The rights and obligations of shareholders under South African insolvency laws

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1. Structure of insolvency laws fragmented

Winding up (liquidation) of insolvent company by court or voluntary winding up of insolvent companies by resolution in terms of Companies Act 61 of 1973 ("1973 Companies Act").

Members voluntary winding up of solvent companies in terms of Companies Act 71 of 2008, but administered in terms of 1973 Companies Act.

Insolvency Act 24 of 1936 applies mutatis mutandis (with the necessary changes) to company "unable to pay it debts" where Companies Act 61 of 1973 does not deal with a matter.

Special provisions for entities such as banks and insurance companies.

2. Rights and obligations of shareholders in liquidation

Assets of company vest in Master of the High Court (Department of Justice official, insolvency regulator) and after appointment in liquidator.

Transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up (filing of application for liquidation with registrar of the court) without the sanction of the liquidator, is void.

Every disposition of its property by any company being wound-up and unable to pay its debts made after the commencement of the winding-up (filing of application for liquidation with registrar of the court), shall be void unless the Court otherwise orders.

The liquidator of a company in a winding-up by the Court, with the authority granted by separate meetings of creditors and members or contributories or on the
directions of the Master of the High Court have the wide powers mentioned in section 386 (4) of the 1973 Companies Act. The liquidator of a company must in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting. If members have not given directions at a general meeting it leaves the trustee without authority to Act unless authority has been given by the Master of the High Court or the Court. In regard to any matter which has been submitted by the liquidator for the directions of creditors and members or contributories in general meeting, but as to which no directions have been given or as to which there is a difference between the directions of creditors and members or contributories, the liquidator may apply to the Master for directions and the Master may give or refuse to give directions as the Master may deem fit.

Shareholders are entitled to dividend in the (unlikely) event of surplus after payment in full of costs and claims of creditors, with interest to date of payment. Any surplus must, unless the memorandum of articles provides otherwise, be distributed among the members according to their rights and interests in the company. Unless otherwise provided, shareholders share in proportion to the number of ordinary shares held by them.

Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or shareholder make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court deems fit.

Liquidator manages company after liquidation. No new fiduciary duties imposed on shareholders.

In case of liquidation there is no formal insolvency plan. A company is wound up, assets are sold and liquidation and distribution account lodged with the Master by the liquidator and advertised for inspection. Interested persons, like shareholders, may lodge objection to account with the Master before confirmation of the account by the Master.
3. Rights and obligations of shareholders in business rescue

Opening a business rescue procedure – Chapter 6 of the Companies Act 71 of 2008

- **Voluntary**: Resolution by board of the company
- **Court order**: Application by affected person and order
- **Standing**: “Affected person” defined as shareholder, creditor, trade union, or employee not represented by a trade union.
- **Grounds**:
  - Financially distressed company -
    - unable to pay debts as become due and payable; or
    - company will become insolvent within following 6 months.
  - Reasonable prospect to rescue the company - development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company

**Rights and duties of shareholders**

Notification of resolution for voluntary or application for court order.

Rights relating to shares

- Transfer of securities in ordinary course of business.
- Alteration of status or classification of issued shares requires court approval or approved business rescue plan.
- Authorised but unissued shares may be transferred by business rescue practitioner in terms of approved business rescue plan.
• Unauthorised shares require the approval of shareholder to the business rescue plan
• No right of pre-emption on issue of shares unless business rescue plan provides otherwise.
• If company survives shareholders retain shares

Right to consult with business rescue practitioner.

Do not vote on business rescue plan unless it alters their rights of the class of shares. Vote binding on all shareholders.

No shareholder committees.

May apply to court to have directors declared delinquent or under probation.

Shareholders who are creditors may participate in creditors’ meeting.

**Right to information re insolvent company**

• Shareholders entitled to notice of each court proceeding, decision, meeting or other relevant event - notice of meeting to determine future of company and consider business rescue plan.
• Attendance at meeting to consider business rescue plan if shareholder rights altered. Meeting and vote of classes of shareholders whose rights are altered.
• Right to make a binding offer to purchase voting interests of persons opposed to business rescue plan.
• No power to call special investigation of company affairs.

**Way forward**

A new Insolvency Bill, on the legislative program for 2016, provides for insolvency legislation in one Act, but winding up of solvent companies and business rescue still in the new Companies Act 2011 and the rest in the Bill.