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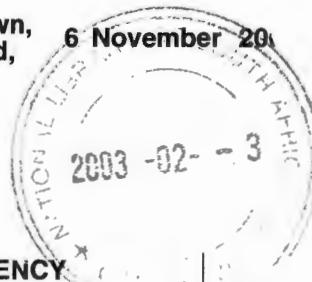
REPUBLIC OF SOUTH AFRICA
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6 November 2002

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THE PRESIDENCY

DIE PRESIDENSIE

No. 1388

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

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 33 of 2002: Insolvency Amendment Act, 2002.

No. 33 van 2002: Insolvensiewysigingswet, 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):

“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)—

- (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.

(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.

(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).

(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);

ALGEMENE VERDUIDELIKENDE NOTA:

[] Woorde in vet druk tussen vierkantige hake dui skrappings uit bestaande verordenings aan.

_____ Woorde met 'n volstreep daaronder, dui invoegings in bestaande verordenings aan.

(Engelse teks deur die President geteken.)
(Goedgekeur op 28 Oktober 2002.)

WET

Tot wysiging van die Insolvensiewet, 1936, ten einde die uitwerking van sekwestrasie op dienskontrakte en eise vir uittree- en afdankingsbetaling verder te reël; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

DAAR WORD BEPAAL deur die Parlement van die Republiek van Suid-Afrika, soos volg:—

Vervanging van artikel 38 van Wet 24 van 1936

1. Artikel 38 van die Insolvensiewet, 1936 (hierna die Hoofwet genoem), word hierby 5 deur die volgende artikel vervang:

“Uitwerking van sekwestrasie op dienskontrak

38. (1) Die dienskontrakte van werknemers wie se werkgewer gesekwestreer is, word met ingang van die datum van die verlening van 'n sekwestrasiebevel opgeskort.

10 (2) Sonder om afbreuk te doen aan subartikel (1), gedurende die tydperk van opskorting van 'n dienskontrak in subartikel (1) bedoel—

(a) word nie van 'n werknemer wie se kontrak opgeskort is, vereis om dienste ingevolge die kontrak te lewer nie en is die werknemer nie op enige vergoeding ingevolge die kontrak geregtig nie; en

15 (b) kom geen diensvoordeel aan 'n werknemer ingevolge die dienskontrak wat opgeskort is, toe nie.

(3) 'n Werknemer wie se dienskontrak opgeskort is, is geregtig op werkloosheidsvoordele ingevolge artikel 35 van die Werkloosheidsversekeringswet, 1966 (Wet No. 30 van 1966), vanaf die datum van sodanige opskorting, behoudens die bepalinge van daardie Wet.

20 (4) 'n Kurator wat ingevolge artikel 56 aangestel is, of 'n likwidateur wat ingevolge artikel 375 van die Maatskappywet, 1973 (Wet No. 61 van 1973), aangestel is, of 'n likwidateur wat, ingevolge artikel 74 van die Wet op Beslote Korporasies, 1984 (Wet No. 69 van 1984), na die eerste vergadering in die amp aanbly en 'n mede-likwidateur, indien enige, wat 25 deur die Meester aangestel is, kan behoudens subartikels (5) en (7) die dienskontrakte van werknemers beëindig.

(5) 'n Kurator kan nie 'n dienskontrak beëindig nie tensy die kurator oorleg gepleeg het met—

30 (a) enige persoon met wie die insolvente werkgewer verplig was om oorleg te pleeg, onmiddellik voor die sekwestrasie, ingevolge 'n kollektiewe ooreenkoms in artikel 213 van die Wet op Arbeidsverhoudinge, 1995 (Wet No. 66 van 1995), omskryf;

- (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. 15
- (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—
- (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—
- (a) the date of the appointment of a trustee in terms of section 56; or 40
(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),
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. 50
- (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:

- (b) (i) 'n werkplekforum in artikel 213 van die Wet op Arbeidsverhoudinge, 1995, omskryf; en
- (ii) 'n geregistreerde vakbond wie se lede waarskynlik deur die beëindiging van die dienskontrak geraak sal word, indien daar nie so 'n kollektiewe ooreenkoms is wat onmiddellik voor die sekwestrasie bestaan het nie;
- (c) 'n geregistreerde vakbond wat werknemers verteenwoordig wie se dienskontrakte ingevolge subartikel (1) opgeskort is en wat waarskynlik deur die beëindiging van die dienskontrak geraak sal word, indien daar nie so 'n werkplekforum is nie; of
- (d) die werknemers wie se dienskontrakte ingevolge subartikel (1) opgeskort is en wat waarskynlik deur die beëindiging van die dienskontrak geraak sal word of hulle verteenwoordigers wat vir daardie doel benoem is, indien daar nie so 'n vakbond is nie.
- (6) Die oorlegpleging in subartikel (5) bedoel moet daarop gerig wees om eenstemmigheid te bereik oor gepaste maatreëls om die geheel of 'n gedeelte van die besigheid van die insolvente werkgewer te behou of te red—
- (a) deur die verkoop van die geheel of 'n gedeelte van die besigheid van die insolvente werkgewer; of
- (b) deur 'n oordrag in artikel 197A van die Wet op Arbeidsverhoudinge, 1995, beoog; of
- (c) deur 'n skikking of reëling in artikel 311 van die Maatskappywet, 1973, bedoel; of
- (d) op enige ander wyse.
- (7) Indien enige party in subartikel (5) bedoel voorstelle wil doen rakende enige aangeleentheid in subartikel (6) beoog, moet daardie party skriftelike voorstelle aan die kurator of likwidateur voorlê binne 21 dae na die aanstelling van die kurator ingevolge artikel 56, of die aanstelling van die likwidateur ingevolge artikel 375 van die Maatskappywet, 1973, of die aanstelling van 'n mede-likwidateur ingevolge artikel 74 van die Wet op Beslote Korporasies, 1984, of indien 'n mede-likwidateur nie aangestel word nie, die datum van die afsluiting van die eerste vergadering, tensy die kurator of likwidateur en 'n werknemer anders ooreenkom.
- (8) 'n Skuldeiser van die insolvente werkgewer kan, met die toestemming van die kurator, deelneem aan enige oorlegpleging in hierdie artikel beoog.
- (9) Tensy die kurator of likwidateur en 'n werknemer ooreengekom het op die voortgesette indiensneming van die werknemer in die lig van maatreëls in subartikel (6) beoog, word alle opgeskorte dienskontrakte beëindig 45 dae na—
- (a) die datum van die aanstelling van 'n kurator ingevolge artikel 56; of
- (b) die datum van die aanstelling van 'n likwidateur ingevolge artikel 375 van die Maatskappywet, 1973; of
- (c) die datum van die aanstelling van 'n mede-likwidateur ingevolge artikel 74 van die Wet op Beslote Korporasies, 1984, of as 'n mede-likwidateur nie aangestel word nie, die datum van die afsluiting van die eerste vergadering.
- (10) 'n Werknemer wie se dienskontrak—
- (a) ingevolge subartikel (1) opgeskort is; of
- (b) ingevolge subartikel (4) of (9) beëindig is, is geregtig om skadevergoeding van die insolvente boedel van sy of haar voormalige werkgewer te eis vir verliese gelyk as gevolg van die opskorting of beëindiging van 'n dienskontrak voor die verstryking daarvan.
- (11) 'n Werknemer wie se dienskontrak ingevolge hierdie artikel eindig of beëindig is, is geregtig om skeidingsvoordele van die boedel van die insolvente werkgewer ooreenkomstig artikel 41 van die Wet op Basiese Diensvoorwaardes, 1997 (Wet No. 75 van 1997), te eis.”

Wysiging van artikel 98A van Wet 24 van 1936

- 60 2. Artikel 98A van die Hoofwet word hierby gewysig deur subparagraaf (iv) van subartikel (1)(a) deur die volgende subparagraaf te vervang:

“(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.

“(iv) enige uittree- of afdankingsbetaling wat aan die werknemer ingevolge enige wet, ooreenkoms, kontrak, [of] loonreëlmaatstaf, of as gevolg van ’n beëindiging kragtens artikel 38 verskuldig is; en”.

Kort titel en inwerkingtreding

- 5 3. (1) Hierdie Wet heet die Insolvensiewysigingswet, 2002, en tree op 1 Januarie 2003 in werking of op ’n vroeër datum wat die President by proklamasie in die *Staatskoerant* bepaal.
- (2) Hierdie Wet geld ten opsigte van boedels wat op of na die datum van inwerkingtreding van hierdie Wet gesekwestreer of voorlopig gesekwestreer word.