

INSOLVENCY (AMENDMENT) ACT, 2023

No. 14



of 2023

ARRANGEMENT OF SECTIONS

SECTION

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An Act to amend the Insolvency Act.

Date of Assent: 17.10.2023

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Insolvency (Amendment) Act, 2023, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Short title and commencement

2. The Insolvency Act (in this Act referred to as "the Act") is amended in section 2 by —

Amendment of section 2 of Cap. 42:02

(a) substituting for the definition of "free residue", the following new definition —

"free residue", in relation to an estate, means a portion of an estate under sequestration which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge, right of retention or security interest;"

(b) substituting for the definition of "security", the following new definition —

"security" as distinguished from "marketable security", in relation to the claim of a creditor, means property of the insolvent over which the creditor has a preference right by virtue of any special mortgage, legal hypothec, pledge, right of retention or security interest, but does not include property over which the creditor has, or purports to have, a preferent right by reason of a mortgage or pledge of the general assets of the estate or of the general assets of any business belonging to the estate;" and

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Amendment of
section 46 of
the Act

(c) inserting in its alphabetical order, the following new definition —
““security interest” has the same meaning assigned to it under
the Movable Property (Security Interests) Act.”.

3. The Act is amended in section 46 by —

- (a) substituting for subsection (1), the following new subsection —
“(1) No right of retention, tacit hypothec or security interest shall
give any preference to any claim, unless the creditor claiming the
right of retention, tacit hypothec or security interest has set forth
the particulars thereof in the affidavit made in proof of his claim
or in any amendment of that affidavit which he may make.”; and
- (b) substituting for subsection (2), the following new subsection —
“(2) No creditor shall lose the right of any retention, tacit
hypothec or security interest by delivering to the trustee, on
demand, the property subject to such right of retention, tacit
hypothec or security interest, if, when delivering the property,
he notifies the trustee, in writing, of his rights and in due course
proves his claim against the estate.”.

Amendment of
section 78 of
the Act

4. The Act is amended in section 78 by substituting for subsection
(17), the following new subsection —

“(17) The provisions of this section shall apply *mutatis mutandis*
in respect of any creditor for value of a solvent spouse for whom
provision is made in section 20 and who holds movable property
of that spouse as security for his claim as if such security were the
property of an insolvent over which the creditor had a preferent
right by virtue of any special mortgage, legal hypothec, pledge,
right of retention or security interest.”.

Amendment of
section 87 of
the Act

5. The Act is amended by substituting for section 87, the following
new section —

“Landlord’s
hypothec 87. No tacit hypothec, legal hypothec or security interest
(under which shall not be included any right of retention)
shall give any preference on the estate of the insolvent except
the landlord’s hypothec; and the landlord’s hypothec shall
give a preference for all rent in respect of the period current
with and up to the sequestration and arrear of rent, not
exceeding three months, in respect of a period immediately
prior thereto.”.

Amendment of
section 89 of
the Act

6. The Act is amended in section 89 by substituting for subsection
(1), the following new subsection —

“(1) The cost of maintaining, conserving and realizing any
property which is subject to any special mortgage, legal hypothec,
pledge, right of retention or security interest shall be paid out of
the proceeds of the property, if sufficient, and if insufficient, by a
creditor *pro rata* who is entitled to rank against such proceeds in
priority to any other person.”.

7. The Act is amended in section 90 by substituting for subsection (1), the following new subsection ---

Amendment of
section 90 of
the Act

“(1) After payment of the costs and charges provided in section 89 (1) and (2), the proceeds of any property subject to a special mortgage, legal hypothec, pledge, right of retention or security interest shall be applied in the payment of a claim thereby secured in its legal order of preference with interest from the date of sequestration to the date of such payment:

Provided that whenever a claim has not been proved in respect of a debt secured by a special mortgage over immovable property of the insolvent and the trustee is not satisfied that such debt has been discharged, the trustee shall deposit with the Master for payment into a special account to be kept by the Master for the purpose, the proceeds of the sale of such property, not exceeding such capital of the said special mortgage and such arrears of interest as the mortgage would have had a preferent right to claim; and the amount so deposited or any part of such amount shall be paid to the mortgagee if, within a period of one year after confirmation of the distribution account under which the money is distributed such trustee applies to the Master and the Master is satisfied, by a certificate of the trustee or other evidence deemed by him to be sufficient, that the mortgagee is entitled to the amount or part of such amount.”.

PASSED by the National Assembly this 10th day of August, 2023.

BARBARA N. DITHAPO,
Clerk of the National Assembly.