



# INSOLVENCY AND LIQUIDATION

## WHAT IS THE MEANING OF INSOLVENCY OR LIQUIDATION (FINAL LIQUIDATION)

Final liquidation occurs when a company or close corporation has applied to the High Court (or the Magistrate's Court in the case of the close corporation) for an order of final liquidation. This order will have the effect that the company no longer exists. The company 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 placed in final liquidation.

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

## PROCESSES OF LIQUIDATION

Liquidation may be final or provisional. An alternative to an application for liquidation is an application to court placing a company under judicial management. It is important to distinguish between the two processes (final liquidation has already been discussed above).

## PROVISIONAL LIQUIDATION

The company or close corporation (voluntary liquidation) or the creditors (compulsory liquidation) apply to the high court to place it in liquidation. The court hears the application and appoints a provisional liquidator to manage the company with the interests of the creditors in mind. The court makes an order which will stipulate a time period by which the 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 liquidation order to be lifted and that control of close corporation or company be given back to management or that the company or close corporation be placed in final liquidation. A company under provisional liquidation has to suspend all contracts of employment (rather than terminate which was the situation prior to the amendments). This will regulate the rights of employees during this period.

## JUDICIAL MANAGEMENT

Judicial management is a process in which the company trades out of its insolvency. They may be substantial assets or contingent claims in favour of the company and the liquidator decides it is not in the creditors' interests to liquidate the business. Orders of judicial management are not uncommon but are often a stage on the way to final liquidation.

A company in judicial management has a choice whether to terminate the contracts of employment of the employees of the company or close corporation or to continue the employment of the employees.

## AMENDMENTS TO THE INSOLVENCY ACT

A number of problems were identified in terms of the Labour Relations Act, 1995 that employees experienced when a business was liquidated. As a means of addressing these concerns the following amendments were passed:

- Workers need to be informed timeously of possible liquidations; 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.

## TRANSFER OF CONTRACTS OF EMPLOYMENT IN CIRCUMSTANCES OF INSOLVENCY

Amendments have been passed that align the Department of Labour together with the Department of Justice. 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 sequestrating 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 an order of insolvency or liquidation (provisional or final) issued by the High Court. The employee's recourse is to lodge a claim 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, 1936, as amended  
Labour Relations Act, 1995, as amended, ss197A and 197B