# THE DEVELOPMENT OF A HARMONISED BUSINESS MODEL FOR SOUTH AFRICA AND THE SADC SUB-REGION

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## DEDICATION

This work is dedicated to God.

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**TABLE OF CONTENT**

## TABLE OF CASES

Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies (GNP) 2012 JDR 0345 (GNP)

F E Gormley v West City Precinct Properties (Pty) Ltd (unreported).

Investec Bank Ltd v Andre Bruyns [2011] ZAWCHC 423

Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd 2012 (3) SA 273 (GSJ).

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC)

W G Koen v Wedgewood Village Golf (2) SA 378 (WCC)

## TABLE OF STATUTES

Bankruptcy Code, Bankruptcy Reform Act 1978

Bodies Corporate (Official Liquidatings) Act of 1963

Companies Act 61 of 1973

Companies Act 71 of 2008 (South Africa)

Companies and Allied Matters Act (CAMA) Cap C20 LFN 2004 (Nigeria)

Companies Code 1963 (Ghana)

Cross-border Insolvency Act 42 of 2000 (South Africa)

Enterprise Act 2002 (U.K.)

Insolvency Act 1986 (U.K.)

Insolvency Act 1962 (Ghana)

Southern African Development Coordination Conference (SADCC) Treaty

Southern African Development Community (SADC) Treaty

## CHAPTER ONE

### 1.0.0. Abstract

Business rescue regime has led to dramatic improvement in ailing organizations across the globe in recent years. This work critically examines current South African business rescue option in the context of her role in the SADC sub-region. A robust model, taking into consideration, the legal, socio-cultural, political and economic diversity of SADC members is proposed. It is believed that the model can serve as a template for other regions in the continent.

### 1.1.0. **Background**

The term "business rescue" has been defined as proceedings to facilitate the rehabilitation of a company that is financially distressed[1]. Generally, cross-border business rescue refers to proceedings to preserve a company whose sphere of operation cuts across different countries from imminent collapse. "Cross-border insolvency" refers to those situations in which an insolvency occurs in circumstances which in some way transcend the 'confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements in the case'[2]. According to Alice Belcher, "rescue" is a major intervention to avert the eventual failure of a company"[3]. The philosophy of business rescue, in the words of Gerard McCormack, is that "a business may be worth a lot more if preserved, or even sold as a going concern than if the parts are sold off piecemeal"[4].

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[1] Section 128(1)(b) of the South African Companies Act 71 of 2008

[2] Ian F Fletcher 'International Insolvency: The Way Ahead' (1993) 2 *International Insolvency Review* 7 cited in R.H. Zulman, Cross-Border Insolvency in South African Law 21 (2009) *SA Merc LJ* 804–817.

[3] Alice Belcher, Corporate Rescue: A Conceptual Approach to Insolvency Law (London), Sweet & Maxwell, (1997) cited in FHI Cassim et al, Contemporary Company Law,2nd edition, JUTA, P.861

[4] Gerard McCormack, Business Rescue Law – An Anglo-American Perspective, Edward Elgar Publishing Limited, P. 4.

Contemporary history of business rescue can be traced to Chapter 11 of the USA Bankruptcy Code, Bankruptcy Reform Act 1978[5]. The objective of the Act is to reorganize companies that experience financial difficulties. Italy, France, Norway, the United Kingdom and other countries in the world have followed suit[6]. In the United Kingdom, particularly, the Sir Kenneth Cork Committee was set up, in 1977, to review the UK Insolvency law[7]. The Committee through its report (Cork Report) recommended new procedures, by way of a legislation, to rescue companies as going concerns[8]. This led to the Insolvency Act of 1986. The Act created the voluntary arrangement and procedures otherwise known as business rescue[9].

In African countries such as Nigeria, Ghana and South Africa business rescue is well documented. In Nigeria, business rescue is provided for in Parts XIV and XVI of Companies and Allied Matters Act (CAMA)[10]. Part XIV is entitled "Receiver and Manager" and part XVI is "Arrangement and Compromise". This followed the United Kingdom Arrangement provisions, particularly the UK's Joint Stock Companies Act of 1870[11]. Receivership is a remedy by which a secured creditor enforces its security by appointing a receiver/manager (outside manager) to take over the affairs of an ailing company[12]. A receiver may be appointed by court or out of court[13]. The receiver/manager can, possibly, return the company to profitability[14].

With respect to Arrangement and Compromise, it must be stated that the two terms are used interchangeably. Section 537 of the Companies and Allied Matters Act (CAMA) defines an "arrangement" as "any change in the rights or liabilities of members, debentureholders or creditors of a company or any class of them or in the regulation of a company". Here, a negotiation may be reached with the shareholders and/or lenders or a class of them to accept less

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[5] By "contemporary history", it is meant within the past forty years. See generally Harry Rajak and Johan Henning, "Business Rescue for South Africa", 116 S. African LJ 262 (1999), p. 262

[6] Rajak and Johan Henning (supra)

[7] Department of Trade and Industry, Review Committee: Report of the Review Committee, Chairman Sir Kenneth Cork CBE (Cmnd 8558 (1982)), (the "Cork Report").

[8] The Cork Report.

[9] Harry Rajak, Company Rescue and Liquidation, 3rd edition, Sweet & Maxwell, p.3. It is to be noted that the UK Enterprise Act of 2002 amended the Insolvency Act of 1986.

[10] Companies and Allied Matters Act Cap C20 LFN 2004. See also Bolanle Adebola, "The Nigerian Business Rescue Model: An Introduction", (2013) NIALS Journal of Legal Studies (forthcoming); Anthony Idigbe SAN (supra).

[11] Akingbolahan Adeniran, Mediation-Based Approach to Corporate Re-organisations in Nigeria, 29 N.C.J Int'l L. & Com. Vol. 29, pp. 291-252 (2003-2004)

[12] Bolanle Adebola (supra). See also J.I. Oyegun, "Receivers and Managers" in E.O. Akanki (ed), Essays on Company Law, University of Lagos Press, P.245

[13] J.I. Oyegun (supra)

[14] J.I. Oyegun (supra)

than what they are ordinarily entitled to in lieu of their obligation. Also, a company may persuade its creditors to accept shares or part-shares and part-cash in lieu of their debt. Furthermore, an agreement may be reached with ordinary shareholders to surrender part of their shares to preference shareholders in the place of dividend arrears. By sections 539 and 540 of the CAMA, an arrangement must be sanctioned by the court.
In Ghana, the legal framework for companies and insolvency is a set of three laws namely the Insolvency Act 1962, Companies Code of 1963 and the Bodies Corporate (Official Liquidatings) Act of 1963[15]. There is at present a Draft Corporate Insolvency Bill[16].
In South Africa, business rescue is one of the innovative features of the Companies Act 2008[17]. South Africa belongs to the same legal family as Namibia[18]. The framework for business rescue is chapter 6 of the Companies Act of 2008[19]. Section 7(k) of the Companies Act of 2008 states that one of the purposes of the Act is to "provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders"[20]. The chapter provides, inter alia, for mode of commencement of business rescue proceedings, duration of business rescue and business rescue plan.

R.H. Zulman (2009), in an article entitled "Cross-Border Insolvency in South African Law", examined the Cross-Border Insolvency Act 42 of 2000. He stated that the Act is based on the outmoded concept of reciprocity and that the concept is political in nature. Also, Michele Olivier and Andre Borraine (2005) in an article entitled "Some Aspects of International Law in South African Cross-Border Insolvency Law" stated that harmonization of laws can be achieved through two broad ways namely treaties and model law. Similarly, M.A.L.M. Willems (2006 ), in a book entitled UNCITRAL Model Law on Cross-border Insolvencies, stated inter alia, that the UNCITRAL Model Law on Insolvency (upon which the South African Cross-border

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[15] W. Paatii Ofosu-Amaah, Reforming Business-related Laws to Promote Private Sector Development: The World Bank Experience in Africa, The International Bank for Reconstruction and Development / The World Bank, (2000) p. 30.
[16] See Daily Graphic (Online) of 17th, 2014 with the caption "Pass Insolvency Law - GARIA" –available at http://graphic.com.gh/business/business-news/19517-pass-insolvency-law-garia.html#sthash.xCoHJ6MG.dpuf, accessed on 3rd December, 2014.
[17] See generally FHI Cassim et al (supra)
[18] They both have the Roman-Dutch and English Common Law origin. See generally Ndulo, Muna, "The Need for the Harmonization of Trade Laws in the Southern African Development Community", 4 Afr. Y.B. Int'l L. 199 (1996).
[19] See generally FHI Cassim et al (supra)
[20] See also the Department of Trade and Industry policy paper entitled "South African Company Law for the 21st Century: Guidelines for Corporate Law Reform" GN 1183 of 23 June 2004; GG 26493 para 4.6.2.

Insolvency Act 2000 is based) is procedural. Moreover, Jane Franco (2003) in an article entitled "The Cross-Border Insolvency Act: Lifting the Barrier or Creating New Ones", examined the Cross-Border Insolvency Act. She stated that the South African Cross-border insolvency Act 2000 is based on reciprocity.

In spite of the various business rescue models in operation in different African countries, there is no provision for the harmonization of transnational laws thereby creating controversies in the applicable law.

### 1.1.1. Importance of Harmonisation of Laws

The importance of harmonization of law cannot be over-emphasised. The late Professor Ademola Yakubu in his book "Harmonisation of Laws in Africa" outlined the various benefits of harmonization of laws[21]. These include the following. Firstly, harmonization promotes globalization of private business. Rules of law are uniform and predictable. This enhances international trade[22].

Secondly, harmonization facilitates cross-fertilisation of ideas. States can adopt, at the international level, relevant principles of law peculiar to a specific jurisdiction[23].

Thirdly, harmonisation promotes cooperation and systemization of rules of law of various states[24].

### 1.1.2. Importance of Cross-border Business Rescue

There are many advantages of business rescue. They include the following. Firstly, it preserves jobs[25]. In South Africa, the level of unemployment is high[26]. Also, in Botswana, the rate of unemployment is high[27]. Secondly, it enables businesses to contribute to the society through

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[21] Ademola Yakubu, Harmonisation of Laws in Africa, Malthouse Press Ltd, 1999, pp 29-36.
[22] Yakubu (ibid)
[23] Yakubu (supra).
[24] Yakubu (ibid).
[25] Harry Rajak and Johan Henning,"Business Rescue for South Africa", 116 S. African LJ 262 (1999), p 262.
[26] Statistics South Africa - http://www.statssa.gov.za accessed on 17/1/2015. According to Statistic South Africa, the current rate of unemployment is 25.4%.
[27] It is twenty percent in 2014 - Central Statistics Office of Botswana, available at http://www.cso.gov.bw/index.php/component/content/?task=view&id=20, accessed on 20/1/2015.

taxation and corporate social responsibility[28]. Thirdly, business rescue enables work in progress to be satisfactorily completed[29]. Fourthly, it promotes foreign investment[30]. Fifthly, according to the World Bank**,** the highest recovery rates for creditors are recorded in economies where restructuring is the most common insolvency proceeding[31].

### 1.2.0. Justification

The current business rescue model of South Africa does not reflect the economic hub status of South Africa in the sub-region. In other words, the current model takes no cognizance of South Africa's business interests in other SADC countries.

SADC as a body does not have a business rescue model for multinational companies operating in the region. There is lack of adequate information on resolution of disputes involving different jurisdictions (countries) in which the multinational companies operate.

### 1.3. 0. Objective

The objective of this study involves:

(1) x-raying of current South Africa business rescue model;

(2) restructuring of SADC economic framework to incorporate business rescue in its operation.

The overall objective of this study is to develop a simple, more robust business rescue model putting into consideration critical role of South Africa in the SADC region.

### 1.4. 0. Methodology

The research is doctrinal. Materials would be sourced from the library and the internet. These materials include legislations, judicial decisions (cases), articles, books, newspaper articles, treaties and agreements and resolutions of commissions, bodies and organs established for the promotion and regulation of businesses in South Africa and SADC.

### 1.5. Outline

In the next chapter, I will examine business rescue in South Africa under chapter 6 of the Companies Act 71 of 2008. I will also examine the South African Cross-Border Insolvency Act

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[28] Anthony Idigbe SAN, "Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: the role of Judges", being a paper presented at the 2011 Federal High Court Judges Conference held at Sankuru Hotel, Sokoto on 11th October, 2011.

[29] See generally Harry Rajak and Johan Henning (supra)

[30] See generally FHI Cassim et al, (supra).

[31] Doing Business, World Bank/ International Bank for Reconstruction and Development (2011).

42 of 2000 particularly the aspects that pertain to cross-border business rescue.

In chapter 3, I will examine SADC and its business rescue mechanism(s). Under the chapter, I will give a brief history of SADC. I will also talk about the major institutions (organs) of SADC. In addition, I will talk about the challenges facing SADC.

In chapter four, I will propose a harmonized business rescue model for the SADC sub-region. Under the chapter, I will discuss, among other things, the sources of international law (as it relates to harmonization of laws); the appropriate option(s) for the harmonization of law in the SADC sub-region; and the business rescue regimes in the world.

Chapter five is the conclusion.

## CHAPTER TWO

## BUSINESS RESCUE UNDER THE SOUTH AFRICAN COMPANIES ACT 71 of 2008 AND THE CROSS-BORDER INSOLVENCY ACT.

### 2.0.0. Definition and Purpose

Chapter 6 of the Companies Act of 2008 provides for business rescue in South Africa. Section 128(1)(b) of the Companies Act defines business rescue thus: "proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for: (i) the temporary supervision of the company, and of the management of its affairs, business and property; (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis, or if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company".

Business rescue facilitates the rehabilitation of a company that is in financial difficulty or in certain other circumstances[32]. It aims to strike a golden mean between the interests of the debtor company, which is afforded the opportunity to prepare a rescue plan with some protection from action by creditors, and the creditors themselves who have a right to vote on the plan[33]. The philosophy of the Companies Act 2008 is expressed in its section 7. Section 7 provides inter alia:

"The purposes of this Act are to –

(b) promote the development of the South African economy by –

(i) encouraging entrepreneurship and enterprise efficiency;

(ii) creating flexibility and simplicity in the formation and maintenance of companies;

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[32] Anneli Loubser, Some Comparative Aspects of Corporate Rescue in South Africa, LL.D thesis submitted to the University of South Africa, available at http://www.uir.unisa.ac.za/handle/10500/3575 accessed on 25th September, 2014.

[33] Jonathan Rushworth, "A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008" in T.Moshepo Mongalo (ed.) Modern Company Law for a Competitive South African Economy, JUTA, p.375.

(c) promote innovation and investment in the South African markets;
(d) re-affirm the concept of the company as a means of achieving economic and social benefits;
(f) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders".[34]

The foregoing refer to the substructure of business rescue[35]. There are two objectives of business rescue namely[36]: (a) restoring ailing companies to profitability (b) better realization of assets.

2.1.0. Commencement of Business Rescue

There are two ways by which business rescue proceedings can be commenced. These are as follows:

(a) by a resolution of the board of directors of the company to voluntarily begin business rescue proceedings, if the board has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company[37];
(b) an affected person may apply to a court at anytime for an order placing the company under supervision and commencing business rescue proceedings[38].

Each of these will be discussed seriatim.

**2.1.1. Commencement by Voluntary Board Resolution**

By section 129 (1) of the Companies Act, the board of directors of a company may, subject to section 129 (2)(a), resolve that the company voluntarily begins business rescue proceedings. Two conditions must be satisfied before this mode of commencement can be successfully initiated. Firstly, as per section 129(1)(a), the board of directors must have "reasonable grounds

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[34] See also the Department of Trade and Industry policy paper entitled "South African Company Law for the 21st Century: Guidelines for Corporate Law Reform" GN 1183 of 23 June 2004; GG 26493 para 4.6.2. See also George Mutsa Museta, The Development of Business Rescue in South African Law, a thesis submitted in fulfillment of the requirement of the award of LL.M, Faculty of Law, University of Pretoria, available at http:// upetd.up.ac.za/thesis/available/etd-09102012-141143/.../dissertation.pdf, accessed on 30th September, 2014.

[35] George Mutsa Museta, (supra)

[36] FHI Cassim et al (supra). See generally Anneli Loubser (supra).
[37] Section 129(1) Companies Act 2008.
[38] Section 131(1) Companies Act 2008.

to believe that the company is financially distressed". Secondly, as per section 129(1)(b), " the board has reasonable ground that there appears to be a reasonable prospect of rescuing the business".

With respect to the first condition i..e. that the company must be "financially distressed", section 128(1) of the Companies Act defines a "financially distressed company" as "one that appears to be reasonably unlikely to be able to pay all its debts as they become due and payable within the immediately ensuing six months or a company that appears to be reasonably likely to be insolvent within the immediately ensuing six months". The foregoing refers to cash-flow insolvency and balance-sheet insolvency respectively[39].

In F E Gormley v West City Precinct Properties (Pty) Ltd[40], Traverso DJP Deputy Judge President of the Cape High Court, held that business rescue should apply only to companies that are "financially distressed" as defined in section 128(1)(f). The judge stated:

"It must either be unlikely that the debts can be repaid within six months or that there is the likelihood that the company will go insolvent within the ensuing six months. In this case the company is presently insolvent and cannot pay its debts unless a moratorium of three to five years is granted. The facts of this matter do not bring West City's financial situation within the definition of 'financially distressed'. That should, in my view, be the end of the matter."

The judge said that business rescue is designed as a "short-term approach" and that "[t]his is so for self-evident reasons. There must be a measure of certainty in the commercial world. Creditors cannot be left in a state of flux for an indefinite period." The court held that the company was so insolvent that it did not fall within the definition of "financially distressed". The application for the business rescue was dismissed and the company was placed in provisional liquidation.

With respect to the second condition, the essence is preventing companies that are not economically viable from being place under business rescue proceedings[41]. It must be stated that the court has interpreted the expression "reasonable prospect". In Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd[42], the applicant alleged that the company has reasonable prospect to recover. The judge held that allegations must contain some "concrete and objectively ascertainable details going beyond mere speculation". The court held that the

[39] Jonathan Rushworth (supra).
[40] Traverso DJP in F E Gormley v West City Precinct Properties (Pty) Ltd (unreported).
[41] Harry Rajak and Johan Henning (supra).
[42] Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC). See

following factors will be taken into consideration namely: the likely costs of rendering the company capable of resuming its business, the likely availability of the necessary cash resources and any other necessary resource, and why the proposed plan will have a reasonable prospect of success. The court dismissed the application for business rescue in this case.

Similarly, in W G Koen v Wedgewood Village Golf[43], Judge Binns-Ward stated thus "[w]hatever the object of the proposed business rescue [i.e. whether recovery or a better return for creditors or shareholders than would result from immediate liquidation] in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved." The court in this case dismissed the application for business rescue.

Also, in Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd[44], Judge Classen stated as follows: "I would add that if the facts indicate a reasonable possibility of the company being rescued, a court may exercise its discretion in favour of granting a business rescue order". In this case, the court dismissed the application for business rescue.

Commencement by voluntary board resolution has some advantages including the following. Firstly, it saves time and money[45]. There is no court involvement at this stage. Secondly, it allows the board to treat impending insolvency at an early instead of a later stage[46].
Thirdly, voluntary board resolution is a reflection of a debtor -friendly business rescue system[47].
Fourthly, it is a flexible way of commencing rescue proceedings. In other words, there is facility with respect to its implementation.

However, commencement by voluntary board resolution allows the board of directors to eat their cake and have it: they might have brought about the rescue proceedings due to their ineptitude.[48]
Both majority and minority directors (dissenting directors) are bound by the board's resolution[49].

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[43] W G Koen v Wedgewood Village Golf 2012 (2) SA 378 (WCC). See also AG Petzetakis International Holdings Limited v Petzetakis Afrika (Pty) Ltd 2012 (5) SA 515 (GSJ).
[44] Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd 2012 (3) SA 273 (GSJ). See also Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 (Pty) Ltd 2012 JDR 1166 (FB); Nedbank Limited v Bestvest 153 (Pty) Ltd 2012 (5) SA 497 (WCC); First Rand Bank Limited v Zoneska Investments (Pty) Ltd 2012 JDR 1494 (WCC).
[45] Cassim et al (supra).
[46] Anneli Loubser (supra); The Cork Report
[47] Cassim (supra).
[48] Cassim (supra)
[49] Cassim (supra)

Rescuing the company means achieving the goals of business rescue.

The Companies Act imposes some restrictions on the board resolution to commence business rescue proceedings. Section 129(2) states thus: "A resolution may not be adopted if liquidation proceedings have been initiated by or against the company; and (b) has no force or effect until it has been filed with the Companies and intellectual Property Commission".

A company may not adopt a resolution to commence liquidation proceedings once the board has decided to voluntarily commence business rescue proceedings[50]. However, there is an exception – where the resolution to commence proceedings has lapsed or after the business rescue proceedings have become terminated[51].

Furthermore, there are a number of restrictions with respect to publicity requirements of board resolution. The purpose of this is to save time and prevent abuse of procedure[52]. One of such restrictions is that the company must publish a notice of the board resolution within five business days of the filing of the resolution, to every "affected person"[53]. A sworn statement of the facts relevant to the grounds for the board resolution must be attached to the notice.[54] An "affected person" is defined as a shareholder or creditor of the company, a registered trade union representing employees of the company, and each of those employees not represented by a trade union or representatives of such employees[55].

By section 129(3), the company must appoint a business rescue practitioner. Section 129 (3) provides thus: "Within five business days after a company has adopted and filed a resolution, as contemplated in sub-section (1), or such longer time as the Commission, on application by the company, may allow, the company must – (b) appoint a business rescue practitioner who satisfies the requirements of section 138 and who has consented in writing to accept the appointment". A notice of the appointment of the business rescue practitioner must be filed within two business days of such

[50] Section 129(6)
[51] Section 129(6).
[52] Cassim (supra)
[53] Section 129(7).
[54] Section 129(3)(a of the Companies Act.
[55] Section 128(1)(a).

appointment. Also, a copy of the notice of appointment must be sent to each affected person within five business days after the notice was filed[56].

The effect of non-compliance with the foregoing provisions or their prescribed time periods is the lapse and nullity of the board resolution commencing business rescue proceedings[57]. In Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies (GNP)[58], the court held thus: "If there is non-compliance with s129(3) and (4) the relevant resolution lapses and is a nullity….. There is no other way out, and no question of any condonation or argument pertaining 'substantial compliance'." The import of this judgement is that the argument of "substantial compliance" will not avail any business rescue practitioner or directors who are considering placing a company under supervision. Perhaps, the practitioner or directors involved would have to make application to court under section 129(5)(b). According to section 129(5)(b), the court may grant an application, on good cause shown, to file a further resolution to place the company under supervision.

Also, by section 129(6), once the board adopts voluntarily a resolution to commence business rescue proceedings, it may not adopt a resolution to commence liquidation. However, there are two exceptions. Firstly, the board may adopt a resolution to begin liquidation where the resolution to commence business rescue proceedings have lapsed[59] in terms of section 129(5) . Secondly, liquidation may be initiated where the business rescue proceedings have terminated[60]. Also, as stated in section 129(5)(b), a company may not file a similar resolution unless a court (High Court) approves the company filing a further resolution.

By section 129(7), if the board does not adopt a resolution to commence business rescue even though it has reasonable grounds to believe that the company is financially distressed, the board must deliver a written notice to each affected person setting out which of the two criteria for financial distress applies to the company and the reasons for not adopting a resolution to commence a business rescue proceedings. This allows an affected person to institute an action to commence business rescue proceedings[61].

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[56] Section 129(4) and (b).
[57] Section 129(5)(a)
[58] Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies (GNP) 2012 JDR 0345 (GNP). See generally Mododza (Pty) Ltd (in business rescue) v Absa Bank (case 38906/2012, unreported).
[59] Section 129(6).
[60] Section 129(6
[61] Cassim (supra)

At any time after the adoption of a board resolution commencing the proceedings until a business rescue plan is adopted, an affected person may apply to a court for an order to set aside the resolution or to set aside the appointment of the business rescue practitioner[62]. There are some grounds by which the resolution may be set aside[63]. These include the following. Firstly, the resolution will be set aside where there is no reasonable basis for believing that the company is financially distressed[64]. Secondly, the resolution will be set aside where there is no reasonable prospect for rescuing the company[65]. The grounds for setting aside the appointment of the practitioner include his not being properly qualified or independent or lacking the necessary skills, having regard to the company's circumstances[66]. An order may also be sought requiring the practitioner to provide security in an amount and on terms and conditions the court considers necessary to secure the interests of the company and any affected persons[67].

By section 130(2), a director who voted in favour of a resolution commencing the business rescue proceedings (in his capacity as an affected person) may not apply to the court to set aside the resolution or the appointment of the practitioner, unless he satisfies the court that, in supporting the resolution, he had acted in good faith on the basis of information that has subsequently been found to be false or misleading. A copy of the application to court must be served by the applicant on the company and the Commission[68]. Each affected person must be notified and they have a right to participate in the hearing of the application[69]. The court has wide powers when considering the application, for example, it may set aside the resolution on the grounds set out in the Act, or if it considers it is just and equitable to do so, or it may provide the practitioner with sufficient time to form an opinion on certain matters concerning the grounds for the application to court, for instance as to whether there is a reasonable prospect of rescuing the company[70]. The court may set aside the resolution, after receiving the practitioner's report of

[62]Section 130(1).
[63] S.130(1)
[64] Section 130(1)(a)(i).
[65] Section 130(1)*(a)*.
[66] Section 130(1)*(b)*.
[67] Section 130(1)*(c)*.
[68] Section 130(3)*(a)*.
[69]Sections 130(3)*(b)* and 130(4).
[70] Sections 130(5)*(a)* and *(b)*.

his opinion, if the court decides that the company is financially distressed or there is no reasonable prospect of rescuing the company[71].

By section 130(5)(c), the court may make further orders when setting aside the board's resolution, for instance that the company be placed under liquidation or an order for costs against any director who voted in favour of the resolution to commence the proceedings, if there were no reasonable grounds for believing that the company would be unlikely to pay its debts as they became due and payable[72]. Nevertheless, such an order will not be made where the director acted in good faith[73]. Also, if the court sets aside the appointment of a practitioner, it must appoint an alternate practitioner recommended by, or acceptable to, the holders of a majority of the voting interests of independent creditors who were represented in the hearing before the court[74]

### 2.1.2. Commencement of Business Rescue by Court order

By section 131(1) of the Companies Act 2008, an affected person may apply to a court for an order to place the company under supervision and to commence business rescue proceedings. However, where business rescue is commenced by voluntary board resolution, business rescue may not be commenced under this subsection.[75]. The applicant to the court must serve a copy of the application on the company and the Commission and notify each affected person[76]. Every affected person may participate in the hearing of the application[77].

**Powers of the Court**

The court, after considering the application, may make an order to place the company under supervision and to commence business rescue proceedings, if it is satisfied of the following conditions namely: (a) that the company is financially distressed (b) that it has failed to pay an amount due under a public regulation (as defined in the new Act) or under a contract, in respect of employment matters; (c) that it is otherwise just and equitable to do so for financial reasons[78].

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[71] Section 130(5)*(b)*.
[72] Section 130(5)*(c)*.
[73]Section 130(5)*(c)*(ii).
[74] Section 130(6).
[75] Section 131(1).
[76] Section 131(2).
[77] Section 131(3).
[78] Section 131(4)*(a)*.

In respect of each of these grounds, the court must also be satisfied that there is a reasonable prospect for rescuing the company.[79]

Unlike the grounds for commencing business rescue proceedings by voluntary board resolution, the grounds for commencing business rescue proceedings under section 131are wider. This is because they are not limited to cash flow and balance sheet insolvency.

Also, after considering an application, the court may dismiss it and, in doing so, may make other orders, including placing the company under liquidation[80]. If the court makes an order commencing the proceedings, it may appoint an interim business rescue practitioner nominated by the affected person who commenced the proceedings at court[81]. This appointment is subject to ratification by the holders of a majority of the voting interests of independent creditors at the first meeting of creditors.

By section 131(6) if liquidation proceedings have already been commenced when an application is made for the commencement of business rescue proceedings, the liquidation proceedings will be suspended until the court has adjudicated on the application or, until the proceedings end if the court makes the order to begin the business rescue proceedings.[82] Also, the court may make an order commencing business rescue proceedings or to appoint an interim business rescue practitioner during the course of any liquidation proceedings or proceedings to enforce any security against the company[83].

By section 131(8), a company which has been placed under supervision may not adopt a resolution placing itself in liquidation until the proceedings have ended and it must notify every affected person of the court order within five business days of its date.

### 2.2.0. Duration of business rescue proceedings

Section 132 provides for the commencement and termination of business rescue proceedings. The moratorium commences when the business rescue proceedings also commences. Business rescue proceedings commence via a formal application by the board of directors, an affected person or the court.

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[79] Section 131(4)*(a)*.
[80] Section 131(4)*(b)*.
[81] Section 131(5).
[82] Section 131(6).
[83] Section 131(7).

By section 132(2), business rescue proceedings end when the court sets aside a resolution or order commencing the proceedings or converts the proceedings to liquidation proceeding; the business rescue practitioner files a notice of termination of the proceedings with the Commission; a business rescue plan has been proposed and rejected, without action being taken to extend the proceedings[84]; or the plan has been adopted and notice of substantial implementation of the plan has been filed by the practitioner[85].

If the business rescue proceedings have not ended within three months or longer if the court allows, on the application of the business rescue practitioner, the practitioner must prepare a report on the progress of the proceedings, with updates at the end of each subsequent month[86]. The business rescue practitioner must also deliver the report and each update to every affected person and to the court, if the proceedings were the subject of a court order, or to the Commission, in any other case.[87]

**2.3.0. Moratorium (Stay)**

There is an automatic stay on legal proceedings or executions against the company, its assets and on the exercise of the rights of creditors during business rescue proceedings. Thus, the business rescue practitioner and, in appropriate cases, the directors are afforded the opportunity to reschedule the debts and liabilities of the companies while the company carries on its operation.

**2.3.1. Moratorium on Legal Proceedings**

By section 133(1), the company is protected against legal proceedings during business rescue. Section 133(1) provides expressly thus: "During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company may be commenced or proceeded with in any forum". Nevertheless, the foregoing admits of some exceptions. These are as follows. Firstly, by section 133(1)(a), the practitioner may consent in writing to such proceedings being commenced or continued. Secondly, by section 131(1)(b), the court may give leave on terms it considers suitable. Thirdly, by section 133(1)(c), set-off rights may be exercised against a claim made by the company in legal proceedings (whether the proceedings commenced before or after the business rescue proceedings began).

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[84] Section 132(2)*(c)*(i).
[85] Section 132(2)*(c)*(ii)
[86] Section 132(3)*(a)*
[87] 56 Section 132(3)*(b)*.

Fourthly, criminal proceedings may be brought against the company, its directors or officers[88]; Fifthly, by section 133(1)(e), proceedings may take place in respect of property or rights over which the company exercises the powers of a trustee[89]. Sixthly, by section 133(2), if a company is subject to business rescue proceedings, a guarantee or a surety in respect of its liabilities in favour of any other person may not be enforced against the company that gave it, unless the court grants leave and on terms it considers just and equitable in the circumstances. Thus, in Investec Bank Ltd v Andre Bruyns[90], the court held that, in business rescue proceedings, a surety for a company's debt can be sued for such debt by the creditors - the moratorium in favour of a company under temporary supervision as per Chapter 6 attaches only to the company and cannot be extended to the surety.

By section 133(3), if the commencement of proceedings or claims is subject to a time limit, it is suspended during the business rescue proceedings.

### 2.3.2. Moratorium on property interests

By section 134(1), during business rescue proceedings, subject to certain exceptions, a company may dispose or agree to dispose of its property only in the following circumstances: (a) in the ordinary course of its business[91]; (b) in a *bona fide* transaction at arm's length for fair value approved in advance (in writing) by the practitioner[92] or (c) as part of the implementation of an approved business rescue plan[93].

According to section 134(1)(b), where a third party is in lawful possession of any property owned by the company, under an agreement made in the ordinary course of its business before the proceedings commenced, he may exercise rights in respect of the property under the terms of the agreement, subject to certain rights which arise during the proceedings. Also, by section 134(1)(c), no person may exercise any right in respect of any property in the lawful possession of the company during the business rescue proceedings, whether or not the property is owned by the company, unless the practitioner consents in writing, despite any provision of an agreement to the contrary.

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[88] Section 133(1)*(d)*.
[89] Section 133(1)*(e)*.
[90] Investec Bank Ltd v Andre Bruyns [2011] ZAWCHC 423.
[91] Section 134(1)*(a)*(i).
[92] Section 134(1)*(a)*(ii).
[93] Section 134(1)*(a)*(iii).

If the company wishes to dispose of any property in which a third party has a security or title interest, it must obtain the prior consent of the other party, unless the proceeds would be sufficient to discharge the indebtedness protected by the security or title interest[94]. Also, the proceeds of the sale must be promptly paid to the third party to discharge the company's indebtedness or otherwise security must be provided for the amount of those proceeds, to the reasonable satisfaction of the third party[95].

**2.4.0. Post-Commencement Finance**

Section 135(2) provides that a practitioner may obtain finance for the operation of the company during the rescue proceedings. The finance may be secured on assets of the company which are not otherwise encumbered and which will therefore rank ahead of unsecured creditors of the company, subject to certain costs and expenses and liabilities to employees[96]. The advantage of post-commencement finance is that it facilitates the running of the company particularly where the previous creditors of the company are not ready or are unable to provide additional funding to the company[97].

Section 135(3)(a) and (b) provides for the ranking of claims concerning post-commence finance. It states thus "After payment of the practitioner's remuneration and expenses referred to in section `143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated –

(a) in subsection (1) will be treated equally, but will have preference over –
    (i) all claims contemplated in subsection (2), irrespective of whether or no they are secured ; and
    (ii) all unsecured claims against the company; or
(b) in sub-section (2) will have preference in the order in which they were incurred over all unsecured claims against the company".

Any remuneration and expenses and other amounts relating to employment which are not paid by the company will be paid after the practitioner's remuneration and expenses and other claims

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[94] Section 134(3)*(a)*.
[95] Section 134(3)*(b)*
[96] Section 135(2).

[97] See Jonathan Rushworth (supra).

arising out of the costs of the business rescue proceedings[98]. These are all post-commencement finance[99]. Also, they will be treated equally but have preference over unsecured claims and amounts incurred for post-commencement finance during the proceedings, whether or not these amounts are secured[100].

By section 135(4), the preference in respect of payment will continue if the proceedings are superseded by a liquidation order, except to the extent of any claims arising out of the costs of liquidation.

**2.5.0. Effect of Business Rescue Proceedings on Various Stakeholders**

Business rescue proceedings have different effects on employment contracts, company contracts, shareholders and directors.

**2.6.1. Effect of Business Rescue Proceedings on Employees And Contracts Generally**

By section 136(1), employees of the company who are employed immediately before the business rescue proceedings commence will continue to be employed on the same terms and condition. However, there are some exceptions namely: (a) where there are changes in the ordinary course of attrition; and (b) where the employees and the company agree to different terms and conditions, in accordance with applicable labour law[101]. Retrenchment of employees contemplated in a business rescue plan is subject, as per section 136(1)(b), to certain provisions of the Labour Relations Act, 1995 and other relevant employment legislation.

According to section 136(2)(a), the business rescue practitioner may suspend any provision of an agreement to which the company is a party when the proceedings commence, entirely, partially or conditionally, despite any contrary provision in the agreement. However, the practitioner may not suspend the provisions of an employment contract and agreement relating to certain provisions of the Insolvency Act, 1936[102]. Also, the business rescue practitioner may make an application urgently to court to cancel, wholly or conditionally, any contract of the company which obstructs the business rescue proceedings[103]. The basis of the application is that the

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[98] Section 135(1)

[9999] See generally section 135(1).

[100] Section 135(1), read together with s 135(3)*(a)*.

[101]Section 136(1)*(a)*.

[102] Section 136(2A).

[103] Section 136(2)(b)

cancellation is just and reasonable in the circumstances[104]. By section 136(3), a party to an agreement which has been suspended or cancelled (or where any provision has been suspended or cancelled) may institute an action against the company for damages only.
According to section 136(4), if liquidation proceedings are converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim for his remuneration and expenses incurred before the business rescue proceedings began.

**2.6.2. Effect of Business Rescue Proceedings on Shareholder and Directors**

By section 137(1), any alteration to the classification or status of securities during business rescue proceedings other than by way of a transfer of securities in the ordinary course of business is invalid. However, this is subject to two exceptions namely (a) where the court directs such alteration; and (b) where such alteration is contemplated in an approved business rescue plan[105]. With respect to directors, by section 137(2)(a), they must continue to exercise their functions as directors during the proceedings, subject to the practitioner's authority. Also, according to section 137(2)(b), each director has a duty to the company to exercise management functions in the company as expressly instructed or directed by the practitioner, to the extent it is reasonable to do so. Moreover, directors remain bound by the requirements of section 75 of the Act concerning their (and related persons) personal financial interests[106]. By section 137(2), to the extent that each director complies with the duty to exercise management functions as expressly instructed or directed and acts in accordance with the requirements concerning personal financial interests, he is relieved from having to comply with the general standards required for directors' conduct and from certain liabilities spelt out in sections 76 and 77 respectively.

Each director must attend to the requests of the practitioner at all times during the business rescue proceedings and provide the business rescue practitioner with information about the company's affairs as may reasonably be required[107]. By section 137(4) if one or more directors purport to take any action on behalf of the company which requires the approval of the practitioner, the action is void unless it is approved by the practitioner[108]. The business rescue

[104] Section 136(2)(b).
[105] Section 137(1)*(b)*.
[106] Section 137(2)*(c)*.
[107] Section 137(3).
[108] Section 137(4).

practitioner may apply to court for an order removing a director from office on any of the following grounds. Firstly, the court may remove a director, upon application by a practitioner where the director has failed to comply with a requirement of this chapter[109]. Secondly, a director may be removed where by act or omission, he has impeded, or is impeding the practitioner in the performance of his powers and functions, the management of the company by the business rescue practitioner; or the development or implementation of a business rescue plan[110].

### 2.6.0. Qualifications of Business Rescue Practitioners

Section 138 spells out the qualifications of business rescue practitioner. Section 138(1) provides thus: "A person may be appointed as the business rescue practitioner of a company only if the person –

(a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission;
(b) has been licensed as such by the Commission in terms of subsection (2);
(c) is not subject to an order of probation in terms of section 162(7);
(d) would not be disqualified from acting as a director of the company in terms of section 69(6);
(e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and
(f) is not related to a person who has a relationship contemplated in paragraph (e)".

By section 138(2), the Companies and Intellectual Property Commission may license any qualified person to practice as a business rescue practitioner. The Commission may also suspend or withdraw such licence[111]. Furthermore, the Minister may make regulations prescribing standards and procedure to be followed by the Companies Commission in carrying out its functions. Also, according to section 138(2), the Minister may make regulations providing for minimum qualifications for aspiring business rescue practitioner.

### 2.7.0. Removal and Replacement of practitioner

Section 139 provides for the removal and replacement of a business rescue practitioner. A business rescue practitioner may be removed by a court order on two bases[112]. Firstly, a practitioner may be removed due to an objection to his or her appointment by an affected person

[109] Section 137(5)*(a)*.
[110] Section 137 (5)*(b)*.
[111] Section 138(2).
[112] Section 139(1) and (2).

following a business rescue resolution[113]. The grounds for such objection include lack of relevant skill and relationship with the company[114]. Secondly, by section 139(2), the court may, suo motu, remove a business rescue practitioner from office on a number of grounds[115]. Section 139(2) provides inter alia: " the court may remove a practitioner from office on any of the following grounds:

(a) incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
(b) failure to exercise the proper degree of care in the performance of the practitioner's functions;
(c) engaging in illegal act or conduct;
(d) if the practitioner no longer satisfies the requirements set out in section 138(1);
(e) conflict of interest or lack of independence; or
(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time".

By section 139(4), if a business rescue practitioner dies, resigns or is removed from office, the company itself or any creditor who nominated the practitioner must appoint a new practitioner[116]. However, an affected person may apply to the court to set the appointment on the same grounds as those which apply following the appointment of a practitioner on the adoption of a resolution by directors to commence business rescue proceedings[117].

### 2.8.0. General Powers and Duties of Practitioners, including Investigations And Directors' Duties to Co–Operate With Practitioners

The business rescue practitioner has a lot of duties to perform. Thus, the practitioner is given enormous powers to enable him or her carry out the duties.

### 2.8.1. Powers and duties of the practitioners

[113] Section 130
[114] Sections 138 and 139.
[115] Section 139(2).
[116]Section 139(3).
[117] Section 139(3).

By section 140(1), a practitioner has wide powers and duties including full management control of the company in substitution for its board and management. However, he may delegate any of his powers or functions to anyone who was a director or part of the pre-existing management of the company[118].

Also, by section 140(1)(c), the practitioner has power to remove from office any person who formed part of the management of the company. He may also appoint a person as part of the management, whether or not to fill a vacancy, provided that the approval of the court is obtained to appoint such a person where that person has a relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person would be compromised[119], or where that person is related to a person who has such a relationship[120].

According to section 140(3)(a), a practitioner is an officer of the court during the proceedings. Thus, he or she must report to the court in accordance with any applicable rules of, or orders made by, the court.

Also, by section 140(3(b), the practitioner has the same responsibilities, duties and liabilities of a director in respect of personal financial interests, standards of conduct and certain liabilities, as provided in sections 75 to 77 of the Companies Act 2008.

According to section 140(3)(c)(i), the practitioner is not liable for any act or omission in good faith in the course of the exercise of his powers and the performance of his functions as practitioner[121]. However, he may be liable under relevant law for the consequences of any act or omission which amounts to gross negligence in the exercise of his powers and the performance of his function as practitioner.[122]

If the business rescue proceedings conclude with an order placing the company in liquidation, anyone acting as practitioner during the proceedings may not be appointed liquidator[123].

This prevents any conflict of interest from arising between a business rescue practitioner and a liquidator[124]. In addition, it enables a liquidator to challenge any actions taken by the business rescue practitioner which are considered inappropriate or in breach of duty[125].

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[118]Section 140(1)*(b)*.
[119]Section 140(2)*(a)*.
[120] Section 140(2)*(b)*.
[121]Section 140(3)*(c)*(i).
[122]Section 140(3)*(c)*(ii).
[123]Section 140(4).

### 2.8.2. Investigation of the company's affairs

By section 141, a practitioner has a duty to investigate the company's affairs, business, property and financial situation, as soon as practicable after his appointment. After such investigation, he must assess the degree of severity of the company's financial difficulties and consider whether there is a reasonable prospect of the company being rescued[126]. By section 141(2), if at any time he concludes that there is no reasonable prospect for the company to be rescued, he must inform the court, the company and all affected persons. In addition, he must apply to court for an order discontinuing the proceedings and placing the company into liquidation[127]. The court may make the order applied for or any other order it considers appropriate in the circumstances[128].

By section 141(2)(b)(ii), if at any time during the proceedings, the practitioner concludes that there are no longer reasonable grounds to believe the company is financially distressed, he must inform the court, the company and all affected persons and apply to court for an order to terminate the proceedings, if the process was confirmed by court order or initiated by an application to the court[129]. If the proceedings did not involve a court order, he must file a notice of termination of the proceedings with the Commission[130]. If at any time the practitioner concludes that there is evidence, in the company's dealings before the proceedings began, that there were voidable transactions or a failure by the company or a director to perform any material obligation in relation to the company, he must direct the management to take any necessary steps to rectify the matter[131]. According to section 141(2)(c)(ii)(aa), if there is evidence that there has been reckless trading, fraud or other contravention of any law relating to the company, he must forward the evidence to the appropriate authority for further investigation and possible prosecution. In addition, he must direct the management to take any necessary steps to rectify the matter, which may include recovering any misappropriated company assets[132].

### 2.8.3. Duty of directors to co-operate with and assist a practitioner

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[124] FHI Cassim (ibid).
[125] Jonathan Rushworth (ibid).
[126] Section 141(1).
[127] Section 141(2)*(a)*(ii).
[128] Section 141(3).
[129] Section 141(2)*(b)*(i)
[130] Section 141(2)*(b)*(ii).
[131] Section 141(2)*(c)*(i).
[132] Section 141(2)*(c)*(ii)(*bb*).

Section 142 provides for the duty of directors to cooperate and assist a business rescue practitioner. Sub-section 1states thus: "As soon as practicable after business rescue proceedings begin, each director must deliver to the practitioner all books and records that relate to the company's affairs which are in the director's possession". The delivery of the statement of affairs to the practitioner is important. In the words of Jonathan Rushworth, "The statement of affairs will provide the practitioner at an early stage in the proceedings with a basis of information to assist him as he oversees the company and its affairs, and the development of the business rescue plan"[133].

Also, by section 142(2), a director must inform the practitioner the whereabouts of any other books and records relating to the company which are not in his possession, if he knows where they are kept[134].

The directors must provide the practitioner with a statement of affairs within five business days after the proceedings commence, or longer if the practitioner allows[135]. The Act spells out a list of matters which are the minimum requirement to be included in the statement of affairs[136].

Section 143 states, inter alia, thus: "(a) any material transactions involving the company or the assets of the company, and occurring within 12 months immediately before the rescue proceedings began;

(b) any court, arbitration or administrative proceedings including pending enforcement proceedings involving the company;

(c) the assets and liabilities of the company, and its income and disbursements within the Immediately preceding 12 months;

(d) the number of employees and any collective agreements or other agreements relating to thev rights of employees ;

(e) any debtors and their obligations to the company; and

(f) any creditors and their rights or claims against the company."

By section 142(4), no one is entitled (as against the business rescue practitioner) to retain possession of any books or records of the company or to claim or enforce a lien over any such books and records unless such books or records are in the lawful possession of the person and he or she has made copies available to the practitioner or has afforded the practitioner a reasonable opportunity to inspect the books or record.

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[133] Jonathan Rushworth (supra)

[134] Section 142(2).

[135]Section 142(3).

[136] Sections 142(3)*(a) – (f)*.

### 2.9.0. Remuneration of practitioners

By section 143(1), the practitioner may charge a company an amount for his remuneration and expenses in accordance with a tariff prescribed by the respective Minister of government.[137] Also, according to section 143(2), the practitioner may propose an agreement with the company for further remuneration in addition to his entitlement under the tariff prescribed by the Minister on a contingency basis. Section 143(2) provides thus: "The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to –

(a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or

(b) the attainment of any particular result or combination of results relating to the business rescue proceedings."

The agreement is final and binding on the company provided it is approved by the holders of a majority of creditors' voting interests in the company[138] and the holders of a majority of the voting rights of any shares of the company which entitle the shareholder to a portion of the residual value of the company on a winding-up[139]. The majority would be in respect of those creditors and shareholders present and voting at the respective creditors and shareholders' meetings called for the purpose of considering the proposed agreement.

By section 143(4), a creditor or shareholder who voted against a proposed agreement in respect of remuneration and expenses may apply to a court within 10 business days after the vote is taken for an order to set aside the agreement[140]. There are two grounds for the application namely (a) that the agreement is not just and equitable[141]; or (b) that the remuneration set out in the agreement is unreasonable having regard to the financial circumstances of the company[142]. A practitioner's claim for remuneration and expenses will rank for payment before all secured and unsecured creditors, to the extent they are not fully paid[143].

### 2.10.0. Rights of Affected Persons During Business Rescue Proceedings

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[137] Section 143(6).
[138] Section 143(3)*(a)*.
[139] Section 143(3)*(b)*.
[140]Section 143(4).
[141] Section 143(4)*(a)*.
[142] Section 143(4)*(b)*.
[143] Section 143(5).

Some persons are stakeholders during business rescue proceedings. These include the following (a) employees (b) creditors and (c) holders of the company's securities. The rights of these persons are discussed below.

### 2.10.1. Employees

The rights of employees are provided for in Section 144. Employees' interests in business rescue proceedings may be exercised in a number of ways. Those employees who are represented by a registered trade union may exercise their rights collectively through the trade union or in accordance with applicable labour law[144]. If they are not represented by a registered trade union, they may elect to exercise their rights directly or by proxy through an employee organisation or representative[145].

By section 144(2), any remuneration, reimbursement for expenses or other amounts relating to employment became due and payable by a company to an employee at any time before the business rescue proceedings began and remain outstanding will be treated as preferred unsecured claim for the purposes of these provisions[146]. Thus, they would, presumably rank for payment before unsecured creditors but behind liabilities incurred during the business rescue proceedings to employees and other post-commencement finance, and other liabilities incurred during the proceedings.

By section 144(4)(a), a medical scheme or a pension scheme which includes a provident scheme, for the benefit of past or present employees of the company, is an unsecured creditor of the company, to the extent of any amount that was due and payable by the company to the trustees of the scheme but was unpaid at the beginning of the rescue proceedings. In the case of a defined benefit pension scheme, the scheme is an unsecured creditor to the extent of the present value at the commencement of the proceedings of any unfunded liability under the scheme[147].

The rights of every registered trade union representing employees of the company and any employee not so represented are spelt out in section 144(3). The sub-section states thus: "During a company's business rescue process, every registered trade union representing employees of the company, and any employee who is not so represented is entitled to –

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[144]Section 144(1)*(a)*.
[145] Section 144(1)*(b)*.
[146] Section 144(2).
[147] Section 144(4)*(b)*.

(a) notice which must be given in the prescribed manner and form to employees at their at their workplace, and served at the head office of the relevant trade union, of each court proceedings, decision, meetings or other relevant events concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the proceedings;

(c) form a committee of employees' representatives;

(d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152(1)(c);

(e) be present and make a submission to the meeting of holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152(1)(c);

(f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection ; and

(g) if the proposed business rescue plan is rejected, to –

(i) propose the development of an alternative plan in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of one or more affected persons, in the manner contemplated in section 153."

These employee rights are expressed to be in addition to certain other rights[148].

### 2.10.2. Creditors

The rights of creditors are provided for in section 145. The section states thus: "Each creditor is entitled to –

(a)notice of each court proceedings, decisions, meetings and other relevant events concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter;

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

(2) In addition to the rights set out in subsection (1), each creditor has –

(a) the right to vote to amend, approve or reject a proposed business plan in the manner contemplated in section 152;

(b) if the proposed business rescue plan is rejected, a further right to -

[148] Section 144(5).

(i) propose the development of an alternative plan in the manner contemplated in section 153; or
(ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153."

By section 145(3), the creditors may form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan. If any decision during the proceedings requires the support of the holders of creditors' voting interests, a secured or unsecured creditor has a voting interest equal to the value of the amount owing to that creditor by the company[149]. A creditor whose rights would be subordinated in a liquidation has a voting interest equal to the amount, if any, that the creditor could reasonably expect to receive in a liquidation of the company[150]. This amount has to be independently and expertly appraised and valued, at the practitioner's request[151].

Secured creditors seem to be in a strong position so far as voting on a plan is concerned. They have a right to vote in respect of the whole amount of the indebtedness due to them, not only to the extent of any excess of their claim over the value of their security interest. However, their rights under the terms of a plan may presumably be prejudiced by, for instance, the discharge of their security. If their voting ranks with unsecured creditors, it may be that their rights are prejudiced by the terms of the plan, if they do not have an adequate voting interest when their votes are taken into account with those of other creditors.

A valuation of a subordinated interest will be on the basis of what could reasonably be expected to be received in a liquidation of the company. Subordination provisions may be expressed to come into effect in a liquidation in the relevant contractual terms, whereas it could be argued that account should be taken when establishing voting interests that the company may continue to operate as a going concern under the terms of the plan and not be put into liquidation.

By section 145(5)(b), the practitioner must determine whether a creditor is independent[152], and request a suitably qualified person to give an independent and expert appraisal and value in respect of a subordinated voting interest[153]. He must give written notice of his determination or

[149] Section 145(4)*(a)*.
[150] Section 145(4)*(b)*.
[151] Section 145(4)*(b)*.
[152]Section 145(5)*(a)*.
[153] Section 145(5)*(b)*.

appraisal and valuation to the relevant creditor at least 15 business days before the date of the meeting to consider the proposed plan[154]. The practitioner determines whether a creditor is independent, in particular in regard to voting rights at meetings. Section 128(1)(g) defines an independent creditor as a person who is a creditor of the company, (including an employee to the extent that any remuneration, expenses or other amounts relating to employment was due and payable at any time before the proceedings commenced but was not paid) and the creditor is not related to the company, the director or the practitioner[155]. For these purposes, an employee is not related to the company solely as a result of being a member of a trade union that holds shares in the company.

The definition of 'related, in section 2 of the Companies Act 2008, is relatively extensive[156]. It includes relationship of marriage, living together in a relationship similar to marriage[157] or people separated by no more than two degrees of natural or adopted consanguinity or affinity[158]. An individual is related to a juristic person if the individual directly or indirectly controls the juristic person (which includes the ability to exercise or control the exercise of a majority holding of voting rights or control the appointment of directors)[159].

By section 2(3), a court, the Companies Tribunal or the Takeover Regulation Panel may exempt a person from any provision of the Act which would apply to that person because of a relationship falling within the defined term, if the person can show that, in respect of a particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person.

Creditors who receive a notice of a determination as to independence or an appraisal and valuation of a subordinated interest have five business days to apply to a court to review the practitioner's determination that the person is, or is not, an independent creditor[160] or to review, reappraise and revalue the person's voting interest, as determined at the request of the practitioner, where it is subordinated[161].

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[154] Section 145(5)*(c)*.
[155] Section 128(1)*(g)*.
[156] See s 1 and s 2(1). See Rushworth (supra).
[157] Section 2(1)*(a)*(i).
[158] Section 2(1)*(a)*(ii).
[159] Section 2(1)*(b)*.
[160] Section 145(6)*(a)*
[161] Section 145(6)*(b)*

### 2.10.3. Holders of Companies Securities

Section 146 deals with the rights of the holders of a company's securities It provides inter alia:
"During a company's business rescue proceedings, each holder of any issued security of the company is entitled to –
(a) notice of each court proceedings, decisions, meetings or other relevant events
concerning the business rescue proceedings;
(b) participate in any court proceedings arising during the business rescue proceedings;
(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter;
(d) vote to approve or reject a proposed business rescue plan in the manner contemplated in section 152, if the plan would alter the rights associated with the class of securities held by that person".
Also, by section 146(e), holders of securities may propose the development of an alternative plan or present an offer to acquire the interests of creditors or other holders of the company's securities provided, if the business plan is rejected.
Section 146 is not confined to shareholders only. "Securities" means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company[162]. A debentureholder is a creditor and thus ranks higher in the hierarchy of affected person than a shareholder[163].
Unlike the creditors and employees, the holders of the company's securities are not entitled to form a committee or consult with the business rescue practitioner[164].

### 2.11.0. First Meetings of Creditors and Employees' Representatives and the Appointment of Committees

Sections 147 and 148 deal with first meetings of creditors and employees and their representatives, which must be convened by the practitioner. Each of these will be discussed below.

### 2.11.1 First Meeting of Creditors

[162] See generally Cassim (supra).
[163] See generally Cassim (supra).
[164] See generally FHI Cassim (supra).

The practitioner must inform the creditors at their first meeting, convened within 10 business days of his appointment, whether he believes there is a reasonable prospect of rescuing the company pursuant to the proceedings and he may receive proofs of claim by creditors. At the meeting, the creditors may determine whether or not a committee of creditors should be appointed and, if so, they may appoint the members of the committee.

Notice of the meeting must be given by the practitioner to every creditor of the company whose names and addresses he knows or can reasonably obtain[165]. The notice must set out the date, time and place of the meeting and its agenda[166]. Decisions are taken by simple majority vote of independent creditors' voting interests, as explained earlier in this chapter[167]. This provision applies to the vote at any meeting of creditors, save that when a proposed business rescue plan is considered[168]. It should be noted that there is no quorum requirement for meetings of creditors.

### 2.11.2. First meeting of employees' representatives

By section 148(1)(a), the practitioner must inform employees' representatives at their first meeting, convened within 10 business days of his appointment, whether he believes there is a reasonable prospect of rescuing the company pursuant to the proceedings[169]. Also, the representatives may determine at the meeting whether or not an employees' committee should be appointed and, if so, they may appoint the members of that committee[170].

Notice of the meeting must be given by the practitioner to every registered trade union representing employees of the company and, if there are employees who are not so represented, to those employees or their representatives[171]. The notice must set out the date, time and place of the meeting and its agenda[172]. The Act does not specify the necessary majority vote for the approval of any matter considered by a meeting of employees' representatives.

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[165] Section 147(2).
[166] Section 147(2).
[167] Section 147(3).
[168] Section 148(1)*(a)*.
[169] Section 148(1)*(b)*.
[170] Section 148(2).
[171] Section 148(2).

### 2.11.3. Creditors and Employee Committees

By section 149(1) (a), committees of creditors or employees may consult with the practitioner about any matter relating to the business rescue proceedings. However, they cannot direct or instruct the practitioner. Thus, the independence of the practitioner would be preserved[173] . In addition, the practitioner will able to comply with his duties and responsibilities. The committees may, on behalf of the general body of creditors or employees, as appropriate, receive and consider reports relating to the business rescue proceedings[174]. They must act independently of the practitioner to ensure fair and unbiased representation of creditors' and employees' interests[175]. There are restrictions on who can be a member of a committee of creditors or employees[176]. This is spelt out in section 149(2). It provides thus: "A person may be a member of a committee of creditors or employees, respectively, only if the person is –

(a) an independent creditor or an employee of the company;
(b) an agent, proxy or attorney of an independent creditor or employee or other person acting under a general power of attorney; or
(c) authorised in writing by an independent creditor or employee to be a member of a committee."

### 2.12.0. Proposal of Business Rescue Plan

Section 150 deals with proposal of business rescue plan. Section 150(1) states thus: "The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151[177]. The plan must contain all the information reasonably required to assist affected persons in deciding whether or not to accept or reject the plan[178]. The plan must be divided into three parts namely background[179], proposals[180] and assumptions and conditions[181]. In each case, the list of requirements is the minimum as to what is required for the contents of the relevant part of the plan.

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[173] Jonathan Rushworth (supra)
[174] Section 149(1)*(b)*.
[175] Section 149(1)*(c)*
[176] Section 149(2).
[177] That is a meeting of creditors other affected persons and the management of the company.
[178] Section 150(2).
[179] Section 150(2)*(a)*.
[180] Section 150(2)*(b)*.
[181] Section 150(2)*(c)*.

With respect to background information, this must include a complete list of all material assets of the company. Section 150(2)(a) provides thus:

"The business rescue plan must contain all the information reasonably required to facilitate affec ted persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts, as follows:

(a) Part A Background, which must include at least –

(i) a complete list of all the material assets of the company, as well as an indication as to which of them were held as security by creditors when the business rescue proceedings began;

(ii)a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in the terms of laws of insolvency law, and an indication as to which of the creditors have proved their claims;

(iii)the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

(iv)a complete list of the holders of the company's issued securities;

(v)a copy of the written agreement concerning the practitioner's remuneration; and a (vi)a statement whether the business rescue plan includes a proposal made informally by a creditor of the company."

The part of the plan addressing the proposals must include information concerning the nature and duration of any moratorium for which the plan makes provision[182], the extent to which the company is to be released from payment of its debts and the extent to which any debt is proposed to be converted into equity in the company or another company[183]. Information should be included about the continuing role of the company and the treatment of any existing agreements[184];244 the property of the company that is to be available to pay creditors' claims under the plan[185]; the order of preference in which the proceeds of property will be applied to pay creditors if the plan is adopted[186]; the benefits of adopting the plan, as opposed to the benefits which would be received by creditors if the company were to be placed in liquidation[187];

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[182] Section 150(2)*(b)*(i).

[183] Section 150(2)*(b)*(ii).

[184] Section 150(2)*(b)*(iii)

[185]245 Section 150(2)*(b)*(iv).

[186] Section 150(2)*(b)*(v).

[187] Section 150(2)*(b)*(vi).

and the effect that the plan will have on the holders of each class of the company's issued securities[188].

In respect of assumptions and conditions, the information must include a statement of the conditions (if any) that must be satisfied for the plan to come into operation and be fully implemented[189]; the effect (if any) that the plan contemplates on the number of employees and their terms and conditions of employment[190] the circumstances in which the plan will end[191]; and a projected balance sheet for the company and a projected statement of income and expenses for the ensuing three years[192]. The projected balance sheet and statement of income and expenses must include a notice of any material assumptions on which the projections are based[193] and may include alternative projections based on varying assumptions and contingencies[194].The proposed plan must conclude with a certificate by the practitioner stating that actual information provided appears to be accurate, complete and up-to-date[195] and projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement[196]. The plan must be published by the company within 25 business days after the practitioner's appointment or any longer period permitted by the court, on the company's application[197], or the holders of a majority of the creditors' voting interests[198].

### 2.13.0. Consideration of Business Rescue Plan

By section 151(1), the practitioner must convene and preside over a meeting of creditors and other holders of voting interests called to consider the proposed business rescue plan, within 10 days of the publication of the plan[199]. The practitioner must give at least five business days'

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[188] Section 150(2)*(b)*(vii).
[189] Section 150(2)*(c)*(i).

[190] Section 150(2)*(c)*(ii).
[191] Section 150(2)*(c)*(iii).
[192] Section 150(2)*(c)*(iv).
[193]Section 150(3)*(a)*.
[194]Section 150(3)*(b)*.
[195] Section 150(4)*(a)*.
[196] Section 150(4)*(b)*.
[197] Section 150(5)*(a)*.
[198] Section 150(5)*(b)*.
[199] Section 151(1).

notice of the meeting to all affected persons, setting out the date, time and place of the meeting, its agenda and a summary of the rights of affected persons to participate in and vote at the meeting[200]. The meeting may be adjourned from time to time as may be necessary or expedient, until a decision is taken with regard to the plan and the company's future[201].

The practitioner has certain duties in respect of the meeting over which he presides. He must introduce the proposed plan for consideration by creditors and, if applicable, shareholders[202]. He must inform the meeting whether he continues to believe there is a reasonable prospect of the goals of the business rescue proceedings being achieved[203]. He must provide an opportunity for employees' representatives to address the meeting[204]. He must invite discussion and conduct a vote on any motions from creditors to amend the plan in any way moved and seconded by holders of creditors' voting interests which are satisfactory to the practitioner[205] or to direct the practitioner to adjourn the meeting, in order to revise the plan for further consideration[206]. Finally, he must call for a vote for preliminary approval of the plan, as amended if applicable, unless the meeting has first been adjourned[207].

To be approved on a preliminary basis, the plan must be supported by holders of more than 75 per cent of the creditors' voting interests that were voted[208] and, in addition, the votes in support must include at least 50 per cent of the independent creditors' voting interests, if any, that were voted[209].The concept of an independent creditor is explained earlier in this chapter. There is thus a double majority requirement, with particular protection for independent creditors who have to approve the plan by at least a simple majority vote if it is to be adopted. If the plan is not approved on a preliminary basis, it is treated as rejected, but may be considered subsequently, as provided in the new Act[210]. If the plan does not alter the rights of holders of any class of the company's securities, approval of the plan on a preliminary basis is treated as final adoption of

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[200]Section 151(2).
[201]Section 151(3).
[202]Section 152(1)*(a)*.
[203] Section 152(1)*(b)*.
[204] Section 152(1)*(c)*.
[205] Section 152(1)*(d)*(i).
[206] Section 152(d)*(ii)*.
[207]Section 152(1)*(e)*.
[208] Section 152(2)*(a)*
[209]Section 152(2)*(b)*.
[210] Section 152(3)*(a)*.

the plan, subject to the satisfaction of any conditions[211]. If, however, the plan does alter the rights of the holders of the company's securities, the practitioner must immediately hold a meeting of the class or classes of securities whose rights would be altered by the plan, and call for a vote by them to approve adoption of the plan[212]. If a majority of the voting rights of holders of securities exercised support adoption of the plan, it will be treated as having been finally adopted, subject to the satisfaction of any conditions[213]. If a majority of the voting rights exercised oppose adoption of the plan then the plan is treated as rejected, but may be considered subsequently, as provided in the Act[214].

### 2.14.0. Effect of the Adoption of Business Rescue Plan

By section 152, a business rescue plan which has been adopted binds the company, each creditor and every holder of securities in the company, whether or not such person was present at the meeting voted in favour of adoption of the plan or, in the case of creditors, had proved their claims against the company. With regard to implementation of the plan, the company, under the practitioner's direction, must take all necessary steps to attempt to satisfy any conditions to the plan and implement it[215]. To the extent necessary to implement an adopted plan, the practitioner may determine the consideration for, and issue, any authorised securities of the company, as provided in the plan[216]. This overrides certain requirements set out earlier in the Act in respect of the issue of shares.

Moreover, by section 152(6)(b), if the plan is approved by shareholders, he may amend the company's Memorandum of Incorporation in order to authorise and determine the preferences, rights, limitations and other terms of any securities not otherwise authorised but which are contemplated to be issued in terms of the rescue plan. This again overrides provisions in the new Act which would otherwise restrict this exercise. In addition, save to the extent provided in the plan, pre-emption rights of shareholders contained in the Act do not apply in respect of share

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[211] Section 152(3)*(b)*.
[212] Section 152(3)*(c)*(i).
[213] Section 152(3)*(c)*(ii)(*aa*).
[214] Section 152(3)*(c)*(ii)(*bb*).
[215] Section 152(5).
[216] Section 152(6)*(a)*.

issues under a business rescue plan[217]. Once the plan has been substantially implemented, the practitioner must file a notice of this with the Commission[218].

**2.15.0 Failure to Adopt Business Rescue Plan**

By section 153(1)(a), if the plan is rejected by creditors or, where relevant, holders of securities in the company, the practitioner may seek a vote of approval from holders of voting interests to prepare and publish a revised plan or he may advise the meeting that the company will apply to the court to set aside the result of the vote by holders of voting interests or shareholders, on the grounds that the result was inappropriate[219]. If the practitioner does not take steps to seek a vote to prepare a revised plan or apply to the court to set aside the result of the vote, any affected person who was present at the meeting may call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan, or may apply to the court to set aside the result of the vote on the grounds that it was inappropriate[220].

If the practitioner does not seek a vote to approve the preparation of a revised plan nor apply to court to set aside the result of the vote, any affected person, or a group of them, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the plan[221].This offer must be at a value independently and expertly determined at the request of a practitioner, to be a fair and reasonable estimate of the return to that person (or persons) if the company were to be liquidated[222]. The holder of the voting interest, or a person acquiring that interest under a binding offer, may apply to court for a review, reappraisal or revaluation of a determination made by an independent expert appointed at the request of the practitioner[223].

If an application is to be made to the court seeking to set aside the result of the vote by holders of voting interests or shareholders on the grounds that the result of the vote was inappropriate, the practitioner must adjourn the meeting for five business days, unless the application is made to the

[217] Section 152(7).
[218] Section 152(8).
[219] Section 153 (1)*(a)*
[220] Section 153(1)*(b)*(i).
[221]Section 153(1)*(b)*(ii).
[222]Section 153(1)*(b)*(ii).

[223] Section 153(6).

court during that period, or until the court has disposed of the application[224]. By section 153(3)(a), if a vote of creditors requires the practitioner to prepare and publish a revised business rescue plan, he must conclude the meeting after that vote and prepare and publish a new or revised plan within 10 business days. The provisions of the Act concerning the publication and consideration of this new or revised plan will apply [225].

If an offer is made by an affected person to acquire the voting interests of creditors or holders of securities who opposed adoption of the plan, the practitioner must adjourn the meeting for no more than five business days, in order for him to have the opportunity to make any revisions necessary to the plan to reflect the results of the offer[226]. In addition, he must set a date for resumption of the meeting, without any further notice being given, at which the provisions concerning consideration of the business rescue plan will apply, as explained above[227].

If no action is taken following the rejection of the plan, the practitioner must file a notice of termination of the proceedings with the Commission[228].

**2.16.0. Discharge of debts and claims**

Section 154 deals with discharge of debts. Section 154(1) states thus: "A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has agreed to the discharge of the whole or part of the debt owing to that creditor will lose the right to enforce the relevant debt or part of it". Also, if a plan has been approved and implemented, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, save to the extent provided for in the plan[229].

**2.17.0. The Cross-Border Insolvency Act 42 of 2000**

**Introduction**

The Cross-Border Insolvency Act (hereinafter referred to as "The Act") is an adaptation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on

[224] Section 153(2).
[225] Section 153(3)*(b)*.
[226] Section 153(4)*(a)*.
[227] Section 153(4)*(b)*.
[228] Section 153(5).
[229] Section 153(2).

Insolvency[230]. The goal of the Model Law was to create a legislative template in member states for cross-border insolvency[231]. The General Assembly of the United Nations passed a resolution approving the draft model law in December 1997[232].The Project Committee of the South African Law Commission made some modifications to the Model Law to suit South African circumstances[233]. The modified version was introduced in the South African National Assembly as a section 75 Bill and was published in the Government Gazette (i.e. 20862 of 4 February 2000)[234]. The Bill was assented to, on 8 December 2000, by the President.

The Act consists of six chapters as well as thirty-four sections. Chapter 1 deals with interpretation and fundamental principles. Chapter 2 deals with access of foreign representatives and creditors to South African courts. Chapter three is concerned with recognition of foreign proceedings and reliefs. Chapter four deals with cooperation with foreign courts and foreign representatives. Chapter five deals with concurrent provisions. Chapter six deals with general provisions.

The objectives of the Act are spelt out in the preamble. These are:

" * to strengthen cooperation between South African courts and foreign ones in cross-border insolvency matters;

*for greater legal certainty for trade and investment;

* for fair and efficient administration of cross-border insolvencies that protect the interests of creditors and other interested persons, including the debtor;

* for protection and maximization of the value of the debtor's assets;

* for the facilitation of the rescue of financially troubled business, thereby protecting investment and preserving employment."

The Act deals more with the procedural aspect of cross-border business rescue[235]. For example, section 15 deals with application for recognition of foreign proceedings.

The Act is based on the principle of reciprocity. Section 2(2)(a) and (b) states thus:

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[230] Michelle Olivier and Andre Boraine, "Some Aspects of International Law in South African Cross-border Insolvency Act", (2005) CILSA 373-395, 378; Jane Franco, "The Cross-Border Insolvency Act: Lifting the Barrier or Creating New Ones", (2003) 15 SA *Merc LJ* 27-43, ; R.H. Zulman, "Cross-border Insolvency in South African Law" 21 *SA Merc LJ* 804–817 (2009).

[231] Michelle Olivier and Andre Boraine (supra).

[232] Resolution 52/158 of 15 December 1997 of the United Nations General Assembly.

[233] Michelle Olivier and Andre Boraine, "Some Aspects of International Law in South African Cross-border Insolvency Act", (2005) CILSA 373-395.

[234] Michelle Olivier and Andre Boraine (supra).

[235] M.A.L.M. Willems, UNCITRAL Model Law on Cross-border Insolvencies, Kluwer Publishing, Deventer.

S.2(2)(a) "Subject to paragraph (b)this Act applies in respect of any State designated by the Minister by notice in the Gazette.
S.2(2)(b) "The Minister may only designate a State as contemplated in paragraph (a) if he or she is satisfied that the recognition accorded by the law of such a State to proceedings under the laws of the Republic relating to insolvency justifies the application of this Act to foreign proceedings in such State". To date, the minister has not designated any state. This has made the Act ineffective[236].

### 2.17.1. The Cross-border Insolvency Act and Business Rescue

It must be stated at the outset that judicial management was the business rescue mechanism in South Africa at the time of enactment of the Cross-border Insolvency Act. In other words, the Companies Act 61 of 1973 (as amended) was in force in 2000. Hence the expression "judicial manager" in the Act to refer to someone responsible for the restructuring of an ailing company. Under judicial management, a judicial manager is appointed (consequent upon the order of a court) to take over the management and control of an ailing company with a view to saving the company from liquidation[237]. The court exercises supervision over the process. Such a person has a burden of proving that the company has a probability of being successful as a going concern[238]. Also, there may or may not be a moratorium (stay) on legal proceedings against the company and its assets[239]. In addition, the judicial manager in the event of failure of the rescue process may be appointed as a liquidator of the company[240].
In cross-border business rescue and in terms of the Act, a person is appointed (foreign representative) consequent upon a collective judicial or administrative proceedings in a foreign State in which proceedings the assets and affairs of a debtor company are subject to control or supervision by a foreign court, to administer the restructuring of a company. There are two types of proceedings in which the person can be appointed. These are foreign main proceedings and foreign non-main proceedings. According to section 1(e) foreign main proceedings means "….foreign proceedings, taking place in the State where the debtor has the center of his or her or its main

[236] R.H. Zulman (supra); Michelle Olivier and Andre Boraine (supra).
[237] Section 311 of the Companies Act 61 of 1973.
[238]Section 427(1) of the Companies Act 1973.
[239] Section 423(3) of the Companies Act 61 of 1973. See also Anneli Loubser (supra).
[240] Also, there is no compulsory business rescue plan. See also Anneli Loubser, "Judicial Management as a Business Rescue Procedure in South African Corporate Law", SA Merc LJ (2004) Vol 16, p. 137

interests[241]".

Also, section 1(f) defines foreign non-main proceedings thus: "…foreign proceedings, other foreign main proceedings, taking place in a State where the debtor has an establishment within the meaning of paragraph (c) of this section".

The foreign representative must apply to a South African Court for recognition of the foreign proceedings in which he has been appointed[242]. And by section 9 of the Act, a foreign representative may apply to a South African Court for relief.

Section 20 deals with the effects of recognition of foreign main proceedings. It provides thus:"Upon recognition of foreign proceedings that are foreign main proceedings

(a) commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities stayed;
(b) execution against the debtor's assets is stayed;
(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended."

Section 21 deals with the relief that may be granted upon recognition of foreign proceedings. It provides, inter alia, thus: "Upon recognition of foreign proceedings whether main or no-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including –

(1) staying the commencement or continuation of individual legal actions, or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities to the extent that they have not been stayed under section 20(1)(a)".

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[241] The centre of main interest is the registered office of the company.
[242] Section 15 of the Cross-Border Insolvency Act.

## CHAPTER THREE

## THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

## AND BUSINESS RESCUE MECHANISM

### 3.0.0. Historical Overview of SADC

SADC is the acronym for Southern African Development Community[243]. It is the successor organization to the Southern African Development Coordination Conference (SADCC)[244]. SADCC was established in April 1980 in Lusaka, Zambia. The primary goal of SADCC was to decrease regional economic dependence on South Africa[245]. Also, SADCC aimed to promote regional development[246]. SADC has fifteen members including South Africa, Zambia, Zimbabwe, Botswana, Lesotho, Swaziland, Angola, Malawi, Tanzania, Mozambique, Namibia, Democratic Republic of Congo, Seychelles and Mauritius[247]. The objectives of SADC are spelt out in Article 5 of the SADC Treaty. They include the improvement of standard of living of its citizens as well as the promotion of integration in Southern Africa[248]. Article 5(2) of SADC spells out the strategies for achieving these goals. It states thus: "SADC is to: (a) harmonize political and socio-economic policies and plans of member States; (b) encourage the people of the region and their

institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and objectives of SADC; (c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions; (d) develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of peoples of the region generally among member States; (e) promote the development of human resources; (f) promote the development, transfer and mastery of technology; (g) improve economic management and

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[243] http://www.sadc/int accessed on 28/11/2014.
[244]http://www.sadc/int accessed on 28/11/2014.

[245] Margaret Lee, "Regionalism in Africa: A part of problem or a part of solution", Polis/R.C.S.P/C.P.S.R. Vol. 9, Numero Special, 2002, P.10; See also Ndulo, Muna "The Need for the Harmonization of Trade Laws in the Southern African Development Community", 4 Afr. Y.B. Int'l L. 199 (1996). Abegunrin L., "The Southern African Development Coordination Conference: Politics of Dependence" in Onwuka RI and Sesay A (eds) *The Future of Regionalism in Africa* (Macmillan London 1985).

[246] Margaret Lee (supra).
[247] http://www.sadc/int accessed on 28/11/2014.
[248] Article 5 (1)(a) of the Consolidated text of the SADC Treaty as amended.

performance through regional cooperation; (h) promote the coordination and harmonization of international relations of member States; and (i) secure international understanding, cooperation and support, and mobilize the inflow of public and private resources into the region".

SADC is composed of the following institutions[249]: (a) the Summit of Heads of State or Government; (b) the organ on Politics, Defence and Security Cooperation; (c) the Council of Ministers ; (d) the Integrated Committee of Ministers; (e) the Standing Committee of Officials (f)the Secretariat; (g) the Tribunal; and (h) SADC National Committees.

3.1.0. Major Institutions of SADC

The major institutions of SADC include the following: (a) the Summit of Heads of State or Government (b) the Council of Ministers (c) The Tribunal.

(a) The Summit of Heads of State or Government

According to Article 10(1) of the SADC Treaty, the Summit of the Heads of State or Government is the supreme policy-making institution of SADC. It comprises heads of State or Government of member nations[250]. It is responsible for controlling and giving policy direction for all SADC institutions and member states[251]. The Summit is headed by a Chairperson and Vice Chairperson[252]. The Chairperson and the Vice- Chairperson are elected by the members for one year on a rotational basis[253]. The Summit meets at least twice a year[254]. The Summit appoints the Executive and Deputy Secretary[255]. The Summit also admits new members into SADC[256]. By Article 10, the Summit may create Committees and other institutions. The decisions of the Summit are reached by consensus and are binding on all members[257].

(b) The Council of Minister

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[249] Article 9 of the SADC Treaty.

[250] See generally Afadameh-Adeyemi A and Kalula E, "SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community", 2010 *Monitoring Regional Integration in Southern Africa: Yearbook* 5-22.

[251] Article 10 (2) of the SADC Treaty.

[252] Article 10(3) of the SADC Treaty.

[253] Article 10 (3)of the SADC Treaty.

[254] Article 10 of the SADC Treaty.

[255] Article 10 of the SADC Treaty.

[256]Article 10 of the SADC Treaty.

[257] Article 10(8) of the SADC Treaty.

The Council of Minister comprises one minister from every member State usually from the Ministries of Foreign Affairs, Economic Planning, or Finance[258]. It meets twice a year (in January or February and in August or September)[259]. The functions of the Council are spelt out in Article 11(2). It states thus: "It shall be the responsibility of the Council to:

(a) oversee the functioning and the development of SADC;
(b) oversee the implementation of the policies of SADC and the proper execution of its programmes;
(c) advise the Summit on matters of overall policy and efficient and harmonious functioning and development of SADC;
(d) to approve policies, strategies and work programmes of SADC;
(e) direct, coordinate and supervise the operations of the institutions of SADC subordinate to it;
(f) define sectoral areas of cooperation and allocate to Member States responsibility for coordinating sectoral activities or re-allocate such responsibilities;
(g) create its own committees as necessary;
(h) recommend to the Summit persons for appointment to the post of Executive Secretary and Deputy Executive Secretary;
(i) determine the Terms and Conditions of the staff of the institutions of SADC;
(j) convene conferences and other meetings as appropriate, for purposes of promoting the objectives and programmes of SADC; and
(k) perform such other duties as may be assigned to it by the Summit or this Treaty."

The Council is headed by the Chairman and Vice-Chairman appointed by the Member States holding the position of Chairman and Vice-Chairman respectively[260]. One major challenge of the Council is that it cannot make binding decisions. Article 11(5) of the SADC Treaty states expressly thus: "The Council shall report and be responsible to the Summit". This renders the Council impotent.

(c) The Tribunal

The composition, powers, functions and procedures of the Tribunal are set out in a separate Tribunal. This is the Protocol on the Tribunal. By Article 14 of the Protocol on the Tribunal, the Tribunal has jurisdiction over all matters that relate to the interpretation, validity and application of the SADC Treaty and all its protocols. By Article 15 of Protocol on the Tribunal, the Tribunal can entertain disputes between member states and between natural or legal persons and member

[258] See generally Article 11(1) of the SADC Treaty.
[259] See generally Article 11 of the SADC Treaty. See also http://www.sadc.int/about-sadc/sadc-institutions/council/ accessed on 15/01/2015.
[260] Article 11(3) of the SADC Treaty.

states. Also, the Tribunal has the jurisdiction to hear matters between SADC and member states. Also, by Article 17 of the Protocol on the Tribunal, an institution of SADC can institute an action against a member state. In addition, the Tribunal adjudicates on matters referred to it. By Article 16(5) of the SADC Treaty, its decisions are final and binding. The Tribunal is headed by a President. The Tribunal consists of ten judges – five regular members and five called upon by the President when the need arises[261]. By Article 6 of the Protocol on the Tribunal, the judges are appointed for a term of five years and may be re-appointed for another term of five years. The Tribunal is an important institution of the SADC. In the words of some scholars, "The SADC Tribunal is a cornerstone to regional integration in the SADC….It plays a vital role in ensuring compliance with SADC rules. It ensures that the provisions of the SADC Treaty and its subsidiary legislations are properly interpreted and adhered to"[262].

3.2.0. Model of Regional Integration in SADC

The model of integration adopted by SADC to achieve its objectives is market integration[263]. According to Bela A. Balassa, market integration consists of the linear progression of degrees of integration which include a *free trade area* where tariffs are removed among member states, but each country retains its own tariffs against non-members; *customs union* where the free trade area remains in place and member states impose a common external tariff (CET) against non-member states; *common market* where the customs union remains in place along with the free flow of the factors of production (capital and labour); *economic union* which consists of a common market along with the harmonization of monetary and fiscal policies; and *total economic integration* which consists of a common market along with the unification of monetary and fiscal policies"[264]. The model assumes that the following are constant: (a) perfect competition in transport markets; (b) free flow of labour and capital inside but not between countries; (c) No transport cost; (d) tariffs as the only trade restrictions and balanced trade

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[261] Article 3 of the Protocol on theTribunal.

[262] Afademeh-Adeyemi A. and Kalula E, supra, p 15. For further discussion on SADC Tribunal, see chapter four (supra).

[263] See generally Article 5 of the Consolidated Text of the SADC Treaty as amended. According to scholars of regionalism such as Margaret Lee, integration, regionally, can be achieved through Regional Cooperation, Market Integration, Development Integration and Regional Integration. See Margaret Lee, "Regionalism in Africa: A part of problem or a part of solution", Polis/R.C.S.P/C.P.S.R. Vol. 9, Numero Special, 2002, P.3; Margaret C. Lee, "Development Cooperation and Integration in the SADC Region", in Dani Nadubere (ed.), Globalisation and the African Post-Colonial State, Harare, Zimbabwe, AAPS Books.

[264] Bela A.Balassa, "The Theory of Economic Integration," Homewood, Illinois: Richard Dale, Inc., 1961, p.1.

between countries; (d) Prices reflecting the opportunity costs of production; (e) Resources, e.g. labour, are fully employed[265].

3.3.0. SADC and Business Rescue Mechanism

Efforts have been made to actualise the objectives of SADC through market integration. For example, in 2005, SADC launched the Regional Indicative Strategic Development Plan (RISDP)[266]. The RISDP is a fifteen year plan being implemented in three five year phases (i.e. 2005-2020)[267]. The RISDP is assessed against specific goals, strategies and principles[268]. It is noteworthy however that no business rescue regime has been developed to foster investment in the sub-region. Each member state has provisions for business rescue. In a cross-border investment and commercial dispute within SADC, the parties will be unsure of the applicable law[269]. The result of a dispute depends on the court and place where the action is instituted (and heard).

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[265] Jens Haarlov, *Regional Cooperation and Integration within Industry and Trade in Southern Africa: General Approaches, SADCC and the World Bank*".Aldershot:Averbury, 1997, p.26 cited in Margaret Lee, "Regionalism in Africa: A Part of Problem or a Part of Solution" Polis/R.C.S.P/C.P.S.R.Vol 9, Numero Special, 2002.See also, Jacob Viner, (1950) "Customs Union Issues", New York, Carnegie Endowment. The welfare gains from integration are based on the idea of trade creation (shift from a high-cost, less efficient regional producer to a low-cost, more efficient regional producer) and trade diversion (shift from a low-cost, more efficient non-member producer to a high-cost, less efficient regional producer).

[266] http://www.sadc.int/about-sadc/overview/strategic-pl/ accessed on 12th January, 2015.

[267] http://www.sadc.int/about-sadc/overview/strategic-pl/ accessed on 12th January, 2015.

[268] http://www.sadc.int/about-sadc/overview/strategic-pl/ accessed on 12th January, 2015.

[269] See generally Ndulo Muna (supra).

# CHAPTER FOUR

# PROPOSED BUSINESS RESCUE MODEL FOR THE SADC SUB-REGION

## 4.0.0. Introduction

The importance of harmonization of laws cannot be over-emphasised. Harmonization promotes globalization of private business[270]. Rules of law are uniform and predictable. This enhances international trade. Also, harmonization facilitates cross-fertilisation of ideas. States can adopt, at the international level, relevant principles of law peculiar to a specific jurisdiction[271]. Moreover, harmonisation promotes cooperation and systemization of rules of law of various states[272].

## 4.1.0. Harmonisation of Laws - Choices

There are two main ways of achieving harmonization of laws namely treaties (conventions) and model law.[273] Each of these will be discussed seriatim.

### 4.1.1. Treaties

According to Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969), "treaty" "means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation." A treaty is a binding source of international law[274]. The principle of pacta sunt servanda applies. In other words states which consent to a treaty are bound by the provisions of the treaty.

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[270] See Ademola Yakubu, Harmonisation of Laws in Africa, Malthouse Press Limited cited in chapter one (supra).
[271] Yakubu (supra).
[272] Yakubu (ibid).
[273] Michelle Olivier and Andre Borraine, "Some Aspects of International Law in South African Cross-Border Insolvency Law", (2005) CILSA 373-395.

[274] Michelle Olivier and Andre Borraine (ibid). See also Umozulike, U.O., Introduction to International Law, 2nd edition, Ibadan, Spectrum Law Publishing, chapters 2 and 3; J.G. Starke, Introduction to International Law, 10th edition, London, Butterworth, pp .

In this work, "treaty" is used to include binding agreements with specific substantive obligations which implement the general objectives of an umbrella convention[275]. In other words, protocols of international organizations and treaty are used interchangeably.
A treaty may be applied in one of two ways[276]. This is either monism or dualism[277]. Monism holds that municipal and international law are part of a single legal structure[278]. Under monism, a treaty operates directly in the national laws of states. Dualism holds that municipal and international law are separate legal systems[279]. Under dualism, a treaty only becomes a law in a state after it has been incorporated into the national laws of the state (i.e. adopted in the form of a domestic legislation)[280].

**Advantage(s) of Treaties**

The major advantage of treaties is that it has the force of law internationally.

**Disadvantages of Treaties**

Firstly, it may be difficult to negotiate treaties[281]. This is because states lose a part of their sovereignty on account of treaties[282]. In addition, the peculiarities of different legal systems would have to be taken into consideration[283].

Secondly, treaty obligations will not be observed consistently by states[284].

**4.1.2. Model Law**

The Model Law is a kind of "soft law". "Soft law", is in reality not "law"[285]. Soft law, according to John O' Brien refers to "instruments which do not specify concrete legal rights. It inhabits the

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[275] See generally https://www.treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml, accessed on 13/01/2015.

[276] Olivier and Boraine (ibid).

[277] See generally J.G. Starke, "Monism and Dualism in the Theory of International Law", 17 Brit. YB Int'l L. 66 (1936); J.H. Jackson, "Status of Treaties in Domestic Legal Systems: A policy analysis", The American Journal of International Law Vol. 86, No 2 (April 1992), pp 310-340; H. Kelsen, "Sovereignty and International Law", 48 Georgetown LJ, p 627 (1959-1960); D.P.O. Connell, "The Relationship Between International and Municipal Law", 48 Georgetown LJ, p. 431 (1960); Umozulike (ibid).

[278] J.G.Starke (supra). See generally John O' Brien, International Law, Cavendish Publishing, London, pp 98-99 (2001); M.B. Akehurst, Modern Introduction to International Law (P. Malanczuk ed), Routledge (London), 7th revised edition, 1997; Malcolm N. Shaw, International Law 4th edition, Cambridge, Cambridge University Press (1997); Umozulike (ibid). Hans Kelsen and Hersch Lauterpatsch are some of the exponents of monism.

[279] Starke (supra). H. Triepel and D. Anzilotti are some of the exponents of dualism.

[280] J.H. Jackson (ibid).

[281] Olivier and Boraine (ibid).

[282] Olivier and Boraine (ibid).

[283] Olivier and Boraine (ibid).

[284] Michelle Olivier and Andre Borraine (ibid).

middle ground between binding legal norms and irrelevant political assertions. The category of "soft law" is said to comprise certain declarations and recommendations of international organizations as well as resolutions of international conferences"[286]. A model law is not a binding source of international law[287]. It is a template for legislation[288]. It becomes the law of a country once adopted as domestic law. A typical example of a model law is the United Nations Commission on International Trade Law Model Law on Insolvency.

**Advantage(s) of Model Law**

The major advantage of a model law is its flexibility[289]. It is possible for states to modify or omit certain provisions of a model law before adopting it as their domestic legislation[290].

**Disadvantage(s) of Model Law**

Firstly, it does not have international law force[291].

Secondly, in the words of M.A.Willems, "the degree of, and certainty about harmonization achieved through a model law is likely to be lower than in the case of a convention."[292]

What Option(s) for SADC?

One of the problems of SADC is lack of harmonized laws[293]. The course open to SADC to achieve harmonization is either one of treaty and model law or a combination of both. I suggest treaty due to the following reasons.

Firstly, treaty has international law force[294]. In other words, it is binding on states party to it.

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[285] John O' Brien (ibid).

[286] John O' Brien (ibid). See generally H. Hillgenberg, "A Fresh Look at Soft Law", Eur J Int Law (1999) 10 (3): 499-515; C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 48 ICLQ No 4, pp 850-866 (1989); P.M. Dupuy, "Soft Law and the International Law of the Environment", 12 Mich. J. Int'l L. 420 (1990-1991); A.T. Guzman and T.L. Meyer, "International Soft Law", Journal of Legal Analysis, Vol. 2 Issue 1, pp 171 - 225 (2010)

[287] Michelle Olivier and Andre Borraine (ibid).

[288] Michelle Olivier and Andre Borraine (ibid).

[289] John O' Brien (ibid).

[290] M.A.L.M. Willems, UNCITRAL Model Law on Cross-border Insolvencies, Kluwer Publishing, Deventer, pp 19-20. The expression "convention" also implies treaty.

[291] John O' Brien (ibid).

[292] M.A.L.M. Willems (ibid).

[293]See generally Ndulo Muna, "The Need for the Harmonization of Trade Laws in the Southern African Development Community", 4 Afr. Y.B. Int'l L. 199 (1996).

[294] John O'Brien (ibid).

Secondly, with respect to harmonization of laws, treaty has a higher degree of certainty and uniformity than model law[295]. International economic treaties do not usually allow for changes (reservation) whereas model law allow for modifications[296].

Thirdly, states do not subscribe to model law. For example, less than twenty percent of states have adopted the UNCITRAL Model Law on Insolvency[297]

South Africa is one of the few States that have adopted the UNCITRAL Model Law on Insolvency. In the event of conflict between the South African Cross-border Insolvency Act and a SADC Treaty, which law will prevail? By Section 3 of the South African Cross border insolvency Act provides that the Act is subject to South Africa's treaty obligations which have been enacted into law under section 231 (4) of the South African Constitution. Section 231(4) regulates international agreements which South Africa has entered into and which form part of the body of South African law[298]. However, the conflict is not likely to arise as no State has been designated by the Minister[299].

**4.2.0. Variants of Business Rescue**

There are different business rescue regimes in the world. Each of these will be examined and the suitable one(s) will be recommended.

**4.2.1. Management and Control**

Management and control are very important in a company. Under business rescue, the management and control may remain in the hands of the board of directors .This is known as the debtor-in-possession approach. Alternatively, the management and control of a company may shift to an external individual. Each of these will be examined below.

(a) Debtor-in-Possession

The management and control of an ailing company rest with the board that steered the company up to the time the company becomes distressed. Example of a jurisdiction where this model, as it

[295] M.A.L.M. Wilems (ibid)

[296] M.A.L.M. Wilems (ibid).

[297]Indeed as of 16 December 2013, only twenty out of 183 countries have adopted the UNCITRAL Model Law on Insolvency: Resolution 68/107 of the United Nations General Assembly of 16th December 2013 (Revision of The Guide To Enactment Of The Model Law On Cross-Border Insolvency).

[298] Michel Olivier and Andre Boraine (supra).

[299] Olivier and Boraine (supra). See also chapter 2 (supra).

were, is found is the United States of America[300] (i.e. by Chapter 11 of the USA Bankruptcy Code, Bankruptcy Reform Act 1978) .Under Chapter11, the debtor-in-possession remains in control of the day-to-day business of the company and is subject to the oversight and jurisdiction of the court[301]. The debtor company (its board) serves as trustee of the business unless a separate trustee is appointed for cause[302].

Under Chapter 11, a company is given various means to reorganise its business. Automatic stay is granted in favour of the debtor company – litigation against the company is suspended (and fresh action s cannot be instituted against the company)[303]. The debtor company, may with the consent of court, reject and cancel contracts[304]. Moreover, a debtor company can borrow loans on favourable terms from new creditors as the latter can be given first priority on the revenue of the company[305].

One of the advantages of this regime is that the directors are "familiar with the terrain" – they are familiar with the supplier and they know the nature of the business. However, the ineptitude of the directors may have been responsible for the reorganization[306].

(b) External Individual

The management and control of an ailing company may pass to an external individual. In such jurisdictions as the United Kingdom and South Africa, an external individual is appointed to take over the day-to-day running of the company[307]. However, there are variations of this regime. For example, under the previous South African Companies Act (i.e. Companies Act 61 of 1973), a judicial manager (who is not necessarily a rescue professional) was appointed, upon a court order to take over the management of an ailing company and restore the company to life[308]. In the United Kingdom, by virtue of the Insolvency Act 2000 and Enterprise Act 2002, an administrator

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[300] See generally McCormack, Gerrard, Corporate Rescue Law – An Anglo-American Perspective, Edward Elgar Publishing , Cheltenham, U.K; Aminoff, Nicholas A. "The Development of American and English Bankruptcy Legislation - From a Common Source to a Shared Goal", 10 Statute L. Rev. 124 (1989).

[301] See generally Jay Lawrence Westbrook (ed.), A Global View of Business Insolvency Systems, World Bank/International bank for Reconstruction and Development.

[302] 11 U.S.C. S 1107.

[303] 11 U.S.C. S 362.

[304] Chapter 11

[305] See generally Jay L. Westbrook (supra).

[306] See generally FHI Cassim (supra).

[307] See generally the United Kingdom Enterprise Act 2002. See also Chapter 6 of the South African Companies Act of 2008.

[308] See chapter 2 supra.

who is a professional is appointed to rescue an ailing company. Also, Chapter 6 of the South African Companies Act provides for the appointment of a business rescue practitioner.
The major disadvantage of this regime is that the individual appointed may not be familiar with the terrain, as it were, of the company.
What option for SADC? I suggest the appointment of a business rescue practitioner. This is due to the following main reason. A business rescue practitioner possesses better skill. However, the professional association body should be regulated, at the SADC level.

### 4.2.2. Degree of Court Intervention

The degree of court intervention in business rescue proceedings differs from one jurisdiction to the other. In such jurisdiction as the United States of America, there is a high degree of court intervention in the rescue process[309]. In a similar vein, under judicial management of the South African Companies Act of 1973, there is a high degree of court intervention[310]. For example, the court is directly involved in the appointment of a judicial manager in South Africa (prior to the coming into force of Companies Act 2008). The major advantage of this regime is that it promotes accountability[311]. The disadvantage is that it is expensive as it means engaging the services of such professional as lawyers and accountant". In the words of Professors Harry Rajak and Johan Henning, "Expenses are high where highly trained professional personnel are necessarily involved, and this is a supreme irony when we recall that the procedure is invoked only where there is too little rather than too much or enough money."[312]
However, in the United Kingdom and South Africa (under Chapter 6 of the Companies Act 2008), there is a relatively low level of court intervention in business rescue proceedings[313]. One of the advantages of this regime is that it is relatively cheap.
What option for SADC? I suggest a regime in which there is a relatively low of court intervention. This is due to the following reasons. Firstly, as stated above, it is relatively cheap. Secondly, in African countries, litigations are not fast – they take a relatively long time[314].

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[309] See Westbrook (supra).
[310] See generally Rajak and Henning (supra).
[311] See generally Rajak and Henning (supra).
[312] Rajak and Henning.
[313] See generally McCormark (supra).
[314] See generally, Adeniran (supra)

Thirdly as a South African regime, it would be suitable for other SADC countries – South Africa is the most advanced in the sub-region[315].

### 4.3.0. SADC Court

A SADC Court is sine qua non in dealing with cross-border issues in SADC[316]. It must be stated at this juncture that the SADC Tribunal is dead[317]. One major factor responsible for the death is that the Tribunal could not make decisions which have direct effect within SADC[318]. It did not have the machinery for enforcing its rulings or judgements. According to Article 32(1) of the Protocol on the Tribunal, the decisions of the SADC Tribunal must be registered and enforced as foreign judgements within SADC. In Gramara (Pvt) and Anor v The Government of Zimbabwe[319], the Zimbabwe refused to register and enforce a SADC because the judgement was contrary to public policy in Zimbabwe.

I submit that the new SADC Protocol on the Tribunal (which gave the Tribunal limited power to settle disputes between member states) should be re-adopted. This point is very germane for the

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[315] See generally, Amos , The Role of South Africa in SADC Regional Integration: The Making or Braking of the Organisation", 5 J. Int'l Com. L. & Tech., 124 (2010); Neuma Grobbelaar, "Can South African Business Drive Regional Integration on the Continent, SA J Int Aff, Vol. 11, Issue 2, pp 91-106.

[316] See generally Afadameh-Adeyemi and Kalula (supra); Anton Bösl, Willie Breytenbach, Trudi Hartzenberg, Colin McCarthy and Klaus Schade (ed.), Monitoring Regional Integration in Southern Africa Yearbook 2008, Tralac, pages 179-223.

[317] The 34th Southern African Development Community (SADC) Summit of Heads of State and Government (2014) Final Communique (*available at* www.**sadc**.int/documents-publications/show/2751*)* wherein the Summit adopted the new protocol on the SADC Tribunal. The old Tribunal was in effect dissolved. The jurisdiction of the new SADC Tribunal is limited to the adjudication of disputes between member states.

[318] See generally Afadameh-Adeyemi and Kalula (supra). The other factor responsible for the death was the judgement of the Tribunal in Mike Campbell (Pvt) and others v Republic of Zimbabwe. The facts of the case are as follows. The landed properties of white farmers including Mike Campbell were acquired by the Zimbabwean government following a (July) 2000 land reform policy as well as amendment to the constitution. There were four issues for determination before the SADC Tribunal namely: (a) whether the Tribunal had jurisdiction to hear the case; (b) whether the plaintiffs had been denied access to domestic courts in violation of the SADC Treaty; (c) whether the Zimbabwean government had discriminated against the plaintiffs on the basis of race; and (d) whether the plaintiffs were entitled to compensation. The four issues were resolved in favour of Mike Campbell. In other words, judgement was given in favour of Mike Campbell. Mike Campbell applied to register the judgment at the High Court of Zimbabwe. The court refused to recognise the judgement on three grounds including the fact that it is contrary to public policy in Zimbabwe. Mike Campbell instituted a fresh application to declare the Government of Zimbabwe in contempt. The Tribunal held that the Government of Zimbabwe failed to comply with the earlier decisions of the Tribunal. The Tribunal reported its finding to the Summit of the Heads of State and Government. The Summit did not sanction the judgement of the Tribunal. In August 2010, the SADC Summit effectively suspended the Tribunal - it failed to renew the tenure of five judges and failed to appoint five new judges.

[319] Gramara (Pty) Ltd and one other v The Government of the Republic of Zimbabwe and two others (HC 33/09) [2010] ZWHHC1.

purpose of integration. In the words of G. Erasmus: "The more comprehensive the trade arrangements and the more advanced the integration process, the stronger the need for appropriate institutions with supranational powers[320]"

Also, I suggest that the SADC Tribunal should have power to make decisions which have direct effect within SADC member states.

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[320] Erasmus G "Is the SADC Trade Regime a Rules-based System?" 2011 *SADC Law Journal* 17-34. See generally Mutharika B, Towards Multinational Economic Cooperation in Africa, Praeger, New York (1972).

# CHAPTER FIVE

# CONCLUSION

Business rescue in South Africa and cross-border business rescue in SADC have been examined. I have also examined the South African Cross-border Insolvency Act 2000. I have proposed a suitable model for both South Africa and SADC. I have also suggested that treaty should be the means of achieving harmonization of laws in the Southern African Development Community (SADC). Moreover, I proposed a suitable business rescue regime. I proposed that a business rescue practitioner should be responsible for the management and control of an ailing company. Furthermore, I proposed that there be less degree of court involvement. With respect to settlement of disputes, I have advocated the read option of the previous Protocol on SADC Tribunal. Also, I proposed that the decision of SADC Tribunal should have direct effect within SADC member states.

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