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THE PRESIDENCY

No. 121 22 January 2003

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 69 of 2002: Insolvency Second Amendment Act, 2002.



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GENERAL EXPLANATORY NOTE:

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

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

(English text signed by the President.)
(Assented to 30 December 2002.)

ACT

To amend the Insolvency Act, 1936, so as to require notice of a petition for the sequestration of a debtor's estate to be given to employees of the debtor, registered trade unions representing such employees, the South African Revenue Service and the debtor; to provide for the service of sequestration orders on such employees, trade unions and the South African Revenue Service; to make further provision regarding a debtor's rights to compensation; and so as to effect certain textual corrections; to amend the Companies Act, 1973, so as to require notice of an application for the winding-up of a company to be given to employees of the company, registered trade unions representing such employees, the South African Revenue Service and the company; to provide for the service of winding-up orders on such employees, trade unions, the South African Revenue Service and the company; to make provision regarding a company's rights to compensation; and to provide for matters incidental thereto.

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

Amendment of section 4 of Act 24 of 1936, as amended by section 3 of Act 16 of 1943, section 19 of Act 62 of 1995 and section 1 of Act 49 of 1996

1. Section 4 of the Insolvency Act, 1936, is hereby amended by the substitution for subsection (2) of the following subsection: 5

“(2) (a) Within a period of seven days as from the date of publication of the said notice in the *Gazette*, the petitioner [shall] must deliver or post a copy of the said notice to every one of the creditors of the debtor in question whose address he or she knows or can ascertain. 10

(b) The petitioner must further, within the period referred to in paragraph (a), furnish a copy of the notice—

(i) by post to every registered trade union that, to the petitioner's knowledge, represents any of the debtor's employees; and

(ii) to the employees themselves— 15

(aa) by affixing a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or

(bb) if there is no access to the premises by the employees, by affixing a copy of the notice to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the surrender; and 20

(iii) by post to the South African Revenue Service.”

Amendment of section 9 of Act 24 of 1936, as amended by section 6 of Act 16 of 1943, section 2 of Act 99 of 1965 and section 1 of Act 122 of 1993

2. Section 9 of the Insolvency Act, 1936, is hereby amended by the insertion after subsection (4) of the following subsection:

- “(4A) (a) When a petition is presented to the court, the petitioner must furnish a copy of the petition—
- (i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor’s employees; and
 - (ii) to the employees themselves—
 - (aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor’s premises; or
 - (bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;
 - (iii) to the South African Revenue Service; and
 - (iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.
- (b) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph (a) was complied with.”

Substitution of section 11 of Act 24 of 1936

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

“Service of rule nisi [upon the debtor]

11. (1) If the court sequestrates the estate of a debtor provisionally it [shall] must simultaneously grant a rule nisi calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestrated finally.

(2) If the debtor has been absent during a period of twenty-one days from his or her usual place of residence and of his or her business (if any) within the Republic, the court may direct that it [shall be] is sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the *Gazette*, or may direct some other mode of service.

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

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

(3) Upon the application of the debtor the court may anticipate the return day for the purpose of discharging the order of provisional sequestration if twenty-four hours’ notice of such application has been given to the petitioning creditor.

(4) For the purposes of serving the rule nisi in terms of subsection (2A), the sheriff must establish whether the employees are represented by a registered trade union and determine whether there is a notice board inside the employer’s premises to which the employees have access.”

Substitution of section 15 of Act 24 of 1936

4. The following section is hereby substituted for section 15 of the Insolvency Act, 1936:

“Compensation to debtor if petition is an abuse of court’s procedure or malicious or vexatious 5

15. Whenever the court is satisfied that a petition for the sequestration of a debtor’s estate is an abuse of the court’s procedure or is malicious or vexatious, the court may allow the debtor forthwith to prove any damage which he or she may have sustained by reason of the **[provisional sequestration of his estate]** presentation of the petition and award him or her such compensation as it may deem fit.” 10

Amendment of section 49 of Act 24 of 1936, as amended by section 21 of Act 6 of 1963, section 12 of Act 99 of 1965 and section 1 of Act 49 of 1996

5. Section 49 of the Insolvency Act, 1936, is amended by the substitution for subsection (2) of the following subsection: 15

“(2) Nothing in this section shall be construed as preventing the **[Secretary for Inland Revenue]** Commissioner for the South African Revenue Service from proving in the manner provided in this Act a claim against the estate of a partnership in respect of any sum referred to in paragraph (b) of section one hundred and one, or any interest due on such sum.”. 20

Amendment of section 99 of Act 24 of 1936, as substituted by section 5 of Act 6 of 1972 and amended by section 6 of Act 62 of 1973, section 9 of Act 29 of 1974, section 69 of Act 85 of 1974, section 50 of Act 103 of 1978, section 3 of Act 139 of 1992 and section 3 of Act 122 of 1998

6. Section 99 of the Insolvency Act, 1936, is amended— 25

(a) by the substitution for the words following subparagraph (v) of subsection (1)(b) of the following words:

“but did not pay to the **[Secretary for Inland Revenue]** Commissioner for the South African Revenue Service prior to the sequestration of the estate, and any interest payable under that Act in respect of such amount in respect of any period prior to the date of sequestration of the estate;” 30
and

(b) by the substitution for paragraph (e) of subsection (1) of the following paragraph:

“(e) any amount which in terms of the Unemployment Insurance Contributions Act, **[1966 (Act No. 30 of 1966)] 2002 (Act No. 4 of 2002)**, was, immediately prior to the sequestration of the estate, due to the Unemployment Insurance Fund by the insolvent in his capacity as an employer, in respect of any contribution, penalty or other payment; and” 35
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Amendment of section 346 of Act 61 of 1973, as amended by section 11 of Act 70 of 1984

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

“(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application— 45

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

(ii) to the employees themselves—

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or 50

(bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises.

where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;

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

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

Insertion of section 346A in Act 61 of 19738

8. The following section is hereby inserted after section 346 of the Companies Act, 1973:

“Service of winding-up order

346A. (1) A copy of a winding-up order must be served on—

- (a) every trade union referred to in subsection (2);
- (b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor’s premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;
- (c) the South African Revenue Service; and
- (d) the company, unless the application was made by the company.

(2) For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a registered trade union and determine whether there is a notice board inside the premises of the company to which the employees have access.”

Amendment of section 347 of Act 61 of 19739

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

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

Short title and commencement

10. This Act is called the Insolvency Second Amendment Act, 2002, and shall come into operation on 1 January 2003 or such earlier date as the President may determine by proclamation in the *Gazette*.