Dealing with assets in South Africa

Hillary Plaatjies reports on the recognition of foreign representatives by South African courts to deal with assets In South Africa

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Due to the increase in international trade and investments on the worldwide markets, trade and movement of assets across borders are now more frequent. As a result thereof, cross-border insolvencies are becoming more frequent.

Cross-border insolvency law primarily deals with situations where an insolvency procedure is initiated in one jurisdiction, in relation the property of a debtor who is situated in another jurisdiction.[1] The law of insolvency on the one hand, and the conflict of laws on the other, (Private International law) must be considered.

A question which is increasingly imposed is whether an order made by a foreign court, appointing a foreign representative, will be recognised by a court in South Africa and what steps must be taken by the foreign representative to deal with assets of the debtor in South Africa.

In South Africa, the common law system dealing with Private International Law and precedent must be applied in cross-border insolvency matters. The statutory position will come into effect, once the cross-border Act[2] comes into full effect. The Cross-border Insolvency Act was enforced on 28 November 2003.[3] This Act is based on the UNCITRAL Model Law on cross-border Insolvency. Its purpose is to provide an effective mechanism and to create a modern legal framework to address cross-border insolvency proceedings and to regulate co-operation between foreign courts. South Africa also built an element of reciprocity into the cross-border provisions. No countries have been designated whose insolvency court orders would be reciprocally recognised in South Africa and the Act[4] cannot be implemented until the Minister of Justice has designated the foreign states to which the Act will apply.

Cross-border insolvency is invoked by States using either a territoriality approach or the universality approach. The territoriality approach seeks to protect local assets for the benefit of local creditors. It confines the insolvency proceedings to the jurisdictional limits of the country in which the assets and debts are located[5]. The universality approach supports co-operation between states when dealing with multinational corporations. The universality approach treats cross-border insolvency as a single matter to ensure equal treatment to creditors from different jurisdictions and to which the courts of other countries would give their assistance.

South Africa is not a party to any international convention or treaty on Cross-border insolvency. Unless the situation is governed by a treaty or legislation, the common law principles and precedent regarding recognition of a foreign representative in South Africa is applicable. The common law regulates recognition of foreign representatives by South African courts.

Property as defined in the Insolvency Act[6] includes all types of movable and immovable property situated in South Africa. In South African Insolvency Law, the property is vested in the trustee by a sequestration as provided for in section 20 of the Insolvency Act[7]. In a liquidation, the company remains owner of its property and the liquidator obtains control of that property.[8] The common law draws a distinction between immovable and movable assets. In the case of movable assets, the principle is that the foreign representative may claim any movable property without first having to obtain recognition. The movable assets are deemed to be vested in the foreign trustee and recognition is deemed to be a formality.

A foreign representative who wants do deal with immovable property must first obtain recognition by the courts. The law of location of the property (*lex rei sitae*) applies in respect of immovable property and recognition must be obtained by the court where the property is situated.

In *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd*[9] the court held that a foreign representative of a legal person who wants to deal with movable property, immovable property or incorporeal property in South Africa must apply for recognition to the High Court of South Africa. The court held that a recognition of a foreign liquidator is in the discretion of the court but dependent on considerations of comity, convenience and equity. The South African courts exercise their discretion when hearing such an application based on comity, convenience and equity. If recognition is refused by a South African court, a foreign creditor may apply for a sequestration or winding-up of the estate in the jurisdiction.

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Request for recognition by foreign representatives to South African courts

Foreign representatives have no *locus standi* to deal with any property in South Africa belonging to a debtor, or sue, or defend actions for the company under provisional or final liquidation unless they apply to the South African court for recognition.

It has been submitted that a foreign representative who seeks recognition from a court must satisfy the court of his appointment, but this will not be done by just submitting a letter of request as required by previous legislation. Application must be made by the foreign representative to a division of the High Court in South Africa having the necessary jurisdiction, where the assets are situated.

The discretion of the court as to whether it should grant recognition of a foreign representatives is absolute. However, in practice, the discretion is granted in the interest of comity, convenience and equity. In *Ward v Smit: in re: Gurr v Zambia Airways Corporation Ltd*[10] it is stated that the court has wide discretion to recognise or not and would strive to protect local creditors if desirable to do so.

In practice, application for formal recognition has been put into a principle. The recognition order in these instances is a declaratory order regarding the foreign representative entitlement to administer the assets as if they were in the relevant jurisdiction where his authority derives from. It is also submitted that a foreign provisional representative should not be recognised where it is uncertain if his appointment will become final but the court has a discretion in these instances. In some instances, the court will be reluctant to grant recognition to a foreign representative if he is a provisional trustee and not sure if he is going to be the final trustee. South African courts lean towards the territoriality approach and will protect the interest of local creditors.

The court may impose conditions, for example a notice to interested parties to be published in the Government Gazette and local newspapers. The court may also request the foreign representative to provide appropriate security to the Master of the High Court.

Conclusion

The Cross-border Insolvency Act 42 of 2000 cannot come into effect because of the Minister of Justice's failure to designate certain states which are to enjoy its terms. This act does not provide assistance to a South African insolvency representative or agent who institute insolvency proceedings against a debtor who also has assets or business in a foreign jurisdiction. To achieve such reciprocity, the foreign state would need a similar act in which South Africa is a designated state.

The Cross-border Insolvency Act, when implemented, will only be applicable to designated countries. Due to this system of designation, the South African law will in future follow a dual approach to recognition of foreign bankruptcy orders[11] in that the foreign representatives of designated countries will follow the procedure of the Cross-border Insolvency Act, whilst those representatives from non-designated countries will still have to follow the general route that is based on common law and precedent. ■

Footnotes:

1 Meskin Insolvency Law 17.1
2 Cross-Border Insolvency Act 42 of 2000
3 By proclamation no R73 of 2003 published in GG 25768 of 27 November 2003
4 Cross-Border Insolvency Act 42 of 2000
5 Smith & Ailolo (1999) 11SA Merc LJ192
6 Section 2 of Insolvency Act, Act 24 of 1936
7 Act 24 of 1936
8 Section 361 of the Companies Act
9 1998 (3) 175 (SCA)
10 1998 (3) SA 175
11 Michele Oliver and Andre Boraine, University of Pretoria

> **THE SOUTH AFRICAN LAW WILL IN FUTURE FOLLOW A DUAL APPROACH TO RECOGNITION OF FOREIGN BANKRUPTCY ORDERS**