



INSOL
INTERNATIONAL



Liquidation of companies

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Introduction

- Purpose of liquidation
 - Dealing with a corporation unable to pay its debts when due (commercial insolvency)
 - or
 - Terminating the existence of a corporate entity for other reasons (dissolution)
- Section 82 of the Companies Act 2008 – dissolution of companies after receiving Master's certificate of winding-up

Solvent and insolvent liquidations

- Companies Act of 1973 – all liquidations regulated by Chapter XIV
 - Grounds ranging from inability to pay debts to just and equitable
 - A few provisions only applicable to companies unable to pay their debts
 - Some specific sections of Insolvency Act also made applicable – some only to company unable to pay its debts, others to all company liquidations
 - General application of insolvency law to companies unable to pay their debts if there is no provision in Companies Act (s 339)

Solvent and insolvent liquidations

- Companies Act of 2008
 - Section 79: a **solvent** company may be dissolved in terms of sections 80 and 81 (only provide for grounds and commencement)
- Item 9 of Schedule 5 to the Companies Act of 2008
 - Continued application of 1973 Act to winding-up and liquidation as if the Act had not been repealed
 - But specific sections excluded by Item 9 as being not applicable to solvent liquidations
 - Effect: procedures of 1973 Act apply to all liquidations except for
 - excluded sections in case of solvent liquidations
 - sections applicable only to company unable to pay its debts

Winding-up of a solvent company (ss 79-81 of the Companies Act 2008)

- Voluntary winding-up of a solvent company (s 80) or by court order (s 81)
- Test for solvency – commercial or factual?
 - Companies Act of 1973: commercial insolvency required in terms of test in section 345 (when is a company deemed unable to pay its debts)
 - Factual insolvency is not included in the test
 - No indication in sections 79 – 81 of “solvent”, resulting in conflict of opinions
 - *Boschpoort Ondernemings v ABSA* (2014 SCA)
 - *Murray NO v African Global Holdings* (2020 SCA)

Voluntary winding-up of a solvent company

- Voluntary winding-up (s 80)
 - requires a special resolution by shareholders filed with the CIPC
 - resolution must indicate whether it is a winding-up by the company (~~or by creditors~~)
 - security for payment of all debts within 12 months or proof that company has no debts
 - commences on filing of resolution

Winding-up of a solvent company by court order

- Winding-up by court order (s 81)
 - application to High Court by specified persons on particular grounds
 - time of commencement depends on applicant and grounds –
 - Commences when application is made
 - By company after special resolution or to convert voluntary winding-up or
 - By Business Rescue Practitioner
 - In all other cases it commences when court has made the order

Applicants and grounds for winding-up of a solvent company by court order

- **Company:** taken special resolution for winding-up by court or applies to court to continue voluntary winding-up by court
- **Business rescue practitioner:** no reasonable prospect of rescue, must apply to court to discontinue BR and place into liquidation (s 141(2))
- **Creditors:**
 - BR proceedings have ended i.t.o
 - s 132(2)(b) – notice of termination filed by BRP (no financial distress, or substantial implementation of rescue plan) or
 - (c)(i) – business rescue plan rejected and no further action taken
 - **and** it appears to the court that it is just and equitable
 - or
 - otherwise just and equitable

Applicants and grounds (continued)

- The company, one or more directors, one or more shareholders
 - directors are deadlocked and
 - Irreparable injury to company resulting or may result or
 - Company's business cannot be conducted to advantage of shareholders generally
 - shareholders are deadlocked in voting power and have failed for at least two consecutive AGM's to elect directors replacing those whose terms have expired or
 - it is otherwise just and equitable for company to be wound up
- A shareholder with leave of the court
 - Fraudulent or illegal conduct by directors, prescribed officers or others in control of company, or
 - Company assets being misapplied or wasted
- Commission or TRP
 - Fraudulent or illegal action, ignored compliance notice and enforcement procedures taken within previous 5 years for substantially the same conduct

“Just and equitable” as grounds for solvent winding-up

- Shareholders and creditors may rely on this ground
- Must come to court with “clean hands”
- *Thunder Cats Investments 92 v Nkonjane Economic Prospecting*
 - No fixed category of circumstances
 - Five categories were identified under 1973 Act –
 - Disappearance of company’s substratum
 - Illegality of objects and fraud connected to it
 - Deadlock
 - Quasi-partnership
 - Oppression (but s 163?)

Further limitations

- Shareholder
 - must have been one continuously for at least six months immediately before application unless
 - Acquired another shareholder e.g. through merger or take-over or
 - Inherited from former shareholder
 - and together satisfied requirement of 6 months
- Shareholder, CIPC or TRP based on illegal or fraudulent conduct
 - If implicated directors have resigned or been removed or
 - Shareholder(s) have applied to court for directors responsible for misconduct to be declared delinquent
- Extended standing to a person for class action or with leave of court, in public interest

Winding-up of an insolvent company

- Chapter XIV of the Companies Act 61 of 1973 applies
- Company must be commercially insolvent (unable to pay its debts when due)
- Section 343(1) provides for winding-up by the Court or voluntary winding-up
- Voluntary winding-up may be a creditors' voluntary winding-up ~~or a members' (or shareholders') voluntary winding-up~~

Voluntary winding-up by creditors of an insolvent company (sections 349-353)

- Requires a special resolution by shareholders (or members of a NPC) filed with the CIPC
- Resolution must indicate that it is a creditors' voluntary winding-up (cannot be a winding-up by members/shareholders if insolvent)
- Commences on filing of resolution at CIPC
- Certified copy must also be lodged with the Master
- Some provisions excluded, e.g. ss 417 and 418 (examinations) s 425 (criminal provisions of insolvency law)

Winding-up by court order

- Application to High Court by persons listed in s 346 –
 - The company itself
 - Resolution by shareholders or board?
 - Section 66 of 2008 Act
 - One or more creditors – *Afgri Operations v Hamba Fleet Management*
 - One or more shareholders
 - Registered for at least 6 months immediately before application or transferred as a result of death of previous shareholder
 - Some grounds excluded
 - Some or all of them together
 - The Master, a creditor or shareholder of a company in voluntary liquidation
 - Provisional judicial manager after discharge of provisional jm order

Grounds for insolvent winding-up (ss 344 and 345)

- Special resolution by company
 - Shareholder may not rely on this ground
- Not commenced business within a year
- 75% of issued share capital lost
- Unable to pay its debts
 - Test for inability to pay debts contained in s 345
 - Fact that value of company's assets exceed liabilities not relevant if unable to pay debts – *ABSA Bank v Rhebokskloof; Murray v African Global Holdings*
 - Shareholder may not rely on this ground

Inability to pay debts (s 345)

Company is deemed to be unable to pay its debts if –

- Demand to pay was served on company by creditor
 - who is owed at least R100
 - No payment or security for payment within 3 weeks

or

- *Nulla bona* return by sheriff executing court judgment in favour of a creditor

or

- Proved to satisfaction of the court that company is unable to pay its debts

Grounds for insolvent winding-up (cont)

- External company dissolved in country of incorporation or ceased to carry on business
 - Shareholder may not rely on this ground
- Appears just and equitable to the court
 - Still relevant?

Commencement and procedure

- Before application is made:
 - security for costs lodged with Master
 - notice of application to company (unless it is the applicant), registered trade unions, employees and SARS
 - Master's Report
- Commencement deemed to be on presentation of application to court (s 348): i.e. filing of application but only if order is granted
- Provisional winding-up order usually issued

Liquidation of close corporations

Close Corporations Act before the Companies Act 2008:

- ~~Section 66(1): Companies Act of 1973 applies (with several exceptions) to liquidations in so far as CC Act does not provide for such a matter~~
Substituted
- Section 66(2)(a): Changes in terminology, e.g. share means member's interest in close corporation; shareholder or director means member
- Section 66(2)(b): Special resolution means written resolution signed by all members in terms of section 67
- ~~Section 67: Voluntary winding-up by written resolution signed by all members – winding-up by members or creditors~~
Substituted
- ~~Section 68: Liquidation by Court:~~
 - ~~Resolution by more than half of total votes of members at meeting; not commenced business within a year; unable to pay debts; or appears just and equitable to the court~~
Repealed
- Section 69: Circumstances under which corporation deemed to be unable to pay its debts
 - Demand for at least R200 not paid within 21 days; *nulla bona* return by sheriff executing judgment; inability to pay proved to Court

Winding-up of close corporations

Item 7 of Schedule 3 to the Companies Act 2008: Dissolution of corporations

- Section 66(1): Laws mentioned or contemplated in Item 9 of Schedule 5 of the Companies Act 2008 apply to the liquidation of a close corporation if not specifically provided for in Close Corporations Act
 - Chapter 14 of the Companies Act 1973 applies where necessary
 - But sections 343, 344, 346, 348-353 dealing with commencement and grounds are not applicable to solvent corporations
- Section 67: Dissolution of corporations
 - Part G of Chapter 2 of the Companies Act 2008 applies to solvent corporations – sections 79, 80 (voluntary w/u of solvent company), 81 (w/u of solvent company by court order)
- Section 68: Liquidation by court – repealed
 - Liquidation of insolvent close corporation: applicants and grounds as in Companies Act 1973