INSOLVENCY IN LESOTHO AND REALITIES AND CHALLENGES

The paper narrates an overview of insolvency in Lesotho with the aim of unlocking challenges necessary for development of viable and investment friendly policy formulation. This is even more necessary against the background of regional integration of economies of Southern African Development Community (SADC) member states; encouraging and facilitation of trade in African and globally; promotion of certainty and ease of legal and regulatory framework for amongst others, attracting foreign direct investment.

Lesotho is one of the fifteen (15) SADC countries, that is completely surrounded by the Republic of South Africa. Lesotho has a dual legal system – Customary Law and the Roman-Dutch Law. Customary law came as a result of uniform adherence to traditional practices. Many of these practices became written rules and became known as Laws of Lerotholi.

The Received Law of the Cape became the Common Law of Lesotho through Section 2 of Proclamation 2B of 1884 which proclamation also recognized the existence of customary law of the Basotho.

Lesotho became a British Protectorate on the 12th March 1868 and a number of Proclamations were enacted which to this day form part of Lesotho’s legal and regulatory framework despite Lesotho attaining her independence on the 4th October 1966.

The Insolvency Proclamation No. 51 of 1957 and Administration of Estates Proclamation No. 19 of 1935 are still pieces of legislation in force in Lesotho. These
laws are clearly antiquated as the world and global economies have undergone a major socio-political and economic transformation that ushered in:

a) Integrated economies through expansion of multi-national corporations.
b) Technologically driven forms of providing goods and services.
c) Liberal and dynamic means of adopting processes that promote corporate efficiencies\(^1\).
d) Conscious and accelerated reform of corporate law that seek to promote
   
   (i) Simple and practical procedures necessary for compliance with legal framework including insolvency.
   
   (ii) Transparency in the way business is conducted in order to attain international best practice corporate governance.
   
   (iii) Certainty and predictable legal and regulatory framework.

In recognition of the dynamism and modernity of business structures and need for reform that seeks to be compatible and answers the needs of the economies and ways of doing business with less complexities as possible, Lesotho repealed the Companies Act No.25 of 1967 and enacted the Companies Act No.18 of 2011 which came into law on the 2\(^{nd}\) May 2012.

However, the challenges are still there as the applicable Insolvency Rules to liquidation are still to comply with the Insolvency Proclamation 1957. Section 124(3) of the Companies Act 2011 provides that:

“In applying rules of the law of insolvency in liquidation a claim by an unsecured creditor admitted by a liquidator shall be treated as if it were a debt proved in accordance with the requirements of the Insolvency Proclamation 1957 or any other law relating to insolvency.”

In terms of the Insolvency Proclamation the acts of insolvency are:

\(^1\) Corporate efficiency is about a shift in company law from the unflexible framework of the capital maintenance regime to the regime base on “solvency and liquidity”. Davis D et al. Companies and other Business Structures in South Africa Oxford University Press.1\(^{st}\) Ed.2009.Page9.
a) Where a person leaves Lesotho or absents himself therefrom or departs from his dwelling or otherwise absents himself, with the intent to evade or delay the payment of his debts.
b) Where the debtor has no sufficient disposable property to satisfy the judgement.
c) Where there is demand from debtor and the debtor fails to show that he has sufficient property to satisfy the judgement.
d) Where a person makes and or attempts to make any disposition of any of property to the prejudice of his creditors or preferring one creditor above another.
e) Where a person removes any of property to the prejudice of his creditors or preferring one creditor above another.
f) Where a person makes or attempts to make an arrangement for release of any of property to the prejudice of his creditors or preferring one creditor above another.
g) Incomplete and or Incorrect publication of surrender of assets by a person.
h) Where a debtor files notice of indebtedness to the creditors.
i) Where as a trader, the debtor gives notice of indebtedness to the creditors that he is unable to pay his debts.

In terms of Section 9(1) of the Proclamation, “A creditor (or his agent) who has a liquidated claim for not less than R100.00 (one hundred rands), or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than R200.00 (two hundred rands) against a debtor who has committed an act of insolvency, may petition the Court for the sequestration of the estate of the debtor.”

Where a final order of sequestration (including an order on acceptance of surrender) has been served upon the insolvent, the insolvent shall:

a) Deliver to the sheriff or his lawful deputy all the records relating to his affairs

---

2 Person includes both natural and juridic person
3 Section 2 of the Proclamation provides that “disposition” means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release compromise, donation or any contract therefore, but does not include a disposition in compliance with an order of the Court.
4 Act of Insolvency – Section 8 of the Insolvency Proclamation.
b) The insolvent is to lodge within seven (7) days of the Order a statement of his affairs which statement shall include:

- Assets and Liabilities register
- Immovable Property
- Any movable property whatsoever
- Outstanding Claims, bills bonds and other securities
- List of creditors
- Movable assets pledged hypothecated, subject to a right of retention or under attachment in execution of a judgement
- Enumeration and description of every book in use by the debtor at time of notice of surrender or sequestration, or at the time when he ceased carrying on business
- Detailed statement of causes of debtor’s insolvency
- Personal information
- Affidavit confirming the truthfulness and completeness and fair estimates of the balance sheet

In terms of Section 19 the sheriff has a right to take into his custody on receipt of the sequestration order all the books of accounts, invoices, vouchers, business correspondences, cash, share certificates, bonds, bills of exchange, promissory notes, and other securities, and remit all such cash to the Master.

- He shall also store all movables other than animals in a room or suitably sealed place or appoint a suitably sealed place or appoint a suitable person to hold any movable property in his custody
- A copy of the inventory shall be handed to the person appointed to receive the order, with the Notice that the property has been attached by virtue of a sequestration order, which Notice shall contain a statement of the offence constituted by Section 142 (removing or concealing property to
defeat an attachment or failure to disclose property) and the penalty provided therefore.

The effect of sequestration of the estate of an insolvent shall be: [Section 20 of the Proclamation]

a) To divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and when trustee is appointed to vest the estate in him.
b) All civil proceedings by or against the insolvent are stayed save such proceedings as may, in terms of Section 23 (the section deals with rights and obligations of insolvent during sequestration).
c) A sheriff whose duty is to execute any judgement given against an insolvent becomes aware of sequestration order – the sheriff is to stay execution, unless the Court directs otherwise.
d) To empower the insolvent, if in prison for debt, to apply to the Court for his release, after the notice to the creditor at whose suit he is so imprisoned, and to empower the Court to order his release, on such conditions as it may think fit to impose.

“The additional effect of the sequestration of separate estate of one of two(2) spouses who are living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of trustee, to vest in him all the property…”

There are exceptions to the above provision and to mention but one is that the above shall not apply where property has been acquired by that spouse through a marriage settlement. It should be noted that this provision shall also not apply where it may later
be proved that there was collusion between parties to the divorce and the resulting disposition was to defraud and or prejudice creditors.

The question then to ask is whether the Insolvency Proclamation 1957 is in harmony with business reforms geared towards positive responsiveness to the needs of the business community.

Paragraph 2 of the Statement of Objects and Reasons of the Companies Act No.18 of 2011 reads:

“The Bill provides a structure for the organization and operation of companies; and impose minimum formalities yet capable of meeting diverse needs and circumstances of the business. It further clarifies the relationship between companies their management organs and shareholders as well as the rights and obligations of the shareholders and directors.”

Section 125(1) of the Companies Act provides that:

A company shall be put into liquidation by order of Court upon application by the Registrar, the company, a shareholder, a director or creditor of the company if the Court –

a) Determines that the company is unable to pay its debts, or;

b) Is satisfied that 75 percent of the issued share capital of the company has been lost or has become useless for the business of the company.

The effect of commencement of liquidation – Section 128
a) The company’s assets shall be in the custody and control of the liquidator.
b) The directors shall remain in office but cease to have powers, function or duties other than those required or permitted under liquidation process.
c) No legal proceeding may commence or continue against the company or in relation to its property, or exercise or enforce a right or remedy over or against property of the company, unless the liquidator otherwise agrees or the Court otherwise orders.
d) A person shall not enforce against a liquidator a lien over books, records or documents of the company.
e) Unless the Court orders otherwise, shares in the company shall not be transferred.
f) An alteration shall not be made to the rights or liabilities of a shareholder of the company and to the articles of incorporation of the company.
g) A shareholder shall not exercise a power under the articles of incorporation of the company or this Act except for the purposes of liquidation process.

Section 128(2) provides that the above provisions do not affect the right of a secured creditor to take possession of, and realise of otherwise deal with the property of the company over which that creditor has preferential right by virtue of any mortgage, landlord’s legal hypothec, pledge or right of retention or any charge.

Section 134(1) of the Act provides that:
The primary duty of a liquidator is to take all reasonable steps necessary to take possession of, protect, realise and distribute the assets or the proceeds of the realisation of the assets of the company to its creditors,
and if there are surplus assets, to distribute them or the proceeds of the realisation of the surplus assets in accordance with this Act and the articles of incorporation.

The Act provides for pooling of assets of related companies and the following requisites are to be met for the Court to grant such an order: 

Section 142(2) of the Act

a) The extent to which the related company took part in the management of the company in liquidation.

b) The conduct of the related company towards the creditors of the company in liquidation.

c) The extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company.

d) Such other matters as the Court deems fit.

Judicial management may be viewed as but a novel way of ensuring continuity of a business where there is belief that the assets of the company are being misapplied or misused (section 156 of the Act).

In the instance of Lesotho, completion of liquidation cases and other commercial cases are now possible after the establishment of the Commercial Division of the High Court and enactment of the High Court (Commercial Division) Rules No. 91 of 2009.

The major challenge is still with the office of the Sheriff. They do not proactively seek completion of execution where assets are attached. Practitioners have to prepare and ensure that sales in execution do take place. There is currently no clear regulatory framework governing sheriffs and the arbitrary nature under which they exercise their functions makes it difficult for aggrieved party(ies) to seek satisfactory remedy/ies. In the case of NORSAD Agency v G.M.T Civils (Pty) Ltd and 2 Others CCT/90/2009 (unreported)
The 1st Defendant was loaned funds for expansion of its business. The 1st defendant became indebted to Plaintiff in the amount of ZAR 3, 889 556.00. The immovable property of the Defendants were specially executable in terms of the agreement between the parties.

The first sale in execution took place in November 2010 and the second execution is yet to take place as at the writing of this paper. This is but a classical example of why there is need for reform in order to hold the sheriffs accountable for delays in conclusion of sales in execution. The law regulating prescription to wit: Prescription Proclamation No. 6 of 1861 is out of touch with reality and modern ways of doing business and therefore urgent need for its repeal.

The paper seeks to open dialogue necessary for meeting the objectives of INSOL Africa Round Table to wit:

1) To facilitate a high level dialogue on insolvency reform in Africa with key stakeholders, including private sector practitioners, regulators and policymakers, thereby encouraging reform experiences to be shared and challenges to be discussed frankly;

2) To elevate insolvency reform on the African policy agenda; and

3) To encourage insolvency policymakers and professionals to establish an annual forum to stimulate discourse and learning across the region.

---

5 The writer has “first hand” information relating to this case as the law firm she practices at are Attorneys for the Plaintiff.

6 INSOL World – First Quarter 2012 at Page 30
References
INSOL World First Quarter 2012 Laws
1. Administration of Estates Proclamation No. 19 of 1935
2. Companies Act No.18 of 2011
3. Insolvency Proclamation No.51 of 1957
4. Prescription Proclamation No.6 of 1861

Cases
Norsad Agency V G.M.T Civils (Pty) Ltd & 2 Others CCT/90/2009
Unreported. Lesotho

Paper Prepared by Attorney: Tiisetso Sello-Mafatle
For presentation and discussion at INSOL Africa Round Table in Nairobi-Kenya September 7 – 8 2012


She has a wide range of experience ranging from mining, financial institutions and manufacturing. She holds Bachelor of Arts Degree in Public Administration and Sociology and LLB both from The National University of Lesotho (NUL); LLM in Mercantile Law specialising in International Investment Law, Company Law and Advanced Contract from University of the Free State (UFS) (South Africa).