



INSOL
INTERNATIONAL



Sequestration and liquidation procedures and the application of Insolvency law to winding-up

Chapters 27 paragraphs 27-1-27-6

Lindi Coetzee

Nelson Mandela University

Liquidation of companies and close corporations

- Existence of companies and close corporations can only be terminated through dissolution
- Liquidation is the process that precedes dissolution
- Before dissolution the following takes place:
 - tracing and taking control of assets
 - realising the assets
 - paying creditors according to ranking of preferences
 - distribute residue, if any, to shareholders/members

Liquidations

- Takes place under control of Master of High Court
- Jurisdiction of the Masters office depends on method of liquidation being used
- Chapter XIV of 1973 Companies Act continues to apply as if the **previous act** was not repealed
- Definitions and rules regarding jurisdiction in the 1973 act must be applied, despite the repeal of the 1973 Act.

Solvent liquidations

- Winding up of solvent companies – dealt with in sections 79 to 83 of 2008 Companies Act
 - Chapter XIV of 1973 act will apply to liquidation of solvent companies, except following sections
 - Section 343 (modes of winding up)
 - Section 344 (circumstances in which company may be wind up by court)
 - Section 346 (application to court for winding-up of a company)
 - Section 348 (commencement of winding-up by court)
 - Sections 349 – 353 Voluntary winding-up
 - Where there is a conflict between a provision of previous act and a provision of Part G of chapter 2 of the 2008 act (i.r.o. solvent company), 2008 provision prevails.

Solvent and Insolvent companies

- If company being wound up as solvent is found to be insolvent, interested person may apply to court for winding up order in terms of 1973 act.
- Step one – determine whether company is solvent or insolvent
 - The solvency or insolvency of the company will determine which act will apply

Liquidation

- 2008 Companies Act does not define solvent or insolvent company
- 1973 act defines when company is unable to pay its debts
- Initially uncertainty whether company will be insolvent if commercially insolvent (inability to pay debts) or factually insolvent. (liabilities exceed assets)

Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd

- Court held solvent company = company that is liquid – able to pay its debts as it becomes due in ordinary course of business
- S345 was retained to enable determination to be made in terms of s79(3) of whether company is solvent or insolvent.
- Deeming provisions in section 345 of 1973 act, may be used to establish solvency of company in terms of s79(3) of the 2008 Act
- Company could be factually solvent but commercially insolvent and still be liquidated

Liquidation

- *Murray NO and Others v African Global Holdings (Pty) Ltd* – company held to be unable to pay debts where banking facilities were terminated – company was unable to access liquid assets

Application of Insolvency Act

- Several sections of Chapter XIV of 1973 act provides that law relating to insolvency applies when liquidating companies
- Some provisions of Insolvency act will apply to both solvent and insolvent companies
- Insolvent liquidations – law of insolvency applies in respect of matters not dealt with in 1973 act.
- Insolvent estate must be read as liquidated estate of company unable to pay its debts

Application of Insolvency Act

1973 Section nr	Subject matter of section	Applicable to Insolvent liquidations	Applicable to Solvent liquidations
S340	Voidable & Undue Preferences	✓	
S341(2)	Dispositions after winding up = void	✓	
S342	Application of assets and costs of winding up	✓	
S360	Application by ct or member for authority to inspect books and records of company	✓	
S364(2)	Convening and holding 1 st meeting of creditors	✓	✓
S365(2)	Voting, manner of voting, voting by agent, rights of cessionary	✓	✓


Application of Insolvency Act

1973 Section nr	Subject matter of section	Applicable to Insolvent liquidations	Applicable to Solvent liquidations
S366(1)	Proof of claims	✓	✓
S366(1)(c)	Right of secured creditor to take over security	✓	
S383(1)	Apportionment of costs of security	✓	✓
S386(4)(g)	Exercise powers of trustee- S35 (uncompleted acquisition of immovable property)	✓	
S386(4)(g)	Exercise powers of trustee- S37 (effect of sequestration on lease)	✓	✓

Application of Insolvency Act

1973 Section nr	Subject matter of section	Applicable to Insolvent liquidations	Applicable to Solvent liquidations
S412	Convening & holding meetings of creditors (appl of s52 Insol Act-cred right to vote)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
S414(1)	Duty of Directors & Officers to attend meetings	<input checked="" type="checkbox"/>	<input type="checkbox"/>
S415(1)	Examination of directors & others at meetings	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Application of Insolvency Act

1973 Section nr	Subject matter of section	Applicable to Insolvent liquidations	Applicable to Solvent liquidations
S416	Application of S65(Interrogation of insolvent and other witnesses), s66 (enforcing summonses & giving evidence), s67 (steps to take when suspicion of offences)& s68 (Presumption record of proceedings & validity of acts at meetings of creditors) of Insol Act		

Application of Insolvency Act

1973 Section nr	Subject matter of section	Applicable to Insolvent liquidations	Applicable to Solvent liquidations
S417	Confidential examination by Master or Court	<input checked="" type="checkbox"/>	
S421	Register of directors of dissolved companies	<input checked="" type="checkbox"/>	
S425	Application of criminal provisions of law relating to insolvency	<input checked="" type="checkbox"/>	
S386(4)(d)	Make arrangement with creditors, incl creditors with unliquidated claims		<input checked="" type="checkbox"/>
389(1)	Power to make arrangement with creditors – binding on dissenting		<input checked="" type="checkbox"/>

Section 339 of 1973 Act

- Winding-up of company unable to pay debts law relating to insolvency apply *mutatis mutandis* (with the necessary changes)
- Ref to insolvent or insolvent's estate read to refer to company or its assets

Three part test

- Can provision apply to winding-up? E.g. rehabilitation or assets excluded from insolvent estate not applicable to winding-up of company
- Does Companies Act provide for matter specifically?
 - S44 of Insolvency Act: No claim shall be proved against estate after three months as from conclusion of second meeting of creditors, except with leave of court.
 - S366(2) of Companies Act provides that Master may, on application of liquidator, fix time within which creditors must prove their claims or otherwise be excluded from benefit of distribution under account lodged with Master before those claims were proven.
 - See *De Montlehu v Mayo NO and others* SCA confirmed three-month period provided for in s44(1) of Insolvency act applies to both sequestrations and liquidations
- Does provision apply to mode of liquidation in question?
 - Where Companies Act does not specifically provide for matter in question and company is unable to pay its debts, the provisions of Insolvency Act (or common law) applies with necessary changes.

Winding-up of solvent companies

- S79- solvent company may be dissolved by voluntary winding-up initiated by company in terms of S80, or liquidation through order of court in terms of S81
- Where 2008 Co's act does not contain provision, apply 1973 Act.

Voluntary winding up of solvent company

- Why- company achieved purpose for which it was formed.
- Requires special resolution of shareholders or members, if NPC.
- Resolution
 - Special resolution (75% of those present and entitled to vote must vote in favour of resolution)
 - Adopted by shareholders, and
 - Must provide for voluntary winding-up of solvent company

Voluntary winding up of solvent company

- Shareholders control process
- Much simpler and cheaper
- No meetings of creditors
- Inclusion of creditors in voluntary winding-up – clearly drafting error

Voluntary winding up of solvent company

- Which documents must be filed with CIPC?
 - Form CoR40.1
 - Special resolution
 - JM12
 - Certified copies of identity documents of directors who signed C

JM12 Security for debts

- Prior to filing resolution, company must
 - Arrange for security to satisfaction of the Master, for payment of company's debts within no more than 12 months after start of winding-up
 - Obtain consent from Master to dispense with security
 - Master may only consent if company submitted
 - Sworn statement by director authorised by the board of directors, stating that company has no debts; and
 - Certificate by company's auditor stating that to best of auditor's knowledge and belief & according to company's financial records, the company appears to have no debts.

Voluntary winding-up

- Winding-up starts when resolution is filed with CIPC
- When resolution has been filed, CIPC must deliver copy to Master
- Resolution must be accompanied by resolution nominating liquidator
- Master normally appoints nominated person
- Meeting of shareholders determine remuneration of liquidator.
- Company must give notice of winding up in Government Gazette (<https://www.gpw.gov.za/>)
- Send copies of resolution to sheriffs and registrars

Voluntary winding-up

- Liquidator gives notice of appointment in Government Gazette
- May exercise all powers conferred by 2008 Act or 1973 Act on liquidator appointed in winding-up by court
 - Without sanction through court order and
 - Subject to any directions given by shareholders in general meeting
- Company continues to exist as juristic person and retains all its powers while being wound-up but must stop carrying on business.

Winding-up of solvent company by court order

- Bring application to division of high court where company's registered office is.
- *PMG Motors Kyalami (Pty) Ltd and Another v Firststrand Bank Ltd, Wesbank Division (SCA)* court found that jurisdiction of court arising from the location of the principal place of business of a company is unaffected by its liquidation.

Who may apply & grounds for application?

- Ground on which application made depends on who is the applicant.
- **Company** – resolved, by special resolution to be wound up by court; or applied to court to have voluntary winding-up continued by court
- **BRP** – grounds that there is no reasonable prospect of rescue
- **Co's creditors**: BRP filed notice of termination of BR or business rescue plan was rejected.

Who may apply & grounds for application?

- Co's directors/shareholders:

- Directors are deadlocked in management of company and shareholders cannot break deadlock & irreparable injury to company is resulting/may result from deadlock or co's business cannot be conducted to advantage of shareholders generally, as result of deadlock.
- Shareholders are deadlocked in voting power and have failed for period of at least two consecutive AGM meeting dates to elect successors to directors whose terms have expired; or
- Just and equitable for the company to be wound up

Who may apply & grounds for application?

- **Shareholder:**
 - Directors, prescribed officers or other persons in control of company are acting fraudulent or illegal; or
 - The company's assets are being misapplied or wasted
- **CIPC or the Takeover Regulation Panel**
 - Those in control of company acting fraudulently or illegal, CIPC or Panel issued compliance notice in respect of conduct and company has failed to comply
 - Within previous five years, enforcement procedures were taken against company, its directors, prescribed officers of those in control for substantial the same conduct, resulting in administrative fine, or conviction for an offence.

Just and equitable: *Budge NO v Midnight Storm Investments 256 (Pty) Ltd*

- Same as under s344(H) of '73 act, except directors' deadlock in management and shareholders' deadlock in voting power
- Domestic company/ *quasi* partnership / co akin to partnership may be liquidation due to complete breakdown in relationship of reasonableness, good faith, trust, honesty, and mutual confidence which should exist between directors and or shareholders
- Applicant on just & equitable grounds must come to court with clean hands – must not be responsible for state of affairs
- Where applicant is responsible for breakdown, appl cannot insist on winding up

Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others

- Instead of winding-up, court declared provision of shareholders' agreement that provided that deadlock would not constitute ground for winding-up as *pro-non scripto* (ignored provision in agreement)

Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd

- Just and equitable in s81(1)(d)(iii)
 - Examples provided in section of deadlock not exhaustive.
 - Word “otherwise” does not limit meaning of ‘just and equitable’
 - Extends grounds to include other cases of deadlock
 - No fixed category of circumstances that provide a basis for winding up on “just and equitable” ground
 - Disappearance of reason why co was incorporated (substratum)
 - Illegality of objects of company and fraud in relation to it
 - Deadlock
 - Oppression
 - Grounds similar to dissolution of partnership

Limitations on rights of some applicants to apply

- Shareholder may not apply for winding up of solvent company, unless the shareholder
 - Has been shareholder continuously for at least six months immediately before date of application, or
 - Became shareholder as result of take-over or merger or distribution of estate of former shareholder and shareholder and former shareholder has been shareholder for at least six months.

Limitations on rights of some applicants to apply

Where shareholder/CIPC/Panel applies court will not make order if before conclusion of court proceedings:

- any directors resigned or were removed and court believes remaining directors were not materially implicate in fraudulent or illegal conduct, or
- One or more shareholders applied to court to have directors responsible declared delinquent and court is satisfied that removal of those directors will end misconduct

Extended locus standi

- S157 may obtain leave of court to apply for remedies provided for in 2008 act:
 - persons acting on behalf of others who cannot act in their own name;
 - Acting as a member or in the interest of group/class of persons
 - Acting in public interest

Minister of Environmental Affairs v Recycling & Economic Development Initiative of SA NPC, Minister of Environmental Affairs v Recycling and Kusaga Ktaka Consulting (Pty) Ltd

- Legal question: Can cabinet minister bring application in terms of s157 (1) (d) if it was ‘in public interest’
 - Person includes natural persons and juristic persons
 - Interpretation Act does not include government in its definition of person
 - Therefore cabinet minister cannot get leave to apply.

Winding-up of insolvent company

- Can be wound-up by a court or voluntarily
- Any voluntary winding-up of an insolvent company will be a creditors' voluntary winding-up
- Requires adoption of special resolution by shareholders that provides for the winding-up to be a creditors' winding up on an insolvent company

Winding-up of insolvent company

- File with CIPC within 30 days of adopting special resolution
 - Form CM26 (Special resolution-1973 Act)
 - Prescribed fee of ZAR80 (ZAR150 for later lodgement)
 - Special resolution (must state section of act/para of Memorandum of articles in terms of which resolution was passed)
 - Copy of notice convening meeting/consent to waive notice period (CM25)/consent to propose and pass special resolution at meeting of which notice was not given (CM25A)
 - CM100 (Statement of affairs)
 - Certified copy of identity doc of director who signed CM26

Winding-up of insolvent company

- Directors must give account of affairs of company (CM100) before tabling resolution
- Liquidation ensues after special resolution is filed
- Certified copy of resolution and CM100 statement of affairs must be filed with Master within 28 days of filing resolution
- Special resolution normally nominates liquidator nominated by shareholders.
- Co to give notice of voluntary winding up in Government Gazette
- Copy of resolution sent to sheriffs and registrars
- Hereafter procedure same as winding-up by a court

Winding-up of insolvent company

- Powers of directors cease upon liquidation
- Directors less prone to prosecution because s425 (criminal sections in insolvency act applicable to current and former directors) only applies to winding-up by the court
- Sections 344 -348, 356(1), 357(1), 358, 361, 363(2), 363(3), 386(5), 387, 422(1)(a) & 425 only apply to liquidation by a court
- *South African Philips (Pty) Ltd v The Master*: s417 enquiry cannot be held in creditors voluntary winding-up – must apply to have company wound-up by court
- Master, creditor or shareholder may apply to court for winding up of company that is being voluntarily wound up

Winding-up of an Insolvent company by court order

- Who May apply?
 - Company
 - Difference of opinion on whether company must be authorised by special resolution
 - *Ex Parte Tangent Sheeting (Pty) Ltd* court decided directors can decide to bring application
 - *Ex Parte Russlyn Construction (Pty) Ltd & Ex Parte Screen Media Ltd* directors' function is to manage, not take decisions ending management
 - Hockly prefers *Tangent* because 2008 act provides that business and affairs of company must be managed by its board with the authority to perform any of the company's functions unless excluded in Act or MOI

Winding-up of an Insolvent company by court order

- One or more creditors (including contingent and prospective creditors)
 - Contingent or prospective creditor has conditional claim that will only become enforceable in future e.g. a surety that has bound herself as surety and principal debtor of company
- Shareholder
 - Must have been registered as shareholder in securities register for at least six months before date of application or shares must have been transferred as result of death of previous member
- Jointly by company, creditors or shareholders
- Master, creditor or shareholder of company being voluntarily wound-up

Grounds for winding-up of insolvent companies

- Company has resolved by special resolution to apply to court for its winding-up
- Company has not commenced business within year from incorporation or has suspended its business for whole year
- 75% of issued share capital of company has been lost or useless for business
- Company unable to pay its debts
- External company dissolved in country of incorporation/ceased to carry on business or is only carrying on business to wind-up its affairs
- Just and Equitable

Inability to pay

- Letter of demand served on company by creditor who is owed at least ZAR100 and co fails to pay within three weeks;
- *Nulla bona return*
- Proved to satisfaction of court that company is unable to pay

Inability to pay

- *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee road Carriers CC and Another*-applicant need not prove company is insolvent in order to rely on chapter XIV of the '73 Act.
- Need not prove balance sheet insolvency (liabilities > assets)
- Sufficient to prove commercial insolvency
- *ABSA Bank Ltd v Newcity Group (Pty) Ltd, cChen v Newcity Group (Pty) Ltd & Another*: incorrect to state applicant creditor is entitled to winding up order simply because the creditor is unpaid.
- Rights of creditors must be weighed with rights of shareholders, employees and public interest
- Question must be asked whether liquidation can be avoided (independent of prospect of business rescue)

Inability to pay

- *Taylor & Steyn v Koekemoer* –even if company is liquidated on other ground than inability to pay, may still interrogate directors and others in terms of s415(1) if company is unable to pay debts.
- Ability to pay debts must be determined when section is invoked by liquidator/proved creditor
- Master or presiding officer may at s415 examination make determination that company is unable to pay

Inability to pay

- *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd* SCA said court's discretion to refuse to grant winding-up order where unpaid creditor applies for it is "very narrow" that is rarely exercised, and then only in special circumstances
- Where one or more creditors oppose liquidation, narrow approach inappropriate
- Court's discretion allows it to consider interests of creditors as a whole.
- Court not bound to refuse merely because majority of creditors by value in number oppose winding-up
- Court to consider creditors reasons for opposing application

Inability to pay

- Doesn't matter that company's assets > liabilities
- Court must consider whether there are liquid assets, proceeds of which will make company able to pay
- Where creditor has a debt that co cannot pay, creditor is *ex debito justitiae*, entitled to winding-up order.
- *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & Others*- farm valued at ZAR25 000 000 was not easily realisable and was in market for some time. Co could not pay ZAR3 500 000 debt. Court found co commercially insolvent (unable to pay)

Commencement of winding-up of insolvent company by court

- Commence at time of presentation to court of application for winding-up (s348 does not apply to solvent liquidations: 2008 Act)
- Time of presentation to court = exact time when papers are lodged with Registrar of Court – not time it is heard by judge



INSOL
INTERNATIONAL



The end

