


ASSET FORFEITURE VS LIQUIDATION

IN UNLAWFUL FINANCIAL SCHEMES IN SOUTH AFRICA



South Africa continues to grapple with unlawful financial and investment schemes. In recent years, pyramid, Ponzi, multiplication, and other fraudulent operations have made headlines, often leading to investigations and legal action. In this climate, retail investors, businesses, and other financial stakeholders must remain alert.

Asset forfeiture is a crime-fighting mechanism used by the state to seize property linked to organised crime. It is regulated by the Prevention of Organised Crime Act (POCA), 1998, and enforced by the Asset Forfeiture Unit (AFU).

ASSET FORFEITURE CAN FOLLOW TWO DISTINCT PATHS:





CHAPTER 6

BASED ON THE NATURE OF THE PROPERTY

- The AFU applies for a preservation order, which prevents any party from dealing with the property and allows it to be seized and placed under the temporary control of a curator. A court may grant this order if the property:
 - is an instrumentality of a listed offence;
 - represents the proceeds of unlawful activities; or
 - is linked to terrorism or related acts.
- If granted, the AFU may then seek a forfeiture order, transferring the property to the state.
- If no forfeiture application is made within 90 days, the preservation order lapses (except in limited cases).



CHAPTER 5

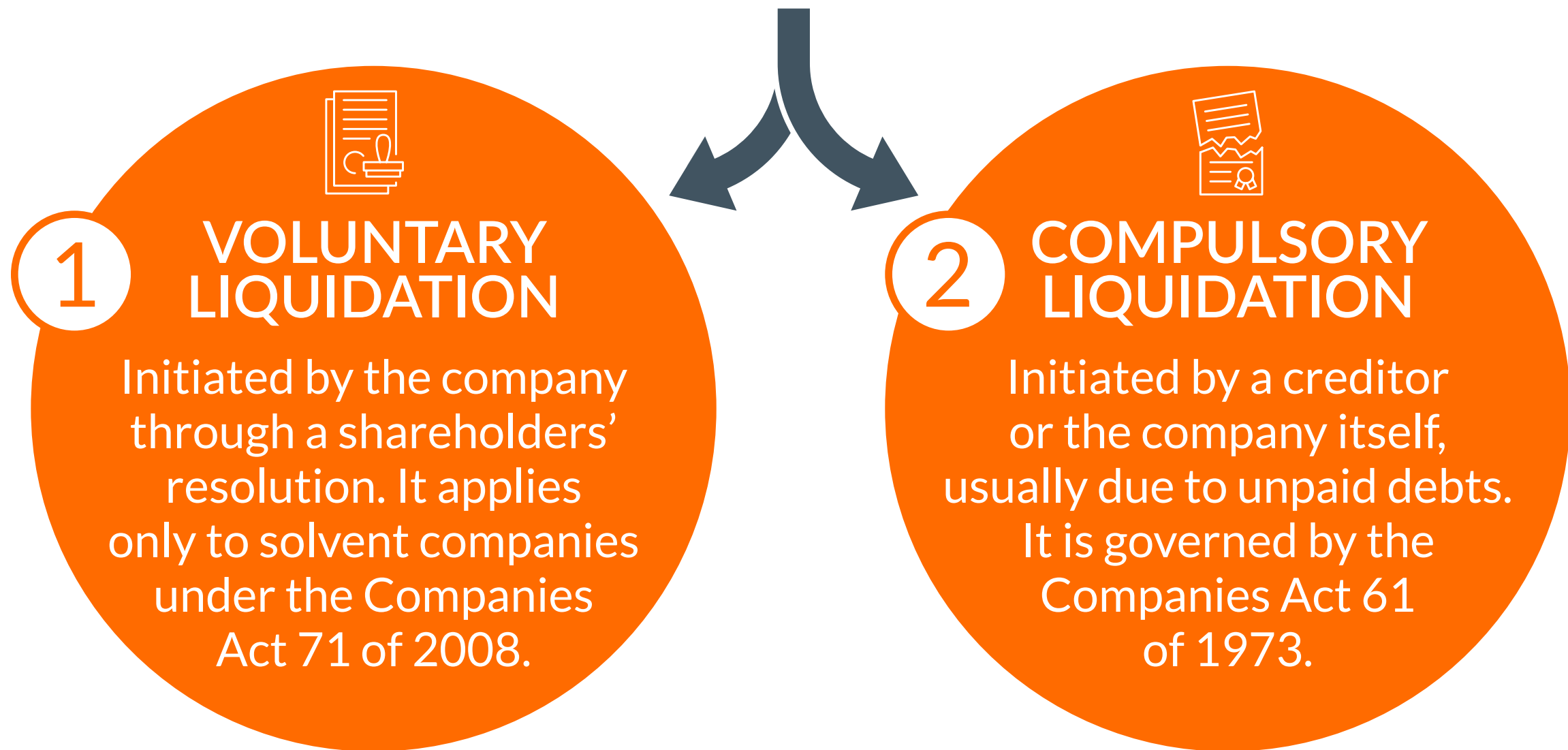
BASED ON THE OWNERSHIP OF THE PROPERTY

- **Confiscation order:** Granted after a conviction, allowing the state to recover an amount of up to equal to the benefit gained from the offence.
- **Restraint order:** Prevents disposal of property while criminal proceedings are underway, where a confiscation order has been or may be issued.
- **Realisation order:** Instructs the curator to sell the property, applying proceeds to the confiscation order, with any surplus handled under POCA.

POCA includes protections for innocent third parties, covering issues such as debts and deceased estates.

Liquidation is a commercial process to wind up a company's affairs, typically due to insolvency, and distribute remaining assets fairly.



LIQUIDATION CAN OCCUR IN TWO WAYS:



In both cases, a liquidator is appointed to:

- Take control of the company's estate.
- Invite creditors to prove their claims.
- Distribute assets fairly among creditors (concursum creditorum).
- Recover debts and potentially reverse prior transactions.

KEY DIFFERENCES BETWEEN ASSET FORFEITURE AND LIQUIDATION:

| |  Asset forfeiture |  Liquidation |
|--------------------|--|---|
| Purpose | Combat crime and seize unlawful assets | Wind up companies and repay creditors |
| Trigger | Criminal activity/fraud/organised crime | Insolvency/inability to meet financial obligations |
| Custodian | Curator (court-appointed) | Liquidator |
| Outcome | Property forfeited to the state | Assets distributed among creditors |
| Legal Basis | POCA (1998) | Companies Act (1973 and 2008) & Insolvency Act (1936) |

In both asset forfeiture and liquidation, early involvement of skilled legal advisors is essential to secure the best possible outcome and protect the interests of affected parties.

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