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THE PRESIDENCY

No. 1388 6 November 2002

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

No. 33 of 2002: Insolvency 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 28 October 2002.)

ACT

To amend the Insolvency Act, 1936, so as to further regulate the effect of sequestration on employment contracts and claims for severance and retrenchment pay; and to provide for matters incidental thereto.

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

Substitution of section 38 of Act 24 of 1936

1. The following section is hereby substituted for section 38 of the Insolvency Act, 1936 (hereafter referred to as the principal Act):

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“Effect of sequestration on contract of service

38. (1) The contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order.

(2) Without limiting subsection (1), during the period of suspension of a contract of service referred to in subsection (1)—

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(a) an employee whose contract is suspended is not required to render services in terms of the contract and is not entitled to any remuneration in terms of the contract; and

(b) no employment benefit accrues to an employee in terms of the contract of service which is suspended.

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(3) An employee whose contract of service is suspended is entitled to unemployment benefits in terms of section 35 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), from the date of such suspension, subject to the provisions of that Act.

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(4) A trustee appointed in terms of section 56, or a liquidator appointed in terms of section 375 of the Companies Act, 1973 (Act No. 61 of 1973), or a liquidator who, in terms of section 74 of the Close Corporations Act, 1984 (Act No. 69 of 1984), remains in office after the first meeting and a co-liquidator, if any, appointed by the Master may terminate the contracts of service of employees, subject to subsections (5) and (7).

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(5) A trustee may not terminate a contract of service unless the trustee has consulted with—

(a) any person with whom the insolvent employer was required to consult, immediately before the sequestration, in terms of a collective agreement defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

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- (b) (i) a workplace forum defined in section 213 of the Labour Relations Act, 1995; and
(ii) any registered trade union whose members are likely to be affected by the termination of the contract of service, if there is no such collective agreement that existed immediately prior to the sequestration; 5
- (c) a registered trade union representing employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service, if there is no such workplace forum; or 10
- (d) the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose, if there is no such trade union.
- (6) The consultation referred to in subsection (5) must be aimed at reaching consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer— 15
- (a) by the sale of the whole or part of the business of the insolvent employer; or
- (b) by a transfer as contemplated in section 197A of the Labour Relations Act, 1995; or 20
- (c) by a scheme or compromise referred to in section 311 of the Companies Act, 1973; or
- (d) in any other manner.
- (7) If any party referred to in subsection (5) wishes to make proposals concerning any matter contemplated in subsection (6), that party must submit written proposals to the trustee or liquidator within 21 days of the appointment of the trustee in terms of section 56, or the appointment of the liquidator in terms of section 375 of the Companies Act, 1973, or the appointment of a co-liquidator in terms of section 74 of the Close Corporations Act, 1984, or if a co-liquidator is not appointed, the date of the conclusion of the first meeting, unless the trustee or liquidator and an employee agree otherwise. 25 30
- (8) A creditor of the insolvent employer may, with the consent of the trustee, participate in any consultation contemplated in this section. 35
- (9) Unless the trustee or liquidator and an employee have agreed on continued employment of the employee in view of measures contemplated in subsection (6), all suspended contracts of service shall terminate 45 days after— 40
- (a) the date of the appointment of a trustee in terms of section 56; or
- (b) the date of the appointment of a liquidator in terms of section 375 of the Companies Act, 1973; or
- (c) the date of the appointment of a co-liquidator in terms of section 74 of the Close Corporations Act, 1984, or if a co-liquidator is not appointed, the date of the conclusion of the first meeting. 45
- (10) An employee whose contract of service has been—
- (a) suspended in terms of subsection (1); or
- (b) terminated in terms of subsection (4) or (9), 50
- is entitled to claim compensation from the insolvent estate of his or her former employer for loss suffered by reason of the suspension or termination of a contract of service prior to its expiration.
- (11) An employee whose contract of service terminates or has been terminated in terms of this section is entitled to claim severance benefits from the estate of the insolvent employer in accordance with section 41 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997).” 55

Amendment of section 98A of Act 24 of 1936

2. Section 98A of the principal Act is hereby amended by the substitution for paragraph (iv) of subsection (1)(a) of the following subparagraph:

“(iv) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, [or] wage-regulating measure, or as a result of termination in terms of section 38; and”.

Short title and commencement

3. (1) This Act shall be called the Insolvency 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*. 5

(2) This Act applies in respect of estates which are sequestrated or provisionally sequestrated on or after the date of commencement of this Act.