

RAIL WORKING GROUP

workshop 1 September 2015

DEFAULTING AND INSOLVENT DEBTORS

presenter:
CLAIRE VAN ZUYLEN



BG Bowman Gilfillan
AFRICA GROUP

ANTANANARIVO
CAPE TOWN
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Integrity,
quality,
consistency.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Existing forms of security over rolling stock – reservation of title, special notarial bond.
- Default usually takes two forms:
 - Ordinary breach by debtor (eg non-payment)
 - Insolvency (liquidation or bankruptcy)
- “Self help” clauses to by-pass the court in foreclosure actions usually permitted under South African law in relation to incorporeal movable assets – not usually in the case of corporeal movables (vehicles, equipment, rolling stock) which are in the possession of the debtor.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Ordinary Breach
- Special notarial bond:
 - A notarial bond usually provides that creditor can simply take possession of secured rolling stock and then sell them as per agreed mechanism.
 - If debtor, in breach of agreed terms of the notarial bond, refuses to allow possession to be taken, an order of the High Court is required to take possession of the rolling stock.
 - Rolling stock must be sold by agreed mechanism. Debtor has the right to apply to the High Court for relief if the creditor is disposing of assets in a prejudicial manner.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Ordinary Breach
- Reservation of Title:
 - Notice of breach and of cancellation of agreement must be sent to the debtor
 - A court order is required to take possession of the rolling stock.
 - Rolling stock must be sold by agreed mechanism. Debtor has the right to apply to the High Court for relief if the creditor is behaving in a prejudicial manner.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Breach on insolvency
- General
 - South African insolvency law applies if a South African registered company / debtor is liquidated regardless of the “choice of law” clause in security documentation.
 - South Africa is currently regarded as having the most predictable and creditor-friendly insolvency regime in Africa.
 - Foreign creditors in a South African winding up are not treated any less favourably than local creditors.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Breach on insolvency - liquidation
 - On liquidation, the estate is frozen until a final liquidator is appointed (can be a few months after liquidation).
 - Corporeal assets subject to security can only be sold with the involvement of the liquidator, either by the creditor or by the liquidator.
 - NB: section 84 of Insolvency Act and reservations of title – asset deemed to be asset of liquidated debtor, and creditor with reservation of ownership deemed to be secured creditor. Current controversy as regards “financial leases”.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Breach on insolvency – liquidation
 - After the sale of asset (notarial bond or reservation of title), even if by the creditor, the creditor would have to pay over the net proceeds to the liquidator and would still have to prove its claim against the debtor in the course of the liquidation proceedings and then await the liquidation and distribution account to be finalised (which could be some months after the sale).
- Alternatives:
 - Liquidator agrees to let the creditor to “take over” the security on the basis that he releases his claim fully or partially against the estate accordingly, and pays the liquidator’s fees.
 - Liquidator agrees to pay creditor an “interim dividend”. NB: provision of guarantee.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Breach on insolvency - bankruptcy
- Business Rescue
 - Moratorium as soon as Business Rescue ensues.
 - Intended to last 3 months, but can be extended by court order.
 - Business Rescue Practitioner (“BRP”) supervises the board.
 - Aim to trade back to solvency or achieve better dividend for creditors than in liquidation
 - Company in BR cannot sell assets unless in ordinary course of business, or per approved Plan, or with consent of BRP (must be arms length).
 - Creditors cannot enforce and only get paid through Business Rescue after Plan approved.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Breach on insolvency - bankruptcy
- Business Rescue
 - Very controversial “cherry picking” section 136 of Companies Act 2008: BRP can suspend, partially or wholly, or cancel (with court approval) any term of any pre-commencement contract. Thus could retain use of rolling stock while suspending obligation to pay monthly or quarterly instalments/rentals.
 - Post-commencement cancellation of contracts possible but cannot enforce the cancellation with damages or vindication claims due to moratorium.

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

- Restrictions on foreclosing on assets owned by the State or a parastatal?
- Regulatory hurdles for state assets to be secured (Public Finance Management Act)
- If a money judgement: restriction on attaching and selling an asset belonging to the South African government (although does not apply to wholly owned subsidiaries such as Transnet or PRASA): State Liability Act 20 of 1957
 - Restriction recently declared unconstitutional, now amended to allow for attachment of assets after a process unless sale of assets would “severely disrupt service delivery, threaten life or put the security of the public at risk.”

ROLLING STOCK - DEFAULTING DEBTOR: SOUTH AFRICA

•QUESTIONS??



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Contact:

Claire van Zuylen

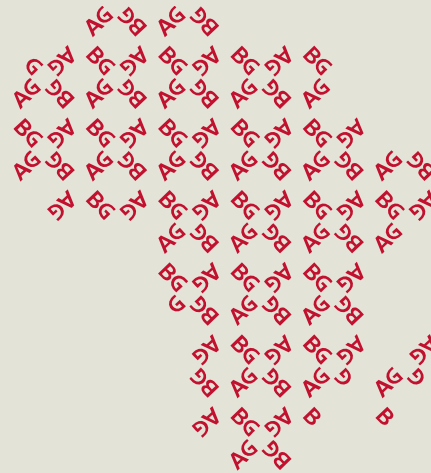
Bowman Gilfillan attorneys

Email: c.vanzuylen@bowman.co.za

Direct landline: +27 11 6699406

Website: www.bowman.co.za

Thank you



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