

grounds for believing it to be correct, or who knowingly submits a false nomination to the Commissioner.

(3) A liquidator of an insolvent estate who intentionally or negligently fails to lodge with the Commissioner an account or to pay over a sum of money within 30 days from the date on which he or she became obliged to submit such account or pay over such sum of money, or fails to comply with the duties in **section 59** within 30 days from the commencement of liquidation is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

(4) (a) Any person who is convicted of an offence contemplated in subsection (1)(a) or (b) or subsection (2)(f), (g) or (h) is liable to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

(b) Any person who is convicted of an offence contemplated in subsection (1)(c), (d), (e), (f), (g), (h), (i), (j) or (k) or subsection (2)(e) is liable to a fine or imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

(c) Any person who is convicted of an offence contemplated in subsection (1)(h) or subsection (2)(a), (b), (c), (d) or (h) is liable to a fine or to imprisonment not exceeding six months or to both such fine and such imprisonment.

## **CHAPTER 7**

### **PUBLIC REGISTERS**

#### **Public registers relating to insolvents and others**

**215.** This Chapter applies to a public register established under **sections 24, 153 and 165.**

### **Access to public registers**

**216.** (1) The Commissioner must ensure that all public registers are available for access and inspection by members of the public during the Commissioner's ordinary business hours.

(2) However, the Commissioner may refuse access to a public register or suspend the operation of a public register, wholly or partly -

- (a) if the Commissioner considers that it is not practical to provide access to the register; or
- (b) for any other reason as may be prescribed for the purposes of this section.

### **Purposes of public registers**

**217.** (1) The public register kept under **section 24** has -

- (a) the purpose of providing information about unrehabilitated and rehabilitated insolvents; and
- (b) the further purposes specified in subsection (4).

(2) The public register kept under **section 153** has -

- (a) the purpose of providing information about persons subject to a current summary instalment order; and
- (b) the further purposes set out in subsection (4).

(3) The public register kept under **section 165** has -

- (a) the purpose of providing information about persons currently admitted to the no-asset procedure and persons discharged from that procedure under **section 174**; and
  - (b) the further purposes set out in subsection (4).
- (4) The further purposes of the public registers are -
- (a) to facilitate the compliance, audit, and other supporting and administrative functions of the Commissioner, the Minister, the Court or any other person under this Act or any other law;
  - (b) to facilitate the enforcement functions and the exercise of the powers of the Commissioner, Minister, the Court, or any other person under this Act or any other law; and
  - (c) to provide statistical information and information for research purposes in relation to insolvency, summary instalment orders and the no-asset procedure.

### **General information to be included in public registers**

**218.** (1) The Commissioner must ensure that the public registers contain the required information in respect of the following persons-

- (a) a person who is or has been an insolvent;
- (b) a person who is subject to a current summary instalment order;
- (c) a person who is currently admitted to the no-asset procedure, or who has been discharged from that procedure under **section 174**.

(2) The required information for the purposes of subsection (1) is the following:

- (a) the person's full name;
- (b) whether the person-
  - (i) is currently insolvent, or has been discharged from insolvency;
  - (ii) is subject to a current summary instalment order; or
  - (iii) is currently admitted to the no asset procedure, or has been discharged from the no-asset procedure under **section 174**;
- (c) the liquidation, summary instalment order, or no-asset procedure number (if any);
- (d) the person's address as contained in -
  - (i) a statement of the person's financial position;
  - (ii) an application for a bankruptcy order in respect of the person;
  - (iii) an application for a summary instalment order in respect of the person; or
  - (iv) an application by the person for admission to the no-asset procedure;
- (e) if the person has notified the Commissioner of a change of address, that address;
- (f) if the person has been declared insolvent on a creditor's application, the person's address as contained in the application;
- (g) the person's occupation and current employment status, if known;

- (h) if a liquidation order has been made in respect of the person, the time and date of the on which the order was made;
- (i) if the person is admitted to the no-asset procedure, the date of that admission;
- (j) if the person is discharged from the no-asset procedure under **section 174**, the date when the person was so discharged;
- (k) if the person is a rehabilitated insolvent, the date, type, and conditions (if any) of the rehabilitation;
- (l) if the liquidation order has been set aside, the provision of this Act under which it was set aside;
- (m) if the Court has refused to rehabilitate an insolvent, the details of the refusal;
- (n) if the Court has suspended an insolvent's rehabilitation, the details of the suspension;
- (o) in the case of a person subject to a current summary instalment order, the full name and business postal address of the supervisor;
- (p) any other information or documents prescribed for the purposes of this section.

(3) The Commissioner must ensure that a public register does not contain information relating to a person in respect of whom a liquidation order has been set aside.

(4) The Commissioner must ensure that all information relating to a person who has been declared an insolvent and who was rehabilitated from insolvency is

removed from the public register kept under **section 24** as soon as practicable after the expiry of four years after the date of discharge.

(5) The Commissioner must ensure that all information relating to a person who has been admitted to the no-asset procedure is removed from the public register kept under **section 165** as soon as practicable after -

- (a) the expiry of four years after the date of discharge under **section 174**; or
- (b) the person's participation in the procedure is terminated in accordance with **section 169(a), (c) or (d)**.

### **Information kept indefinitely in public registers**

**219.** (1) This section applies to a person who -

- (a) is or has been declared an insolvent on two or more occasions; or
- (b) is or has been both declared an insolvent and discharged from the no-asset procedure under **section 174**.

(2) The Commissioner must ensure that information about a person referred to in subsection (1) is not removed from a public register kept under this Act.

(3) Subsections **(4), (5) and (6)** of **section 217** do not apply to a person referred to in subsection (1).

(4) The Commissioner must ensure that the relevant public register contains all of the information required by this Act about such a person and each insolvency event.

(5) A person declared insolvent under the repealed Insolvency Act, 1936 (Act No. 24 of 1936) counts for the purposes of subsections (2) and (4).

**Restricted information**

**220.** The Commissioner must ensure that a person only has access to the documents contained in a public register which are not private and confidential.

**Commissioner may omit, remove, restrict access to or amend information in public registers**

**221.** (1) The Commissioner may omit, remove, or restrict access to information contained in a public register in respect of a person if the Commissioner considers that the disclosure of the information via the public register would be prejudicial to the person's safety or welfare or the safety or welfare of the person's family.

(2) The Commissioner may amend the information contained in a public register in order to update the information or correct any error in, or omission from, the information.

(3) The Commissioner may refuse to provide access to any information in a public register if, in the Commissioner's opinion, it is impractical to provide the volume of information requested.

**Information in public registers may be used for statistical or research purposes**

**222.** Nothing in this Chapter prevents the use of information contained in the public registers for statistical or research purposes if the information -

- (a) does not identify anyone; and
- (b) is not published in any form that could reasonably be expected to identify anyone.

### **Government and Commissioner not liable for certain acts or omissions**

**223.** Neither the Government nor the Commissioner is liable for any act or omission in relation to the maintenance of a public register under this Division done or omitted to be done in good faith and with reasonable care.

## **CHAPTER 8 GENERAL PROVISIONS**

### **Court may stay or set aside liquidation**

**224.** (1) The Court may at any time after the commencement of the liquidation of an insolvent on the application of a liquidator or creditor and on proof to the satisfaction of the Court that all proceedings in relation to the liquidation ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary liquidation on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a liquidation, have regard to the wishes of the creditors as proved to the Court by sufficient evidence.

(3) Notice of an application to set aside liquidation proceedings must be furnished to-

(a) the head office of every registered trade union that, as far as the applicant can reasonably ascertain, represents a debtor's employees, if any at the commencement of liquidation;

(b) all employees whose addresses can be obtained from the liquidator.

(4) An order setting aside liquidation proceedings must detail the effect of the order on-

- (a) the assets of the debtor immediately before the commencement of liquidation;
- (b) actions taken by the liquidator during the liquidation; and
- (c) contracts of service terminated during the liquidation.

### **Meetings to ascertain wishes of creditors and others**

**225.** Where by this Act the Court is authorised, in relation to a liquidation, to have regard to the wishes of creditors -

- (a) the value of the respective creditors' claims must also be taken into consideration; and
- (b) the court may, if it thinks fit, for the purpose of ascertaining the wishes of such creditors direct meetings of the creditors to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairperson of any such meeting and to report the result thereof to the Court.

### **Dispositions after liquidation void**

**226.** (1) Every transfer of an interest in a trust, shares of a company, members' interest in a close corporation or other right conferred by agreement effected after the commencement of the liquidation of an insolvent estate without the sanction of the liquidator, is void.

(2) Every disposition of its property (including rights of action) by any debtor being liquidated made after the commencement of the liquidation, is void unless the Court otherwise orders.

### **General provisions relating to Part 4, Chapter 3 proceedings**

227. (1) Subject to the provisions of this section and any resolution of creditors passed at a meeting of creditors, a liquidator has the power, in his or her own name but on behalf of creditors of an insolvent estate-

- (a) to commence any proceedings contemplated in **Part 4 of Chapter 3**;
- (b) to settle or compromise any such proceedings or claims relating thereto;  
and
- (c) to receive any amounts pursuant to any such proceedings or settlement or compromise.

(2) Prior to commencing any proceedings referred to in subsection (1), the liquidator must advise all proved creditors by liquidator's notice of the steps he or she proposes to take, with reasons and an explanation of this section and its effect.

(3) Any creditor who does not within two weeks object in writing to the proposed steps will be deemed to have approved such steps and will, for purposes of such proceedings and claims, be regarded as a participating creditor.

- (4) If any creditor does object-
  - (a) the objecting creditor will, for purposes of the proceedings and claims in question, be regarded as an excluded creditor;
  - (b) the liquidator may not exercise any of the powers referred to in subsection (1)(b) on behalf of such creditor.

(5) All receipts and expenditure in connection with the proceedings and claims in question must be accounted for in a special account in such a way that only participating creditors will benefit from any proceeds and contribute to any expenditure, and further subject to any directions which the Court may give.

(6) The liquidator will not be required to give security for the costs of any such proceedings, unless the Court on application of the defendant or respondent is satisfied that the proceedings are frivolous or vexatious.

(7) Any amounts received by the liquidator arising from any such proceedings or claims is, for purposes of remuneration and distribution of proceeds, treated as if they were proceeds of estate assets.

(8) The proceedings referred to in subsection (1) may be brought by a liquidator on behalf of creditors who extended credit to the insolvent while the insolvent was engaged in insolvent trading or, if the liquidator refuses or fails to obtain the necessary authority or directions from creditors in terms of **section 66** of this Act, by such a creditor or group of creditors.

(9) If any creditor has taken proceedings under subsection (1) no creditor who was not a party to the proceedings may derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.

(10) (a) Proceedings in terms of subsection (1) may be launched by way of notice of motion.

(b) If the Court is unable to decide the case by way of application procedure disputes of fact must be referred to oral evidence as may be necessary.

(11) In any proceedings in terms of subsection (1), the Court may give such further directions, whether in regard to limitation, quantification, procedure, distribution of proceeds or otherwise as the Court thinks proper for the purpose of giving effect to any order it may make.

(12) In particular the Court may declare that a person is liable for the costs of investigating the liability of such person or the costs of administration in the insolvent estate or such part thereof as the Court may direct.

(13) Where the Court makes a declaration contemplated in subsection (12), the Court may give such further directions as the Court thinks proper for the purpose of giving effect to the declaration, and in particular may-

- (a) make the liability of any such person under the declaration a charge on any debt or obligation due from the insolvent to the person referred to in that subsection, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the insolvent held by or vested in-
  - (i) that person;
  - (ii) any company or person on the person's behalf;
  - (iii) any person claiming as assignee from or through that person; or
  - (iv) any company or person acting on the assignee's behalf.
- (b) from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(14) For the purposes of subsection (13), the expression "assignee" includes any person to whom or in whose favour, by the direction of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(15) Without prejudice to any other criminal liability incurred, where any business of an insolvent is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, is guilty of an offence.

(16) The claim of a creditor against the debtor in respect of the debt which gave rise to a declaration in terms of **Part 4 of Chapter 3**, will be reduced by the amount received by the creditor in terms of the declaration.

### **Giving of evidence after conviction for failure to testify**

**228.** (1) Any person who is serving a term of imprisonment for the offence contemplated in **section 213(2)(c)** and who declares himself or herself willing to give the required evidence or to produce the required books, documents, or records may, on the written application of the Commissioner or another person who is to preside at a meeting or to chair a commission, made to the head of the institution where that person is being held in custody, be brought before the Commissioner or other person for the hearing of such evidence or the production of the required books, documents, or records.

(2) A person contemplated in subsection (1) who has given the required evidence or produced the required books, documents, or records may on his or her own application be brought before the Court which imposed the sentence and that Court may, irrespective of whether or not the Court is composed as it was when the sentence was imposed, suspend the remaining portion of the sentence or any portion thereof upon the conditions that the Court deems just, if the Court is satisfied that the said person has answered fully and correctly all questions put to him or her or produced all books, documents, or records required of him or her, in so far as it was possible for him or her to do so.

(3) In order to satisfy itself concerning the facts contemplated in subsection (2), the Court may accept as conclusive proof of those facts a certificate given by the presiding officer referred to in subsection (1) to the effect that the said person had appeared before him or her and had answered fully and correctly all questions put to him or her and produced all books, documents, or records required of him or her.

### **Criminal liability of partners, administrators, servants or agents**

**229.** (1) Any person who -

- (a) is or was a member of a partnership and who does or omits to do in relation to any property or to the affairs of that partnership or debtor or of the insolvent estate of that partnership or debtor;
- (b) is or was charged with the administration of an estate and who does or omits to do in relation to any property or to the affairs of that estate; or
- (c) as a servant or agent has had the sole or practical control of any property or of the affairs of his or her employer or principal and who does or omits to do in relation to that property or the affairs of his or her employer or principal or of the insolvent estate or his or her former employer or principal,

any act which, if done or omitted by him or her in like circumstances in relation to his or her own property or affairs or to any property belonging to, or the affairs of his or her insolvent estate, would have constituted an offence under this Act, is deemed to have committed that offence.

(2) The liability under subsection (1) of a partner, servant or agent does not affect the liability under that subsection or under any other provision of this Act, of another partner or of a servant or agent of the same partnership, or of the employer or principal of the employee or agent who is so liable.

### **Jurisdiction of Court**

**230.** (1) The Court has jurisdiction in respect of an application for the liquidation of the estate of any debtor who -

- (a) on the date of the application -
  - (i) is domiciled within the court's area of jurisdiction;

(ii) owns or is entitled to property situate within the Court's area of jurisdiction; or

(b) at any time within 12 months immediately before the date of the application ordinarily resided or carried on business within the Court's area of jurisdiction.

(2) If the Court has jurisdiction over a debtor or the insolvent estate of a debtor by virtue of subsection (1), the Court also has jurisdiction in respect of any matter regulated by this Act arising out of the liquidation of the estate of the said debtor.

(3) Foreign representatives and foreign creditors have access to the Court as provided in **Chapter 5** of this Act, and liquidation of the estate of a debtor must be limited as provided in that Chapter.

(4) The Court may rescind or vary any order made by the Court under the provisions of this Act.

### **Appeals**

**231.** (1) Any person aggrieved by-

- (a) a final liquidation order;
- (b) by a refusal to grant a provisional order or a final liquidation order without a provisional liquidation order;
- (c) an order setting aside a provisional liquidation order; or
- (d) any other appealable order made in terms of this Act,

may, subject to the provisions of section 18 of the High Court Act, appeal against such order.

(2) The Rules of the Court applicable to appeals from judgments or orders given in civil matters by the Court apply, subject to subsection (3), with the changes necessitated by the context to appeals contemplated in subsection (1).

(3) Notwithstanding the provisions of any other law, the noting of an appeal against a final liquidation order does not have the effect of suspending the operation of any provision of this Act: Provided that pending judgment on appeal no property belonging to the insolvent estate may be realised without the written consent of the debtor or, failing such consent, permission granted by order of Court on an application by an interested person who has furnished security to the satisfaction of the Court for restitution in the event of the appeal being successful.

(4) If an appeal against a final liquidation order is allowed, the respondent may be ordered to pay all liquidation costs.

## **Review**

**232.** (1) Any person aggrieved by any decision, order or taxation of the Commissioner or by a decision by the liquidator or by a decision or order of an officer presiding at a meeting of creditors of an insolvent estate, including the liquidator, may, within 90 days or such further period as the Court may allow for good cause shown, bring such decision, order or taxation under review by the Court upon notice to the Commissioner or the presiding officer, as the case may be, and to any other person whose interests are affected.

(2) If all or most of the creditors are affected by an application referred to in subsection (1), notice need to be given to the liquidator only.

(3) The Court reviewing any decision, order or taxation has the power to consider the merits of any such matter, to hear evidence and to make any order it deems just: Provided that the Court may not re-open any confirmed liquidator's account otherwise than as is provided in **section 109**.

(4) If the Court on review confirms any decision, order or taxation of the Commissioner or officer referred to in subsection (1) the applicant's costs may not be paid out of the estate concerned unless the Court otherwise directs.

### **Commissioner's fees**

**233.** The Commissioner must in respect of the matters mentioned in **Schedule 3**, ensure that the fees specified therein are recovered in the manner stipulated in that Schedule.

### **Custody and destruction of documents**

**234.** (1) The Commissioner has custody of all documents relating to an insolvent estate.

(2) The liquidator of an insolvent estate may after three years elapsed as from the confirmation by the Commissioner of the final liquidation account destroy all books, documents and records in his or her possession relating to the insolvent estate, unless the Commissioner consents to the earlier destruction of such book, documents or records or directs that they be retained for a longer period determined by him or her.

(3) The Commissioner may destroy all records in his or her office relating to an insolvent estate after five years have elapsed from the rehabilitation of the insolvent.

### **Insurer's liability in respect of indemnification of debtor**

**235.** Whenever any person (herein referred to as the insurer) is obliged to indemnify another person (herein referred to as the insured) in respect of any liability incurred by the insured towards a third party, such third party is, on the liquidation of the estate of the insured, entitled to recover from the insurer the amount of the insured's liability towards the third party, but not exceeding the maximum amount for which the insurer is bound in terms of the indemnity.

**Non-compliance with directives**

**236.** (1) Nothing done under this Act is invalid merely by reason of the non-compliance with any directive prescribed by or in terms of this Act, unless in the opinion of the Court, or if the Court is not involved, in the opinion of the Commissioner or the presiding officer, a substantial injustice has thereby been caused which cannot be remedied by an appropriate order of the Court, the Commissioner or the presiding officer.

(2) No defect or irregularity in the election or appointment of a liquidator vitiates anything done by him or her in good faith.

**Regulations, policy and other powers of Minister**

**237.** (1) The Minister may make regulations prescribing -

- (a) the procedure to be observed in Commissioners' offices in connection with insolvent estates;
- (b) the form, and manner of conducting proceedings under this Act;
- (c) the manner in which fees payable under this Act must be paid and brought to account;
- (d) rights of members of the public to inspect public registers;
- (e) any matter which in terms of this Act is required or permitted to be prescribed; and
- (f) any matter in respect of which the Minister considers it necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) A regulation made under subsection (1) may provide for the creation of offences and imposition of penalties which may not exceed a fine of N\$ 500 000 or

imprisonment for a period not exceeding two years, or both such fine and such imprisonment.

(3) The Minister may by notice in the *Gazette* amend **Schedule 2**.

(4) Where this Act provides that an amount must be determined from time to time so as to reflect any subsequent fluctuation in the value of money, the Minister must before 31 March of each year adjust the amount by notice in the *Gazette* in accordance with the fluctuation of the weighted average of the consumer price index for the preceding period from January to December rounded to the nearest N\$100.

(5) The Minister may determine policy for the appointment of a liquidator or judicial manager by the Commissioner in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.

(6) Any policy determined in accordance with the provisions of subsection (5) must be published in the *Gazette* and tabled in Parliament.

### **Amendment and repeal**

**238.** (1) The laws mentioned in **Schedule 3** are hereby amended or repealed to the extent indicated in the third column of that Schedule.

(2) Anything done under any provision of any law repealed by subsection (1) which may be done under a corresponding provision of this Act is deemed to have been done under that corresponding provision.

### **Short title and commencement**

**239.** (1) This Act is called the Insolvency Act, 2018, and comes into operation on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) for different provisions of this Act.