

LESOTHO

WEBBER NEWDIGATE FIRM OF ATTORNEYS



FIRM INFORMATION

Website address: www.webbernew.com
Languages spoken: English
Address: 2nd Floor, Metropolitan Life Building, Kingsway, Maseru, Lesotho
Contact: Albertus Kleingeld
Telephone: +27 51 430 1340
Email address: ajk@webberslaw.com

TYPE OF GOVERNMENT

Democracy

POLITICAL SYSTEM

Based on the English system

LEGAL SYSTEM

Roman Dutch Law

TESTS FOR INSOLVENCY

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

In terms of section 125 of the Companies Act of Lesotho 18/2011 ("Act"), a company will be said to be insolvent if the company is unable to pay its debts or if 75% of the issued share capital has been lost.

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

Lesotho does not have financial distress procedures in place but has a judicial management system. In terms of section 156 of the Act, if it appears to the court that by reason of mismanagement it is desirable to issue such an order the court will place the company under judicial management.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Lesotho has one formal insolvency procedure for a company, namely liquidation which is initiated by way of an application to the High Court.

Formal restructuring procedures

There are no formal restructuring procedures in Lesotho. The closest restructuring procedure that is available is that of judicial management which is initiated by way of an application to the High Court. This procedure is used as a result of the mismanagement of the company, and if there are prospects to trade the company out of its difficulties.

Informal insolvency and restructuring procedures

Although not commonly used in practice, it is possible to follow an informal distribution plan if all creditors are willing to cooperate.

LIQUIDATION

What is the aim of liquidation?

It is a process used to close a business and sell what it owns in order to pay its debts for the benefit of its creditors.

Process required to commence a liquidation

A liquidation in Lesotho is initiated by way of an application to the High Court brought by either the Registrar of Companies, the company itself (acting through its board of directors), a shareholder, any director of the company or a creditor of the company. The company through its board of directors should pass a resolution of the ordinary majority for an application to be brought. This procedure is set out in section 125 of the Act.

At what point does the liquidation process commence?

In terms of section 125(4) of the Act, the liquidation process commences on the date on which the court makes an order to place the company in liquidation.

Duration of the liquidation process

The duration of the liquidation process depends on the magnitude of the company and usually takes about a year to complete, from start to finish.

Extent of court involvement in the liquidation process

After the order is granted by the court to place the company into liquidation, the court plays no further role in the liquidation process. From this point onwards, the Master of the High Court becomes involved in the process.

Management of the company whilst in liquidation

According to section 128(1)(a) of the Act, the liquidator maintains custody and control over the company's assets. However, and in terms of 128(1)(b) of the Act, the directors of the company remain in office but cease to maintain the powers, functions or



duties that they would ordinarily have to manage the company other than those powers, functions or duties required, or permitted to be exercised, in terms of the liquidation provisions of the Act. The directors must, however, deliver the books, records and documents of the company to the liquidator within a reasonable time. If the books, records and documents are not delivered within a reasonable time, the liquidator can bring an application to court to compel compliance.

Filing of claims

Formal claim forms are to be presented to the Master of the High Court 24 hours before the first meeting of creditors, at which meeting the claims are adjudicated.

Factors which influence the period of the administration in a liquidation

The magnitude of the company, coupled with any litigation brought against or by the liquidators, are factors that may delay the finalization of the liquidation process.

Effect of liquidation on employees

As at the date of the commencement of liquidation, contracts of employment are immediately terminated. Employees are given preferential treatment for their claims to the extent of M100.00 only. For the remaining amount due they have a concurrent claim.

Effect of liquidation on contracts

The liquidator may decide to either terminate or maintain certain contracts. It is within the liquidator's discretion.

Effect of liquidation on shareholders

Shareholders may vote at the creditors' meetings and may make proposals at meetings of creditors and shareholders. Shareholders can make proposals on any matter. A creditor may make a proposal regarding the proper distribution of the proceeds.

Effect of liquidation on creditors

Creditors may vote at the creditors' meetings and may make proposals at meetings of creditors and shareholders. The creditors may make proposals in respect of the distribution of the proceeds of the estate.

Pending claim, litigation and arbitration

The liquidator may elect to proceed, settle or withdraw any pending litigation or arbitration proceedings that were initiated at the instance of the company. The same applies to pending proceedings brought against the company.

Voidable transaction

Section 140 and 141 of the Act set out the instances in which transactions concluded prior to the commencement of liquidation may be set aside. This arises when the transaction was entered into a year prior to liquidation, when the company received no consideration or benefit for such transaction, when the company was unable to pay its debts, when the transaction was entered into when an obligation was incurred knowing that the company was unable to perform the obligation or if the company became unable to pay its debts as a result of the transaction.

How is the liquidation process terminated?

Section 152 of the Act states that liquidation proceedings will have been completed when the liquidator files a final account with the Registrar of Companies. Further, the court can also decide to terminate liquidation proceedings following an application made to court by a prospective buyer of the company in which a dividend is paid to creditors (if it is accepted by creditors).

Director or officer liability

Directors and officers will be held personally liable for fraudulent transactions up to the value of the transaction or up to the damages suffered by the company as a result of the fraudulent transaction. A director or officer will be civilly liable through a civil action to the court.

Consequences of director or officer liability

Civil consequences

If a director received any advantage from a transaction that he or she concluded on behalf of the company at a time when he or she was a director of the company, an application can be brought to court by shareholders, the liquidator or any other person who suffered loss, to cancel any such transaction. Although the act does not make provision for the consequences relating to the cancellation of the transactions, a civil action would have to be instituted against the director. Where the director did not fulfil his fiduciary duty, he may also be held personally liable. In terms of section 63(3) of the Act, the directors, including former directors, may be individually liable to the company, its shareholders and any other person, for any loss suffered by the company.

Criminal consequences

The Act makes provision for offences and penalties. Where a director makes false or misleading statements or fraudulently conceals or destroys any property of the company, he commits an offence and may be subject to a fine of M500 000.00 or to imprisonment for 20 years, or both. Where a director intends to defraud or deceive another person he or she commits an offence and is liable on conviction to a fine of M20 000.00 or to imprisonment for a term of 3 years, or both.

JUDICIAL MANAGEMENT

Process required to commence judicial management

An application may be made to court by a shareholder, director or creditor to place a company under judicial management.

At what point does the judicial management process commence?

The judicial management process commences when an order to that effect is granted by the court.

Duration of the judicial management process

The duration of the judicial management process is largely dependent on the circumstances of each company. The Act does not make provision for a specific time frame within



which the judicial management process should be completed. However, the Master of the High Court in consultation with the creditors requires the process to be completed within a reasonable time, failing which the creditors may bring an application to court for the liquidation of the company.

Extent of court involvement in the judicial management process

The court is not that involved in the judicial management process. The court places the company under business administration and appoints the judicial manager and thereafter the Master of the High Court is responsible for overseeing the administration process.

Management of the company while under judicial management

According to section 128(1)(a) of the Act, the judicial manager has custody and control over the company's assets. Furthermore, in terms of section 128(1)(b), the directors remain in office but cease to have the powers, functions or duties that they would ordinarily have, other than those required or permitted to be exercised in terms of the provisions of the Act. The directors must, however, co-operate with the judicial manager and deliver the books, records and documents of the company to the judicial manager. The time period for the delivery of such books and records is the same as with liquidation.

Filing of claims

There is no formal process determined by the law for the filing of claims in a judicial management process. The process is informal - claims can (but do not need to) be submitted to the judicial manager, in any form, provided they are supported with documents which indicate that a claim exists. If claims are submitted, the judicial manager will either accept or reject the claim. If a claim is not submitted, the judicial manager will determine what the claims is against the company.

Factors which influence the period of judicial management

The Act does not make provision for the time period in which the judicial management process should be complete and for this reason there are no factors which influence the time period of the judicial management procedure.

Funding of the company whilst under judicial management

For the duration of the judicial management process, the company is funded by the income that it generates. In terms of Lesotho's laws, a judicial manager is not permitted to borrow money for the purpose of funding the company whilst it is under judicial management, unless he or she obtains the approval of the court.

Effect of administration on employees

Employment contracts remain in place and continue to run. The employees do not have a preference for their claims during this period because their employment contracts are not automatically terminated.

Effect of administration on contracts

All contracts that were concluded by the company prior to the commencement of judicial management continue and remain of full force and effect. The judicial manager steps into the shoes of the directors and he or she does not have greater powers than what the board of directors had before the company was placed into judicial management.

Effect of administration on shareholders

The commencement of the judicial management process has no effect on the shareholding of the company. The shareholders retain their shares in the company and they are free to sell them as they would be entitled to in the ordinary course of the company's business.

Effect of administration on creditors

Creditors can submit historic claims to the judicial manager. These would then be paid, either in part or in full, as agreed to between the creditor and the judicial manager. Creditors cannot enforce their claims against the company by way of any legal proceedings.

Pending claims, litigation and arbitration

All judicial actions already instituted or to be instituted against the company are stayed.

Effect of the moratorium

During a company's judicial management, no creditor or person can act legally against the company without the permission of the court. The permission of the court must be obtained by way of an application to court.

Voidable transactions

Application can be made to court by the judicial manager to cancel a transaction concluded within one year prior to the commencement of the judicial management.

Administration plan

A judicial management plan must be submitted to the Master of the High Court and the judicial manager must advise the court within 6 months of the date on which the judicial management plan is submitted to the Master of the High Court, whether or not he or she believes that the company can be revived.

Voting on plan

During judicial management, the judicial manager formulates a plan so that the company can continue to trade and the plan is not voted on by any of the stakeholders of the company. It is merely submitted to the Master of the High Court, and if approved by the Master of the High Court, it is implemented by the judicial manager.

Cram down on creditors

On the basis that no vote is cast in respect of the judicial manager's plan, there is no cram down on creditors per se. However, the terms of the plan are binding on the creditors of the company whether they agree with the terms or not.



Implementation of the plan

A payment schedule is submitted to the Master of the High Court for approval where after the judicial manager gives effect to the plan.

Discharge of claims

The claims of creditors are paid out in accordance with the schedule submitted to the Master of the High Court. Whether or not the claims of creditors are paid in full, pursuant to the plan, the creditors are not entitled to enforce any remainder of their claim that is due to them, against the company.

Effect on suretyships

Suretyship agreements remain intact and are not affected by the plan. The judicial management provisions of the Act contain no provision preserving a creditor's right against the surety and therefore the common law would have to be applied.

How is the process terminated?

The judicial management process is terminated after application is made to court and with the court granting an order for the termination of the proceedings, or if the company is subsequently placed in liquidation.

What is the status of the company after judicial management?

If the judicial manager pays out the claims of creditors in accordance with the schedule of payment and the court hands down an order terminating the judicial management process, the company will continue to trade.

Director or officer liability

Directors and officers will be held liable for fraudulent transactions. The same provisions (as set out above) that are applicable to director and officer liability pursuant to liquidations are applicable during judicial management.

Consequences of director or officer liability**Civil consequences**

If a director received any advantage from a transaction that he or she concluded on behalf of the company at a time when he or she was a director of the company, an application can be brought to court by shareholders, the judicial manager or any other person who suffered loss by the company to cancel any such transaction. The same provisions (as set out above) that are applicable to director and officer liability pursuant to liquidations are applicable during judicial management.

Criminal consequences

A director may be charged with fraud or offences provided for in the Act. The same provisions (as set out above) that are applicable to director and officer liability pursuant to liquidations are applicable during judicial management.

SECURITY**Types of security**

In Lesotho, mortgage bonds, pledges, general notarial bonds and cessions as well as guarantees and suretyships are available to lenders as security for their loans.

Taking of security

Mortgage Bonds - Security over immovable property can only be obtained by way of a special mortgage bond registered over immovable property. The procedure for registration is set out in the Deeds Registry Act and the bond must be registered in the Deeds Registry. A mortgage bond does not transfer title of the mortgaged property to the mortgagee. The mortgagee only has a limited right over the immovable property. When the mortgagor defaults on payments of the mortgage bond, the mortgagee may sell the property in execution and the proceeds that were recovered may be applied to reduce the outstanding debt.

Pledge - A pledge is a mortgage over movable property given by a borrower in favour of a lender. For a pledge to be valid and effective the pledged movables must be delivered to, the lender. No registration is required.

General Notarial Bond - A general notarial bond is a mortgage by a borrower over all its tangible movable property in favour of a lender. A general notarial bond does not make the lender a secured creditor. The general notarial bond confers a limited statutory preference over the claims of concurrent creditors. In order to be effected the notarial bond must be registered in terms of the Deeds Register Act.

Cession by way of Security - Security over intangible movable property is created by way of a cession over such assets in favour of a creditor. A cession can either take up the form of a cession in securitatem debiti where title to the property remains with the cedent and an out and out cession, where title to the property is transferred to the cessionary, subject to the cedent's right to have the property ceded back to it by the cessionary once the debt and/or other obligations that it secures, are discharged. No registration is required.

Guarantee or Suretyships - This is not real security and one only creates a personal right.

Security trustees or special purpose vehicles

It is uncertain whether security can validly be created in favour of a trustee acting as a trustee for a group of lenders. This is not commonly used in Lesotho.

Most robust form of security available to lenders

The most robust form of security available to lenders is a special or general notarial bond over movable property. An out and out security cession is the most robust form of security when intangibles are applicable. It removes ownership of the secured asset from the debtor and can be disposed of outside the liquidation process.

Stamp duty

Stamp duties are applicable in Lesotho and the tariffs are regulated by the Stamp Duty Act as amended from time to time.



Registration costs

The costs for the registration of mortgage bonds are regulated by tariffs as prescribed under the Deeds Registry Act and the Regulations thereto.

Requirements for the assignment or transfer of security

The transfer of a mortgage bond or a notarial bond is done by way of a cession and registered by the Registrar of Deeds in terms of the Deeds Registry Act. The party responsible for paying the registration fee is the mortgagor. There are no registration costs applicable when it comes to pledges or cessions.

Instances in which securities might be vulnerable to attack

Voidable transactions can be set aside by the liquidator or judicial manager when a company is placed in liquidation or under judicial management.

Methods of enforcement of security

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

The pledgee must realise his/her security through a court order authorising the sale and execution of the secured asset.

In some cases, the secured creditor can agree with the borrower that the secured assets are sold without the need for judicial execution (known as *parate executie*). An agreement of *parate executie* over movables that were pledged and delivered is valid, but there should be no prejudice to the secured provider. An agreement of *parate executie* over immovable property is invalid. However, it is not advisable to execute in this manner, one should rather approach the court for the execution of movable property.

Problems experienced when enforcing security

The following problems are experienced when enforcing security in Lesotho:

- Competing secured claims which require their priority or ranking to be determined by a court;
- Delays in obtaining court orders for attachment due to backlogs at the High Court and the unavailability of judges;
- Delays in court messengers or deputy sheriffs attaching and executing on sales because of the lack of an official relative to the work load and as a result of poor administrative systems; and/or
- Property having been disposed of prior to attachment (especially with movables).

Financial assistance requirements

A company may provide financial assistance either directly or indirectly to a person for the purpose of the acquisition of its own shares.

RECOGNITION OF FOREIGN JUDGEMENT

Instances in which your court will recognize a foreign judgment

If the foreign judgment is applicable to a person or company domiciled in Lesotho, the courts of Lesotho may recognize such a judgment.

Requirements for recognition of a foreign judgment

In order for a foreign judgment to be recognized, an application would need to be brought to the High Court. Certified copies of the pleadings in respect of the matter and a certified copy of the judgment would need to be attached to the application to court.

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

The process to recognize a foreign trustee, business rescue practitioner or insolvency practitioner is the same as that for the recognition of a foreign judgment.

