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THE INSOLVENCY (AMENDMENT) BILL, 2023**A Bill for****AN ACT of Parliament to amend the Insolvency Act; and for connected purposes.**

ENACTED by the Parliament of Kenya, as follows —

This Act may be cited as the Insolvency (Amendment) Act, 2023.

Short title.

1. Section 2 of the Insolvency Act, hereinafter referred to as the “principal Act” is amended by inserting the following definition immediately after the definition of the word “business records” —

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to finance.

2. The principal Act is amended by inserting the following sub-heading immediately after section 575 —

Insertion of new sections in No. 18 of 2015.

Division 8A- Fast track administration process

3. The principal Act is amended by inserting the following new sections immediately after section 575 —

Fast track administration process.

575A. (1) A fast track administration process may be carried out with respect to

-
- (a) a company that is subject to the small companies regime under section 623 of the Companies Act;
 - (b) a company with assets and turnover that does not exceed an amount prescribed by the Cabinet Secretary;
 - (c) a company with such class of creditors or such amount of debt as may be prescribed by the Cabinet Secretary; and
 - (d) such other Company as the Cabinet Secretary may prescribe.

Application for fast track administration process.

575B. (1) An application for a fast track administration process with respect to a company may be made to the Court by –

- (a) the company debtor;
- (b) a director of a company;
- (c) a creditor of a company; or
- (d) such other person or class of persons as the Cabinet Secretary may prescribe.

(2) An application under subsection (1) shall be submitted together with –

- (a) information evidencing default by the entity; and
- (b) such other information as the Cabinet Secretary may prescribe.

(3) An applicant, upon making an application under subsection (2), shall notify any person who is entitled to make an application for a fast track administration process under subsection (1) and such other person as the Cabinet Secretary may prescribe.

Determination of application.

575C. A Court, on hearing an application under section 575A, may –

- (a) make the order sought; or
- (b) dismiss the application; and
- (c) make such order or impose such conditions as it may consider appropriate.

Appointment of administrator.

575D. (1) The Court, in making an order under section 575B, may appoint an administrator on such conditions as the Court may impose.

(2) A person shall not be eligible for appointment as an administrator unless such person meets the prescribed criteria.

(3) The administrator shall oversee the fast track administration process in accordance with the rules prescribed by the Cabinet Secretary.

Time period for completion of fast track corporate insolvency process.

575E. (1) Subject to the provisions of subsection (3) the fast track administration process shall be completed within eighteen months from the issuance of an administration order.

(2) The period specified under subsection (1) may be extended by a resolution passed at a meeting of creditors and supported by a vote of not less than seventy five percent of the creditors for a further period not exceeding six months.

(3) The administrator shall within seven days of the passing of the resolution in subsection (2) submit to the Court the resolution for the extension of the completion period in subsection (1).

(4) A resolution for extension of the fast track administration procedure under this section shall not be passed more than once.

Applicability of Part VIII (Division 8) (Administration Process).

575F. (1) The process of administration under Division 8 of Part VIII shall, with necessary modification, apply to a fast track administration process under this Part.

(2) Notwithstanding subsection (1), the fast track administration process shall be carried out within the time prescribed under section 575E or such further time as may be extended under section 575E(2).

(3) The Cabinet Secretary shall prescribe regulations for the carrying out of a fast track administration process under this Part.

3. The Cabinet Secretary shall prescribe the regulations required under this Act within six months from the commencement of this Act.

Regulations.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The principal object of this Bill is to amend the Insolvency Act, No. 18 of 2015 to provide for an expedited and fast tracked process for the resolution of insolvency cases.

The Insolvency Act No. 8 of 2015 consolidated insolvency laws of natural and corporate persons with a bid to provide an insolvency procedure that seeks to maintain the profitability of an entity and at the same time protect the interests of creditors.

The banking sector has however experienced a steady increase in non-performing loans over the past ten years. The rate of non-performing loans further increased to an unprecedented 14.1% in 2020 at the height of the covid pandemic.

An emerging trend in the insolvency sector in various jurisdictions has been the provision of a fast track insolvency resolution process for corporate entities within a prescribed turnover and debt threshold.

The fast track insolvency resolution process is a means of providing an expedited insolvency procedure for mid to small size enterprises (MSMEs) to help them quickly resolve their financial problems, pay out their creditors and prevent any further losses.

The procedure allows for an entity to maximize the value of its distressed assets by allowing for a quick sale or re-organisation and therefore benefiting creditors and shareholders by ensuring that they receive the maximum possible value for their investments. The fast-track procedure is also cost effective due to the statutory time limits for resolutions and is an affordable option for MSMEs.

The Bill proposes to amend the Insolvency Act by inserting new sections 575A, 575B, 575C, 575D, 575E and 575F. The proposed new section 575A seeks to introduce a fast track insolvency resolution process to the Administration procedure under division 2 of Part VIII of the Act. The section further mandates the Cabinet Secretary for the Ministry of Finance to prescribe regulations on the category of companies based on turnover, assets and class of creditors eligible for the fast track process.

Section 575B provides for the application process for a fast track administration procedure including the parties that can apply for the procedure, the information to be submitted in support of the application and notification of interested parties.

Section 575C provides for the determination of an application for a fast track administration procedure and the orders therein that the court may issue.

Section 575D provides for the appointment of an insolvency practitioner to preside over the fast track process.

Section 575E provides for the time period for the completion of a fast track administration process and sets out that the process shall be completed within a period not exceeding eleven months. The section also provides for the extension of the prescribed period for a further period not exceeding six months.

Section 575F provides that the administration procedure under the Act shall apply in the same way to the fast track process with necessary modifications but within the prescribed eleven month time line and any extension granted thereafter.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

Sections 575A, 575B, 575D, 575E and 575F delegate legislative powers to the Cabinet Secretary for the time being in charge of the Ministry of Finance to develop subsidiary legislation on the fast track insolvency process.

The Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

Fast tracked administration processes are beneficial to trade and preservation of businesses. Trade development is a devolved function under part 2 of the fourth schedule of the Constitution.

MSMEs in various counties across the county stand to benefit from the proposed amendment of the Act as it will bring about faster resolution of insolvency cases and also lead to the preservation of business and ultimate protection of business owners and investors.

The Bill therefore concerns county governments in terms of Articles 110(1)(a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 27th April, 2023.

MUTINDA MAUREEN TABITHA,
Senator.