SOUTH AFRICA
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REPUBLIC OF SOUTH AFRICA | WERKSMANS ATTORNEYS

TYPE OF GOVERNMENT

The Republic of South Africa is a constitutional democracy with a nationwide election held every five years. The president of the Republic is elected by majority vote of Parliament, but has historically been the leader of the ruling party. The President is limited to two terms in office.

POLITICAL SYSTEM

MULTI-PARTY DEMOCRACY

The Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) is one of the most progressive in the world and entrenches a Bill of Rights which guarantees property rights, equality, socio-economic rights and individual rights. The Constitution also makes provision for an independent judiciary and the right to freedom of expression.

LEGAL SYSTEM

South Africa has its own independent executive, legislature and judiciary. The supreme law of the Republic is the Constitution, and any law inconsistent with its provisions is unenforceable. The common law runs secondary to the Constitution which is founded on Roman-Dutch law with important English law influences.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

A company will be said to be insolvent if its liabilities either exceed its assets (factual insolvency) or if it cannot pay its debts as and when they fall due (commercial insolvency). The latter is the more appropriate test (and the test used to determine the status of a company or corporation) for companies in that very often a company will be factually insolvent but not commercially insolvent.

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

A company will be financially distressed within the meaning of the Companies Act 71 of 2008 (2008 Act) when it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (impending commercial insolvency) or it appears to be reasonably likely that the company will become insolvent (i.e. with its liabilities exceeding its assets) within the immediately ensuing six months (impending factual insolvency). The test for financial distress is thus a six-month forward-looking test. It contemplates the situation in which the company will find itself in the ensuing six months.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

If a company is insolvent, it should be placed in liquidation. The provisions of Chapter 14 of the Companies Act 61 of 1973 (1973 Act) still regulate the liquidation process for insolvent companies notwithstanding the repeal of the majority of the provisions of the 1973 Act. The liquidation process is well established in South African law and has been deliberated on by our judiciary for many years.

Formal restructuring procedures

Chapter 6 of the 2008 Act introduced business rescue for financially distressed companies to the South African landscape. This is essentially a form of administration and is akin to the administration process in the United Kingdom and Chapter 11 proceedings in the United States.

South African companies that are financially distressed have an opportunity to restructure their businesses as business rescue proceedings are aimed at facilitating the rehabilitation of a company that is financially distressed by providing for -

- the temporary supervision of the company, and the management of its affairs, business and property, by a business rescue practitioner;
- a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities and equity.

The aim of business rescue is to restructure the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the immediate liquidation of the company.

Furthermore, South African law also offers companies a process known as a compromise with creditors in terms of section 155 of the 2008 Act. In some instances, a company may wish to enter into a compromise with its creditors or a certain class of creditors as an alternative to business rescue and liquidation. It provides a proactive step that the company can take to restructure the company's financial affairs. The company must provide a detailed proposal (akin to a business rescue plan proposed to creditors in a business rescue scenario) to its creditors and follow the process set out in section 155 of the 2008 Act. For a compromise to be successful, the proposal must be accepted by creditors representing at least 75% in value of the company's creditors present and voting at the meeting convened for the approval of the proposal.

Informal insolvency or restructuring procedures

An informal restructuring requires a company to work with some or all its creditors outside of a formal process in order to come to a negotiated solution where the company can return to financial health. The company can informally convene a meeting of its creditors and attempt to reach an agreement to compromise their debt. Such an agreement would need to be accepted by all of the creditors of the company for it to be binding on all creditors and meaningful. A company would also need to obtain undertakings from the creditors not to make application to court to place the company into liquidation or business rescue during the process.

LIQUIDATION

What is the aim of liquidation?

When a company (or corporation) is no longer able to trade as a consequence of it being insolvent, the company's assets are liquidated – that is, sold either by way of private treaty or by way of public auction in order to pay costs incurred in the winding-up as well as a dividend to the creditors of the company, should there be sufficient assets available to cover the liabilities of the company and the costs of liquidation. Any residue is thereafter divided amongst the former shareholders of the company in accordance with their rights and interest in the company.

Process Required to Commence a Liquidation

In South African law, as it currently stands, a distinction must be drawn between insolvent companies and solvent companies. Insolvent companies are regulated by the provisions of the 1973 Act, whilst the liquidation of solvent companies are regulated by the provisions of the 2008 Act. Some provisions of the 1973 Act, relating to the administration of a liquidated estate and the position and powers of the liquidator, are regulated by the 1973 Act.

Insofar as an insolvent company is concerned, an insolvent company may be liquidated -

- voluntarily by the board of directors passing of a resolution to that effect (driven by the shareholders of a company) and by thereafter filing such resolution and various other forms and documents with the companies' office known as the Companies and Intellectual Property Commission of South Africa (CIPC); or
- a formal application having been made to court by a creditor, the company itself or one or more of its shareholders.
- insofar as a solvent companies are concerned, a solvent company may also be wound-up by -
  - o voluntarily by the board of directors passing of a resolution to that effect; or
  - o winding-up by court order in the event that the company is unable to effect a voluntary winding-down due to for example, deadlock on the board.

At what point does the liquidation process commence?

For insolvent companies, the 1973 Act provides that a voluntary winding-up commences when the resolution passed, which initiates the process, is registered with the South African companies' office. For a compulsory liquidation, initiated by an application to court, the liquidation shall be deemed to commence at the time of the presentation to the court of the application for the winding-up, once the court has granted a final liquidation order.

Insofar as solvent companies are concerned, the 2008 Act provides that a voluntary liquidation will similarly commence when the resolution is filed with CIPC and that a compulsory liquidation will commence when the court grants the order for the final liquidation of the company.

Duration of the liquidation process

Once a company is in liquidation, the liquidator is appointed to administer the estate and wind it down. Liquidation and the winding-up proceedings, from start to finish, can take anything from 6 months to 5 years depending on the size of the estate, the nature and complexity of the transactions with which the company was involved in and the efficiency of the Master of the High Court's office (public office mandated to assist with deceased estates, liquidations, trusts etc.).

Extent of court involvement in the liquidation process

Compulsory liquidations require the involvement of the courts for their initiation, whilst voluntary procedures do not. The courts, will however, have a role to play in the winding-up process if, for instance, there is any litigation that the company was involved in prior to the commencement of the liquidation of the company, and which the party to the litigation wishes to pursue, or if the liquidator needs to recover assets disposed of by the company when they should not have been disposed of, the liquidator may utilise court proceedings for this purpose.

Management of the company whilst in liquidation

When a company is placed in liquidation, the company remains a corporate and legal entity and retains all its powers but will, from the date of the commencement of the winding-up, cease to carry on its business except in so far as may be required for the winding-up of the company. From the date of the commencement of a voluntary winding-up, all the powers of the directors of a company cease except in so far as their continuance is sanctioned (a) by the liquidator or the creditors in a creditors' voluntary winding-up; or (b) by the liquidator or the company in general meeting in a members' voluntary winding-up.

As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered with CIPC, the Master of the High Court may appoint any suitable person as provisional liquidator of the company and who shall hold office until the appointment of a liquidator. Liquidators, both provisional and final, are appointed by creditors based on -

1. The number of votes submitted by creditors for a particular liquidator to be appointed. For example, 6 out of 10 creditors voted in favour of a particular liquidator being appointed; and
2. The highest value of a creditor's claim that voted in favour of a particular liquidator being appointed. For example, creditor ABC Trading (Pty) Ltd holds the largest claim against the liquidated company and has voted for a particular liquidator.

Filing of claims

In liquidation proceedings, creditors' claims are filed on affidavit and supported with documentary evidence to indicate that the company is in fact indebted to the creditor. A creditor must file his or her claim with the liquidator prior to the first or second meeting of creditors. Thereafter, if the creditor wishes to file a claim, he may ask to convene a special meeting at which meeting he or she will file his or her claim. The costs of convening such meeting will be for that creditor's account. Only creditors who have proved their claims will benefit from a distribution and can vote for a particular liquidator to be appointed, as set out above.

Factors which influence the period of the administration in a liquidation

Administrative issues remain a major issue for expediting liquidation proceedings. Delays in the appointment of a liquidator, the realisation of assets, the conduct of meetings of creditors and the lodgement and approval of the liquidation and distribution accounts by the Master of the High Court adds to the delay in the liquidation process. Furthermore, the liquidator may need to institute legal proceedings for the recovery of assets that were disposed of by the company at a time when the company should not have disposed of such asset or assets. These legal proceedings can take anything from 6 months to 2 years, depending on the form used for the initiation of such proceedings and the manner in which the litigation unfolds.

Effect of liquidation on employees

In liquidation proceedings, employment contracts are immediately suspended for a period of time and may in time be cancelled by a liquidator after he or she has given due consideration to appropriate measures to prevent the cancellation of employment contracts and in turn, retrenchments. All suspended contracts, not already terminated by the liquidator, will be automatically terminated 45 days after the date of the final appointment of the liquidator. Employees are not obligated to render services to the company once it has commenced liquidation and the company is not required to remunerate such employees for any services so rendered. Insofar as payments to employees are concerned, employees will have a limited, but preferent claim for a portion of their salary and wages, leave, maternity leave, severance (retrenchment) pay as well as the contributions that were to be made by the liquidated company towards any pension, provident, medical aid, sick pay, holiday, unemployment training scheme or fund, or similar fund and a concurrent claim for what remains due to them over and above their preferent claim.

Effect of liquidation on contracts

Generally speaking, in the absence of an express statutory provision to the contrary, all contracts concluded with the company remain in effect when the company is placed in liquidation. The liquidator will need to make a decision, within a reasonable period of time, whether or not he or she intends to continue with such contract.

Effect of liquidation on shareholders

Once a company has been liquidated, the shareholders will have no rights as the company no longer exists. Any residue left after satisfying all the company's debts is paid to the shareholders.

Effect of liquidation on creditors

Creditors' claims are ranked and are paid out in accordance with an order of preference determined by South African legislation. Once all the costs of winding up have been paid, creditors will be entitled to their proportionate share of the residue of the company's estate. Preferent creditors are creditors who are entitled to be paid first by law from the free residue. An example of a preferent creditor are employees. Preferent creditors are paid before concurrent creditors. Secured creditors are those who hold security for their claims and they are paid from the proceeds of a sale of the security that they hold. Concurrent creditors (which would include preferent and secured creditors whose claims are not satisfied in full) are paid out of the free residue of the estate and are the last of the creditors to be paid.

Pending claims, litigation, arbitration

When the court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered with CIPC (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void. Every person who, having instituted legal proceedings against a company which is suspended by a winding-up, intends to continue with such litigation, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, must within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings. If no notice is given, the proceedings shall be considered to be abandoned unless the court otherwise directs.

Voidable transactions

Any transaction entered into by the debtor company before liquidation whereby it has disposed of property belonging to it for no value or in a manner that has the effect or intention of prejudicing creditors or preferring one above the other is a voidable or undue preference transaction and may be set aside.

The Insolvency Act allows the court to set aside dispositions made by an insolvent debtor in the following cases:

Dispositions without value

Where the liquidator can prove that it falls within one of the following categories: (i) dispositions of property made more than two years before the liquidation of the insolvent debtor's estate, (ii) immediately after making the disposition, the liabilities of the insolvent debtor exceeded its assets; and (iii) the disposition was not made for value.

Voidable preferences

The court can set aside a disposition where all the following apply: (i) it is made by an insolvent debtor within six months before the date of liquidation; (ii) it has the effect of preferring one creditor over another; and (iii) immediately after the disposition, the liabilities of the insolvent debtor exceeded the value of its assets. The setting aside of a disposition can be prevented where the person who benefitted from the disposition can prove that it was (i) made in the ordinary course of the debtor's business; and (ii) was not intended to prefer one creditor over another.

Undue preference to creditors

The court can set aside a disposition of property made by a debtor as an undue preference where all the following apply: (i) the debtor's liabilities exceed its assets; (ii) it was made with the intention of preferring one creditor over another; and (iii) the debtor's estate is subsequently liquidated.

Under common law, once insolvency procedures have commenced, and a disposition is not set aside for any of the reasons stated above, a creditor holding movable or immovable property as security cannot realise that security itself but must deliver it to the liquidator for realisation. The secured creditor must give notice to the Master of the High Court and the liquidator, that it holds the security before the second meeting of creditors. However, a secured creditor can realise movable property itself provided certain procedures set out in the Insolvency Act, 1936, are followed.

Section 88 of the Insolvency Act, 1936, further states that certain mortgages are invalid, whether special or general, where they are passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such first-mentioned debt. The bond shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging.

How is the liquidation process terminated?

Once the affairs of a company have been wound up and if the liquidator has complied with all the requirements of the Master of the High Court, the liquidator may apply in writing to the Master of the High Court for a certificate to that effect. The Master of the High Court shall, when he issues the certificate, state that he consents to the reduction of the security by the liquidator to a stated amount or to its cancellation. The liquidation and winding-up proceedings at this point would be terminated and the company's name removed from the register of companies.

Director or officer liability

A director, including an alternate director, a prescribed officer or a person who is a member of a committee of a board of a company, or of the audit committee of a company is prohibited from trading a company recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. If either of the aforesaid trades a company in this manner, they could be held personally liable for the debts of the company. The aforesaid conduct can also constitute a criminal offence for which a person may be liable for a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment.

BUSINESS RESCUE / ADMINISTRATION

Process required to commence a business rescue

A company can be placed in business rescue voluntarily by the board of directors adopting and filing a resolution to commence business rescue and to place the company under the supervision of a business rescue practitioner. Thereafter, a number of forms and documents would need to be submitted to CIPC for filing. A formal application can also be made to court by affected persons (creditors, employees, shareholders) to place a company in business rescue (this is known as compulsory business rescue).

Once the company is placed under business rescue, all affected persons must be notified of this. A voluntary business rescue application cannot be filed if a compulsory business rescue application has been initiated or if liquidation proceedings have already been initiated by or against the company.

At what point does the business rescue or administration process commence?

A voluntary business rescue commences when the requisite documents are filed with CIPC. A compulsory business rescue, arising from an application made to court where no liquidation proceedings have been instituted against such company, commences once the papers have been lodged with the court. Where liquidation proceedings have been instituted, business rescue proceedings will commence once a court makes such order placing the company under supervision.

Duration of business rescue

In accordance with the provisions of the 2008 Act, business rescue proceedings are designed to last for a period of 3 months from start to finish. However, in practice, business rescue proceedings are extended from time to time with the support of the majority of creditors and can take anything from 6 months to 2 years, depending on the complexities of the business.

Extent of court involvement in the business rescue

Compulsory business rescue applications require the involvement of the courts to a limited degree, whilst voluntary procedures do not. A compulsory business rescue is initiated following an order of the court. Unless there is general litigation pertaining to a business that has been placed under business rescue, other than the initiation of a compulsory business rescue, the court should have no further involvement in the matter.

Management of the company whilst in business rescue

During business rescue proceedings, the business rescue practitioner has full management control of the company and the directors, though not exonerated from their duties and responsibilities (and corresponding liabilities) are answerable to the business rescue practitioner. Any action taken by a director whilst the company or corporation is in business rescue which requires the approval of the business rescue practitioner will be void.

Filing of claims

Claims in a business rescue need not be submitted on affidavit. In practice, business rescue practitioners either compile their own claim forms for the submission of creditors' claims, creditors, or legal advisors, prepare the necessary claim forms. There is no legal time period prescribed by law within which a business rescue practitioner may receive claims. Typically though, claims are submitted at the first meeting of creditors and can be received up until such time as the business rescue plan is published by the practitioner, for the consideration of all affected persons. The practitioner may, however, determine a date by which all claims must be submitted. In some instances, and following a consideration of the books and accounts of the company, practitioners take into account the position of all creditors, whether or not they prove their claims, when preparing the business rescue plan.

Factors Which Influence the Period of Business Rescue

Factors which necessitate the continuation of business rescue, beyond the 3 month period, include but are not limited to (i) the business rescue practitioner attempting to procure a purchaser for the business or assets; (ii) the need to obtain regulatory approvals in respect of a plan that has been adopted with the requisite support; and (iii) the fulfilment of any conditions precedent, following the adoption of a plan; or (iv) even a general lack of cooperation from creditors or shareholders.

Funding of the company whilst in business rescue

During business rescue, the company may obtain post-commencement finance which is either new money provided to the company following the commencement of business rescue or services rendered by employees or suppliers of the company for the duration of the business rescue. Post-commencement finance will rank in preference to the claims of unsecured and pre-commencement creditors. Post-commencement financiers may also take security for their funding but only over unsecured assets belonging to the company in business rescue. They are also afforded voting rights in the approval or rejection of business rescue plans, whereby all post-commencement financier votes must be included in the tallying of voting results.

Effect of business on employees

Employees continue to be employed by the company on the same terms and conditions, unless different terms are agreed upon between the employees and the company or unless changes occur in the ordinary course of attrition. Any retrenchments contemplated by the business rescue practitioner will be subject to South African labour legislation.

Effect of business rescue on contracts

Generally speaking, contracts concluded with the company (unless they contain an event of default clause, of which business rescue is one such event), prior to the commencement of business rescue, remain extant. The business rescue practitioner may suspend (entirely, partially or conditionally), any agreement to which the company is party to without the sanction of the court, however, the other party to the contract may assert a claim for damages against the company. If the business rescue practitioner wishes to cancel a contract, he or she may only do so with the sanction of the court.

Effect of business rescue on shareholders

There can be no alteration to the classification or status of a company's issued securities unless this is done in the ordinary course of business, by way of an order of court or in pursuance of the provisions of the business rescue plan. Further, shareholders retain their shareholding in the company, notwithstanding the commencement of business rescue.

Effect of business rescue on creditors

The historic position, and claims of creditors, is crystallised as at the date of the commencement of business rescue. Creditors are entitled to submit claims to the business rescue practitioner but may not enforce any claims against the company by way of the institution or commencement of legal proceedings. This is so as a consequence of the "stay" on legal proceedings against the company known as the general moratorium.

Pending claims, litigation, arbitration and the effects of the moratorium

The commencement of business rescue proceedings gives rise to the operation of a general moratorium on the rights of creditors to enforce their claims against a company or in respect of property belonging to the company or lawfully in its possession. A creditor may also not continue with enforcement action against a company (i.e. execution of a writ). In certain instances, proceedings may be brought against a company with the written consent of the business rescue practitioner or with the leave of the court. If a claim is subject to a time limit, the claim will not prescribe during the period in which the company is in business rescue. Prescription will be interrupted.

Voidable transactions

The business rescue provisions in our law do not deal specifically with voidable transactions. Instead, they place an obligation on the business rescue practitioner to investigate any voidable transaction, though these are not specified. However, any action taken by a creditor without the approval of the business rescue practitioner will be void.

The business rescue plan

The business rescue process culminates in the preparation of a business rescue plan by the business rescue practitioner. The business rescue practitioner will consult with all affected persons, creditors and the management of the company when preparing the plan. Broadly speaking the plan will set out details relating to the background of the company, any proposal made for the rescue or rehabilitation of the company and any assumptions or conditions upon which the plan is based. The plan will also include how the assets, liabilities, contracts and employees will be treated following the adoption of the plan.

Voting on the plan

The business rescue practitioner must convene and preside over a meeting of the creditors within 10 business days of the publication of the plan. At this meeting, the plan must be introduced, the employees' representatives may address all persons at the meeting and a discussion is held on the proposed plan. The practitioner will then procure a vote for the approval of the plan. A plan will be accepted if at least 75 per cent of the creditors' vote in favour of the plan and 50 per cent of such votes must be from independent creditors' voting in favour of the plan (i.e. not entities related to the company in business rescue). If the plan affects the rights of shareholders or securities holders, a separate vote of the shareholders or securities holders affected must be procured. A simple majority vote is required for a plan to be supported by shareholders and/ or securities holders. If a plan is rejected, affected persons or the business rescue practitioner can apply to court to set aside the vote on a plan or procure a vote from creditors to draft a revised plan, failing which the plan will be held to have been rejected.

Cram down on creditors

Once the business rescue plan has been approved, it is binding on all creditors regardless of whether or not the creditors were present at the meeting, voted in favour or against the plan or abstained from voting.

Implementation of the plan

Once the plan has been substantially implemented, the business rescue practitioner must file a notice of substantial implementation of the plan with CIPC.

Discharge of claims

If a business rescue plan that is approved by creditors and shareholders, if need be, compromises the claims of creditors, such creditors are not entitled to enforce the remainder of their claims against the company unless the business rescue plan provides otherwise. In such an instance, the company will continue to trade with a "clean bill of health".

Effect on suretyships

If the company that is in business rescue gave a surety or guarantee to a third party, such party cannot enforce such surety or guarantee against the company in business rescue as a result of the operation of the moratorium. Such a party would need to submit a claim in the business rescue. However, if a third party stood surety for, or guaranteed the obligations of, the company in business rescue, such third party could be liable for the remainder of the debt that the company is not able to pay, unless the principal claim is discharged. If the principal claim is discharged, the suretyship claim will fall away but the guarantee, provided it is drafted as an independent guarantee, will remain extant.

How is the process terminated?

Business rescue proceedings end when (a) the court sets aside the resolution or order that began the business rescue proceedings or when the court converts business rescue proceedings into liquidation proceedings; (b) the business rescue practitioner files a notice of termination of business rescue proceedings with CIPC; and (c) business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the 2008 Act or a business rescue plan has been adopted and the business rescue practitioner has subsequently filed a notice of substantial implementation of the plan.

What is the status of the company after the business rescue?

If a business rescue plan is adopted and implemented in accordance with its terms, the company will continue to trade and will graduate from business rescue. If a plan is rejected, and steps are not taken to implement a revised plan, the practitioner will need to make application to court to place the company in liquidation. A similar result may ensue if the conditions precedent to a plan are not fulfilled.

Director and officer liability

The civil and criminal liability of directors or officers of a company that is placed in business rescue is the same as that which arises if a company is placed in liquidation.

Compromise in terms of section 155 of the 2008 Act

This is an arrangement governed by section 155 of the 2008 Act between the company and its creditors, or certain classes of creditors. The section applies to a company, irrespective of whether or not it is financially distressed, but not in circumstances where the company is under business rescue proceedings.

The board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal to every creditor of the company, or every member of the relevant class of creditors (whose name or address is known to, or can reasonably be obtained by the company), and CIPC.

No moratorium arises by operation of the law with this compromise procedure. It may however be incorporated as a provision of the compromise proposal.

A proposal must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal and must be divided into three parts.

Part A sets out the company background. This must include at the very least -

1. a complete list of all the assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal;
2. complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
3. the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
4. complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and
5. whether the proposal includes a proposal made informally by a creditor of the company.

Part B should set out -

1. the nature and duration of any proposed debt moratorium;
2. the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
3. the treatment of contracts and the ongoing role of the company;
4. the property of the company that is proposed to be available to pay creditors' claims;
5. the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and
6. the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation.

Part C should set out the assumptions and conditions of the proposal including -

1. a statement of the conditions that must be satisfied, if any, for the proposal to come into operation and be fully implemented;

2. the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment; and
3. a projected balance sheet for the company and statement of income and expenses for the ensuing three years, prepared on the assumption that the proposal is accepted.

To be effective, the proposal must be supported by a majority in number, representing at least 75% in value, of the creditors (or each relevant class of creditor/s) present and voting in person or by proxy, at a meeting called for that purpose.

A court may sanction the compromise as set out in such proposal if it considers it "just and equitable to do so" having considered, inter alia, the number of creditors present and voting. There is no obligation on the company to seek court approval though such approval would be prudent.

SECURITY

Types of security

Security can be taken over immovable, movable assets, intellectual property as well as financial instruments i.e. shares and debt securities.

IMMOVABLE PROPERTY

Mortgage bonds

Security over immovable assets is obtained through the registration of a mortgage bond as set out in the Deeds Registry Act 47 of 1937 ("Deeds Registry Act"). The mortgage bond does not transfer the title to the mortgagee but confers a limited real right on to the mortgagee to have the immovable property sold in execution and the proceeds used to settle the secured debt.

Movable property

The most common forms of security for movable or intangible assets are pledges, a cession in security (including a cession in securitatem debiti and an out-and-out cession), general notarial bonds, special notarial bonds and a landlord's hypothec.

Pledge

A pledge is a type of mortgage of movable property given by a pledger in favour of a pledgee as security for an obligation. It is created by an agreement between the parties and is perfected by the delivery of the pledged asset to the pledgee or an appointed agent. The pledgee maintains possession of the pledged asset, but does not acquire ownership unless a default occurs.

Cessions

A cession in security is a way of granting security over incorporeal movable property (including shares in companies and mineral rights), through an agreement to grant security by a cession of rights in favour of the cessionary.

Cessions can take two different forms namely
- a cession in securitatem debiti, where title to the property remains with the cedent (this is the preferred and most commonly used form); or
- an out-and-out cession, where the cedent agrees to transfer the title to the property to the cessionary, subject to a right of the cedent to have the property transferred back to it by the cessionary once the obligation secured is discharged.

Security over financial instruments is typically created by a pledge or a cession in security, however it is recommended that a combination of the two is utilised. In practice where the shares or any financial instrument is evidenced through a certificate i.e. share certificates, the certificates are usually delivered with a transfer form to perfect the security.

General Notarial bonds

A general notarial bond is a mortgage by a mortgagor of all of its movable property in favour of a mortgagee as security. In the absence of attachment of the property before insolvency, a general notarial bond is merely a means of obtaining a limited statutory preference above the claims of concurrent creditors in the insolvent estate of the mortgagor.

Special Notarial bonds

A special notarial bond is a bond registered after the commencement of the Security by Means of Movable Property Act over tangible movable property where the property has been described so that it is readily recognisable. The title to the movable property remains with the mortgagee subject to the mortgagor security interest.

Landlord's hypothec

A Landlord's hypothec is a form of security that comes into effect automatically where rent has become due and payable by the Lessee and has not been paid. The Lessor has a hypothec that provides him or her with a real right of security allowing him to attach and execute the Lessee's property to satisfy payments of the arrears. The Lessor's share of public utility services, such as rates and taxes, electricity, water, sanitation and sewer charges that become overdue during the business rescue period and are paid by the Landlord to third parties will be regarded as post-commencement finance.

Guarantees

Guarantees are a form of security generally used in lending transactions where a Guarantor undertakes to pay or perform another person's debt or obligation in the event of a default by the person primarily responsible for it. The Guarantor, who is not the debtor, guarantees these obligations by granting a security interest in favour of the secured Creditor. In turn the debtor will usually give the Guarantor an indemnity, which is a form of security that exempts the Guarantor from any legal responsibility. These concepts are discussed in more detail below.

STATUTORY PRESCRIBED FORMS OF SECURITY

Aircraft

The Recognition of Rights in Aircraft Act, 1993 prescribes that security over shares in an aircraft can only be created by a deed of mortgage in the prescribed form and can only be enforced by third party creditors to the extent that the asset is located in South Africa. A general notarial bond or special notarial bond cannot be created or registered over an aircraft.

South African ships

Security can only be created by a mortgage in the prescribed form according to the Ship Registration Act, 1998. A general notarial bond or special notarial bond cannot be created or registered over a ship.

Intellectual property

- Trademarks may be hypothecated by a deed of security. The deed of security must be recorded against the relevant mark in the Trade Marks Register;
- the Designs Act, 1993 prescribes that the security that can be taken over registered designs or applications for designs can be taken by a hypothecation by cession in security. Security over unregistered designs is granted by a cession in security;
- Security over patents or application for patents can be taken by a hypothecation according to the Patents Act, 1978 or by a cession in security. Security over unregistered patents is granted by a cession in security;
- Security over copyright is created by a cession in security;

Commercial Security or Quasi-Security

The following forms of transactions are ordinarily not classified as security in the ordinary sense, however, because of the consequences the transactions have they can be classified as a form of commercial security or quasi-security.

Briefly examples of these transactions are -

- Sale and leaseback;
- Factoring;
- Hire purchase;
- Instalment sales;
- Finance leases; and
- Repurchase agreements.

In general, there are no specific formalities to be complied with in relation to these transactions. These structures are also unlikely to be re-characterised as security interests if the parties genuinely intended the contracts to have the intended effect.

Taking security

There are two common ways for a lender to take security in South Africa namely though the establishment of a Security Special Purpose Vehicle ("Security SPVs") or the appointment of Security Trustees.

1. Security SPVs

Security SPVs are the most popular method by which secured creditors take security where there are multiple lenders and have been utilised since the late 1980s. The security SPV is established and usually takes the form of a ring-fenced shelf company, it then grants a guarantee to the secured creditors for the obligations of a debtor under a loan agreement. The debtor in turn provides an indemnity to the security SPV and secures its obligations under the indemnity by granting security to the security SPV. The shares in the security SPV are usually held by an owner trust or other administrative party.

The owner trust or administrative party is ordinarily required to grant a cession and pledge to the secured creditors over the shares it holds in the security SPV. This structure is preferred not only because it is accessible to multiple lenders but also because it is an insolvency remote structure.

2. Security trusts

A security trustee is an entity which holds the various security interests created in trust for the various creditors, such as banks or bondholders. This structure is, however, not favoured as it is uncertain whether security can validly be created in favour of a security trustee acting as trustee for a group of lenders. A security trustee can be seen as an agent for the lenders in relation to the security, with the result that the security was therefore not validly created. However, if the lenders intend taking security in the form of mortgage or notarial bonds, this will not be possible under this structure as the registration of mortgage bonds and notarial bonds where security is granted in favour of an agent for a principal is prohibited by the Deeds Registry Act.

Registration and registration costs of security

- Mortgage bonds, general notarial bonds, special notarial bonds, aircraft mortgages, ship mortgages and hypothecations relating to trade marks, designs and patents must be registered as discussed above and there are registration fees payable for the registration.
- Conveyancers and notaries in relation to registration of bonds draw up the necessary documentation, on the instruction of the mortgagee, and are entitled to charge

fees for preparing bonds according to a recommended tariff, which calculates fee based on the sum secured by the bond on a sliding scale, payable by the party giving the security.
- The legal rights associated with the mortgage bond come into effect only after the mortgage bond has been registered in the relevant Deeds Office. An endorsement is made on the Title Deed of the mortgaged property, recording the details of the mortgage bond.
- Where transfer duty is payable, the rate is determined on a sliding scale based on the value of the property. The mortgagor is liable for transfer duty.
- There are no documentary taxes payable in connection with the granting or taking of any other forms of security.

Requirements for the assignment or transfer of registered Security

Secured debt is frequently traded in South Africa, usually by the cession of the transferring creditor's rights in the security.

To be able to transfer or assign registered security, where the security is a bond, the consent of the bondholder may be required. The cession must also be registered at a relevant Deeds Registry. This is because mortgage bonds are ranked in order of preference and a bondholder holds first preference from the proceeds of the sale of the property in the event of insolvency of the property owner.

If a security SPV structure has been used, the guarantee granted by the security SPV usually stipulates that it is granted for the benefit of all holders of the debt for which the guarantee was granted, including any and all transferees.

Methods of enforcement of security

Secured creditors can generally enforce their security on the happening of a default in connection with the principal obligation. The following general principles apply in relation to security conferred by -

- a cession in securitatem debiti, a pledge and a special notarial bond, the secured creditor can, without prior judgement against the security provider, procure the sale of the secured assets and apply the proceeds to satisfy the principal obligation; and
- a mortgage bond and a general notarial bond, the secured creditor is first required to perfect the security by taking possession of the secured assets, usually by way of attachment, pursuant to a court order, by the sheriff of the relevant High Court. After this, the secured creditor can procure the sale of the assets and apply the proceeds to discharge the principal obligation.

An agreement of parate executie may be entered into by the parties where they agree that the secured assets will be sold without the need for judicial execution provided there is no prejudice to the security provider.

This type of agreement is, however, invalid in relation to security over immovable property or secured assets not in the possession of the secured creditor at the time it wishes to enforce its rights.

Instances in which securities might be vulnerable to attack by third parties, including the government

The most prominent instances where security becomes vulnerable are where expropriation by the Government occurs. Expropriation is governed by the Expropriation Act, 1975, pending the proclamation of the Expropriation Act,2024. According to the Expropriation Act, 1975, where ownership of property is expropriated in terms of the act on the date of expropriation, the property is released from all mortgage bonds (if any) but if such property is land, it shall remain subject to all registered rights (except mortgage bonds) in favour of third parties with which it is burdened, unless or until such rights have been expropriated from the owner thereof in accordance with the provisions of the act. Expropriation is a genuine threat as it attacks what is considered to be the most secure form of security being mortgage bonds leaving the secured creditor with no recourse to the underlying asset or the debtor.

Lenders of security in the form of mortgage bonds should also be cognisant of section 88 of the Insolvency Act as discussed above under the topic of voidable dispositions – undue preference to creditors. In terms of section 88, should a mortgage bond be registered for the purposes of securing the payment of a debt which was previously not secured and should such unsecured debt have been incurred more than two months prior to the lodgement of the mortgage bond in the applicable deeds registry, such mortgage bond shall not confer any preference in favour of the lender should the borrower be sequestrated (or the borrowing entity be liquidated in the case where the mortgagor is an entity) within a period of six months after lodgement of the mortgage bond.

Problems experienced when enforcing security

The most common problems faced by a secured creditor when attempting to enforce security include exchange control approval and competition laws.

Financial assistance requirements

The securing of any debt or obligation by a creditor will constitute the provision of financial assistance under the Companies Act where a debtor and/or guarantor/security provider are related or inter-related persons. The Companies Act states that a juristic person is "related" to another juristic person if -

- either of them directly or indirectly controls the other or the business of the other;
- either is a subsidiary of the other; or
- a person directly or indirectly controls each of them or the business of each of them.

An "inter-related person", when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are "related" (as defined above), and one of them is related to the third in any such manner, and so forth in an unbroken series.

The guarantee/security may also constitute a "distribution" as it entails the incurrence of a debt or other obligation by the South African entity for the benefit of another company within the same group of companies i.e. the Borrower.

Accordingly, in terms of both section 45 and section 46 of the Companies Act, inter alia, a special resolution of the debtor's shareholders will be required and the board of directors be required to be satisfied that the debtor will meet the requirements of the solvency and liquidity test as set out in the 2008 Act. This will not apply in instances where a holding company grants financial assistance to or for the benefit of a subsidiary company.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

A judgment duly obtained in a court of a foreign jurisdiction is enforceable in South Africa provided it accords with the ordinary procedures applicable under South African law for the enforcement of foreign judgments.

Requirements for recognition of a foreign judgment

For a court to enforce a foreign judgment, the foreign court's judgment must be final and conclusive in that it is unalterable by the court which pronounced on it; the foreign court must have had jurisdiction to hear the matter before it in accordance with its laws and the laws governing the jurisdiction of South African courts and the recognition of the foreign judgment must not be contrary to public policy or to the laws of natural justice and the foreign judgment must accord with section 1 of the Protection of Businesses Act 1999 of 1978.

Requirements for the recognition of a foreign trustee, business rescue practitioner, or an insolvency practitioner
When a foreign representative, such as a liquidator, trustee or receiver, wishes to deal with assets in South Africa, such an individual must first be recognized by a court of law in South Africa before he is entitled to act. Our law does, and has accordingly, recognized foreign representatives.