KINGDOM OF ESWATINI
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TYPE OF GOVERNMENT

Eswatini is an independent monarchy whose current Head of State is His Majesty King Mswati III (since 25 April 1968). Quite recently, the country has changed its name from Swaziland to the Kingdom of Eswatini. The Kingdom practices a Tikhundla (constituencies) based electoral system of Government. This system is a democratic participatory system which emphasizes devolution of power from central Government to Tikhundla areas and individual merit as a basis for election and appointment to public office. The country is led by the King and has a unique system of governance based on the Westminster Parliamentary System.

POLITICAL SYSTEM

According to section 79 of the Constitution of the Kingdom of Eswatini, the system of Government is democratic and participatory based on the Constituencies. Individual members of Parliament are elected on the different constituencies (a total of 55 Constituencies). Certain members of parliament are then appointed into the executive arm of Government which is led by the Prime Minister who in turn is appoint ed by His Majesty the King.

LEGAL SYSTEM

Eswatini has a dual legal system. On the one hand, there exists the Roman-Dutch Common Law which is highly regulated by the Constitution and other pieces of legislation. On the other hand, there is also Swazi Customary Law which is not codified. The former is highly litigated in the civil courts and other tribunals such as the Conciliation, Mediation and Arbitration Commission (CMAC). The latter is applied in Swazi Courts established in terms of the Swazi Courts Act. However, the High Courts of the land retain supervisory powers over all subordinate Courts which include the Swazi Courts.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

Insolvency is highly regulated by the Insolvency Act, 1955 and the Companies Act, 2009. The main test for insolvency, in relation to a company, is the inability to pay debts. In terms of section 288 of the Companies Act, a company is deemed to be unable to pay its debts when-

- the company is indebted to a creditor in a sum not less than E5 000-00 and the company has failed to pay the debt within 21 days of receipt of a demand;
- when a judgment has been issued against the company and the sheriff or messenger of Court filed a nulla bona return to the effect that there are no sufficient assets to satisfy the judgment debt; and
- if it is proved to the satisfaction of the Court that the company is unable to pay its debts.

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

The equivalent for the concept of business rescue in Swaziland is judicial management. Section 365 of the Companies Act provides that the Court may grant an order for judicial management of a company if the following requirements are established -

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

Once the order for judicial management is granted, the affairs of the company are then placed in the hands of the provisional judicial manager who shall be appointed by the Court. Such judicial manager, inter alia, is vested with such rights and powers to raise money in any way without the authority of the shareholders of the company with the main aim of resuscitating the financial capacity of the company or to make it a successful concern.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

A company may elect to either voluntarily apply to be declared insolvent or any of its creditors may apply to Court for the company to be declared insolvent. Voluntary surrender is usually by way of petition and creditors move by way of application. Before a petition or application is made, security has to be paid to the Master of the High Court for payment of all fees and charges necessary for the prosecution of all winding-up proceedings and all costs of administering the company in liquidation until a provisional liquidator has been appointed. The petition in Court has to be accompanied by a certificate issued by the Master of the High Court to this effect. A court seized with an application for liquidation issues an interim order which places the company under provisional liquidation. The provisional liquidation order calls upon any person (creditors) to file their objections, if any, for the winding up of the company. This is the reason why the provisional order has to be published in the local media and Government Gazette.

Once the final order for liquidation has been issued, the company is effectively placed in the hands of the liquidator who is appointed by the Court (such a liquidator has to be qualified and have the necessary skill and expertise). Amongst other duties, the liquidator has the following responsibilities -

- take the company in his control and immediately open a current account in the name of the company;
- shall provide the Master with sufficient security for the proper performance of his duties as liquidator and the Master shall appoint him as liquidator by issuing a certificate of appointment;
- shall thereafter open a current account in the name of the company and shall, from time to time, deposit therein to the credit of the company all moneys received by him on behalf of the company;
- investigate and examine the affairs and transactions of the company before winding-up to ascertain whether the directors or officers or past directors or past officers of the company have contravened any provision of the Companies Act;
- prepare a report detailing, inter alia, the amount of capital issued by the company and the estimated value of its assets and liabilities, if the company has failed, the reason and causes of the failure and whether or not any director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company. This report is prepared for the creditors of the company and to be presented at the general meeting for the creditors;
- prepare a liquidation and distribution account for the inspection of both the Master and other creditors of the company and lodge such account with the Master within 6 months of his appointment;
- to make an arrangement with creditors on how to liquidate outstanding balances due by the company, and to distribute the assets of the company in accordance with the arrangement; and
- to lodge with the Master the receipts for dividends paid or other proof of their payment and a report stating that the company has been wound-up.

Formal restructuring procedure

A court seized with an application to place a company under judicial management issues an order appointing a provisional judicial manager of the company. The provisional judicial manager of the company shall -

- assume the management of the company and recover and reduce into possession all the assets of the company;
- after 7 days of his appointment, lodge with the Registrar of Companies a copy of the letter of his appointment;
- prepare an account for the general state of affairs of the company and a statement detailing why the Company is unable to pay its debts or what prevents the company from becoming a successful concern;
- a statement of the assets and liabilities of the company;
- a list of all the creditors and prospective creditors of the company;
- particulars as to the source from which money has been or is to be raised for purposes of carrying on the business of the company; and
- the considered opinion of the provisional judicial manager as to the respects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern

This information is thereafter furnished to the Court on the return date for the Court to give further direction on the management of the Company. The Court will then also appoint a final judicial manager of the company. The final judicial manager has the duty, inter alia -

- to take over the management of the company from the provisional judicial manager;
- to conduct such management subject to the orders of the Court and in such a manner as he may deem most economic and in the best interests of the members and creditors of the company;
- lodge with the Registrar of Companies a copy of the judicial management order and a copy of a letter of his appointment;
- enter into an investigation to determine if any of the directors of the company is liable for damages and compensation to the company and to file a report with the Master's office;
- examine the affairs and transactions of the company pre-commencement of the judicial management;
- determine the prospects of prospective winding-up of the company or that the company may be revived; and
- do any other matter which he deems necessary for the company.

A moratorium is placed on the company's debts and the creditors are prevented from calling up their claims and/or placing the company under liquidation whilst the company is under judicial management.

Informal Insolvency or Restructuring Procedures

The company's board of directors may, lodge with the Master, a special resolution to have the company wound up and liquidated. This process, however, is not commonly used in Swaziland. There is no informal process for restructuring. However, there is no law barring a company from entering into negotiations with creditors and reaching a compromise in relation to payment for all or some of the company's liabilities.

LIQUIDATION

What is the aim of liquidation?

The main aim of liquidation is to bring the company to an end. A company under liquidation is administered by either the Master of the High Court or an appointed liquidator whose main aim is to close down the company. The liquidator has to locate all the assets of the company, realise the assets and then pay all the creditors in accordance with their order of preference. Thereafter, he ought to distribute the residue to the shareholders of the company in accordance with their rights.

Process required to commence liquidation

The process of liquidating a company as a result of insolvency starts with an application to Court for the company to be placed under liquidation. The application may be moved by either -

- the company itself (by way of petition);
- one or mor e of its creditors (by way of application);
- one or more of its members; or
- jointly by any or all the par ties mentioned above.

At what point does the liquidation process commence?

Section 291 provides that a winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up. Section 294, on the other hand, provides that a voluntary winding-up of a company shall commence at the time of the lodgement of the special resolution of the directors of the company authorizing the winding-up.

Duration of the liquidation process

The Companies Act provides that the liquidation process has to be finalised within a period of 6 months. However, it is permissible to apply for the extension of this period. In practical terms, the entire liquidation process can take up to a year or more to finalize.

Extent of court involvement in liquidation process

Once the Court has granted the final order for liquidation, it has little to no involvement after that time. The liquidator works largely hand-in-hand and from time-to-time with the Master of the High Court who monitors the entire process. However, there are certain instances where the involvement of the Court is required such as sanctioning and implementing a management scheme, the removal of errant liquidators and the settlement of any disputes which may arise during the liquidation process.

Management of the company whilst in liquidation

In most cases, the role of the board of directors in running the company comes to an end once the company is placed under liquidation and in the hands of a liquidator. The board of directors will only be called to submit the statement of affairs of the company. The directors also have a duty to attend all meetings called by the liquidator. The liquidator, on the other hand has, inter alia, the following roles, responsibilities and powers -

- to take the company under his control;
- to summon meetings of creditors;
- to institute and defend any legal proceedings instituted by or against the company;
- to carry on or discontinue any part of the business of the company in so far as may be necessary;
- to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof;
- to draw up a comprehensive liquidation and distribution account;
- to sell any movable and immovable assets of the company by either public auction or private treaty; and
- To do any such powers as may be conferred upon him by either the Court or the Master of the High Court which are not contrary to any provisions of the Companies Act

Filing of claims

Claims under liquidation are filed before the final liquidation and distribution account is drawn and, in a form, prescribed in terms of the Companies Act which is accompanied by an affidavit in proof of the claim. Such affidavit shall be made by the creditor or by any person fully cognisant of the claim. After all claims have been submitted, there shall be a meeting of creditors. The officer presiding at any such meeting of creditors may of his own motion or at the request of other creditors call upon any person present at the meeting who wishes to prove his claim to take an oath and submit to interrogation by the said officer and other creditors in order to prove his claim. After the meeting of creditors, the officer who presided thereat, if not the liquidator, shall deliver to the liquidator every claim proved against the company and the liquidator shall examine all available books and documents relating to the company for purposes of ascertaining whether the company indeed owes the claimant. If any claim is disputed by the liquidator, he shall write to the Master and state the reasons why the claim is disputed. The Master shall confirm the claim, reject the claim or reduce the claim and thereafter notify the claimant in writing.

Factors which influence the period of the administration in a liquidation

There are various factors which may influence the period of liquidation. This ranges from the appointment of the liquidator, the competency of the liquidator and also the meetings of creditors – whether they are productive or not. One of the major factors that delays liquidation in the Kingdom is the competency of liquidators. Individuals have the tendency of accepting positions as liquidators when they do not have the requisite expertise.

Effect of liquidation on employees

Liquidation of a company results in the automatic termination of any employment contract. In terms of section 100 of the Insolvency Act, an employee shall be entitled to a salary or wages even though he has not proved his claim, but the liquidator may require such employee to submit an affidavit in support of his claim for such salary or wages. The secured amount which an employee is entitled to is not more than E400-00.

Effect of liquidation on contracts

In relation to supply agreement, the supplier is entitled, after delivery of certain goods which have not been paid for in full, after the sequestration of the company's estate, to reclaim that property if within 30 days after delivery thereof he has given notice in writing to the purchaser or the liquidator or to the Master that he reclaims his property. A lease entered into by any company as lessee shall not be determined by the liquidation process, but the liquidator of the insolvent company may determine the lease by notice in writing to the lessor. If the liquidator does not within 3 months of his appointment notify the lessor that he desires to continue with the lease on behalf of the company, he shall be deemed to have determined the lease at the end of such three months. The rent due by then shall be included as liquidation costs.

Effect of liquidation on shareholders

The shareholders are entitled to claim the residue after the company has been liquidated and distribution has occurred.

Effect of liquidation on creditors

Once creditors become aware that a provisional order for liquidation has been issued by the Court, they have may object to the order being made final. If the order is subsequently made final, creditors have a duty to examine the liquidation and distribution account and also to lodge their claims with the liquidator and attend all meetings and participate in the liquidation of the company so that their debts are cleared.

Pending claims, litigation, arbitration

The liquidator has the power to elect either to enforce pending claims or oppose the enforcement of pending claims. Any legal proceedings that were instituted against the company before it was liquidated become suspended and any pending attachment is declared void.

Voidable transactions

Section 283 of the Companies Act provides that a disposition by a company of its property which, if made by an individual, could, for any reason be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay its debts. The provision further provides that any cession or assignment by a company of any of its property to trustees for the benefit or purported benefit of all its creditors shall be void.

How is the liquidation process terminated?

When the affairs of the company have been completely wound-up, the liquidator shall report this to the Master who shall, in turn, transmit to the Registrar of Companies a certificate to that effect and send a copy to the liquidator. The liquidation process shall be deemed to have been terminated and the Registrar shall cause to be published in the government gazette and local media the fact that the company has been dissolved.

Director or officer liability

If it appears, whether it be in winding up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company, the Court may, on the application of the Master, or liquidator or any other creditor, declare that any person who knowingly was a party to the carrying on of the business in such manner, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

Consequences of the Companies Act

In terms of section 360, where it is held that a director or officer or member of the company is personally liable for certain damages to the company, such director, or officer or member of the company may be ordered to repay or restore the money or property or any part thereof with

Financial assistance requirements

The situation regarding financial assistance by one company to another has not been judicially determined in the Kingdom of Eswatini. However, where financial assistance is to be given by one entity to another, this can only be done by a holding company assisting one of its subsidiaries. Such assistance can be by way of a special resolution of the company in a general meeting.

BUSINESS RESCUE/ADMINISTRATION

The applicable legislation in Eswatini, being the Companies Act as well as the Insolvency Act, do not recognise the concept of business rescue. Instead, the Companies Act recognises the concept of judicial management. Inasmuch as it is by far one of the dormant areas of our jurisprudential dispensation, judicial management is applicable and Courts do have the power to grant an order for judicial management of a company if by reason of mismanagement or for any other cause: (a) is unable to pay its debts or is probably unable to meet its obligations; and (b) has not become or is prevented from becoming a successful concern and there is a reasonable probability that, if placed under judicial management, it will pay its debts or meet its obligations or become a successful concern.

The main aim for judicial management is to rescue the business. Failing this, the business has to be placed under liquidation. Under judicial management, the process is commenced by an application to Court and upon satisfaction, the Court may grant an order for judicial management and effectively the company is placed in the hands of a provisional judicial manager who manages the affairs of the company.

The entire process for judicial management mirrors that of liquidation save for the fact that with judicial management, the main aim is to resuscitate the company and make it a going concern or successful. However, the powers of a liquidator and that of a judicial manager are almost the same. For instance, just as a liquidator is expected to investigate what may have caused the downfall of the company to a point of winding-up, a judicial manager is also tasked to investigate if any of the directors of the company may have been the reason for the downfall of the company or why it is unable to become a successful concern.

SECURITY

Types of security

In terms of the Insolvency Act of 1955, security is the right of a creditor in relation to the assets of an insolvent estate - a preferent right by virtue of any special mortgage, landlord's hypothec, pledge or right of retention such as a lien.

Statutory prescribed forms of security

In Eswatini there are a few statutory prescribed securities. These include the mortgage bonds and notarial bonds which are regulated in terms of the Deeds Registry Act as well as deeds of hypothecation which are regulated by the Financial Institutions Act. Other securities are governed by the provisions of the common law.

Taking of security

Securities such as notarial bonds, mortgage bonds and deeds of hypothecation are supposed to be registered with the office of the Registrar of Deeds. However, the securities that are governed by the common law do not need prior registration before they can confer real rights on the holder of such security.

Most robust form of security

The most robust form of security is the registered security. In relation to immovables, the most robust security is the mortgage bond. In relation to movables, the most robust form of security is the notarial bond. Both these types of bonds are normally registered with the Registrar of Deeds.

Registration of security

The registration of a security requires the debtor to execute a power of attorney which authorises a conveyancer to appear and register the security at the office of the Registrar of Deeds. This is in relation to security which is in the form of immovable property. In relation to movables, the power of attorney is executed in favour of a notary public and/or conveyancer and a notarial bond is thereafter prepared and registered with the office of the Registrar of Deeds. Stamp duty and transfer duty, in relation to immovable security, are payable at the office of the Accountant General, calculated on a gazetted tariff sliding scale depending on the value of the security.

Stamp duty

As of December 2018, there was an amendment to the stamp duty payable on registration of any bond by the credit receiver. The stamp duty is payable prior to execution at the office of the Registrar of Deeds and payment is made with the Accountant General. The stamp duty payable is calculated on a sliding scale as follows -

- where the total amount of the debt secured does not exceed E300 000-00, 0.85% is charged for every E10 000-00 or part thereof;
- where the total amount of debt secured exceeds E300 000- 00 but does not exceed E1 000 000-00, 0.95% is charged for every E10 00-00 or part thereof; and
- where the total amount of the debt secured exceeds E1 000 000-00 1% is charged for every E10 000-00 or part thereof.

Registration Costs

The costs for registration are borne by the credit receiver. These costs are reflected in the table. These costs are paid through the conveyancer or notary by the credit receiver to the Accountant General and must be paid prior to execution. Proof in a form of a transfer duty receipt is produced by the Registrar Of Deeds. In addition, there are deeds office levies in the sum of E30-00. This payment is also made simultaneously with the payment of stamp duty before execution.

Methods of enforcement of security

The ordinary method of enforcing security is by obtaining a Court order for the attachment of the property (or through the perfection of the landlord's hypothec) or by way of summons. Immovable property cannot be realised without an order of Court. The Court subsequently issues a writ of execution which authorises the creditor to realise the property and perhaps dispose of it by public auction in a transparent and fair manner or even by private treaty.

Requirements for the assignment / transfer of security

In order to assign or transfer registered security, the parties need to consent to the transfer, and this has to be in writing. The deed of assignment is thereafter prepared by a conveyancer or notary public. Thereafter, the deed is executed by the conveyancer through the Registrar of Deeds.

Instances in which securities might be vulnerable to attack

The registration of security has the effect of conferring a real right in favour of the creditor. The security cannot be easily attacked unless there is evidence of fraudulent transactions or collusive dealings by the directors of the company prior to liquidation.

interest at such rate as the Court thinks just. Where a director has been found to have committed a criminal act within his duties as director, he may be liable criminally and if found guilty, liable on conviction to a fine not exceeding E100-00 or in default of payment thereof to imprisonment not exceeding 6 months or both.

Problems experienced when enforcing security

One of the major problems with enforcing security is the period that has to be followed before there is an order authorising the credit provider to foreclose and dispose of the property in order to recover the judgment debt. Another problem arises when the security is of a specific nature, highly specialised, and cannot be easily disposed of – especially if one has to find buyers who are in the similar field as the debtor. Another problem arises during the public auction. You find that the owners of the credit receiver have agents in the auction who are there to delay and frustrate the entire process. They place the highest bids and when the time for payment comes, they renege on their obligations.

Also, there have been challenges in Court by credit receivers who complain that the reserve price for the property is way below market value and hence it may not cover the debt owed and/or that they will not receive any residue for the sale. They normally produce valuation reports which may depict a different amount from that stated as the reserve price.

Financial assistance requirements

The situation regarding financial assistance by one company to another has not been judicially determined in the Kingdom of Eswatini. However, where financial assistance is to be given by one entity to another, this can only be done by a holding company assisting one of its subsidiaries. Such assistance can be by way of a special resolution of the company in a general meeting.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which the high court of Eswatini will recognise a foreign judgment

In Eswatini, we have the Reciprocal Enforcement of Judgments Act, 1922. It advocates for the both the recognition and enforcement of foreign judgments. Certain requirements have to be met in terms of the Act before the foreign judgment can be recognised and enforced. Upon the complete fulfilment of these requirements, the Court grants an order recognizing the foreign judgment and the judgment will thereafter have the same status as a judgment granted by the High Cour t of Eswatini.

Requirements for recognition of a foreign judgment

The requirements as listed by the Act are as follows-

- firstly, it has to be demonstrated that the foreign court that issued the judgment was seized with the pre-requisite jurisdiction to entertain the matter and issue that judgment;
- secondly, it has to be demonstrated that the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of such court;
- thirdly, the judgment debtor, being the defendant in the proceedings, was duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of such court or agree to submit to the jurisdiction thereof;
- judgment was not obtained by fraud;
- judgment debtor does not satisfy the court either that an appeal is pending, or that he is entitled and intends to appeal against that judgment; and
- the judgment was with respect to a cause of action which for reasons of public policy or for some other similar reason, could not have been entertained by the court.

The normal process is to make an application to Court accompanied by an affidavit that comprehensively demonstrate the above factors.

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

The recognition of a foreign trustee or foreign liquidator is governed by the Recognition of External Trustees and Liquidators Act No. 51 of 1932. In terms of the Act, the High Court may order the recognition of any external trustee or external liquidator who has -

- determined in writing a place in Eswatini as his domicilium citandi;
- produced to the Court his or her letter of appointment as an external trustee or liquidator.

Thereafter, the property in Eswatini belonging to the insolvent company will vest in the hands of the external trustee or liquidator. Once the High Court has granted the recognition, the Registrar of the High Court is obliged to transmit a copy of the order to the Master of the High Court, the Registrar of Deeds and the Registrar of Mining Rights. Thereafter, the recognised trustee or liquidator would realise the company assets in Eswatini under the supervision of the Master of the High Court.