



**UNIVERSITY OF ZIMBABWE  
FACULTY OF LAW**

**“JUDICIAL MANAGEMENT AS A BUSINESS RESCUE SCHEME” A CRITIQUE OF  
THE EFFECTIVENESS OF JUDICIAL MANAGEMENT AS A RESCUE SCHEME**

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**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS OF A MASTERS DEGREE IN LAW (LLM)**

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**2017**

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## **Dedication**

I dedicate this product of my brains to my one and only wife, Angeline, for her special and unfading love.

To my role model and admirer, my late father Hebert Karima who gave me wisdom, life principles, fatherly guidance and taught me the need to be a hard worker. You played your part on earth and left us to be your good ambassadors responsible for creating a better reputation and image of our name. Rest in peace; for we are determined to take up the responsibility responsibly. This dedication also goes with equal measure to my beloved mother, Cotilda Murambiza, who was left too early with the responsibilities of a sole parent.

To my beloved children Akatendeka and Sarudzo. I challenge you to surpass my own achievements.

To my brothers and sisters. I love you all. Special mention goes to my brother Fungai. You opened the way to academic excellence in our family. All I could do was to follow such path. I equally challenge you not to tire but keep on taking up challenging tasks.

## **Acknowledgements**

To the Almighty God; you guide me throughout all turbulent times. I thank you for the blessings I receive in my life. I seek your continued divine guidance in all my endeavours throughout my entire life.

To my supervisor, Doctor I. Maja. I acknowledge my indebtedness to your valuable guidance throughout the project.

To Professor L. Madhuku. Thank you for your role in imparting advanced legal reasoning in me. I promise to live up to your expectations in displaying such advanced legal skills in the practice of law. You are such an amazing and inspiring lecturer. You demystify what appears to be complex situations and legal concepts and simplify them.

Am also indebted to all my classmates Adv. J Mudenda, Justice H. Zhou, S. Hofisi, C. Mutangadura, W.O.M Simango, O. Mushuma, I. Ndudzo, G. Pise, F. Murisi, A Madhaka, S. Chivizhe, B. Nyamwanza, E Mangezi, B.S. Nhliziyo and F. Midzi

Am also indebted to My colleagues and staff at Chatsanga & Partners: E. Ngwerewe, N Makunyire, M Tarugarira, Trophine, Stanford and Given. Thank you for giving me cover when I was busy with school work.

Last but not least, am indebted to sisi Abigail, secretary, Public law department for always keeping me posted of any developments as well as for making the final touches to this project.

**MAY THE LORD GOD BLESS YOU ALL ABUNDANTLY**

## **Abstract**

The main thrust of the study was to ascertain the effectiveness of judicial management procedure as a corporate rescue scheme. Thus the research unraveled the shortcomings of the laws of insolvency in light of the objectives of insolvency laws in particular the need to protect the interests of not only the creditors and shareholders, but the society at large. The study was carried out in Harare targeting insolvency practitioners as well as the use of secondary data. The qualitative research methodology was employed because of its ability to explore and describe the effectiveness of judicial management as a corporate rescue scheme capturing the experiences and opinions of experts directly involved in judicial management. Thus indepth interviews and secondary data analysis research techniques were utilized. The overall findings confirmed that indeed judicial management procedure is flawed. It was established that the procedure is restricted to companies only at the exclusion of any other form of business entity. Further, those who are eligible for appointment as judicial managers do not need to have a business management qualification which appear to be necessary for the revival of financially distressed companies. In light of these findings several recommendations were made chief among them the need for law reform to enhance the effectiveness of corporate rescue procedures.

# CHAPTER ONE

## RESEARCH OVERVIEW

### 1.1 INTRODUCTION

Zimbabwe's insolvency law regime provides two main procedures that apply to companies that are facing viability challenges, which are winding-up<sup>1</sup> and judicial management<sup>2</sup>. These procedures are provided in the Companies Act (Chapter 24:03).

Winding-up, which is also referred to as liquidation, is provided for in the Companies Act from Section 199 to Section 298 and entails the dismantling of the company by closing the company's operations by the appointed liquidator, followed by collection of, and gathering, all company's assets which are sold and proceeds realized are paid to creditors in terms of an order of preference provided by the law<sup>3</sup>. The surplus or balance of the proceeds, if any, will be paid to the shareholders and the company is deregistered from the register of companies kept at the registrar of companies. Winding up thus extinguishes the company.

On the other hand, judicial management provided for from Section 299 to Section 321 of the Companies Act is Zimbabwe's corporate-rescue mechanism as it has the potential of preserving the existence of the company by appointing a third party to manage and control the operations of the company with a view of reviving it to a successful entity<sup>4</sup>.

It is generally accepted that a company does not exist in a vacuum but forms an integral part of the community in which it operates. For this reason, a company's failure affects,

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<sup>1</sup> Section 206(f) of Companies Act (Chapter 24:03)

<sup>2</sup> Section 300 of Companies Act

<sup>3</sup> Section 218

<sup>4</sup> Section 302



not only its creditors and members, but also among others its employees, suppliers, distributors, and other

business partners, and, through them, the community at large. In light of this factual reality, it thus makes sense to prioritize all efforts to rescuing ailing companies and businesses suffering from temporary setbacks but which have the potential to survive if given some assistance and breathing space to overcome their financial difficulties<sup>5</sup>.

Companies are an integral part of any national economy. If companies are exposed to closures merely on the basis of financial challenges which can be offset by giving them a chance to be revived, there will be an enormous danger to the nation's economy. This realization has led to a widespread culture of business-rescue worldwide, resulting in enactment of laws providing for business rescues in many legal systems. There is now a new approach to insolvency law called "fresh start" approach that originated in the USA<sup>6</sup>. The philosophy behind this approach being that insolvency or bankruptcy is not a crime but is one of the risks of capitalism which should not deserve punishment. The insolvent must rather be assisted to recover financially, hopefully having learnt some lessons from its previous failure.

In light of the foregoing, this article seeks to examine and critique Zimbabwe's judicial management procedure and assess whether it is sound and alive to the widespread culture of business-rescue or that it is outdated and irrelevant to modern culture that it should either be amended or repealed and in its place, a new set of procedure is put in place. It is accepted that law is dynamic and not static. It changes as per the dictates of

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<sup>5</sup> Judicial Management as a Corporate Rescue Procedure in South Africa Corporate Law by Anneli Loubser UNISA, page 137

<sup>6</sup> Anneli Loubser (supra) 137

the time. It must be highlighted at this stage that judicial management procedure is not practised in any of the developed nations. It was introduced in South Africa in 1926 and has since been repealed in 2008. It appears Zimbabwe could be one of the few remaining places where it is still operational. Is the procedure yielding the desired results? This is the gist of this article: a critique of effectiveness of the procedure as a corporate-rescue scheme.

## **1.2 STATEMENT OF THE PROBLEM**

Zimbabwe is a country that is facing economic depression. A lot of companies and business entities are facing viability challenges. It is almost given that the majority of business entities, if not all, are commercially insolvent. The government itself and parastatals have huge and frightening debts. A lot of big companies have closed owing to the unfavourable operating environment. In their place, there has developed a new set of businesses called small to medium enterprises, which are also struggling to remain afloat. There is now plenty of informal businesses that are somehow keeping the economy afloat. Despite all these developments, our law of insolvency has not been changed to accommodate the changing operating environment. The law appears to be creditor-oriented as it is not conducive for small and medium enterprises. The culture of business rescue that is now widespread world-wide is yet to be developed. Zimbabwe needs a more progressive business-rescue procedure in order to safeguard and preserve the businesses that are operating. The procedure has to be user-friendly so that all interested parties are taken care of.

It appears Zimbabwe's insolvency law is outdated as it is not modified to suit the dictates of time and the economic environment. Since we are not living in the past but

in the present time, the law has to be dynamic and responsive to the current operating environment. This is a problem that needs a solution. This article therefore aims at identifying the deficiencies in our judicial management procedure with a view to assist in developing our law of insolvency to match the modern times and our operating environment.

### **1.3 OBJECTIVES OF THE STUDY**

The main objective of this study is to reveal the shortcomings of our judicial management procedure. This study exposes the shortcomings of the law of insolvency and seeks to recommend law reform to bring statutory provisions that emphasize the need to rescue businesses that are facing viability challenges. The underlying philosophy being that closure of businesses affects not only the creditor and shareholders, but the society at large.

### **1.4 ASSUMPTIONS**

1. The legislation does not make it mandatory that judicial management be the first remedy to take when a company is facing financial challenges. As such, winding-up can be resorted to at the first instance in circumstances where judicial management process could be the best option.
2. The use of the word “company” in Sections 299 and 300 of Companies Act restricts judicial management procedure to only registered companies to the exclusion of other business-entities like partnerships, individual business persons and business trusts.
3. Judicial management procedure entails a closely regulated and court supervised rescue procedure. While this may be good for big creditors and big companies,

this renders the procedure costly, cumbersome and inappropriate for small and medium businesses.

4. Creditors seem to be given too much power and influence in judicial management procedure in particular, and in insolvent companies in general. This flies in the face of the objective of insolvency law which is to preserve and safeguard other conflicting interests like the societal interest in the preservation of businesses. The insolvency law in its current form is undesirably too creditor-oriented.
5. The law as it stands appears not to be consistent with the modern culture of business-rescue in insolvency law which is based on the philosophy that bankruptcy is one of the risks of capitalism and is not a crime.
6. One of the reasons for failure of judicial management as a viable business-rescue regime is that the main emphasis has been placed on the protection of creditors' interests, like in liquidation, rather than on the rescue of the company or its business.
7. Reference to "mismanagement" in section 300 of the Act as a cause of failure is unnecessary as there are many causes other than this.
8. Making "commercial insolvency" a requirement in Section 300 is not in line with the objectives of insolvency law, particularly corporate rescue procedure. A mere likelihood of insolvency is not enough for the purposes of utilizing judicial management procedure.

9. The phrase “reasonable probability that it will be enabled to pay its debts” places a heavy burden of proof on the applicant and makes judicial management procedure restricted, thus against the spirit of corporate rescue.
10. The requirement for the company to pay debts in full entails that the whole corporate entity should be rescued. “Successful” is narrowly defined and does not include a rescue of only part of the company’s business.
11. The law does not provide an automatic moratorium to companies upon placement under judicial management. A successful rescue operation without a moratorium is unlikely.
12. The complete lack of any requirements regarding qualifications, training or experience for appointment of judicial managers is one reason for the failure by judicial management procedure.
13. The applicants nominate a person to be appointed as judicial manager. The fact that directors and shareholders are eligible to apply exposes this procedure to abuse and compromises the judicial managers’ independence and impartiality.
14. A judicial manager is not disqualified from appointment as liquidator of the same company he/she would have managed unsuccessfully.
15. Just and equitable is made an additional requirement in section 300. This implies that creditors are primarily entitled to liquidation to get repayment.

## **1.5 RESEARCH QUESTIONS/ GUIDING QUESTIONS**

1. What is the scope, purpose and objectives of insolvency law, in particular the judicial management procedure?

2. What is the success rate of revival of companies that are placed under judicial management?
3. Is the judicial management procedure open for use by any business entity?
4. Whose interests are being protected or advanced by judicial management proceedings as provided by the law in its current form?
5. What can be the reasons for the failure of companies that were placed under judicial management?
6. What are the requirements for an application for judicial management order?
7. Are the requirements consistent with the purpose and objectives of the procedure itself in light of the fact that judicial management procedure is the main formal business-rescue procedure in Zimbabwe?
8. Should judicial management procedure be restricted to companies that are already in commercial insolvency?
9. Who qualify to be appointed as judicial managers and why?
10. Is our judicial management procedure in its current form effective in rescuing financial distressed companies?
11. Is there need for reform of the procedure or should it be repealed and replaced by a totally different procedure?

## **1.6 SCOPE OF THE STUDY**

The main study or research was carried out in Harare. Interviews were conducted with various selected judicial managers who managed various companies, personnel in the Master's Office in the Insolvency department, selected judges in civil law department and selected legal practitioners involved in insolvency law practice. These were the

preferred interviewees because of their in-depth expertise and experience in dealing with companies that were placed under judicial management, hence constitute the more relevant constituency for the study of this nature.

## **1.7 STRENGTHS AND LIMITATIONS**

The outstanding strength in this study is that in all cases interviewees were very cooperative. They sacrificed their precious time to entertain the researcher and gave reliable and professional information.

However, the major problem encountered in undertaking this study has been the limited scholarly articles written about Zimbabwe's insolvency law in general and judicial management in particular. The researcher had to rely on various articles written on the subject about South African Law and other legal systems. This is one of the major contributions that this research is making to scholarship. The other limitation has been inadequacy of time to do the research. The researcher had to work extra hours to ensure that this research could be completed timeously.

## **1.8 ORGANISATION OF THE STUDY**

Chapter 1: Comprises the research problem, the objectives, assumptions, the research questions, the scope of the study and the strengths and limitations of the study.

Chapter 2: This chapter constitutes literature review where it introduces the law of insolvency and its scope, purpose and objectives in brief. It then looks at current Zimbabwe's legal framework in respect of judicial management procedure.

Chapter 3: This chapter consists of the research methodology.

Chapter 4: Consists of presentation and discussion of research findings gathered from the interviews and secondary data obtained from the textbooks, statutes and online research. A comparative analysis of corporate rescue schemes of Zimbabwe against other legal systems is also given herein as well as a critique of the Insolvency Bill gazetted on 14 April, 2017

Chapter 5: This chapter gives the conclusion of the study, followed by suggestion and/or recommendations.



## CHAPTER TWO

### THE LEGAL FRAMEWORK

#### 2.1 WHAT IS INSOLVENCY

Insolvency is a state of affairs brought about by legal person's ability to pay debts or meet legal obligations. Robert Sharrock *et al* say "*In common parlance*, a person is insolvent when he is unable to pay his debts. But the legal test of insolvency is whether the debtor's liabilities, fairly estimated, exceeds his assets, fairly valued... inability to pay debts is at most merely evidence of insolvency"<sup>7</sup>.

A person who has insufficient assets to discharge his liabilities satisfies the test of insolvency, but is not, for legal purposes treated as insolvent unless his estate has been sequestrated by an order of court. Hence sequestration order is a formal declaration that a debtor is insolvent.

It appears that in a barter society or a strictly cash economy, no one can become insolvent in the sense of liabilities exceeding assets<sup>8</sup>. It is only when financial obligations are undertaken which are not immediately discharged in full that a person can become subject to a liability that exceeds or may, when it becomes payable, exceeds his present or future reliable assets. This process is the creation of credit and gives rise to the relationship of debtor and creditor. According to the Cork Report, credit is the likelihood of the modern industrialised economy. Credit is fundamental to trade, commerce and industry<sup>9</sup>. The provision of credit for trade and industry stimulate

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<sup>7</sup> Hockly's Insolvency Law, 9<sup>th</sup> Edition by Robert Shanock et al at page 3

<sup>8</sup> Report of the Review Committee chaired by Sir Kenneth Cork of June 1982 at page 9 (The Cork Report)

<sup>9</sup> Cork Report (supra) page 10

production and encourage enterprise as well as helping individuals and businesses over difficult economic times. To this end , it is argued that insolvency is an integral part of any modern industrialised economy as some of the financial obligations may not be discharged timeously, hence creating the state of insolvency. There is individual insolvency and corporate insolvency where the debtor is a natural person and a company respectively.

### **2.1.1 WHAT IS INSOLVENCY LAW?**

Insolvency law is the law regulating the treatment of insolvent persons and deals with the procedures of rescuing insolvent persons from the consequences of their inability to pay debts. It also defines the claims of creditors, the assets available for distribution, proof and ranking of claims and, where possible, the rehabilitation of insolvent person if it is a natural person. Corporate insolvency law is the law regulating the affairs of an insolvent company. The significant extenders of credit are banks, finance houses, micro and macro finance institutions and building societies which extend credit to companies mainly<sup>10</sup>. This makes corporate insolvency law a key component of national laws.

### **2.1.2 PURPOSE AND DESIGN OF INSOLVENCY LAW**

Society facilitates the creation of credit and this creates the risk of insolvency<sup>11</sup>. It is thus incumbent upon the society to provide machinery, which in the event of insolvency, is adequate to ensure a fair distribution of insolvent's estate amongst his creditors. While it will always remain essential to punish the dishonesty or reckless insolvent, it is also important to devise a system of law to deal compassionately with the honest though

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<sup>10</sup> Cork Report (supra) page 10

<sup>11</sup> Cork Report (supra) page 13

unfortunate debtor who is often no more than a bewildered, ill-informed and overstretched consumer. The system of law should enable the insolvent to extricate himself from a situation of hopeless debt as quickly and as cheaply and with as little fuss as possible bearing in mind that it is the creditor who possess capital which is the capital of society as a whole, to which the debtor seeks access for purposes beneficial first to himself, secondly to the creditor in providing him with a market for his capital and thirdly to the society as a whole. In respect of corporate insolvency law it is generally accepted that a company does not exist in a vacuum but forms an integral part of the community in which it operates<sup>12</sup>. As such, a company's failure affects not only its members and creditors, but also, among others, its employers, suppliers and distributors, and through them, the community at large.

On that basis, it makes sense for the society to have a legal framework that serves the interests of all the interested parties/ constituencies. The law ought to strike a balance between such crucial but conflicting interests. On the basis of the understanding that credit is the lifeblood of modern industrialised economy, it is vital that the consequences of insolvency be properly managed by putting in place legal framework that facilitates the stabilisation of trade, commerce and consequently the national economy. Insolvency law should thus be designed to ensure that all the conflicting interests are, at least, to a certain degree, protected. The role of credit in society appears to be pivotal in facilitating the smooth running and expansion of business and activities of individuals.

The purposes of insolvency law thus differ from society to society on the perspectives of the legal system involved. Depending on the society involved, insolvency law may be

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<sup>12</sup> Anneli Loubser (supra) page 137

regarded as pro creditor in legal system that emphasises the protection of creditors' interests and rights. In other societies, insolvency law may appear to be pro- debtor where the interests of the debtor are emphasised and that the law focuses much on reviving the business to become a viable entity again. In the latter situation, by preserving commercial entities, other societal interests are protected. It appears that this latter situation is preferable.

### **2.1.3 OBJECTIVES OF INSOLVENCY LAW**

In the Cork Report, it is stated that *"It is a basic objective of the law to support the maintenance of commercial morality and encourage the fulfillment of financial obligations. Insolvency must not be an easy solution for those who bear with equanimity the stigma of their own failure or their responsibility for the failure of the company under their management. The law of insolvency takes the form of a compact to which there are three parties, the debtor, his creditors and society. Society is concerned to relieve and protect the individual insolvent from the harassment of his creditors, and to enable him to regain financial stability and to make a fresh start... In the case of an insolvent company, society has no interest in the preservation or rehabilitation of the company as such, though it have a legitimate concern in the preservation of the commercial enterprise"*<sup>13</sup>.

The above statement shows that English insolvency law is pro-creditor, where the legal framework seeks to ensure that to a large extent , the interests of creditors are protected by ensuring that the procedures used facilitate the repayment of the creditors' dues even if that would lead to the collapse of the company.

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<sup>13</sup> Cork Report page 53

The South African legal position is stated by Robert Sharrock et al as follows: “ *The main objective of a sequestration order is to secure the orderly and equitable distribution of the debtor’s assets where they are insufficient to meet the claims of all his creditors*”<sup>14</sup> and that “*The law of insolvency exists primarily for the benefit of the creditors and accordingly, a court will not sequestrate a debtor’s estate unless it is shown that the sequestration will be to the advantage of creditors*”.

The South African position appears to be pro creditor as well. It is observed that the fact that a debtor is insolvent, its assets clearly are insufficient to meet the claims of all creditors. It is thus unnecessary to say “*where they (assets) are insufficient to meet the claims of all his creditors*” in the first quotation.

In summary the following appear to be the generally accepted objectives of the good modern insolvency law<sup>15</sup>:

- **To prevent self-help and provide for a collective process for creditors.**

Self -help exists where each creditor pursues his individual rights and remedies as provided by the law for debt recovery. Self- help would ensure that success goes to the fastest and more efficient litigant creditor. Insolvency law regards this as undesirable as some creditors may be paid in full (because of speed) while others may not be paid at all after debtor’s assets are sold in execution to satisfy the fastest creditor’s claims. This may be detrimental to the entire scheme of availability of credit. Rather the law provides a collective process that ensures a fair and equitable administration of the debt collection system and prevents a

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<sup>14</sup> Robert Shanock page 4

<sup>15</sup> Cork page 53

“winner- take- all” attitude. This is however debatable. There is no evidence to show that self- help is destructive. Furthermore the law provides the ranking of creditors where secured creditors will get paid from the proceeds realised from the property used as security to the debt at the expense of the unsecured creditors. In such a situation there is high possibility that unsecured creditors will go with nothing hence the criticism that the law do not necessarily provide for equitable administration and distribution of debtor’s assets to the whole body of creditors.

- **To maximize returns to creditors.**

This is linked to the first objective. The law ensures that the interests of the individual creditors are subordinated to the collective interests of the general body of creditors, as self- help mechanism is regarded as detrimental to the general body. It is believed that collective debt collection procedure ensures that all creditors receive something in proportion to what they are owed.

This is equally debatable. On the basis of the ranking of creditors, the secured creditors will almost always get full or close to full payment of the debts while the unsecured creditors will always get little, if anything at all, as they are paid last. The law of insolvency seeks to protect the interests of the secured creditors more than the general body of unsecured creditors, it can be argued. It can thus be argued that unsecured creditors’ interests can best be served by resorting to individual rights and remedies as provided by law, albeit before insolvency law procedures are initiated.

- **To restore the insolvent to stability (for individual) or to profitable trading (for companies)**

Insolvency law must have mechanisms for restoring an insolvent to solvency. For an individual, the law ensures that he/she is not destroyed by mere account of inability to pay debts but that his/ her affairs must be managed with a view to rehabilitation. With companies, insolvency law provides mechanisms for the management and reorganisation of the company with a view to restoring it to viability and handing it back to its owners.

This objective is in line with modern trend of insolvency law which is widespread worldwide where there is a new approach to insolvency law whereby the law emphasises the need not necessarily to punish the unfortunate debtor but to assist the debtor to have a fresh start that will lead to rehabilitation (individual) or profitable trading (companies). The new approach is noticeable in the adoption and development of business rescue mechanisms in various legal systems.

- **To identify the causes of inability to pay debts and imposing appropriate sanctions**

This is appropriate to corporate insolvency of a company. Insolvency of a company affects many interested parties, hence the law must provide a mechanism for the investigation into the causes of the failure and, where appropriate, impose sanctions (criminal or civil) upon those found to be guilty of culpable acts (reckless trading).

- **To diagnose and treat an imminent insolvency at an earlier rather than a late stage**

This is in line with the desire to keep companies afloat where insolvency law procedures are resorted to merely on the basis of a likelihood that the company may become insolvent rather than to wait for it to be insolvent before utilizing the procedure. It is understood that if the company's financial problems are detected earlier and procedures used, there are high chances of restoring it to viability.

- To relieve and protect where necessary the insolvent from any harassment and undue demands by creditors whilst taking into consideration the rights which the insolvents should enjoy, at the same time, to have regard to the rights of the creditors.
- To recognize that the effects of insolvency are not limited to the private interests of the insolvent and his creditors but rather that other interests of society or the groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognized and safeguarded
- To provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country.

As shown above, the objectives of each particular legal system differ from the other, but the list provided above constitutes the standard objectives worldwide.



## **2.2 JUDICIAL MANAGEMENT**

### **2.2.1 WHAT IS JUDICIAL MANAGEMENT?**

Judicial Management is an insolvency proceeding as it arises in circumstances where a company is unable to pay its debts and is provided for in terms of sections 299 to section 314 of the Companies Act.

Effectively judicial management entails the placement of a company under the direction and management of a Judicial Manager who will run the affairs of the company until the return day, if it is provisional judicial management, or until returning the company to a successful concern if it is final judicial management or until the company is placed in liquidation<sup>16</sup>. The procedure therefore introduces new management and divests the directors of their management powers. This therefore means, in essence, that creditors of the company take over the management of the company, under the direction of the judicial manager as the judicial manager takes into account the interests of the creditors to whom he reports.

### **2.2.2 WHO APPLIES FOR A JUDICIAL MANAGEMENT ORDER**

There are two circumstances where the court may make a judicial management order in terms of section 299. These are;

- a) On an application made to court for such order by any person who is entitled to apply for the winding up of a company.
- b) On an application made to the court for the winding up of the company where the court instead grants a provisional judicial management order.

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<sup>16</sup>Section 300 of the Companies Act

The persons who can therefore apply for a judicial management order are spelt out in Section 207 of the Act and these are:-

- a) The company itself hence the board of directors can initiate a judicial management application.
- b) Any creditor or creditors of the company, including any contingent or prospective creditor or creditors of the company.
- c) Any contributory or contributories or
- d) the Minister.

### **2.2.3 REQUIREMENTS FOR JUDICIAL MANAGEMENT ORDER**

For a provisional Judicial Management order the requirements are provided in section 300 and these are:-

- i) That the company is unable to pay its debts, or is probably unable to pay its debts, the insolvency requirement;
- ii) That the insolvency is a result of mismanagement or any other cause. Thus there has to be a cause for insolvency.
- iii) That the company has not become or is prevented from becoming a successful concern;
- iv) That there is a reasonable probability that the company if placed under judicial management, it will be enabled to pay its debts or meet its obligations and become a successful concern, and
- v) That it would be just and equitable to do so or it appears to the court that:-

- vi) If the company is placed under judicial management upon an application for winding up the grounds for its winding up may be removed and that it shall become a successful concern and ;
- vii) It would be just and equitable to do so.

For a final judicial management order, the requirements are provided in section 305 of the Act and these are:-

- i) That there is a reasonable probability that the company will be enabled to become a successful concern and ,
- ii) That it is just and equitable to grant such an order.

#### **2.2.4 CONTENTS OF A PROVISIONAL JUDICIAL MANAGEMENT ORDER**

These are provided in section 301 of the Act and these are:-

- a) The date of the return which shall not be less than sixty days from the date of the grant of the order.
- b) Directions that the company shall be under the management of a provisional judicial manager, subject to the supervision of the court and that any other person vested with the management of the company affairs shall be divested thereof;
- c) Conferring upon the provisional judicial manager the power, subject to the rights of the creditors, to raise money in any way without the authority of shareholders, as the court may consider necessary, and
- d) May contain the directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summons and other

processes against the company be stayed and be not proceeded with without the leave of the court.

### **2.2.5 WHO APPOINTS THE PROVISIONAL JUDICIAL MANAGER**

The provisional judicial manger shall be appointed by the Master in terms of section 302 (1)(b)(i). The provisional judicial manger shall give security for the proper performance of his duties in his capacity as such as the Master may direct, and shall hold office until discharged by the court in terms of section 305.

### **2.2.6 QUALIFICATIONS FOR APPOINTMENT AS PROVISIONAL JUDICIAL MANAGER**

In terms of section 302(2), a person shall not be appointed as such if he is the auditor of the company, or if he is disqualified under the Act from being appointed as liquidator in a winding up.

In terms of Section 218 (2) (b), the Master may, subject to section 274, appoint any fit person or shall appoint any person whom the court has directed to be the appointed as a provisional liquidator of the company, to hold office until the appointment of the liquidator, and may or shall, as so directed by the court, restrict his powers by the terms of his letter of appointment.

When a vacancy occurs in the office of liquidator, the Master shall fill the vacancy by making an appointment under section 219 and 274. This is provided for in terms of section 218(3)

Section 274 provides that each liquidator shall furnish security to the satisfaction of the Master for the due performance of his duties as such. This provision clearly provides

that for a person to be appointed as a liquidator he/she has to furnish security to the satisfaction the Master.

All these statutory provisions relating to the appointment of a liquidator, which apply in equal measure to the appointment of a provisional judicial manger, show that the only statutory qualification for the appointment of both liquidator and judicial manger is merely furnishing security to the satisfaction of the Master. There is no other qualification required in terms of the statute.

### **2.2.7 DUTIES OF PROVISIONAL JUDICIAL MANAGER**

These are spelt out in section 303 as follows:

- a) He/ she assumes the management of the company and takes possession of all the assets of the company;
- b) He lodges with the Registrar within 7 days of his appointment a copy of his letter of appointment and
- c) He prepares and lay before meetings a report containing
  - An account of the general state of the affairs of the company,
  - A statement of reasons why the company is unable to pay its debtors or is probably unable to meet its obligations or has not become, or is prevented from becoming a successful concern.
  - A statement of the assets and liabilities of the company.
  - A complete list of creditors and amounts and nature of the claim of each creditor.

- Particulars as to any source from which money has or is to be raised for the purposes of carrying on the company's business, and
- His considered opinion as to the prospects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern.

The provisional judicial manager's report together with the report of the Master and that of the Registrar, shall be used by the court on the return day to decide whether to grant a final judicial management order or to discharge it. Other considerations are the opinion and wishes of the creditors and members of the company and the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of the claims. This is provided in section 305(1)

### **2.2.8 DUTIES OF FINAL JUDICIAL MANAGER**

These are provided in section 306. These are:

- a) Taking over from provisional judicial management and assumes the management of the company;
- b) Managing the company, subject to any order of court, in such manner as he may consider most economic and most likely to promote the interests of the members and creditors of the company.;
- c) He complies with directions of the court made in the final judicial management order;

- d) Lodges with the registrar a copy of the final judicial management order and the Master's letter of appointment and, in the event of the final judicial management order being cancelled, a copy of the order cancelling it.
- e) Complies with section 123,
- f) Keeps such accounting records and prepares annual financial statements,
- g) Convenes the annual general meetings of members in terms of the Act and supply with all the requirements with which the directors of the company would in terms of the Act have been obliged to comply with had the company not placed under judicial management,
- h) Convenes meetings of creditors
- i) Submits to meetings of creditors reports showing the assets and liabilities of the company and its debtors and obligations as verified by the auditor of the company and all such information as may be necessary to enable the creditors to become fully acquainted with the position of the company.
- j) Lodges with the Master copies of all documents submitted to the meetings
- k) Examines the affairs and transactions of the company before commencement of judicial management to ascertain whether any officer of the company contravened any provision of the Act and submits to the Master a report on any such contraventions or offences
- l) Examines the affairs and transactions of the company prior to judicial management to ascertain whether any officer of the company is personally liable to pay damages or compensation to the company and shall submit to the Master

and the next succeeding meeting of members and creditors a report containing full particulars of such liability and

m) If at any time he is of the opinion that the continuation of judicial management will not enable the company to become a successful concern, apply to the court for the cancellation of the relevant judicial management order and the issue of an order for the winding up of the company.

### **2.2.9 APPLICATION OF ASSETS DURING JUDICIAL MANAGEMENT**

In terms of section 307(1), a judicial manager shall not without the leave of the court, sell or otherwise dispose of any of the company's assets except in the ordinary course of the company's business.

All the money of the company available shall be applied by the judicial manager towards paying costs of judicial management, conducting of the company's business and paying the claims of creditors which arose before the date of the order.

### **2.2.10 REMUNERATION OF JUDICIAL MANAGERS**

In terms of section 308, a provisional judicial manager and a final judicial manager shall be entitled to such reasonable remuneration for their services as may be fixed by the Master from time to time, taking into account the manner in which they would have performed their functions and any recommendations by the members and creditors of the company relating to such remuneration.

Section 192 of Insolvency Act shall apply mutatis mutandis with regards to any fixing of remuneration by the Master.



### **2.2.11 CANCELLATION OF FINAL JUDICIAL MANAGEMENT ORDER**

This is provided for in section 314 of the Act.

If at any time, an application by the final Judicial manager or any person having an interest in a company under judicial management, it appears to the court that the purpose of the final judicial management order has been fulfilled or that for any other reason it is undesirable that the order should remain in force, the court may cancel such order and thereupon the final Judicial manager shall be divested of his functions.

In terms of section 314(2), in cancelling the order *“the court shall give such directions as may be necessary for the resumption of the management and control of the company by the officers thereof, including directions for the convening of a general meeting of members for the purpose of electing directors of the company”*.

This will thus mark the end of the judicial management proceedings.

### **2.2.12 WHY CLASSIFYING JUDICIAL MANAGEMENT AS A CORPORATE RESCUE SCHEME**

Judicial management is a procedure whereby the management and control of a company that is facing viability challenges are taken away from the directors and are placed in the hands of a judicial manager with the aim of turning around the fortunes of the company.

Section 300 (a)(ii) is instructive as it sets out the requirement that the court should be satisfied that the company will be enabled to pay its debts or meet its obligations and become a successful concern if placed under judicial management. Section 300(b)(i) also shows that a company may be placed under judicial management on an application

for winding up if it also appears to the court that placing the company under judicial management will remove the grounds for its winding up, and it will become a successful concern.

Further, Section 303 (a) and (c) (vi) point to the fact that judicial management is meant to rescue an ailing company. In terms of paragraph (a), the provisional judicial manager takes over and assumes the management of the company. This means the company will continue to run, now under a new management. Business is thus not ceased. In terms of paragraph (c) vi), the provisional judicial manager prepares and lays a report containing his considered opinion as to the prospects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern. This clearly shows that the purpose of judicial management proceedings is to revive companies thus rescuing them from total collapse.

Section 305 again provides that a final judicial management order may be granted if the court is satisfied that if a company is placed under final judicial management, there is a reasonable probability that it will be enabled to become a successful concern, failing which the court will discharge the provisional order. Section 306 (m) provides that *“if at any time he is of the opinion that the continuation of judicial management will not enable the company to become a successful concern...”*, the judicial manager shall apply to the court for the cancellation of the relevant judicial management order and the issue of an order for the winding up of the company.

It is thus apparent from the foregoing that judicial management procedure is provided for the purpose of rescuing a financially distressed company with a view to make it viable. It is thus a corporate-rescue procedure which is in direct contrast with winding up proceedings which are meant to extinguish a company from existence after creditors' interests are safeguarded. While it is admitted that judicial management is not the only mechanism provided in the statute to rescue financially distressed companies as there exists compromises and schemes of arrangement with creditors, it is argued that it is the dominant mechanism with a broad scope and is the most frequently used procedure.

### **2.3 COMPROMISES AND SCHEMES OF ARRANGEMENT**

These are provided for under Section 191 of the Act.

A compromise is an agreement where a dispute over rights is settled by each party giving ground and a scheme of arrangement is whereby creditors agree to re-arrange the enforcement mechanisms or sometimes cancelling part of their rights with the intention of making the company survive while at the same time honouring some of its obligations to creditors.

The court is involved on two stages in terms of Section 191:-

- (i) The Court has to give an order for the holding of creditors' meeting to consider the scheme (Section 191 (1)).
- (ii) In terms of subsection (2), the court sanctions the compromise or arrangement thereby making it binding on all creditors or class of creditors, or on the members or class thereof and also on the company.

Noticeably, compromise and arrangements are narrower in scope than judicial management although they all constitute corporate rescue mechanisms.

### **2.2.7 SHORTCOMINGS OF JUDICIAL MANAGEMENT AS A CORPORATE RESCUE SCHEME**

Judicial Management has been widely criticized for not being the best mechanism for corporate-rescue<sup>17</sup>. There are various elements in the procedure that are undesirable, inconsistent with the spirit of corporate-rescue and amount to a threat to the efforts of rescuing companies. To that end, it has been argued that judicial management has too many flaws that it should either be amended in a substantial way or repealed altogether and in its place, a new, better and more convenient and appropriate procedure be put in place<sup>18</sup>. The following are some of the areas of concern:-

- (i) The absence of a mandatory statutory provision that in insolvency regime, judicial management is the first procedure to be followed and that winding up should only be resorted to upon failure of judicial management in rescuing a financially distressed company. Such provision should allow winding up at the first instance only in exceptional circumstances.
- (ii) Judicial management procedure is only available to companies registered in terms of the Act. It is argued that in this jurisdiction, there are many forms of businesses. Judicial management ought to cover other forms of businesses like Trusts,

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<sup>17</sup> Pieter Kloppers page 370

<sup>18</sup> Anneli Loubser page 162

- (iii) The procedure is too court regulated and court supervised that it becomes too costly, cumbersome and inappropriate for small and medium businesses. This is a deterrent factor, considering that to rescue a financially distressed entity there is need to avoid too high costs.
- (iv) The procedure emphasizes the rights of creditors, and makes the procedure more inclined towards safeguarding the interests of the creditors than of any other stakeholders.
- (v) Section 300 makes reference to mismanagement as the cause of a company's inability to pay its debts. This is unnecessary as there are many genuine causes of company failure outside mismanagement.
- (vi) The procedure requires "commercial insolvency" for a company to adopt the procedure. If one of the objectives of insolvency law is to rescue corporates, then it will be desirable to adopt the procedure where insolvency is imminent rather than to restrict it to companies that are already insolvent.
- (vii) The requirement of "reasonable probability that it will be enabled to pay its debts" places a heavy burden of proof on the applicant and restricts the use of the procedure. There should be a mere probability required to make the procedure accessible to many who desire its use.
- (viii) The mere evidence of revival of only part of the company's business and not the entire corporate entity should suffice.

- (ix) Section 301 does not make moratorium automatic. The judicial management order should make the moratorium automatic if there is going to be a serious and successful rescue operation.
- (x) The procedure ought to set some minimum business qualifications and experience for persons who are eligible for appointment as judicial managers.
- (xi) An applicant must not be allowed to nominate a person for appointment as a judicial manager as that subjects the procedure to abuse.
- (xii) The eligibility of the same persons for appointment as liquidators and judicial managers.
- (xiii) The fact that a judicial manager is eligible for appointment as a liquidator of the same company.
- (xiv) Just and equitable requirement makes the granting of judicial management order difficult and subject to excessive judicial discretion even where other requirements have been met.

## **CHAPTER 3**

### **RESEARCH METHODOLOGY**

#### **3.1 INTRODUCTION**

This chapter gives an overview of how data was gathered addressing all issues relating to methodology including but not limited to research design, sampling techniques and data collection techniques.

The study adopted the qualitative research methodology. Qualitative research is concerned with developing explanations of social phenomena, that is, it helps bring out an understanding of the world and an exploration of why things are the way they are. Burns and Grove (2003:19), postulate that qualitative research is a systematic subjective approach used to describe life experiences and situations to give them meaning. It is a form of social enquiry that focuses on the way people interpret and make sense of their experience and the world in which they live (Halloway and Wheeler 2002:30). Researchers who use qualitative research methodology adopt a person-centered holistic and humanistic perspective to understand human lived experiences without focusing on the specific concepts (field and Morse 1996:8). The rationale of using a qualitative approach was to explore and describe the effectiveness of judicial management as a corporate rescue scheme capturing the experiences and opinions of individuals who are directly involved in judicial management.

#### **3.2 RESEARCH DESIGN**

A research design is a blue print for conducting the study that maximizes control over factors that could interfere with the validity of the findings. According to Burns and

Grove (2001:223), it helps the researcher in planning and implementing the study in a way that helps them to obtain intended results. For the purposes of this study, descriptive and phenomenological research designs were employed.

### **3.2.1 DESCRIPTIVE RESEARCH DESIGN**

This research design is most applicable when the researcher knows what has to be studied and where to look for the solution, thus research is conducted to have a clear picture of events or situations. The rationale for descriptive study was to give a clear picture of the phenomenon under study. Descriptive research refers to research studies that have as their main objective the accurate portrayal of the characteristic of persons, situations or groups (Polit and Hungler 1999:643). It can also be defined as a non-experimental research design used to observe (and measure) a variable when little conceptual background has been developed on specific aspects of the variables under study. In the present study the descriptive approach was particularly appropriate because an authentic and accurate description was required of the legal provisions with regard to judicial management as well as the prevailing situation of companies that were placed under judicial management in order to deduce whether it is an effective corporate rescue scheme. In this regard secondary data (legislative provisions in particular) was available and examined giving a clear description of judicial management and this was complemented by experiences of players involved in judicial management which prompted the researcher to complement descriptive approach with phenomenological approach.



### **3.3.2 PHENOMENOLOGY**

For the purposes of study phenomenological research design was also employed. The rationale behind choosing this design was that it is design of enquiry coming from psychology and philosophy in which the researcher describes the lived experiences of individuals about a phenomena (in this case judicial management) as described by participants. This description culminates in the essence of experiences for several individuals who have all experienced the phenomenon. The purpose of the phenomenological approach in this study was to illuminate the specific phenomena through how it is perceived by the actors in the situation. In relation to judicial management it was thus imperative to explore the worldviews of those individuals directly involved in judicial management so as to get a deeper understanding of whether it is effective as a corporate rescue scheme. In human sphere phenomenology normally translated into gathering deep information and perceptions through inductive, qualitative methods such as interviews among others and representing it from the perspective of the participants since phenomenology is concerned with the study of experience from the perspective of the individual actors (participants).

### **3.3 POPULATION OF THE STUDY**

Polit and Hungler (1999:37) define study population as an aggregated or totality of all the objects, subjects or members that conform to a set of specification. Study population can also be understood as the entire set of individuals (or objects) having some common characteristics as defined by the sampling criteria established for the study. For the purposes of this study the population from whom a sample was selected to participate included judicial managers, employees at the Master's Office, Judges at

the High Court of Zimbabwe as well as Lawyers. The researcher considered these groups as constituting the population for the study because they were thought of as information rich with regards judicial management.

### **3.4 SAMPLING**

#### **3.4.1 SAMPLE**

A sample is a subset of a population selected to participate in the study. In other words it is a fraction of the whole selected to participate in the research study. According to Nworgu (1991:69) a sample is that portion of the population that is studied in situations where a study entails a large population which cannot all be studied. A sample in this study is therefore a smaller group of elements drawn through a definite procedure from an accessible population. To be specific the sample of the population of this study comprised of 5 judicial managers, 3 employees at the Master's Office, 2 judges, and 2 lawyers. The number of participants was decided on the understanding that in non-probability sampling it is more useful to think in terms of richness of the data in answering the researcher's questions rather than having large numbers of individuals with limited insight and appreciation of the research questions.

#### **3.4.2 SAMPLING METHODS**

Purposive and Snowball sampling techniques were used in the present study. The two techniques fall under non-probability sampling which implies that not every element of the population has an opportunity for being included in the sample. Non-probability sampling was chosen because it is less vigorous compared to probability sampling. Though non probability sampling tends to be less representative and might limit the generalizability of the study, the researcher preferred it on the basis that it saved

resources specifically time and financial resources. Non probability sampling was also employed because the researcher wished to focus the research on an in-depth study of a smaller number of cases that would allow him to develop more complex insights. In this regard the people studied were not representative of the wider population but they were worth studying precisely because they represented exceptional and critical examples of the phenomenon the researcher was interested in, that is, judicial management.

#### **3.4.2.1 Purposive Sampling**

The study employed the purposive sampling technique which is a technique widely used in qualitative research for the identification and selection of information-rich cases for the most effective use of limited resources (Patton 2002). Researchers thus use their judgment to select the membership of the sample based on research goals. For the purpose of this study the researcher deliberately identified and selected research participants on the basis that they were knowledgeable about the phenomenon of interest, that is judicial management. The rationale for choosing this approach was that the researcher had limited time thus had to identify individuals whom he believed had vast knowledge about judicial management who would bring more insight on its effectiveness as a corporate rescue scheme by virtue of their experience.

#### **3.4.2.2 Snowball Sampling**

In order to complement purposive sampling, snowballing also known as chain referral sampling was also used for the purpose of identifying participants in this study. This method entailed that participants or informants with whom contact had already been made used their social networks to refer the researcher to other people who could

potentially participate in the study. Though snowball sampling is often used to find and recruit “hidden populations”, that is, groups not easily accessible to researcher through other sampling strategies, for the purposes of this study the researcher found the technique ideal considering the constraint of time. The respondents especially judicial managers who were purposively selected assisted immensely towards the success of the research since they referred the researcher to some of their colleagues within the system. The use of snowballing was also advantageous in that it was easier to create good rapport with the participants since they had social links with those who would have referred the researcher. Respondents who were identified and recruited through snowball sampling were co-operative mainly because they had a sense of security and trusted the individual who referred the researcher to them.

### **3.5 RESEARCH INSTRUMENTS**

The research techniques employed in the study fall under qualitative paradigm. These were preferred because they are typically more flexible, that is, they allow greater spontaneity and adaptation of the interaction between the researcher and the research participant. The researcher also benefited from secondary data. Thus the study utilized two specific research instruments namely in-depth interviews as well as secondary data analysis.

#### **3.5.1 In-Depth Interviews**

The in-depth interview is a technique designed to elicit a vivid picture of the participant’s perspective on the research topic. The researcher’s interest towards this technique was motivated by the desire to learn everything the participants could share about the research topic. The researcher engaged with the participants by posing questions in a

neutral manner, listening attentively to participants' responses and asking follow up questions and probes based on those responses. The in-depth interviews were conducted face to face and involved one interviewer and one participant. This was key in that it gave the researcher an opportunity to learn about the perspectives of individuals on judicial management and its effectiveness as a corporate rescue scheme as opposed to group norms. In-depth interviews gave the researcher an opportunity to gain insight into how participants viewed the phenomenon under study. This was accomplished as a result of the researcher's ability to capture the causal explanations provided by participants on what they experienced.

#### **3.5.1.1 In-Depth Interview Procedure**

Ideally interviews should be conducted in a private location with no outsiders present and where people feel that their confidentiality is completely protected. For that reason all interviews were conducted in locations which participants mostly preferred so that their privacy could be protected to the greatest extent possible. In this study therefore most in-depth interviews were conducted in respondents' offices. The majority of the interviews lasted for about an hour on average due to the fact that most participants for this study are busy people. Field notes and tape recordings were used to document the interviews at the consent of the participants. The researcher rapport building skills encouraged participants talk freely, openly and honestly about the research topic. The researcher also mastered the art of treating the participants as experts which made the interviewees describe their own perspectives without the need to modify the responses to please the interviewer. Because of the face to face nature of in-depth interviews the researcher also benefited from non-verbal cues from participants which included body

language and tone. An example could be when the researcher would be guided by facial expressions and tone to know it was time to wind up the interviews.

### **3.5.2 Secondary Data Analysis**

Secondary data are that data collected by a party not related to the research study but collected these data for some other purpose and at a different time in the past. Secondary data analysis was employed because it is cheaper and faster to access. Denzin and Lincoln (2000) concurs that the major advantages associated with secondary data analysis are the cost effectiveness and the convenience it provides. They opine that the use of existing data sets can accelerate the pace of research because some of the most time consuming steps of a typical research project are eliminated. For the purposes of this study, text books, journals and statutes were utilized as sources of secondary data. These assisted immensely in providing insights on legislative provisions regulating judicial management and other forms of rescue schemes in the chosen jurisdictions as well as furnishing the researcher on what is on record with regards to the strengths and weaknesses of judicial management and other forms of corporate rescue schemes.

### **3.6 ETHICAL CONSIDERATIONS**

Researchers face ethical dilemma in their endeavour to investigate social phenomena. When humans are used to study participants in a research investigation, care must be exercised that the rights of individuals are protected. Research ethics observed in this study can be summed up as informed consent, protection from harm and confidentiality.

### **3.6.1 Informed Consent**

Informed consent is a mechanism for ensuring that people understand what it means to participate in a particular research so that they can decide in a conscious, deliberate way whether they want to participate (Denzin and Lincoln (2000)). For the purposes of this study, to achieve informed consent, the researcher informed all potential participants in a way they could understand. The purpose of the research, what is expected of a research participant, expected risks or benefits as well as the fact that participation was voluntary and that participants could withdraw at any time with no negative repercussions were disclosed to potential participants and all participants agreed to oral informed consent. Since some participants were recruited from government institutions for instance the Master's Office, clearance was sought from the judicial service commission in order to make sure that they were protected from harm if they chose to participate in this research. Seeking approval thus served a purpose of protecting the professional well-being of some of the participants since getting information from them without such approval would have negative implications on their job security.

### **3.6.2 Confidentiality**

Respondents were assured that what they say will be kept in confidence in order to earn their trust so that they could give good and reliable data. For the purpose of respect for confidentiality, therefore, all names of individual participants have been withheld and will in no circumstance be divulged to anyone.

### **3.7 CHAPTER SUMMARY**

This chapter dealt with the research methodology and design that was followed in this study, addressing the issues including but not limited to population of the study, sampling techniques as well as research instruments. Ethical considerations which could have impacted on the study were also adhered to.



## **CHAPTER FOUR**

### **PRESENTATION AND DISCUSSION OF FINDINGS**

#### **4.1 INTRODUCTION**

This Chapter contains the research findings obtained by the researcher from the research conducted through in-depth interviews and secondary data. For professional and confidentiality reasons, owing to the sensitivity of some information provided by the interviewees, a request was made that their names should not be disclosed, and the researcher respects such professional and ethical request and will not disclose names of the interviewees. As will be seen below, it generally appears common cause that judicial management procedure is in need of reform to make it effective. The thematic approach is utilized in this chapter for the purposes of presentation and discussion. This approach entails that themes would be crafted out of objectives and research questions to make the presentation coherent.

#### **4.2 PRESENTATION AND DISCUSSION OF DATA FROM IN-DEPTH INTERVIEWS**

##### **4.2.1 The scope, purpose and objectives of insolvency law, in particular judicial management procedure**

- Some respondents said the purpose and objectives of insolvency laws in general is to provide a legal framework for the orderly manner of dealing

with an insolvent such that creditors do not scramble for insolvent debtors' assets by rushing to secure court orders individually for debt recovery

- Insolvency laws in general are a legal framework aimed at protecting the interests of creditors by ensuring that insolvent debtors are made to at least pay debts to their innocent and unfortunate creditors. This view was shared by the majority of respondents who tend to believe that judicial management procedure is creditor-oriented.
- It was generally accepted that judicial management, as an insolvency proceeding, is meant to resuscitate ailing companies that are prevented from being successful concerns.
- While it is generally accepted that judicial management also serves the interests of the debtor and the society to some extent where ailing companies are enabled to become successful concerns, the way the law relating to judicial management is crafted show that to a very large extent, judicial management procedure is meant to serve the interests of creditors. Creditors have a huge role to play as the judicial managers are answerable to them and have the control and influence on who should be appointed as a judicial manager. The insolvency laws are thus said to be pro-creditors to a large extent.

#### **4.2.2 Success rate of revival of companies that are placed under judicial management**

- The selected five judicial managers gave a percentage of success rate of companies they individually managed. The five gave, 30%, 40%, 50%, 60% and 70% respectively.
- The office of the Master said success rate is an average of 50%. The Master's office further stated that the success rate depends on the individual judicial manager's performance and pointed out that some insolvency practitioners are good as liquidators and not as judicial managers. Such practitioners have a very low success rate of even 10%. On the other hand, there are some practitioners who are managing to turn around the fortunes of ailing companies and such have a very high success rate of even 75%.

#### **4.2.3 Reasons for the failure of companies that are placed under judicial management**

- Some judicial managers said lack of capital and working capital hinders efforts to revive a financially distressed company in that financiers and other businesses are unwilling to deal with and extend credit facilities to a company that is under judicial management. Placing a company under judicial management is evidence that the company is insolvent, hence those with capital would lack confidence in such companies and regard dealing with such companies as a high risk. In such circumstances, when financiers extend credit to such companies, the capital / loan will be too expensive as the interest rates are inflated to compensate the high risks.

- The other reason of failure is interference by shareholders with the activities of judicial managers. This view was mainly highlighted by officials in the Master's office who happens to be the supervisors of judicial management. They argued that this is common in voluntary placement of a company under judicial management where the companies would have nominated a certain person to be appointed judicial manager. The majority shareholders would usually want to control the judicial managers and tell them what to do and what not to do. These shareholders are usually the managing directors of the companies under whose direction the companies would have sunk unto insolvency.
- The other key factor is that companies are placed under judicial management when they would be already commercially insolvent. They would have sunk already. One lawyer described it as efforts to save life at the very last minute when a patient is already in intensive care unit where no efforts were ever made to save same when the condition was still manageable. In simple terms, judicial management is resorted to when it is too late, he chuckled. Key staff would have left due to non-payment of salaries.
- According to the Master's Office, some insolvency practitioners are good managers while others are just bad in judicial management but rather, are good in liquidating companies. Thus, personal attributes and competence of the persons appointed as judicial managers have a bearing on the success or otherwise of judicial management proceedings.

- The office of the Master as well as some judicial managers bemoaned lack of business and management qualifications for judicial managers. A person registered as Estate Administrator is eligible to be appointed as judicial manager, without any other qualification. In terms of Estate Administrators Act, a person who has 5 'O' level passes has to write and pass two courses that are basic accounting and trust law to qualify as estate administrator. This is purely basic knowledge. Without a specific requirement of a management course, judicial managers are not specialized and skilled persons to manage ailing companies and this is one of the reasons for a low success rate and why success rate differ from one judicial manager to another.
- Judges and lawyers in practice pointed out that judicial managers fail because they do not understand commercial, corporate and business law. Their actions are normally challenged in courts and that further depletes company's resources.
- Too much involvement of courts is said to be another stumbling block to the success of companies under judicial management, bemoaned some concerned judicial managers. They contended that court proceedings are expensive and consume too much productive time. Courts sometimes reserve judgments indefinitely and that affects operations.

#### **4.2.4 The nature of businesses that can utilize judicial management proceedings**

- This a legal question. The answer, as propounded by the lawyers and judges, is that judicial management is open to a business that is

conducted under a registered company in terms of Companies Act. The same business that is operated under a different legal persona is not eligible. The Act specifically provides that a company is the legal entity that can utilize judicial management procedure.

- This appears to be undesirable and unjustifiably discriminatory, opines one lawyer.

#### **4.2.5 Interests protected or advanced by judicial management proceedings**

- The law talks of creditors and sometimes shareholders. To a very large extent, considering the crucial role that creditors have in the judicial management proceedings, the interests of creditors can best be said to be the ones being protected by judicial management procedure, said judicial managers.

#### **4.2.6 The requirements for an application for judicial management order.**

- Lawyers and judges agreed that the requirements are spelt out in Section 300 (Provisional Order) and Section 305 (final order) of the Act. These are:-
  - A company;
  - Which is unable to pay its debts or probably unable to pay its debts;
  - Which has not become or is prevented from becoming a successful concern;
  - By reason of mismanagement or any other cause;
  - Which has reasonable probability that it will be enabled to pay debts and become a successful concern, and;

- Where it appears to court to be just and equitable.

#### **4.2.7 Whether or not the requirements are consistent with the purpose and objectives of judicial management procedure**

- The procedure does not cater for other businesses which do not operate under a registered company, concurred lawyers and judges.
- The requirement for 'inability to pay debts' makes the procedure available to companies when they are almost dead. This runs against the spirit of rescuing businesses. Again when a company is already insolvent, key staff would have left for non-payment of salaries, hence difficult to save the companies from collapsing.
- They further argued that mismanagement must not be provided as the reason for the company's insolvency but that anything that causes the collapse of the entity should suffice for judicial management purposes.
- They raised an issue with the requirement of "reasonable probability" which they said placed a heavier burden of proof on the applicants to show that there are high chances of resuscitation. This makes the procedure restrictive.
- The 'just and equitable' ground gives the court too wide a discretion to grant or not to grant an order, even where other requirements are met, queried lawyers.

#### **4.2.8 The need for law reform**

-officers from the Master's office and judicial managers agree that owing to the flaws inherent in judicial management procedure, there is need to change

the legal framework to make the procedure more user friendly and appropriate as a measure to rescue financially distressed businesses.

### **4.3 PRESENTATION AND DISCUSSION OF SECONDARY DATA**

#### **4.3.1 Corporate Rescue Schemes in Other Legal Systems**

To give this research value, importance, and a comparative texture, the researcher has obtained secondary data in respect of procedures that are in operation in other jurisdictions. The comparison of our judicial management procedure with corporate rescue schemes in other countries makes it easier to understand the merits and shortcomings of our procedure. In that regard, the rescue schemes in South Africa, England, Australia and United States of America will be discussed below. The selection of these four legal systems is not random. Rather, South Africa is considered first because of the closeness of the legal systems of Zimbabwe and South Africa. In fact it is common cause that the law applicable in Zimbabwe is the law practiced at the Cape of Good Hope on 10 June 1891. England is the second legal system chosen because of the Anglicised nature of the Zimbabwe's Roman-Dutch law, especially in the field of commercial and merchantile law as well as the fact that Zimbabwe is a former British colony. On that basis, English system could not escape the attention of the researcher. Australian system is chosen for the comparative analysis because it is one of the British colonies, hence its system would likely resemble that of other British colonies and the British system. Lastly, United States of America could not be left out, considering that it is one of the world's economic giants. Its legal system in this regard will be useful.



#### **4.3.1.1 South African System**

South Africa introduced judicial management procedure in its company law by the Companies Act 46 of 1926 at a time when the concept of business rescue was virtually unknown in any other comparable legal systems<sup>19</sup>. Even the English Companies (Consolidated) Act of 1908 on which the South African Act had been closely modeled contained no equivalent provision.

In South Africa, several attempts were made to explain the origins of judicial management but it appears no conclusive answer has yet been found that its appearance in South Africa's company law remains "something of a mystery".

Judicial management procedure has its flaws and for that reason, representations were made to the Van Wyk Vries Commission in 1970 for the abolition of judicial management on the ground that it had a low success rate and that it was being abused. However, the Commission decided to retain the procedure because it had been extremely successful in many cases. On that basis, judicial management was re-enacted in the Companies Act 61 of 1973, purely on the basis of the Commission's report. Despite this, the court in *Le Roux Hotel Management (Pty) Ltd –vs- E Rand (Pty) Ltd* [2001] 1 All SA 223 (C), per Josman J, reviewed the history of judicial management and the conservative approach the courts have followed in its interpretation and application. The court agreed that although international developments seemed to support the need for a more progressive attitude towards business rescue, this required new legislation.

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Owing to the inherent shortcomings of the judicial management procedure in South Africa, the procedure was finally repealed from South African company law and replaced by business-rescue provided in Chapter 6 of the Companies Act 71 of 2008. Thus, judicial management ceased to be part of South African company law in 2008 and business rescue was introduced in its place.

### **Business Rescue in South Africa**

Business rescue is a procedure whereby a company's problems are attended to by an independent business rescue practitioner who proposes a rescue plan to rescue its business and the process is regulated by the Companies and Intellectual Property Commission<sup>20</sup>.

The purpose of business rescue is to facilitate the rehabilitation of a financially distressed company. Since 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 genuine attempt to achieve the aims of the Act. This is to curb the risk that business rescue proceedings may be abused by a company with no prospects of financial recovery to obtain a temporary respite from creditors.

According to the Act<sup>21</sup> "rescuing the company" is achieving the goals set out in the definition of the "business rescue", which are to facilitate the rehabilitation of a company or corporation in financial distress through-

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<sup>20</sup> Hockly's Insolvency Law page 275

<sup>21</sup> Section 128 (1)(6) of Companies Act 71 of 2008

- The temporary supervision of the company and the management of its affairs , business and property,
- A temporary moratorium on the rights of claimants against the company or in respect of property in its possession.
- The development of and implementation of a plan to rescue the company by restructuring its affairs, business equity in a manner that maximises the likelihood of it continuing in existence on a solvent basis or, if this is not possible, that results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

From the forgoing, it is apparent that the main purposes of a business rescue are to rehabilitate the company to a solvent status and/or; if that is impracticable, to give a better return for the company's creditors and shareholders than would result from immediate liquidation. Business rescue envisages the restructuring of a potentially viable company so that it can continue to function as an economic entity.

Business rescue proceedings against a company may be commenced by way of either a resolution adopted by the company's board of directors<sup>22</sup> or a court order<sup>23</sup>. The commencement of business rescue proceedings results in a general moratorium on legal proceedings against the company<sup>24</sup>. No legal proceedings against the company or in relation to any company's property may be commenced or proceeded with in any forum during business rescue proceedings except with the written consent of the

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<sup>22</sup> Section 129 of Companies Act 71 of 2008

<sup>23</sup> Section 131 of Companies Act 71 of 2008

<sup>24</sup> Section 133 of Companies Act 71 of 2008

business rescue practitioner or with the leave of the court and in accordance with such terms the court considers suitable.

While a company is subject to rescue proceedings, it may dispose, or agree to dispose of its property only in the ordinary course of business, or in a bona fide transaction concluded at arm's length for value approved in advance and in writing by the practitioner or in a transaction contemplated by and undertaken as part of the implementation of an approved business rescue plan<sup>25</sup>. Employees of the company continue to be employed on the same terms and conditions as immediately before the proceedings. On other contracts the business rescue practitioner may suspend, entirely, partially or conditionally, any agreement or provision of an agreement to which the company was a party at the commencement of the proceedings. An alteration in the classification or status of a company's issued securities is invalid unless it takes place by way of transfer of the securities in the ordinary course of business, or in terms of a court order or pursuant to an approved business rescue<sup>26</sup>.

For the duration of business rescue proceedings, the practitioner has full management control of the company in substitution for its board and management. The directors continue to exercise the functions of directors subject to the authority of the practitioner. They exercise the management functions in accordance with the express instructions or direction of the practitioner and must attend to and provide the practitioner at all times with any information about the company's affairs as may reasonably be required. The directors are obliged to co-operate with and assist the practitioner. The practitioner may

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<sup>25</sup> Section 134 of Companies Act 71 of 2008

<sup>26</sup> Section 137 of Companies Act 71 of 2008

apply to court for an order removing a director from office if he failed to comply with a requirement of chapter 6, or if he impeded or is impeding the practitioner's exercise of his functions or powers, his management and implementation of a business rescue plan.

The business rescue practitioner must be a member in good standing of a legal, accounting or business management profession accredited by the Commission and licensed as such by the Commission<sup>27</sup>. The responsible Minister is empowered to make regulations prescribing minimum qualifications for practitioners and laying down standards and procedure to be followed by the Commission in carrying out its licensing functions. A person is not qualified to be appointed a practitioner if he is subject to a probation order as director or disqualified from acting as director of the company, or if he has a relationship with the company that would lead a third party to conclude that his integrity, impartiality or objectivity is compromised or he is related to someone who has such a relationship with the company.

A practitioner is appointed by the company upon adopting a business rescue resolution or by the court on granting a business rescue application or where the court upholds an objection against a practitioner appointed by the company. Any court appointment must be ratified by an independent creditor vote at the first meeting of creditors. The court may remove a practitioner from office upon an objection to his appointment or on incompetence or failure to perform his duties, failure to exercise proper degree of care, engaging in illegal acts or conduct, where he no longer satisfies the requirements for

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<sup>27</sup> Section 138 of Companies Act 71 of 2008

appointment, or where he is incapacitated and unable to perform the functions of his office and is unlikely to regain that capacity within a reasonable time.

Upon appointment, the practitioner must inform all relevant regulatory authorities that the company has been placed under business rescue proceedings and that he has been appointed as practitioner. Most importantly the Practitioner investigates the affairs of the company and develops and implements a business rescue plan. The practitioner is an officer of the court and subject to the duties and liabilities of a director. If the business rescue proceedings are superseded by an order placing the company in liquidation, the practitioner may not be appointed as liquidator of the company. The practitioner is entitled to remuneration in accordance with a prescribed tariff and his claim for remuneration and expenses ranks ahead of all secured and unsecured claims. This preference is retained if the business rescue is superseded by a winding up order but ranks behind the costs of liquidation.

#### **4.3.1.2 Administration in England**

Administration procedure in England starts with a petition to court for an order placing the company under administration lodged by the company, its directors, acting unanimously or by a resolution duly approved by a majority taken at properly constituted board meeting, or by a creditor<sup>28</sup>. A contingent or prospective creditor can apply. A contingent liability is one that may arise out of an already existing legal commitment, for instance, a potential liability as surety or potential liability of an insurer under a contract of indemnity insurance. A prospective liability is one that will certainly arise but that is

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<sup>28</sup> Pieter Kloppers page 362

not yet due and is not yet finally established or quantified, such as a liability for work in progress.

There are five requirements that the court should be satisfied to grant the administration order<sup>29</sup>. First requirement is that the court must be satisfied that the company is, or is likely to become, unable to pay its debts. The standard of proof is the normal standard of proof in civil cases. It must be more probable than not that the company is, or is likely to become, insolvent.

The second requirement is to satisfy the court that the making of the order would be likely to achieve one of the following purposes:-

- a) The survival of the company, and the whole or any part of its undertaking, as a going concern,
- b) The approval of a voluntary arrangement ,
- c) The sanctioning of a compromise or arrangement between the company and any such persons as are mentioned in that section, and
- d) A more advantageous realization of the company's assets than would be effected on a winding up.

These are the four purposes of administration and are not susceptible to proof as a matter of fact. Hence the second requirement involves a forecast as to the company's prospects in light of what is already known. The word "likely" in this context means the probability that the purposes will be achieved need not be higher than an even chance and that a probability of an even chance is thus sufficient.

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<sup>29</sup> Pieter Kloppers page 263

The third requirement is that the company must not have gone into liquidation while the fourth and fifth requirements are that the administrative receiver must not have been appointed or, if one has, his /her appointer must consent to the order; and that the company must not be an insurance company or a recognized bank or licensed institution respectively.

#### **4.3.1.3 Voluntary Administration in Australia**

The procedure does not start with a court order<sup>30</sup>. The directors or liquidator or a secured creditor may appoint an administrator if of the opinion that the company is insolvent or likely to become insolvent. The appointment requires no more than a simple written appointment without the intervention of the court, with the aim of restoring the company to a successful concern. The appointment should be in writing using the common seal of the company. The appointment cannot be made if the company is already being wound up.

Upon his appointment the administrator has to act rather speedily, and lodges with the Australian Securities Commission a notice before the end of the next business day. Such notice must also be published within three business days in a national newspaper.

#### **4.3.1.4 American Scheme**

The scheme in United States of America is provided in terms of Chapter 11 of the American Bankruptcy code (as enacted by section 101 of the Bankruptcy Reform Act of 1978)<sup>31</sup>. This scheme draws no distinction between business debtors which are

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<sup>30</sup> Pieter Kloppers page 265

<sup>31</sup> Pieter Kloppers page 367



companies and other business debtors. The scheme is available to all business debtors, as a matter of right.

#### **4.3.2 Lessons learnt from other Legal Systems**

The first point to note is that Zimbabwe's judicial management procedure is restricted to companies. This is a shortcoming as business can be conducted in any other juristic form other than a company. In this regard, the American all-inclusive scheme is preferable as it does not distinguish the nature of business involved. The American scheme covers all business debtors.

Secondly, Zimbabwe can also draw some lessons from the Australian system. Our judicial management procedure is too court regulated and supervised scheme, thereby making it too cumbersome and expensive. An Australian scheme does not involve the courts unnecessarily. The scheme is initiated by the company without the need of a court order. Further an English scheme is initiated by a petition to court and the court makes an order. An English scheme is cheaper than Zimbabwe's because the former requires court order once while the latter involves the courts twice or more, hence more expensive and cumbersome.

Thirdly the English law specifies four purposes of the scheme. It is thus open to broad interpretation hence accommodating other societal interests like preservation of business entities for the benefit of the national economy, over and above protecting the interests of the creditors.

Fourth, the English system makes business debtors eligible for the scheme at an early stage before the debtor becomes insolvent. This is also the case with South Africa,

Australia and United States of America. A mere probability that the debtor is likely to be unable to pay debtors suffices, unlike Zimbabwe's scheme that requires commercial insolvency.

A South African approach has many advantages over our judicial management procedure. The first one being the purpose of the business rescue procedure which is said to be to facilitate the rehabilitation of a financially distressed company, failing which the procedure will secure a better return for the creditors and shareholders than would be achieved by immediate liquidation. An English procedure has a wider scope than all the other comparable legal systems as it outlines four purposes of the Administration procedure.

The other advantage is that directors in South African systems remain in place but now under the direction and management of the practitioner. They act in terms of the practitioner's instructions and are required to assist and co-operate with the practitioner.

One of the major advantages of South African system is that the practitioner must be a member in good standing of a legal, accounting or business management profession accredited to the Commission and the Minister sets minimum qualifications. Such practitioners are better qualified and are of higher integrity and competence than our managers who are 5 'O' level holders and registered estate administrators. There is more public confidence in a scheme that is managed by better qualified personnel than ours.

A South African practitioner may not be appointed liquidator should business rescue proceeding be superseded by winding up. This is a positive development in South

African company law. Further a practitioner can be removed from office on grounds of incompetence and failure to perform his functions. This is alien in our legal system.

#### **4.3.3 Has Zimbabwe learnt from these foreign procedures? An analysis of the Insolvency Bill Gazetted on 14th April 2017**

The Insolvency Bill appears to be a progressive step towards adoption of the modern trends and attitude in insolvency laws. The Bill seeks to consolidate the insolvency legislation in Zimbabwe, a positive development as it brings convenience to those involved in insolvency practice. It combines and introduces new provisions to the current Insolvency Act and Companies Act in so far as insolvency law is concerned. If enacted into law, the legal framework would have made huge strides towards the right direction. However, the Bill still has inherent shortcomings that the researcher feels need to be addressed before making it law as will be shown below

Clause 121(1) (b) defines “Corporate Rescue” as proceedings to facilitate the rehabilitation of a company that is financially distressed....” The use of the word “company” makes corporate rescue proceedings restricted to businesses that are operated under an entity registered as a company in terms of Companies Act. The corporate rescue proceedings will thus remain restricted to companies. Businesses that are conducted under different entities like business trusts and co-operative societies among others are not eligible for the use of corporate rescue proceedings. This is a grey area that needs to be attended to. There is need to redefine the proceedings by the use of “business” to call them “business rescue proceedings” in order to make the proceedings all inclusive. South Africa uses the phrase “business rescue”.

On a positive note, Clause 121(1)(b)(ii) outlines the purpose of corporate rescue proceedings as to maximise the likelihood of the company continuing in existence on a solvent basis or if that is not possible, to result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. This appears to be a lesson learnt from South African system.

Another positive development is the provision under Clause 121(1) (f) which provides that reasonable likelihood that the company will become insolvent within the immediately ensuing six months qualifies the company to utilise corporate rescue procedure. This is a positive step because the current provision that a company has to be virtually insolvent made rescuing companies difficult. Rather, if by making a forecast, a company is given assistance early, chances of rescuing the company from collapsing are great. The Bill thus has some positive developments in line with the objectives of insolvency laws.

Another shortcoming of the Bill is Clause 122(2) (a) which seeks to bar corporate rescue proceedings where liquidation proceedings have been limited. This appears retrogressive and contrary to modern trends. It would be desirable to give corporate rescue proceedings a priority over liquidation to the extent that should a resolution be made to commence corporate rescue, liquidation proceedings should be stayed until the corporate rescue proceedings are completed. This will ensure that the legislation serves the objective of insolvency laws which are among others to preserve the commercial enterprises for national economic stability. Surely liquidation proceedings which are meant to bring a company to extinction, should not be preferred over corporate rescue. Liquidation proceedings are merely meant to serve the interests of creditors by evening

that assets are realised and proceeds paid to creditors. This is contrary to modern trends of serving interests of not only the creditors but the society at large by preserving the existence of companies. Zimbabwe should learn from South Africa provision which suspends liquidation proceedings once a resolution to place a company under business rescue is adopted.

In terms of Clause 122(3), corporate rescue proceedings may be commenced by a company adopting a resolution to that effect. This provision does not require a court order. This is desirable as involvement of courts makes the procedure cumbersome and costly. This is thus a positive development, which makes the procedure appropriate to even small business entities.

In terms of Clause 126, there is a general moratorium on legal proceedings against the company during corporate rescue proceedings. The provision thus makes moratorium automatic from the placements of the company under corporate rescue proceedings. This is a positive development as the current law does not automatically give a moratorium.

A major shortcoming of the bill is failure in Clause 131 to provide a management qualification for practitioners. The Bill does not require professional practitioners to belong to any professional regulatory bodies. Besides requiring practitioners to be unrelated to the company, there is no meaningful change from the current law. In terms of South African law, a business rescue practitioner must be a member in good standing of a legal, accounting or business management profession accredited by the Commission. This requirement instils confidence in the public as members of a

professional body are associated with experience, integrity, experience and high degree of ethics. As such our Bill falls short in this regard.

It is noted with great concern that the company or the creditor who applies for an order placing a company under corporate rescue proceedings nominates the practitioner. This appears to be undesirable as there is always the risk of nominating a person who is a friend or a relative, or even a connection, of the nominator. Even replacement of a practitioner (in Clause 132(3)) follows the same route. The researcher considers this undesirable as such nominee is likely to be compromised and partial. This position is consistent with the South African position. It is argued that it is advisable to copy only the good aspects and modify or improve the bad aspects.

Another provision in the bill that is similar with a South African provision but which require modification is clause 133(5) which provides that “If the corporate rescue process concludes with an order placing the company in liquidation, any person who has acted as corporate rescue practitioner during the corporate rescue process may not be appointed as liquidator of the company.” This is a positive development. However the use of the word “may” gives a discretion on whether or not the practitioner can ultimately be the liquidator. It is argued that this is a shortcoming and the practitioner must be disqualified from being appointed as liquidator. There must not be any room for him to occupy those two positions, otherwise there will not be any incentive to rescue, but rather to liquidate, the company. Liquidation will attract an additional financial incentive.

As noted above the new Insolvency Bill has some positive and progressive provisions in shaping our insolvency laws in line with modern trends consistent with the objectives of

insolvency law regime. However there are still grey areas that need attention to make legislation that is advanced and user friendly to all business debtors without discrimination. Since the Bill is yet to be debated in Parliament and to be made law, it is still available for the necessary modifications to accommodate the suggestions raised herein.

There are a lot of positives that Zimbabwe can learn from the legal systems cited above. The persons interviewed gave very good account of their expert knowledge and experiences as well as the flaws inherent in Zimbabwe's insolvency law in general and judicial management procedure in particular and came up with their recommendations to have a better legal framework. The researcher is grateful to the interviewees for their co-operation and valuable contribution in this regard.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATION**

As shown above, judicial management proceedings are outdated. They are no longer consistent with modern world trends in insolvency law regime. The procedure is marred with a lot of flaws to the extent that it is not very effective as a corporate rescue scheme. Zimbabwe appeared to have copied judicial management from South African legal system. However, owing to its inherent weaknesses and outdatedness, South Africa discarded the procedure in terms of the 2008 Companies Act and in its place, a more advanced modern regime was introduced. Zimbabwe is lagging behind. The following appear to be the shortcomings of the judicial management procedure that result in a low success rate of companies' success in avoiding liquidation:

- a) The fact that the law restricts the procedure to companies registered in terms of Companies Act. This makes other businesses run under different entities ineligible for the utilisation of the procedure. Ultimately, the insolvency law's objectives of preserving commercial enterprise and stabilizing a national economy are not fulfilled as small and medium businesses, formal or informal, cannot be saved by the use of the procedure.
- b) the over-emphasis of the interests of creditors where the law treats the creditors with kid-gloves by giving them too much and overriding powers in the judicial management process. The law is inclined too much towards protection of creditors' interests at the expense of the other important societal interests.



- c) the law retains the just and equitable ground as a requirement thereby giving the courts too much power to grant or refuse to grant an application for judicial management even where the other requirements are met.
- d) the legislation does not give priority or preference to judicial management over liquidation.
- e) the law does not classify judicial managers and liquidators differently. The persons who qualify to be liquidators also qualify to be judicial managers without any additional qualifications or requirements.
- f) the law allows a judicial manager to be appointed as liquidator of the same company upon judicial management proceedings' failure.
- h) the applicant nominates his/her choice of a judicial manager and the courts grant an order to that effect. There is no panel or lists of registered persons for such appointment from which judicial managers should be drawn.
- i) the procedure is onerous and expensive due to heavy involvement of courts. This makes the procedure inappropriate for small and medium enterprises.
- j) reference to "mismanagement" as the cause of failure of companies is not necessary.
- k) The law makes commercial insolvency a requirement, hence judicial management proceedings adopted at a very late stage, thereby hampering chances of saving the entity from collapse.

- l) complete lack of management qualifications by judicial managers means the procedure entrusts the management of an ailing company to a person who lacks expertise in the management of the company.

## **RECOMMENTATIONS / SUGGESTIONS**

It is notable that some of the shortcomings listed above have been addressed in the Insolvency Bill. This is commendable. It is thus recommended that the Insolvency Bill should sail through the law – making processes with modifications meant to cure the outstanding shortcomings to make a good and modern piece of insolvency legislation. The following modifications should be included in the Bill before being enacted into law:

- (i) That the Bill must abandon the term “corporate rescue proceedings” and substitute it with “business rescue proceedings” to include all necessary business debtors like Trusts. The definition of “corporate must be removed.
- (ii) The rescue proceedings must strike a balance between conflicting interests of creditors, debtors and society at large and must expressly provide the purposes as including interests of all the interested stakeholders. There should be a broad definition the purpose of rescue proceedings like the English one which has four purposes expressly provides by the law.
- (iii) The law must expressly prioritise rescue proceedings over winding up proceedings. When rescue proceedings are adopted while liquidation proceedings have been initiated, the latter must be stayed until rescue proceedings are completed.

- (iv) The Bill should provide that since rescue practitioners need better management skills, rescue practitioners have to have minimum management qualifications as opposed to liquidators. There should thus be two classes of insolvency practitioners: liquidators and rescue practitioners. Such persons must belong to professional bodies responsible for disciplining errant practitioners.
- (v) Rescue practitioners must not be nominated by the company or the applicant. There should be a panel of rescue practitioners from which the Master should pick the name of a rescue practitioner for a particular matter.
- (vi) The law must disqualify a rescue practitioner from being appointed liquidator of that entity should rescue proceedings fail.

It is submitted that should these recommendations be adopted into the proposed new legislation, Zimbabwe will have one of the best insolvency laws in the world to the extent that the modern world expectations will be fulfilled. The objectives of insolvency law will be achieved leading to stability of the national economy. There will be investor confidence and credit, being the lifeblood of every trading economy, will be readily provided. Clearly our law is in need of reform. Judicial management procedure should be contemned and be of historical context as it is outdated. It has failed to be effective as a corporate rescue scheme.

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**LEGISLATION:**

1. Companies Act (Chapter 24:03) (Zimbabwe)
2. Companies Act 61 of 1973 (South Africa)
3. Companies Act 71 of 2008 (South Africa)
4. Insolvency Bill of 2017 (Zimbabwe)