

INSOLVENCY ACT 24 OF 1936

[ASSENTED TO 17 JUNE 1936] [DATE OF COMMENCEMENT: 1 JULY 1936]

(Signed by the Governor-General in Afrikaans)

as amended by

Finance Act 17 of 1938

Income Tax Act 31 of 1941

Hire-Purchase Act 36 of 1942

Insolvency Law Amendment Act 16 of 1943

Insurance Act 27 of 1943

Merchant Shipping Act 57 of 1951

General Law Amendment Act 32 of 1952

General Law Amendment Act 62 of 1955

General Law Amendment Act 50 of 1956

Proclamation 229 of 1956

Farmers' Assistance Amendment Act 16 of 1960

Finance Act 64 of 1960

Proclamation 210 of 1960

Income Tax Act 80 of 1961

Proclamation 159 of 1961

Income Tax Amendment Act 6 of 1963

Insolvency Amendment Act 99 of 1965

Insolvency Amendment Act 6 of 1972

Income Tax Act 90 of 1972

General Law Amendment Act 62 of 1973

General Law Amendment Act 29 of 1974

Income Tax Act 85 of 1974

Sales Tax Act 103 of 1978

Insolvency Amendment Act 78 of 1980

Insolvency Amendment Act 101 of 1983

Insolvency Amendment Act 84 of 1984

Transfer of Powers and Duties of the State President Act 97 of 1986

Insolvency Amendment Act 27 of 1987

Insolvency Amendment Act 89 of 1989
Insolvency Amendment Act 6 of 1991
Financial Institutions Amendment Act 54 of 1991
General Law Amendment Act 139 of 1992
Security by Means of Movable Property Act 57 of 1993
Insolvency Amendment Act 122 of 1993
General Law Third Amendment Act 129 of 1993
General Law Fifth Amendment Act 157 of 1993
Insolvency Amendment Act 32 of 1995
General Law Amendment Act 49 of 1996
Judicial Matters Amendment Act 104 of 1996
Judicial Matters Amendment Act 34 of 1998
Judicial Matters Second Amendment Act 122 of 1998

ACT

To consolidate and amend the law relating to insolvent persons and to their estates.

Section 2 Definitions

In this Act unless inconsistent with the context-

'account', in relation to a trustee, means a liquidation account or a plan of distribution or of contribution, or any supplementary liquidation account or plan of distribution or contribution, as the case may require;

'banking institution' means a banking institution as defined in section 1 of the Banks Act, 1965 (Act 23 of 1965), and registered or provisionally registered or deemed to be registered as a banking institution in terms of section 4 of that Act, but does not include a provisionally registered banking institution which is so registered provisionally after the coming into operation of the Insolvency Amendment Act, 1972;

[Definition of 'banking institution' inserted by s. 1 of Act 6 of 1972.]

'building society' means a building society as defined in section 1 of the Building Societies Act, 1965 (Act 24 of 1965), and finally registered or deemed to be finally registered as a building society in terms of section 5 of that Act;

[Definition of 'building society' inserted by s. 1 of Act 6 of 1972.]

'Court' or 'the Court', in relation to any matter means the provincial or local division of the Supreme Court which has jurisdiction in that matter in terms of section one hundred and forty-nine or one hundred and fifty-one, or any judge of that division; and in relation to any offence under this Act or in section eight, twenty-six, twenty-nine, thirty, thirty-one, thirty-two, paragraph (a) of subsection (3) of section thirty-four, seventy-two, seventy-three, seventy-five, seventy-six, seventy-eight or one hundred and forty-seven the expression 'Court' or 'the Court' includes a magistrate's court which has jurisdiction in regard to the offence or matter in question;

'debtor', in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies;

'disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and 'dispose' has a corresponding meaning;

[Definition of 'disposition' substituted by s. 1 of Act 27 of 1987.]

'free residue', in relation to an insolvent estate, means that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention;

[Definition of 'free residue' amended by s. 2 (a) of Act 16 of 1943.]

'Gazette'

[Definition of 'Gazette' inserted by s. 2 (b) of Act 16 of 1943 and deleted by s. 1 of Act 49 of 1996.]

'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 another;

'immovable property' means land and every right or interest in land or minerals which is registrable in any office in the Republic intended for the registration of title to land or the right to mine;

'insolvent' when used as a noun, means a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context;

'insolvent estate' means an estate under sequestration;

'magistrate' includes an additional magistrate and an assistant magistrate;

'Master' in relation to any matter, means the Master of the Supreme Court within whose area of jurisdiction that matter is to be dealt with and includes an Assistant Master;

'messenger' means a messenger of a magistrate's court and includes a deputy-messenger;

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

'preference', in relation to any claim against an insolvent estate, means the right to payment of that claim out of the assets of the estate in preference to other claims; and 'preferent' has a corresponding meaning;

'property' means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fidei commissary heir or legatee;

'Republic'

[Definition of 'Republic' ("Union") added by s. 2 (d) of Act 16 of 1943 and deleted by s. 1 of Act 49 of 1996.]

'security', in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention;

'sequestration order' means any order of court whereby an estate is sequestered and includes a provisional order, when it has not been set aside;

'sheriff' includes a deputy sheriff;

'special mortgage' means a mortgage bond hypothecating any immovable property or a notarial mortgage 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 mortgage bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act 18 of 1932), but excludes any other mortgage bond hypothecating movable property;

[Definition of 'special mortgage' inserted by s. 2 (c) of Act 16 of 1943 and substituted by s. 4 of Act 57 of 1993 and by s. 1 (1) of Act 157 of 1993.]

'Supreme Court'

[Definition of 'Supreme Court' inserted by s. 2 (c) of Act 16 of 1943 and deleted by s. 1 of Act 49 of 1996.]

'the Territory'

[Definition of 'the Territory' inserted by s. 2 (c) of Act 16 of 1943 and deleted by s. 1 of Act 49 of 1996.]

'trader' means any person who carries on any trade, business, industry or undertaking in which property is sold, or is bought, exchanged or manufactured for purpose of sale or exchange, or in which building operations of whatever nature are performed, or an object whereof is public entertainment, or who carries on the business of an hotel keeper or boarding-house keeper, or who acts as a broker or agent of any person in the sale or purchase of any property or in the letting or hiring of immovable property; and any person shall be deemed to be a trader for the purpose of this Act (except for the purposes of subsection (10) of section twenty-one) unless it is proved that he is not a trader as hereinbefore defined: Provided that if any person carries on the trade, business, industry or undertaking of selling property which he produced (either personally or through any servant) by means of farming operations, the provisions of this Act relating to traders only shall not apply to him in connection with his said trade, business, industry or undertaking;

'trustee' means the trustee of an estate under sequestration, and includes a provisional trustee.

Section 5 Prohibition of sale in execution of property of estate after publication of notice of surrender and appointment of curator bonis

(1) After the publication of a notice of surrender in the Gazette in terms of section four, it shall not be lawful to sell any property of the estate in question, which has been attached under writ of execution or other process, unless the person charged with the execution of the writ or other process could not have known of the publication: Provided that the Master, if in his opinion the value of any such property does not exceed R5 000, or the Court, if it exceeds that amount, may order the sale of the property attached and direct how the proceeds of the sale shall be applied.

[Sub-s. (1) substituted by s. 1 of Act 99 of 1965 and amended by s. 1 of Act 101 of 1983.]

(2) After the publication of a notice of surrender as aforesaid in the Gazette the Master may appoint a curator bonis to the debtor's estate, who shall forthwith take the estate into his custody and take over the control of any business or undertaking of the debtor, as if he were the debtor, as the Master may direct, including any business the debtor is licensed to carry on in terms of the Liquor Act, 1928, but subject in every case, mutatis mutandis, to the provisions of section seventy.

[Sub-s. (2) amended by s. 4 of Act 16 of 1943.]

Section 17 Notice of sequestration

(1) The registrar shall without delay transmit-

(a) one original of every sequestration order and of every order relating to an insolvent estate or to a trustee or to an insolvent, made by the court, to the Master;

(b) one original of every provisional sequestration order or if a final sequestration order was not preceded by a provisional sequestration order, then of that final order, and of every order amending or setting aside any prior order so transmitted, which was made by the court to-

(i) the deputy-sheriff of every district in which it appears that the insolvent resides or owns property;

(ii) every officer charged with the registration of title to any immovable property in the Republic;

(ii)bis every officer having charge of a register of ships kept at a port of registry appointed as such in terms of paragraph (c) of section four of the Merchant Shipping Act, 1951, for the registration of ships;

[Sub-para. (ii)bis inserted by s. 1 of Act 57 of 1951.]

(iii) every sheriff and every messenger who or whose deputy holds under attachment any property belonging to the insolvent estate.

(2) Every officer who has received an order transmitted to him in terms of subsection (1), or a certificate and a copy of an order transmitted to him in terms of section 18A, shall register each such order, certificate or copy and note thereon the day and hour when it was received in his office.

[Sub-s. (2) substituted by s. 2 (a) of Act 122 of 1993.]

(3) (a) Upon the receipt by any officer referred to in subparagraph (ii) of paragraph (b) of subsection (1) of a sequestration order, or of a certificate and a copy of an order referred to in section 18A, he shall, if he has not yet entered such a caveat, enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent, and if the sequestration order or the certificate referred to in section 18A contains the name of the spouse of the insolvent, he shall in like manner enter a caveat in respect of such spouse.

(b) A caveat contemplated in this subsection, whether it was entered before or after the commencement of the Insolvency Amendment Act, 1993, shall expire ten years after the date of the sequestration order in question, or six months after the commencement of the said Act, whichever date is the later.

[Sub-s. (3) substituted by s. 2 (b) of Act 122 of 1993.]

(3)bis Upon the receipt by any officer referred to in subparagraph (ii)bis of paragraph (b) of subsection (1) of a sequestration order he shall enter a caveat against the transfer of every ship or share in a ship or the cancellation or cessation of every deed of mortgage of a ship or share in a ship registered in the name of or belonging to the insolvent or his or her spouse.

[Sub-s. (3)bis inserted by s. 1 of Act 57 of 1951.]

(4) When the Master has received a sequestration order or an order setting aside a provisional sequestration order he shall in each case give notice in the Gazette of such order.

[Sub-s. (4) substituted by s. 10 of Act 16 of 1943.]

Section 18 Appointment of provisional trustee by Master

(1) As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his duties as provisional trustee and shall hold office until the appointment of a trustee.

(2) At any time before the first meeting of the creditors of an insolvent estate in terms of section forty, the Master may, subject to the provisions of subsection (3) of this section, give such directions to the provisional trustee as could be given to a trustee by the creditors at a meeting of creditors.

(3) A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.

[Sub-s. (3) amended by s. 11 of Act 16 of 1943.]

(4) When a meeting of creditors for the election of a trustee has been held in terms of section forty and no trustee has been elected, and the Master has appointed a provisional trustee in the estate in question, the Master shall appoint him as trustee on his finding such additional security as the Master may have required.

Section 18A Trustee to furnish particulars of insolvent

Any person appointed as provisional trustee after the commencement of the Insolvency Amendment Act, 1993, or if no provisional trustee has been appointed, or if the provisional trustee has failed to perform the duties mentioned below, a trustee appointed after the said commencement shall as soon as possible after his appointment determine whether the particulars referred to in section 9 (3) (a) (i) and (ii) are correctly reflected in the sequestration order, and if any of such particulars are not so reflected or are incorrectly reflected he shall forthwith take all reasonable steps to obtain the correct particulars and shall transmit a certificate containing such particulars, a copy of the sequestration order and of his appointment to every officer charged with the registration of title to any immovable property in the Republic and to the Master.

[S. 18A inserted by s. 3 of Act 122 of 1993.]

Section 18 B Trustee may cause caveat to be entered

(1) A trustee may, before or after the rehabilitation of an insolvent, 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 or of his spouse contemplated in section 21 (13), 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.

(2) The notice referred to in subsection (1) shall be accompanied by the written consent of the Master contemplated in that subsection and shall identify sufficiently the person in respect of whom and the property or bond in respect of which the caveat is to be entered so as to enable the officer charged with the registration to enter the caveat as contemplated in the said subsection.

(3) The caveat shall remain in force until the date indicated by the Master in his consent.

[S. 18B inserted by s. 3 of Act 122 of 1993.]

Section 35 Uncompleted acquisition of immovable property before sequestration

If an insolvent, before the sequestration of his estate, entered into a contract for the acquisition of immovable property which was not transferred to him, the trustee of his insolvent estate may enforce or abandon the contract. The other party to the contract may call upon the trustee by notice in writing to elect whether he will enforce or abandon the contract, and if the trustee has after the expiration of six weeks as from the receipt of the notice, failed to make his election as aforesaid and inform the other party thereof, the other party may apply to the court by motion for cancellation of the contract and for an order directing the trustee to restore to the applicant the possession of any immovable property under the control of the trustee, of which the insolvent or the trustee gained possession or control by virtue of the contract, and the court may make such order on the application as it thinks fit: Provided that this section shall not affect any right which the other party may have to establish against the insolvent estate, a non-preferent claim for compensation for any loss suffered by him as a result of the non-fulfilment of the contract.

Section 80bis Sale of movable or immovable property on authorization of Master

(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.

(2) The Master may thereupon authorize the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorize the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale.

[S. 80bis inserted by s. 23 of Act 16 of 1943 and substituted by s. 10 of Act 101 of 1983.]

Section 86 Effect of general bond and general clause

No general mortgage bond registered after the thirty-first day of December, 1916, shall confer any preference in respect of immovable property, and no general clause in a mortgage bond hypothecating immovable property registered after the said date shall confer any preference in respect of any property: Provided that the preceding provisions of this section shall not affect any preference conferred by a general clause in any mortgage bond passed before the commencement of this Act by a widower or widow in favour of a Master, for the purpose of securing the payment to his or her child of any sum of money due to the child from the estate of the widower's or widow's deceased spouse.

[S. 86 amended by s. 26 of Act 16 of 1943.]

Section 87 Ranking of mortgages for future debts

Priority under any mortgage bond to secure the payment of future debts shall depend on the date of the registration of that mortgage bond, and not on the date upon which any such debt comes into existence.

Section 88 Certain mortgages are invalid

A mortgage bond, other than a kustingbrief, whether special or general passed for the purpose of securing the payment of a debt not previously secured, 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 incurred in novation of or substitution for any such first-mentioned debt, shall not confer any preference if the estate of the mortgage debtor is sequestered within a period of six months after such lodging: Provided that a mortgage bond shall be deemed not to have been lodged as aforesaid, if it was withdrawn from registration.

Section 127A Rehabilitation by effluxion of time

(1) Any insolvent not rehabilitated by the court within a period of ten years from the date of sequestration of his 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 orders otherwise prior to the expiration of the said period of ten years.

(2) If a court issues an order contemplated in subsection (1), the registrar shall transmit a copy of the order to every officer charged with the registration of title to any immovable property in the Republic.

(3) Upon receipt of the order by such officer he shall enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of or belonging to the insolvent.

Section 129 Effect of rehabilitation

(1) Subject to the provisions of subsection (3) and subject to such conditions as the court may have imposed in granting a rehabilitation, the rehabilitation of an insolvent shall have the effect-

(a) of putting an end to the sequestration;

(b) of discharging all debts of the insolvent, which were due, or the cause of which had arisen, before the sequestration, and which did not arise out of any fraud on his part;

(c) of relieving the insolvent of every disability resulting from the sequestration.

(2) A rehabilitation granted on an application made in circumstances described in subsection (3) of section one hundred and twenty-four shall have the effect of reinvesting the insolvent with his estate.

(3) A rehabilitation shall not affect-

(a) the rights of the trustee or creditors under a composition;

(b) the powers or duties of the Master or the duties of the trustee in connection with a composition;

(c) the right of the trustee or creditors to any part of the insolvent's estate which is vested in but has not yet been distributed by the trustee, but subject to the provisions of subsection (2);

(d) the liability of a surety for the insolvent;

(e) the liability of any person to pay any penalty or suffer any punishment under any provision of this Act.

(4) The caveat shall remain in force until the date upon which the insolvent is rehabilitated.

[S. 127A inserted by s. 6 of Act 6 of 1972 and substituted by s. 7 of Act 122 of 1993.]