

INSOLVENCY AND LIQUIDATION (WINDING-UP)



WHAT IS THE MEANING OF INSOLVENCY OR LIQUIDATION (FINAL LIQUIDATION / WINDING-UP)

Final liquidation occurs when the High Court (or the Magistrate's Court in the case of the close corporation) issues a final winding-up order. In terms of the Company Act 71 of 2008, there are a number of reasons why a winding-up order may be granted including, by special resolution of a company; failure by the business to commence or continue with business; loss of capital; inability to pay debts; dissolution of the external company; no reasonable prospect of business rescue succeeding; etc. This order will have the effect that the business will stop trading; its assets will be liquidated and distributed to creditors in order of ranking. All contracts of employment are automatically terminated (s38 of the Insolvency Act) when a company or close corporation is wound-up.

NOTE - A person or a business (partnership or sole trader) may be sequestered.

Workers need to be informed timeously of the possible winding-up of the business; and

A process of limited consultation between employees facing dismissals as a result of insolvency and relevant stakeholders needs to take place in order to attempt to reach consensus on appropriate measures that could be taken to save part or whole of the business.

OVERVIEW OF POWERS OF THE COURT: WINDING-UP

The Court may grant or dismiss an application for a winding up order. It may issue either a final or a provisional winding-up order or convert a provisional order into a final order. The Court may also effect business rescue proceedings.

When it comes to sequestration, a sequestration order suspends the employment contract between the employee and the employer with immediate effect (s38(1) of the Insolvency Act).

PROVISIONAL WINDING-UP ORDER

The company or close corporation (voluntary winding-up) or the creditors (compulsory winding-up) apply to the High Court for a winding-up order. As soon as practical after a provisional winding-up order has been granted, the Master of the Court must appoint a provisional liquidator to manage the business with the interests of the creditors in mind. The Court makes an order which will stipulate a time period by which the provisional liquidator must report to the Court on the status of the company or close corporation.

The provisional liquidator may recommend to the court that the winding-up order be lifted and that control of close corporation or company be given back to management or that liquidation final winding-up order be granted by the Court.

BUSINESS RESCUE PROCEEDINGS

A company may adopt a resolution to enter business rescue proceedings in terms of section 129 of the Companies Act 71 of 2008. Alternatively, in terms of section 131 of the Companies Act, an affected person such as a trade union that represents employees of that company, creditors of the company, and employees of the company who are not represented by a registered trade union, may apply to the Court for an order to effect business rescue proceedings.

Section 128 (1) (b) of the Companies Act defines "business rescue" as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- i. the temporary supervision of the company, and of the management of its affairs, business and property;
- ii. a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- iii. the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, to prevent liquidation or to minimise the impact of liquidation on those directly affected by it.

Business rescue proceedings do not change the terms and conditions of employment of employees as existed prior to the proceedings. Termination of employment will thus still have to be undertaken in terms of the Labour Relations Act. During business rescue proceedings there is a general moratorium on legal proceedings against the company. This includes any enforcement action against the company (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except(a) with the written consent of the practitioner; (b) with the leave of the court and in accordance with any terms the court considers suitable; (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began.

TRANSFER OF CONTRACTS OF EMPLOYMENT IN CIRCUMSTANCES OF INSOLVENCY

Section 197A applies to transfers of a business where the old employer is insolvent and a scheme of arrangement or compromise has been entered into to avoid winding-up or sequestering the employer for reasons of insolvency. If a transfer of business takes place between an old employer and a new employer in the circumstances above, the new employer is:

Unless otherwise agreed, automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's winding-up or sequestration. The transfer of business does not interrupt the employees' continuity of employment and their employment continues with the new employer as if with the old employer.

However, anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer and not the new employer. For example, the new employer cannot be responsible for a dismissal made against an employee by the old employer. In addition, all rights and obligations between the old employer and each employee at the time of transfer remain the rights and obligations of the old employer and each employee.

The rights and obligations of the old employer in respect of collective agreements and arbitration awards also become the rights and obligations of the new employer.

The new employer will comply with its obligations in terms of s197A if the new employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer. However, if the terms and conditions are determined by a collective agreement, this will continue to apply.

S197A also does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belong prior to the transfer.

CAN THE MATTER BE REFERRED TO THE CCMA?

The CCMA has no jurisdiction to consider the validity of a winding-up order. In the case of a final winding-up order being granted, an employee may lodge a claim of outstanding money with the liquidators. Any claim brought by an employee to the CCMA would end upon the company or close corporation's final liquidation.

RELEVANT LEGISLATION

- Insolvency Act 24 of 1936, as amended
- Labour Relations Act 66 of 1995 as amended,
- Companies Act 71 of 2008.