BOTSWANA
ARMSTRONGS ATTORNEYS

FIRM INFORMATION

Website address **: www.armstrongs.bw**
Languages spoken **: English, Setswana**
Telephone : +267 395 3481
Address : 2nd Floor, Acacia House, Plot 74358, Cnr Khama Crescent Ext and P G Matante Road, New CBD
Contact : Sipho Ziga
Email : sipho@armstrongs.bw

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COUNTRY INFORMATION

Botswana is a country on the border of South Africa. The languages spoken in the country are English and Setswana.

TYPE OF GOVERNMENT

Botswana is a stable multiparty democracy.

POLITICAL SYSTEM

Parliamentary multiple party democracy.

LEGAL SYSTEM

The legal system of Botswana is a mixture of Roman-Dutch and English common law principles. There are also local systems of tribal law and custom in rural districts which govern everyday disputes and property relations but are subordinate to statutory law. The Superior Courts in Botswana are the Court of Appeal, the High Court and the Industrial Court.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

In terms of the Companies Act CAP 42:01 (Act), a company will be deemed to be insolvent where:

- A creditor to whom the company is indebted in the sum exceeding P1000.00 has served on the company a demand requiring it to pay such sum and the company has for 3 weeks thereafter neglected to pay such sum or to secure or compound for it to the reasonable satisfaction of the creditor;

- The execution of any other process issued on a judgment by a Competent Court in favour of a creditor, against the company, is returned by the sheriff or messenger with the endorsement that no assets can be found to satisfy the debt; and/or

- It is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether the company is unable to pay its debts the Court will take into account the contingent and prospective liabilities of the company.

What are the tests for financial distress (i.e. business rescue or administration?)

A company may be placed under judicial management where:

- the company, because of its management or due to any other cause, is unable to pay its debts or is unable to meet its obligations; or

- the company has not become, or has been prevented from becoming, a successful concern and there is a reasonable possibility that if the company is placed under judicial management it will be able to pay its debts, or meet its obligations, or become a successful concern.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

In Botswana, there are two formal processes available to a company that is either insolvent or experiencing financial difficulties - liquidation or judicial management, each of which is initiated by way of an application to Court.

Formal restructuring procedures

In terms of Part XV of the Act, a board, liquidator or any creditor or shareholder (with the leave of the Court) may propose a compromise if it has reason to believe that the company is, or will be, unable to pay its debts.

In addition, Part XVI of the Act provides for schemes of arrangement, which allow a company to enter into a compromise or arrangement with its creditors or members (or any class thereof). Such schemes require approval by the requisite majority of the affected creditors or members and sanction by the High Court, after which the arrangement becomes binding on all parties within the relevant class.

Informal insolvency or restructuring procedures

At common law, a company can enter into a compromise agreement or arrangement with its creditors and provided that it is accepted by each and every person to whom it is proposed, it will be binding on all creditors.

LIQUIDATION

What is the aim of liquidation?

The purpose of liquidation is to remove the management of a company's affairs from the directors, freeze the rights of creditors in order to prevent certain creditors from being preferred and/or enhancing their position at the expense of others, to appoint a liquidator whose duties are to ascertain, realise and distribute the assets to all creditors and finally to put an end to the company's corporate existence by the formal process of dissolution.

Process required to commence a liquidation

The liquidation of a company is commenced by way of an application to Court, prepared on notice to the company. Such application takes the form of a petition and can be brought by a creditor or shareholder of the company or by the company itself.

At what point does the liquidation process commence?

The liquidation process commences upon the lodging of the winding up application with the High Court.

Duration of the liquidation process

The length of the entire winding up process depends on the size of the company, the number of assets that need to be realised, the number of claims that need to be proved and whether or not there are any disputes between the liquidator, creditors and/or any third party claiming against the estate. Proceeds to creditors can generally only be paid after confirmation of the liquidation and distribution account which is only prepared and lodged by the liquidator once assets are realised and once cash is available for distribution.

Extent of court involvement in the liquidation process

The High Court is initially involved in the liquidation process at the application stage. However, once a final winding up order is granted the Court does not play a significant role in the process, save for supervising the liquidator, through the office of the Master of the High Court, or save for sanctioning or approving certain actions of the liquidator that require the sanction of the Court.

Management of the company whilst in liquidation

Upon a winding up order being granted, the board of directors and shareholders are divested of all management powers and play no further role in the management or control of the company. In a winding up, all the property and management of the company is deemed to be in the custody and under the control of the Master of the High Court until a provisional liquidator has been appointed and has assumed office. Upon the appointment of a liquidator, the company's property and the management thereof vests in the liquidator and the liquidation process is controlled and managed by such person subject, however, to any directions of the creditors given to the liquidator in formal meetings.

Filing of claims

In a winding up, creditors must prove their claims against the company at a creditors' meeting called by the liquidator. A claim can be proved at any time before the final distribution of the estate. Every such claim shall be proved by affidavit as nearly as may be in the forms prescribed in the Insolvency Act CAP 42:02 and the affidavit must be made by the creditor, or any person fully cognisant of the claim, and must set out full particulars of the claim. The affidavit and supporting documents must be delivered to the office of the Master of the High Court no later than 24 hours before the authorised time of the creditors' meeting. The Master of the High Court or liquidator may examine the claim. Once a claim has been proved against the estate, it shall be delivered by the Master of the High Court to the liquidator who has a right to dispute such claim, and if so, must give notice to both the Master of the High Court and creditor of such dispute and the reasons why the claim should be expunged. The creditor has a right of reply, which must be delivered to the Master of the High Court. The Master of the High Court must decide whether or not to expunge the claim.

Factors Which Influence the Period of the Administration in a Liquidation

- Delays in court processes - delays are often experienced with the bringing of winding up applications due to the backlog in case hearings at the High Court; and

- Disputes - between the liquidator and third parties claiming against the estate can often delay the winding up process because distributions cannot technically be made until the liquidator files a liquidation and distribution account with the Master of the High Court. If there are, however, contingent liabilities which cannot or have not been resolved, this will often result in the liquidator holding off on the filing of a final account and/or the distribution of assets until such liabilities are quantified, settled or resolved.

The size of the company and the number of assets that are to be realised and distributed amongst creditors can also delay the process.

Effect of liquidation on employees

Employees are preferential creditors insofar as the first 3 months of their salaries are concerned. With respect to their employment, such employment can be determined by the liquidator and no special process is required to be followed to terminate their employment.

Effect of Liquidation on contracts

The liquidator has the power to set aside any transaction in terms of which immovable property was purchased by or from the company, the transfer of which has not been effected in favour of the company or terminate any lease entered into by the company as lessee provided that such cancellation will not affect any claim by the lessor against the company for damages he may have sustained by reason of the non-performance of the terms of the lease. Technically all other contracts cannot be terminated and if terminated will give rise to a claim for damages that would need to be proved by the creditor at a meeting of creditors.

Effect of liquidation on shareholders

Shareholders are dispossessed of any control over the company and they rank behind the concurrent creditors for the purpose of receiving any distribution in respect of any claim that arises out of a loan made by them to the company. Any transfer of shares or alteration in the status of the company's shareholding made after the commencement of the winding up will, unless sanctioned by the Court, be void.

Effect of liquidation on creditors

When a company is placed in liquidation, the order of preference in which creditors rank is as follows:

- Liquidation costs;

- Secured creditors - payment is made to secured creditors from the proceeds of a sale of the secured assets. Where a secured creditor's claim is not secured in full, the unpaid balance is treated as a concurrent claim;

- Preferent creditors - these are creditors who do not hold security for their claims but rank above the claims of concurrent creditors. They are paid from the proceeds of the unencumbered assets in a pre-determined order. Preferent creditors include employees and the Botswana Unified Revenue Services; and

- Concurrent creditors - these are creditors who are paid from the proceeds of unencumbered assets (the free residue) that remains after preferent creditors have been paid in full. They are paid in proportion to the amounts owed to them.

Freezing of Claims

The rights of creditors as at the date of liquidation are suspended in order to prevent creditors from being preferred and/or enhancing their position at the expense of others. They cannot execute against the assets of the company nor can they proceed with, or commence with, any action against the company without the sanction of the High Court.

Control of the Company

The liquidator controls and manages the company for the duration of the liquidation, subject to the reasonable directions of the creditors, which are given to the liquidator at formal meetings called for this purpose.

Pending claims, litigation and arbitration

No proceedings shall be proceeded with or commenced with against the company except with the leave of the Court and subject to such terms as the Court may impose following a winding up. Any attachment or execution put in force against the assets of the company after the commencement of the winding up is void.

Voidable Transactions

The following dispositions of property are voidable and may be set aside by a liquidator:

- Any disposition which is made for no value - the liquidator must prove that the insolvent made the disposition and that it received no value for it. If the disposition was made more than 2 years before the liquidation, it can only be set aside if the liquidator proves that immediately after the disposition was made, the liabilities of the insolvent exceeded its assets. However, if the disposition occurred within 2 years of the liquidation, it will be set aside, unless the person claiming under, or who benefited from, the disposition proves that immediately after it was made, the assets of the insolvent exceeded its liabilities;

- Dispositions that have the effect of preferring one creditor over another - the High Court may set aside a disposition made by the insolvent within 6 months of the sequestration or liquidation of its estate, which had the effect of preferring one creditor above another and where, immediately after the disposition was made, the liabilities of the insolvent exceeded the value of its assets;

- Dispositions which are intended to prefer one creditor above another - the High Court may set aside a disposition made by the insolvent at any time before liquidation where he or it made the disposition with the intention of preferring one of his or its creditors above another and when made, its liabilities exceeded its assets;

- Dispositions made in collusion with another person and having the effect of prejudicing its creditors or preferring one above another - the High Court may set aside a transaction entered into by an insolvent before liquidation in terms of which the insolvent, in collusion with another person, disposed of its property in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another. To establish a collusive dealing, the liquidator must prove that the insolvent and the person knew that (i) the debtor was insolvent; and that (ii) the disposition would have the result of prejudicing its creditors or preferring one creditor above another; and

- Dispositions in fraud of creditors - in terms of the common law, creditors have a right to set aside a disposition which has been made in fraud. The relevant action at common law is known as the actio paulina. The test under the common law, to determine whether or not the transaction was fraudulent, is simply whether the object of the transaction was to give one creditor unfair advantage over the others on the liquidation of the company.

How is the liquidation process terminated?

When the affairs of the company have been completely wound up, the High Court may, upon the application of the Master, make an order that the company be dissolved from the date of the order. Upon the granting of the dissolution order, the Registrar of the High Court transmits a copy of the order to the Master of the High Court and the Registrar of Companies. The Registrar of Companies then records the dissolution of the company in the register and publishes notice of the dissolution in the Government Gazette.

Director or officer liability

In terms of section 439 of the Act CAP 42:01, when a company has acquired a business or property from the services of a director within 3 years of the date on which a company has been liquidated, the liquidator may recover from such director any amount by which the value of the consideration given for the acquisition of the business property or services, exceeded the value of the business, property or services at the time of the acquisition.

In terms of section 439 of the Act CAP 42:01, when a company has disposed of a business or property, or provided services or issued shares to a director within 3 years of the liquidation, the liquidator may recover from such director any amount by which the value of the business property, or services for the value of the shares at the time of the disposition, exceeded the value of any consideration received by the company.

In terms of section 441 of the Act, if a company in liquidation has failed to comply with the accounting and/or financial record sections of the Act and the High Court holds that such failure contributed to the company's inability to pay all of its debts or to its insolvency, the Court may, on application of the liquidator, declare that any one or more of the directors is, or are, personally responsible, without limitation of liability, for all or any part of the debts and other liabilities of the company as the Court may direct.

In terms of section 481 of the Act, if during the course of a winding up it appears that any business of the company was being carried on recklessly or with intent to defraud creditors of the company or for any fraudulent purpose, the High Court may, on the application of the liquidator, or any creditor, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, to be personally responsible, without any limitation of liability, for all or any of the debts of the company, as the court may direct.

In terms of section 160 of the Act, a director of the company who was knowingly a party to the contracting of a debt by the company and, had at the time the debt was contracted, no reasonable or probable expectation that the company would be able to pay the debt, will on the application of the liquidator be liable for the whole or any part of any loss suffered by the creditor to whom the debt was incurred.

Consequences of director or officer liability

Criminal Consequences

In terms of section 479 of the Act, any director who absents himself without a valid excuse from attending a meeting of the creditors in a winding up of the company after having been required in writing to attend such meeting by the office of the Master of the High Court or the liquidator, will be guilty of an offence and liable to a fine not exceeding BWP2000 or to imprisonment for a term not exceeding 6 months or to both.

In terms of section 480 of the Act, any officer or director of the company who conceals, destroys, mutilates or falsifies, or is privy to such actions in respect of any book or document relating to the property or affairs of the company, or conceals any part of the property of the company which ought, by law, to be divided amongst the creditors, or causes or permits any property of the company which it has obtained on credit, and which has not been paid for, to be pledged, mortgaged or disposed of, otherwise than in the ordinary course of the company's business, will be guilty of an offence and liable to imprisonment not exceeding 3 years.

In terms of section 480 of the Act, any officer or director of a company that causes or knowingly permits an undue preference, or causes or knowingly permits any debt/s to the aggregate amount of BWP1000.00 or more to be contracted by the company without any reasonable expectation that the company will be able to discharge it, and the company is thereafter wound up, will be guilty of an offence and liable to imprisonment for a period not exceeding 1 year.

In terms of section 480 of the Act, when a company is wound up and any officer or director who when making any statement either verbally or in writing in regard to the business or affairs of the company, conceals any liability present or future, certain or contingent, which the company may then have contracted, or mentions as if it were any asset of the company, any right or property which at the time is not an asset or in any way conceals or disguises or attempts to conceal or disguise any loss which the company has sustained, will be guilty of an offence and liable to imprisonment for a term not exceeding 3 years.

In terms of section 480 of the Act, a director shall be guilty of an offence and liable to imprisonment for a term not exceeding 2 years where, at any time during the winding up, such director failed to inform the liquidator of any false debt proved against the company or failed to disclose to the liquidator to the best of his knowledge all the property of the company of any kind, and the manner in which such property was disposed of, or failed to deliver to the liquidator all books, documents, papers and writings in his custody or under his control relating to the property or affairs of the company, or prevents the production or delivery of any such books.

In terms of section 480, a director will be guilty of an offence and liable to imprisonment for a term not exceeding 6 months, if he or she under examination at a meeting of creditors fails to account for, or to disclose, what has become of any property of the company which is proved to have been in his possession or to his knowledge in the possession of the company, before the commencement of the winding up.

JUDICIAL RECOVERY

Process required to commence judicial recovery

The judicial management process is commenced by an application brought to the High Court by any shareholder or creditor of the company. Normally the Court first grants, or the applicant first seeks, a provisional order for judicial management and thereafter such provisional order is confirmed at a subsequent hearing. This allows time for meetings of the creditors and shareholders to be held at which meetings these parties may be informed of the company's circumstances and asked to recommend whether the company should be placed under final judicial management.

At what point does judicial recovery commence?

The judicial management process commences upon an application being lodged with the High Court for judicial management.

Duration of the judicial recovery process

The judicial management process will continue until the purpose of the order has been fulfilled or where it is undesirable for the order to remain in force. In other words, the judicial management order will remain in place until the company has become a successful concern or is no longer exposed to the threat of liquidation or insolvency. If, however, there are no prospects of the company achieving either of the aforesaid objectives or purpose, an application can be brought to the High Court to cancel the judicial management order and thereafter to liquidate the company.

Extent of court involvement in the judicial recovery process

The Court is initially involved in the judicial management process through the Court's granting of the judicial management order. Once the judicial management order has been granted there is very little involvement by the Court in the process, save for the Master of the High Court's supervision of the judicial manager and/or where judicial sanction is required under the Act for any matter. The High Court is involved in the judicial management process at the conclusion thereof on the basis that judicial management is terminated by way of an application to the High Court.

Management of the company whilst in judicial recovery

When a company is placed under judicial management, the directors are divested of all powers and management responsibility, with respect to the management of the company and such powers and responsibility devolve upon the judicial manager.

A judicial management order has the effect of vesting the management of the company in the judicial manager's hands subject to the Court's supervision. In this respect the judicial manager has the following duties, to:

- Assume the management of the company;
- Manage the company in a way that he considers most economical and beneficial for the members and creditors of the company;
- Recover and reduce into his possession, assets of the company, both movable and immovable;
- Comply with any direction of the Court made in the judicial management order or any variation thereof;
- Once a year, transmit to the registrar of companies a return containing all information as is required with respect to annual returns furnished by companies in terms of the Act;
- Keep such books of account, and prepare a balance sheet and profit and loss account, and all expenses as would have been the duty of the directors of the company in the ordinary course of business; and
- To convene, during the period that the company is under judicial management, the annual general meeting of members and furnish to such members a report containing such information as is required.

The judicial manager, for instance, cannot, without the leave of the High Court, sell or otherwise dispose of any of the company's assets except in the ordinary course of the business of the company and as required by the Act including any reports of directors, together with all duly audited accounts of the company.

Filing of claims

Creditors wishing to vote at any creditors' meeting with respect to a company under judicial management must prove their claims at such meeting in the same manner as prescribed for liquidations.

Factors which influence the period of the administration in a judicial recovery

- The state and condition of the company - the more dire the condition of the company, the longer it will take to convert the company into a going concern or remove the risk of liquidation;

- The attitude of the creditors - if creditors are hostile towards the judicial management process, this can result in applications being brought against the judicial manager and/or the company, which in turn may either end the process or prolong it whilst such actions and/or applications are being defended; and

- Delays with the High Court - backlogs at the High Court will affect the timing of any application brought to place the company into judicial management or any application brought against the judicial manager or company.

Funding of the Company Whilst in Judicial Management

The company will fund itself during the judicial management process unless the creditors voluntarily agree to fund the operations of the company during this period.

Effect of Judicial Management on Employees

There is no effect on employees as they continue to be employed by the company during the judicial management period and in this respect are entitled to their full salaries.

Effect of Judicial Management on Contracts

Judicial management has no effect on contracts to which the company is a party, as the company continues to operate and carry on its business. Suppliers and/or creditors are, however, generally prohibited as a result of the order handed down by the High Court, from taking any action against the company during the judicial management period.

Effect of Judicial Management on Shareholders

Upon the grant of a judicial management order, the management and control of the company vest in the judicial manager, and the powers of the board of directors are effectively displaced. Shareholders are therefore divested of their ability to control the affairs of the company through the board, although they retain their proprietary interest in their shares. The judicial manager does not override the powers of shareholders and matters which the Companies Act, or the constitution of the company require to be approved by shareholders continue to require such approval.

Effect of Judicial Management on Creditors

The commencement of judicial management has very little effect on creditors save that they are normally prevented from proceeding with attachment or any other process against the company.

Pending Claims, Litigation and Arbitration

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

Effects of the Moratorium

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

Voidable Transactions

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

How is the Process Terminated?

The judicial management process is terminated by way of an application to the High Court brought at the instance of the judicial manager or any interested person to terminate the judicial management order.

What is the Status of the Company after Judicial Management?

Upon the cancellation of a judicial management order, the High Court shall in giving such order, give directions as may be necessary for the resumption of the management and control of the company by the directors. Such directions may include directions for the holding of a general meeting of the shareholders for the election of directors. In short, the company will have the same status as it did before the granting of the judicial management order and will operate in the normal course.

Director and Officer Liability

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

SECURITY

Types of security

- Mortgage Bonds - security over immovable property can only be obtained by a special mortgage over immovable property as set out in the Deeds Registry Act. A mortgage bond does not transfer title in the mortgaged immovable property to the lender. It confers a limited real right on the lender to have the immovable property sold in execution and the proceeds of that sale applied to settle or reduce the debts secured by the mortgage bond. A special mortgage of immovable property is created by a mortgage bond. A mortgage bond is affected by registering it at the Deeds Registry where the immovable property is registered

- Pledge - a pledge is a charge or mortgage over movable property given by a borrower in favour of a lender. For a pledge to be valid and effective the pledged movable must be transferred to, and controlled by, the lender. There are no registration requirements.

- General Notarial Bond - a general notarial bond is a mortgage by a borrower over all of its tangible movable property, and in favour of a lender. A general notarial bond does not however (in the absence of an attachment of the property before insolvency) make the lender a secured creditor of the borrower and consequently it is not a true mortgage of the property but is rather a means of obtaining a limited statutory preference above the claim of concurrent creditors in the borrower's insolvent estate. A notarial bond must be registered in terms of the Deeds Registry Act in order to be effective.

- Cession by Way of Security - security over intangible movable property is created by the debtor granting security by way of cession over such assets in the creditor's favour. It can be structured as either a cession in securitatem debiti where title to the property remains with the cedent; or an out and out cession, where title to the property is transferred to the cessionary, subject to the cedent's right to have the property ceded back to it by the cessionary once the debt and/or other obligations that it secures, are discharged. There are no registration requirements.

Deeds of Hypothecation

Tangible movables can be secured through a deed of hypothecation in terms of the Hypothecation Act CAP 46:05 (Hypothecation Act). A deed of hypothecation is a statutory pledge and must be affected in the form prescribed by the Hypothecation Act. In order to be effective, a deed of hypothecation is required to be registered in terms of the Hypothecation Act at the Deeds Registry. A deed of hypothecation is not available unless the creditor is an authorised creditor. In order to become an authorised creditor, application must be made to the Minister of Trade and Industry and if approved then a regulation to this effect is published in the Government Gazette.

Guarantees/Suretyship

This is not real security in Botswana and gives rise only to personal rights.

Security trustees and special purpose vehicles

Botswana law generally requires that security be granted in favour of a creditor to whom the underlying secured obligation is owed. This requirement has historically created uncertainty as to whether security may validly be granted in favour of a trustee or agent acting on behalf of a syndicate of lenders. In practice, syndicated financing transactions are structured to address this difficulty. It is common for the security to be held through alternative arrangements such as a special purpose vehicle or other structures designed to ensure that the entity holding the security is itself a creditor in respect of the secured obligations. These structures enable lenders participating in a syndicated financing to share in the benefit of the security while ensuring that the security arrangements remain enforceable under Botswana law.

Most robust form of security available to lenders

The most robust form of security available is a special mortgage over immovable property and a deed of hypothecation over movables. With respect to intangibles, an out and out security cession is the most robust form of security as it removes ownership of the secured asset from the debtor and consequently can technically be disposed of outside the liquidation process.

Stamp Duty

There are no stamp duty requirements in Botswana.

Registration Costs

The cost of registering a mortgage bond or deed of hypothecation is regulated by a tariff prescribed under the Deeds Registry Act CAP 33:02.

Requirements for the assignment or transfer of security

- Mortgage bonds and Notarial Bonds - transfer of a mortgage bond or notarial bond must be effected by way of a cession registered by the Registrar of Deeds in terms of the Deeds Registry Act; and

- Deed of Hypothecation - it is not clear from the Hypothecation Act whether a deed of hypothecation can be transferred or assigned. The prevailing view is that it can be, provided the cession or transfer is to an authorised creditor and the cession is registered with the Deeds Registry.

The party responsible for paying the registration charge or fee is the mortgagor. There are no registration costs for pledges or cessions.

Instances in which security might be vulnerable to attack

Voidable transactions can be set aside where a company is placed in liquidation or under judicial management.

Methods of enforcement of security

For mortgage bonds or general notarial bonds, the secured creditor must obtain a Court order directing the sheriff of the High Court to attach the relevant asset. The secured creditor can then procure a sale of the assets and apply the proceeds of the sale to discharge the principal obligation.

With respect to a pledge, the pledgee must realise its security through a Court order authorising the sale and execution of the secured asset.

A deed of hypothecation is enforced through an expedited Court process. The creditor files a statement with the Registrar of the High Court setting out the breach, describing the property for attachment and attaching the deed of hypothecation. A copy of the said statement is also sent to the debtor by registered post. The said statement once filed has the effect of a civil judgment. A notice is thereafter issued to the debtor notifying him that a writ of execution is to be issued by the Court unless he can demonstrate that he is not in breach. A writ of execution may thereafter be issued, after 14 days of the lodging of the statement, unless the debtor has demonstrated that he is not in breach.

In some cases, however, the secured creditor can simply agree with the borrower that the secured assets are sold without the need for judicial execution. This is known as parate executie (the right of a creditor to realise a borrower's property without first obtaining a Court order). An agreement of parate executie concerning movables pledged and delivered to the secured creditor is valid provided there is no prejudice to the security provider. However, an agreement of this nature is invalid in relation to security over immovable property and secured assets not in the possession of the secured creditor at the time it wishes to enforce its rights.

Problems experienced when enforcing security

The following problems may be experienced regarding the enforcement of security:

- Competing secured claims which require their priority or ranking to be determined by a Court;

- Delays in obtaining Court orders for attachment as a result of the backlogs at the High Court;

- Delays in Court messengers or deputy sheriffs attaching and executing on sales because of the lack of officials relative to the workload or poor administrative systems; and/or

- Property having been disposed of prior to attachment (especially with movables).

Financial assistance requirements

A company is permitted to provide financial assistance directly or indirectly to any person for the purpose of, or in connection with, the acquisition of its own shares provided such assistance is compliant with section 76 of the Act. For the purposes of section 76, a company may give financial assistance where the board has resolved that:

- The giving of the assistance is in the best interest of the company; and

- The terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholder not receiving such assistance.

Where, however, financial assistance approved by the board exceeds 10% of the company's stated capital, the company shall not give financial assistance until it first obtains from its auditor a certificate stating that such auditor has enquired into the state of affairs of the company and is not aware of anything that indicates that the opinion of the board is unreasonable in all the circumstances.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Botswana Courts will, in general, accept and enforce a judgment of a foreign Court through a registration process under the Judgments (International Enforcement) Act. The Judgments (International Enforcement) Act extends to countries, which are recognised by the President by way of a statutory instrument. Section 4(1) records that the Judgments (International Enforcement) Act extends to every country to which the United Kingdom Judgments Act applied immediately before the commencement of the Judgments (International Enforcement) Act. The Judgments (International Enforcement) Act commenced on 25 September 1981.

Although the Judgments (International Enforcement) Act provides for the enforcement of foreign judgments through the process of registration, that process (by virtue of administrative inefficiencies at the Court) is not that effective. The preferred method for enforcing foreign judgments is by way of an action instituted (either by way of provisional sentence or summary judgment).

Requirements for recognition of a foreign judgment

Under the Judgments (International Enforcement) Act, registration by the Court is subject to the following conditions:

- The foreign Court that issued the judgment must have been the Superior Court of the relevant country;
- The judgment must be final and be for a sum of money;
- Substantial reciprocity must exist between the country in which the judgment was pronounced and Botswana (meaning that a judgment given by the High Court of Botswana would be enforced in that country) - such countries include England, Wales and South Africa, but not the United States of America;
- The judgment must not have been obtained through fraudulent means; and
- The judgment must not be contrary to Botswana's public policy.

There are also certain minimum standards that must be adhered to, such as the impartiality of the Court, reasonable notice and an opportunity having been given to the person/s affected, to defend the action.

Where the judgment emanates from a country that does not have the necessary reciprocity arrangement with Botswana, the judgment can be enforced by way of an original action, by way of summons, with the judgment as the cause of action.

Requirements for the recognition of a foreign trustee, business rescue practitioner or an insolvency practitioner

The position regarding the recognition of foreign trustees, business rescue practitioners or insolvency practitioners is regulated by the common law as there is no cross-border insolvency or liquidation legislation in force in Botswana. In terms of the common law, a foreign liquidator would need to make application to the High Court for recognition in the form of a declaration, declaring that he or she is entitled to deal with Botswana assets in the same way as if he or she were within the jurisdiction of the country where he or she was appointed. This will always be subject to the High Court's imposition of conditions, for the purpose of protecting local creditors, or in recognition of the requirements of Botswana law.