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JUDICIAL MANAGEMENT IN BOTSWANA: IS IT A TIME FOR CHANGE?

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I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertation papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ABSTRACT

A company is an integral part of society whose existence impacts the country's economy and community as a whole, thus, the previous global financial crisis has highlighted the need for countries to have effective mechanisms to support and encourage corporate rescue. This is important because companies that encounter financial or economic collapse are able to benefit from corporate rescue mechanisms which may help preserve their on-going viability. In this regard, the turnaround of such companies will enable restoration of production capacity, employment, and the promotion of sustainability of capital and investments. However, existing legal frameworks on corporate rescue in many countries have been found to be wanting, and this has in turn triggered a new wave of legislative reform proposals.

Thus, the aim of this dissertation is to interrogate into the issue of whether there is a need for Botswana to reform its insolvency laws in order to accommodate a modernised corporate rescue regime. This dissertation probes on the shortcomings of judicial management as a corporate rescue regime which is currently operative in Botswana. Furthermore, the study reveals the performance of judicial management as a regime in other countries in order to illustrate its inherent weaknesses.

This study makes a comparison of the main components that make up modern corporate rescue regimes in order to be able to identify critical issues to be considered in making recommendations for legislative reform. Overall the study recommends the reform of the judicial management laws in Botswana by integrating the positive aspects of corporate rescue as applied in other countries as illustrated by examples of Australia, the United Kingdom and South Africa, and avoiding the pitfalls so far proving a burden in these jurisdictions. The reform should also make adjustments accordingly as relevant to the existing business environment and the economy as well as develop new provisions to cover social conditions unique to Botswana.

DEDICATION

To my mother, Dr Seja Gasenone Maphanyane, who has been a great support system.

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Firstly, I would like to thank God Almighty, who has given me the strength and grace to complete this degree.

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LIST OF ABBREVIATIONS

ASIC Australian Securities and Investments Commission

CVA Company Voluntary Arrangement

DCA Deed of Company Arrangement

UK United Kingdom

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CHAPTER ONE: INTRODUCTION

1.1 Background Information

Many countries now have corporate rescue or restructuring laws that seek to preserve the going concern value of ailing enterprises; [1] this is because a company is an integral part of a countries economy whose success is highly beneficial to society. In this light, McCormack notes that corporate rescue laws are not only there to maximise returns to creditors, but also to help secure other objectives such as preserving employment, encouraging the creation and development of an entrepreneurial class of business people and facilitating national strategic objectives such as maintaining choice for the consumer and keeping alive corporate champions that might otherwise fall victim to foreign competition.[2] The concern for the wellbeing of those dependent upon an enterprise which may well be the lifeblood of a region is also a legitimate factor that a modern law of insolvency should seek to uphold.

Moreover, one cannot overlook the distinct possibility that the reason why first world countries flourish may be due to the progressive attitude adopted by these countries towards assisting enterprises that encounter difficulties that can be overcome.[3] With this in mind, one would advocate for countries, especially developing ones like Botswana, to keep abreast of modernised corporate rescue laws.

1.1.1 Corporate Rescue

Corporate rescue is a term used to refer to an outcome by which the business of an insolvent or near insolvent company avoids closure and can continue trading as a going concern, after having been through a formal or informal rescue procedure.[4] Firstly, such rescue may be conducted by way of the continuation of the company as an entity, for example, through reorganisation, financial restructuring, refinancing,

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[1] G McCormack 'Corporate rescue law in Singapore and the appropriateness of chapter 11 of the US bankruptcy code as a model' (2008) *Singapore Academy of Law Journal* 396.
[2] Ibid at 401.
[3] R Bradstreet 'New Business Rescue: will creditors sink or swim '(2011) 128 *SALJ* 352 at 355, Bradstreet cites *Le Roux Hotel Management (Pty) Ltd* (2000)(2)SA 27 (c) para 55 in this regard
[4] A John 'Corporate insolvency in the United Kingdom: The impact of the Enterprise Act 2002' *5ECFR 148* (2008) 148 at 155.

debt composition or rescheduling.[5] Additionally, the company's undertaking may be rescued by its continuation under new ownership and management liberated from the company's debts. In this regard, Frisby makes a distinction between 'rescuing the company' and 'rescuing the business' of the company in the following words:

> 'Rescuing the company, which might be described as pure rescue, would involve the corporate entity emerging from the rehabilitation endeavour intact, so as to continue substantially the same operations , with the same workforce and in the ownership of the same people. The critical point is that the entity itself remains functional. However, rescuing the business is perhaps most accurately expressed as a form of corporate recycling. The company's business, or a viable part of that business, is sold as a going concern to a third party. This means that the productive part of the enterprise is removed from its original owners'.[6]

These types of corporate rescue structures generally allow management to stay in place, while giving sufficient time to come up with a rescue plan, whereas traditional insolvency laws emphasis on the settlement of creditors' claims.[7] Thus, a key feature of modern rescue regimes, in line with international practice is the preparation and implementation of a rescue or reorganisation plan.[8] The plan seeks to maximise, preserve and possibly even enhance the value of a debtor's business enterprise, in order to maximise payment to the creditors of the distressed debtor company.[9] In this regard, an insolvency practitioner drafts a plan that will assist enable company turnaround, in most instances; such a plan has to be approved by the creditors of the company.

1.1.2 Judicial Management

The current corporate rescue regime in Botswana is judicial management, as provided for under the Companies Act Cap 42:02 of 2003('Botswana Companies Act').[10]This is a regime which allows the court to grant an order whenever an application to the court for liquidation is made and the court is satisfied that there is a reasonable probability that if the company is placed under judicial management it

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[5] Ibid.
[6] S Frisby 'In Search of Rescue Regime: The Enterprise Act 2002' (2004) *Modern Law Review 67* 247 at 248.
[7] Ibid.
[8] DA Burdette 'Some Initial Thoughts on the development of a modern and effective Business rescue Model South Africa' (2004) *16 SA Merc LJ* 241 at 259.
[9] A Smits 'Corporate Administration- A proposed Model' (1999) *De Jure* at 80.
[10] S 471 Botswana Companies Act.

will remove the occasion for liquidation or dissolution.[11] This order may be granted by the court on the application of any member or creditor, if it appears to the court that by reason of mismanagement or any other cause it is desirable that the company be placed under judicial management.[12] Thus this regime is wholly administered through the courts, making it an inflexible corporate rescue mechanism.

Furthermore, judicial management emphasises the creditor's interests, and stands in contrast to the aim of rescuing a debtor from financial difficulty, which aim is advanced by modern corporate rescue regimes. Thus the regime is creditor friendly compared to the modern corporate rescue which is more debtor friendly.

1.2 Justification for study

This study is conducted in order to highlight the inadequacies of judicial management as a corporate rescue regime in light of advantages associated with other successful corporate rescue regimes and make recommendations for reform regarding the current operational regime in the case of Botswana.

Judicial management as a corporate rescue regime in Botswana as was in South Africa[13] has proven to have a number of short comings when compared to modern corporate rescue regimes. One of the major problems of judicial management is the fact that it is solely administered by the courts.[14] Having a court administered regime is costly and time consuming as much money is spent on legal fees and cumbersome court processes. This is unlike modern corporate rescue regimes which are flexible in that they are to a large extent self-administered under the supervision of an independent insolvency practitioner. The move from court supervision to self-administration will save significant costs and enable financially distressed small companies to consider corporate rescue as an available alternative to liquidation. Owing to its heavy reliance on court proceedings, judicial management has further been regarded as unattractive because the order affects the creditworthiness of a company detrimentally, even after the order is later set aside.[15]On the contrary, the likelihood of this happening in a modern rescue regime is minimal as it is not

[11]S 471(1) Botswana Companies Act.
[12] S 471(2) Botswana Companies Act.
[13]Judicial management was imported from South Africa, however, the regime was said to be outdated.
[14]Cilliers, Benade *Corporate Law 3ed* (2000) at 478.
[15]Ibid at 431.

necessary for a company to get the court's approval in order to obtain the protection that corporate rescue has to offer.

The Botswana Companies Act[16] states that during liquidation proceedings, the court may decide whether to grant a judicial management order or make an order for liquidation. The courts of Botswana are usually reluctant to grant a judicial management order as it is considered to be a drastic remedy[17]due to the fact that creditors of a company that is unable to pay its debts are entitled to use liquidation in order to recover payment.[18] This reluctance on the part of the courts then means that the courts will readily grant a remedy for liquidation instead of judicial management. In this regard, liquidation has been considered as a drastic measure the effect of which may be described as the guillotining of a company.[19] According to Bradstreet, 'Granting such an order of liquidation results not only in the demise of the corporate entity and the attendant loss of jobs but it may also disrupt other businesses.[20] It is therefore desirable to have legislation that is effective in providing escape routes against such commercial deaths, such legislation that is aimed at rescuing a financially distressed company from its decline towards liquidation.'[21]

Furthermore, the courts have refused to grant a judicial management order upon the application of a company, where the court was not satisfied that the company is unable to pay its debts. [22] Thus, companies may have foresight of potential financial distress, which the courts may refuse to appreciate, in the long run leading to liquidation. This is unlike modern rescue proceedings which encourage early recognition and treatment of insolvency.[23] A modern day corporate rescue regime makes room for rescue where there is likelihood of the company becoming insolvent in the near future. One such example is the South African corporate rescue regime; which provides for commencement of business rescue when it is reasonably unlikely that a company will be able to pay its debts when they fall due for payment in the immediate ensuing six months or that there is likelihood of insolvency in the

[16] S 471 Botswana Companies Act
[17] *BP Distributors (Pty) Ltd v Gladen Supplies (Pty) Ltd and others* 168-1970 BLR 30.
[18] Ibid.
[19] Bradstreet op cit note 3 at 352, cites P Wood *Principles of International Insolvency* (2007) at 31.
[20] Bradstreet op cit note 3 at 352.
[21] Ibid.
[22] *Macdonald v Coin Botswana (Pty) Limited* 2004 (1) BLR 415.
[23] *Welman v Marcelle Props* 193 CC (33958/2011) [2012] 32.

immediately ensuing six months.[24] It is therefore submitted that there is a need for a reform to the judicial management regime used in Botswana.

The late Professor Kahn Freund wrote that:

> 'Business organisation is in a constant state of flux, and the law cannot hope to keep abreast of development if it ascribes to its own provisions the quality of immutability. Other branches of Commercial law may content themselves with setting up a stable framework and leave the function of adaptation to the contractual practice of the business community itself. Company law cannot afford to do this. As soon as the privileges of corporate personality and limited liability have been made available to the business world, as soon as the handling of vast funds contributed by large and small investors has been entrusted to managers who are not subject to the law of loan and debt, the law must be on the alert to protect against abuses, the investor, the outside creditor, and the public itself. Company law can never reach a stage of finality. It is in need of constant revision'.[25]

This statement asserts that company law is not stagnant and is constantly in need of reform to meet modern demands and trends. Company Law should be up-to-date in order to reflect the country's economic climate and aspirations. According to Kiggundu, an outdated company law is dangerous as it leads to unnecessary expense and delay.[26] This is the case in the current judicial management regime of Botswana which requires the satisfaction of cumbersome tests, expenses and delays due to heavy reliance on the courts. Furthermore, Kiggundu makes note of the fact that Company law reform in Botswana lags behind that in countries such as Britain, South Africa, Canada, United States, Ghana and Malawi.[27] As a country that aspires to stay relevant and continue participating in international trade and attracting new business investments, one would then argue that Botswana needs to reform its judicial management regime to meet the international insolvency law trends.

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[24] S 128(f) Companies Act 2008.
[25] O Khahn-Freud 'Company Law Reform' (1946) *9Modern LR* at 235.
[26] J Kiggundu 'Company Law Reform in Botswana: the agenda for the twenty-first century' (1996) *SALJ* 496 at 517.
[27] Ibid.

1.3 Choice of Comparative law

Comparing countries with experience in working with reformed corporate rescue regimes may assist in indicating issues that should be considered in making legislative reform.[28] It is useful in realising common themes that emerge in order to recognise best practice.

Thus an analysis will be made of corporate rescue frameworks of South Africa as a country whose laws form the bulk of Botswana's judicial precedent. Additionally, Botswana has a similar version of judicial management as was operative in South Africa through its previous Companies Act ('1973 Companies Act').[29]

The comparison will also be made with Australia as one of the countries that has long standing experience and success with corporate rescue.[30] Its long standing success with the regime will be beneficial in providing insights into the challenges and best practices of implementing this regime.

The United Kingdom is a country with a lot of legislative influence over Botswana due to its historic ties.[31] Additionally, the UK, Australia and South Africa are countries that have had official inquiries into their insolvency regimes, which subsequently led to new legislation being enacted in those jurisdictions. These countries are therefore considered to be examples of modern rescue regimes which would serve as a good example to Botswana.

The best practices and short falls of these three regimes will also be interrogated to propose legislative reform for Botswana in the area of corporate rescue.

1.4 Research question

The question to be answered is whether judicial management as a corporate rescue regime is still relevant and effective in Botswana and whether there is need for a new corporate rescue regime, and if so, what should it be.

In answering the question on whether judicial management is effective, a discussion will be made of judicial management as a corporate rescue regime in

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[28] C Anderson 'Viewing the proposed South African Business Rescue provisions from an Australian perspective' (2008) *1 Potchefstroom Elektroniese Regbland* 1 at 1.
[29] Companies Act 61 of 1973.
[30] Anderson op cit note 28.
[31] C F Fombad 'Botswana Introductory Notes' available at *www.ida.up.ac.za/country-reports/botswana-country-report.pdf* accessed on 15 April 2015.

Botswana. The study will also review judicial management cases in other countries in order to assess the performance of judicial management as a corporate rescue regime.

Thereafter a discussion and comparative analysis will be made in respect of the different corporate rescue models in Australia, South Africa and the United Kingdom, taking the best practices and recommending them for legal reform in Botswana as relevant.

However, it is worth noting that legislative transplants can be problematic, this is so especially if a law is transplanted into an environment that is totally different from where it was taken. There is therefore a need to analyse the corporate rescue models of the three chosen countries with a view to inform the reform but also make recommendations looking at the legislative, economic and political environment operative in Botswana.

1.5 Methodology

This dissertation is a desktop study. In this regard, relevant primary and secondary information sources on the subject will be used. In analysing the primary sources, reference will be made to statutory provisions in Botswana, the United Kingdom, Australia and South Africa pertaining to corporate rescue. Additionally, secondary documents such as books, journals and case law will be used to investigate the research question.

1.6 Chapter Synopsis

Chapter one has been an introductory discussion on the general framework of the dissertation, providing the justification of the study and the research question that the dissertation seeks to answer.

Chapter two is an overview of the performance of judicial management as a corporate rescue regime, particularly looking at the case of South Africa before the creation of a business rescue system provided under its 2008 Companies Act.[32] This chapter will look at the shortcomings of judicial management before the enactment of the current legislation on business rescue also keeping in mind that the judicial management provisions of Botswana law were introduced from South African

[32] Companies Act 71 of 2008.

previous Law.[33] This chapter will also look into the official management and judicial management regimes of Australia and Zimbabwe, which regimes mimicked South Africa's judicial management regime.[34] Overall, the discussion will assist in illustrating the inherent weaknesses of judicial management as a corporate rescue regime in Botswana.

Chapter three discusses the concept of judicial management as a corporate rescue regime operative in Botswana based on the current Companies Act of Botswana and Case Law in-order to build a case for the need to meet modernised corporate rescue trends.

Chapter four analyses the corporate rescue regimes in Australia, South Africa and the United Kingdom by discussing the different models and how they operate in ensuring that financially distressed companies are rescued.

Chapter five is the recommendations and conclusion that will focus on best practice gleaned from chapter 4 in order to make recommendations for reform in Botswana Law.

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[33] *Builders Merchants Botswana (pty) Limited v Botoka Construction* 1979-1980 BLR 1, per Hayfron Benjamin CJ:

> 'The provisions for placing a company under judicial management have no counterpart in English Law; they were introduced into Botswana from South Africa'.

[34] See Olver 'Judicial management in South Africa' LLD (UCT) 1980 at 19, this regime first appeared in the South African Companies Act of 1926.

CHAPTER 2 OVERVIEW OF JUDICIAL MANAGEMENT AS A CORPORATE RESCUE REGIME

Introduction

This chapter will discuss the judicial management regime formerly operative in South Africa in order to gain an overview of the inherent weaknesses of the regime that may have been transferred into the nation of Botswana through importation of the provisions of the said system. A discussion of the 1973 Companies Act will be made in so far as it highlights the weaknesses of judicial management as it was then.

The chapter will end by looking into the performance of some of the jurisdictions that embraced the judicial management regime as was operative in South Africa, among them Australia and Zimbabwe.[35] With this in mind, this discussion will assist in realising whether the said jurisdictions have had to reform their laws or are still struggling with the said judicial management regime, in order to add into the inquiry as to whether there is a need for a modernised corporate rescue regime.

Additionally, this chapter will further assist in gaining background of the judicial management regime that is currently operative in Botswana, and associated challenges that render it ineffective.

2.1 Judicial Management in South Africa

Judicial management saw its first entry into South African company law through the Companies Act 46 of 1926 with the aim to incorporate a formal corporate rescue regime.[36] It was a system that aimed at rehabilitating companies that got into difficulties which under normal circumstances would lead to winding-up.[37] However, the regime had inherent weaknesses and the courts had a conservative approach toward it as a rescue regime.[38] Despite its shortcomings, it was subsequently adopted by Zimbabwe[39] and Botswana,[40] which countries based their judicial management legislation on that of South Africa. Australia also went along to implement a system

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[35] Ibid.
[36] A Loubser 'Judicial management as a Business Rescue in South African corporate law' (2004)16 *SA Merc LJ* 137 at 139.
[37] P Kloppers, 'Judicial management-A Corporate Rescue mechanism in need of Reform?' (1999) *3 Stellenbosch LR* 417 at 429.
[38] Loubser op cit note 36 at 140, referred to the case of *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty)* where the judge referred to judicial management as a regime that has barely worked since its initiation in 1926.
[39] RH Christie *Business Law in Zimbabwe 2ed* (1998) at 422.
[40] Op cit note 33.

of official management which was similar to judicial management as was operative in South Africa.[41]

2.1.1 Application for Judicial Management Order

Section 427-440 of the 1973 Companies Act made provision for judicial management. In terms of section 427(1) of the 1973 Companies Act, a judicial management order could be granted by the court in the following cases:

a) If by reason of mismanagement or any cause the company ;
   i) is unable to pay its debts or probably unable to meet its commitments, and
   ii) has not become or is prevented from becoming a successful business concern and
b) there is a reasonable probability that, if the company is placed under judicial management, it will be in a position to:
   i) pay its debts or meet its obligations and
   ii) become a successful business concern, then a court may if it appears just and equitable grant a judicial management order.[42]

Therefore an application for judicial management could be made by the company itself, a creditor,[43] member, or one of the aforementioned jointly.[44] Although it would seem as if this provision balanced the debtor's and creditor's ability to apply for judicial management, this was not always the case as will be discussed further. It is observed that the scale tilted more towards the creditors due to the pro-creditor attitude that the courts had developed.

Furthermore, the onus of prove that one had to satisfy was too high.[45] The applicant had to prove that there was a reasonable probability that the company will recover to the extent of being able to repay its debts.[46] After that, the court still had to be satisfied that it was just and equitable to grant such an application.[47] In this regard, Kloppers has noted that this is one of the reasons why judicial management then

[41] Olver op cit note 34 at 19.
[42] 1973 Companies Act s 427(1).
[43] 1973 Companies Act s 427(2) Including contingent or prospective creditors.
[44] 1973 Companies Act s 427(2).
[45] 1973 Companies Act s 427(1).
[46] 1973 Companies Act s 427(1)(b)(i).
[47] 1973 Companies Act s 427(1)(b)(ii).

could not be successfully implemented in South Africa.[48] The above provision ('s427 (1)1973 Companies Act') will be discussed in detail below:

2.1.1.1 Reliance on Court Proceedings

In terms of the Act,[49] judicial management required a court application in order to be implemented. This requirement made the procedure costly because money had to be spent in financing legal fees, making it unsuitable for small and medium sized businesses.[50] Additionally, the high costs also made the procedure an unattractive option for creditors because the costs incurred in running the process resulted in all available funds being spent on the process itself.[51]

Another problem with regard to reliance on the court was the requirement that there be a provisional and final order, and this lead to inevitable delays that come with court applications. Furthermore (as discussed below in 2.1.1.5-2.1.1.6), the ineffectiveness of the procedure could be attributed to the attitude of reluctance that the courts showed towards the regime, the courts were not too eager to award such order for judicial management.

2.1.1.2 Reasonable Probability Requirement

Another contribution to the inadequacy of the regime was the burden of proof that the applicant had to bear in proving the company's eligibility for judicial management. In this light, the applicant had to prove that there was a reasonable probability that the company will pay its debts in full thus becoming a successful business concern.[52] According to Rajak and Henning, the requirement of recovery to the point of being able to pay all debts in full is unrealistic and often contrary to the interests of the creditors and debtors.[53] This is so because it may be to the advantage of the creditor to accept an amount less than the face value of his claim in order to preserve a future supplier or purchaser of his products.[54]

In cases where there was a negative answer as to whether there is a reasonable probability of the company recovering under judicial management, it became

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[48] Kloppers Op cit note 37 at 418, where Kloppers states that the provisions of section 427(1) have been criticized for being unrealistic and outdated.
[49] 1973 Companies Act s 427(1).
[50] H Rajak & J Henning 'Business Rescue for South Africa' (1999) *116 SALJ* 262 at 268.
[51] Ibid.
[52] 1973 Companies Act s 427(1)(i).
[53] Rajak & Henning op cit note 50.
[54] Ibid.

irrelevant to continue with the court proceedings as the application would fail.[55] This then meant that 'the reasonable probability requirement' was the ultimate test to be proven for judicial management eligibility.

Furthermore, one may argue that the Act did not stipulate what amounts to the company becoming a successful concern; the above provision is thus vague and added to the difficult requirements that had to be proven in order for a judicial management order to be granted.

2.1.1.3 Just and Equitable

After proving to the court that a reasonable probability exists that the company will recover, the court still went ahead to consider whether it would be just and equitable to grant a judicial management order.[56] This requirement then made it even more difficult to persuade a South African court to grant an application for judicial management. In the case of *Le Roux Hotel Management (Pty) Ltd v E Rand* (Pty) Ltd,[57] the court held that because of the precarious financial situation of the intervening creditor, it would not be just and equitable to grant a judicial management order to the applicant. The court in making its decision considered the reasons behind the financial difficulties of the company to determine whether there is a probability of the company becoming a successful concern and whether it is just and equitable to grant the order.

Furthermore, the court considered the interests of the creditors and shareholders in deciding whether it was just and equitable to grant the order.[58] It is therefore submitted that because there was no solid framework to determine what was just and equitable; the court was at sole discretion to make the determination.[59]

2.1.1.4 Mismanagement

According to the 1973 Companies Act,[60] mismanagement was a factor that could be considered as warranting an application for judicial management. Reference to mismanagement in this context brought about the perception that the management of

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[55] See *Tenowitz v Tenny Investments (Pty) Ltd* 1979(2) 680, a judicial management order will not be granted if it is not probable that the company will pay its debts and meet its obligations.
[56] S 427(1) (a) 1973 Companies Act. See also *De Jager v Karoo Koeldranke and Roomys (Edms) Bpk* 1956 (3) SA 594.
[57] 2001(2) SA 727 CPD.
[58] See *De Jager v Karoo Koeldranke and Roomys(Edms)Bpk* 1956(3) SA 594.
[59] Loubser op cit note 36 at 148.
[60] S 427(1)(a) 1973 Companies Act.

the company was to blame for the company seeking to apply for judicial management.[61] Although this may not have been the intention of the legislation, it can be said that the wording of this provision played a role in making directors hesitant to apply for judicial management as they avoided the stigma attached to this requirement.

Furthermore, mismanagement was attached to the inability to pay debts. Thus, one could not be permitted to apply for judicial management without proving that the company was unable to pay its debts. There was therefore no opportunity to place a company under judicial management upon first signs of financial distress. This insolvency requirement acted as a barrier that defeated the object of the exercise, which was to make the company profitable again.[62]

2.1.1.5 Attitude of the Courts

The courts saw judicial management as being an extraordinary measure, due to the fact that creditors of a company that was unable to pay its debts were entitled to apply for liquidation in order to recover payment of their claims.[63] With this in mind, the court would seldom grant a judicial management order against the wishes of the creditor unless it was persuaded that doing so would be in the interests of all creditors and shareholders.[64]

An aspect that further restricted judicial management as a rescue regime was the fact that the South African courts treated it as a remedy that should only be allowed in exceptional circumstances.[65] This view was further illustrated in the case of *Pax Clothing Co Ltd v Vaskis Tailoring (Pty) Ltd*[66] where the court held that judicial management was a special privilege given in favour of a company and will be authorised in special circumstances.

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[61] See A Loubser, ' Some Comparative aspects of corporate rescue in South African company Law' LLD (UNISA) at 21, because of the stigma attached to the word "mismanagement", directors would be reluctant to apply for rescue in the form of judicial management, meaning that an ailing company would end up being liquidated.
[62] Ibid.
[63] P Kloppers 'Judicial management reform-steps to initiate a business rescue' (2001) *13 SA Merc LJ* 358 at 361.
[64] Ibid at 376.
[65] Ibid.
[66] 1953 (2) PH E 13(T).

2.1.1.6 Costs attributed to court proceedings

The reliance of judicial management on court proceedings made it an expensive procedure to opt into, especially considering that a lot of money had to be spent on legal costs. Olver suggests that judicial management was not a suitable remedy for small companies; attributing this to the costs involved in judicial management proceedings.[67] Although small private companies may have desired to make such applications for judicial management, this would be frivolous due to lack of sufficient assets to cover the costs.

2.2 Judicial Manager

Upon granting a provisional order, the court would hand over the management of an unsuccessful company to a judicial manager, thus divesting the persons currently managing the company of their powers to manage.[68] After taking over management of the company, the judicial manager would investigate the situation of the company and report it to the meeting of creditors and members.[69] During the meeting of creditors and members, consideration was made as to whether the company should be placed under final judicial management.[70]After this meeting, the judicial manager would report to the court on the prospect of the company being able to become a successful concern or to pay its debts within a reasonable time.[71] It is upon this report that the court would consider whether to grant a final order. During this process the judicial manager would continue to run the business under the supervision of the master.[72]

A point worth noting in the 1973 Companies Act was that there was no requirement for the judicial manager to submit a formal rescue plan stipulating how the company will be rescued. This factor has been critiqued because the judicial manager could act without a sense of accountability due to the fact that there was no stipulated plan setting forth how company turnaround would occur.[73]

Furthermore, a judicial management order could only be terminated by the court, this meant that the judicial manager was not placed under pressure to complete his

[67] A H Olver 'Judicial Management- a case for reform' *THRHR* (1986) 86 at 87.
[68] S 422 1973 Companies Act.
[69] S 430 1973 Companies Act, the meeting was convened by the master.
[70] S 431 (2) 1973 Companies Act.
[71] S 432(2) 1973 Companies Act.
[72] S 433 1973 Companies Act.
[73] S 433 Companies Act 1973.

task within a specified period of time and may continue earning fees without any real progress.[74] Thus, the fact that the judicial manager was not given a specified number of days in which to complete his task could be subject to abuse. Furthermore in this regard, there was no professional organisation put in place to ensure that the judicial manager was held liable for unprofessional or dubious actions.[75]

2.2.1 Criteria in Appointment of Judicial Manager

Another reason why judicial management had limited success in South Africa was the insufficient procedure used by the courts in appointing judicial managers.[76] There was no set criterion for the appointment of judicial managers and therefore the courts adopted a traditional practice of appointing liquidators as judicial managers.[77]

Moreover, judicial management was historically associated with liquidation because it was included at the end of a chapter on winding-up in the 1926 Companies Act, this later matured into the practice of liquidators being appointed by the courts as judicial managers.[78] Owing to this fact, there was a shortcoming in the procedure since a judicial manager's objective was to carry on trading to restore the business to prosperity, contrary to liquidators who generally end business trading in order to sell the assets of the business.[79]

Additionally, the appointment of liquidators as judicial managers also constituted a conflict of interest because a judicial manager was at liberty to make a recommendation for liquidation.[80] One may argue that since such judicial managers were liquidators, there was a risk that they would readily make recommendations for liquidation even where the situation would not necessitate such an option.

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[74] S 433 Companies Act 1973.
[75] S 433 Companies Act 1973.
[76] Loubser op cit note 61 at 39.
[77] Olver op cit note 123 at 86.
[78] Ibid.
[79] Ibid.
[80] S 433 (I) 1973 Companies Act, if the judicial manager is of the opinion that the continuation of the judicial management will not enable the company to become a successful concern, he may apply for a court order cancelling the judicial management order in turn issuing an order for winding-up of the company

2.3 Jurisdictions that have taken example of South Africa

2.3.1 Zimbabwe

The corporate rescue regime operative in Zimbabwe is also called judicial management; the provisions of which have been adopted from those of the 1973 Companies Act of South Africa.[81] Therefore as is the case in Botswana, the provisions of judicial management in Zimbabwe are similar to those in the 1973 Companies Act of South Africa.

The Companies Act of Zimbabwe[82] provides that an application for a provisional judicial management order may be made for the following reasons:

(i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern;

(ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and

(iii) that it would be just and equitable to do so.[83]

It is submitted that the above mentioned provision is identical to s 427 (1) of the 1973 Companies Act, as pertaining to grounds for making an application for judicial management. There is a similar requirement for the company to show that there is a reasonable probability that if the company is placed under judicial management it can pay its debts or meet its obligations and become a successful concern. Furthermore, as was the case in the 1973 Companies Act, the court must also consider it just and equitable to place the company under judicial management.[84]

It appears that the Zimbabwean judicial management regime carries with it some of the weaknesses which were found under the judicial management regime of South Africa as provided for under the 1973 Companies Act. In this regard, Chizana has identified a number of weaknesses in the Zimbabwean judicial management regime which appear to have been inherited from that of the 1973 Companies Act.[85] He

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[81] Christie op cit note 39 at 421.
[82] Companies Act Cap 24:03 ('hereinafter referred to as the Zimbabwean Companies Act').
[83] S 300(a) Zimbabwean Companies Act.
[84] Ibid.
[85] T Chizana 'Business Rescue and the Companies Act', 25 October 2013, available at *www.lexisnexis.com/hottopics/Inacademic*, accessed on 17 April 2015.

notes that although directors are discharged of their duties, the legal framework does not place sufficient motivation on the directors to be part of the rescue process as the judicial manager solely carries such responsibility. Furthermore, he submits that directors should be kept on board in order to assist the practitioner in rescuing the company; this is because directors are ordinarily privy to the information and knowledge of the operations of the company.[86]

According to the Zimbabwean Companies Act, as was the case in the 1973 Companies Act, a company is only placed under judicial management when it is unable to pay its debts as they fall due, this lowers the chances of recovery because at this stage the company will be very ill.[87] Therefore, it can be said that a company is regarded as being financially distressed if it is unable to pay its debts, however, it may be worth noting that such company may be financially distressed before reaching a position of being unable to pay its debts. In this light, Chizana submits that there is a need for intervention before a company reaches the stage where it is unable to pay its debts as it will be a pre-emptive measure.[88] The business will then have better chances at survival if rescue begins at signs of financial distress unlike the case under judicial management in Zimbabwe.

Another weakness identified by Chizana is the fact that there are no detailed requirements specifying the presentation of the judicial manager's plan to rescue the business, as was the case in South Africa.[89]

Hufisi, who is a judicial management expert in Zimbabwe, further unfolds the weaknesses of judicial management by submitting that the process damages the confidence of financiers on the concerned company to the extent that they are often reluctant to extend credit lines.[90] This was also the case in South Africa where the judicial management order affected the creditworthiness of companies.[91] Judicial management in Zimbabwe is also viewed as being a costly procedure because the

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[86] Ibid.
[87] Ibid.
[88] Ibid, here Chizana appears to be advocating for a revised business rescue regime similar to that stipulated in the 2008 Companies Act of South Africa, which makes provision for a financially distressed company to be placed on business rescue.
[89] Ibid.
[90] K Hufisi, 'Judicial management an effective tool', 10 October 2012, available at *www.herald.co.zw/judicial-management-an-effective-tool/,* accessed on 20 April 2015.
[91] Cilliers,Benade op cit note 14 at 478.

fees receive prime consideration over other creditors'.[92] One would assume that this is so because a lot of money has to be spent on court and administrative fees.

Moreover, the fact that the Zimbabwean legislation on judicial management was last updated in 1959 is viewed as warrant for reform because much in the world has changed since then.[93]

Although judicial management is still operative as a corporate rescue regime in Zimbabwe, there is an on-going debate on whether it is an adequate regime or should be reformed to align with international regimes.[94]

2.3.2 Australia

In 1961, Australia followed the example of South Africa by introducing official management as a corporate rescue regime.[95] Although Australia embraced a similar concept of judicial management as was operative in the 1973 Companies Act, the difference lay in the method by which companies were placed under judicial management or official management.[96] Official management was therefore distinguishable from judicial management in terms of the 1973 Companies Act.

While in South Africa only courts could place companies under judicial management, in Australia creditors could pass a resolution which places a company under official management.[97] In this case, official management was not heavily reliant on the courts as was the case of judicial management in South Africa. However, the approach used under official management also had its weaknesses as a resolution had to be passed by creditors and creditors are not always objective compared to the court which may consider the facts impartially.[98] Creditors also played a role in judicial management as the official manager had to give a report to the courts after a meeting with the creditors, which report the courts considered in

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[92] Ibid.
[93] Ibid, here Chizana notes that South Africa has revised its business rescue legislation after identifying short comings in the effectiveness of judicial management; he notes that success stories in Zimbabwe may be increased if judicial management legislation is reformed.
[94] RS Dzimbo Should the Zimbabwean Companies Act move away from judicial management and adopt business rescue? (2013), available at open.uct.ac.za
[95] Olver op cit note 34 at 19.
[96] Olver op cit note 34 at 289.
[97] Olver op cit note 34 at 290.
[98] Ibid.

deciding whether to award a final order.[99] The courts in this case were not bound to follow the views of the creditors; they were at liberty to consider other factors.[100]

The major difference between the two systems is that the Australian system was not reliant on judicial supervision whereas the South African system was subject to the supervision of the Courts. Olver notes that the Australian system was 'creditor management' as opposed to 'judicial management', one was court oriented and the other relied on resolution of creditors.[101] Another notable difference between the two systems was that in the case of official management, creditors where the ones who chose the official manager, whereas in the case of South Africa, the judicial manager was appointed by the courts.[102]

There was no provisional procedure in Australia because the courts decided whether to place a company under official management, whereas in the case of judicial management there was a provisional procedure put in place in order to obtain the views of creditors before the court makes a final order.[103] The procedure of judicial management was subject to the Courts as they could disregard the views of the creditors in making a final order, which is why judicial management has been criticised for its heavy reliance on court proceedings.[104] Furthermore, the 1973 Companies Act did not stipulate the time period within which a company must have had rehabilitated itself, in the case of Australia the company was to be placed under official management for a period not exceeding two years.[105]

No notable statistics of official management performance in Australia has been officially recorded. [106]Although Australia took the example of official management from South Africa, it appears from the differences in the two systems that Australia made the system unique to the Australian economy. Some of the areas which lead to failure of judicial management system in South Africa were not adopted by the official management system.

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[99] Olver op cit note 34.
[100] Olver op cit note 32 at 290.
[101] Ibid.
[102] Olver op cit note 32 at 291.
[103] Ibid.
[104] Ibid.
[105] Olver op cit note 34 at 295.
[106] Olver op cit note 34 at 289.

However, Australia later took steps towards adopting a modernised corporate rescue regime in the form of voluntary administration as a move to a modernised corporate rescue regime. In considering reforming the corporate regime, the Australian Commission of inquiry had the opportunity of considering the English model of administration and the chapter 11 procedure of the United States of America.[107]

Under official management, Australia took example of judicial management and made it unique to itself. In the case of South Africa as regards its 'business rescue' regime, one would question whether it was a wise decision to completely overhaul its corporate rescue regime instead of modernising the judicial management that was in place. According to Kloppers, there was a need for a complete overhaul of the judicial management regime because there was a bad attitude attributed to the regime as it was viewed as an extraordinary measure.[108]

The popularity of modern corporate rescue regimes worldwide and the fact that judicial management had not been very successful in South Africa resulted in a number of commentators calling for a review of the South African corporate rescue procedure.[109]

Conclusion

An overview of judicial management in South Africa and in countries which took example from its regime shows that judicial management as a corporate rescue measure has not been an effective remedy and that there is a drive and move towards the trend of adopting modernised corporate rescue regimes as seen by the steps taken by South Africa and Australia. While Zimbabwe has not taken steps to reform its judicial management regime; the current commentary suggests that the regime is ineffective and desirous to be traded for a modernised rescue regime which would ensure that ailing companies are rescued before reaching a stage of insolvency.

[107] Pont & Griggs 'The Resuscitation of the Corporate Cadaver: an Autopsy of Business Rescue Laws' (1994) *Australian Journal of Corporate law* at 309.
[108] Kloppers op cit note 64 at 426.
[109] Department of Trade and Industry Policy Document 2004.

CHAPTER 3 OVERVIEW OF JUDICIAL MANAGEMENT IN BOTSWANA

Introduction

This chapter discusses judicial management as a corporate rescue regime operative in Botswana. More specifically, there will be a discussion on the historical development of the regime and its current status .The discussion will be based upon the current Companies Act of Botswana[110] and available case law.

In relation to the actual judicial management regime, the discussion will deal with the key aspects that make up the regime in Botswana in order to illustrate its ineffectiveness.

3.1 Historical Background

As will be discussed, the law governing company operations in Botswana is part of the received law and is to a large extent based on English law.[111] In 1885, Botswana was declared a protectorate, and from then onwards it was ruled from the Colony of the Cape of Good Hope.[112] The Order-in-Council of 9 May 1891 established the Office of the High Commissioner of Botswana,[113] who was required to respect any native laws by which the civil relations of the people of Botswana were regulated.[114] At that time, having a company as a means of doing business was unknown and business transactions were mainly done by way of barter.

On the 10 of June 1891, the High Commissioner issued a General Administration Proclamation[115] which provided that the laws in force at the Cape of Good Hope would mutatis mutandis be the law in force and observed in Botswana.[116] At that time, the law applicable at the Cape of Good Hope was the Roman-Dutch Law. This law was a hybrid system consisting of Roman-Dutch common law principles and English statutory and common law principles introduced in the Cape.[117] Therefore, by virtue of the 1891 Proclamation, Botswana received the Company Law statutory

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[110] Cap 42:01 of 2008.
[111] J Kiggundu 'Company Law Reform in Botswana: The Agenda for the Twenty First Century' (1996) *113 SALJ* 496.
[112] Ibid.
[113] PR Wood *Principles of International Insolvency 2ed,* Before Colonisation, Botswana was referred to as Bechuanaland Protectorate.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.

enactments and common law principles that were applicable at the Cape at that time.[118]

Thus the reception of South African company law into Botswana included the South African system of judicial management. As such, looking at the historical development of Company law in Botswana illustrates that this area of the law is highly influenced by English and South African Law.

3.2 Definition and Purpose

Judicial management in the context of Botswana is defined as the process in which the court places the management of the company's affairs in the hands of a judicial manager, who then runs the company under the supervision of the Master of the High Court.[119] In this regard, the purpose of judicial management is to enable companies suffering a temporary setback due to mismanagement or other circumstances to become a successful business once more.[120] Thus the primary duty of the judicial manager is to make an effort to ensure that the company becomes successful again.[121] However, one would then question the efforts of the judicial manager because as will be explained further, such a position is usually occupied by liquidators. Furthermore, it would be contradictory to assume that individuals trained in liquidating companies are able to effectively make an effort at rescuing the company.

3.3Judicial Management under the Companies Act of Botswana

The Botswana Companies Act makes provision for judicial management. One notable issue concerning this provision is its title which reads as, 'Winding Up and Judicial Management'. This way of arranging the companies Act seems to have been adopted from the 1973 Companies Act of South Africa which made the provisions on judicial management fall at the end of a chapter on winding-up.[122] It is submitted that this title may bring about uncertainty as it seems to suggest that winding up and judicial management operate identically, this is similar to the position under the 1973 Companies Act, where the arrangement of the Act matured into the practice of appointing liquidators as judicial managers. Furthermore, this reflects the attitude of

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[118] Ibid
[119] J Kiggundu *Company and Partnership Law in Botswana* 1ed (2008) at 208.
[120] Ibid.
[121] Ibid.
[122] A H Olver 'Judicial management –a case for law reform' (1986) *THRHR* 84 at 86.

reluctance that the courts have towards judicial management in Botswana. The title does not demonstrate the importance of an efficient rescue culture in company law and is suggestive of the idea that winding up and judicial management are of the same class. As such, a sufficient example of statute that has succeeded in emphasizing the importance of rescue culture is Chapter 6 of the South African Companies Act, which dedicates an entire chapter towards business rescue proceedings.[123] Judicial management should not be seen to operate interchangeably with winding-up as one concept intends to prevent the other; they are opposing proceedings and cannot be structured in one chapter. It is thus argued that placing the two concepts under one title and chapter suggests that they are ad idem.

Furthermore it is submitted that the pro creditor mindset attached to this regime in Botswana is as a result of its reception from South Africa. In this regard, Olver has noted the following:

> 'The Judicial management section acted as encouragement to judicial managers to make no serious attempt to carry on the company's business but to proceed at once to liquidate its assets for the purpose of paying creditors. Judicial management thus became established as a process of winding-up without any kind of control by the court'.[124]

As will be further discussed, this is a reflection of the judicial management regime as it currently stands in Botswana.

3.4 The Judicial Management Process

According to section 471 of the Botswana Companies Act, judicial management may be commenced in one of two ways:

(i) By order arising from a liquidation application,[125] and

(ii) By way of an order arising from application for judicial management.[126]

This process of judicial management commencement is solely court oriented, as compared to modern corporate rescue regimes which seem to support the out of court entry route.

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[123] Companies Act 71 of 2008, Chapter 6 of the Act is dedicated towards business rescue.
[124] Olver op cit note 123.
[125] S 471(1) Botswana Companies Act.
[126] S 471(2) Botswana Companies Act.

3.4.1 Order arising from liquidation application-s 471(1)

Firstly, a judicial management order may be granted by the court under the following circumstances:

> 'Where an application is made to the court for the liquidation of any company on the ground that such a company is unable to pay its debts or that by reason of its mismanagement or of its probable inability to meet its obligations or become a successful concern or for some other cause, it is just and equitable that the company should be wound up, but the court upon consideration of the facts, is of the opinion that notwithstanding any present inability of the company to meet its obligations, or the existence of any other fact or circumstance alleged in the application, there is a reasonable probability that if the company be placed under judicial management as provided in this section it will be enabled to meet such obligations and to remove the occasion for liquidation or dissolution, and that it is otherwise just and equitable that the granting of an order of liquidation should be postponed'[127]

It is submitted that this provision is insufficient; this is so because the complete discretion awarded to the courts in deciding whether it is just and equitable for a company to be placed under judicial management is prone to misuse. In the High Court case of *Macdonald v Coin Botswana (Pty) Limited*,[128] an application had been brought by the applicant for the judicial management of the respondent. The applicant company was in a parlous financial situation and unable to pay its debts. Despite evidence from accountants to the effect that the company was in a bad financial state, the court held that there was no evidence to show that the company was facing difficulties which were beyond the capabilities of existing management and that there was accordingly no basis for the application for judicial management. In this regard, the courts of Botswana also seem to have developed an attitude of reluctance towards judicial management as they are caught between having to protect the rights of creditors and providing a moratorium for the company via judicial management. It is submitted that because of the attitude of reluctance that the courts have, it is difficult for even 'rescuable' companies to be allowed to access judicial management.

[127] S 471 (1) Botswana Companies Act.
[128] 2004(1) BLR 415(H).

3.4.2 Order arising from application for judicial management-s 471(2)

Lastly, a judicial management order may also be granted by the court in the following circumstances:

> ' …in respect of a company on the application of any member or creditor, if it appears to the court that, by reason of mismanagement or any other cause, it is desirable that the company should be placed under judicial management'. [129]

In terms of section 471(1),[130] the test for placing a company under judicial management is that of 'reasonable probability'. As such, there must be a reasonable probability that if the company is placed under judicial management it will recover, namely that it will be able to pay its debts and become a going concern. However, the test in section 471(2) is that of 'desirability', the provision states that a judicial management order may be granted if it is desirable, thus, it must be desirable that the company be placed under judicial management. This then implies that section 471[131] contains two tests. One may suggest that the reason behind the two tests is that one is done during a liquidation proceeding, which then means that more discretion is awarded to the court. However, the second application is done by the members and creditors of the company, which implies that the test lessens the discretion placed upon the courts. Although this is the case, even though the members and creditors of the company may desire judicial management, because of the attitude of reluctance the courts have towards judicial management, the application may not yield the desired outcome.[132] Furthermore, the court in concluding the test will not only consider whether the application is desirable only for the applicant but will have to consider other parties as well. This then makes it a complicated task for the courts, because members and creditors may not always want the same thing.

The dicta of the Court of Appeal judges' carries weight and thus lower courts often refer to them in carrying out decisions.[133] Cases that have been decided by the Court of Appeal in Botswana can be implied to be the position of the law as it stands in Botswana. In this light, in the case of *BP Distributers (Pty) Ltd v Gladen Supplies*

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[129] S 471(2) Botswana Companies Act.
[130] Botswana Companies Act.
[131] Ibid.
[132] *Builders Merchants Botswana v Botoka Construction (Pty) Ltd* 1968-70 at 350.
[133] This is referred to as the doctrine of stare decisis, lower courts follow the decisions of superior courts.

(Pty) Ltd,[134] the applicant had petitioned the court of appeal of Botswana for judicial management orders with respect to two companies which were in a bad financial state. The judge in this case, Dendy Young CJ, refused to grant the judicial management order on grounds that the applicant failed to establish a reasonable probability that the companies would overcome their difficulties if placed under judicial management. The judge was of the view that the overriding test is that of reasonable probability-that is to say there must be a reasonable probability that the company will recover if placed under judicial management. Although the test is objective, one may not know what the judge considers in deciding whether a company will be able to recover. The decision then is based on what the judge thinks to be a reasonable probability that if the company is placed under judicial management, it will recover. It is thus submitted that courts in Botswana do not seem to identify with rescue culture, and the reasonable probability test also plays a role in fuelling the court's reluctance to place companies under judicial management. Moreover, the legislation does not tell judges what to look for in making a decision, they cannot be expected to be well versed on the viability of companies.

Additionally, the judiciary is responsible for upholding creditors' rights and therefore, taking a risk in trying to rescue a company that has no plan would not be a priority to judges. In the case of *Builders Merchants Botswana v Botoka Construction (Pty) Ltd,*[135] a group of the respondent company's creditors petitioned to have the company wound-up. Another group of creditors counter-petitioned as they favoured having the company placed under judicial management. The court in this case refused to grant the judicial management order because the group counter-petitioning had failed to show that there was a reasonable probability of the company recovering if placed under judicial management, a provisional liquidation order was granted instead. The burden of proving that there is a reasonable probability that the company will recover is on the petitioner. In this regard, Kiggundu submits that proving reasonable probability is a heavy burden to bear.[136]

Judges have attempted to justify why they are reluctant to grant judicial management as a remedy. In the BP Distributors case,[137] Dendy Young CJ said that

[134] 1968-70 BLR 350.
[135] 1979-70 BLR 1.
[136] J Kiggundu *Company and Partnership Law in Botswana* 2ed at 209.
[137] 1968-70 BLR 350.

judicial management is a fairly drastic remedy to apply, especially because it is coupled with an order that whilst in force, all actions and execution of writs, summons and other processes against the company may not be pursued without leave of the court.[138] He further points out that such an order would in effect inhibit litigation against the company.[139]

In highlighting the position of the courts in Botswana, Hayfron-Benjamin CJ in the *Builders Merchants*[140] said:

> 'The company in this case is involved in the sensitive areas of higher defense. A serious disruption of work on the projects should if possible be avoided. It is true that creditors have a right to put a company which is incapable of paying its debts into liquidation. But all rights, even those considered fundamental must be exercised without prejudice to the national interest'.

The decisions in the *Builders Merchants Botswana* and *BP Distributors* cases are judgments of the Court of Appeal. The Court of Appeal is a superior court, it being the final court of appeal in the case. Botswana courts are thus obliged to take regard of the doctrine of stare decisis, in which decisions of superior courts are binding on inferior courts.[141] Currently, it may be concluded that the attitude of reluctance towards judicial management is the position of the courts in Botswana.

Kiggundu has highlighted that an outdated company law is dangerous because it leads to unnecessary expenses and delay.[142] He further points out that this is problematic as time-consuming formalities have to be followed, procedures and forms for doing things then become embedded in administration and practice, and mystique develops, which is understood only by a few legal specialists.[143] This gives rise to a procedure that is inflexible and expensive as a result of many formalities, procedures and tests. One may submit that this is a reflection of judicial management in Botswana as an outdated procedure that is inflexible and costly.

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[138] Ibid.
[139] Ibid.
[140] 1979-1980 BLR.
[141] CM Fombad *Essays on the law of Botswana* 237.
[142] Kiggundu op cit note 26.
[143] Ibid.

3.4.3 Moratorium

In the event that the petitioners discharge the burden of proving that there is a reasonable probability that the company will recover, the court may grant a judicial management order to be in force for the period that is stipulated in the order.[144] In this regard, the court may direct that while the judicial management order is in force, all actions and the execution of all writs, summonses, and other processes against the company be stayed and be not proceeded without leave of the court.[145] The use of the word 'may' implies that the stay in executions (moratorium) is not mandatory; it then creates uncertainty as to whether the court will include the moratorium in judicial management. This is unlike most modern corporate rescue regimes which have automatic moratoriums that operate upon commencement of corporate rescue.[146]

Furthermore, the court may vary the terms of the order at any time and in any manner it deems fit, [147] a fact that that illustrates the heavy reliance of the regime on the courts, and the absolute discretion granted to the judges as pertaining to judicial management. However, judges are not trained to rescue companies but to litigate, which duty includes upholding rights of those that are entitled or aggrieved, i.e. creditors.

3.5 The Judicial Manager

3.5.1 Qualifications

One of the shortcomings of the Botswana Companies Act, as was the case under the 1973 Companies Act, is that it does not stipulate the qualifications that a judicial manager is required to have. The Act only stipulates that judicial managers should not be auditors of the company.[148] Although this approach seems to prevent conflict of interest in upholding the independence of the judicial manager's office, it is submitted that it is insufficient. As such, there are no stipulated skills or requirements that persons occupying the office of the judicial manager are required to satisfy, thus one may suggest that such approach is not rescue-specific. According to Bradstreet,

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[144] S 472 Botswana Companies Act.
[145] S 472(d) Botswana Companies Act.
[146] See P Kloppers 'Judicial management-A Corporate Rescue Mechanism in need of Reform?' (1999) *3 Stellenbosch LR* 417 at 430.
[147] S 472(2) Botswana Companies Act.
[148] S 473(2) Botswana Companies Ac.t

qualifications of those that rescue the company are crucial as the success of the rescue procedure depends on them.[149] Thus one would then be displeased by the fact that the qualifications of the office of the judicial manager are not defined in the Act. Accordingly the fact that judicial managers' qualifications are undefined has led to liquidators being casually appointed in this office with the assumption that they would do a better job in turning the company around.[150]

3.5.2 Appointment

Judicial managers are appointed in terms of Section 382, [151] which requires that the names for appointment of liquidators be submitted when the final winding-up order has been made.[152] This then implies that judicial managers are appointed in the same manner as liquidators; this would further be suggestive of the fact that liquidators are appointed to be judicial managers in the judicial management procedure.[153] In this regard, one of the reasons for the failure of judicial management in South Africa was the fact that liquidators were appointed as judicial managers.[154] This is problematic because liquidators are trained in winding up companies. It is submitted that they will not be of much assistance in ensuring company turnaround because they are accustomed to dismantling companies.

3.5.3 General Duties

The judicial manager is allocated several statutory duties under the Act,[155] these duties include:

> '(a) to recover and reduce into possession all the assets of the company, and undertake the management of the company after his appointment
>
> (b) to manage the company subject to the order of the court, in such manner that he sees as being most economic and conducive to the interests of the members and creditors

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[149] R Bradstreet 'The leak in the chapter 6 life boat: Inadequate regulation of Business Rescue Practitioners May adversely Affect Lenders Willingness and Growth of the Economy' (2010) *Mercantile Law Journal* 195 at 201.
[150] Ss 472, 382 Botswana Companies Act.
[151] S 472 Botswana Companies Act, a judicial manager is appointed in terms of section 382 of the Act.
[152] S 382(1) Botswana Companies Act.
[153] Ss 382, S 472(1)(a) Botswana Companies Act.
[154] Olver op cit note 123 at 87.
[155] Botswana Companies.

(c) to comply with any direction of the court made in the judicial management order or any variation thereof,

(d) to keep such books of account, and to prepare a balance sheet and profit and loss account,

(e) to convene the annual general meeting, during the period that the company is under judicial management and to furnish to the persons entitled thereto a report containing such information as is required'.[156]

It is observed that among all these duties, there is none requiring the judicial manager to make a rescue plan as is common among modern corporate rescue regimes. Thus the judicial manager doesn't have to make a plan proposing how company turn around will be attempted. However, the rescue plan is a key feature in modern corporate rescue regimes, which cannot be ignored.[157] Furthermore, the rescue plan is important as it makes corporate rescue process more transparent as all stakeholders are able to see where the company is going and vote and deliberate on how the practitioner is going to formulate a plan to turn the company into a profitable entity.[158]

3.5.4 Application of assets

Generally, the judicial manager is not permitted to sell or dispose of any of the company's assets without leave of the court.[159] However, he or she may dispose of the company's assets without leave of the court if it is in the ordinary course of the company's business.[160] One would suggest that this is done in order to prevent abuse, this is so because the judicial manager is prevented from freely disposing the company's assets outside the ordinary course of business,

The creditors of the company whose claims arose before the date of the judicial management order may at a meeting convened by the judicial manager resolve that all liabilities incurred or to be incurred by the judicial manager in the conduct of the company's business be paid on preference to all other liabilities, exclusive of the costs of the judicial management.[161] Thereupon all claims based upon such first-

[156] S 474 (a)-(e) Botswana Companies Act.
[157] Burdette op cite note 8.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] S 476(2) Botswana Companies Act.

mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the company, except claims arising out of the costs of the judicial management.[162]

3.6 Liquidation as a fall-back position

Although liquidation is not always the enemy, especially in cases where companies have no sign of being able to recover, a company should be given a fair chance at survival. This is so especially with the trend of appointing liquidators as judicial managers, which implies that even if a company is placed under judicial management, it may end up being liquidated. Furthermore, the courts have developed an attitude of reluctance towards the regime, in such a case; liquidation may be the option that the courts choose to take over judicial management. It is submitted that in Botswana companies are not given a fair chance at survival, due to judicial management being a shadow behind liquidation.

This being said, Botswana is a small country with a population estimated at 2,05million.[163] It consists of an economy of mainly small to medium sized companies. In this light, an efficient and well-functioning corporate rescue procedure has advantages for every country and every type of economy; these advantages are even more relevant in developing countries where the preservation of jobs is of primary concern.[164] The economy would thus experience difficulty due to companies that go through liquidation when they can benefit from an effective corporate rescue regime.

Modubule in demonstrating his concerns of the liquidation of a giant transport company, Lobtrans, where 500 jobs were affected, stated that the liquidation would exacerbate the unemployment situation that is already existent in Botswana.[165] Furthermore, in February 27 2015, over 800 jobs of employees working at Discovery Metals Bosetu Mine were affected after the mine was shut down.[166] The decision in this regard was whether to auction or liquidate the company. Under the modern

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[162] S 476(2) Botswana Companies Act.
[163] 'Botswana population 2015', available at worldpopulationreview.com/countries/botswana-population/, accessed on 18 June 2015.
[164] A Loubser 'Business rescue in South Africa: a procedure in search of a home?' *Comparative and International Law Journal of Southern* (2007) 152 at 153.
[165] L Mooketsi, 'Botswana: Modubule Questions Liquidation of Lobtrans, available at allafrica.com/stories/2008/02111806.html, accessed on 17 June 2015.
[166] E Mmolai 'Botswana Daily News', available at *www.dailynews.gov.bw/news-details.php?nid=18182*, accessed on 18 June 2015.

corporate rescue regimes, one may place a company in corporate rescue where it can be perceived that in the coming future the company may enter into financial distress. A company in this case would thus have a higher chance of survival as a forecast could be made to determine the viability of the company in the preceding months.

The attitude of the courts may end up resulting in companies being liquidated prematurely resulting in the consequences being felt by the economy of the country, including high levels of unemployment. Therefore, a small country like Botswana, which is already troubled by unemployment, cannot afford to face additional job losses in the economy due to liquidation.

Conclusion

Although Botswana has made an attempt at having a formal corporate rescue in the form of judicial management, it is necessary to create legislation that is aimed at rescuing ailing companies from their decline towards liquidation. The fact that the courts are reluctant to apply the remedy, places a limitation on the success of the current remedy. Moreover, the high interference of the courts towards access of the judicial management process is the major reason why the regime as a whole is insufficient. In turn, the aim that the regime seeks to promote, which is to rescue ailing companies becomes defeated.

Countries globally are moving towards accommodating modern corporate rescue regimes. These regimes recognize corporate rescue as a necessary alternative to liquidation, and operate on the basis that the value of the company is greater if it, or its business is preserved as a going concern, as opposed to the assets being sold off on a piecemeal basis. Botswana should not be an exception in flowing with the global trend towards acquiring modernized corporate rescue mechanisms.

CHAPTER 4 CORPORATE RESCUE IN SOUTH AFRICA, AUSTRALIA AND THE UNITED KINGDOM

Introduction

Corporate rescue strategy is firmly established in most developed corporate systems across the globe,[167] among them, South Africa, United Kingdom and Australia which countries may be regarded as having modernised corporate rescue regimes.

This chapter is a comparative analysis of the corporate rescue regimes operative in South Africa, United Kingdom and Australia, thereafter setting out the differences and similarities of the regimes.

The corporate rescue procedure is extensive and therefore only the major components that make up this process will be discussed in this chapter. All corporate rescue regimes comprise of three distinct steps which are:

(i) commencement

(ii) investigation and development of plans,

iii) and decision making.[168]

These steps will then be discussed as pertaining to each jurisdiction and at the end of each step there will be an analysis in order to make a comparison. It is notable that making a comparison among jurisdictions where the stated aims are the same is useful as an indicator of issues to be considered in making legislative reform.[169]

The relevant legislation in each jurisdiction will be considered-viz. the South African Companies Act 71 of 2008 (‘Companies Act 2008), the Australian Corporations Act 50 of 2001(Corporations Act 2001) and the United Kingdom Insolvency Act of 1986(UK Insolvency Act).

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[167] J De Lacy *The Reform of United Kingdom Company Law* (2002) at 433.
[168] Anderson op cit note 28.
[169] Ibid.

4.1 Definition and Aims of the corporate rescue regimes

4.1.1Australia

The corporate rescue regime operative in Australia is termed 'voluntary administration'[170]and is provided for under part 5.3A of the Corporations Act 2001.This is a procedure that attempts to allow companies in financial distress time to develop and implement a restructuring plan with its creditors.[171] Section 435A of the Act[172] specifies that one of the objectives of the procedure is to ensure that the business, property and affairs of the company are administered in such a way that maximises the chances of the company or as much of its business as possible surviving. Where this aim is not possible, the next objective is to generate results that will bring a better return for the company's creditors and members than would be from an immediate winding up of the company.[173]

4.1.2 South Africa

Similarly, an equivalent procedure termed 'business rescue' is operative in South Africa under Chapter 6 of the Companies Act 2008. [174] However in South Africa the procedure is defined in more detail:

> 'Business rescue means 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 maximises 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

[170] This procedure was recommended by the Report of the Australian Law Reform and has been operative since 1993.
[171] Murray & Harris *Keay's Insolvency Personal and Corporate Law and Practice* 8ed (2014) at 603.
[172] Corporations Act 2001.
[173] S 435B Corporations Act 2001.
[174] Ss 128(1), 130 Companies Act 2008.

existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company'.[175]

This definition seems to encompass all the components that make up business recue in South Africa. It is thus a summary of the regime in its entirety.

4.1.3 United Kingdom

In the United Kingdom the corporate rescue procedure is known as Administration and is provided for under the Insolvency Act of 1986.[176] The main objective of administration is to ensure that the administrator pursues the rescue of the company as a going concern.[177] An alternative aim would be to achieve better results for the company's creditors as a whole than would be likely if the company were wound up.[178]

Analysis

It appears that the corporate rescue procedures in all three jurisdictions share similar primary objectives, one of which is to maximise the likelihood of the company continuing on a solvent basis. Although the rescue of a company is paramount, where this is not possible, the second objective is to get better results for creditors than they would if the company entered liquidation.[179] One would submit that the fact that the insolvency practitioner strives to get better returns than if a company is under liquidation makes this procedure more favourable for creditors and members as compared to liquidation.

4.2 Commencement

The commencement stage of corporate rescue is important as it provides a gateway through which the procedure may be undertaken,[180] thus it is important to have a simple, affordable and flexible commencement in order for the regime to be easily accessed. In cases where there are many rigid and complex procedures used for commencement, one may submit that there may be likelihood that the regime will

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[175] S 128(1)(b) Companies Act 2008.
[176] A bulk of this procedure is provided for under schedule b1 of the UK Insolvency Act.
[177] Schedule b1 paragraph 3(1)(a) UK Insolvency Act.
[178] Schedule b1 paragraph 3(1)(b) UK Insolvency Act.
[179] A Keay 'A Comparative Analysis of Administration Regimes in Australia and the United Kingdom' in: PJ Omar (ed) *International Insolvency Law: Themes and Perspectives* (2008) 105 at 112.
[180] C Anderson & D Morrison 'The Commencement of the Company Rescue: How and When Does it start?' in: PJ Omar (ed) *International Insolvency Law: Themes and Perspectives* (2008) 83 at 85.

fail because of ineffectiveness and lack of use. Moreover, Anderson has pointed out that commencement is important as it establishes the most fundamental issues with respect to the advantages that may be taken by corporate participants in the process, as well as identifying those that are able to initiate the said regimes to their advantage.[181]

4.2.1 South Africa

In South Africa, business rescue may be commenced in one of two ways. Firstly, commencement may be done by way of a resolution made by the board of directors to voluntarily begin business rescue proceedings, this may be done 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.[182] In this regard, a company is regarded as being 'financially distressed' when the following ensues:

> (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
>
> (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months

It is notable that the above mentioned provision does not specifically speak of the present inability of the company to pay its debts. This is unlike Australia and the UK, which commencement requirements speak to the present and future solvency of the company. However this provision may be applauded because once a company sees signs of financial distress at an early stage,[183] it may make an application for business rescue. In this case, the board of directors may commence business rescue proceedings by way of a resolution upon obtaining majority vote. The provision only requires that the board of directors has reasonable grounds for believing that the company is financially distressed and reasonable prospects of being rescued. This requirement of commencement is flexible and appears to reduce the difficulty of entry.[184] One would observe that this entry route encourages directors of financially distressed companies to seek help at an early stage rather than waiting until it's too late,[185] this is because the test is a simple one which involves the controllers of the

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[181] Ibid at 103.
[182] Ss 129(1)(a),129(b) Companies Act 2008.
[183] Being within the immediately ensuing six months.
[184] FH Cassim Contemporary company law 2ed (2012) at 866.
[185] Ibid.

company. This then increases the likelihood of a company being successfully rescued, as directors will be free to commence rescue before the company becomes insolvent. Furthermore, this procedure of commencement is efficient because directors are in the best position to know when a company is undergoing financial difficulties. It appears to be advantageous to authorise the board to make such a decision because it avoids unnecessary delays and costs that one has to go through in the case of commencing by way of the court. The route may therefore be termed as being flexible in that it is not complicated and it's easy to implement.

The second way of commencing business rescue is where affected persons[186] apply to a court for an order placing the company under supervision and commencing business rescue proceedings, this application may be made at any time.[187] Loubser has expressed concern regarding the inclusion of employees and shareholders as affected persons, reason being that it will not achieve the desired results as they may not have the necessary information to prove the requirements of rescue.[188]

The fact that this second way of commencement has to be approved by the courts, helps in preventing malicious applications and other forms of applications made with the intent to abuse the process[189]. When the application is before the courts, there is a consideration of three grounds in deciding whether to place the company under business rescue.[190] Firstly, the company must be financially distressed, secondly, the company must have failed to pay over any amount in terms of an obligation under a public regulation or contract, finally, that the court finds it just and equitable to do so for financial reasons. The courts are at discretion to decide on anyone of the grounds in making a decision, however the fact that the grounds are listed in the alternative makes it different from judicial management.

Cassim points out that these three thresholds are important as they may prevent creditors from placing a company under business rescue simply because they want to

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[186] S 128(1) Companies Act 2008, includes a shareholder or creditor of the company, any registered trade union representing employees, employees or their respective representatives where they are not represented by trade unions.
[187] S 131(1) Companies Act 2008.
[188] A Loubser 'Some Comparative Aspects of Corporate Rescue in South African Company Law' LLD (UNISA) at 52.
[189] Cassim op cit note 186 at 873.
[190] S 131(4)(a) Companies Act 2008

pressurize the company.[191] The fact that the list of 'affected persons' excludes directors may be detrimental to directors that believe that the company is under financial distress when outvoted, this is because they are not included in the list of people that may apply to court. Thus such parties may only apply to court if they are both directors and shareholders, otherwise they will not have the required locus standi.

4.2.2 Australia

In terms of the Australian rescue regime, administration commences when the administrator is appointed. There is a wide range of parties that are entitled to appoint the administrator. The company may appoint an administrator where the board has resolved that in the opinion of directors, the company is insolvent or that it is likely to become insolvent at some future time.[192] A person is thus insolvent when they are unable to pay all of their debts as and when they become due and payable.[193]

In most cases, the company makes the appointment, because once the company becomes insolvent or becomes likely to be insolvent; directors may be faced with potential liability for insolvent trading.[194]The legislature's intention was to allow directors to readily and quickly appoint an administrator without unnecessary procedures. Murray & Harris note that if directors were required to engage in substantial examination, administrations could not be commenced speedily once the directors realised that the company had a problem.[195] Directors are not required to examine the entirety of the company's financial position or call in experts; they just need to form a genuine opinion with regards to the company's solvency.[196] Thus this procedure adds to the flexibility towards the entry route.

A liquidator or provisional liquidator of the company may also appoint an administrator if he or she thinks that the company is insolvent or likely to become insolvent 'in the future'.[197] It is a requirement that such person must be a registered Liquidator.[198] However, it is submitted that this provision is wanting as it does not

[191] Cassim op cit note 186 at 874.
[192] S 436A(1)Corporations Act 2001.
[193] S 95A Corporations Act 2001.
[194] S 436A(1) Corporations Act 2001. See Murray& Harris op cit note 173 at 608.
[195] Murray & Harris op cit note 173 at 609.
[196] Ibid.
[197] S 436B Corporations Act 2001.
[198] S 448B Corporations Act 2001.

state how far into the future the insolvency must be likely to be. This is unlike the position in South Africa where a time frame of six months is stipulated.[199]

Thirdly, appointment may be made by a secured creditor who has charge over the company's property, where such secured creditor is entitled to enforce the charge.[200] Thus the interest held by the creditor must be in the nature of security and must be enforceable.[201] Additionally, it is of interest to note that only a qualifying charge-holder may appoint an administrator, no other creditor may do so.[202] In this light, the critical question to be raised is whether the competing interest of unsecured and secured creditors have been effectively balanced.[203] Anderson has noted that the fact that no other creditor may make the appointment results in an inequality among creditors with regards to effecting appointment.[204] Furthermore, the need to have insolvent companies put under external administration may be important to unsecured creditors because they have no security to rely on[205] as they are not given a right to apply for administration. As is the case for ordinary creditors, shareholders are also excluded from the list of parties that may commence rescue.[206]

It is observed that in Australia there is no provision available for a court to make an order that an administrator be appointed; the court is not among the category of parties that may commence administration.[207] The reasoning behind the exclusion of the court is the realisation that court based systems often lead to delays and costly litigation that may result in smaller dividends for creditors.[208]Nevertheless, the court may intervene where the administrator is managing the affairs of the company in a manner that is prejudicial to the interests of some or all of the company's creditors or members, thereafter making an order that it deems fit.[209] Therefore the court in the Australian administration regime only appears to play a supervisory role. However, as will be discussed below, the court may in some instances enable the application for receivership.

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[199] S 128(f) Companies Act 2008.
[200] S 436C(1) Corporations Act 2001.
[201] Murray & Harris op cit note 173 at 607.
[202] S 436C(1)(A) Corporations Act 2001.
[203] P Lipton 'Voluntary Administration: Is there life after insolvency for the unsecured creditor?' in: JPG Lessing& JF Corkery (ed)*Corporate Insolvency Law* (1995) at 79.
[204] Anderson &Morrison op cit note 182 at 99.
[205] Anderson&Morrison op cit note 182 at 101.
[206] Anderson op cit note 28 at 113.
[207] Ss 436(A),436(b),436(C) Corporations Act 2001.
[208] Anderson op cit note at 113.
[209] S 447E Corporations Act 2001.

4.2.2.1 Receivership

It is worth noting that Australia also makes provision for another type of external administration in the form of receivership. In this regard, receivers are usually appointed by a secured creditor when the assets of a company are under threat because of the company's insolvency or financial instability.[210] Thus, a receiver is appointed in respect of a corporation to take control of property, or to get it, in order to protect the rights of the party entitled to the property.[211] Keay makes a distinction between voluntary administration and receivership by stating the following:

> 'In contrast to receivership (which is based on the underlying secured loan document), voluntary administration is a totally legislative invention…While the usual initiator of receivership is a secured creditor, voluntary administration is typically commenced by the company itself'. [212]

In this regard, one may point out that receivership is unlike administration in that administration is a collective procedure that allows all creditors an opportunity to provide input and participate.

Receivership is commenced by the appointment of a receiver, which may be done by the court[213] or privately. Although this regime seems to uphold creditor rights, one may submit that unsecured creditors are left out in the cold as they are not given the right to commence receivership nor administration.

4.2.3 United Kingdom

In the UK, administration takes effect after the appointment of an administrator.[214]An administrator is a person appointed under the Act to manage the company's affairs; business and property whilst under administration with the aim of rescuing the company as a going concern.[215] The appointment of the administrator may be done by an administration order of the court,[216] by the holder of a floating charge[217] and by the company or its directors.[218] All these options of appointment provide a level of

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[210] Murray & Harris op cite note 173 at 540.
[211] Ibid, the receiver is appointed to preserve the assets for the creditor.
[212] A Keay 'Receiverships in light of recent legislative changes' in: JPG Lessing & JF Corkery (ed) *Corporate Insolvency Law* (1995) 33 at 39.
[213] S1323 Corporations Act 2001.
[214] Schedule B1 paragraph 1(2) UK Insolvency Act.
[215] Schedule B1 paragraph 1(1) UK Insolvency Act.
[216] Schedule B1 paragraph 2 (a) UK Insolvency Act.
[217] Schedule B1 paragraph 2 (b) UK Insolvency Act.
[218] Schedule B1 paragraph 2(c) UK Insolvency Act.

flexibility as there are provisions for the administrator to be appointed extra-judicially, by the company itself, the directors or a substantial chargeholder. Above all, the court carries a supervisory role in that an application may be made to the court where the administration process or administrators are not efficient.[219]

In instances where appointment is made by a holder of a floating charge, it is a requirement that such charge must be enforceable. Other creditors who are not substantial chargeholders are also included as they are given the option to petition the court for an administration order.[220] It is submitted that because of this approach, unsecured creditors (as interested parties) will not feel left out of the process as they will have the option of petitioning the court. However, Robinson submits that given that the UK procedure involves a great deal of preparatory work based on company information, it will be unusual that a creditor will have access to such information to enable it to present a successful petition.[221]

Administration may only be commenced on condition that the company is unlikely to be able to pay its debts[222] However it is only in relation to appointment by the court and an appointment by the company or its directors that there should be a conclusion that the company is or is likely to become unable to pay its debts, the requirement does not apply where the appointment is by the holder of a qualifying floating charge. Hitherto, in order to have jurisdiction to appoint an administrator, the court has to first be notified that the company is or will be unable to pay its debts within the meaning of section 123 of the Insolvency Act.[223] In *Re Imperial Motors (UK) Ltd*[224] , Hoffman J considered two ways in which a company may be deemed unable to pay its debts under section 123:

> ‘ One is known as the balance sheet test which says that it has to be proved to the satisfaction of the court that the value of the company’s assets is less than the amount of its liabilities, taking into account hope or exception on the part of the company that it will acquire further assets. The other is the fact that the company is unable to pay its debts as they fall due, whatever be the state of its balance sheet’.

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[219] Schedule B1paragraph 74 UK Insolvency Act
[220] Schedule B1 paragraph 12 UK Insolvency Act
[221] WC Robinson ‘Entry Requirements: A Comparative analysis of the Corporate Rescue Regimes in Australia, the United Kingdom and the United States of America’ *Corporate & Business Law Journa*l (1995) 129 at 141.
[222] Schedule B1 paragraph 11(a), paragraph 27(2)(a) UK Insolvency Act.
[223] UK Insolvency Act.
[224] Robison op cite note 223, cites this case at (1990) BCLC 29.

There is therefore no jurisdiction to make an administration order in relation to a solvent company. This is similar to the position in Australia[225] where the criterion for administration is a company which is insolvent or likely to become insolvent at some future time.

Upon appointment, the administrator is required to send a notice of his appointment to the company and its creditors.[226] However in this regard, there is no requirement for employees to be notified of the administration.

4.2.3.1 Administrative receivership

As, is the case in Australia, the Cork Committee recognised that companies could sometimes be rescued by the appointment of an administrative receiver.[227] Not only can the floating charge holder appoint an administrative receiver, but the appointment can also block the appointment of an administrator.[228] Initially, a receiver was appointed by a secured creditor holding a floating charge over the whole or substantial part of the company's property. Rajak in describing receivership has said the following:

> 'There is the informal control of the debtor by one powerful creditor, the latter's superiority over the other creditors deriving from the proprietary consequences of the contract between the debtor and this superior creditor…The best example of this institution is the creditor who has security not only over the immovable or fixed assets of the debtor (a "fixed charge"), but also over the movable assets of the debtor (a "floating charge"). The latter is uncommon and found mainly in common law jurisdictions such as England'.[229]

Thus, this procedure is run with the interests of one creditor in mind, the floating charge holder.[230] One would argue that, the interests of other stake holders such as employees and unsecured creditors are then disregarded. However, more proposals to administrative receivership have been published as part of an Enterprise Act of 2002,[231] which among others had the effect of curtailing the right of holders of floating charges to appoint an administrative receiver of the company. In this regard,

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[225] S 436A(1)(A) Corporations Act 2001.
[226] Schedule B1 paragraph 46(2),46(3) UK Insolvency Act.
[227] Keay op cit note 181 at 107.
[228] G Broc & R Parry 'Corporate rescue an overview of recent developments from selected countries in Europe' *32 International Business Lawyer* (2004) at 152.
[229] H Rajak Rescue versus liquidation in central and Eastern Europe 33 *Tex.Int'L.J.17* (1998) at 158.
[230] Broc & Parry op cit note 230.
[231] S 250 Enterprise Act 2002.

because of the Enterprise Act of 2002, there is a diminution of administrative receivership as an institution with the option of administrative receivership being limited to pre-commencement floating charges.[232] Under administration there is provision for the appointment of an administrator by a floating charge holder,[233] it is this method which intends to take the place of the appointment of an administrative receiver.[234]

4.2.4 Analysis of Commencement

The corporate rescue procedures in South Africa, UK and Australia are similar in that they are not perpetual but temporary in nature. Furthermore, the regimes all aim at rescuing the company as a going concern.[235] However Australia is unique in that section 435A[236] specifies that the company be administered in such a way that maximises the chances of it or 'as much of its business as possible' surviving. Where the business remains in existence after the sale, some or all of the people who worked in the business prior to its sale are able to retain their jobs. The work in progress may also be completed resulting in almost certainly attaining a higher price for the assets of the company, leading to a higher dividend for distribution among the creditors and retention of the goodwill attached to the business.[237] Additionally, all three regimes have a similar secondary objective of creating a better return for creditors than would result from a winding up.

It appears that all three jurisdictions have an insolvency requirement that must be fulfilled in order for rescue to commence. This insolvency requirement seems to be similar,[238] although there is a difference in the terminology used. In Australia there is a requirement that the company be insolvent or likely to be insolvent 'at some future time', whereas UK is silent on timing,[239] it just requires that the company is or is likely to become unable to pay its debts. In South Africa, the insolvency requirement is that there be insolvency or inability to pay debts within the immediately ensuing

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[232] British virgin Islands Administrative Receivership and English Insolvency Law www.chasecambria.com/site/journal/article.php?id=183, accessed on 18 August 2015.
[233] Schedule B1 paragraph 2(b) UK Insolvency Act.
[234] Op cit note 234.
[235] S 435A Corporations Act 2001, Schedule B1 paragraph 3(1)(a) UK Insolvency Act, s128(1)(b)(iii) Companies Act 2008.
[236] Corporations Act 2001.
[237] Op cit note 234.
[238] Schedule B1 paragraph 11(a), 27(2)(a) UK Insolvency Act. See also s436A(1) Corporations Act 2001.
[239] Ibid.

six months. South Africa is unique as compared to Australia and the UK in that it sets out a stipulated time frame, which is 'the immediately ensuing six months'.[240] However, all these requirements speak to the company's inability to pay its debts.

Moreover, UK and South Africa provide an opportunity for commencement by way of court application in terms of their rescue provisions, which is not the case under the Australian voluntary administration regime. However, in Australia, the court is given authority to be able to appoint a receiver.[241]In this regard, one further key distinction among these three countries is the fact that Australia and the UK make provision for "receivership". In this regard, Australia and the UK seem to provide an additional regime that appears to be creditor friendly. Although receivership may be a desired option for secured creditors, this may not be so for unsecured creditors. This is because, the receiver only considers the position of the secured creditors, and thus the hope of unsecured creditors to maximise their returns is diminished.

It has been observed that the Australian and UK procedures may be commenced in one of three ways, however in South Africa; commencement may begin in one of two ways. There is however a shared consensus in the commencement process of the three countries in that people in control of the company, the directors, are given the opportunity to commence rescue. As discussed above, allowing directors to commence rescue is advantageous as they are the persons best equipped to know whether the company is in financial distress as they are in control of the company. Additionally, allowing directors to place the company on rescue is advantageous as it helps avoid unnecessary delay and costs.[242]Furthermore Australia is unique as compared to the UK and South Africa in that there is provision for direct commencement by a liquidator or provisional liquidator where a company is unable to pay its debt or unlikely to be able to pay its debt.[243]

A further interesting distinction among these three countries is the fact that they have different views pertaining to commencement of corporate rescue when

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[240] S 128(f)(i)(ii) Companies Act 2008.
[241] S 1323 (h) Corporations Act 2001.
[242] Cassim op cit note 11 at 866.
[243] S 436B Corporations Act 2001, this may not be a favored way of commencement for South Africa because one of the reasons why judicial management failed was the frequent appointment of liquidators as judicial managers.

liquidation proceedings have been initiated against the company. Australia[244] and South Africa[245] permit commencement even when liquidation proceedings have been initiated. However, in the UK, a person may not be appointed as an administrator of a company which is in liquidation.[246]

It is worth noting that in the UK and Australia, shareholders cannot effect appointment of the administrator. In South Africa, shareholders are termed 'affected persons'[247] and may commence business rescue by making an application to the court. In this regard, Loubser has noted that shareholders have a right and reason to be involved in a corporate rescue procedure because they have a real interest in the outcome.[248] This is because a successful rescue will revive their shares and these shares will regain at least some of their previous value.[249]

4.3 Investigation and Development of Plan

It is critical that the affairs of the company be investigated in order to develop a plan that will allow the company to be rehabilitated. All the jurisdictions have this process in common, although it is initiated in different ways; the aim of the process is the same.

4.3.1 South Africa

The investigation procedure in South Arica forms a critical part of the business rescue process as there will be a determination of the success of the process. As soon as practicable after being appointed, the practitioner must investigate the company's affairs, business, property and financial situation in order to form an opinion as to whether there is a reasonable prospect of the company being rescued as defined in the Act.[250]

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[244] S 436B Corporations Act 2001.
[245] *Ritcher v Absa* 2015 ZACSCA at 100, where the court held that an application for business rescue may be brought after a final liquidation order.
[246] Schedule B1 paragraph 8 UK Insolvency Act.
[247] S 128(1)(a)(i) Companies Act 2008.
[248] A Loubser 'The role of shareholders during corporate rescue proceedings: Always on the outside looking in?' (2008) *SAMerc.LJ* 372at372.
[249] Ibid.
[250] Ss 141(1),128(b) Companies Act 2008

4.3.1.1 Business Rescue Practitioner

4.3.1.1.1 Appointment

Appointment of the practitioner may be done in one of two distinct ways. Firstly, such practitioner may be appointed by the board of directors if the business rescue proceedings are commenced by the board of directors, such appointment must be done within a period of five days.[251] One may point out that in this regard, South Africa is different from Australia and UK, where the appointment of an administrator commences rescue. Secondly, the court may make an order appointing as an interim practitioner a person who has been nominated by the affected person who applied for commencement, however this is made subject to ratification by the holders of a majority of the independent creditors.[252] The court may make an order setting aside the appointment of the practitioner; it must then appoint an alternative practitioner who is acceptable to the majority of the independent creditors with voting interests.[253]

The practitioner is an officer of the court and must report to the court in accordance with the applicable rules of the court.[254] One may submit that because the practitioner is an officer of the court, he/she will be compelled to do things in an orderly manner as they will be under the supervisory umbrella of the court.

4.3.1.1.2 Qualifications and Duties

The success of an insolvency regime is heavily dependent on those who administer it.[255] In this regard, Bradstreet notes that 'the functions and terms of appointment of a practitioner will be pertinent in assessing the merits of a corporate rescue regime'. [256] This means that it is crucial to appoint a qualified practitioner as the success of the rescue procedure is reliant on such an individual. The business rescue practitioner is tasked with overseeing the business rescue process and in so doing, developing a business rescue plan that will help the company to return to its solvent state.

In order for business rescue to succeed, the practitioner must have a high level of skill and expertise fit for his position as he will be in management or control of the

[251] S 129(3) Companies Act 2008.
[252] S 131(5) Companies Act 2008.
[253] S 130(6)(a) Companies Act 2008.
[254] S 140(3)(a)Companies Act 2008.
[255]Bradstreet op cit note 150 at 201, where he cited the Cork report.
[256] Ibid.

company and aims to devise a plan that will cause the company to turnaround from its insolvent status, thus it is important for such a position to be highly regulated. The Companies Act lays down a list of requirements that one has to meet in order to be appointed as a business rescue practitioner[257]. Firstly, it is worth noting that the business rescue practitioner is not permitted to have any other relationship with the company,[258] this ensures that he/she conducts his duties independently. This is commendable as it prevents a conflict of interest on the part of the business rescue practitioner

Furthermore, what is of particular interest is the fact that such business rescue practitioners have to be licensed by the Companies Commission.[259] These licenses do not expire and thus not rescue specific, in this regard, Bradstreet notes the following:

> 'It would seem, in principle, preferable to issue licenses on a case-by-case basis, rather than license an individual business rescue practitioner to take on whatever work he likes…'[260]

The business rescue practitioner is given extensive powers, the most trying one being that he has full management control of the company in substitution of the board.[261] He may delegate power and remove from office any person in the pre-existing management of the company.[262]Although the practitioner is given extensive authority, he/she is an officer of the court and must report to the court, his powers are not without supervision.[263] Furthermore he/she is liable for any act or omission amounting to gross negligence in the exercise of his powers and functions.[264] Thus although the practitioner is given extensive powers, there are safeguards put in place to ensure that he/she doesn't abuse such powers.

Where the business rescue process concludes with a company being in liquidation, a business rescue practitioner may not be appointed as a liquidator,[265] this is unlike in judicial management where the judicial manager was in most cases

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[257] Ss138(1)(a)-(f) Companies Act 2008.
[258]See S 138(1)(e) Companies Act 2008.
[259] Ss138(1)(b),(2) Companies Act 2008.
[260] R Bradstreet 'Business rescue practitioners: what role for the legal profession?' *De Rebus* .
[261] S140 (1) Companies Act 2008.
[262] S140 (1)(b),(c) Companies Act 2008.
[263] Ss 140(3)(a),140(2) Companies Act 2008.
[264] S 140(3)(c) (ii) Companies Act 2008.
[265] S 140(4) Companies Act 2008.

the liquidator. It is submitted that this is a good thing as it distinguishes the role of the business rescue practitioner from that of the liquidator, which roles are not ad idem.

4.3.1.2 Moratorium

Upon commencement of business rescue, there is an automatic stay on legal proceedings against the company, its property, assets and on the exercise of the rights of the creditors.[266] It may be worth noting that the moratorium is important in the rescue procedure as it gives the company breathing space, during which the company is able to reorganise and reschedule its debts and liabilities.[267] During this breathing space, the business rescue practitioner is able to devise a plan in order to achieve the purpose of the rescue process.[268] However, the moratorium does not entirely remove the right to commence legal proceedings against the company; it simply places the discretion to do so under the consent of the business rescue practitioner or with leave of the court.[269] Additionally, criminal proceedings against the company or its directors and officers are not subject to the moratorium, they don't enjoy the protection guaranteed by the moratorium.[270] This is a good thing as it upholds the interests of stakeholders as directors won't be able to use a procedure that is used for financially distressed companies to get away with crimes that they have committed.

The suspension of legal proceedings against the company is generally made with regard to all the creditors[271] of the company.[272] The rights of the creditors here are only frozen for the duration of the business rescue. According to Bradstreet, even though creditors may be inclined to view the moratorium as prejudicing their rights of recovery, it is designed to facilitate a successful rescue, which may result in them ultimately being repaid in full.[273]

During business rescue proceedings, a company intending on disposing property belonging to a third party or secured creditor may only do so upon obtaining consent from such third party or creditor, however, such consent will not be required where

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[266] S 133(1) Companies Act 2008,thus referred to as ' moratorium '
[267] Cassim op cit note 11 at 879.
[268] Ibid.
[269] S 133(1)(a)-(b) Companies Act 2008
[270] S 133(1)(d) Companies Act 2008
[271] The moratorium applies to dissenting and secured creditors.
[272] S 133(1) Companies Act 2008.
[273] Bradstreet op cit note 150 at373.

the proceeds of the disposal are sufficient enough to pay the third party or creditor in full.[274]

4.3.1.3 Rescue Plan

The rescue plan is vital as it sets out how the rescue of the company will be achieved. This was not a requirement under the 1973 South African judicial management model and is thus a feature that is absent in the current rescue regime of Botswana.

In this regard, the business rescue practitioner is tasked with making a business rescue plan for consideration and possible adoption at a meeting held to consider the future of the company.[275] In making such a plan, the practitioner must consult the creditors, other affected persons, and the management of the company.[276] Therefore the business rescue plan must contain all the information required to facilitate affected persons in deciding whether or not to accept or reject the plan.[277] This procedure then is helpful in ensuring that all the affected persons make an informed decision as they will have all the relevant information at their disposal.

Once adopted, the business rescue plan is binding on the company and on each of the creditors of the company and every holder of the company's securities.[278]

4.3.2 Australia

After voluntary administration commences, the administrator must investigate the company's business, property, affairs and financial circumstances, thereafter forming an opinion to assist with the rescue process.[279] In this regard, the administrator is viewed as being an 'agent' of the company as he or she carries broad powers to deal with the company's property and carry on the company's business.[280]

Where an administrator is unable to conduct investigations because of parties in the rescue process, such administrator may seek direction from the court.[281] Thus the

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[274] S 134(3)(a) Companies Act 2008.
[275] Ss 150(1),151 Companies Act 2008.
[276] Ss 150(1),151 Companies Act 2008.
[277] S150 (1),(2) Companies Act 2008
[278] S152 (4) Companies Act 2008.
[279] S 438A Corporations Act 2001.
[280] Murray & Harris op cit note 173 at 632.
[281] Murray & Harris op cit note 173 at 636, cites *JA Pty v Jonco Holdings (Pty) Ltd* 2000 NSWSC 147, where the court said that if the administrator has inadequate information, it would be wise for him/her to approach the court for direction.

process is made flexible by the fact that the court is there to prevent roadblocks in the process where there are uncooperative parties.

4.3.2.1 Administrator

4.3.2.1.1 Appointment

Voluntary administration in Australia commences when the administrator is appointed, such appointment may be made by a board resolution, liquidator or provisional liquidator; or secured creditors (as discussed in 4.2.2 above).

4.3.2.1.2 Qualifications and Duties

Unlike in South Africa, in Australia, an administrator is required to be a registered liquidator, who must give consent of his/her appointment in writing.[282] As discussed above, this would not be a favourable option for South Africa because the appointment of liquidators as judicial managers was one of the reasons for the failure of its former judicial management regime.

There are several people who are disqualified from acting as administrators, among them being directors of the company, creditors, employees and auditors of the company[283]. This approach is similar to that in South Africa, where a business rescue practitioner is disqualified from acting if he/she has any other relationship with the company.[284] One may submit that this approach helps in ensuring that the administrator acts independently. Appointing someone that is connected to the company may lead to bias and thus an issue of conflict of duty may arise. Thus, the office of the administrator is highly esteemed and as such the administrator is required to be an independent officer, in so doing there must be a declaration of relevant relationships.[285]

The administration is short term as within 25 business days of beginning the administration, a meeting of creditors must be held to determine whether the company should be put into liquidation or a deed of company arrangement should be

[282] Ss 448A, 448B Corporations Act 2001.
[283] S 448C(1) Corporations Act 2001.See also J Harris,A Hargoran, M Adams *Australian Corporate Law*(4ed) 2013 at 702, one of the reasons for appointing external persons is to provide a disincentive for shareholders to encourage management to take unnecessary risks as the company approaches the point of insolvency.
[284]S138(1)(e) Companies Act 2008.
[285] S 436D Corporations Act 2001.

entered into.[286] In South Africa, within 10 business days after publishing the rescue plan, the practitioner must convene a meeting of creditors to determine whether the rescue plan should be entered into.[287] Thus in South Africa, the meeting may be extended from time to time until a decision is reached, whereas in Australia there is a set extension of up to 45 business days.[288] The difference between the two jurisdictions is that Australia limits the extension days, whereas South Africa does not. Although more time allows thorough investigation to be done, it may also be disadvantageous as the company and its creditors may stand to lose a lot if the company is eventually liquidated after dragging the process for a long time.

Whilst the company is in the process of administration, the administrator takes control of the company's business, property and affairs.[289] As in South Africa[290], the administrator may exercise such power as the company or any of its officers could perform if the company were not in administration.[291] Therein, the administrator is at liberty to decide whether to discontinue the company's business and dispose of any of its property.[292] Additionally, as is the case in South Africa, the administrator may remove a director from office or appoint another one in his or her place.[293] Thus the position of the administrator during administration is that of full control over the company; however such control is under the supervision of the court.[294] In this regard, the court may give an order preventing the administrator from disposing of the assets of the company if it is not satisfied that the disposal would protect the interests of the secured parties, owners or lessors.[295]

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[286] S 439A Corporations Act 2001.
[287] S 151 Companies Act 2008.
[288] Ss 439A, 439B Corporations Act 2001, the 25 day period may be extended by up to 45 days. See also S 151(3) Companies Act 2008.
[289] S 437A(1) Corporations Act 2001.
[290] S 140(b)(c) Companies Act 2008.
[291] S 437A(1) Corporations Act 2008, it is worth noting that as in Australia, in South Africa the business rescue practitioner also takes control of the company from those that control it, which are the directors . See also s140(1)(a) Companies Act 2008.
[292] Ibid.
[293] Ss 442A(a), 442A(b) Corporations Act 2001.
[294] See Ss 442,437A(1) Corporations Act 2001.
[295] S 442C(4)-(6) Corporations Act 2001.

4.3.2.2 Moratorium

At the beginning of the administration, a moratorium comes into effect.[296] This ensures that whilst under investigation and assessment, the company is at an advantage of protection granted by the legislation guaranteeing the company a stay in proceedings.[297] The intention of the legislature in this regard is to protect the company from legal proceedings in order to give the administrator room to formulate a plan for the future of the company. Whilst the company is under the umbrella of the moratorium, court proceedings against the company or its property may only be commenced upon the written consent of the administrator or an order of court.[298]

Additionally, the moratorium extends to property in that during administration no enforcement process in relation to company property may be commenced, except with leave of the court[299]. Similar to South Africa[300] is the fact that the moratorium does not operate with respect to criminal proceedings or prescribed proceedings.[301] As discussed above, this is a way of ensuring that directors don't misuse the moratorium to try and get away with crimes that they have committed.[302]

4.3.2.3 Deed of Company Arrangement (DCA)

The administrator may propose a deed of company arrangement in which a plan of rescuing the company is proposed. If a DCA is to be proposed by the administrator, a copy of the proposed or actual deed of company arrangement should be presented to the creditors prior to the second meeting.[303] This DCA is a plan comprising issues to be taken into consideration, the present condition of the company and the ultimate goal of restoring the company to a going concern.[304] In this light, one would assume that, the DCA, as with the rescue plan in South Africa[305] will contain material details

[296] S 440 Corporations Act 2001.
[297] S 440D(1)Corporations Act 2001.
[298] S 440D(1) Corporations Act 2001,
[299] S 440F Corporations Act 2001.
[300] S 133(1)(d) Companies Act 2008.
[301] S 440D(2) Corporations Act 2001.
[302] See also I Eow 'The Door to reorganisation: Strategic behaviour or abuse of Voluntary Administration?' *Melbourne University Law* Review (2006) at 300.
[303] S439A Corporations Act 2001.
[304] S444(A) (4) Corporations Act 2001.
[305] Ss 150(1),150(2) Companies Act 2008.

that will assist the creditors in making an informed decision as to whether to vote in favour of the deed.[306]

At the meeting, if the creditors resolve that the company should adopt the deed of company arrangement, the administrator will be given 15 business days to execute the deed.[307] However, in South Africa, there is no stipulated time given in which to execute the rescue plan, the only requirement is that necessary steps be taken to implement the adopted plan.[308] Furthermore, the administrator must advertise and send a notice to each creditor that the DCA has been signed and a copy filed with the Australian Securities and Investments Commission (ASIC).[309] The DCA may be varied by a resolution passed at a meeting of the company's creditors, however it may also be varied through an application made to the court by the administrator.[310]

Therein, the rescue procedure in Australia seems to be creditor oriented, in this regard, one may question the ability of the affected parties to influence the feasibility of the DCA. This is so because creditors have a lot of power and may dictate it to the affected parties. South Africa also has a similar approach to the extent that creditors must approve the rescue plan.[311] However according to King, the requirement that creditors approve the DCA may slow down decision making because the administrator has to consult the creditors or court, even on minor matters.[312]

4.3.3 United Kingdom

As in South Africa and Australia as discussed above, similarly in the UK, upon appointment, the administrator must as soon as is reasonably practicable investigate into the affairs of the company, in so doing, he should require a statement of affairs[313] of the company from relevant persons[314]. Each person is required to submit

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[306] C Anderson 'Ending a means to an End: Transition from Voluntary Administration Process to a Deed of Company Arrangement or Liquidation' *University of Tasmania Law Review* (2004) at 18, the contents of the deed of company arrangement will vary according to the need of the particular company and its creditors.

[307] S 444B(2)(a) Corporations Act 2001, however in terms of section 444(b), there may be an extension by the court.

[308] S 152(5) Companies Act 2008

[309] S 450B Corporations Act 2001.

[310] S 445A Corporations Act 2001.

[311] Ss 152(1)-(3) Companies Act 2008

[312] R King 'Voluntary Administrations: Proposals For Change' in: JPG Lessing & JF Corkery (ed) Corporate Insolvency *Law* (1995) at 98.

[313] Schedule B1 paragraph 47(2) UK Insolvency Act,the statement of affairs must contain, among other things: a)give particulars of the company's property, debts and liabilities b) the names and addresses of the company's creditors c)give the date on which each security was granted.

a statement of the company's affairs to the administrator, and must do so within a period of 11 days.[315]

4.3.3.1 Administrator

4.3.3.1.1 Appointment

As discussed above, the administrator is appointed by an order of court, holder of a floating charge or by the company or its directors (as discussed in 4.2.3).

4.3.3.1.2 Qualifications and duties

An individual may only qualify to act as an 'insolvency practitioner' in relation to the company. In this regard, section 390[316], has the heading 'The requisite qualification, and the means of obtaining it'. A portion of this section speaks of persons who are not qualified to act as insolvency practitioners.

One does not qualify to act as an insolvency practitioner if he or she is not a member of a recognised professional body.[317] Another set requirement is that one must hold authorisation granted by a competent authority.[318] Moreover, a person is not qualified to act as an insolvency practitioner if at that time he has been adjudged as bankrupt or his estate is sequestrated, is disqualified from being a director or is declared mentally unstable.[319] Even though the said provision only talks of persons that are 'not qualified to act as insolvency practitioners', it is submitted that the 'recognised professional bodies'[320] will ensure that the insolvency practitioner is properly qualified and licensed to undertake the position. This approach is different from the one in South Africa where the Act clearly stipulates that the business rescue practitioner must have a license issued by the Commission.[321]

The administrator carries wide powers as conferred by the Act.[322] Such administrator may do anything necessary or expedient for the management of the

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[314] Schedule B1 paragraph 47 UK Insolvency Act.
[315] Schedule B1 paragraph 48(1) UK Insolvency Act.
[316] UK Insolvency Act.
[317] S 390,391 UK Insolvency Act.
[318] S 390(2)(b) UK Insolvency Act.
[319] S 390(2)(c) UK Insolvency Act.
[320] S 391 UK Insolvency Act.
[321] S 138(1)(b) Companies Act 2008, the business rescue practitioner must be licensed by the Commission.
[322] Schedule B1 paragraph 59(1) UK Insolvency Act.

affairs, business and property of the company.[323] Thus, the powers given to the administrator are not defined, he is given wide powers to manage the company as he sees fit. Furthermore, upon appointment, the administrator is required to take control of all the property to which he thinks the company is entitled to.[324] In attempting to rescue the company, the administrator may give priority to saving the business where this leads to a better result for creditors.[325] It can thus be argued that the administrator's priorities are towards the protection of creditors as a whole.[326]

As is the case in Australia[327] and South Africa,[328] the administrator in the UK may remove a director and appoint another one in his or her place.[329] However, it is submitted that such power of removal may be misused if not monitored. This is so because there are no stipulated grounds for removal and there is no requirement for the administrator to be under court supervision while exercising such power.[330]

4.3.3.2 Moratorium

The moratorium of the UK is unique in that it has an interim moratorium set in place. The interim moratorium applies where an administration application in respect of a company has been made and the application has not yet been granted or taken effect.[331] It applies from the time a copy of the notice of intention to appoint an administrator is filed with the court.[332]

In illustrating the function of an interim moratorium, Loubser notes that a general moratorium only commences on the granting of an administration order and that in the period immediately after the first steps towards administration, the company will be vulnerable to actions by creditors who hope to enforce their claims before the moratorium takes effect.[333] However, the interim moratorium comes to an end when the appointment of an administrator takes effect.[334] Furthermore, the interim

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[323] Schedule B1 paragraph 59(1) UK Insolvency Act.
[324] Schedule B1 paragraph 67 UK Insolvency Act.
[325] Schedule B1paragraph 3(3)(b) UK Insolvency Act stipulates that the objective of rescuing the company must give way to arrangements that would give a better result for the creditors as a whole
[326] V Finch 'Corporate rescue: A game of three halves' (2012) *32legal stud* 302 2 at 305.
[327] S442A Corporations Act 2001.
[328] S140(1)(c) Companies Act 2008.
[329] Schedule B1 paragraph 61 UK Insolvency Act.
[330] Schedule B1 paragraph 61 UK Insolvency Act.
[331] Schedule B1 paragraph 44 UK Insolvency Act.
[332] Schedule B1 paragraph 44 UK Insolvency Act.
[333] A Loubser 'The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions' (2010) *Journal pf South African Law* at 689.
[334] Schedule B1paragraph 44(2)(a) UK Insolvency Act.

moratorium comes to an end if an administrator has not been appointed within five business days of filing the notice of intention to appoint administrator.[335]

When the administrator is appointed, the interim moratorium comes to an end,[336] the general moratorium then comes into effect replacing it. The general moratorium applies to a company that is in administration. It appears that at this stage, no resolution or order may be passed against such a company for winding up.[337] Thus the regime provides for a moratorium on insolvency proceedings against the company whilst on administration. Additionally, no steps may be taken to enforce security over the company's property except with consent of the administrator or permission of court.[338] Furthermore no steps may be taken to repossess goods in the company's possession and no legal process may be initiated or continued against the company or its property, unless leave of the court or permission of the administrator is obtained.[339]

4.3.3.3 Rescue Plan

The administrator is required to make a statement setting out proposals for achieving the purpose of administration[340]. The statement addresses such matters as may be prescribed, and where need be an explanation is made as to why the administrator thinks that the objectives mentioned cannot be achieved[341]. Furthermore, the UK Insolvency Act makes recommendations as to what the proposals may include, among other things, a proposal for voluntary arrangement and a proposal for a compromise.[342] The administrator is required to send a copy of the statement of his proposals to the registrar of companies, every creditor of the company and every member of the company.[343] During an initial meeting, creditors are given an opportunity to approve the proposals or approve them with modifications.[344]However, to guard against abuse, the administrator is required to

[335] Schedule B1 paragraph 44(2)(b) UK Insolvency Act.
[336] The interim moratorium ends and the general one takes effect, only when the appointment of the administrator takes effect. When the time lapses for the administrator to be appointed, the interim moratorium ends and the general one doesn't come into effect.
[337] Schedule B1 paragraph 42(1)-(3) UK Insolvency Act .
[338] Schedule B1paragraph 43 (1), 43(2) UK Insolvency Act.
[339] Schedule B1 paragraph 43(1), 43(2) UK Insolvency Act.
[340] Schedule B1 paragraph 49 UK Insolvency Act.
[341] Schedule B1 paragraph 49(2) UK Insolvency Act.
[342] Schedule B1 paragraph 49(3) UK Insolvency Act.
[343] Schedule B1 paragraph 49(4) UK Insolvency Act.
[344] Schedule B1 paragraph 51 UK Insolvency Act.

report on the decisions taken during such meetings, such report is made to the court, registrar of companies and such persons as may be prescribed.[345]

4.3.4 Analysis

A common aspect among the three regimes is the fact that they favour placing the property and affairs of the company in the hands of an independent person, a qualified practitioner. The existing management of the company then loses control of the company as it shifts to the practitioner. In undertaking their duties, the practitioners may have significant dependence on information and advice of directors[346]. However, such practitioners may remove the director of a company from office and appoint another one in his or her place.[347]

Additionally, similar among all the jurisdictions is the fact that there is a moratorium put in place which allows companies to have breathing space in order to successfully conduct the rescue proceedings. In South Africa, the moratorium applies after commencement. However, in the UK there is an interim moratorium which operates before commencement, South Africa and Australia don't have such interim moratorium. However, the Australian voluntary administration is voluntary by nature and will not require such interim moratorium. Furthermore, UK provides a unique moratorium against winding up during rescue. In this regard, no resolution or order may be passed for the winding up of the company during administration.[348] However, in South Africa, contrary to the position in the UK, the court may convert business recue proceedings into liquidation proceedings.[349]

Also similar among the jurisdictions is the fact that the moratorium is not absolute. Whilst the company is under rescue, court proceedings in relation to the company and its property may be commenced upon the practitioner giving consent or by leave of court. Furthermore, in all the three jurisdictions, the moratorium does not apply to criminal proceedings.

The court is given a supervisory position in all the three jurisdictions; this is so even in Australia where the court doesn't play a role in commencement of voluntary

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[345] Schedule B1 paragraph 53 UK Insolvency Act.
[346] Keay op cit note 391 at 112.
[347] S140(1)(c) Companies Act 2008, s442A Corporations Act 2001, Schedule B1 paragraph 61 UK Insolvency Act.
[348] Schedule B1 paragraph 42(1)(2) UK Insolvency Act.
[349] S 132(2)(a)(ii) Companies Act 2008.

administration. These jurisdictions all attempt to minimise the role of the court in rescue. Unlike in South Africa, in Australia, the administrator is permitted to become the liquidator of the company if the creditors resolve that the company be wound up[350]. As discussed above, the role of a liquidator and practitioner are contrary roles, and therefore, it is submitted that the expectation to have one person play the same role in contrary offices is unnecessary and may lead to a conflict of interest.

Also common among the three countries is the requirement that the practitioner recommend a rescue plan for the future course of the company. In all these jurisdictions, creditors are given a chance to vote on the rescue plan recommended by the practitioner. However in the UK, administrators may seek for a court order where the creditors fail to approve of their recommended plans.

4.4 Decision making

This is the last process of a corporate rescue procedure and is thus where the fate of the company is decided. It deals with persons who are ultimately able to exercise control-i.e. how power is allocated in each jurisdiction.

4.4.1 South Africa

Within a period of 10 business days after publishing the business rescue plan, the practitioner has a duty to convene and preside over a meeting of creditors and any other holders of a voting interest, including shareholders whose rights are affected in order to consider the rescue plan.[351] Thus before the meeting, the practitioner must deliver a notice of meeting to all affected persons.[352] In this regard, Bradstreet has noted that business rescue is not only concerned with repaying creditors, but also with protecting all affected parties by appointing a business rescue practitioner to ensure that the various stake are balanced within the constraints of the legislation.[353]

At the meeting of creditors,[354] the practitioner is required to introduce the proposed business rescue plan to the creditors, and shareholders where it is applicable.[355] Additionally, the practitioner is required to give his opinion as to

[350] S 446A Corporations Act.
[351] S 151(1) Companies Act 2008.
[352] S 151 (2) Companies Act 2008, the notice must set forth the agenda of the meeting and a summary of the rights of affected persons, this will help in making an informed decision.
[353] Bradstreet op cit note 3 at 355.
[354] See ss 152(1),152(2) Companies Act 2008,
[355] S 152(1)(a) Companies Act 2008.

whether he or she believes that there is a reasonable prospect of the company being rescued.[356]

Moreover, the practitioner must also provide an opportunity for the employees' representatives to address the meeting.[357] It is notable that employees have a say in the during the rescue procedure of the company and are therefore stakeholders in the proceedings.[358]

During the meeting, the practitioner also conducts a vote where creditors are able to amend or revise the proposed rescue plan[359]. In this light, creditors of a company are entitled to form a creditor's committee, through which the practitioner must consult during the development of the business rescue plan.[360] If the business rescue plan is approved by the prescribed majority creditors who have a voting interest, such plan will be final. However, the plan should not alter the rights of any class of shareholders and holders of the company's securities.[361] A business rescue plan that has been adopted is binding on the company, on each creditor of the company and every holder of the company's securities[362]. This process compels every affected party to adhere to the rescue plan.

If the business rescue plan proposed is rejected, and no affected person has acted to extend the proceedings, the business rescue proceedings will come to an end.[363]

4.4.2 Australia

During administration, there are two crucial meetings that are necessary for the decision making process. The first meeting is to occur within 8 days of administration commencement, the purpose of this meeting is to allow creditors to determine whether they should appoint a creditor's committee[364]. This is similar to the position in South Africa, where there is also provision for the appointment of a

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[356] S 152(1)(b) Companies Act 2008.
[357] S 152(c) Companies Act 2008.
[358] The employees delegate their authority to their chosen employee representatives, and therefore they are sufficiently represented.
[359] S 152(d) Companies Act 2008.
[360] S 145(3) Companies Act 200.8
[361] S 152(3)(b), however if the rescue plan does alter the rights of the holders of any securities, the practitioner must hold a meeting with the holders where they will vote to approve the adoption of the proposed business plan.
[362] S 152(4) Companies Act 2008 the rescue plan is adopted regardless of whether the person was present at the meeting, voted in favour of the adoption of the plan or in the case of creditors, had proven their claims against the company.
[363] S 132(2)(c) Companies Act 2008.
[364] S 436E Corporations Act 2001.

creditor's committee.[365]The committee merely acts as a middle man because it consults with the administrator about matters relating to administration and considers response reports made by the administrator. An additional purpose of this meeting is to remove or replace the administrator[366] if there is need to do so.[367] According to Murray & Harris, this approach gives creditors a measure of control in the proceedings because usually administration is commenced by the directors.[368]

At the second meeting of creditors, the future of the company is decided. In this meeting, the creditors consider which of three routes they want to take, namely that:

(i) The company execute the deed of company arrangement, [369]

(ii) the administration should end, [370]

(iii) or the company be wound up.[371]

If creditors decide that the administration should end, the moratorium ceases to operate and the management of the company returns to the hands of the directors. Where the resolution is that the company be wound-up, the administrator then automatically becomes the liquidator of the company.[372]During the second meeting, the administrator must give the creditors a report regarding the company's financial position and a statement indicating the administrator's opinion as to whether it is in the creditor's interests to enter into a deed of company arrangement, whether the company should terminate the administration or whether the company should be wound up.[373] This enables the creditors to vote having been advised after the administrator's opinion. If at the end of the meeting the creditors fail to make a resolution, the administration comes to an end and the management of the company then returns to the directors.[374]

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[365] S 145(3) Companies Act 2008.
[366] In South Africa, the business rescue practitioner may only be removed by a court order. This may be done upon the request of affected persons or by the court's own motion. See ss139(1),139(2) Companies Act 2008.
[367] Ss 139(1),130(2) Companies Act 2008.
[368] Murray & Harris op cit note173 at 651.
[369] S 439C(a) Corporations Act 2001.
[370] S 439C(b) Corporations Act 2001.
[371] S 439C(c) Corporations Act 200.1
[372] S 446A Corporations Act 2001.
[373] S 439A Corporations Act 2001.
[374] S 435C(3) Corporations Act 2001.

4.4.3 United Kingdom

In deciding on the way forward of the company, an initial meeting of creditors is held during which the administrator's proposals are considered.[375] The creditors may approve the proposals without modifications or with modifications, in which event the administrator has to give consent.[376] Where the proposals are approved, the administrator is required to manage the company and its affairs in terms of any proposals made.[377] Therefore if the proposal is approved, its terms are binding on the affected persons. As is the case in South Africa and Australia, a creditor's committee may be appointed to play the role of a middleman as between the administrator and the creditors.[378]

On application of the administrator, the court may end the appointment of the administrator, thus ending the rescue procedure.[379] Additionally, if the administrator thinks that the purpose of administration has been sufficiently achieved, he or she may file a notice to court or with the registrar of companies thus terminating the administration process.[380] Lastly, on the application of a creditor of a company, the court may provide for the appointment of an administrator of the company to cease to have effect, therefore ending administration.[381]

4.4.4 Analysis

It is observed that the decision making process in Australia and UK is more creditor friendly as compared to South Africa, this is because only the interests of the creditors are to be considered. In South Africa, the decision making process engages all affected stakeholders, which includes employees, creditors and shareholders.[382] Similar among all the jurisdictions is that there is no need for a court approval for the implementation of the rescue plan. However in the UK, the administrator is required to notify the court of the decision made in the creditors meeting as whether the proposals are to be adopted or modified. Moreover in all three countries, the practitioner gives his or her opinion and the affected parties vote in favour of or

[375] Schedule B1 paragraph 53 UK Insolvency Act.
[376] Schedule B1 paragraph 53 UK Insolvency Act.
[377] Schedule B1 paragraph 68 UK Insolvency Act.
[378] Schedule B1 paragraph 57 UK Insolvency Act.
[379] Schedule B1 paragraph 79 UK Insolvency Act.
[380] Schedule B1 paragraph 80 UK Insolvency Act.
[381] Schedule B1 paragraph 81 UK Insolvency Act.
[382] S152 Companies Act 2008.

against the suggested plan. As an outcome, in all of these jurisdictions, if the rescue plan is approved, it is binding and the practitioner may not deviate from it.

Among all the three countries, there is a common trend of allowing the appointment of a creditor's committee, which committee acts as a middleman between the practitioner and the creditors. In this regard, before convening the meeting with creditors, the practitioner must publish a notice or opinion that will help them make an informed decision.

During the process of decision making, it is notable that in South Africa, a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company.[383] In Australia, the legislation[384] is silent on the matter of voting rights. However, the Corporations Act does not recognise that a holder of security over a company's assets is entitled to greater voting rights than an unsecured creditor or a creditor holding inferior security.[385]According to Lipton, this may result in a creditors meeting resolving that a deed of company arrangement be executed by the company against the wishes of the secured creditors.[386] This may cause the secured creditors to enforce their rights under the security, i.e. receivership, rather than participating in administration.[387]

Where a decision is made to terminate the corporate rescue process, the moratorium comes to an end and the management of the company returns back to the directors.

Conclusion

Whilst there is some common ground in each of the regimes, there are also differences. A discussion of all these regimes helps illustrate the fact that each regime though sharing similar components is tailor made to best suit the countries social, political and economic environment.

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[383] S145(4) Companies Act 2008.
[384] S 439C Corporations Act 2001.
[385] The Corporations Act does not make a distinguish between classes .See Lipton op cit note 205 at 85.
[386] Lipton op cit note 205 at 85.
[387] This is because their security may mean that they will be paid in full rather than have to take on the risk that the rescue may be unsuccessful or accept a lower payment when resources are shared with unsecured creditors in terms of the rescue plan.

Chapter 5 RECOMMENDATIONS AND CONCLUSION

The judicial management regime in Botswana has proven to carry with it a number of shortcomings that make it an ineffective corporate rescue regime. As a regime of corporate reorganisation, the procedure is faulty in itself as illustrated from the discussion in chapter two concerning its operation in South Africa, Zimbabwe and Australia. There is thus a need for Botswana to move towards a modern effective corporate rescue regime. In this regard, Godwin notes that because of the previous financial crisis, there has been a re-examination of corporate rescue statutes as a way of protecting the economy.[388] Thus Botswana should re-examine its corporate rescue regimes, to ensure that an effective rescue mechanism is put in place to turnaround ailing companies and therefore protect the economy which is making an attempt towards growth.

5.1 Drawbacks of judicial management in Botswana

As indicated above in chapter three, the following are weaknesses of the judicial management regime in Botswana, thus warranting reform:

- The fact that this regime is highly reliant on court process makes it expensive and onerous, thus being unsuitable for small companies. In this regard, Kloppers has pointed out that small and medium companies play an important role in the economy of a developing and developed country.[389] Therefore, such companies are worthy of corporate rescue as big companies.[390] However the fact that the judicial management is court oriented is a drawback also looking at the fact that the majority of companies in Botswana are small to medium sized.
- Additionally, the burden of proof required by the Botswana Companies Act, being that there should be a 'reasonable probability' that the company will recover is a heavy burden to proof. Having requirements that are less burdensome will encourage directors to opt for corporate rescue when the company gets into financial distress.
- Moreover there is no requirement for there to be a rescue plan that outlines how the company will be turned into a profitable entity. This plan as

[388] A Godwin 'Corporate rescue in Asia-Trends & challenges' (2012) *34 Sydney L.Rev* 163 at 164.
[389] Kloppers op cit note 37 at 425.
[390] Ibid

discussed above also allows the participation of various stakeholders, which consists of creditors and shareholders. Such key players in the company will thus be able to feel that they play a part in the turnaround process, if there is provision for a rescue plan.

- Another pitfall is the fact that there are no set qualifications that are required for one to be eligible to become a judicial manager, thus the tradition of appointing liquidators as judicial managers. Furthermore the fact that liquidators are appointed as judicial managers is problematic because they are trained in dismantling the company and not in rescuing the company. There is therefore a need for set qualifications and skills which follow the position of the rescue practitioner.
- The judicial management provisions further do not provide for an automatic moratorium. Under the Botswana Companies Act, a moratorium may only come into place upon the discretion of the courts, this is not mandatory or automatic.
- Furthermore, the attitude of reluctance that the courts have towards judicial management makes it a dormant procedure. Thus the procedure is not able to achieve its stated aim of rescuing companies that are going through financial distress. The procedure is therefore creditor-friendly unlike modern corporate rescue regimes that are more debtor friendly, looking towards maintaining the company as a going concern. The courts see this procedure as a being a 'drastic measure' because of the need to uphold creditor rights over debtor rights.

5.2 Recommended corporate rescue regime for Botswana

The establishment of an efficient and effective corporate rescue mechanism presents challenges for all jurisdictions, this is because of several reasons which are worth noting: Firstly, there are many different corporate rescue models from which countries can choose and these require a range of issues to be considered and resolved. Among these factors are whether creditors should be able to initiate the process to whether the debtor in possession model should be adopted.[391] According

to Godwin, the choice of model is a reflection of where jurisdictions stand in relation to a broad range of political, social and economic issues, including the following: [392]

Where to strike a balance between the right of debtors and the right of creditors, particularly secured creditors. This is true also looking at the current judicial management regime in Botswana, which is creditor friendly in contrast with modern corporate rescue, which is more debtor friendly. Furthermore, countries try to incorporate creditors and other interested parties in order to balance the rights between creditors and debtors. The issue is thus, where to strike a balance between the rights of creditors and debtors in a regime.

A further issue to consider is the extent to which the rights of stakeholders other than the debtors and the creditors should be taken into account and protected. Lastly, there is a need to consider the role of the existing management in corporate rescue and whether the directors should play an active part in implementing the rescue.

5.2.1 Aims of Corporate rescue

It is recommended that corporate rescue in Botswana should seek to satisfy two key aims:

(i) to ensure that the business, property and affairs of the company are administered in such a way that maximises the chances of the company or as much of its business as possible surviving, and,

(ii) to get better results for creditors than they would get if the company entered liquidation

The ultimate aim should be to ensure the viability of the company. Thus it will be advantageous for the economy to have a business continue, even if it is under different ownership. In this regard, jobs will be saved and the society at large will enjoy the benefits. It is further submitted that, aiming to get better results for creditors will ensure that the interests of creditors are considered even though there is a moratorium operating against them.

5.2.2 Commencement

As discussed above, the commencement stage is important as it is the entry route through which corporate rescue is initiated. [393]Thus it is important that the commencement route should be a flexible and less cumbersome procedure. It is thus recommended that corporate rescue in Botswana be commenced voluntarily by the company's directors. This is so because directors as controllers of the company are likely to know when the company is in financial distress, thus being able to initiate rescue at the first signs of financial distress. As is the case in South Africa, it would be good to include an insolvent trading provision to ensure that directors that allow the company to trade while insolvent without seeking the relief of corporate rescue be held liable.[394]

It is also submitted that receivership will not be a suitable alternative for Botswana. This is because the aim of corporate rescue is to rescue the debtor and contrary to this aim, receivership has been criticized as being more of a means for the recovery of the loan, regardless of the effect on a fragile business.[395] Furthermore, company voluntary arrangements (CVA) would be of more interest as they are generally used for smaller countries in Australia. This will be ideal for a country like Botswana which has a majority of small sized companies.

It is recommended further that Botswana adopt a second route of commencement that will allow interested parties to commence corporate rescue by application to an independent body. Among these interested parties will be secured creditors, instead of having receivership that runs the risk of defeating the aim of rescuing an ailing company. Interested persons such as creditors, shareholders and employees will then have a chance to take part in the recue process. It is recommended that the court only play a supervisory role, in that dissatisfied interested parties be able to make an appeal upon rejection of application to the independent body.

Furthermore, it is recommended that a company be eligible for corporate rescue before reaching a critical stage of insolvency. Thus the company should be able to apply for corporate rescue at first signs of financial distress, rather than wait until the company is in a critical stage. Such company will have a better chance at survival

than one that has already reached dire financial distress. Thus, a system as is operative in South Africa of having a company that may be insolvent in the next ensuing six months being eligible for corporate rescue will be a sufficient measure.

5.2.3 Corporate Rescue Practitioner

It is recommended that corporate rescue in Botswana commence upon the appointment of a corporate rescue practitioner that will oversee the affairs of the company whilst the company is undergoing corporate rescue. The nomination of such practitioner should be done by the parties that initiate the corporate rescue proceedings. Such practitioner should be able to take over the management of the company from the hands of the directors whilst allowing the directors to assist where such practitioner needs clarity. It is further recommended that the corporate rescue practitioner take over management as it will be assumed that such practitioner will be trained and have the necessary skills and expertise needed to turnaround the company, which directors may not have. Allowing the directors to continue controlling the company may therefore disrupt the rescue process. In this light, it is recommended that the qualifications for occupying the office a corporate rescue practitioner be stipulated to ensure that persons with the necessary qualifications and skills to rescue the company from financial distress be appointed. It is necessary that there be an established regulatory body that will regulate persons that are eligible to occupy such office.

Furthermore, it is recommended that lawyers, accountants and business persons will be the best persons suited to occupy such a position, however, they should undergo training in order to understand the dynamics of rescuing companies. Although having necessary qualifications is important, it is not satisfactory, there should be training on how to rescue ailing companies. It is recommended that consultants be brought in from countries with experience in corporate rescue in order to train corporate rescue practitioners and regulators. Corporate rescue practitioners should be independent and not associated with the company in any way, in order to prevent a conflict of duty whilst attempt is being made to rescue the company.

5.2.4 Moratorium

It is recommended that Botswana have an automatic moratorium in place, which is operative upon appointment of the corporate rescue practitioner. This will give the company a chance to recover without having to worry about creditor's claims. The moratorium should not be at the discretion of the courts as is the case under judicial management. Furthermore, it is recommended that the moratorium operates against both secured and unsecured creditors; and that creditors should not be given opportunity to disrupt the rescue proceedings of a company that is already at a financially feeble stage. However it is recommended that there be grounds that will warrant the lifting of the moratorium upon leave of court, this should only be done under exceptional circumstances that will warrant such relief.

As discussed under all the three jurisdictions mentioned above,[396] it is recommended that the moratorium not apply to criminal proceedings, so as to ensure that directors don't use a procedure designed for aiding distressed companies to defeat the ends of justice. The moratorium should operate until the corporate rescue procedure comes to an end, meaning that it should continue to operate even whilst the rescue plan is being implemented.

5.2.5 Rescue plan

It is recommended further that there be a stipulated provision requiring the practitioner to make a rescue plan that will set out steps to be taken towards rescuing the company. Such plan should be approved by the creditors of the company as interested parties in the going concern. As is the case in South Africa it is recommended that voting interest on the rescue plan be according to the value of the amount owed to the creditor by the company.

Conclusion

Due to the ineffectiveness of judicial management in Botswana, this dissertation suggests that it is time for Botswana to change its corporate rescue regime to be in line with modern corporate rescue trends. Thus, the dissertation proposes a corporate rescue regime that will be effective in rescuing ailing companies in Botswana. Such corporate rescue mechanism must suit the economy of Botswana that consists mainly of small to medium sized companies. Furthermore, the courts should play a minimal

role of being supervisor over this corporate rescue regime. Thus such regime should be a flexible and affordable one that will be able to accommodate small companies undergoing financial distress return back to viability.

BIBLIOGRAPHY

Primary Sources

Cases

Australia

JA Pty v Jonco Holdings Pty Ltd 2000 NSWSC 147

Botswana

BP Distributors (Pty) Ltd v Gladen Supplies (Pty) Ltd and others 168-1970 BLR 30

Builders Merchants Botswana (Pty) Limited v Botoka Construction 1979-1980 BLR 1

Macdonald v Coin Botswana (Pty) Limited 2004 (1) BLR 415

South Africa

De Jager v Karoo Koeldranke and Roomys (Edms) Bpk 1956 (3) SA 594

Le Roux Hotel management v E rand 2001 (2) SA 727 CPD

Pax Clothing Co Ltd v Vaskis Tailoring Pty Ltd 1953 2 OH E 13(T)

Ritcher v Absa 2015 ZACSCA 100

Tenowitz v Tenny Investments Pty Ltd 1979(2) 680

Welman v Marcelle Props 193 CC (33958/2011) [2012] 32

Statutes

Australia

Corporations Act 50 of 2001

Botswana

Companies Act Cap 42:02 of 2003

South Africa

Companies Act 61 of 1973

Companies Act 71 of 2008

The United Kingdom

Enterprises Act of 2002

United Kingdom Insolvency Act of 1986

Zimbabwe

Companies Act Cap 24:03 of Zimbabwe

Secondary Sources

Books

Charles M Fombad *Essays on the law of Botswana* (2007) Juta and Co Ltd

Farouk Cassim *Contemporary company law* 2ed (2012) Juta and Co Ltd Cape Town

H S Cilliers, M L Benade *Corporate Law* 3ed (2000) Lexis Nexis South Africa

Jason Harris, Anil Hargoran and Michael Adams *Australian Corporate Law* 4ed (2013) Lexis Nexis Butterworths Australia

John De Lacy *The Reform of United Kingdom Company Law* (2002) Cavendish

John Kiggundu *Company and Partnership Law in Botswana* 1ed (2010) Bay Publishing

Michael Murray and Jason Harris *Keay's Insolvency personal and corporate law and practice* 8ed (2013) Thomson Reuters

Philip R Wood *Principles of International Insolvency* 2ed (2007) Thomson Sweet and Maxwell

RH Christie *Business Law in Zimbabwe* 2ed (1998) Juta and Co Ltd

Journals

A H Olver 'Judicial Management-A Case for Law Reform' (1986) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 84

Andrew Keay 'Receiverships in light of recent legislative changes' in: JPG Lessing & JF Corkery (ed) *Corporate Insolvency Law* (1995) The Taxation & Corporate Researche Centre Law School 33

Andrew Godwin 'Corporate rescue in Asia-Trends & challenges' (2012) *Sydney Law Review* 163

Andrew Keay 'A comparative Analysis of Administration Regimes in Australia and the United Kingdom' in Paul J. Omar *International Insolvency Law-Themes and Perspectives* (2008) Ashgate Publishing Ltd, Hampshire, England 105

Anneli Loubser 'Business rescue in South Africa: a procedure in search of a home?'(2001) *Comparative and International Law Journal of Southern Africa* 152

Anneli Loubser 'Judicial management as a Business rescue Procedure in South African Corporate Law' (2004) *South African Mercantile Law Journal* 137

Anneli Loubser 'The Business Rescue proceedings in the Companies Act of 2008: concerns and question' (2010) *Journal of South Africa Law* 689

Anneli Loubser 'The role of shareholders during corporate rescue proceedings: Always on the outside looking in?'(2008) *South African Mercantile Law J*ournal 372

Colin Anderson, David Morrison 'The Commencement of the Company Rescue: How and when does it start' in P J Omar (Ed) International Insolvency Law: Themes and Perspectives (2008)

Colin Anderson 'Viewing the proposed South African Business Rescue provisions from an Australian perspective' (2008) *Potchefstroomse Elektroniese Regsblad* 1

D A Burdette 'Some Initial Thoughts on the development of a modern and effective Business rescue Model South Africa'(2004) *South African Mercantile Law Journal* 409

Gerrard McCormack 'Corporate rescue law in Singapore and the appropriateness of chapter 11 of the US bankruptcy code as a model' (2008) *Singapore Academy of Law Journal* 396

Harry Rajak and Johan Henning 'Business Rescue for South Africa' (1999) *South African Law Journal* 262

Harry Rajak 'Rescue versus liquidation in central and Eastern Europe' (1998) *Texas International Law Journal* 157

John Armour 'Corporate insolvency in the United Kingdom: The impact of the Enterprise Act 2002' (2008) *European Company and Financial Law Review* 148

John Kiggundu 'Company Law Reform in Botswana: the agenda for the twenty-first century' (1996) The South African Law Journal 517

Katarzyna Gromek Broc & Rebecca Parry 'Corporate rescue an overview of recent developments from selected countries in Europe' (2004) *International Business Lawyer* 238

O Kahn-Freud 'Company Law Reform' (1946) *Modern Law Review* 235

Pieter Kloppers 'Judicial Management Reform- steps to initiate a Business Rescue' (2001) *South African Mercantile Law Journal* 358

Pieter Kloppers 'Judicial management-A Corporate Rescue Mechanism in need of reform' (1999) 10 *Stellenbosch Law Review* 417

Philip Lipton 'Voluntary Administration: Is there life after insolvency for the unsecured creditor?' in: JPG Lessing& JF Corkery (ed) *Corporate Insolvency Law* (1995) The Taxation & Corporate Research Centre Law School 73.

Pont & Griggs 'The Resuscitation of the Corporate Cadaver: an Autopsy of Business Rescue Laws' (1994) *Australian Journal of Corporate law* 309

Richard Bradstreet 'New Business Rescue: will creditors sink or swim '(2011) 128 The South African Law Journal 352

Richard Bradstreet' The leak in the Chapter 6 Life Boat: Inadequate regulation of Business Rescue Practitioner may adversely affect Lenders willingness and the growth of the Economy' (2010) *22 Mercantile Law Journal* 195

Rhonda King 'Voluntary Administrations: Proposals for Change' in: JPG Lessing & JF Corkery (ed) Corporate Insolvency *Law* (1995) The Taxation & Corporate Research Centre Law School 91

Sandra Frisby 'In Search of Rescue Regime: The Enterprise Act 2002' (2004) *Modern Law Review* 247

Vanessa Finch 'Corporate rescue: A game of three halves' (2012) *Legal studies32* 302

Wai Chee Robinson 'Entry Requirements: A Comparative analysis of the Corporate Rescue Regimes in Australia, the United Kingdom and the United States of America' (1995) *Corporate & Business Law Journa*l 129

Reports and other sources

A H Olver '*Judicial management in South Africa*' (1980) LLD University of Cape Town

Anneli Loubser Loubser '*Some Comparative Aspects of corporate rescue in South African Company Law'* (2010) PHD Thesis University of South Africa

British virgin Islands Administrative Receivership and English Insolvency Law *www.chasecambria.com/site/journal/article.php?id=183*

Charles F Fombad 'Botswana Introductory Notes' available at *www.ida.up.ac.za/country-reports/botswana-country-report.pdf*

Department of Trade and Industry Notice 1183 of 2004

K Hufisi, 'Judicial management an effective tool', 10 October 2012, available at *www.herald.co.zw/judicial-management-an-effective-tool/*

Lekopanye Mooketsi, ‘Botswana: Modubule Questions Liquidation of Lobtrans, available at *allafrica.com/stories/2008/02111806.html*

Richard Bradstreet Business rescue practitioners: what role for the legal profession? De rebus digital

Smits ‘Corporate Administration- A proposed Model’ (1999) De Jure 80

Tapiwa Chizana ‘Business Rescue and the Companies Act’, 25 October 2013, available at *www.lexisnexis.com/hottopics/Inacademic*