

The Insolvency Act

Workers are set to benefit from a proposed amendment to the Insolvency Act. Employees whose employers go bankrupt will be paid out ahead of other creditors. This brings South African legislation in line with ILO conventions.

Order of preference

In terms of the Insolvency Act of 1936, the current order of preference when an employer becomes insolvent is that the trustee pays secured creditors (for example, bondholders) first. Then the Act provides for funeral costs, if necessary. Next in line are the liquidators and trustees of the insolvent estate. Then there are the various amounts due to the government, including Workmen's Compensation, income tax, VAT, customs and sales duty. Only then are workers eligible for payment. If government's claims were substantial there might be nothing left over for workers.

Amendment

At the end of 1995, the Ministry of Labour proposed an amendment to the Act which not only changes the order of payment, but also means that workers could receive larger amounts.

Internationally, legal systems have failed to adequately address the position of employees of insolvent employers. In 1992 the ILO adopted the Protection of

by Etienne Vlok

Workers' Claims (Employer Insolvency) Convention. The intention of the Ministry of Labour is to bring the Insolvency Act in line with the convention.

In terms of the amendment, the trustee of the insolvent employer will pay workers up to three months' salary or wages (under the current Act a limit of two months' wages is set). The Minister of Justice will set an upper limit on the amount payable.

If there are further funds available, the trustee must settle leave or holiday pay due in the year of the insolvency or the previous year and severance or retrenchment pay due. If there are still further funds available, the trustee will pay funds such as pension and provident funds and medical aid schemes.

More changes

Willie Hofmeyer, ANC member of the Parliamentary Portfolio Committee on Justice, says that, after consultation with the minister, the committee is likely to propose further changes to the Act. One possible change is that a maximum amount might be set in the Act instead of by the Minister of Justice. This means that workers would not have to wait for a ruling from the minister before they can

be paid out. (The maximum amount is set to protect lower paid workers. Without it, better-paid employees would receive larger amounts.)

The committee is also considering the definition of an 'employee'. Keeping track of who small businesses employ is not always easy. This could lead to abuse of the current definition in the Bill. Another possible change involves payment to funds and schemes.

Employers often set up illegitimate funds that allow them to benefit personally when they go bankrupt. The Portfolio Committee wants to make sure that the insolvent employer only pays *bona fide* funds.

Union response

COSATU has welcomed the amendment as "particularly important in the current economic situation, which sees numerous insolvencies, as well as fly-by-night operations, which leave workers totally destitute". The federation would, however, like to see further changes. It has proposed that "legislation should require that proper notice of the possibility of insolvency is given to trade unions and they should outline procedures to deal with this issue".

Delays

A major concern is the time that it is taking to pass this amendment. The

Ministry of Labour identified the problem at the end of 1995, and Nedlac agreed to the amendment on 30 May 1996. Almost two years later, government has still not passed it into law.

According to Hofmeyer, the Bill was tabled in Parliament three months ago. The reason given for the delay is that the amendment is part of the Judicial Matters Amendment Bill, which contains other, more controversial issues, which need to be settled in the Portfolio Committee. Hofmeyer expects the Bill to become law by August. ★



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