

INSOLVENCY

IF THE ONLY THING YOU CAN PAY IS ATTENTION, THEN YOU MIGHT BE INSOLVENT

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What is the difference between Insolvency, Bankruptcy and Liquidation?

A person or a company is insolvent if they are unable to pay their debts when they are due. This may be due to liabilities exceeding assets (factual insolvency) or being illiquid (where you have assets that exceed your liabilities but the assets cannot quickly be converted to cash to pay your debts – this is known as commercial insolvency).

Bankruptcy is referred to as sequestration in Botswana. It is the legal process declaring that a person is insolvent and finally winding up their estate to pay off creditors.

Liquidation is similar to bankruptcy/sequestration, but it is in relation to a company.

When is a company declared insolvent or an individual bankrupt?

As a creditor you must prove one of 3 things to demonstrate that a company is insolvent:-

1. You have served a company with a letter of demand (for a sum exceeding P1,000) and the company has neglected to pay the sum or any portion of it for three weeks or more after receiving the letter;
2. You have secured judgement against a company, but the Deputy sheriff found that there are either no assets to satisfy the debt or that the assets found are insufficient; or
3. That the company is unable to pay its debts as seen from its existing and foreseeable future liabilities.

A natural person is insolvent if:

1. They have departed from Botswana or absented themselves with intention to evade or delay the payment of their debts;
2. They have no sufficient disposable property to satisfy a judgment against them;
3. They dispose of or remove any property which disposition has the effect of prejudicing their creditors or of preferring one creditor above another;
4. They agree or offer to assign their estate for the benefit of creditor(s) or make or offer to make any arrangements with creditors for releasing them (wholly or partially) from the debts;
5. They give notice to any of their creditors that they have suspended or are about to suspend payment of their debts or if they have actually suspended payment of the debts; and
6. They are a trader and give notice that they are unable to meet the liabilities of their business.

Can a company oppose declaration of Insolvency?

Yes! If a creditor files a liquidation or sequestration petition, the company or person can oppose the petition. But it is certainly not easy if the creditor demonstrates that you are actually insolvent per the requirements above. The only way to successfully oppose a petition for liquidation/sequestration is to just pay the debt!

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