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BANKRUPTCY LAWS OF SOUTH AFRICA

*Richard A. Gitlin & Timothy B. DeSieno**

I. INTRODUCTION

In recent years, the economy of the Republic of South Africa has undergone a difficult transition.¹ Although the economy is driven by well-developed industrial, commercial, and agricultural sectors,² it has grown at a sluggish pace, and the growth has been marked by high levels of unemployment.³

It is in the context of this economic environment that the Heavy Duty Equipment Manufacture Company ("Heavy Duty"), a privately owned company formed under the Companies Act No. 61 of 1973⁴ (as amended, the "Companies Act"), is currently facing financial difficulties. Heavy Duty specializes in manufacturing heavy industrial machinery, and it has had a difficult time due to a slow down in orders for new equipment. Indeed, the balance sheet of Heavy Duty indicates that the company is insolvent, with a negative equity of \$1.75 million.⁵ The members (the registered shareholders) of Heavy Duty are unwilling to provide further

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1. The focus of this discussion will be on the bankruptcy laws of the Republic of South Africa. The bankruptcy/insolvency laws in Botswana, Lesotho, Namibia, Swaziland, Zambia, and Zimbabwe are substantially similar to those in South Africa.

2. Industrial production accounts for forty percent of GDP, while agriculture accounts for five percent of GDP. See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 390 (1995).

3. In the last few years, the economy absorbed less than five percent of the more than 300,000 workers entering the labor force annually. See *id.* at 390; see generally PRICE WATERHOUSE, DOING BUSINESS IN SOUTH AFRICA 15-17 (1991).

4. § 1 *et seq.* of Companies Act, No. 61 of 1973 (BSRSA 1994)(S.Afr.)(as amended) [hereinafter Companies Act].

5. According to the balance sheet, the total asset value of Heavy Duty is \$7.75 million and the total liabilities amount to \$9.5 million.

capital, and the creditors are concerned that the business cannot survive or even compete with other firms in the industry in light of its financial problems.

The following discussion will focus on how the South African bankruptcy process works in cases of companies in Heavy Duty's position.

II. STRUCTURES AVAILABLE FOR RELIEF OF INDEBTEDNESS

In South Africa, relief from indebtedness for companies is governed by the Companies Act.⁶ Under the Companies Act, such relief can take three forms: (i) liquidation (known in South Africa as "winding-up") either by order of the court or by voluntary resolution of members, (ii) reorganization by means of a court-sanctioned "compromise" or "arrangement," and (iii) operation of the company's business under judicial management.⁷

A. *Winding-up*

The most common form of debt relief in South Africa is a winding-up via court order, and the winding-up proceeding is ordinarily commenced by a creditor or a group of creditors.⁸ Of course, the Companies Act also provides that the members can voluntarily wind-up the affairs of the business.⁹

In order to commence a winding-up proceeding in court, creditors, members, or Heavy Duty itself would file an application in the provincial or local division of the Supreme Court, and the court would decide whether the petition states sufficient grounds for liquidation.¹⁰ For creditors, Heavy

6. See Companies Act § 1 *et seq.*

7. Although bankruptcy procedures for a company are largely governed by the Companies Act, procedures for an individual or partnership are governed by the Insolvency Act No. 24 of 1936 (as amended). See generally § 1 *et seq.* of Insolvency Act No. 24 of 1936 (JSRSA 1995)(S.Afr.)(as amended) [hereinafter Insolvency Act]. The Companies Act states, however, that certain provisions of law relating to insolvency apply *mutatis mutandis* to any matter not specifically provided for by the Companies Act. Companies Act § 339. For example, the order of priorities established by sections 95 through 104 of the Insolvency Act applies to a company's bankruptcy. Insolvency Act §§ 95-104.

8. Companies Act § 343.

9. *Id.* §§ 343(2)(b), 346(c).

10. See D.H. BOTHA ET AL., CORPORATE LAW ¶¶ 30.09, 30.23-30.58 (H.S. Cilliers & M.L. Benade eds., 1987) [hereinafter CORPORATE LAW].

Duty's inability to pay debts would serve as the primary ground on which a final liquidation order would be issued.¹¹

As soon as the court issued a winding-up order, Heavy Duty would no longer be under the control of its managing directors, but would be in the hands of a Master¹² until a provisional liquidator is appointed.¹³ The provisional liquidator would preside over the affairs of the company until a final liquidator is appointed.¹⁴ After the appointment of a provisional liquidator, the Master would convene a meeting of creditors and a separate meeting of members for the purpose of nominating the final liquidator.¹⁵ If different persons are nominated in the separate meetings, the Master would make the decisive appointment.¹⁶

In practice, the Master regularly appoints as liquidator the person whom the secured creditor supports. Given the prevalence of secured credit, the secured creditor would ordinarily hold enough debt to control the creditors' vote. Once appointed, the liquidator, operating in the name of the company, takes possession of the assets, collects debts of the company, pays creditors, and distributes any remaining surplus pro rata among the members.¹⁷ Once the process of liquidation is complete, the company is dissolved.¹⁸

South African secured creditors of course have enforcement mechanisms other than liquidation available to them under the terms of their contracts and under applicable law. However, these remedies typically include the filing of a summons in an attempt to reach a judgment. The debtor can often successfully delay the summons process,

11. A company may be wound up by the court if it is unable to pay its debts. Companies Act § 344(f). A company is deemed to be unable to pay its debts if (1) the company neglects, after receiving a demand for payment, to pay or secure the debt to the "reasonable satisfaction of the creditor;" (2) a judgment is returned by the sheriff because the sheriff did not find enough "disposable property" to fully satisfy that judgment; or (3) the court finds that the company is unable to pay its debts. *Id.* § 345; *see also* CORPORATE LAW, *supra* note 10, ¶ 30.36.

12. Companies Act § 429. "Master" is defined as a court-appointed official charged with administering the bankruptcy proceedings. *Id.* § 1.

13. *Id.* § 429. Appointment is usually within twenty-four hours of the entry of an order for relief. CORPORATE LAW, *supra* note 10, ¶ 31.08; *see also* Companies Act § 429.

14. CORPORATE LAW, *supra* note 10, ¶ 31.08.

15. *Id.* ¶ 31.05.

16. *Id.* ¶ 31.10.

17. Companies Act § 391.

18. *Id.* § 419.

and it can be quite a while before the creditor obtains judgment. Accordingly, in practice, creditors (at least those whose debts are not the subject of a *bona fide* dispute) normally prefer to place the debtor into liquidation proceedings.

B. Reorganization

The second form of relief is a reorganization under section 311 of the Companies Act.¹⁹ Although relatively rarely used, section 311 provides a

19. *Id.* § 311. Section 311 provides, in relevant part, that:

“(1) Where any compromise or arrangement is proposed between a company and its creditors . . . or between a company and its members . . . , the Court may . . . order a meeting of the creditors or class of creditors, or of the members of the company or class of members . . . to be summoned in such manner as the Court may direct.

(2) If the compromise or arrangement is agreed to by —

- (a) a majority in number representing three-fourths in value of the creditors or class of creditors; or
- (b) 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 at the meeting, such compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members (as the case may be) and also on 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. . . .

(4) If the compromise or arrangement is in respect of a company being wound up and provides for the discharge of the winding-up order or for the dissolution of the company without winding up, the liquidator . . . shall lodge with the Master a report in terms of section 400(2) and a report as to whether or not any director or officer . . . is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities . . . under any provision of this Act, and the Master shall report thereon to the Court.

(5) The Court, in determining whether the compromise or arrangement should be sanctioned or not, shall have regard to the number of members or members of a class present or represented at the meeting referred to in subsection (2) voting in favour of the compromise or arrangement and to the report of the Master referred to in subsection (4). . . .

great degree of flexibility in designing reorganizations, which may include compromises with creditors and more broad-sweeping arrangements in which a company's capital structure is restructured through a composition or arrangement.²⁰ The reorganization can include a merger or a take-over,²¹ and creditors can be paid out of the proceeds of the sale of the company.²² Quite often, a reorganization is proposed and implemented by parties who have purchased some or all of the claims against the company. Heavy Duty could select any one or more of these options in seeking to assemble and propose a reorganization.

Procedurally, in cases such as Heavy Duty's, a reorganization can only be proposed after the commencement of winding-up proceedings. Once such proceedings have commenced (i.e., once the court enters an order for relief), there is a stay against creditor actions.²³ The stay affords an opportunity for any interested party to propose a reorganization for Heavy Duty. The proponent of the reorganization for Heavy Duty would submit its proposal to the liquidator who would seek to determine whether Heavy Duty's creditors and members would support the proposal. If the liquidator believed that enough parties would vote for the proposal, he would present it to the court. If the court agreed that the prescribed majority of interested parties were going to accept the proposal, it would order a vote.²⁴ The court would order the liquidator to convene a meeting of creditors and a meeting of members at which the parties will vote on the proposal.²⁵ If the proposal divides creditors and members into various classes, then each class must have a separate meeting.²⁶

(8) In this section 'company' means any company liable to be wound up under this Act and the expression 'arrangement' includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods."

Id.

20. See CORPORATE LAW, *supra* note 10, ¶ 21.08.

21. See 1 HENOCHSBERG ON THE COMPANIES ACT 604 (Philip M. Meskin et al. eds., 5th ed. 1994) [hereinafter HENOCHSBERG].

22. *Id.*

23. CORPORATE LAW, *supra* note 10, ¶ 30.22.

24. *Id.* ¶ 21.14.

25. Companies Act § 311(1).

26. See HENOCHSBERG, *supra* note 21, at 609. Classification is first based on the dissimilarity of rights and obligations, and secondly on the basis of "common interests." See CORPORATE LAW, *supra* note 10, ¶¶ 21.09, 21.10. Creditors, for example, are often classified into "secured," "preferent," or "concurrent" classes, which is the order of priority

A class of creditors accepts the scheme if a majority in number representing three-fourths of value of those present (or voting by proxy) vote in favor of it.²⁷ A class of members accepts the scheme if three-fourths of the votes exercisable by those present (or voting by proxy) vote in favor of it.²⁸ If a class does not accept the proposal, it cannot be imposed upon the class. However, rejection of the proposal by a class does not preclude acceptance by other classes and the proponent may still seek to implement the terms of a proposal that govern the claims (or interests) of accepting classes.

No proposal to reorganize Heavy Duty would be binding on any party until the court sanctioned it. The court's decision to sanction a proposal is guided, in part, by the Master's report and by the results of the classes' votes.²⁹ The court does not merely rubber stamp the decision of the voting parties. Rather, it too must be satisfied that the proposal should be approved. In analyzing this issue, the court would consider whether the proposal is reasonable and fair, whether the parties who considered the proposal were adequately represented, whether such parties had adequate information on which to base their decisions, etc.³⁰ Once the court sanctioned the proposal, it would be binding on all parties in the classes who accepted it, including parties who voted to reject and those who did not vote.³¹

C. Judicial Management

The third form of relief is that of judicial management. A creditor, member, or Heavy Duty itself can petition the court to grant an order that vests management control in the hands of a judicial manager, who operates the company's business under the supervision of the Master.³² The court will grant such an order if (i) mismanagement is found to be a major factor in Heavy Duty's inability to pay debts, and (ii) there is a "reasonable probability" that, if placed under judicial management, Heavy Duty will be able to meet its obligations and become a successful concern.³³ Judicial

under the Insolvency Act. *Id.* ¶ 21.12. These terms will be discussed further in part III.

27. Companies Act § 311(2).

28. *Id.*

29. *See id.* § 311(5).

30. *See* HENOCHSBERG, *supra* note 21, at 622-23.

31. Companies Act § 311(7).

32. *Id.* at 429.

33. CORPORATE LAW, *supra* note 10, ¶ 29.08.

management is similar in many respects to Chapter 11 of the United States Bankruptcy Code, inasmuch as it provides a company a chance to obtain a relatively longer stay against creditor action and an opportunity to restructure its business.³⁴ Judicial management is rarely used in South Africa, however, given, among other things, the requirement that the company must quickly be able to satisfy its existing obligations as they become due.³⁵ Such a requirement normally requires the support of a significant source of financing for troubled companies, which is not ordinarily available in South Africa.

Of course, Heavy Duty can agree with its creditors on an out-of-court reorganization as well. While an out-of-court agreement has its advantages, including increased speed and lower cost, practical reality in South Africa makes such agreements relatively rare and relatively short-term when they do exist. For example, fraud in business remains a significant problem in South Africa.³⁶ Consequently, creditors are generally concerned that their borrower may be misleading them and that they may not be sufficiently informed about the borrower's true financial condition to enter into an out-of-court agreement. Instead of assuming these risks, creditors would prefer to place their debtors into bankruptcy if they are not receiving payment.

On the other hand, upon the commencement of bankruptcy proceedings, a liquidator is immediately appointed. The liquidator is a professional whose name must appear on the official list of professionals admitted to act in such capacity,³⁷ and is vested with significant and powerful investigatory responsibilities.³⁸ The liquidator typically examines the debtor under oath soon after the entry of an order for relief. To date, persons under interrogation have not been able to invoke their privilege against self-incrimination, although their statements have been deemed made *in camera* and have not been disclosed to prosecutors.³⁹ The

34. See generally 11 U.S.C. § 362 (1995).

35. See CORPORATE LAW, *supra* note 10, ¶ 29.33.

36. John Mason, *News: International: Big company frauds detected only by chance*, FIN. TIMES, May 17, 1996, at 3 (citing the Ernest & Young 1996 International Fraud Survey).

37. See CORPORATE LAW, *supra* note 10, ¶ 31.08.

38. Companies Act § 386.

39. S. AFR. CONST. ch. 4, §§ 25(2)(c), 3(d)(interim constitution)(as amended), *repealed* by Constitution of the Republic of South Africa, Act 108 of 1996 (JSRSA 1996)(effective Jan. 1, 1998). Given South Africa's recent adoption of a written constitution incorporating a bill of rights, however, South African courts are currently struggling with the constitutionality of this provision. A *Constitutional Struggle*, LAW INT'L, June 1995, at 6, available in LEXIS, World Library, Curnws File.

examination covers all aspects of the debtor's business and financial affairs, and provides all interested parties with a much clearer picture of the company's financial position than they could have had beforehand. Creditors in South Africa generally prefer to negotiate a reorganization (or simply pursue a liquidation) based upon such information.

In South Africa, creditors, particularly large secured creditors, ordinarily are in a position to determine whether a company in financial difficulty can negotiate such an out-of-court restructuring and, if bankruptcy proceedings are commenced, to select the form of debt relief. If a creditor is not receiving payment from its debtor, and the creditor believes that it is better to liquidate the debtor's assets rather than enter into a compromise or other out-of-court agreement with the company, the creditor can file a petition seeking to commence liquidation proceedings.⁴⁰ Once the court enters an order for relief and the Master convenes the first creditors' meeting, the large secured creditor can significantly influence the nomination of a liquidator. The winding-up process could then proceed to resolution as the creditor desired. However, if the company or a third-party "rescuer" proposes a reorganization, the large secured creditor will either have a significant vote in considering the plan (if all creditors are classified together) or be able to veto the proposal as it affects the secured creditor's claim (if the secured creditor is in a class of its own).⁴¹

In the case of Heavy Duty, the bank lenders, hold claims of sufficient value (approximately 53% of the total liabilities) to thwart any proposed reorganization, even assuming all of the creditors are grouped into one class.⁴² Even if all 50 suppliers voted in favor of the proposal (representing a majority of creditors in number), they would lack the requisite claim value to meet the provisions of section 311 of the Companies Act. Indeed, in Heavy Duty's situation, the bank lenders (depending on the extent and nature of their collateral) would likely choose to liquidate their collateral, and no party would likely be able to stop them.

III. PLAYERS INVOLVED IN OBTAINING RELIEF

The court plays a significant supervisory role in each of the various forms of relief. The court of course plays a critical role in deciding

40. See generally Companies Act §§ 343, 346.

41. Insolvency Act § 119(7); see CORPORATE LAW, *supra* note 10, ¶ 21.14.

42. According to the balance sheet, the bank lenders hold \$5 million in claims; the suppliers hold \$3 million; retirees hold \$250,000; the taxing authorities hold \$1 million; and the owners hold \$250,000.

whether to grant an order that initiates a winding-up proceeding. If a reorganization is proposed under section 311 of the Companies Act, the court determines whether the proposal should go to a vote. The court also has the final say in deciding whether to sanction the proposal. In the case of judicial management, the court generally supervises the operation of the company and determines whether the company is likely to be able to meet all of its existing obligations.

The role of the Master is to assist the court in the administrative aspects of supervising the proceedings, both in the case of winding-up proceedings and judicial management.⁴³ For example, once the court issues a final liquidation order,⁴⁴ the Master is the first person who seizes control of the company and summons the first meetings of creditors and members where a liquidator is appointed.⁴⁵ The Master is ultimately responsible for the appointment of a liquidator.⁴⁶ However, even after a liquidator is appointed the Master retains a supervisory role, making sure that the liquidator is properly performing his or her duties.⁴⁷ In the case of judicial management, it is the Master who actually supervises the judicial manager in the day-to-day management of the company.⁴⁸

Other than in the case of judicial management, where the judicial manager and the Master are by far the most significant players, the liquidator is the most important player in South African bankruptcy proceedings. The liquidator is selected at the first meeting of creditors,⁴⁹ and presides over all such meetings thereafter.⁵⁰ In the case of a winding-up, the liquidator is charged with collecting the company's assets, reducing them to money, and distributing the money to creditors and members in accordance with the statutory provisions.⁵¹ In the case of a proposed reorganization, the liquidator is charged with (i) circulating the proposal and all relevant information to creditors, and (ii) presiding over the meeting at which parties in interest vote on the proposal and reporting the results of the voting to the court.⁵² Further, if a reorganization is accepted by the

43. Companies Act § 1.

44. *Id.* § 427.

45. *See id.* §§ 369, 429.

46. *Id.* §§ 379, 438(3).

47. *See id.* § 381; *see* CORPORATE LAW, *supra* note 10, ¶ 31.19.

48. Companies Act § 428(3).

49. *Id.* § 369.

50. *Id.* § 386.

51. *Id.* § 391.

52. *See id.* § 312; *see also* CORPORATE LAW, *supra* note 10, ¶ 21.14.

parties in interest and sanctioned by the court, the court ordinarily appoints the liquidator as the "Receiver for Creditors," i.e., the person charged with implementing the reorganization.⁵³

Regardless of whether a reorganization is proposed, it is the liquidator who reports to the court and the creditors on the affairs of the company, contests creditors' claims (which are generally filed at the second meeting of creditors), and examines the corporate conduct of directors and officers.⁵⁴ The liquidator's work also includes pursuing actions to undo prejudicial transfers of property, fraudulent conveyances, or collusive disposition of assets.⁵⁵

Of course, the company's members and creditors are also significant players in the bankruptcy proceedings, especially if a reorganization is proposed. Another significant player is the party who proposes any such reorganization (which may be a third party). Each of these groups participates in the negotiations that leads to the formation of the proposal. Then the creditors and the members vote on whether to accept the proposal.

Each of the players are ordinarily represented by professionals including attorneys and accountants. Except in the case of the liquidator and the "liquidating creditor,"⁵⁶ the players pay for their professional advice themselves. The liquidator and the liquidating creditor are reimbursed out of the estate for the cost of professional advice in amounts approved by the court.⁵⁷ The liquidator is also paid out of the estate.⁵⁸ The amount of the liquidator's fee is regulated by the Insolvency Act.⁵⁹

IV. PRIORITIES AMONG CREDITORS

Claims against a South African insolvent company's estate fall into one of three general categories: (i) "secured" claims, i.e., claims which are secured by an interest in property, (ii) "preferent" claims, i.e., claims that

53. See generally Companies Act § 386.

54. See Companies Act §§ 400, 386(4); see also CORPORATE LAW, *supra* note 10, ¶¶ 31.26, 31.31.

55. Companies Act §§ 400, 386(4); Insolvency Act, §§ 26(1), 29(1), 30(1), 31(1); see also CORPORATE LAW, *supra* note 10, ¶¶ 31.54, 31.58-31.61.

56. The "liquidating creditor" is the creditor who successfully commenced the winding-up proceedings. See Companies Act §§ 343(2)(a), 346(c).

57. *Id.* § 384; Insolvency Act § 63.

58. Insolvency Act § 63.

59. *Id.*

are entitled to a payment priority over other claims under applicable South African law, and (iii) "concurrent" claims, i.e., general unsecured claims.⁶⁰ Sections 95 through 104 of the Insolvency Act apply to a company's bankruptcy and establish the precise priorities of such claims.⁶¹ The following is a list of the priorities established by the Insolvency Act:⁶²

I. Secured claims (including interest on such claims)⁶³

II. Preferent claims:

- a. Funeral and death-bed expenses⁶⁴
- b. Costs of sequestration (administration of the estate)⁶⁵
- c. Costs of execution (against property)⁶⁶
- d. Statutory obligations (all such claims rank *pari passu*):⁶⁷
 1. Certain amounts due under the Workmen's Compensation Act, 1941
 2. Certain amounts due under the Income Tax Act, 1962
 3. Certain amounts due under the Pneumoconiosis Act, 1962
 4. Certain amounts due under the Customs and Excise Act, 1964
 5. Certain amounts due under the National Supplies Procurement Act, 1970;
 6. Certain amounts due under the Sales Tax Act, 1966
 7. Certain amounts due under Value-Added Tax Act, 1991
 8. Certain amounts due under the Community Development Act, 1966
 9. Certain amounts due under the Unemployment Insurance Act, 1966
 10. Certain amounts due from an insolvent in its capacity as an employer, in respect of pension contributions, medical insurance, sick leave, or other insurance funds

60. *See id.* § 94.

61. Insolvency Act §§ 95-104.

62. *See* CATHERINE SMITH, *THE LAW OF INSOLVENCY* 239-49 (1973).

63. Insolvency Act § 95.

64. *Id.* § 96.

65. *Id.* § 97.

66. *Id.* § 98.

67. *Id.* § 99.

- a. Salary or wages of former employees of the insolvent⁶⁸
- b. Taxes on persons or the incomes or profits of persons⁶⁹
- c. Claims secured by a general mortgage bond⁷⁰

III. Concurrent (also called "non-preferent") claims which are timely proved⁷¹

IV. Concurrent claims which are proved late⁷²

V. TREATMENT OF SECURED CREDITORS

In general, the secured creditor has tremendous control of the bankruptcy process in South Africa. First, if a secured creditor is not receiving payment in accordance with its contract, it can place its debtor into liquidation proceedings in the confidence that neither its claim, nor its lien or mortgage, will be affected without its consent, at least not for very long. Despite the automatic stay of all creditor action upon the entry of an order for relief, the debtor's assets are thereafter liquidated quite quickly. Second, even if somebody proposes a reorganization, the secured creditor will be able to veto the proposal in most cases (at least inasmuch as the proposal purports to affect the secured creditor's claim or collateral) if it does not find the terms satisfactory.⁷³ In either event, the secured creditor will have received the proceeds of its collateral, or will have agreed to a reorganization it finds satisfactory within a matter of days, or weeks at most.

For these and several further reasons, secured creditors generally prefer bankruptcy proceedings to their non-bankruptcy remedies and out-of-court negotiations. First, fraud is prevalent in business, and creditors benefit from the information-gathering powers of the bankruptcy liquidator.⁷⁴ Second, the foreclosure process is difficult for the secured

68. *Id.* § 100.

69. *Id.* § 101.

70. *Id.* §§ 102, 103(2).

71. *Id.* § 103.

72. *Id.* § 104.

73. *Id.* § 119(7).

74. *See generally* Mason, *supra* note 36.

creditor and is easy for the debtor to delay.⁷⁵ Finally, there is no concept of self-help in the South African system, and the secured creditor's access to its collateral, even if the collateral is movable property,⁷⁶ is only through a court,⁷⁷ and can be quite slow.

VI. POTENTIAL PERSONAL LIABILITY

Directors, officers and promoters can be found liable in connection with the bankruptcy of their company on any of several grounds. Among the most significant are (i) liability for breach of fiduciary duty (e.g., misappropriation of the company's property and other forms of self-dealing), and (ii) liability for fraudulent conduct of business (e.g., intent to defraud creditors or reckless trading—incurring debts at a time when the manager knew, or when a reasonable manager should have known, that such debts could not be repaid). In the former case, the manager can be ordered to return the property to the company's estate, along with interest as ordered by the court.⁷⁸ In the latter case, the manager can be found liable for some or all of the debts of the company.⁷⁹ In both cases, the manager is subject to criminal investigation, and, if found guilty (especially of actual fraud), may serve time in jail under applicable criminal law.⁸⁰ A director found liable under any of these laws is disqualified from serving as a director in any company, until such time as a court of competent jurisdiction orders otherwise.⁸¹

It is often the case that the liabilities imposed on a manager under these laws lead to his or her insolvency and the need for "sequestration."⁸² However, once the sequestration proceedings have commenced, the manager is again prohibited from serving in elected office until that manager is rehabilitated.⁸³ In this context, the manager can be

75. *Id.*

76. *See generally* Insolvency Act. In fact, there is no central filing system for movable property in South Africa, and creditors are often unsure of who has an interest in which property of the company.

77. *See id.* §§ 17, 19.

78. Companies Act § 423.

79. *Id.* § 424.

80. *Id.* § 426(1).

81. *See id.* § 219; CORPORATE LAW, *supra* note 10, ¶ 31.71.

82. Insolvency Act § 9. "Sequestration" is the South African term for the liquidation of the estate of an insolvent natural person. *Id.*

83. Companies Act § 219.

rehabilitated only if either the court grants a rehabilitation order⁸⁴ or ten years passes after the sequestration of his or her estate.⁸⁵

Nevertheless, with the exception of cases of clear-dealings, in practice, it is very difficult to prove that managers are liable under these provisions. The statutes require that the manager be shown to have engaged in the wrongful or reckless acts "knowingly,"⁸⁶ a standard which is quite difficult to meet.

84. Insolvency Act § 129. "Rehabilitation" includes obtaining a discharge for debts incurred before the sequestration and removal of the prohibitions (such as against serving as a company's director) that have been imposed. *Id.*

85. *Id.* § 127A.

86. Companies Act § 424(3).