

Highlights of Business Laws (Amendment) (No.2) Act, 2021: Part 2

May 6, 2021

This is a follow-up to our alert dated 23 April 2021 on the Business Laws (Amendment) (No.2) Act of 2021 (the **Act**), which can be found [here](#).

In Part 2 of this series, we highlight some amendments to the Insolvency Act, 2015 (the **Insolvency Act**) made by the Act, specifically in the context of distributions to unsecured creditors and pre-insolvency moratoria.

Distributions to unsecured creditors

In a situation where a company had registered a debenture (floating charge) over its assets, and that company subsequently faced insolvency proceedings, the Insolvency Act provided that:

- the liquidator, administrator or provisional liquidator would distribute the prescribed portion of the company's assets to cater for unsecured debts (a **Distribution**); and
- the Distribution would not be made to a debenture holder unless there was an excess to the prescribed portion.

The Act now provides that a debenture holder can apply to court to oppose the Distribution on the grounds that such Distribution will negatively affect its interest. The court may stop the Distribution altogether or conditionally allow it to proceed.

This amendment has reinstated the common law position that a secured creditor should be paid in full prior to unsecured debts being paid.

Pre-insolvency moratoria

In a situation where a company in financial difficulty applies to court for a moratorium (i.e. court-mandated suspension of enforcement actions by creditors for a period), the company must be considered eligible under the Insolvency Act.

A company was considered **ineligible** under the Insolvency Act if:

1. it was under full or provisional administration or liquidation, or if a voluntary arrangement already had effect;
2. it was under moratorium in the 12-month period prior to the date of the moratorium application and no voluntary arrangement was in place when the moratorium ended or, if a voluntary arrangement was in place, it did not end prematurely;
3. an administrator or administrative receiver held office during the 12 months immediately prior to the Lodgement Date; or
4. it had outstanding liabilities under agreements amounting to KES 1 billion or more.

The Act now provides that any **financially distressed** company is eligible to apply for a moratorium. However, neither the Act nor the Insolvency Act defines this term.

Condition (2) above has been amended by the Act. A company is now ineligible if it was under a moratorium at any time during the 12-month period prior to the date of the moratorium application, without any further conditions.

Condition (4) above has been repealed by the Act. Companies with outstanding liabilities under agreements amounting to KES 1 billion or more are now **eligible** for a moratorium.

There are further amendments to the Insolvency Act made by the Act, which will be considered in a separate alert.

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