



SPECIAL ISSUE

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LEGAL NOTICE NO. 78

THE INSOLVENCY ACT

(No. 18 of 2015)

IN EXERCISE of the powers conferred by section 730 of the Insolvency Act, 2015, the Attorney-General makes the following Regulations:—

THE INSOLVENCY (AMENDMENT) (NO. 2) REGULATIONS, 2018

1. These Regulations may be cited as the Insolvency (Amendment) (No. 2) Regulations, 2018.

Citation.

2. The Insolvency Regulations, 2016, hereinafter referred to as “the principal Regulations” are amended in Part X, Division 5 by inserting the following new regulation immediately after regulation 95—

Amendment of regulation 96 of L. N. No. 18 of 2016.

Provable debt.

95A. (1) For the purpose of Part VI, Division 8 of the Act, a creditor’s claim is a document that a creditor submits to the liquidator for the purpose of proving the debt.

- (2) A provable debt is a debt or liability that the company owes—
 - (a) at the commencement of the liquidation; or
 - (b) after the commencement of liquidation based on an obligation incurred by the company before the commencement of liquidation.
- (3) A debt is proved when it is allowed by the liquidator.
- (4) A creditor who wishes to lodge a claim in liquidation shall follow the procedure set out in the Third Schedule.

3. The principal Regulations are amended by inserting the following new regulations immediately after regulation 127—

Insertion of new regulations.

Sale of substantial assets by an Administrator.

127A. For the purpose of section 573 of the Act, the administrator of a company shall convene a meeting seeking creditors’ approval for the sale of substantial assets of not less than ten percent of the total assets of the company.

Administrator may continue or disclaim contracts entered into by the company before administration commenced

127B For the purpose of section 580 of the Act, if a company is a party to a contract, the Administrator may—

- (a) continue the contract, subject to the terms of the contract and all relevant rules of law; or
- (b) disclaim the contract.

4. The principal Regulations are amended by inserting the following new regulation immediately after regulation 137—

Insertion of new regulation

Creditors request for information from a relevant office holder

137A. (1) A creditor may request for information relating to the creditor's interest, from a relevant office holder where it is reasonable for the office holder to comply with the request, and that the office holder has not previously provided the information to the interested creditor.

(2) For the purposes of this regulation, "the relevant office-holder" means the Official Receiver, the bankruptcy trustee, the supervisor of the voluntary arrangement, the administrator, the liquidator or the provisional liquidator, whichever is applicable.

5. The Third Schedule to the principal Regulations is amended—

Amendment of Third Schedule of L. N No 18 of 2016

- (a) in Part 6, by inserting the following new paragraph immediately after paragraph 31—

Equal treatment of creditors within a class

31A. For the purpose of this Part creditors in the same class shall be treated equally in relation to each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favourable treatment of such particular claim or interest.

- (b) by inserting the following new Part immediately after Part 6—

PART 6A—CREDITORS CLAIM

Creditors claim in the liquidation

31B. (1) A creditor, including a creditor who has a preferential claim, who wishes to claim in the liquidation, shall submit a creditor's claim to the liquidator before the deadline for submitting claims.

(2) The liquidator may accept such a claim only if the claim is in Form 5 as set out in the First Schedule.

(3) For the purpose of sub-paragraph (1), the deadline is either—

- (a) the time specified by the liquidator in a notice given to the creditor; or

(b) the time specified in an advertisement published by the liquidator in a newspaper widely circulating in the area in which the creditor normally resides or carries on business.

(4) The creditor shall bear the costs of proving the debt, unless the Court makes an order as to the creditor's costs under paragraph 31H.

(5) The creditor may amend or withdraw the claim, but an amended claim has to comply with the formalities prescribed for the original claim.

Liquidator's examination of creditors claim.

31C. (1) The liquidator shall examine each creditor's claim and the grounds of the debt, unless of the opinion that no dividend will be paid to creditors.

(2) As soon as practicable after examining a claim, the liquidator shall do one or more of the following—

- (a) wholly or partly allow the claim;
- (b) wholly or partly reject the claim; or
- (c) require further evidence in support of the claim or an item contained in it.

Notice to creditor of a rejected claim.

31D. As soon as practicable after rejecting a creditor's claim, or a part of it, the liquidator shall give the creditor a notice rejecting the claim and specifying the grounds for the rejection.

Directors or creditors notice to the liquidations.

31E. (1) The company's directors or any creditor may give the liquidator notice to allow or reject a creditor's claim.

(2) If the liquidator has not made a decision allowing or rejecting the creditor's claim within fourteen days after receiving the claim, the creditor or the directors may apply to the Court for an order under sub-paragraph (3).

(3) On the hearing of an application made under sub-paragraph (2), the Court shall, if it finds the claim—

- (a) to be substantiated or partly substantiated, make an order allowing the claim or partly allowing the claim; or
- (b) is wholly or partly unsubstantiated, make an order rejecting or partly it, and in either case may make such other order of an ancillary nature as it considers appropriate.

An application to court an improperly allowed creditors claim.

31F. (1) The Official Receiver, the company's directors or a creditor may make an application to the Court for an order under sub-paragraph (2) on the ground that the liquidator improperly allowed a creditor's claim.

(2) On the hearing of an application made under sub-paragraph (1), the Court may make an order cancelling the creditor's claim or reducing the amount claimed, if it considers that the claim was improperly allowed or was improperly allowed in part.

Creditors application
to court for a
rejected creditors
claim

31G. (1) A creditor whose claim has been rejected by the liquidator may apply to the Court to make an order under sub-paragraph (3).

(2) The application under sub-paragraph (1) can only be made within twenty-one days after the creditor receives the liquidator's notice of rejection of the claim, or within such extended period as the Court may allow.

(3) On the hearing of an application made under sub-paragraph (1), the Court shall, if it considers that the liquidator's decision was—

- (a) wholly justified, confirm the decision; or
- (b) only partly justified, confirm the decision as to that part and quash the rest of the decision, but if it considers that the decision was wholly unjustified, it shall quash the decision.

(4) A creditor has no right to prove for a debt that has been rejected by the liquidator, unless the creditor has made an application under this paragraph.

Service of a copy of
the application in
paragraph 31B

31H. (1) This paragraph applies to an application made under paragraph 31B (1).

(2) If the applicant is not the liquidator, the applicant shall serve a copy of the application on the liquidator as a party to the proceeding.

(3) If the applicant is not the directors or a creditor who is affected by the decision of the liquidator, the applicant shall serve a copy of the application on the directors or that creditor.

(4) On being served with a copy of the application, the directors or creditor may give notice to the Court that the directors or creditor wish to appear and be heard at the hearing and, on doing so, become a party to the proceedings.

Courts order on
costs

31I. On the hearing of an application made under paragraph 31B (5), the Court may, make an order directing specified costs—

- (a) of a creditor to be added to the creditor's claim;

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- (b) of a party to the proceeding to be paid out of the company's estate; or
 - (c) to be paid by a specified party to the proceedings (other than the liquidator).

Made on the 28th March, 2018.

GITHU MUIGAL,
Attorney-General.

EXPLANATORY MEMORANDUM TO THE INSOLVENCY (AMENDMENT) (NO.2) REGULATIONS, 2018

PART I

Name of the Statutory Instrument: The Insolvency (Amendment) (No.2) Regulations, 2018.

Name of the Parent Act: The Insolvency Act, 2015

Enacted Pursuant to: Section 730 of LN. NO.18 of 2015

Name of the Ministry/ Department: Office of the Attorney General and the Department Of Justice, Business Registration Service

Gazetted on: 13th April, 2018
Tabled on:

PART II

1.The Purpose of the Insolvency (Amendment)(No.2) Regulations, 2018

The purpose of these Regulations is to provide for the proper implementation of the Insolvency Act, 2015 by coming up with amendments to improve the implementation and operationalisation of the Act.

Regulation 2 and Part 6A (in the Third Schedule) of the Insolvency (Amendment) (No. 2) Regulations, 2018 (hereinafter referred to as the Regulations) seek to provide a mechanism through which an individual creditor can challenge a decision of insolvency representatives to approve all claims if the decision affects the creditor's right. Although there are some general powers in the court to have regard to the wishes of creditors and the value of their debts and the power to bring misfeasance actions against liquidators, there is no equivalent specific provision which apply to liquidation.

Regulation 3 of the Regulations seeks to provide for the approval by creditors for sale of substantial assets of the debtor to ensure that creditors protect their charge during sale of assets. These regulations further seeks to allow for continuation of contacts supplying essential goods and service essential for a debtor's survival so that the debtor is able to continue with business after commencement of insolvency proceedings.

Regulation 4 of the Regulations seeks to provide mechanisms through which an individual creditor can challenge a decision of insolvency representative to approve all claims if this decision affects the creditor's rights.

Regulation 5 of the Regulations seeks to allow for the equal treatment of creditors in a class meaning that the law allows for division of creditors into classes for the purpose of voting on the

reorganization plan so that each class of creditors has a say and thus ensuring that the interests of secured creditors are protected during voting unless a creditor approves otherwise.

2.Legislative Context

The Insolvency Act, 2015 empowers the Attorney General to make Regulations necessary or convenient for carrying out or giving effect to the Act. The Insolvency (Amendment) (No.2) Regulations, 2018 are therefore issued to give effect to the Act.

3.Policy Background

The regulatory framework on insolvent persons and entities is an initiative of the Office of the Attorney General, Ministry of Industry, Trade and Cooperatives, Law Society of Kenya, Institute of Certified Public Secretaries of Kenya, Institute of Certified Public Accountants of Kenya, the Capital Market Authority, IBM Research Africa, Insurance Regulatory Authority, Kenya Law Reform Commission, PricewaterhouseCoopers Limited, Deloitte & Touche, Ernst & Young including law firms like Anjarwalla & Khanna Advocates, Coulson Harney Advocates, Raffman, Dhanji Elms & Virdee Advocates, Walker Kontos Advocates, Hamilton Harrison& Matthews Advocates and Kaplan & Stratton Advocates .

Further, these regulations will significantly improve Kenya's ranking on the ease of doing business index under the 'Resolving Insolvency' indicator.

4. Consultations Outcome

The Insolvency (Amendment) Regulations, 2018 have taken into account the views of the Official Receiver's department in the Office of the Attorney General and Department of Justice who are versed with the operational aspects of resolving insolvency in Kenya. The Attorney General in coming up with the regulations has sought the extensive input of the Ag. Official Receiver and the Ag- Director General who is the accounting officer and administrator of the Business Registration Service. Also numerous consultative meetings have been held between the Office of the Attorney General and the Ministry of Industry, Trade and Cooperatives being a ministry that is keen to improve the ease of doing business in Kenya.

5.Guidance

The Business Registration Service will sensitize its officers for adherence to the objectives of accountability and efficiency in the management of the Registry. The Service will also engage key stakeholders whose participation and cooperation remains instrumental in the successful implementation of the key aspects of the Insolvency Act and the regulations.

6.Impact Assessment

As impact assessment has not been prepared for this Instrument. The instrument is made pursuant to the objectives as operationalised by the Insolvency Act.

7. Review of the Regulations

The Ag. Director General shall monitor the application of the Insolvency (Amendment) Regulations. This will be done through the reports prepared at regular intervals. In addition, the implementers of the regulations will carry out regular monitoring and evaluation of the specific provisions of these regulations with the aim of initiating any legislative amendments as may be necessary on an annual basis.

8. Contact Person

The contact person at the Office of the Attorney General is Mr. Kenneth Gathuma, Ag- Director General, Business Registration Service and Mr. Mark Gakuru, Ag- Official Receiver.