

COMPANIES ACT NO. 61 OF 1973

[ASSENTED TO 19 JUNE 1973]

[DATE OF COMMENCEMENT: 1 JANUARY 1974]

(Unless otherwise indicated)
(Afrikaans text signed by the State President)

CHAPTER XIV

WINDING-UP OF COMPANIES (ss 337-426)

GENERAL (ss 337-343)

337. **Definitions**

In this Chapter, unless the context otherwise indicates-

'company' includes a company, external company and any other body corporate;

'contributory' in relation to a company limited by guarantee, means any person who has undertaken to contribute to the assets of the company in terms of section 52 (3) (b) in the event of its being wound up and, in relation to any company which is unable to pay its debts and is being wound up by the Court or by a creditors' voluntary winding-up, includes any person who is liable to contribute to the costs, charges and expenses of the winding-up of the company.

338. **Application of Repealed Act, where winding-up has already commenced**

- (1) The provisions of this Act relating to the winding-up of a company shall not apply to any company if its winding-up was commenced before the commencement of this Act, and the winding-up of any such company shall be continued as if this Act had not been passed.

- (2) When a company having shares which are not fully paid-up, is wound up under this Act, the provisions of the repealed Act in respect of such shares and the contributories in relation thereto shall continue to apply in respect of such a company, notwithstanding the repeal of that Act.

339. **Law of insolvency to be applied *mutatis mutandis***

In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.

340. **Voidable and undue preferences**

- (1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.
- (2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be-
- (a) in the case of a winding-up by the Court, the presentation of the application, unless that winding-up has superseded a voluntary winding-up, when it shall be the registration in terms of section 200 of the special resolution to wind up the company;
[Para. (a) substituted by s. 17 (a) of Act 83 of 1981.]
- (b) in the case of a voluntary winding-up, the registration in terms of section 200 of the special resolution to wind up the company;
[Para. (b) substituted by s. 17 (b) of Act 83 of 1981.]
- (c) in the case of a winding-up of any company unable to pay its debts by the Court superseding a judicial management order, the presentation of the application to the Court in terms of section 433 (l) or 440.
- (3) Any cession or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

341. **Dispositions and share transfers after winding-up void**

- (1) Every 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 without the sanction of the liquidator, shall be void.
- (2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.

342. **Application of assets and costs of winding-up**

- (1) In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, subject to the provisions of section 435 (1) (b), the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and, unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interests in the company.
- (2) The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company.

343. **Modes of winding-up**

- (1) A company may be wound up -
 - (a) by the Court; or
 - (b) voluntarily.
- (2) A voluntary winding-up of a company may be –
 - (a) a creditors' voluntary winding-up; or
 - (b) a members' voluntary winding-up.

WINDING UP BY THE COURT
(ss 344-348)

344. **Circumstances in which company may be wound up by Court**

A company may be wound up by the Court if-

- (a) the company has by special resolution resolved that it be wound up by the Court;
- (b) the company commenced business before the Registrar certified that it was entitled to commence business;
- (c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;
- (d) in the case of a public company, the number of members has been reduced below seven;
- (e) seventy-five percent of the issued share capital of the company has been lost or has become useless for the business of the company;
- (f) the company is unable to pay its debts as described in section 345;
- (g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;
- (h) it appears to the Court that it is just and equitable that the company should be wound up.

345. **When company deemed unable to pay its debts**

- (1) A company or body corporate shall be deemed to be unable to pay its debts if-

- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due -
 - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
 - (ii) in the case of any Body Corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
 - (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
[Para. (b) substituted by s. 26 of Act 59 of 1978.]
 - (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.
- (2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

346. **Application for winding-up of company**

- (1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made-
 - (a) by the company;
 - (b) by one or more of its creditors (including contingent or prospective creditors);

- (c) by one or more of its members, or any person referred to in section 103(3), irrespective of whether his name has been entered in the register of members or not;
[Para. (c) substituted by s. 11(a) of Act 70 of 1984.]
 - (d) jointly by any or all of the parties mentioned in paragraphs (a), (b) and (c);
 - (e) in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company; or
 - (f) in the case of the discharge of a provisional judicial management order under section 428 (3) or 432 (2), by the provisional judicial manager of the company.
[Para. (f) added by s. 11 (c) of Act 70 of 1984.]
- (2) A member of a company shall not be entitled to present an application for the winding-up of that company unless he has been registered as a member in the register of members for a period of at least six months immediately prior to the date of the application or the shares he holds have devolved upon him through the death of a former holder and unless the application is on the grounds referred to in section 344 (b), (c), (d), (e) or (h).
- (3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (e) of that subsection, shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.
- * (4) (a) Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the Gazette.

(b) The Master or any such officer may report to the Court any facts ascertained by him which appear to him to justify the Court in postponing the hearing or dismissing the application and shall transmit a copy of that report to the applicant or his agent and to the company.

(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application -

(i) applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves-

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;

(iii) to the South African Revenue Service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with.

[Sub-s. (4A) added by s. 7 of Act 69 of 2002.]

346A **Service of winding-up order**

- (1) A copy of a winding-up order must be served on-
 - (a) every trade union referred to in subsection (2);
 - (b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;
 - (c) the South African Revenue Service; and
 - (d) the company, unless the application was made by the company.
- (2) For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a registered trade union and company to which the employees have access.
[S. 346A inserted by s. 8 of Act 69 of 2002.]

347. **Power of Court in hearing application**

- (1) The Court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.
- (1A) Whenever the court is satisfied that an application for the winding-up of a company is an abuse of the court's procedure or is malicious or vexatious, the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and award it such compensation as the court may deem fit.
[Sub-s. (1A) inserted by s. 9 of Act 69 of 2002.]

- (2) Where the application is presented by members of the company and it appears to the Court that the applicants are entitled to relief, the Court shall make a winding-up order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.
- (3) Where the application is presented on the ground that the company commenced business before the Registrar had certified that it was entitled to commence business, the Court may, instead of granting a winding-up order, give directions that the company shall obtain such certificate from the Registrar or make such other order as it thinks fit and the Court may order the costs or any part thereof to be paid by any person who in the opinion of the Court is responsible for the default.
- (4) Where the application is presented to the Court by-
 - (a) any applicant under section 346 (1) (e), the Court may in the winding-up order or by any subsequent order confirm all or any of the proceedings in the voluntary winding-up; or
 - (b) Any member under that section, the Court shall satisfy itself that the rights of the member will be prejudiced by the continuation of a voluntary winding-up.
- (5) The Court shall not grant a final winding-up order in the case of a company or other body corporate which is already being wound up by order of Court within the Republic.

348. **Commencement of winding-up by Court**

A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.

VOLUNTARY WINDING-UP (ss 349-353)

349. **Circumstances under which company may be wound up voluntarily**

A company, not being an external company, may be wound up voluntarily if the company has by special resolution resolved that it be so wound up.

[S. 349 substituted by s. 18 of Act 83 of 1981.]

350. **Members' voluntary winding-up and security**

- (1) A voluntary winding-up of a company shall be a members' voluntary winding-up if the resolution contemplated in section 349 so states, but such a resolution shall be of no force and effect unless-
 - (a) it has been registered in terms of section 200; and
 - (b) prior to the registration thereof-
 - (i) security has been furnished to the satisfaction of the Master for the payment of the debts of the company within a period not exceeding twelve months from the commencement of the winding-up of the company; or
 - (ii) the Master has dispensed with the furnishing of such security on production to him of-
 - (aa) a sworn statement by the directors of the company that it has no debts; and
 - (bb) a certificate by the auditor of the company that to the best of his knowledge and belief and according to the records of the company, it has no debts.
- [Sub-s. (1) substituted by s. 19 of Act 83 of 1981.]
- (2) The costs incurred in furnishing the security referred to in paragraph (b) of subsection (1) may be recovered from the company concerned.
- (3) Unless otherwise provided, in a members' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding-up by the Court, subject to such directions as may be given by the company in general meeting.

351. **Creditors' voluntary winding-up**

- (1) A voluntary winding-up of a company shall be a creditors' voluntary winding-up if the resolution contemplated in section 349 so states, but such a resolution shall be of no force and effect unless it has been registered in terms of section 200.
[Sub-s. (1) substituted by s. 20 of Act 83 of 1981.]

- (2) Unless otherwise provided, in a creditors' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding-up by the Court subject to such directions as may be given by the creditors.

352. **Commencement of voluntary winding-up**

- (1) A voluntary winding-up of a company shall commence at the time of the registration in terms of Section 200 of the Special Resolution authorising the winding-up.
- (2) The Registrar shall forthwith, after the registration by him of a special resolution referred to in Sub-Section (1), transmit a copy thereof to the Master.
[s. 352 substituted by s. 21 of Act 83 of 1981].
- (3) Effect of voluntary winding-up on status of company and on directors.

353. **Effect of Voluntary Winding-Up on Status of Company and on Directors**

- (1) A company which is being wound up voluntarily shall, notwithstanding anything contained in its articles, remain a corporate body and retain all its powers as such, but shall from the commencement of the winding-up cease to carry on its business, except in so far as may be required for the beneficial winding up thereof.
- (2) As from the commencement of a voluntary winding-up all the powers of the directors of the company concerned shall cease except in so far as their continuance is sanctioned-
- (a) by the liquidator or the creditors in a creditors' voluntary winding-up; or
- (b) by the liquidator or the company in general meeting in a members' voluntary winding-up.

GENERAL PROVISIONS AFFECTING ALL WINDINGS-UP (ss 354-366)

354. Court may stay or set aside winding-up

- (1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, 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 may deem fit.
- (2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.

355. Notice to creditors or members in review by Court in winding-up, and no re-opening of confirmed account

- (1) In any review by the Court of any matter under the winding-up of a company where the general body of creditors, members or contributories is affected, notice to the liquidator shall be notice to them.
- (2) The Court shall not authorise the re-opening of any duly confirmed account or plan of distribution or of contribution otherwise than as is provided in section 408.

356. Notice of Winding-Up of Company

- (1) The Master shall upon receipt of a copy of any winding-up order of any company lodged with him give notice of such winding-up in the Gazette.
- (2) Any company which has passed a special resolution under section 349 for its voluntary winding-up shall, within 28 days after the registration of that resolution, in terms of Section 200 –
 - (a) Lodge with the Master a certified copy of the resolution concerned, together with –
 - (i) In the case of a member's voluntary winding-up if any further resolution nominating a person or persons for appointment as liquidator or liquidators of the company has been passed, a certified copy of that resolution; or

- (ii) In the case of a creditors' voluntary winding-up, two certified copies of the statement referred to in section 363 (1); and
- (b) Give notice of the voluntary winding-up of the company in the Gazette.
[Sub-s. (2) substituted by s.22 of Act 83 of 1981 and amended by s. 12 of Act 70 of 1984.]
- (3) Any company which fails to comply with any provision of sub-section (2) and every registrar or officer thereof who knowingly authorised or permitted such failure, shall be guilty of an offence.

357. **Notice of Winding-Up to certain officials and their duties thereafter**

- (1) A copy of every winding-up order, whether provisional or final and of any order staying, amending or setting such order aside, made by the Court, shall forthwith be transmitted by the Registrar of the Court to –
 - (a) The Sheriff of the Province in which the registered office of the company or main office of the Body Corporate is situate and to the Sheriff of every Province in which it appears that the Company or such Body Corporate owns property;
 - (b) Every Registrar or other Officer charged with the maintenance of any Act in respect of any property within the Republic which appears to be an asset of such Company;
 - (c) The Messenger of every Magistrate's Court by the order whereof it appears that property of such Company is under attachment.
- (2) Where the assets of any such company are under four hundred rand in value, the Court may direct that its movable assets may, upon such terms as to security as it may determine, remain in the custody of such person as may be specified in the directions, and in that event it shall not be necessary to transmit a copy of any order to any sheriff or messenger.

- (3) A copy of every special resolution for the voluntary winding-up of any company passed under section 349 and of every order of court amending or setting aside the proceedings in relation to the winding-up shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company to the officers and registrars referred to in paragraphs (a), (b) and (c) of subsection (1).
[Sub-s. (3) substituted by s. 23 of Act 83 of 1981.]
- (4)
- (a) Any officer and registrar to whom a copy of any such order or resolution is transmitted in terms of subsection (1) or (3) shall record such copy and note thereon the day and hour of receipt thereof.
 - (b) Any registrar and officer referred to in paragraph (b) of subsection (1) shall upon receipt of a copy of any order or resolution referred to in subsection (1) or (3), enter a caveat in his register accordingly.
- (5) Any company which fails to comply with any of the requirements of subsection (3) and every director or officer of such a company who knowingly is a party to such failure, shall be guilty of an offence.

358. **Stay of legal proceedings before winding-up order granted**

At any time after the presentation of an application for winding-up and before a winding-up order has been made, the company concerned or any creditor or member thereof may-

- (a) where any action or proceeding by or against the company is pending in any court in the Republic, apply to such court for a stay of the proceedings; and
- (b) where any other action or proceeding is being or about to be instituted against the company, apply to the Court to which the application for winding-up has been presented, for an order restraining further proceedings in the action or proceeding,

and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

359. **Legal proceedings suspended and attachments void**

- (1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –
 - (a) All civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
 - (b) Any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.
- (2)
 - (a) Every person who, having instituted legal proceedings against a company which was suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the Liquidator, give the Liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.
 - (b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.

360. **Inspection of records of company being wound up**

- (1) Any member or creditor of any company unable to pay its debts and being wound up by the Court or by a creditors' voluntary winding-up may apply to the Court for an order authorising him to inspect any or all of the books and papers of that company, whether in possession of the company or the liquidator, and the Court may impose any condition it thinks fit in granting that authority.
- (3) The provisions of subsection (1) shall not be construed as affecting any powers or rights conferred by any law upon any department of State or any person acting under its authority at all times to inspect or cause to be inspected, the books and papers of any company being wound up.

361. **Custody of or control over, and vesting of property of, company**

- (1) In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.
- (2) In any winding-up of any company, at all times while the office of the liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master.
- (3) If for any reason it appears expedient, the Court may by the winding-up order or by any subsequent order direct that all or any part of the property, immovable and movable (including rights of action), belonging to the company, or to trustees on its behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official capacity any action or other legal proceedings relating to that property, or necessary to be brought or defended for the purpose of effectually winding-up the company and recovering its property.

362. **Court may order directors, officers and others to deliver property to liquidator or to pay into bank**

- (1) The Court may at any time after making a winding-up order or after a special resolution for the voluntary winding-up of a company has been registered in terms of section 200, order any director, member, trustee, banker, agent or officer of the company concerned to pay, deliver, convey, surrender or transfer to the liquidator of the company forthwith, or within such time as the Court directs, any money, property or books and papers in his hands to which the company is prima facie entitled.
[Sub-s. (1) substituted by s. 25 of Act 83 of 1981.]
- (2) The Court may order any director, member, purchaser or other person from whom money is due to any company which is being wound up, to pay the same into a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), to be named by the Court for the account of the liquidator instead of to the liquidator, and such order may be enforced in the same manner as if it had ordered payment to the liquidator.

- (3) All moneys paid into a banking institution as aforesaid in the event of a winding-up by the Court shall be subject in all respects to the orders of the Court.

363. **Directors and others to submit statement of affairs**

- (1) Where it is intended to pass a resolution for a creditors' voluntary winding-up of a company, the directors of that company shall make out or cause to be made out, in the prescribed form, a statement as to the affairs of the company and lay it before the meeting convened for the purpose of passing such a resolution.

[Sub-s. (1) substituted by s. 26 of Act 83 of 1981.]

- (2) Where an order for the winding-up of a company has been made by the Court-

(a) the persons who at the time of the winding-up order were directors and officers of the company; and

(b) such persons who have been directors or officers of the company or who participated in its formation, at any time within one year before the winding-up order, as may be required to do so by the Master,

shall make out or cause to be made out, in the prescribed form, such statement as to the affairs of the company and lodge two certified copies thereof with the Master within fourteen days from the date of the winding-up order in question or within such extended time as the Master or the Court may for special reasons appoint.

- (3) The Master may exempt any person referred to in subsection (2) from the obligation to comply with the requirements of that subsection if such person satisfies him by affidavit that he is unable to make out or cause to be made out or to verify such statement as to the affairs of the company concerned.

- (4) The statement as to the affairs of a company referred to in subsection (1) or (2)-

- (a) shall contain such matter and be in such form as prescribed including particulars of the company's assets, debts, liabilities (including contingent and prospective liabilities), any pending legal proceedings by or against it, the names, addresses and nature of the businesses of its creditors, the security held by each of them, the dates when each of the securities was given and, in the case of such a statement under subsection (2), such further information as the Master may require; and
 - (b) shall be verified by affidavit by each of the persons referred to in subsection (1) or (2) and such verifying affidavit shall be annexed to the said statement.
- (5) The Master shall transmit a copy of any statement as to the affairs of a company lodged with him in terms of this section to the liquidator on his appointment.
 - (6) Any person shall be entitled by himself or his agent, on payment of the prescribed fee, to inspect or apply for a copy of or an extract from any statement as to the affairs of a company lodged with the Master in pursuance of this section.
 - (7) Any person who is required to make or cause to be made any statement as to the affairs of a company in terms of this section, shall be paid by the Master, out of the assets of the company, such costs and expenses incurred by him in respect of the preparation and making of such statement as the Master may consider reasonable.
 - (8) Any person who fails to comply with any requirement of subsection (1), (2) or (4) shall be guilty of an offence.

363A. **Change of address by directors and secretaries and certain former directors and secretaries**

- (1) Any person who is a director or secretary of a company which is being wound up and who, after the winding-up of such company has commenced but before the liquidator's final account has in terms of section 408 been confirmed, changes his residential or postal address, shall notify the liquidator by registered post of his new residential or postal address within fourteen days after such change, or, if the liquidator has not been appointed on the date of such change, within fourteen days after the appointment of the liquidator.

- (2) Any person who fails to comply with any requirement of subsection (1) shall be guilty of an offence.
- (3) Whenever at the trial of any person charged with an offence referred to in subsection (2) it is proved that such person is a director or secretary of a company which is being wound up and that he has changed his residential or postal address after the winding-up of that company has commenced and that the liquidator has no written record of such change, it shall be presumed, unless the contrary is proved, that he did not notify the liquidator of such change.
- [S. 363A inserted by s. 8 of Act 84 of 1980.]

364. **Master to summon first meetings of creditors and members and purpose thereof**

- (1) As soon as may be after a final winding-up order has been made by the Court or a special resolution for a creditors' voluntary winding-up of a company has been registered in terms of section 200, the Master shall summon-
- (a) a meeting of the creditors of the company for the purpose of-
- (i) considering the statement as to the affairs of the company lodged with the Master under section 363;
 - (ii) the proof of claims against the company; and
 - (iii) nominating a person or persons for appointment as liquidator or liquidators; and
- (b) a meeting of the members of the company or, in the case where the winding-up concerns a company limited by guarantee, a meeting of the contributories in respect of that company, for the purpose of-
- (i) considering the said statement as to the affairs of the company; and

- (ii) nominating a person or persons for appointment as liquidator or liquidators,

unless the company in general meeting, when passing a resolution provided for in section 349, has already disposed of the matters referred to in subparagraphs (i) and (ii).

[Sub-s. (1) amended by s. 27 of Act 83 of 1981.]

- (2) Meetings of creditors under this section shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency, and meetings of members or contributories in the manner prescribed by regulation: Provided that, in the case of a meeting of creditors, the Master may direct the company concerned or the provisional liquidator to send a notice of such meeting by post to every creditor of the company.

365. **Offences in securing nomination as liquidator and restriction on voting at meetings**

- (1) Any person who gives or agrees or offers to give to any member, creditor or contributory of a company any reward with a view to securing his own nomination or appointment or to securing or preventing the nomination or appointment of any person as the company's liquidator, shall be guilty of an offence.

(2)

- (a) The provisions of the law relating to insolvency in respect of voting, the manner of voting and voting by an agent at meetings of creditors, shall apply mutatis mutandis to any meeting referred to in sections 351 and 364: provided that in any winding-up by the Court a director or former director of a company shall have no voting right in respect of the nomination of a Liquidator on the ground of his loan account with the company or claims for arrear salary, travelling expenses or allowances due by the company or claims paid by such director or former director on behalf of the company.

- (b) The provisions of paragraph (a) shall mutatis mutandis apply to a person to whom a right contemplated in the said paragraph has been ceded. [Sub-s. (2) substituted by s. 27 of Act 111 of 1976.]

366. **Claims and proof of claims**

- (1) In the winding-up of a company by the Court and by a creditors' voluntary winding-up-
 - (a) the claims against the company shall be proved at a meeting of creditors mutatis mutandis in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency;
 - (b) a secured creditor shall be under the same obligation to set a value upon his security as if he were proving his claim against an insolvent estate under the law relating to insolvency, and the value of his vote shall be determined in the same manner as is prescribed under that law;
 - (c) a secured creditor and the liquidator shall, where the company is unable to pay its debts, have the same right respectively to take over the security as a secured creditor and a trustee would have under the law relating to insolvency.
- (2) The Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved.

LIQUIDATORS (ss 367-385)

367. **Appointment of liquidator**

For the purpose of conducting the proceedings in a winding-up of a company the Master shall appoint a liquidator or liquidators as hereinafter provided.

368. **Appointment of provisional liquidator**

As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master may appoint any suitable person as provisional liquidator

of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his duties as provisional liquidator and who shall hold office until the appointment of a liquidator.

[S. 368 substituted by s. 28 of Act 83 of 1981.]

[NB: S. 368 has been substituted by s. 16 of the Judicial Matters Amendment Act 16 of 2003, a provision which will be put into operation by proclamation. See PENDLEX.]

369. **Determination of person to be appointed liquidator**

- (1) In the case of a members' voluntary winding-up of a company, the Master shall, subject to the provisions of section 370, appoint the person or persons nominated by the company in the resolution referred to in section 356 (2) (a) (i) as liquidator or liquidators of the company concerned.

[Sub-s. (1) amended by s. 29 (a) of Act 83 of 1981.]

(2)

- (a) In the case of a creditors' voluntary winding-up and a winding-up by the Court of a Company, the Master shall, subject to the provisions of section 370, appoint the person or persons nominated by any meetings referred to in Section 364 as liquidator or liquidators of the company concerned, if the same person or persons have been nominated by the said meetings.

[Para. (a) amended by s. 29 (b) of Act 83 of 1981.]

- (b) If the said meetings have nominated different persons, the Master shall, subject to the provisions of section 370, decide the difference and appoint all or any of the persons so nominated, as he thinks fit, as liquidator or liquidators of the company concerned.

370. **Master may decline to appoint nominated person as liquidator**

- (1) If a person who has been nominated as liquidator by meetings of creditors and members or contributories of a company was not properly nominated or is disqualified from being nominated or appointed as liquidator under section 372 or 373 or has failed to give within a period of seven days as from the date upon which he was notified that the Master had accepted his nomination or within such further period as the Master

may allow, the security mentioned in section 375 (1) or, if in the opinion of the Master the person nominated as liquidator should not be appointed as liquidator of the company concerned, the Master shall give notice in writing to the person so nominated that he declines to accept his nomination or to appoint him as liquidator and shall in that notice state his reason for declining to accept his nomination or to appoint him: Provided that if the Master declines to accept the nomination for appointment as liquidator because he is of the opinion that the person nominated should not be appointed as liquidator, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person nominated should not be appointed as liquidator of the company concerned.

(2)

- (a) When the Master has so declined to accept the nomination of any person or to appoint him as liquidator or the Minister has under Section 371(3) set aside the appointment of a liquidator, the Master shall convene meetings of creditors and members or contributories of the company concerned for the purpose of nominating another person for appointment as liquidator in the place of the person whose nomination as liquidator the Master has declined to accept or whom the Master has declined to appoint or whose appointment has been so set aside.
- (b) In the notice convening the said meetings the Master shall state that he has declined to accept the nomination for appointment as liquidator of the person previously nominated or to appoint the person so nominated and the reasons therefor, subject to the proviso to Sub-Section (1), or that the appointment of the person previously appointed as liquidator has been set aside by the Minister, as the case may be, and that the meetings are convened for the purpose of nominating another person for appointment as liquidator.
- (c) The Master shall post a copy of such notice to every creditor whose claim against the company was previously moved and admitted.
- (d) The meetings referred to in Paragraph (a) shall be deemed to be continuations of the first meetings of creditors, members or contributories or of the meetings referred to in sections 350 and 364.

- (3) If the Master again declines for any reason mentioned in subsection (1) to accept the nomination for appointment as liquidator by the meetings mentioned in subsection (2), or to appoint a person so nominated, he shall-
- (a) act in accordance with the provisions of subsection (1); and
 - (b) if the person so nominated was nominated as sole liquidator or if all the persons so nominated have not been appointed by him, appoint as liquidator or liquidators of the company concerned any other person or persons not disqualified from being liquidator of that company.

371. **Remedy of aggrieved persons**

- (1) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister.
 - (2) The Master shall within seven days of the receipt by him of the request referred to in subsection (1) submit to the Minister, in writing, his reasons for such appointment or refusal together with any relevant documents, information or objections received by him.
 - (3) The Minister may, after consideration of the reasons referred to in subsection (2) and any representations made in writing by the person who made the request referred to in subsection (1) and of all relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and, in the event of the refusal by the Master being set aside, direct the Master to accept the nomination of the liquidator concerned and to appoint him as liquidator of the company concerned.
 - (4)
- [Sub-s. (4) deleted by s. 49 of Act 88 of 1996.]

372. **Persons disqualified from appointment as liquidator**

No person shall be qualified for nomination or appointment as the liquidator of a company, if he is-

- (a) an insolvent;
- (b) a minor or any other person under legal disability;
- (c) a person declared under section 373 to be incapable of being appointed as a liquidator, while he remains so incapable;
- (d) a person removed from an office of trust by the Court on account of misconduct or a person who is the subject of any order under this Act disqualifying him from being a director;
- (e) a corporate body;
- (f) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document or perjury and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding twenty rand;
- (g) any person who has by means of any misrepresentation or any reward, whether directly or indirectly induced or attempted to induce any person to vote for him in the nomination of a liquidator or to effect or assist in effecting his nomination or appointment as liquidator of any company;
- (h) a person who does not reside in the Republic;
- (i) any person who at any time during a period of twelve months immediately preceding the winding-up of a company acted as a director, officer or auditor of that company; and
- (j) any agent authorised specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the company concerned and acting or purporting to act under such special authority or general power of attorney:

Provided that the provisions of paragraph (i) shall not apply to an auditor in the case of the voluntary winding-up of the company concerned by the members as contemplated in section 350.

[S. 372 amended by s. 28 of Act 64 of 1977.]

373. **Persons disqualified by Court from being appointed or acting as Liquidators**

The Court may, on the application of any interested person, declare any person proposed to be appointed or appointed as liquidator, to be disqualified from holding office, and, if he has been appointed, may remove him from office, and may, if it thinks fit, declare him incapable for life or for such period as it may determine of being appointed as a liquidator under this Act -

- (a) if he has accepted or offered or agreed to accept or solicited from any auctioneer, agent or other person employed on behalf of a company in liquidation, any share of the commission or remuneration of such auctioneer, agent or person or any other benefit; or
- (b) if he has, in order to obtain or in return for the vote of any creditor, member or contributory, or in order to exercise any influence upon his nomination or appointment as liquidator-
 - (i) procured or been privy to the wrongful insertion or omission of the name of any person in or from any list or schedule required by this Act; or
 - (ii) directly or indirectly given or agreed to give any consideration to any person; or
 - (iii) offered or agreed with any person to abstain from investigating any transactions of or relating to the company or of any of its directors or officers; or
 - (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

374. **Master may appoint co-liquidator at any time**

Whenever the Master considers it desirable he may appoint any person not disqualified from holding the office of liquidator and who has given security to his satisfaction, as a co-liquidator with the liquidator or liquidators of the company concerned.

[NB: S. 374 has been substituted by s. 17 of the Judicial Matters Amendment Act 16 of 2003, a provision which will be put into operation by proclamation. See PENDLEX.]

375. **Appointment, commencement of office and validity of acts of liquidator**

- (1) When the person to be appointed to the office of liquidator of a company has been determined and when such person has given security to the satisfaction of the Master for the proper performance of his duties as liquidator, except where in the case of a members' voluntary winding-up the company concerned has resolved that no security shall be required, the Master shall appoint him as liquidator of the company by issuing to him a certificate of appointment.
- (2) The said certificate of appointment shall be valid throughout the Republic.
- (3) A liquidator shall be entitled to act as such from the date of his certificate of appointment.
- (4) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.
- (5) Upon receipt of such certificate of appointment the liquidator shall-
 - (a) within seven days after receipt thereof send a copy thereof to the Registrar under cover of the prescribed form; and
 - (b) give notice of his appointment in the Gazette.

376. **Title of liquidator**

A liquidator shall be described as the liquidator of the particular company in respect of which he has been appointed, and not by his individual name.

377. **Filling of vacancies**

- (1) When a vacancy occurs in the office of liquidator, the Master shall-
 - (a) in the case of a winding-up by the Court or a creditors' voluntary winding-up, convene meetings of creditors and members or contributories of the company concerned; and
 - (b) in the case of a members' voluntary winding-up, convene or direct the company concerned to convene a meeting of members; or
 - (c) if there is a remaining liquidator or liquidators, direct him or them to convene the meetings referred to in paragraph (a) or (b), for the purpose of nominating a person or persons for appointment as liquidator to fill the vacancy: Provided that if the Master is of the opinion that the remaining liquidator or liquidators will be able to complete the winding-up, he may dispense with the appointment of a liquidator to fill the vacancy and may direct the remaining liquidator or liquidators to complete the winding-up.
- (2) All the provisions of this Act relating to the convening and conduct of the said meetings and the nomination and appointment of a liquidator shall apply to the filling of a vacancy in the office of liquidator.
- (3) Subject to the proviso to subsection (1), if for any reason a vacancy is not filled as provided in this section, the Master may appoint any person as provisional liquidator or as liquidator to fill such vacancy.
[NB: Sub-s. (3) has been substituted by s. 18 of the Judicial Matters Amendment Act 16 of 2003, a provision which will be put into operation by proclamation. See PENDLEX.]

378. **Leave of absence or resignation of liquidator**

- (1) A liquidator shall not be absent from the Republic for a period exceeding 60 days unless-
 - (a) the Master has before his departure from the Republic granted him permission in writing to be absent; and

- (b) he complies with such conditions as the Master may think fit to impose.

[Sub-s. (1) substituted by s. 13 (a) of Act 70 of 1984.]

- (2) At the request of a liquidator the Master may relieve him of his office or direct him to resign, upon such conditions as the Master may think fit.

- (3) Every liquidator who is permitted to absent himself from the Republic for a period exceeding 60 days or who is relieved of his office by the Master or so resigns therefrom, shall give notice thereof in the Gazette.

[Sub-s. (3) substituted by s. 13 (b) of Act 70 of 1984.]

379. **Removal of liquidator by Master and by the Court**

- (1) The Master may remove a liquidator from his office on the ground-

- (a) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney; or

- (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or

- (c) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator; or

- (d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or

(e) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.

(2) The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.

380. **Notice of removal of Liquidator**

The Master shall give notice in the Gazette of the removal of any liquidator.

381. **Control of Master over liquidators**

(1) The Master shall take cognisance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator.

(4) The Court may, upon the application of the Master, order that any costs reasonably incurred by him in performing his duties under this section be paid out of the assets of the company or by the liquidator de bonis propriis.

(5) Any expenses incurred by the Master in carrying out any provision of this section shall, unless the Court otherwise orders, be regarded as part of the costs of the winding-up of that company.

382. **Plurality of liquidators, liability and disagreement**

(1) When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.

- (2) Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to the Master who may thereupon determine the question in issue or give directions as to the procedure to be followed for the determination thereof.

383. **Cost and reduction of security by liquidator**

- (1) The cost of giving security by a person appointed as liquidator to an amount which the Master considers reasonable shall, subject to the provisions of section 89 (1) of the Insolvency Act, 1936 (Act 24 of 1936), be paid out of the assets of the company concerned as part of the costs of liquidation thereof.
- (2) When a liquidator has in the course of the winding-up of a company accounted to the satisfaction of the Master for any property belonging to the company, he may in writing apply for the consent of the Master to a reduction of the security given by him and the Master, if he is satisfied that the reduced security will suffice to indemnify the company and the creditors and contributories thereof against any maladministration on the part of the liquidator in respect of the remaining property belonging to the company, may consent wholly or in part to such reduction.

384. **Remuneration of liquidator**

- (1) In any winding-up a liquidator shall be entitled to a reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration: Provided that, in the case of a members' voluntary winding-up, the liquidator's remuneration may be determined by the company in general meeting.
- (2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.
- (3) No person who employs or is a fellow employee or in the ordinary employment of the liquidator, shall be entitled to receive any remuneration out of the assets of the company concerned for services rendered in the winding-up thereof and no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled under this Act.

385. **Certificate of completion of duties by liquidator and cancellation of security**

- (1) When a liquidator of a company has performed all the duties prescribed by this Act and complied with all the requirements of the Master, he may apply in writing to the Master for a certificate to that effect.
- (2) The Master shall, when he issues the said certificate, additionally state therein that he consents to the reduction of the security given by the liquidator to a stated amount or to its cancellation.

POWERS OF LIQUIDATORS (ss 386-390)

386. **General**

- (1) The liquidator in any winding-up shall have power-
 - (a) to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;
 - (b) to prove a claim in the estate of any debtor or contributory of the Company and receive payment in full or a dividend in respect thereof;
 - (c) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company: Provided that no liquidator shall, except with the leave of the Court or the authority referred to in subsection (3) or (4), or for the purposes of carrying on the business of the company in terms of subsection (4) (f) have power to impose any additional liabilities upon the company;
 - (d) to summon any general meeting of the company or the creditors or contributories of the company for the purpose of obtaining its or their authority or sanction with respect to any matter or for such other purposes as he may consider necessary;

- (e) subject to the provisions of subsections (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.
- (2) Subject to the consent of the Master, a liquidator may, at any time before a general meeting contemplated in subsection (1) (d) is convened for the first time, terminate any lease in terms of which the company is the lessee of movable or immovable property.
[Sub-s. (2) substituted by s. 9 (a) of Act 84 of 1980.]
- (2A) At any time before a general meeting contemplated in subsection 1 (d) is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.
[Sub-s. (2A) inserted by s. 9 (b) of Act 84 of 1980.]
- (2B) The Master may thereupon authorise the sale of such property or any portion thereof on such conditions and in such manner as he may determine: Provided that if such property or a portion thereof is subject to a preferential right, the Master shall not authorise the sale of such property or portion unless the person entitled to such preferential right has given his consent thereto in writing.
[Sub-s. (2B) inserted by s. 9 (b) of Act 84 of 1980.]
- (3) The liquidator of a company-
 - (a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;
 - (b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and
 - (c) in a members' voluntary winding-up, with the authority granted by a meeting of members,

shall have the powers mentioned in subsection (4).

(4) The powers referred to in subsection (3) are-

- (a) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;
- (b) to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;
- (c) to compromise or admit any claim or demand against the company, including an unliquidated claim;
- (d) except where the company being wound up is unable to pay its debts, to make any arrangement with creditors, including creditors in respect of unliquidated claims;
- (e) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;
- (f) to carry on or discontinue any part of the business of the company may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;

- (g) to exercise mutatis mutandis the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;
 - (h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;
 - (i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.
- (5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.
- (6) The Master may restrict the powers of a provisional liquidator.

387. **Exercise of liquidator's powers in winding-up by Court**

- (1) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court, shall, 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.
- (2) 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 he may deem fit.
- (3) Where the Master has refused to give directions as aforesaid or in regard to any other particular matter arising under the winding-up, the liquidator may apply to the Court for directions.

- (4) Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.

388. **Court may determine questions in voluntary winding-up**

- (1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.
- (2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit.

389. **Exercise of power to make arrangement and the binding of dissentient creditors**

- (1) Any arrangement entered into between a company able to pay its debts and about to be or in the course of being wound up and its creditors shall, subject to the provisions of subsection (2), be binding on the company if sanctioned by a special resolution of members and on the creditors of the company if acceded to by three-fourths in number and value of such creditors.
- (2) Any such creditor or member may, within three weeks from the completion of the arrangement, bring the same under review by the Court, and the Court may amend, vary, set aside or confirm the arrangement as it thinks just.

390. **Exercise of power of liquidator in voluntary winding-up to accept shares for assets of company**

- (1) Where a company is proposed to be or is being wound up voluntarily and the whole or part of its business or property is proposed to be transferred or sold to another company, whether registered under this Act or not (in this section

called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement, whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company: Provided that, in the case of a creditors' voluntary winding-up, the powers of the liquidator conferred by this section shall not be exercised save with the consent of three-fourths in number and value of the creditors present or represented at a meeting called by him for that purpose and of which not less than fourteen days' notice has been given, or with the sanction of the Court.

- (2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.
- (3) If any member of the transferor company who did not vote in favour of the special resolution, expresses his dissent therefrom in writing addressed and delivered to the liquidator or left at the registered office of the company within seven days after the passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by this section.
- (4) If the liquidator elects to purchase such member's interest, the purchase money shall be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution of the company concerned.
- (5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding-up the company or for nominating liquidators, but if an order is made within a year of such resolution for winding-up the company by the Court, the special resolution shall not be valid unless sanctioned by the Court.
- (6) For the purposes of an arbitration under this section, the provisions of the Arbitration Act, 1965 (Act 42 of 1965), shall apply.

DUTIES OF LIQUIDATORS (ss 391-411)

391. General Duties

A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.

392. Liquidator's duty to give information to Master

Every liquidator shall give the Master such information and such access to and facilities for inspecting the books and documents of the company and generally such aid as may be requisite for enabling that officer to perform his duties under this Act.

393. Liquidator's duty to keep records and inspection thereof

- (1) Immediately after his appointment a liquidator shall open a book or other record wherein he shall enter from time to time a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the company.
- (2) The Master may at any time in writing require the liquidator to produce any such book or record for inspection.
- (3) Any creditor or contributory may, subject to the control of the Master, at all reasonable times personally or by his agent inspect any such book or record.

394. Banking accounts and investments

- (1) The liquidator of a company-
 - (a) shall open a current account from which amounts are withdrawable by cheque in the name of the company in liquidation with a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), within the Republic, and shall from time to time deposit therein to the credit of the company all moneys received by him on its behalf;

- (b) may open a savings account in the name of such company with such a banking institution, a mutual building society registered under the Mutual Building Societies Act, 1965 (Act 24 of 1965), or a building society registered under the Building Societies Act, 1986 (Act 82 of 1986), within the Republic, and may transfer thereto moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company;
- (c) may place moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company, on interest-bearing deposit with such banking institution, mutual building society or building society within the Republic;
- (d) shall not withdraw any money from any account referred to in paragraph (b) or (c) otherwise than by way of a transfer to the said current account.

[Sub-s. (1) substituted by s. 6 of Act 63 of 1988.]

- (2) Whenever required by the Master to do so, the liquidator shall in writing notify the Master of the banking institution or building society and the office, branch office or agency thereof with which he has opened an account referred to in subsection (1), and furnish the Master with a bank statement or other sufficient evidence of the state of the account.
- (3) A liquidator shall not transfer any such account from any such office, branch office or agency to any other such office, branch office or agency except after written notice to the Master.
- (4) All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by the liquidator or his duly authorised agent.
- (5) The Master and any surety for the liquidator or any person authorised by such surety shall have the same right to information in regard to that account as the liquidator himself possesses, and may examine all vouchers in relation thereto, whether in the possession of the banking institution or building society or of the liquidator.

- (6) The Master may, after notice to the liquidator, in writing direct the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, to pay over into the Guardians' Fund all moneys standing to the credit of that account at the time of the receipt, by the said manager, of that direction, and all moneys which may thereafter be paid into that account, and the said manager shall carry out that direction.
- (7)
- (a) Any liquidator who without lawful excuse, retains or knowingly permits his co-liquidator to retain any sum of money exceeding forty rand belonging to the company concerned longer than the earliest day after its receipt on which it was possible for him or his co-liquidator to pay the money into the bank, or uses or knowingly permits his co-liquidator to use any assets of the company except for its benefit, shall, in addition to any other penalty to which he may be liable, be liable to pay to the company an amount not exceeding double the sum so retained or double the value of the assets so used.
- (b) The amount which the liquidator is so liable to pay, may be recovered by action in any competent court at the instance of the co-liquidator, the Master or any creditor or contributory.

395. **Liquidator's duties as to contributories**

- (1) In the case of a winding-up by the Court or of a creditors' voluntary winding-up of a company, the liquidator shall, if necessary, settle a list of contributories.
- (2) A past member of a company limited by guarantee shall not be liable to contribute to its assets unless-
- (a) at the commencement of the winding-up there is unsatisfied debt or liability of the company contracted before he ceased to be a member; and
- (b) it appears to the liquidator that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

396. **Notices to contributories and objections**

- (1) As soon as the liquidator has settled the list of contributories, he shall send a notice to every person included in the list, stating that fact and the extent of the liability of that person.
- (2) Any person who objects to his inclusion in the list, shall be entitled within fourteen days from the date of the notice to file an objection with the liquidator in the form of an affidavit giving full reasons why he should not be included in the list.
- (3) The liquidator may accept the objection and amend the list of contributories or he may reject such objection and shall, if the objection is rejected, notify the person concerned accordingly by registered post.
- (4) A person whose objection has been rejected, shall be entitled, within fourteen days from the date of the notice provided for in subsection (3), to apply to the Master for a ruling as to whether his name should be included in the list, and the Master shall direct the liquidator to include his name in or to exclude it from the said list.

397. **Recovery of contributions and nature of liability**

- (1)
 - (a) A liquidator shall proceed to recover from the contributories a proportion of or the full amount of their liability, as may be required from time to time, taking into consideration the probability that some of the contributories may partly or wholly fail to pay the amount demanded from them.
 - (b) In the event of the death of any contributory or the insolvency of his estate, the Liquidator may recover the contribution from the estate concerned.
 - (c) In the event of the death of any contributory or the insolvency of his estate, the Liquidator may recover the contribution from the estate concerned.

(2)

- (a) The liability for the payment of any amount by a contributory to the company shall be a debt due by him to the company as from the date on which the amount was demanded from him by the Liquidator.
- (b) A contributory shall not be entitled to set off against his liability any amount due to him by the Company in respect of dividends, profits or directors' remuneration.

398. **Adjustment of rights of contributories inter se**

The liquidator shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

399. **Evidence as to contributions and contributories**

- (1) A letter of demand by the liquidator to a contributory for the payment of a contribution shall be prima facie evidence that the amount thereby appearing to be due, is due.
- (2) All books and papers of the company and of the liquidator shall, as between the contributories and the company, be prima facie evidence of the truth of all matters therein recorded.

400. **Liquidator's duty to expose offences and to report thereon**

- (1) A liquidator shall examine the affairs and transactions of the company before its winding-up in order to ascertain-
 - (a) whether any of the directors and officers or past directors and officers of the company have contravened or appear to have contravened any provision of this Act or have committed or appear to have committed any other offence; and
 - (b) in respect of any of the persons referred to in paragraph (a), whether there are or appear to be any grounds for an order by the Court under section 219 disqualifying a director from office as such.

(2) A liquidator shall, before lodging his final account with the Master, submit to him a report containing full particulars of any such contraventions or offences, suspected contraventions or offences and any such ground which he has ascertained.

(3)

(a) Any report submitted to the Master under subsection (2) shall be confidential and shall not be available for inspection by any person.

(b) If any such report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the said grounds, the Master shall forthwith transmit a copy thereof to the Attorney-General concerned.

(4) A liquidator shall conduct such further investigation and shall render such assistance in connection with any prosecution or contemplated prosecution as the Master or the Attorney-General may require.

401. **Attorney-General may make application to Court for disqualification of director**

When an Attorney-General, upon receipt of the report referred to in section 400 (3) (b) and after such further enquiry as he may deem fit, is satisfied that there are grounds for an application to the Court for an order in terms of section 219, he may make such application to the Court.

402. **Liquidator's duty to present report to creditors and contributories**

Except in the case of a members' voluntary winding-up, a liquidator shall, as soon as practicable and, except with the consent of the Master, not later than three months after the date of his appointment, submit to a general meeting of creditors and contributories of the company concerned a report as to the following matters:

(a) the amount of capital issued by the company and the estimated amount of its assets and liabilities;

(b) if the company has failed, the causes of the failure;

- (c) whether or not he has submitted or intends to submit to the Master a report under section 400 (2);
- (d) whether or not any director or officer or former director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company as provided in this Act;
- (e) any legal proceedings by or against the company which may have been pending at the date of the commencement of winding-up or which may have been or may be instituted;
- (f) whether or not further enquiry is in his opinion desirable in regard to any matter relating to the promotion, formation or failure of the company or the conduct of its business;
- (g) whether or not the company has kept the accounting records required by section 284, and, if not, in what respects the requirements of that section have not been complied with;
- (h) the progress and prospects of the winding-up; and
- (i) any other matter which he may think fit or in regard to which he may desire the directions of the creditors or the contributories.

403. **Liquidator's duty to file liquidation and distribution account**

- (1)
 - (a) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors and contributories to contribute towards the costs of the winding-up, a plan of contribution apportioning their ability.

- (b) If the final account lodged under Paragraph (a) is not a final Account, the Liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time, frame and lodge with the Master a further account and plan of distribution; Provided that the Master may at any time and in any case where the Liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied towards the payment of debts, direct the liquidator in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified.
- (2) account shall be lodged in duplicate in the prescribed form, shall be fully supported by vouchers, including the liquidator's bank statements or certified extracts from his bank and building society accounts showing all deposits and withdrawals, and shall be verified by an affidavit in the prescribed form.

404. **Master may grant extension of time for lodging account**

- (1) If any liquidator is unable to lodge an account with the Master under section 403 he shall before the expiration of any relevant period prescribed under that section-
 - (a) make and lodge with the Master an affidavit stating the reasons why he is not able to lodge an account, the amount of funds in hand available for distribution, a summary of the position in respect of the winding-up, and whether he has applied for an extension of time, and shall send a copy thereof to each creditor of the company; and
 - (b) lodge with the Master written reasons for his inability to lodge the account in question together with a statement of the grounds, if any, upon which he claims an extension of time within which to lodge such account, and the Master may thereupon grant such an extension of time as he may in the circumstances think necessary.

- (2) If any liquidator fails to lodge an account with the Master as required by section 403 and to comply with paragraphs (a) and (b) of subsection (1) of this section, the Master or any person having an interest in the company may serve a notice on the liquidator requiring him within two weeks after the date of the notice-
- (a) to lodge the account in question with the Master; or
 - (b) to comply with the requirements of the said paragraphs (a) and (b) of the said subsection, and the Master may, if the account has not been lodged but paragraphs (a) and (b) of the said subsection have been complied with, grant such an extension of time as he may in the circumstances think necessary.
- (3) Any liquidator who fails to satisfy the Master that he ought to receive an extension of time for the lodging of any account, may, after notice to the Master and to the person referred to in subsection (2), apply to the Court for an order granting such an extension of time within which to lodge that account.

405. **Failure of liquidator to lodge account or to perform duties**

- (1) If any liquidator fails to lodge an account with the Master as and when required by or under this Chapter or to lodge any vouchers in support of such account or to perform any other duty imposed upon him by this Chapter or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation of the company, the Master or any person having an interest in the company may, after giving the liquidator not less than two weeks' notice, apply to the Court for an order directing the liquidator to lodge such account or vouchers in support thereof or to perform such duty or to comply with such demand.
- (2) The costs adjudged to the Master or to such person shall, unless ordered otherwise by the Court, be paid by the liquidator de bonis propriis.

406. **Places for and periods of inspection of account**

- (1) Every liquidator's account shall lie open for inspection for such period, not being less than fourteen days, as the Master may determine-
- (a) at the office of the Master; and

- (b) if the office of the Master and the registered office of the company are not situated in the same district-
 - (i) at the office of the magistrate of the district in which such registered office is situated; or
 - (ii) if such registered office is situated in a portion of such district in respect of which an additional or assistant magistrate permanently performs the functions of the magistrate of the district at a place other than the seat of magistracy of that district, at the office of such additional or assistant magistrate; and
 - (c) if the company also carried on business at any other place, then also at the office of the magistrate (including any additional or assistant magistrate) of the district or the portion thereof in which any such other place is situate, as may be determined by the liquidator with the approval of the Master.
- (2) The liquidator shall lodge a copy of the account with every magistrate, additional Magistrate or Assistant Magistrate in whose offices the account is to lie open for inspection.
- (3) The liquidator shall give due notice in the Gazette of the places at which any such account will lie open for inspection and shall in that notice state the period during which the account will lie open for inspection and shall transmit by post or deliver a similar notice to every creditor who has proved a claim against the company.
- (4) The Magistrate shall cause to be affixed in some public place in or about his office a list of all such accounts as have been lodged in his office, showing the respective periods during which they will lie open for inspection, and shall upon the expiry of any such period endorse on the account in question his certificate that the account has lain open at his office for inspection in terms of this section and transmit the account to the Master.

407. **Objections to account**

- (1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.

- (2) If the Master is of opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit.
- (3) If in respect of any account the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged with him, direct the liquidator to amend the account, or he may give such other directions as he may think fit.
- (4)
 - (a) The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit.
 - (b) If any such direction given by the Master under this section affects the interests of a person who has not lodged an objection with the Master, such account as amended shall again lie open for inspection in the manner and with the notice as prescribed in section 406, unless the person affected consents in writing to the immediate confirmation of the account.

408. **Confirmation of account**

When an account has lain open for inspection as prescribed in section 406 and-

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again lain open for inspection, if necessary, as in section 407 (4) (b) prescribed, and no application has been made to the Court within the prescribed time to set aside the Master's decision; or

- (c) an objection has been lodged but has been withdrawn or has not been sustained and the objector has not applied to the Court within the prescribed time, the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.

409. **Distribution of estate**

- (1) Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith or to collect from the creditors and contributories liable to contribute thereunder the amounts for which they may respectively be liable.
- (2) The liquidator shall give notice of the confirmation of the account in the Gazette and shall in such notice state, according to the circumstances, that a dividend is being paid or that a contribution is to be collected and that every creditor and contributory liable to contribute is required to pay to the liquidator the amount for which he is liable and the address at which the contribution is to be paid.

410. **Liquidator's duty as to receipts and unpaid dividends**

- (1) The liquidator shall without delay lodge with the Master the receipts for any dividends paid or other proof of payment thereof.
- (2) If any dividend remains unpaid for a period of two months (or such longer period as the Master may approve) after the confirmation of the relevant account, the liquidator shall immediately pay the amount to the Master for deposit in the Guardians' Fund for the account of the creditor or member concerned.
- (3)
 - (a) Any failure by a liquidator to furnish the Master within the said period of two months with a proper receipt or other proof of payment in respect of any dividend which has not been deposited as aforesaid, shall be prima facie evidence that such dividend has been retained by him and has not been dealt with as prescribed in this section, and the Master may thereafter institute proceedings against the liquidator under section 405.

- (b) The Court may at the hearing of such proceedings order the liquidator to pay any such dividend which has not been paid or deposited and in addition to pay to the Master for the benefit of the Consolidated Revenue Fund an amount equal to the amount of such dividend.
- (4) Any creditor or member of a company entitled to any dividend may, if payment thereof is delayed, after notice to the liquidator, apply to the Court for an order compelling the liquidator to pay that dividend to such creditor or member.

411. **Payment of money deposited with Master**

Any person claiming to be entitled to any money deposited with the Master by a liquidator under the provisions of this Act may apply to the Master for payment thereof, and the Master may, on a certificate by the liquidator or on other sufficient evidence that the person claiming such payment is entitled thereto, pay the amount in question to the person concerned.

PROVISIONS AS TO MEETINGS IN WINDING-UP (ss 412-416)

412. **Meetings of creditors and members and voting at meetings of creditors**

- (1) In any winding-up of a company, meetings of creditors and members or contributories shall, save as otherwise provided in this Act, be convened and held in the following manner:
 - (a) In the case of meetings of creditors, as nearly as may be in the manner prescribed for the holding of meetings of creditors under the law relating to insolvency; and
 - (b) in the case of meetings of members or contributories, in the manner prescribed by regulation.
- (2) The provisions of section 52 of the Insolvency Act, 1936 (Act 24 of 1936), shall mutatis mutandis apply to the right of any creditor to vote at a meeting of creditors in a winding-up of a company.

413. **Meetings to ascertain wishes of creditors and others**

Where by this Act the Court is authorised, in relation to a winding-up, to have regard to the wishes of creditors, members or contributories-

- (a) the value of the respective creditors' claims and the voting rights of the various members or contributories of the company in terms of its memorandum or articles shall also be taken into consideration; and
- (b) the Court may, if it thinks fit, for the purpose of ascertaining the wishes of such creditors, members or contributories direct meetings of the creditors, members or contributories to be called, held and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

414. **Duty of directors and officers to attend meetings**

- (1) In any winding-up of a company unable to pay its debts, every director and officer of the company shall-
 - (a) attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorised him in writing to absent himself from that meeting;
 - (b) attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.
- (2) The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person-
 - (a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or

- (b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.
- (3) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

415. **Examination of directors and others at meetings**

- (1) The Master or officer presiding at any meeting of creditors of a company which is being wound-up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414 (2) (a), and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.
- (2) In connection with the production of any book or document in compliance with a subpoena issued under section 414 (2) (b) or the interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness subpoenaed to produce a book or document or give evidence in a magistrate's court shall apply: Provided that a banker at whose bank the company concerned keeps or at any time kept an account, shall be obliged, if subpoenaed to do so under section 414 (2) (b), to produce-
 - (a) any cheque in his possession which was drawn by the company within one year before the commencement of the winding-up; or

- (b) if any cheque so drawn is not available, any record of the payment, the date of payment and the amount of the cheque which may be available to him, or a copy of such record, and shall, if called upon to do so, give any other information available to him in connection with any such cheque or the account of the company.
- (3) No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or officer presiding at such meeting: Provided that the Master or officer presiding at such meeting may only oblige the person in question to so answer after the Master or officer presiding at such meeting has consulted with the Director of Public Prosecutions who has jurisdiction.
[Sub-s. (3) substituted by s. 10 (a) of Act 55 of 2002.]
- (4) The Master or officer presiding at any meeting aforesaid shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section, has made to the liquidator or his agent a statement which has been reduced to writing, or has delivered a statement in writing to the liquidator or his agent, that statement may be read by or read over to that person when he is called as a witness under this section and, if then adhered to by him, shall be deemed to be evidence given under this section.
- (5) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an interrogation in terms of subsection (1) shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to-
 - (a) the administering or taking of an oath or the administering or making of an affirmation;
 - b) the giving of false evidence;

- (c) the making of a false statement; or
- (d) a failure to answer lawful questions fully or satisfactorily.

[Sub-s. (5) substituted by s. 10 (b) of Act 55 of 2002.]

- (6) Any person called upon to give evidence under this section may be represented at his interrogation by an attorney with or without counsel.
- (7) Any person other than a director or officer of the company concerned subpoenaed to attend a meeting of creditors for the purpose of being interrogated under this section shall be entitled to such witness fees, to be paid out of the funds of the company, as he would be entitled to if he were a witness in civil proceedings in a magistrate's court.
- (8) Any director or other officer of a company who is called upon to attend any meeting of creditors held after the second meeting or an adjourned second meeting, shall be entitled to an allowance out of the funds of the company to defray his necessary expenses in connection with such attendance.

416. **Application of provisions of Insolvency Act, 1936**

- (1) The provisions of sections 66, 67 and 68 of the Insolvency Act, 1936 (Act 24 of 1936), shall, in so far as they can be applied and are not inconsistent with the provisions of this Act, mutatis mutandis apply in relation to-
 - (a) any person who is in terms of section 414 (1) of this Act required to attend any meeting of a company being wound up and which is unable to pay its debts, as if such person were an insolvent required to attend any meeting referred to in section 64 of the Insolvency Act, 1936; and
 - (b) any person subpoenaed in terms of section 414 (2) of this Act to attend any meeting of the creditors of such a company or to produce any book or document at any such meeting, and the provisions of section 65 of the Insolvency Act, 1936, shall, in so far as they can be applied and are not inconsistent with the provisions of this Act, mutatis

mutandis apply in relation to the production of any book or document or the interrogation of any person under section 415 of this Act, as if such person had been subpoenaed to produce any book or document or were being interrogated under the said section 65 of the Insolvency Act, 1936.

(2) In applying the said sections 66, 67 and 68 of the Insolvency Act, 1936, in terms of subsection (1) of this section, any reference in any of the said sections or in section 64 or 65 of that Act-

- (a) to the estate of an insolvent, shall be construed as a reference to the estate of the company concerned;
- (b) to the trustee of an insolvent estate, shall be construed as a reference to the liquidator of such company;
- (c) to a meeting of the creditors of an insolvent, shall be construed as a reference to a meeting of the creditors of such company;
- (d) to a creditor who has proved a claim against an insolvent estate, shall be construed as a reference to a person who has proved a claim against such company;
- (e) to the business or affairs or property of an insolvent, shall be construed as a reference to the business or affairs or property of such company;
- (f) to any person indebted to an insolvent estate, shall be construed as a reference to a person indebted to such company;
- (g) to the sequestration of an insolvent estate, shall be construed as a reference to the commencement of the winding-up of such company.

EXAMINATION OF PERSONS IN WINDING-UP (ss 417-418)

417. Summoning and examination of persons as to affairs of company

- (1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

[Sub-s. (1) substituted by s. 9 (a) of Act 29 of 1985.]

- (a) Any person summoned under sub-section (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.

[Sub-s. (1A) inserted by s. 9 (b) of Act 29 of 1985.]

(2)

- (a) The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

[Para. (a) substituted by s. 9 (c) of Act 29 of 1985.]

- (b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.

[Para. (b) substituted by s. 11 (a) of Act 55 of 2002.]

(c) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to-

(i) the administering or taking of an oath or the administering or making of an affirmation;

(ii) the giving of false evidence;

(iii) the making of a false statement; or

(iv) a failure to answer lawful questions fully and satisfactorily.

[Para. (c) added by s. 11 (b) of Act 55 of 2002.]

(3) The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.

[Sub-s. (3) substituted by s. 9 (d) of Act 29 of 1985.]

(4) If any person who has been duly summoned under subsection (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by the Master or the Court, the Master or the Court may cause him to be apprehended and brought before him or it for examination.

[Sub-s. (4) substituted by s. 9 (d) of Act 29 of 1985.]

(5) Any person summoned by the Master under sub-section (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.

[Sub-s. (5) added by s. 9 (e) of Act 29 of 1985.]

- (6) Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.

[Sub-s. (6) added by s. 9 (e) of Act 29 of 1985.]

- (7) Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.

[Sub-s. (7) added by s. 9 (e) of Act 29 of 1985.]

418. **Examination by commissioners**

(1)

- (a) Every Magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company.
- (b) The Master of the court may refer the whole or any part of the examination of any witness or of any enquiry under this Act to any such commissioner, whether or not he is within the jurisdiction of the Court which issued the winding-up order.
- (c) The Master, if he has not himself been appointed under Paragraph (a), the Liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an Attorney, with or without Counsel, who shall be entitled to interrogate any witness: provided that a Commissioner shall disallow any questions which are irrelevant or would, in his opinion, prolong the interrogation unnecessarily.
- (d) The provisions of Section 417 (1A, (2) (b) and (5) shall apply mutatis mutandis in respect of such an examination or enquiry.

- (2) A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417.
- (3) If a commissioner-
- (a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or
 - (b) has been appointed by the Court, he shall, in such manner as the Court may direct, report to the Master and the Court, on any examination or enquiry referred to him.
- (4) Any witness who has given evidence before the Master or the Court under section 417 or before a commissioner under this section, shall be entitled, at his cost, to a copy of the record of his evidence.
- (5) Any person who-
- (a) has been duly summoned under this section by a commissioner who is not a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons; or
 - (b) has been duly summoned under section 417 (1) by the Master or under this section by a commissioner who is not a magistrate and who-
 - (i) fails, without sufficient cause, to remain in attendance until excused by the Master or such commissioner, as the case may be, from further attendance;
 - (ii) refuses to be sworn or to affirm as a witness; or
 - (iii) fails, without sufficient cause-

(aa) to answer fully and satisfactorily any question lawfully put to him in terms of section 417 (2) or this section; or

(bb) to produce books or papers in his custody or under his control which he was required to produce in terms of section 417 (3) or this section, shall be guilty of an offence.

[S. 418 substituted by s. 10 of Act 29 of 1985.]

DISSOLUTION OF COMPANIES AND OTHER BODIES CORPORATE (ss 419-422)

419. Dissolution of companies and other bodies corporate

- (1) In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator.
- (2) The Registrar shall record the dissolution of the company and shall publish notice thereof in the Gazette.
- (3) The date of dissolution of the company shall be the date of recording referred to in subsection (2).
- (4) In the case of any other body corporate the certificate of the Master under subsection (1) shall constitute its dissolution.

420. Court may declare dissolution void

When a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

[S. 420 substituted by s. 10 of Act 84 of 1980.]

421. Registrar to keep a register of directors of dissolved companies

- (1) The Registrar shall establish and maintain a register of directors of companies which have been dissolved and were unable to pay their debts, and cause to be entered therein, in respect of each such director-

- (a) his full forenames and surname, and any former forenames and surname, his nationality, if not South African, his occupation, his date of birth and his last known residential and postal addresses;
 - (b) the name of the company of which he was a director when such company was dissolved for the reason that it was unable to pay its debts and, where more than one company was dissolved at the same time, the names of those companies;
 - (c) the date of his appointment as director;
 - (d) the date of dissolution of the company or companies.
- (2) The liquidator shall, within fourteen days after the date of the certificate referred to in section 419 (1), send to the Registrar on a prescribed form, in duplicate, in respect of each director of the company who was a director thereof at a date within two years before the commencement of the winding-up, the particulars referred to in subsection (1) (a) to (d) of this section, together with a statement as to which director, in his opinion, was the effective cause of the company being unable to pay its debts.
- (3) The Registrar shall, under cover of a prescribed form, send to each director one copy of the particulars furnished under subsection (2) in respect of that director, and where the liquidator has in a statement furnished under the said subsection expressed any opinion as to which director was the effective cause of the company being unable to pay its debts, the Registrar shall at the same time send a copy of such statement to the director named therein.
- (4) A director may, within one month of the date of the form referred to in subsection (3), object, by affidavit or otherwise, to his name being entered in the register referred to in subsection (1).
- (5) If after considering the objections made by or on behalf of a director or if a director fails to object and the Registrar is of opinion that the name of the director should be entered in the register, he shall inform such director accordingly.

- (6) The Registrar shall, on the expiration of one month after the date of his decision under subsection (5) or, if an application under subsection (7) is then pending, after the application has been disposed of and the Court has not ordered otherwise, enter the name of the director in the register.
- (7) Any person aggrieved by the decision of the Registrar to make an entry or not to make an entry in the register, shall be entitled, within one month of the date of such decision, to apply to the Court for relief, and the Court shall have power to consider the merits of the matter, to receive further evidence and to make any order it deems fit.
- (8) Any liquidator who fails to comply with the provisions of subsection (2), shall be guilty of an offence.
- (9) The provisions of section 9 as to the inspection of documents kept by the Registrar and extracts therefrom certified by the Registrar shall mutatis mutandis apply to the register to be maintained by him under this section.

422. **Disposal of records of dissolved company**

- (1) When any company has been wound up and is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of-
 - (a) in the case of a winding-up by the Court, in such way as the Master may direct;
 - (b) in the case of a members' voluntary winding-up, in such way as the company by special resolution may direct;
 - (c) in the case of a creditors' voluntary winding-up, in such way as the creditors may direct.
- (2) After five years from the dissolution of the company, no responsibility shall rest on the liquidator, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to a person claiming to be interested therein.

PERSONAL LIABILITY OF DELINQUENT DIRECTORS AND OTHERS AND OFFENCES
(ss 423 - 426)

423. Delinquent directors and others to restore property and to compensate the company

- (1) Where in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the Court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just.

[Sub-s. (1) substituted by s. 28 of Act 111 of 1976.]

- (2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

424. Liability of directors and others for fraudulent conduct of business

- (1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.
- (3) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration and, in particular, may make provision for making

- (a) the liability of any such person under the declaration a charge on any debt or obligation due from the Company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this sub-section.
 - (b) For the purposes of this sub-section, the expression "assignee" includes any person to whom or in whose favour, by the directions 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 the valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.
- (3) Without prejudice to any other criminal liability incurred, where any business of a company 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, shall be guilty of an offence.
- (4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.

425. **Application of criminal provisions of the law relating to insolvency**

If any person who is or was a director or officer of a company in respect of which a winding-up order has been granted, whether or not such order has been discharged or confirmed under the provisions of this Act, and which is or was unable to pay its debts, has committed any act or made any omission in relation to any assets, books, records, documents, business or the affairs of such company, which act or omission, if such act had been committed or such omission had been made by a person whose estate was sequestrated on the date upon which the winding-up of such company commenced, in relation to his assets, books, documents, business or affairs, or those of

his estate, would have constituted an offence under the law relating to insolvency, such past or present director or officer shall be guilty of such offence and liable on conviction to the penalties provided therefor in the said law relating to insolvency, and all the provisions of the said law relating to insolvency shall mutatis mutandis apply in respect of such act or omission, the method of establishing the same, and such past or present director or officer charged with the same.

426. **Private prosecution of directors and others**

- (1) If it appears in the course of the winding-up of a company that any past or present director, member or officer of the company has been guilty of an offence for which he is criminally liable under this Act or, in relation to the company or the creditors of the company, under the common law, the liquidator shall cause all the facts known to him which appear to constitute the offence, to be laid before the Attorney- General concerned and, if the said Attorney-General certifies that he declines to prosecute, the liquidator may, subject to the provisions of section 386 (3) and (4), institute and conduct a private prosecution in respect of such offence.
- (2) The Court may, upon application by the liquidator, order the whole or any portion of the costs and expenses incidental to such private prosecution to be paid out of the assets of the company in priority to all other liabilities.