

**UNIVERSITY OF ZIMBABWE**



**GRADUATE SCHOOL OF MANAGEMENT**

**An investigation of the factors that negatively affect the success of Judicial  
Management as a corporate rescue strategy in Zimbabwe.**

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## **Dedication**

I dedicate this research to my family, that is, my darling wife Nozie, my son Myles and my daughter Colleen.

## Declaration

I, **TAWANDA COLLINS MUPINI**, do hereby declare that this dissertation is the result of my own investigation and research, except to the extent indicated in the acknowledgements, references and by comments included in the body of the report, and that it has not been submitted in part or in full for any other degree to any other university.

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Student signature

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Date

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Date

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Above all I thank my Lord and Saviour Jesus Christ for in him I know I am highly favoured!

## **Abstract**

The continual survival of companies as going concerns is vital to every country and failure of these companies has far reaching consequences that go beyond the owners and creditors of the companies. It also affects the community at large. Corporate rescue mechanisms have been put in place in different countries to try and ensure the continual existence of companies. In Zimbabwe there is Judicial Management [JM], the corporate rescue mechanism that has been incorporated into the Companies Act [24:03]. However, since dollarisation, the number of JM attempts that have failed is disconcerting, with more and more distressed companies finding themselves ushered into liquidation. This has called for an investigation into the factors why JM attempts have flopped, with an intention of addressing these to make the procedure sounder.

This paper attempted to identify the factors that have hindered successful implementation of JM and possibly propose counter measures or remedies to these negative factors. The research started from a proposition that the costs of JM, choice and make up of JM practitioners, regulation and monitoring of JM practitioners, macroeconomic failure to access capital had the biggest influence on the performance of JM as a corporate rescue strategy in Zimbabwe. A qualitative exploratory and inductive research was carried out and in-depth interviews used to collect data, which was then analysed through the content approach method. Multiple factors were discovered through the research findings for the failure of JM, withinability to access capital and the incompetence of the JM practitioners cited as the major reasons for the failure. Several other factors revealed from the research were misaligned legal framework, interference by shareholders, the role of the directors, poor timing for initiating the JM attempts, poor regulation and monitoring of the JM industry, unethical conduct by the JM practitioners, the heavy workload of the JM practitioners, role of the creditors, lenience towards creditors' plight and inadequate provisions for JM. All the factors identified more than validated the research proposal but went on further to provide other factors that were critical to the success of JM. It was concluded that indeed, since dollarisation, JM had failed as a corporate rescue strategy and several recommendations were made to enhance the JM procedure and recommendations for further study were also provided.

## **Abbreviations**

BPT	-	Bankruptcy Policy Theory
BR	-	Business Rescue
CBT	-	Creditors' Bargain Theory
DIMAF	-	Distressed and Marginalised Areas Fund
JM	-	Judicial Management
NSSA	-	National Social Security Authority
RST	-	Risk Sharing Theory
SA	-	South Africa
TPT	-	Team Production Theory
UK	-	United Kingdom
USA	-	United States of America
VBT	-	Value Based Theory
ZETREF	-	Zimbabwe Economic Revival Facility
ZIMRA	-	Zimbabwe Revenue Authority

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# CHAPTER 1: INTRODUCTION

## 1. Introduction

The importance of the continued existence of companies as going concerns and their contribution to the overall well-being and success of a country is summarised in the following statement by Cilliers *et al* (2000), which formed the basis of this research paper:

‘A developing economy cannot lightly permit companies which help to comprise its industries and commercial enterprises to be dissipated by winding up and dissolution due to some temporary setback in cases where there is a reasonable probability that they would, if granted a moratorium, be able to overcome their difficulties, discharge their debts and become successful concerns’ – Cilliers *et al* (2000, p. 478).

A culture of corporate rescue has been integrated into legal systems worldwide through special statutory provisions in cognisance of this assertion which is supported by Loubser (2004) who adds that a company’s failure affects not only its members and creditors, but also, among others, its employees, suppliers and distributors, and, through them, the community at large. Kloppers (1999) states that the survival of companies has become a desirable objective from the perspective of the broader community, adding that insolvency and the consequent failure are not felt by the company itself, but also affect the society at large. However, the increased number of ailing companies going under liquidation in Zimbabwe is alarming. Given the fact that there is a corporate rescue mechanism in place in the form of Judicial Management (JM) meant to offer distressed companies a lifeline, the present results of JM efforts have shot the confidence of many a stakeholder to the proceedings. From a Zimbabwean perspective, to most people, JM has failed and is still failing to bring about the desired outcome of resuscitating ailing companies especially in cases where it is deemed that the company is suffering a temporary setback, but given some assistance and time it can be resuscitated back to health. This has had detrimental economic and social implications which have hounded the country especially from the time the

country adopted dollarisation, and calls for an in-depth analysis of the procedure with the aim of bringing about reforms to make it more effective, and align it with the current dictates of the present environment. This chapter looks at the background, research problem, objectives, questions, and proposition, as well as providing a justification for carrying out such research. It also provides the scope within which the research has been carried out and ends with a summary of the chapter.

## **1.1. Background to the study**

### **1.1.1. An Overview Business Environment in Zimbabwe**

The period since 2007, just before the dollarisation, a difficult period for businesses which was characterised by hyperinflation, and going into the dollarisation period which has seen a huge number of companies struggling for survival due to various reasons some of which include failure to secure working capital, high production and administrative overheads, high finance costs and competition from imported products. In some instances, the failure of some companies has primarily been the management's failure to come up with business models that align to the current operational environment. This was coming from a pre-dollarisation time of super profits as a result of high profit margins, arbitrage pricing, and speculation in some cases. Dollarisation brought with it some sanity in the economy that demanded a quick adaption by businesses to the prevailing market condition. Unfortunately, even up to now, some companies are still suffering the punitive effects of failing to adapt their business models quickly. The manufacturing sector capacity utilisation in Zimbabwe is still worryingly low having shed 3.3% points, from 39.6% in 2013, to 36.3% in 2014 (Chinamasa, 2014). Some of these companies have closed through liquidation, while others are looking for respite through a business rescue mechanism in the form of JM.

### **1.1.2. An Overview of Corporate Rescue Efforts in Zimbabwe**

The importance of JM succeeding in Zimbabwe cannot be overemphasised. In cognisance of the importance of the continued existence of companies, the policy makers in Zimbabwe have incorporated JM as one of two formal processes intended to rescue ailing companies. Even though it has been included in the Companies Act [24:03], it is still a relatively new phenomenon in the country and not much research has been done on the practice in Zimbabwe. However, now that it is being practiced with more frequency and due to its high failure rate, several weaknesses and flaws in the JM process are being identified and require to be addressed as a matter of urgency to ensure the effectiveness of the practice. As a result of its low success rate, many stakeholders are beginning to lose confidence in the JM process, and would rather opt for liquidation which, even though it may offer low dividends, offers a quicker solution to JM which can drag on for long periods and still end up in liquidation, further eroding the value of the claims of creditors. This situation is detrimental to companies which, if placed under JM would have a high chance of successfully turning around their fortunes, but due to a lack of confidence on the part of some stakeholders will not be given a chance to resuscitate under JM but will be thrown straight into liquidation. According to Bimha (2015), the records from the Master of the High Court's office indicate that of 87 companies were liquidated and 60 companies placed under JM in 2014 compared to 44 companies liquidated and 44 companies placed under JM in 2013. The number of the JM cases have been on the increase from 20 companies in 2011 to 27 companies in 2012. The continued failure of JM will dampen the economy further through massive unemployment, shrinkage of the economy, loss of fiscal income in the form of taxes, a reduction in the supply of goods and services, only to name but a few detrimental effects to the country. Due to the currently worsening performance of the economy, a successful corporate rescue programme has become increasingly important given the increased rate of corporate failure in Zimbabwe. In some quarters, some have called for the government to intervene more in the process by setting up a structure to look at JM in the hope of coming up with a solution (Mwete, 2015).

### 1.1.3. An Outline of the JM Process

The following is the sequence of events in the JM process as adopted from the Zimbabwean Companies Act [24:03] in conjunction with Cilliers *et al* (2000, p. 450):

Step 1	Application for JM is submitted to the High Court
Step 2	The Court grants a Provisional Order for JM
Step 3	The master appoints a provisional judicial manager and convenes separate meetings with the creditors, members and debenture holders (if any)
Step 4	The provisional judicial manager takes over the management of the company and takes possession of the company's assets
Step 5	At the meeting of the members, creditors and debenture holders, the provisional judicial manager reports fully on the financial situation and future prospects of the company; the meeting considers the report, decide on the desirability of placing the company in final JM and nominate a person as judicial manager, and creditors prove their claims.
Step 6	On the return day of the provisional JM order, the court decides whether a final JM order should be granted, inter alia, taking into account the opinions of the creditors, or whether the company should be rather wound up.

Step 7	If a final JM order is granted, the court makes an order vesting the management of the company in the hands of the final judicial manager, subject to the supervision of the court.
Step 8	The final judicial manager takes over the management of the company inter alia, investigates its affairs in the same manner a liquidator would have done.
Step 9	When surplus funds become available, he distributes these among the creditors
Step 10	In due course, the judicial manager may apply either for the cancellation of the JM order or for the winding up (liquidation) of the company.

*Table 1: Outline of the JM Process as adopted from the Companies Act [24:03] in conjunction with Cilliers et al (2000*

#### **1.1.4. Implications from the Background Brief Analysis**

The background analysis in the previous section gives an appreciation for the need for at least some form of corporate rescue to arrest the continued collapse of companies going through financial distress. It highlights the importance of having viable and successful companies in the economy and makes it imperative that countries look seriously into developing and/or reforming the area of corporate rescue as a matter of urgency. Zimbabwe has not enjoyed much success in corporate rescue, and this research has been done on Zimbabwe's own corporate rescue model, Judicial Management [JM], one of the two rescue models catered for in the Companies Act [Chapter 24:03] for financially distressed companies. The results for JM in Zimbabwe have been dismally poor to date, and it has failed to curb the continued failure of companies. JM is a temporary court-supervised rescue

plan for companies that are in distress but show signs of coming back to life if they are given a chance (Mwete, 2015). This research paper tries to highlight the shortfalls that are present in the current JM process which call for immediate addressing if Zimbabwe is to have a more effective corporate rescue model.

Menezes (2014) states that the willingness of banks and investors to support new business depends a great deal on the insolvency regimes that exist in the country. These insolvency procedures, of which corporate rescue is a part, not only affect the end of a business life cycle, but they also have a profound effect on the beginning. She alludes that financial institutions and investors are willing to lend when they know they can at least recover some of their investments; and entrepreneurs are more willing to enter the market when they are not putting their entire fortunes at risk. Menezes (2014) goes on to state that the benefits of a country carrying out effective insolvency regimes include lower cost of credit, increased availability of credit, increased returns to creditors, job preservation through reorganisation and corporate rescue, better support for entrepreneurship, and benefits for small firms.

The corporate rescue models in many countries have evolved over the years, with one of the most recent being the South African “Business Rescue” model in Chapter 6 of the South African Companies Act which came into effect on the 1<sup>st</sup> of May 2011, replacing JM which had been there since 1926. Most countries have in the past implemented corporate rescue and Anderson and Morrison (2008) state:

‘It has been a recognisable trend across jurisdictions and it is difficult to find a developed economy where there has not been at least some consideration given to implementing a specific updated rescue regime aimed at salvaging the corporate structure in certain circumstances of insolvency.’

A comparison with the improved business rescue practices in South Africa also necessitate the review of JM practices in Zimbabwe with an aim of making the procedure more successful too. It is from this background that the author has decided to undertake this research.



## **1.2. Statement of the problem**

JM, a procedure that is meant to be the panacea for rescuing ailing companies, and in the process result in the preservation of social and economic benefits seems to be failing – only delaying the seemingly inevitable end of every financially struggling company. Most companies that are offered this lifeline still find themselves eventually taking the liquidation route, which decision often times leaves the stakeholders in a worse position financially than they would have been in had the decision for liquidation been made from the onset. Due to its low success rate in Zimbabwe especially since the time the country dollarised, JM has faced a lot of criticism being described by some a system that does not work. Rajak (1999) even goes on to describe the process of JM as ‘unsupervised winding up’. It remains, however, the main provision in Zimbabwe’s Companies Act [24:03] for resuscitating ailing companies and thus measures have to be put in place to ensure that it is more effective and successful to instil confidence in stakeholders and to ensure that an honest effort is put in trying to revive distressed companies – failure of which, a major corporate rescue reform may be necessary to improve the insolvency regime in the country.

Companies should only be liquidated when it is deemed unrealistic that they can be turned even with the process of JM. A failure of JM in Zimbabwe means further shrinkage of an already ailing economy, resulting in massive detrimental social and economic implications. As a result, an in-depth analysis of the current practice is not only necessary but critical in an effort to arrest the downward spiral in the economic performance of the country’s corporate sector.

## **1.3. Objectives of the Research**

The research was conducted with the goal of achieving the following objectives:

### **1.3.1. Main Objective**

To identify the factors that mitigate the success of judicial management practices in Zimbabwe.

### **1.3.2. Sub-Objectives**

To identify the factors that are deemed most critical to the failure of judicial management efforts in Zimbabwean.

To make recommendations to mitigate the factors identified as the most critical to the failure of judicial management efforts in Zimbabwe.

## **1.4. Research Questions**

The questions to be answered by this research were as follows:

### **1.4.1. Main Research Question**

What factors that mitigate the success of judicial management practices in Zimbabwe?

### **1.4.2. Secondary Research Question**

Which factors that are deemed most critical to the failure of judicial management efforts in Zimbabwean?

## **1.5. Research Proposition**

The basic proposition in carrying out this research was that the costs of JM, choice and make up of JM practitioners, regulation and monitoring of JM practitioners, macroeconomic failure to access capital had the biggest influence on the performance of JM as a corporate rescue strategy in Zimbabwe.

## **1.6. Significance of or Justification for the study**

There is virtually no authoritative literature on JM and its performance in Zimbabwe, and what there is mostly its provisions in the Companies Act [24:03]. This study sought to provide an insight on the current practices in the country, focusing particularly on the failure of JM to achieve its stated objective of reviving ailing companies, with a goal of identifying the detrimental factors to reaching this objective. In so doing, the research sought to add on to the current body of academic knowledge on the subject by pinpointing areas that could be targeted for reformation of current practices to ensure the process of JM is more effective.

To the academia, this research sought to add value to the existing body of knowledge on corporate rescue with particular emphasis on JM. There is currently not much literature on the subject of JM in Zimbabwe, and as such this research would be invaluable to any scholars that wish to have an appreciation of JM in Zimbabwe. This research paper was also meant to stimulate further research in the area of corporate rescue in Zimbabwe.

To the policy makers and regulators of the JM process in Zimbabwe, this research sought to enlighten them on the need to revise some of the current practices in line with global trends to make the process more effective. Menezes (2014) could not have put it better when she stated that countries with weak insolvency regimes struggle have more companies that struggle whose assets often languish unproductively limiting creditor recovery – thus they tend to make investors, entrepreneurs and financial institutions tentative to invest thus hampering economic growth. Current poor results of JM should encourage Zimbabwe through its policy makers to jump onto the bandwagon of many other countries that have seen a reformation of earlier corporate rescue practices in line with global trends and the economic environment. Even the governing body of the judicial managers in Zimbabwe, that is the Council of Estate Administrators (Zimbabwe), would be made aware of required adjustments to their registration, certification, monitoring and evaluation criteria for judicial managers and liquidators, with possible changes needing introduction even in the Estate Administrators Act [Chapter 27:10].

Lastly for the judicial managers, the research sought to enlighten them on the factors to take into consideration for them to do an effective job, and was meant to offer ways in which they can better handle the negative factors identified. It would also inspire them to put a better effort in their job, incite their knowledge of the importance of their role on the overall well-being of the community at large, and the magnitude of the responsibility that is in their hands.

### **1.7. Scope and Delimitation of the Study**

The concept and principles of corporate rescue present a vast area of research possibilities. Considering this, there is a danger of casting the study too wide. This research document's intention was not to explore all the corporate rescue strategies in Zimbabwe, but rather to explore the aspects of JM as the main strategy as it is being practised in Zimbabwe. The research restricted its focus on the period after dollarization, that is, from 2009 to 2015. This is because there is a vast difference between the pre-dollarisation and the post-dollarisation era, and a focus on the latter era makes the research relevant to use at the present time. The research was also carried out in Harare where the majority of the JM cases are handled at the Master of the High Court's office. The other geographical place where JM cases are heard is Bulawayo, but due to the time and cost constraint the research was limited to Harare, but would be generalised for the whole country.

JM is an old practice that some countries have either long moved away from, or have drastically changed to suit their business environments. In Zimbabwe, JM is a subject on which not much research has been conducted so the research was resigned to using literature from other countries, especially South Africa where the procedure originated, some of which is more than ten years old. The primary reason for choosing South African journals is that the phenomenon of JM is that until 2008, South Africa was also practising JM as its corporate rescue strategy before it went through reformations of its Companies Act to adopt a new concept they call "Business Rescue" in place of JM. Both Zimbabwe and South Africa have the Roman Dutch Law as their source of law, which makes comparative analysis of JM between the two states reasonably feasible for the purposes of this research.

## **1.8. Dissertation Outline**

This dissertation comprises five chapters which are arranged as follows: Chapter 1 introduced and lay out the scope of the dissertation, giving an overview of the research study. Chapter 2 reviewed the literature on the subject of corporate rescue and JM from the perspective of several authors and putting emphasis on the provisions for JM in the Companies Act [24:03]. Chapter 3 outlined the methodology used in carrying out the research and the presentation, analysis and discussion of findings is done in Chapter 4. The last chapter which is Chapter 5 contains the conclusions and recommendations of the researcher.

## **1.9. Summary of the Chapter**

JM is a corporate rescue strategy meant to give financially distressed companies a breath of life. It is the main provision for resuscitating ailing companies in Zimbabwe going by the Companies Act [24:03], yet it has failed dismally in achieving this primary goal with most companies placed under JM still eventually finding themselves liquidated. This chapter has looked at the background to the research study, the research problem, objectives questions and proposition. The importance of the study limitations of the research and the outline for the whole dissertation have also been provided under this chapter. The ensuing chapter which will review current literature, looking at what is currently known on the area of corporate rescue with more emphasis being given to JM.

## **CHAPTER 2: LITERATURE REVIEW**

### **2.1. Introduction**

This chapter will start off by describing the concept of corporate rescue – its definition and its purposes. The researcher will look at the philosophies governing corporate insolvency and the theories that have ensued from these philosophies. A further brief discussion will be on the current practices for insolvent or ailing businesses in other countries, notably the England, Australia and South Africa. Lastly the chapter critically looks at corporate rescue in the form of JM. The chapter will then identify the gaps in the research literature and conclude with the conceptual framework for the research.

### **2.2. The Meaning of Corporate Rescue**

#### **2.2.1. Definition of Corporate Rescue**

Kloppers (1999) states that the emphasis on business rescue came about partly because insolvency law started taking into account the large scale rise in corporate insolvencies in the last few decades, which he views to have been largely as a result of increasing interdependence of all national economies and the effects of a rise and fall of economies in the international arena. The terms “corporate rescue” and “business rescue” are often used interchangeably, therefore references to corporations are often used to mean businesses in the wider sense than corporations or companies alone (Kloppers, 2001). Broc *et al* (2004) use the term corporate rescue to denote broadly the statutory corporate insolvency procedures that offer an alternative to liquidation, with the aim of achieving economic results that are potentially better than those that might be achieved under liquidation, by preserving and potentially improving the company’s business

assets through rationalisation. This procedure is usually reserved for companies that are either insolvent, on the brink of insolvency, or facing a potential economic crisis as concurred with by Omar, in Kloppers (1999). Here Omar defines corporate rescue as ‘being associated with what is termed the revival of companies on the brink of economic collapse, and the salvage of economically viable units to restore production capacity, employment, and continued rewarding of capital and investments’.

According to Cilliers *et al* (2000, p.448), of the various factors that can lead to a company’s failure to succeed, the company may have control of some factors, for instance poor management, while others may be beyond the company’s control such as economic factors. Hunter, in Burdette (2004) in concurrence with Omar’s definition of corporate rescue, describes “rescue culture” as:

‘...a multi-aspect concept, having both a positive and protective role, and a corrective and a punitive role. On one level, it manifests itself by legislative and judicial policies, directed to the more benevolent treatment of insolvent persons, whether they be individuals or corporations, and at the same time to a more draconian treatment of true economic delinquents. On another level, it entails the adoption of a general rule for the construction of statutes, which is deliberately inclined towards the giving of a positive and socially profitable meaning (rather than a negative or socially destructive meaning), to statutes of socio-economic import. Of such statutes, insolvency legislation may justly be regarded as the paramount example.’

In another matter of speaking, Hunter’s notion of rescue culture can be seen to reward efficient and successful firms, while at the same time punishing and making extinct inefficient and poorly performing firms, a point that is also subscribed to by Broc (2004).

### **2.2.2. The objectives of corporate rescue**

Burdette (2004) argues that despite its name, the purpose of business rescue is not necessarily to prevent a company or corporation from being wound up or liquidated. She further states that even if the business cannot be restored to a solvent and profitable status, the higher return to

creditors in the long-run should be an important objective, and then goes on to quote Smits who states:

‘Modern “corporate rescue” and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial bankruptcy procedures, reorganisation seeks to maximise, preserve and possibly even enhance the value of a debtor’s business enterprise, in order to maximise payment to the creditors of the distressed debtor.’

Harmer, in Burdette (2004) feels that corporate rescue has a far better chance of success in a debtor-friendly insolvency system as opposed to a creditor-friendly system of insolvency where the courts tend to take a conservative approach to insolvency which affects negatively the success of rescue attempts. In creditor-friendly systems, JM is taken as an extraordinary measure, while in other jurisdictions business rescue procedures are seen as a necessary and natural precursor to insolvency itself, Harmer continues to say.

Burdette (2004) adds that the English law identifies the following two aims ‘of a good modern insolvency law’ as quoted from the Cork Report:

- ‘(i) to recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and safeguarded;
- (j) to provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country;’

In resuscitating ailing companies, effective corporate rescue procedures promote economic and social stability through the preservation of the value of assets represented by an ailing company (where the survival of the company as a going concern is likely to be more profitable than the disposal of its assets upon liquidation), and through the preservation of employment. Ideally, the amount and/or value received by creditors under a rescue plan will be more than what they would have received were the ailing company placed under liquidation, and the rescue procedure also ensure that the company can continue to trade in the future, thereby affording an opportunity



for the preservation of mutually beneficial relationships with the creditors (Broc, 2004). Kloppers (1999) goes on to emphasise that the most important goal of corporate rescue is not to save a juristic person, but the survival of the enterprise and the real business carried on by the juristic person, in whole or in part.

It is important that any corporate rescue procedure tries to find balance between the interest of the parties concerned i.e. on one hand we have the members, directors and employees of the company who wish for the business to continue trading, on the other hand we have the creditors who may prefer that the company be liquidated sooner rather than later in order that their losses can be minimised. A system that heavily leans towards meeting the interests of the first group may bring social benefits, in particular through the continued employment of the workforce. However, such a system may enable the rescue procedures to be used in cases where there is no reasonable hope of success and losses to creditors may be increased in consequence. These losses may mean that any benefits flowing from the prolonged trading of the company are outweighed in the long term by the impact of the unnecessary costs of this prolonged trading. On the other hand, the system that favours the interests of the creditors may provide insufficient support to struggling but viable companies and this may generate unwarranted social costs (Broc, 2004). Corporate rescue is meant to be a preserve for deserving companies.

### **2.2.3. The Importance of Good Corporate Rescue Regimes**

Menezes (2014) states the following as some of the major benefits of a country having good corporate rescue regimes: -

- (i) Lower cost of credit
- (ii) Increased availability of credit
- (iii) Increased returns to creditors
- (iv) Job preservation through reorganisation and business rescue
- (v) Support entrepreneurship
- (vi) Benefit small firms

## **2.2.4 The Underlying Theoretical Philosophies behind Corporate Insolvency**

The normative debates on insolvency philosophy and policy have taken numerous forms, but there now seems to be some consensus that it consists of two main schools of thought, namely proceduralist (or contractualist) and traditionalist (of communitarianist) philosophies (Wood, 2013). He states that the main difference between these two schools of thought lies in the answers to the question, '*Whose interests should corporate rescue serve?*'.

### **2.2.4.1. Proceduralists / Contractualists**

This philosophy, as it applies to insolvency law, has its roots in the Law and Economics Movement and it has as its basis, the idea of wealth maximisation: the idea that the law should maximise the collective return to creditors, taking no consideration of either the debtor or the public interest (Walton, 2011). This philosophy contends that corporate rescue exists primarily for the interests of the creditors. Woods (2013) attempts to describe proceduralists in the following statement:

‘They see the core element of insolvency law as a mechanism to maximise the extent of recoveries for parties with non-insolvency legal entitlements relating to financially distressed debtors. The basis of this contention rests with the comparison of insolvency law satisfying the interests of a debtor’s creditors and suggesting that this is very much of the same nature as to how civil procedure vindicates the interests of parties with legal entitlement, namely those who seek judicial relief or satisfaction via civil litigation.’

Woods (2013) goes on to describe this wealth maximisation model as resting on the notion creditors with entitlement to the company’s assets would prefer an insolvency system that kept the size of the pool of assets as large as possible so that they recover as much as possible – this

assertion aligning itself with the one of wealth maximisation as alluded to by Walton (2011). It seeks insolvency proceedings that are less costly, with fewer administrative costs in realising the assets and to a larger aggregate realisation of the debtor's assets by pursuing compulsory and collective bargaining. Rather than for each creditor to pursue their claim against the company in their individual nature, at a relatively higher cost, it calls for the collective effort of all the creditors in a less costly, more efficient and orderly manner in the form of insolvency proceedings.

This proceduralist philosophy has been criticised mainly for only considering hypothetical *contract* creditors and ignoring other hypothetical creditors who are not voluntarily contracting with the debtor such as tax authorities. Other critics have pointed out that an economic analysis cannot by definition consider non-economic matters such as social, moral, political and personal consequences and that this philosophy also ignores distributional issues (Walton, 2011). However, Wood (2013) states that these wider interests (interests not concerning the primary issues arising from insolvency) can be considered on limited occasions, and these should be pursued outside the main insolvency proceedings. The critical point that the proceduralists argue, is that taking into account extraneous interests (such as those of the employees) may be detrimental to the interests of holders of private law legal rights (the right to have contracts performed or to be compensated for breaches by the debtor) and this in the insolvent company would be "prima facie theft" and constitute a "corruption of civil justice" (Wood, 2013). In other words, they feel insolvency law should be concerned with determining the affairs of those who have a contractual relationship to the ailing company, and not merely fulfilling a role to satisfy a communitarian approach, he goes on to say. From this philosophy derives one of the more popular theory in corporate insolvency, that is, the Creditors' Bargain Theory (CBT).

*In corporate insolvency, proceduralists' prefer to rely on economic models and market trends to determine resolutions for distressed companies, as opposed to the use of judicial discretion determined on the basis of case law. The reliance on extrapolative formulas is not a precise process and given its dependence on a wide number of variables, it means that it has a tendency to employ solutions to problems, which does not necessarily correlate with legislation (Wood, 2013).*

#### **2.2.4.2. Traditionalist / Communitarianists**

Traditionalists believe that stakeholders in general who have an economic interest in the company should be included in insolvency proceeding whether or not they have contractual claims on the company's assets. Communitarians look to balance a wide range of different stakeholders in the insolvency of the debtor, and while they still take account of financial matters they argue that such matters need to be balanced with the welfare of the community at large (Walton, 2011). Traditionalists differ from proceduralists in corporate insolvency in that they do not abide by economic models, but choose to promote and highlight the wider concerns that should be considered and that the realised wealth should be distributed accordingly. In so doing they take or may alter creditors' pre-insolvency rights to give priority to community concerns. As a result, communitarians would favour insolvency practices that result in the survival of businesses where feasible as well as orderly windings up where survival is not possible. They feel that the ripple effects of a business failure and its long term consequences should be factored into insolvency law (Wood, 2013), and Walton (2011) concurs with this by adding that what they are most concerned with is providing alternatives to liquidation; namely providing solutions to financial distress and addressing the issues regarding the preservation of companies, protection of employment, furthering the interests of the community and promoting equity amongst the creditors of the insolvent company .

The main criticism on communitarians is that the interests of the community at large are not easily defined, and as such the courts or some other independent arbiter would need to be called upon to adjudicate each time a potential community interest was raised as relevant (Woods, 2013). One of the more popular theories that has come out of this philosophy is the Team Production Theory (TPT). This, including the Creditors' Bargain Theory (CBT), will be looked at in brief in the ensuing section.

#### **2.2.4.3. Selected Insolvency Theories**

From the two philosophies to corporate insolvency reviewed above, several theories have been put forward and these include the following theories:

- a) Creditors' Bargain Theory (CBT)
- b) Team Production Theory (TPT)
- c) Value Based Theory (VBT)
- d) Risk Sharing Theory (RST), and
- e) Bankruptcy Policy Theory (BPT)

For the sake of this research, the researcher will briefly look at the two main theories of corporate insolvency, that is the Creditors Bargain Theory (CBT) and the Team Production Theory (TPT), where one theory taking an *inclusive* approach with the interests of non-contractual stakeholders being considered, whilst the other approach is restrictive and excludes certain parties from the proceedings.

#### *2.2.4.3.1. Creditors' Bargain Theory (CBT)*

The CBT is a contractualist approach whose main proponent was Thomas Jackson in 1980, and as such it states that the insolvency law is for the exclusive benefit of the creditors, to the exclusion of all the other stakeholders to the insolvency proceedings. It is derived from early law and economics, and was the main or popular view in insolvency law prior to the reforms to the insolvency laws in the 1980s. According to Bruckner (2013), the CBT asserts that the most prominent features of insolvency law are best seen as reflecting the notional agreement the creditors of the company themselves would strike given the chance to bargain with each other before anyone lends anything. He further states that optimal bankruptcy systems should have two aims:

- a) respect the rights of contractual creditors
- b) maximise the expected value of the assets of the insolvent company.

Walton (2011) criticises it for only considering rights as negotiated pre-insolvency, thereby ruling out the other stakeholders such as employees who would have contributed in a human resource capacity to the company and deserve as much recognition to their claim as the creditors, thus being discriminated for providing human capital instead of financial capital. Korobkin in Woods (2013) agrees with this criticism and further suggests that the economic approach of the

CBT is incapable of recognising non-economic values such as moral, political, social and personal considerations following failure.

#### *2.2.4.3.2. Team Production Theory (TPT)*

The TPT submits that the justification for the existence of a company is to organise team production. According to Wood (2013) the TPT recognises that the production effort within a company is the result of contribution from many sources, creating one joint effort as opposed to separate inputs belonging to one person, for example, creditors with their financial input and employees with their human capital etc. It acknowledges that the creditors are not the only ones that contribute to the positive value of the company, nor are they the only ones who take the risk of investment in companies; they should therefore be given equal weight in being considered in the insolvency proceedings. Wood (2013) further emphasises that caution should be exercised so that the term *equal* be not intended to mean “equality” in the general sense, but should be read to mean that equal respect and concern will be afforded to each claim.

#### **2.2.4.4. Practical Applications of the Insolvency Philosophies and Theories**

The American model of insolvency law has been modelled around and embraces the argument for considering other interests deserving of protection in insolvency, as captures within its Bankruptcy Code, which allows, even if quite rare, the court to appoint a trustee in place of the “debtor in possession” (DIP) where the management commits wrongdoing. This model allows other “interests of the estate” to be considered, beside that of the creditors (Woods, 2013).

However, other insolvency legislation in other countries such as Administration in the UK and JM in Zimbabwe, even though not following the DIP model does not mean that it does not wish to consider other interests but that of the creditors. Whilst the main mandate of the insolvency practitioners (Administrator for England, and judicial manager for Zimbabwe) once appointed are technically the agents of the company and must therefore conduct their duties in the best

interests of the creditors as a whole, they must also consider the possibility of rescuing the company as a going concern, which leans more towards the proceduralist philosophy, while at the same time having strong traditionalist inclinations. The duty of attempting to save the company whilst clearly of a benefit to the creditors does mean that other interests would be considered as part of the process. This change in attitude marks a fundamental shift in the priority of interests and objectives in the UK and Zimbabwean insolvency law, with the focus switching from liquidating a company to maximising the value for creditors to considering the sale of the company as a going concern which offers a genuine measure to enhance the protection of employees (Wood, 2013). In fact, it appears that corporate rescue legislation is being reformed to try and create a balancing act between the interest of several stakeholders.

Whereas traditional insolvency law emphasised the settlement of creditors' claims, what is central to the philosophy of contemporary trends is the idea that 'insolvency law should generally reflect the hypothetical agreement that creditors would reach if they were to bargain amongst themselves before extending credit to the company', thus also placing emphasis on the protection of creditors' individual rights vis-à-vis one another (Bradstreet, 2011). JM falls under this *traditional* insolvency law and as such tends to be creditor friendly. The general idea is that debtor-friendly corporate rescue legislation is more likely to be successful. Although the forerunner of this 'bargain-oriented' approach was the United States, this prototype legislation has been subject to much criticism and other jurisdictions that later followed suit have proved to be better sources of influence for South Africa's reform. The reforms of the United Kingdom and Australia are particularly relevant.

Bradstreet (2011) claims that in addition to being ineffective, judicial management is outdated as it sets the reimbursement of creditors as the main target of the bankruptcy process, and gives a substantial amount of control to the creditors, i.e. it is creditor-friendly. He feels that creditor-friendly regimes generally result in liquidation rather than a rescue of the business. In some instances, it can be argued that instead of focusing on paying out creditors, a company in JM might be better served channelling some, if not most of the funds generated into funding the business, e.g. in the form of working capital, necessary capital expenditure, etc. with a goal of reviving it to such an extent that it is able to generate more to cover the creditors and still remain a going concern.

### **2.3. Existing Corporate Rescue Practices in Selected Countries**

According to the Bankruptcy Reform Act of 1978 in the USA, the culture of corporate rescue is believed to have originated from the United States in 1978 and spread to Europe and the philosophy behind it being that bankruptcy is one of the risks of capitalism and not a crime for which companies should be punished but rather assisted to recover financially (Loubser, 2004). It was the so called “fresh start” approach in the USA which birthed the culture of corporate rescue and since then, corporate rescue has featured prominently in company law in many countries’ legal systems, be it under different names and/or different approaches. This research paper will briefly look at corporate rescue strategies as they are being practiced in England, Australia and South Africa. According to Burdette (2011), the USA has the most debtor-friendly insolvency system compared to other legal systems, which is deemed the most effective in preserving the value of distressed businesses. Chapter 11 of the US Bankruptcy Code gives management of the business all powers to preserve and look after the businesses value. The court appointed trustee is mandated to facilitate and not to control, giving management some flexibility in coming to grips with the current financial position of the business and finding the best way to save the business from bankruptcy (Bezuidenhout, 2012).

South Africa has been chosen as a case study for the literature review primarily because until recently (2008) it was also practising JM as a corporate rescue strategy, and the source of law for both Zimbabwe and South Africa is the Roman Dutch law. England and Australia have been selected because English law has had an important influence on Zimbabwean law, especially in the field of company law, all three countries until 2003, shared a Commonwealth Heritage, both England and Australia have had a reform in their insolvency regimes, and the corporate rescue mechanisms in all three countries share some resemblances.



### **2.3.1. England – Administration**

The English corporate rescue procedure is called Administration and it is, just like JM, only available to companies. A company that is unable to pay its debts, or is likely to be unable to pay its debts can have either its directors and/or creditors apply to the courts for the appointment of an Administrator. All the interested parties have to be notified of this petition, and once granted, Kloppers (2000) states that the aim of placing the company under administration will be:

- a) The survival of the company, and the whole or part of its undertaking as a going concern;
- b) Approval of a voluntary arrangement;
- c) The sanctioning of a compromise or arrangement scheme
- d) A more advantageous realisation of the company's assets that would be effected on a winding up.

Once appointed the Administrator takes over the running of the company from the directors, and the administration order is accompanied by a moratorium on the enforcement of creditors' rights. As soon as the Administrator is appointed, he sets out to investigate the affairs of the company and drafts a proposed rescue plan in accordance with the objectives in the order, which he presents to the creditors for consideration. The creditors can either approve the plan, reject the plan or suggest amendments to the plan. If the proposed plan is rejected, then the courts will discharge the administration order. The administration will also come to an end on application to the court for such by the administrator after deeming that the purposes set out in the administration order have been achieved or are incapable of being achieved. Moratorium ceases to operate with the vacation of office by the Administrator.

### **2.3.2. Australia – Voluntary Administration (VA)**

The Australian procedure that closely resembles JM is called Voluntary Administration, and as such does not commence with a court order. Loubser (2007) has pointed out that the main goal of this rescue process in Australia is not to save the company itself but rather to maximise the value of the business and save employment and markets. This procedure is initiated by the directors of an ailing company, rather than by the court. In such an instance, the board of directors resolve to appoint an Administrator if they are of the view that the company is insolvent or likely to become insolvent and that an administrator should be appointed. It is important to note that the company can only make use of this approach if it is not yet in liquidation.

Once the Administrator is appointed, he goes on to do a thorough analysis of the company and its present position in order to make a decision on the necessary steps to take to turn its fortunes around. He produces a report called the *Deed of Company Arrangement* – a document that contains the statement of affairs, identification of the challenges being faced by the company and a proposed rescue plan. This rescue plan is presented to the creditors, and if adopted at the creditors meeting, it then becomes binding on the company and all pre-administration creditors.

Much like in JM, the Administrator has full powers to run the affairs of the company and can perform any function and exercise any power that the company or its officers could perform before the administration (Kloppers, 2000). One important characteristic of Voluntary Administration is that it has tight time frames for each stage, for example, the creditors are given 21 days to accept or reject the Deed of Company Arrangement. If they accept it is adopted and the administration will cease with the execution of the rescue plan. However, if they reject it then procedures for winding up of the company will commence. Voluntary Administration also makes provision for the formation of a committee of creditors which are tasked with overseeing the administration until the deed of company arrangement is executed by the company.

### **2.3.3. South Africa (SA) – Business Rescue (BR)**

Prior to 2008, South Africa had JM as its corporate rescue strategy (Kloppers, 2001), but then reformed it to come up with a procedure they call Business Rescue (BR). According to Sharrock *et al* (2012), BR proceedings against a company, just like in JM, can occur in two ways – either the directors through a board resolution can apply for the placement of the company under BR,

or it can be compulsory through a court order. BR cannot commence in the case of liquidation proceeding having been initiated against a company. In the case of BR, there has to be reasonable grounds to believe that the company is financially distressed and there appears to be reasonable prospects of rescuing the company. the South African Companies Act states in section 129, that a company is deemed financially distressed if:

- a) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediate ensuing *six months*; or
- b) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing *six months*.

This is almost similar to the grounds upon which a company is considered distressed in the case of JM except that in this case a specific time frame of six months is given. Within five business days of filing for placement under BR, the company is required to notify all its creditors and also *appoint* a BR practitioner as guided by the requirements for appointment set out in the Act, and the appointed has to accept their appointment in writing. Both the BR resolution and the appointed BR practitioner can be challenged by the creditors successfully provided that have good ground for the dismissal of either, and the objection is lodged in good time.

The BR practitioner, once appointed has the mandate to investigate the company's affairs, business, property and financial situation, and once done consider the prospects of the business being capable or not of being rescued (s 141(1)). If prospects of rescue do not exist, he has to notify the court and the creditors and proceedings for liquidation will commence. If chances of rescuing the company are good, then he prepares a rescue plan which has to be consented to by the creditors and the court before it can be implemented. He then continues to monitor the company's situation and propose to take action according to the situation.

## **2.5. Judicial Management (JM)**

JM is a *temporary* court-supervised rescue plan for companies that are in distress but show signs of coming back to life if they are given a chance (Mwete, 2015). In Zimbabwe, this procedure is governed by the Companies Act [24:03], but where issues are not clear the Insolvency Act [6:04]

is used. There are many things that are considered before granting a JM order so in some instances it is very normal that the courts will grant a provisional order enabling those opposed to JM to be heard first before the final JM order is granted. Cilliers *et al* (2000, p. 449) describes the purpose of JM as to enable companies which are experiencing a temporary setback due to mismanagement or other special circumstances, to become successful concerns once again. Visser *et al* (2005, p. 411) agrees with Cilliers *et al* (2000) and goes on further to state the object of JM as being to obviate a company being placed in liquidation if there is reasonable probability that by proper management or by proper conservation of resources the company may be able to surmount its difficulties and carry on. Sharrock *et al* (1996, p. 189) states that JM is resorted to when a company is in financial trouble but has the potential to recover, with the underlying idea being that the court appointed Judicial Manager will come in and identify and correct the financial maladies of the company, and in so doing enable the company to become a successful concern. The main parties to a JM are the members, the directors, the creditors and the employees, with the Master of the High Court taking a supervisory role. Desired results are seldom achieved under JM with many companies under JM still going the liquidation route (Sharrock *et al*, 1996).

### **2.5.1. Instances in Which a JM Order may be granted**

In terms of section 300 of the Companies Act [24:03], the court may grant a provisional judicial management order in respect of a company if it appears to the court:

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

or if it appears to the court that:

- (b)
  - (i) if the company is placed under judicial management the grounds for its winding up may be removed and that it will become a successful concern; and
  - (ii) that it would be just and equitable to do so.

### **2.5.2. Effects of a JM order (provisional & final)**

Once granted, the provisional JM order should:

- (i) state the return day on which the court will consider granting a final order.
- (ii) contain directions that the company has been placed under the management of, subject to the supervision of the court, the provisional judicial manager appointed, and that all persons vested with the management of the company's affairs shall from that date be divested thereof;
- (iii) contain such other directions as to the management of the company or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary;
- (iv) and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court.

The provisional judicial management order has the following effects:

#### **2.5.2.1. Legal Proceedings**

General moratorium is enjoyed by the distressed company. The Companies Act [24:03] requests that while the distressed company is under JM, all processes against the company be stayed and should not proceed without the leave of the court. According to Loubser (2004) a moratorium is one of the major advantages of JM and applications for JM should as a rule

include the request for such stay. She further asserts that generally a successful rescue operation without moratorium is highly unlikely and moratorium should therefore be an automatic inclusion in JM. The cessation of legal and commercial action against the struggling company gives both the company and judicial manager the opportunity to operate without pressure from creditors, allowing for an opportunity for re-organisation.

#### ***2.5.2.2. Property Interests***

Once placed under JM, a company may only dispose or agree to dispose of its property only:

- a) In the ordinary course of business
- b) In a bona fide transaction concluded at arm's length for fair value in advance or in writing by the judicial manager
- c) In a transaction contemplated by, and undertaken as part of the implementation of the rescue plan

#### ***2.5.2.3. Employment Contracts***

During JM proceedings, employees of the company continue to be employed on the same terms and conditions as immediately before the proceedings.

#### ***2.5.2.4. Other Contracts***

While JM proceedings are in place, the judicial manager may suspend, entirely, partially or conditionally, any agreement or provision for an agreement to which the company was a party at the commencement of the JM proceedings.

#### ***2.5.2.5. Directors***

During the duration of a JM procedure, the judicial manager has full management control – the powers of the directors are divested into him. The directors may continue to exercise the functions of director subject to the authority of the judicial manager and must attend to the requests of the judicial manager.

### **2.5.3. Critical Analysis of Judicial Management as a Corporate Rescue Mechanism**

The critical areas of analysis of JM as a corporate rescue strategy has been put into areas of contention as follows:

#### ***2.5.3.1. Cost Issue***

Kloppers (2001) and Burdette (2004) feel that one of the reasons JM has failed as a corporate rescue strategy is because of its heavy reliance on court proceedings, making it a costly exercise and thus very unsuitable for the needs of small and medium sized businesses. Kloppers (2001) contends that small and medium companies play an important role in every economy and are as much worthy of receiving corporate rescue as the big companies with many employees. Loubser (2004) bemoans the fact that JM, according to the statutes seems to be a preserve for “companies” as defines by the Companies Act meaning that other forms of business cannot make use of this rescue mechanism. She does agree with Kloppers that the procedure would be too costly and inappropriate for small businesses given the close regulation and the court supervision that the procedure calls for. In some instances, one may find that the corporate rescue effort under JM may call for the expending of all or most of the assets of the ailing company. Rajak and Olver in Kloppers (2001) concur that the problem may not be that JM is not suited for small private companies, but rather that the heavy reliance on court procedures plainly makes JM too expensive. This is unlike the Voluntary Administration practiced in Australia which is initiated merely by the decision of the relevant party and is virtually without cost and extremely fast.

### **2.5.3.2. Liquidators as Judicial Managers**

Kloppers (2001) and Burdette (2004) both cite and agree with one of the reasons given by Olver for the failure of JM as an effective corporate rescue strategy as the traditional practice of appointing liquidators to act as judicial managers. They both concur with Olver that the primary objectives and duties of these two categories are completely opposed. Whereas the objective of a judicial manager is to help ailing companies remain as going concerns, the liquidator's function is to stop on the trading of financially distressed companies and to dispose of the assets as quickly as possible. Loubser (2004) feels that liquidators, whose field of specialisation is the dismantling and liquidation of companies, generally do not have the business skills to turn around a company that is already experiencing serious financial problems. Rajak and Henning, in Burdette (2004) also express the unsuitability of professional liquidators being appointed judicial managers and even go further to suggest that a panel of retired or semi-retired businesspeople be employed in order to oversee the rescue procedure, whatever form it takes.

Olver in Kloppers (2001) argues for JM, submits that the procedure of JM is sound, but the main problem lies in the persons appointed as judicial managers. He especially points to the possible conflict of interest of judicial managers applying for appointment as liquidators and JM's unsuitability as a remedy for small private companies.

### **2.5.3.3. Technical Competence**

Lack of competence, qualifications and regulation are also cited by Kloppers (2001) as another reason why JM has not performed so well. He feels that unqualified and inexperienced people are being appointed judicial managers, which greatly and adversely impacts on the probability of them succeeding in their efforts. Loubser (2004) resounds this concern for unfit people being appointed judicial managers when she asserts that the complete lack of any requirements regarding qualifications, training or experience for such appointment being the main reason why JM does not have a high success rate.



#### **2.5.3.4.Regulation and Control**

The fact that judicial managers (and liquidators) are not required to have any professional training and that membership of a professional body is not compulsory, means there is virtually no control over the activities of negligent, dishonest and incompetent judicial managers (Loubser, 2004). She feels that generally there are no clear policies to be followed in the appointment of judicial managers that consistency fairness and transparency. Kloppers (2001) agrees with this assertion and bemoans the inadequate regulation of this area of JM as another reason for its poor performance as well.

#### **2.5.3.5.Directors' Preferences**

Olver in Kloppers (2001) also puts some degree of blame on the directors of distressed companies for the failed JM efforts. He accuses some directors, especially in cases of voluntary application for JM, of preferring this route to liquidation, even in cases where they will be better end results were the company to be placed under liquidation. Where the likelihood of the redemption of an ailing company is almost impossible, it is important that the directors be not in denial of their failure and accept liquidation as a lesser of two evils, so to speak. In as much as JM can be taken to represent failure of the directors, if it is a better option for all the stakeholders concerned, then it should be applied for as soon as possible so that these same stakeholders do not suffer a bigger loss.

#### **2.5.3.6.Service fees & Possibility of Appointment as Liquidator**

There is also a contentious issue where a provisional judicial manager can also stand eligible as a candidate for the role final liquidator of the company for which he was provisional judicial manager. Loubser (2004) feels that the failure of a company attempt at JM could act as a financial incentive for the judicial manager, provisional or final. Her reasoning was that if a judicial manager can stand to be appointed as the liquidator to the same company, then this will

represent double fees to them – first the JM fees and second, the liquidation fees – hardly an incentive to strive for successful JM. Kloppers (2001) also shows concern for this possible double role, and brings in the issue of the comparable fees for the liquidator versus those for the judicial manager - liquidation fees being generally higher. Given these two facts, he argues that this represents serious conflict of interest where a judicial manager or provisional judicial manager must recommend liquidation and then can go ahead and apply for appointment as liquidator. In almost all cases, liquidation also takes time to conclude as compared to JM, and this in itself represents a quicker payoff for the liquidator and is less complex than JM.

#### **2.5.3.7. Statutory Requirements**

Rajak in Kloppers (2001) questions the existing requirement that states that a company is eligible for JM if ‘it is capable of recovery to the point where it is able to pay all its debts in full’. He views this as outdated, unrealistic and sometimes contrary to the wishes of the both the debtor companies and the creditors. He states that it is to the advantage of creditors to accept a value less than the face value of their claim in order to preserve a future supplier or purchaser of their products.

#### **2.5.3.8. Timing**

Burdette (2004) also bemoans the statutory requirement that strictly requires that the company must be unable to pay its debts before a judicial management order may be granted. She cites and agrees with Kloppers that insolvency or pending insolvency should not be a requirement as it not only acts as a bar for its more general use, but it also defeats the object of the exercise, namely staving off insolvency and making the company profitable again. They both feel that the earlier a company enters judicial management for assistance, the better chance there is that it will become a successful concern. In other words, they blame delays in placement of companies under JM as one of the reasons for the failure of the JM efforts as it will be initiated too late.

### **2.5.3.9.Reputation and Attitudes**

Cilliers *et al* (2000) state that a JM order damages the creditworthiness of a company, even if the JM order is later on set aside. This ties in closely with the attitude of the main creditors as elaborated by Kloppers (2000), who feels that the attitudes and behaviours of the main creditors especially financial institutions have a serious implication on the success or failure of JM efforts. By virtue of them being almost always a secured creditor and having the largest claim, they usually have the deciding vote on whether a company should be placed under JM or wound up. Given JM's history of failure, most financial institutions would rather opt for liquidation, even in case where there might be a good shout for JM. A creditor-friendly insolvency system like the one in which JM operates places a lot of power in the hands of creditors, thus at times putting the debtor at a disadvantage. Kloppers (2000) also bemoans the lack of a business rescue culture as detrimental to JM efforts.

## **2.6. Research Gaps Identified in the Literature**

Most of the research literature considered above on JM is derived from the South African corporate rescue system, and looks at the research work done prior to 2008 – that is before South Africa reformed their JM legislation to come up with Business Rescue. As such, the various researchers quoted above are predominantly South African and they concerned their research on how JM was working out for the South African economy before they moved to Business Rescue. Various countries use different corporate rescue systems, and in the African scenario, countries have tended to adopt the corporate rescue practices by their former colonisers which ties in with their legislation. South Africa at one point used JM and this is one of the main reasons why literature has come from authors from that country. There was little, virtually no literature from credible sources that was available for the researcher. The topic of JM in Zimbabwe seems to be an area where not much research has been conducted before.

The applicability, or generalisation of the results from the South African research literature to the Zimbabwean scenario is arguably unjustified. Zimbabwe and South Africa, are two countries that

have never been closely comparable in the last two decades. They have vast differences in their economic, social, political and technological setups, and even their legal systems, though they both derive from the Roman-Dutch law, are very different. According to the report by the African Development Bank:

‘In the last two decades, Zimbabwe has gone through long periods of subdued growth and between 2000 and 2008, a sustained and broad-based decline in economic activities led to a cumulative decline of nearly 50 percent in real GDP growth. The crisis can be attributed largely to a combination of factors, including economic mismanagement, poor governance mainly arising from weaknesses in the rule of law in the context of the Government’s fast-tracked land reform program, the concomitant loss of support from the international community, capital flight, and low investment. The inflation rate increased substantially from 2000, reaching triple figures in 2006. It then moved to severe hyperinflation in 2007 before peaking at five hundred billion percent at end-2008.’

This of course was followed by dollarization, a serious liquidity crunch and currently negative inflation. All these things are unique to Zimbabwe and is alien to South Africa and the rest of the countries looked at in the literature review – especially during the time the various researches of corporate rescue were carried out. The other countries considered in the literature review such as England and Australia are both developed countries which then present a different environment for corporate rescue when compared to Zimbabwe which is a developing country. All the factors highlighted justify the carrying out of an independent research on JM in Zimbabwe.

## 2.7. Conceptual Framework

After analysing the related literature in preceding sections and the stated objectives, the following conceptual diagrammatic framework was developed:

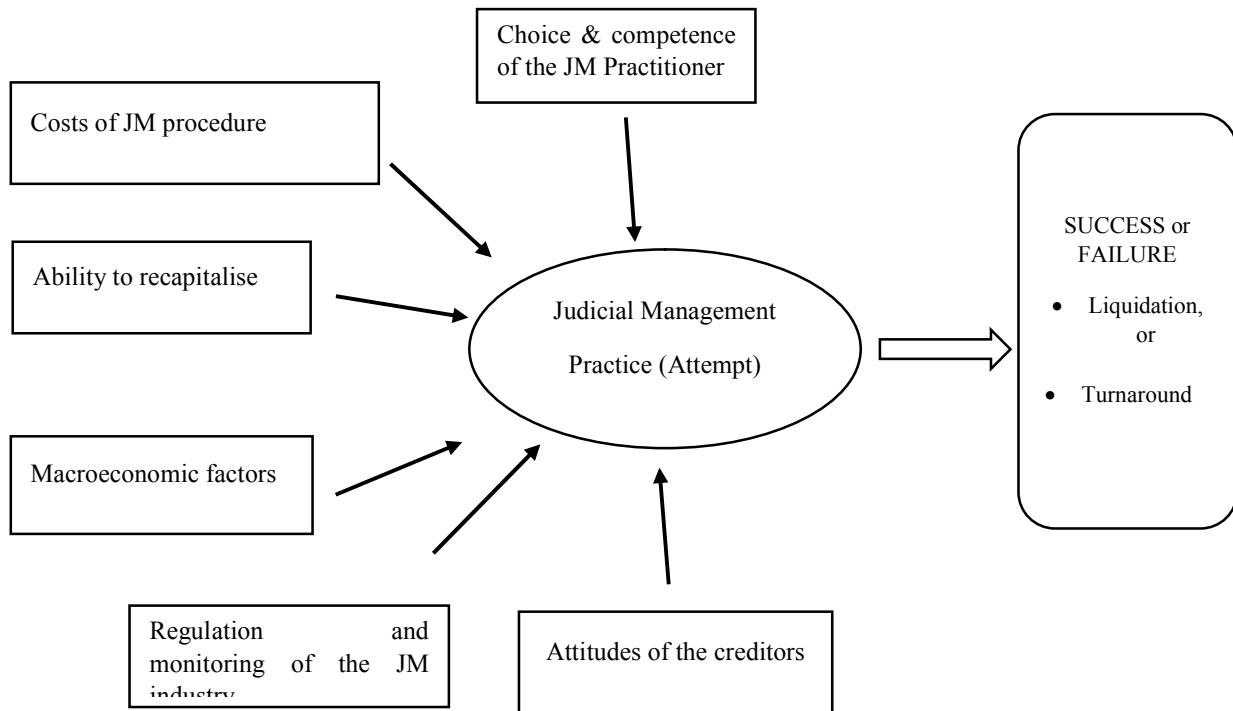


Figure 1: Conceptual Framework

## **2.8. Summary of the Chapter**

Throughout the literature presented in sections above, the authors have converged on similar major facts, but they have also differed in opinions here and there. In the section that follows, the researcher will point out the main areas of concurrence between the several authors, and will also show the areas of contention on the issues of corporate rescue with particular emphasis given to JM.

### **2.8.1. Areas of Convergence in the Literature Review**

All the authors have given an appreciation of having a sound insolvency regime, specifically corporate rescue, and notably Broc *et al* (2004), Cilliers *et al* (2000), Menezes (2014) and Kloppers (1999) emphasising that corporate failure has far reaching consequences that go beyond detrimentally affecting the debtor company, its employees, owners and creditors, but has spilling effect on society and the nation as a whole. Nearly all the authors agree to the need for regular reforms to the insolvency laws in line with global trends as has been done in the countries looked at, that is England, Australia and South Africa, with South Africa having reformed its JM procedure to come up with Business Rescue as early as 2008.

One fact that is without contention is that JM has failed as a corporate rescue strategy – its results have been very poor (Rajak & Henning (1999), Olver in Loubser (2007), Kloppers (2001) etc.). in line with the call for reforms of corporate rescue strategies, Mwete (2015) calls for a revamp of the JM process in Zimbabwe, also conceding that past and current JM attempts in Zimbabwe have failed. It is agreed by all the authors in the literature above that moratorium is an important aspect of any corporate rescue procedure including JM.

It is felt that moratorium provides the distressed company and the judicial manager some much needed respite from creditors to reorganise the business and strategise to get the ailing company out of the intensive care unit (Loubser, 2004). Another important component of the corporate rescue attempts is the drafting and presentation of a written rescue plan. This is common in whatever jurisdiction and it plays an important purpose in the corporate rescue effort.

As to the reasons for failure of JM, almost all the authors have converged on the following as the main reasons:

- a) Use of liquidators as judicial managers
- b) Technical incompetence on the part of the selected judicial managers (education, qualifications, experience, knowledge of the industry etc.)
- c) Over reliance on court proceedings and the high costs involved in the JM procedure.

Other reasons were given by the different authors but the three above appeared the most prevalent in almost all literature considered for this research paper.

### **2.8.2. Areas of Divergence in the Literature Review**

From the literature considered, it appears there is no conclusive position on the better insolvency regime – whether to go for a debtor-friendly regime or a creditor-friendly one. The United States of America, credited with starting the corporate rescue culture seems to prefer the debtor-friendly regime (Burdette, 2011) with Harmer, in Burdette (2004) feeling that corporate rescue has a far better chance of success in a debtor insolvency system as opposed to a creditor-friendly system of insolvency where the courts tend to take a conservative approach to the insolvency proceedings. Bradstreet (2011) also feels that creditor-friendly regimes most often tend to result in liquidation. Most countries that followed after the United States of America, notably England, Australia, South Africa and Zimbabwe have opted for the creditor-friendly approaches in the form of Administration, Voluntary Administration, Business Rescue and JM respectively. There is also no particular procedure that is agreed on to be superior to the others. Only Olver in Kloppers (2011) feels that the JM procedure is sound. However, he puts a lot of blame for the failure of JM on the persons appointed to be the judicial managers.

Different authors also place different weights to the factors that have resulted in the failure of JM. Some (e.g. Olver) feel the personnel chosen in JM has the greatest impact while others like Kloppers and Burdette put a significant amount of blame on the costs involved and the over-reliance on legislation of the whole process of JM.

The next chapter will be looking at the methodology used by the author in carrying out the research.

## **CHAPTER 3: RESEARCH METHODOLOGY**

### **3.1. Introduction**

This chapter focused on the research design, philosophy, strategy, population, sampling techniques, sources of data, the data collection procedure, data analysis, research limitations, ethics and data credibility. The chapter mentioned the different research methodologies that exist, but a detailed explanation of the chosen methodology was given, including the justification for its selection. In conclusion, the summary of the chapter was given.

### **3.2. Research Design**

A research design is a general plan containing clear objectives emanating from the research questions, and clearly specifying the sources of the data as well as how it will be collected and analysed (Fisher, 2003 & Saunders *et al*, 2012). In line with this definition the research design adopted herein provided the guideline for data collection and analysis in pursuance of answering the research questions posed in Chapter 1. The purpose of research is generally classified into three, being exploratory, explanatory and/or descriptive.

A descriptive study aims to portray an accurate profile of persons, events or situations. The methodology most frequently associated with this type of research is case study or survey research which asks predominantly ‘who’ and ‘how’ questions (Neuman, 2006). The explanatory



studies seek to establish a causal relationship between variables with a goal to explain the relationship between the variables.

For the purpose of this research, both the descriptive and explanatory purposes were not applicable as the research sought neither to describe any phenomena (descriptive), nor did he seek to establish any cause-and-effect relationships (explanatory). Rather, the research study used of the exploratory approach which is defined by Robson in Saunders *et al* (2012) as a valuable means of finding out ‘what is happening; to seek new insights; to ask questions and assess the phenomena in new light’. This approach is said to be particularly useful if one is unsure of the precise nature of the problem, i.e. when not much is known about the area and the research may be seen to be a first step in a sequence of studies (Saunders *et al*, 2012). Consequently, exploratory research seldom yields definitive answers but is more likely to lead to further research questions being asked. In the case of JM in Zimbabwe, what is generally accepted is that it has failed in the time that it has been practiced since its inclusion in the Companies Act. However, even though it has been around for a long time, there is virtually little knowledge of the procedure in the general populace and there have not been any credible studies conducted on the procedure from the Zimbabwean perspective. One can generally feel that research on the area of JM in Zimbabwe is an area that has virtually been uncharted, more so the reasons why JM attempts have yielded dismal results. This research paper sought to find out or explore such reasons, making a strong case for an *exploratory* study.

The majority of the literature reviewed in the last chapter of the topic of JM has come from South Africa, which was also making use of the same procedure as a corporate rescue strategy until 2008 when it reformed the procedure to come up with a new corporate rescue mechanism called ‘Business Rescue’. There is hardly any credible and recognized Zimbabwean literature on the subject of corporate rescue, indicating that there have been very few studies on the subject (if any), particularly on JM in Zimbabwe. Thus the facts mentioned above mainly of the lack of study on the subject from a Zimbabwean standpoint more than justified the use of the exploratory approach by the researcher. The researcher is of the opinion that there is definitely need to conduct more studies on the area of JM.

A research design basically, covers three aspects namely the research philosophy, research approaches and research methods. These were looked at in the sections that follow.

### **3.2.1. Research Philosophy / Paradigm**

A research philosophy refers to belief and assumptions about the way in which data about a phenomenon should be gathered, analysed and used (Saunders *et al*, 2012).

Positivists believe that reality is stable and can be observed and described from an objective viewpoint, that is, without interfering with the phenomena being studied. They contend that the research is conducted as far as possible in a value-free way, with the phenomena being isolated; and that observations should be repeatable (Saunders *et al*, 2012). This research did not take the positivist view because in order to collect insightful data of the subject of JM in Zimbabwe, the researcher had to collect data using the survey strategy through unstructured interviews which require that the researcher interacts with the respondents and not merely observe them from a distance. No scientific measuring tools were used in conducting this research which was purely a qualitative research and not a quantitative one which is often associated with positivism.

Interpretivists believe that reality can be fully understood only through the subjective interpretation of and intervention in reality. Interpretivism emphasise the importance of the researcher understanding the differences between humans (social actors) in their different roles in society (Saunders *et al*, 2012). In interpretivism, not only does the researcher interact with environment but also seek to make sense of it through their interpretation of events and the meaning that they draw from these.

Realism is based on a mixture of both interpretivism and positivism, combining the positivism view, an exclusive single reality with interpretivists multiple realities. It is in between the two philosophies (Krauss, 2005). Realism mainly concentrates in the reality and beliefs that are already exist in the environment and can be classified into direct and critical realism. Direct reality refers to what individuals feel, see, and/or hear; while on the other hand, in critical realism, individuals argue about their experiences for a particular situation (Sekaran & Bougie,

2010). Realism mainly goes hand in hand with mixed research methods, which in this case was not the case as the researcher conducted a purely qualitative research.

Interpretivism philosophy usually goes well with qualitative studies. The researcher chose to take the interpretivism philosophy in this research because of the need to avoid loss of rich insights on the issues of JM in Zimbabwe as would be the case if the positivist approach were to be taken. This philosophy takes into consideration the respondents' subjective interpretations as influenced by experiences and perceptions of the JM procedure and the world in general. This required that the researcher, in his data collection, interact with the respondents and probe to find out their views on the subject of JM. Thus the aim of the researcher in this philosophical approach was to place himself in a position where he could better comprehend, describe and reveal social reality from the perspective of different participants with the ultimate objective of understanding rather than explaining. In this instance reality is deemed to be subject to the interpretation of the respondent and is not objective (Mack, 2010).

### **3.2.3 Research Methods / Approaches**

The researcher's intention was to take advantage of the unstructured nature of the qualitative research instruments which provide a great degree of flexibility that allows for deeper and richer insights into the attitudes and behaviours of people, so he chose to use the qualitative approach to the research (Collins & Hussey, 2009). The nature of the research questions and/or objectives made qualitative research a more suitable approach to address these as it provides very insightful data and allows for greater spontaneity and adaptation to the conversation between the researcher and the respondent. The choice of the qualitative nature also owed a large extent, to the exploratory purpose of the research on the subject of JM in Zimbabwe.

The research can basically take one of two approaches – either the deductive approach or the inductive approach. The deductive approach is mainly associated with positivism and the inductive to interpretivism. Deductive approach involves the development of a theory that is then subjected to rigorous test, and is dominant in the natural sciences (quantitative research). It involves the formulation and testing of a hypothesis, for which the results of the enquiry will

either confirm the hypothesis (in which case the theory is adopted) or will not concur with the hypothesis (in which case it may be necessary to modify the theory in light with the findings) (Robson, 2002). This research does not follow the deductive approach as it does not seek to test any predetermined theory or hypothesis as is normally the case with the deductive approach.

In choosing the qualitative method of research, the researcher also went for the inductive approach. For this particular research, the inductive method appeared the more suitable option as compared to the deductive approach as the researcher was not working with a theory or hypothesis, but rather he sought to identify patterns to the data collected to come up with a tentative hypothesis and possibly a theory. In other words, with the inductive approach, the researcher moved from data to theory, or from the specific to the general.

#### **3.2.4. Research Strategy**

Case studies were deemed not ideal for the research as a research strategy because they are used mostly on a particular contemporary phenomenon within its real context using multiple sources of evidence (Robson 2002). Experiments were also not chosen because they are often used to study causal links or relationships between variables and are therefore not ideal for this study. Grounded theory is described as the use of a structured interview, each subsequent interview is adjusted based on the findings and interpretations from each previous interview, with the purpose to develop general concepts or theories with which to analyse the data (Cooper & Schindler, 2014). This is said to be ideal in a research such as where there is need to determine product design or redesign and advertising and promotion development. As such, this was not the best data collection method to use in this research. Another data collection method, ethnography, was also not selected because its purpose is mainly to describe and explain the social world the subjects inhabit in a way that would describe and explain it (Saunders *et al*, 2012). It is also time consuming and requires the researcher to immerse themselves into the social world, and since time was a critical and limiting factor in this research, this method was also deemed not ideal. Archival research was also not chosen because it deals mostly of secondary data such as administrative records and documents

Having considered the various research strategies, the researcher chose to use surveys as the research strategy for this particular research. Surveys tend to be used mostly for exploratory and descriptive research and are usually inexpensive (Saunders *et al*, 2012). They are often used to answer the *who, what, where, how much and how many* questions. This was deemed ideal for this research paper because the research sought to investigate the factors that have hindered JM (*what question*) and allowed for the data to be collected in an inexpensive manner. It was also ideal because of the exploratory nature of the research.

### **3.3. Population and Representation Techniques**

#### **3.3.1 Population**

In this research, the population was composed of all direct stakeholders to JM procedures in Zimbabwe, that is the regulators, practitioners, affected companies (i.e. their employees, shareholders and directors), and the creditors. The researcher looked at the *direct* stakeholders because these are the people that are directly affected in JM proceedings and as such, in almost all cases, have an insight or some level of knowledge on the subject of JM. However, it was not practically possible to study the entire population, considering that this research is cross sectional of which time is limited. Due to several constraints such as time, cost, accessibility, and resources, studying the entire population was not feasible, so a sample was used instead as depicted in the ensuing section.

#### **3.3.2 Sampling / Representation**

##### **3.3.2.1. Sampling procedures**

The sampling procedure can take one of two forms, that is, they can be probabilistic or non-probabilistic. Probability sampling is most commonly associated with survey-based research strategies where the researcher needs to make inferences from the sample about the population to answer research question(s) or to meet research objectives (Saunders *et al*, 2012). The underlying theory with probability sampling is that each element in the population has a known chance (mathematically) of being chosen for the sample, thereby leaving no room for the researcher's influence. This type of sampling is mainly associated with quantitative research.

The research made use of a mixture of non-probability sampling methods. First, he used purposive/judgemental sampling, which enabled the researcher to select candidates that best enabled him to answer the research question(s) and to meet the research objectives. Judgemental sampling was employed in that the researcher then used his discretion to deem those respondents that he felt would provide as much rich information as possible to answer the research question(s). The next step was dividing the population into specific groups, which were the JM practitioners, the monitors and regulators, the creditors, and the company. The JM practitioners included all the judicial managers in the country; the regulators and monitors referred to the court officials (i.e. the office of the Master of the High Court) and the council of estate administrators and the lawyers; the creditors included the financial institutions, statutory creditors (e.g. ZIMRA), the suppliers and other providers of finance; and the company referred to the employees, the directors and the shareholders. By so doing the researcher borrowed a leaf out of the quota sampling book, and used non-proportional quota sampling and because of heterogeneity within the population he sought to include views from all the groups *but* was not particularly concerned about representing these views proportionately. Coming up with the different groups was meant to reduce bias by any particular group of persons, and to try and have well-rounded and balanced opinions from the chosen respondents.

Convenience sampling was also applied in that research only used respondents based in Harare where the researcher had easier access to them, and thus less costly and time consuming. This made for what the researcher felt was a good sample from which he could get in-depth knowledge to greatly enrich the study.

### **3.3.2.2. Sample Size**

As for the size of the sample, it depends on the research question(s) and objectives – in particular what the researcher needs to find out, what will be useful, what will have credibility and what can be done within the available resources (Patton, 2002). For the sake of this research study that is looking at a fairly heterogeneous population, the sample size used was 15 respondents.

In utilising the judgemental sampling procedure, the researcher used his discretion in deciding on the number of respondents to use for each group. For example, he judged that one of the most informed group on the subject of JM (if not the most informed) would be the JM practitioners themselves, so a larger number of respondents was picked for this group. In some instances, the number of respondents for the other groups was influenced by the level of *data saturation* as alluded to in Saunders *et al* (2012) which states that data should be collected until such data saturation is reached.

## **3.4. Sources of Data**

Research data can be in the form of either primary data or secondary data. Secondary data are relevant data that are collected for a different research problem that can be used to solve other research problems. The main advantages of secondary data are that it is less consuming of resources such as time and money, it is unobtrusive, allows for longitudinal studies, it is permanent and can provide comparative and contextual data. On the negative side, secondary data may be difficult or costly to access, the researcher has no real control over its quality, initial purpose for which it was collected may affect how it is presented, it may have been collected for a purpose that does not match the current research needs, and aggregations and definitions may be unsuitable (Saunders *et al*, 2012).

This research used primary data because they are most authoritative because the information has not been filtered or interpreted by a second party (Cooper & Schindler, 2014). It is this originality that the researcher sought that gives specific responses to the research question(s) and objectives. One of the biggest advantages of primary data was that the researcher has direct

control over what data he collects and this could be tailored according to the research question(s) or objectives. However, acquisition of primary data may be costly in terms of resources.

### **3.5. Data Collection Procedure**

Collection of primary data in qualitative research can be done using several instruments including questionnaires, observations and interviews.

For the purpose of this research, the researcher used interviews as his data collection instrument. This method was preferred because of its suitability vis-à-vis the research question(s) and objectives, and because of its ability to gather deep and rich information on the research subject from the respondents. It is also a very flexible instrument allowing for probing and enabling clarifications to and from the respondents so that ambiguity is reduced. One of the advantages of using interviews for data collection methods in qualitative interviews as it being very suited to explorative, explanatory and descriptive types of research (Saunders *et al*, 2012). The researcher also sought to take advantage of the other advantage stated by these authors of qualitative research being favoured or preferred by most respondents, especially where the research topic is interesting and relevant to the respondents' line of work. The nature of the questions used in gathering data are best answered through interviews, as they are mostly open ended and the order and logic of the questions also needs to be varied according to the different settings and responses obtained from the respondents. Interviews are also less tedious for most respondents who prefer to speak out their sentiments that write them down. This also saves a lot on the time taken to collect the data (Saunders *et al*, 2012). Interviews also have the added advantage of



allowing the researcher to capture verbal and non-verbal cues. In light of these apparent advantages that interviews have, the researcher felt that they would be the best instrument to collect relevant and appropriate data to answer the research questions and objectives.

### **3.5.1 The Interviews**

#### ***3.5.1.1. Interview Type***

There are three types of interviews that can be conducted namely structured interviews, semi-structured interviews and unstructured or in-depth interviews. The researcher opted for the *unstructured interviews* are informal and in-depth and which encourage the interviewee to talk freely on the subject matter. Being an exploratory and qualitative research, the researcher felt this type of interview would best result in the widest range of insightful data without restricting the interviewee to a certain path of conversation with the use of predetermined structured questions in a questionnaire. This would have resulted in a loss of data on any other areas pertinent to the subject of JM which may have been omitted had the researcher opted for the two other types of interviews. This type of interview also makes use of audio recordings of the conversation which were beneficial in collecting all and preserving data. Unstructured interviews also allowed for probing to a large extent. This type of interview was deemed by the researcher adequate to provide the adequate depth of responses to the research question that are also very relevant.

Although the researcher could have used the *semi-structured* interviews instead, he felt that he would have had to come up with predetermined themes for the interviews, and in the process risk leaving out any other themes that may be very important to the research. These predetermined themes also have a tendency of leading the interviewees into a certain type of thinking. The goal was to have them freely express their opinions on JM. The *structured interview* was not ideal for the research because it uses questionnaires based on predetermined and standardised, or identical set of interview administered questions which, considering the heterogeneity of the sample, were not going to be applicable to all interviewees, and would also potentially act as a limiting factor to interviewees opinions.

### ***3.5.1.2. Interview Guide***

As for the interview guide, the research questions and/or objectives, themes discovered in the literature review and the conceptual framework formed the backbone of the interview questions. The researcher was also sensitive to the heterogeneity within the sample and as such interview questions were formulated with that in mind. Probing and follow up questions were as a result of the different responses of the interviewees.

## **3.6. Data Analysis**

There are various data analysis methods for qualitative research. Quantitative data analysis methods use inferential statistics which can be calculated using several sophisticated computer programs such as SPSS, Minitab, SAS and Statview; or the very simple packages such as Excel spreadsheets. Qualitative data analysis on the other hand, uses methods such as include thematic approach and content analysis, although software packages such as NVivo, ATLAS, Leximancer, Ethnograph, and Knowledge Workbench also exist.

For the purpose of this research the content analysis approach was used for data analysis. After obtaining consent from the respondents, interviews were recorded with audio devices, which recordings were then transcribed verbatim coded and grouped in to meaningful categories also with the help of the theoretical framework designed in Chapter 2. This approach was selected because it provided a meaningful structure and produced rich and insightful information, while at the same time it is not too complex a procedure.

## **3.7. Research Limitations**

In some instances, the use of recording equipment posed a challenge in that it put -off some respondents, who were visibly uncomfortable especially at the start of the interviews. The issue of anonymity and confidentiality presented problems, and was an issue from some of the

respondents despite the written assurance given by the researcher. Some interviewees refused completely to be recorded and insisted that the researcher took written notes instead, and some even went as far as threatening legal action should their identity be revealed with their contribution. In a few cases the researcher's presence during the interviews made some respondents uneasy.

### **3.8 Credibility of the Research Findings**

Several measures were put in place to try and ensure higher credibility of the research and the major steps are highlighted below:

- a) *Development of an early familiarity with the topic.* The researcher read and obtained a lot of knowledge on the subject topic of JM before conducting interviews to collect the data. This helped in picking up data inconsistencies in the responses of the interviewees as well as helping to come up with good probing questions that revealed relevant information of the subject.
- b) *Triangulation of data collection methods.* The use of a mixture of data collection methods also helped in ensuring consistencies in the data collected from interviewees. For example, the use of observation in conjunction with semi-structured interviews by the researcher assisted in picking up both verbal and non-verbal cues that were of relevance to the research.
- c) *The use of mixed sampling methods.* This helped to act as checks and balances against bias in particular. A variation of quota sampling ensured that the researcher got balanced responses from all the groups involved in a JM proceeding, that is the JM practitioners, the regulators and monitors, the creditors, employees, owners and directors. This was mixed with judgemental sampling procedures to ensure that knowledgeable people were selected for the sample. An example of the effectiveness of this method in enhancing credibility is that had we only taken a sample of JM practitioners, they may have been biased into not revealing their own weaknesses that have contributed to the dismal

success of JM. The inclusion of the other groups will most certainly do counter this bias giving a balanced opinion of JM.

- d) *An option of refusal.* Participants were given the option to refuse to be interviewed as part of the sample. This ensured that those that were interviewed did so freely and willingly.
- e) *Use of various ploys in the interviews.* Ploys such as probing for more details and iterative questions was also useful in uncovering deliberate lies by the respondents. The use of such ploys is thought to have deterred would-be liars from providing false data.
- f) *Peer consultations.* The research methodology was presented to peers for their review before the actual data collection and analysis was done. This allowed for rich and corrective feedback to be acquired, thus improving the research somewhat. Advice received was invaluable and some was implemented to make the research more credible.
- g) *Adoption of well-established research methods.* From the literature reviews, the researcher adopted some of the research strategies documented to have been successful in researches of a similar nature. This helps to avoid pitfalls that may have been encountered by other researchers before.
- h) *Reassurances on anonymity and confidentiality.* The respondents were given written assurances of anonymity and confidentiality before they were interviewed so that they could be freer, more comfortable and less reluctant to provide deep information.

### **3.9. Research Ethics**

The goal of ethics is to ensure that no one is harmed or suffers adverse consequences from the research. The following ethical issues were observed during the research:

- a) Privacy of research participants.
- b) Participants participated voluntarily and were afforded to right to refuse to participate.

- c) Consent was obtained from all participants considered for the research.
- d) Maintenance of confidentiality of data provided was maintained, and anonymity of respondents observed.
- e) The researcher was honest in his dealings with the respondents.
- f) There was due diligence to avoid academic fraud

### **3.10. Chapter Summary**

This chapter looked at the methodology that was used by the researcher in carrying out the research. It discussed the design of the research including the philosophies adopted by the researcher and the methods for data collection. It went further by defining the population and the method used to derive a sample out of that population. Data collection procedures, data analysis methods used and the measures put in place to enhance the credibility of the research were also presented. In all this, justification for use of whatever method, philosophy, tool and or procedure was provided. The next chapter will now look at and analyse the data collected to come up with the research findings.



## CHAPTER 4: RESEARCH RESULTS AND DISCUSSION

### 4.1. Introduction

The purpose of this research was to identify those factors that have negatively affect the success of JM as a corporate rescue strategy in Zimbabwe. In trying to achieve this purpose, the research made use of the qualitative methods using the inductive approach which followed an interpretivism philosophy. Mixed sampling methods were used with the predominant method being judgemental sampling and primary data were collected using unstructured interviews. Questions posed to the interviewees were guided by the research questions and/or objectives, the discoveries in the literature review and the conceptual framework as proposed in Chapter 1. The content analysis approach was used to analyse the data with several measures as depicted in 3.8.3 being used to enhance the credibility of the research. Ethical considerations were also thought to be imperative and thus were put in place.

### 4.2. Sample Demographics

The researcher collected data using in-depth interviews on fifteen (15) respondents from the five (5) various subgroups to the JM proceedings as identified in Chapter 3. These form the direct stakeholders to a JM proceeding and their distribution was as follows:

GROUP	COMPOSITION OF GROUP	NO. OF RESPONDENTS	MALES	FEMALES
Practitioners	<ul style="list-style-type: none"><li>• Judicial Managers</li></ul>	4	3	1
Regulators & Monitors	<ul style="list-style-type: none"><li>• Master of the High Court's office</li><li>• The Council of Estate Administrators</li><li>• Legal practitioners</li><li>• High Court Judges</li></ul>	3	2	1

Creditors	<ul style="list-style-type: none"> <li>Secured (e.g. financial institutions)</li> <li>Statutory (e.g. ZIMRA, NSSA)</li> <li>Unsecured Creditors</li> </ul>	4	2	2
Company	<ul style="list-style-type: none"> <li>Employees (Workers Unions)</li> <li>Directors</li> <li>Shareholders (owners)</li> </ul>	4	3	1
<b>TOTAL NUMBER OF RESPONDENTS</b>		<b>15</b>	<b>10</b>	<b>5</b>

Table 2: The Sample - Distribution of Respondents

The range of the duration times for the interviews were between fifteen (15) and twenty-seven (27) minutes, with the average time being twenty-one (21) minutes. Of all the 15 respondents interviewed, 12 consented to being recorded whilst 3 refused to be recorded. The longest interview was the one where the respondent was adamant about not wanting to be recorded using audio devices, and insisted that the researcher took notes instead. The gender distribution of the respondents was 10 males and 5 females as depicted in Table 2. In line with the identified groups of the direct stakeholders, respondents have been coded as follows:

GROUP	NUMBER OF RESPONDENTS	CODE USED
JM Practitioners	4	P1 - P4
Regulators & Monitors	3	R1 - R3
Creditors	4	CR1 - CR4
Company representatives	4	CO1 - CO4

Table 3: Coding of Respondents



### 4.3. Findings of the Research

The ensuing section covers the research finding that are primarily based on the in-depth interviews carried out by the researcher. From the literature review, there were some patterns (themes) that emerged that were also consistently coming out in the interviews carried out. So the researcher used these as pre-determined themes for data analysis adding any new themes that did not come up in the literature review.

#### 4.3.1. Factors Identified as Detrimental to JM Efforts

The following factors emerged as being hindrances to the successful implementation of JM proceedings in Zimbabwe:

##### *Competence of the Judicial Managers*

In the case of almost all the respondents except for two, one of the major reasons for failed JM proceedings was stated as the lack of competence to perform their task on the part of the chosen judicial manager lacked. Some of the chosen judicial managers were accused of lacking the requisite qualification to conduct a corporate rescue attempt nor did they possess the adequate experience and expertise to succeed. CR2 echoes this fact in the following statement:

*“Mind you these people (judicial managers) are coming in to replace the directors most of whom have at least a Masters Degree in Business Administration among other qualifications - some even being chartered accountants, and on top of that having several years of experience – most of which was as successful business people. In Zimbabwe if one has at least 5 ‘O’ Levels and has passed some general written and oral examinations with the Council of Estate Administrators then they qualify to be a judicial manager. So how can we possibly expect a judicial manager to succeed where several CAs have failed when his highest qualification is a Higher National Diploma?”*

In some cases, some judicial managers were even alleged to lack proper knowledge on the procedure itself. One respondent R3 bemoaned their lack of a legal background stating that it is imperative that judicial managers have legal knowledge especially in corporate affairs so that the

process is not slowed down by unnecessary litigations that could have been avoided and thus prevented unnecessary costs, had proper legal knowledge been possessed by these judicial managers. In other words, it is imperative that JM practitioners possess the right qualifications, experience, relevant expertise, good business acumen and legal oversight to enhance their chances of successfully turning around struggling businesses. The current provisions of these factors in both the Companies Act [24:03] and the Estate Administrators Act [27:20] were condemned to be inadequate if Zimbabwe wishes to see an improvement in the results the JM efforts.

Coupled to their lack of legal knowledge, it was also established that some of the JM practitioners were not even well versed with the process of JM. R1 stated that the Master of the High Court's office was constantly consulted by some judicial managers who made enquiries on even the smallest matters that they felt were so blatantly clear and obvious that a JM practitioner is expected to know. They stated:

*“Some of these appointed judicial managers appear so naïve to their jobs that they are always knocking on the Master's office seeking clarifications and guidance on petty things that you would expect every judicial manager to know. Some are clueless as to what they are supposed to be doing and what they can and cannot do, making it highly unlikely that such judicial managers would be successful in turning around the affair of any company.”*

### ***Unethical Conduct by JM Practitioners***

CO2, CR1 and CR3 introduced the unethical conduct of JM practitioners as another factor that has hindered to success of JM efforts in Zimbabwe. According to CR1:

*“I have always felt that the current practise of appointing the provisional judicial managers as the final liquidators of the company for which they were overseeing is a gross error. Surely if I am appointed provisional judicial manager to a company with sizeable assets where I know that I lack the technical competence, and also given the fact that my recommendation for final action (whether final JM or liquidation) is*

*seriously considered – I would be tempted to push for liquidation, be appointed the final liquidator, sell off the assets and walk away with substantial fees in the process.”*

Several case studies of provisional judicial managers that opted for liquidation as a quicker and easier solution to JM were cited by CR3, and in all such cases, the creditors and the Master of the High Court had wisely refused to go with the provisional judicial manager’s recommendation for liquidation, picked another practitioner as final judicial manager and seen these companies successfully resuscitated. Another area of concern as far as JM is concerned that was highlighted by CO1 as perhaps contributing to the demise of JM efforts due to some judicial managers’ unethical conduct was corruption and fraudulent activities. With regards the issue of unethical practices which include corruption, P2 stated:

*“There may be lack of evidence (of corruption), but from the grapevine and the market, yes we hear that this judicial manager did this this judicial manager is being sued for doing that. And yes this does derail the efforts of JM.”*

### ***Lack of Access to Capital***

Failure to get funds for capitalisation stood out as a sore thumb with almost all the respondents interviewed as the major drawback to JM efforts. P4 stated one of the main reasons why companies are placed under JM is undercapitalisation, and this is a problem that the incumbent JM has to adopt and resolve. In his words:

*“it is my humble view that whether it is JM or business rescue plan, it must be accompanied by a source of funding....”*

With most of the machinery used especially in Zimbabwe’s manufacturing sector deemed obsolete, there is usually need for funds for retooling and for working capital needs according to P3 who states:

*“The three main sources of recapitalisation for companies in JM are disposal of non-core assets, credit facilities from financial institutions and fresh capital injection from the shareholders (old or new).”*

Efforts by the judicial managers to access funds from financial institutions have not yielded much, notwithstanding Section 309 of the Companies Act [24:03] which states that *the current creditors may resolve that all liabilities incurred or to be incurred by the provisional judicial manager or final judicial manager in the conduct of the company's business shall be paid in preference to all other liabilities not already discharged, exclusive of the costs of the judicial management, and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the company except claims arising out of the costs of the judicial management.* Extending credit facilities to companies under JM are seen as unjustified increases in risk by the financial institutions. In most cases, these companies would have already accessed credit facilities from these financial institutions which will be forming quite a large part of pre-judicial management debts so granting more credit facilities will increase the exposure of the financial institutions. With the poor record of the performance of JM since dollarisation, a lot of such financial institutions are not willing to gamble more funds on the possibility of a turnaround especially in the case where their pre-judicial management credit facilities were secured against assets. Such facilities always get preference of being paid first before all the other creditors in the event that the company is liquidated resulting in minimised losses (if any). They would rather cut their losses, opt for liquidation and recover what they can before it gets further eroded through failed JM attempts.

In other instances, the judicial managers are failing to access fresh capital from financial institutions because they lack collateral. CR1 alluded to this fact in the following statement which was supported by P1, P2, P3 and P4:

*“In as much as we (the financial institutions) would want to assist these companies under JM our hands will be tied. Obviously for every credit facility granted, one would wish to have sufficient security to cover their exposure. In the case of these companies (under JM) most have their assets already pledged as security for pre-judicial management debts, which makes them (the assets) unsuitable as security for fresh loans.”*

The other avenue that was commonly used by judicial managers to raise capital was luring foreign investors. The interviewees alluded to the fact attracting foreign investor has become a

nearly impossible task mainly for two reasons – the economic policies and policy inconsistencies. P2 summarises it in the following extract:

*“It is difficult to attract foreign investors largely because of the business environment. If you look at the Indigenisation and Economic Empowerment Act [14:33], it is not aligned to the Companies Act [24:03]. Most of the guys (foreign investors) would prefer an outright purchase and not the 49% that is on offer. The second thing is that they would want to know about the security of their investments and policy inconsistencies have discouraged quite a number of them (investors).”*

As an example for policy inconsistencies, CO3 gave examples of such in the mining sector where the government at one point moved to and fro with the ban of export of mineral ores, issues to do with what goods can come into the country duty-free which can change at any time among other policy inconsistencies.

### ***Interference by the Shareholders***

Interference by the shareholders was also noted as a hindrance to the efficient functioning of the JM efforts. This interference is seen to waste company resources such as time and money where there are cases of litigation involved as well. Responded P4 alluded to this fact when he stated:

*“You would find in the majority of cases that shareholders will also be directors, but upon the placement of the company under JM, the effect would be to divest the powers of the directors into the judicial manager, giving his sufficient power to run the business. Nevertheless, from time to time you find the shareholder interfering with the operations in their capacity as shareholder. As shareholders they are supposed to be given financial statements and wait for the AGM convened by the judicial manager and then raise and review issue but you find most of them start interfering with the day to day operation. At the end of the day the judicial manager spends more time in courts with the shareholder.”*

### ***Huge Workload on the Part of Judicial Managers***

Another factor that was picked up and stated as detrimental to the JM efforts was the fact that some JM practitioners had too many cases they were handling at any given point thus negatively affecting their performance of their mandates. In some instances, it was stated that some judicial managers had as many as eight JM cases they were handling at any given time. It was generally felt that as the number of cases handled by the judicial manager increased, so did his inefficiency and ineffectiveness. R2 alluded to this fact in the following statement:

*“There should be a limit as to the number of cases handled by the judicial manager at any given point but it also depends on their capacity. Ideally the number has to be limited to about 4 or 5 cases per judicial manager per year, then progress should be checked. If there is still a lot of back log, then the Master of the High Court should deny the appointment of such a judicial manager until such a time that they have reduced their work load.”*

### ***Misaligned Legal Framework***

The study also revealed that the legal framework in the country was not aligned. P2 bemoaned the fact that the current legislation was not supportive of JM efforts. Amongst the examples of such misalignment, the Labour Act [28:01] and the Indigenisation and Economic Empowerment Act [14:33] were listed as not being in sync with the Companies Act [24:03], especially with provisions for JM. P2 had this to say:

*“Some of the legal framework is very outdated. It’s not making sense in that you find the Labour Act is not aligned to the Companies Act. If as a JM I make a suggestion to the worker that I cannot pay US\$1,000, I can start with US\$250, can I increase it as we make progress, the Labour Act will say no.”*

### ***Macroeconomic Dynamics***

Over half of the respondents bemoaned the prevailing harsh macroeconomic conditions in the country as a major factor for the failure of JM. The existence of cheaper import substitutes was pointed out as not giving ailing companies a fighting chance as their products faced lower demand due to their quality and prices as compared to the cheaper imports. Closely tied to this

was the inconsistent and ever-changing policies, especially trade and investment policies as already been alluded to. The liquidity crunch has affected the access of credit facilities amongst other things. High taxation, indigenisation policies etc. were all cited as being detrimental to JM efforts.

### ***Poor Timing of the Institution of JM Proceeding***

The research also revealed that the timing for the institution of JM proceedings was also a critical factor to the success and/or failure of the procedure. Most respondents felt that the earlier JM proceedings were instituted the better the chances of a turnaround. Respondent P3 concurs with this:

*“Some of the companies are waiting too long before applying for JM expecting some miracle to happen that will turn around the fortunes of their companies. only after they have lost a lot of assets and are on the brink of collapse do they finally go for JM. By this time, they would have lost most of their assets and their liabilities will be insurmountable that it will act as mission impossible for whoever will then be asked to come on as the judicial manager. They would have left him little resources to work with.”*

### ***Role of the Directors***

The study also revealed that part of the failure of the JM process in Zimbabwe had to do with the abuse of the process by the directors of the ailing companies. This was common in cases where the directors will be seeking to buy some time and respite from their creditors through the moratorium that is usually afforded by JM where all the legal proceeding against the company are stayed the moment an order for JM is granted, up to the time that it is set aside. R2 alluded to this fact in the following statement:

*“JM in Zimbabwe has been used as a way of evading or delaying paying creditors what they are owed. Most directors apply for this not because their companies are good candidates for the procedure, but simply to abuse moratorium that normally comes with*

*the process. In some instances, you discover that a better or more suitable option for such companies would have been liquidation but directors opt for JM instead. As a result, it is no surprise that JM fails and liquidation is recommended soon after.”*

The role of the directors was also noted as a critical factor in the success and/or failure of JM efforts. In some instances, the judicial managers were accused of doing away with the current directors once their certificate of appointment had been issued. It was noted that the present directors could still be invaluable to the judicial manager because they possess knowledge on the business, and this is especially important on industries where the judicial manager lacks adequate knowledge. It is at the judicial manager’s discretion to choose to work with the old directors or not, and to determine how much authority and power to grant them. Some judicial managers were blamed for chasing the directors away rather than taking advantage of their expertise, knowhow and networks by working together with them to find viable strategies of turning around the company through JM.

Another point that came out is that the directors is that in instances where directors have signed personal guarantees the creditors will go for them once the JM order has been granted to the company. This renders the directors ineffective for use by the JM should he choose to do so, thus affecting the overall JM efforts. It also emerged that another factor that affected JM proceeding negatively was directors who did not cooperate with the judicial managers. CR2 summarises it in the following statement:

*“Some directors refuse to play ball. Not only can they choose not to sincerely assist the judicial manager especially with information and expertise, but in some cases they either hide some on the company’s assets or are responsible for asset stripping activities before having the company places under JM. In such instances, when the judicial manager eventually comes in he is faced with a shell of a company with hardly any resources to work with t turn around the company.*

### ***Role of the Creditors***

The role of creditors in derailing JM efforts has been touched on briefly, especially the secured creditors. In a liquidation case, these get paid before everyone else and this class of creditors



usually comprises banks and has the biggest claim. Another group that was also as important that also enjoyed preference after the secured creditors was the statutory bodies such as Zimbabwe Revenue Authority (ZIMRA), National Social Security Authority (NSSA) and the utility companies. these also usually have significant claims. As such, these two groups of creditors have the largest say in the meetings of creditors, as to the fate of distressed companies. it was discovered that because of past experience with JM, they do not have much confidence in the process and are normally willing to go for liquidation instead. R3 states:

*“the attitude of the main creditors towards JM is also a big concern to the success of the procedure. Usually in cases where there are significant assets, most of the secured and statutory creditors would sooner opt for liquidation which enables them to quickly realise all or part of their claim. They seem oblivious to the plight of the workers and the company in general and history has in most cases taught them that JM attempts will fail and they will stand to lose a lot more if they choose to go that route.”*

As a result, good prospective candidates for successful JM end up getting voted for liquidation, further dampening the results of JM efforts. Statistics would read that companies in such fate have failed when no fair chance has been afforded to them to be resuscitated. Creditors such as statutory bodies have also been cited as uncompromising, and pushing JM companies over the edge. CO1 states:

*“...the penalties levied against companies, distressed or not, are harsh and unjustified. For petty issues such as failure to submit remittance forms even those that are not accompanied with payments, ZIMRA levies unreasonable penalties and interest and at times are uncompromising even in cases where it is blatantly clear that affected companies will be forced to close down for lack of capacity to pay such fines. Companies in JM are not spared, and in some cases such statutory bodies have the largest claim, removal of which the distressed company will have high probability of surviving. Rather than consider the wide ranging effects of such punishments, these statutory bodies are adamant that they be paid even to the detriment of survival efforts of such ailing companies.”*

### ***Poor Monitoring and Regulation***

Applications for JM are considered at the High Court whose judges determine whether or not the applicant has provided sufficient evidence to prove that indeed the company should be placed in JM. R3 and CR2 bemoaned the fact that these cases (applications) are made before judges some of whom are lack business acumen to fairly determine the fate of applicant companies. as a result, some undeserving companies find themselves placed in JM, while good candidates for JM have their application denied and are sent into liquidation. This is also seen to contribute to the failure of JM as these undeserving companies eventually fail adding to the statistic. According to CR2:

*“These applications for JM are heard and determined by judges who have only a legal background and no business acumen. They cannot even interpret financial statements. How then can these judges fairly determine the applications on JM?”*

Closely related to the issue of incompetent judges, it also emerged that the lack of efficient and effective supervision and regulation of the JM industry was also affecting the success of JM efforts. CR3 felt that this role was being badly performed by the Master’s office and the Council of Estate Administrator. The latter is responsible for overseeing the general conduct of the estate administrators (of which the judicial managers are one) and ensuring that they are conforming to the provisions of the Estate Administrators Act [27:20]. R3 generally felt that the powers of the Master’s office were inadequate for them to perform the monitoring role efficiently, also adding that this office neither had the capacity nor the adequate authority to perform their mandate.

*“The Master’s role is ineffective. When you attend the meetings of the creditors and the judicial managers, it appears that all they do is a chairing role and do not really have any significant contribution. They do not appear knowledgeable on the business side of JM nor are they inquisitive with some of the business plans and resolutions presented by the judicial managers. Added to this, they do not have the resources to effectively monitor every case of JM, as in some incidence, you find some companies have been on JM for more than 10 years with nothing really materialising and the Master’s office not doing anything about it. Now if you consider these difficult times and the sheer number of companies that are struggling, you can tell that the Master’s office has its work cut*

*out and they do not seem likely to cope. It monitoring and supervision is lacking, then the end result is abuse of office by the judicial managers.”*

In further support of the above and poor monitoring and regulation CO3 states:

*“The JM procedure as being allowed to run for too long. In some countries practicing JM, the JM order is allowed to run for a maximum of 180 days before a fresh application for an extension order is granted by the courts. Here in Zimbabwe companies have been under JM for more than 10 years, prejudicing the creditors.”*

The Council of Estate Administrators has not been spared and has received the brunt of the criticisms for their inefficient role in monitoring and regulating the industry. It was noted by CR3, R3 and CO3 that their biggest handicap was the fact that they neither had resources nor capacity to perform their mandate well. They are constantly understaffed and underfunded that they cannot even follow up on simple complaints against their members by the public. R3 also cited:

*“Too much reference to the High Court is an impediment that has a tendency of reducing the effectiveness of the JM and the Master of the High Court in carrying out their different function in the JM process. As a result, they can become useless, uncreative and limited in trying to ensure turnaround of ailing companies. The process then becomes monotonous and almost routine; thus no innovative strategies are allowed for in such a rigid system.”*

### ***Too Much Lenience Towards the Creditors’ Plight***

The fact that JM is a creditor-friendly procedure has also been cited as working negatively against company turnaround efforts. CO1 and CO3 concur with this assertion, and from the interviews it was argued that being overly leaned towards the creditors means that payment of their debts is given priority over the growth and/or improvement of the company. CO3 stated:

*“Because JM is creditor-friendly, whatever is generated by the company under JM is prioritised to be paid to the creditors over the actual development of the company. sometimes it is more desirable and beneficial to all parties concerned if funds generated*

*be ploughed back into the business so that it increases its capacity and earns substantially more in the future that will be beneficial to all the stakeholder concerned.”*

### ***High Costs***

Some respondents bemoaned the high cost associated with JM which they felt also had a hand to play in the demise of JM efforts. These costs include legal fees and application fees to have the company placed under JM, the Master’s fees and the JM fees. In cases where there are disputes, it also includes litigation fees. The main area of concern was the fees paid to the JM. In as much as some judicial managers were quick to state that they are determined in consultation with the creditors and the Master’s office, they were still deemed too much. P3 alluded to the fact that they were not clearly gazetted as in the case with liquidations but they could go as high as 6% of turnover generated by the JM efforts. These were still deemed too exorbitant and in most cases presented a huge drain on the company’s resources, further hindering the prospect of a JM turnaround. CO3 stated:

*“The charges for JM are too high as the judicial managers take the lion’s share of what the company generated.”*

As a result, profits generated that could go towards the dispensing of debt and perhaps further resuscitation of the company and result in a company coming out of JM soon are in fact channelled towards the JM fees. This forces companies to contend with longer periods under JM.

### ***Inadequate Provisions for JM***

The current legislation was accused by some interviewees to be pro-liquidation with JM taken as an extraordinary measure. as a result, there are a lot of grey areas in the legislation that were also felt to further dampen JM efforts. These gaps impact on the knowledge and training of judicial managers. It also emerged that there was generally lack of knowledge amongst the general populace of what JM was all about. As an example of this lack of knowledge, R1 gave an example and stated:

*“In cases of lack of knowledge of JM, shareholders for example do not know their position in such proceedings. Some judicial managers mistake the control they get when appointed with the ownership of the business. Shareholders remain the owners of the businesses and judicial managers are mandated to report to them just like the director before their appointment did.”*

#### **4.3.2. Factors Deemed the Most Critical in JM Efforts**

From the responses gathered in the interviews conducted, the researcher also sought to find out which, amongst all the identified factors in 4.3.1, were deemed to be the most crucial to the failure of JM attempts, in line with the secondary objectives of the research. All the respondents were in consensus that the primary factor that needed to be tackled was the issue to do with recapitalisation. In the words of P4,

*“The three main reasons that companies are placed under JM are undercapitalisation, tragic failure of leadership (corporate governance issues) or the company will be heavily indebted. In order to deal with all three problems a judicial manager need to ensure that there is adequate capital for working capital needs and for retooling.”*

The research findings concluded that the number one problem faced by the JM initiatives is failure to access capital for needs stated above, and that without capitalisation, then the JM efforts are almost always in vain.

The second most critical factor was the competence of the judicial managers. It was generally felt that people with inadequate business acumen, expertise, education, skills and experience would seldom yield positive results if placed under JM, bearing in mind the calibre of the directors they are replacing. As a result, careful selection of incumbents had to be done considering various criteria. Other factors that were considered critical by at least 80% of the respondents were macroeconomic factors and the misalignment of legislation. The other factors

above were common with some respondents but were not so much a factor in others. So if some form of ranking of the factors in order of their impact on the failure of JM based on the research findings were to be performed, number one would be the issue of recapitalisation followed by competence of the judicial managers, then macroeconomics factors, then misalignment of legislation, then the rest of the factors identified in 4.3.1 would follow.

#### **4.4. Chapter Conclusion**

This chapter contained the findings of the study in accordance to the research questions and objectives stated in Chapter 1. It was agreed generally that JM had failed in Zimbabwe and the importance of its succeeding could not be overemphasised. Several factors for its failure were highlighted in section 4.3.1 with the ones deemed most critical suggested in 4.3.2. The next chapter looks at the conclusions and recommendations.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### **5.1. Introduction**

This study set out to investigate the factors that have led to the failure of JM as a corporate rescue strategy in Zimbabwe. Although it is meant to give a life line to ailing companies, the results of JM post-dollarisation have been poor, and the research sought to pinpoint the factors responsible for this dismal performance. The researcher sought to add on to the current body of academic knowledge on the subject of JM by pinpointing areas that can be targeted for reformation of current practices to ensure the process of JM is more effective. This research was meant to be of benefit to the academia by providing deeper understanding of the subject (seeing there is not much literature on its current practices in Zimbabwe), thereby stimulating further research in the area of corporate rescue in Zimbabwe. Policy makers were another group targeted to benefit from this paper and perhaps inspire them to introduce reforms that will make the procedure be more in line with global trends and the economic environment, and make it more successful at its mandate. The other targeted groups to benefit from this research were the regulators, the JM practitioners and finally the government, to adopt and fine tune their procedure to ensure effectiveness and increased success in turning around distressed companies.

The basic proposition was the costs of JM, choice and make up of JM practitioners, regulation and monitoring of JM practitioners, macroeconomic failure to access capital had the biggest influence on the performance of JM as a corporate rescue strategy in Zimbabwe. The main research instrument was an in-depth research interview that was administered to a sample comprising of five groups of direct stakeholders to the JM proceeding, that is, the JM

practitioners, the regulators, the creditors and the company representatives made up of the employees, the directors and the shareholders. This chapter also highlights the research limitations and areas of further study.

## **5.2. Conclusions**

This section looks at the specific research objectives and questions presented in Chapter 1, issues that arose from the literature review as portrayed by the conceptual framework and lastly some issues that unfolded during the field research. Though itemised conclusions are presented below, the main conclusion is that JM in Zimbabwe has performed poorly as a corporate rescue strategy in Zimbabwe, and there are several factors responsible for that failure which need to be addressed if the procedure is going to be turned into a viable one. This study came to the following conclusions:

- a. It is imperative that every country has a sound corporate insolvency regime as failure of companies have effects that go beyond just the company concerned, but has social and economic effects to the nation as a whole, and possibly political effects as well. Attention need to be put on the insolvency regimes to make sure they are aligned to global trends and the environments in which they are practiced.
- b. Judicial management post-dollarisation has performed badly as a corporate rescue mechanism in Zimbabwe. There is need to address the factors that have resulted in such poor performance if the country is going to have a viable insolvency regime to curb the number of companies going for liquidation.
- c. The results of the research unearthed the various factors that were highlighted to be the main contributors to the dismal performance of JM as a corporate rescue strategy in



Zimbabwe, in answer to the main research objective. Several factors were identified and addressed in section 4.3.1 of the last chapter in greater detail. These are:

- (i) The incompetence of the JM practitioners
- (ii) Unethical conduct by the JM practitioners to the detriment of the JM process
- (iii) Lack of access to capital
- (iv) Interference in the JM process by the shareholders
- (v) Huge workloads on the part of the JM practitioners
- (vi) Misaligned legal framework
- (vii) Macro-economic dynamics
- (viii) Poor timing for the institution of JM proceedings by ailing companies
- (ix) Poor monitoring and regulation of the JM sector
- (x) Creditor-friendly regime at the detriment of resuscitation efforts.
- (xi) High costs which are unsustainable
- (xii) Inadequate provisions in the Companies Act for JM
- (xiii) The role of the creditors
- (xiv) The role of the directors.

d. The research found that of all the factors identified in 4.3.1, the most critical were established in order of impact as:

- (i) Recapitalisation issues
- (ii) Competence of the JM practitioners
- (iii) Macroeconomic factors
- (iv) Misaligned legislation
- (v) The rest of the factors.

This was in line with the second objective of the research that sought to identify the most critical of these factors.

e. The researcher attributed other factors unearthed by this research to the different settings in the countries from where the literature originated, to the Zimbabwean scenario. Most of the literature came from South Africa and was on the South African concept of JM. Zimbabwe and South Africa are not comparable in terms of their business environments.

The economic, social, political, legal and political dynamics are vastly different and as a result, there were bound to be factors in the Zimbabwean set up that did not come up in the South African set up and vice-versa. These factors that were not raised as an issue in the literature review are the lack of access to capital, misaligned legal framework and macroeconomic dynamics. Zimbabwe and South Africa cannot draw parallels between these two as they differ greatly.

### **5.3. Proposition Validation**

The research proposition was that the costs of JM, choice and make up of JM practitioners, regulation and monitoring of JM practitioners, macroeconomic failure to access capital had the biggest influence on the performance of JM as a corporate rescue strategy in Zimbabwe. The results of this study have validated this proposition and also added to it other factors that influence the success of JM. Costs of the JM process and the competence of the JM practitioners were cited by 60% of the respondents as a factor, especially the fees for the judicial manager. So in general, the research findings agree with the research proposition but go on to improve on the proposition by adding factors that were not covered in the proposition. All the factors stated in the research proposition were established in the research findings as true factors that are responsible for the failure of JM as a corporate rescue strategy.

### **5.4. Managerial Implications of the Research Study**

The managerial implications of this research study are meant to be beneficial not only to management within well performing companies, but also to the JM practitioners of ailing companies. What has emerged from the research finding that is of great importance is:

#### ***Timing for Application for JM***

Some directors were accused of leaving the process until it was too late. It has been shown how important it is for companies to constantly be assessing themselves and the state of their

companies such that should there be signs of distress, appropriate action can be taken. The saying *a stitch in time saves nine* is applicable in this instance. Companies that enter JM proceedings early while their losses are still minimal and their assets are still intact are said to have better chances of successful JM proceeding. This was attributed to the fact that they will still be in reasonably good shape with sufficient resources to really afford the JM a fighting chance. This is unlike a scenario where only a shell is left and the company is already in intensive care unit, so to speak.

### ***Protection under JM***

JM offers moratorium in most cases that has an effect of staying any legal action against the company by pre-judicial management creditors. Knowing this provision will save some companies who were ignorant of the provisions of JM will assist such companies to better reorganise themselves in a manner that allows them to pay off all their debts in an orderly manner without constant harassing from the creditors. One JM practitioner puts it best when he states that JM helps to protect companies and stakeholders, including creditors by ensuring the company was given a chance to return to viability or find an investor and or raise money to pay off the creditors.

## **5.5. Policy Implications**

The second secondary objective for carrying out this research was to suggest possible solutions to factors identified in 4.3.1. that would then enhance or improve the exercise of corporate rescue with particular emphasis being on JM in Zimbabwe. The following were proposals presented by the interviewees:

### ***Creation of a Revolving Fund for Ailing Companies***

The importance of creating a revolving fund for distressed companies emerged from the research findings. All the JM practitioners called for a revolving fund for distressed companies. they asked that the now defunct Distressed Marginalised Areas Fund [DIMAF] established in 2011 be revived, and that funds be pooled in such a fund for the purpose of providing capital to ailing companies. they also asked that initiatives such as the Zimbabwe Economic Trade Revival Facility [ZETREF] launched in 2012 be administered better. While both these initiative were plausible, it was felt that the conditions for accessing funds from the two were too restrictive.

### ***Legislative and Policy Reforms***

Alignment of current legislation so that there are no contradictions between different statutes, but ensuring that statutes are supportive and complement each other is necessary. This will save a lot on legal costs of consultations and court wrangles where there are grey areas or contradictions in statutes. On the issue of attracting foreign direct investments [FDI], it is suggested that reforms need to be considered especially to the investment and trade laws. Revision of restrictive laws such as the one on indigenisation need to be done so that the country becomes a conducive environment to attract FDI, which plays a big role in the JM efforts. The government needs to try to be consistent with these trade and investment policies so the foreign investors are assured of the security of their investments. Consistent policies also enable judicial managers to come up with business rescue plans that are relevant and not bound to be rendered unviable before the judicial managers have a real go at them due to drastic policy changes.

Other reforms include the provision of subsidies in industries where companies were in JM, even though it is generally agreed that the country is not currently is a good enough financial shape to offer such. These, coupled with a ban or quotas on import substitutes would go a long way in enhancing the viability of companies under JM. Special exemptions in the form of reduced interest rates on loans, lower taxes and rebates on input imports for companies under JM would also assist in increasing the success of such.

### ***Creation of a Separate Professional Board to Regulate the Industry***

In other legislations, notably South Africa, business rescue is considered a profession, and a body of professional have been created to regulate the industry. Training programs for rescue practitioners are available and overseen by this board where examinations are prepared for would be practitioners. Every practising practitioner has to be affiliated with this board which generally monitors and regulates this industry. This ensures that aptly qualified people are appointed and reduces the chance of failure of rescue effort. In Zimbabwe it was bemoaned that the Council of Estate Administrators which is mandated with this task has dismally failed. Several respondents called for its revision and financing so that it becomes for effective in carrying out this mandate. There is need to ensure that it is run by professionals in the area of corporate rescue and insolvency so as to bring about vast improvements in the industry.

### ***Creation of Specialised Courts***

The country needs to consider the creation of specialised courts, that is a commercial court where cases of company insolvency could be heard. These would be presided over by specialised judges with good business management knowledge and backgrounds coupled with their legal background. This will ensure that deserving cases are placed under JM while undeserving one face liquidation. This saves on costs and further erosion of creditors' value.

### ***Enhanced Role of the Master's Office***

The Master is generally not doing a good enough job. For starters, the fees for JM were said to be unsustainable for the ailing companies and the Master has to consider each company on merit to determine a reasonable amount of fees for the judicial manager. the Master's office was also accused of allowing the process of JM to go on for too long to the detriment of the creditors. This was said to be largely due to their incapacity to follow up on every case. Some cases were said to have been on JM for more than 10 years, a scenario that should never be allowed where there is effective monitoring. The Master is also accused of even adding more cases to judicial managers that fail to complete their prior assignments. As a result, it is recommended that adequate resources be availed to the Master's office and provide training on insolvency issues especially

liquidations and JM. This way they will be more effective and efficient in carrying out their functions. Frequent audits of JM work were also recommended.

### ***Public Awareness Campaigns***

As noted in section 4.3.1, there is general lack of knowledge on the process of JM. The idea would be to ensure that even the smaller ailing companies would know of such a provision in the Companies Act and use it to good effect. It will also ensure that applications for JM are done in good time such that the judicial manager is afforded a decent chance to revive the company while it is still in good shape. Finally, it will rebuff the negative connotation that is associated with companies under JM that in some instances make people shun these and not want to do business with such companies. These public awareness campaigns will not only serve the public but will also be beneficial to the practitioner and regulators as well.

## **5.6. Limitations of the Study**

The research took a qualitative and explorative approach which made use of non-probability sampling method which make it difficult to generalise the findings to the whole population. The heterogeneity in the sample requires a larger sample size than currently used, and due to limitations of time and resources, the research could not come up with thorough representative sample for the heterogeneity within this sample.

## **5.7. Areas of Further Study**

Owing to the exploratory nature of this research, it is recommended that further study be conducted on the subject of JM and the identified factors within themselves can be studied through explanatory research to have an appreciation of their relationship with JM. This area

provides a vast amount of research topics which will be invaluable to make our corporate rescue mechanism in Zimbabwe as effective as possible.

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