insolvent Estate?” 1996 *TSAR* 719
- Flessner A                          “Philosophies of Business Bankruptcy Law: An International Overview” in Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994)
- Fletcher IF                          *The Law of Insolvency* 2nd ed (1996)
- Fourie J                              ‘n *Kritiese Evaluering van Enkele Probleme Rondom die Likwidasië van Beslote Korporasies* (unpublished LLM dissertation, University of Pretoria, 1991)
- Giovanoli M,  
Heinrich C (eds)                      *International Bank Insolvencies: A Central Bank Perspective* (1999)
- Goode RM                          *Principles of Corporate Insolvency Law* 2nd ed (1997)

- 
- Harmer RW “Comparison of Trends in National Law: The Pacific Rim” 1997  
*13 Brookings Journal of International Law* 139
- Havenga MK “Voluntary Liquidations in a New Insolvency Dispensation” 2000  
*DJ* 108
- Henning JJ “Akkoord, Skikking en Reëling en die Beslote Korporasie in  
Likwidasie” 1987 2 *JJS* 218
- Henning JJ “Close Corporations and Private Companies in South and  
Southern Africa” 1 *Perspectives on Company Law* (1995)
- Henning JJ “Close Corporations in South Africa: The First Decade” 1995  
*Tran CBL* 130
- Henning JJ “Closely Held Corporations: Perspectives on Developments in  
Four Jurisdictions” 1995 *THRHR* 100
- Henning JJ “Judicial Management and Corporate Rescues in South Africa”  
1992 1 *JJS* 90
- Henning JJ,  
Bleimschein MFR “Die Neue Unternehmensform der Close Corporation in  
Südafrika” 1990 *Recht der Internationalen Wirtschaft* 627

- 
- Henning JJ, Bonnet A “Likwidasie van Beslote Korporasies en Reëlinskemas ingevolge Artikels 311 en 389 van die Maatskappywet” 1991 *THRHR* 274
- Herbert MJ *Understanding Bankruptcy* (1995)
- Hunter M “The Nature and Functions of a Rescue Culture” 1999 *Journal of Business Law* 491
- Jackson TH *The Logic and Limits of Bankruptcy* (1986)
- Joubert NL “Artikel 21 van die Insolvensiewet: Tyd Vir ‘n Nuwe Benadering” 1992 *TSAR* 699
- Katz MM *Companies 3 Butterworths Forms and Precedents* (1991)
- Keay AR *McPherson, The Law of Company Liquidation* 4th ed (1999)
- Keay AR “To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals” 1999 *DJ* 62
- Keay AR “The Unity of Insolvency Legislation: Time for a Re-think?” 1999 *Insolvency Law Review* 5
- Keay AR *Insolvency, Personal and Corporate Law and Practice* 3rd ed (1998)



- 
- Keay AR “Statutory Demands in Light of the Corporate Law Reform Act 1992” 1994 12 *Companies & Securities Law Journal* 407
- Keay AR, Boraine A, Burdette DA “Statutory Preferences in Corporate Insolvency: A Comparative Analysis” 2001 *International Insolvency Review* 1
- Keay AR, Kennedy FR “To Bankrupt, or Not to Bankrupt? The Question Faced by All Insolvency Advisers” 1993 *Insolvency Law Journal* 187
- Kennedy DS “The Commencement of a Case Under the New Bankruptcy Code” 1979 36 *Washington and Lee Law Review* 977
- Kennedy DS, Clift RS “An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today’s United States Bankruptcy Court and Its Judicial Officers” 9 *Journal of Bankruptcy Law and Practice* 165
- Kercher B “An indigenous Jurisprudence? Debt Recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction, 1788 to 1814” 1990 6 *Australian Journal of Law and Society* 1
- King LP (ed in chief) *1998 Collier Handbook for Trustees and Debtors in Possession* (1998)
- King LP *1998 Collier Pamphlet Edition, Part 1, Bankruptcy Code* (1998)

- 
- Klee KN “Legislative History of the New Bankruptcy Code” 1980 54(3) *American Bankruptcy Law Journal* 275
- Kloppers P “Judicial Management - A Corporate Rescue Mechanism in Need of Reform?” 1999 *Stell LR* 417
- Kloppers P “Judicial Management Reform - Steps to Initiate a Business Rescue” 2001 13 *SA Merc LJ* 359
- Kunst JA (gen ed) *Meskin, Henochsberg on the Companies Act* (1994)
- Kunst JA (ge ed) *Meskin, Insolvency Law and its Operation in Winding-up* (1999)
- Larkin MP “A Question of Management: Does it Include Ceasing to Manage?” 1987 *BML* 165
- Levinthal LE “The Early History of Bankruptcy Law” 1918 66 *University of Pennsylvania Law Review* 223
- Lombard S “Directors’ Liability from a South African Perspective” unpublished paper presented at the Academics’ Meeting of the INSOL Sixth World Congress held in London on 17 and 18 July 2001

- 
- Loubser A “Ensuring Advantage to Everyone in a Modern South African Insolvency Law” 1997 *SA Merc LJ* 325
- Luiz SM,  
Van der Linde KE “Trading in Insolvent Circumstances - Its Relevance to Sections 311 and 424 of the Companies Act” 1993 *SA Merc LJ* 230
- Mattingly JV, Misback A,  
Milenkovich TM,  
Hansen JM, Sommer JA *International Bank Insolvencies: A Central Bank Perspective* (1998)
- McCoid JC “The Occasion for Involuntary Bankruptcy” 1987 61 *American Bankruptcy Law Journal* 195
- McLennan JS “Powers of Directors to Wind up Insolvent Companies” 1987 *SALJ* 232
- Milman D, Durrant L *Corporate Insolvency Law and Practice* 3rd ed (1999)
- Milne A (ed) *Henochsberg on the Companies Act* 3rd ed (1975)
- Morice JT “The Reform of Insolvency Proceedings” 1906 *SALJ* 345 and 1907 *SALJ* 160

- 
- Moss GS (ed in chief) *Cross-Frontier Insolvency of Insurance Companies* (2001)
- Mussman M,  
Riesenfeld SA “Garnishment and Bankruptcy” 1942 *27 Minnesota Law Review*  
1
- Nathan M *South African Insolvency Law* 3rd ed (1928)
- Naudé SJ “Beslote Korporasie - Die Voorgestelde Ondernemingsvorm vir  
Kleinsake” 1983 *MB* 62
- Naudé SJ “Die Toekoms van die Beslote Korporasie en die Private  
Maatskappy” 1986 *3 Tran CBL* 1
- Naudé SJ “The South African Close Corporation” 1984 *JJS* 119
- O’Brien P, Boraine A “Review of Case Law and Publications” 2001 *SAILR* 25
- O’Donovan J *Mc Pherson, The Law of Company Liquidation* 3rd ed (1987)
- Olver AH *Judicial Management in South Africa* (unpublished doctoral thesis  
1980 UCT)
- Olver AH “Judicial Management: A Case for Law Reform” 1986 *THRHR* 84

- 
- Patrikis CT “Role and Functions of Authorities: Supervision, Insolvency Prevention and Liquidation” in Giovanoli and Heinrich (eds) *International Bank Insolvencies, A Central Bank Perspective* (1999) 283
- Paulus CG “The New German Insolvency Code” 1998 33 *Texas International Law Journal* 141
- Rajak H, Henning JJ “Business Rescue for South Africa” 1999 *SALJ* 262
- Ribbens DS *In Quest for the Appropriate Code for the Ideal Legal Form for the Proprietary Business Enterprise* (1986)
- Riesenfeld SA “Collection of Money Judgments in American Law: A Historical Inventory and Prospectus” 1957 42 *Iowa Law Review* 155
- Riesenfeld SA “Enforcement of Money Judgments in Early American History” 1973 71 *Michigan Law Review* 691
- Rochelle MR “Lowering the Penalties for Failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; the American Experience, and Possible Uses for South Africa” 1996 2 *TSAR* 315
- Roestoff M, Jacobs L “Statutêre Akkoord voor Likwidasie: ‘n Toereikende Skuldenaar Remedie” 1997 *DJ* 189

- Rose DJ *Lewis' Australian Bankruptcy Law* 11th ed (1999)
- Schäfer B “Limitations on Secured Creditors’ Rights” <http://themis.wustl.edu/ibll/bank/Schaefer.htm>
- Shrand D *The Law and Practice of Insolvency, Winding-up of Companies and Judicial Management* 3rd ed (1977)
- Skeel DA “The Genius of the 1898 Bankruptcy Act” 1999 15(2) *Bankruptcy Developments Journal* 321
- Smith C *Insolvency Law* 3rd ed (1988)
- Smith A, Boraine A “Crossing Borders Into South African Insolvency Law: From the Roman-Dutch Jurists to the Uncitral Model Law” 2002 10 *ABI Law Review* 135
- Smits A “Corporate Administration: A Proposed Model” 1999 32 *DJ* 80
- Stander L “Die Eienaar van die Bates van die Insolvente Boedel” 1996 *THRHR* 388

- 
- Stander L                                    *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte*  
(unpublished LLD thesis, Potchefstroom University for Christian  
Higher Education, 1994)
- Stander L                                    “Geskiedenis van die Insolvensiereg” 1996 *TSAR* 371
- Stewart CE                                    *Insolvency Code - Act Introducing the Insolvency Code* (1997)
- Tabb CJ                                        “A Century of Regress or Progress? A Political History of  
Bankruptcy” 1999 15(2) *Bankruptcy Developments Journal* 343-  
381
- Tabb CJ                                        “The History of Bankruptcy Laws in the United States” 1995 3  
*ABI Law Review* 5
- Tomasic R, Whitford K                    *Australian Insolvency and Bankruptcy Law* 2nd ed (1997)
- Trebilcock M, Katz J                        “The Law and Economics of Corporate Insolvency: A North  
American Perspective” in Rickett (ed) *Essays on Corporate  
Restructuring and Insolvency* (1996)
- Van der Linden J                            *Regtsgeleerd, Practicaal en Koopmans Handboek* (1806)
- Van Dorsten JL                              *South African Business Entities* 3rd ed (1993)
- Vinelott J                                        1987 *Current Legal Problems* 5
- Visser C                                        “Romeinsregtelike Aanknopingspunte van die Sekwestrasieproses  
in die Suid-Afrikaanse Insolvensiereg” 1980 *DJ* 42

- Voet J *Commentarius ad Pandectas* (1776)
- Walker GA *International Banking Regulation: Law, Policy and Practice* (2000)
- Warren C *Bankruptcy in United States History* (1935)
- Wenger L *Institutes of Roman Law of Civil Procedure* (1940) 230
- Wessels JW *History of the Roman Dutch Law* (1908)
- Willis N *Banking in South African Law* (1981)
- Wood PR *Principles of International Insolvency* (1995)
- Wood PR, Totty PG *Butterworths International Insolvency Laws* (1994)



## 2 COMMISSION AND OTHER REPORTS

### 2.1 Australia

- ALRC DP32 ALRC DP32, General Insolvency Inquiry, August 1987
- Harmer Report Australian Law Reform Commission, Report No 45, General Insolvency Inquiry, 1988

### 2.2 England

- Loreburn Committee Report of the Company Law Amendment Committee (Cd 3052 of 1906)
- Greene Committee Company Law Amendment Committee 1925-1926 (Cmd 2657 of 1926)
- Cohen Committee Report of the Committee on Company Law Amendment (Cmnd 6659 of 1945)
- Jenkins Committee Report of the Company Law Committee (Cmnd 1749 of 1962)
- Interim Cork Report Bankruptcy: Interim Report of the Insolvency Law Review Committee (Cmnd 7968) 1980

Cork Report                      Insolvency Law and Practice, Report of the Review Committee  
(Cmnd 8558) 1982

### **2 3     Scotland**

Scottish Law Commission      Report of the Scottish Law Commission (published in 1982 as HC  
Paper 176, Scot Law Com No 68)

### **2 4     South Africa**

Lansdown Commission         Report of the Companies Act Commission 1935-1936 (UG 45 of  
1936)

Millin Commission              Verslag van die Kommissie van Onderzoek insake die wysiging  
van die Maatskappywet 1947-8 (UG 69 of 1948)

Van Wyk de Vries  
Commission                      Kommissie van Onderzoek na die Maatskappywet: Hoofverslag  
RP 45/1970

Van Wyk de Vries  
Commission                      Kommissie van Onderzoek na die Maatskappywet: Aanvullende  
Verslag en Konsepwetsontwerp RP 31/1972

- 
- SA Law Commission Working Paper 33 of the South African Law Commission, Project 63 (1991)
- SA Law Commission Discussion Paper 66, Project 63 by the South African Law Commission (1996)
- Hoexter Commission Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court Third and Final Report Vol 1 Book 1 (1997)
- Report on a Unified  
Insolvency Act Final Report Containing Proposals on a Unified Insolvency Act Jan 2000 Vol 1 to 5 (Centre for Advanced Corporate and Insolvency Law, University of Pretoria - copy available at the Merensky Library)
- SA Law Commission SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000)
- King Report King Report on Corporate Governance for South Africa 2002 (King Committee on Corporate Governance, Main Report, March 2002)

Administration Orders      Interim Research Report on the Review of Administration Orders in terms of Section 74 of the Magistrates' Courts Act 32 of 1944, Centre for Advanced Corporate Insolvency Law, University of Pretoria, May 2002

## **2 5      United States**

USA Reform      Report of the Commission on the Bankruptcy Laws of the United States (1973)

USA Reform      Reforming the Bankruptcy Code The National Bankruptcy Conference's Code Review Project Final Report (1 May 1994)

---

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## ANNEXURE E

### DRAFT INSOLVENCY AND BUSINESS RECOVERY BILL

The draft Insolvency and Business Recovery Bill in this annexure contains the proposals for a unified insolvency statute, which was the main aim of this thesis. It represents the merging of the winding-up provisions contained in the Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984,<sup>1</sup> into the draft Insolvency Bill drawn up by the South African Law Commission.

Please note that:

1. Insertions into the Law Commission's Draft Insolvency Bill have been indicated by underlined words and sentences, for example: insertion.
2. Omissions from the Law Commission's Draft Insolvency Bill having been indicated by striking out the words or sentences concerned, for example: ~~deletion~~.

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<sup>1</sup> It also includes a blanket provision, in cl 9, dealing with the winding-up provision contained in various other legislation such as the Banks Act.



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**Draft Insolvency and Business Recovery Bill**

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**BILL**

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**To consolidate, unify and amend the law relating to the insolvency of natural persons, companies, close corporations, trusts, partnerships and other legal entities, with or without legal personality**

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

**CHAPTER 1 - DEFINITIONS**

1. **Definitions.** - In this Act, unless the context otherwise indicates - [2]

**“account”**, in relation to a liquidator, means a liquidation account and plan of distribution or of contribution, or any supplementary liquidation account and plan of distribution or of contribution;

**"associate"** (a) in relation to a natural person means-

- (i) the spouse of such person; or
- (ii) any person who is by consanguinity related to such first-mentioned person or to his or her spouse, in the first, second or third degree of relationship as determined in accordance with section 1(3)(d) or (e) of the Intestate Succession Act, 1987 (Act No. 81 of 1987); or
- (iii) the partner of such person or the spouse of such partner or any person who is related to such partner or spouse as is contemplated in subparagraph (ii); or
- (iv) the beneficiaries of a trust, or a trust of which such person or associate of such person is the a trustee or beneficiary; or

- (v) a company of which such person is a director or a close corporation of which such person is a member or any juristic person of whom such person is a manager or of which he or she has control;
- (b) in relation to a juristic person means -
  - (i) any natural person who is a director of that juristic person or a member of a close corporation or who has control of that juristic person or close corporation, either alone or together with his or her associate as contemplated in sub paragraph (a); or
  - (ii) any other juristic person which is controlled by the same person who controls the first-mentioned juristic person;
- (c) of another person means a person who has control of an undertaking of the other person, and that person also has control of an undertaking if the person who manages the undertaking is or the persons who manage it are accustomed to act in accordance with that person's directions or instructions, unless that person gives advice in a professional capacity only;
- (d) means a natural person or juristic person who was an associate of another natural person or juristic person at the time of the disposition in question or at the date of the liquidation of the estate or liquidation of one of the parties; and
- (e) means that two entities are associates of each other if the one is an associate of the other; [New definition]

**“bank”** means a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990) or a mutual bank finally registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993); [banking institution]

**"book or books"** in relation to bookkeeping or the recording or storage of information, includes any electronic or mechanical device by means of which the information concerned is recorded or stored, and in relation to the production, the handing over or the attachment of any book or books, means the production, the handing over or the attachment of a print-out or other written version of the said information produced by means of such device; [New definition]



"**concurrent creditor**" means a creditor who in whole or in part has a claim other than as a secured creditor or a preferent creditor; [New definition]

"**contribution**" in respect of a fund or annuity means a contribution made to such fund or annuity by ~~the insolvent debtor~~ in respect of the ~~insolvent debtor~~, less that part of the contribution which represents commission or a premium in respect of death or disability benefits and benefits paid to the ~~insolvent debtor~~ before the date of liquidation; [New definition]

"contributory" as applied in Chapter 20 of this Act in relation to a company limited by guarantee, means any person who has undertaken to contribute to the assets of the company in terms of section 52(3)(b) of the Companies Act 61 of 1973. [Section 337 of the Companies Act]

"**court**" means the provincial or local division of the High Court which has jurisdiction in the matter or a judge of that division, and in section ~~2(b); 12(1); 18, 20, 21, 101 and 102 2(b); 16(1); 20, 22, 23, 136 and 175~~ and also a magistrate's court which has jurisdiction in respect of the matter or offence concerned;

"**date of liquidation**" means-

(a) the date of the first liquidation order; or

(b) in the case of a voluntary liquidation by resolution, the date on which a voluntary liquidation commences as provided for in subsection (9) of section 8;

~~"debtor", in connection with the liquidation of the debtor's estate, means a person or entity which is a debtor in the usual sense of the word, except a debtor which can be wound up under the Companies Act, 1973 (Act No. 61 of 1973) or any other Act and; unless inconsistent with the context or clearly inappropriate, includes such a debtor before the date of liquidation of his or her estate;~~

“debtor”, when referring to who may be liquidated in terms of this Act, means:

- (a) a natural person or the estate of such natural person (hereinafter referred to as a “natural person debtor”);
- (b) a partnership or the estate of a partnership (hereinafter referred to as a “partnership debtor”);
- (c) a trust as defined in section 1 of the Trust Property Control Act 57 of 1988 (hereinafter referred to as a “trust debtor”);
- (d) a company incorporated in terms of the Companies Act 61 of 1973, or in terms of any Act or Acts which preceded the Companies Act 61 of 1973, including an external company (hereinafter referred to as a “company debtor”);
- (e) a corporation incorporated in terms of the Close Corporations Act 69 of 1984 hereinafter referred to as a “close corporation debtor”;
- (f) any other person or entity which is a debtor in the usual sense of the word (hereinafter referred to as an “association debtor”). [New definition]

“debtor”, when used as a noun in the context of this Act, means a debtor as defined in the previous paragraph which has been liquidated in terms of the provisions of this Act and, unless inconsistent with the context or clearly inappropriate, includes such a debtor before the liquidation of the debtor’s estate. [New definition]

**"disposition"** means any transfer or abandonment of rights to property and includes a sale, mortgage, pledge, delivery, payment, release, compromise, donation, suretyship or any contract therefor,

“estate affairs” for the purposes of Chapter 7 of this Act, means the affairs of the debtor or any associate of the debtor, whether before or after the liquidation of the debtor’s estate, and includes any matter which may affect a liquidation and distribution account;

**"exchange"** in relation to transactions on an exchange, means a stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial exchange or clearing house as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989); [35A(1)]

**“financial lease”** means a contract whereby a lessor leases specified movable property to a lessee at a specified rent over a specified period subject to a term of the contract that-

- (a) at the expiry of the contract the lessee may acquire ownership of the leased property by paying an agreed or determinable sum of money to the lessor; or
- (b) the rent paid in terms of the contract shall at the expiry of the contract be applied in reduction of an agreed or determinable price at which the lessee may purchase the leased property from the lessor; or
- (c) the proceeds of the realization of the leased property at the expiry of the lease shall accrue wholly or partly to the lessee; [New definition]

**“first liquidation order”** means a provisional order for the liquidation of the estate of a debtor or an order for the final liquidation of the estate of the debtor if a provisional liquidation order has not been granted. [New definition]

**“free residue”** in relation to an insolvent estate, means that portion of the estate which is not subject to any claim by a secured creditor;

**“fund”** means any pension fund, provident fund or pension scheme which is instituted in terms of any law or regulation or a fund which is registered or provisionally registered in terms of section 4 of the Pension Funds Act, 1956, (Act No. 24 of 1956); [New definition]

**“Gazette”** means the **Government Gazette**;

**“good faith”** in relation to the disposition of property, means the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above the other;

**“immovable property”** means land and every right, title and interest in and to land or minerals which is registerable in any office in the Republic intended for the registration of title to land or the right to mine;

**"insolvent"** means a debtor whose estate is under liquidation, and in relation to a debtor who at the date of the liquidation of his or her estate is married in community of property, includes the spouse of such debtor;

**"insolvent estate"** means an estate which is under liquidation and where the joint estate of spouses married in community of property is under liquidation it includes the separate property of the spouses;

**"liquidation order"** means an order of a court whereby the estate of a debtor is placed under liquidation and includes a provisional liquidation order when it has not been set aside; [sequestration order]

**"liquidation resolution"** means:

- (a) in the case of a trust debtor, a resolution passed in accordance with the provisions of the trust deed in respect of decisions to be taken by the trustees of that trust or, failing such provisions in the trust deed, a resolution passed by all the trustees of that trust;
- (b) in the case of a company debtor, a special resolution passed by the members of that company in accordance with the Companies Act 61 of 1973, but shall exclude an external company as defined in that Act;
- (c) in the case of a close corporation debtor, a written resolution passed at a meeting of the members of the corporation and which has been signed by all the members of such corporation;
- (d) in the case of an association debtor,
  - (i) if such debtor has been created by legislation, a resolution by the management of such association as provided for in the enabling legislation, if applicable;
  - (ii) if such debtor has been created by the adoption of a constitution, a resolution by the members of such association in terms of the provisions of such constitution, if applicable;
  - (iii) if such debtor has been created by agreement, a resolution by the members of such association in terms of such agreement, if applicable;

in terms of which it has been resolved to liquidate the debtor concerned, either by court or as a voluntary liquidation by creditors.

"magistrate" includes an additional magistrate and an assistant magistrate;

**“management of a debtor” means**

- (a) in the case of a trust debtor, the trustees of such trust which have been granted letters of authority to act as such by the Master of the High Court in terms of the provisions of the Trust Property Control Act 57 of 1988 or, if a trust came into existence before the coming into operation of the Trust Property Control Act 57 of 1988, the trustees or administrators who act on behalf of such trust, or former trustees or administrators of the trust who acted under such authority or on behalf of such a trust for a period of twelve months prior to the liquidation of the trust concerned;
- (b) in the case of a company debtor, the directors, secretary or other officers of such company who at the time of the liquidation of the company debtor were directors, the secretary or other officers of such company debtor, and shall include former directors, secretaries or officers of such company debtor who were involved with the management or affairs of such company for the period of twelve months prior to the liquidation of the company concerned;
- (c) in the case of a close corporation debtor, the members of such close corporation who at the time of the liquidation of the corporation were members of the corporation concerned, and shall include former members of such corporation who were members for the period of twelve months prior to the liquidation of the corporation concerned;
- (d) in the case of an association debtor
  - (i) where such association has been created by legislation, the persons who at the time of its liquidation were responsible for the management of such association in terms of the enabling legislation, and shall include any person who was involved in the management of such association for the period of twelve months prior to the liquidation of the association concerned;

(ii) where such association has been created by the adoption of a constitution, the persons who at the time of its liquidation were responsible for the management of such association in terms of the constitution, and shall include any person who was responsible for the management of the association for the period of twelve months prior to the liquidation of the association concerned;

(iii) where such association has been created by agreement, the persons who at the time of its liquidation were in fact responsible for the management of such association in terms of the agreement or otherwise, and shall include any person who was responsible for the management of such association for the period of twelve months prior to the liquidation of the association concerned;

(e) any other person who, to the satisfaction of the court, is effectively a part of the management of the debtor.[New definition]

"**market participant**" in relation to transactions on an exchange, means a stock broker or a member as defined in section 1 of the Stock Exchanges Control Act, 1985, or a financial instrument principal or a financial instrument trader as defined in section 1 of the Financial Markets Control Act, 1989, or a client of such a stock broker, member, or financial instrument trader or any other party to a transaction; [35A(1)]

"**Master**" means the Master of the High Court within whose area of jurisdiction the matter concerned is to be dealt with and includes a Deputy Master and an Assistant Master;

"**Minister**" means the Minister of Justice;

"**movable property**" means every kind of property and every right or interest which is not immovable property;

"**personal notice**" means a notice or delivery by mail, telefax, electronic mail, or personal delivery supported by an affidavit by the liquidator with a list of the persons given notice and the method of delivery used by the liquidator: Provided that the

liquidator may substitute for personal notice another form of notice approved by the Master;

"**preferent creditor**" means a creditor whose claim enjoys preference in terms of section 80 ~~84~~ or a provision in terms of any other Act to pay a creditor who has no preference in respect of particular assets before concurrent creditors; [New definition]

"**property**" means movable or immovable property wherever situated and includes contingent interests in property;

"**Republic**" means the Republic of South Africa;

"**reservation of ownership contract**" means a contract in terms of which corporeal or incorporeal movable property is sold to a purchaser, the purchase price is payable wholly or partly in the future, the property is delivered to or placed at the disposal of the purchaser and the ownership in the property does not pass to the purchaser upon delivery of the property, but remains vested in the seller until the purchase price is fully paid or until the occurrence of some other specified event; [Instalment sale transaction section 1 of the Credit Agreements Act 75 of 1980]

"**rules of an exchange**" means rules made pursuant to either section 12 of the Stock Exchanges Control Act, 1985 or section 17 of the Financial Markets Control Act, 1989; [35A(1)]

"**secured creditor**" means a creditor of an insolvent estate ~~who~~ to the extent that such person holds security for his or her claim, or a portion of a claim, against the estate; [New definition]

"**security**" in relation to the claim of a creditor of an insolvent estate, means property of the insolvent estate over which the creditor has a preferent right by virtue of any special bond, landlord's legal hypothec, pledge, including a cession of rights to secure a debt, right of retention, reservation of ownership, financial lease, or ~~a preferent~~ any such right over property in terms of any other Act;

"**sheriff**" includes a deputy sheriff;

"**social benefit**" means the pension, allowance or benefits payable to a person in terms of the Occupational Diseases in Mines and Works Act 1973 (Act No. 78 of 1973), section 9 of the Civil Protection Act 1977 (Act No. 67 of 1977), the Social Assistance Act, 1992 (Act No. 59 of 1992) and the Compensation for Occupational Injuries and Diseases Act 1993 (Act No. 130 of 1993); [New definition]

"**special bond**" means a mortgage bond hypothecating any immovable property or a notarial bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act 57 of 1993), or such a notarial bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act No. 18 of 1932);

"**spouse**" means a spouse in the legal sense, and even if there is such a spouse, also a spouse according to any law or custom or a person of any sex living with another as if married; [21(13)]

"**transaction**" in relation to transactions on an exchange, means any transaction to which the rules of an exchange apply. [35A(1)]

| **CHAPTER 2 - ACTS OF INSOLVENCY AND MANNERS IN WHICH DEBTOR MAY**  
| **BE LIQUIDATED**

| **2. Acts of insolvency and circumstances in which certain debtors may be**  
| **liquidated by the court.** -

| (1) A debtor commits an act of insolvency -

- | (a) in the case of a natural person debtor, if such debtor ~~he or she~~ leaves the Republic or, being out of the Republic remains absent therefrom, or absents himself or herself from his or her dwelling, or regular place of business, with intent thereby to evade or delay the payment of his or her debts; [8(a)]



## Annexure E

## Draft Insolvency and Business Recovery Bill

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- (b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof; [8(b)]
  - (c) if a debtor ~~he or she~~ disposes or attempts to dispose of his or her or its property or any part thereof in a manner which appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she or it was able to pay his or her debts after the disposition; [8(c)]
  - (d) if a debtor ~~he or she~~ removes or attempts to remove any of his or her property in a manner which appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she was able to pay his or her debts after the removal or attempted removal; [8(d)]
  - (e) if a debtor ~~he or she~~ makes or offers to make any arrangement with any of his or her creditors for releasing him or her wholly or partially from his or her debts; [8(e)]
  - (f) if, having applied in terms of section 3 for the liquidation of the estate ~~his or her estate~~, a debtor ~~he or she~~ fails to comply with the requirements of that section or submits a statement of affairs contemplated in that section which is substantially incorrect or incomplete; [8(f)]
  - (g) if a debtor ~~he or she~~ gives notice in writing to any one of his or her creditors that he or she is unable to pay any of his or her debts. [8(g)]

(2) A debtor may be liquidated by the court if:

- (a) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, the debtor concerned has resolved that it be liquidated by the court in terms of a liquidation resolution as defined in section 1 of this Act; provided that such debtor is not prevented by law, agreement or any other legally enforceable reason, from passing such resolution;  
[New provision]
- (b) the debtor is unable to pay its debts as described in subsection (3) of this section; [Section 344(f) of the Companies Act and section 68(c) of the Close Corporations Act]

Annexure E

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(c) in the case of a company debtor, close corporation debtor or association debtor in appropriate circumstances, it appears to the court that it is just and equitable that the debtor should be liquidated.[Section 344(h) of the Companies Act and section 68(d) of the Close Corporations Act]

(3) A debtor shall be unable to pay its debts if:

(a) a creditor, by cession or otherwise, to whom the debtor is indebted in an amount of not less than R2000 then due-

(i) has served on a company debtor or close corporation debtor, by leaving the same at its registered office or main place of business, a statutory demand for payment of such an amount to pay an amount which is due and payable, or to give security to the reasonable satisfaction of the creditor for such amount, or to enter into a compromise therefor. The statutory demand shall correspond substantially with Form F in Schedule 1 and shall be served on the debtor by the sheriff of the magistrate's court within whose jurisdiction the debtor resides or by the creditor's attorney or the attorney's clerk by delivering it to the debtor; or

(ii) in the case of a debtor other than a company debtor or close corporation debtor, has served such demand by handing it to the debtor or leaving it at its 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,

and the debtor has for twenty one days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof; or

(c) it is proved to the satisfaction of the court that the debtor is unable to pay its debts.

(4) In determining for the purpose of subsection (3) whether a debtor is unable to pay its debts, the court shall also take into account the contingent and prospective liabilities of the debtor. [Section 345 of the Companies Act and section 69 of the Close Corporations Act]

**3. Application by debtor for liquidation of estate.** - (1) A natural person debtor or a partnership debtor who is insolvent or a person who lawfully acts on behalf of an insolvent natural person debtor who is incompetent to manage his or her own affairs or the executor or liquidator of the insolvent estate of a deceased person may apply to a court for the liquidation of the estate of the debtor. [3(1)]

(2) The application shall contain the following information, which shall also appear in the heading of the application:

- (a) The full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number; and
- (b) the marital status of the debtor and, if he or she is married in community of property, the full name and date of birth of his or her spouse and, if an identity number has been assigned to the spouse, that identity number. [9(3)(a)]

(3) An application referred to in subsection (1) shall be accompanied by -

- (a) a statement of affairs of the debtor corresponding substantially with Form A of Schedule 1 and which shall contain the particulars provided for in the said Form, which particulars shall be sworn to or confirmed as required by the said Form; [4(3)]
- (b) a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section ~~79~~ 83, which are not recoverable from other creditors of the estate. [9(3)(b)]

(4) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and send a copy of the application and two copies of the statement of affairs referred to in subsection 3(a) as well as a copy of the affidavit in support of the application, to the Master. [4(1)]

(5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just. [New provision]

(6) The affidavit in support of the application for liquidation referred to in subsection (1) shall confirm that the requirements of subsection (4) have been complied with. [New provision]

(7) The Master may require the applicant to cause the property enumerated in the statement of affairs to be valued by an appraiser appointed in terms of the Administration of Estates Act 1965 (Act 66 of 1965), or by a person designated by the Master. [4(4)]

(8) Having considered the application, the court may make an order as contemplated in section 7 10 or may dismiss the application or postpone its hearing or make any other order that it deems just. [9(4), (5)]

**4. Application for liquidation by certain debtors.** (1) An application to the Court for the liquidation of a trust debtor, a company debtor, close corporation debtor or association debtor may, subject to the provisions of this section, be made-

(a) by the debtor itself or, notwithstanding any contrary provisions contained in the articles, memorandum, association agreement or constitution of the debtor concerned, by the management of such a debtor;

(b) by one or more of its members, or any person referred to in section 103(3) of the Companies Act 61 of 1973, irrespective of whether his name has been entered in the register of members or not;

(c) jointly by any or all of the parties mentioned in paragraphs (a) and (b);

(d) in the case of any debtor being liquidated voluntarily by the Court in terms of a liquidation resolution, by the Master or any creditor or member of that debtor; or

(e) in the case of a judicial management order in terms of Chapter 24, by the judicial manager of the debtor.

[Section 346(1) of the Companies Act]

(2) A member of a debtor shall not be entitled to present an application for the liquidation of that debtor unless he or she has been a member for a period of at least six months immediately prior to the date of the application or the shares or interest he or she holds have devolved upon him or her through the death of a former holder, and unless the application is on the grounds referred to in section 2(2)(c).

[Section 346(2) of the Companies Act]

(3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (d) of that subsection, shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from other creditors of the estate.

[Section 346(3) of the Companies Act]

(4) Before noon on the fifth day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and send a copy of the application and two copies of the statement of affairs as well as a copy of the affidavit in support of the application to the Master.

(5) If the applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.

(6) (a) After having considered any application referred to in subsections (1) to (3), the court may grant any order in terms of the provisions of section 7, 10 or 11 of this Act, but the court shall not refuse to grant a liquidation order on the ground only that the assets of the debtor have been mortgaged to an amount equal to or in excess of those assets or that the debtor has no assets. [Section 347(1) of the Companies Act]

(b) Where the application is presented by members of the debtor and it appears to the court that the applicants are entitled to relief, the court shall grant a liquidation order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking

to have the debtor liquidated instead of pursuing that other remedy.

[Section 347(2) of the Companies Act]

(c) Where the application is presented to the court by-

(i) any applicant under section 2(2)(d), the court may in the liquidation order or by any subsequent order confirm all or any of the proceedings in the voluntary liquidation; or

(ii) any member under that section, the court shall satisfy itself that the rights of the member will be prejudiced by the continuation of a voluntary liquidation.

[Section 347(4) of the Companies Act]

(d) The court shall not grant a final liquidation order in the case of a debtor which is already being liquidated by order of court within the Republic.

[Section 347(5) of the Companies Act]

**5. Application by creditor for liquidation of debtor's estate.** (1) A creditor who has a liquidated claim of not less than the amount of R2000 against a debtor who has committed an act of insolvency, or who is insolvent or which is unable to pay its debts as determined in section 2(3), or two or more creditors who in the aggregate have liquidated claims against such debtor for not less than the amount of R2000 may apply to a court for the liquidation of the debtor's estate. [9(1)]

(2) The Minister may amend the amounts in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) A claim in respect of a liquidated debt which is payable at some determined time in the future may be taken into account for purposes of subsection (1). [9(2)]

(4) (a) An application contemplated in subsection (1) shall be made with notice to the debtor and, in the case of a natural person debtor, also to the debtor's spouse with whom he or she is married in community of property, unless the court orders that such notice may be dispensed with.

- 
- (b) Such an application shall, subject to subparagraph (d), contain the following information, namely -
- (i) in the case of a natural person debtor, the full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number and, in the case of any other debtor, the registration number or other reference number which has been assigned to such debtor and, if no such registration number or reference number exists, this fact shall be stated;
  - (ii) in the case of a natural person debtor, the marital status of the debtor and if he or she is married in community of property, the full name and date of birth of his or her spouse and if an identity number has been assigned to the spouse, such identity number; [9(3)]
  - (iii) the amount, cause and nature of such claim;
  - (iv) whether or not security has been given for the claim and if so, the nature and value of the security; and
  - (v) the act of insolvency or ground of liquidation on which the application is founded or otherwise an allegation that the debtor is in fact insolvent. [9(3)]
- (c) The allegations in the application shall be supported by an affidavit and the application shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from creditors of the estate. [9(4)(b)]
- (d) The particulars in paragraph (b)(i) and (ii) shall appear also in the heading of the application and if the applicant is unable to furnish all such particulars he or she shall mention the reason why he or she is unable to do so. [9(4)(c)]
- (e) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and, unless notice to the debtor has been dispensed with, a copy of the application and copies of all annexures

thereto shall be served on the debtor or handed to him or her by the applicant or his or her attorney or the attorney's clerk. [New provision]

- (f) If the debtor wishes to oppose the application he or she shall lodge a notice and replying affidavit with the registrar and serve on or hand a copy thereof to the applicant, before noon on the second court day before the day on which the application is to be heard by the court. [New provision]
- (g) A copy of the application and of every affidavit in support of the allegations in the application shall be sent to the Master when the application is lodged with the registrar. [9(3)(a)]

(5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just. [New provision]

(6) Having considered the application, the court may make an order as contemplated in section 7 10 or may dismiss the application or postpone its hearing or make any other order that it deems just. [9(4), (5)]

**6. Liquidation of partnership estate.** (1) When application is made to a court for the liquidation of the estate of a partnership, application shall simultaneously be made, whether in terms of this Act or another Act, for the liquidation of the separate estate of every partner, other than 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 or her estate. [3(2); 13]

(2) The provisions of section 3, in so far as they are applicable, shall apply **mutatis mutandis** in respect of an application by members of a partnership for the liquidation of the partnership estate and the provisions of section 4 5, in so far as they are applicable, shall apply **mutatis mutandis** in respect of an application by a creditor or creditors of a partnership for the liquidation of the estate of the partnership. [New provision]

(3) 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 separate estate 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 or her estate: 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 liquidated by reason only of the liquidation of the estate of the partnership. [13(1)]

(4) In the case where there is no partner whose estate may be liquidated as contemplated in subsection (3), the court may nevertheless liquidate the partnership estate and in such event every director of a juristic person or member of a close corporation which juristic person or corporation is a partner of the partnership in question and every natural person who is a partner but whose estate may not be liquidated, shall for the purpose of performing any statutory requirement in respect of the partnership estate be deemed to be a person whose estate is under liquidation. [New provision]

(5) Where the separate estate of a partner is unable to meet fully the costs of the liquidation of that estate, the balance shall be paid out of the partnership estate and where the partnership estate is unable to meet fully the costs of liquidation the balance shall be paid out of the estates of the partners. [13(2)]

(6) If a partnership has been dissolved and the partnership estate is unable to pay its debts, the partnership estate may, on the application of a creditor of the partnership or a former partner, be liquidated as an insolvent estate and the provisions of subsections (1), (2), (3), (4) and (5) shall **mutatis mutandis** apply to such liquidation. [New provision]

**7. Malicious or vexatious application for liquidation.** - Whenever the court is satisfied that an application for the liquidation of a debtor's estate is malicious or vexatious, the court may allow the debtor forthwith to prove any damages which he or she may have suffered by reason of the provisional liquidation of his or her estate and award him or her such compensation as it deems fit. [15]

**8. Voluntary liquidation by resolution.** (1) A trust debtor, company debtor, close corporation debtor or association debtor which is insolvent, may be liquidated as a voluntary liquidation by creditors if the debtor has passed a liquidation resolution, as defined in section 1 of this Act, resolving that the debtor be liquidated voluntarily as a voluntary liquidation by creditors.

(2) A voluntary liquidation by creditors of a debtor as contemplated in subsection (1) shall be a creditors' voluntary liquidation if the liquidation resolution contemplated in subsection (1) so states, but such a liquidation resolution shall be of no force and effect unless:

(a) the liquidation resolution has been registered

(i) by the Master in the case of a trust debtor;

(ii) by the Registrar of Companies in the case of a company debtor;

(iii) by the Registrar of Close Corporations in the case of a close corporation debtor;

(iv) by the relevant authority responsible for the administration of that specific type of debtor in the case of an association debtor; and

(b) the debtor has personally given all known creditors and the Master at least seven days notice of the meeting at which the liquidation resolution is to be considered;

(3) Upon receipt of the notice referred to in paragraph (b) of subsection (2), the Master shall, if requested to do so by creditors nominating a liquidator, appoint a liquidator or liquidators in accordance with the provisions of sections 37.

(4) The notice referred to in paragraph (b) of subsection (2) shall contain the following information, failing which such resolution shall be null and void, even if passed by the requisite majority at such meeting:

(a) the date and time of the meeting at which the liquidation resolution is to be considered;

(b) the venue at which such meeting will take place, which venue must be accessible to the public in order that creditors who have an interest in the adoption of such resolution, may attend such meeting should they so require.

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(5) The notice referred to in paragraph (b) of subsection (2) shall be accompanied by the following documents, failing which such resolution shall be null and void, even if passed by the requisite majority at such meeting:

- (a) a copy of the statement of affairs of the debtor wishing to pass the liquidation resolution, which statement of affairs shall correspond substantially to Form A contained in Schedule 1 to the Act;
- (b) a copy of the liquidation resolution which is to be tabled for adoption at the meeting concerned;
- (c) a certificate of the Master, issued not more than 14 days before the date on which the meeting to pass a liquidation resolution will be held, that sufficient security has been given for the payment of all costs of the liquidation of the estate as referred to in section 83, which are not recoverable from the creditors of the estate.

(6) A creditor, or any other person who has a financial, administrative or other interest in the affairs of such debtor, whether or not such creditor or other person has been notified of the meeting referred to in paragraph (b) of subsection (1), may:

- (a) before the meeting at which the liquidation resolution is to be adopted takes place, bring an application to court preventing the debtor concerned from adopting the liquidation resolution; or
- (b) within 14 days after the liquidation resolution has been registered with the Master, Registrar of Companies or Close Corporations or other relevant authority in terms of paragraph (a) of subsection (1), bring an application to have the liquidation resolution set aside;

Provided that such creditor or other person shall give, to the court's satisfaction, the debtor sufficient notice of the fact that he or she intends bringing an application preventing or setting aside the adoption of the liquidation resolution, as the case may be, and the debtor shall be entitled to oppose such an application.

(7) In an application brought under the provisions of paragraph (a) or (b) of subsection (6), the court may, after having considered the interests of the general body of creditors, set aside or confirm such liquidation resolution, or make such order as it in the circumstances deems appropriate.

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(8) The registration of the liquidation resolution as contemplated in paragraph (a) of subsection (1) shall comply with the procedures set down from time to time by the Master, Registrar of Companies or Close Corporations or relevant authority: Provided that if such liquidation resolution is not lodged with the Master, Registrar of Companies or Close Corporations or relevant authority for registration within 30 days from the date of the adoption of the resolution, the liquidation resolution shall lapse and be void.

(9) A voluntary liquidation by creditors of a debtor as contemplated in this section, shall commence at the time that the liquidation resolution is passed by the persons authorised to pass such a resolution in accordance with the definition of “liquidation resolution” in section 1 of this Act: Provided that the liquidation resolution has been duly registered by the Master, Registrar of Companies or Close Corporations or relevant authority, as the case may be, in accordance with the provisions of subsection (8).

(10) Except in the case of a creditors’ voluntary liquidation by a trust debtor, the Registrar of Companies or Close Corporations or other relevant authority shall forthwith after the registration by him or her of a liquidation resolution referred to in this section, transmit a copy thereof to the Master.

(11) The nomination of a liquidator or liquidators in terms of an adopted liquidation resolution as referred to in this section, shall be of no force and effect and the Master shall appoint a liquidator or liquidators in accordance with the provisions of this Act.

(12) Any debtor as contemplated in this section which has passed a liquidation resolution for its voluntary liquidation by creditors, shall within 30 days after the registration of that resolution by the Master, Registrar of Companies or Close Corporations or relevant authority, as the case may be:

(a) except where the debtor is a trust debtor, lodge with the Master a certified copy of the liquidation resolution concerned; and

(b) send a copy of the liquidation resolution to the persons referred to in paragraphs (a) and (b) of subsection (1) of section 13; and

(c) give notice of the voluntary liquidation of the debtor in the **Gazette**.

**CHAPTER 3 - SPECIAL PROVISIONS APPLICABLE TO SPECIFIC DEBTORS**

**9. Special provisions relating to the liquidation of certain debtors.** (1) If a debtor which has been, or is in the process of being liquidated in terms of the provisions of this Act is:

- (a) a long-term insurer as defined in section 1 of the Long-Term Insurance Act 52 of 1998, or a short-term insurer as defined in section 1 of the Short-Term Insurance Act 53 of 1998, or
- (b) a bank as defined in section 1 of the Banks Act 94 of 1990; or
- (c) a mutual bank as defined in section 1 of the Mutual Banks Act 124 of 1993; or
- (d) a pension fund as defined in section 1 of the Pension Funds Act 24 of 1956; or
- (e) a financial exchange as defined in section 1 of the Financial Markets Control Act 55 of 1989; or
- (f) a medical scheme as defined in section 1 of the Medical Schemes Act 72 of 1967; or
- (g) a management company as defined in section 1 of the Unit Trusts Control Act 54 of 1981; or
- (h) a co-operative as defined in section 1 of the Co-operatives Act 91 of 1981; or
- (i) a friendly society as defined in section 1 of the Friendly Societies Act 25 of 1956,

the provisions of this section must be applied when applying this Act to such a debtor.

(2) In the application for the liquidation of a debtor as referred to in paragraphs (a) to (i) of subsection (1), the registrar of such debtor shall be deemed to be a person authorized by section 4 to make an application to the court for the liquidation thereof.

(3) The registrar of any debtor as referred to in paragraphs (a) to (i) of subsection (1), may with the written consent of the Minister responsible for the administration of such debtor, make an application under section 4 for the liquidation of such a debtor if he or she is satisfied that it is in the interests of the beneficiaries or creditors of such debtor to do so.

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(4) In any sections of this Act-

- (a) any reference to the Master in respect of notice being given, shall be construed as a reference also to the registrar of the debtor concerned;
- (b) any reference to the Registrar of Companies shall be construed as a reference also to the registrar of the debtor concerned.

(5) If an application to the court for or in respect of the liquidation of a debtor as referred to in paragraphs (a) to (i) of subsection (1) is made by any other person than the registrar of the debtor concerned-

- (a) it shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar of such debtor at least 15 days, or such shorter period as the court may allow on good cause shown, before the application is set down for hearing; and
- (b) the applicant concerned shall not, at any time before the application is set down for hearing, make public or cause to be made known to any person other than the registrar concerned, his or her intention to bring such an application, failing which the applicant shall be guilty of an offence and, on conviction, shall be sentenced to imprisonment for a period not exceeding X years, or a fine; and
- (c) if, for any reason, the registrar of the debtor concerned is satisfied that the application is contrary to the interests of such debtor or its beneficiaries, such registrar may join the application as a party and file affidavits and other documents in opposition to the application.

(6) No liquidation resolution relating to the liquidation of a debtor referred to in paragraphs (a) to (i) of subsection (1), as contemplated in section 8 or paragraph (d) of subsection (1) of section 4 of this Act, shall be registered by the Registrar of Companies in terms of section 200 of the Companies Act 61 of 1973, and no liquidation resolution to that effect in terms of the constitution of such a debtor which is not a company shall have legal force -

- (a) unless a copy of the notice referred to in paragraph (b) in subsection (2) of section 8 has been lodged also with the registrar of the debtor concerned; or

(b) if the registrar of such debtor, by notice to the debtor, declares that the resolution is contrary to an appropriate legislative provision which prohibits the adoption of such resolution.

(7) (a) Notwithstanding the provisions of the Companies Act 61 of 1973 or any other law under which a debtor as referred to in paragraphs (a) to (i) of subsection (1) has been incorporated, Chapter 24 of this Act shall, subject to this subsection and with the necessary changes, apply in relation to the judicial management of such a debtor, whether or not it is a company, and in such application the registrar of the debtor concerned shall be deemed to be a person authorised by section 4 of this Act to make an application to court for the liquidation thereof.

(b) The registrar of the debtor concerned may make an application under Chapter 24 of this Act for a judicial management order, in respect of such a debtor if he or she is satisfied that it is in the interests of the debtor or the beneficiaries of such debtor to do so.

(c) If an application to the court for the judicial management of a debtor as referred to in paragraphs (a) to (i) of subsection (1), is made by any other person than the registrar of the debtor concerned-

(i) it shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar of the debtor concerned at least 15 days, or such shorter period as the court may allow on good cause shown, before the application is set down for hearing; and

(ii) the registrar of the debtor concerned may, if satisfied that the application is contrary to the interests of the debtor or its beneficiaries, join the application as a party and file affidavits and other documents in opposition to the application.

(d) As from the date on which a provisional or final judicial management order is granted in respect of a debtor as referred to in paragraphs (a) to (i) of subsection (1), any reference to such debtor shall, unless clearly inappropriate, be construed as a reference to the provisional or final judicial manager, as the case may be;

(8) Notwithstanding the provisions of this Act, a person recommended by the registrar of a debtor as referred to in paragraphs (a) to (i) of subsection (1), shall be appointed by the Master as co-liquidator or co-judicial manager, as the case may be.

(9) The provisions of this section may not in any way be amended or changed without prior consultation with, and written approval of such changes by, the Minister responsible for the administration of a debtor as referred to in paragraphs (a) to (i) of subsection (1).

#### **CHAPTER 4 - LIQUIDATION ORDERS AND COMMENCEMENT OF LIQUIDATION**

**10. Provisional liquidation order.** - (1) If a court hearing an application for the liquidation of the estate of a debtor as contemplated in section 3, 4 or 5 ~~or 4~~ is satisfied *prima facie* that -

- (a) the applicable requirements of section 3, 4 or 5 ~~or 4~~, as the case may be, have been complied with;
- (b) in the case of a natural person debtor there is reason to believe that the liquidation of the estate of the debtor will be to the advantage of his or her creditors;
- (c) the debtor has committed an act of insolvency, or that he or she is insolvent, or that the circumstances referred to in section 2(2)(a) to (c) are present; and
- (d) in the case of an application contemplated in section 5~~4~~, the applicant has a claim against the debtor as contemplated in subsection (1) of that section,

the court may grant a first order for the liquidation of the estate of the debtor. [10]

(2) A court granting a first liquidation order contemplated in subsection (1) ~~shall~~ may simultaneously grant a rule **nisi** calling upon the all interested parties and the respondent, if any, to appear on a date mentioned in the rule and show cause why his or her estate should not be liquidated finally. [11]



(3) The return day of the rule **nisi** may on the application of the respondent be anticipated for the purpose of discharging the order for first liquidation if 24 hours notice is given to the applicant. [11(3)]

(4) If the court does not grant a first liquidation order as contemplated in subsection (1) it may grant an order in terms of section 11, dismiss the application, postpone the hearing thereof, but not *sine die*, or make any other order which it deems just. [12(2)]

(5) When a first liquidation order is granted the registrar shall ensure that the particulars which shall in terms of section 3(2) and ~~54~~(3)(d) appear in the heading of the application appear also on the order. [9(3)(d)]

(6) If there are reasonable grounds to believe that ~~an insolvent~~ a natural person debtor or the management of a debtor may flee the country to avoid prosecution or to take assets out of the reach of creditors, the court may when it grants a first or final liquidation order, or at any time thereafter on an application by the liquidator issue an order that the passport or passports of the ~~insolvent~~ such person should be handed to the liquidator for the period stated in the order.

**11. Final liquidation order.** - (1) If at the hearing of an application as contemplated in section 3, ~~4~~ or ~~5~~ or pursuant to the rule **nisi** contemplated in section ~~10~~(2) the court is satisfied that -

- (a) in the case where the application for liquidation was made by a creditor, that creditor has established a claim against the debtor in accordance with section ~~54~~;
- (b) the debtor has committed an act of insolvency or is insolvent, or the circumstances referred to in section 2(2)(a) to (c) are present; and
- (c) in the case of a natural person debtor, there is reason to believe that it will be to the advantage of creditors of the debtor if his or her estate is liquidated,

it may make an order for the final liquidation of the estate of the debtor. [12(1)]

(2) If the court does not issue a provisional order in terms of section 10, and is not satisfied as contemplated in subsection (1), it shall dismiss the application for the liquidation of the estate of the debtor and set aside the first liquidation order or require further proof of the allegations in the application and postpone the hearing for a reasonable period but not **sine die**. [12(2)]

(3) When a final liquidation order is granted the registrar shall ensure that the particulars which shall in terms of section 3(2) and 5(3)(d) appear in the heading of the application appear also on the order.

**12. Obligations of creditor upon whose application a liquidation order is made.**

(1) The creditor upon whose application a liquidation order is made shall, at his or her own cost, prosecute all the proceedings in the liquidation until a liquidator is appointed. [14(1)]

(2) The liquidator shall pay to the said creditor his or her costs in respect of the prosecution of the liquidation proceedings, as costs of the liquidation and the costs so payable to the said creditor shall be taxed according to the tariff applicable in the court that made the liquidation order. [14(2)]

**13. Notice and commencement of liquidation.** - (1) The registrar of the court that ~~which~~ has granted a first liquidation order shall without delay send a copy of that order and of any order amending or discharging that order -

(a) to the registrar of deeds of every deeds registry in the Republic; and [17(1)(b)(ii)]

(b) to the sheriff of the district in which the ~~insolvent~~ debtor resides, has its registered office or principal place of business, or appears to be carrying on business, or owns property. [17(1)(b)(i)][357 Companies Act]

(2) Every registrar of deeds and every sheriff who has received a copy of an order sent to him or her in pursuance of subsection (1) shall note thereon the date and time when it was received by him or her. [17(2)]

(3) A registrar of deeds who has received a copy of a first liquidation order or a copy of the liquidation resolution referred to in section 8 shall enter a **caveat** against the transfer of all immovable property or the cancellation or cession of every bond registered in the name of or belonging to the insolvent debtor, and if the registrar receives a copy of an order discharging a liquidation order, he or she shall cancel every **caveat** entered in respect of such first liquidation order. A **caveat** entered in terms of this subsection shall expire ten years after the date of the liquidation order in question, or date of the registration of a duly registered liquidation resolution as referred to in section 8. [17(3)]

(4) The registrar of the court shall without delay send a copy of every first provisional or final liquidation order and any other order made by the court in respect of the insolvent debtor or the liquidator of the insolvent estate, to the Master. [17(1)(a)]

(5) Upon the granting of a first liquidation order the applicant who applied for the order shall without delay cause a notice of the order to be published in the **Gazette**. [17(4)]

## **CHAPTER 5 - EFFECT OF LIQUIDATION**

**14. Effect of liquidation on insolvent debtor and his or her property.** - (1) The issuing of a first liquidation order, or the registration of a liquidation resolution in terms of section 8, in respect of a debtor an insolvent shall have the effect that all the property of the debtor concerned shall be deemed to be in the custody and under the control of the Master until a liquidator has been appointed, the debtor insolvent is divested of his or her or its estate, and that his or her or its insolvent estate vests in the Master until a liquidator is appointed whereupon the insolvent estate vests in the liquidator shall be deemed to be in the custody and control of the liquidator. [20(1)(a)]

(2) The estate of the insolvent debtor remains ~~vested~~ in the custody and under the control of the liquidator until it reverts to the insolvent debtor in terms of a composition or compromise contemplated in section 71 Chapters 22 or 23 of this Act, or until the liquidation order is set aside property is re-vested in the debtor or the debtor's estate in terms of section 104(1)(d) or any other provision in this Act which makes provision for the setting aside of a liquidation order or a liquidation resolution adopted in terms of section 8.[25(1)]

(3) If the liquidator vacates his or her office or dies or becomes incompetent to exercise his or her powers and perform his or her duties, the estate shall vest in any remaining liquidator or if there is none, in the Master until the appointment of a new liquidator. [25(2)]

(4) After the expiry of every caveat entered in terms of sections ~~10~~ 13(3), ~~62~~ 45(8), or ~~98~~ 103(3) or paragraph 16 of Schedule 4 in respect of the property of a debtor insolvent any act of registration in respect of such property brought about by such debtor ~~him~~ shall be valid in spite of the fact that the property formed part of the insolvent estate. [25(3)]

(5) If a debtor ~~person~~ who is or was insolvent unlawfully disposes of immovable property which forms part of his or her insolvent estate, the liquidator may recover the value of the property so disposed of -

- (a) from the debtor insolvent or former debtor insolvent; or
- (b) from any person who, knowing such property to be part of the insolvent estate, acquired such property from the debtor insolvent or former debtor insolvent; or
- (c) from any person who acquired such property from the debtor insolvent or former debtor insolvent without giving sufficient value in return, in which case the amount so recovered shall be the difference between the value of the property and any value given in return. [25(4)]

(6) (a) The execution of a judgment in respect of property of the debtor insolvent shall be stayed as soon as the sheriff becomes aware of the issuing of a first liquidation order against the debtor insolvent, unless the court orders otherwise. [20(1)(c)]

(b) The execution of a judgment in respect of property of the debtor shall be stayed as soon as the sheriff becomes aware of the adoption of a liquidation resolution by the debtor in terms of section 8; Provided that the sheriff shall hold over such execution of a judgment until such time as he is satisfied that the resolution in question has been registered with the necessary authority in terms of section 8(2)(a), failing which he shall continue with the execution of the judgment as if the liquidation resolution in question had not been adopted.

- (c) If costs in connection with the sale in execution of assets of the debtor insolvent have already been incurred when the execution of a judgment is stayed as contemplated in paragraph (a), the Master may on the application of the liquidator, on the conditions he or she finds just and subject to confirmation of the sale price by the Master or by resolution of a meeting of creditors of the estate, approve the continuation of the sale for the benefit of the insolvent estate, in which case the costs of the sale before or after liquidation shall be deducted from the proceeds. [20(2)]
- (d) The liquidator of an insolvent estate is entitled to recover from a creditor of the debtor insolvent the net amount of any payment in pursuance of the execution of any judgement made to such creditor after the granting of the first liquidation order or after the adoption of a liquidation resolution in pursuance of section 8. [New provision]
- (7) For the purposes of this section -
- (a) the following property shall be excluded from the estate of a natural person's debtor's insolvent estate:
- (i) the necessary beds, bedding and wearing apparel of the insolvent and his or her family;
  - (ii) the necessary furniture (other than beds) and household utensils of the insolvent in so far as they do not exceed R2000 in value;
  - (iii) stock, tools and agricultural implements of a farmer, in so far as they do not exceed R2000 in value;
  - (iv) the supply of food and drink in the house sufficient for the needs of the insolvent and his or her family during one month;
  - (v) tools and implements of trade, in so far as they do not exceed R2000 in value;
  - (vi) professional books, documents or instruments necessarily used by the insolvent in his or her profession, in so far as they do not exceed R2000 in value;

(vii) such arms and ammunition as the insolvent is required by law, regulation or disciplinary order to have in his or her possession as part of his or her equipment; and [82(6)]

(b) all other property of the ~~insolvent debtor~~ at the date of the issuing of the first liquidation order, or at the date of the adoption of a liquidation resolution in pursuance of section 8, including property or the proceeds thereof which are in the hands of the sheriff under a writ of attachment or a warrant of execution, and, subject to section ~~15 16~~, all property acquired by or which accrued to the ~~insolvent debtor~~ during his or her insolvency, shall notwithstanding the provisions of any other law form part of the ~~insolvent's debtor's~~ insolvent estate. [20(2)]

(8) The Minister may change the amounts referred to in subsection (7)(a)(ii), (iii), (v) and (vi) from time to time by notice in the **Gazette**. [New provision]

**15. The effect of liquidation on civil proceedings by or against the insolvent debtor.**

(1) The issuing of a first liquidation order in respect of a ~~debtor an insolvent~~, or the adoption and subsequent registration of a liquidation resolution as provided for in section 8, has the effect that all civil proceedings instituted in a court by or against the ~~debtor insolvent~~ shall, subject to the provisions of section ~~15 16~~(8), be stayed. [20(1)(b)]

(2) Proceedings which have been stayed in terms of subsection (1) may with the consent of the court or liquidator appointed in terms of section ~~55 71~~ or with three weeks' notice to the liquidator be continued against the insolvent estate. The opposite party may apply to the Registrar to substitute the liquidator for the ~~insolvent debtor~~ in the proceedings. [75(1)]

(3) The liquidator may, by giving written notice to all parties and to the registrar, substitute himself or herself as party for the ~~insolvent debtor~~ in proceedings by or against the ~~debtor insolvent~~, other than proceedings contemplated in section ~~15 16~~(7). [New provision]

(4) The court may on application by the liquidator or a creditor who has proved a claim against the insolvent estate prohibit the continuation of proceedings against the insolvent estate if the court is of the opinion that the institution or continuation of the proceedings was delayed unreasonably and that the continuation of the proceedings will delay the finalisation of the insolvent estate unreasonably. [75(1)]

(5) After the confirmation of the liquidator's first account by the Master and more than three months after the conclusion of the first meeting no person shall institute legal proceedings against the insolvent estate in respect of any liability which arose before the date of liquidation: Provided that the court may, subject to the provisions of section ~~90~~ 100 and subject to such conditions as the court may impose, permit the institution of such proceedings if it is of the opinion that there was a reasonable excuse for the delay in instituting the proceedings. [75(2)]

## **CHAPTER 6 - RIGHTS AND OBLIGATIONS OF DEBTOR DURING INSOLVENCY**

**16. Rights and obligations of insolvent debtor during insolvency.** - (1) The fact that a natural person debtor entering into a contract is insolvent shall not affect the validity of that contract: Provided that if the insolvent debtor thereby purports to dispose of any property of his insolvent estate or, without the consent in writing of the liquidator of his or her estate, enters into any contract whereby any earnings which accrues to his or her insolvent estate in terms of subsection (5) is or is likely to be adversely affected, the contract shall in either case be voidable at the option of the liquidator, but subject to the provisions of section ~~16~~ 17. [23(1) & (2)]

(2) ~~The insolvent~~ A natural person debtor may follow any profession or occupation and, subject to subsection (5), he or she may collect for his or her own benefit any remuneration for work done or payment for professional services rendered by him or her or someone on his or her behalf after the issuing of the first liquidation order. [23(3)]

(3) Any person who, after the date of liquidation of ~~an insolvent's~~ a debtor's estate, became a creditor of the insolvent debtor as a result of illegal conduct on the part of the insolvent debtor shall be entitled to payment of the debt out of any assets that accrued to the insolvent estate as a result of the said illegal conduct to the extent that such debt cannot be recovered from

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| the ~~insolvent debtor~~ personally and after payment of all costs attributable to such assets: Provided that the said creditor was not at the time when he or she became a creditor aware of and could not by exercising reasonable care have acquired knowledge of the illegal conduct.

| (4) (a) ~~The insolvent~~ A natural person debtor shall keep a detailed record of all assets and income received by him or her from whatever source and of all expenses incurred by him or her and he or she shall for a period of one year from the issuing of the first liquidation order send to the liquidator monthly during the first week of every month a statement of his or her income and expenses during the preceding month, confirmed by an affidavit or a solemn declaration, and after the expiry of the said period of one year he or she shall send to the liquidator annually a return of his or her income and expenses for the preceding year, likewise sworn to or confirmed, and in addition he or she shall at the written request of the liquidator within seven days after such request, submit to the liquidator particulars of income received and expenses incurred by him or her for the period indicated by the liquidator. [23(4)]

| (b) The liquidator may at all reasonable times inspect the records referred to in paragraph (a) and may require the ~~insolvent debtor~~ to submit proof in support of such records and of expenses which he or she claims to have incurred for his or her own support or that of his or her dependants. [23(4)]

| (5) No benefit in terms of any pension law or the rules of a fund which is claimable by a natural person debtor ~~the insolvent~~ and is paid after the date of liquidation of his or her estate, and no social benefit which is so claimable and paid, shall form part of the ~~insolvent's debtor's~~ insolvent estate, except to the extent that such benefit exceeds R200 000 paid prior to the date of rehabilitation in the year after the date of liquidation or a subsequent year. [123(7)]

(6) The Minister may amend the amount in subsection (5) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.



- (7) (a) The liquidator may issue from the magistrates court of the district in which the ~~insolvent~~ natural person debtor resides, carries on business or is employed a notice calling on the ~~insolvent~~ debtor to appear at a hearing before the court in chambers on a date specified in such notice to give evidence on and supply proof of the earnings received by the ~~insolvent~~ debtor or his or her dependants out of the exercise of his or her profession, occupation or employment and all assets or income received by the insolvent or his or her dependants from whatever source and his or her estimated expenses for his or her own support and that of his or her dependants.

The notice, substantially in the form of Form E† G of Schedule 1 to this Act, shall be drawn up by the liquidator, shall be signed by the liquidator and the clerk of the court and shall be served by the sheriff on the ~~insolvent~~ debtor at least 7 days before the date specified in the notice for the hearing, in the manner prescribed by the Uniform Rules of Court for the service of process in general.

The court may at any time in the presence of the ~~insolvent~~ debtor postpone the proceedings to such date as the court may determine and may order the ~~insolvent~~ debtor to produce such documents as the court may specify at the hearing on the date determined by the court.

On the appearance of the ~~insolvent~~ debtor before the court the court in chambers shall call upon the ~~insolvent~~ debtor to give evidence under oath or affirmation on his or her earnings or estimated expenses contemplated in the first paragraph above and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just by or on behalf of either the ~~insolvent~~ debtor or the liquidator as is material to the determination of the said earnings or estimated expenses.

The court shall after the hearing issue a certificate indicating which proportion of the ~~insolvent's~~ debtor's future earnings, if any, is not required for such support and shall accrue to his or her insolvent estate.

- (b) The liquidator may submit a copy of a certificate contemplated in paragraph (a) to the insolvent's employer whereupon the employer shall be obliged to transmit to the liquidator in accordance with the certificate the amount stated therein. [23(5)]

- (c) Any property which the ~~insolvent debtor~~ obtains after the issuing of a first liquidation order with earnings which do not in terms of a certificate contemplated in paragraph (a) accrue to his or her insolvent estate, shall not form part of the insolvent estate. [New provision]

(8) If an emoluments attachment order issued by a court in respect of a judgment debtor prior to the date of liquidation of his estate is in force when his estate is liquidated, such order shall remain in force for a period of six months from the date of the first liquidation order. The employer upon whom the emoluments attachment order was served shall in accordance with the order make payments to the liquidator for the benefit of the insolvent estate. [65J.(1) Magistrates' Courts Act]

- (9) (a) ~~The insolvent~~ A natural person debtor may sue or be sued in his or her own name without reference to the liquidator of his or her estate in any matter relating to status or any right in so far as it does not affect his or her insolvent estate or in respect of any claim due to or against him or her under this section but no cession of his or her earnings after the date of liquidation of his or her estate, whether made before or after the issuing of the first liquidation order, shall be of any effect so long as his or her estate is under liquidation. [23(6)]
- (b) ~~The insolvent~~ A natural person debtor may be sued in his or her own name for any delict committed by him or her after the date of liquidation of his or her estate, and his or her insolvent estate shall not be liable therefor. [23(10)]
- (c) ~~The insolvent~~ A natural person debtor may for his or her own benefit recover any compensation for any loss or damage which he or she may have suffered, whether before or after the date of liquidation of his or her estate, by reason of any defamation or personal injury: Provided that where such compensation recovered by the ~~insolvent debtor~~ includes medical or other expenses a creditor in respect of such expenses is entitled to be paid out of the compensation or recover the compensation from the ~~insolvent debtor~~ even though the claim for such expenses arose before the date of liquidation of the estate: Provided further that the ~~insolvent debtor~~

shall not without leave of the court institute any action against the liquidator of his or her estate on the ground of malicious prosecution or defamation. [23(8)]

(10) Any property claimable by the liquidator from the insolvent debtor under this section may be recovered from the insolvent debtor by warrant of execution to be issued by the registrar upon the production to him or her of a certificate by the Master that the property stated therein is so claimable. [23(11)]

(11) The insolvent in the case of a natural person debtor, the partners in the case of a partnership debtor and the management of a debtor in the case of any other debtor, shall at the request of the liquidator assist the liquidator to the best of his or her ability in collecting, taking charge of or realising any property belonging to the insolvent estate and, in the case of a natural person debtor, the liquidator shall during the period of such assistance, give to the insolvent debtor out of the insolvent estate such an allowance in money or in goods as is, in the opinion of the Master, necessary to support the insolvent debtor and his or her dependants. [23(12)]

(12) ~~The insolvent~~ A natural person debtor shall keep the liquidator informed in writing of his or her postal and residential address. [23(13)]

(13) If a notice is to be conveyed to ~~an insolvent~~ a natural person debtor in terms of this Act personal notice shall be given to ~~the insolvent~~ such debtor to the address in subsection (11). [23(14)]

## **CHAPTER 7 - IMPEACHABLE DISPOSITIONS**

**17. Alienation by insolvent debtor of property to third party who is in good faith.** If ~~the insolvent~~ a debtor, without the consent of the liquidator of his or her estate, alienates for value any property which he or she acquired after the date of liquidation of his or her estate and which forms part of his or her insolvent estate, or any right to such property, to a person who proves that he or she was not aware and had no reason to suspect that the estate of the insolvent debtor was under liquidation, the alienation shall nevertheless be valid. [24(1)]

**18. Presumptions relating to property in possession of insolvent debtor.** - (1) Whenever an insolvent a debtor has acquired the possession of property and the liquidator of his or her estate claims that property for the benefit of the insolvent estate that property shall be presumed to belong to the insolvent estate, unless the contrary is proved. [24(2)]

(2) If any person who became a creditor of the insolvent debtor after the date of liquidation of the insolvent's debtor's estate alleges against the insolvent debtor or the liquidator that property acquired by the insolvent debtor does not belong to the insolvent estate and claims any right thereto, then it shall be presumed, unless the contrary is proved, that the said property does not belong to the insolvent estate. [24(2)]

**19. Disposition without value.**- (1) Every disposition of property not made for value may be set aside by the court if such disposition was made by the insolvent debtor within two years before the presentation of the application for liquidation of his or her estate to the Registrar or within three years before the presentation of the application for liquidation to the Registrar if the disposition was made in favour of an associate: Provided that if it is proved by someone opposing the setting aside of the disposition that the liabilities of the insolvent debtor at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of such excess. [26(1)]

(2) A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent debtor, shall not give rise to any claim in competition with the creditors of the insolvent's debtor's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent debtor, and which -

- (a) was made by way of suretyship, guarantee or indemnity; and
- (b) has not been set aside under subsection (1),

the beneficiary concerned may compete with the creditors of the insolvent's debtor's estate for an amount not exceeding the amount by which the value of the insolvent's debtor's assets exceeded his or her liabilities immediately before the making of that disposition. [26(2)]

**20. Antenuptial contracts.** - (1) No immediate benefit under a duly registered antenuptial contract given in good faith by one spouse to the other or to any child to be born of the marriage shall be set aside as a disposition without value, unless the application for the

liquidation of the estate of the spouse who gave the benefit was presented to the Registrar within two years of the registration of that antenuptial contract.

(2) In subsection (1) the expression "immediate benefit" means a benefit given by a transfer, delivery, payment, cession, pledge, or special bond of property completed before the expiration of a period of three months as from the date of the marriage. [27(2)]

**21. Voidable preferences.** - (1) Every disposition of his or her property made by a debtor which has the effect that any one of his or her creditors receives a benefit to which he or she would not have been entitled had the debtor's estate been under liquidation at the time of the making of the disposition may be set aside by the court if -

- (a) the debtor's liabilities exceeded the value of his or her assets immediately after the making of the disposition; and
- (b) the disposition was made within 6 months before the presentation of the application for liquidation of the debtor's estate to the Registrar or within 12 months before the said presentation in the case where it was made to an associate of the debtor,

unless the person for whose benefit the disposition was made, proves that it was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above the other, and if he or she is an associate of the debtor, also proves that he or she was not aware and had no reason to suspect that the debtor's liabilities would exceed the value of his or her assets immediately after the making of the disposition. [29(1)]

(2) For purposes of subsection (1) it shall be presumed unless the contrary is proved, that a disposition was made not in the ordinary course of business if -

- (a) it was made by way of payment of a debt that was not due and payable or not legally enforceable;
- (b) it embodied payment in an unusual form or a form other than that originally agreed upon;

- (c) it was made by way of securing an existing unsecured debt or securing a debt in novation or substitution of an existing unsecured debt which existed for more than one month after the creditor in respect of such debt performed his or her obligations in respect of the transaction giving rise to that debt. [New provision]

(3) Any disposition of his or her property by a debtor at a time when his or her liabilities exceed his or her assets, made with the intention of preferring one of his or her creditors above another, may be set aside by the court if the application for the liquidation of the estate of the debtor is presented to the Registrar within 3 years after the making of the disposition. [30(1)]

(4) For purposes of this section a surety of a debtor or a person by law in a position analogous to that of a surety shall be deemed to be a creditor of the debtor. [30(2)]

(5) Every disposition of property made under a power of attorney, whether revocable or irrevocable, shall for the purposes of this section, be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place. [29(3)]

**22. Collusive dealings for prejudicial disposition of property.** - (1) Any transaction entered into by a debtor before or after the liquidation of his or her estate in collusion with another person for disposing of property belonging to the debtor or the debtor's estate in a manner which had the effect of prejudicing his or her creditors or preferring one creditor above another, may after the liquidation of his or her estate be set aside by the court. [31(1)]

(2) Any person who was a party to such collusion shall be liable to make good any loss thereby incurred by the insolvent estate and shall pay for the benefit of the estate, by way of penalty, such sum as the court may determine, which sum shall not be more than the amount by which he or she would have benefited if the disposition had not been set aside, and if he or she is a creditor he or she shall also forfeit his or her claim against the insolvent estate. [31(2)]

(3) The compensation and penalty referred to in subsection (2) may be recovered in any proceedings for the setting aside of the transaction concerned. [31(3)]

**23. Application of sections 19, 21 and 22 to certain debtors.** (1) The provisions of section 19, 21 and 22 shall apply to a trust debtor, company debtor, close corporation debtor and association debtor if such debtor has been liquidated in terms of the provisions of this Act.

(2) For the purposes of applying sections 19, 21 and 22 to a trust debtor, company debtor, close corporation debtor or association debtor, the event which shall be deemed to correspond with the presentation of the application for liquidation of a debtor shall be-

(a) where the liquidation order has superseded a voluntary liquidation by members, the date of registration of the special resolution or resolution, as the case may be, to liquidate the debtor; and

(b) where the liquidation order has superseded a voluntary liquidation by creditors in terms of section 8, the date on which notice was given to creditors of the liquidation resolution to liquidate the debtor; and

(c) in the case of a voluntary liquidation by resolution in terms of section 8, the date upon which notice was given to creditors to liquidate the debtor by resolution. [Section 340(2) of the Companies Act]

(2) Any cession or assignment by a trust debtor, company debtor, close corporation debtor or association debtor of all of its property to trustees for the benefit of all its creditors shall be void. [Section 340(3) of the Companies Act]

**24. Certain contributions to pension funds may be recovered for benefit of insolvent estate.** - (1) If an insolvent a debtor at any time within two years before the presentation to the Registrar of the application for the liquidation of his or her estate undertook new obligations in respect of a fund at a time when the insolvent's debtor's liabilities exceeded his or her assets, or as a result of which his or her liabilities exceeded his or her assets, the liquidator of his or her estate may recover from the fund or funds concerned for the benefit of the insolvent estate any contribution in respect of such new obligation which together with the total contributions in respect of existing obligations, exceed the amount of R10000 per annum: Provided that if it is proved by someone opposing the recovery of contributions that the liabilities of the insolvent debtor at any time after the new obligation was undertaken exceeded his or her assets by less than the said amount which the liquidator may recover the amount which may be recovered shall not be greater than the amount by which the insolvent's debtor's liabilities exceeded his or her assets: Provided further that payment by one fund to another fund upon

termination of service or dissolution of a fund and contributions to a new fund in so far as they replace contributions to another fund shall not be regarded as new obligations: Provided further that if contributions which are recoverable have been made to more than one fund, or membership has been transferred from one fund to another, the amount which may be recovered from any such fund shall be proportioned according to the contributions made or transferred to each fund in respect of such new obligations.

(2) The Minister may amend the amount in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) Notwithstanding the provisions of any other law, a fund from which any contribution is recovered as contemplated in subsection (1) may reduce the benefits to which the insolvent debtor concerned would have been entitled in terms of the rules of the fund in respect of such contributions, in proportion to the contributions so recovered from the fund.

(4) No greater amount shall be recovered from a fund in terms of subsection (1) than the amount that would have been payable to ~~the insolvent~~ debtor if the fund had been dissolved on the date when the amount is recovered.

(5) If the full amount in terms of subsection (1) cannot be recovered because of the limitation in subsection (4), the liquidator may recover the deficit proportionately from the insolvent debtor personally in respect of benefits which he or she received from the said fund within three years after date of liquidation, and from another beneficiary in respect of benefits which he or she received from the said fund before or within three years after the date of liquidation in connection with the insolvent debtor.

(6) If a fund had bought an annuity for a member from an insurer, the fund may recover from the insurer that part of the purchase price paid out of contributions recoverable in terms of subsection (1) and the insurer may, notwithstanding the provisions of any other law, reduce the future benefits in respect of the annuity accordingly: Provided that the amount so recovered shall not exceed the value of the insolvent's debtor's annuity on the date when the amount is recovered.



(7) If the insolvent debtor conceals the payment of a contribution to a fund from his or her creditors or partakes in the concealment thereof or resigns himself or herself thereto, the liquidator may recover contributions made before creditors discovered the payment of the contribution, or could reasonably have discovered if they had acted with due care, irrespective of whether the said contributions were made within two years before presentation to the Registrar of the application for the liquidation.

(8) The provisions of this section shall not prejudice the rights of a liquidator or creditors in terms of the common law or this Act, if contributions were made fraudulently to the disadvantage of creditors or if there were collusive dealings as contemplated in section ~~21~~ 22.

(9) If the payment of premiums in respect of a life policy is a contributions to a fund in terms of this section, the provisions of section 63 of the Long Term Insurance Act, 1998 (Act No. 52 of 1998) shall not apply. [New provision]

**25. Attachment of property in possession of associate.** (1) If a liquidator suspects that a disposition of property by the insolvent debtor to an associate of the insolvent debtor may be liable to be set aside, the liquidator may instruct the sheriff to attach such property.

(2) The sheriff shall-

- (i) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;
- (ii) without delay deposit in a banking account as contemplated in section 89(1)(a) or (b) all cash taken into his or her custody;
- (iii) in so far as possible leave all other movable which he or she has attached, other than animals, in a properly locked storage place or appoint a suitable person to keep the said property in his or her custody, in which case he or she shall hand to such person a copy of an inventory of the property left in his or her custody and he or she shall draw that person's attention to the offence contemplated in section 136(2)(f) in respect of the unauthorised disposition of property under attachment;

(iv) be entitled to fees according to Tariff A in Schedule 2.

(3) The property must be released if the sheriff is instructed to do so by the liquidator.

(4) The liquidator shall instruct the sheriff to release property as soon as it is evident that attachment of the property is not required to safeguard the interests of the estate in the setting aside of a disposition of property.

(5) An associate may apply to the Court for appropriate relief if property of the associate is attached or held under attachment without reasonable cause.

(6) The costs of attachment of the property shall form part of the costs of liquidation.

**26. Certain rights not affected by improper disposition.** - (1) A person who, in return for any disposition which is in terms of section ~~18, 20 or 21~~ 19, 21 or 22 liable to be set aside, has parted with any property or security which he or she held or who has lost any right against another person shall, if he or she acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the liquidator has indemnified him or her for parting with such property or security or for losing such right. [33(1)]

(2) Section ~~18, 20 and 21~~ 19, 21 and 22 shall not affect the rights of any person who acquired property in good faith and for value from any person other than a person whose estate was subsequently liquidated. [33(2)]

(3) The setting aside of a disposition made by a debtor in terms of section ~~18, 20 or 21~~ 19, 21 or 22 shall not discharge a surety for the debtor.

**27. Set-off.** - If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is liquidated within a period of six months after the taking place of the set-off, or if a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result

that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is liquidated; then the liquidator of the insolvent estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place: Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 1 and any other party in accordance with the rules of such an exchange, or if it amounts to payment of a net amount in terms of section 32. [46]

**28. Payment of debt to insolvent debtor after liquidation.** - If on or after the date of liquidation of ~~an insolvent's~~ a debtor's estate (hereinafter in this section referred to as the insolvent) a debtor of the insolvent pays to the insolvent a debt that was due before the date of liquidation or otherwise fulfils any obligation towards the insolvent the cause of which arose before the date of liquidation, such payment or such fulfilment shall be void, unless the debtor proves that it was made or done in good faith without knowledge on his or her part of the liquidation. [22]

**29. Institution of proceedings on behalf of insolvent estate** - (1) Proceedings for the setting aside of any disposition of property made by a debtor or for the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of the insolvent estate of the debtor may be instituted by the liquidator and, if the liquidator fails to take any such steps they may be taken by any creditor on behalf of the insolvent estate upon having indemnified the liquidator against all costs thereof to the reasonable satisfaction of the liquidator. [32(1)]

(2) If any creditor has taken proceedings under subsection (1) no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.

(3) In any such proceedings the insolvent debtor, or the management of the debtor, may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he or she may be called upon by the court to give evidence and the provisions of

section ~~65~~ 52(6) shall **mutatis mutandis** apply to the giving of evidence at such proceedings. [32(2)]

(4) In any such proceedings under section ~~18, 20, or 21~~ 19, 21 or 22 it is presumed, until the contrary has been proved, that the liabilities of the debtor exceeded his or her assets or the value of his or her assets at any time within 3 years before the date of liquidation of the estate.

(5) When the court sets aside any disposition of property it shall declare the liquidator entitled to recover the alienated property or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher, and interest may be recovered on the value of such property in accordance with section 2A of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975). [32(3)]

#### **CHAPTER 8 - EFFECT OF LIQUIDATION UPON CERTAIN CONTRACTS**

**30. Uncompleted acquisition of immovable property by insolvent debtor.** - (1) If before the date of liquidation of his or her estate ~~an insolvent~~ a debtor had entered into a contract for the acquisition of immovable property by him or her and such property had not yet been transferred to him or her at the date of liquidation, the liquidator of the insolvent estate may elect either to abide by the contract or to abandon it.

(2) The other party to the said contract may call upon the liquidator by written request to exercise his or her choice and if the liquidator fails to exercise his or her choice and to notify the other party thereof within 6 weeks after he or she has received the written request, the other party may apply to the court for an order for the cancellation of the contract and for restoring any such immovable property which came in possession or under the control of the ~~insolvent~~ debtor or the liquidator by virtue of the contract.

(3) The court may, in respect of an application referred to in subsection (2), make any order it finds just.

(4) The provisions of this section shall not affect any right which the said other party may have to establish against the insolvent estate a concurrent claim for any loss suffered by him or her as a result of the non-fulfilment of the contract. [35]

**31. Transactions on an exchange.** - (1) If upon the date of liquidation of the estate of a market participant the obligations of such market participant in respect of any transaction entered into prior to the date of liquidation have not been fulfilled, the exchange in question in respect of any obligation owed to it, or any other market participant in respect of obligations owed to such market participant, shall in accordance with the rules of that exchange applicable to any such transaction be entitled to terminate all such transactions and the liquidator of the insolvent estate of the market participant shall be bound by such termination. [35A(2)]

(2) No claim as a result of the termination of any transactions as contemplated in subsection (1) shall exceed the amount due upon termination in terms of the rules of the exchange in question. [35A(3)]

(3) Any rules of an exchange and the practices thereunder which provide for the netting of a market participant's position or for set-off in respect of transactions concluded by the market participant or for the opening or closing of a market participant's position shall upon the date of liquidation of the estate of the market participant be binding on the liquidator in respect of any transaction or contract concluded by the market participant prior to such date of liquidation, but which is, in terms of such rules and practices, to be settled on a date occurring after the date of liquidation, or settlement of which was overdue on the date of liquidation. [35A(4)]

(4) ~~Sections 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 18 and 19 and 21 of this Act shall not apply to property disposed of in accordance with the rules of an exchange. [35A(5)]~~

**32. Agreements providing for termination and netting.** - (1) Subject to the provisions of subsection (2), in this section "agreement" means -

- (a) an agreement which provides that, in the event of the estate of a party thereto or the estate of a party to two or more agreements with the same counterparty, being liquidated before such party has performed fully in terms of the agreement or one or more of the agreements;
  - (i) all unperformed obligations of the parties terminate or may be terminated; and
  - (ii) the termination values of the unperformed obligations are determined or may be determined; and
  - (iii) the termination values are netted or may be netted, so that only a net amount (whether in South African currency or some other currency) is payable to or by a party; or
- (b) any agreement declared by the Minister after consultation with Minister of Finance, by notice in the Gazette to be an agreement for the purposes of this section.

(2) In this section "agreement" does not include -

- (a) a transaction contemplated in section ~~27~~ 31; or
- (b) a netting arrangement as contemplated in the National Payment System Act, 1998 (Act No. 78 of 1998); or
- (c) any agreement declared by the Minister after consultation with the Minister of Finance, by notice in the Gazette to not be an agreement for the purposes of this section.

(3) Upon the liquidation of the estate of a party to an agreement all unperformed obligations arising out of such agreement or all such agreements between the same parties shall, notwithstanding any conflicting rule of the common law, automatically be terminated as at the date of liquidation, termination values be calculated at market value at that date and a net amount be payable.

**33. Effect of liquidation of estate of seller under reservation of ownership contract. -** The liquidation of the estate of a seller under a reservation of ownership contract shall not give a right to the liquidator of the estate to reclaim property sold under the contract. [New provision.]

**34. Goods purchased not on credit but not paid for.** - (1) If a ~~person~~ debtor, before the date of liquidation of his or her estate, received delivery of movable property bought by him or her and the purchase price of such property had not been paid in full at the time of the delivery despite a term of the contract that the purchase price shall be paid on delivery of the property, the seller may, after the liquidation of the purchaser's estate, reclaim the property if within 14 days after the delivery thereof he or she has given notice in writing to the purchaser or the liquidator or the Master that he or she reclaims the property. [36(1)]

(2) If the liquidator disputes the seller's right to reclaim the property he or she shall, within 14 days after having received notice of the claim, notify the seller in writing that he or she disputes the claim, whereupon the seller may within 14 days after the receipt of the said notice, institute legal proceedings to enforce his or her right. [36(1)]

(3) For the purposes of subsection (1) a contract of purchase and sale shall be deemed to provide for the payment of the purchase price upon delivery of the property in question to the purchaser, unless the seller has agreed that the purchase price or any part thereof shall not be payable before or at the time of such delivery. [36(2)]

(4) The liquidator of the purchaser's insolvent estate shall not be obliged to restore any property reclaimed by the seller in terms of subsection (1), unless the seller refunds to him or her every part of the purchase price already received by him. [36(3)]

(5) Except as provided in this section, a seller shall not be entitled to recover any property which he or she sold and delivered to a purchaser whose estate was liquidated after the sale, only by reason of the fact that the purchaser failed to pay the purchase price. [36(4)]

**35. Effect of liquidation upon lease.** - (1) This section does not apply to a financial lease.

(2) A lease of movable or immovable property shall not be terminated by the liquidation of the estate of the lessee, but the liquidator of the insolvent estate may, without prior notice, terminate the lease by notice in writing to the lessor with the approval of the Master or in terms of a resolution of creditors taken at a meeting of creditors of the insolvent estate. [37(1)]

(3) The lessor may claim from the insolvent estate compensation for any loss which he or she may have sustained by reason of the non-performance of the terms of the lease. [37(1)]

(4) If the liquidator does not within 3 months of his or her appointment notify the lessor that he or she continues the lease on behalf of the insolvent estate, he or she shall be deemed to have terminated the lease at the end of the said three months. [37(2)]

(5) The rent due in terms of the lease from the date of liquidation of the estate of the lessee to the termination or cession of the lease by the liquidator, shall be included in the cost of the liquidation. [37(3)]

(6) The termination of the lease by the liquidator in terms of this section shall deprive the insolvent estate of any right to compensation for improvements, other than improvements made in terms of an agreement with the lessor, made to the leased property during the period of the lease. [37(4)]

**36. Contract of service terminated by insolvency of employer.** - (1) Notwithstanding the provisions of section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), the liquidation of the estate of an employer shall terminate the contract of service between the employer and his or her employees that was in existence at the date of liquidation. [38]

(2) Any employee whose contract of service has been so terminated shall be entitled to claim compensation from the insolvent estate of his or her employer for any loss which he or she may have sustained by reason of the termination of his or her contract of service prior to its expiration. [38]

## **CHAPTER 9 - APPOINTMENT OF LIQUIDATOR**

**37. Appointment of liquidator.** - (1) A creditor of the estate with a liquidated claim, the cause of which arose before liquidation and who will after proof of the claim have the right to vote for a liquidator at a meeting, may in writing nominate a person to be appointed by the Master as liquidator.



(2) The Master shall as soon as possible after 10:00 a.m. on the second working day after the granting of the first liquidation order, or, in the case of a voluntary liquidation by resolution in terms of section 8, after receipt of a duly adopted liquidation resolution in terms of paragraph (b) subsection (2) of section 8, or after the time when a liquidator ceases to function as liquidator according to the provisions of section 73, as if the nominations were votes for a liquidator at a meeting, appoint the liquidator or liquidators nominated by creditors in nominations received by the Master before 10:00 a.m. on the said working day: Provided that the Master may reject a nomination or amend the amount of a claim in a nomination if it appears from the information in nominations that the creditor's claim cannot be proved at a meeting or cannot be proved for the amount reflected in the nomination.

(3) If the Master deems it necessary for the proper administration of an insolvent estate he or she may at any time appoint one additional liquidator after 48 hours notice by telefax, electronic mail, or personal delivery to each liquidator appointed or to be appointed in terms of subsection (2) of the reasons for an additional appointment.

(4) If

(a) in the case of a liquidation by the court the appointment of a liquidator is so urgent that it cannot be delayed until the second working day after the granting of the first liquidation order the Court may when granting the order simultaneously appoint a provisional liquidator for the preservation of the estate on such conditions regarding the giving of security or otherwise the court deems fit; or

(b) in the case of a voluntary liquidation by resolution in terms of section 8 the appointment of a liquidator is so urgent that it cannot be delayed for forty eight hours after receipt of the duly adopted liquidation resolution by the Master in terms of subsection (10) of section 8, the Master may appoint a provisional liquidator at any time after receipt of the notice of the meeting referred to in paragraph (b) of subsection (2) of section 8: Provided that the Master shall only appoint such liquidator if requested to do so by a creditor or creditors as provided for in subsection (1).

(5) The provisional liquidator shall after his or her appointment proceed to recover and take into possession all the assets and property of the insolvent estate and shall give effect to any directions by the Court.

(6) In the event of the provisional liquidator not being appointed in terms of subsection (2) or (7), the provisional liquidator shall vacate his or her office when a liquidator is appointed in terms of subsection (2) or (8) and shall deliver the assets, property and books to the liquidator and account to the liquidator.

(7) The provisional liquidator is entitled to remuneration taxed by the Master in accordance with Tariff B in Schedule 2.

(8) Failing any valid nomination for the appointment of a liquidator in terms of subsection (2) the Master shall appoint a person of his or her choice as liquidator.

(9) If in the case of a liquidation by the court the Master is unable to appoint a liquidator he shall, after the issue of a final order and after giving notice to the person who applied for liquidation and in the **Gazette**, report to the court with or without any formal application or motion and request the court to set aside the liquidation order.

(10) The court may on receipt of the Master's report referred to in subsection (8) set aside the liquidation order, or refer the report back to the Master and direct the Master to proceed by way of formal application or motion at the cost of the estate, or make any other order it deems fit.

(11) The written nomination referred to in subsection (1) shall be substantially in the form of Form AA of Schedule 1 to this Act.

(12) No person shall be appointed in terms of subsection (2) or (8) unless he or she has given security to the satisfaction of the Master for the proper exercise of his or her powers and performance of his or her duties as liquidator and has lodged an affidavit stating that he or she is not disqualified in terms of section 57. [18(1)]

(13) A liquidator appointed in terms of subsection (2) or (8) shall, before the first meeting of creditors of the insolvent estate, be obliged to give effect to any direction given to him or her by the Master. [18(2)]

(14) The Master shall keep a public record, which must be updated at least every 14 days, of appointments in terms of subsection (3) or section 68(4) which shall reflect the name and reference number of the estate, the name and address of the person appointed, the amount of security called for and the reasons for the appointment.

## **CHAPTER 10 - POWERS AND DUTIES OF LIQUIDATORS**

**38. Liquidator shall serve first liquidation order on insolvent debtor and attach property belonging to insolvent estate.** - (1) In the case of a liquidation by the court the liquidator shall immediately after his or her appointment serve a copy of the first liquidation order on the ~~insolvent debtor~~ and in the case of a natural person debtor, if the name of the insolvent's spouse appears on the order he or she shall serve a copy of the order also on the spouse. When a copy of a first liquidation order is served on ~~an insolvent a debtor~~ he or she shall be supplied with two copies of the form referred to in section ~~34~~ 39(1)(b). [16(1); new provision]

(2) When serving the first liquidation order the liquidator shall in so far as it is possible, obtain the following particulars in respect of the ~~insolvent debtor~~ and his or her spouse, if applicable, namely -

- (a) the full name, date of birth and identity number or registration number of the ~~insolvent debtor~~;
- (b) where applicable, the ~~insolvent's debtor's~~ marital status and, if he or she is married in community of property, the full name, date of birth and identity number of his or her spouse. [18A]

(3) If the name, date of birth, ~~or~~ identity number or registration number of the ~~insolvent debtor~~ or his or her spouse which appears on the first liquidation order is incorrect or if any of these particulars are not stated the liquidator shall note the correct particulars on the copy of the first liquidation order and he or she shall send a copy thereof to the registrar of every deeds registry in the Republic together with a copy of his or her letter of appointment and he or she shall also send a copy of the order on which the particulars have thus been noted, to the applicant, the Master and to the registrar of the court. [18A]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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(4) Service of a copy of a liquidation order may be effected by the liquidator's clerk or by the sheriff, if requested thereto by the liquidator, in which event the provisions of subsections (2) and (3) relating to the particulars which shall be endorsed on the copy of the order shall apply to the said clerk or sheriff, as the case may be. [New provision]

(5) Service of a copy of a liquidation order shall be carried out in accordance with the Uniform Rules of Court: Provided that if the insolvent debtor has been absent from his or her usual place of residence or his or her business in the Republic during a period of 21 days, the court may be approached for directions with regard to some other mode of service. [11(2)]

(6) The liquidator shall, after the issue of his or her appointment, attach all the movable property in the possession of the insolvent debtor and he or she shall compile a full inventory thereof. Such property in respect of which a person allegedly has a right of pledge or a right of retention or which is under judicial attachment shall not be attached but shall be shown on the inventory. [19(1)] [69(1)]

(7) The liquidator shall -

- (a) take into his or her personal custody all books of account, invoices, vouchers, business correspondence and any other records relating to the affairs of the insolvent debtor and make a specified list of all such books, documents and other records;
- (b) if the insolvent debtor or a director, member, officer or trustee of the debtor is present, ask him or her whether the list referred to in paragraph (a) is a complete list of all books and records relating to his or her affairs and note his or her reply on the list;
- (c) note on the list any explanation which the insolvent debtor or management of the debtor gives with regard to the books, documents and other records relating to his or her affairs or in respect of any books, documents or other records which he or she is unable to supply;
- (d) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;
- (e) without delay deposit in a banking account as contemplated in section ~~83~~ 89(1)(a) or (b) all cash which he or she has taken into his or her custody;

- (f) in so far as is possible leave all other movable property which he or she has attached, other than animals, in a properly locked storage place or appoint a suitable person to keep the said property in his or her custody, in which case he or she shall hand to such person a copy of an inventory of the property left in his or her custody and he or she shall draw that person's attention to the offence contemplated in section 136 (2)(f) in respect of the unauthorised disposition of property under attachment. [19(1)]

(8) The liquidator may perform the attachment himself or herself or he or she may cause the attachment to be performed in whole or in part by the Sheriff. The Sheriff shall be entitled to fees taxed by the Master according to tariff A in Schedule 2 and the rules for the construction of that tariff.[New provision]

- (9) (a) Any person who has an interest in the insolvent estate or in any property which is attached is entitled to be present or may authorise a person to be present on his or her behalf when property of the insolvent estate is attached and when an inventory in respect thereof is compiled. [19(2)]

- (b) If the ~~insolvent~~ debtor or his or her representative is present, he or she shall sign the inventory and a copy thereof shall be handed to him or her and any comment which he or she may have with regard to the inventory or with regard to any assets, books or records of the ~~insolvent~~ debtor not included in the inventory should be attached to the inventory. [New provision]

(10) The liquidator shall send a copy of the inventory to the Master. [19(4)]

(11) The liquidator shall cause the property attached to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, 1965 (Act 65 of 1965) or some other person approved by the Master and he or she shall supply the Master with a copy of the valuation. [69]

(12) In the case of a trustee debtor, company debtor, close corporations debtor or association debtor -

(a) The court may at any time after making a liquidation order, or after a liquidation resolution for the voluntary liquidation of a debtor in terms of section 8 of this Act has been adopted, order any director, member, trustee, banker, agent or officer of the debtor concerned to pay, deliver, convey, surrender, or transfer to the liquidator of the debtor forthwith, or within such time as the court directs, any money, property or books and papers in his hands to which the debtor is **prima facie** entitled.

(b) The court may order any director, member, trustee, purchaser or other person by whom money is due to any such debtor which is being liquidated, to pay the same into a banking institution registered under the Banks Act 94 of 1990, to be named by the court for the account of the liquidator instead of to the liquidator, and such order may be enforced in the same manner as if it had ordered payment to the liquidator.

(c) All moneys paid into a banking institution as aforesaid in the event of a liquidation by the court shall be subject in all respects to the orders of the court. [Section 362 of the Companies Act]

**39. Insolvent Debtor shall hand over books to liquidator and shall submit statement of affairs to Master and liquidator.** - (1) When a liquidation order is served upon an insolvent a debtor as contemplated in section 38(1), the insolvent debtor shall -

(a) immediately hand over to the liquidator all books of account, invoices, vouchers, business correspondence and any other records relating to his or her affairs and obtain from him or her a specified receipt in respect thereof; [16(1)]

(b) (i) in the case of a natural person debtor or partnership debtor within 7 days after the service of the said order submit to the Master and the liquidator one copy each of a statement of affairs as on the date of liquidation, compiled in a form substantially corresponding to Form A of Schedule 1 and which shall contain the particulars provided for in that Form, which particulars shall be confirmed by affidavit. [16(2)]

(ii) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, the persons who at the time of the

liquidation order or adoption of the liquidation resolution were responsible for the management of such debtor, and such persons who have been responsible for the management of the debtor, or who participated in its formation, at any time within one year before the first liquidation order or adoption of the liquidation resolution, as may be required by the Master to do so, shall within 7 days after the service of the said order or adoption of the resolution submit to the Master two copies of a statement of affairs as on the date of liquidation, compiled in a form substantially corresponding to Form A of Schedule 1 and which shall contain the particulars provided for in that Form, which particulars shall be confirmed by affidavit; Provided that the Master may exempt any person referred to in this paragraph from the obligation to comply with such requirement if such person satisfies him by affidavit that he is unable to make out or cause to be made out or to verify such statement as to the affairs of the debtor concerned. [Section 363(2) and (3) of the Companies Act]

(2) All stock in trade enumerated in a statement of affairs contemplated in subsection (1) shall be valued at cost price or at the market value thereof at the time of the making of the sworn statement, whichever value is the smallest. [16(4)]

(3) If the Master is satisfied that the insolvent debtor was unable to draw up the statement of affairs that was submitted he or she may allow a person who has assisted the insolvent debtor or his or her spouse, where applicable, to draw up the statement of affairs to recover from the insolvent estate the costs which the Master determines. [16(5)]

**40. Liquidator may obtain search warrant.** - (1) If the liquidator suspects that any book, document or record relating to the affairs of the insolvent debtor or any property belonging to the insolvent debtor is being concealed or otherwise unlawfully withheld from him or her he or she may apply to the magistrate within whose area of jurisdiction such book, document, record or property is suspected to be or a magistrate who presided at a questioning in terms of section ~~65, 66 or 68~~ 52, 53 or 55, for a search warrant.

(2) If it appears to a magistrate to whom such application is made on the ground of an affidavit, or evidence given at a questioning in terms of section 52, 53 or 55 or answers to question contemplated in section 54(3)(b) that there is substantiated reason to suspect that a book, document or other record relating to the affairs of the insolvent debtor or property belonging to the insolvent estate is being concealed in possession of a person or at a place or on a vehicle or vessel or in a container of whatever nature or is otherwise unlawfully withheld from the liquidator, within the area of jurisdiction of the said magistrate, he or she may issue a warrant authorising the liquidator or a police officer to search a person, or place or vehicle, vessel or container mentioned in the warrant and to take possession of such book, document, record or property.

(3) The provisions of sections 21, 27 and 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) shall, in so far as they are applicable, apply **mutatis mutandis** with regard to the execution of a warrant referred to in subsection (2). [69]

**41. Registration of name and address with liquidator.** (1) Any person who claims to be a creditor of the estate may register his or her name and address in the Republic with the liquidator of the estate upon payment to the liquidator of a fee of R200 and may indicate property which he or she claims to hold as security for a claim.

(2) The Minister may amend the amount in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) Thereupon the liquidator shall send to that address a notice of every meeting of creditors of the estate, a copy of every report contemplated in section 42(1), a copy of every notice in terms of section 93(2) that an account will lie open for inspection and a notice of the date, time and place of the sale of any property which a person claims to hold as security in terms of subsection (1).

(4) The liquidator shall send a copy of an account which has been advertised to lie open for inspection to a person registered in terms of this section upon the request of the person for a copy of the account and upon payment of the reasonable costs to make a copy of the account and send the copy to the person.



(5) Failure on the part of the liquidator to comply with a provision of this section shall constitute a failure to perform his or her duties but shall not invalidate anything done under this Act.

**42. Liquidator's report.** - (1) The liquidator shall investigate the affairs of the insolvent debtor and the business transactions entered into by him or her before the liquidation of his or her estate and shall at the first meeting of creditors of the insolvent estate, or in so far as he or she is then not ready to do so, at a special meeting of creditors submit a full written report on those affairs and transactions and on any matter of importance relating to the insolvent debtor or the insolvent estate. The liquidator shall in particular report on -

- (a) the assets and liabilities of the insolvent estate;
- (b) whether, in his or her opinion, there is a risk of a contribution by creditors in terms of section ~~94~~ 99, or indicate why he or she is unable to express an opinion on the matter;
- (c) the cause of the insolvent's debtor's insolvency;
- (d) in the case of a natural person debtor, partnership debtor, trust debtor or association debtor in appropriate circumstances, the bookkeeping relating to the insolvent's debtor's affairs, the question whether proper bookkeeping in respect of his or her business transactions was carried out and if not, in what respect it is defective, insufficient or incorrect;
- (e) in the case of a company debtor, close corporation debtor or association debtor in appropriate circumstances, whether or not the debtor has kept the accounting records required by section 284 of the Companies Act 61 of 1973, or section 56 of the Close Corporations Act 69 of 1984, and, if not, in what respects the requirements of those sections have not been complied with. [Section 402(g) of the Companies Act and section 79(g) of the Close Corporations Act]
- (f) the question whether the insolvent debtor appears to have contravened any provision of this Act or to have committed any other offence, in particular whether he or she has failed to submit a statement of affairs and, in the case of a natural person debtor, of his or her income and expenses as required by this Act;
- (g) where applicable, the monthly income and expenses of the insolvent, any allowance made by the liquidator to the insolvent by way of maintenance

- for himself or herself and his or her family, and the assistance given to the liquidator during the period for which the allowance was paid;
- (h) any business carried on on behalf of the insolvent estate and the result thereof;
  - (i) any legal proceedings instituted by or against the insolvent debtor which were suspended by the liquidation of the estate and any other legal proceedings which are pending or may be instituted against the insolvent estate;
  - (j) any transaction entered into by the insolvent debtor before the liquidation of his or her estate in respect of the acquisition of immovable property which was not transferred to him or her or any transaction entered into by the insolvent debtor as lessee;
  - (k) the names of secured creditors with the amounts of the secured claims and steps taken or envisaged to investigate the validity of security or the reasons why it was not regarded as necessary to investigate the validity of security;
  - (l) any other matter relating to the administration or the realisation of the insolvent estate requiring direction of the creditors. [81(1)]
  - (m) in the case of a company debtor, or association debtor in appropriate circumstances, whether there are or appear to be any grounds for an order by the court under section 219 of the Companies Act 61 of 1973, disqualifying a director from office as such; [Section 400(1) of the Companies Act]
  - (n) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, whether or not any trustee, director, officer or member or former trustee, director, officer or member appears to be personally liable for damages or compensation to the debtor or for any debts or liabilities of the debtor as provided for in this or any other Act; [Section 402(d) of the Companies Act]
  - (o) whether or not further enquiry is in his or her opinion desirable in regard to any matter relating to the promotion, formation or failure of the debtor or the conduct of its business; [Section 402(f) of the Companies Act and section 79(f) of the Close Corporations Act]

(2) The liquidator shall supply the Provincial Commander of the Commercial Branch of the South African Police Service with an affidavit containing a report relating to any offence which the ~~insolvent~~ debtor in his or her opinion committed and shall on request of the Branch supply the further particulars that the Branch may require. A copy of the liquidator's report to the Branch shall be sent to the Master. [81(4)]

**43. Recovery of debts due to estate.** The liquidator shall, in the notification of his or her appointment in the **Gazette**, call on all persons indebted to the estate of which he or she is liquidator to pay their debts within a period and at a place stated in the notice, and if any such person fails to do so, the liquidator shall forthwith recover payment from him or her, if need be by legal process. [77]

**44. Remuneration of liquidator.** - (1) A liquidator shall be entitled to a reasonable remuneration for his or her services and for expenses incurred by him or her in the administration of an insolvent estate.

(2) The remuneration and expenses referred to in subsection (1) shall be taxed by the Master in accordance with Tariff B in Schedule 2 to this Act.

(3) The liquidator may apply for an increase in remuneration, in the case of an increase of R50 000 or more at least 14 days after a copy of his or her application with the reasons for the increase has been delivered to proved creditors who will be affected by the increase by personal notice. The Master may for good cause increase or decrease the liquidator's remuneration or disallow his or her remuneration, either wholly or in part, by reason of any failure of or delay in the discharge of his or her duties or on account of any improper performance of his or her duties, and in particular the Master may increase the liquidator's remuneration to compensate him or her for the time spent in assisting with criminal prosecutions or investigating the affairs of the ~~insolvent~~ debtor.

(4) The Minister may by notice in the **Gazette** amend the said tariff.

(5) Any person who employs the liquidator or who is a fellow employee of or who is ordinarily in the employment of the liquidator shall not be entitled to any remuneration out of the

insolvent estate for services rendered to the estate, and a liquidator or his or her partner shall not be entitled to remuneration out of the estate for services rendered to the estate, except the remuneration to which he or she is under this Act entitled as a liquidator. [63]

(6) A liquidator shall not be entitled to receive any remuneration before the liquidation account making provision for the remuneration has been confirmed as provided in section ~~90~~ 95, unless payment of such remuneration or part thereof has been approved in writing by the Master.

**45. General duties and powers of liquidator.** - (1) The liquidator of an insolvent estate shall proceed forthwith to recover and take into his or her possession all the assets and property of the insolvent estate and he or she shall apply the said assets and property, as far as they extend, in satisfaction of the costs of the administration of the estate and the claims of creditors of the estate and if any cash balance remains, he or she shall deal therewith in accordance with the provisions of section ~~93~~ 98. [69(1); 391 Companies Act]

(2) The liquidator shall, in addition to any powers that he or she has in terms of this Act, have power to perform any act which is necessary for the proper administration and distribution of the estate and, except where otherwise provided by this Act, he or she need not obtain formal authorisation for the performance of any such act. [386(4)(i) Companies Act]

- (3) The liquidator shall in particular have the power -
- (a) to execute in the name of and on behalf of the estate all deeds, receipts and other documents; [386(1)(a) Companies Act]
  - (b) to prove a claim in the estate of any debtor of the insolvent estate and to receive payment or a dividend in respect thereof; [386(1)(b) Companies Act]
  - (c) to draw, accept, make or endorse any bill of exchange or promissory note in the name of or on behalf of the estate: Provided that any such act by which the estate is burdened with additional liabilities shall require the authorisation of the Master or the creditors of the estate; [386(1)(c) Companies Act]

- (d) to carry on the business of the ~~insolvent~~ debtor or any part thereof: Provided that the liquidator may, pending the obtaining of authorisation thereto, only carry on the business of the ~~insolvent~~ debtor in so far as it is necessary that expenses of the estate be paid or necessary expenses be incurred in order to avoid loss; [80; 386(4)(f) Companies Act]
- (e) to obtain credit for the payment of necessary expenses which he or she is obliged to incur before funds for the payment thereof are available; [New provision]
- (f) to convene a meeting of creditors of the estate; [386(1)(d) Companies Act]
- (g) to take the necessary measures for the protection and the administration of the estate. [386(1)(e) Companies Act]

(4) The liquidator shall, if authorised thereto by the Master or by resolution of a meeting of creditors of the estate, have the power -

- (a) to institute or defend any legal steps in civil proceedings by or against the estate and to settle such proceedings; [18(3), 73(1); 386(4)(a) Companies Act]
- (b) to submit to determination of arbitrators any dispute concerning the estate; [62(4); 386(4)(e) Companies Act]
- (c) to compromise or admit any claim submitted for proof at a meeting of creditors of the estate, including any unliquidated claim,; [78(2), 78(3); 386(4)(c) Companies Act]
- (d) to disallow or reduce a claim in terms of section ~~46~~ 62;
- (e) to carry on the business or part of the business of the ~~insolvent~~ debtor in accordance with the directions of the Master or the creditors of the estate; [80;386(4)(f) Companies Act]
- (f) to exercise his or her election in respect of contracts entered into before liquidation, including his or her election in terms of section ~~26 or 30~~ 30 or 35; [35, 37; 386(4)(g) Companies Act]
- (g) to sell or alienate property of the insolvent estate, subject to the directions of the Master or the creditors of the estate: Provided that if such property or a portion thereof is subject to rights of a secured creditor the secured

creditor must give his or her consent in writing; [80bis, 82; 386 (2B) and (4)(h) Companies Act]

- (h) to engage the services of an attorney or advocate or any other professional person or to employ any other person to render services on behalf of the insolvent estate; [73(1), 73(1A), 97(2)(c)]
- (i) to dispose of a debt owing to the estate or to accept payment of a reasonable part of a debt in full settlement of the debt or to give a reasonable extension of time for payment of a debt or part thereof; [78(1); 386(4)(b) Companies Act]
- (j) to draw, accept, make or endorse any bill of exchange or promissory note by which the estate is burdened with liabilities; [386(1)(c) Companies Act]
- (k) in the case of a natural person debtor, to make available to the insolvent debtor or his or her dependants a sum of money or assets for his or her maintenance or that of his or her dependants; [79]
- (l) to make available to the insolvent debtor assets of the insolvent estate in excess of the values referred to in section ~~14~~ 14(6) or the amounts fixed in terms of section 14(7): [New provision]

Provided that the powers set out in this subsection can before the issue of a final order only be exercised with the consent of the insolvent debtor, the management of a debtor or the court.

(5) A liquidator or a debtor who disagrees with the assets made available in terms of subsection (4)(l) by resolution of a meeting of creditors can refer the matter to the Master for his or her decision.

(6) A liquidator may at any time, approach the court in regard to any matter arising from the liquidation and the court may give directions or grant the liquidator all powers that in its opinion are necessary for the proper administration, liquidation and distribution of the insolvent estate in question. [386(5) Companies Act]

(7) Notwithstanding the provisions of any law relating to tax or duties a liquidator of an insolvent estate shall be entitled -

- (a) to inspect any return or other document submitted to the Commissioner for the South African Revenue Services by or on behalf of ~~an insolvent a~~ debtor or the spouse of ~~an insolvent a~~ debtor, where applicable, in connection with tax or duties; [81(2)]
- (b) to make copies of any such return; [81(2)]
- (c) to have any such copy, certified as correct by or on behalf of the Commissioner; [81(2)]
- (d) at his or her request to be apprised in writing by or on behalf of the Commissioner of the basis for any estimated assessment made in terms of any revenue law. [New provision]

(8) A liquidator may, before or after the rehabilitation of ~~an insolvent a~~ natural person debtor, with the written consent of the Master, by notice to the officer charged with the registration of title to immovable property in the Republic, in respect of immovable property or a bond registered in the name of the ~~insolvent~~ debtor, or his or her spouse if he or she is married in community of property, cause a **caveat** to be entered against the transfer of the immovable property or the cancellation or cession of the bond referred to in the notice. [18B(1)]

(9) The notice referred to in subsection (8) shall be accompanied by the written consent of the Master and shall identify sufficiently the person in respect of whom and the property or bond in respect of which the **caveat** is to be registered so as to enable the officer charged with the registration to enter the **caveat** as contemplated in subsection (8). The **caveat** shall remain in force until the date indicated by the Master in his consent. [18B(2),(3)]

(10) If any entry in a return contemplated in subsection (7) is relevant in any civil or criminal proceedings in which the ~~insolvent~~ debtor or the insolvent estate is involved, that return or a copy thereof, purporting to be certified as contemplated in subsection (7), shall be admissible in those proceedings on its mere production by any person and such certified copy shall have the same evidentiary value as the original return. [81(2)]

(11) No provision in any contract, including the Memorandum or Articles of Association of a company, which purports to regulate the manner in which property belonging to a person shall be disposed of on or after his or her insolvency or which on his or her insolvency limits a person's power to dispose of his or her rights to property as he or she wishes, shall bind the liquidator of such person's insolvent estate. [New provision]

**CHAPTER 11 - MEETINGS AND QUESTIONING OF DEBTOR AND OTHER PERSONS**

**46. First meeting of creditors.** - (1) A liquidator of an insolvent estate appointed in terms of section ~~32~~ 37 shall convene a first meeting of creditors to be held within 60 days of his or her appointment by notice in the **Gazette**. [40]

(2) The notice referred to in subsection (1) shall state the time and place of the meeting and the matters that will be dealt with and shall be published in the **Gazette** not less than 14 days before the date fixed for the meeting. Personal notice shall, not less than 14 days before the date fixed for the meeting, be given to the insolvent debtor and to every creditor of the insolvent debtor whose name and address is known to the liquidator or which he or she can reasonably obtain. [41]

(3) The liquidator shall at least 14 days before the date determined in the **Gazette** for the holding of the first meeting of creditors of the estate send by personal notice to every creditor whose name and address are known to him or her or which he or she can reasonably obtain, the following documents namely:

- (a) a copy of the report contemplated in section ~~36~~ 42(1);
- (b) a copy of the inventory contemplated in section ~~33~~ 38(4);
- (c) a copy of the valuation contemplated in section ~~33~~ 38(11);
- (d) a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting;
- (e) a copy of the notice contemplated in subsection (2); [81(1) **bis** (a)]
- (f) any composition which is to be considered.



(4) The liquidator shall submit to the Master or a magistrate who is to preside at the meeting, before the time of the day advertised for the commencement of the meeting on or before the second working day before the date determined for the meeting of creditors -

- (a) a copy of the report contemplated in section ~~36~~ 42(1)(a);
- (b) a copy of the documents contemplated in subsection (3)(b), (c), (d) and (e); and
- (c) an affidavit containing a list of the names and addresses of the creditors to whom the documents referred to in subsection (3) have been sent. [81(1) **bis** (b)]

(5) Any one or more of the following matters may be dealt with at the meeting:

- (a) the proof of claims against the estate;
- (b) the questioning of any person in terms of the Act;
- (c) the considering of the report of the liquidator;
- (d) the nomination and appointment of one or more co-liquidators;
- (e) the considering of a composition;
- (f) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the estate. [New provision]

(6) If the first meeting of creditors is held before a final liquidation order is given, the liquidator's report shall deal with the question whether the liquidation of the debtor's estate will probably be to the advantage of his or her creditors and the said question shall be considered at the said meeting or at a subsequent meeting of creditors and the liquidator shall submit a report to the court and the applicant on this question before the court considers whether a final liquidation order should be made. [New provision]

(7) If the liquidator is unable to convene a meeting in the manner contemplated in subsection (1) he or she shall obtain the Master's permission to convene the meeting within the time determined by the Master. [New provision]

(8) If the liquidator fails to convene a meeting as contemplated in subsections (1) or (7), the Master may take any steps he or she deems necessary to force the liquidator to convene a meeting of creditors of the insolvent estate. [New provision]

(9) If the majority in value of creditors voting at the meeting rejects the liquidator's report the liquidator shall submit a report to an adjourned or subsequent meeting or refer the report to the Master who may give such directions with regard to the report as he or she deems appropriate. [New provision]

**47. Special meeting of creditors.** - (1) The liquidator of an insolvent estate may at any time and shall, if requested thereto by not less than one fourth in value of creditors who have proved claims against the estate or on request of the Master or whenever a composition has to be considered, convene a special meeting of creditors of the estate [42]: Provided that the liquidator shall convene a special meeting for the proof of claims if requested to do so by a creditor who tenders payment.

(2) Any one or more of the following matters may be dealt with at a special meeting of creditors:

- (a) The proof of claims against the estate;
- (b) the questioning of any person in terms of the Act;
- (c) considering of a composition;
- (d) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the insolvent estate. [New provision]

(3) The liquidator shall not less than 14 days before the date set for the meeting referred to in subsection (1) publish in the **Gazette** a notice of the time and place of the meeting and the matters to be dealt with.[41]

(4) The liquidator shall at least 14 days before the date determined in the Gazette for the holding of the meeting send by personal notice to every creditor whose name and address are known to him or her or which he or she can reasonably obtain, the following documents, namely:

- (a) any composition which is to be considered;

- (b) a copy of any report contemplated in section 42(1) to be considered at the meeting;
- (c) a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting;
- (d) a copy of the notice contemplated in subsection (3). [81(1)*bis*(a)]

(5) The liquidator shall before the time of day advertised for the commencement of the meeting on or before the second working day before the date set for the meeting lodge with the person who is to preside at the meeting copies of the documents sent to creditors in terms of subsection (4) together with a list of the names and addresses of the persons to whom they were sent. [81(1)*bis*(b)]

(6) The liquidator may at any time after his report has been accepted by creditors or the Master by notice in the **Gazette** fix a date after which creditors who have not proved claims against the estate will be excluded from participation in any distribution in terms of an account which will be submitted to the Master within two weeks after the said date. The said notice shall be published not less than 4 weeks before the date so fixed and before such publication a copy thereof shall be sent by personal notice to each unproved creditor whose name and address are known to the liquidator or which he or she can reasonably obtain. [Companies Act 366(2)]

**48. General provisions relating to meetings of creditors.** - (1) A meeting shall, subject to subsection (9), be convened

- (a) in the magisterial district where the ~~insolvent~~ debtor had his main place of business at the time of liquidation, or
- (b) if the ~~insolvent~~ debtor did not carry on a business or if it is unclear where the ~~insolvent's~~ debtor's main business was situated, in the magisterial district where the ~~insolvent~~ debtor had his ordinary residence or registered office at the date of liquidation; or
- (c) if the ~~insolvent~~ debtor did not have his ordinary residence or registered office within the Republic or it is unclear where he had his ordinary residence or registered office, within the magisterial district of the court which issued the liquidation order.

(2) The Master or an officer of his or her office appointed by him or her shall, subject to subsection (4), preside at a meeting of creditors convened within a magisterial district in which the Master has an office. [39(2)]

(3) If a meeting of creditors is to take place in a magisterial district where the Master has no office, the magistrate of the district concerned or a person appointed by him or her shall, subject to subsection (4), preside at the meeting. [39(2)]

(4) The Department of Justice shall ensure that sufficient magistrates who may hold court under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), are available to preside over creditors' meetings to be held before a Master or a magistrate, where such a magistrate is required to consider the incarceration of recalcitrant witnesses.

(5) A liquidator may convene any meeting to be held before himself or herself at any place within the magisterial district contemplated in subsection (2), but no questioning can take place at such a meeting and if a questioning must be held or if any person who avers that he or she is a creditor of the insolvent estate demands, before or during the meeting, that the meeting must be held or continued before the Master or a magistrate, the meeting shall be held or continued before the Master or the magistrate contemplated in subsection (1). The liquidator shall announce at the meeting when and where the meeting will be continued or convene the meeting to be held before the Master or the magistrate. [New provision]

(6) The presiding officer at a meeting of creditors shall keep a record of the proceedings, which he or she shall certify at the conclusion of the meeting, and if he or she is not the Master, he or she shall transmit the record to the Master. [39(5)]

(7) A meeting of creditors may, if necessary, be adjourned from time to time. [39(5)]

(8) A meeting may after an adjournment be presided over by a different presiding officer and a meeting before the Master may be adjourned to take place before a magistrate.

- (9) With the consent of the Master
- (a) a meeting may be convened in a magisterial district other than the district contemplated in subsection (1); and
  - (b) a meeting may after an adjournment take place at a different place, including a place in another magisterial district.

(10) The place where a meeting of creditors is held shall, subject to section ~~65~~ 52(4), be accessible to the public. [39(6)]

(11) The publication of any statement made by any person or any evidence given at a meeting of creditors shall be privileged to the same extent as the publication of evidence given in a court of law. [39(6)]

(12) A meeting of creditors shall, if duly convened, for purposes of this Act be deemed to be a meeting of creditors although no creditor or only one creditor or his or her representative attended the meeting personally. [New provision]

**49. Voting at meeting of creditors.** - (1) Every creditor of an insolvent estate who has proved a claim against the estate shall, subject to subsection (3), be entitled to vote at a meeting of creditors of the estate. [52(1)]

(2) A creditor may vote on all matters relating to the administration of the estate, but may not vote on matters relating to the distribution of the assets of the estate or the payment of costs of liquidation. [53(1)]

- (3) A creditor may not vote -
- (a) in respect of any claim which was ceded to him or her after commencement of the proceedings for the liquidation of the debtor's estate, or after the adoption of a liquidation resolution as contemplated in section 8 of this Act; or [52(4)]
  - (b) on the question as to whether steps should be taken to contest his or her claim or preference. [52(6)]

- (4) (a) Voting by creditors takes place according to value except where this Act provides that voting shall take place according to number and value. [52(2) and 53(2)]
- (b) (i) In the case of voting according to number the number of votes brought out in favour of a resolution and those brought out against the resolution are determined, without taking into account the value represented by the votes. [New provision]
- (ii) In the case of voting according to value the aggregate value of votes brought out in favour of a resolution and the aggregate value of votes brought out against the resolution are determined, without taking into account the number of votes for or against the resolution. [54(4)]
- (5) (a) A secured creditor is entitled to vote on the full value of his or her claim in respect of any matter affecting his or her security or on the election of a liquidator.
- (b) On a matter other than those mentioned in paragraph (a)
- (i) a secured creditor may vote only if he or she had placed a monetary value on his or her security when he or she proved his or her claim or the liquidator has obtained a valuation of the security or the security has been realised.
- (ii) If a secured creditor's security has been realized, the creditor may vote on the amount (if any) by which his or her claim exceeds the proceeds of the realization of the security.
- (iii) If the security has not been realized, the secured creditor may vote on the amount (if any) by which his or her claim exceeds -
- (aa) the value placed by him or her on the security; or
- (bb) the valuation of the security obtained by the liquidator; whichever is the greater. [52(5)]
- (6) A creditor may vote personally or through an agent appointed thereto by him or her by power of attorney.

(7) No person shall vote as an agent of a creditor, unless he or she submits proof of his or her mandate. [New provision]

(8) Every resolution taken at a meeting of creditors and the result of the voting on any matter shall be recorded in the minutes of the meeting and in so far as a resolution contains a directive to a liquidator, it shall be binding upon the liquidator. [53(3)]

(9) Any directive of creditors which infringes the rights of any creditor may be set aside by the court on application within 90 days or such further period as the court may allow for good cause by the court on application by the creditor, or the liquidator with the consent of the Master. [53(4)]

(10) No resolution of creditors that a specific attorney, auctioneer or any other person be employed in connection with the administration of an insolvent estate shall be binding upon the liquidator, but creditors may by resolution recommend the employment of any such person and if the liquidator does not accept the recommendation the Master's decision in respect of such employment shall be final. [53(5)]

**50. Insolvent Debtor and other persons shall attend meetings of creditors. - ~~An insolvent~~ A natural person debtor, the partners of a partnership debtor and the management of a trust debtor, company debtor, close corporation debtor or association debtor shall attend all meetings of creditors of ~~his or her~~ the insolvent estate in question and of which he or she is notified in writing by the liquidator or an adjourned meeting which he or she is directed by the presiding officer to attend, unless he or she is excused in writing by the liquidator, the Master or the person who is to preside at such meeting from attending such meeting or the resumption of such adjourned meeting. [64(1)]**

**51. Summons to attend meeting of creditors and notice to furnish information. -**

(1) If the officer who presides or is to preside at a meeting of creditors or any Master or magistrate has reasonable ground for believing that a person -

- (a) has or had in his or her possession or custody property belonging to the insolvent estate; or
- (b) is indebted to the insolvent estate; or

- (c) is able to give material information on any matter relating to the ~~insolvent~~ debtor or his or her business or affairs, whether before or after the liquidation of his or her estate, or concerning any property which at any time belonged to the insolvent estate; or
- (d) has in his or her possession or custody any book, document, or record relating to the ~~insolvent's~~ debtor's affairs or his or her property,

he or she may summon the said person to appear at a meeting of creditors of the insolvent estate at a time stated in the summons, in order to be questioned in terms of section ~~65~~ 52 and, where applicable, to produce the books, documents, or records specified in the summons. [64(2)]

(2) A summons referred to in subsection (1) shall be substantially in the form of Form E of Schedule 1 to this Act. [New provision]

**52. Questioning of insolvent debtor and other persons.** - (1) The presiding officer at a meeting of creditors of an insolvent estate may call upon the ~~insolvent~~ debtor or any person summoned for questioning or the production of any book, document or record in terms of section ~~64~~ 51, or any other person who is present and who possesses relevant information, to appear before him or her and to give evidence, to be questioned on all matters relating to the ~~insolvent~~ debtor or his or her business or affairs, whether before or after the liquidation of the estate, and concerning any property which at any time belonged to the insolvent estate or to produce a book, document or record and the said presiding officer shall administer to such person the oath or take from him or her an affirmation to speak the truth. [65(1)]

(2) A person who, in terms of subsection (1), is called upon to testify or to produce a book, document, or record may be questioned by the presiding officer, the liquidator and a proved creditor on whose request that person was summoned or called upon to testify, or the representative of any of them, and the presiding officer may allow any other creditor to put questions to that person through the presiding officer to the extent that the presiding officer in his discretion allows such questions. [65(1)]

(3) A person called upon in terms of subsection (1) to testify may be assisted by a representative and such representative may question the said person only in so far as it is necessary to clarify answers given by him or her. [65(3)]



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(4) The place where proceedings under this section takes place shall be accessible to the public: Provided that if in the opinion of the presiding officer it is necessary for the effective questioning of a person or for the maintenance of good order or the protection of the public interest, he or she may order that the proceedings or any part thereof shall take place behind closed doors or that any particular person or persons may not be present during any particular stage of the proceedings or that the proceedings or any part thereof may not be published. [39(6)]

(5) If a banker is summoned in terms of section ~~64~~ 51 or ordered in terms of section ~~67~~ 54 to produce documents, books or statements or give information, such banker shall, notwithstanding the law relating to privilege, be obliged to produce such documents, books or statements or give such information. [65(2)]

(6) Notwithstanding the provisions of any other law or the common law, but subject to the court's power to avoid questioning being conducted in an oppressive, vexatious or unfair manner, no person questioned in terms of this section may refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or her or apply for a postponement of the questioning until the criminal or disciplinary proceedings have been finalised: Provided that evidence given by a person in terms of this section is not admissible against him or her in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged in connection with evidence given during the questioning with perjury or the giving of false evidence under oath or affirmation or a contravention of section ~~68~~ 55(3) for refusal or failure to answer lawful questions fully and satisfactorily. [65(2), (2A),(b)]

(7) The ~~insolvent~~ debtor or management of a debtor shall at a questioning under this section be required to declare that he or she has disclosed all his or her affairs or the affairs of the debtor fully and correctly. [65(4)]

- (8) The presiding officer at proceedings in terms of this section -
- (a) shall disallow all questions that are irrelevant and may disallow questions that would prolong the proceedings unnecessarily; [65(1)]
  - (b) shall record the proceedings or cause them to be recorded. [65(3)]

(9) A person who in answer to a summons issued in terms of section ~~64~~ 51 attends a meeting of creditors or a person called upon in terms of this section to testify at such meeting or to produce books, documents, or records including the ~~insolvent~~ debtor, shall be entitled to the witness fees to which he or she would have been entitled if he or she were a witness in civil proceedings before a court of law. [65 (7)]

(10) Any evidence given under this section shall, subject to the proviso to subsection (6), be admissible in any proceedings instituted against the person who gave such evidence and any record of a questioning introduced in such proceedings shall form part of the record of the proceedings.

(11) The liquidator may in terms of an agreement with a creditor repay the creditor's costs and expenses in connection with questioning conducted by the creditor if sufficient money is recovered as a result of the investigation and in the absence of such an agreement the court or the Master may order that the whole or any part of such costs or expenses shall form part of the costs of liquidation.

**53. Questioning by commissioner.** - (1) The liquidator or any creditor of an insolvent estate may at any time after the liquidation of the ~~insolvent's~~ debtor's estate apply to the court or the Master -

- (a) that a person known or suspected to have in his or her possession any property belonging to the insolvent estate or to be indebted to the insolvent estate or to be able to give material information regarding the affairs of the ~~insolvent~~ debtor or of his or her property, be summoned to appear before a commissioner for questioning; and [417(1) Companies Act]
- (b) that a suitable person be appointed as commissioner to carry out the questioning contemplated in paragraph (a). [418(1)(a) Companies Act]

(2) A creditor who makes an application contemplated in subsection (1) shall furnish security to the satisfaction of the court or the Master for all costs in connection with the questioning. [New provision]

(3) If the court or the Master grants an application referred to in subsection (1) the Court or the Master-

- (a) shall appoint a magistrate or any other person the court or the Master deems suitable, as commissioner with the assignment to carry out the questioning in terms of this section; and [418(1)(a) Companies Act]
- (b) may summon a person referred to in subsection (1)(a) to appear before the said commissioner and to produce any books, documents or records in his or her custody or under his or her control relating to the insolvent debtor on a date and at a place stated in the summons in order to be questioned with regard to the affairs of the insolvent debtor. [417(2)(a), 417(3) Companies Act]

(4) A summons referred to in subsection (2) shall be substantially in the form of Form E4 of Schedule 1 to this Act.

(5) A commissioner appointed in terms of subsection (3) shall administer the oath to the person who appears before him or her for questioning or take from him or her an affirmation to speak the truth. [418(1)(a) Companies Act]

(6) A commissioner has the power to summons witnesses and to question them and to require the production of documents. [418(2) Companies Act]

(7) If a commissioner -

- (a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or
- (b) has been appointed by the court, he shall, in such manner as the court may direct, report to the Master and the court,

on any questioning referred to him. [418(3) Companies Act]

(8) The provisions of subsections (2), (3), (5), (6), (7), (8) and (9) of section ~~65~~ 52 shall apply **mutatis mutandis** with regard to the giving of evidence and the production of documents in terms of this section. [(2): 418(1)(c) Companies Act; (3): 417(1A) Companies Act; (6): 416(2)(b) Companies Act; (8)(a): 418(c) Companies Act; (9): 417(5) Companies Act]

(9) A witness who gave evidence in terms of this section shall at his or her own cost be entitled to a copy of the record of his or her evidence. [418(4) Companies Act]

(10) A creditor at whose request a questioning is carried out in terms of this section shall be liable for all costs and expenses incurred in connection with the questioning: Provided that the court or the Master may order that the whole or any part of such costs or expenses shall be reckoned as costs of the liquidation. [417(6) Companies Act]

(11) A questioning in terms of this section and any application therefor shall be private and confidential, unless the court or the Master, either generally or in respect of any particular person, directs otherwise. [417(7) Companies Act]

**54. Liquidator may put written questions or call for accounts, books, documents, records or information.**

(1) If in the opinion of the liquidator of an insolvent estate it would be convenient to obtain information concerning the affairs of the insolvent debtor by means of written questions and answers instead of oral evidence given at a meeting of creditors of the estate contemplated in section 51 or an interrogation in terms of section 52 or a questioning in terms of section 53, he or she may send such written questions to the insolvent debtor, or the persons responsible for the management of such debtor, or a creditor or to any other person to be answered by him or her.

- (2) (a) Questions contemplated in subsection (1) may be put to the insolvent debtor or such other person with regard to all matters relating to his or her business or affairs, whether before or after the liquidation of his or her estate, and with regard to any property which at any time belonged to the insolvent estate.
- (b) Questions may be put to a creditor of the estate with regard to a claim proved by him or her against the estate or a claim offered for proof.
- (c) Questions may be put to
- (i) any other person with regard to any transaction which such person had with the insolvent debtor, or
  - (ii) any property, books, documents or records of the insolvent debtor which such person had in his or her possession

within 36 months before the date of liquidation of the estate of the insolvent debtor.

- (3) (a) Personal notice of the questions contemplated in subsection (1) shall be given to the person to whom they are put.
- (b) The written answers to the questions shall be sworn to or affirmed and shall be sent to the liquidator by certified mail or telefax or delivered by hand within 14 days after receipt of the questions.

(4) The provisions of subsections (5) and (6) of section ~~65~~ 52 are **mutatis mutandis** applicable with regard to the written answers to questions referred to in this section.

(5) The answers to questions referred to in this section shall be regarded as evidence given in terms of section ~~65~~ 52.

(6) The giving of answers to questions referred to in this section or a refusal to give such answers shall not prevent a person from being summoned in terms of section ~~64~~ 51 or from being questioned in terms of section ~~65~~ 52 or section ~~66~~ 53 and shall not absolve a person from the obligation to give evidence when called upon to do so. [New provision]

(7) The liquidator of an insolvent estate may by written notice order any person with whom the insolvent debtor or his or her spouse had an account or transactions within 12 months before the date of the liquidation of the insolvent's debtor's estate to furnish the liquidator within 7 days or such longer period as the liquidator may allow, with a statement reflecting the state of the said account or the debits, credits and balance due in respect of the transactions during the said period of 12 months.

(8) The liquidator may by written notice order any person whom he or she has reason to believe to be in possession or control of any book, document, record or material information relating to the affairs of the insolvent debtor or his or her spouse, before or after the liquidation of the insolvent's debtor's estate or of property which belong or had belonged to the insolvent debtor or his or her spouse, to make the book, document, record information or property specified in the said notice available to the liquidator within 7 days of the date of the said notice or within such

longer time as the liquidator may allow and such person shall allow the liquidator or someone on behalf of the liquidator to make copies of or extracts from any such book, document or record.

**55. Questioning by or on behalf of the Master.** - (1) If at any time after the liquidation of an insolvent's a debtor's estate and before his rehabilitation or dissolution, as the case may be, the Master is of the opinion that the insolvent debtor or the liquidator of the insolvent estate or any other person is able to give information or is in possession of books, documents or records which the Master considers desirable to obtain, concerning the insolvent debtor or his or her insolvent estate or the administration of the estate or concerning any demand made against the estate, the Master may by notice in writing delivered to the insolvent debtor or the liquidator or such other person, summon him or her to appear before the Master or before a magistrate at a place and on a date and time stated in the notice, and to furnish all the information within his or her knowledge concerning the insolvent debtor or his or her estate or the administration of the estate and produce the books, documents or records specified in the notice. [152(2)]

(2) The notice referred to in subsection (1) shall be substantially in the form of Form E5 of Schedule 1 to this Act.

(3) The Master may at any time appoint a person to investigate the books, documents, records and vouchers of the liquidator and direct the liquidator to deliver to the person so appointed or to the Master any book, document, or record relating to or property belonging to the insolvent estate of which he or she is the liquidator. The reasonable costs incurred in performing such an investigation shall, unless the court otherwise orders, be regarded as part of the costs of liquidation, and if the liquidator is removed from office consequent upon such an investigation, it shall be paid by the liquidator **de bonis propriis**. [Companies Act 381(3), (4), (5)]

(4) After having questioned the person summoned in terms of subsection (1), the Master or the magistrate may deliver to him or her a notice to appear again before the Master or the magistrate at a place and time stated in the notice and to furnish such further information or to produce any book, document, or record specified in such notice. [152(3)]

(5) A person summoned in terms of subsection (1) may be questioned by the Master or the magistrate presiding at the proceedings and if a person other than the liquidator is summoned in terms of the said subsection, the liquidator or his or her representative may cross-examine the

person concerned in regard to evidence given by him or her and to the extent that the presiding officer allows any person having an interest in the estate or the administration thereof or his or her representative may question the person concerned. The reasonable costs of such questioning shall, unless the court otherwise orders, be regarded as part of the costs of liquidation, and if the liquidator is removed from office consequent upon such a questioning, it shall be paid by the liquidator **de bonis propriis**. [152(4)]

(6) The provisions of section ~~65~~ 52(3), (5), (6), (7) and (8) shall **mutatis mutandis** apply to questioning under this section. Section ~~65~~ 52(9) shall apply **mutatis mutandis** but the liquidator of the insolvent estate shall not be entitled to witness fees. [152(5) and (7)]

(7) Proceedings under this section shall be private and confidential and without the permission of the presiding officer at the proceedings no person whose attendance thereat is not necessary shall be present at the proceedings and no publication of the proceedings shall take place without the permission of the said presiding officer. [New provision]

**56. Enforcing summonses and giving of evidence.** (1) If a person summoned under section ~~64, 66 or 68~~ 51, 53 or 55 fails to appear at a meeting of creditors or questioning in answer to the summons, or if ~~an insolvent a debtor or management of such debtor~~ fails to attend a hearing in terms of section 16(5)(a) or a meeting of creditors in terms of section ~~63~~ 50, or fails to remain in attendance at that hearing or meeting, any magistrate for the district where the meeting, questioning or hearing was scheduled to be held who may hold a court under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), may issue a warrant, authorizing any member of the police force to apprehend the person summoned or the ~~insolvent debtor~~, as the case may be, and to bring him before the said magistrate.

(2) Unless the person summoned or the ~~insolvent debtor~~, as the case may be, satisfies the said magistrate that he had a reasonable excuse for his failure to appear at or attend such meeting, questioning or hearing, or for absenting himself from the meeting, hearing or questioning, the said magistrate may commit him or her to prison to be detained there until such time as the said magistrate may determine, and the officer in charge of the prison to which the said person or ~~insolvent debtor~~ was committed, shall detain him or her and produce him or her at the time and place determined by the magistrate for his or her production.

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(3) If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book, document or record which he or she was summoned to produce, or if any person who may be questioned at a meeting of creditors in terms of section ~~65~~ 52 or during an interrogation in terms of section ~~66 or 68~~ 53 or 55 or a hearing in terms of section 16(5)(a) refuses to be administered the oath or make an affirmation to speak the truth at a meeting of creditors, questioning or hearing at which he or she is called upon to give evidence or refuses to answer any question lawfully put to him or her under the said sections or does not answer the question fully and satisfactorily, the said magistrate may issue a warrant committing the said person to prison, where he or she shall be detained until he or she has undertaken to do what is required of him or her, but subject to the provisions of subsection (5).

(4) If a person who has been released from prison after having undertaken in terms of subsection (3) to do what is required of him or her, fails to fulfil his or her undertaking, the said magistrate may commit the person to prison as often as may be necessary to compel him or her to do what is required of him or her.

(5) Any person committed to prison under this section may apply to the court for his or her discharge from custody and the court may order the discharge if it finds that the person was wrongfully committed to prison or is being wrongfully detained.

(6) In connection with the apprehension of a person or with the committal of a person to prison under this section, the magistrate who issued the warrant of apprehension or committal to prison shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him or her in the exercise of his or her functions.

(7) The said magistrate may upon the request of the liquidator, the Master, a Commissioner or a proved creditor and after giving the witness or the ~~insolvent~~ debtor the opportunity to be heard, order the witness or the ~~insolvent~~ debtor to pay costs occasioned by failure contemplated in subsection (1) and the costs to have him or her brought before the magistrate in the amount determined by the Magistrate. [New provision]

**57. Suspected commission of offence shall be reported to Commercial Branch.** (1) If it appears from an answer or statement given by a person who is questioned under section ~~65, 66, 67 or 68~~ 52, 53, 54 or 55, that there are reasonable grounds for believing that any person has



committed an offence, the presiding officer at the proceedings, or the liquidator in the case of proceedings under section ~~67~~ 54, shall submit the answer or statement or a certified copy thereof with supporting documents, if any, and report such suspicion to the Provincial Commander of the Commercial Branch of the South African Police Service and set out the grounds on which the suspicion rests. If the presiding officer is not the Master, a copy of the answer or statement and supporting documents, if any, and the report to the Branch shall be sent to the Master.

(2) The said Branch shall with due consideration of the provisions of section ~~65~~ 52(6) investigate whether criminal proceedings should be instituted in the matter. [67]

**58. Proof of record of proceedings of meetings of creditors.** - (1) Any record purporting to be a record of the proceedings at a meeting of the creditors of an insolvent estate or a questioning held under this Act and purporting to have been signed by a person describing himself or herself as Master or magistrate or other presiding officer or commissioner shall, upon its mere production in judicial proceedings, be **prima facie** proof of the proceedings recorded therein.

(2) Unless the contrary is proved, it shall be presumed that any meeting of creditors or any questioning referred to in subsection (1) was duly convened and held and that all acts performed thereat were validly performed. [68]

## CHAPTER 12 - CLAIMS

**59. Claim by partnership creditor against estate of insolvent partner.** - When the estate of a partner in a partnership is liquidated and the partnership is as a result thereof dissolved without the partnership being placed under liquidation, any claim that a creditor of the partnership might have against the estate of the insolvent partner shall be regarded as an unliquidated claim until the debts of the partnership have been settled in terms of the dissolution of the partnership. [New provision]

**60. Claims against partnerships.** - When the estate of a partnership and the estates of the partners in that partnership are under liquidation simultaneously any claim in respect of a partnership debt shall be proved against the partnership estate, irrespective of the fact that a partner

might be personally liable for such debt. In so far as the partnership estate is insufficient to meet such debt a creditor who has proved his or her claim against the partnership estate shall for the balance of his or her claim have a claim against the separate estates of the partners without formal proof of his or her claim in respect of such balance. The liquidator of the estate of a partner shall be entitled to any balance of the partnership's estate that may remain after satisfying the claims of the creditors of the partnership estate, so far as that partner would have been entitled thereto if his or her estate had not been liquidated. [49]

**61. Proof of claims.** (1) Any person who has a liquidated claim against an insolvent estate, the cause of which arose on or before the date of liquidation of the estate, or the authorised agent of such person, may at any time before the final distribution of the estate, but subject to the provisions of section ~~47~~ 63, prove that claim against the estate. [44(1)]

(2) A claim against an insolvent estate shall be admitted at a meeting of creditors of the estate if it has been proved to the satisfaction of the presiding officer on the face of the claim form, documents in connection with the claim submitted by the creditor or another person, if any, and on the evidence, if any, by the creditor. If the claim has not been proved in this manner, the presiding officer shall reject it. [44(3)]

(3) A creditor who holds security for his or her claim shall place a monetary value on his or her security, or have his or her voting rights limited in terms of section ~~42~~ 49(5). [44(4)]

(4) The rejection of a claim shall, subject to the provisions of section ~~11~~ 12(5), not debar the claimant from proving the claim at a later meeting of creditors or by an action at law. [44(3)]

(5) Every claim shall be proved by an affidavit in a form corresponding substantially with Form B or C of Schedule 1 to this Act and, subject to subsections (10) and (11) no oral evidence shall be received in support of any claim. [44(4)]

(6) The affidavit contemplated in subsection (5) and all documents submitted in support of the claim or a copy thereof shall be lodged with the person who is to preside at the meeting of creditors, before the time of day advertised for the commencement of the meeting on or before the

second working day before the date of the meeting, failing which the claim shall not be admitted at that meeting unless the presiding officer is of the opinion that the creditor had a reasonable excuse for his or her failure to lodge the claim with the presiding officer within the said time. [44(4)]

(7) Where appropriate the amount of a claim may be expressed in a foreign currency, but all claims in a foreign currency shall be paid in its equivalent in Rand and the conversion date of Rand to a foreign currency shall be the date of liquidation.

(8) A claimant who has proved a claim which is deficient in any respect may at a subsequent meeting of creditors prove a corrected claim. [44(4)proviso]

(9) The documents referred to in subsection (6) may be perused free of charge by the liquidator, the ~~insolvent~~ debtor and any creditor of the insolvent estate or the representative of any of them during office hours at the office of the person who is to preside at the meeting and the liquidator, ~~insolvent~~ debtor, or creditor may submit motivated objections to the prove of a claim at the meeting where the claim is submitted for proof or with the presiding officer before the meeting. [44(5)]

(10) Any person who has an unliquidated claim against an insolvent estate may tender such claim for proof at a meeting of creditors, but such claim shall not be admitted to proof until it has been accepted by the liquidator by way of compromise or proved in an action at law. When such claim is compromised or proved in an action at law it shall be deemed to have been proved and admitted against the estate at the meeting where it was submitted for proof, unless the creditor informs the liquidator in writing within seven days of the compromise or judgment that he or she abandons the claim.[78(3)]

(11) The presiding officer at the meeting of creditors may of his or her own motion or at the request of the liquidator or his or her representative or any creditor who has proved a claim at a meeting of creditors or the representative of such creditor, call upon any person present at the meeting who wishes to prove a claim or who has proved a claim against the estate to submit to questioning by the presiding officer, the liquidator or his or her representative or any such creditor or his or her representative in regard to such claim, and for purposes of such questioning the presiding officer shall administer to the said person the oath or take from him or her a solemn

declaration to speak the truth: Provided that a creditor who has proved a claim at a meeting shall not be permitted to question a creditor who wishes to prove a claim at the same meeting before the claim of such creditor has been admitted or rejected. [44(7)]

(12) Any person who wishes to prove or who has at any time proved a claim against an insolvent estate and who is absent from a meeting of creditors may be summoned in writing by the presiding officer in a summons substantially in the form of Form ~~E2~~ EE of Schedule 1 to this Act to appear before him or her at a place and time stated in the summons for the purpose of being questioned by the presiding officer, the liquidator or a creditor who has proved a claim against the estate, or the representative of the liquidator or such creditor in regard to such claim, and the provisions of subsection (11) with regard to the administering of the oath or the taking of a solemn declaration shall **mutatis mutandis** apply with regard to the giving of evidence by such person. [44(8)]

(13) If a person who wishes to prove a claim is called upon to be questioned as contemplated in subsection (12) and fails without reasonable excuse to appear or refuses to take the oath or make a solemn declaration or to submit to questioning or to answer fully and satisfactorily any lawful question put to him or her, his or her claim, may be rejected. [44(9)]

**62. Liquidator shall examine claims.** - (1) The person who presided at a meeting of creditors shall, if he or she is not the liquidator, after the meeting deliver to the liquidator every claim proved against the insolvent estate at that meeting and every document submitted in support of any claim. [45(1)]

(2) The liquidator shall examine the claims and supporting documents referred to in subsection (1) and all available books, documents or records relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed and the liquidator may require the claimant to submit additional supporting proof of his or her claim and, in the case where the claim is based on an estimate, the basis on which the estimate was arrived at. [45(2)]

(3) If the liquidator disputes a claim after it has been proved at a meeting of creditors, he or she may, with the authority of the Master or creditors in terms of section 45(4) and after having afforded the claimant the opportunity of substantiating his or her claim or any part thereof,

reduce or disallow the claim, and he or she shall forthwith notify the claimant and the Master in writing of such reduction or disallowance of the claim. [45(3)]

(4) The reduction or disallowance of a claim as contemplated in subsection (4) shall subject to the provisions of section ~~11~~ 12(5) not debar a claimant from establishing his or her claim by means of an action at law. [45(3)]

**63. Late proof of claims.** - (1) Subject to the provisions of section ~~80~~ 84(8), a creditor of an insolvent estate who has not proved his or her claim against the estate before a date fixed in terms of section 47(6) shall, subject to subsection (2), not be entitled to share in the distribution of the assets reflected in an account submitted to the Master within 2 weeks after the said date. [104(1)]

(2) If the Master is satisfied that a creditor referred to in subsection (1) has a reasonable excuse for the delay in proving his or her claim, the Master may permit him or her to prove his or her claim before the confirmation of the account contemplated in subsection (1) and the Master may order the liquidator to draw up a new account in which provision is made for the claim so proved, provided that the creditor tenders all costs in connection with the drawing-up of the new account, including wasted advertisement costs, if any. [104(1)]

(3) A creditor of an insolvent estate who has proved a claim against the estate and who was not in terms of subsection (2) permitted to share in the assets reflected in an account, shall, in so far as available funds allow, be entitled to be awarded out of any subsequent distribution account the amount to which he or she would have been entitled under the earlier distribution account if he or she had proved his or her claim in time. [104(2)]

(4) A creditor who delayed proving his or her claim pending the outcome of proceedings for the setting aside of any disposition of property made by a debtor or for the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of the insolvent estate of the debtor shall not be entitled to share in the distribution of any money or the proceeds of property recovered as a result of such proceedings. [104(2)]

**64. Conditional claims.** - (1) A creditor who has a claim against an insolvent estate which is dependent upon the fulfilment of a condition, may request the liquidator to place a value on the claim.

(2) If a liquidator places a value on a claim referred to in subsection (1), he or she shall indicate in writing the grounds on which he or she arrived at the valuation.

(3) The valuation of a conditional claim by a liquidator is subject to review by the court on application of the creditor.

(4) After a conditional claim has been valued as contemplated in this section, the claim may be proved by the creditor for the amount of the valuation.

(5) If the condition upon which a claim is dependent is fulfilled before the inclusion of the amount referred to in subsection (4) in a proposed distribution account, the claim may be proved in full. If the condition is fulfilled after provision had already been made in a distribution account for the claim contemplated in subsection (4), the balance of the claim may be proved, subject to the provisions relating to the late proving of claims. [48]

**65. Arrear interest and debt due after liquidation.** - (1) A creditor may prove a claim against an insolvent estate in respect of a capital debt and interest thereon which has accrued at the date of liquidation. [50(1)]

(2) No claim shall be proved for interest which accrues after the date of liquidation, but such interest is payable in the circumstances set out in sections ~~75~~ 79(5) and ~~80~~ 84(5). [New provision]

(3) The capital amount of a debt which becomes payable after the date of liquidation shall be reduced by twelve percent of that amount per annum compounded monthly on completed months from the date of liquidation to the date on which the debt becomes payable. [50(2)]

**66. Withdrawal of claim.** - (1) A creditor who has proved a claim against an insolvent estate may withdraw his or her claim by written notice to the liquidator.

(2) A liquidator who receives a notice of withdrawal of a claim shall give personal notice to the Master of the withdrawal.

(3) A creditor who has withdrawn his or her claim remains liable for his or her **pro rata** share of the costs of liquidation up to the date when the notice of withdrawal was received by the liquidator.

(4) A creditor who has withdrawn his or her claim may by written notice to the liquidator cancel his or her withdrawal, but if he or she does so he or she shall not be entitled to payment of his or her claim out of the estate until all other creditors who have proved claims have been paid in full.

(5) If a creditor cancels his or her withdrawal as contemplated in subsection (4), he or she shall not be liable for liquidation costs for which he or she was not liable at the time of the cancellation of the withdrawal of his or her claim. [51]

**67. Creditor may not recover the debt from insolvent estate which is recovered from another source.** A creditor who has proved a claim against an insolvent estate and who, after the date of liquidation of the insolvent estate, has received payment of that debt in whole or in part, from a source other than the insolvent estate, shall notify the liquidator in writing of such payment within 60 days from receiving payment and if he or she fails to do so double the amount paid to him or her out of the insolvent estate to which he or she is not entitled, may be recovered from him or her. [New provision]

**CHAPTER 13 - ELECTION, APPOINTMENT AND DISQUALIFICATION OF LIQUIDATORS**

**68. Election of liquidator.** - (1) Any creditor of an insolvent estate who has proved claims against the estate may vote for one liquidator at the first meeting of creditors or a subsequent meeting convened to elect a liquidator. [54(1)]

- (2) (a) A liquidator is elected by the majority in number and in value of the votes of creditors who are entitled to vote and who voted at such meeting. [54(2)]
- (b) If no candidate for the office of liquidator has obtained a majority in number and in value of the votes, the candidate who has obtained a majority of votes in number shall be deemed to be elected as liquidator if no candidate has obtained a majority of votes in value, and the candidate who has obtained a majority of votes in value shall be deemed to have been so elected if no candidate has received a majority of votes in number. [54(3)(a)]
- (c) If one candidate obtained a majority of votes in value and another a majority in number, both such candidates shall be deemed to be elected as liquidators, and if either of them declines to share the office of liquidator with the other, the other candidate shall be deemed to be the sole elected liquidator. [54(3)(b)]

(3) If no liquidator is elected at a meeting of creditors the liquidator appointed by the Master in terms of section ~~32~~ 37 shall be the liquidator of the estate. [18(4), 54(5)]

(4) If the Master deems it necessary for the proper administration of an insolvent estate he or she may at any time appoint one additional liquidator after 48 hours notice by telefax, electronic mail, or personal delivery to each liquidator appointed or to be appointed in terms of subsection (2) or (3) of the reasons for an additional appointment.

**69. Persons disqualified from being liquidators.** - (1) Any of the following persons shall be disqualified from being elected or appointed as a liquidator -

- (a) any person who is not a member of a professional body recognised under subsection (2) or who is not permitted to act as a member of that body in terms of its rules; [New provision]
- (b) an insolvent; [55(a)]
- (c) any person who does not reside in the Republic;
- (d) where applicable, the spouse of the ~~insolvent~~ debtor concerned; [55(b)]



- (e) any person who is by consanguinity related or deemed to be related in the first, second or third degree of relationship, as determined in accordance with section 1(3)(d) or (e) of the Intestate Succession Act, 1987 (Act No. 81 of 1987), to such insolvent debtor or to his or her spouse; [55(b)]
- (f) a minor or any other person under legal disability; [55(c)]
- (g) any person who is declared under section ~~59~~ 75 to be disqualified, while such disqualification lasts, or any person removed by the court from office of trust on account of misconduct; [55(g)]
- (h) a corporate body or any other entity which is not a natural person; [55(h)]
- (i) any person who has been convicted, in the Republic or elsewhere, of an offence in terms of this Act or an offence of which dishonesty is an element and who was sentenced to imprisonment without the option of a fine or to a fine of not less than R1000.[55(i)]
- (j) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he or she undertook that he or she would, when performing the functions of a liquidator, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law; [55(j)]
- (k) any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to nominate him or her as liquidator to vote for him or her as liquidator or to effect or assist in effecting his or her election as liquidator of any insolvent estate; [55(k)]
- (l) any person who at any time during a period of twelve months immediately preceding the date of liquidation acted as the bookkeeper, accountant or auditor of the insolvent debtor; [55(l)]
- (m) any person with a proven interest opposed to the general interest of the creditors of the insolvent estate.

(2) The Minister may from time to time publish by notice in the **Gazette** the name of a recognised professional body if it appears to him or her that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member of such body is a fit and proper person to be appointed as liquidator and meets acceptable requirements for education and practical experience and training. [New provision]

(3) A notice recognising a professional body may be revoked by a further notice if it appears to the Minister that the body no longer satisfies the requirements of subsection (2). A notice revoking a previous notice may provide that members of such body continue to be treated as authorised to act as liquidators for a specified period after the revocation takes effect. [New provision]

**70. Master may refuse to appoint elected liquidator.** - (1) The Master may on any one or more of the following grounds refuse to appoint as liquidator a person elected in terms of section ~~52~~ 68, namely that the said person -

- (a) was not properly elected;
- (b) is in terms of section ~~53~~ 69 disqualified from being appointed as liquidator or as liquidator of the insolvent estate in question;
- (c) has failed to give security, within 7 days after his or her election or within such longer period as the Master may allow, to the satisfaction of the Master for the proper performance of his or her duties as liquidator;[57(1)]

(2) If the Master refuses to appoint as liquidator a person elected as such, he or she shall notify such person in writing of the reason for his or her refusal. [57(1)]

(3) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to appoint a person elected as liquidator, may within a period of seven days from the date of such appointment or refusal submit his objections to the Master in writing. The Master shall within seven days of the receipt by him of the objections inform the objector and the person elected, if applicable, of his decision. Any interested party may apply to the court for a review of the Master's decision within fourteen days after the Master has informed the objector and the person elected, if applicable, of his decision. [57(7)]

(4) Whenever the Master refuses to appoint as liquidator a person elected as such, or the court has set aside an appointment of a liquidator by the Master, the Master shall direct the liquidator appointed in terms of section ~~32~~ 37 to convene a meeting of creditors of the insolvent estate for purposes of electing another person as liquidator in the place of such person or liquidator. [57(2)]

- (5) The notice of the meeting referred to in subsection (4) -
- (a) shall state that the purpose of the meeting is to elect a liquidator;
  - (b) shall set out the reason in subsection (1) (a), (b) or (c), why the Master has refused to appoint the person elected as liquidator, or shall state that the appointment of the liquidator has been set aside by the court;
  - (c) shall be published in the **Gazette** not less than 14 days and not more than 21 days before the date fixed for the meeting;
  - (d) shall be sent by personal notice to every creditor who has proved a claim against the estate. [57(2)]

(6) The meeting mentioned in subsection (4) shall be held as if it were the continuation of a first meeting of creditors held after an adjournment thereof. [57(3)]

(7) If the Master refuses to appoint as liquidator a person elected at a meeting convened in terms of subsection (4), he or she shall notify such person in writing and state the reason for his or her refusal, as contemplated in subsection (2), whereupon the Master may, if he or she deems it necessary for the proper administration of the estate, appoint as joint liquidator any person whom he or she regards as a suitable person for appointment. [57(4)]

(8) All the provisions of this Act relating to a liquidator shall apply to a liquidator appointed by the Master under this section. [57(6)]

**71. Appointment of liquidator and security.** - (1) When final liquidation order has been made and a person elected as liquidator has given security to the satisfaction of the Master for the proper performance of his or her duties and lodged an affidavit stating that he or she is not disqualified in terms of section ~~53~~ 69, the Master shall, subject to section ~~54~~ 70, appoint him or her as liquidator and issue him or her with a letter of appointment, which shall be valid throughout the Republic. [56(2)]

(2) After the receipt of his or her letter of appointment the liquidator shall make known his or her appointment and his or her address by notice in the **Gazette**. [56(3)]

(3) The costs to the liquidator of giving security shall, up to a maximum amount which the Master deems reasonable, be included as part of the costs of the liquidation. [56(6)]

(4) The Master may at any time call for additional security, or reduce the security given by the liquidator if the liquidator has to the satisfaction of the Master accounted for any property in the estate and the Master is of the opinion that the reduced security will suffice to indemnify the estate or the creditors against any maladministration by the liquidator of the remaining property in the estate. [56(7)]

**72. Joint liquidators shall act jointly.** - (1) When more than one liquidator has been appointed in respect of an insolvent estate all such liquidators shall act jointly in performing their functions as liquidators and each of them shall be jointly and severally liable for every act performed by them jointly. [56(4)]

(2) Whenever liquidators of an insolvent estate disagree on any matter relating to the estate, the matter shall be referred to the Master who shall determine the question in issue or give directions as to the procedure to be followed for the determination thereof. [56(5)]

**73. Vacation of office of liquidator.** (1) A liquidator shall vacate his or her office -

- (a) if his or her estate is liquidated;
- (b) if he or she is in terms of the Mental Health Act, 1973 (Act No. 18 of 1973), received and detained in an institution contemplated in the said Act or if he or she is declared by a competent Court to be incapable of managing his or her own affairs;
- (c) if he or she is convicted in the Republic or elsewhere of an offence of which dishonesty is an element and is sentenced to imprisonment without the option of a fine or to a fine of at least R1000. [58]

(2) Whenever a liquidator of an insolvent estate vacates his or her office for whatever reason, any legal proceedings pending against the estate shall not lapse merely by reason of the vacating of office and may, with the permission of the court, be continued in the name of any remaining or newly appointed liquidator.

**74. Removal of liquidator from office by the Master.** - (1) The Master shall remove a liquidator from office -

- (a) if he or she was not qualified for appointment as liquidator or if his or her appointment was unlawful; [60(a)]
- (b) if the majority in value and the majority in number of the creditors who have proved claims against the estate -
  - (i) have requested the Master in writing to do so; or
  - (ii) have at a meeting of creditors of the estate, after notice of the intended resolution was given, resolved, that the liquidator shall be removed from office; [60(d)]
- (c) if he or she resigns from the office of liquidator; [61]
- (d) if he or she is temporarily absent from the Republic for a period longer than 60 days without the permission of the Master, or contrary to the conditions, if any, set by the Master when he or she gave permission;
- (e) if after his or her appointment he or she becomes disqualified from being a liquidator; [60(a)]

and the Master may remove a liquidator from office on the ground that he or she has failed to perform satisfactorily any duty imposed upon him or her by this Act or to comply with a lawful demand of the Master.

(2) The Master may, when a liquidator has been formally charged with the committal of an offence, or on the strength of a complaint made to him or her on affidavit, or evidence given at an ~~interrogation~~ questioning in terms of section ~~65, 66 or 67~~ 52, 53 or 54, or written answers in terms of section ~~67~~ 54 and pending an investigation by him or her into the suitability of a liquidator to remain in office, suspend the liquidator from office and, if necessary, appoint an interim liquidator for the preservation of the estate: Provided that the Master shall in the case of a complaint, evidence or written answers, without delay carry out the necessary investigation and either remove the liquidator from office or set aside the suspension and in the case of a liquidator charged with an offence remove the liquidator from office or set aside the suspension as soon as the prosecution has been finalised. [New provision]

(3) No person shall be appointed as interim liquidator unless he or she has given security to the satisfaction of the Master for the proper exercise of his or her powers and performance of his or her duties as interim liquidator and has lodged an affidavit stating that he or she is not disqualified in terms of section ~~53~~ 69. [New provision]

(4) The interim liquidator shall after his or her appointment proceed to recover and take into possession all the assets and property of the insolvent estate and all books of account, invoices, vouchers, business correspondence and any other records relating to the affairs of the debtor insolvent and may apply for a search warrant in terms of section ~~35~~ 40. [New provision]

(5) The interim liquidator shall give effect to any directions by the Master and may without the authorisation of the Master as contemplated in section ~~62~~ 45 perform any act which is necessary for the preservation of the estate until the suspension of the liquidator is set aside or another liquidator is appointed. [New provision]

(6) The interim liquidator is entitled to remuneration taxed by the Master in accordance with Tariff B in Schedule 2. [New provision]

(7) The interim liquidator vacates his or her office when the suspension of the liquidator is set aside or a liquidator is appointed in the place of the removed liquidator and shall deliver the assets, property, books, documents or records to the liquidator and give account to the liquidator. [New provision]

**75. Court may declare liquidator disqualified or remove liquidator.** - If in the opinion of the court it is in the interests of the proper administration of an insolvent estate, it may, on the application of the Master or any other interested party -

- (a) declare any person disqualified from being a liquidator of the estate; or
- (b) remove from office any person who has been appointed as liquidator; and
- (c) declare such a person incapable of being elected or appointed as liquidator under this Act during his or her lifetime or for such other period as determined by the court. [59]

**76. Election of new liquidator.** - (1) When one of two or more joint liquidators of an insolvent estate has vacated his or her office, has been removed from office by the Master or the court, or has resigned or died, the Master shall direct the remaining liquidator or liquidators to convene a meeting of creditors of the estate for the purpose of electing a new liquidator in the place of the one who vacated his office and when a majority of proved creditors in value at any time requests it the Master shall direct the liquidator or liquidators to convene a meeting for the election of a further liquidator.

(2) When every liquidator or the sole liquidator of an insolvent estate has vacated his or her office, has been removed from office by the Master or the court, or has resigned or died, the Master shall direct the liquidator appointed in terms of section 37 to convene a meeting of creditors of the estate for the purpose of electing a liquidator.

(3) The provisions of section 38 ~~46~~(2) shall **mutatis mutandis** apply to a meeting referred to in subsections (1) or (2). [62]

#### **CHAPTER 14 - RIGHTS AND DUTIES OF CREDITORS**

**77. Realization of security.** - (1) A secured creditor of an insolvent estate shall as soon as he or she becomes aware of the liquidation of the estate notify the liquidator in writing of the nature and extent of his or her security and the amount of his or her claim. [83(1)]

(2) If such property consists of securities as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial instrument as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), the creditor may, subject to the provisions of subsection (5), after giving the notice mentioned in subsection (1), realize the property in the following manner: [83(2)]

- (a) if it is property of a class ordinarily sold through a stockbroker as defined in section 1 of the Stock Exchanges Control Act, 1985, the creditor may, subject to the provisions of the said Act and (where applicable) the rules referred to in section 12 thereof, forthwith sell it through a stockbroker, or if the creditor is a stockbroker, also to another stockbroker; or

(b) if it is a financial instrument, the creditor may, subject to the provisions of the Financial Markets Control Act, 1989, and rules referred to in section 17 thereof, forthwith sell it through a financial instrument trader as defined in section 1 of the said Act, or, if the creditor is a financial instrument trader or financial instrument principal as defined in section 1 of the said Act, also to another financial instrument trader or financial instrument principal. [83(8)]

(3) A creditor who has realized property contemplated in subsections (2) shall forthwith pay over to the liquidator the proceeds after deduction of the reasonable costs of realization and furnish the liquidator with vouchers in support of the realization of the property and the costs of realization. [83(10)]

(4) A secured creditor with security other than property contemplated in subsection (2) shall as soon as possible after liquidation place the liquidator in possession of the security and a secured creditor with security contemplated in subsection (2) which has not been realized by the creditor before the first meeting of creditors, shall within five days after the commencement of that meeting or within such longer period as the liquidator may allow, place the liquidator in possession of the security and the liquidator shall cause the security to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, 1965 (Act 65 of 1965) or some other person approved by the Master and he or she shall supply the Master with a copy of the valuation. [83(6)]

(5) A creditor who has placed the liquidator in possession of property held by him or her as security shall not thereby lose the security to which he or she is entitled in respect of such property. [47]

(6) Subject to subsection (7) and section ~~62~~ 45(4), the liquidator shall realize the property made available to him or her pursuant to subsection (5) for the benefit of a creditor whose claim is secured by such property. [83(11)]



(7) The liquidator may, if authorised thereto by the Master or by resolution at a meeting of creditors of the estate, sell property constituting the security of a creditor whose claim ranks first in preference and who has proved his or her claim against the estate, to such creditor at a value agreed upon between the liquidator and the creditor. [New provision]

(8) After proof of his or her claim and the realisation of the security, any secured creditor is entitled to payment of his or her secured claim if he or she has furnished security to the satisfaction of the liquidator for the repayment of the payment with interest at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), if according to the confirmed account the creditor is not entitled to the payment or a part thereof. [83(10)]

**78. Attachment of property upon failure to deliver to liquidator.** - (1) If a creditor has failed to place the liquidator in possession of the property constituting his or her security as contemplated in section ~~73~~ 77(5), the liquidator shall send to him or her a written demand by personal notice to place the liquidator in possession and if the creditor fails to do so within 7 days after such demand was delivered or sent to him or her, the liquidator may obtain from the Master or the magistrate of the district where the property is or is situated a warrant directing the sheriff to attach such property and to place the liquidator in possession of the property.

(2) The creditor concerned shall be liable for all costs resulting from his or her failure to place the liquidator in possession of the property and if such costs cannot be recovered from the said creditor they shall form part of the costs of realizing the security in terms of section ~~75~~ 79(4). [83(6)]

**79. Application of proceeds of security.** - (1) A secured creditor shall be entitled to share in the distribution of the proceeds of his or her security only if he or she has proved a claim against the insolvent estate. [83(10)]

(2) Any interest due in respect of a secured claim in respect of any period not longer than two years before the date of liquidation shall be secured as if it were part of the capital debt. [89(3)]

(3) If the claim of a secured creditor exceeds the sum payable to him or her in respect of his or her security, he or she shall be entitled to rank against the estate in respect of the excess as a concurrent creditor, unless when proving his or her claim he or she had indicated that he or she relied solely on his or her security for the fulfilment of his or her claim. [83(12), 89(2)]

(4) The costs of maintaining, conserving and realizing any security shall be paid out of the proceeds of that security if sufficient and, if insufficient, the costs shall be paid by the secured creditor who would have been entitled, in priority to other creditors, to the proceeds if it had been sufficient to cover the said costs. [89(1)]

(5) The liquidator's remuneration in respect of any security and a proportionate share of any excess of minimum liquidator's remuneration over the ordinary tariff, a proportionate share of the costs incurred by the liquidator in giving security for his or her proper administration of the estate, a proportionate share of the Master's fees, calculated on the proceeds of the security, and if the property is immovable, any assessment rates as defined in subsection (7) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the liquidation and in respect of the period from that date to the date of the transfer of that property by the liquidator of that estate, with any interest or penalty which may be due on the said assessment rates in respect of any such period, shall form part of the costs of realization.

(6) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any assessment rates as defined in subsection (7) due thereon have been paid, that law shall not debar the liquidator of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if the liquidator has paid or offered reasonable security for payment of the assessment rates which may have been due on that property in respect of the periods mentioned in subsection (5) and no preference shall be accorded to any claim for such assessment rates in respect of any other period.

(7) For the purposes of subsections (4) and (6) "assessment rates" in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property, but excluding any payment for services rendered in respect of such property.

(8) After payment of the costs referred to in subsection (4), the balance of the proceeds of the security shall be applied in satisfying, in order of preference of secured creditors, first the capital sums of claims secured by the said security, and thereafter simple interest on the capital sums at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or a higher rate of interest by virtue of a lawful stipulation in writing, from date of liquidation to the date of payment. [95(1)]

(9) Any balance of the proceeds of the security remaining shall be added to the free residue of the insolvent estate. [83(12)]

(10) If a creditor whose claim is secured by a special mortgage over immovable property belonging to the insolvent estate has not proved his claim and the liquidator is not satisfied that the debt in question has been discharged or abandoned, he shall deposit with the Master for payment into the Guardians' Fund the proceeds of the sale of the former mortgagee's security to an amount not exceeding such capital amount of the said mortgage and such arrears of interest for which the mortgagee would have been a secured creditor, after deduction of an amount equal to the costs which the secured creditor would have had to pay if he or she had proved a claim and had stated in the affidavit submitted in support of his or her claim that he or she relied for the satisfaction of his or her claim solely on the proceeds of the sale of the said property. The amount so deposited or the part thereof to which the former mortgagee may be entitled shall be paid to him or her if, within a period of one year after confirmation in terms of section 95 of the distribution account under which the money is distributed, he or she applies therefor to the Master and the Master is satisfied after proof of the former mortgagee's claim, that he or she is entitled to the amount or part thereof.

(11) Any amount deposited with the Master in terms of subsection (7) which has not been paid out to the former mortgagee, as in that subsection provided, shall after the expiry of the year mentioned in that subsection be distributed among the creditors who have proved claims against the insolvent estate prior to the confirmation of the said distribution account, as if the amount had, at the time of such confirmation, been available for distribution among them.

(12) Any creditor claiming to be entitled to share in the said distribution shall apply in writing to the Master for payment of his or her share, and the Master may pay out to such creditor or may hand the money to the liquidator, if any, for distribution among the creditors entitled thereto, or, if there is no liquidator, may appoint a liquidator on such conditions as the Master may think fit to impose for the purpose of making such distribution.

(13) Any liquidator charged with the duty of making such a distribution shall submit to the Master a supplementary account in respect thereof and the provisions of this Act relating to an account shall apply in respect of such supplementary account. [95(2)-(5).]

**80. Security in respect of reserved ownership or financial lease.** - (1) If a creditor could immediately before the liquidation of the estate of a debtor assert his or her ownership to property delivered to a debtor under a reservation of ownership contract or a financial lease the property shall, subject to the rights of other secured creditors, upon the liquidation of the estate of the debtor be deemed to be held by the creditor or his or her successor in title (herein referred to as the creditor) as security for the amount outstanding in respect of the purchase price of the property or the balance owing on the financial lease. [84(1)]

(2) If property referred to in subsection (1) was returned by the debtor to the creditor within three months before the date of liquidation of the debtor's estate, the liquidator may demand from the creditor that he or she deliver to the liquidator the property or its value at the date when it was returned to him or her, subject to payment to the creditor by the liquidator or to deduction from the value (as the case may be) of the difference between the total amount payable under the transaction and the total amount actually paid. [84 (2)]

**81. Security in respect of landlord's hypothec.** - (1) A landlord's hypothec shall confer a preference with regard to the property which is subject to the hypothec, for rent due in respect of the period immediately prior to the date of liquidation, but not exceeding rent for a period of -

- (a) three months, if the rent is payable monthly or at shorter intervals than one month; or
- (b) six months, if the rent is payable at intervals exceeding one month but not exceeding three months; or

- (c) nine months, if the rent is payable at intervals exceeding three months but not exceeding six months; or
- (d) fifteen months, if the rent is payable at intervals exceeding six months. [85(2)]

(2) A tacit or legal hypothec other than a landlord's hypothec in subsection (1) shall not confer any preference against an insolvent estate. [85(1)]

**82. Certain mortgages afford no security or preference.** - With the exception of a *kustingsbrief*, no special bond or a general bond over movables, or a general clause in a special bond over movables passed for the purpose of securing the payment of an existing unsecured debt or obtaining a preference for an existing concurrent debt which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration, or for the purpose of securing the payment of a debt or obtaining a preference for a debt incurred in novation of or substitution for any such first-mentioned debt, shall confer any security or preference if the application for the liquidation of the estate of the debtor is lodged with the Registrar within six months after such lodging of the said bond with the registrar of deeds: Provided that a bond shall be deemed not to have been lodged as aforesaid if it was withdrawn from registration. [88]

## **CHAPTER 15 - COSTS OF LIQUIDATION AND APPLICATION OF FREE RESIDUE**

**83. Costs of liquidation.** - (1) The costs of liquidation shall include -

- (a) the sheriff's charges incurred since the date of liquidation; [97(2)(a)]
- (b) fees payable to the Master in connection with the liquidation; [97(2)(b)]
- (c) the costs, as taxed by the registrar of the court, incurred in connection with the application by a debtor for the liquidation of his or her estate or of a creditor for the liquidation of a debtor's estate, excluding the costs of opposition to such application, unless the court has ordered that such costs shall be included in the costs of liquidation; [97(3)]

- (d) the amount determined by the Master for the preparation of a statement of his or her affairs by the insolvent debtor as required by section 39; [97(2)(c)]
- (e) the remuneration of an interim liquidator appointed in terms of section 37 and of the liquidator, including the costs incurred by the liquidator in giving security for the proper administration of the estate; [97(2)(c)]
- (f) any expenses incurred by the Master or by a presiding officer in carrying out the provisions of this Act, unless otherwise ordered by the Master or the court and subject to the provisions of section ~~68~~ 55(2); [153(2)]
- (g) the salary, wages or fees of any person who was engaged or appointed by the liquidator in connection with the administration of the estate; [73(1A); 97(2)(c)]
- (h) such costs incurred in the administration of a deceased estate before the liquidation of the estate as the Master may allow; [New provision]
- (i) all other costs of the administration and the liquidation of the estate of the insolvent debtor. [97(2)(c)]

(2) The taxed fees of the sheriff in connection with proceedings stayed in terms of section 15 shall be regarded as costs of liquidation of the estate; [New provision]

(3) The costs of liquidation referred to in subsections (1) and (2) shall rank **pari passu** and abate in equal proportion, if necessary. [97(2)(c)]

**84. Application of the free residue.** - (1) The free residue of an insolvent estate shall be applied in the first place in defraying the costs of liquidation contemplated in section ~~79~~ 83, but excluding the costs referred to in section ~~75~~ 79(4). [97(1)]

- (2) Thereafter the balance of the free residue shall be applied in paying -
  - (a) to an employee who was employed by the insolvent debtor—
    - (i) any salary or wages, for a period not exceeding three months, due to an employee;

- (ii) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the insolvent debtor in the year in which liquidation occurred and the previous year, whether or not payment thereof is due at the date of liquidation;
    - (iii) any payment due in respect of any other form of paid absence for a period not exceeding three months immediately prior to the date of liquidation of the estate; and
  - (b) any contributions which were payable by the insolvent debtor, including contributions which were payable in respect of any of his or her employees, and which were, immediately prior to the liquidation of the estate, owing by the insolvent debtor, in his or her capacity as employer, to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or any similar scheme or fund under the provisions of any law or to such a fund administered by a bargaining or statutory council recognized in terms of the Labour relations Act, 1995 (Act No. 66 of 1995).
- (3)
- (a) The payments in subsection (2) shall not exceed the smaller of R20 000 or six months' salary in respect of a single employee.
  - (b) The Minister may amend the amount in paragraph (a) by notice in the **Gazette** in order to take account of subsequent fluctuations in the value of money.
- (4)
- (a) The claim referred to in subsection (2)(a)(i) shall be preferred to the claims referred to in subsections (2)(a)(ii), (iii) and (iv) and (2)(b).
  - (b) The claims referred to in subsection (2)(a)(ii), (iii) and (iv) shall be preferred to the claims referred to in subsection (2)(b) and shall rank equally and abate in equal proportions, if necessary.
  - (c) The claims referred to in subsection (2)(b) shall rank equally and abate in equal proportions, if necessary.

- (5) For the purposes of this section—
- (a) 'salary and wages' includes all cash earnings which the employee is entitled to receive from the employer, but excludes other benefits;
  - (b) 'unemployment fund' does not include the unemployment insurance fund referred to in section 6 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966).

(6) The Minister may, after consultation with the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act, 1994, by notice in the Gazette exclude from the operation of the provisions of this section a category of employees, schemes or funds specified in the notice by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in this section.

(7) A director of a company employed by the company or a member of a close corporation employed by the corporation is not entitled to payment in terms of this section.

- (8) (a) Thereafter any balance of the free residue shall be applied in paying maintenance due by ~~the insolvent~~ a natural person debtor in terms of a court order and in arrear at the date of liquidation of the estate, for a period not exceeding three months subject to the maximum amount of R20 000.
- (b) The Minister may amend the amount in paragraph (a) by notice in the **Gazette** in order to take account of subsequent fluctuations in the value of money. [New provision]

(9) Thereafter any balance of the free residue shall be applied in paying simple interest from the date of liquidation to the date of payment on the claims paid in terms of subsections (1) to (8) in their order of preference at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

(10) Thereafter the balance of the free residue shall, subject to any maximum amount in terms of a bond, be applied in payment of the proved claims of creditors who are holders of a



general bond over movables or a special bond over movables with a general clause, registered in the deeds registry, in their order of preference with simple interest from the date of liquidation to the date of payment at the rate of interest prescribed in the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or a higher rate of interest by virtue of a lawful stipulation agreed upon in writing.

(11) Thereafter any balance of the free residue shall be applied in payment of the concurrent claims of creditors proved against the estate, in proportion to the amount of each claim. [103(1)(a)]

(12) When the concurrent claims have been paid in full, any balance of the free residue shall be applied in payment of simple interest on such claims from the date of liquidation to the date of payment, in proportion to the amount of each such claim. [103(1)(b)]

(13) The interest referred to in subsection (12) shall be calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the amount of the claim bears interest at a higher rate of interest by virtue of a lawful stipulation agreed upon in writing. [103(2)]

(14) An employee of the ~~insolvent~~ debtor shall be entitled to payment in terms of subsection (2)(a) even though he or she has not proved a claim against the estate in respect thereof, but the liquidator may require the employee to submit an affidavit indicating the amount due to him or her. [100(3)]

**85. Costs incurred in respect of legal services.** - (1) Subject to the provisions of subsection (2), costs incurred to engage the services of attorneys or counsel or both to perform legal work on behalf of the estate except costs awarded against the estate in legal proceedings, shall not be subject to taxation by the taxing master of the court if the liquidator has entered into any written agreement in terms of which the fees of any attorney or counsel will be determined in accordance with a specific tariff: ~~Provided that no contingency fees agreement referred to in section 2(1) of the Contingency Fees Act, 1997 (Act No. 66 of 1997), shall be entered into without the express prior written authorization of the creditors.~~

(2) If—

- (a) the liquidator has not entered into an agreement under subsection (2); or
- (b) there is any dispute as to the fees payable in terms of such an agreement

the costs shall be taxed by the taxing master of the High Court having jurisdiction or, where the costs are not subject to taxation by the said taxing master, such costs shall be assessed by the law society or bar council concerned or, where the counsel concerned is not a member of any bar council, by the body or person designated under section 5(1) of the Contingency Fees Act, 1997.

(3) No bill of costs based upon an agreement entered into under subsection (1) shall be accepted as cost of liquidation of the estate, unless such bill is accompanied by a declaration under oath or affirmation by the liquidator stating—

- (a) that he or she had been duly authorized by either the creditors or the Master, as the case may be, to enter into such an agreement;
- (b) that any legal work specified in such bill has been performed to the best of his or her knowledge and belief;
- (c) that any disbursements specified in such bill have been made to the best of his or her knowledge and belief; and
- (d) that, to the best of his or her knowledge and belief, the attorney or counsel concerned has not overreached him or her.

(4) Notwithstanding anything to the contrary contained in this Act, the Master may disallow any costs incurred under this section if the Master is of the opinion that any such costs are excessive, unnecessary, incorrect or improper or that the liquidator acted in bad faith, negligently or unreasonably in incurring any such costs.[73(2)]

(5) If it appears to the court that a legal representative or legal adviser has, with intent to benefit himself or herself, improperly given legal advice or acted with intent to benefit himself or herself, whether for or against an insolvent estate, or has caused any unnecessary expense in that regard, the court may order that such expense or any part thereof shall be borne by that legal representative or legal adviser personally.[74]

**CHAPTER 16 - SPECIAL PROVISIONS RELATING TO THE SALE OF PROPERTY BELONGING TO THE INSOLVENT ESTATE**

**86. Non-compliance with provisions of Act in sale of property of insolvent estate.** - (1) If property of an insolvent estate is sold without the provisions of this Act having been complied with, the sale shall be void unless the purchaser proves that he or she acquired the property in good faith and for value and, where applicable, that a court order authorising the sale was not a prerequisite.

(2) Any person who disposes of property of an insolvent estate contrary to the provisions of this Act shall be liable to make good to the estate twice the amount of the loss which the estate might have sustained as a result of any such disposition. [82(8)]

**87. Bona fide sale of property in possession of insolvent debtor.** - (1) The owner of movable property which was in the possession or custody of a person debtor at the date of liquidation of that person's debtor's estate, shall, subject to the provisions of section 80, not be entitled to recover that property if it has, in good faith, been sold as part of the said person's debtor's insolvent estate, unless the owner has, by notice in writing given before the sale to the liquidator or the Master, demanded the return of that property. [36(5)]

(2) If property contemplated in subsection (1) has been sold as part of the insolvent estate, the former owner of the property may recover from the liquidator, before the confirmation of the liquidator's account as contemplated in section-~~90~~ 95 the net proceeds of the sale of that property, unless he or she has recovered the property itself from the purchaser, and thereupon he or she shall lose any right to reclaim the property as contemplated in subsection (1). [36(6)]

**88. Persons incompetent to acquire property from insolvent estate.** - The liquidator or an auctioneer employed to sell property of the insolvent estate in question or an employer, employee or associate of such liquidator or auctioneer shall not acquire any property of the insolvent estate unless the acquisition is authorised by an order of the court. [82(7)]

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**CHAPTER 17 - BANKING ACCOUNTS, INVESTMENTS AND MONEYS BELONGING TO THE INSOLVENT ESTATE**

**89. Banking accounts and investments.** - (1) The liquidator of an insolvent estate -

- (a) shall open a cheque account in the name of the estate with a bank within the Republic and shall deposit therein all moneys received by him or her on behalf of the estate;
- (b) may open a savings account in the name of the estate with a bank within the Republic and may transfer thereto from the account referred to in paragraph (a) moneys not immediately required for the payment of any claim against the estate;
- (c) may place moneys deposited in an account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate, on interest-bearing deposit with a Bank within the Republic. [70(1)]

(2) Whenever required by the Master to do so, the liquidator shall notify the Master in writing of the Bank and the office, branch office or agency thereof with which he or she has opened an account or placed a deposit referred to in subsection (1) and furnish the Master with a bank statement or other sufficient evidence of the state of the account. [70(2)]

(3) All cheques or orders drawn upon an account referred to in subsection (1) shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by every liquidator or his or her authorised agent. [70(4)]

(4) The Master and any surety for the liquidator, or any person authorised by such surety, shall have the same right to information in regard to an account referred to in subsection (1) as the liquidator himself or herself has, and may examine all vouchers relating thereto, whether in the hands of the bank or the liquidator. [70(5)]

(5) The Master may, after notice to the liquidator, direct in writing the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, to pay over into the Guardian's Fund all moneys standing to the credit of that account at the time of the receipt by the said Manager of that direction, and all moneys which may thereafter be paid into that account, and the said Manager shall carry out that direction. [70(6)]

**90. Recording of receipts by liquidator.** - (1) The liquidator of an insolvent estate shall immediately after his or her appointment open a record in which all moneys, goods, accounts and other documents received by him or her on behalf of the estate are recorded. [71(1)]

(2) The Master may at any time direct the liquidator in writing to produce the said record for inspection and every creditor who has proved a claim against the estate and, if the Master so orders, every person claiming to be a creditor or surety for the liquidator, may inspect the said record at all reasonable times. [71(2)]

**91. Unlawful retention of moneys or use of property by liquidator.** - (1) A liquidator who, without lawful cause, retains any money exceeding one hundred rand belonging to the insolvent estate of which he or she is liquidator, or knowingly permits his or her co-liquidator to retain such a sum of money longer than the earliest day after its receipt on which it was possible for him or her or his or her co-liquidator to pay that money into a bank, or who uses or knowingly permits his or her co-liquidator to use any property of the insolvent estate, except for the benefit of the estate, shall, in addition to any other penalty to which he or she may be liable, be liable to pay into the estate an amount equal to double the amount so retained or double the value of the property so used. [72(1)]

(2) The amount which a liquidator is liable to pay in terms of subsection (1) may be deducted from any remuneration to which he or she is entitled out of the insolvent estate or may be recovered from him or her by action in a court of law at the instance of his or her co-liquidator or the Master or any creditor who has proved a claim against the estate. [72(2)]

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**CHAPTER 18 - ESTATE ACCOUNTS, DISTRIBUTION AND CONTRIBUTION**

**92. Estate Accounts.** - (1) Subject to subsections (5), (6) and (7), a liquidator shall within a period of six months from the date of his or her appointment as final liquidator in terms of section ~~55~~ 71(1) submit to the Master a liquidation account and a distribution account of the proceeds of the property in the insolvent estate available for payment to creditors, or if any surplus is not required for the payment of claims, costs and charges or interest, the liquidator shall indicate a distribution account of such surplus, or if all realisable property in the insolvent estate has been realised and brought into account and the proceeds are insufficient to cover the costs and charges referred to in section ~~79~~ 83 a contribution account apportioning the liability for the deficiency among creditors who are liable to contribute. [91(1)]

(2) The accounts referred to in subsection (1) shall be substantially in the form set out in Form D of Schedule 1: Provided that the Master may insist on strict compliance with any item of the said Form. [New provision]

(3) If a liquidation account is not a final account, the liquidator shall from time to time as the Master may direct, but at least every six months unless he or she has received an extension of time as contemplated in subsections (5), (6) or (7), submit to the Master periodical accounts in form and in all other respects similar to the accounts mentioned in subsection (2). [92(4)]

(4) If the estate of a partnership is under liquidation, separate accounts shall be submitted in respect of the partnership and the estate of each partner whose estate is under liquidation. [92(5)]

(5) If a liquidator is unable to submit an account to the Master within the period of six months as required by subsection (1) or (3), he or she shall before the expiration of such period or within the further period that the Master may allow, submit to the Master an affidavit in which he or she shall state -

- (a) the reasons for his or her inability to submit the account concerned; and
- (b) those affairs, transactions or matters relating to the insolvent debtor or the insolvent estate as the Master may require; and

(c) the amount of money available for payment to creditors or, if there is no free residue or the free residue is insufficient to meet all costs referred to in section ~~79~~ 83, the deficiency the creditors are liable to make good, and the Master may thereupon extend such period to a date determined by him or her. [109(1)]

(6) If the Master extends the period in terms of subsection (5) the liquidator shall inform proved creditors of the extension by personal notice and enclose a copy of the affidavit in terms of the subsection.

(7) If a liquidator fails to submit an account within the period required by subsection (1) or before the date determined by the Master in terms of subsection (5), the Master may, subject to subsection (7), serve a notice on the liquidator in which he or she is required -

- (a) to submit the account concerned to the Master; or
- (b) if he or she is unable to submit such account, to submit an affidavit as contemplated in subsection (5) to the Master,

within a period of 14 days from the date of the notice and the Master may, if the account concerned or the said affidavit is not submitted to him or her, after the expiration of the said 14 days extend such period to a date determined by him or her. [109(2)]

(8) If the Master refuses to extend the period as contemplated in subsection (7), the liquidator may apply by motion to the court, after having given the Master notice of his or her intention to make the application, for an order extending the said period and the court may thereupon make such order as it deems fit. [109(3)]

(9) If a liquidator has funds in hand which, in the opinion of the Master, ought to be distributed ~~among creditors of the estate~~ and the liquidator has not submitted to the Master a plan for the distribution of those funds, the Master may direct him or her in writing to submit to the Master a plan for the distribution of those funds, although the period prescribed in subsection (1) or (3) may not have elapsed. [110]

(10) If any liquidator fails to submit any account to the Master as and when required by or under this Act, or to submit any vouchers in support of such account upon the request of the Master, or to perform any other duty imposed upon him by this Act or to comply with any

reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of an estate, the Master or any person having an interest in the liquidation or distribution of the estate may, after giving the liquidator not less than fourteen days' notice, apply to the court for an order directing the liquidator to submit such account or any vouchers in support thereof or to perform such duty or to comply with such demand.

(11) The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the liquidator **de bonis propriis**.

**93. Copies of liquidator's accounts to be open for inspection.** - (1) The liquidator shall as soon as possible after he or she has submitted an account to the Master as contemplated in section 87~~92~~ transmit a copy of the account to the magistrate of the district in which the ~~insolvent debtor~~ resided or carried on business before his or her ~~insolvency liquidation~~ in the case where there is no Master's office in the said district, and if the ~~insolvent debtor~~ resided or carried on business in a portion of a district in respect of which an additional magistrate or assistant magistrate permanently carries out the functions of the magistrate of the district at a place other than the seat of the magistracy of that district, a copy of the account shall be sent to that additional magistrate or assistant magistrate. [108(1)]

(2) The liquidator shall give notice in the **Gazette** that the account will lie open for inspection by ~~creditors~~ any person having an interest in the estate at the place and during the period stated in the notice and shall give personal notice to each creditor who has proved a claim against the estate. [108(2)]

(3) Every such account and every copy thereof transmitted to a magistrate shall be open for inspection by ~~creditors~~ any person having an interest in the estate of the estate in question at the office of the Master and of such magistrate during a period of 14 days as from the date of the publication of the notice in the **Gazette**. [108(3)]

(4) A magistrate who has received a liquidator's account shall cause a notice to be affixed in a public place in or about his or her office that the account will lie open for inspection at his or her office during the period stated in the notice. [108(4)]



(5) After the expiration of the said period the magistrate shall endorse upon the account a certificate that the account was open for inspection at his or her office as hereinbefore provided, and he or she shall transmit the account to the Master. [108(5)]

**94. Objections to liquidator's account.** - (1) The ~~insolvent~~ debtor or any person having an interest in the estate may at any time after the commencement of the period contemplated in section ~~88~~ 93 until the liquidator's account is confirmed in terms of section ~~90~~ 95 submit to the Master in writing any objection to that account, stating the reasons for such objection. [111(1)]

(2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he or she is of the opinion that the account is in any respect incorrect or that it contains any improper charge or that the liquidator acted **mala fide**, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he or she may direct the liquidator to amend the account or may give such other direction in connection therewith as he or she may think fit. [111(2)]

(3) Any person who feels aggrieved by any such direction of the Master or by the Master's refusal to sustain an objection so lodged, including the liquidator, may within 14 days as from the date of the Master's direction apply to the court for relief and the court shall have the power to consider the merits of any such matter, to hear evidence and to make any order it deems fit. [111(2)(a)]

(4) When any direction by the Court affects the interests of a person who has not lodged an objection the account so amended shall again lie open for inspection by creditors in the manner and with the notice prescribed by section ~~88~~ 93, unless the person affected as aforesaid consents in writing to the immediate confirmation of the account. [111(2)(b)]

**95. Confirmation of liquidator's accounts.** - When a liquidator's account has been open to inspection as prescribed by this Act and -

(a) no objection has been lodged; or

- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been open for inspection, if necessary, and no application for relief has been made to the court in terms of section ~~89~~ 94(3); or
- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to court for relief,

the Master shall confirm the account and his or her confirmation shall notwithstanding mistakes in the account be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it. [112]

**96. Distribution of estate and collection of contributions.** (1) Immediately after the confirmation of a liquidator's account the liquidator shall give notice of the confirmation in the **Gazette** and shall state in that notice that a dividend to creditors, and where applicable, members or other persons, is in the course of payment or that a contribution is in the course of collection from creditors, as the case may be, and that every creditor liable to contribute is required to pay to the liquidator the amount for which he is liable. [113(1)]

(2) If any contribution is payable the liquidator shall specify fully in that notice the address at which payment of the contribution is to be made and he or she shall send a copy of the notice by personal notice to every creditor who is liable to contribute. [113(2)]

(3) Immediately after the confirmation of a liquidator's account but not later than two months after such confirmation the liquidator shall in accordance therewith distribute the estate or collect from each creditor who is liable to contribute, the amount for which he or she is liable. [113(3)]

**97. Liquidator to produce acquittances for dividends or pay over unpaid dividends to Master.** - (1) The liquidator shall within three months after the confirmation of the account lodge with the Master the receipts for dividends paid to creditors or other persons and if there is a contribution account, the vouchers necessary to complete the account: Provided that a cheque purporting to be drawn payable to a creditor or other person in respect of a dividend due to him or her and paid by the banker on whom it is drawn, or a statement by a Bank that the Bank of the creditor has credited or has been instructed to credit the account of the creditor with the amount of the dividend shall be accepted by the Master in lieu of any such receipt. [114(1)]

(2) If any such dividend has at the expiration of a period of two months from the confirmation of the account under which it was payable, not been paid to the creditor or other person who is entitled thereto, the liquidator shall within three months after confirmation of the account pay the dividend over to the Master who shall deposit it in the Guardian's Fund on account of the creditor or other person. [114(2)]

**98. Surplus to be paid into Guardian's Fund.** - Except in the case of a partnership debtor, in which case the provisions of section 48 shall apply, if after the confirmation of a final account there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the liquidator shall after the confirmation of that account-

(a) in the case of a natural person debtor, pay the surplus over to the Master who shall deposit it in the Guardian's Fund and after the rehabilitation of the insolvent shall pay it out to the debtor at his or her request; [116]

(b) in the case of a trust debtor, pay the surplus over to the trustees of the trust or, if there are no trustees, to the Master who shall deposit it in the Guardian's Fund and upon application by the capital beneficiaries as determined by the trust deed, pay it out to them: Provided that if the circumstances for the capitalisation of the trust as determined by the trust deed have not yet taken place, the Master may, after having appointed new trustees in the trust concerned, pay such funds to the new trustees so appointed;

(c) in the case of a company debtor, distribute such surplus among the members according to their rights and interests in the company: Provided that such distribution shall be subject to any contrary provisions contained in the memorandum or articles of such company;

(d) in the case of a close corporation debtor, distribute such surplus among the members according to their rights and interests in the corporation: Provided that such distribution shall be subject to any contrary provisions contained in the founding statement, or association agreement entered into by the members, of such corporation;

(e) in the case of an association debtor, distribute such surplus among the members according to their rights and interests in the association: Provided that such distribution shall be subject to any contrary provisions contained in the founding statement, constitution, memorandum or articles of association of such association.

**99. Contribution by creditors towards cost of liquidation.** - Where there is no free residue in an insolvent estate or where the free residue is insufficient to meet all the costs mentioned in section ~~79~~ 83 the following rules shall apply with regard to the liability of creditors to pay contributions towards defraying any such deficiency: [106]

- (a) The creditor upon whose application the liquidation order was made, whether or not he or she has proved a claim against the estate, shall be liable to contribute not less than the amount he or she would have had to contribute if he or she had proved a claim for the amount stated in his or her application for liquidation and where he or she is a secured creditor, without reliance on his or her security; [14(3)]
- (b) each concurrent creditor shall be liable to pay a contribution in proportion to his or her concurrent claim; [106]
- (c) if a creditor has withdrawn his or her claim, he or she shall be liable to pay a contribution only so far as is provided in section ~~50~~ 66 and if a creditor withdraws his or her claim within 5 days after the date of any resolution of creditors he or she shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution; [106(b)]
- (d) if a claim has been reduced or disallowed by a liquidator in terms of section ~~46~~ 62(4) the creditor shall, unless the claim is subsequently admitted by means of compromise or proved in action at law, be liable to pay a contribution, in respect of costs incurred before the date of notice referred to in the said subsection on the amount of the claim before the claim was reduced or disallowed and in the case of a reduced claim in respect of costs incurred after the date of the said notice, on the amount to which the claim was reduced by the liquidator. [New provision]

**100. Enforcing payment of contribution.** - (1) If a creditor who is liable to contribute under an account has failed to pay the amount of his or her liability within a period of 30 days after the date of the sending or delivery to him or her of a notice referred to in section ~~94~~ 96(2) the liquidator may take out a writ of execution for the amount of the creditor's liability in the magistrate's court in which the creditor could be sued for the contribution in question. [118(1)]

(2) Whenever a creditor who is liable to contribute under an account is in the opinion of the Master and of the liquidator unable to pay the contribution for which he or she is liable or whenever the liquidator has incurred expenses in connection with the recovery of any contribution,

which expenses are in the opinion of the Master and the liquidator irrecoverable, the liquidator shall as soon as practicable and in any event within such period as the Master may prescribe therefor, frame and submit to the Master a supplementary contribution account wherein he or she shall apportion the share of the creditor who is unable to pay or the expenses in question among the other creditors who are in the opinion of the Master and the liquidator able to pay. [118(2)]

(3) The provisions of subsection (2) shall **mutatis mutandis** apply whenever a creditor who is liable to contribute under a first or further supplementary account is, in the opinion of the Master and the liquidator, unable to pay the contribution for which he or she is liable, or whenever the liquidator has incurred expenses in connection with the recovery of a contribution under a first or further supplementary account which are, in the opinion of the Master and the liquidator, irrecoverable by the liquidator. [118(3)]

(4) The liquidator may in lieu of complying with the requirements of section ~~88~~ 93 in connection with any supplementary contribution account, furnish a copy of that ~~plan~~ account to every creditor who is liable to contribute thereunder and thereupon the provisions of subsection (1) shall **mutatis mutandis** apply. [118(4)]

## **CHAPTER 19 - REHABILITATION OF NATURAL PERSONS**

**101. Rehabilitation.** - (1) ~~An insolvent~~ A natural person debtor may, subject to the provisions of subsection (2), apply to the court for an order for his or her rehabilitation -

- (a) at any time after the confirmation by the Master of a distribution account providing for the full payment of all claims proved against the estate, with interest thereon from the date of liquidation, calculated in terms of section ~~80~~ 84(5) and (6) and all costs of liquidation; or [124(5)]
- (b) at any time after the Master has issued a certificate of acceptance of a composition as contemplated in section ~~71~~ 119; or [124(1)]
- (c) in any other case, but subject to subsection (2), after the expiration of four years from the date of the confirmation by the Master of the first liquidation account in the estate. [124(2)(a)]

(2) In the case where ~~an insolvent~~ a debtor has been convicted in respect of the existing or any prior insolvency for an offence referred to in section ~~101~~ 136(1)(a), (b), (d), (e) or (g) or 2(e) or (f) or for any other fraudulent act, the ~~insolvent~~ debtor may not apply to the court for an order for his or her rehabilitation before a period of five years has elapsed from the date of the conviction concerned.

(3) The Master may on the request of the ~~insolvent~~ debtor recommend to the court that an application referred to in subsection (1)(c) may be made before the expiration of the said period of four years but no such application shall be made within a period of twelve months from the said date or, in the case where the ~~insolvent's~~ debtor's estate was liquidated prior to the liquidation in respect of which he or she applies for rehabilitation, within a period of three years from the said date. [124(2)(b) and proviso to 124(2)]

(4) ~~An insolvent~~ A debtor who wishes to apply for a rehabilitation order shall -

- (a) send a written notice of his or her intended application by mail, telefax, electronic mail, or personal delivery-
  - (i) in the case of an application contemplated in subsection (1)(a), to the Master and the liquidator, not less than four weeks before the date of the intended application; or [124(1)]
  - (ii) in the case of an application contemplated in subsection (1)(b), (c) or (d), to the Master and the liquidator (if there is one), not less than six weeks before the date of the intended application, and by way of notice in the **Gazette**, and he or she shall send a copy of the said notice by mail, telefax, electronic mail, or personal delivery to every creditor of the estate whose name and address are known to him or her or which he or she can readily obtain; and [124(2)]
- (b) furnish security to the registrar of the court in the amount of or to the value of R5000 in respect of the costs of any person who may oppose the application for rehabilitation and who may be awarded costs by the court. [125]

(5) The Minister may amend the amount in subsection (3) by notice in the **Gazette** in order to take account of subsequent fluctuations in the value of money.

(6) The notice referred to in subsection (4)(a)(i) or (ii) shall state the estimated value and reflect full details of the assets of the ~~insolvent~~ debtor at the time of the application. [New provision]

(7) ~~An insolvent~~ A debtor shall in support of his or her application for rehabilitation submit an affidavit that he or she has made a complete surrender of his or her estate and that he or she has not granted or promised any benefit to any person or entered into any secret agreement with intent to induce the liquidator of the estate or any creditor not to oppose the application for rehabilitation. The said affidavit shall contain a statement of his or her assets and liabilities and of his or her earnings and his or her own as well as his or her spouse's contribution to his household, on the date of the application. Furthermore the court shall be apprised of the dividend (if any) paid to his or her creditors, what further assets in the insolvent estate are available for realisation and the estimated value thereof, the total amount of all claims proved against the estate, and the total amount of his or her liabilities at the date of liquidation of his or her estate. If application is made for rehabilitation pursuant to subsection (1)(b), the ~~insolvent~~ debtor shall set out the particulars of the composition and shall state whether there are or are not creditors whose claims against the estate have not been proved, and if there are such creditors, shall state their names and addresses and particulars of their claims. [126]

(8) A liquidator who has received a notice contemplated in subsection (4)(a) shall report to the Master any facts which in his or her opinion would warrant the court to refuse, postpone or qualify the ~~insolvent's~~ debtor's rehabilitation. [124(4)]

(9) A partnership whose estate has been sequestrated shall not be rehabilitated.

**102. Opposition to rehabilitation or refusal of rehabilitation by court.** - (1) The Master shall report to the court on the merits of the application and furnish a copy of the report to the applicant or the applicant's attorney. The Master, the liquidator or any other person having an interest in the estate may appear in person or through a legal representative to oppose the application. [127(1)]

(2) If the court is satisfied on the strength of a certificate by the Master or on any other evidence that the ~~insolvent~~ debtor has intentionally impeded, obstructed or delayed the administration of his or her insolvent estate -

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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- (a) through failure to submit a statement of affairs in accordance with the requirements of the Act; or
- (b) through failure to make available to the liquidator of the estate in accordance with written directives by the liquidator or the Master property belonging to the insolvent estate which was in his or her possession or custody or under his or her control or any book, document or record relating to his or her affairs which was in his or her possession or custody or under his or her control; or
- (c) through failure to notify the liquidator of the estate of the existence of any book, document, or record relating to his or her affairs which was not in his or her possession or custody or under his or her control, and as to where such book, document, or record could be found, or of any property belonging to his or her insolvent estate which was not mentioned in his or her statement of affairs, and as to where such property could be found; or
- (d) through failure to keep the liquidator of the estate informed of any change of his or her address during the period of three years after the liquidation of his or her estate; or
- (e) through failure to comply with section ~~15~~ 16(3); or
- (f) through any other act or omission,

the court shall not grant a rehabilitation order until the expiry of a period of 10 years after the date of liquidation of his or her estate. [New provision]

(3) The court may, whether the application for rehabilitation is opposed or not, refuse the application or postpone the hearing of the application or grant the application for rehabilitation subject to any condition it may think fit, including any provision that the ~~insolvent~~ debtor shall consent to judgment against him or her for the unpaid portion of a debt proved against the estate or which could have been proved against the estate or for such lesser amount that the court may determine, but in such instance no execution shall take place in terms of the judgment save with permission of the court and after proof that the ~~insolvent~~ debtor has since the date of liquidation of the estate acquired property or income which is available for the payment of his or her debts, and apart from such judgment the court may impose any other condition with regard to any property or income which may in future accrue to the ~~insolvent~~ debtor. The court may order the ~~insolvent~~ debtor to pay the costs of any opposition to the application for rehabilitation, unless the court is satisfied that the opposition is vexatious. [127(2), (3)]



(4) When granting an order for rehabilitation in respect of an application made in terms of section 96 101(1)(b), the court may order that any obligation incurred by the applicant on or before the date of of his or her estate and which, but for the order, would be discharged as a result of the rehabilitation, shall remain of full force and effect notwithstanding the rehabilitation. [127(4)]

(5) The registrar of the court shall forthwith give notice to the Master of every order for rehabilitation which is granted by the court. [127(5)]

**103. Rehabilitation by effluxion of time.** - (1) Any insolvent debtor not rehabilitated by the court within a period of ten years from the date of liquidation of his or her estate, shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent debtor orders otherwise prior to the expiration of the said period of ten years. [127A(1)]

(2) If a court makes an order under subsection (1), the registrar of the court shall send a copy of the order to the Master and every officer charged with the registration of titles to immovable property in the Republic. The Master shall forward a copy of the order to the liquidator.[127A(2)]

(3) Whenever such officer receives such order he or she shall enter a **caveat** against the transfer of all immovable property and the cancellation of every bond registered in the name of the insolvent debtor or which belongs to the insolvent debtor. The **caveat** remains in force until the date on which the insolvent debtor is rehabilitated. [127A(3), (4)]

**104. Effect of rehabilitation.** - (1) Subject to the provisions of subsection (2) and any conditions which the court may have imposed when granting an order for rehabilitation, the rehabilitation of an insolvent a debtor shall have the effect -

(a) of putting an end to the liquidation; [129(1)(a)]

- (b) of discharging all debts of the ~~insolvent~~ debtor which were due, or the cause of which had arisen, on or before the date of liquidation, and which did not arise out of any fraud on his or her part or the commission by him or her of any offence referred to in sections ~~101~~ 136(1)(e) or section ~~101~~ 136(1)(c) in respect of a previous liquidation; and [129(1)(b)]
- (c) of relieving the ~~insolvent~~ debtor of every disability resulting from the liquidation.

(2) The rehabilitation of an ~~insolvent~~ a debtor shall not affect -

- (a) the rights of a liquidator or of creditors under a composition;
- (b) the power or duties of the Master or the duties of the liquidator in connection with a composition;
- (c) the right of the liquidator or of creditors to any part of the ~~insolvent's~~ debtor's estate which is vested in the liquidator but as yet not distributed by him or her;
- (d) the liability of a surety for the ~~insolvent~~ debtor;
- (e) the liability of any person to pay any penalty or suffer any punishment under any provision of this Act. [129(3)]

(3) Evidence of a conviction on any offence contemplated in subsection (1)(b) shall be admissible in subsequent civil proceedings as **prima facie** evidence that the ~~insolvent~~ debtor committed the offence in question.

**105. Penalties for unlawful inducement to accept compromise or in connection with rehabilitation.**

(1) It shall be unlawful for any person to offer or promise to any other person any benefit in order to induce him or her to accept an offer of composition or to agree to or refrain from opposing an application for the rehabilitation of an ~~insolvent~~ a debtor, or as a consideration for his or her acceptance of an offer of composition or for supporting or refraining from opposing an application for the rehabilitation of an ~~insolvent~~ a debtor and any person who has accepted or agreed to accept any such benefit, whether for himself or herself or for any other person, shall be liable to pay, by way of penalty, for the benefit of the other creditors of the insolvent estate -

- (a) a sum equal to the amount of any claim proved by him or her against the estate; and

- (b) the amount or value of the benefit promised or given; and
- (c) in the case of a composition, the amount paid or to be paid to him or her under the composition. [130]

(2) The liquidator shall be competent to enforce the penalty referred to in subsection (1) and if he or she fails to do so any creditor of the estate may enforce the penalty in the name of the liquidator, if he or she indemnifies the liquidator against all costs in connection with such action. [131]

**CHAPTER 20 - SPECIAL PROVISIONS RELATING TO TRUST DEBTORS, COMPANY DEBTORS, CLOSE CORPORATION DEBTORS AND ASSOCIATION DEBTORS IN LIQUIDATION**

**106. Provisions relating to contributories in the case of a company limited by guarantee.**

(1) In the case of a liquidation by the Court or of a creditors' voluntary liquidation by resolution of a company (incorporated in terms of the Companies Act 61 of 1973) limited by guarantee, the liquidator shall, if necessary, settle a list of contributories.

(2) A past member of a company limited by guarantee shall not be liable to contribute to its assets unless-

- (a) at the commencement of the liquidation there is unsatisfied debt or liability of the company contracted before he ceased to be a member; and
- (b) it appears to the liquidator that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

(3) As soon as the liquidator has settled the list of contributories, he shall send a notice to every person included in the list, stating that fact and the extent of the liability of that person.

(4) Any person who objects to his inclusion in the list, shall be entitled within fourteen days from the date of the notice to file an objection with the liquidator in the form of an affidavit giving full reasons why he should not be included in the list.

(5) The liquidator may accept the objection and amend the list of contributories or he may reject such objection and shall, if the objection is rejected, notify the person concerned accordingly by registered post.

(6) A person whose objection has been rejected, shall be entitled, within fourteen days from the date of the notice provided for in subsection (3), to apply to the Master for a ruling as to whether his name should be included in the list, and the Master shall direct the liquidator to include his name in or to exclude it from the said list.

(7) (a) A liquidator shall proceed to recover from the contributories a proportion of or the full amount of their liability as may be required from time to time, taking into consideration the probability that some of the contributories may partly or wholly fail to pay the amount demanded from them.

(b) In the event of the death of any contributory or the insolvency of his estate, the liquidator may recover the contribution from the estate concerned.

(8) (a) The liability for the payment of any amount by a contributory to the company shall be a debt due by him to the company as from the date on which the amount was demanded from him by the liquidator.

(b) A contributory shall not be entitled to set off against his liability any amount due to him by the company in respect of dividends, profits or directors' remuneration.

(9) The liquidator shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

(10) A letter of demand by the liquidator to a contributory for the payment of a contribution shall be *prima facie* evidence that the amount thereby appearing to be due, is due.

(11) All books and papers of the company and of the liquidator shall, as between the contributories and the company, be *prima facie* evidence of the truth of all matters therein recorded. [Sections 395 to 399 of the Companies Act]

**107. Attorney-General may make application to Court for disqualification of director.**

(1) When an Attorney-General, upon receipt of the report referred to in section 57 and after such further enquiry as he may deem fit, is satisfied that there are grounds for an application to the Court for an order in terms of section 219 of the Companies Act 61 of 1973, he may make such application to the Court.[Section 401 of the Companies Act]

**108. Dissolution of company debtors, close corporation debtors and association debtors. -**

(1) In any liquidation, when the affairs of a company debtor or close corporation debtor have been completely liquidated, the Master shall transmit to the Registrar of Companies and Close Corporations a certificate to that effect and send a copy thereof to the liquidator.

(2) The Registrar of Companies and Close Corporations shall record the dissolution of the company or close corporation and shall publish notice thereof in the Gazette.

(3) The date of dissolution of the company or close corporation shall be the date of recording referred to in subsection (2).

(4) In the case of an association debtor the certificate of the Master under sub-section (1) shall constitute its dissolution.

[Section 419 of the Companies Act]

**109. Court may declare dissolution void. -** When a company debtor, close corporation debtor or association debtor has been dissolved, the Court may at any time on an application by the liquidator of such debtor, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against such debtor as might have been taken if such debtor had not been dissolved.

[Section 420 of the Companies Act]

**110. Registrar of Companies and Close Corporations to keep a register of directors of dissolved companies and members of other bodies corporate. -** (1) The Registrar of Companies and Close Corporations shall establish and maintain a register of directors of

companies and members of other bodies corporate which have been dissolved and which were liquidated under the terms of this Act, and cause to be entered therein, in respect of each such director or member

(a) his full forenames and surname, and any former forenames and surname, his nationality, if not South African, his occupation, his date of birth and his last known residential and postal addresses;

(b) the name of the company or body corporate of which he was a director or member, as the case may be, when such company or body corporate was dissolved for the reason that it was liquidated in terms of this Act and, where more than one company or body corporate was dissolved at the same time, the names of those companies or bodies corporate;

(c) the date of his appointment as director or the date on which he became a member;

(d) the date of dissolution of the company or companies or body corporate or bodies corporate.

(2) The liquidator shall, within fourteen days after the date of the certificate referred to in section 108 (1), send to the Registrar of Companies and Close Corporations on a prescribed form, in duplicate, in respect of each director of the company or member of the body corporate who was a director or member thereof at a date within two years before the commencement of the liquidation, the particulars referred to in subsection (1) (a) to (d) of this section, together with a statement as to which director or member, in his opinion, was the effective cause of the company or body corporate being liquidated in terms of this Act.

(3) The Registrar of Companies and Close Corporations shall, under cover of a prescribed form, send to each director or member one copy of the particulars furnished under subsection (2) in respect of that director or member, and where the liquidator has in a statement furnished under the said subsection expressed any opinion as to which director or member was the effective cause of the company or body corporate being liquidated in terms of this Act, the Registrar of Companies and Close Corporations shall at the same time send a copy of such statement to the director or member named therein.

(4) A director or member may, within one month of the date of the form referred to in sub-section (3), object, by affidavit or otherwise, to his name being entered in the register referred to in subsection (1).

(5) If after considering the objections made by or on behalf of a director or member or if a director or member fails to object and the Registrar of Companies and Close Corporations is of opinion that the name of the director or member should be entered in the register, he shall inform such director or member accordingly.

(6) The Registrar of Companies and Close Corporations shall, on the expiration of one month after the date of his decision under subsection (5) or, if an application under subsection (7) is then pending, after the application has been disposed of and the Court has not ordered otherwise, enter the name of the director or member in the register.

(7) Any person aggrieved by the decision of the Registrar of Companies and Close Corporations to make an entry or not to make an entry in the register, shall be entitled, within one month of the date of such decision, to apply to the Court for relief, and the Court shall have power to consider the merits of the matter, to receive further evidence and to make any order it deems fit.

(8) Any liquidator who fails to comply with the provisions of subsection (2), shall be guilty of an offence.

(9) The provisions of section 9 of the Companies Act 61 of 1973, as to the inspection of documents kept by the Registrar of Companies and Close Corporations and extracts therefrom certified by the Registrar of Companies and Close Corporations shall **mutatis mutandis** apply to the register to be maintained by him under this section. [Section 421 of the Companies Act]

**111. Change of address by directors and secretaries and certain former directors and secretaries.** (1) Any person who is a director or secretary of a company debtor which is being liquidated and who, after the liquidation of such company debtor has commenced but before the liquidator's final account has in terms of section 95 been confirmed, changes his residential or

postal address, shall notify the liquidator by registered post of his new residential or postal address within fourteen days after such change, or, if the liquidator has not been appointed on the date of such change, within fourteen days after the appointment of the liquidator.

(2) Any person who fails to comply with any requirement of subsection (1) shall be guilty of an offence.

(3) Whenever at the trial of any person charged with an offence referred to in sub-section (2) it is proved that such person is a director or secretary of a company debtor which is being liquidated and that he has changed his residential or postal address after the liquidation of that company has commenced and that the liquidator has no written record of such change, it shall be presumed, unless the contrary is proved, that he did not notify the liquidator of such change. [Section 363A of the Companies Act]

(4) The provisions of subsections (1), (2) and (3) shall apply **mutatis mutandis** to members of a close corporation registered in terms of the Close Corporations Act 69 of 1984. [New provision in respect of close corporations]

**112. Delinquent directors and others to restore property and to compensate the company.**

(1) Where in the course of the liquidation or judicial management of a company debtor incorporated in terms of the Companies Act 61 of 1973, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible. [Section 423 of the Companies Act]



**113. Private prosecution of directors and others.** (1) If it appears in the course of the liquidation of a trust debtor, company debtor, close corporation debtor or association debtor that any past or present trustee, director, member or officer of the debtor has been guilty of an offence for which he is criminally liable under this Act or, in relation to the debtor or the creditors of the debtor, under the common law, the liquidator shall cause all the facts known to him which appear to constitute the offence, to be laid before the Attorney-General concerned and, if the said Attorney-General certifies that he declines to prosecute, the liquidator may, subject to the provisions of section 45, institute and conduct a private prosecution in respect of such offence.

(2) The court may, upon application by the liquidator, order the whole or any portion of the costs and expenses incidental to such private prosecution to be paid out of the assets of the debtor in priority to all other liabilities. [Section 426 of the Companies Act]

**CHAPTER 21 - PERSONAL LIABILITY FOR FRAUDULENT TRADING,  
INSOLVENT TRADING AND BY MEMBERS OF CLOSE CORPORATIONS**

**114. Liability for fraudulent or reckless conduct of business.** (1) When a debtor is liquidated in terms of the provisions of this Act, or is placed under judicial management in terms of Chapter 24 of this Act, and it appears that any business of the debtor was or is being carried on recklessly or with intent to defraud creditors of the debtor or creditors of any other person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the debtor, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the debtor as the court may direct. [Section 424(1) of the Companies Act]

(2) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made. [Section 424(4) of the Companies Act]

**115. Insolvent trading.** (1) If a debtor is liquidated in terms of the provisions of this Act, or is placed under judicial management in terms of the provisions of Chapter 24 of this Act, the court may, upon application, declare that any person responsible for the management of the debtor who caused or allowed the debtor to incur a debt at a time when he or she knew or had

reasonable grounds to suspect that the debtor would not be able to pay such debt as well as its other debts as they fell due, shall be liable to pay such amount as awarded under this section.

(a) For the purposes of this section the facts which a person referred to in subsection (1) ought to know or ascertain, the conclusions which he or she ought to reach and the steps which he or she ought to take are those which would be known or ascertained or reached or taken by a reasonable diligent person having both-

(i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out similar functions as are entrusted to and carried out by that person in relation to the debtor; and

(ii) the general knowledge, skill and experience that such person has.

(b) Proof that-

(i) the liabilities (including prospective and contingent liabilities) of the debtor exceeded its assets, fairly valued, when the debt was incurred; or

(ii) that the particular person committed an offence in respect of the accounting records of the debtor in respect of the period during which the debt was incurred; or

(iii) that the particular person failed to take all reasonable steps to ensure that the accounting records in respect of the period during which the debt was incurred are surrendered or transferred to the liquidator,

shall be prima facie evidence that the particular person, at the time the debt was incurred, had reasonable grounds to believe that the debtor would not be able to pay its debts as they fell due.

(2) Without prejudice to the defences which may be raised against an application under this section, a person, if he or she establishes one or more of the following defences, will not be held liable in terms of subsection (1) where, at the time the debt was incurred-

(a) he or she had no knowledge of the transaction and could not reasonably be expected to have had knowledge of such a transaction; or

- (b) he or she believed that the debtor would be able to repay the debt because a competent and reliable person was responsible for monitoring the solvency of the debtor and for reporting to him or her and was fulfilling that responsibility satisfactorily; or
- (c) he or she did not take part in the management of the debtor on account of illness or for some other good reason; or
- (d) he or she took all reasonable steps to prevent the debtor from incurring such debt; or
- (e) he or she took all reasonable steps to ensure that the creditor is informed that the debtor had reasonable grounds to believe that it would not be able to repay that debt when it fell due.

(3) The court shall determine the amount payable with reference to the loss that was or will be suffered by the creditors on account of the insolvent trading and-

- (a) the amount so determined will be payable to the applicant or applicants for distribution among the creditors represented in the application, or for distribution in such a way as the court may be requested to order, and the court may make any such order as it deems just and equitable in the circumstances;
- (b) in determining the amount and its fair distribution among the creditors, the court shall have regard to the extent to which a particular creditor negligently or intentionally contributed to his or own loss.

(4) The provisions of this section shall apply notwithstanding that the person or persons concerned may be criminally liable in respect of the matters on which the declaration by the court is based. [New provision]

**Repayments by members of close corporations.** (1) Where a close corporation debtor is being liquidated in terms of this Act, any payment made to a member by reason only of his membership within a period of two years before the commencement of the liquidation of the corporation, shall be repaid to the corporation by the member, unless such member can prove that

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**Annexure E**

**Draft Insolvency and Business Recovery Bill**

- (a) after such payment was made, the corporation's assets, fairly valued, exceeded all its liabilities; and
- (b) such payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and
- (c) such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of business.

(2) A person who has ceased to be a member of the corporation concerned within the said period of two years, shall also be liable for any repayment provided for in subsection (1) if, and to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the corporation.

(3) A certificate given by the Master as to the amount payable by any member or former member in terms of subsection (1) or (2) to the corporation, may be forwarded by the liquidator to the clerk of the magistrate's court in whose area of jurisdiction the registered office of the corporation is situated, who shall record it, and thereupon such notice shall have the effect of a civil judgment of that magistrate's court against the member or former member concerned.

(4) The court in question may, on application by a member or former member referred to in subsection (2), make any order that it deems fit in regard to any certificate referred to in subsection (3). [Section 70 of the Close Corporations Act]

**117. Repayment of salary or remuneration by members of a close corporation debtor.**

(1) If a close corporation debtor is being liquidated in terms of this Act, and-

- (a) any direct or indirect payment of a salary or other remuneration was made by the corporation within a period of two years before the commencement of its liquidation to a member in his capacity as an officer or employee of the corporation; and
- (b) such payment was, in the opinion of the Master, not **bona fide** or reasonable in the circumstances,

the Master shall direct that such payment, or such part thereof as he may determine, may be repaid by such member to the corporation.

(2) A person who has within a period of two years referred to in subsection (1)(a) ceased to be a member of a corporation referred to in that subsection may, under the circumstances referred to therein, be directed by the Master to make a repayment provided for in subsection (1), if, and to the extent that, any such repayments by present members are, together with all other available assets, insufficient for paying all the debts of the corporation.

(3) The provisions of subsections (3) and (4) of section 116 shall **mutatis mutandis** apply in respect of any repayment to a corporation in terms of subsection (1) or (2). [Section 71 of the Close Corporations Act]

## **CHAPTER 22 - COMPOSITIONS**

**118. Pre-liquidation composition with creditors.** (1) Any natural person debtor, partnership debtor, trust debtor, close corporation debtor or association debtor who cannot pay his or her debts and who wants to offer his or her creditors a composition, may lodge a signed copy of the composition and a complete sworn statement in the form prescribed in the Annexure with the magistrate's court in the district where he or she normally resides, or carries on business, (hereafter referred to as "the court"). If the composition provides for the immediate payment of a cash amount for distribution among creditors, the amount shall, pending the outcome of the offer of composition, be invested in an interest-bearing savings account in trust with an attorney or someone else whom the court approves. The debtor shall offer proof that the cash amount has been invested in this manner.

(2) If a debtor incurs debt during the period from lodging the composition with the magistrate until creditors have voted on the composition, he or she shall notify the creditor who offers him or her credit of the pending composition and at the first appearance before a magistrate in connection with the composition, he or she shall provide full particulars concerning any such debt incurred by him or her. During the said period or after a composition has been accepted, a debtor or the management of such debtor shall not alienate, encumber or voluntarily dispose of any property which shall be made available to creditors in terms of the composition or do anything which can impede compliance with the composition. A debtor or management of such debtor who contravenes these provisions shall be guilty of an offence and upon conviction be liable to a fine not exceeding one thousand rand or to imprisonment not exceeding six months or to both such fine and such imprisonment.

(3) On receipt of the composition and statement, the court determines a date for the questioning of the debtor or the management of such debtor and the consideration of the composition by the creditors of the debtor (hereafter referred to as the “hearing”), if it appears to the court that no such date has been determined during the preceding six months. The date determined shall give the debtor sufficient time to notify creditors of the hearing, as prescribed in subsection (4).

(4) The debtor shall at least 14 days before the date determined for the hearing send by mail, telefax, electronic mail, or personal delivery to each of his or her creditors a copy of the composition and of the statement and a notice with the case number and the place and date of the hearing. The debtor shall before the date of the hearing offer proof to the court that he or she gave notice in the prescribed manner.

(5) At the hearing -

- (a) a creditor may, whether he or she has received notice or not, prove the debt and object to a debt listed in the statement by the debtor;
- (b) every debt listed by the debtor in the said statement shall, subject to any amendments to it by the court, be deemed to be proved, unless a creditor objects to it or the court rejects it or requires that it be corroborated by evidence;
- (c) a creditor whose debt is being objected to by the debtor or another creditor or who is required by the court to corroborate his debt with evidence, shall prove his debt;
- (d) a court may defer the proving of a debt and the consideration of the composition, or allow the other creditors to vote on the composition, and if a composition is accepted, the debt is added to the listed debts at a later stage when it is proved;
- (e) the debtor may be questioned by the court and by any creditor whose debt has been acknowledged or proved, or by any other interested party with the permission of the court, about -
  - (i) his or her assets and liabilities;
  - (ii) his or her present and future income and that of his or her spouse living in with him or her;

- (iii) his or her standard of living and the possibility of living more frugally; and
- (iv) any other matter which the court considers to be relevant.

(6) If it appears to the court at the hearing that a debt, other than a debt which is based upon or derives from a judgment debt, is disputed between the debtor and the creditor or between the creditor and another creditor of the debtor, the court may, after it has investigated the objection, admit or disallow the debt or part thereof.

(7) Any person whose debt has been disallowed in terms of subsection (6) may institute an action or continue with an action which has already been instituted in respect of such debt.

(8) If a person contemplated in subsection (7) obtains judgment in respect of a debt contemplated in that subsection, the amount of the judgment is added to the list of proved debts referred to in subsection (5).

(9) A creditor may by written power of attorney authorise any person to appear at a hearing on his or her behalf and to do everything at such hearing which the creditor would have been entitled to do.

(10) The hearing may be deferred by the court and the proposed composition may be amended or revoked with the permission of the debtor.

(11) A composition is not accepted if a creditor demonstrates to the satisfaction of the magistrate that it accords a benefit to one creditor over another creditor to which he or she would not have been entitled on liquidation of the debtor's estate. If the composition is accepted by the majority in number and ~~2/3~~ two-thirds in value of the concurrent creditors who vote on the composition, the court shall certify that the composition is accepted as such and thereafter the composition is binding on all creditors who have been informed of the hearing or appeared at the hearing, but the right of a secured or otherwise preferent creditor shall not be prejudiced by the composition, unless he or she consents to the composition in writing.

- (12) (a) If the composition provides for payments by the debtor in determined instalments or otherwise, the acceptance of the composition has the effect of a judgment in terms of section 65 of the Magistrates' Courts Act 32 of 1944 in respect of the payments. Any person who in terms of the composition shall receive the payments on behalf of creditors, or if there is no such person, any creditor who is in terms of the composition entitled to a benefit out of the payments, shall have the rights which a judgment creditor would have in terms of the section.
- (b) If any person is appointed in terms of the composition to execute the composition, he or she shall be entitled to the remuneration which is payable in terms of the composition.
- (13) (a) The court may at any time on application of the debtor or an interested person direct the debtor to appear for such further questioning as the court may deem necessary, after notice to creditors of at least 14 days by mail, telefax, electronic mail, or personal delivery by the debtor or the interested person, as the case may be. The court may -
- (i) revoke the composition for cogent reasons; and
  - (ii) authorise a debtor who on reasonable grounds is not able to comply with his or her obligations in terms of the composition to submit an amended composition to creditors in the manner and with the consequences contemplated in subsection (1).
- (b) Without limiting the phrase "cogent reason" in subsection 13(a)(i), it shall include the following:
- (i) If the debtor does not comply with his or her obligations in terms of the composition; or
  - (ii) If the debtor renders false information in his or her statement or in the course of the questioning; or
  - (iii) If the debtor gives a benefit in respect of a claim which falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.



(14) Any creditor who is entitled to a benefit in terms of the composition can, notwithstanding the provisions of subsection (13), after 14 days notice to the debtor apply to the court to revoke the composition if the debtor does not comply with his or her obligations in terms of the composition. The creditor must submit an affidavit in support of his or her application. The court shall order that the composition be revoked if the debtor did not substantially comply with his or her obligations.

(15) If the composition is revoked, or if the estate of a debtor has been liquidated in terms of ~~the Insolvency Act ... of 19...~~ this Act before he or she complied with his or her obligations in terms of the composition, the claim of a creditor is restored to the extent that the claim has not been satisfied in terms of the composition.

(16) If a composition is not accepted by the required majority, and the court is of the opinion that the debtor is unable to make available to creditors substantially more than that which he or she offered in the proposed composition, the court shall either:

(a)- declare that the proceedings in terms of this section have ceased and that the debtor is once again in the position he or she was prior to the commencement thereof; or

(b)- determine whether or not the provisions of section 74 of the Magistrates Court Act 32 of 1944 can be applied to the debtor in question and, if so, apply the provisions accordingly and within the discretion of the presiding officer. inquire from the debtor whether he or she prefers that his or her assets be administered and divided in terms of the Insolvency Act this Act and his or her debts be acquitted in terms of the said Act as though his or her estate were liquidated on the date on which his or her choice was exercised, but without being regarded as insolvent or his or her estate as being liquidated when any other Act is applied. If the debtor affirms, the court shall forward to the Master of the High Court a certificate stating that the debtor exercised the choice and the statement submitted by the debtor. The debtor shall not be required to submit a statement of affairs. The court shall forward the certificate to the Registrar of Deeds who shall enter a **caveat** as if a liquidation order had been issued on the date when the debtor exercised his or her choice. The court may instruct the sheriff to attach assets and books in terms of the Insolvency Act this Act. If any creditor who declares his or her particulars of claim accepts liability for the cost of

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~~administration as if his or her claim has been proved, the Master shall, after receipt of the certificate, appoint a liquidator who shall hold such office until a liquidator is elected at a first meeting. The Master shall convene a meeting for the election of a liquidator and proof of claims and if no claims are proved at the meeting and a liquidator has not yet been appointed, the Master shall consider the estate to be concluded until a creditor accepts liability for the costs as if he or she has proved a claim. In all matters not provided for in this subsection the debtor or his or her estate or matters related to the debtor or his or her estate shall be dealt with as if the estate of the debtor was liquidated on the date when the debtor exercised his or her choice.~~

(17) Between the determination of a date for a hearing and the conclusion of the hearing no creditor with a claim the cause of which arose before the determination of the date, shall without the permission of the court institute any action against the debtor or apply for the liquidation of the estate of the debtor.

**119. Post-liquidation Composition.** - (1) ~~An insolvent~~ A debtor may at any time after the issuing of the first liquidation order but after he or she has submitted his or her statement of affairs as required by section ~~34~~ 39, submit to the liquidator of his or her estate a written offer of composition. [119(1)]

(2) If the liquidator is of the opinion that there is a likelihood that the creditors of the estate will accept the offer of composition, he or she shall as soon as possible after the receipt of the offer send a copy thereof together with his or her report thereon and notice of the time and the place of the meeting at which the composition will be considered by personal notice to every creditor whose name and address are known to the liquidator or which he or she can reasonably obtain. If a special meeting is convened to consider a composition the notice in the **Gazette** shall be published not less than 14 days and not more than 21 days before the date fixed for the meeting. [119(2), (5) and (6)]

(3) If the liquidator is of the opinion that there is no likelihood that creditors will accept the offer of composition, he or she shall inform the ~~insolvent~~ debtor that the offer is unacceptable and that he or she does not propose to send a copy thereof to the creditors. The ~~insolvent~~ debtor may thereupon require the Master to review the liquidator's decision and the Master may, after

having considered the offer and the liquidator's report thereon, direct the liquidator to submit the offer to the creditors of the estate in the manner provided in subsection (2). [119(3) and (4)]

(4) If the offer is accepted by a majority in number and two-thirds in value of the concurrent creditors who have voted on the offer and payment under the composition has been made or security for such payment has been given as specified in the composition, the insolvent debtor shall, subject to subsection (5), (6) and (7), be entitled to a certificate under the hand of the Master of the acceptance of the offer. [119(7)]

(5) An offer of composition which contains any condition under which any creditor would obtain as against another creditor any benefit to which he or she would not have been entitled upon the distribution of the estate in the ordinary manner, shall be invalid. [119(7)]

(6) Subject to subsection (5), a condition providing for the discharge of a provisional liquidation order or the setting aside of a final liquidation order upon the acceptance of an offer of composition shall not be invalid. [New provision]

(7) If the composition provides for the giving of security, the nature of the security shall be fully specified and if it consists of a surety bond or guarantee, every surety shall be named. [119(7)]

(8) The liquidator shall, despite the absence of a resolution of creditors authorising him or her to do so, be competent to approach the court for the cancellation of a composition, the setting aside of an order providing for the discharge of a first liquidation order or an order setting aside a final liquidation order, or for other relief if the insolvent debtor or any other person has failed to give effect to the terms of the composition or to comply with the provisions of this section, or if the offer of composition supplied incorrect information which might reasonably have resulted in the requisite majority of creditors voting in favour of the composition. [New provision]

(9) An offer of composition which has been accepted as aforesaid shall be binding upon the insolvent debtor and upon all creditors of the insolvent estate in so far as their claims are not

secured or preferent but the right of any secured or preferent creditor shall not be prejudiced thereby, except in so far as he or she has expressly and in writing waived his or her preference. [120(1)]

(10) If the composition is subject to the condition that any property in the insolvent estate shall be restored to the insolvent debtor, the acceptance of the composition shall divest the liquidator of such property and vest such property in the insolvent debtor as from the date on which such property is in pursuance of the composition to be restored to the insolvent debtor, but subject to any condition provided for in the composition. [120(2)]

(11) A composition shall not affect the liability of a surety for the insolvent debtor or any liability regarding transactions that are invalid or liable to be set aside. [120(3)]

(12) When the estate of a partnership and the estate of a partner in that partnership are simultaneously under liquidation, the acceptance of an offer of composition by the separate creditors of the partner shall not take effect until the expiration of a period of six weeks as from the date of a notice in writing of that acceptance given by the liquidator of the partner's separate estate to the liquidator of the partnership estate, or if the liquidator of the partner's estate is also the liquidator of the partnership estate, as from the date of the acceptance of the composition. The said notice shall be accompanied by a copy of the deed embodying the composition. [121(1)]

(13) At any time during the period of six weeks referred to in subsection (12) the liquidator of the partnership estate may take over the assets of the estate of the insolvent partner if he or she fulfils the obligations of the insolvent partner in terms of the composition, other than obligations to render any service or obligations which only the insolvent partner can fulfil: Provided that if the composition provides for the giving of any specific security, the Master shall determine what other security the liquidator of the partnership estate may give in lieu thereof. [121(2)]

(14) Any moneys to be paid and anything to be done for the benefit of creditors in pursuance of a composition shall be paid and shall be done, as far as practicable, through the liquidator: Provided that any creditor who has failed to prove his or her claim before the liquidator has made a final distribution among those creditors who have proved their claims, shall be entitled

to recover direct from the insolvent debtor within six months from the confirmation by the Master of the account under which the distribution was made, any payments to which he or she may be entitled under the composition and the liquidator shall have no duty in regard thereto, and after the said distribution the creditor shall have no claim against the insolvent estate. [123(1)]

(15) When a composition has been entered into between an insolvent debtor and the creditors of his or her estate and the liquidation order has not been discharged or set aside, the liquidator of that estate shall frame a liquidation account and distribution account of the assets which are or will become available for distribution among the creditors under the composition, and all the provisions of this Act which relate to a liquidation account and distribution account of assets among creditors shall apply in connection with the liquidation account and distribution account, and the assets. [123(2)]

## CHAPTER 23 - COMPROMISES

**120. Compromise between a company and its creditors.** - (1) Where any compromise is proposed between a debtor, as defined in subsection (8), and its creditors or any class of them, the court may, on the application of the debtor or any creditor or member of the debtor or, in the case of a debtor being liquidated, of the liquidator, or if the debtor is subject to a judicial management, of the judicial manager, order a meeting of the creditors or class of creditors, to be summoned in such manner as the court may direct.

(2) If the compromise is agreed to by a majority in number representing three-fourths in value of the creditors or class of creditors present and voting either in person or by proxy at the meeting, such compromise shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, and also on the debtor or on the liquidator if the debtor is being liquidated or on the judicial manager if the debtor is subject to a judicial management order.

(3) No such compromise shall effect the liability of any person who is a surety for the debtor.

(4) If the compromise is in respect of a debtor being liquidated and provides for the discharge of the liquidation order or for the dissolution, where applicable, of the debtor without

liquidation, the liquidator of the debtor shall lodge with the Master a report in terms of section 42 and a report as to whether or not any person who forms part of the management of the debtor is or appears to be personally liable for damages or compensation to the debtor or for any debts or liabilities of the debtor under any provision of this Act, and the Master shall report thereon to the Court.

(5) The Court, in determining whether the compromise should be sanctioned or not, shall have regard to the number of creditors or creditors of a class present or represented at the meeting referred to in subsection (2) voting in favour of the compromise and to the report of the Master referred to in subsection (4).

(6) (a) An order by the Court sanctioning a compromise shall have no effect until a certified copy thereof has been lodged with the Registrar under cover of the prescribed form and registered by him.

(b) A copy of such order of court shall be annexed to every copy of the memorandum or similar document, if applicable, of the debtor issued after the date of the order.

(7) If a debtor fails to comply with the provisions of subsection (6)(b), the debtor and every person who forms part of the management of such debtor who is a party to the failure, shall be guilty of an offence.

(8) For the purposes of this section, a “debtor” means an association of persons that has been accorded legal personality in terms of the common law or in terms of a statutory provision.

[Section 311 of the Companies Act]

**120A. Information as to compromises.** (1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 120 for the purpose of agreeing to a compromise, there shall -

(a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement -

(i) explaining the effect of and alternatives to the compromise; and

(ii) in particular stating any material interests of the management of the debtor, whether as directors or as members or as creditors of the debtor or otherwise, and the effect thereon of the compromise, in so far as it is different from the effect on the like interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.

(2) Where the compromise affects the rights of debenture-holders of a company, the said statement shall give the like explanation and statement as respects the trustee of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of the said statement can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the debtor free of charge with a copy of the statement.

(4) Where a debtor makes default in complying with any requirement of this section, the debtor and every person who is part of the management of the debtor who is a party to the default, shall be guilty of an offence, and for the purpose of this subsection any liquidator of the debtor and any trustee of a deed for securing the issue of debentures of a company shall be deemed to be an officer of the debtor: Provided that a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person, being a director or trustee for debenture-holders, to supply the necessary particulars as to his interests and that fact has been stated in the statement.

(5) It shall be the duty of every person who forms part of the management of a debtor and of every trustee for debenture-holders, where applicable, to give notice to the debtor of such matters relating to himself as may be necessary for the purposes of this section, and if he makes default in complying with such duty, he shall be guilty of an offence. [Section 312 of the Companies Act]

**120B. Provisions facilitating reconstruction or amalgamation.** (1) If an application is made to the Court under this section for the sanctioning of a compromise proposed between a company and any such persons as are referred to in this section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as the “transferor company”) is to be transferred to another company (in this section referred to as the “transferee company”) the Court may, either by the order sanctioning the compromise or by any subsequent order, make provision for all or any of the following matters:

- (a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- (b) the allotment or appropriation by the transferee company of any shares, debentures or other like interests in that company which under the compromise are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (d) the dissolution, without liquidation, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court may direct, dissent from the compromise;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out;

Provided that no order for the dissolution, without liquidation, of any transferor company shall be made under this subsection prior to the transfer in due form of all the property and liabilities of the said company.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall by virtue of the order vest in, subject to transfer in due form, and those liabilities shall become the liabilities of, the transferee company.

(3) If an order is made under this section, every company in relation to which the order is made shall, within thirty days after the making of the order, cause a copy thereof to be lodged



with the Registrar, under cover of the prescribed form, for registration, and if default is made in complying with this subsection, the company shall be guilty of an offence.

(4) In this section the expression “property” includes property, rights and powers of every description, and the expression “liabilities” includes duties.

(5) Notwithstanding the provisions of subsection (8) the expression “company” in this section does not include any company other than a company within the meaning of the Companies Act 61 of 1973.

[Section 313 of the Companies Act]

## **CHAPTER 24 - JUDICIAL MANAGEMENT**

**121. Circumstances in which certain debtors may be placed under judicial management.** - (1) When a company debtor, close corporation debtor, trust debtor or association debtor by reason of mismanagement or for any other cause-

(a) is unable to pay its debts or is probably unable to meet its obligations; and

(b) has not become or is prevented from becoming a successful concern, and there is a reasonable possibility that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that debtor.

(2) An application to Court for a judicial management order in respect of any debtor may be made by any of the persons who are entitled under section 3 and 4 to make an application to Court for the liquidation of a debtor, and the provisions of section 3 and 4 as to the application for liquidation shall **mutatis mutandis** apply to an application for a judicial management order.

(3) When an application for the liquidation of a debtor is made to court under this Act and it appears to the court that if the debtor is placed under judicial management the grounds for its liquidation may be removed and that it will become a successful concern and that the granting of a judicial management order would be just and equitable, the Court may grant such an order in respect of that debtor.

**122. Provisional judicial management order.** - (1) The court may on an application under section 121 (2) or (3) grant a provisional judicial management order, stating the return day, or dismiss the application or make any other order that it deems just.

(2) A provisional judicial management order shall contain-

(a) directions that the debtor named therein shall be under the management, subject to the supervision of the court, of a provisional judicial manager appointed as hereinafter provided, and that any other person vested with the management of the debtor's affairs shall from the date of the making of the order be divested thereof; and

(b) such other directions as to the management of the debtor, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the debtor, to raise money in any way without the authority of shareholders as the court may consider necessary,

and may contain directions that while the debtor is under judicial management, all actions, proceedings, the execution of all writs, summonses and other processes against the debtor be stayed and be not proceeded with without the leave of the court.

(3) The court which has granted a provisional judicial management order, may at any time and in any manner, on the application of the applicant, a creditor or member, the provisional judicial manager or the Master, vary the terms of such order or discharge it.

**123. Custody of property and appointment of provisional judicial manager on the granting of judicial management order.** - Upon the granting of a provisional judicial management order-

(a) all the property of the debtor concerned shall be deemed to be in the custody of the Master until a provisional judicial manager has been appointed and has assumed office;

(b) the Master shall without delay-

(i) appoint a provisional judicial manager (who shall not be the auditor of the debtor or any person disqualified under this Act from being appointed as liquidator in a liquidation) who shall give security for

the proper performance of his duties in his capacity as such, as the Master may direct, and who shall hold office until discharged by the court as provided in section 135;

- (ii) convene separate meetings of the creditors, the members and debenture-holders (if any) of the debtor for the purposes referred to in section 125.

**124. Duties of provisional judicial manager upon appointment.** - A provisional judicial manager shall-

- (a) assume the management of the debtor and recover and reduce into possession all the assets of the debtor;

- (b) within seven days after his appointment lodge with the Registrar concerned, under cover of the prescribed form, a copy of his letter of appointment as provisional judicial manager; and

- (c) prepare and lay before the meetings convened under section 137(b) a report containing-

- (i) an account of the general state of the affairs of the debtor;

- (ii) a statement of the reasons why the debtor is unable to pay its debts or is probably unable to meet its obligations or has not become or is prevented from becoming a successful concern;

- (iii) a statement of the assets and liabilities of the debtor;

- (iv) a complete list of creditors of the debtor (including contingent and prospective creditors) and of the amount and the nature of the claim of each creditor;

- (v) particulars as to the source or sources from which money has been or is to be raised for purposes of carrying on the business of the debtor; and

- (vi) the considered opinion of the provisional judicial manager as to the prospects of the debtor becoming a successful concern and of the removal of the facts or circumstances which prevent the debtor from becoming a successful concern.

**125. Purpose of meetings convened under section 137(b)(ii).** - (1) Any meeting convened under section 123(b)(ii) shall be presided over by the Master or a magistrate having jurisdiction in the area where the meeting is held and shall be convened and held in the manner prescribed by section 46 in respect of a meeting in the liquidation of a debtor in terms of this Act.

(2) The purpose of any such meeting shall be-

(a) to consider the report of the provisional judicial manager under section 124(c) and the desirability or otherwise of placing the debtor finally under judicial management, taking into account the prospects of the debtor becoming a successful concern;

(b) to nominate the person or persons (not being disqualified under section 69) whose names shall be submitted to the Master for appointment as final judicial manager or managers;

(c) in the case of any such meeting of creditors, the proving of claims against the debtor; and

(d) to consider the passing of a resolution referred to in section 130.

(3) The chairman of any such meeting shall prepare and lay before the Court a report of the proceedings of such meeting, including a summary of the reasons for any conclusion arrived at under subsection (2) (a).

(4) The provisions of this Act relating to the proof of claims against a debtor which is being liquidated and to the nomination and appointment of a liquidator of any such debtor shall **mutatis mutandis** apply with reference to the proof of claims against a debtor which has been placed under judicial management and the nomination and appointment of a judicial manager of such a debtor.

**126. Return day of provisional order of judicial management and powers of the court.** - (1) Any return day fixed under section 122 shall not be later than sixty days after the date of the provisional judicial management order but may be extended by the court on good cause shown.

(2) On such return day the court may after consideration of-

- (a) the opinion and wishes of creditors and members of the debtor;
- (b) the report of the provisional judicial manager under section 124;
- (c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims;
- (d) the report of the Master; and
- (e) the report of the Registrar,

grant a final management order if it appears to the court that the debtor will, if placed under judicial management, be enabled to become a successful concern and that it is just and equitable that it be placed under judicial management, or may discharge the provisional order or make any other order it may deem just.

(3) A final judicial management order shall contain-

- (a) directions for the vesting of the management of the debtor, subject to the supervision of the court, in the final judicial manager, the handing over of all matters and the accounting by the provisional judicial manager to the final judicial manager and the discharge of the provisional judicial manager, where necessary;
- (b) such other directions as to the management of the debtor, or any matter incidental thereto, including directions conferring upon the final judicial manager the power, subject to the rights of the creditors of the debtor, to raise money in any way without the authority of shareholders or members, as the court may consider necessary.

(4) The court which has granted a final judicial management order, may at any time and in any manner vary the terms of such order on the application of the Master, the final judicial manager or a representative acting on behalf of the general body of creditors of the debtor concerned by virtue of a resolution passed by a majority in value and number of such creditors at a meeting of those creditors.

**127. Duties of final judicial manager.** - A judicial manager shall, subject to the provisions of the memorandum and articles of the company, or founding statement of the corporation, or partnership agreement of the partnership, or trust instrument of the trust concerned in so far as they are not inconsistent with any direction contained in the relevant judicial management order-

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- 
- (a) take over from the provisional judicial manager and assume the management of the debtor;
- (b) conduct such management, subject to the orders of the court, in such manner as he may deem most economic and most promotive of the interests of the members and creditors of the debtor;
- (c) comply with any direction of the court made in the final judicial management order or any variation thereof;
- (d) lodge with the Registrar-
- (i) a copy of the judicial management order and of the Master's letter of appointment under cover of the prescribed form;
- (ii) in the event of the judicial management order being cancelled, a copy of the order cancelling it, within seven days of his appointment or of the cancellation of such judicial management order, as the case may be;
- (e) keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the debtor or its directors, members or other officers would have been obliged to keep or prepare if it had not been placed under judicial management;
- (f) convene the annual general meeting and other meetings of members of the debtor provided for by the Companies Act, Close Corporations Act, partnership agreement or trust instrument and in that regard comply with all the requirements with which the directors, members, partners or trustees of the debtor would in terms of such authority have been obliged to comply if the debtor had not been placed under judicial management;
- (g) convene meetings of the creditors of the debtor by notices issued separately on the dates on which the notices convening annual general meetings of the debtor are issued or on which any interim report is sent out to members and in the case of a private company not later than six months after the end of its financial year, and submit to such meetings reports showing the assets and liabilities of the debtor, its debts and obligations as verified by the auditor or accounting officer of the debtor, and all such information as may

be necessary to enable the creditors to become fully acquainted with the debtor's position as at the date of the end of the financial year or the end of the period covered by any such interim report or, in the case of a private company, as at a date six months after the end of its financial year;

(h) lodge with the Master copies of all the documents submitted to the meetings as provided in paragraphs (f) and (g);

(i) examine the affairs and transactions of the debtor before the commencement of the judicial management in order to ascertain whether any director, member, past director, past member officer or past officer of the debtor has contravened or appears to have contravened any provision of any Act or has committed any other offence, and within six months as from the date of his appointment submit to the Master such reports as are in terms of section 42 required to be submitted to the Master by a liquidator, and in relation to which the provisions of that section shall apply;

(j) examine the affairs and transactions of the debtor before the commencement of the judicial management in order to ascertain whether any director, member, past director, past member, officer or past officer of the debtor is or appears to be personally liable for damages or compensation to the debtor or for any debts or liabilities of the debtor, and within six months from the date of his appointment prepare and submit to the Master and to the next succeeding meeting of members and of creditors of the debtor, a report containing full particulars of any such liability; and

(k) if at any time he is of opinion that the continuation of the judicial management will not enable the debtor to become a successful concern, apply to the Court, after not less than fourteen days' notice by registered post to all members and creditors of the debtor, for the cancellation of the relevant judicial management order and the issue of an order for the liquidation of the debtor.

**128. Application of assets during judicial management.** - (1) A judicial manager shall not without the leave of the court sell or otherwise dispose of any of the debtor's assets save in the ordinary course of the debtor's business.

(2) Any moneys of the debtor becoming available to the judicial manager shall be applied by him in paying the costs of the judicial management and in the conduct of the debtor's business in accordance with the judicial management order and so far as the circumstances permit in the payment of the claims of creditors which arose before the date of the order.

(3) The costs of the judicial management and the claims of creditors of the debtor shall be paid **mutatis mutandis** in accordance with the law relating to a liquidation in terms of Chapter II of the Companies Act 61 of 1973.

**129. Remuneration of provisional judicial manager or judicial manager.** - (1) The provisional judicial manager or the judicial manager shall be entitled to such remuneration for his services as may be fixed by the Master from time to time.

(2) In fixing the remuneration the Master shall take into account the manner in which the provisional judicial manager or the judicial manager has performed his functions and any recommendation by the members or creditors of the debtor relating to such remuneration.

(3) The provisions of section 44 of this Act shall apply with reference to any fixing of remuneration by the Master under this section.

**130. Pre-judicial management creditors may consent to preference.** - (1) (a) The creditors of a debtor whose claims arose before the granting of a judicial management order in respect of such debtor may at a meeting convened by the judicial manager or provisional judicial manager for the purpose of this subsection or by the Master in terms of section 123(b)(ii), resolve that all liabilities incurred or to be incurred by the judicial manager or provisional judicial manager in the conduct of the debtor's business shall be paid in preference to all other liabilities not already discharged exclusive of the costs of the judicial management, and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the debtor except claims arising out of the costs of the judicial management.

(b) If a judicial management order is superseded by a liquidation order-



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(i) the preference conferred in terms of paragraph (a) shall remain in force except in so far as claims arising out of the costs of the liquidation are concerned; and

(ii) all claims based on such liabilities incurred by the judicial manager shall be taken to have been proved and the provisions of section 61 shall not apply in respect thereof.

(2) (a) A meeting convened by the provisional judicial manager or the judicial manager in terms of subsection (1) shall be convened by him by written notice sent by registered post at least ten days before the date of the meeting, as specified in the notice, to every creditor of the debtor whose name and address is known to him, and also by notice in one or more newspapers circulating in the district where the debtor's main place of business or registered address is situated.

(b) The last-mentioned notice shall comply with the provisions of section 46 of this Act and shall appear at least ten days before the date of the meeting.

(3) The provisional judicial manager or the judicial manager, as the case may be, shall preside over a meeting referred to in subsection (2), and the provisions of sections 46 and 49 shall apply **mutatis mutandis** in respect of the conduct of any such meeting, the right to vote thereat, the manner of voting and the calculation of the value of votes: Provided that for the purposes of voting at any such meeting convened by a provisional judicial manager, the claims of creditors shall be determined to the satisfaction of the provisional judicial manager.

**131. Voidable and undue preferences in judicial management.** - (1) Every disposition of its property which if made by a natural person could for any reason be set aside in terms of section 19, 21 and 22, may, if made by a debtor unable to pay its debts, be set aside by the court at the suit of the judicial manager in the event of the debtor being placed under judicial management, and the provisions of sections 19, 21 and 22 shall **mutatis mutandis** apply in respect of any such disposition.

(2) For the purposes of this section the event which shall be deemed to correspond with a liquidation order under section 19, 21 or 22 shall be the presentation to the court of the application in pursuance of which a judicial management order is granted.

**132. Period of judicial management to be discounted in determining preference under mortgage bond.** - The time during which any debtor being a mortgage debtor in respect of any mortgage bond, is subject to a judicial management order, shall be excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 82.

**133. Position of auditor and accounting officer in judicial management.** - Notwithstanding the granting of a judicial management order in respect of any debtor and for so long as the order is in force, the provisions of the Companies Act 61 of 1973, or Close Corporations Act 69 of 1984, relating to the appointment and reappointment of an auditor or accounting officer and the rights and duties of an auditor or accounting officer shall continue to apply as if any reference in the said provisions to the directors or members of the debtor were a reference to the judicial manager.

**134. Application to judicial management of certain provisions of liquidation.** - (1) The provisions relating to questioning in terms of sections 52, 53, 54 and 55 of this Act apply **mutatis mutandis** to judicial management.

**135. Cancellation of judicial management order.** - (1) If at any time on application by the judicial manager or any person having an interest in the debtor it appears to the court which granted a judicial management order that the purpose of such order has been fulfilled or that for any reason it is undesirable that such order should remain in force, the court may cancel such order and thereupon the judicial manager shall be divested of his functions.

(2) In cancelling any such order the Court shall give such directions as may be necessary for the resumption of the management and control of the debtor by the officers thereof.

## **CHAPTER 25 - OFFENCES**

**136. Offences.** - (1) ~~An insolvent~~ A debtor or the management of such debtor shall be guilty of an offence -

- (a) if before or after the liquidation of ~~his or her estate~~ the debtor's estate he or she conceals or parts with or intentionally destroys any book or

- accounting record relating to his or her affairs or the affairs of the debtor or if he or she intentionally erases the information contained therein or makes it illegible or permits any other person to perform any such act in regard to any such book or accounting record; or [132(a)]
- (b) if before or after the liquidation of his or her estate or the estate of the debtor he or she alienates property, obtained by him or her or the estate on credit and not paid for, otherwise than in the ordinary course of business; or [132(c)]
- (c) if he or she, despite having been expressly asked about his or her or the debtor's financial standing and credit worthiness, falsely conceals his or her or the debtor's insolvent status and as a result thereof obtains credit for more than R500; or [137(a)]
- (d) if he or she offers or promises to any person any reward in order to procure the acceptance by a creditor of his or her estate or the estate of the debtor of an offer of compromise or, in the case of a natural person debtor, to induce a creditor not to oppose an application for rehabilitation or to give up any investigation in regard to the estate or to conceal any information in connection therewith; or [137(b)]
- (e) if at any time within two years before the date of liquidation of his or her estate or the estate of the debtor he or she, with intent to obtain credit or the extension of credit, intentionally gave false information in connection with his or her or the debtor's assets and liabilities to a creditor or to anyone who became his or her or the debtor's creditor on the strength of information given by him or her to such person, or intentionally concealed any material fact or made any false representation with regard thereto; or [133]
- (f) in the case of a natural person debtor, if before the liquidation of his or her estate he or she carried on any business or for his or her own account practised any profession or occupation and has failed to keep proper accounting records of all business transactions, income, expenditure, assets and liabilities and to retain the accounting records for a period of at least three years; or [134]
- (g) in the case of a natural person debtor, if at any time when his or her liabilities exceeded his or her assets or at any time within six months immediately prior to the date of liquidation of his or her estate he or she

reduced his or her assets through gambling, betting or risky speculation or contracted debts which were not reasonably necessary in connection with business or occupation or for his or her own maintenance or that of his or her dependants; or [135(3)(b)]

- (h) if he or she contracted any debt of R100 or more or debts to the aggregate of R500 or more, without any reasonable expectation of being able to discharge such debt or debts; or
- (i) if he or she without good cause fails to submit a statement of his or her affairs or the affairs of the debtor as required by section 39(1)(b); or [137(c)]
- (j) if he or she without lawful cause fails to attend any meeting or continuation of a meeting of creditors of his or her estate or the estate of the debtor of which he or she has been notified writing or the continuation of such meeting which he or she has been directed by the presiding officer of the meeting to attend at the time and place determined by the presiding officer; [66, 139(1)]
- (k) if at any time during the liquidation of his estate or the estate of the debtor he knows or suspects that any person has lodged or intends to lodge a nomination contemplated in section 37 which is false or has proved or intends to prove a false claim against his estate or the estate of the debtor and fails to inform the Master in the case of a nomination and the Master and the liquidator of his estate or the estate of the debtor in the case of a claim in writing of that knowledge or suspicion within 14 days as from the date upon which he acquired that knowledge or upon which his suspicion was aroused.

(2) Any person who -

- (a) evades the service of a summons on or a notice to him or her as contemplated in section 17(6)(a), 51, 53, or 55 or who without lawful cause fails to attend at the time and place determined in the summons or notice or having appeared, without lawful cause fails to remain in attendance until he or she is excused from further attendance by the presiding officer of the meeting concerned; or [66; 139(1), 417(4), 418(5) Companies Act ]

- (b) who has been called up for questioning in terms of section 17(6)(a), 51, 53 or 55 and who refuses to be sworn as a witness or to take an affirmation or who without lawful cause refuses or fails to answer any question lawfully put to him or her or who without lawful cause refuses or fails to produce any book, document, or record which is in his or her possession or custody and which he or she is in terms of the summons or a direction of the presiding officer of the meeting obliged to produce; or [66, 139(1)]
- (c) without lawful cause fails to comply with a written order of a liquidator contemplated in section 54(7) or (8); or [New provision]
- (d) without lawful cause fails to answer fully and correctly any written questions put to him or her by the liquidator of the insolvent estate in terms of section 54 or to submit the said answers within the time and in the manner contemplated in section 54(3); or [New provision]
- (e) receives any benefit or accepts any promise of a benefit as a reward for having kept in abeyance or stopped any action for the liquidation of the estate of the ~~insolvent debtor~~ or for having undertaken to keep such action in abeyance or to stop it or for having agreed to a composition or rehabilitation or for not opposing it or for having undertaken to agree to such composition or rehabilitation or not to oppose it or for having kept any inquiry in connection with any matter relating to the insolvent estate in abeyance or for having undertaken to hold it in abeyance or for having concealed particulars of ~~an insolvent a debtor~~ or an insolvent estate or for having undertaken to conceal such information; or [141]
- (f) before or after the liquidation of the estate of ~~an insolvent a debtor~~, conceals, parts with, damages, destroys, alienates or otherwise disposes of property attached in terms of section ~~22A 25~~ or property belonging to the ~~insolvent debtor~~ or his or her insolvent estate with intent to frustrate the attachment of such property by virtue of a liquidation order, in terms of section ~~22A 25~~, or with intent to prejudice creditors of the insolvent estate; or [142(1)]

- (g) has in his or her possession or custody or under his or her control property belonging to an insolvent estate and who intentionally fails to notify the liquidator of the insolvent estate as soon as possible of the existence and whereabouts of such property and to make it available to the liquidator; or [142(2)]
- (h) intentionally impedes or hinders a liquidator appointed in terms of section 68 or a liquidator appointed in terms of this Act or any person acting under his or her command, in the execution of his or her duties, [145]
- (i) makes or causes to be made or allows to be made a false nomination in terms of section 37 or who signs such a nomination without reasonable grounds for believing it to be correct, or who knowingly submits a false nomination to the Master,

shall be guilty of an offence.

(3) A liquidator of an insolvent estate who intentionally or negligently fails to submit to the Master an account or to pay over a sum of money within 30 days from the date on which he or she became obliged to submit such account or pay over such sum of money, or fails to comply with the duties in section ~~33~~ 38 within 30 days from the date of liquidation shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment. [144]

- (4)
  - (a) Any person who is convicted of an offence contemplated in subsection (1)(a) or (b) or subsection (2)(f), (g) or (h) shall be liable to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.
  - (b) Any person who is convicted of an offence contemplated in subsection (1)(c), (d), (e), (f), (g), (h), (i), (j) or (k) or subsection (2)(e) shall be liable to a fine or imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.
  - (c) Any person who is convicted of an offence contemplated in subsection (1)(h) or subsection (2)(a), (b), (c), (d) or (h) shall be liable to a fine or to imprisonment not exceeding six months or to both such fine and such imprisonment. [132-145]

**CHAPTER 26 - CROSS-BORDER INSOLVENCIES**

**137. Purpose and aims.** The purpose of this Chapter of the Act is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of—

- (a) co-operation between the courts and other competent authorities of the Republic and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

**138. Scope of application.** This Chapter applies where—

- (a) assistance is sought in the Republic by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) assistance is sought in a foreign State in connection with a proceeding under the laws of the Republic relating to insolvency; or
- (c) a foreign proceeding and a proceeding under the laws of the Republic relating to insolvency in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under the laws of the Republic relating to insolvency.

**139. Definitions.** For the purposes of this Chapter—

- (a) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of paragraph (f) of this section;
- (d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- (e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.
- (g) "curator" means a curator appointed in terms of section 6 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), or section 69 of the Banks Act, 1990 (Act No. 94 of 1990), or section 81 of the Mutual Banks Act, 1993 (Act No. 124 of 1993);
- (h) "receiver" means a receiver or other person appointed by the High Court to administer a compromise or arrangement under section 120 of this Act.

**140. International obligations of the Republic.** To the extent that this Chapter conflicts with an obligation of the Republic arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.



**141. Competent court.** The functions referred to in this Chapter relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by the High Court.

**142. Authorization of trustee, liquidator, judicial manager, curator, or receiver to act in a foreign State.** A trustee, liquidator, judicial manager, curator, or receiver is authorized to act in a foreign State on behalf of a proceeding under the laws of the Republic relating to insolvency, as permitted by the applicable foreign law.

**143. Public policy exception.** Nothing in this Chapter prevents the court from refusing to take an action governed by this Chapter if the action would be manifestly contrary to the public policy of the Republic.

**144. Additional assistance under other laws.** Nothing in this Chapter limits the power of a court or a trustee, liquidator, judicial manager, curator, or receiver to provide additional assistance to a foreign representative under other laws of the Republic.

**145. Interpretation.** In the interpretation of this Chapter, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

**146. Right of direct access.** A foreign representative is entitled to apply directly to a court in the Republic.

**147. Limited jurisdiction.** The sole fact that an application pursuant to this Chapter is made to a court in the Republic by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of the Republic for any purpose other than the application.

**148. Application by a foreign representative to commence a proceeding under the laws of the Republic relating to insolvency.** A foreign representative is entitled to apply to commence a proceeding under the laws of the Republic relating to insolvency if the conditions for commencing such a proceeding are otherwise met.

**149. Participation of a foreign representative in a proceeding under the laws of the Republic relating to insolvency.** Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under the laws of the Republic relating to insolvency.

**150. Access of foreign creditors to a proceeding under the laws of the Republic relating to insolvency.** (1) Subject to paragraph (2) of this section, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under the laws of the Republic relating to insolvency as creditors in the Republic.

(2) Paragraph (1) of this section does not affect the ranking of claims in a proceeding under the laws of the Republic relating to insolvency, except that the claims of foreign creditors shall not be ranked lower than non-preferent claims.

(3) Without derogating from the application of the law and practice of the Republic generally, the ranking of claims in respect of assets in the Republic shall be regulated by the law and practice of the Republic on the ranking of claims.

**151. Notification to foreign creditors of a proceeding under the laws of the Republic relating to insolvency.** (1) Whenever under the laws of the Republic relating to insolvency notification is to be given to creditors in the Republic, such notification shall also be given to the known creditors that do not have addresses in the Republic. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall—

- (a) indicate a reasonable time period for filing claims and specify the place for their filing;
- (b) indicate whether secured creditors need to file their secured claims; and
- (c) contain any other information required to be included in such a notification to creditors pursuant to the law of the Republic and the orders of the court.

**152. Application for recognition of a foreign proceeding.** (1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition shall be accompanied by—

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of the Republic.

**153. Presumptions concerning recognition.** (1) If the decision or certificate referred to in section 152(2) indicates that the foreign proceeding is a proceeding within the meaning of section 139(a) and that the foreign representative is a person or body within the meaning of section 139(d), the court is entitled to so presume.

(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

(3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

**154. Decision to recognize a foreign proceeding.** (1) Subject to section 143, a foreign proceeding shall be recognized if—

(a) the foreign proceeding is a proceeding within the meaning of section 139(a);

(b) the foreign representative applying for recognition is a person or body within the meaning of section 139(d);

(c) the application meets the requirements of section 152(2); and

(d) the application has been submitted to the court referred to in section 4.

(2) The foreign proceeding shall be recognized—

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of section 139(f) in the foreign State.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of sections 152, 153, 154 and 155 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

**155. Subsequent information.** From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of—

- (a) any change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

**156. Relief that may be granted upon application for recognition of a foreign proceeding.**

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

- (a) staying execution against the debtor's assets;
- (b) entrusting the administration or realization of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) any relief mentioned in section 158(1)(c), (d) and (g).

(2) An order issued in terms of subsection (1) shall be dealt with as contemplated in section 13 of this Act.

(3) Unless extended under section 158(1)(f), the relief granted under this section terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this section if such relief would interfere with the administration of a foreign main proceeding.

**157. Effects of recognition of a foreign main proceeding.** (1) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(a) commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(d) section 15 of this Act shall apply with regard to assets situated in the Republic to the same extent as if the insolvent was sequestered by a court in the Republic.

(2) The scope, and the modification or termination, of the stay and suspension referred to in subsection (1) of this section are subject to the provisions of sections 14 and 17 of this Act, and the court may at the request of the foreign representative or a person affected by subsection (1) modify or terminate the scope of the stay and suspension to the extent that it considers appropriate.

(3) Subsection (1)(a) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) Subsection (1) does not affect the right to request the commencement of a proceeding under the laws of the Republic relating to insolvency or the right to file claims in such a proceeding.

**158. Relief that may be granted upon recognition of a foreign proceeding.** (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(a) staying the commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under section 157(1)(a);

- (b) staying execution against the debtor's assets to the extent it has not been stayed under section 157(1)(b);
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 157(1)(c);
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (e) entrusting the administration or realization of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court;
- (f) extending relief granted under section 156(1);
- (g) granting any additional relief that may be available to a trustee, liquidator, judicial manager, curator, or receiver under the laws of the Republic.

(2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in the Republic are adequately protected.

(3) In granting relief under this section to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

(4) Without derogating from the application of rules of the Republic generally, in granting relief under this section the court shall indicate the rules of the Republic relating to the administration, realization or distribution of a debtor's estate in South Africa that will apply and may modify any such rules or set out conditions subject to which any such rule should be applied.

**159. Protection of creditors and other interested persons.** (1) In granting or denying relief under section 156 or 158, or in modifying or terminating relief under subsection (3), the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) The court may subject relief granted under section 156 or 158 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under section 156 or 158, or at its own motion, modify or terminate such relief.

**160. Actions to avoid acts detrimental to creditors.** (1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the Republic relating to insolvency.

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the legal action relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceeding.

**161. Intervention by a foreign representative in proceedings in the Republic.** Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of the Republic are met, intervene in any proceedings in which the debtor is a party.

**162. Cooperation and direct communication between a court of the Republic and foreign courts or foreign representatives.** (1) In matters referred to in section 166, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee, liquidator, judicial manager, curator, or receiver.

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.



**163. Cooperation and direct communication between the trustee, liquidator, judicial manager, curator, or receiver and foreign courts or foreign representatives.** (1) In matters referred to in section 138, a trustee, liquidator, judicial manager, curator, or receiver shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

(2) The trustee, liquidator, judicial manager, curator, or receiver is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

**164. Forms of cooperation.** Cooperation referred to in sections 162 and 163 may be implemented by any appropriate means, including—

- (a) appointment of a person or body to act at the direction of the court;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same debtor.

**165. Commencement of a proceeding under the laws of the Republic relating to insolvency after recognition of a foreign main proceeding.** After recognition of a foreign main proceeding, a proceeding under the laws of the Republic relating to insolvency may be commenced only if the debtor has assets in the Republic; the effects of that proceeding shall be restricted to the assets of the debtor that are located in the Republic and, to the extent necessary to implement cooperation and coordination under sections 162, 163 and 164, to other assets of the debtor that, under the law of the Republic, should be administered in that proceeding.

**166. Coordination of a proceeding under the laws of the Republic relating to insolvency and a foreign proceeding.** Where a foreign proceeding and a proceeding under the laws of the Republic relating to insolvency are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 162, 163 and 164, and the following shall apply—

(a) when the proceeding in the Republic is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) any relief granted under section 156 or 158 must be consistent with the proceeding in the Republic; and

(ii) if the foreign proceeding is recognized in the Republic as a foreign main proceeding, section 157 does not apply;

(b) when the proceeding in the Republic commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) any relief in effect under section 156 or 158 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in the Republic; and

(ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 157(1) shall be modified or terminated pursuant to section 157(2) if inconsistent with the proceeding in the Republic;

(c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

**167. Coordination of more than one foreign proceeding.** In matters referred to in section 166, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under sections 162, 163 and 164, and the following shall apply—

(a) any relief granted under section 156 or 158 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under section 156 or 158 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

**168. Presumption of insolvency based on recognition of a foreign main proceeding.** In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the laws of the Republic relating to insolvency, proof that the debtor is insolvent.

**169 Rule of payment in concurrent proceedings.** Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under the laws of the Republic relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

## **CHAPTER 27 - GENERAL PROVISIONS**

**170. Court may stay or set aside liquidation.** (1) The Court may at any time after the commencement of the liquidation of a debtor on the application of any liquidator, creditor, trustee or member, and on proof to the satisfaction of the Court that all proceedings in relation to the liquidation ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary liquidation on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a liquidation, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence. [Section 354 of the Companies Act]

**171. Meetings to ascertain wishes of creditors and others.** (1) Where by this Act the court is authorised, in relation to a liquidation, to have regard to the wishes of creditors, beneficiaries, members or contributories-

(a) the value of the respective creditors' claims and the voting rights of the various members or contributories of the debtor in terms of its trust deed, memorandum, articles, founding statement, agreement or constitution shall also be taken into consideration; and

(b) the court may, if it thinks fit, for the purpose of ascertaining the wishes of such creditors, beneficiaries, members or contributories direct meetings of the creditors, beneficiaries, members or contributories to be called, held and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court. [Section 413 of the Companies Act]

**172. Dispositions and share transfers, or transfer of a members' interest after liquidation void.** (1) Every transfer of an interest in a trust, shares of a company, members' interest in a close corporation or other right conferred by agreement or the constitution of an association debtor being liquidated, or alteration in the status of its members or beneficiaries effected after the commencement of the liquidation without the sanction of the liquidator, shall be void.

(2) Every disposition of its property (including rights of action) by any debtor being liquidated made

(a) in the case of a liquidation by the court, after the application for the liquidation has been filed with the Registrar, and

(b) in the case of a voluntary liquidation by resolution in terms of section 8, after the date upon which notice was given to creditors to liquidate the debtor by resolution, shall be void unless the Court otherwise orders.[Section 341 of the Companies Act]

**173. Inspection of records of company debtor, close corporation debtor or association debtor being liquidated.** (1) Any person having an interest in a debtor which is being liquidated in terms of this Act may apply to the court for an order authorising him or her to inspect any or all of the books and papers of that debtor, whether in possession of the debtor or the liquidator, and the court may impose any condition it thinks fit in granting that authority.

(2) The provisions of subsection (1) shall not be construed as affecting any powers or rights conferred by any law upon any department of State or any person acting under its authority at all times to inspect or cause to be inspected, the books and papers of any company or corporation being liquidated. [Section 360 of the Companies Act]

**174. General provisions relating to Chapter 7 or Chapter 21 proceedings.** (1) Subject to the provisions of this section and any resolution of creditors passed at a meeting of creditors, the liquidator or administrator will have the power, in his own name but on behalf of creditors:

- (a) to conclude a contingency fees agreement as referred to in section 2(1) of the Contingency Fees Act 1997 (Act No. 66 of 1997);
- (b) to commence any proceedings as contemplated in Chapter 7 or 21;
- (c) to settle or compromise any such proceedings or claims relating thereto; and
- (d) to receive any amounts pursuant to any such proceedings or settlement or compromise.

(2) Prior to concluding any contingency fees agreement or commencing any such proceedings, the liquidator or administrator shall advise all proved creditors by personal notice of the steps he proposes to take, with reasons and an explanation of this section and its effect.

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(3) Any creditor who does not within two weeks object in writing to the proposed steps will be deemed to have approved such steps and will, for purposes of such proceedings and claims, be regarded as a participating creditor.

(4) If any creditor does object:

(a) The objecting creditor will, for purposes of the proceedings and claims in question, be regarded as an excluded creditor;

(b) The liquidator or administrator may not exercise any of the powers referred to in 1(b) above on behalf of such creditor.

(5) All receipts and expenditure in connection with the proceedings and claims in question shall be accounted for in a special account in such a way that only participating creditors will benefit from any proceeds and contribute to any expenditure, and further subject to any directions which the Court may give in this regard:

(6) The liquidator or administrator will not be required to give security for the costs of any such proceedings, unless the court on application of the defendant or respondent is satisfied that the proceedings are frivolous or vexatious.

(7) Any amounts received by the liquidator or administrator arising from any such proceedings or claims shall, for purposes of remuneration and distribution of proceeds, be treated as if they were proceeds of estate assets.

(8) The application referred to in subsection (1) may be brought by the liquidator of the debtor on behalf of creditors who extended credit to the debtor while it was engaged in insolvent trading or, if the liquidator refuses or fails to obtain the necessary authority or directions from creditors in terms of section 45 of this Act, by such a creditor or group of creditors.

(9) If any creditor has taken proceedings under subsection (1) no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.

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(10) Where any such liability has been investigated and prima facie established by way of statutory enquiry, the proceedings may be launched by way of notice of motion and supported by the evidence obtained by way of enquiry. If the court is unable to decide the case on the papers and the enquiry record, disputes of fact shall be referred to oral evidence as may be necessary.

(11) In any such proceedings, the court may give such further directions, whether in regard to limitation, quantification, procedure, distribution of proceeds or otherwise as it thinks proper for the purpose of giving effect to any order it may make. In particular:

(a) it may order that a person is liable for the costs of investigating the liability of such person or the costs of administration in the estate or such part thereof as the court may direct.

(b) (i) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the debtor to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the debtor held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(ii) For the purposes of this subsection, the expression “assignee” includes any person to whom or in whose favour, by the direction of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made. [Section 424(2)(a) and (b) of the Companies Act]

(c) Without prejudice to any other criminal liability incurred, where any business of a debtor is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly

a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence. [Section 424(3) of the Companies Act]

(d) The claim of a creditor against the debtor in respect of the debt which gave rise to a declaration in terms of Chapter 7 or 21, will be reduced by the amount received by the creditor in terms of the declaration.

**175. Giving of evidence after conviction for failure to testify.** - (1) Any person who is serving a term of imprisonment for the offence contemplated in section 136(2)(c) and who declares himself or herself willing to give the required evidence or to produce the required books, documents, or records may, on the written application of the Master or another person who is to preside at a meeting or to chair a commission, made to the head of the institution where the said person is being held in custody, be brought before the Master or other person for the hearing of such evidence or the production of the required books, documents, or records. [66(2), 66(3)]

(2) A person contemplated in subsection (1) who has given the required evidence or produced the required books, documents, or records may on his or her own application be brought before the court which imposed the sentence and that court may, irrespective of whether or not it is composed as it was when the sentence was imposed, suspend the remaining portion of the sentence or any portion thereof upon the conditions that it deems just, if the court is satisfied that the said person has answered fully and correctly all questions put to him or her or produced all books, documents, or records required of him or her, in so far as it was possible for him or her to do so. [66(5)]

(3) In order to satisfy itself concerning the facts contemplated in subsection (2), the court may accept as conclusive proof of those facts a certificate given by the presiding officer to the effect that the said person had appeared before him or her and had answered fully and correctly all questions put to him or her and produced all books, documents, or records required of him or her. [New provision]

**176. Criminal liability of partners, administrators, servants or agents.** - (1) Any person who -

(a) is or was a member of a partnership or who is or was a person responsible for the management of a debtor and who does or omits to do in relation to



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any property or to the affairs of that partnership or debtor or of the insolvent estate of that partnership or debtor; or

- (b) is or was charged with the administration of an estate and who does or omits to do in relation to any property or to the affairs of that estate; or
- (c) as a servant or agent has had the sole or practical control of any property or of the affairs of his or her employer or principal and who does or omits to do in relation to that property or the affairs of his or her employer or principal or of the insolvent estate or his or her former employer or principal,

any act which, if done or omitted by him or her in like circumstances in relation to his or her own property or affairs or to any property belonging to, or the affairs of his or her insolvent estate, would have constituted an offence under this Act, shall be deemed to have committed that offence. [143(1)]

(2) The liability under subsection (1) of a partner, person responsible for the management of a debtor, servant or agent shall not affect the liability under that subsection or under any other provision of this Act, of another partner or person responsible for the management of a debtor or of a servant or agent of the same partnership, or of the employer or principal of the employee or agent who is so liable. [143(2)]

**177. Jurisdiction of court.** - (1) A court shall have jurisdiction in respect of an application for the liquidation of the estate of any ~~person~~ debtor who -

- (a) on the date of the application -
  - (i) is domiciled within the court's area of jurisdiction; or
  - (ii) owns or is entitled to property situate within the court's area of jurisdiction; or
  - (iii) has its registered office or main place of business within the court's area of jurisdiction; or
- (b) at any time within twelve months immediately before the date of the application ordinarily resided or carried on business within the court's area of jurisdiction. [149(1)]

(2) A court which has jurisdiction over a person debtor or the insolvent estate of a person debtor by virtue of subsection (1) shall have jurisdiction in respect of any matter regulated by this Act arising out of the liquidation of the estate of the said person debtor. [New provision]

(3) When it appears to a court equitable or convenient that the estate of a person debtor over whom it has jurisdiction in terms of subsection (1) should be liquidated by another court in the Republic the court may decline to exercise jurisdiction in the matter and make such order as it finds appropriate. [149(1) proviso]

(4) Foreign representatives and creditors have access to the court as provided in Chapter 2 of this Act, and liquidation of the estate of a debtor shall be limited as provided in that Chapter.

(5) The court may rescind or vary any order made by it under the provisions of this Act. [149(2)]

**178. Appeals.** - (1) Any person aggrieved by a final liquidation order, or by a refusal to grant a provisional order or to grant a liquidation order without a provisional liquidation order, or by an order setting aside a provisional liquidation order, or any other appealable order made in terms of this Act may, subject to the provisions of section 20(4) and (5) of the Supreme Court Act, 1959 (Act No. 59 of 1959), appeal against such order. [150(1), (5)]

(2) The rules applicable to appeals from judgments or orders given in civil matters by the court concerned shall, subject to subsection (3), **mutatis mutandis** apply to appeals contemplated in subsection (1). [150(2)]

(3) Notwithstanding the provisions of any other law, the noting of an appeal against a final liquidation order shall not have the effect of suspending the operation of any provision of this Act: Provided that pending judgment on appeal no property belonging to the insolvent estate shall be realised without the written consent of the debtor insolvent or, failing such consent, permission granted by order of court on an application by an interested person who has furnished security to the satisfaction of the court for restitution in the event of the appeal being successful. [150(3)]

(4) If an appeal against a final liquidation order is allowed, the respondent may be ordered to pay all liquidation costs. [150(4)]

**179. Review.** - (1) Any person aggrieved by any decision, order or taxation of the Master or by a decision by the liquidator or by a decision or order of an officer presiding at a meeting of creditors of an insolvent estate, including the liquidator, may, within 90 days or such further period as the court may allow for good cause shown, bring such decision, order or taxation under review by the court upon notice to the Master or the presiding officer as the case may be and to any other person whose interests are affected. [151]

(2) If all or most of the creditors are affected by an application referred to in subsection (1), notice need to be given to the liquidator only. [151 proviso]

(3) The court reviewing any decision, order or taxation shall have the power to consider the merits of any such matter, to hear evidence and to make any order it deems fit: Provided that it shall not re-open any confirmed liquidator's account otherwise than as is provided in section 90. [151 second proviso]

(4) If the court on review confirms any decision, order or taxation of the Master or officer referred to in subsection (1) the applicant's costs shall not be paid out of the estate concerned unless the court otherwise directs. [151 bis]

**180. Master's fees.** - The Master shall in respect of the matters mentioned in Schedule 3, ensure that the fees specified therein are recovered in the manner prescribed in the Schedule.

**181. Custody and destruction of documents.** - (1) The Master shall have custody of all documents relating to an insolvent estate. [154(1)]

(2) The liquidator of an insolvent estate may after one year has elapsed as from the confirmation by the Master of the final liquidation account destroy all books, documents and records in his or her possession relating to the insolvent estate, unless the Master consents to the earlier destruction of such book, documents or records or directs that they be retained for the longer period determined by him or her. [155(1)]

(3) The Master may destroy all records in his or her office relating to an insolvent estate after five years have elapsed as from the rehabilitation of the insolvent debtor or the dissolution of a company debtor, close corporation debtor or association debtor in appropriate circumstances, or confirmation of the final account in the estate of any other debtor. [155(2)]

**182. Insurer's liability in respect of indemnification of insolvent debtor.** - Whenever any person (herein referred to as the insurer) is obliged to indemnify another person (herein referred to as the insured) in respect of any liability incurred by the insured towards a third party, such third party shall, on the liquidation of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party, but not exceeding the maximum amount for which the insurer is bound in terms of the indemnity. [156]

**183. Non-compliance with directives.** - (1) Nothing done under this Act shall be invalid merely by reason of the non-compliance with any directive prescribed by or in terms of this Act, unless in the opinion of the court, or if the court is not involved, in the opinion of the Master or the presiding officer, a substantial injustice has thereby been caused which cannot be remedied by an appropriate order of the court, the Master or the presiding officer. [157(1)]

(2) No defect or irregularity in the election or appointment of a liquidator shall vitiate anything done by him or her in good faith. [157(2)]

**184. Regulations and other powers of Minister.** - (1) The Minister may make regulations prescribing -

- (a) the procedure to be observed in Masters' offices in connection with insolvent estates;
- (b) the form, and manner of conducting proceedings under this Act;
- (c) the manner in which fees payable under this Act shall be paid and brought to account. [158]

(2) The Minister may by notice in the **Gazette** amend Schedule 2. [158bis]

**185. Amendment and repeal.** - (1) The laws mentioned in Schedule 3 are hereby amended or repealed to the extent indicated in the third column of the Schedule. [1]

(2) Anything done under any provision of any law repealed by subsection (1) which may be done under a corresponding provision of this Act, shall be deemed to have been done under that corresponding provision.

**186. Short title and commencement.** - This Act shall be called the Insolvency and Business Recovery Act, 2..., and shall come into operation on a date fixed by the President in the **Gazette**. [159]

**SCHEDULE 1**

**FORM A**

**STATEMENT OF DEBTOR'S AFFAIRS**

**FAILURE TO SUBMIT THIS FORM TO THE MASTER AND THE LIQUIDATOR  
WITHIN 7 DAYS IS A CRIMINAL OFFENCE AND MAY DELAY REHABILITATION,  
WHERE APPLICABLE**

**PART 1**

**B A L A N C E S H E E T  
OF.....\***

\* Here insert the name in full of the debtor

| Liabilities                       | R | c | Assets  | R | c |
|-----------------------------------|---|---|---|---|---|
| Debts due as per Part 5 . . . . . |   |   | Immovable property as per<br>part 2 . . . . .       |   |   |
|                                   |   |   | Movable property as per<br>Part 2 . . . . .         |   |   |
|                                   |   |   | Outstanding claims, etc, as<br>per Part 3 . . . . . |   |   |
|                                   |   |   | Deficiency/surplus . . . . .                        |   |   |
| Total                             |   |   | Total   |   |   |

**PART 2****IMMOVABLE PROPERTY**

|                                    | Description of property | Situation and extent | Mortgages and other secured claims | Estimated values |
|------------------------------------|-------------------------|----------------------|------------------------------------|------------------|
| Property situate in the Republic   |                         |                      |                                    | R                |
| Property situate elsewhere . . . . |                         |                      |                                    | c                |
|                                    |                         |                      | Total                              |                  |

**PART 3****ANY MOVABLE PROPERTY WHATSOEVER WHICH IS NOT INCLUDED IN PART 4 OR PART 5**

|  | Description of property | Estimated value |
|--|-------------------------|-----------------|
| Property situate in the Republic . . . |                         | R               |
| Property situate elsewhere . . . . .   |                         | c               |
|  | Total                   |                 |

**Note:** Movable property includes assets such as insurance policies and credit balances in accounts with banks or other institutions or persons. Any merchandise mentioned in this part shall be valued at its cost price or at its market value at the time of the making of this statement, whichever is the lower, and the statement shall be supported by detailed stock sheets relating to such merchandise.

**PART 4****OUTSTANDING CLAIMS, BILLS, BONDS AND OTHER SECURITIES**

|                     | Names and residential and postal address of the debtor | Particulars of claim | Estimated amount good | Estimated amount bad or doubtful |
|---------------------|--|----------------------|-----------------------|----------------------------------|
| In the Republic . . |  |                      | R           c         | R           c                    |
| Elsewhere . . . . . |  |                      |                       |                                  |
|                     |  | Total                |                       |                                  |

**PART 5****LIST OF CREDITORS**

| Name and address of creditor | Nature and value of security for claim | Nature of claim | Amount of claim |
|------------------------------|--|-----------------|-----------------|
|                              |  |                 | R           c   |
|                              |  | Total           |                 |



**PART 6**

**MOVABLE ASSETS PLEDGED, HYPOTHECATED, SUBJECT TO A RIGHT OF RETENTION OR UNDER ATTACHMENT IN EXECUTION OF A JUDGMENT**

| Description of asset | Estimated value of asset | Nature of charge on asset | Amount of debt to which charge relates | Name of creditor in whose favour charge is |
|----------------------|--------------------------|---------------------------|--|--|
|                      |                          |                           |  |  |

| The nominal amount of unpaid capital liable to be called up is R\* .....

| \* This information to be provided by a company debtor

**PART 7**

**ENUMERATION AND DESCRIPTION OF EVERY BOOK OR DOCUMENTING RECORD IN USE BY THE DEBTOR AT TIME OF THE LIQUIDATION OR AT TIME WHEN ~~HE OR SHE~~ THE DEBTOR CEASED CARRYING ON BUSINESS**

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**PART 8**

**DETAILED STATEMENT OF CAUSES OF DEBTOR'S INSOLVENCY**

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**PART 9**

**PERSONAL INFORMATION (TO BE COMPLETED BY NATURAL PERSON DEBTORS)**

State whether the debtor is married, widowed or divorced

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If the debtor is or was married, state -

- (a) name or names of spouse or spouses (a 'spouse' means not only a wife or husband in the legal sense, but also a person who in terms of any legal system or recognised custom is recognised as such a person's spouse and also any person with whom such person is cohabitating in a marriage relationship, irrespective of whether or not he or she is lawfully married to any other person).

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- (b) whether the debtor is or was married in or without community of property and whether the accrual system applies

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- (c) date of marriage

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- (d) whether the matrimonial property system has been changed since entering into the marriage and, if so, the nature of the change

.....  
.....

- (e) full names and date of birth of the spouse and, if an identity number has been assigned, the identity number of the spouse

.....  
.....

State the debtor's nationality

.....

State the debtor's place of birth, date of birth and, if an identity number has been assigned, the identity number

.....  
.....

Was the debtor's estate or the estate of a partnership in which the debtor is or was a partner previously liquidated or placed in bankruptcy, whether in the Republic or elsewhere?

.....

If the preceding answer is in the affirmative, state -

- (a) whether debtor's own estate or his partnership's estate was (i) liquidated; or (ii) placed in bankruptcy

.....  
.....

- (b) the place where and the date when that estate was liquidated or placed in bankruptcy

.....  
.....

- (c) whether the debtor has been rehabilitated or his estate released; if so, when

.....  
.....

**PART 10**

**AFFIDAVIT/SOLEMN DECLARATION**

I, ..... declare under oath/solemnly and sincerely declare\* that to the best of my knowledge and belief the statements contained in this Schedule are true and complete, and that every estimated amount therein contained is fairly and correctly estimated.

Signature of declarant .....

Sworn/solemnly declared before me on the .....day of ..... at  
.....

.....  
Commissioner of Oaths  
.....  
Full names  
.....  
Business address  
.....  
Designation and area or office

[Schedule 1, Form B]

**SCHEDULE 1: FORM AA [New form]**

**NOMINATION FOR LIQUIDATOR**

(Clause 37)

RE: \_\_\_\_\_ ("the Debtor")

1. I understand that application has been/is to be made to the High Court for an order for the placing of the Debtor in liquidation.
2. I declare that \_\_\_\_\_ ("the Creditor") is a creditor of the Debtor.
3. I hereby nominate \_\_\_\_\_ of \_\_\_\_\_ telephone number \_\_\_\_\_ for appointment as liquidator and request you to make the necessary appointment. The Creditor intends proving a claim and voting for the final appointment of the aforementioned person at the first meeting of creditors in this estate.
4. I declare that the Creditor is not a person disqualified, in terms of the provisions of sections 42 of the Insolvency Act from voting for the appointment of the aforesaid person as liquidator. As far as I am aware the nominated person is not disqualified from the aforesaid appointment by virtue of the provisions of section 54 of the Insolvency Act.
5. I further declare that I have satisfied myself that the amount reflected herein as owing by the Debtor to the Creditor is, to the best of my knowledge and belief, true and correct.
- 6.1 NAME OF CREDITOR: \_\_\_\_\_
- 6.2 ADDRESS OF CREDITOR: \_\_\_\_\_
- 6.3 TELEPHONE NUMBER OF CREDITOR: \_\_\_\_\_
- 6.4 FAX NUMBER OF CREDITOR (IF ANY) \_\_\_\_\_
- 6.5 E-MAIL ADDRESS OF CREDITOR (IF ANY) \_\_\_\_\_
7. AMOUNT OF CLAIM: \_\_\_\_\_  
(Amount in words)
8. CAUSE OF ACTION: The amount owing by the Debtor to the Creditor is owing in respect of:



**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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Official Stamp Company/Business, Close  
Corporation/Financial Institution

\_\_\_\_\_  
**SIGNATURE**

\_\_\_\_\_  
**DATE**

\_\_\_\_\_  
**PRINTED NAME**

\_\_\_\_\_  
**CAPACITY**

**FORM B**

**AFFIDAVIT FOR PROOF OF ANY CLAIM OTHER THAN A CLAIM BASED ON A PROMISSORY NOTE OR OTHER BILL OF EXCHANGE**

Strike out inapplicable words where \* occurs.

In the insolvent estate of: .....

Date of liquidation: .....

Name of creditor: .....

Address of creditor: .....

E-mail address of creditor .....

Fax number of creditor .....

Amount of claim at date of liquidation: .....

I, .....declare \*under oath/solemnly as follows

(1) \*I am the creditor/I am the .....(capacity) of the creditor and have authority to make this declaration and submit the claim for proof as appears from the attached documentation.

(2) \*I have personal knowledge of the nature and particulars of the claim/I have satisfied myself as to the nature and particulars of the claim.  
[44(4)]

(3) \*The claim was not obtained by cession after the commencement of liquidation proceedings/The claim was obtained by cession on .....(date).  
[44(4)]

(4) The nature of the claim (for instance money advanced, goods delivered, salary due) is ..... as appears from the attached documentation or declaration.

[44(2)]

(In respect of debts which accrued over a period or in respect of which payments were made a statement shall be submitted with a brief description of all debits and credits over the period of 12 months immediately preceding the date of liquidation.)

[44(6)]

(5) The debt arose on or since ..... (date).The debt was due to me on the date of liquidation/The debt or part thereof became due to me or will become due to me after liquidation as set out on the attached statement.

(6) \*I hold no security in respect of the debt/The particulars of security held by me for payment of the debt and the value placed be me on the security (if a value is placed on the security) are as follows:

.....  
.....  
.....

\* I do not rely on my security for the payment of my claim./I rely solely on my security for the payment of my claim.

[44(4)]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

(7) \*To the best of my knowledge no one except the insolvent estate is liable for the debt or a part thereof/The particulars of others who are to my knowledge liable for the debt and the security held in respect thereof are as follows . . . . .  
 . . . . .  
 . . . . .  
 . . . . .

\* (8) I authorize the liquidator to have any dividend due to me transferred electronically to my banking account (supply name of account, branch number and account number. . . . .  
 . . . . .

.....  
 Signature of declarant

\*Sworn to/ solemnly declared before me on: .....(date) at .....(place)

.....  
 Commissioner of oaths  
 .....  
 Full names  
 .....  
 Business address  
 .....  
 Designation and area or office

[Schedule 1, Form B]

**FORM C**

**AFFIDAVIT FOR THE PROOF OF A CLAIM BASED ON A PROMISSORY NOTE OR OTHER BILL OF EXCHANGE**

Strike out inapplicable words where \* occurs.

In the insolvent estate of: .....

Date of liquidation: .....

Name of creditor: .....

Address of creditor: .....

E-mail address of creditor .....

Fax number of creditor .....

Amount of claim at date of liquidation: .....

I, .....declare \*under oath/solemnly as follows

- (1) \*I am the creditor/I am the .....(capacity) of the creditor and have authority to make this declaration and submit the claim for proof as appears from the attached documentation.
- (2) \*I have personal knowledge of the nature and particulars of the claim/I have satisfied myself as to the nature and particulars of the claim.  
[44(4)]
- (3) \*The claim was not obtained by cession after the commencement of liquidation proceedings/The claim was obtained by cession on .....(date).  
[44(4)]
- (4) The debtor was on the date of liquidation and still is indebted to me by virtue of the following \*promissory note/bill of exchange:

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

| Date of note or bill | Name of maker or drawer | Name of acceptor | Name of person to whom payable | Date when payable | Name of endorser | Amount |
|----------------------|-------------------------|------------------|--------------------------------|-------------------|------------------|--------|
|                      |                         |                  |                                |                   |                  |        |

(5) The nature of the claim (for instance money advanced, goods delivered, salary due) is ..... as appears from the attached documentation or declaration.

[44(2)]

(In respect of debts which accrued over a period or in respect of which payments were made a statement shall be submitted with a brief description of all debits and credits over the period of 12 months immediately preceding the date of liquidation.)

[44(6)]

(6) That the said \*note/bill is in all respects genuine and valid.

(7) \*I hold no security in respect of the debt / The particulars of security held by me for payment of the debt and the value placed by me on the security (if a value is placed on the security) are as follows:

.....  
 .....  
 .....

\* I do not rely on my security for the payment of my claim./I rely solely on my security for the payment of my claim.

[44(4)]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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(8) \*To the best of my knowledge no one except the insolvent estate is liable for the debt or a part thereof/ The particulars of others who are to my knowledge liable for the debt and the security held in respect thereof are as follows . . . . .  
. . . . .  
. . . . .  
. . . . .

\* (9) I authorize the liquidator to have any dividend due to me transferred electronically to my banking account (supply name of account, branch number and account number). . . . .  
. . . . .

.....  
Signature of declarant

\*Sworn to/ solemnly declared before me on: .....(date) at .....(place)

.....  
Commissioner of oaths  
.....  
Full names  
.....  
Business address  
.....  
Designation and area or office

[Schedule 1, Form D]

**FORM D**

**FORM AND CONTENTS OF ACCOUNTS**

1. The accounts shall be lodged on A4 standard paper and totals shall be added up separately at the foot of each sheet with a total at the end of each account. [New provision]

**2. Heading**

The heading of the account shall contain the following information:

- (a) The name of the ~~insolvent~~ debtor;
- (b) the address of the ~~insolvent~~ debtor;
- (c) the identity number or date of birth or registration number of the ~~insolvent~~ debtor;
- (d) the date of liquidation;
- (e) the ordinal number of the account or supplementary account;
- (f) the nature of the account (eg liquidation account);
- (g) where applicable, whether it is a final or supplementary account;
- (h) whether it is a distribution account or a contribution account or both;
- (i) the Master's reference number.

[New provision]

**3. Liquidation account**

3.1 A liquidation account shall contain a record of all receipts derived from the realisation of assets and disbursements made or to be made in defraying the costs of liquidation, except receipts and disbursements reflected in a trading account. [92(1)]

3.2 The record of receipts and disbursements shall reflect full particulars explaining their nature and state the amount thereof in a money column. [92(2)]



3.3 The gross proceeds of assets shall be reflected and the disbursements incidental to the realisation shall be entered as disbursements. [New provision]

3.4 Receipts and disbursements shall upon the request of the Master be supported by satisfactory vouchers numbered consecutively in the top right-hand corner by reference to the number appearing in the account opposite the relative item. [92(3)]

3.5 The account shall reflect separately the distribution to be made (if any) to secured claims, preferent claims and concurrent claims and the contribution to be levied (if any). [New provision]

3.6 If security has been realised, the liquidation account shall contain a free residue account dealing with receipts not subject to security and consecutively numbered encumbered asset accounts dealing with receipts subject to security. [New provision]

3.7 If disbursements or income are apportioned amongst the free residue and encumbered asset accounts the liquidation account shall indicate how the apportionment has been calculated. [New provision]

3.8 An encumbered asset account shall be drawn to indicate the proceeds of the realization of security, the disbursements payable out of the proceeds of the security and the amount payable to a creditor or creditors with the period for and rate at which interest before and after liquidation (if any) has been calculated. [New provision]

#### **4. Trading account**

When the liquidator carried on business by either purchasing stock or entering into new transactions for the purpose of trading, a separate trading account including the following items only, shall be submitted:

- (a) The value of the stock on hand at the date of liquidation shown on the credit side;
- (b) the receipts and disbursement on the trading account;

- (c) the value of stock on hand at the date on which the accounts were made up shown on the debit side with a note of the items in the liquidation account reflecting the proceeds of the stock that has been realised (if any). [93]

**5. Bank reconciliation**

5.1 The liquidator shall lodge complete statements up to the date on which the accounts were made up of all accounts opened in terms of section 84. [92(3)]

5.2 The account shall contain a bank reconciliation statement with the following information:

- (a) The balance in the cheque account and the date at which the bank statement reflected that balance;
- (b) the amount of the contribution provided for in the contribution account (if any);
- (c) the amount (if any) of each outstanding deposit with sufficient particulars to explain its nature or a reference to the item in the liquidation account which together with the even numbered voucher (if any) explain its nature;
- (d) the amount of each disbursement in the liquidation account that must still be paid with sufficient particulars to explain its nature or a reference to the item in the liquidation account which together with the even numbered voucher, if any, explain its nature;
- (e) the amount of the payment (if any) still to be made to each secured creditor with an explanation if this amount does not agree with the amount reflected in the distribution account;
- (f) the total amounts to be paid to preferent creditors and concurrent creditors (if any) with an explanation if these amounts do not agree with the totals reflected in the distribution account;
- (g) the amount (if any) to be transferred to a next account.  
[New provision]

**6. Distribution account, contribution account or contribution and distribution account**

6.1 The liquidator shall, upon the request of the Master, lodge all proved claims and unproved claims admitted or compromised by the liquidator or proved in an action at law.

6.2 The account shall indicate the basis for contribution if this is not the amount of the concurrent claim and contain the following columns that are applicable to the account:

- (a) claim reference number;
  - (b) creditor's name and if dividends are to be transferred electronically the account name, branch number and account number of the creditor's account;
  - (c) total claim;
  - (d) concurrent claim;
  - (e) secured claim;
  - (f) award in previous accounts;
  - (g) concurrent award with a separate column for interest after liquidation (if any) and an explanation in the account of the rate at and period for which interest has been calculated;
  - (h) secured or preferent award;
  - (i) amount of contribution;
  - (j) shortfall.
- [94, 105]

6.3 In the event of the debtor being a company debtor or close corporation debtor, the account shall in addition also contain a list of the amounts returnable to contributories, if applicable, and such list shall contain the following columns that are applicable to the account:

- (a) The full christian names and surname of the contributory;
- (b) The number of shares or percentage of the members interest held by the contributory;
- (c) The amount returnable to the contributory expressed as a dividend in the rand.

[List B, CM 101, Regulations to the Companies Act]

**7. Certificate**

7.1 Each liquidator shall sign the certificate under oath or affirmation. [107]

7.2 The certificate shall state that the account contains a true account of the administration of the estate. [107]

7.3 If it is a final account, the certificate shall state that so far as the liquidator is aware all the assets of the insolvent estate have been disclosed in the accounts. [107]

7.4 If it is not a final account, the certificate shall reflect a list of all unrealised assets of which the liquidator is aware with the reason why the assets have not been realised and an estimate of the value of the assets. [92(4)]

FORM E1 [New form]

NOTICE IN TERMS OF SECTION 15(5)(A) (7)(a) OF THE INSOLVENCY ACT ?? OF 20?? (THE "ACT") TO ATTEND A HEARING IN TERMS OF SECTION 15(5)(A) (7)(a) OF THE ACT

In re
INSOLVENT ESTATE OF
MASTER'S REFERENCE NO

To:

You are hereby notified in terms of section 15(5)(a) (7)(a) to appear at a hearing to be held at (details of venue) on the day of 19, at to give evidence and supply proof of earnings received by you or your dependants out of the exercise of your profession, occupation or employment and all assets or income received by you or your dependants from whatever source and the estimated expenses for your own support and that of your dependants.

Dated at this day of 19,

.....

Magistrate

(Here insert details of the name, address telephone number, fax number and e-mail of the liquidator or the attorneys acting for the liquidator)

NOTE:

Your attention is specifically drawn to the provisions of sections 68A 56 and 136(2)(a) and (b) of the Act which sections are printed on the reverse side hereof.

| [Print on back, sections ~~68A~~ 56 and ~~101~~ 136(2)(a) and (b).]

FORM E2 [New form]

**SUMMONS IN TERMS OF SECTION ~~45(11)~~ 61(12) OF THE INSOLVENCY ACT ?? OF 20?? (THE "ACT") TO ATTEND A MEETING OF CREDITORS FOR QUESTIONING IN TERMS OF SECTION ~~45(11)~~ 61(12) OF THE ACT**

In re  
INSOLVENT ESTATE OF .....  
MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section ~~45(11)~~ 61(12) to appear in person at a meeting of creditors in the above estate to be held at ..... (details of venue) on the.....day of..... 19....., at..... to be questioned by the presiding officer, the liquidator or a creditor who has proved a claim against the estate, or the representative of the liquidator or such creditor in regard to your claim against the insolvent estate. You are summonsed to bring with you all books, documents or records in support of your claim.

Dated at.....this.....day of....., 19.....,

.....

Presiding Officer

(Here insert details of the name, address telephone number, fax number and e-mail of the liquidator or the attorneys acting for the liquidator)

NOTE:

In terms of clause ~~45(12)~~ 61(13), if a person who wishes to prove a claim is called upon to be questioned as contemplated in subsection (12) and fails without reasonable excuse to appear or refuses to take the oath or make a solemn declaration or to submit to questioning or to answer fully and satisfactorily any lawful question put to him or her, his or her claim, may be rejected.

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

**FORM E3 [New form]**

**SUMMONS IN TERMS OF SECTION ~~64(1)~~ 51(1) OF THE INSOLVENCY ACT ?? OF 20?? (THE "ACT")  
TO ATTEND A MEETING OF CREDITORS FOR QUESTIONING IN TERMS OF SECTION ~~65~~ 52 OF THE  
ACT**

In re

INSOLVENT ESTATE OF .....

MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section ~~64(1)~~ 51(1) to appear in person at a meeting of creditors in the above estate to be held at ..... (details of venue) on the.....day of..... 19...., at..... to give evidence and to be questioned on all matters relating to the insolvent or his or her business or affairs, whether before or after the liquidation of the estate, and concerning any property which at any time belonged to the insolvent estate and to produce to the presiding officer at the meeting all the books, papers and documents specified hereunder:

**LIST OF BOOKS, PAPERS OR DOCUMENTS TO BE PRODUCED**

| Description of book, paper or document | Date (if any) | Copy or original required |
|--|---------------|---------------------------|
|  |               |                           |
|  |               |                           |
|  |               |                           |
|  |               |                           |

Dated at.....this.....day of....., 19.....,

.....  
Presiding Officer

(Here insert details of the name, address  
telephone number, fax number and e-mail  
of the liquidator or the attorneys action for the liquidator)

**NOTES:**

1. A cheque for witness fees in the form of appearance money and travelling allowances in the sum of R .... (....., Rand) is attached to your copy of the summons. You are entitled to make representations to the Presiding Officer of the meeting for additional necessary witness fees.
2. Your attention is specifically drawn to the provisions of subsections ~~65~~ 52(3), ~~65~~ 52(6), ~~65~~ 52(9), ~~69~~ 57(10) and ~~68A~~ 56 of the Act which sections are printed on the reverse side hereof.

[Print on back, subsections ~~65~~ 52 (3), (6), (9) and (10) and section ~~68A~~ 56.]



**Annexure E**

**Draft Insolvency and Business Recovery Bill**

**FORM E4 [New form]**

**SUMMONS IN TERMS OF SECTION 66 53(3)(b) OR 66 53(5) OF THE INSOLVENCY ACT ?? OF 20?? (THE "ACT") TO ATTEND A QUESTIONING IN TERMS OF SECTION 66 53 OF THE ACT**

In re

INSOLVENT ESTATE OF .....

MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section 66 53(3)(b) or 66 53(5) to appear in person at a questioning in the above estate to be held at ..... (details of venue) on the.....day of..... 19....., at..... to be questioned on property in your possession belonging to the insolvent estate, amounts due by you to the insolvent estate and all matters relating to the affairs of the insolvent and his or her property and to produce to the presiding officer at the questioning all the books, documents or records specified hereunder:

**LIST OF BOOKS, DOCUMENTS OR RECORDS TO BE PRODUCED**

| Description of book, document or record | Date (if any) | Copy or original required |
|---|---------------|---------------------------|
|   |               |                           |
|   |               |                           |
|   |               |                           |
|   |               |                           |

Dated at.....this.....day of....., 19.....,

.....

Master/Court/  
Presiding Officer

(Here insert details of the name, address telephone number, fax number and e-mail of the liquidator or the attorneys acting for the liquidator)

**NOTES:**

1. A cheque for witness fees in the form of appearance money and travelling allowances in the sum of R .... (....., Rand) is attached to your copy of the summons. You are entitled to make representations to the Presiding Officer of the meeting for additional necessary witness fees.
2. Your attention is specifically drawn to the provisions of sections 65 52(3), (6), (9), (10), 66 53(7), (8) and (10), 68A 56 and 101 136(2)(a) and (b) of the Act which sections are printed on the reverse side hereof.

[Print on back, sections 65 52(3), (6), (9), (10), 66 53(7), (8) and (10), 68A 56 and 101 136(2)(a) and (b).]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

**FORM E5 [New form]**

**SUMMONS IN TERMS OF SECTION ~~68~~ 55(1) OF THE INSOLVENCY ACT ?? OF 20??  
(THE "ACT") TO ATTEND A QUESTIONING IN TERMS OF SECTION ~~68~~ 55 OF THE ACT**

In re

INSOLVENT ESTATE OF .....

MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section ~~68~~ 55(1) to appear in person at a questioning in the above estate to be held at ..... (details of venue) on the.....day of..... 19....., at..... to furnish information and to be questioned on all information within your knowledge concerning the insolvent or his or her estate or the administration of the estate and to produce to the presiding officer at the meeting all the books, documents and records specified hereunder:

**LIST OF BOOKS, DOCUMENTS OR RECORDS TO BE PRODUCED**

| Description of book, document or record | Date (if any) | Copy or original required |
|---|---------------|---------------------------|
|   |               |                           |
|   |               |                           |
|   |               |                           |
|   |               |                           |

Dated at.....this.....day of....., 19.....,

.....  
Master of the High Court

Your attention is specifically drawn to the provisions of sections ~~65~~ 52(3), ~~65~~ 52(6), ~~65~~ 52(9), ~~65~~ 52(10), ~~68~~ 55(5), ~~68~~ 55(6) ~~68A~~ 56 and ~~101~~ 136(2)(a) and (b) of the Act which sections are printed on the reverse side hereof.

[Print on back, sections ~~65~~ 52(3), (6), (9), (10), ~~68~~ 55(5), (6), ~~68A~~ 56 and 101 136(2)(a) and (b).]

**FORM F**

**STATUTORY DEMAND IN TERMS OF SECTION 2(3)(a)(i) OF THE INSOLVENCY AND BUSINESS RECOVERY ACT**

**WARNING**

This is an important document. If you should fail to respond to the document within twenty-one days after service thereof your estate may be liquidated and your assets taken away from you.

**DEMAND**

To: \_\_\_\_\_

Address: \_\_\_\_\_

The creditor claims that you are indebted to him or her for the following amount which is now due and payable and that he holds no security for the amount claimed.

| <b><u>When incurred</u></b> | <b><u>Type of debt<br/>(cause of action)</u></b> | <b><u>Amount due as at<br/>the date of the<br/>demand</u></b> |
|-----------------------------|--|---|
|                             |  |   |
|                             |  |   |

The creditor demands that you pay the amount due within three weeks after the service of this demand or give security to the reasonable satisfaction of the creditor therefor, or enter into a compromise in respect thereof.

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

Should you fail to comply with this demand, this does not preclude you from opposing an application for the liquidation of your estate. If you deny indebtedness wholly or in part, you should contact the creditor without delay.

SIGNATURE: \_\_\_\_\_

NAME OF CREDITOR: \_\_\_\_\_

(PRINT)

DATE: \_\_\_\_\_

CAPACITY: \_\_\_\_\_

(IF NOT CREDITOR PERSONALLY)

ADDRESS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

TEL NO: \_\_\_\_\_

PERSON YOU MAY CONTACT IF NOT CREDITOR PERSONALLY:

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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If debt obtained by cession or otherwise:

|                                 | <u>Name</u> | <u>Date of cession or other act</u> |
|---------------------------------|-------------|-------------------------------------|
| <b><u>Original creditor</u></b> |             |                                     |
| <b><u>Cessionaries</u></b>      |             |                                     |
|                                 |             |                                     |
|                                 |             |                                     |

**SCHEDULE 2**

**TARIFF A**

**SHERIFF'S FEES (SECTION 33 38)**

In this Tariff a reference to the tariff in an item refers to the items in the tariff applicable according to Rule 68 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (otherwise known as the Uniform Rules of Court), as amended from time to time.

1. For service or attempted service of documents the tariff in item 2.
2. For each separate attachment of property the tariff in item 5.
3. For making an inventory and the list of books and records referred to in section 33(7) of the Act the tariff in item 6.
4. For reporting on the attachment of assets the tariff in item 7.
5. For making of all necessary copies of documents the tariff in item 9.
6. Travelling allowance, per kilometre or fraction thereof according to the tariff in item 3.
7. For each necessary letter, excluding formal letters accompanying attachment or service of documents the tariff in item 12.
8. For each necessary attendance by telephone (in addition to prescribed trunk charges) the tariff in item 13.

9. For sending and receiving of each necessary facsimile per A4 size page (in addition to telephone charges) the tariff in item 14.
10. Bank charges: Actual costs incurred regarding bank charges and cheque forms.
11. For any work necessarily done by or on behalf of the sheriff in performing the duties under section 38 of the Act, for which no provision is made in this tariff: An amount to be determined by the Master.

**RULES FOR THE CONSTRUCTION OF THE TARIFF AND THE GUIDANCE OF THE SHERIFF**

- (1) Where there are more ways than one of doing any particular act, the least expensive way shall be adopted unless there is some reasonable objection thereto, or unless the party at whose instance process is executed desires any particular way to be adopted at his or her expense.
- (2) Where any dispute arises as to the validity or amount of any fees or charges the matter shall be determined by the Master.
- (3) The sheriff may pay rent, if necessary for premises required for the storage of goods attached, for a period of one month or such longer period as the Master or the liquidator shall authorize.

**TARIFF B**

**REMUNERATION OF LIQUIDATOR (SECTIONS 66)**

1. On the gross proceeds of any immovable property sold by the liquidator or the value at which property constituting security has been disposed of to a creditor in settlement of his or her claim or the gross proceeds of any sales by the liquidator in carrying on the business of the ~~insolvent~~ debtor, or any part thereof, in terms of section ~~62~~ 67(3)(d) 5 per cent
2. On the gross proceeds of any other movable property sold by the liquidator or other gross amounts collected by the liquidator 10 per cent.

Provided that the total remuneration of a liquidator in terms of this tariff shall not be less than two thousand five hundred rand.

**REMUNERATION OF INTERIM LIQUIDATOR (SECTION 62)**

A reasonable remuneration to be determined by the Master, not to exceed the rate of remuneration of a liquidator under this tariff.

[Schedule 2, Tariff B]



**TARIFF C**

**MASTER'S FEES OF OFFICE (SECTION 83(1)(b))**

1. On all insolvent estates under final liquidation in which the total gross value of the assets according to the liquidator's account for each complete R5 000

..... R25  
subject to a minimum fee of R500 and a maximum fee of R25 000.

2. (a) For a copy of or an extract from any document preserved in the office of a Master, when made in such office (including the certification of such copy or extract), a fee of R4,50 shall be paid.

(b) For the certification of such copy or extract not made in such office a fee of R9,00 shall be paid.

3. On any amount paid by the liquidator into the Guardians' Fund for account of creditors, a commission of five per cent shall be payable, to be deducted by the Master from the moneys so paid into the Guardians' Fund.

4. (a) The fees referred to in item 1 shall be assessed by the Master and shall be payable on or before a date determined by the Master to any receiver of revenue. Proof of such payment shall be submitted by the liquidator to the Master.

(b) The payment of the fees referred to in item 2 shall be denoted-  
(i) by affixing adhesive revenue stamps to; or  
(ii) by impressing stamps by means of a franking machine approved by the Commissioner for Inland Revenue

on, the written request for the rendering by the Master of the service in question.

[Schedule 3]

**SCHEDULE 3**  
**PROVISIONS OF LAWS AMENDED OR REPEALED**

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

\_\_\_\_\_            **Words underlined with solid line indicate insertions in existing enactments.**

| No and year of law | Short title                   | Extent of amendment or repeal   |
|--------------------|-------------------------------|---|
| Act No. 32 of 1944 | Magistrates' Courts Act, 1944 | <p>1. The amendment of section 65A by the addition of the following subsection:</p> <p style="padding-left: 40px;">“(5) If it appears to the court during proceedings in terms of subsection (1) that there are reasonable grounds for suspecting that any person has committed an offence, the court shall transmit the relevant information and certified copies of relevant documents to the <del>Commercial Crime Unit</del> Provincial Commander of the Commercial Branch of the South African Police Service in whose area of jurisdiction the proceedings was held or the offence is suspected of having been committed to enable the <del>Unit</del> Branch to determine whether criminal proceedings should be instituted in the matter.”.</p> <p>2. The amendment of section 74 by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;">“(b) states that the total amount of all his <u>unsecured</u> debts does not exceed the amount determined by the Minister from time to time by notice in the <b>Gazette</b>.”.</p> <p>3. The amendment of section 74B by the addition of the following subsection:</p> |

| No and year of law | Short title                         | Extent of amendment or repeal   |
|--------------------|-------------------------------------|---|
|                    |                                     | <p>“(6) If it appears to the court during a hearing in terms of subsection (1) that there are reasonable grounds for suspecting that any person has committed an offence, the court shall transmit the relevant information and certified copies of relevant documents to the <del>Commercial Crime Unit</del> Provincial Commander of the Commercial Branch of the South African Police Service in whose area of jurisdiction the proceedings was held or the offence is suspected of having been committed to enable the <del>Unit</del> Branch to determine whether criminal proceedings should be instituted in the matter.”.</p> <p>4. Section 74X set out in Schedule 4 is hereby inserted after section 74W.</p> |
| Act No. 66 of 1965 | Administration of Estates Act, 1965 | <p>The amendment of section 88 by the substitution for subsection (1) of the following subsection:</p> <p>"(1) Subject to the provisions of sub-sections (2) and (3), interest calculated on a monthly basis at the rate per annum determined from time to time by the Minister of Finance, and compounded annually at the thirty-first day of March, shall be allowed on each rand of the principal of every sum of money received by the Master for account of any minor, lunatic, unborn heir or any person having an interest therein of a usufructuary, fiduciary or fideicommissary nature, or for an insolvent in terms of section 93 of the Insolvency Act, 1997."</p>  |
| Act No. 68 of 1969 | Prescription Act, 1969              | <p>The amendment of section 13 by the substitution for paragraph (g) of subsection (1) of the following paragraph:</p> <p>“(g) the debt is the object of a claim <b>[filed]</b> against the estate of a debtor who is deceased <b><u>before the distribution in accordance with the final account in terms of the Administration of Estates Act, 1966 (Act No. 66 of 1965)</u></b>; or against the insolvent estate of the debtor or against</p>  |

## Annexure E

## Draft Insolvency and Business Recovery Bill

| No and year of law | Short title         | Extent of amendment or repeal   |
|--------------------|---------------------|---|
|                    |                     | a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No. 28 of 1966) <b><u>before the conclusion of the first meeting;</u></b> or.”.   |
| Act No. 53 of 1979 | Attorneys Act, 1979 | The amendment of section 83 by the insertion after paragraph (g) of subsection (11) of the following paragraph:<br><b><u>“(h) a candidate for appointment as liquidator or judicial manager who informs a creditor of an insolvent estate or of a company of the liquidation of the insolvent estate or the judicial management or liquidation of the company and indicates that he or she is available for such appointment.”.</u></b> |

## Annexure E

## Draft Insolvency and Business Recovery Bill

| No and year of law | Short title         | Extent of amendment or repeal   |
|--------------------|---------------------|---|
| Act No. 61 of 1973 | Companies Act, 1973 | <p>1. The amendment of section 311 by the substitution thereof of the following section:</p> <p><b>“311. [Compromise and a]Arrangement between a company[,] and its members [and creditors]. - (1)Where any [compromise or] arrangement is proposed between a [company and its creditors or any class of them or between a] company and its members or any class of them, the Court may, on the application of the company or any [creditor or] member of the company [or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager], order a meeting of the [creditors or class of creditors, or of the] members of the company or class of members [(as the case may be),] to be summoned in such manner as the Court may direct.</b></p> <p>(2) If the [compromise or] arrangement is agreed to by [-</p> <p><b>(a) a majority in number representing three-fourths in value of the creditors or class of creditors; or</b></p> <p><b>(b)] a majority representing three-fourths of the votes exercisable by the members or class of members, [(as the case may be)] present and voting either in person or by proxy at the meeting, such [compromise or] arrangement shall, if sanctioned by the court, be binding on [all the creditors or the class of creditors, or on] the members or class of members [(as the case may be)] and also on the company [or on the liquidator if the company is being liquidated or on the judicial manager administrator if the company is subject to a judicial management order].</b></p> <p>(3) No such [compromise or] arrangement shall effect the liability of any person who is a surety for the company.</p> <p><b>[(4) If the [compromise or] arrangement is in respect of a company being liquidated and provides for the discharge of the liquidation order or for the dissolution of the company without liquidation, the liquidator of the company shall lodge with the Master a report in terms of section 41 and a report as to whether or not any director or officer or past director or officer of the company is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company under any provision of this Act, and the Master shall report thereon to the Court.]</b></p> |

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|  |  | <p>(5) The Court, in determining whether the [<b>compromise or</b>] arrangement should be sanctioned or not, shall have regard to the number of members or members of a class present or represented at the meeting referred to in subsection (2) voting in favour of the [<b>compromise or</b>] arrangement [<b>and to the report of the Master referred to in subsection (4)</b>].</p> <p>(6)(a) An order by the Court sanctioning [<b>a compromise or</b>] <b>an</b> arrangement shall have no effect until a certified copy thereof has been lodged with the Registrar under cover of the prescribed form and registered by him.</p> <p>(b) A copy of such order of court shall be annexed to every copy of the memorandum of the company issued after the date of the order.</p> <p>(7) If a company fails to comply with the provisions of subsection (6)(b), the company and every director and officer of the company who is a party to the failure, shall be guilty of an offence.</p> <p>(8) In this section “company” means any company incorporated in terms of the provisions of the Companies Act 61 of 1973, [<b>liable to be liquidated under this Act</b>] and the expression “arrangement” includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods.”</p> <p>2. The amendment of section 312 by the substitution thereof of the following section:</p> <p><b>“312. Information as to [compromises and] arrangements.</b></p> <p>- (1) Where a meeting of [<b>creditors or any class of creditors or of</b>] members or any class of members is summoned under section 311 for the purpose of agreeing to [<b>a compromise or</b>] <b>an</b> arrangement, there shall -</p> <p>(a) with every notice summoning the meeting which is sent to a [<b>creditor or</b>] member, be sent also a statement -</p> <p>(i) explaining the effect of the [<b>compromise or</b>] arrangement; and</p> <p>(ii) stating all relevant information material to the value of the shares and debentures concerned in any arrangement; and</p> |
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|  |  | <p>(iii) in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the <b>[compromise or]</b> arrangement, in so far as it is different from the effect on the like interests of other persons; and</p> <p>(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which <b>[creditors or]</b> members entitled to attend the meeting may obtain copies of such a statement.</p> <p>(2) Where the <b>[compromise or]</b> arrangement affects the rights of debenture-holders of the company, the said statement shall give the like explanation and statement as respects the trustee of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.</p> <p>(3) Where a notice given by advertisement includes a notification that copies of the said statement can be obtained by <b>[creditors or]</b> members entitled to attend the meeting, every such <b>[creditor or]</b> member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.</p> <p>(4) Where a company makes default in complying with any requirement of this section, the company and every director or officer of the company who is a party to the default, shall be guilty of an offence, and for the purpose of this subsection any <b>[liquidator of the company and any]</b> trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company: Provided that a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person, being a director or trustee for debenture-holders, to supply the necessary particulars as to his interests and that fact has been stated in the statement.</p> <p>(5) It shall be the duty of every director of a company and of every trustee for debenture-holders to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and if he makes default in complying with such duty, he shall be guilty of an offence."</p> |
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|  |  | <p>3. The amendment of section 313 by the substitution thereof of the following section:</p> <p><b>“313. Provisions facilitating reconstruction or amalgamation.</b> - (1) If an application is made to the Court under this section for the sanctioning of <b>[a compromise or an]</b> arrangement proposed between a company and any such persons as are referred to in this section, and it is shown to the Court that the <b>[compromise or]</b> arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as the “transferor company”) is to be transferred to another company (in this section referred to as the “transferee company”) the Court may, either by the order sanctioning the <b>[compromise or]</b> arrangement or by any subsequent order, make provision for all or any of the following matters:</p> <ul style="list-style-type: none"> <li>(a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;</li> <li>(b) the allotment or appropriation by the transferee company of any shares, debentures or other like interests in that company which under the <b>[compromise or]</b> arrangement are to be allotted or appropriated by that company to or for any person;</li> <li>(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;</li> <li>(d) the dissolution, without liquidation, of any transferor company;</li> <li>(e) the provision to be made for any persons who, within such time and in such manner as the Court may direct, dissent from the <b>[compromise or]</b> arrangement;</li> <li>(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:</li> </ul> <p>Provided that no order for the dissolution, without liquidation, of any transferor company shall be made under this subsection prior to the transfer in due form of all the property and liabilities of the said company.</p> |
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|  |  | <p>(2) Where an order under this section provides for the transfer of property or liabilities, that property shall by virtue of the order vest in, subject to transfer in due form, and those liabilities shall become the liabilities of, the transferee company.</p> <p>(3) If an order is made under this section, every company in relation to which the order is made shall, within thirty days after the making of the order, cause a copy thereof to be lodged with the Registrar, under cover of the prescribed form, for registration, and if default is made in complying with this subsection, the company shall be guilty of an offence.</p> <p>(4) In this section the expression “property” includes property, rights and powers of every description, and the expression “liabilities” includes duties.</p> <p>(5) Notwithstanding the provisions of section 311(8) the expression “company” in this section does not include any company other than a company within the meaning of the Companies Act 61 of 1973.”</p> <p>4. The amendment of section 337 by the substitution of the definition of “<b>contributory</b>” of the following paragraph:<br/> “<b>contributory</b>’, in relation to a company limited by guarantee, means any person who has undertaken to contribute to the assets of the company in terms of section 52(3)(b) in the event of its being wound up [<b>and, in relation to any company which is unable to pay its debts and is being wound up by the court or by a creditors’ voluntary winding-up, includes ay person who is liable to contribute to the costs, charges and expenses of the winding-up of the company</b>].”</p> <p>5. The amendment of section 338 by the substitution of the following subsections:<br/> “(1) The provisions of this Act relating to the <b>voluntary</b> winding-up of a company <b>by its members</b>, shall not apply to any company if its winding-up was commenced before the commencement of this Act, and the winding-up of any such company shall be continued as if this Act had not been passed.</p> |
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|  |  | <p>(2) When a company having shares which are not fully paid up, is wound up <b><u>as a voluntary winding-up by members</u></b> under this Act, the provisions of the repealed Act in respect of such shares and the contributories in relation thereto shall continue to apply in respect of such a company, notwithstanding the repeal of that Act.”</p> <p>6. The repeal of section 339.</p> <p>7. The repeal of section 340.</p> <p>8. The amendment of section 341 by the substitution of the following subsection:<br/> “(1) Every transfer of shares of a company being wound up <b><u>as a voluntary winding-up by members</u></b>, or alteration in the status of its members effected after the commencement of the <b><u>voluntary</u></b> winding-up without the sanction of the liquidator, shall be void.<br/> <b>[(2) Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.]</b>”</p> <p>9. The amendment of section 342 by the substitution of the following subsection:<br/> “(1) In every <b><u>voluntary</u></b> winding-up of a company <b><u>by its members</u></b> the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, <b>[subject to the provisions of section 435(1)(b), the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and,]</b> unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interests in the company.<br/> <b>[(2) The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company.]</b>”</p> <p>10. The amendment of section 343 by the substitution of the following subsection:<br/> “(1) A company may be <b><u>only</u></b> be wound up <b><u>in terms of this Act voluntarily by members as provided for in section 349.</u></b></p> |
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|  |  | <p>(2) A voluntary winding-up of a company may be -</p> <p>(a) a creditors' voluntary winding-up; or</p> <p>(b) a members' voluntary winding-up.]”</p> <p>11. The repeal of section 344.</p> <p>12. The repeal of section 345.</p> <p>13. The repeal of section 346.</p> <p>14. The repeal of section 347.</p> <p>15. The repeal of section 348.</p> <p>16. The amendment of section 349 by the substitution of the following section:</p> <p>“349. <b>Circumstances under which company may be wound up voluntarily by members.</b> - A company, not being an external company, may be wound up [voluntarily] <b>as a voluntary winding-up by members</b> if the company has by special resolution resolved that it be so wound up.”</p> <p>17. The amendment of section 350 by the substitution of the following subsection:</p> <p>“(3) Unless otherwise provided, in a members' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers [by this Act] given to the liquidator in a [winding-up] <b>liquidation</b> by the Court <b>in terms of the Insolvency and Business Recovery Act ?? of 20??</b>, subject to such directions as may be given by the company in general meeting.”</p> <p>18. The repeal of section 351.</p> <p>19. The amendment of section 352 by the substitution of the following subsection:</p> <p>“(1) A voluntary winding-up of a company <b>by its members</b> shall commence at the time of the registration in terms of section 200 of the special resolution authorizing the winding-up.”</p> |
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|  |  | <p>20. The amendment of section 353 by the substitution of the following subsections:</p> <p>“(1) A company which is being wound up <b>as a voluntary winding-up by members [voluntarily]</b> shall, notwithstanding anything contained in its articles, remain a corporate body and retain all its powers as such, but shall from the commencement of the winding-up cease to carry on its business except in so far as may be required for the beneficial winding-up thereof.</p> <p>(2) As from the commencement of a voluntary winding-up <b>by members</b> all the powers of the directors of the company concerned shall cease except in so far as their continuance is sanctioned[-</p> <p style="padding-left: 40px;">(a) <b>by the liquidator or the creditors in a creditors' voluntary winding-up; or</b></p> <p style="padding-left: 40px;">(b) <b>by the liquidator or the company in general meeting [in a members' voluntary winding-up].”</b></p> <p>21. The amendment of section 354 by the substitution of the following section:</p> <p><b>“354. Court may stay, convert or set aside winding-up. -</b></p> <p>(1) The Court may at any time after the commencement of a <b>voluntary</b> winding-up <b>by members</b>, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the <b>voluntary</b> winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of <b>[any] the</b> voluntary winding-up on such terms and conditions as the Court may deem fit.</p> <p><b><u>(1A) The Court may at any time after the commencement of a voluntary winding-up by members, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the voluntary winding-up by members ought to be converted to a liquidation by the Court in terms of the provisions of the Insolvency and Business Recovery Bill 00 of 20??, make an order converting the proceedings to a liquidation by the Court in terms of the said Act.</u></b></p> <p>(2) The Court may, as to all matters relating to <b>an application in terms of subsections (1) or (1A), [a winding-up,]</b> have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.”</p> |
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|  |  | <p>22. The amendment of section 355 by the substitution of the following subsections:</p> <p>“(1) In any review by the Court of any matter under the <b>voluntary</b> winding-up of a company <b>by members</b> where the general body of <b>[creditors,]</b> members or contributories is affected, notice to the liquidator shall be notice to them.</p> <p>(2) The Court shall not authorise the re-opening of any duly confirmed account or plan of distribution or of contribution otherwise than as is provided <b>for in this Act [in section 408].</b>”</p> <p>23. The amendment of section 356 by the substitution of the following subsection:</p> <p>“(1) <b>[The Master shall upon receipt of a copy of any winding-up order of any company lodged with him give notice of such winding-up in the Gazette.</b></p> <p><b>(2)]</b> Any company which has passed a special resolution under section 349 for its voluntary winding-up, shall within 28 days after the registration of that resolution in terms of section 200[-</p> <p><b>(a)]</b> lodge with the Master a certified copy of the resolution concerned, together with[-</p> <p><b>(i) in the case of a members' voluntary winding-up if] a certified copy of</b> any further resolution nominating a person or persons for appointment as liquidator or liquidators of the company <b>[has been passed, a certified copy of that resolution; or</b></p> <p><b>(ii) in the case of a creditors' voluntary winding-up, two certified copies of the statement referred to in section 363 (1);] and</b></p> <p><b>[(b)]</b> give notice of the voluntary winding-up of the company in the <b>Gazette.</b></p> <p><b>(2) [(3)]</b> Any company which fails to comply with any provision of subsection <b>[(2)] (1)</b> and every director or officer thereof who knowingly authorised or permitted such failure, shall be guilty of an offence.”</p> |
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|  |  | <p>24. The amendment of section 357 by the substitution of the following subsections:</p> <p>“(1) A copy of every <b><u>special resolution for the voluntary winding-up by members of any company passed under section 349, and of every order of court amending or setting aside the proceedings in relation to the winding-up, shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company [winding-up order, whether provisional or final and of any order staying, amending or setting such order aside, made by the Court, shall forthwith be transmitted by the Registrar of the Court]</u></b> to-</p> <p>(a) the sheriff of the province in which the registered office of the company or main office of the body corporate is situate and to the sheriff of every province in which it appears that the company or such body corporate owns property;</p> <p>(b) every registrar or other officer charged with the maintenance of any register under any Act in respect of any property within the Republic which appears to be an asset of such company;</p> <p>(c) the messenger of every magistrate's court by the order whereof it appears that property of such company is under attachment.</p> <p>(2) Where the assets of any such company are under four hundred rand in value, the Court may direct that its movable assets may, upon such terms as to security as it may determine, remain in the custody of such person as may be specified in the directions, and in that event it shall not be necessary to transmit a copy of any order to any sheriff or messenger.</p> <p><b>[(3) A copy of every special resolution for the voluntary winding-up of any company passed under section 349 and of every order of court amending or setting aside the proceedings in relation to the winding-up shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company to the officers and registrars referred to in paragraphs (a), (b) and (c) of subsection (1).]</b></p> |
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|  |  | <p>(4)(a) Any officer and registrar to whom a copy of any such order or resolution is transmitted in terms of subsection (1) <b>[or (3)]</b> shall record such copy and note thereon the day and hour of receipt thereof.</p> <p>(b) Any registrar and officer referred to in paragraph (b) of subsection (1) shall upon receipt of a copy of any order or resolution referred to in subsection (1) <b>[or (3)]</b>, enter a caveat in his register accordingly.</p> <p>(5) Any company which fails to comply with any of the requirements of subsection <b>[(3)] (1)</b> and every director or officer of such a company who knowingly is a party to such failure, shall be guilty of an offence.”</p> <p>25. The repeal of section 358.</p> <p>26. The amendment of section 359 by the substitution of the following subsections:</p> <p>“(1) When <b>[the Court has made an order for the winding-up of a company or]</b> a special resolution for the voluntary winding-up of a company <b>by its members</b> has been registered in terms of section 200-</p> <p>(a) All civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and</p> <p>(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.</p> <p>(2)(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.</p> <p>(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.”</p> |
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|  |  | <p>27. The repeal of section 360.</p> <p>28. The amendment of section 361 by the substitution of the following subsections:</p> <p>“(1) <b>In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.]</b></p> <p>(2) In any <b>voluntary</b> winding-up of [any] a company <b>by its members</b>, at all times while the office of the liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master.</p> <p>(3) If for any reason it appears expedient, the Court may <b>[by the winding-up order or by any subsequent order]</b> direct that all or any part of the property, immovable and movable (including rights of action), belonging to the company, or to trustees on its behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official capacity any action or other legal proceedings relating to that property, or necessary to be brought or defended for the purpose of effectually winding-up the company and recovering its property.”</p> <p>29. The amendment of section 362 by the substitution of the following subsections:</p> <p>“(1) The Court may at any time after <b>[making a winding-up order or after]</b> a special resolution for the voluntary winding-up of a company <b>by its members</b> has been registered in terms of section 200, order any director, member, trustee, banker, agent or officer of the company concerned to pay, deliver, convey, surrender or transfer to the liquidator of the company forthwith, or within such time as the Court directs, any money, property or books and papers in his hands to which the company is <i>prima facie</i> entitled.</p> |
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|  |  | <p>(2) The Court may order any director, member, purchaser or other person from whom money is due to any company which is being wound up <b><u>as a voluntary winding-up by members</u></b>, to pay the same into a banking institution registered under the Banks Act, <b><u>[1965 (Act 23 of 1965)] 1990 (Act 94 of 1990)</u></b>, to be named by the Court for the account of the liquidator instead of to the liquidator, and such order may be enforced in the same manner as if it had ordered payment to the liquidator.</p> <p>(3) All moneys paid into a banking institution as aforesaid in the event of a winding-up by the Court shall be subject in all respects to the orders of the Court.”</p> <p>30. The repeal of section 363.</p> <p>31. The repeal of section 363A.</p> <p>32. The repeal of section 364.</p> <p>33. The repeal of section 365.</p> <p>34. The repeal of section 366.</p> <p>35. The amendment of section 367 by the substitution of the following subsections:</p> <p>“<b><u>(1) For the purpose of conducting the proceedings in [a] the voluntary winding-up of a company by its members, the Master shall appoint a liquidator or liquidators as [hereinafter] provided for in sections 37 or 68 of the Insolvency and Business Recovery Act 00 of 20??.</u></b></p> <p><b><u>(2) The Master shall, subject to the provisions of section 70 of the Insolvency and Business Recovery Act 00 of 20??, appoint the person or persons nominated by the company in the resolution referred to in section 356(1) as liquidator or liquidators of the company concerned.</u></b></p> <p><b><u>(3) The provisions of sections 37, 68, 69, 70, 71, 72, 73, 74, 75 and 76 of the Insolvency and Business Recovery Act 00 of 20??, shall apply mutatis mutandis to the liquidator or liquidators appointed in terms of this section.</u></b>”</p> <p>36. The repeal of section 368.</p> <p>37. The repeal of section 369.</p> <p>38. The repeal of section 370.</p> <p>39. The repeal of section 371.</p> |
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|  |  | <p>40. The repeal of section 372.</p> <p>41. The repeal of section 373.</p> <p>42. The repeal of section 374.</p> <p>43. The repeal of section 375.</p> <p>44. The repeal of section 376.</p> <p>45. The repeal of section 377.</p> <p>46. The repeal of section 378.</p> <p>47. The repeal of section 379.</p> <p>48. The repeal of section 380.</p> <p>49. The repeal of section 381.</p> <p>50. The repeal of section 382.</p> <p>51. The repeal of section 383.</p> <p>52. The amendment of section 384 by the substitution of the following subsections:</p> <p>“(1) In any <b>voluntary</b> winding-up <b>of a company by its members</b>, a liquidator shall be entitled to <b>[a reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration] the same remuneration as a liquidator in terms of section 44 of the Insolvency and Business Recovery Act 00 of 20??</b>:</p> <p>Provided that[, in the case of a members' voluntary winding-up,] the liquidator's remuneration may be determined by the company in general meeting.</p> <p>(2) <b><u>The provisions of section 44 of the Insolvency and Business Recovery Act 00 of 20??, shall mutatis mutandis be applicable in the determination of the liquidator's remuneration in terms of this section [The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.</u></b></p> |
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|  |  | <p>(3) No person who employs or is a fellow employee or in the ordinary employment of the liquidator, shall be entitled to receive any remuneration out of the assets of the company concerned for services rendered in the winding-up thereof and no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled under this Act.”</p> <p>53. The repeal of section 386 and the substitution thereof of the following subsection:<br/> <b>“(1) The liquidator in any voluntary winding-up by members shall <i>mutatis mutandis</i> have the same powers as a liquidator in terms of section 45 of the Insolvency and Business Recovery Act 00 of 20??, and which has been appointed in terms of that Act.”</b></p> <p>54. The repeal of section 387.</p> <p>55. The amendment of section 388 by the substitution of subsection (1) of the following subsection:<br/> <b>“(1) Where a company is being wound up <u>as a voluntary winding-up by members, [voluntarily,]</u> the liquidator or any member <u>[or creditor or contributory]</u> of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being <u>liquidated in terms of the provisions of the Insolvency and Business Recovery Act 00 of 20??</u> [wound up by the Court].”</b></p> |
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|  |  | <p>56. The amendment of section 390 by the substitution of the following subsections:</p> <p>“(1) Where a company is proposed to be or is being wound up voluntarily <b>as a voluntary liquidation by members</b>, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether registered under this Act or not (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement, whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company[<b> Provided that, in the case of a creditors' voluntary winding-up, the powers of the liquidator conferred by this section shall not be exercised save with the consent of three-fourths in number and value of the creditors present or represented at a meeting called by him for that purpose and of which not less than fourteen days' notice has been given, or with the sanction of the Court</b>].</p> <p>(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for <b>the voluntary</b> winding-up <b>of</b> the company <b>by its members</b> or for nominating liquidators, but if an order is made within a year of such resolution for winding-up the company by the Court, the special resolution shall not be valid unless sanctioned by the Court.”</p> <p>57. The repeal of section 391.<br/> 58. The repeal of section 392<br/> 59. The repeal of section 393.</p> |
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|  |  | <p>60. The repeal of section 394 and the substitution thereof of the following section:</p> <p><b><u>“394. Banking accounts and investments. - The provisions of sections 89, 90 and 91 of the Insolvency and Business Recovery Act 00 of 20?? shall <i>mutatis mutandis</i> be applicable to the liquidator of a company which is being wound up as a voluntary winding-up by members.”</u></b></p> <p>61. The repeal of section 395.<br/>         62. The repeal of section 396.<br/>         63. The repeal of section 397.<br/>         64. The repeal of section 398.<br/>         65. The repeal of section 399.<br/>         66. The repeal of section 400.<br/>         67. The repeal of section 401.<br/>         68. The repeal of section 402.</p> <p>69. The repeal of section 403 and the substitution thereof of the following section:</p> <p><b><u>“403. Liquidator’s duty to file liquidation and distribution account. - The liquidator of a company which is being wound up as a voluntary winding-up by members as provided for in this Act, shall have the same obligation to lodge liquidation and distribution accounts as provided for in section 92 of the Insolvency and Business Recovery Act 00 of 20??, and the provisions of sections 93, 94, 95. 96, 97 and 98 of the Insolvency and Business Recovery Act 00 of 20??, shall <i>mutatis mutandis</i> be applicable to such an account or accounts.”</u></b></p> <p>70. The repeal of section 404.<br/>         71. The repeal of section 405.<br/>         72. The repeal of section 406.<br/>         73. The repeal of section 407.<br/>         74. The repeal of section 408.<br/>         75. The repeal of section 409.</p> |
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|  |  | <p>76. The repeal of section 410.</p> <p>77. The repeal of section 411.</p> <p>78. The repeal of section 412.</p> <p>79. The repeal of section 413.</p> <p>80. The repeal of section 414.</p> <p>81. The repeal of section 415.</p> <p>82. The repeal of section 416.</p> <p>83. The repeal of section 417.</p> <p>84. The repeal of section 418.</p> <p>85. The repeal of section 419 and the substitution thereof of the following section:<br/> <b>“419. Dissolution of companies and other bodies corporate. - <u>The provisions of section 108 of the Insolvency and Business Recovery Act 00 of 20??, shall mutatis mutandis be applicable to a company being wound up as a voluntary winding-up by members.</u>”</b></p> <p>86. The repeal of section 420 and the substitution thereof of the following section:<br/> <b>“420. Court may declare dissolution void. - <u>The provisions of section 109 of the Insolvency and Business Recovery Act 00 of 20??, shall mutatis mutandis be applicable to a company being wound up as a voluntary winding-up by members.</u>”</b></p> <p>87. The repeal of section 421.</p> <p>88. The amendment of section 422 by the substitution of subsection (1) of the following subsection:<br/> <b>“422. Disposal of records of dissolved company. - (1)</b><br/> When any company has been wound up <b><u>as a voluntary winding-up by members</u></b>, and is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of[-<br/> <p style="padding-left: 40px;"><b>(a) in the case of a winding-up by the Court, in such way as the Master may direct;</b></p> </p> |
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|  |  | <p>(b) <b>in the case of a members' voluntary winding-up,]</b> in such way as the company by special resolution may direct[;</p> <p>(c) <b>in the case of a creditors' voluntary winding-up, in such way as the creditors may direct]."</b></p> <p>89. The repeal of section 423 and the substitution thereof of the following section:</p> <p><b><u>"423. Delinquent directors and others to restore property and to compensate the company. -(1) The provisions of section 112 of the Insolvency and Business Recovery Act 00 of 20??, shall <i>mutatis mutandis</i> be applicable to a company being wound up as a voluntary winding-up by members."</u></b></p> <p>90. The amendment of section 424 by the substitution of subsection (1) of the following subsection:</p> <p><b><u>"(1) When it appears[, whether it be in a winding-up, judicial management or otherwise,]</u> that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of [<b><u>the Master, the liquidator, the judicial manager,</u></b>] any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."</b></p> <p>91. The repeal of section 425.</p> <p>92. The amendment of section 426 by the substitution thereof of the following section:</p> <p><b><u>"426. Private prosecution of directors and others. - (1) The provisions of section 113 of the Insolvency and Business Recovery Act 00 of 20??, shall <i>mutatis mutandis</i> be applicable to a company which is being wound up as a voluntary winding-up by members."</u></b></p> <p>93. The repeal of Chapter XV (Judicial Management).</p> |
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Annexure E

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| <p>Act No. 69 of 1984</p> | <p>Close Corporations Act, 1984</p> | <p>1. The amendment of section 64 by the substitution of subsection (1) of the following subsection:</p> <p>“(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of <b>[the Master, or]</b> any creditor<del>[,]</del><b> or member [or liquidator]</b> of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.”</p> <p>2. The amendment of section 66 by the substitution of subsections (1) and (2) of the following subsections:</p> <p>“(1) The provisions of the Companies Act which relate to the <b>voluntary</b> winding-up of a company <b>by its members</b>, including the regulations made thereunder, (except sections 337, 338, <b>[344, 345, 346(2), 347(3),]</b> 349, <b>[364, 365(2),]</b> 367 <b>[to 370, inclusive]</b>, <b>[377, 387,]</b> 389, 390, <b>[395 to 399, inclusive, 400(1)(b), 401, 402, 417, 418,]</b> 419(4), <b>[421,]</b> 423 and 424), shall apply <i>mutatis mutandis</i> and in so far as they can be applied to the <b>voluntary</b> liquidation of a corporation <b>being wound up as a voluntary winding-up by its members</b> in respect of any matter not specifically provided for in this Part or in any other provision of this Act.</p> <p>(2) For the purposes of subsection (1) -</p> <p>(a) any reference in a relevant provision of the Companies Act, and in any provision of the <b>[Insolvency Act, 1936 (Act No. 24 of 1936)] <u>Insolvency and Business Recovery Act, 20?? (Act No. 00 of 20??)</u></b>, made applicable by any such provision -“</p> <p>3. The amendment of section 67 by the substitution of subsection (1) of the following subsection:</p> <p>“(1) A corporation may be wound up voluntarily if all its members so resolve at a meeting of members called for the purpose of considering the <b>voluntary</b> winding-up of the corporation, and sign a written resolution that the corporation be wound up voluntarily by members <b>[or creditors, as the case may be]</b>.”</p> <p>4. The repeal of section 68.</p> |
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|  |  | <p>5. The repeal of section 69.</p> <p>6. The repeal of section 70.</p> <p>7. The repeal of section 71.</p> <p>8. The repeal of section 72.</p> <p>9. The amendment of section 73 by the substitution of subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) Where in the course of the <b>voluntary</b> winding-up of a corporation <b>by its members</b> it appears that any person who has taken part in the formation of the corporation, or any former or present member, officer or accounting officer of the corporation has misapplied or retained or become liable or accountable for any money or property of the corporation, or has been guilty of any breach of trust in relation to the corporation, a Court may, on the application of <b>[the Master or of the liquidator or of]</b> any creditor or member of the corporation, inquire into the conduct of such person, member, officer or accounting officer and may order him to repay or restore the money or property, or any part thereof, with interest at such rate as the Court considers just, or to contribute such sum to the assets of the corporation by way of compensation or damages in respect of the misapplication, retention or breach of trust, as the Court considers just.”</p> <p>10. The repeal of section 74 and the substitution thereof of the following section:</p> <p style="padding-left: 40px;"><b>“74. Appointment of liquidator. - (1) <u>The provisions of sections 37 and 68 to 76, inclusive, of the Insolvency and Business Recovery Act 00 of 20??, shall apply mutatis mutandis to the appointment of a liquidator in the case of a corporation being wound up as a voluntary winding-up by members; Provided that the Master shall take into consideration any resolution or further resolution passed at a meeting of members nominating a person as liquidator.</u>”</b></p> <p>11. The repeal of section 75.</p> <p>12. The repeal of section 76.</p> <p>13. The repeal of section 77.</p> <p>14. The repeal of section 78.</p> |
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|  |  | 15. The repeal of section 79.<br>16. The repeal of section 80.<br>17. The repeal of section 81. |
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**SCHEDULE 4**

**STATEMENT IN RESPECT OF PROPOSED PRE-LIQUIDATION COMPOSITION**

**(SECTION 118)**

**PART A**

**PERSONAL PARTICULARS OF DEBTOR**

Full names and surname . . . . .  
. . . . .

Address . . . . .

(Documents in connection with the composition may be delivered to the debtor at this address until such time as he or she has notified the magistrate of a change of address)

Date of birth . . . . .

Identity number, if one has been assigned . . . . .

Marital status . . . . .

If married, state—

full names of spouse (“spouse” means a spouse in the legal sense, and even if there is such a spouse, also a spouse according to any law or custom or a person of any sex living with another as a spouse) . . . . .  
. . . . .

date of birth of spouse . . . . .

identity number of spouse, if one has been assigned . . . . .

whether the debtor is or was married in or without community of property and whether the accrual system applies  
. . . . .

date of marriage . . . . .

whether the matrimonial property system has changed since entering into the marriage and, if so, the nature of the change . . . . .  
. . . . .

Whether the debtor’s estate has been placed under administration during the last five years or whether it is under administration at present and, if so, the date of the administration order and whether it has been concluded . . . . .  
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Whether the debtor has during the last six months lodged a composition with a magistrate for submission to creditors .....

Whether the debtor's estate has been liquidated during the last ten years and, if so, the date of liquidation and the Division of the High Court that issued the liquidation order .....

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## **PART B**

### **APPLICABLE STATUTORY PROVISIONS**

The debtor declares that he or she is aware of the following statutory provisions in connection with his or her application:

If the composition provides for the payment of a cash amount for distribution among creditors, the amount shall, pending the outcome of the offer of composition, be invested with an attorney or someone else whom the court approves in an interest-bearing savings account in trust. The debtor shall offer proof that the cash amount has been invested in this manner.

If a debtor incurs debt during the period from lodging the composition with the magistrate until creditors have voted on the composition, he or she shall notify the creditor who offers him or her credit of the pending composition and at the first appearance before a magistrate in connection with the composition, he or she shall provide full particulars concerning the said debt incurred by him or her. During the said period or after a composition has been accepted, a debtor shall not alienate, encumber or voluntarily dispose of any property which shall be made available to creditors in terms of the composition or do anything which can impede compliance with the composition. A debtor who contravenes these provisions shall be guilty of an offence.

If the composition provides for payments by the debtor in determined instalments or otherwise, the acceptance of the composition has the effect of a judgment in terms of section 65 of the Magistrates' Courts Act 32 of 1944 in respect of the payments. Any person who in terms of the composition shall receive the payments on behalf of creditors, or if there is no such person, any creditor who is in terms of the composition entitled to a benefit out of the payments, shall have the rights which a judgment creditor would have in terms of the section.

The magistrate may revoke the composition for cogent reasons. "Cogent reason" shall include the following:

1. If the debtor does not comply with his or her obligations in terms of the composition;  
or

2. If the debtor renders false information in his or her statement or in the course of the questioning; or
3. If the debtor gives a benefit in respect of a claim which falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.

**PART C**

**INCOME AND EXPENDITURE**

The name and business address of the debtor's employer or, if the debtor is not employed, the reason why he or she is not employed

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The debtor's trade or vocation and his or her gross weekly or monthly income as well as the income of his or her spouse living in with him or her, and particulars of all deductions therefrom by way of debit order or otherwise, supported as far as possible by written statements by the employer of the debtor or his or her spouse

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A detailed list of the debtor's weekly or monthly necessary expenses and the expenses of persons who are dependent on him or her, including the travelling expenses of the debtor or his or her spouse to and from work and such expenses of his or her children to and from school, and expenses required to retain assets that are subject to the composition

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The number and ages of persons who are dependent on the debtor or his or her spouse and their relationship to the debtor or his or her spouse

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**PART D**

**ASSETS**

**(i) Assets not subject to the composition**

| <u>Description of asset</u> | <u>Value</u> | <u>Subject to secured claim?</u><br><u>(Bond, property tax, pledge,</u><br><u>cession, hire-purchase,</u><br><u>instalment contract, etc)</u> |
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**(ii) Assets subject to the composition**

| <u>Description of asset</u> | <u>Value</u> | <u>Subject to secured claim?</u><br><u>(Bond, property tax, pledge,</u><br><u>cession, hire-purchase,</u><br><u>instalment contract, etc)</u> |
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The debtor affirms that assets which are subject to the composition are in safe custody, that obligations in respect of the assets are included in “necessary expenses” in Part C above, and that such obligations will be fulfilled until conclusion of the composition.

**PART E**

**DEBTS**

**(i) Debts not subject to security**

| <u>Name and address of debtor</u> | <u>Amount</u> | <u>Give particulars if the debt is not immediately claimable</u> |
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| .....                             |               |  |

**(ii) Debts subject to security**

| <u>Name and address of debtor</u> | <u>Amount</u> | <u>Nature of security and identification of asset subject to security (Part D above)</u><br><u>Give particulars if the debt is not immediately claimable</u> |
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Name and address of any other person who is apart from the debtor liable for any of the abovementioned debts

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**AFFIDAVIT/SOLEMN DECLARATION**

I,.....declare under oath/solemnly and sincerely declare\* that to the best of my knowledge and belief the statements contained in this form are true and complete, and that every estimated amount therein contained is fairly and correctly estimated.

.....  
Signature of declarant

Sworn/solemnly declared before me on the .....day of.....at.....

.....  
Commissioner of Oaths

.....  
Full names

.....  
Business address

.....  
Designation and area of office

\* Delete which is not applicable.  
[New provision]