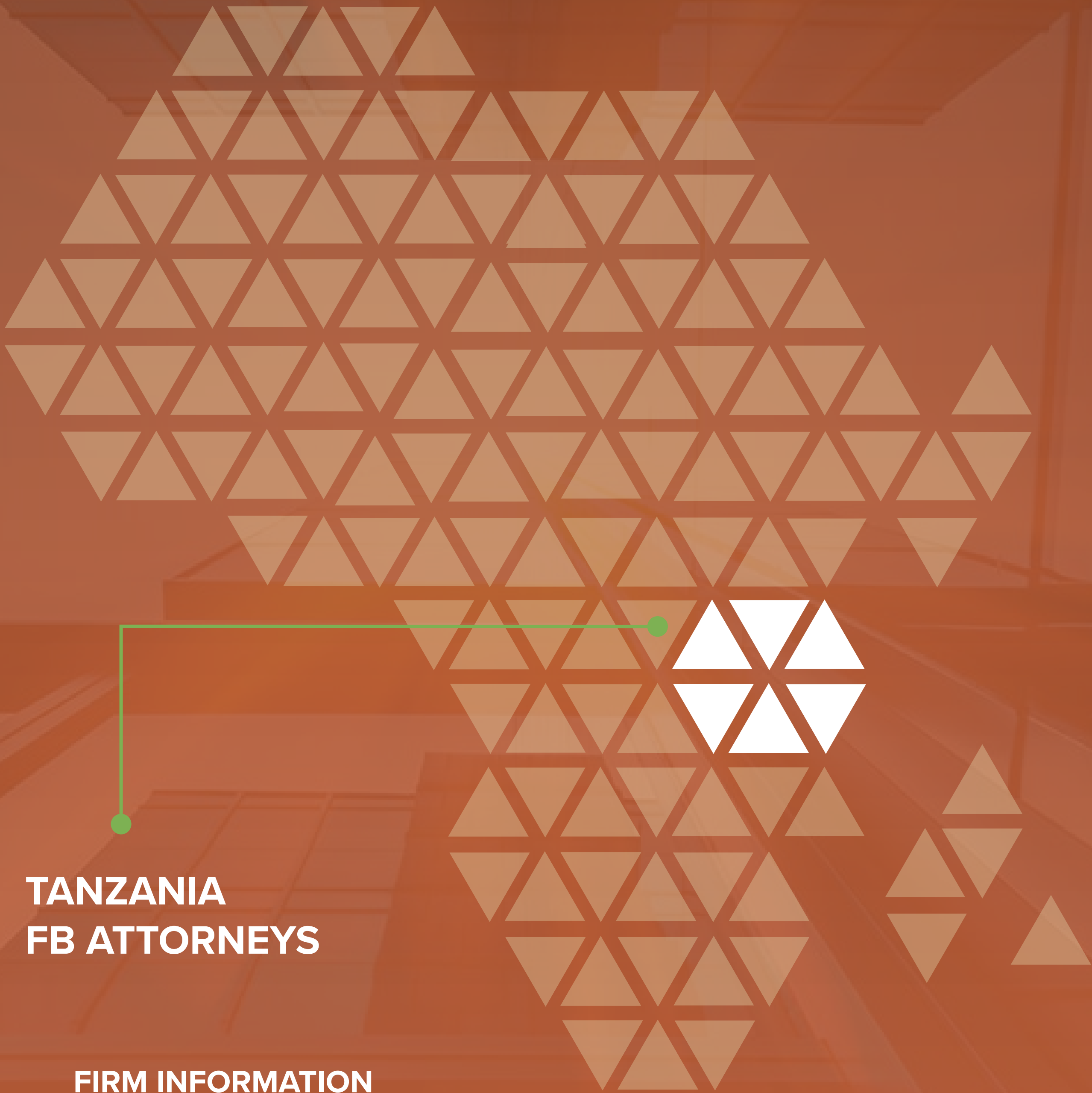

TANZANIA
FB ATTORNEYS

FIRM INFORMATION

Website address : **www.fbattorneys.co.tz**
Languages spoken : **Kiswahili, English, German, Gujerati, Hindi**
Telephone : +255 22 2135994/5
Address : 8th Floor Amani Place, Ohio Street, Dar es Salaam
Contact : Dr. Fayaz Bhojani, Jonathan Mugila and Alyshah Bharwani
Email : fbhojani@fbattorneys.co.tz, jmugila@fbattorneys.co.tz and abharwani@fbattorneys.co.tz

TANZANIA | FB ATTORNEYS

TYPE OF GOVERNMENT

Presidential Republic.

POLITICAL SYSTEM

The country has a multiparty system.

LEGAL SYSTEM

The legal system of Tanzania is based on Common Law but also accommodates Islamic and Customary Law.

TESTS FOR INSOLVENCY

DISTRESS

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

The test for insolvency under the Companies Act of Tanzania is if the company is unable to pay its debts. A company is deemed unable to pay its debts and therefore subject to winding up/ liquidation under the following circumstances:

- if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding TZS 50,000 (approximately USD 18.62) then due has served on the company, by leaving at the registered office of the company, a written demand requiring the company to pay the sum so due and the company has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

- if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

- if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due; or

- if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.

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

The Companies Act, Cap 212 does not specifically provide for financial distress but provides for administration by order of the Court, if the Court is satisfied that the company is or is likely to become unable to pay its debts. The tests for administration orders are as follows:

- If the Court is satisfied that a company is or is likely to become unable to pay its debts; and

- considers that following an administration order it would be likely that the company will achieve one or more of the below purposes -

- the survival of the company, and the whole or any part of its undertaking, as a going concern;
- sanctioning a compromise or arrangement between the company and its creditors; and
- a more advantageous realisation of the company's assets than would be effected on a winding up;

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Under the Companies Act, there are two ways under which a company can be wound up.

Voluntary winding up

A company can be voluntarily wound up when the period, if any, fixed for the duration of the company by the Articles of Association expires, or the event, if any, occurs, on the occurrence of which the Articles of Association provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

Winding up by court

This is where the Court makes an order for winding up of a company.

Formal restructuring procedures

The restructuring procedure is what is termed under the Companies Act of Tanzania as arrangements and reconstructions. Where a compromise or arrangement is proposed between a company and its creditors or between the company and its members, the Court may, on application (in a summary way) by the company or by any creditor or member of the company, or, in the case of a company being wound up, by the liquidator, order a meeting of the creditors, or of the members of the company, (as the case may be), in such manner as the Court directs.

If a majority in number representing three-fourths in value of the creditors or members (as the case may be), present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court is binding on all creditors or on the members (as the case may be), and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

Informal insolvency or restructuring procedures

Insolvency and restructuring in Tanzania is a formal procedure which must be conducted in accordance with the Companies Act.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation is to wind up the company i.e. bring it to an end and pay off or discharge all company liabilities. According to the Companies Act liquidation operates in favour of all the creditors and all the contributories of the company.

Process required to commence a liquidation

In Tanzania there is voluntary winding up and winding up by Court.

Voluntary winding up

For a voluntary winding up, the directors must call an extra ordinary general meeting and issue a notice to all shareholders of not less than 21 days from the date of the meeting and all the shareholders or representatives of the shareholders should attend unless otherwise unable. Procedures as per the Memorandum and Articles of Association of the company should be adopted. The extraordinary members' meeting should discuss the voluntary winding up and not less than 75% of the members should vote for the winding up and pass a special resolution for voluntary winding up. The shareholders must also appoint a liquidator(s) to wind up the affairs of the company, to distribute the assets and fix the remuneration to be paid to the liquidator.

Once the special resolution for voluntary winding up is passed, it must be filed with the Registrar of Companies within 14 days. Further, within 30 days from the passing of the resolution for winding up of a company, the the directors must make a declaration which must be in a prescribed form that they have made a full inquiry into the affairs of the Company, and that, having so done, they are of the opinion that the Company will be able to pay its debts in full within such period not exceeding twelve months from the commencement of the winding up.

Voluntary winding up by creditors of the company starts with a meeting of creditors which has to be called on 21 days' notice (simultaneously with sending the notices of the general meeting of the company). The creditors appoint the liquidator in that meeting. If the creditors and company nominate different persons, then the person nominated by the creditors shall be the liquidator.

Winding up by Court

Presentation of the petition for winding up of a company to Court which may be presented by the members, creditors or contributories is the start of the process.

At what point does the liquidation process commence?

- A voluntary winding up is deemed to commence at the time of passing the resolution for voluntary winding up.

- The winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for the winding up to the Court. If a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution.

Duration of the liquidation process

Liquidation ends as soon as all the company's affairs are wound up according to the procedures provided under the Companies Act. There is no set duration for liquidation. It therefore depends on the extent and complexity of the companies' liabilities and/or affairs.

Extent of court involvement in the liquidation process

In winding up by Court, the Court is involved from the beginning to the end and has powers to -

- hear winding up petitions
- dismiss or give interim orders
- stay proceedings antecedent to the winding up order
- appoint an official receiver
- issue and enforce any orders relevant to the liquidation suo motto or upon application

During the process of voluntary winding up, the Court can be involved to the below extent -

- If a vacancy occurs by death, resignation or otherwise in the office of the liquidator appointed by the company, a general meeting may be convened by any contributory or, if there were more liquidators than one, by any continuing liquidator for appointment of the liquidator to fill the vacancy. On application by any contributory or, by the continuing liquidators, the manner for conducting such meetings shall be determined by the Court.

- On the application of the liquidator or of any other person who appears to the Court to be interested, the Court may make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

Management of the company whilst in liquidation – the role, responsibility and powers of the board of directors and the liquidator

Upon appointment of the liquidator, all powers of the directors shall cease except insofar as it is agreed otherwise by a resolution. The liquidator assumes full control of the company's affairs until they are finally wound up.

Filing of claims – form, timing, adjudication and process

All debts and claims must be proved against the company. The claimants will issue a proof to the liquidator. In the creditor's proof of debt, the following must be disclosed -

- the creditors' name and address
- the total amount of his claim at the date of liquidation
- whether the debt is a preferential debt
- particulars of how and when the debt was incurred
- information of the securities held
- any witnesses to the claims in winding up by Court, the Court may fix a time within which creditors are to prove their debts or claims or are to be excluded from the benefit of any distribution made before those debts are proved.

Factors which influence the period of the administration in a liquidation

- Complexity of the company affairs
- The number of claims and proving of the said claims
- Opposition or objections by contributories, creditors or the company.
- The Courts diary

Effect of liquidation on:

- **Employees**

Employees stand to be dismissed at the time of commencement of the liquidation process. In terms of the Companies Act, the wages and salaries of employees who are not directors in respect of services rendered to the company in the 4 months before the commencement of the liquidation, are considered preferential debts. Preferential debts are those debts which are paid in priority to all other debts and include all Government taxes, local rates and customs and excise duties due from the company at the relevant date and having become due and payable within 12 months before that date, all Government rents not more than 1 year in arrears and the above-mentioned employees' wages and salaries.

- **Contracts**

The Court may on the application of any person who is entitled to the benefit of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the nonperformance of the contract or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

- **Shareholders**

In the event of a company being wound up, every present and past shareholder is liable to contribute to the assets of the company in an amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves. A past shareholder is not liable to contribute if he has ceased to be a shareholder for one year or more before the commencement of the winding up. Further, a past shareholder is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a shareholder.

- **Creditors**

Creditors are paid out of the assets of the company and after payment of the preferential debts.

- **Pending claims, litigation, arbitration**

On application by the company, creditor or contributory after the liquidation process has commenced or after the liquidation/winding up order has been issued, the proceedings in Court against the company may be stayed.

Voidable transactions

Where the company has 2 years prior to commencement of winding up entered into a transaction with any person under value, the Court may make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction, on application to the Court.

A company will be said to have entered into a transaction with a person at undervalue if -

a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

b) the company enters into a transaction with that person for a consideration the value of which is significantly less than the value of the consideration provided by the company.

How is the liquidation process terminated?

With a voluntary winding up, once the liquidator disposes of the assets of the company and winds up the business of the company, the liquidator makes up an account of the winding up, showing how the winding up has been conducted and how the assets of the company have been disposed of. After the liquidator prepares an account, he should call a members' meeting and at the meeting the liquidator must table the account of how the assets of the company were disposed. After the members' meeting, the liquidator must submit the statement of account to the Registrar within 14 days from the date of the said meeting and once the Registrar receives the account, he shall register it and within 3 months from the date of filling the account, the company shall be deemed dissolved.

With a winding up by Court, when the affairs of a company are completely wound up, the Court, if the liquidator makes an application, makes an order that the company be dissolved from the date of the order, and the company is dissolved accordingly. A copy of the order must, within 14 days from the date thereof be delivered by the liquidator to the Registrar of Companies for deregistration.

Director or officer liability

When a company is ordered to be wound up by the Court, any person being a past or present director or officer of the company will be deemed to have committed an offence where, within 12 months immediately preceding the commencement of the winding up, such director or officer -

- concealed any part of the company's property or debt due to or from the company
- fraudulently removed any part of the company's property
- concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the company's property or affairs
- made false entry in any book or paper affecting or relating to the company's property or affairs
- fraudulently parted with, altered or made any omission in any document affecting or relating to the company's property or affairs
- pawned, pledged or disposed of any property of the company which has been obtained on credit and which has not been paid for (unless the pawning, pledging or disposal was in the ordinary course of the company's business)

Further, when a company is ordered to be wound up by the Court, an officer or director of the company is deemed to have committed an offence unless he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors, if he has -

- by false pretences or by fraud induced any person to give credit to the company
- made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property
- concealed or removed any part of the company's property since, or within 2 months before, the date of any unsatisfied judgment or order for the payment of money obtained against the company.

Misconduct by a director or officer at the time the company is being wound up can amount to an offence.

Under the Act, the director will be committing such offence if he -

- does not, to the best of his knowledge and belief, fully and truly disclose to the liquidator all the company's property, and how and to whom and for what consideration and when the company disposed of any part of that property (except such part as has been disposed of in the ordinary course of the company's business)
- does not deliver to the liquidator (or as he directs) all of the company's property as is in his custody or under his control, and which he is required by law to deliver
- does not deliver to the liquidator (or as he directs) all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver
- knowing or believing that a false debt has been proved by any person in the winding up, fails to inform the liquidator as soon as practicable
- after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the company's property or affairs.
- such a person commits an offence if after the commencement of the winding up he attempts to account for any part of the company's property by fictitious losses or expenses; and
- he is deemed to have committed that offence if he has so attempted at any meeting of the company's creditors within the 12 months immediately preceding the commencement of the winding up.

Consequences of director or officer liability (criminal and civil consequences)

A person guilty of an offence under the above-mentioned offences can be liable to imprisonment or a fine, or both.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a business rescue

As per the Companies Act, administration is commenced by way of an application to Court for an administration order. The application is made by way of a petition and affidavit which may be lodged by the company, directors or creditors.

At what point does the administration process commence?

The administration process commences upon the presentation of a petition to Court for an administration order.

Duration of administration process

There is no set duration for the administration process under the law. This depends on the extent and complexity of the companies' liabilities and/or affairs.

Extent of court involvement in the administration process

The Court is involved from the outset of the administration process and is the one empowered to make an administration order. Prior to making the administration order and on hearing a petition for an administration order, the Court may dismiss it, adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit. The Court can appoint an administrator or fill his vacancy upon death, resignation or otherwise. On application by the administrator the Court may discharge or vary the administration order.

Management of the company whilst in administration

After appointment, the administrator of a company may do all such things as may be necessary for the management of the affairs, business and property of the company.

Filing of claims

Where an administration order has been made, the administrator shall, within 3 months (or such longer period as the Court may allow) after the making of the order, send to the Registrar and (so far as he is aware of their addresses) to all creditors, a statement of his proposals for achieving the purpose/s specified in the order, and lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less than 14 days' notice. The administrator shall also, within 3 months (or such longer period as the Court may allow) after the making of the order, either: send a copy of the statement (so far as he is aware of their addresses) to all members of the company, or publish in the prescribed manner a notice stating an address to which members of the company should write for copies of the statement to be sent to them free of charge.

Factors which influence the period of administration

- The complexity of the company's affairs
- The complexity of the proposed plan

Funding of the company whilst in administration

The administrator has powers provided under the Companies Act to raise or borrow money and grant security over the property belonging to the company during the administration process. Effect of administration on -

- **Employees**

Depending on the proposed rescue plan, the treatment of employees remains regulated by existing employment and labour laws. If the company is restructured, and if employees are retrenched, they will need to be trenched in accordance with their contracts and the applicable employment and labour laws.

- **Contracts**

This will vary depending on the kind of contract entered into and the proposed rescue plan. If the contract contains a termination clause upon administration, then they will terminate upon the commencement of the administration process. The administrator may choose to uphold certain contracts that may aid the rescue plan.

- **Shareholders**

Shareholders will be provided with the administration plan by the administrator and if at any time they think the administrator is handling the company's affairs, business and property in a manner which is unfairly prejudicial to the interests of all shareholders or part of the shareholders, they can apply to Court for necessary orders against the administrator.

- **Creditors**

An administrator must convene a creditors' meeting with sufficient notice. The meeting will afford the creditors an opportunity to review and possibly modify the proposed plan. The Companies Act imposes a duty on the administrators to ensure that creditors are furnished with the company's' statement of affairs within 3 months of the issuance of the administration order. For protection of their interests, creditors can at any time while administration order is in place, apply to the Court by petition for an order on the ground that the company's affairs, business and property are being or have been managed by the administrator in a manner which is unfairly prejudicial to the interests of its creditors or members generally, or of some part of its creditors or members.

Pending claims, litigation, arbitration and effects of the moratorium

At any time when an administration order is in force, no proceeding or legal process may be commenced or continued with against the company or in respect of its property save with the leave of the Court or the consent of the administrator.

Where the company has, 2 years prior to commencement of the administration process, entered into a transaction with any person at under value, the Court may make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction on application to Court. A company will be said to have entered into a transaction with a person at under value if -

- the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
- the company enters into a transaction with that person for a consideration the value of which is significantly less than the value of the consideration provided by the company.

The plan

Where an administration order has been made, the administrator shall, within 3 months (or such longer period as the Court may allow) after the making of the order send to the Registrar and (so far as he is aware of their addresses) to all creditors a statement of his proposals for achieving the purpose or purposes specified in the order, and lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less than 14 days' notice. The meeting may approve the proposals of the administrator as it is or with modifications subject to the appr oval of administrator.

Implementation of the plan

The administrator shall implement the plan and if the creditors are of the opinion that the administrator has been managing the company in a manner which is unfairly prejudicial to the interests of its creditors or members or that any actual or proposed act or omission of the administrator is or would be so prejudicial, can apply to Court for necessary orders and the Court can make such order as it thinks fit for giving relief in respect of the matters complained of.

How is the process terminated?

If the proposed plan is successful, the administrator releases himself upon application to the Court followed by publication in the Government Gazette.

What is the status of the company after administration?

After release of the administrator, the company can resume its undertaking. However, if the scheme is abandoned, creditors may petition the Court for a winding up of the company.

Director and officer liability (civil consequences and criminal consequences)

The directors must at all times act honestly and in good faith and in what they believe to be in the best interests of the company.

If found guilty of any offence before or after the issuance of an administration order, can be liable to imprisonment or to a fine, or both.

SECURITY

Types of securities

- Legal charge over landed property
- Debenture over fixed and/or floating assets of a company
- Deed of assignment (assignment of receivables)
- Share pledge
- Personal or corporate guarantee
- Chattel mortgage over property owned by individuals

Statutory prescribed forms of security

Land Forms No. 29 (notification of a disposition), Land form No. 30 (application for approval of disposition) 40 (mortgage of a right of occupancy) Company Form No. 96, spouse consent.

Taking of security

- Legal charge over landed property – execution of a mortgage of a right of occupancy agreement and the land forms or company form for a property issued by a company
- Debenture – execution of the debenture and the relevant forms
- Assignment (assignment of receivables) – execution of the deed of assignment
- Share pledge - execution of the share pledge agreement
- Personal or corporate guarantee - execution of the guarantee
- Chattel mortgage over property owned by individuals – execution of the chattel mortgage agreement

Security trustees/special purpose vehicles

The law allows for security trustees which can be arranged or agreed by the lenders.

Most robust form of security

Mortgage of a right of occupancy over landed properties

Registration of security

- Debenture – must be registered by the Registrar of Companies within 42 days from the date of execution.
- Charge of a landed property – if issued by a company it must be registered by the Registrar of Companies within 42 days from the date of execution. Thereafter it should be registered by the Registrar of Titles at the Ministry of Lands and Human Settlement Developments. If it is issued by an individual it is only registered by the Registrar of Titles.

Stamp Duty and Registration Costs

Document	Official Fee (USD)	Stamp Duty
Mortgage of a right of occupancy	USD 74.35 200000	USD 4.07
Mortgage of a right of occupancy by a Company	USD 74.35 (at the company registry)	USD 4.07
Debenture	USD 8.18	USD 5.17
Chattel Mortgage	USD 29.74	USD 1
Guarantee	USD 14.87	USD 1
Other agreements and security documents	SD 14.8	USD 1

Each extra copy is charged stamp duty in the amount of USD 0.19. TZS 2,663 is equal to USD 1.

Instances in which securities might be vulnerable to attack by third parties

The application for renewal of leasehold land (where the maximum term is 99 years) must be made by the registered owner. When the term expires while the property is charged in favour of a lender as security, owners tend not to make the application and the property reverts to the President as trustee of all land. Upon the issuance of statutory notices for default and intentions to sell charged property, most debtor companies make application to Court for injunctive orders to prohibit the realization of security.

Methods of enforcement of security

Public auction and private sale.

Problems experienced when enforcing security

Issuance of injunctive orders by Courts to prohibit the realization of security.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which the court will recognize a foreign judgment.

The position of the law in Tanzania is that foreign Judgments can be enforced in two different ways: direct enforcement approach or by way of action, depending on whether their countries of origin have reciprocal arrangements with Tanzania or not. First, by way of action, which applies when there is no reciprocal arrangement between Tanzania and the foreign country from which the foreign Judgment sought to be recognized and enforced in Tanzania emanates. In this regard, the foreign judgment creditor institutes a fresh suit in the competent court in Tanzania attaching the foreign judgment in his suit and thereby bringing it to the attention of the Tanzanian court that there exists an obligation by the Defendant as expressed in the attached foreign judgment which obligation remains unfulfilled and thus the plaintiff is suing the defendant on the basis of his failure to fulfil his obligations under the foreign judgment.

Second, direct enforcement applies where the country of origin of the foreign Judgment is one with which Tanzania has a reciprocal arrangement for mutual recognition and enforcement of their judgments. According to the Reciprocal Enforcement of Foreign Judgements Act Cap. 8 R.E 2019, A foreign judgement will be recognised if -

- It is a judgement by a Superior Court of a foreign country that enjoys the benefits under the Reciprocal Enforcement of Foreign Judgements Act or is a judgement made after an order directing that the Reciprocal Enforcement of Foreign Judgements Act shall apply in that country.
- Seeks to satisfy a specified or liquidated sum arising from criminal or civil proceedings.
- Is final and conclusive
- Is not wholly satisfied or executed.
- Is made by a Court with competent jurisdiction to try the matter given the circumstances of the case.
- Fairly obtained between the parties i.e. foreign ex parte orders due to failure to properly serve the defendant are not recognized.
- Is not contrary to public policy.
- Is not res judicata.
- Was not obtained fraudulently.
- Is registered with the High Court of Tanzania according to the provisions of the Reciprocal Enforcement of Foreign Judgements Act.

Requirements for recognition of a foreign judgment

The judgment holder has to make an application to the High Court of Tanzania to have the judgment registered at any time within 6 years after the date of the judgment. The respondent has a right to challenge the application. On registration, the judgment has the same force and effect (reciprocity) as if it had been originally given and delivered by the High Court of Tanzania.

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

There are no provisions in the Companies Act for recognition of foreign practitioners.