AN ANALYSIS OF THE CORPORATE RESCUE PROCEEDINGS IN THE ZIMBABWEAN INSOLVENCY ACT (CHAPTER 6:07)

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DEDICATIONS

This work is dedicated to the blessed memory of my Mum and Dad. Thank you so much for believing in me and working tirelessly to secure my future the fruits which I am enjoying today. The seed you planted has now grown into a giant tree in the forest, towering majestically high and ruling a territory.

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It is with gratitude that I acknowledge the love, care and support given by the Queen of my heart during the time of writing this work and always. You have never stood in my way and always allow me to be what I am. I love you

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CHAPTER 1

RESEARCH OVERVIEW

1.1 INTRODUCTION

Insolvency in general terms refers to a person's inability to settle debts and obligations. Robert Sharrock[1] defined insolvency in a rather broader sense by holding that "In common parlance, a person is in insolvent when he is unable to pay his debts. But the legal test of insolvency is whether the debtors' liabilities, fairly estimated, exceeds his assets, fairly valued. Inability to pay debts is at most evidence of insolvency". Before the Insolvency Act (Chapter 6:07), the Zimbabwean insolvency regime was premised in the then Companies Act (Chapter 24:03) which provided for two possible avenues to be followed in the event that a company is financially distressed, viz are winding up and judicial management.

Winding up was the most drastic and was provided for in terms of Section 199 to section 298 of the above said Companies Act. It entailed that a liquidator was to be appointed, whose sole function was to bring closure to all the company's operations, gather all the company's assets, dispose them and thereafter pay the company's creditors in the order of preferential as provided for in terms of the law. The surplus proceeds of the said sale of assets will then be shared amongst the shareholders of the company and ultimately the company was then deregistered.

Judicial management was provided for in terms of Section 299 to section 321 of the Companies Act (Chapter 24:03). It provided for a corporate rescue mechanism wherein an independent third party was appointed to manage the company in a bid to rescue same.

The said regime had a number of deep-seated problems leading to an abandonment of same by the majority of jurisdictions with South Africa abandoning same by the comping into force of the South African Companies Act, Act 71 of 2008. Zimbabwe was however left legging behind up until the 25th of June 2018 when the Zimbabwean Insolvency Act (Chapter 6:07) came into force. The Act brought with it

[1] Hockley's Insolvency Law, 9th Edition, by Robert Sharrock et al, page 3

a “new” corporate rescue mechanism which this paper seeks to analyse. The preceding insolvency law regime was characterised by the following shortfalls;

I. Absence of a legal sanction that made judicial management a preference to liquidation. In the preceding era, a company had the discretion as to which avenue to follow between judicial management and liquidation. Liquidation should always be a last resort considering the socio-economic impact followed by it. This was a major setback that was found in the then the insolvency period.

II. The insolvency era was focused on registered companies and paid a blind eye to the effect that the Zimbabwean economy was evolving to the extent that some unregistered entities like trusts and associations where becoming key players in the economy, whose interests in as far as corporate rescue is concerned should not have been ignored.

III. There were no special skills nor minimum qualifications governing the eligibility of an individual to be appointed to the post of a Judicial manager or liquidator when in essence during the course of liquidation and judicial management, the affairs of the company where left in the sole hands of such an individual. This was very dangerous and prejudicial to companies.

IV. The fact that a company was put in the hands of a single person to manage its affairs was a major hiccup. Corporate rescue is an onerous and important function which requires at least that the appointed judicial manager or liquidator be deputised.

V. The proceedings had a greater inclination towards creditors and ignored completely the fact that corporate rescue should be conducted in a wider spectrum in view of the socio-economic implications associated with winding up.

VI. The proceedings had heavy involvement of the courts making the same expensive and draining the finances of an organisation that is already facing financial ruin.

VII. Companies were at liberty to appoint their own judicial managers and or liquidators a stance which was open to corporate manipulation and potentially prejudicial to the company.

VIII. An appointed judicial manager could also act as the liquidator of the company, a situation which was undesirable for corporate rescue as the judicial manager may act in a biased manner to perpetuate his engagement with the company.

IX. Judicial managers and liquidators were not classified and distinguished. A liquidator could also be a judicial manager and vice-versa.

Corporate rescue, in terms of the Insolvency Act is provided for under part XXIII[2] and is defined to mean proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for, temporary supervision of a company and the management of its affairs, business and property; and a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to sole continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company[3]. From the Act's definition, the new corporate rescue era has the following integral components.

a) To place the company under temporary supervision by a single third party.

[2] Insolvency Act (Chapter 6:07)
[3] Section 121 (1) (b)

b) To suspend claimants' rights against the company or in respect of property in the company's possession.
c) To develop and implement a rescue plan for the company to ensure that the company continues in existence, failure of which, at least to obtain a better return for creditors and shareholders than would have resulted in the case of immediate liquidation.

What the corporate rescue model as envisaged by the Act seeks to achieve is to ensure that there is a continued existence of the company, if that then becomes unattainable, at least creditors and shareholders get a better return. The said paramount consideration is guaranteed by the provisions set out in the Insolvency Act (Chapter 6:07). How the provisions thereof best promote attainment of the intended purpose is however a subject for debate and this paper seeks to explore same to greater heights.

1.2 PROBLEM STATEMENT

Gorven J in *DH Brothers Industries (Pty) Ltd V Karl Johannes Gribintz NO and others*[4] commenting on the South African Corporate rescue provisions held that goods and services are the life blood of an economy and business entities in providing goods and services, generate this life blood. Regulatory provisions are therefore geared up to assist the lifeblood flow as efficiently as possible taking into consideration the formation of companies, their functions, continued existence and how they are revived in the event of financial distress. Zimbabwe like any other nation, needs the continued existence and revival of its economic key players which include companies. This ensures that a robust economy is achieved and the socio-economic interests of the populace are promoted. Accordingly, like any other jurisdiction, Zimbabwe realised the shortcomings of the judicial management system as a corporate rescue mechanism and adopted the novel corporate rescue proceedings as contained in the Insolvency Act (Chapter 6:07). In terms of the Act, corporate rescue proceedings can be initiated mainly by two ways, viz;

a. By a company resolution wherein the directors voluntarily begin corporate rescue proceedings and place the company under supervision in the event

[4] High Court of South Africa, Kwazulu-Natal Division, Pietermaritzburg, Case Number 3878/13

that the board believes that the company is financially distressed and there appears to be reasonable prospects of rescuing the company[5].

b. By way of a court order filed by an affected person in terms of section 124 of the Act.

The above set procedures of initiating corporate rescue proceedings have set regulatory provision in terms of the Act. Our jurisdiction having moved from the judicial management system as a failed mechanism for corporate rescue adopted the new corporate rescue proceedings under the Insolvency Act. This article will analyse the novel corporate rescue proceedings and exhume if the same has managed to bring with it 'new' and plausible corporate rescue elements or its just new wine in old bottles. The article will further propose amendments to the Insolvency Act (Chapter 6:07) in as far as corporate rescue is concerned so as to bring the Act in line with reality and save the ever failing companies and business entities.

1.3 OBJECTIVES OF THE STUDY

This study is aimed at taking a holistic approach in as far as corporate rescue proceedings in Zimbabwe are concerned. It will unpack the Insolvency Act (Chapter 6:07) and analyse all the pertinent provisions of the same. It will further juxtapose the provisions of the Act with the objectives of corporate rescue and the Companies and Other Business Entities Act (Chapter 24:31) a contemporary Act which seeks to regulate companies and other business entities. The main focus will be to draw out and lay bare the shortcomings of the Act and propose tangible solutions which amplifies the proceedings for the betterment of the Zimbabwean economy.

1.4 GUIDING QUESTIONS

1. How effective are the Zimbabwean corporate rescue proceedings?
2. What are the objectives of the corporate rescue proceedings and how best are the objectives preserved by the Insolvency Act (Chapter6:07)?
3. Are the objectives of the corporate rescue proceedings alive to the socio-economic impact of corporate failure in our jurisdiction?
4. Do corporate rescue proceedings strike a balance between the need to resuscitate an ailing entity and rights of third parties?

[5] Section 122 of the Insolvency Act (Chapter 6:07)

5. What are the shortfalls embedded in the corporate rescue proceedings?
6. Do the corporate rescue proceedings accommodate other business entities other than registered companies?
7. How corporate recue practitioners appointed are and what impact does the appointment procedure have on the entirety of Zimbabwean corporate rescue proceedings.
8. What could be the best corporate rescue model for our jurisdiction?
9. How best can corporate rescue proceedings be amplified?
10. Is there a precisely set time frame within which corporate rescue proceedings must be started and finished?
11. To whom is the corporate rescue practitioner answerable in the event of his/her mismanagement of the company?
12. Are the procedures to institute corporate proceedings satisfactory?
13. What is the effect of corporate rescue proceedings on property rights?
14. Who is responsible for developing the corporate rescue plan and is the set procedure satisfactory?

1.5 SCOPE OF THE STUDY

In coming up with this article, the researcher engaged various institutes such as the Master of the High Court's office, corporate rescue practitioners and other individuals involved in corporate rescue proceedings such as legal practitioners specialising in this area. The researcher interviewed a number of individuals from the above said offices and professions. Further and above to that, the researcher also made use of a desk-top approach wherein he inquired on various websites on the anatomy of corporate rescue proceedings in various jurisdictions.

1.6 CHAPTER SYNOPSIS.

1.6.1 Chapter 1

The chapter will discuss the law of insolvency linked to corporate rescue proceedings before the introduction of the Insolvency Act (Chapter 6:07) on the 25th of June 2018. It will outline the shortfalls of the judicial management system which short comings motivated the absorption of the current corporate rescue procedure.

The Chapter will further outline the problem statement and the objectives of the study.

1.6.2 Chapter 2

This chapter will introduce the law of insolvency. It will outline the major tenets and objectives of the law of insolvency and will further discuss whether or not such objectives and tenets where being satisfied before the adoption of the new corporate rescue regime.

1.6.3 Chapter 3

Chapter three will focus on the corporate rescue procedure as set in the insolvency Act. It will basically outline how key procedures under the Insolvency Act.

1.6.4 Chapter 4

This chapter will exhaustively discuss and analyse the corporate rescue proceedings in our Insolvency Act. The chapter will critically analyse each and every key procedure. Laying bare the weaknesses of the procedure. The Chapter will compare our corporate rescue proceedings with those of other jurisdictions. The Companies and Other Business Entities Act shall also be roped into discussion to see if its tenets are advanced by our corporate rescue proceedings.

1.6.5 Chapter 5

The chapter will focus mainly on recommendations. It will outline the shortfalls of the current corporate rescue proceedings and make recommendations as to how best the Zimbabwean corporate rescue proceedings can be amplified.

CHAPTER 2

JUDICIAL MANAGEMENT UNDER THE COMPANIES ACT

2.1 INSOLVENCY AND THE LAW OF INSOLVENCY

The preamble to the Insolvency Act (Chapter 6:07) reads as follows

"An Act for the administration of insolvent and assigned estates and the consolidation of insolvency legislation in Zimbabwe; to repeal the Insolvency Act (Chapter 6:04) and to provide for matters connected with or incidental to the foregoing"

It is pertinent to not that the Insolvency Act (Chapter 6:07) does not contain a definition for the term insolvency regardless of it being an embodiment of laws that regulates issues to do with insolvency. In general terms insolvency refers to a person's ability to settle debts and obligations. Robert Sharrock[6] defined insolvency as follows

"In common parlance, a person is in insolvent when he is unable to pay his debts. But the legal test of insolvency is whether the debtors' liabilities, fairly estimated, exceeds his assets, fairly valued. Inability to pay debts is at most evidence of insolvency".

Section 205 of the repealed Companies Act (Chapter 24:03) laid down circumstances when a company is deemed unable to pay its debts. Such circumstances were as follows;

a) If a creditor, by cession or otherwise to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected the sum or secure or compound for it to the reasonable satisfaction of the creditor; or

[6] Supra

b) If the execution or other process issued; on a judgment, a decree or order of any competent court in favour of a creditor, against the company is returned by the Sheriff or messenger with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so, or

c) If it is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

A person becomes insolvent once a sequestration order is issued against his estate. A sequestration order is therefore the official declaration of insolvency. Once a person is declared insolvent, the law of insolvency automatically comes into operation. Loosely defined, the law of insolvency refers to the body of laws that regulate a sequestrated estate. Primarily the law of insolvency exists to protect creditors[7]. Robert Sharrock propounded that the object of the [Insolvency Act] is to ensure a due distribution of assets amongst creditors in their preferential order. The sequestration order crystallises the insolvent's position, the hand of the law is laid upon the estate, and at once the right of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. In as much as the sequestration is meant for the primary benefit of creditors, it seems the debtor benefits in a way due to the fact that he is relieved from legal proceedings by creditors, he has time to rehabilitate himself and he is freed from all unpaid pre-sequestration debts.

Some writers submit that insolvency is rather a branch of legal procedure other than a branch of mercantile law[8]. This assertion is based on the fact that insolvency is mainly a continuation of judgment execution though in a different format. Catherine Smith in her book[9] held that;

"If a debtor owes money to a creditor which he fails or refuses to pay, the creditor may enforce his rights by having recourse to the courts and eventually, after the

[7] Ex parte Pillay, Mayet v Pillay 1955 (2) SA 209
[8] Hockley's Insolvency Law, 9th Edition, by Robert Sharrock et al, page 4.
[9] The Law of Insolvency, 3rd Edition, page 32

required procedural steps have been taken, causing the attachment and selling in execution of the debtor's assets in order to obtain satisfaction of his, the creditor's claim. Compulsory sequestration of a debtor's estate embodies the ultimate form of execution and results in concarsus creditorum. Instead of piecemeal sales in execution of the debtor's assets at the instance of several execution creditors, all of the debtors' assets rests, on his insolvency, in the master and subsequently, the trustees, for realisation and distribution amongst the general body of his creditors. The same results flow from the voluntary surrender by a debtor of his own estate"

Over the years, insolvency law has evolved to the extent that it no longer focuses primarily on creditors alone. It now includes aspects of corporate rescue. This has the ultimate effect of maximisation of returns for creditors. The creditors would get more if corporate rescue proceedings are undertaken other than that which they might have obtained had the company dived into insolvency right away. It also takes with it rehabilitation of insolvency in the case of natural persons. It further provides for preferential ranking and the procedures to be adopted whilst a corporate is under rescue. This is obviously a positive function which aims at striking a balance between competing interests.

2.2 WHAT ARE THE OBJECTIVES OF INSOLVENCY LAWS?

1. **To assist in the resuscitation of a corporate that would have been otherwise rendered useless by its creditors.**

Insolvency laws are designed in a way that they have a protective force against the condemnation to extinction of an entity going through economic turmoil. Instead of allowing creditors to proceed and finish off an ailing entity, insolvency steps in and sets regulatory procedures to be followed. Such regulatory procedures allow the entity to get back on its feet if possible.

2. **To avoid a "winner grabs all" situation.**

Insolvency laws exists to avoid a situation whereby a single creditor who proceeds against an ailing entity can recoup whatever he finds to recoup to his own satisfaction at the prejudice and expense of all the other creditors. It ensures that all creditors, in their order of preferential gets something in return thereby reducing severability of the negative impact caused by a sequestrated entity on creditors.

3. **To prevent creditors from resorting to self-help.**

In the early stages of insolvency law, under the twelve tables, if a debtor was unable to pay his debts, his creditors could seize him and sell him into slavery (*manusiniecto*) or , it seems, cut his body into pieces. In the latter regard, it was specifically provided that creditors were not to be prejudiced[10]. This was largely an era of self-help with no sane and plausible insolvency law. The current insolvency law is meant to avoid such a kind of a situation and ensures that there are set procedures and regulations to be followed in the event of insolvency and the populace is guided by the same.

4. **To give the concerned individual some breathing space.**

Insolvency laws are designed in a way that gives the debtor some breathing space. Instead of the entity being bombarded with creditors from all angles and being dragged to court. The insolvency laws, by the operation of a moratorium brings all such proceedings to a halt and allows the debtor to restructure and if possible have a rejuvenated start.

5. **To maximise creditors' return should the organisation ultimately fail.**

In as much as insolvency laws are meant for the benefit of the creditors. They do not just roll out on an estate that is already on its verge of collapse to the extent that the creditor's returns are rendered worthless. They seek to ensure that such creditors' returns are maximised by any possible way. This obviously has a positive function to the creditors who in most circumstances will be banks and financial institutions in that it enables same to keep pumping resources into the economy without fear of realising worthless returns in the event that the debtors fail.

6. **Rules to regulate all interested stakeholders whilst insolvency proceedings are underway.**

Since insolvency is a system that consists of different stakeholders, it would have been chaotic if there were no set rules and regulatory provisions to control all the

[10] Hockley's Insolvency Law, 9th Edition, by Robert Sharrock et al, page 5.

parties involved and enlisting how and when certain events in the insolvency proceedings are to be executed.

7. **To detect the symptoms of possible insolvency at an early stage and act upon them.**

Insolvency laws provides for regulatory provisions that assists in the detection of insolvency symptoms and further follows up same by outlining routes that can be followed in the event of same. This allows an entity to be saved from diving into liquidation. An example is contained in section 122 of the insolvency Act (Chapter 6:07) which provides that directors may resolve that a company voluntarily commence corporate rescue proceedings in the event that there are reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company[11].

2.3 CORPORATE RESCUE PROCEEDINGS BEFORE THE INSOLVENCY ACT (CHAPTER 6:07)

Prior to the inception of the Insolvency Act (Chapter 6:07), corporate rescue proceedings were embedded under the judicial management system which was provided for in terms of section 299-321 of the now repealed Companies Act (Chapter 24:03). The origins of the judicial management system in our law remains unclear. The system was adopted in South Africa through the Companies Act of 1926[12]. There are however a number of theories which suggests that the system has its roots in the discussions in the case of *Moss Streamship Company Limited v Whitney*[13] where Lord Halsbury explained that,

"When joint stock companies needed to retain capital, they issued debentures, in order to secure the debenture holders in their rights, the company used of application to court which removed the conduct and guidance of the company from its directors and placed it in the hands of the receiver and the manager."

[11] The South African Courts have unpacked the meaning of the phrase "reasonable prospects". In the case of Oakdene Square Properties (Pty) Ltd and others v Farm Botha's Fonten (Kayalami) (Pty) Ltd and Others 2013(4)SA 539 (SCA) where the court held that reasonable prospect is less than a reasonable probability but more than a mere speculative suggestion. It must be a prospect based on reasonable grounds.
[12] A.Loubser op cit note 3 at 139
[13] (1912) AC 254 at 260

The concept of the appointment of the receiver and manager can somehow be equated to our then process of the appointment of a judicial manager. There are however striking differences in the procedures. The receiver and manager was appointed solely for the benefit of the creditors. The judicial manager however had some other functions which leaned towards corporate rescue.

In the 19th Century, in the United States a system was developed to re-organise financially distressed railroad companies. The system was referred to as the 'Federal equity Consent Receivership'. Through the use of this system, creditors of an ailing railroad company would approach the requisite federal court and show the need to preserve the liquid assets of the corporate. A corporate rescue plan would then be drawn and approved by the court. This procedure has resembling similarities with the judicial management system and was partly codified in the U.S Bankruptcy Act of 1898 under Section 77.[14]

The South African Minister on the reading of the Companies Act Bill in February 1923 made mention that the judicial management system was motivated by practices in the United States and England[15]. The Zimbabwean Companies Act was passed in 1951, it could be argued that Zimbabwe borrowed its system from South Africa.

2.4 COMMENCEMENT OF JUDICIAL MANAGEMENT PROCEEDINGS

2.4.1 Provisional Judicial Management

Corporate rescue proceedings in terms of the Companies Act commenced with provisional judicial management. A provisional judicial management order was obtained in the following circumstances;

- On application by a person eligible for application for winding up of a company or;[16]
- On an application for winding up, the court may grant, instead, a provisional judicial management order[17]

[14] Encyclopaedia Britannica 17 (1971) at 22
[15] A.H Oliver cit note 8 at 2
[16] Section 299 (1) (a)

Section 207 of the companies Act is instructive as to who could file a petition of winding. Such persons include the company itself, current creditor(s) or prospective creditors or such persons jointly or any of the said persons.

It was a pre requisite that before an application for provisional judicial management is filed with the court, it had to be lodged with the Master of the High Court[18] who may report to the court on any circumstances which appear to him to justify the court in postponing or dismissing the application and the master was obliged to transmit such report to the applicant as well.

2.4.2 Requirements to be met for a Provisional Judicial Management Order to be Granted

In terms of section 300 of the Companies Act, they were set requirements for the order to be granted and these are as follows;

i. That by reason of mismanagement or any other reason, the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern;
ii. That there is reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern.
iii. That it will be just and equitable to do so.

In the event that the application before the court is one for winding up. The court would grant an order for provisional judicial management instead if it appears that if the company is placed under provisional judicial management the grounds for its winding up may be removed and that it will become a successful concern.

2.4.3 Contents of a Provisional Judicial Management Order.

The following where the terms that ought to be contained in an order for provisional judicial management.

- Since the order was a provisional order, it had to contain in it a return day. The return day was not supposed to be less than 60 days from the date of

[17] Section 299 (1) (b)
[18] Section 299 (2)

granting of the provisional order[19]. It is striking to note that there was no cap as to the number days within which the return date should be fitted in. The Act simply provided for the number of days within which the return date may not be fixed.

- The court had to contain as a term that the company concerned was placed under judicial management subject to the supervision of the court and of a provisional judicial manager to be appointed in terms of the Act.
- Judicial management was centred on divesting of management powers on the usual managerial staff of the company and vesting of same in the hands of the provisional judicial manager, the court order had to contain a term to that effect.
- The court order would contain such other directions as to the management of the company or any other matter incidental thereto, including directions conferring upon the judicial manager the power, subject to the rights of creditors of the company, to raise money in any way without the authority of the shareholders; as the court may consider necessary.[20]

In terms of section 301 of Companies Act, it was not mandatory that the court order contain a moratorium. However, the court order could as well contain a moratorium.

Whatever contents of the court order where not cast and stone, they could be varied by the court upon application by a creditor, a member. The provisional judicial manager, the master or any person entitled to apply for provisional judicial management[21].

2.4.4 What was the way Forward after Granting of a Provisional Judicial Management Court Order?

Upon the granting of a provisional judicial order, all the property of the company was placed in the custody of the Master of the High Court until a provisional judicial manager has been appointed and same has assumed office.[22]

It was the sole duty of the Master to appoint a provisional judicial manager who was obliged to give security for the due performance of his duties. An auditor of the

[19] Section 301
[20] Section 301(1) (c)
[21] Section 301 (2)
[22] Section 302 (1) (a)

company was not eligible to hold office as a provisional judicial manager or any person who was disqualified from being a liquidator in winding up[23].

2.4.5 What were the Duties of the Provisional Judicial Manager?

Section 303 is instructive as to the duties of the provisional judicial manager which are as follows;

a) The judicial manager was to assume management of the company and recover and take possession of all assets of the company.
b) Within seven days after the provisional judicial manager's appointment, he was obliged to lodge with the Registrar of Companies his letter of appointment in the prescribed form.
c) The most important duty of the provisional judicial manager was to prepare and lay reports at the creditors and members/ debenture holders' meetings convened by the master of the High Court on;
    i. The general state of affairs of the company;
    ii. A statement of the reasons why the company is unable to pay its debts or is probably unable to meet its obligations or has not become or is prevented from becoming a successful concern.
    iii. A statement of the assets and liabilities of the company.
    iv. A complete list of creditors of the company, including contingent and prospective, together with the amounts owed and the nature of the claim.
    v. Particulars as to any source from which money has or is to be raised for the purposes of carrying on the business of the company.
    vi. Lastly the provisional judicial manager was expected to give his considered opinion on the prospects of restoration of the company to be a successful concern and removal of the factors that have been militating on the company being a successful concern.

2.4.6 Return day of Provisional Judicial Management Order

On the return day, the court after considering the following elements;

[23] Section 302 (2)

1) Opinion and wishes of the creditors and members of the company;[24]
2) Report of the provisional judicial manager;[25]
3) The number of creditors who did not prove claims at the first meeting and the amounts and the nature of the claims;[26]
4) The report of the master;[27]
5) The report of the Registrar;[28]

May grant the final judicial management order if it appears to the court that there is reasonable probability that the company concerned, if placed under judicial management will be able to become a successful going concern and that it is just and equitable to grant such and order, or it may discharge the provisional order or make any other that it may think is just.

2.4.7 Contents of a Final Judicial Management Order[29]

The final judicial management order had to contain the following;

a) A direction vesting all the management of the company, subject to the supervision of the court, in the hands of the final judicial manager;
b) The handing over all matters and accounting by the provisional judicial manager in the hands of the final judicial manager.
c) Discharge of the provisional judicial manager where necessary.
d) Such other directions as to the management of the company or any other matter incidental thereto, including directions conferring upon the judicial manager the power, subject to the rights of creditors of the company, to raise money in any way without the authority of the shareholders; as the court may consider necessary.

2.4.8 Duties of a Final Judicial Manager

The duties of the final judicial manager where contained in Section 306 of the Act and they included the following;

[24] Section 305 (1) (a)
[25] Section 305 (1) (b)
[26] Section 305 (1) (c)
[27] Section 305 (1) (d)
[28] Section 305 (1) (f)
[29] Section 305 (2)

1. Management of the company under the supervision of the court.
2. Complying with any directions of the court order.
3. Keep accounting books and prepare such annual financial statements as the company or its directors would have been obliged to keep or prepare if it had not been placed under judicial management.
4. Convene annual general meetings or any other meetings provided for in terms of the Act.
5. Examine the affairs and transactions of the company before the commencement of judicial management order to ascertain whether any officer or past officer of the company is or appears to be personally liable to pay damages or compensation to the company or is personally liable for any liabilities of the company, and within six months from the date of his appointment, shall submit to the master and to the next succeeding meeting of members and creditors of the company a report containing full particulars of any such liability.
6. If at any time he is of the opinion that the continuation of judicial management will not enable the company to become a successful concern, apply to court, after not less than fourteen days' notice by registered post to all members and creditors of the company for cancellation of the relevant judicial management order and the issue of an order for the winding up of the company.

2.4.9 Cancellation of the Final Judicial Management Order

A final judicial management order could be cancelled upon application to court by the judicial manager or an interested person that;

a) The purpose of the final judicial management order had been fulfilled or;
b) That for any other reason the company should not remain under judicial management.

On cancellation of the order, the court had to direct the resumption and management of the company or any order as it may deem necessary.

2.4.10 Why were the Former Corporate Rescue Proceedings Abolished?

Judicial management had a number of its weaknesses which led to it not being an appropriate corporate rescue model for most jurisdictions. It was abolished in South

Africa through the coming of the Companies Act number 71 of 2008 and was subsequently abolished in our jurisdiction on the 25th of June 2018 through the Insolvency Act (Chapter 6:07). Judicial management had so much reliance on the court machinery and the court proceedings were always an impending force. This made the process cumbersome and expensive. Obviously most business entities would procrastinate to take the route and preferring to explore the winding up procedure[30]. With judicial management, most resources would be used towards unending court attendances. The process itself was lengthy and cumbersome since the process involved the issuance a provisional judicial management order which should have a return date of more than sixty days from the day it was passed. After the return date, a final judicial manager could be appointed and it there was no ceiling as to when such final judicial management proceedings should be done and dusted. The judicial manager would obviously relax as he had no timeframes within which he should conclude his tasks.

In applying for provisional judicial management, it was a requirement in terms of section 300 of the Companies Act that the applicant show that there is a 'reasonable probability' that the company will be a successful concern. This was an onerous burden of proof which probably might have scared many interested individuals leading to companies pursuing the winding up route. D.A Burdette submits that judicial management would have been more favourable for an applicant had the requirement been a 'reasonable possibility'. This would have required a lesser burden of proof[31].

Winding up and judicial management were placed at par with no preferential order. In view of the fact that judicial management was not a simple route to follow, most companies would opt for winding up instead.

In terms of section 301 (2) of the companies Act, a moratorium was not automatic. The provision made use of the word "may". It was up to the court to decide whether

[30] AH Olver 'Judicial management– A case for Law reform' (1986) 49 *THRHR* 84 at 87. The author raises the argument that a company with gross assets under R10 000, already in financial difficulty cannot bear the costs
[31] D.A Burdette 'some initial thoughts' on the development of a modern and effective business rescue model for South Africa (Part 1) 2004 16 SA Merc LJ at 249

or not to grant same. This denied companies the necessary breathing space in the event that a moratorium is not granted[32].

Judicial management proceedings, where only reserved for companies registered under the companies Act. This was undesirable considering the socio-economic impact associated with failure of a business entity. In the case of *Tobacco Auctions Limited v AW Hamilton (Private) Limited*[33], the court commented that there was absolutely no reason why other business entities should be excluded from the judicial management proceedings. The proceedings further had so much focus and over emphasis on the protection of creditors whilst paying a blind eye to the fact that rehabilitation of companies should be the paramount consideration as they are the lifeblood of any economy.

[32] P Kloppers 'Judicial management– A corporate rescue mechanism in need of reform?' (1999) 3 *Stell LR* 417 at 430.
[33] 1966 (2) SA 500 ® at 503

CHAPTER 3

CORPORATE RESCUE UNDER THE INSOLVENCY ACT

3.1 COPORATE RESCUE PROCEEDINGS UNDER THE INSOLVENCY ACT (CHAPTER 6:07)

The insolvency Act (Chapter 6:07) came into force on the 25th of June 2018. It is striking to note that the Act only repealed the then the Insolvency Act (Chapter 6:04) however, the Companies Act (Chapter 24:03) was not affected by the coming into force of the Act. The Companies Act (Chapter 24:03) provided for judicial management and liquidation whereas the Insolvency Act (Chapter 6:07) provided for the novel corporate rescue proceedings. This therefore implies that for some time, the two corporate rescue regimes had to run side by side. That situation was only remedied on the 15th of November 2019 by the coming into force of the Companies and other Business Entities Act (Chapter 24:31) which had the effect of repealing the Companies Act (Chapter 6:07).

Corporate rescue is defined in terms of the Insolvency Act to mean proceedings to facilitate the rehabilitation of a company that is finically distressed by providing for-[34]

i) The temporary supervision of the company, and of the management of its affairs; business and property; and

ii) A temporary moratorium on the rights of claimants against the company in respect of property in its possession; and

iii) The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

The definition of corporate rescue proceedings as provided for by the Act, in essence outlines the purpose of corporate rescue proceedings under the Insolvency Act.

[34] Section 121 (1) (b) of the Insolvency Act Chapter (6;07), Act number 7 of 2018

Commenting on the South African corporate rescue proceedings as contained in the South African Companies Act 71 of 2008, Rogers AJ In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Anor*, pointed out that the business rescue provisions in the Act *"reflect a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction"*[35]. It is however clear from the above provision of the Act that corporate rescue proceedings are not solely centred on returning a financially distressed company to solvency. The corporate rescue proceedings are also inclined towards the protection of creditors. The court in the matter of *Absa Bank Limited v Caine NO and Another***;** in re Absa Bank Limited v Caine N.O. and Another) [36] stated that corporate rescue proceedings are not solely premised on preventing a company from falling into liquidation.

In *Oakdene Square Properties (Pty) Ltd and Ors v Farm Bothasfontein (Kyalami) (Pty) Ltd and Ors*,[37] the court expressed the view that the new provisions in the Act were in line with modern trends in corporate rescue regimes in that they attempted to secure and balance the competing interests of creditors, shareholders and employees, and envisaged a shift away from only having regard for creditors' interests, and are predicated on the belief that to preserve a business and the experience and skill of its employees, might, in the end prove to be a better option for creditors and enable them to secure a better recovery of their debts from their debtor.

In their work entitled *Companies and Other Business Structures in SA*,[38] the authors have explained that whereas it is fundamental to healthy market-based economies that companies which cannot be competitive will fail, owing to the negative social impact such failures can have on employees and their dependents and considering the effect on sovereign economies as a result of the loss of revenue previously generated by such failed companies, since the 1990s there has been a shift in approach in most industrialised nations towards 'rescuing' financially distressed corporate entities rather than liquidating them, and indeed, the *"straightforward"* liquidation of companies has become rather *"unfashionable"*.

[35] 2011 (5) SA 600(WCC)
[36] (38123/2013; 3915/2013) [2014] ZAFSHC 46 (2 APRIL 2014)
[37] 2011 (5) SA 600 (WCC)
[38] D.DAVIS, W Geach et al (3rd Edition) 2013.

3.2 COMMENCEMENT OF CORPORATE RESCUE PROCEEDINGS UNDER THE INSOLVENCY ACT.

Under the insolvency Act, corporate rescue proceedings are commenced by either,

a) A company resolution[39]
b) A court order[40]

3.2.1 Company Resolution to Commence Corporate Rescue Proceedings

The board of a company may resolve that the company voluntarily begin corporate rescue proceedings and place the company under the supervision. The resolution may only be passed if the board has reasonable grounds to believe that the company is distressed and there appears to be a reasonable prospect of rescuing the company.

The foregoing means that a company cannot just pass a resolution to commence corporate rescue, lest the system will be open to abuse. There should be reasonable grounds to believe that the company is financially distressed. The reasonable man test is therefore brought into use. In the case of *S v Muchairi*[41], the court held that the reasonable man test requires an objective assessment of the entirety of facts and find out if a diligent *paterfamilias* placed in the circumstances of the accused, would have arrived at the conclusion reached by the accused. Similarly, by use of the word 'reasonable', the Act calls upon the use of such a test. In the event that there are reasonable grounds to the effect that the company is financially distressed found. The inquiry does not however end there. The second rung of the test comes into play. Which is the existence of reasonable prospects of rescuing the company.

The South African Courts have unpacked the meaning of the phrase "reasonable prospects". In the case of *Oakdene Square Properties (Pty) Ltd and others v Farm Botha's Fonten (Kayalami) (Pty) Ltd and Others*[42] where the court held that reasonable prospect is less than a reasonable probability but more than a mere speculative suggestion. It must be a prospect based on reasonable grounds.

[39] Section 122 of the Insolvency Act (Chapter 6:07)
[40] Section 124 of the Insolvency Act (Chapter 6:07)
[41] HB 41/06
[42] 2013(4) SA 539 (SCA)

The resolution however, may not be adopted if liquidation proceedings have been initiated by or against the company and further has no force or effect until filed with the Master of the High court and the Registrar of Companies. If it's a company or the Registrar of Co-operative Societies in the case of co-operative societies.

In terms of Section 121 (3) of the Insolvency Act (Chapter 6:07), within five days of adopting and filing a resolution with the Master of the High Court, the company is obliged to do the following;

1. Give notice of the resolution; and its effective date, by standard notice to every affected person, including with the notice, a sworn statements of the facts relevant to the grounds on which board resolution was found[43].
2. Appoint a corporate rescue practitioner who meets the qualifications set in section 131 and has to accept the appointment in writing.

3.2.2 What Happens After the Appointment of a Corporate Rescue Practitioner?

After appointing a corporate rescue practitioner, a company should do the following;

a) file a notice of appointment of a practitioner within two days after making the appointment with the Master of the High Court and[44]
    i. the Registrar of Companies in the case of a company.
    ii. The Registrar of Co-operative Societies in the case of Co-operative societies.
b) Publish a copy of the notice of appointment to each affected person with (5) business days after the notice was published.

Failure to comply with the steps outlined in section 122 of the Insolvency Act renders the resolution a nullity[45].

3.2.3 What is the Essence of the Stringent Procedure for Voluntary Corporate Rescue?

The stringent procedure is meant to achieve the treatment of corporate rescue proceedings with urgency. This assertions is bolstered by the case of *Advanced*

[43] Section 122 (3) (a)
[44] Section 122 (4) (a)
[45] Section 122(5)

Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees Sas and Others[46], wherein Fabricius J was asked to consider an application for the extension of the time limits stated in ss 129(3) and (4) after these had expired. He was of the view that it was clear from the relevant sections contained in Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings.

Secondly the procedure is meant to guard against abuse of the proceedings from mala fide corporates. In *Griessel and another v Lizemore and others*[47] it was held as follows;

"A resolution to commence business rescue must be passed in good faith. Business rescue must not be used as a 'litigation strategy' to prevent a creditor from enforcing a claim to the full extent."

The above stated assertions is further bolstered by the case of *Alderbaran (Pty) Ltd and another v Gideon Phillipus Bouwer and others* [48]*.* The facts of the said matter where as follows;

Alderbaran purchased the property from Bouwer in 2014 in terms of a written agreement which stipulated a purchase price of R 1 000 000.00 payable by a way of a deposit of R 50 000.00 and the balance payable over five years in monthly instalments. A mortgage bond was registered over the property in favour of Bouwer as security for Alderbaran's obligations in respect of the balance of the purchase price.

The property was purchased with a view to development by subdivision thereof into 50 separate title portions. The subdivision was delayed, and Alderbaran failed to pay any of the monthly instalments due to Bouwer in terms of the sale agreement.

Bouwer sued for payment of the balance of the purchase price and obtained default judgment against Alderbaran on 25 April 2016 in the Riversdale Magistrates Court

[46] (GNP) Case No 72522/20112, judgment delivered on 6 June 2012
[47] [2015] 4 ALL SA 433 (GJ) at para 83 and 84
[48] High Court of South Africa, Cape Town, Case Number 19992/17

for payment of the amount of R 950 000.00, plus interest and costs. Pursuant thereto the property was attached and advertised for sale in execution on 15 September 2016.

On 31 August 2016 Alderbaran launched an application for the rescission of the default judgment as well as the setting aside of any warrant of execution issued in respect of the property and the staying of any sale in execution pending the determination of the rescission. As a result, the sale in execution scheduled for 15 September 2016 did not proceed. On 13 September 2016 the Riversdale Magistrates' Court dismissed the rescission application.

On 13 September 2016, the same day the rescission application was dismissed, Shaheed Noor, the sole director of Alderbaran, passed a resolution in terms of section 129(1) of the Act to place Alderbaran under business rescue. Annexed to Bouwer's answering affidavit in the main application are a Notice of Beginning of Business Rescue Proceedings and a Notice of Appointment of Business Rescue Practitioner appointing Faizel Noor as business rescue practitioner, both dated 13 September 2016 and signed by Shaheed Noor.

In view of the facts above, the court held that it was in the interest of justice and equity that the resolution be set aside.

3.2.4 When Can One Object to Company Resolution?

An affected person may apply to court for an order setting aside the resolution at any time after the adoption of a corporate rescue plan until adoption of a corporate rescue plan. The grounds upon which a resolution can be set aside are both procedural and substantial. The resolution can be set aside for failure to satisfy procedural requirements set in section 122 of the Insolvency Act. The resolution can be set aside on substantial grounds on account of failure to satisfy any of the essential elements for the adoption of voluntary corporate rescue proceedings, which are;

i. Absence of reasonable basis for believing that the company is financially distressed.[49]

ii. Absence of reasonable prospect for rescuing the company.[50]

Similarly, one can apply to court to set aside the appointment of the corporate rescue practitioner on the fact that he does not satisfy the qualifications set out in section 131 o the Act or that h is not independent of the company or its management or that he lacks the necessary skills with regards to the company's circumstances.

3.2.5 The Procedure Associated with Setting Aside a Resolution

The Act set out a special procedure which one has to adopt in a bit to set aside a resolution.

1. In terms of section 123 (3) (a) of the Act, the applications should be served on the Master of the High Court.
2. The applicant has to notify each affected person by way of standard notice and each affected person has a right to participate in the hearing of the Application. [51]

3.2.6 What are the Considerations in an Application to Set Aside a Resolution?

When considering an application to set aside a resolution in terms of section 123 (1) (a) the court may set aside the resolution on failure to meet the essential requirements or the set procedural requirements or it may further consider that in view of all the evidence, whether it is just and equitable to do so. Most authors submits that the test 'just and equitable' simply refers to whether or not it is in the

[49] Section 123 (1)(a)(i) of the insolvency Act.
[50] Section 123 (1)(a)(ii) of the insolvency Act
[51] This is in line with the *audi alteram paterm* rule. In **Taylor v Minister of Education and Another 1996 (2) ZLR 772 (S) at 780 A-B** the court stated as follows;
"The maxim audi alteram partem expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought Adam's defence before banishing him from the garden of Eden. Yet the proper limits of the principle are not properly defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken."

interest of creditors and all the other interested shareholders to set aside the resolution[52].

The court has an option to consider whether or not the substantial requirements of adopting a resolution are met, by requesting a report from the corporate rescue practitioner and the court may proceed to set aside the resolution acting on the report so submitted[53]. The court in setting aside the resolution, may make any order as may be appropriate to it, including placing the company under liquidation[54].

3.2.7 What are the Options Available to the Court when Faced with an Application to set Aside the Appointment of a Practitioner?

In terms of section 123 (6) of the Insolvency Act, the court has the following options at its disposal;

a) The court must appoint an alternative practitioner, recommended or accepted by the majority of independent creditors' voting interests who were represented in the hearing before the court.

3.3 COMMENCEMENT OF CORPORATE RESCUE PROCEEDINGS BY WAY OF A COURT APPLICATION

Other than voluntary commencement of corporate rescue proceedings, corporate rescue proceedings can also be commenced by a court order[55].Such an application can be made by affected person and the application thereof has to be served on the Master of the High Court and the Registrar of Companies. Each affected person has to be notified by way of a standard notice.

After considering the application, the court may make an order placing the company under supervision and commencement of corporate rescue proceedings if it is satisfied that the company is financially distressed or that the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matter or that its otherwise just and equitable to grant the application.

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[52] D.DAVIS, W Geach et al(3rd Edition) 2013.
[53] Section 123 (5)(b)
[54] Section 123 (5)(c)
[55]Section 124

It seems the second requirement that the company has failed to pay a debt is merely an extension and evidence of the fact that the company is financially distressed and therefore superfluous.

The court may however dismiss the application and place the company under liquidation or make any other appropriate order. This is a dangerous tool statutorily placed in the hands of the court in as much as it destroys the whole essence of corporate rescue when the court can just dive into liquidation. However, they may be some deserving circumstances wherein such an order must be granted. The power thereof must be exercised sparingly.

If the court grants an order for commencement of corporate rescue proceedings, it may so appoint an interim practitioner who has been nominated by the affected person who applies for commencement of corporate rescue subject to the ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors.

In terms of section 124(6), an application for commencement of corporate rescue proceedings suspends liquidation proceedings that may otherwise have been commenced until the application is adjudicated upon.

3.3.1 A Comparison of Commencement of Proceedings under Compulsory Corporate Rescue and Voluntary Corporate Rescue

a) Compulsory corporate rescue proceedings have the involvement of the court whereas voluntary corporate rescue proceedings have no court interferences. Compulsory commencement of corporate rescue proceedings is therefore subject to the court's ordinary rules making it lengthy and cumbersome as compared to voluntary corporate rescue proceedings.
b) Voluntary corporate rescue is subject to numerous objections as compared to compulsory corporate rescue commencement when most of the issues are done and iron out with the supervision of the court accompanied by the force of a court order.

c) All proceedings are inclined towards the protection of creditors, for instance, in appointing a practitioner in compulsory corporate rescue proceedings, the same has to be nominated by the creditors and similarly when the appointment of a corporate practitioner under voluntary corporate rescue proceedings, the court has to endorse a practitioner nominated by the practitioners.

d) In compulsory corporate rescue proceedings, the court is not only limited to consideration of the fact that the company is financially distressed. It can proceed to unpack the features of financial distress in the form of the company failing to pay an obligation and or employees, a position which is not found under voluntary corporate rescue proceedings. Probably, the legislature omitted that requirement or extension on voluntary corporate rescue proceedings commencement as it is too wide and may be subject to abuse. It is only the court in its wisdom that can grant the provision its befitting effect.

e) In voluntary corporate rescue proceedings, the company may appoint its own corporate rescue practitioner without the interference of the shareholders in compliance with all the requirements of the law, a position which is absent in compulsory corporate rescue proceedings.

f) Voluntary corporate rescue proceedings cannot be commenced when liquidation proceedings are underway. In contrast, under compulsory corporate rescue proceedings, an application for corporate rescue suspends liquidation.

3.3.2 When do Corporate Rescue Proceedings Start and End?

Corporate rescue proceedings begin when[56] a company files a resolution to place itself under supervision or applies to court for consent to file a resolution or when an affected person applies to court for an order placing the company under supervision or when a court makes an order placing the company under supervision during liquidation proceedings.

[56] Section 12591) of the Insolvency Act (Chapter 6:07)

The proceedings end when[57]

a) The court aside the resolution or order that commenced the proceedings or
b) Has converted the proceedings into liquidation proceedings
c) When the practitioner files with the master a notice of the termination of proceedings
d) A proposed corporate rescue plan has been rejected in terms of the law and the matter is not revived by any affected person.
e) Or when a corporate rescue practitioner has filed a notice of substantial implementation of a corporate rescue plan adopted in terms of Sub-Part D of Part XXIII of the Insolvency Act (Chapter 6:07).

3.3.3 Within What Time Frame should Corporate Rescue Proceedings End?

The Act simply prescribes a minimum period of three months; it does not however specify the specific period within which the proceedings should end. However, after a period of three months, the practitioner shall be requested to prepare a progress report of the corporate rescue proceedings monthly until the end of the proceedings. The monthly report has to be delivered by standard notice to each affected person, the Master and to the court if the proceedings have been subjected to a court order[58].

3.3.4 Moratorium on Legal Proceedings

During corporate rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

a) With the written consent of the practitioner; or
b) With the leave of the court and in accordance with any terms the court considers suitable or

[57] Section 125 (2) of the Insolvency Act (Chapter 6:07)
[58] Section 125 (3) of the Insolvency Act (Chapter 6:07)

c) As a set-off against any claim made by the company in any proceedings , irrespective of whether those proceedings commenced before or after the corporate rescue proceedings began; or
d) Criminal proceedings against the company or any of its directors or officers or
e) Proceedings concerning any property or right over which the company exercises its powers of a trust; or
f) Proceedings by a regulatory authority in the execution of its duties after written notification to the corporate rescue practitioner.

Furthermore, during corporate rescue proceedings a guarantee or surety by a company in favour of any other person may not be enforced against the company except with the leave of the court.
The automatic statutory moratorium is a positive development in our law and is key to corporate rescue proceedings since it gives the company a period to restructure and rehabilitate itself through the aid of the corporate practitioner. In the case of *Arendse and others v Van der Merwe NO (in his capacity as joint business rescue practitioner of African Bank Investments Limited) and another*[59] , the court held that the moratorium is central to the business rescue process since it provides the crucial breathing space to enable the company to restructure its affairs. However, it is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue.

The exceptions against the moratorium are so numerous and unnecessary considering the fact that corporate rescue proceedings are in their nature urgent and should be treated with the urgency they deserve.

Commenting on the fact that leave may be applied to court in order to proceed against a company that is under corporate rescue. The court in *Arendse and others v Van der Merwe NO (in his capacity as joint business rescue practitioner of African Bank Investments Limited) and another*[60] held as follows*;*

[59] [2016] 4 All SA 48 (GJ)
[60] Ibid

> *"An applicant seeking to obtain leave under the section must as a minimum requirement establish a prima facie case against the company in business rescue. There is no justification why an applicant for leave under section 133(1)(b) should be obliged to establish a prima facie case with a higher degree of proof than would ordinarily be required in a summons or founding affidavit. It is sufficient if it be shown that the averments made, if unchallenged, establish a cause of action or demonstrate the existence of a triable issue. What needs to be fully set out in any application for leave are the reasons why legal proceedings against the company in business rescue are necessary and appropriate."*

The moratorium further has effect on property rights, as the company is mandated to retain all the property that was lawfully in its possession. This protects the company in a way as it may require the property for its functioning. A question that however arises is whether or not the proceedings protect the company against eviction proceedings in view of the fact that corporate rescue proceedings are aimed at protecting creditors and the rehabilitation of the company. In most circumstances, in the event of financial distress, which is a test for corporate rescue commencement, companies may fail to meet their rental obligations. A simple thought on the provision, will result on the conclusion that eviction proceedings can continue since the company will be possessing the property unlawfully.

The South African courts had an opportunity to consider that legal question. It was held that a moratorium does not militate against property rights. In the case of *Southern Value Consortium v Tresso Ttrading (Pty) Limited (Klopper N.O* and another as intervening business rescue practitioner[61], the court held that following failure of the company under corporate rescue to pay rentals, the applicant was entitled to a claim of *rei vindicatio* and the general moratorium as provided by the Companies Act could not militate against such an action in view of the fact that the applicant has a real right in the property and the moratorium cannot prevail over real rights. The court held as follows;

[61] [2015] JOL 34787 WCC

"The concept 'legal proceedings' in section 133 (1) of the companies Act is on the face of it quite wide. The section draws an express distinction, however, between two categories of legal proceedings, namely;

i. Against the company; and
ii. In relation to any property belonging to the company, or lawfully in its possession.

In my view this distinction corresponds with the distinction between real rights and personal rights. The second category comprises actions which intended to enforce real rights. Applicants' cause of action in the present case is rei vindicatio. It seeks to recover property in respect of which it has a real right, namely ownership. It doesn't seek to enforce a personal right…in my view, it could not have been the intention of the legislature that the company in business rescue would restructure itself by utilising assets it has no lawful claim."

3.3.5 What are the Effects of Corporate Rescue Proceedings on Labour Law?

During corporate rescue proceedings the employees of the company who were employed by the company immediately before the corporate proceedings continue to be employed by the company on the same terms and conditions except to

a) Changes that may occur in the ordinary course of attrition or the parties may agree to vary the terms and conditions thereof.[62]
b) All retrenchment proceedings should be subject to the Labour Act (Chapter 28:01)

The practitioner shall further not suspend any provision of an employment contract and a court may also not cancel any employment contract.[63]The above means that corporate rescue proceedings are not meant to be arbitrary on employees. All legal due course should be followed should the employment contracts be altered or retrenchment be pursued. Corporate rescue proceedings therefore seek to strike a balance between loss of employment and the socio-economic impact thereof.

[62] Section 129 of the Insolvency Act
[63] Section 129 (3) of the Insolvency Act

3.3.6 Qualifications of a Practitioner and Removal and Replacement of a Practitioner.

Unlike the judicial management era where no qualifications where set for eligibility to be appointed a judicial manager. The insolvency Act (Chapter 6:07) brought with it a new era which requires a person holding the office of a practitioner to possess the following minimum qualifications;

- The person should not be disqualified to be appointed liquidator in terms of section 74 of the Act.
- The person should be a registered and licensed insolvency practitioner in terms of the Estate Administrative Act Chapter 27:20)
- The person should not be disqualified from acting as director in terms of the companies Act.
- The person should not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship and the person is not an associate of a person described in the foregoing.
- The person should further provide security in an amount and on conditions that the Master considers necessary to secure the interests of the company and any affected person.

A corporate rescue practitioner may be removed only[64]

a) By a court order
b) As provided for in terms of section 132 of the Insolvency Act
c) By the Mater in terms of the grounds set in section 79 of the insolvency Act.

Or upon request of any of the affected person or on its own motion, the court may remove a practitioner on the following grounds;

[64] Section 132 of the Insolvency Act.

a) Incompetency or failure to perform duties of a corporate rescue practitioner of the company.
b) Failure to exercise the proper degree of care in the performance of the corporate rescue practitioner's functions;
c) Engaging in illegal acts or conduct
d) If the corporate rescue practitioner no longer satisfies the qualifications for appointment as a practitioner in terms of the Act.
e) Conflict of interests or lack of independence
f) The practitioner is incapacitated and unable to perform the functions of that office, ad is unlikely.

3.3.7 General Functions of a Corporate Rescue Practitioner.

The functions of a corporate rescue practitioner in terms of the Act may be summarised as follows[65];

1. To take full management and control of the company, however, he may delegate functions of a practitioner to any person who was part of the board or the pre-existing management of the company.
2. May appoint a person as part of the management of the company to develop or implement a corporate rescue plan.
3. Must notify all regulatory authorities of the fact that the company has been placed under corporate rescue and also of his appointment immediately after he has been appointed to that office.
4. He may appoint an advisor or a person to be part of the management of the company subject to guidelines set by the Act.
5. He is an officer of the court during such corporate rescue proceedings and should report to the court in accordance with the law.
6. He carries the responsibilities of a director of the company.

[65] Section 133 of the Insolvency Act.

3.3.8 Corporate Rescue Plan

The corporate rescue practitioner has a duty to prepare a corporate rescue plan after consulting the creditors and other affected persons for consideration and possible adoption.[66]

The corporate rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan and must be divided in three parts.[67] Part A, B and part C.

Part A is mainly a background which is mandated in terms of the law to contain the following;

- List of all the material assets of the company as well as an indication as to which assets were being held by creditors as security.
- List of all the creditors when the proceedings commenced and their order of preferential.
- Complete list of the holders of the company's issued shares.
- Written agreement copy of the practitioner's remuneration.
- A statement whether the corporate rescue plan includes a proposal made informally by the creditors of the company.

Part B must contain the following;

- Nature and duration of any moratorium of which the corporate rescue plan makes provision.
- The extent of which the company is to be released from payment of its debts and the extent to which any debt is proposed to be converted to equity in the company or another company
- The ongoing roll of the company and the treatment of any existing agreements
- The property of the company that is to be available to pay creditors' claims in terms of the corporate rescue plan;

[66] Section 141(1) of the Insolvency Act
[67] Section 141(2) of the Insolvency Act

- The order of preference in which the proceeds of the property will be applied to pay creditors if the corporate rescue plan is adopted.
- Benefits of adopting the corporate rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed into liquidation.
- The effect that the corporate rescue plan will have on the holders of each class of the company's issued securities.

Part C must contain assumptions and conditions, which must include at least-

- A statement of the condition that must be satisfied, if any, for the corporate rescue plan to come into operation or be fully implemented.
- The effect that the corporate rescue plan contemplates on the number of employees and their terms and conditions of employment.
- The circumstances in which the corporate rescue plan will end.
- A projected balance sheet of the company and a statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed corporate plan is adopted.

Within 10 business days after publishing a corporate rescue plan, the corporate rescue practitioner must convene and preside over a meeting of creditors and any other holders with voting interests for the purposes of considering the rescue plan[68].

At the said meeting, the corporate rescue plan will be approved on preliminary basis if It was supported by the holders of 75% of the creditors' voting interests that were voted and the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted[69].

3.3.9 Failure to Adopt a Corporate Rescue Plan

In the event that the corporate rescue plan is rejected, the following avenues are available to the corporate rescue practitioner;

[68] Section 143 (1) of the Insolvency Act.
[69] Section 143 (2) of the Insolvency Act.

1) Seek a vote of approval from the holders of voting interests to prepare and publish a revised plan.[70]
2) Advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be on the ground that it was inappropriate.

If the practitioner does not take action as contemplated above, any interested person may;

a) Call for a vote of approval from the holders of voting interests requiring the corporate rescue practitioner to prepare and publish a revised plan, or
b) Apply to court to set aside the result of the vote by the holders of voting interests or shareholders on the ground that it was inappropriate.
c) Make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the corporate rescue plan, at a value independently and expertly determined, on the request of the corporate rescue practitioner, to be fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

[70] Section 145 (1) of the Insolvency Act.

CHAPTER 4

COMPARATIVE ANALYSIS

4.1 WHAT ARE THE ADVANTAGES OF THE ZIMBABWEAN CORPORATE RESCUE MODEL?

The Zimbabwean corporate rescue proceedings have a number of advantages; which advantages makes up the strengths of the system. The advantages of the system are as follows;

1. The availability of an automatic statutory general moratorium.

In *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Weskbank,* [71], it was held as that;

> *"It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with other creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process."*

It is common cause that corporates require a moratorium for their rehabilitation. Unlike in the subsistence of the judicial management era where corporate rescue proceedings didn't have a moratorium as of right. The development is therefore a positive one.

2. The objectives of the corporate rescue proceedings are a positive move meant to balance the competing interests which are associated with corporate failure. The objectives are alive, to the fact that a corporate failure has heavy implications on the society. Gorven J in *DH Brothers Industries (Pty) Ltd V Karl Johannes Gribintz NO and others*[72] commenting on the South African Corporate rescue provisions held that goods and services are the life blood of an economy and business entities in

[71] 2015 (3) SA 438 (SCA)
[72] High Court of South Africa, Kwazulu-Natal Division, Pietermaritzburg, Case Number 3878/13

providing goods and services, generate this life blood. Regulatory provisions are therefore geared up to assist the lifeblood flow as efficiently as possible taking into consideration the formation of companies, their functions, continued existence and how they are revived in the event of financial distress. The Act was so much alive to the purpose of corporate rescue proceedings and inserted under section 121(1) (b) that corporate rescue proceedings are meant to facilitate rehabilitation of a company that is financially distressed by providing temporary supervision of the company and the management of its affairs, business and property. This is essentially the backbone of corporate rescue proceedings. Unlike in the past where corporate rescue proceedings leaned heavily in favour of creditors, the corporate rescue proceedings under the new Insolvency Act are rather balanced. *In Koen v Wedgewood Village Golf and and Country Estate (Pty) Ltd*[73]*,* Binns-Ward J of the South African High Court held as follows;

> *"It is clear that that the legislature has recognised that liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is not in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidation in cases in which there is a reasonable prospect of salvaging the business of a company in a financial distress or of securing a better return to creditors than would probably be achieved in immediate liquidation."*

The cork committee, whilst recommending a corporate rescue approach in the U.K Insolvency Act of 1986 stated that;

> *"A concern for the livelihood and wellbeing of those dependent upon an enterprise which may well be a lifeblood of a whole town or a region is a*

[73] 2012 (2) SA 378 9WCC)

legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and community that it must not be overlooked"[74]

3. Under the judicial management era, there were no set qualifications for a judicial manager. However, under the Insolvency Act (Chapter 6:07) under, qualifications for the appointment of a practitioner are set under section 131.

4. The corporate rescue proceedings under the Insolvency Act provides for the possibility of the corporate rescue practitioner teaming up with the directors of the company under his supervision. This at least doesn't affect the flow of the company but boosts same towards the realisation of corporate rescue goals.

5. The practitioner may not also be the liquidator of the company in the event of liquidation.

6. In the event that an application for corporate rescue proceedings has been filed in the midst of liquidation, liquidation proceedings are automatically suspended to give way for the application. This is a progressive move as it seeks to prioritise corporate rescue over liquidation.

7. The system has moved away from the preceding judicial management era where the court was heavily involved. Under the new corporate rescue era, a company may commence corporate rescue proceedings by the adoption of a resolution. However, compulsory corporate rescue proceedings remain available.

8. Under voluntary cooperate rescue proceedings, in terms of section 123 (1)(b)(iii), a practitioner may be removed I he lacks skills that tally with the

[74] Report of the insolvency committee on insolvency law and Law and Practice (Cork Committee Report, 1982 (cmnd 8558) para 204.

company's circumstances. This is a further progressive move meant to achieve the purpose of the corporate rescue proceedings. It is common cause that a practitioner who understands the gist of a company's business and trade, may be better equipped to rescue it.

9. The duties and functions of the practitioner are not subject to the heavy supervision and intervention of the court. In terms of the insolvency Act, the practitioner may even dispose the company's assets without applying for a court order[75] unlike in the judicial management era where such acts needed to be done with a court application.

10. The corporate rescue proceedings must be treated with a certain degree of urgency unlike in the judicial management era, where the management would go on for years. In the event that the proceedings are not finished within a period of three months, the practitioner is required to prepare monthly progress reports. This ensures that all the parties involved follow through the activities of the company and understand why the proceedings may be delaying.

11. The adoption of a business rescue plan is a positive move as it outlines the trajectory to be followed by the company in its pursuit to attain solvency and be a successful going concern.

4.2 SHORTCOMINGS OF THE CORPORATE RESCUE PROCEEDINGS

The corporate rescue model under the Insolvency Act (Chapter 6:07) equally has its shortcomings which shortcomings are as follows;

1. The voluntary corporate rescue proceedings are cumbersome and open to court proceedings in view of the fact that almost everything done under the proceedings is open to contest through court proceedings ranging from the resolution itself should it fail to meet the test in section 122 (1) of the Insolvency Act. The appointed practitioner

[75] Section 127 of the Insolvency Act (Chapter 6:07)

can as well be removed on the basis of the grounds set under section 123 (1)(b) of the insolvency Act. This essentially erodes the whole essence of voluntary proceedings independent from the onerous supervision and intervention of the court.

2. Secondly, it is not that clear when the corporate rescue proceedings should run and be finalised. In as much as this is dependent on the rescue plan adopted, it should have at least set the maximum period within such proceedings to be finalised and the way forward if not finalised. This would assist in instilling a sense of urgency on the practitioner in the dispensation of his duties and would bring a robust approach towards realisation of corporate rescue agenda. This accordingly has a positive function to the economy and society with the corporate serves.
3. The system still remains creditors oriented. It seems creditors are given undue consideration thereby driving the proceedings towards the archaic stance wherein same where ultimately meant to further the interests of creditors. In section 142, it is clear that for a plan to be adopted, it needs the heavy involvement of creditors furthermore, under compulsory corporate rescue, a practitioner is appointed in close liaison with the creditors.

4. Weaknesses of the general moratorium are the major concern under the business rescue scheme, more particularly in that the company may be dispossessed of properties in its custody by virtue of the flow of the rei vindication principle. This is undesirable particularly in that;

    a. The company may be ejected from the premises of business making a major difficulty in restructuring and rehabilitation of the organisation.
    b. Further, the company may be dispossessed of the property it intends to use for corporate rescue. In as much as there should be a balance between some other citizens' rights and the need to give the company a breathing space, one might submit that

such a state of affairs is undesirable for a company under corporate rescue. It is best that the moratorium be extended to suspend vindication of properties for a minimum period of 3 months from the date of commencement of corporate rescue proceedings to allow a company to come back to its feet.

5. In terms of section 124 (1) (5) of the Insolvency Act, an affected person who files an application to commence corporate rescue proceedings can appoint a corporate rescue practitioner for the company. This is an undesirable situation. It would have been prudent if the court would select from a pool of practitioners in consultation with the Master of the High Court, a most appropriate practitioner in view of the company's circumstances.

6. Under voluntary commencement of corporate rescue proceedings in terms of section 122(2)(a) of the Insolvency Act, a resolution may not be passed where liquidation proceedings are underway. This provision unnecessarily gives liquidation proceedings precedent over corporate rescue and flies in the face of the basic tenets of corporate rescue proceedings.

4.3 CORPORATE RESCUE PROCEEDINGS IN OTHER JURSIDICTIONS

4.3.1 South Africa

South Africa used to have a judicial management system similar to the Zimbabwean preceding system. However, through the South African Companies Act number 71 of 2008, South Africa adopted corporate rescue proceedings which are more or less similar to the current Zimbabwean model. The proceedings provide for both voluntary and compulsory corporate rescue proceedings. Voluntary corporate proceedings provide are commenced by a resolution passed by the company and compulsory proceedings are commenced by way of an application to the court. The same tests available in our Zimbabwean jurisdiction are the same tests available in the South African counterpart. A rescue practitioner is accordingly appointed in whose hands the management of the company vests.

4.3.2 Australia

Australia has a voluntary corporate rescue regime[76]. A court order is therefore unnecessary. The company, directors, liquidator or a secured creditor may appoint an administrator if he is of the opinion that the company is insolvent or likely to be insolvent. The administrator is appointed through a written letter of appointment. The motive behind the appointment of an administrator is to restore the company to be a successful concern. The letter should be bearing the common seal of the company. However, the appointment can only be done if the company is not being wound up. After appointment, the administrator is expected to act swiftly and lodge with the Australian Securities Commission a notice of his appointment and the commencement of corporate rescue proceedings. Such a notice should also be published within 3 days in a national newspaper.

4.3.3 England

Administration proceedings in England are commenced by way of a petition to court for an order placing the company under administration. The petition can be filed by the company, its directors acting unanimously or by way of a resolution duly approved by a majority at and properly constituted board meeting. A contingent or a prospective creditor may as well file the petition[77].

4.4 WHAT COULD BE THE BEST CORPORATE RESCUE SCHEME FOR ZIMBABWE?

Zimbabwe ‘s economy is mainly based on Small and Medium Enterprises (SMEs), PBCs and other business entities, which are not necessarily registered in terms of the Companies Act. Zimbabwe therefore requires a system that is alive to the driving force of our economy. The Companies and Other Business Act (Chapter 24:31) was so much alive to the key players of the Zimbabwean economy and was couched in a way that accommodates such. Such business entities may be too small to the extent that they may not be able to grapple with the onerous procedures as set in the Insolvency Act, both financially and procedurally. It is on the basis of such small entities that the economy is built. Accordingly, the Zimbabwean corporate rescue proceedings should be;

[76] Pieter Kloppers, page 265
[77] Pieter Kloppers, page 362

a) Simple and easy to follow through.
b) Be debtor centred as in the case of the American model[78].
c) A system that is divorced from the courts as in the case of Australia.
d) A system that considers small and medium enterprises, partnerships, co-operatives and other unregistered entities.
e) A system that takes into consideration advancement in technology, which further cut costs related with corporate rescue.
f) A system where there is a specific professional body to which corporate rescue practitioners belong and subscribe to for accountability and security purposes.

[78] Chapter 11 of the American Bankruptcy Act.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 CONCLUSION

Over the years, the insolvency law was mainly meant to ensure and better protect the rights of creditors. Most jurisdictions contained provisions that clearly lean towards ensuring that creditors recoup something at the expense of the demise of an entity that could have, if given a chance to recover, been rehabilitated and be a successful concern. Such an approach has its roots in the origins of the Roman-Dutch law as well. In the early stages of insolvency law, in terms of the twelve tables, if a debtor was unable to settle debts, in terms of the law applicable then, his creditors could seize him and sell him into slavery (*manusiniecto*) [79]. The creditors were not concerned of the circumstances evolving around the debtor and all the factors dependent on him for a livelihood or otherwise. As the law was developed, it came to a period in time wherein such creditors could throw the debtor in prison over failure to settle debts and obligations[80].

The law of Insolvency as contained in the Companies Act (Chapter 24:03) was accordingly not debtor oriented. It placed an onerous judicial management system which was cumbersome and lengthy to the extent that business entities preferred winding up instead of taking the mammoth task of judicial management. There was no statutory preference of corporate rescue as compared to winding up. Judicial management scheme, was the corporate rescue scheme which our jurisdiction had, which was almost ineffective and companies continued to fail despite its existence due to the inherent weaknesses of the system and the law of insolvency at large,

If one is to glean through the Zimbabwean insolvency law history, he will learn that Zimbabwe's main achievement in as far as corporate rescue proceedings are concerned was achieved through the coming into force of the Insolvency Act (Chapter 6:07). The Act greatly furthers the major tenets of modern day corporate rescue proceedings. Corporate rescue proceedings have moved from the archaic stance wherein they were creditors oriented. This was mainly due to the fact that

[79] Hockley's Insolvency Law, 9th Edition, by Robert Sharrock et al, page 5..
[80] Ibid

corporate failure has glaring consequences not only to the shareholders and the creditors. It affects a number of issues including but not limited to employment relations, livelihoods of people, distribution of goods and services and this may potentially affect the moral and health fabric of a society. Various factors are intertwined to corporate failure which further instils the need to rescue such companies and ensure that their continued existence is guaranteed. The cork committee, whilst recommending a corporate rescue approach in the U.K Insolvency Act of 1986 aptly captured the essence of corporate rescue proceedings beautifully by holding that; *"A concern for the livelihood and wellbeing of those dependent upon an enterprise which may well be a lifeblood of a whole town or a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and community that it must not be overlooked"*[81]

Zimbabwe is accordingly alive to the basic tenets of corporate rescue proceedings in the modern days and made a progressive move in the absorption of the Insolvency Act as a corporate rescue mechanism which brought the following striking developments as compared to the former proceedings;

- Minimum qualification requirements for corporate rescue practitioners.
- Preferential of corporate rescue as compared to liquidation.
- Voluntary commencement of corporate rescue proceedings.
- The utilisation of a corporate rescue plan which is the grand escape plan into the rehabilitation of a corporate.
- The consideration of other business entities which are not necessarily companies.
- Relaxed court supervision of corporate rescue proceedings.
- Some measure of expedience in dealing with corporates in the handling of corporate rescue proceedings.
- Some measure of balance between the interests of creditors and the need to preserve the existence of a company.

[81] Report of the insolvency committee on insolvency law and Law and Practice (Cork Committee Report, 1982 (cmnd 8558) para 204.

Despite the above listed progressive achievements, the corporate rescue proceedings have some undesirable and unwelcome provisions which stands as setbacks. These are as follows;

a) The moratorium does not give the company adequate protection as it does not protect the company from dispossession of property in its custody which property may be necessary for its rehabilitation. A company under corporate rescue may be ejected from the premises from which it seeks to recover from. Secondly, the moratorium has a plethora of exceptions which make it not that solid.
b) The proceedings still put undue consideration towards the creditors.
c) The voluntary corporate rescue proceedings are subject to the heavy intervention of the court defeating the whole essence of voluntary proceedings and furthermore;
d) Voluntary corporate rescue proceedings cannot be adopted once company is under winding up, this unnecessarily gives precedent to corporate demolition than rescue.
e) Under compulsory corporate rescue proceedings, the applicant appoints a corporate rescue practitioner, which is a retrogressive move.

5.2 PROPOSED AMENDMENTS

1. The test for the adoption of voluntary corporate rescue proceedings under section 122(1) is burdensome and opens the resolution to attack and unnecessary court proceedings. The South African Courts have defined the phrase “reasonable prospects” in the case of *Oakdene Square Properties (Pty) Ltd and others v Farm Botha’s Fonten (Kayalami) (Pty) Ltd and Others*[82] where the court held that reasonable prospect is less than a reasonable probability but more than a mere speculative suggestion. It must be a prospect based on reasonable grounds. The is a confusing term in as far as voluntary proceedings are concerned and the same must be replaced with a simpler test. The adoption of the word “likely” lessens the test and in the process ensures that the test is not open to attack before the court.

[82] 2013(4)SA 539 (SCA)

2. Section 122 (2) (a) fights the whole spirit of corporate rescue proceedings by militating against the adoption of a resolution to commence corporate rescue proceedings when the company is under liquidation. The same must be deleted and proceedings be allowed to commence voluntarily even where liquidation proceedings have been commenced and liquidation proceedings should be suspended to pave way for corporate rescue proceedings.

3. The Act should specify the maximum possible period within which corporate rescue proceedings must be concluded rather than leaving the proceedings open ended, as this unnecessarily drags the proceedings since they will be no set timeframe for completion.

4. Zimbabwe should draw lessons from the Australian system which is completely independent from the court and judiciary machinery. This makes the system fit so well within the context of a developing country were the economy is supporting by a proliferation of Small and Medium business enterprises. It will be best that the corporate rescue model be custom modelled for the economic environment in which the same shall unction in.

5. Zimbabwe should also draw lessons from the American system as contained in Chapter 11 of the Bankruptcy Act of 1968 which is pro-debtor as compared to a system that is pro creditor.

6. The moratorium should be amended to protect entities from eviction proceedings, which is the most drastic incident which may happen to companies under corporate rescue. This affects the company in that it will be left with no premises to operate from and the obvious consequences of liquidation will face the entity. It is proposed that in as much as they are property rights which should be respected, the same should be suspended for a period between 3-5 months from the date of inception of corporate rescue proceedings and furthermore, the entity should be given adequate notice which is inclined towards corporate rescue. This however should not be done

lightly. There should be compelling reasons other than non-payment of rentals why the entity under corporate rescue should be dispossessed of property.

7. The Act pays a blind eye to the ever mutating business ventures and entities in the country as contrasted by the Companies and other Businesses Act. It is prudent that the Act be amended so that it becomes alive to the nature and calibre of economy within which it thrives to serve. It could be difficult to have a single model corporate rescue scheme that serves both big firms, voluntary partnerships, co-operatives and small and medium business enterprises. Accordingly, there should be a model befitting of all the involved economic key players with a desire to ensure that all business entities, regardless of size are accommodated and the same purpose and tenets of the corporate rescue proceedings are extended to it.

8. Unlike the Companies and Other Business Entities Act which take cognizance of technological advancements in the business arena, the Insolvency Act (Chapter 6:07) ignores same completely. It is common cause that the business platform is ever mutating and inclined towards technological developments. It is suggested that the law should accordingly fit within the advancement facing the community which it intends to serve. Accordingly, the insolvency law should adopt technological advancements with regards to;

    a) Filing of papers with the Master of the High Court's office.
    b) Holding of creditors' meetings.
    c) Filing and publication of corporate rescue plans
    d) Voting and adoption of corporate rescue plans.
    e) Existence of a pool of corporate rescue practitioners online and their credentials within which interested persons may cherry pick a practitioner who best serves the interests of a company under corporate rescue.

5.3 CONCLUSION

The law should continuously be developed to meet the everyday needs and requirements of the populace. The judicial management system was rather to

stationary to the extent that it became obsolete. Accordingly, the Insolvency Act (Chapter 6:07) should continuously be adaptive to the environment within which it exists. It should not remain static as this affects the business environment. There are however imminent changes which should be made to the Act, and these includes the loosening of the grip of the courts in the proceedings, the amplification of the moratorium so that it better protects the company, the move to free the proceedings from creditor alignment and the need to accommodate all Zimbabwean business entities.

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