



**UNIVERSITY OF ZIMBABWE
FACULTY OF LAW**

**A CRITICAL ANALYSIS OF THE APPLICABILITY OF CORPORATE RESCUE
PROCEEDINGS TO SMALL AND MEDIUM ENTERPRISES IN ZIMBABWE**

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DECLARATION

I, **Muchaneta Makoni** declare that the above dissertation is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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APPROVAL FORM

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The undersigned certify that they have read and recommended to the University of Zimbabwe for acceptance a research project entitled “A Critical Analysis of The Applicability of Corporate Rescue Proceedings to Small and Medium Enterprises In Zimbabwe” submitted by Muchaneta Makoni R211176L in partial fulfilment of The Master of Laws (LMCO) Degree requirement at the University of Zimbabwe

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ABSTRACT

This research analyses the applicability of corporate rescue proceedings to small and medium enterprises (SMEs) in Zimbabwe. SMEs are vital to the growth and development of any developing country including Zimbabwe. The research examines the characteristics of SMEs looking into how Zimbabwe defines SMEs. The research lays out the legal framework of Zimbabwe's corporate rescue proceedings showing clearly the demarcation between formal and informal corporate rescue proceedings. It is made clear that the more formalistic processes of corporate rescue are burdensome and would only serve to burden an SME instead of its alleviation from financial distress. The challenges faced by SMEs are made clear in chapter three which examines the challenges faced in attempting to apply the corporate rescue process to SMEs. Chapter four examines the South African insolvency provisions as they relate to SMEs identifying how the Zimbabwean insolvency procedures were largely drawn from the South African context. The chapter also identifies how the challenges in South Africa are also inherent to Zimbabwe due to the similarities within the legal system. The research concludes by proffering recommendations of what can be done to ensure that corporate rescue proceedings are SME-friendly.

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ABBREVIATIONS

SMEs Small and Medium Enterprises

COVID-19 Coronavirus disease

GDP Gross Domestic Product

Table of Contents

DECLARATION	i
APPROVAL PAGE	ii
ABSTRACT	iii
ACKNOWLEDGEMENTS	iv
DEDICATIONS	v
ABBREVIATIONS	vi
Chapter one	1
1.1 Background and Introduction	1
1.2 Statement of the Problem	3
1.3 Research questions	3
1.4 Research Methodology	3
1.5 Literature Review	4
1.6 Chapter Synopsis	7
Chapter one	7
Chapter two	7
Chapter three	8
Chapter four	8
Chapter five	8
Chapter two	9
Zimbabwe's corporate rescue framework and its rationale	9
2.1 Introduction	9
2.2 Characteristics of Small and Medium Enterprises	9
2.3 The Rationale for Corporate Rescue Proceedings	10
2.4 Legal Framework of Corporate Rescue Proceedings	11
2.4 Informal Corporate Rescue	13
2.4.1 Compromises between the company and its creditors	13
2.4.1 Voluntary Corporate Rescue Proceedings	14
2.4.2 Objections to voluntary corporate rescue proceedings	17
2.5 Formal Corporate Rescue Proceedings	17
2.5.1 Court Order Corporate Rescue Proceedings	17
2.5.2 The Corporate Rescue Plan	22
2.6 The effect of placing an SME under corporate Rescue Proceedings	25
2.7 Limitations on Institution of Corporate Rescue Proceedings	25
2.8 Qualifications, Role, and Power of a Corporate Rescue Practitioner ...	26
2.9 Preliminary conclusion	28
Chapter three	30

Challenges faced by SMEs in the Corporate Rescue Procedure	30
3.1 Introduction	30
3.2 Challenges faced by SMEs in the corporate rescue proceedings process. 30	
3.2.1 Bureaucratic and lengthy processes	30
3.2.2 Lack of Proper Corporate Governance Structures in SMEs	32
3.2.3 Lack of Proper Documentation	34
3.2.4 Lack of Managerial Expertise	34
3.2.7 Unavailability of the corporate rescue process to unregistered SMEs ...	35
3.2.8 Vague Legislative Provisions	35
3.2.9 Remuneration of corporate rescue practitioner	36
3.4 Preliminary conclusion	38
Chapter four	39
4.1 Introduction	39
4.2 Overview of the BRP process in South Africa.....	39
4.2.1 Contractual Obligations in the Business Rescue Proceedings	43
4.3 Challenges faced by South African SMEs undergoing Business Rescue Proceedings	43
4.3.1 The broad sweeping powers of the corporate rescue practitioner	43
4.3.2 The cost of remunerating the corporate rescue practitioner	44
4.3.3. Procedurally Cumbersome Corporate Rescue Provisions	45
4.4 The importance of informal alternatives in business rescue	45
4.5 Preliminary Conclusion	47
Chapter five.....	48
5.1 Introduction	48
5.2 Recapitulation	48
5.3 Recommendations.....	49
5.3.1 Broadening the definition of a distressed company...Error! Bookmark not defined.	
5.3.2 Expanding on Informal Business Rescue Processes	49
5.3.3 Expanding the definition of a corporate to cover unregistered SMEs....	51
5.3.4 Government-led capacity building on corporate governance among SMEs	51
5.3.5 Ensuring expertise in SME corporate rescue.....	52
5.4 Conclusion	52
Bibliography.....	53

Chapter one

Introduction

1.1 Background and Introduction

In budding and struggling economies like Zimbabwe, small and medium enterprises (SMEs) are commonplace and have a huge role to play in the success of the economy.¹ It is imperative that SMEs be afforded an opportunity to thrive and grow in order to restore Zimbabwe's economic prowess. SMEs are quite vulnerable to collapsing under the current economic turmoil and the stressors on the economy such as the Coronavirus disease (COVID-19). It is thus imperative that there be in place procedures to rescue struggling SMEs which are in danger of failing due to the turbulent economic conditions. It is vital that an investigation be done into the applicability of the corporate rescue proceedings to SMEs. SMEs are often on the periphery and may not be accorded the recognition which they deserve due to the nominal value of which such entities contribute individually to the economy.² The collective importance of SMEs cannot be understated which SMEs bring into the economy. SMEs have been lauded for their ability to stimulate the economy and enhance the creation of employment opportunities.³ SMEs have the potential to grow and expand into larger businesses with the expected result of increased wealth generation and contributing to a higher gross domestic product (GDP).⁴ SMEs form an integral part of the economy of Zimbabwe. SMEs have become ever more so vulnerable due to the current turbulent economic situation. As such, there is an urgent need to ensure the applicability of corporate rescue proceedings to SMEs in Zimbabwe.⁵

Zimbabwe introduced corporate rescue proceedings through the enactment of the Insolvency Act⁶ in 2018. The introduction of the corporate rescue proceedings was done to replace judicial management proceedings which were in the Companies Act.⁷ The Insolvency Act was introduced to consolidate the administration of

¹ C G, Ștefan., (et al) 2020. Small and Medium-Sized Enterprises (SMEs): The Engine of Economic Growth through Investments and Innovation. 12, *Sustainability* 1.

² R Rajaram, A M. Singh, and N S. Sewpersadh, "Business Rescue: Adapt or Die," (2018) 21, no. 1 *South African Journal of Economic and Management Sciences*: 1.

³ A Boraine and J van Wyk, "Various Aspects to Consider with Regard to Special Insolvency Rules for Small and Medium-Sized Enterprises in South Africa: Insolvency Rules for SMEs in South Africa," 2015), Vol 24, no. 3: *International Insolvency Review* 228-46.

⁴ Boraine & van Wyk, (n 3 above) 5.

⁵ K Njanike, The Factors Influencing SMEs Growth in Africa: A Case of SMEs in Zimbabwe, *Regional Development in Africa* IntechOpen, 2019 <https://doi.org/10.5772/intechopen.87192> 3.

⁶ Insolvency Act [Chapter 6:07].

⁷ *Metallon Gold Zimbabwe (Private) Limited & Ors v Shatirwa Investments (Private) Limited* SC 107/21.

insolvency in Zimbabwe.⁸ The inspiration for Zimbabwe's corporate rescue proceedings seems to have been borrowed from the South African Companies Act.⁹ It is the aim of this research to examine the applicability of corporate rescue proceedings to SMEs who would seem to be burdened by the cumbersome legalities of the corporate rescue proceedings.

The definition of what constitutes an SME has been the subject of discussion by scholars and other regulatory authorities.¹⁰ In Zimbabwe, the accepted definition of an SME is that it is a legal business entity that has an annual turnover of less than US \$800 000.00, which is not a subsidiary or a division of a larger entity and which has a defined maximum number of full-time permanent employees which should not exceed a total number of 100 employees.¹¹

SMEs are already at risk of succumbing to failure due to their minuscule nature and the small market value that they bring to the economic table.¹² The viability of SMEs has been further jeopardised by the fact that the COVID-19 pandemic brought with it various effects which saw most SMEs failing.¹³ COVID-19 has had an immense toll on SMEs whose impact has been manifested through business disruptions, travel, and operational bans which saw businesses that were classified as non-essential being closed down.¹⁴ Most SMEs rely on cross-border imports and trading and the closure of borders saw SMEs reeling from the impact of the pandemic.¹⁵ The pandemic also led to the disruption of the manufacturing industry and the redistribution of resources that were initially meant for humanitarian aid to COVID-19 stimulus packages meant to resuscitate the economy.¹⁶ The disruptions in the trade could lead to fiscal constraints and stress on the Zimbabwean economy.¹⁷

⁸ *Metallon Gold Zimbabwe (Private) Limited & Ors v Shatirwa Investments (Private) Limited* SC 107/21.

⁹ South African Companies (Act 71 of 2008).

¹⁰ G Karedza et al., An Analysis of the Obstacles to the Success of SMEs in Chinhoyi Zimbabwe, 2014. Vol.6 No.6. *European Journal of Business and Management*, 5.

¹¹ Karedza (n 3 above) 3.

¹² K Njanike, *The Factors Influencing SMEs Growth in Africa: A Case of SMEs in Zimbabwe*, *Regional Development in Africa*, IntechOpen, 2019, <https://doi.org/10.5772/intechopen.87192>.

¹³ E Chirume & N Kaseke, "Impact of Covid-19 on Small and Medium-Sized Enterprises (Smes) In Chinhoyi, Zimbabwe" (2020): Vol. 23 no. 1 *International Journal of Business, Economics and Law*, 10.

¹⁴ MF, Malunga Report on Covid-19 Pandemic Experiences of Women in The Informal Economy in Zimbabwe, 2021 *Southern Africa Trust* 7 https://media.africaportal.org/documents/experiences_of_women_in_the_informal_economy_in_zimbabwe.pdf.

¹⁵ Malunga (n 14 above) 7.

¹⁶ Chirume & Kaseke, (n 13 above) 2.

¹⁷ Karedza et al (n 4 above) 3.

1.2 Statement of the Problem

SMEs are often excluded from mainstream business practices due to their minuscule size.¹⁸ SMEs succumb to business failure and very little is done to try and resuscitate these small businesses with even measures like liquidation not being followed through.¹⁹ The corporate rescue proceedings as contemplated within Zimbabwe's insolvency laws do not take into account the miniature nature of SMEs due to the requirement to approach the High Court to commence business rescue proceedings.²⁰ In Zimbabwe, most SMEs do not have a functional board of directors as such no one to resolve that an SME undergo corporate rescue proceedings.²¹ The pathway for SMEs to access corporate rescue proceedings is fraught with obstacles such as litigation, and the need for experienced corporate rescue practitioners which ultimately makes the rescue proceedings cumbersome and taxing.²² If the situation is not resolved, SMEs in Zimbabwe will continue dying a natural death with no hope for resuscitation. Despite recent legal reform, the current legislation does little to encourage small to medium enterprises to go the route of corporate rescue. If this problem is not addressed there is a risk of rendering the corporate rescue proceedings redundant and the preserve of big companies.

1.3 Research questions

1.3.1 What is the legal framework for corporate rescue proceedings in Zimbabwe?

1.3.2 How applicable are corporate rescue proceedings to SMEs in Zimbabwe?

1.3.3 What lessons can Zimbabwe learn from South Africa and other comparable jurisdictions regarding the rehabilitation of SMEs through corporate rescue proceedings?

1.4 Research Methodology

This dissertation follows a purely desk-top research approach. The research relies on varied materials drawn from both secondary and primary sources. The sources include legislation, decided cases, and policy documents. Other sources will include journal articles, books, published theses, and other research papers by academics within the field. The nature of SMEs is such that it is most likely comprised of a sole

¹⁸ T Rensmann, *Small and Medium-Sized Enterprises in International Economic Law*, vol. 1 (2017), (Oxford University Press, <https://doi.org/10.1093/acprof:oso/9780198795650.001.0001>).

¹⁹ Boraine & van Wyk, (n 3 above) 7.

²⁰ T Mazikana, "The Impact of COVID-19 on SMEs Performance in Harare, Zimbabwe," SSRN Scholarly Paper *Social Science Research Network*, (2020).

²¹ G M Magaisa, S Duggal, and R Muhwandavaka, "Corporate Governance Perspectives for Zimbabwean SMEs," 2013, Vol 2, No. 8. *International Journal of Economy, Management and Social Sciences*, 5.

²² Mazikana (n 20 above) 5.

trader who may not have the necessary resources to undergo corporate rescue proceedings.

This research focuses on ascertaining the applicability of the Zimbabwean current insolvency laws particularly the corporate rescue proceedings for SMEs. The research is limited to an analysis of Zimbabwe's laws drawing upon lessons from neighbouring jurisdiction South Africa, on how best to ensure the applicability of corporate rescue proceedings to small enterprises.

1.5 Literature Review

SMEs have become ever more relevant in modern-day development, particularly in developing countries such as Zimbabwe.²³ There is however a dearth of literature in respect of corporate rescue proceedings as related to small and medium enterprises in Zimbabwe. Karedza *et al* discuss the obstacles to the success of SMEs and in so doing discusses the relevance of SMEs in Zimbabwe.²⁴ It is trite that if the SMEs are supported, they assist in resurrecting the economy through the creation of jobs, and innovative products which include goods and services and technology.²⁵ SMEs in Zimbabwe are quite vital to the eradication of unemployment in Zimbabwe.²⁶

Museta posits that most business or corporate rescue processes make use of the influence or relevance of the court in corporate rescue proceedings.²⁷ The fact that legal proceedings are involved would most likely put corporate rescue proceedings out of the reach of the majority of SMEs.²⁸ The cost of running corporate rescue procedures would undoubtedly be very high placing SMEs in a position of never attempting to engage in corporate rescue proceedings.²⁹ Moreso the fact that such proceedings have the involvement of the high court.³⁰ Museta points out that cumbersome proceedings in corporate rescue make the proceedings not only expensive but an unattractive option that is out of reach to small and medium businesses.³¹

Karadza identifies that SMEs are already at a disadvantage and therefore extremely vulnerable to collapse.³² SMEs already have challenges in securing adequate

²³ Njanike (n 12 above) 3.

²⁴ Karedza (n 3 above) 8.

²⁵ Karedza (n 3 above) 3.

²⁶ Karedza (n 3 above) 4.

²⁷ G Museta, *The Development of Business Rescue in South African Law* (Unpublished thesis, University of Pretoria, 2016) 54.

²⁸ Museta (n 27 above) 54.

²⁹ Museta (n 27 above) 54.

³⁰ Section 121(1)(e) of the Insolvency Act.

³¹ Museta (n 27 above) 54.

³² Karedza (n 27 above) 3.

financing from financial institutions.³³ This is premised on the fact that SMEs are deemed to lack collateral due to their small nature.³⁴ The cost of financing SMEs is already identified to be quite high in terms of the interest rates which they are given by financial institutions due to their high-risk nature.³⁵ Mashavira and Chipunza also aver that SMEs often lack marketing skills and have inadequate knowledge of the market which resultantly leads to SMEs failing to meet customer needs.³⁶

SMEs face challenges from the very first step of establishment in Zimbabwe as the corporate legal framework does not make it easy for the incorporation of SMEs although incorporation is not mandatory to be recognised as an SME.³⁷ Fitzpatrick *et al* concur with the sentiments of other scholars pointing out that SMEs often lack access to credit and favourable interest rates and repayment durations.³⁸ SMEs in Zimbabwe are thus bedevilled by myriad challenges such as limited access to the market which is dominated by well-established entities and companies.³⁹ SMEs are thus vulnerable entities that should be afforded support systems to prevent their failure or collapse such as the introduction of the corporate rescue proceedings in a simplified manner to allow their applicability to SMEs.

There has been a marked shift from the traditional approach of just letting businesses fail and crumble and fall under liquidation.⁴⁰ In the past, it was the commonplace practice to just surrender a business to fail and allow the business which has fallen into difficult times to undergo liquidation.⁴¹ This would lead to situations wherein the assets of the debtor business were seized and sold to the highest bidder and the proceeds of such sale were distributed to creditors of the business. An alternative to liquidation has been propounded which is commonly known as rehabilitation or business or corporate rescue.⁴² Mc Cormack posits that adopting a one size fits all approach towards corporate rescue, that is the

³³ Museta (n 27 above) 13.

³⁴ S Sitharam & M Hoque, "Factors Affecting the Performance of Small and Medium Enterprises in KwaZulu-Natal, South Africa," 2016, Vol 14 no. 2: *Problems and Perspectives in Management* 3, <https://doi.org/10.21511/ppm>.

³⁵ Sitharam & M Hoque (n 34 above) 3.

³⁶ N Mashavira, & C Chipunza, C. Managerial conceptual competencies and the performance of small and medium-sized enterprises in Zimbabwe. (2021) Vol 13, No1. *The Southern African Journal of Entrepreneurship and Small Business Management*, 1. <https://doi.org/10.4102/sajesbm.v13i1.386>.

³⁷ Mashavira & Chipunza (n 36 above) 4.

³⁸ D Fitzpatrick (et al) Enhancing Zimbabwe's Regime for Resolving Corporate Financial Distress- Current Challenges and possible solutions *Zimbabwe Economic Policy Analysis and Research Unit* 7.

³⁹ D Majukwa, 2019, 'Sustainability strategies for small and medium sized enterprises in Zimbabwe', (Published Thesis) Walden University, 62.

⁴⁰ M Pretorius & W Rosslyn-Smith, "Expectations of a Business Rescue Plan: International Directives for Chapter 6 Implementation," 18, no. 2 (2019): *Southern African Business Review* 108-39.

⁴¹ R Rajaram, A M. Singh, and N S. Sewpersadh, (n 2 above) 2.

⁴² M Maphiri, "The Suitability of South Africa's Business Rescue Procedure in the Reorganization of Small-to-Medium-Sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code.," no. 8.1 (2018): *Michigan Business & Entrepreneurial Law Review*, 101.

classification of all entities big or small into one corporate rescue proceeding approach does not yield fruitful results.⁴³ The scholar points out that adopting similar approaches and a one size fits all approach does not necessarily achieve the intended results when applied to small businesses.⁴⁴

Maphiri states that in South Africa the businesses therein the majority of formal businesses are regarded as SMEs and the SMEs contribute to over half of the nation's GDP.⁴⁵ The scholar discusses the marked advantages of placing an SME under corporate rescue proceedings as compared to filing for liquidation of the SME.⁴⁶ The scholar posits that there are marked advantages to placing a business under business rescue and the benefits transcend even to the employees of such entity as they stand a chance to remain employed as liquidation often has an immediacy to it.⁴⁷ Tsebe & Strydom however critique business rescue proceedings in South Africa in the steel industry sector.⁴⁸ The scholars allege that for some small and medium enterprises there has been limited success in corporate rescue proceedings.⁴⁹ The scholars aver that this can be attributed to the fact that business forces negated the successful rescue and reversal of the business rescue proceedings or the legal provisions were cumbersome to an extent of failing the rescue proceedings.⁵⁰

The indispensability of SMEs to global economies cannot be understated particularly in developing countries.⁵¹ Majukwa captures this aptly highlighting the need for the government to put in place support mechanisms and policies which are aimed at promoting the growth and development of SMEs.⁵² SMEs play an important role in the growth of economies through their contribution to employment creation, and payment of taxes to the fiscal regime.⁵³ It can be highlighted that given the importance of SMEs the need to have tailor-made rescue proceedings for small to medium businesses is therefore critical to the success of a nation. This is given the fact that Daoning acknowledges that the goals of corporate rescue are the preservation of a going concern and the value of that concern.⁵⁴

⁴³ G. McCormack, *Corporate Rescue Law--an Anglo-American Perspective*, Corporations, Globalisation and the Law, E. Elgar, 2008. 20.

⁴⁴ McCormack (n 43 above) 21.

⁴⁵ Maphiri (n 42 above) 13.

⁴⁶ Maphiri (n 42 above) 13.

⁴⁷ Maphiri (n 42 above) 14.

⁴⁸ A Tsebe & J Strydom, "An Evaluation of the Relative Effectiveness of Business Rescue Strategies for Declining and Distressed Industries," (Vol. X, Issue VII - (2021) *PM World Journal*, 36.

⁴⁹ A Tsebe & J Strydom (n 48 above) 12.

⁵⁰ A Tsebe & J Strydom (n 48above) 12.

⁵¹ R Rajaram, A M. Singh, and N S. Sewpersadh, (n 2 above) 2.

⁵² Majukwa (n 39 above) 43.

⁵³ Majukwa (n 39 above) 43.

⁵⁴ Z Daoning, *Insolvency Law and Multinational Groups: Theories, Solutions and Recommendations for Business Failure*, Routledge, 2019. 10

It should be acknowledged that corporate rescue comes in after the failure of judicial management proceedings due to the heavy reliance on court proceedings which proceedings make it a costly exercise that was unsuitable for the needs of small and medium-sized businesses.⁵⁵ Judicial management was seen to be the preserve of major companies at the exclusion of other business forms which could not make use of this procedure.⁵⁶ It is acknowledged that the use of the courts in most cases makes rescue proceedings expensive.⁵⁷ Scholars however posit that corporate rescue is predicated on a broader social justice perspective unlike the old law of judicial management that was based on private corporate interest.⁵⁸

The corporate rescue process is expected to provide for the temporary management and supervision of the company's affairs under a third party appointed either by the court or the company concerned under voluntary administration.⁵⁹ The process must result in the development of a corporate rescue plan to re-engineer the company into a viable entity. Once the company is under corporate rescue the company enjoys a temporary moratorium from creditors and can only be sued in limited circumstances.⁶⁰

1.6 Chapter Synopsis

Chapter one

Chapter one provides the introductory background and elaborates on the problem to be examined by the research. The chapter outlines the methodology to be used and reviews the literature on corporate rescue proceedings in small and medium enterprises in Zimbabwe. The chapter also captures the research questions.

Chapter two

Chapter two discusses the legal framework of corporate rescue proceedings and the structure of small and medium enterprises in Zimbabwe.

⁵⁵ TC Mupini An investigation of the factors that negatively affect the success of Judicial Management as a corporate rescue strategy in Zimbabwe. (*Unpublished Thesis*, University of Zimbabwe, 2016) 39.

⁵⁶ Mupini (n 55 above) 39.

⁵⁷ Mupini (n 55 above) 39.

⁵⁸ RJ Gumbo, "A Guide to The Corporate Rescue Procedure in Zimbabwe," *Gumbo and Associates* (blog), 2020, 3.

⁵⁹ Gumbo (n 30 above) 3.

⁶⁰ Gumbo, (n 30 above) 6.

Chapter three

Chapter three discusses the challenges that Zimbabwean SMEs have experienced in implementing corporate rescue proceedings in their current format as envisioned by the Insolvency Act.

Chapter four

Chapter four discusses how SMEs have been accommodated in corporate rescue best practices offering a comparative analysis with neighbouring jurisdiction South Africa.

Chapter five

Chapter five discusses recommendations and observations and how Zimbabwe's SMEs can be accommodated in corporate rescue proceedings.

Chapter two

Zimbabwe's corporate rescue framework and its rationale

2.1 Introduction

When a debtor becomes unable to settle his debts in a timely fashion such debtors become liable to various remedies that are open to creditors.⁶¹ The law has however put in place certain safeguards to ensure that debtors are protected to some degree as open season on debtors by creditors would not lead to the ideal society.⁶² The issue of creditors' rights *vis a vis* those of a debtor who becomes unable to pay his dues have thus been a critical issue in every legal system⁶³ This chapter seeks to discuss the legal framework of corporate rescue proceedings in Zimbabwe. The Chapter delves into how SMEs are structured and looks into how the current corporate rescue proceedings could potentially apply to small and medium enterprises. The chapter also briefly looks into the necessity and theoretical framework of corporate rescue proceedings.

2.2 Characteristics of Small and Medium Enterprises

SMEs have been quite influential in shaping economies internationally but there is still a lacuna in that there is no uniformly accepted definition of an SME.⁶⁴ Most countries have resorted to adopting either an economic or statistical definition of what constitutes an SME.⁶⁵ Nations that adopt an economic definition of an SME will generally consider among other factors the profitability of the SME, and the SMEs net worth. Alternatively, a statistical definition of an SME looks into the number of employees of the SME.⁶⁶ In laying out a background for further discussion it is critical to note that in developing countries. SMEs are mostly characterised as a single-owner businesses in which the working staff may be family members who are often unpaid directors that are often actively involved in the management and the overall day-to-day administration.⁶⁷ The family-style SME has ramifications on the corporate rescue procedure as will be observed in the discussion below.

In defining SMEs in Zimbabwe, the Ministry of Small and Medium Enterprises and Cooperative Development (MoSME&CD) policy document (2009), an SME is a legal

⁶¹ L Madhuku, *Insolvency and the Corporate Debtor: Some Legal Aspects of Creditors' Rights under Corporate Insolvency in Zimbabwe*, 1995 Volume 12 Zimbabwe Law Review 85.

⁶² Madhuku (n 61 above) 85.

⁶³ Madhuku (n 61 above) 85.

⁶⁴ Maphiri (n 42 above) 2.

⁶⁵ Maphiri (n 42 above) 2.

⁶⁶ Maphiri (n 42 above) 2.

⁶⁷ S Carter., & W Wilton, (2006). *Enterprise Culture: Necessary in Promoting Enterprise; Lessons from Enterprise Development in Zimbabwe*. 14(3), *Journal of Enterprise and Culture*, 34.

business entity.⁶⁸ An SME is thus characterised by the following variables which include autonomy meaning that such entity should not be a subsidiary or branch or associate of a large business organisation. Such an entity should have an annual turnover of less than USD\$800 000.00.⁶⁹ Based on this classification would mean that the majority of Zimbabwean companies could be classified as SMEs. This is given the fact that the majority of companies have an annual turnover that is less than the prescribed amount.

2.3 The Rationale for Corporate Rescue Proceedings

Corporate rescue proceedings are undertaken with the main critical aim being to restore a company or entity that was once profitable to its former standing of profitability.⁷⁰ When profitability is not possible the aim is to ensure that creditors are protected and also avoid liquidation of the entity where possible.⁷¹ The institution of business rescue proceedings might not necessarily lead to the complete recovery of the said entity but if the entity regains its solvency, then the corporate rescue proceedings would be regarded as a success. Corporate rescue law is in reality complex and elastic.⁷² Corporate rescue theory is fundamental in that it provides two important values that are the preservation of the going concern and also that of certainty.⁷³ There is no uniform pattern or universally acknowledged definition or method of rescue.⁷⁴ There are multiple possibilities of what can be termed rescue proceedings.⁷⁵ These include administration, hybrid regimes, or informal rescue procedures which include private negotiations between debtors and creditors.⁷⁶

When an SME undergoes a decline or enters into distress various questions arise that are asked by key stakeholders. Stakeholders would enquire as to what caused the decline of the SME, why the causes of the demise were not identified in good time, and measures were taken.⁷⁷ Stakeholders often want to bring someone to account. Stakeholders are interested in what can be done to reverse the decline and how the losses of the SMEs can be mitigated ergo corporate rescue proceedings or turnaround strategies.⁷⁸

⁶⁸ Ministry of Small and Medium Enterprises and Cooperative Development (MoSME&CD) policy document (2009).

⁶⁹ Karedza (n 3 above) 3.

⁷⁰ Cassim, F., & Cassim, M. F. (2012). *Contemporary company law*. Claremont [South Africa: Juta. 863.

⁷¹ Cassim (n 70 above) 863.

⁷² Daoning (n 20 above) 41.

⁷³ Daoning (n 20 above) 44.

⁷⁴ Delpont, P. A. (2011). *The new Companies Act manual: Including close corporations and partnerships*. Cape Town: LexisNexis 19.

⁷⁵ Delpont, (n 74 above).19.

⁷⁶ Delpont (n 74 above) 20.

⁷⁷ Tsebe & J Strydom (n 48 above) 12.

⁷⁸ Tsebe & J Strydom (n 48 above) 12.

The court in the case of *Metallon Gold Zimbabwe (Private) Limited and Ors v Shatirwa Investment (Private) Limited and Ors*⁷⁹ paid due regard to the fundamental importance of corporate rescue proceedings. The court stated that corporate rescue is viewed as a redressive measure that seeks to avoid the liquidation of an SME by preserving its solvent state for the benefit of the entity's shareholders and creditors which include the workers of the SME as well as the general society in which such entity exists.⁸⁰ The court appreciated how corporate rescue proceedings were a departure from the concept of judicial management which was narrow in form.⁸¹ Corporate rescue in its essence seeks to cover the interests of all stakeholders who benefit from the entity continuing as a going concern.⁸²

2.4 Legal Framework of Corporate Rescue Proceedings

Before the advent of the current Insolvency Act,⁸³ Zimbabwe as a nation made use of the judicial management proceedings which were set out in terms of the former Companies Act.⁸⁴ The transition to corporate rescue proceedings came about in 2018 after calls by business rescue practitioners to transition to more modern ways of ensuring the existence and longevity of a business entity.⁸⁵ Some of the factors that influenced the transition from judicial management to corporate rescue included the fact that there was a stigma that was associated with an entity being under insolvency proceedings.⁸⁶ Being placed under judicial management often entails a label that a business entity is an unrehabilitated insolvent.⁸⁷ Some analysts posit that in Zimbabwe almost ninety per cent of business entities within Zimbabwe either failed to recover from judicial management or these entities endured prolonged periods under judicial management.⁸⁸

The transition from judicial management to corporate rescue proceedings means that these rescue proceedings are thus meant to bring some relief to those entities

⁷⁹ *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

⁸⁰ Tsebe & J Strydom (n 48 above) 12.

⁸¹ *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

⁸² *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

⁸³ [Chapter 6:03].

⁸⁴ *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

⁸⁵ D Fitzpatrick (et al) Enhancing Zimbabwe's Regime for Resolving Corporate Financial Distress- Current Challenges and possible solutions *Zimbabwe Economic Policy Analysis and Research Unit 7.*

⁸⁶ Fitzpatrick (n 85 above) 3.

⁸⁷ Fitzpatrick (n 85 above) 3.

⁸⁸ F Chimwamurombe & L Gona Corporate rescue in Zim: The legal framework 25 November 2021 at 12 <https://businesstimes.co.zw/corporate-rescue-in-zim-the-legal-framework/>.

which are in dire financial straits. Corporate rescue proceedings are designed to be of a provisional or temporal nature and are expected to extinguish as soon as the financial entity recovers from its financial challenges.⁸⁹ The corporate rescue plan should be implemented in order to maximise the possibility of the business entity continuing in existence and regaining solvency thereafter.⁹⁰ Corporate rescue proceedings envision a sort of reengineering through temporary management and supervision of the affairs of the entity by a third party who is appointed either by the court or the company concerned under voluntary administration.⁹¹ The end goal is to restore the entity to viability through alternative management strategies.⁹² The third party is known as a corporate rescue practitioner and such person is tasked with the development of a corporate rescue plan.⁹³ The plan should aim to restructure the affairs of the SME, its business, property debt, and other liabilities and equity in a manner that maximises the likelihood of the SME continuing in existence on a solvent basis.⁹⁴ Where restoration to solvency is not possible a better deal for the creditors and shareholders of the entity would be most welcome.⁹⁵

As such, modern insolvency law affords the SME which is in the threat of insolvency divergent paths either that of liquidation or corporate rescue.⁹⁶ Corporate rescue proceedings are a broader approach than judicial management in that it protects the interests of all stakeholders who benefit from the existence of the entity in question.⁹⁷ Corporate rescue of SMEs is thus a major intervention to avert the eventual failure of a company.⁹⁸ It should be acknowledged that there are both formal and informal approaches to the corporate rescue.⁹⁹ The Zimbabwean insolvency Act seems to acknowledge the presence of informal approaches which approaches can be utilised in the corporate rescue of SMEs.¹⁰⁰ The informal procedures include all negotiations and compromises the distressed company may

⁸⁹ Section 121 (b) of the Insolvency Act [Chapter 6:03]. See also C Lamprecht, “Business Rescue Replacing Judicial Management: An Assessment of the Extent of Problems Solved,” (2008): no. 1 22, *South African Journal of Accounting Research* 2-3.

⁹⁰ Section 121 (b) of the Insolvency Act [Chapter 6:03].

⁹¹ Section 131 (1) of the Insolvency Act [Chapter 6:03].

⁹² Section 131(1) of the Insolvency Act [Chapter 6:03]. See also C Lamprecht, “Business Rescue Replacing Judicial Management: An Assessment of the Extent of Problems Solved,” (2008): no. 1 22, *South African Journal of Accounting Research* 2-3

⁹³ Section 131 (1) of the Insolvency Act [Chapter 6:03].

⁹⁴ Section 142 (1) of the Insolvency Act [Chapter 6:03].

⁹⁵ R Rajaram, “Success Factors for Business Rescue in South Africa,” University of KwaZulu-Natal (Unpublished Ph.D. Thesis).

⁹⁶ R Rajaram, A M. Singh, and N S. Sewpersadh, (n 2 above) 4.

⁹⁷ P Kloppers, “Judicial Management-A Corporate Rescue Mechanism in Need of Reform?” 10(3).1999 *Stellenbosch Law Review*, 5

⁹⁸ R Rajaram, A M. Singh, and N S. Sewpersadh, (n 2 above) 4.

⁹⁹ A Boraine’, and J van Wyk. “Various Aspects to Consider with Regard to Special Insolvency Rules for Small and Medium-Sized Enterprises in South Africa.” 25 (2016): *International. Insolvency. Review*. 34.

¹⁰⁰ See section 147 of the Insolvency Act [Chapter 6:03] which deals with compromises between the company and its creditors.

agree to enter into with creditors.¹⁰¹ While formal rescue proceedings cover the voluntary corporate rescue proceedings by the directors of the companies together with corporate rescue proceedings that are initiated by way of court application.¹⁰² The formal corporate procedures are discussed in greater detail down below.

2.4 Informal Corporate Rescue

2.4.1 Compromises between the company and its creditors.

One form of informal rescue proceedings is that of compromises between creditors of the company. This procedure is captured within section 47 of the Act and is available to all entities whether they may be under liquidation or financial distress.¹⁰³ These are largely informal processes as alluded to above. The board may propose an arrangement or compromise of its financial obligations to all its creditors.¹⁰⁴ Such informal processes can be commenced by the delivery of a copy of the proposal and notice of meeting to consider the proposal to every creditor whose name or address is known or can be reasonably obtained by the SME and to the registrar of companies.¹⁰⁵ Compromises with the creditors may take multiple forms with an example being a situation wherein the SME may offer eighty cents for every dollar owed to the creditors.¹⁰⁶ The proposal should contain all vital information that is necessary to assist creditors to make informed decisions.¹⁰⁷

In order to ensure that a compromise proposal is effective, it should be adopted by the creditors of the company and should be supported by a majority of members.¹⁰⁸ Such a majority should be at least seventy-five per cent in value of the creditors, present and voting in person or by proxy at a meeting called for that purpose.¹⁰⁹ It is difficult to envision any compromise wherein there is just one creditor who is owed by an SME. However, if a proposal is so adopted the company may then apply to the High Court for an order approving such proposal.¹¹⁰ The court may sanction the proposal as adopted if the courts so consider such proposal to be just and equitable.¹¹¹ Such order of the court should be filed within five working days and so attached a copy to the SMEs memorandum of incorporation that is kept at the SMEs

¹⁰¹ Boraine, and J van Wyk (n 99 above) 3.

¹⁰² Boraine, and J van Wyk (n 99 above) 3.

¹⁰³ Section 147 of the Insolvency Act.

¹⁰⁴ Section 147 (2) of the Insolvency Act.

¹⁰⁵ Section 147 (2) of the Insolvency Act. See also R Rajaram, (et al) "Business Rescue: Adapt or Die," 2018 no. 1: *South African Journal of Economic and Management Sciences* 21, 3. The authors discuss the importance of corporate rescue proceedings.

¹⁰⁶ F M. Tolmie, *Corporate and Personal Insolvency Law*, 2nd ed (London, U.K. ; Portland, Or: Cavendish Pub, 2003) 59

¹⁰⁷ Section 147 (3) of the Insolvency Act.

¹⁰⁸ Section 147 (6) of the Insolvency Act.

¹⁰⁹ Section 147 (6) of the Insolvency Act.

¹¹⁰ Section 147(7) (a)-(b) of the Insolvency Act.

¹¹¹ Section 147(7) (b) of the Insolvency Act.

registered office or anywhere applicable.¹¹² It is averred that it is perplexing that informal proceedings still have to approach the court which can present itself as a barrier to most SMEs. A compromise order is treated as a final and binding order on all the company's creditors or all members of a relevant class of creditors as the case may be.¹¹³ It is further submitted that such compromises or arrangements should not affect the liability of any person who would have offered themselves to be surety of an SME.

Tolmie avers that there can be a difficulty which can be encountered with informal corporate rescue in that a dissenting creditor is likely to be able to derail the whole effect of the agreement which would have been reached by the rest of the creditors and the SME.¹¹⁴ Difficulties can also be encountered where the SME has multiple creditors and these creditors then become difficult to convince to agree to pursuing informal corporate rescue proceedings.¹¹⁵

2.4.1 Voluntary Corporate Rescue Proceedings

The current position in Zimbabwe is that if an entity such as an SME loses its liquidity and becomes insolvent the SME can implement a company resolution to commence corporate rescue proceedings.¹¹⁶ The board of an SME may resolve that such an SME should undergo corporate rescue proceedings.¹¹⁷ Directors are duty bound to present a unison front once the board resolves to go the way of voluntary insolvency proceedings.¹¹⁸ SMEs often face challenges in that they do not have officially set up structures such as a sitting board of directors that may be in a position to initiate corporate rescue proceedings.¹¹⁹ The board of directors can recommend corporate rescue proceedings and place the entity under supervision if the board has reasonable grounds to believe that the business entity is financially distressed.¹²⁰ The board can also recommend rescue proceedings if it believes that there is a reasonable prospect that the business entity could be rescued.¹²¹ If a board intends to initiate corporate rescue proceedings such a board should only do so before the initiation of liquidation proceedings by the company or against the company.¹²² The

¹¹² Section 147(8) of the Insolvency Act.

¹¹³ Section 147(8) (c) of the Insolvency Act.

¹¹⁴ Tolmie (n 106 above) 60.

¹¹⁵ Tolmie (n 106 above) 60.

¹¹⁶ Section 122(2) of the Insolvency Act [Chapter 6:03].

¹¹⁷ Section 122(2) of the Insolvency Act [Chapter 6:03].

¹¹⁸ Section 135 of the Insolvency Act [Chapter 6:03] enjoins the directors of the entity to cooperate with the corporate rescue practitioner thus acting in a united front for the betterment of the SME.

¹¹⁹ G Karedza, et al. "An Analysis of the Obstacles to the Success of SMEs in Chinhoyi Zimbabwe." 2014, 5 *European Journal of Business and Management*, 2.

¹²⁰ Section 122(1)(a) of Insolvency Act [Chapter 6:03].

¹²¹ Section 122(1)(b) of Insolvency Act [Chapter 6:03].

¹²² Section 122 (2)(a) of Insolvency Act [Chapter 6:03].

board should not abuse this process if there are no hopeful prospects of success in bringing the SME back to its former state of solvency.

In order for a resolution by the board to be recognised such resolution has to be filed with the Master of the High Court and Registrar of Companies in the case of companies or the Registrar of Co-operative Societies if it's in the case of co-operatives.¹²³ The full complement of the board of directors is expected to vote and contribute to the ruling this was laid out in the case of *Ofer Sivan v Alexious Dera N.O. & Others*¹²⁴ wherein the court emphasised that a reading of section 196 (1) of the Companies and Other Business Entities Act clearly shows that all directors who are entitled to vote on a matter should vote.¹²⁵ In the above matter, the other directors had excluded one of the directors in a vote and the court held that as an affected director he was entitled to challenge the resolution based on being affected by it.¹²⁶ The failure to properly carry out a resolution has massive ramifications as it can derail the entire corporate rescue process as was seen in the above-referred matter. The court further underscored that voluntary corporate rescue is a step-by-step process that commences with a resolution.¹²⁷ The first step which is the resolution by the directors is the first step and foundation of the corporate rescue process and when it is nullified or suspended everything that is built upon it crumbles and falls away.¹²⁸

Once a board resolves such that an SME should undergo corporate rescue proceedings such SME should so file that resolution within five business days.¹²⁹ The feasibility of this in respect of SMEs which may be operating in remote areas of Zimbabwe can be brought to question as these SMEs may struggle to access these offices where such resolution has to be filed. Such SME that files for corporate rescue proceedings is burdened with the onus to give notice of the resolution and its effective date by standard notice to every person that is so affected by that action. This would be quite challenging except to be done through possible newspaper publications although there is no specification of how notice is to be given.¹³⁰ The notice should be done in a manner wherein there is a notice of a sworn statement that documents relevant facts laying out the grounds upon which such resolution was founded.¹³¹

¹²³ Section 122 (2)(b)(i) & (ii) of the Insolvency Act [Chapter 6:03].

¹²⁴ *Ofer Sivan v Alexious Dera N.O. & Others* HH 13-22.

¹²⁵ *Ofer Sivan v Alexious Dera N.O. & Others* HH 13-22.

¹²⁵ *Ofer Sivan v Alexious Dera N.O. & Others* HH 13-22.

¹²⁶ *Ofer Sivan v Alexious Dera N.O. & Others* HH 13-22.

¹²⁷ *Ofer Sivan v Alexious Dera N.O. & Others* HH 13-22.

¹²⁸ *Ofer Sivan v Alexious Dera N.O. & Others* HH 13-22.

¹²⁹ Section 122 (3) of Insolvency Act [Chapter 6:03].

¹³⁰ Section 122 (3)(a) of Insolvency Act [Chapter 6:03].

¹³¹ Section 122 (3)(a) of Insolvency Act [Chapter 6:03].

It is imperative to note that the SME which files for corporate rescue proceedings is also duty bound to appoint a corporate rescue practitioner.¹³² Such a corporate rescue practitioner is supposed to accept such an appointment in writing.¹³³ The SME is then required to file within two business days, notification of the appointment of the corporate rescue practitioner.¹³⁴ The notification of appointment is filed with the Master of the High Court and the Registrar of Companies or the Registrar of Co-operative Societies.¹³⁵ This is possibly meant to curb the mischief of errant insolvents who file for solvency as a way to avoid paying off their obligations. The SME is further enjoined to publish a notice of the appointment to each and every person who is affected and these persons could include creditors and debtors and any other relevant stakeholders.¹³⁶ What is interesting to note is the time frames within which this notification should be done which are again five business days.¹³⁷ It is quite difficult to envision a scenario where an already struggling SME would be able to meet this set timeframes. It is also pertinent to note that if the SME fails to comply with the provided timeframes the resolution by the board of that SME to begin corporate rescue proceedings and place the company under supervision thus becomes a nullity.¹³⁸

The SME that fails to stick to the deadlines is visited with a punitive sanction in that such SME is prohibited from filing a further resolution for a period of three months after the date on which the last resolution was adopted.¹³⁹ This presents a hurdle as if an SME is teetering towards collapse, then such an SME may not survive for a period of three months. These three months could be precarious for the struggling SME which would have failed to meet deadlines. The only reprieve for the SME that has been barred from filing is to prove to a Court on good cause on an urgent chamber application that seeks the approval of the filing of the company resolution.¹⁴⁰ A company that has succeeded in filing for corporate rescue proceedings is prohibited from initiating liquidation proceedings unless the resolution has lapsed due to delays in filing or when the corporate rescue proceedings are extinguished.¹⁴¹ The board is so empowered when it harbours a reasonable belief that that the SME is financially distressed and such board has no resolution, the board may deliver a written notice

¹³² Section 122 (3)(b) of Insolvency Act [Chapter6:03]. See also S Conradie & C. Lamprecht, *Business rescue: How can its success be evaluated at company level?* 2015 Volume 19 Number 3 *Southern African Business Review* who discusses this from the South African perspective.

¹³³ Section 122 (3)(a) of Insolvency Act [Chapter6:03].

¹³⁴ Section 122 (4)(a) of Insolvency Act [Chapter6:03] See also Naidoo (et al) 'Business Rescue Practices in South Africa: An Explorative View' no. 1 (2018) *Journal of Economic and Financial Sciences* which scholars also discuss the corporate rescue process in South Africa.

¹³⁵ Section 122 (4)(a)(i)-(ii).

¹³⁶ Section 122 (4)(b).

¹³⁷ Section 122 (4)(b).

¹³⁸ Section 122 (5) of the Insolvency Act [Chapter6:03].

¹³⁹ This presents a challenge of accessing the corporate rescue process for SMEs.

¹⁴⁰ Section 122 (5)(b)(1) of the Insolvency Act [Chapter6:03].

¹⁴¹ Section 122 (6) of the Insolvency Act [Chapter6:03].

to every affected person, informing such persons of reasons why the board may not have issued a resolution.¹⁴²

2.4.2 Objections to voluntary corporate rescue proceedings

Any person who is affected by a company that decides to file for voluntary insolvency may object to such a company filing for insolvency.¹⁴³ Such an affected person may apply to the court for an order which seeks to set aside the resolution of the board.¹⁴⁴ The affected person has to set out grounds upon which they rely to overturn the board resolution. This is in line with the intention to curtail situations where entities would file for insolvency when they're not insolvent. The affected person can challenge the resolution on the basis that there are no reasonable grounds for believing that such SME is financially distressed.¹⁴⁵ The affected person can further raise the ground that there are no reasonable prospects of resuscitating or rescuing the company or that the company has failed to comply with procedural irregularities as set out within the Act.¹⁴⁶ It is perplexing to note the emphasis on procedural elements at the expense of the possibility of rescuing the corporate entity.

2.5 Formal Corporate Rescue Proceedings

2.5.1 Court Order Corporate Rescue Proceedings

Corporate rescue proceedings may be initiated through court proceedings as an alternative to voluntary corporate rescue proceedings. Court orders can be initiated by an affected person who may approach the court as an applicant if voluntary corporate rescue proceedings have not been initiated.¹⁴⁷ Formal rescue procedures are court-supervised, so their benefit is that many useful insolvency mechanisms can be used, such as stay and refinancing.¹⁴⁸ The applicant being an affected person may be a shareholder, creditor, a registered trade union representing the company, or any of the employees not represented by a registered trade union or their respective representatives.¹⁴⁹ The key rationale for instituting corporate rescue proceedings is to seek to benefit from the moratorium on debt recovery that is afforded to financially distressed SMEs in respect of legal proceedings or enforcement against property owned by the SME.

¹⁴² Section 122(7) of the Insolvency Act.

¹⁴³ Section 123 of the Insolvency Act.

¹⁴⁴ Section 123(1) of the Insolvency Act.

¹⁴⁵ Section 123(1)(a)(i) of the Insolvency Act.

¹⁴⁶ An SME can thus be potentially be excluded from exploring corporate rescue proceedings on the basis that such SME failed to comply with procedural guidelines.

¹⁴⁷ Section 124 (1) of the Insolvency Act.

¹⁴⁸ D, Zhang. *Insolvency Law and Multinational Groups: Theories, Solutions and Recommendations for Business Failure*. 1st ed. Routledge, 2019. <https://doi.org/10.4324/9780429288487>. 42

¹⁴⁹ Section 121(1) (a) of the Insolvency Act.

The ultimate goal of corporate rescue law is the preservation of going concern value and certainty.¹⁵⁰ The moratorium afforded to SMEs who are under corporate rescue proceedings includes creditors' rights.¹⁵¹ This principle was underscored in the case of *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Ors*¹⁵² 2016 (6) SA 448 (KZD) at 448 the court dealt with the moratorium on business rescue proceedings underscoring that no legal proceedings including enforcement of judgments can be brought against the entity.

The affected applicant who approaches the court to commence corporate rescue proceedings is duty bound to serve an application on the SME, the master of the High Court, and the Registrar of companies.¹⁵³ It is also imperative that the instituter of proceedings also serve copies of the application on each affected person by standard notice.¹⁵⁴ The Master of the High Court is not enjoined in the Act to file his or her report regarding his or her opinion on whether the SME concerned is financially distressed. In practice, however, the Master plays an essential role in assisting the court, the corporate rescue practitioner and the affected persons to ensure that the corporate rescue process works out smoothly.¹⁵⁵ The rationale for serving the registrar of companies is premised on the fact that it acts as a contingency in case the shareholding structure of the SME changes thus enabling the registrar to effect any relevant amendments.¹⁵⁶ It is quite difficult to envision a scenario where a person would serve every affected person given the fact that the entity may be trading with multiple persons. The possible standard notice could be by way of publication in a newspaper although the form of notice to the affected person is not explicitly provided for in the Act. It is important to note that the Act affords each affected person the right of audience which can unnecessarily prolong the matter before the court.¹⁵⁷

Upon receipt of the application to undergo corporate rescue proceedings by an SME which is on the verge of failing the court is seized with various options as to how to proceed. The Court may consider such an application and may make an order that places the entity under the supervision and commencing corporate rescue proceedings.¹⁵⁸ There are conditions that one has to satisfy that the company is financially distressed.¹⁵⁹ The affected person also has to satisfy the Court that the SME has failed to pay over any amount in terms of an obligation under or in terms of

¹⁵⁰ D Zhang. *Insolvency Law and Multinational Groups: Theories, Solutions and Recommendations for Business Failure*. 1st ed. Routledge, 2019. 27.

¹⁵¹ Section 126(1) of the Insolvency Act.

¹⁵² *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Ors* 2016 (6) SA 448 (KZD) at 448.

¹⁵³ Section 124 (1) of the Insolvency Act.

¹⁵⁴ Section 124 (2) (b) of the Insolvency Act.

¹⁵⁵ Gumbo, (n 30 above) 6.

¹⁵⁶ Gumbo, (n 30 above) 6.

¹⁵⁷ Section 124 (3) of the Insolvency Act.

¹⁵⁸ Section 124 (4) of the Insolvency Act.

¹⁵⁹ Section 124 (4) (a)(i) of the Insolvency Act.

public regulation or contract with respect to employment-related matters.¹⁶⁰ An SME which then is in a position wherein it can no longer settle its dues and obligations would be potentially subject to corporate rescue proceedings. When it is just and equitable that an SME is placed under corporate rescue proceedings due to financial reasons the court will grant such an order.¹⁶¹

The court is also bestowed with the discretion to also dismiss the application together with any further necessary and appropriate order which includes placing the SME under liquidation.¹⁶² Liquidation would entail that the court would have adjudged the SME to be beyond redemption. When one sees that it is fit for an SME to undergo corporate rescue proceedings. The Court may make a further order which sets in place an interim corporate rescue practitioner who is a person who satisfies the requirements of a corporate rescue practitioner as envisioned within the confines of the Act. Such practitioner has to have been nominated by the affected person, however, there is an additional safeguard in that such nomination has to be ratified by the holders of a majority of the independent creditors voting interests at the first meeting of the creditors.¹⁶³ The Act envisions a scenario wherein liquidation proceedings may have already commenced against an entity and it is provided that where such a course has occurred the application for corporate rescue proceedings suspends the liquidation proceedings.¹⁶⁴ The liquidation proceedings are only suspended until the court has adjudicated on the merits of the application to place the entity under rescue proceedings.¹⁶⁵ It is interesting to note that the legislature put in place mechanisms and safeguards which seek to uphold the resuscitation of the entity rather than its collapse. This can be attributed to the fact that Zimbabwe has seen multiple businesses and entities undergoing liquidation. It can be argued that this position signifies a turning point in the fate of entities. Companies placed under supervision are prohibited from liquidating through resolution until the entity has gone through the corporate rescue proceedings which must have reached a conclusion.¹⁶⁶

It is critical to note that there is a gap in the law as relating to the form and structure of the standard notice. Practically it is difficult for one to actually know or be aware of all the creditors of the SME. Practically serving each and every creditor or affected person either by mail, email, or fax which may make serving every person impracticable. What is most practicable and has been adopted by the court has been to fight the advert in a newspaper which the court has applauded as being an

¹⁶⁰ Section 124(4) (a)(i) of the Insolvency Act.

¹⁶¹ Section 124(4) (a)(iii) of the Insolvency Act.

¹⁶² Section 124(4)(b) Insolvency Act.

¹⁶³ Section 124(5) of the Insolvency Act.

¹⁶⁴ Section 124(5) of the Insolvency Act.

¹⁶⁵ Section 124(6) of the Insolvency Act.

¹⁶⁶ Section 125(8) of the Insolvency Act.

innovative approach to ensuring that all affected persons are reached.¹⁶⁷ It can be argued that this would have been the most practicable approach for the legislature to adopt given that other notices in other disciplines such as succession law, and registration of certain entities is done through flighting adverts through the press.¹⁶⁸

It is quite difficult to envision a scenario where a person would serve each and every affected person given the fact that the entity may be trading with multiple persons. The possible standard notice could be by way of publication in a newspaper although the form of notice to the affected person is not explicitly provided for in the Act. It is important to note that the Act affords each affected person the right of audience which can unnecessarily prolong the matter before the court.¹⁶⁹ Upon receipt of the Application to undergo corporate rescue proceedings by an SME which is on the verge of failing the court is seized with various options as to how to proceed. The Court may consider such an application and may make an order that places the entity under the supervision and commencing corporate rescue proceedings.¹⁷⁰ There are conditions that one has to satisfy that the company is financially distressed.¹⁷¹ The affected person also has to satisfy the Court that the SME has failed to pay over any amount in terms of an obligation under or in terms of public regulation or contract with respect to employment-related matters.¹⁷² An SME which then is in a position wherein it can no longer settle its dues and obligations would be potentially subject to corporate rescue proceedings. When it is just and equitable that an SME be placed under corporate rescue proceedings due to financial reasons the court will grant such an order.¹⁷³

In order for the court to accept that corporate rescue proceedings are necessary for any given SME. There should be in existence a financially distressed SME or cooperative.¹⁷⁴ In defining financial distress this would basically mean that the SME would be in a position wherein it appears that it would be reasonably unlikely that the SME would be unable to pay all of its debts as they fall owing and such debts being due within the subsequent six month period.¹⁷⁵ Also, an SME could be said to be in distress if such SME is in a position wherein it can forecast that in the period immediately following within the next six months that SME will become insolvent.¹⁷⁶ In order to measure distress, one needs to carry out an objective test wherein the

¹⁶⁷ *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

¹⁶⁸ *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

¹⁶⁹ Section 124 (3) of the Insolvency Act.

¹⁷⁰ Section 124 (4) of the Insolvency Act.

¹⁷¹ Section 124 (4) (a)(i) of the Insolvency Act.

¹⁷² Section 124 (4) (a)(i) of the Insolvency Act.

¹⁷³ Section 124 (4) (a)(iii) of the Insolvency Act.

¹⁷⁴ Section 124 (4) (a)(i) of the Insolvency Act.

¹⁷⁵ See Section 121(1)(f)(i) of the Insolvency Act which defines what constitutes financial distress within an entity that intends to file for corporate rescue proceedings.

¹⁷⁶ Section 121(1)(f)(ii) of the Insolvency Act.

Court examines the financial circumstances of the SME.¹⁷⁷ The court examines the SME whether the SME would be able to meet its obligations as they become due.¹⁷⁸

If the SME is in a position where it cannot pay its salaries to its employees, trade unions, and creditors among other authorities such as tax regulators and social security for employees these signs could be seen as indicators of financial distress.¹⁷⁹ Such indicators of financial distress could also possibly include the inability to settle basic bills such as water bills, and electricity bills.¹⁸⁰ It is not necessary to prove that the entity has failed or is now insolvent but rather that there is a danger of imminent insolvency if this entity is not bailed out.¹⁸¹ If the court comes to the realisation that there are insolvency indicators that are present the court will for all intents and purposes grant the application for corporate rescue proceedings if it is just and equitable to do so for financial reasons.¹⁸² The court is therefore acting as an arbiter seeking to balance the interests of the shareholders and those of every other affected person. The court is thus in a position to make a determination based on the available factors. It is trite to note that an entity with no prospects of success will not be placed under corporate rescue but will rather be sent for liquidation.

The court is also bestowed with the discretion to also dismiss the application together with any further necessary and appropriate order which includes placing the SME under liquidation.¹⁸³ Liquidation would entail that the court would have adjudged the SME to be beyond redemption. When one sees that it is fit for an SME to undergo corporate rescue proceedings. The Court may make a further order which sets in place an interim corporate rescue practitioner who is a person who satisfies the requirements of a corporate rescue practitioner as envisioned within the confines of the Act. Such practitioner has to have been nominated by the affected person, however, there is an additional safeguard in that such nomination has to be ratified by the holders of a majority of the independent creditors voting interests at the first meeting of the creditors.¹⁸⁴ The Act envisions a scenario wherein liquidation proceedings may have already commenced against an entity and it is provided that where such a course has occurred the application for corporate rescue proceedings suspends the liquidation proceedings.¹⁸⁵ The liquidation proceedings are only suspended until the court has adjudicated on the merits of the application to place the entity under rescue proceedings.¹⁸⁶ It is interesting to note that the legislature

¹⁷⁷ *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

¹⁷⁸ *Metallon Gold Zimbabwe (Private) Limited and Ors V Shatirwa Investment (Private) Limited SC 107/21.*

¹⁷⁹ Gumbo, (n 30 above) 5.

¹⁸⁰ Gumbo, (n 30 above) 5.

¹⁸¹ Gumbo, (n 30 above) 6.

¹⁸² Gumbo, (n 30 above) 6.

¹⁸³ Section 124 (4)(b) of the Insolvency Act.

¹⁸⁴ Section 124 (5) of the Insolvency Act.

¹⁸⁵ Section 124 (5) of the Insolvency Act.

¹⁸⁶ Section 124 (6) of the Insolvency Act.

put in place mechanisms and safeguards which seek to uphold the resuscitation of the entity rather than its collapse. This can be attributed to the fact that Zimbabwe has seen multiple businesses and entities undergoing liquidation. It can be argued that this position signifies a turning point in the fate of entities. Companies placed under supervision are prohibited from liquidating through resolution until the entity has gone through the corporate rescue proceedings which must have reached a conclusion.¹⁸⁷

An order that places the entity under corporate rescue may be made at any given point in time even when liquidation proceedings have been commenced, or when proceedings to enforce security against an entity have been commenced. The institution of corporate rescue proceedings should not be used or abused as an avenue to escape liquidation. Once an entity has been placed under corporate rescue proceedings such entity is barred from filing liquidation proceedings until the corporate rescue proceedings can be terminated in terms of the law.

2.5.2 The Corporate Rescue Plan

When an SME goes the corporate rescue route such an SME's corporate rescue practitioner has to prepare a corporate rescue plan.¹⁸⁸ The corporate rescue plan essentially seeks to convince by appealing to reason, the notion that through its approval the creditors of the SME will remain better off as compared to the SME undergoing liquidation. The rescue plan should not be misleading or attempt to coerce anyone.¹⁸⁹ Instead, the corporate rescue plan should influence and alter the manner in which a creditor views an investment.¹⁹⁰ The corporate rescue plan has already been dealt with in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments*¹⁹¹ in this case the court held that it was difficult to conceive a rescue plan that will have good prospects of success of the entity concerned if the corporate rescue plan did not do anything to address the cause of the downfall of the entity in the first place¹⁹². The court was of the opinion that the corporate rescue plan should offer a remedy to the malady and thus a reasonable prospect of success.¹⁹³ The court observed that a business plan which is unlikely to achieve anything would be futile as it would only serve to add to the agony of the entity by substituting one debt for another with there no being light at the end of the lengthily tunnel.¹⁹⁴

¹⁸⁷ Section 125(8) of the Insolvency Act.

¹⁸⁸ W Rosslyn-Smith, (et al). "Informing the Vote: The Business Rescue vs Liquidation Decision, 25 (2021):" *Southern African Business Review*.

¹⁸⁹ Section 142 of the Insolvency Act.

¹⁹⁰ W Rosslyn-Smith (n 188 above) 7.

¹⁹¹ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* 2012 (2) SA 423 (WCC).

¹⁹² *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* 2012 (2) SA 423 (WCC).

¹⁹³ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* 2012 (2) SA 423 (WCC).

¹⁹⁴ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* 2012 (2) SA 423 (WCC).

A corporate rescue plan can be rejected and when it is the corporate rescue practitioner is obligated to seek approval from the holders of the voting interests to prepare and publish a revised work plan.¹⁹⁵ The corporate rescue practitioner is also empowered if he or she feels that the vote by the creditors of the SME was inappropriate or bad in terms of the interests of the SME then the practitioner would inform the meeting that the entity intends to challenge the decision of meeting at the High Court to set aside the result.¹⁹⁶ The practitioner may neglect to challenge the decision not to approve the corporate rescue practitioner. When the practitioner ignores such a decision, any affected persons are then empowered to seek approval from the holders of the voting interests which then requires the rescue practitioner to prepare and publish a revised plan.¹⁹⁷ An affected person can also apply to the high court to set aside the result rejecting the corporate rescue plan on the grounds that the decision is inappropriate.¹⁹⁸

There are multiple safeguards that are entrenched within the confines of legislation. The affected persons are free to make a binding offer to purchase the voting rights of one or more persons who are opposed to the adoption of the corporate rescue plan at a value independently and expertly determined at the request of the corporate rescue practitioner.¹⁹⁹ Such value should be a fair and reasonable estimate of the return to that person if the company had to be liquidated.²⁰⁰ The attractiveness of this is debatable since the returns associated with the liquidation of an entity are bound to be lower than the returns from a going concern given the fact that an SME may have zero assets to be liquidated which presents as a challenge to obtaining any return.

The corporate rescue plan should be considered within a period of 10 days post the publication of the corporate rescue plan.²⁰¹ This is done through the efforts of the corporate rescue practitioner who is expected to call a meeting which he will preside over with the creditors and the holders of voting rights to consider the corporate rescue plan.²⁰² The rescue practitioner is burdened with the daunting task of ensuring that a notice of the meeting, as well as the agenda of the meeting, is communicated to all affected persons indicating the date, time, and place of the

¹⁹⁵ Section 145(1) of the Insolvency Act.

¹⁹⁶ Section 145(2)(b) of the Insolvency Act. This similar process can also be found within the confines of South African Companies Act.

¹⁹⁷ Section 145(1) of the Insolvency Act.

¹⁹⁸ Section 145(2) of the Insolvency Act.

¹⁹⁹ Sections 145 (2) (a) (b) (c) of the Insolvency Act. This position is confirmed by scholars who discuss the role of the business rescue practitioner in South African business law.

²⁰⁰ Sections 145 (2) (a) (b) (c) of the Insolvency Act.

²⁰¹ Section 143(1) of the Insolvency Act.

²⁰² Section 143(1) of the Insolvency Act. Authors discuss this onerous requirement of calling together creditors and acknowledge that indeed it is a mammoth task that could overwhelm the SME which is undergoing the corporate rescue process.

meeting together with the agenda of the meeting.²⁰³ The practitioner in that notification also includes a summation of the voting rights to participate and to vote within the meeting.²⁰⁴ The corporate rescue plan can be approved by at least seventy-five per cent of the creditors of the SME.²⁰⁵

It is pertinent to note that there is no action taken either by the rescue practitioner or any affected person after the corporate rescue plan has been rejected the corporate rescue proceedings will be regarded as having been terminated.²⁰⁶ There is a gap within the legislation that has failed to provide for time frames within which the rescue practitioner or affected persons are expected to take action following the rejection of the corporate rescue plan. The substantial implementation of the corporate rescue plan can lead to the termination of the corporate rescue proceedings once the corporate rescue practitioner informs the Master of the High Court that there has been substantial implementation.²⁰⁷

Corporate rescue proceedings like any other process are expected to have an end and, in this case, they are expected to end within three months from the date of commencement.²⁰⁸ It is not well defined when then the counting of days should start from the time of filing a resolution by the directors or filing of a court application by an affected person.²⁰⁹ It can be averred that the only pragmatic course would be to count the days from the date of the court order.²¹⁰ In event that rescue proceedings are not completed and or finalised within three months then the corporate rescue practitioner should prepare a report on the progress of the proceedings.²¹¹ This report should be on the progress of the proceedings with regular updates expected at the end of each subsequent month until the extinguishing of the proceedings.²¹² In the noncompletion of rescue proceedings within three months of the rescue process, the practitioner is duty bound to apply to the High court for an extension of the period.²¹³ Upon the extension of such time period, the

²⁰³ Section 143(1) of the Insolvency Act. See E Levenstein, 'Business rescue in South Africa: Shortcomings, suggestions and possible amendments to Chapter 6 of the 2008 Companies Act' 2018 222 also who discuss this requirement and how it can act as a barrier to SMEs organizing their business rescue processes efficiently.

²⁰⁴ Section 144(2) of the Insolvency Act.

²⁰⁵ Section 143(2) of the Insolvency Act.

²⁰⁶ Section 145(6) of the Insolvency Act. See discussion by Van, Staden J. 'Cutting the Lifeline - the Termination of Business Rescue Proceedings'. *De Rebus* 2013, no. 537 (2013):14-17. <https://doi.org/10.10520/EJC145229> who discuss the termination of corporate rescue proceedings from the South African perspective?

²⁰⁷ Section 144(8) of the insolvency Act See also scholars who discuss the counting of time frames from the onset of corporate rescue proceedings.

²⁰⁸ Section 125 (1) of the Insolvency Act. See discussion by scholars who discuss the termination of corporate rescue proceedings from the South African perspective.

²⁰⁹ Section 125 (1) of the Insolvency Act.

²¹⁰ Gumbo, (n 30 above) 4.

²¹¹ Section 125 (3) (a) of the Insolvency Act. See also discussion by scholars highlighting the importance of sticking to timeframes when undergoing corporate rescue proceedings.

²¹² Section 125 (3) (a) of the Insolvency Act.

²¹³ Section 125 (3) (a) of the Insolvency Act.

practitioner is duty bound to provide regular updates to the court and the master every month until the proceedings have been extinguished again such notice is expected to be served through standard notice.²¹⁴

2.6 The effect of placing an SME under corporate Rescue Proceedings

Once an SME has been placed under corporate rescue various legal effects consequently follow such designation. The court order which places an entity under corporate rescue proceedings has various effects including suspending any litigation against the SME. No legal proceedings as discussed above may be brought against the entity.²¹⁵ The moratorium that is afforded to entities includes the suspension of any enforcement of writs of execution that may have been obtained prior against the SME.²¹⁶ This suspension grants SMEs a reprieve against the execution of the entity's property or any property which may belong to the entity or in the possession of the entity.²¹⁷

The entity is expected to recover through the efforts of the corporate rescue practitioner. The corporate rescue practitioner is expected to re-engineer the entity and remove it from its almost bankrupt state.

2.7 Limitations on Institution of Corporate Rescue Proceedings

S126 of the Insolvency Act places limits on the said moratorium that is afforded to entities undergoing corporate rescue proceedings, such that entities under corporate are not placed in a vacuum that is devoid of legal rights or execution thereof by creditors.²¹⁸ There are limitations that are placed on the institution of corporate rescue proceedings and in such circumstances include situations wherein proceedings can be excepted and proceedings conducted against the entity. Civil suits may be pursued against the SME with the written consent of the corporate rescue practitioner.²¹⁹ Thus, a litigant may approach the corporate rescue practitioner to seek consent to institute litigation against the SME which consent should be written by the corporate rescue practitioner.

Alternatively, if one intends to sue the SME which is undergoing rescue proceedings one also has the option of seeking leave of the court before commencing court

²¹⁴ Section 125 (3) (b) of the Insolvency Act.

²¹⁵ Section 126(1) of the Insolvency Act. Maphiri discusses the moratorium that is afforded to corporate rescue practitioners.

²¹⁶ Section 126(1) of the Insolvency Act.

²¹⁷ Section 126(1) of the Insolvency Act. See also Nwafor, A O. 'Moratorium in Business Rescue Scheme and the Protection of Company's Creditors'. 13, no. 1 (2017): *Corporate Board Role Duties and Composition* 4.

²¹⁸ Section 126(1) of the Insolvency Act [chapter 6:03].

²¹⁹ Section 126 of the Insolvency Act [chapter 6:03]. See also Nwafor, A O. 'Moratorium in Business Rescue Scheme and the Protection of Company's Creditors'. 13, no. 1 (2017): *Corporate Board Role Duties and Composition* 4.

proceedings against the SME which is undergoing corporate rescue proceedings.²²⁰ Proceedings that are related to set off against any claim made by the SME in any legal proceedings regardless of whether such proceedings were commenced before or after the corporate rescue proceedings began.²²¹ It should be well noted that the moratorium that is afforded to SMEs does not extend to criminal cases as well. Criminal cases may be brought against the entity or its directors even after the commencement of corporate rescue proceedings.²²² This could arise in situations wherein the rescue practitioner investigates the entity which would be under rescue and such practitioner discovers that there are criminal offences that were committed by the directors of such entities before the entity that has filed for corporate rescue. In such a situation the entity or its directors would be prosecuted at the instance of the corporate rescue practitioner.

In addition, the proceedings may be brought against the SME where there may be proceedings that concern property or rights over which the SME exercises the powers of a trustee may be instituted during the corporate rescue proceedings.²²³ Litigation may also be brought in situations wherein they are done by a regulatory authority in the execution of its duties after written notification to rescue practitioner may be executed even during the lifespan of the corporate rescue proceedings.²²⁴ Outside the exceptions discussed herewith SMEs would generally enjoy a moratorium against litigation of all other cases which affords the entity breathing space to recover and be re-engineered back to success.

2.8 Qualifications, Role, and Power of a Corporate Rescue Practitioner

Corporate Rescue proceedings in Zimbabwe have a central figure within them who is known as a corporate rescue practitioner. The corporate rescue practitioner should formulate a corporate rescue plan. The appointment of the corporate rescue practitioner should be done with the full recognition of section 131 of the Act in connection with the practitioner.²²⁵ The practitioner is required to put into writing his or her consent to be appointed as a corporate rescue practitioner.²²⁶ The practitioner which is so appointed should not be disqualified for such a role, a practitioner should be free from any association with the SME or its management to ensure that the proceedings are clear from any taint of bias for one to be registered and licensed as an insolvency practitioner in terms of the Estate Administrators Act.²²⁷ The Master of the High Court is supposed to keep a register of licensed and

²²⁰ Section 126(1)(b) of the Insolvency Act.

²²¹ Section 126 (1)(c) of the Insolvency Act.

²²² Section 126 (1)(d) of the Insolvency Act.

²²³ Section 126 (1)(e) of the Insolvency Act.

²²⁴ Section 126 (1)(f) of the Insolvency Act.

²²⁵ Section 131 of the Insolvency Act.

²²⁶ Section 122 (3) of the Insolvency Act.

²²⁷ Chapter 27:20.

practising insolvency which enables the easy recommendation of corporate rescue practitioners to prospective SMEs.

Historically, in the old regime of judicial management, the competency of judicial managers was brought into question. This was proved in that the successes of judicial were minimal and far between and the judicial management process dragged on unendingly with no conclusion in sight. The legislators thus saw it fit to capture the qualifications of the corporate rescue practitioners.²²⁸ Putting in place qualifications is meant to act as a safeguard to guarantee that corporate rescue practitioners being the soldiers at the gate in attempting to resuscitate an SME should be appropriately qualified. The fact that such esteemed qualifications are put in place is to ensure that the corporate rescue practitioner has adequate qualifications to carry out the duties of salvaging the entity from its doldrums.

The powers of the corporate rescue practitioner include among other things the overall management of the rescue initiative, the practitioner extends to full management control of the company the rescue practitioner is granted full autonomy and he or she can exercise powers that are similar to the board of directors of said entity.²²⁹ The rescue practitioner has the authority to delegate said powers or functions to any person who is part of the board or pre-existing management of the SME.²³⁰ The rescue practitioner is empowered to appoint any other person who should be qualified and should have the necessary management qualifications and experience.²³¹ It can be gathered that the nature of the job for the corporate rescue practitioner is a daunting task that requires immense skill to transform the sinking entity into a viable SME. The corporate rescue practitioner should thus be an ingenuous person who has the proven skill and experience to resuscitate the failing entity. The corporate rescue practitioner is enjoined to inform all regulatory authorities when an entity which they would have been in charge of supervising has been placed under corporate rescue this is done to ensure that key regulatory bodies are aware as they would often have to deal with the rescue practitioner rather than with the management or board of the entity. The rationale for this lies in that there is a temporary suspension of the duties of the board and such a practitioner has to inform stakeholders that they are going to be the contact person for the SME which is undergoing corporate rescue.

The key to the role of the corporate rescue practitioner is to investigate the SME.²³² The practitioner upon appointment has to investigate the affairs of the SME which include, the business, property, and financial situation of the SME.²³³ The rescue

²²⁸ Section 131 of the Insolvency Act.

²²⁹ Section 133 (1)(a) of the Insolvency Act.

²³⁰ Section 133 (1)(b) of the Insolvency Act.

²³¹ Section 133 (1)(c) of the Insolvency Act .

²³² Section 134 (1) of the Insolvency Act.

²³³ Section 134 (1) of the Insolvency Act.

practitioner would utilize results from this inquiry to assess whether there are any prospects of success in resurrecting the SME. The investigation by the practitioner is supposed to be a fair and objective assessment of the entity's affairs and the financial position of the SME peradventure, the rescue practitioner can inform the court if they note that are slim prospects of success of the rescue and apply to the court for the rescue of the entity. The same applies if the SME is out of danger there is then a need for the corporate rescue practitioner to notify the court of the entity and all affected persons of this development through standard notice.²³⁴ The practitioner having notified the affected persons should then apply to the court to have such proceedings terminated.

Corporate rescue practitioners are appointed and can thus be removed from the same office. The corporate rescue practitioner may be removed from office through court order or by the master of the High Court in terms of the Act.²³⁵ An affected person may approach the court for the removal of a corporate rescue practitioner alleging any one of various grounds.²³⁶ One such ground may be that there is incompetence or there has been a failure to perform the duties of a practitioner of the particular SME.²³⁷ The affected person may also approach the court alleging failure to exercise the proper degree of care in the performance of his or her functions.²³⁸ If a corporate rescue practitioners also engage in theft or any such illegal acts or conduct.

Additionally, the rescue practitioner could also be removed from office if the corporate rescue practitioner no longer fulfils the requirements that are provided for the requirements as provided for under section 131 of the Act. This could arise in situations wherein the practitioner then is in a position of conflict or has been disqualified and subsequently removed from the register of insolvency practitioners or where the practitioner is evoking independence.²³⁹ When the practitioner becomes incapacitated and unable to perform their functions of the office and, likely, they may not regain that capacity they could possibly be removed from office. Such incapacitation could possibly be of issues such as mental health challenges which may cause that incapacity. The entity would duly be entitled to appoint a new corporate rescue practitioner.

2.9 Preliminary conclusion

In light of the above discussion, this chapter successfully explores the procedural elements and the law of corporate rescue which is quite complicated. The law of

²³⁴ Section 134 (2)(b) of the Insolvency Act.

²³⁵ Section 79 of the Insolvency Act.

²³⁶ Section 132 (2) of the Insolvency Act.

²³⁷ Section 132 (2) of the insolvency Act.

²³⁸ Section 132 (2) of the Insolvency Act.

²³⁹ Section 132 (2)(d) of the Insolvency Act.

corporate rescue proceedings in Zimbabwe's insolvency legislation is quite complicated and it seems to have been tailor-made for big corporations with no provisions being made for corporate rescue proceedings for smaller entities. Smaller entities are obliged to walk the long mile which can be arduous and straining. Chapter three identifies the challenges that could possibly arise and are being faced by small and medium enterprises in Zimbabwe.

Chapter three

Challenges faced by SMEs in the Corporate Rescue Procedure

3.1 Introduction

This chapter builds upon the previous chapter which identified the legal framework for undertaking corporate rescue proceedings in Zimbabwe and goes on to discuss the challenges that are faced and could be faced by Zimbabwean SMEs which seek to undertake the corporate rescue proceedings process. The Chapter delves into a legal analysis of the current formulation of the rescue proceedings process and how it presents as a hurdle that may be difficult for SMEs to surmount given the often-miniature nature of their operations and how SMEs are financed.

Chapter three discusses the challenges that Zimbabwean SMEs have experienced and could encounter in implementing corporate rescue proceedings in their current format as envisioned by the Insolvency Act. The chapter identified issues such as bureaucratic and lengthy processes, the lack of proper corporate governance structures in most SMEs in Zimbabwe, and the lack of managerial expertise in most SMEs among other challenges. The chapter looks into the litigation that has been done on corporate rescue proceedings in Zimbabwe under the new legislation to appreciate the challenges and success thus far.

3.2 Challenges faced by SMEs in the corporate rescue proceedings process

3.2.1 Bureaucratic and lengthy processes

There are time limits that have to be observed once a company has passed a resolution for voluntary placement on corporate rescue. Within five business days after adopting a resolution for voluntary administration and filing such with either the Master, Registrar of Companies, and Registrar of Co-operatives the SME is obligated to give notice of the resolution and its effective date by standard notice to every person that is so affected by that action.²⁴⁰ The requirements to give notice apply across the board and are quite burdensome whether the SME has filed through voluntary proceedings or the court.²⁴¹ If one files through the court for corporate rescue proceedings such an entity is expected to navigate through complex legal systems which lawyers have also struggled with interpreting.²⁴² The lack of faster and alternative processes for corporate rescue for SMEs has led to the current corporate rescue process being quite daunting and demanding as the procedural

²⁴⁰ Section 122(3) of the Insolvency Act.

²⁴¹ A Boraine, 'Formal Debt-Relief, Rescue and Liquidation Options for External Companies in South Africa', no. 4 (2020. *BRICS Law Journal*) 4.

²⁴² Maphiri (n 42 above) 14.

elements are quite demanding which can hinder SMEs from pursuing corporate rescue rather than opting for it.²⁴³

It would be prudent if the legislature had introduced significant out-of-court or informal corporate rescue mechanisms which would serve as the first point of call before going into litigation or approaching the court. An emphasis on out-of-court or informal rescue proceedings would serve Zimbabwean SMEs better than full-blown out corporate rescue proceedings which are more formal and have the potential to be long and winding given cases which have been litigated all the way to the High Court. There should be a line which has simplified rescue proceedings and those mechanisms which are often complex.²⁴⁴ Although SMEs may also be subject to ordinary insolvency law, they can be classified in a specialized category that requires simplified out-of-court restructuring as the current legislation seems to be designed for large corporates.²⁴⁵

It is trite that already the reorganization of SMEs is less common on the basis that SMEs have a lower profit or returns margin. When this profitability margin is considered in light of the costs of reorganising SMEs to normality the scales may be tilted in favour of opting for liquidation. Court proceedings have in the past proved to be unreliable in the concept of judicial management as such bringing the court back into the process can be argued to be still compounding the problem for Zimbabwean SMEs thus rendering corporate rescue proceedings inaccessible for the average SME.

With Zimbabwe's fluctuating economic turmoil there could be a rise in the number of insolvency cases. The rise in cases of insolvency could lead to the congestion of the courts thus overburdening the current formalistic insolvency regime.²⁴⁶ When courts are congested with litigation related to the corporate rescue process this could potentially lead to the mass liquidation of viable firms.²⁴⁷ Formalistic corporate rescue proceedings can be long and winding especially with the involvement of the court. Insolvency procedures as an effective means of resolving debt problems should be simplistic and easily accessible and not be a barrier to SMEs seeking redress.²⁴⁸ The continued reliance on the court as both voluntary and court-initiated rescue proceedings in Zimbabwe involves the court at some point serves to only increase the cost of SMEs pursuing corporate rescue processes.²⁴⁹ Sections 122 and 124 both speak to approaching the offices of the Master of the High Court with the latter involving actual court procedures and it can be argued that most of these

²⁴³ Maphiri (n 42 above) 14.

²⁴⁴ H Rajak & J Henning, "Business Rescue for South Africa," no. 2 (1999) South African Law Journal 116.

²⁴⁵ Maphiri (n 42 above) 13.

²⁴⁶ Maphiri (n 42 above) 12.

²⁴⁷ Maphiri (n 42 above) 12.

²⁴⁸ Maphiri (n 42 above) 14.

²⁴⁹ Maphiri (n 42 above) 14.

institutions in Zimbabwe are still centralised which places them out of the reach of most SMEs. There is a potential that the current framing of corporate rescue proceedings in Zimbabwe can become too expensive for smaller entities, especially on the side of court-mandated corporate rescue proceedings which places reliance on court procedures. One may argue that cost implications are addressed in the option of voluntary corporate rescue proceedings but it is not always that an entity will exercise the way of voluntary corporate rescue given the fact that the necessary structures may not be in existence. The creditor of the SME is burdened with safeguarding their interests through the more complex, lengthy court-initiated corporate rescue proceedings which may see the creditor incurring additional costs thus potentially creating a cycle of debt recovery processes.

3.2.2 Lack of Proper Corporate Governance Structures in SMEs

In Zimbabwe, the general trend has been that SMEs are divorced from corporate governance structures.²⁵⁰ The traditional structure of SMEs is that there are set up in a manner wherein the manager or the owner of the entity becomes responsible for almost all the operations in that entity.²⁵¹ This makes it difficult for SMEs to have functioning structures such as board members who are separate from the stakeholders and who are capable to run and account for the running of the organisation. It is trite that the failures of these SMEs can be attributed to the way these entities are usually run.²⁵² The rationale for having a board of directors within an entity is to ensure that there is innovation and that new ideas are formulated and implemented. The fact that most SMEs do not have functioning corporate governance structures would impede the filing of voluntary corporate rescue proceedings due to the lack of responsible persons who can resolve that an entity requires corporate rescue initiatives.²⁵³ The lack of a board of directors in most entities works as a disadvantage in that there are no proper checks and balances.

An SME that has proper corporate governance structures is better placed to implement corporate rescue proceedings due to the presence of a good bureaucracy, which prevents the escalation of relaxedness which can lead the SME into insolvency overnight. The lack of good corporate governance structures also affects the strategic implementation of the day-to-day running of the entity as the owner of the entity is highly likely to have complete oversight and dictation of how everything is done and the manner it should be done. The lack of an alternative voice to robustly

²⁵⁰ P. Guruwo, "Corporate Governance Issues in SMEs and Their Impact on Financial Performance: Evidence from Manicaland," Vol. 6 No.3 *Research Journal's Journal of Entrepreneurship*.

²⁵¹ A T Mazikana, "Corporate Governance and Financial Performance in SMEs: A Case of the Kapenta Industry in Kariba." *SSRN Scholarly Paper*. Rochester, NY: *Social Science Research Network*, 2019.

²⁵² G Magaisa (et al) *Corporate Governance Perspectives for Zimbabwean SMEs* 2(8) 2013 *International Journal of Economy, Management and Social Science* 2.

²⁵³ G Magaisa (n 252 above) 2.

challenge or criticize the view of the owner is in most cases going to hamper the effective implementation of any strategy that may be informal to rescue the SME.

The fact that the structure of the SME is not well defined, it thus tends to be hierarchical with the orders of the running of the entity originating from the owner.²⁵⁴ It is trite that one may be slow to admit their failures and successes hence corporate rescue proceedings in such scenarios may be sought when it is too late for them to achieve any modicum of efficacy. This cultural method of running entities has several limitations and the legislature in adopting the Insolvency Act failed to appreciate that there are entities like SMEs which are almost synonymous with their owners.²⁵⁵ Scholars identify that SME founders do not necessarily possess much management or corporate governance expertise and that they are often run with an immense dearth of talent within the ranks of senior management or ownership.²⁵⁶

In any given business entity, the natural order of management is that the responsibility of shaping and executing the business strategy usually falls on the top management. The role of the board of directors should be to exercise oversight and to ensure that there are strategic management concepts that are being applied in a manner that benefits the shareholders.²⁵⁷ The Zimbabwean context is usually divorced from this situation with top management and directors often being the same people, particularly in family-run SMEs.²⁵⁸ This serves to complicate the corporate rescue proceedings as envisioned by the Insolvency Act. This is given the fact that directors should rarely be involved directly in the implementation and formulation of strategy.²⁵⁹ The lack of proper corporate governance structures often leaves the SME with no principal safeguarding machinery as there is no one to sound the alarm when the SME is approaching insolvency. This is often due to the lack of a sound board of directors which can take up issues and address them accordingly.²⁶⁰

Additionally, with SMEs in Zimbabwe, there is a close blending of family and business issues which ends up impacting strategic decision making this often promotes inertia in the SME's growth. The person at the helm of the business enterprise who is often the head of the family may postpone dealing with such issues such as the issues of generational success of the SME while prioritising the concerns of the family welfare.

²⁵⁴ Magaisa (n 252 above) 2.

²⁵⁵ Guruwo (n 250 above) 3.

²⁵⁶ Karedza (n 3 above) 8.

²⁵⁷ Karedza (n 3 above) 8.

²⁵⁸ Karedza (n 3 above) 8.

²⁵⁹ Magaisa (n 252 above) 2.

²⁶⁰ Karedza (n 3 above) 8.

3.2.3 Lack of Proper Documentation

The corporate rescue process is procedurally encumbered with the need to prove that the entity has come upon hard times and as such is essentially in a position wherein it is failing to make good its financial obligations.²⁶¹ SMEs often do not conform to proper accounting procedures and do not keep proper books of accounts.²⁶² Most SMEs are characterized by a lack of proper documentation that is through informality and poor record keeping.²⁶³ This would present a challenge for the SME to prove that it is now financially distressed given the level of informality that often exists within SMEs.

3.2.4 Lack of Managerial Expertise

SMEs are further facing challenges in engaging in corporate rescue in Zimbabwe due to a lack of managerial competence. Issues such as managerial competence have a bearing on the success or lack thereof of the SME.²⁶⁴ In a study by scholars as to the main reason why most SMEs fail and the importance of management, it was found that the major reason why SMEs fail can be attributed to managerial competency.²⁶⁵ It is trite that most small business owners ultimately have an extremely basic understanding of legal, financial, and accounting information. This presents a complex challenge of failing to appreciate the legal intricacies of the corporate rescue proceedings. This would further burden an already struggling venture to undergo complex legal proceedings when the management would be in a position of failing to appreciate the legal intricacies and hiring legal expertise would also come at a cost.

Like many other developing countries, SMEs in Zimbabwe are usually family-owned businesses that are formed by family members or sole traders. SMEs are formed primarily with the intention to alleviate financial circumstances with the hope to break the long generation chains of poverty. The nature of family-run SMEs is such that family bonds do sometimes actually contribute to the failure of such SMEs given the fact that important financial decisions can be made without the implementation of proper business analytical strategies or the enforcement of proper corporate governance strategies. The nature of family-run entities is such that they are based on strong emotional bonds which leads to the decisions that are meant to be done in an independent manner to be done in an emotional state which is devoid of proper

²⁶¹ Magaisa (n 252above) 2.

²⁶² Magaisa (n 252 above) 2.

²⁶³ N, Mashavira, and C Chipunza. "Managerial Conceptual Competencies and the Performance of Small and Medium-Sized Enterprises in Zimbabwe." 13, no. 1 (2021): *The Southern African Journal of Entrepreneurship and Small Business Management* 14.

²⁶⁴ Mashavira, and Chipunza (n 263 above) 2.

²⁶⁵ Mashavira, and Chipunza (n 263 above) 2.

business logic.²⁶⁶ The challenge manifests itself in that in most SMEs there is no demarcation between ownership and control as the managers are often cased the directors and the shareholders.

3.2.7 Unavailability of the corporate rescue process to unregistered SMEs

The act provides that corporate rescue proceedings are the preserve of corporates or registered cooperatives. A number of SMEs in Zimbabwe are not registered and operate informally as informal traders.²⁶⁷ The key question is whether the seemingly complicated corporate rescue process is tailor-made or appropriate for small-scale enterprises. Given the complicatedness of the Zimbabwean corporate rescue procedures, it can be argued that the legislature forgot about the need for the corporate rescue process to be at least two-pronged providing for both the corporate rescue for small entities which is less embedded in legal processes or uses the magistrate's court and on the other hand a more formalistic approach that is dedicated to big entities. It can be argued that Zimbabwe's insolvency legislation does little to accommodate SMEs and their contribution to the grand-scale economy.

Scholars in South Africa have posited that a proper business rescue process should take into account the diverse range of entities through which business is conducted. The scholars describe the concept of business rescue as should be supposedly more inclusive and expansive that include debtors other than corporations or companies. Rajak and Henning were of the opinion that business rescue provisions should be made available to all debtors irrespective of their status.²⁶⁸ The scholars aver that business rescue should be available to the incorporated, unincorporated, or the individual.²⁶⁹ This argument is premised upon the noting that business in developing countries is conducted extensively through operational vehicles such as close cooperation, partnerships, and sole traders among other entities.²⁷⁰ If corporate rescue proceedings are structured in a manner that only allows companies recourse it would indeed be a major shortcoming as there would be the exclusion of millions of enterprises that would not conform to the usual traditional corporation or company. Zimbabwe thus needs to encourage the successful re-structuring of SMEs.

3.2.8 Vague Legislative Provisions

One challenge which SMEs are facing and will continue to face is the issue of vague legislative provisions which are subject to interpretation. When legislative provisions

²⁶⁶ Mashavira, and Chipunza (n 263 above) 2.

²⁶⁷ Mashavira, and Chipunza (n 263 above) 2.

²⁶⁷ Karedza (n 3 above) 8.

²⁶⁸ Rajak, H., & Henning, J. (1999). Business rescue for south Africa. 116(2), 262-287 *South African Law Journal* 2.

²⁶⁹ Rajak, H., & Henning, J. (n 268 above) 3.

²⁷⁰ Rajak, H., & Henning, J. (n 268 above) 3.

are vague a protracted legal battle on the interpretation of such provisions often follows. The current insolvency legislations have gaps and lacunas which are vital for the legislature to address. One such problematic provision is that entities will be required to give notice of a resolution to every affected person such as company shareholders, trade creditors, trade unions, and its employees. Where an SME is trading with multiple stakeholders the possibility of affected persons could be limitless including even trade unions who may be owed dues by the company where employees may be paying subscriptions. The Act makes provision for a standard notice which is only defined as the meaning notice sent by registered mail, fax, email, or personal delivery.²⁷¹ This definition is incomplete in that it only outlines the methods by which the notice can be given but does not elaborate as to the expected form and content of the notice. There is a grey area in that the Act does not provide a precedent as to how the standard notice should appear. The court has had to attempt to redress this grey area in the case of *Associated Mine workers Union of Zimbabwe v Mazowe Pvt.*²⁷² The court upon observing this grey area implored the legislation to urgently redress this in order to guide the court, legal, and corporate rescue practitioners in their work.

3.2.9 Remuneration of corporate rescue practitioner

The SME engaging in or seeking to commence corporate rescue proceedings is saddled with the burden to pay the corporate rescue practitioner for services rendered to the SME. The corporate rescue practitioner is entitled to payment for services duly rendered.²⁷³ There is a tariff that is duly established within the Insolvency Act.²⁷⁴ The Corporate Rescue Practitioner is further entitled to negotiate with the company for a contingency fee arrangement.²⁷⁵ The conditional elements of the contingency fee arrangement hinge on the adoption of the corporate rescue plan within a stated timeframe, or any other issue which can be included in the corporate rescue plan. The SME could also potentially put in place other conditions such as the obtaining of results by the corporate rescue practitioner. The fact that the corporate rescue practitioner has to be remunerated by an already ailing entity already complicates the whole scenario as the remuneration would be subtracted from the payments that would be due to the creditors.²⁷⁶

The introduction of contingency conditions mitigates the immediacy of the payment becoming due, however, but this creates obligations for the SME hence a potential

²⁷¹ Section 2 of the Insolvency Act.

²⁷² HH160/20.

²⁷³ Section 136 (1) of the Insolvency Act.

²⁷⁴ Second schedule item 1 of the Insolvency Act Chapter 6:07.

²⁷⁵ Section 136 (2) (a) (b) of the Insolvency Act.

²⁷⁶ R Bradstreet 'The leak in the Chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22 *South African Mercantile Law Journal* 14.

challenge that SMEs could face is this debt that is lingering and owing.²⁷⁷ Additionally, the practitioner is also entitled to seek reimbursement of all money due and owing to him that are incurred in the execution of his or her duties. An advantage of contingency fees is that they act as a motivating factor as they encourage the corporate rescue practitioner to carry out their duties in a diligent manner which results in better and faster results for the company. It is critical to note that the contingency arrangement is subject to the approval of the creditors.

The rationale of having the creditors approve is to ensure that there is a safeguard around the corporate rescue practitioner charging the already struggling entity exorbitant sums of money.²⁷⁸ Additional safeguards are put into place, a disgruntled creditor or shareholder may approach the high court within a period of ten working days for relief to have the agreement set aside by the court on the grounds that the remuneration to be paid to the corporate rescue practitioner is unreasonable and that it does not take into consideration the financial situation of the SME.²⁷⁹ Additionally, the concerned shareholder can allege that the contingency agreement is not just and equitable. What is concerning is that in the event of claims for remuneration by the corporate rescue practitioner that they have not been paid in full their claims will have priority over the claims of all other secured and unsecured creditors.²⁸⁰

It is worrisome that engaging in corporate rescue proceedings is to salvage the SME from debt however this creates a debt that cannot be avoided by the SME which also ranks higher than the claims of the creditors.²⁸¹ There can be no ultimate guarantee that the practitioners' fees will be settled in full due to the uncertainties involved.²⁸² Another challenge that may befall SMEs about the payment of SMEs regards the fact that the Master of the High Court is in a position to increase such remuneration of the entity for good cause shown to reward the rescue practitioner for successfully investigating the affairs of the SME and or assisting in the prosecution of the SME and its directors.²⁸³ This is quite challenging in that it encourages the practitioners to go on a witch hunt and fault-finding mission rather than attempt to salvage the entity. The Master can however conversely reduce the remuneration that is due to the corporate rescue practitioner which acts as an additional safeguard or the master may disallow the payment in part or the whole on the grounds that

²⁷⁷ R Bradstreet (n 276 above) 14.

²⁷⁸ R Bradstreet (n 276 above) 14.

²⁷⁹ Cassim (n 68 above) 905.

²⁸⁰ See discussion by L Jacobs & D Burdette. 'Queue Politely! South African Business Rescue Practitioners and Their Fees in Liquidation.' *Diener. v Minister of Justice and Correctional Services and Others* 2018 (2) SA 399 (SCA) 8.

²⁸¹ Jacobs & Burdette (n 280 above) 8-9.

²⁸² Jacobs & Burdette (n 280 above) 8-9.

²⁸³ Section 136(6) of the Insolvency Act.

the corporate rescue practitioner has dully failed to carry out or competently discharge their duties.

3.4 Preliminary conclusion

In light of the above discussion, there are various challenges that bedevil Zimbabwean SMEs which seek to go the route of corporate rescue proceedings. Such impediments act as disincentives for SMEs to go the route of corporate rescue in Zimbabwe and serve to discourage SMEs from engaging in corporate rescue. Key among the challenges faced by SMEs is how Zimbabwe's corporate rescue regime is fraught with bureaucracy being quite lengthy and this has implications on the cost of engaging in corporate rescue proceedings. The chapter further identified how some legislative provisions are vague and it has taken the courts to interpret such provisions together with how the remuneration of corporate rescue practitioners by an already ailing SME hamper SMEs from pursuing corporate rescue proceedings.

Chapter three builds a foundation for chapter four with chapter four delving into how South Africa has explored its similar concept of business rescue proceedings. The subsequent chapter will attempt to draw lessons from the South African context and expound on the challenges in the South African context and how they are similar to the Zimbabwean situation in order to draw up recommendations on the best way to ensure that corporate rescue proceedings become accessible to SMEs.

Chapter four

The Business Rescue Process in South Africa as juxtaposed with Zimbabwe's Corporate Rescue Proceedings

4.1 Introduction

South Africa as a nation has, by and large, developed its corporate rescue proceedings procedures for a longer period than Zimbabwe having incorporated insolvency proceedings. Chapter Four builds up on the discussion from the previous chapter juxtaposing the Zimbabwean context to the South African context to draw up lessons as to how best a conducive legal environment can be created which encourages SMEs to pursue corporate rescue proceedings instead of pursuing liquidation proceedings.

Chapter four examines the provisions regulating the law of insolvency in South Africa with a particular focus on SMEs. The chapter looks at how the judiciary has interpreted certain provisions and draws lessons that can be applied within the Zimbabwean Context. Chapter four is central to this research given the evident similarities between the Zimbabwean corporate rescue. The chapter draws upon the South African experiences in interpreting and approaching the aspect of corporate rescue in a bid to ensure that Zimbabwe approaches corporate rescue in a manner that will ultimately benefit SMEs.

4.2 Overview of the BRP process in South Africa

The current business rescue proceedings which are the equivalent of the corporate rescue proceedings in Zimbabwe came about in 2011 with the introduction of Chapter 6 of the South African Companies Act.²⁸⁴ The introduction of the Business Rescue Proceedings was a milestone and constituted a significant shift in restructuring and insolvency law.²⁸⁵ The introduction of the business rescue proceedings in South Africa was a welcome move in that it provided an alternative to the existing liquidation process as it gave an opportunity for business entities including SMEs who are in difficult or dire financial straits to recover financially and operationally.²⁸⁶ Business Rescue Proceedings in South Africa are discussed herewith below. Corporate rescue can be termed a quest to improve on the aspect of judicial management as has been noted by the court.²⁸⁷ The court in the case of *Absa Bank*

²⁸⁴ Act, No. 71 of 2008.

²⁸⁵ Maphiri (n 42 above) 14.

²⁸⁶ P Kloppers (n 96 above) 3 See also discussions by W Rosslyn-Smith, & N Varela Aguiar de Abreu. 'Informing the Vote: The Business Rescue vs Liquidation Decision'. (2021) Vol 25: *Southern African Business Review* 2.

²⁸⁷ A Du Toit, (et al). 'Small, Medium and Micro-Enterprises' Distress and Factual Evaluation of Rescue Feasibility'. 2019 11, no. 1 *The Southern African Journal of Entrepreneurship and Small Business Management* 1.

*Limited v Caine No and Another*²⁸⁸ the court was of the opinion that business rescue proceedings are more flexible and more user-friendly to financially distressed companies who are in a state of solvency.²⁸⁹ The Court appreciated that business rescue proceedings are positionally placed to give a better return to shareholders as compared to immediate liquidation of the entity.²⁹⁰

The courts in South Africa in the case of *Cape Point Vineyards (Pvt) Ltd v Pinnacle Point Group Limited and Another*²⁹¹ concluded that business rescue proceedings evidence a preference for proceedings that are aimed at the resuscitation of viable entities rather than their destruction.²⁹² This case in point was further supported in the case of *Oakdene Square Properties (Pvt) Ltd and Others v Farm Bothasfontein (Pvt) Ltd and Others*²⁹³ wherein the court stated that corporate rescue as a concept is in tandem with modern trends of rescuing struggling entities in that it attempts to secure and balance the competing interests of creditors, shareholders, and employees.²⁹⁴ Corporate Rescue envisages a transition from prioritising creditors' rights only and the belief that such proceedings will enable creditors to secure better prospects as compared to liquidation.²⁹⁵

In order for a business entity to engage in corporate rescue proceedings in South Africa, such an entity should show that either it is declining or in financial distress which is similar to the Zimbabwean position.²⁹⁶ The South African Companies Act elaborates financial distress as being the reasonable likelihood that the SME will not be in a position to pay its debts within the following six months after investigation, or if there is a high likelihood or certainty that the company will become insolvent within the 6 months.²⁹⁷ There is a scientific test for assessing the financial position and health of a company that can be assessed using a system of measurement known as a "solvency ratio" sometimes referred to as the "quick ratio" which exhibits the solvency or liquidity of an SME.²⁹⁸

²⁸⁸ 2014 ZAF SCH 46.

²⁸⁹ *Absa Bank Limited v Caine No and another* 2014 ZAF SCH 46 at para 40.

²⁹⁰ *Absa Bank Limited v Caine No and another* 2014 ZAF SCH 46 at para 40.

²⁹¹ 2011 SA (5) 600 (WCC).

²⁹² *Cape Point Vineyards (Pvt) Ltd v Pinnacle Point Group Limited and another* 2011 SA (5) 600 (WCC).

²⁹³ 2012 (3) SA 273. At para 27.

²⁹⁴ A O Nwafor, 'Moratorium in Business Rescue Scheme and the Protection of Company's Creditors'. (2017): 13, no. 1 *Corporate Board Role Duties and Composition* 4.

²⁹⁵ A Boraine, 'Formal Debt-Relief, Rescue and Liquidation Options for External Companies in South Africa'. (2020): no. 4 *BRICS Law Journal* 2.

²⁹⁶ Section 128 (f) of the South African Companies Act, No. 71 of 2008.

²⁹⁷ W Rosslyn-Smith (n 179 above) 3.

²⁹⁸ A C. Du Toit, et al "Small, Medium and Micro-Enterprises' Distress and Factual Evaluation of Rescue Feasibility," (2019), no. 1 *The Southern African Journal of Entrepreneurship and Small Business Management* 3.

The South African corporate rescue process envisions a restructuring process that is by and large out-of-court. Akin to the Zimbabwean legal framework the South African position also includes the appointment of a business rescue practitioner whose counterpart in the Zimbabwean context is the corporate rescue practitioner.²⁹⁹ The business rescue practitioner is appointed to oversee the moratorium that is afforded to the SME against creditors.³⁰⁰ The practitioner is tasked with the management of the debtor SME and also the preparation, negotiation, and implementation of a business rescue plan.³⁰¹ The business rescue plan is supposed to be approved by an overwhelming majority of the creditors of the debtor SME.³⁰² The percentage of creditors who should so approve is pegged at 75% of creditors.³⁰³ Once the business rescue plan is approved such plan thus becomes binding on both the debtor and the creditor. Like the Zimbabwean context, the rescue process is expected to be ongoing for a period of three months. In the case of *Koen and Another v Wedgewood Village Golf and Country Estate (Pvt) Ltd and Others*³⁰⁴ the court stated as follows that “it is axiomatic that business rescue proceedings by their very nature must be conducted with the maximum possible expedition”.³⁰⁵ Urgency is a very important component in the affairs of a financially distressed SME.³⁰⁶ Urgency is particularly important given the fact that the ultimate end goal of corporate rescue proceedings is to prevent the entity from sinking even deeper into the doldrums of liquidation. As such any delay would possibly lead to a situation wherein it is no longer feasible to rescue the SME which would ultimately lead to liquidation.

The business rescue process can be extended with the leave of the court on application by the business rescue practitioner. The rationale as with the corporate rescue proceedings within the Zimbabwean context is to maximize the chances of the entity being rescued and to preserve it and ensure that it continues as a going concern. The South African context is focused on allowing creditors to initiate and lead successful business restructurings to achieve results that are similar to those achieved in the United Kingdom restructurings.

The South African business rescue proceedings have been applauded for providing flexible processes and the presence of provisions that are set to ensure that there is

²⁹⁹ O, Ayaya, and M Pretorius. ‘The State of Business Rescue Practitioners Professional Accreditation’. 11, no. 4 (2021): *SAGE Journals Open* 2.

³⁰⁰ M Pretorius, ‘Tasks and Activities of the Business Rescue Practitioner: A Strategy as Practice Approach’, 2013 *Volume 17 Number 3 Southern African Business Review* 2.

³⁰¹ Pretorius, (n 300 above) 3.

³⁰² Pretorius, (n 300 above) 3.

³⁰³ D Lusanga, & K J. Fairhurst. ‘Role of Stakeholders in Business Rescue’. no. 1 (2020) *South African Journal of Business Management* 51,): 3.

³⁰⁴ 2012 (2) SA 378 (WCC).

³⁰⁵ 2012 (2) SA 378 (WCC).

³⁰⁶ Maphiri (n 42 above) 16.

a complete restructuring of a distressed SME.³⁰⁷ The South African process has been lauded because it allows the creditors of an entity to select and nominate a business rescue practitioner of their choice. The choice of a practitioner is central to the success or lack thereof of business rescue proceedings. It is in the best interest of the creditors to appoint an individual whom the creditor's trust will have their best interests at heart.³⁰⁸ This is a welcome move as in liquidation proceedings only the court has the power to choose the liquidator. The practitioner is also given a wide bearing to formulate the most applicable corporate rescue plan including such issues as debt-equity swap, and retrenching employees.³⁰⁹

There are lessons to be drawn from the South African business rescue processes. As alluded to earlier the purpose of the business rescue process is to facilitate the rehabilitation of the SME or business entity.³¹⁰ The court pays recognisance to the fact that one of the express purposes of the Companies Act is to facilitate the efficient rescue of financially distressed companies, a court will give preference to business rescue over liquidation but only where there is a genuine attempt to achieve the aims of the Act.³¹¹ The court acts as a safeguard to ensure that there is no abuse by unscrupulous SMEs who may want to evade their debts by gaining temporary respite from their creditors.³¹² The Act provides a meaning of the notion of rescuing the company which can be ascribed to be the facilitation of a rehabilitation exercise of the entity.³¹³ The business rescue proceedings ensure that there is temporary supervision of the company and the management of its affairs.³¹⁴

The corporate rescue plan is meant to maximise the likelihood of the business being maintained as a going concern and as being solvent.³¹⁵ If the possibility of the business not remaining solvent is slim the business rescue process would hinge on obtaining a more favourable position for the SMEs creditors and shareholders than would possibly result from the immediate liquidation of the SME.³¹⁶ It is trite that rehabilitation is the main goal for the corporate rescue proceedings. In South Africa a similar position to that of Zimbabwe prevails and business rescue proceedings can be initiated by either a resolution of directors or through a court order.³¹⁷ Once

³⁰⁷ Rosslyn-Smith, (et al) "Informing the Vote: The Business Rescue vs Liquidation Decision." 25 (2021): *Southern African Business Review*.

³⁰⁸ Rosslyn-Smith, (et al) (n 307 above) 5.

³⁰⁹ M Pretorius, (n 300 above) 5

³¹⁰ Cassim (n 68 above) 783.

³¹¹ H Stoop, 'When Does an Application for Business Rescue Proceedings Suspend Liquidation Proceedings?' 2014 vol 47, no. 2: *De Jure Law Journal* 2

³¹² Stoop (n 311 above) 2-3.

³¹³ P.C. Osode, Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment, (2015). Vol 4 No 1 *Penn State Journal of Law & International Affairs* 8-10

³¹⁴ Osode (n 313 above) 9.

³¹⁵ E Van Deventer, & L Jacobs. 'Corporate Rescue: The South African Business Plan Examined' *Nottingham Insolvency and Business Law e-Journal* 8.

³¹⁶ Van Deventer, & Jacobs (n 315 above) 8.

³¹⁷ Maphiri (n 42 above) 16.

rescue proceedings are in motion no legal proceedings can ensue against the property of the SME in any forum except with the leave of the court or the rescue practitioner.³¹⁸ The SME or entity undergoing rescue proceedings may dispose or agree to dispose of its property only in the ordinary course of business or if there is a bona fide transaction concluded at arm's length for value approved in advance and in writing.³¹⁹ The disposal may also occur if it is undertaken as part of the implementation of an approved business rescue plan.

In asserting the move from liquidation and judicial management Judge Eloff in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments (Pty) Ltd*³²⁰ underscored that there should be a reasonable probability of the resuscitation of the business venture. The Judge was of the view that business rescue was the onset of a new era and that the old thinking that the creditor was entitled to summary liquidation and the winding up of an entity could no longer prevail as a right.³²¹ The judge however underscored the essentiality of carrying out the substantive test of the revivability of the entity and that the threshold though lower than that of judicial management the ultimate discretion of whether an entity should undergo business rescue lay with the court.³²²

4.2.1 Contractual Obligations in the Business Rescue Proceedings

Further proof that Zimbabwe's corporate rescue proceedings processes heavily borrowed from the South African provisions is the fact that the employees of the entity continue to be employed on the same terms and conditions as immediately before the commencement of the proceedings. The SME is obligated to honour employee contractual obligations. Other contractual obligations may be suspended in toto or partially by the business rescue practitioner who is also empowered to also put in place conditions

4.3 Challenges faced by South African SMEs undergoing Business Rescue Proceedings

4.3.1 The broad sweeping powers of the corporate rescue practitioner

It has been noted that one of the challenges, as identified in the South African context, is the fact that the corporate rescue practitioner is endowed with broad

³¹⁸ Maphiri (n 42 above) 16.

³¹⁹ E Van Deventer, &, L Jacobs (n 315 above) 4.

³²⁰ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments (Pty) Ltd* 012 (2) SA 423 (WCC).

³²¹ A C. Du Toit, et al "Small, Medium and Micro-Enterprises' Distress and Factual Evaluation of Rescue Feasibility," (2019), no. 1 *The Southern African Journal of Entrepreneurship and Small Business Management* 3.

³²² *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments (Pty) Ltd* 012 (2) SA 423 (WCC) at para 21.

and sweeping powers. It has been highlighted that corporate rescue practitioners are underregulated in terms of the Companies Act of 2008 whose provisions are similar to the Zimbabwean insolvency legislative framework.³²³ The Companies Act of 2008 provides for the delegation of powers to any person who was part of the board or the pre-existing management of the SME.³²⁴ The practitioner is duly empowered to remove such persons from office and the practitioner is also empowered to appoint someone else in the same manner to management.³²⁵ The practitioner has ultimate control even though the management of the SMEs remains in place. The practitioner is put into power to control the SME in any manner that they may deem fit. It is argued that such broad power can be counterproductive as when too much control is granted to the practitioner it may result in negative effect with the people that are involved in the day-to-day management of the SME being demoralised and losing motivation to assist in bringing the entity back to its profitable state.³²⁶ Conversely, this may work in the SME's favour as the practitioner is enabled to get rid of inefficient staff and management without the familial ties within the SME.

4.3.2 The cost of remunerating the corporate rescue practitioner

The South African system also bemoans the remuneration of the corporate rescue practitioners in the corporate rescue system when an entity is already ailing. The South African Companies Regulations of 2011 outline how corporate rescue practitioners should be remunerated and the tariffs and fees. It is a common cause that most South African SMEs cannot afford the costs of engaging most corporate rescue practitioners.³²⁷ This is premised on the fact that the South African regulations set out tariffs which are quite high. The corporate rescue practitioner is entitled to charge at a maximum rate of about USD 88.00 per hour and this can be to a maximum of around \$1,110.97 per day which amount is inclusive of value added tax (VAT) when they are dealing with a small enterprise.³²⁸ The charges for dealing with a medium enterprise range from a maximum amount of \$142.20 per hour, to a maximum amount of \$1,777.55 per day which also takes into account (VAT).³²⁹ Large corporations are also levied at higher rates. These tariffs are quite exorbitant for the average-sized SME which may be undergoing extreme stress and may not even have the turnover to pay the corporate rescue practitioner for a single day.³³⁰

³²³ Maphiri (n 42 above) 18

³²⁴ Section 140(1)(b) of the South African Companies Act.

³²⁵ Section 140(1)(c) of the South African Companies Act.

³²⁶ Cassim (n 68 above) 900.

³²⁷ South African Companies Regulations of 2011.

³²⁸ South African Companies Regulations of 2011.

³²⁹ South African Companies Regulations of 2011.

³³⁰ Maphiri (n 42 above) 14.

4.3.3. Procedurally Cumbersome Corporate Rescue Provisions

Though the process of corporate rescue is commendable in South Africa there are still some shortfalls with the business rescue process being identified as being cumbersome for most SMEs which are undergoing financial distress.³³¹ The legislature may be commended for keeping up with international standards in the form of introducing a novel form of corporate rescue which resonates with that from Anglo-American settings. The current rescue process which is similar between Zimbabwe and South Africa does little to pay cognisance to the individual situations of the countries themselves which are dominated by SMEs and start-up businesses. It has been argued that the current form of business rescue has had problems in assisting struggling SMEs and the legislature has been urged to develop a corporate rescue process that is closer home and takes into account the African dynamics.

The legislature has been urged to adopt a more informal procedure that takes into account the situation of SMEs. The current business reduce system requires an urgent facelift which will make the corporate rescue system more applicable to SMEs and start-ups. It is trite as has been discussed above and in the preceding chapter that the formally regulated procedure which is inherent in the current rescue process which is premised on the services of highly paid personnel is quite burdensome on SMEs.

Corporate rescue practitioners are often legal practitioners or high-ranking business experts which works against the already struggling SME. One scholar even argues that there is a need for specialist SME corporate rescue practitioners which would have the required expertise to rescue SMEs and not just generic corporate rescue practitioners.³³² This is premised upon the notion that SMEs are sensitive and, in most cases, operate in a survivalist mode and thus require seasoned and experienced corporate rescue practitioners in the field of SME rescue and turnaround strategy.³³³ It can be averred that the one size fits all for business rescue is not favourable for saving SMEs with a monthly turnover which is equivalent to the daily prescribed fees of the business practitioner.³³⁴ Rajak and Henning envisioned a dual system which catered for SMEs which would have served to alleviate the current challenges which are faced by SMEs.³³⁵

4.4 The importance of informal alternatives in business rescue

³³¹ Maphiri (n 42 above) 13.

³³² Rosslyn-Smith, (et al) (n 275 above) 5.

³³³ Maphiri (n 42 above) 14.

³³⁴ A Loubser, "Business Rescue in South Africa: A Procedure in Search of a Home?" 2007 no. 1 vol 40,): *The Comparative and International Law Journal of Southern Africa* 6.

³³⁵ Rajak, & Henning (n 268 above) 3.

The song of informal business rescue can never be sung too loud in relation to corporate rescue proceedings for SMEs these are both occurring in the South African and Zimbabwean legislation. South Africa has provision for settlement agreements which can be done between the creditors of the SME and the SME.³³⁶ The compromise is entered into as an alternative to the more formal business rescue proceedings. What this essentially entails is that the SME may make use of the compromise as a substitute to formal business rescue. It is critical to note that this avenue is only available to an SME that has not yet engaged in corporate rescue proceedings.³³⁷ The compromise basically entails an agreement between the board of directors or liquidators who will bind themselves to arrange for a form of settlement. It is averred that in the case of sole traders and family-run SMEs creditors are likely to be less trusting and will possibly not enter easily into a compromise with the SME.³³⁸

The advantage of making use of this procedure is that this can be engaged into even before the SME is in financial distress. The South African provision is such that the SME may enter into corporate rescue proceedings regardless of the fact that such SME may not be in financial distress.³³⁹ This is commendable because it acts in anticipation that maybe if such an arrangement is not made the entity may fall into financial distress and collapse. The SME can thus utilise this provision even before the creditors are aware of that the SME may be currently encountering problems which helps to save face and maintain the reputation of the SME unlike the previous regime of judicial management. This ensures that SMEs would still be in a position to secure funding from creditors without the burden of reputational damage.

The importance of the informal rescue process is that it avoids the use of the business rescue practitioner who is known as the corporate rescue practitioner in the Zimbabwean context. The corporate rescue practitioner would normally investigate the debtors' affairs and the turnaround strategies which may be necessary to save the entity from collapse.³⁴⁰ With formal corporate rescue, it involves the creation of a business rescue plan or strategy while the SME may benefit in the form of skills transference from the corporate rescue practitioner. The corporate rescue plan is only adopted after approval by creditors of the SME which is a quite long and winding process. Whereas with compromise there is no need for the corporate rescue practitioner which saves the SME from bearing the high cost of the practitioner's fees. It can thus be postulated that the compromise with creditors is likely to benefit the SME through cost reduction. The board of the SME has the power to put in place a proposal to the creditors of the SME to reach a compromise. Key to note is that the compromise procedure allows the SME to engage in it without

³³⁶ Section 155 of Companies Act of 2008.

³³⁷ Maphiri (n 42 above) 22.

³³⁸ *Cassim* (n 68 above) 910.

³³⁹ Section 155(1) of the Companies Act of 2008.

³⁴⁰ Maphiri (n 42 above) 22.

incurring any administrative costs of the application or the meeting with the SMEs creditors. As such an SME which opts for the less formalistic compromise procedure will save costs and possibly ensure that the entity continues as a going concern.

4.5 Preliminary Conclusion

Chapter four provided an overview of the South African business rescue procedure and it was observed that the South African business rescue procedure is similar to the Zimbabwean corporate rescue process. The chapter observed that in most circumstances it was just a change of wording however Zimbabwe and South African legal systems of corporate rescue bear striking similarities as such some challenges occur across the board. Challenges that Zimbabwe may not yet have seen occurring in relation to applying the corporate rescue process to SMEs have already begun occurring in the South African context which has been in operation for a longer period than the Zimbabwean corporate rescue process.

It was, by and large, observed that a two-pronged approach which would cater for SMEs and one for large corporations would be the most ideal legal system for corporate rescue. Thus, builds up on the recommendations to be proffered in the subsequent chapter which sums up the research and provides a conclusion. It was observed further less formalistic approaches to the corporate rescue for SMEs are more ideal to save SMEs from the doldrums of financial demise.

Chapter five

Recommendations and Conclusions

5.1 Introduction

A corporate rescue system that does little to pay homage to the existence of SMEs and their contribution to the economies of developing countries has little to none effect in addressing the core problem of failing business entities. SMEs are a critical core of developing countries such as Zimbabwe. There is a need for the inclusion of SMEs as a specialised branch of corporate rescue processes and also a recognition that there is also a need for there to be less expensive measures for corporate rescue for SMEs in Zimbabwe. Among other things for corporate rescue to be an attractive avenue for Zimbabwean SMEs and to enhance the applicability of current legislation, there has to be in place attractive incentives which incentivise SMEs to go the route of corporate rescue rather than measures which actually discourage corporate rescue. This chapter sums up the observations in the preceding chapters and builds up recommendations to be followed to enhance the applicability of current corporate rescue legislation to the current Zimbabwean situation and to SMEs.

5.2 Recapitulation

This research focused on analysing the applicability of the framing of Zimbabwe's current corporate rescue proceedings to SMEs. The research particularly examined why corporate rescue proceedings are a fundamental component of business dealings. Corporate rescue proceedings were observed to take two forms that are either informal or formal corporate rescue proceedings. It was observed that Zimbabwe's formal corporate rescue proceedings are shrouded in legalistic procedures which often would require the assistance of a professional to navigate them which in essence makes it procedurally inhibiting to most SMEs. Informal corporate rescue proceedings were identified to be more tailor-made for small to medium enterprises being in a better position to offer relief which is less costly to small and medium enterprises.

Challenges which have been met by SMEs which engage in corporate rescue proceedings were also identified and analysed. It was shown that the current framing of corporate rescue proceedings is lengthy and bureaucratic hence serving to only impede rather than save the SME from the impending doom of bankruptcy. SMEs are also in a quagmire due to the lack of proper corporate governance structures which renders the entity inept and unable to kick start the corporate rescue mechanism given the fact that most SMEs operate as family-run businesses which are sole traders or partnerships. There are some legislative provisions which also serve to compound the problems which are vague and subject to interpretation which has seen the court having to intervene to proffer an interpretation that further places the court at the

centre stage of corporate rescue proceedings and also further from the reach of already struggling SMEs.

The South African position was enunciated in chapter four of the research and it was shown that South Africa has indeed experienced almost similar challenges to what Zimbabwe has been experiencing and this is largely due to the fact that the two systems are largely identical. Views from established practices from South Africa were sought and obtained showing a clear picture of how if Zimbabwe is to adapt there is a need for restructuring the corporate rescue process and placing informal corporate rescue proceedings at the top of the hierarchy when tackling corporate rescue proceedings for SMEs.

5.3 Recommendations

The current legal regime ignores the fact that SMEs are usually operating in a survivalist mode, especially with the onset of pandemics such as Covid-19 which caused businesses to close down. SMEs should be afforded an opportunity where any slight form of distress should warrant the introduction or application of business rescue proceedings.³⁴¹ There should thus be a more lenient avenue for proving financial distress which should be available to Zimbabwean SMEs. Because of the vulnerability of SMEs, healthy SMEs may often experience unforeseen financial cash flow problems which may be caused by external factors such as employee strikes, inconsistent government monetary policies, and exchange rate issues.³⁴² Such kind of external factors jeopardise the operations of most SMEs which as has been alluded to earlier operate in a form of survivalist mode as such prone to failure.³⁴³ The presence of such external factors should justify the immediate application of corporate rescue proceedings to SMEs even before there is acute financial distress as they often put SMEs in make-or-break situation. If the SME is to wait until there is insolvency or proof that such SME can no longer pay its bills the chances of resuscitation would have already weakened.

5.3.1 Expanding on Informal Business Rescue Processes

It is proposed that if corporate rescue proceedings are to apply to SMEs in Zimbabwe there is need for remodelling the current corporate rescue regime. Such remodelling would include the introduction of a dual corporate rescue system. This system would ensure that there is in place an accommodative corporate rescue mechanism for SMEs. This approach would ensure categorising the approaches into either formal or informal depending largely on the size of the entity, its annual turnover as well as the number of its employees. The categorisation would actually go back to the

³⁴¹ Maphiri (n 42 above) 25.

³⁴² Njanike (n 12 above) 3.

³⁴³ Maphiri (n 42 above) 26.

definitional elements of what an SME is. If these processes are separated this would ensure that costs of corporate rescue are reduced. An informal approach to corporate rescue is fundamental in that it would be less procedural, and it would also consolidate the negotiation approach which is already present within the legislation.

In order to enhance accessibility to most SMEs, these elements may be put under the supervision of the magistrate's court which is easily accessible in all provinces, unlike the high court. The informal approach would be most welcome in that it could possibly cultivate a culture or environment between the SME and its creditors that aims to reach a compromise and save relationships due the fact that most creditors are actually in the converse key suppliers to SMEs and play a key role in the advancement of the SME.

The benefits of adopting a more informalistic procedure would be that it would also ensure the inclusion of the employees of the SMEs during the renegotiation processes and also the strategic planning processes. The inclusion of employees is advantageous because they have insider knowledge on issues related to creditors and clients and how the SME may be conducting business and if this informal corporate rescue process is conducted in a roundtable manner these employees may provide vital and much-needed input to the discussion.³⁴⁴ Employees can assist in the diagnosis of the problem and development of strategy as they are heavily invested in the entity continuing as a going concern and they may actually provide better insight than engaging a corporate rescue practitioner. The corporate rescue practitioner may also likely be unfamiliar with the way the SME is run.

Informal corporate rescue procedures are more suited to SMEs in the Zimbabwean situation. This is given the fact that for there to be a proper diagnosis of the situation by a corporate rescue practitioner who also has to develop a turnaround strategy without any knowledge of the entity is often time-consuming. The engagement of corporate rescue practitioner also contributes largely to amplified costs of the corporate rescue practitioner. It is submitted that the more formalistic corporate rescue procedure should be a preserve of large-scale corporate entities. The current corporate rescue processes are largely formalistic hence the recommendation for a more two-pronged approach to the corporate rescue process. The current process would most likely be afforded by large corporations which can afford the tariffs of the corporate rescue practitioners as well as the duration and administration of the whole process from commencement until it is extinguished.³⁴⁵

It is also recommended that there be automatic moratoria when an SME enters into a compromise with its creditors. Though the current compromise between an SME

³⁴⁴ Maphiri (n 42 above) 26.

³⁴⁵ Maphiri (n 42 above) 25.

and its creditors is such that it acts as an advantage as corporate rescue practitioners are excluded from the process. The exclusion of corporate rescue practitioners reduces costs however the process remains procedurally heavy, cumbersome and formalistic. It is argued that the legislature should revisit this and ensure the inclusion of an automatic moratorium whenever an SME enters into a compromise with its creditors. Such moratorium may either be long-term or short-term depending once again on corporate size.

5.3.2 Expanding the definition of a corporate to cover unregistered SMEs

It can be seen from the drafting of Zimbabwe's legislation that it was drafted with the view that all SMEs would be registered but this is not the case. Zimbabwe has a lot of SMEs which are not registered and with the rise of sole traders and entrepreneurs, this number is continuously on the rise. It is submitted that there is a need to include unregistered SMEs into Zimbabwean insolvency law as these also contribute greatly to the economy. This is more so important as there has been a drive to tax unregistered sole traders. One would expect that if SMEs, sole traders and such like entities are made to pay the tax they should also be recognised and given a place in insolvency laws. It has already been seen that SMEs have an effect on the economy of developing nations as they also contribute to the growth of the nation. It is only prudent that SMEs be afforded some recognition in Zimbabwe's insolvency laws in order to ensure their continued growth and expansion as they are valuable with start-ups being the big corporates of the future.

5.3.3 Government-led capacity building on corporate governance among SMEs

Given the potential returns that SMEs provide to the economy, it is prudent for the government to introduce capacity building for SMEs around corporate governance. When SMEs are capitated on corporate governance and strategic management such SMEs are highly unlikely to fail. When the owners of SMEs particularly family-run SMEs appreciate the need for corporate governance structures there can be in place systems which act as safeguards such as a board of directors which is often absent in most family-run SMEs or sole traders. When corporate governance structures are put in place this will enable the detection of financial distress and the ability to act in time to save the entity.

It can also be argued that the government of Zimbabwe should go further and even subsidise business rescue proceedings for SMEs. It is submitted that it is in the best interests of the Government to ensure that SMEs continue as a going concern as such it is in the best interests of the government to ensure that SMEs flourish. The government being one of the biggest financiers of funding for SMEs should assist struggling SMEs in the corporate restructuring process. The government of Zimbabwe is in a position to subsidise the costs of business rescue proceedings, especially for

government-funded SMEs. Additionally, the government could actually create a department that is dedicated to corporate rescue procedures under the ministry of small and medium enterprises. Such a department would provide inhouse corporate rescue services with state-run institutions providing corporate rescue assistance to ailing SMEs. This would accordingly reduce the failure rate of SMEs. The introduction of government-led corporate rescue would ensure that the government assists in saving state resources already invested in these entities while also providing employment. This argument is sound in that the government cannot be financing SMEs then watching them dying from some form of financial distress that could have been avoided.

5.3.4 Ensuring expertise in SME corporate rescue

There is a need to ensure the availability of corporate rescue practitioners that have expertise in SME resuscitation. SME corporate restructuring would be significantly different between the larger and the smaller corporates as such it is vital to introduce SME expertise in legislation when SMEs are to be rescued. As such this would require extensive capacity building among existing corporate rescue practitioners or in the alternative ensure that there are practitioners who are known to specialise in the turning around of smaller entities. Although a practitioner has the power and authority to delegate to an expert this would only serve to compound the costs as such there is a need for practitioners who are dedicated to the resuscitation of smaller entities.

5.4 Conclusion

By and large SMEs in Zimbabwe do contribute immensely to the economy by providing much-needed employment and contributing toward revenue generation and the GDP. It is clear that unless there is the reformation of the current business rescue laws as envisioned within the Zimbabwean Insolvency Act, the corporate rescue proceedings therein will remain a preserve of the elite and larger corporations. There is an urgent need for reformation of Zimbabwe's insolvency legislation to capture a two-pronged approach as has also been recommended for the South African system from which Zimbabwe heavily borrowed from. The high failure rate of SMEs, therefore, lends credibility to the notion that there is a need for a reformative corporate rescue system which is tailor-made for SMEs. The current procedures have been shown to be highly regulated cumbersome and burdensome for SMEs which are often in their teething stage when they encounter financial distress.

Bibliography

Text Books

Daoning, Z *Insolvency Law and Multinational Groups: Theories, Solutions and Recommendations for Business Failure* Routledge, 2019.

Delport, P. A. *The new Companies Act manual: Including close corporations and partnerships*. Cape Town: LexisNexis. 2011

McCormack, G. *Corporate Rescue Law--An Anglo-American Perspective*, Corporations, Globalisation and the Law, Cheltenham; Northampton, MA: E. Elgar, 2008

Njanike, K *The Factors Influencing SMEs Growth in Africa: A Case of SMEs in Zimbabwe, Regional Development in Africa*, IntechOpen, 2019,

Rensmann, T *Small and Medium-Sized Enterprises in International Economic Law*, Oxford University Press, 2017

Journal Articles

Carter, S. & Wilton, W. Enterprise Culture: Necessary in Promoting Enterprise; Lessons from Enterprise Development in Zimbabwe. *Journal of Enterprise and Culture*, 14(3), (2006). 177-198.

Chirume, E and N Kaseke. "Impact of Covid-19 On Small and Medium-Sized Enterprise (SMEs) In Chinhoyi, Zimbabwe" *International Journal of Business, Economics and Law*, (2020): 10.

Dlamini, B, and D P. Schutte. "An Overview of the Historical Development of Small and Medium Enterprises in Zimbabwe." *Small Enterprise Research* 27, no. 3 (2020): 306-22.

Du Toit, A (et al). 'Small, Medium and Micro-Enterprises' Distress and Factual Evaluation of Rescue Feasibility'. *The Southern African Journal of Entrepreneurship and Small Business Management* 2019 11, no. 1

Jacobs, L. and Burdette, D., Queue Politely! South African Business Rescue Practitioners and Their Fees in Liquidation. *Diener N.O. V Minister of Justice and Correctional Services and Others* [2017] Zasca 180; [2018] 1 All Sa 317 (Sca); 2018 (2) Sa 399 (Sca), *Wolverhampton Law Journal*, 2019(2), pp. 61-69

- Godwin, A. "Corporate Rescue in Asia - Trends and Challenges." *Sydney Law Review*, 2012.
- Guruwo P, "Corporate Governance Issues In SMEs And Their Impact On Financial Performance: Evidence From Manicaland," Vol. 6 No.3 *Research journal's Journal of Entrepreneurship*.
- Karedza, G (et al) "An Analysis of the Obstacles to the Success of SMEs in Chinhoyi Zimbabwe." *European Journal of Business and Management*, 2014, 5.
- Loubser, A. Business rescue in South Africa: a procedure in search of a home? *The Comparative and International Law Journal of Southern Africa*, 40(1), (2007). 152-171.
- Magaisa G (et al) Corporate Governance Perspectives for Zimbabwean SMEs *International Journal of Economy, Management and Social Science* 22(8) (2013)
- Maphiri, M. "The Suitability of South Africa's Business Rescue Procedure in the Reorganization of Small-to-Medium-Sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code." *Michigan Business & Entrepreneurial Law Review*, no. 8.1 (2018): 101.
- Maseko, N. "The Impact of Personal Tax Knowledge and Compliance Costs on Tax Compliance Behaviour of SMEs in Zimbabwe," *Elite Research Journal of Accounting and Business Management* 13.
- Nwafor, A O. 'Moratorium in Business Rescue Scheme and the Protection of Company's Creditors'. (2017): 13, no. 1 *Corporate Board Role Duties and Composition* 4
- Stoop, H. 'When Does an Application for Business Rescue Proceedings Suspend Liquidation Proceedings?': *De Jure Law Journal* 2 2014 vol 47, no. 2

Online Journal Articles

- Pretorius, M, and W Rosslyn-Smith. "Expectations of a Business Rescue Plan: International Directives for Chapter 6 Implementation." *Southern African Business Review* 18, no. 2 (2019): 108-39. <https://doi.org/10.25159/1998-8125/5681>.
- Tsebe, A and J Strydom. "An Evaluation of the Relative Effectiveness of Business Rescue Strategies for Declining and Distressed Industries," *PM World Journal* 2021, 36.
- Sitharam, S, and M Hoque. "Factors Affecting the Performance of Small and Medium Enterprises in KwaZulu-Natal, South Africa." *Problems and*

Perspectives in Management 14, (2016): 277-88.
[https://doi.org/10.21511/ppm.14\(2-2\).2016.03](https://doi.org/10.21511/ppm.14(2-2).2016.03).

Internet Sources

LEX Africa. "The Fundamentals of Corporate Rescue Proceedings in Zimbabwe," Accessed 23 April 2022. <https://www.lexafrica.com/2021/08/the-fundamentals-of-corporate-rescue-proceedings-in-zimbabwe/>.

Gumbo "A Guide to The Corporate Rescue Procedure in Zimbabwe." *Gumbo and Associates*. Accessed 22 April 2022.
<https://gumboandassociates.com/2020/04/24/a-guide-to-the-corporate-rescue-procedure-in-zimbabwe/>.

Mazikana, A T. "Corporate Governance and Financial Performance in SMEs: A Case of the Kapenta Industry in Kariba." *SSRN Scholarly Paper*. Rochester, NY: *Social Science Research Network*, 2019.

Mazikana, A T. "The Impact of COVID-19 on SMEs Performance in Harare, Zimbabwe." *Social Science Research Network*, 2020.
<https://doi.org/10.2139/ssrn.3718238>.

Cases

Absa Bank Limited v Caine No and another 2014 ZAF SCH 46.

Associated Mine workers Union of Zimbabwe v Mazowe Pvt HH160/20.

Cape Point Vineyards (Pvt) Ltd v Pinnacle Point Group Limited and another 2011 SA (5) 600 (WCC).

Koen and Another v Wedgewood Village Golf and Country Estate (Pvt) Ltd and Others 2012 (2) SA 378 (WCC).

Metallon Gold Zimbabwe (Private) Limited & Ors v Shatirwa Investments (Private) Limited SC 107/21.

Oakdene Square Properties (Pvt) Ltd and Others v Farm Bothasfontein (Pvt) Ltd and Others 2012 (3) SA 273 (GSJ)

Ofer Sivan v Alexious Dera N.O. & Others 2012 (3) SA 273.

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 2012 (2) SA 423 (WCC).

Newspaper Articles

Herald, The. "How Creditors Benefit from Corporate Rescue." The Herald. Accessed April 14, 2022. <https://www.herald.co.zw/how-creditors-benefit-from-corporate-rescue/>.

"Corporate Rescue in Zim: The Legal Framework | Business Times," November 25, 2021. <https://businesstimes.co.zw/corporate-rescue-in-zim-the-legal-framework/>.

Theses and dissertations

Chatsanga, S. 'Judicial Management as a Business Rescue Scheme' A Critique of the Effectiveness of Judicial Management as a Rescue Scheme," LLM Thesis University of Zimbabwe 2018.

Majukwa, D. "Sustainability Strategies for Small and Medium-Sized Enterprises in Zimbabwe," Walden University Walden Dissertations and Doctoral Studies, PhD Thesis 2016.

Museta, G The Development of Business Rescue in South African Law, University of Pretoria, LLM Thesis, 2016.

Mupini, T. C. An investigation of the factors that negatively affect the success of judicial management as a corporate rescue strategy in Zimbabwe LLM Thesis University of Zimbabwe. (2016).