

COUNTRY REPORT: SOUTH AFRICA

HISTORICAL BACKGROUND OF SOUTH AFRICAN INSOLVENCY LAW

An ordinance that was accepted in Amsterdam, Holland, in 1777 is regarded as the basis of much of the subsequent South African insolvency law. An important Cape insolvency ordinance (Ordinance 64 of 1829) was based upon English procedure, although it still contained a great deal of the Dutch practice. This ordinance was the first Insolvency Act in South Africa with detailed provisions as we are familiar with today. Ordinance 64 of 1829 was re-enacted with minor additions and modifications as Cape Ordinance 6 of 1843. This Ordinance was adopted by the other provinces with minor alterations.

The Insolvency Act 32 of 1916 repealed the existing statutes in the provinces and introduced a uniform Act for the whole of South Africa. This Act did not drastically amend the existing insolvency procedure. Its wording was nevertheless closer to that of the present Insolvency Act 24 of 1936 than to the preceding ordinances. The Insolvency Amendment Act 29 of 1926 made important amendments to the Insolvency Act of 1916.

PRESENT INSOLVENCY ACT

The present Insolvency Act 24 of 1936 repealed the 1916 Act but did not amend it drastically. The following amendments are of importance. The Master of the High Court (a public official who supervises, inter alia, the administration of insolvent estates), and no longer the court, appoints provisional trustees. Interrogations before the court or a commissioner were abolished. The Insolvency Act 24 of 1936 has been amended more than twenty times, but without any drastic changes. The South African insolvency law does not differ much in principle from the Roman and Roman-Dutch law. The wording of the Insolvency Act 24 of 1936 is often verbatim the same as the Insolvency Act 32 of 1916. The wording is sometimes similar to provisions in English statutes, for example section 157 of the Insolvency Act 24 of 1936 and section 147 of the Bankruptcy Act 1914 (formal defects), section 8(a) of the Insolvency Act and section 1(d) of the Bankruptcy Act (one of the acts of insolvency) and section 64(5) of the Insolvency Act and section 25(l) of the Bankruptcy Act (interrogations). There was nevertheless no wholesale reception of English law principles that differed essentially from Roman-Dutch law.

The Act, although in the nature of a code, is not a complete statement of the law of insolvency and does not interfere with the common law of insolvency, where the latter is not inconsistent with the provisions of the Act. The sources of the common law are Roman, Roman-Dutch law and the judgments of the courts. Some provisions in other statutes also apply to insolvency, such as the Long -Term Insurance Act 52 of 1998, the Alienation of Land Act 68 of 1981 and the Agricultural Credit Act 25 of 1966.

HISTORY OF LEGISLATION FOR COMPANIES

The Cape Joint Stock Companies Limited Liability Act, 1861, was the first company legislation in South Africa. It was an almost verbatim adoption of the English Joint Stock Companies Act, 1844, and the Limited Liability Act, 1855. The English statutes also served as a precedent in Natal, the Transvaal and the Orange Free State. The previous principal Act, the Companies Act 46 of 1926, was based on the Transvaal Companies Act 31 of 1909, which was in turn based on the English Companies (Consolidation) Act of 1908. Important amendments to the Companies Act in England were followed by commissions of inquiry and legislation in South Africa. The Companies Act 61 of 1973 marks a divergence between English and South African company law. This parting of the ways has been accentuated by England's involvement in the harmonization of the company laws of member states of the EEC. (See H S Cilliers, M L Benade, D H Botha, M H Oosthuizen & E M de la Rey *Corporate Law* 1987 at 16-19.)

LEGISLATION FOR THE WINDING UP OF COMPANIES

The provisions for the winding up of companies in South Africa have not changed drastically over the years. The Insolvency Act 24 of 1936 applies, in so far as it is applicable in the winding-up of a company unable to pay its debts in respect of any matter not specially provided for in the Companies Act. Where the Companies Act specially provides for winding-up the provisions often differ from the provisions of the Insolvency Act in form only and not in respect of substance or principle. Substantial differences between the provisions that apply to insolvency and those that apply to the winding-up of companies can usually be explained in terms of material differences between individuals and companies. The difference in origin of the Insolvency Act and the Companies Act clearly also played a role. The law regulating the

winding-up of a close corporation is contained substantially in the Close Corporation Act 69 of 1984, as amended, and the Companies Act. (Close Corporations are less formalised corporate entities than companies.)

GENERAL FEATURES OF SEQUESTRATION AND WINDING-UP IN SOUTH AFRICA

The process to declare a person's estate bankrupt is known as sequestration. Sequestration orders relating to individuals and liquidation (winding up) orders relating to corporations are made pursuant to orders granted by the various High Courts having jurisdiction. The overall supervision and regulation of bankruptcy is in the hands of a Government official known as the Master of the High Court (the Master) who has offices in 14 cities in the country. Insolvency practitioners, act as liquidators of corporations and trustees of individual bankrupt estates (these persons will be referred to hereinafter as "Insolvency Administrators").

The sequestration of the estate of an insolvent individual divests the insolvent of his estate and vests it in the Master and in the trustee upon his appointment. Sequestration stays civil proceedings and proceedings to execute judgments given against the insolvent. (Section 20(l) of the Insolvency Act.) There is a general duty on the trustee to sell assets (section 82(l)). The proceeds of assets subject to secured claims are applied to pay certain costs and the secured claims (section 95) and assets not subject to secured claims are applied to pay the cost of sequestration, statutory preferences and ordinary creditors who have proved their claims against the estate (sections 96 to 103). The trustee or a creditor in the name of the trustee may institute proceedings to set aside dispositions without value, voidable preferences, undue preferences and collusive dealings before sequestration (sections 26 and 29 to 32). With the exception of a few statutory preferences, a creditor (including a secured creditor) can only pursue his claim by proving his claim against the insolvent estate.

An insolvent individual may apply to court for an order for his rehabilitation (section 124). Any insolvent not rehabilitated by the court within ten years from the date of sequestration is deemed to be rehabilitated after the expiry of that period unless a court orders otherwise prior to the expiration of the period of ten years (section 127A). The rehabilitation does not affect the estate which is vested in the trustee and has not yet been distributed, but in general rehabilitation puts an end to the sequestration, discharges all debts of the insolvent due before sequestration and

relieves the insolvent of every disability resulting from the sequestration (section 128). Debts due at the date of sequestration (except debts arising from fraud) are discharged by rehabilitation (section 128(1)(b)).

Provision is made for acceptance of an offer of composition by 75% of proved creditors in value and in number (section 119). Such a composition is binding on all the ordinary (concurrent) creditors and may provide for the reversion of assets in the insolvent. The composition binds secured and preferent creditors with their consent.

In any winding-up of a company by the court all the property of the company is deemed to be in the custody and under the control of the Master and upon the appointment of the liquidator under the control of the liquidator (section 361 of the Companies Act 61 of 1973). The winding up suspends legal proceedings against the company and attachments or executions after the commencement of the winding-up are void (section 359). The liquidator must recover and reduce into possession all the assets and property of the company and apply it in satisfaction of costs of the winding-up and the claims of creditors (section 391). The law relating to insolvency of individuals applies to the winding-up of companies in so far as it is applicable (section 339 of the Companies Act), in particular the application of assets to pay creditors and costs of winding-up (section 342 of the Companies Act), the proving of claims, the position of secured creditors (section 366) and the setting aside of voidable dispositions and undue preferences (section 340). The court may declare any person who was knowingly a party to any business of the company being carried on recklessly or with intent to defraud creditors of the company to 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 (section 424).

The court may order meetings of the creditors, or a class of creditors to consider a compromise or arrangement. The compromise or arrangement is binding on all creditors or a class of creditors and the liquidator if it is agreed to by a majority in number representing 75% in value of the creditors or a class of creditors and is sanctioned by the court. (Section 311.)

NUMBER OF CASES HANDLED ANNUALLY

The figures in the table below are for all insolvencies (individuals and corporate) in the six offices of the Master for the report years ending 30 June from 1994 to 2000. The figures for the Judicial Management in the Pretoria office, which handles about two thirds of the insolvencies in South Africa, are given in the last column. Judicial management figures are not available for the rest of the country. Figures for compromises in terms of section 311 of the Companies Act 61 of 1973 are not available, but according to the Master, Pretoria, who supplied these statistics, these figures are, like judicial management, very low.

	BI	Cpt	Gr	Kim	Pmb	Pta	Total	JM Pta
94	471	1,323	437	82	808	4,927	8,048	2
95	411	1,351	312	76	775	4,627	7,552	7
96	376	883	320	56	541	4,488	6,664	13
97	364	920	318	67	538	4,238	6,445	6
98	350	1,023	419	69	658	5,755	8,274	1
99	441	1,688	404	82	906	7,847	11,368	1
2000	386	2,428	334	82	888	7,513	11,631	2
Total	2,799	9,616	2,544	514	5,114	39,395	59,982	32

The only available data on the time taken for liquidation proceedings is contained in a limited survey published in Working Paper 29 of the South African Law Commission "Prerequisites for and alternatives to sequestration" March 1989 Schedule 4:

TIME LAPSE FROM GRANTING OF FINAL ORDER TO CONFIRMATION OF FINAL ACCOUNT (143 CASES)					
Months	7-12	13-18	19-24	25-30	30+
Individuals	5.3%	47.4%	26.3%	13.1%	7.9%
Companies	14.9%	40.3%	20.9%	14.9%	9.0%
All cases	9.8%	44.0%	23.8%	14.0%	8.4%

The average length for rehabilitations, that is for the completion of a scheme of arrangement in terms of section 311 of the Companies Act, is about three months. The reason for this is that the scheme documents have to be formulated, application has then to be made to court for leave to convene the necessary meetings of creditors, and if necessary, shareholders, then the meetings of creditors must be convened and notice must be given to creditors and shareholders of the holding of the meeting, the statutory report in terms of section 311 must be prepared and submitted, thereafter if the scheme is accepted application must be made to court for the sanctioning of the scheme and if a liquidation order was granted for the setting aside of the order and only then can the scheme be implemented by the receivers for creditors. All this takes time.

EFFECTIVENESS OF SYSTEM AND MAIN PROBLEMS

The lack of interest displayed by creditors in the administration of insolvent estates is well known in South Africa. One of the reasons for this lack of interest is that concurrent creditors seldom receive any benefit of substance from the insolvent estate.

There are complaints that the examination and confirmation of accounts and other interventions by the Master lead to delays.

There is a lack of confidence in some insolvency administrators and the exercise of discretion to appoint provisional insolvency practitioners by some of the Masters. Both these concerns are addressed in the report of the South African Law Commission.

LEGAL FRAMEWORK

As appears from the historical background above, the law derives from both the common and civil law systems.

The existing legislation was enacted in 1936 and amended several times, but not drastically. The South African Law Commission has concluded a review of the insolvency law and during February 2000 recommended a new Bill to replace the Insolvency Act 24 of 1936. The Standing Advisory Committee on Company Law has proposed unified insolvency legislation to deal with all entities (individuals, companies, close corporations and other entities), much of this based on the recommendations for individuals by the Commission. These proposals have not yet been considered by Parliament.

The primary feature of the law is the principle of **concursum creditorum** - the position as at the date of sequestration is crystallized and safeguarded for transmission to creditors. Provision is also made for a fresh start by an individual debtor through a discharge of debts.

RATING ON THE BASIS OF BEST INTERNATIONAL PRACTICE IDENTIFIED IN SECTION 2.3 OF WORLD BANK'S PRINCIPLES AND GUIDELINES CONSULTATION DRAFT

Director and Officer Liability

There are provisions to curb wrongful trading. Sections 423 to 426 of the Companies Act 61 of 1973 provides for personal liability of delinquent directors and others and offences. Section 424 (1) provides as follows:

When it appears, whether it be in a 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 or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, 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.

The Supreme Court of Appeal has stated that, if a company carries on business and incurs debts when in opinion of reasonable businessmen there is no reasonable prospect of creditors receiving payment when due, it is proper to draw the inference that the business was carried on

recklessly. The director's honest belief as to prospects of payment when due is not in itself determinant of whether he was reckless. Such belief is irrelevant if a reasonable person of business in the same circumstances would not have held that belief. (*Philotex (Pty) Ltd and Others v Snyman* 1998 (2) SA 138 (SCA).)

Section 424(3) provides that ,without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.

Liquidation and rehabilitation

Liquidation

Generally the High Court has exclusive jurisdiction in all matters of insolvency. However, shareholders can initiate liquidation of a company, other than an external company, by passing a resolution to place the company in liquidation and to appoint a liquidator. A company may be wound up voluntarily for any reason even if it is quite solvent. The High Court may, in certain circumstances set aside a voluntary liquidation. A creditor may successfully place a debtor in liquidation by applying to the High Court for a winding-up order. In the case of close corporations the Magistrate Court also has jurisdiction to issue winding-up orders. By far the most businesses are liquidated by initiating winding-up proceedings. Insolvency Administrators are elected by creditors at duly convened meetings of creditors subject to overall supervision by the Master. Such persons will invariably consult and certainly keep creditors advised of matters relating to the insolvency.

Rehabilitation

The rehabilitation procedures for corporate entities are somewhat outmoded. Details are given in the discussion of reorganisation below. Rescue proceedings are in the process of being reviewed.

Eligibility

The insolvency process applies to all forms of enterprises or corporate entities. Special rules apply in respect of certain entities: Chapter VI of the Long Term Insurance Act 52 of 1998; section 29 of the Pension Funds Act 24 of 1956; section 35 of the Friendly Societies Act 25 of 1956; section 18C of the Medical Schemes Act 72 of 1967; sections 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; Chapter X of the Co-Operatives Act 91 of 1981; section 33 of the Financial Markets Control Act 55 of 1989; section 68 of the Banks Act 94 of 1990; Chapter VIII of the Mutual Banks Act 124 of 1993; and sections 59 and 60 of the Labour Relations Act 85 of 1995. Part III of the Agricultural Credit Act 28 of 1966 contains special provisions regarding settlements by farmers who are unable to pay their debts. Section 34 of the Administration of Estates Act 66 of 1965 provides for the administration of insolvent deceased estates.

Access Criteria

In the case of individual insolvency actual insolvency or an “act of insolvency” in terms of section 8 of the Insolvency Act 24 of 1936 can be proved. (For instance, written notice unable to pay debts, or not enough assets to sell in execution for payment of judgment.) For corporate insolvencies section 345(1) of the Companies Act 61 of 1973 provides as follows:

(1) A company or body corporate shall be deemed to be unable to pay its debts if-

- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
 - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
 - (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

- (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

The Bankruptcy Estate

The estate includes all rights, including rights obtained after the commencement of the case subject to exclusions in respect of bedding and necessary clothing, insurance, pension rights, etc, in the case of individual debtors. The estate vests in the trustee or comes under the control of the liquidator after appointment. The trustee or liquidator must take immediate steps to preserve, protect and collect assets of value and may abandon assets without value.

Commencement Effects

Individual actions are stayed by the commencement of proceedings until the insolvency administrator is appointed. Thereafter actions may be continued subject to time scales and special permissions. The sale of assets in execution is also stayed. Payment of debts after commencement of proceedings does not discharge the debt. The collateral of secured creditors is dealt with by the insolvency administrator who applies the proceeds, after payment of certain costs, in payment of secured creditors. Assets subject to financial leases do not form part of the insolvent estate. If a composition in terms of section 311 of the Companies Act is contemplated, a stay is obtained by applying for the winding up of the company. The winding up order is discharged when the court sanctions the composition. A judicial management order also grants a moratorium.

Role of Management

In both liquidation proceedings and rescue proceedings existing management is usually replaced by court appointed officials or insolvency administrators appointed by the Master. In some cases aspects of management may be left to existing management on behalf of the official managers.

Role of Creditors Committee

South African law does not provide for creditor's committees. Creditors have the right to vote on the administration of liquidation or rescue proceedings at meetings. Votes by creditors play an important role when the insolvency administrators are appointed. Nothing prohibits informal committees and major creditors sometimes form a committee in large liquidation proceedings. Liquidation and distribution accounts are advertised for inspection by creditors and other interested parties before distribution.

The insolvency administrator is not an officer of the court, but acts subject to supervision of the Master.

Contractual obligations

As a general rule the insolvency administrator has a right to enforce or cancel contracts. Special rules exist for some contracts, for instance contracts of service (employment contracts), leases, land, and assets dealt with on financial markets. When enforcement is elected, either expressly or by insisting on performance by the other party, the insolvency administrator must perform in full. In practice contracts are usually not enforced after insolvency. There are special rules to ignore set-off in cases of insolvency (except cases involving financial markets).

Fraudulent and Preferential Transactions

Provision is made for the setting aside of fraudulent transactions, undue preferences and other transaction without value. Insolvency is usually a requirement. The setting aside of preferential dispositions is limited to a period of six months. There is no time limitation for cases of fraud or intention to prefer some creditors above others. Provision is made for presumed insolvency within two years in cases of disposition without value.

Treatment of Stakeholders Interests and Priorities

The rights of recognised secured creditors are respected after insolvency. The security is, however, administered and realised by the insolvency administrator and the creditor must prove

a claim against the insolvent estate. This claim is payable from the proceeds of the collateral after deduction of administration costs. The creditor is entitled to interest if the proceeds of the collateral and income are sufficient to pay capital and costs. Reservation of title creditors are regarded as secured creditors but financial lease creditors are owners outside the insolvency administration. The South African Law Commission recommended that financial lease creditors should be included in the same way as other secured creditors.

There is a long list of statutory preferences by unsecured creditors.

Features Pertaining to Corporate Rehabilitation

The South African system for corporate rehabilitation still follows the traditional forms.

Judicial management has high threshold for entry (reasonable prospect to become a successful concern). The procedure is only used a few times each year. Existing management is not allowed to continue operating the enterprise, except with the special agreement of the judicial manager. Provision is made for independent administration. Payments are suspended in respect of all creditors. The duration of the suspension must be within reasonable time. Provision is made, with consent by existing creditors, for priority for funding. Annual financial statements are required, but there are no detailed rules for advancement of the process and control. Directors are in theory required to attend meetings. Creditors have voting rights, but there is no provision for a committee of creditors.

There is no provision for a plan as such or objective analysis in the case of judicial management. The court supervised reorganisations make provision for approval of proposals. These reorganisations and judicial management are discussed in some detail below.

Reorganisations

Most large business undertakings in South Africa are owned by companies and not by natural persons. The effective rescue of such companies invariably takes place by way of reorganisations in terms of judicial proceedings. A moratorium is often obtained by applying for

winding up, judicial management or a stay of actions. The winding up or judicial management order or stay of actions is set aside when the court sanctions the proposals.

These proceedings are typically commenced by outside investors, occasionally by creditors, and in some cases, by shareholders of the company or the company itself. The Companies Act applies to such reorganisations. The well-known and tested American Chapter 11 rescue procedure with the debtor remaining in possession is unknown in South African law. So too is the English bankruptcy concept of a “floating charge”. The Standing Advisory Committee on Company Law is presently considering substantial changes to the Companies Act which may well alter the whole approach to corporate rescue.

At common law a composition as a means of reorganising a company is binding only on a person who accepts it. The need arises both for a procedure whereby the company can negotiate with its creditors and members collectively, and for machinery to enable the company to bind all of them to a reorganisation scheme agreed to and decided upon by a majority of them. Sections 311, 312 and 313 of the Companies Act provide such procedures. More particularly, section 311, provides for the reorganisation of companies by way of compromises or arrangements, particularly between the company and its creditors, or any class of them, or by the company and its members or shareholders, or any class of them, or the company and any combination of its creditors and or members, or any class of them.

Three procedural steps are required. First, where a compromise or arrangement is proposed, a person with *locus standi* under the section must bring an application to the High Court to obtain the authority and directions of the court for the summoning of meetings of creditors or members concerned. Second, if the court grants the order, meetings are summoned and held in order to obtain the agreement of the required majority of creditors or members. Third, if the proposal is agreed to by the requisite majority or majorities, the sanction of the court must be sought to the arrangement. In terms of the arrangement a “receiver” is usually appointed whose function it is subject to the overriding control of the court, to implement the arrangement.

Any person can propose an arrangement, but only a person with the necessary *locus standi* can make the application to the court for the summoning of meetings to consider the arrangement. The court has a wide judicial discretion to decide whether or not to grant leave for the

summoning of meetings to consider the arrangement. In exercising that discretion the court will be required to be satisfied that there is a reasonable probability that the requisite majority might approve of the arrangement. The court will, however, not permit meetings to be summoned where the proposed arrangement would operate unjustly against anyone.

The meetings must be summoned in accordance with the directions of the order of court. The notice convening the meetings must be accompanied by a statement explaining the effect of arrangement, the terms thereof, a copy of the court order summoning the meetings and form of proxy enabling a creditor or member, unable to attend the meeting personally, to appoint a representative.

If the "arrangement" which may be of the widest character is agreed to by a majority in number representing three-fourths in value of creditors or class of creditors or a majority representing three-fourths of the votes exercisable by the members or class of members, (as the case may be) present and voting either in person or by proxy, such arrangement, shall, if sanctioned by the court be binding on all the creditors or class of creditors, or on the members or class of members (as the case may be) and also the company or on the liquidator, if the company is being wound up, or on the judicial manager if the company is subject to a judicial management order. The court, before it sanctions the arrangement, must be satisfied that all of the statutory requirements and the terms of the order of court have been complied with. The court's function is not merely to register the decision of the statutory majority. As a general principle the court will regard the members and creditors of the company as being the best judges of what is in their commercial interests and where the majority have, with sufficient information at their disposal, reached their conclusion in favor of the arrangement honestly and without reference to irrelevant considerations, the court will have regard to the wishes of the majority and not concern itself with the commercial wisdom of the arrangement. Implicit in the exercise of the court's statutory discretion to sanction an arrangement, is the power to impose suitable conditions to secure the effective implementation of its terms. No arrangement affects the liability of any person who is a surety for the company arrangement. Debts arising after the arrangement are not covered by it unless express provision is made therefor.

In many cases the arrangement provides for the appointment of a receiver whose function it is to receive payment of moneys and to make pro rata distributions to creditors in terms of the

arrangement. The receiver is the administrative manager of the arrangement whose function it is to interpret and implement its terms. The receiver is often vested with plenary powers regarding the admission and rejection of claims. A distribution account prepared by the receiver pursuant to the arrangement must lie open for inspection by interested parties. The arrangement binds the receiver to distribute moneys paid to him by way of dividends to those creditors whose claims he has admitted.

Out of Court Rehabilitation

South Africa has no formal non-bankruptcy workouts or restructuring guide-lines. Such matters are dealt with on an ad hoc basis. The out-of-court arrangements are only binding on consenting parties. Where this is not possible it becomes necessary to resort to courts and the procedures discussed under the heading reorganisations above are utilised. Most, if not all, large reorganisations or restructurings take place pursuant to court orders.

Nature of Rehabilitation Negotiations

In both out of court and in court workouts in dealing with debt renegotiation parties mostly deal with debt compromising with or without debt re-scheduling and frequently also engage in and allow debt forgiveness and write-off with or without debt to equity conversions.

Recognition of Formal Rehabilitation

The process of formal rehabilitation through insolvency is recognised and implemented provided this was done under and in terms of section 311 of the Companies Act as set out above. Unfortunately, this process, as the law now stands, is somewhat cumbersome.

Once formal rehabilitations have been sanctioned by the courts it acquires the status of an order of court and the results of such rehabilitations are invariably good.

Judicial Management

Although most countries have enacted their business rescue regimes within the last 20 years South Africa did so as early as 1926. This was done when judicial management was legislated into existence by the South African Companies Act of 1926. In theory judicial management is a most effective rescue tool. However, it has not often been resorted to in recent times in South Africa. According to the Master only once or twice each year.

Judicial management is aimed at obtaining a moratorium and obviating a company being placed in liquidation where by proper management or by proper conservation of its resources, the company will be able to meet its obligations and remove any occasion for winding-up, and become a successful concern. Judicial management takes place pursuant to an order of court and upon the application of the company itself, one or more of its creditors, or by one or more of its members or jointly by any one or all of these parties.

The overriding consideration, which will influence the court in deciding whether or not to grant a judicial management order, is whether a reasonable prospect has been shown by the applicant that the company will be able to surmount its present difficulties and become a successful concern.

When a company is placed under judicial management its directors are divested of their powers and a judicial manager is appointed. The judicial manager acts under the direction of the court and must run the company's business in such a manner as he deems most economic and beneficial to the interests of the members and creditors of the company. The judicial management order usually provides for a moratorium so as to give the company a breathing space. Any moneys received by the judicial manager must be applied by him in payment of the costs of the judicial management and claims of post-judicial management creditors, and only then, in so far as circumstances permit, in payment of the claims of pre-judicial management creditors.

If the judicial management is successful, the judicial manager must apply to court for the cancellation of the judicial management order and for directions for the resumption of the management and affairs of the company. If, on the other hand, it appears to the judicial

manager that the judicial management is unsuccessful, he must apply to court for the cancellation of the judicial management order and for an order winding up the company.

INSTITUTIONAL FRAMEWORK

The High Court has jurisdiction. There are no specialised insolvency courts or judges. A high level commission recently rejected submissions that insolvency courts should be instituted. The independence of the courts are guaranteed by the Constitution. Many persons involved in the insolvency administration business are of opinion that specialised insolvency courts are desirable. The liquidation procedures are carried out under the supervision of the Master, who is a civil servant. The Master has fourteen offices spread across the country. There have been allegations of corruption, but steps are taken continuously to curb this.

REGULATORY FRAMEWORK

There is no statutory body for the control of insolvency administrators. Many of the administrators are attorneys or accountants who are subject to discipline by their statutory professional bodies. The Association of Insolvency Practitioners of Southern Africa (AIPSA) is a voluntary association which represents the vast majority of insolvency administrators. AIPSA has a code of conduct and disciplines its members. The council is not at present independent of its members, but is striving to comply with requirements, such as impartiality, in order to qualify as a statutory body. A person with interests opposed to the general interests of creditors, a person related to the insolvent within certain degrees, an auditor of a company, etc, is disqualified from being appointed as insolvency administrator.

In terms of the proposals by the South African Law Commission a person who is not a member of a professional body recognised by the Minister responsible for Justice will not qualify to be elected or appointed as insolvency administrator. The Minister may, according to the proposals, from time to time publish the name of a recognised professional body if it appears to the Minister that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member is a fit and proper person to be appointed as insolvency administrator and meets acceptable requirements for education and practical experience and training.

Insolvency administrators lodge insurance bonds to the satisfaction of the Master to guarantee the proper performance of their duties. Liquidation and distribution accounts are scrutinised by the Master and advertised for inspection. The Master refuses to appoint insolvency administrators who fail to fulfil their duties and can apply for court orders to force the administrators to comply with legal requirements.

SECURED CREDIT (NON BANKRUPTCY PROCEDURES)

Secured Credit in Real Property

Debts owing to banks and other lending institutions and debts owing in respect of immovable properties are typically secured by mortgage bonds over real estate.

The documents which evidence the aforementioned transactions are the mortgage bonds themselves or a formal notarial bond document or suretyship documents from third parties.

Mortgage bonds are registered in the office of the Registrar of Deeds as are notarial bonds over movables whilst other forms of security are recorded in written documents that are retained by the parties.

There is no limitation on foreigners taking security.

Secured claims are enforced in liquidation by the creditor submitting his claim to the insolvency administrator who will thereafter proceed to realise the secured property and pay over the net proceeds to the secured creditor.

Security in Personal Property

The types of business debts, which are typically secured by personal property, are commercial loans and trade debts.

The principal documents evidencing such a transaction is the notarial general bond over movables or cessions of receivables.

Notarial general bonds over movables are registered in the office of the Registrar of Deeds. No specific formalities are required to perfect cessions of book debts and there are no central register relating thereto.

As a general rule for a party to have a lien or pledge he must be in possession of the debtor's property. This, however, does not apply to a lien arising in terms of the Merchant Shipping Act, 57 of 1951, where special provisions apply. Similarly special provisions apply to security in respect of the financing of the purchase of aircraft by South Africans.

There are no limitations on foreigners taking security.

The enforcement and realisation of secured claims in respect of movables or personal property is dealt with in substantially the same way as the enforcement and realisation of secured claims over immovable or real property and is as described above.

Unsecured Claims

Other than self-help which is frowned upon there are no "non-judicial collection techniques" available in South Africa.

Prior to obtaining a judgment for the recovery of the debt an unsecured creditor has limited access to the property of the debtor. The remedies available include:

- Mareva type injunctions;
- The arrest of an absconding debtor;
- A sequestration order.

Once judgment is obtained, unsecured creditors may have the debtor's property attached and sold at a judicial sale in execution. No special procedures apply to foreign creditors who have full access to the domestic courts on domestic claims, subject only to the provision of security for costs. South African courts also enforce foreign judgments in appropriate cases. The length

of time to obtain a judgment and the cost of obtaining the judgment will depend upon the amount of the debt and the particular court in which proceedings are taken for enforcement and much will depend upon whether the claim is disputed or not. In the case of undisputed claims judgment by default may be obtained in a very short time whilst in the case of disputed claims litigation may take anything from one to three years from the date of issue of summons to the obtaining of a judgment.

PRIMARY NEEDS TO IMPROVE THE SYSTEM OF CREDIT AND INSOLVENCY PROCEDURES

The credit system does not seem to require improvement of a material nature. One aspect worth considering is a central register relating to the cession of receivables.

In my view the major problems experienced with insolvency administration can be related to lack of professionalism of some insolvency administrators and some insolvency regulators. The recommendations in the report of the South African Law Commission will address most of the problems with procedures and practical problems, but not the question of dedicated insolvency judges or insolvency judges in the existing commercial courts. There is, of course, room for debate regarding many policy decisions reflected in the report of the Commission.

The models for company rehabilitation are in need of a review, but the Department of Trade and Industry has indicated that this will receive attention soon.

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