



THE UNIVERSITY OF CAPE TOWN
School for Advanced Legal Studies

Department of Commercial Law

MWEWA CHOLA

(CHLMWE002)

Master of Laws (LLM) in Commercial Law

***REFORMING THE COMPANIES ACT DISPUTE RESOLUTION
FRAMEWORK: A CASE FOR THE ESTABLISHMENT OF A COMPANIES
TRIBUNAL FOR ZAMBIA***

Supervisor: Ms JACQUELINE YEATS

Word count: 24 442

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws Degree (LLM) in Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws Degree (LLM) in Commercial Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature:

Date:

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

ABSTRACT

Companies play a very important role in the economy of any country. A country's economic growth and development depend largely on whether or not its regulatory environment is conducive for enterprises to thrive. In recognition of the important role companies and businesses generally play in an economy, several developing countries have, in recent years, been carrying out reforms intended to enhance the ease of doing business in their respective countries. Zambia has been no exception.

Some of the issues that are widely accepted as having an influence on the ease of doing business include the cost and length of dispute resolution for businesses. Therefore, it is unsurprising that some reforms aimed at, among other things, expediting and lowering the cost of commercial dispute resolution have taken place in Zambia. For example, the commercial list of the High Court was established in 1999 with a view to expediting the resolution of commercial disputes. However, the cost of commercial dispute resolution remains of concern.

The dissertation explores the *Zambian Companies Act* dispute resolution framework in a bid to consider its standing vis-à-vis enhancing Zambia's competitiveness in so far as the ease of doing business is concerned. It posits that the *Companies Act* resolution framework does not help Zambia's quest to enhance the ease of doing business on the dispute resolution front because it is predominantly anchored on recourse to court. A comparative study of current trends in company law dispute resolution is undertaken, which reveals a shift from reliance on the courts as the predominant dispute resolution forum to tribunal based dispute resolution. The dissertation ultimately recommends the establishment of a *Companies Tribunal* for Zambia as a measure that would contribute to lowering the cost of commercial dispute resolution –

at least in the context of the Companies Act – and enhancing the ease of doing business in Zambia.

DEDICATION

To my children Mwewa Kamoto Chola and Taonga Kasunga Chola; my parents Fidelis Chola Sobingi and Christine Simukoko Sobingi; and my wife Mercy Chisala Bundebunde Musonda – Chola.

ACKNOWLEDGEMENTS

I thank my family for allowing me to pursue the LLM programme and for enduring my absence from home for a whole year. Am also grateful to them for their support and understanding during the long hours I spent away from them researching and writing the dissertation.

I am grateful to the Zambian Government and the University of Cape Town for supporting my studies financially through sponsorship and partial scholarship respectively.

My gratitude also goes to my colleagues Magistrate Exnobert Zulu and Mr. Gift Mileji for taking time to read and comment on my draft dissertation. I am indebted for their valuable comments.

I am also thankful to colleagues from the University of Cape Town for the enriching experiences we shared academically and socially.

I am eternally grateful to God for granting me good health and strength during the good and difficult phases of my studies.

LIST OF ACRONYMS

AAT	Administrative Appeals Tribunal.
ASIC	Australian Securities and Investment Commission.
CIPC	Companies and Intellectual Property Commission.
NCLT	National Company Law Tribunal
PACRA	Patents and Companies Registration Agency.

TABLE OF CONTENTS

ABSTRACT	i
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
LIST OF ACRONYMS	v

CHAPTER ONE – THE RAISON D’ETRE AND SYNOPSIS OF THE DISSERTATION

1. Introduction	1
2. An overview of tribunals in common law jurisdictions	1
3. Rationale for the topic	3
4. The research question	5
5. Justification for the choice of jurisdictions discussed	6
6. Literature review	7
7. Methodology	9
8. A synopsis of chapters	9

CHAPTER TWO – THE COMPANIES ACT DISPUTE RESOLUTION FRAMEWORK

1.0. Introduction	10
2.0. Companies Act dispute resolution framework	11
3.0. Companies Act disputes	15
3.1. Decisions of the registrar	15
3.1.1. Decisions relating to incorporation and conversion	16
3.1.2. Decisions relating to receivers and liquidators	18
3.1.3. Decisions relating to the offer of securities to the public	20

3.1.4.	Accounts, audit and annual returns	21
3.1.5.	Foreign companies	22
3.1.6.	Other decisions	24
3.1.7.	General comments	25
3.2.	Powers of court	26
3.2.1.	Powers relating to incorporation and membership of companies	26
3.2.2.	Powers relating to securities	28
3.2.3.	Powers relating to management and administration	31
3.2.4.	Powers relating to fundamental transactions	33
3.2.5.	Powers relating to winding-up	34
3.2.6.	Other powers	37
3.3.	Companies Act offences	37
4.0.	Conclusion	43

CHAPTER THREE – CURRENT TRENDS IN COMPANY LAW
DISPUTE RESOLUTION: A
COMPARATIVE PERSPECTIVE

1.0.	Introduction	45
2.0.	Australia	46
2.1.	Corporations Act dispute resolution framework	46
2.2.	Selected Corporations Act matters reserved for the Courts	47
2.2.1.	Civil matters	47
2.2.2.	Criminal matters	48
2.3.	Matters reserved for the Administrative Appeals Tribunal	49
2.3.1.	General overview	49
2.3.2.	Jurisdiction in relation to the Corporations	

Act	52
3.0. South Africa	54
3.1. Companies Act 2008 dispute resolution framework ...	54
3.2. Selected Companies Act 2008 matters for the courts	56
3.2.1. Civil matters	58
3.2.2. Criminal matters	61
3.2.3. General comments	62
3.3. The Companies Tribunal	62
3.3.1. General overview	62
3.3.2. Jurisdiction	63
4.0. India	67
5.0. Conclusion	69

**CHAPTER FOUR - REFORMING THE COMPANIES ACT
DISPUTE RESOLUTION FRAMEWORK: A
COMPANIES TRIBUNAL FOR ZAMBIA**

1. Introduction	71
2. Summary of findings	71
3. In support of a Companies Tribunal for Zambia	75
4. A Companies Tribunal for Zambia: some recommendations	78
Bibliography	82

CHAPTER ONE – THE RAISON D’ETRE AND SYNOPSIS OF THE DISSERTATION

1. Introduction

This chapter is introductory in nature. It serves as the springboard for subsequent analyses and discussions. As the dissertation revolves around the question of establishing a Companies Tribunal in Zambia, it is necessary – from the outset – to give an overview of tribunals from a common law perspective.¹ Therefore, this chapter opens with a brief discussion of the term ‘tribunal’ and a highlight of the relevance of tribunals in a justice system. Thereafter, the *raison d’être* for the dissertation is provided, followed by a statement of the research question. As the dissertation includes a comparative study of some jurisdictions that have established or provided for tribunals or similar frameworks for certain company law matters, justification for the choice of the jurisdictions to be compared is provided after the statement of the research question. Thereafter, the literature review is given; followed by a brief comment on the research methodology employed for the dissertation. The chapter concludes with a synopsis of subsequent chapters.

2. An overview of tribunals in common law jurisdictions

The term ‘tribunal’ appears not to have a universally agreed definition. Ascribing an exact meaning to it is said to be a difficult undertaking but context or jurisdiction informs its meaning.² In its

¹ The choice of the common law perspective of tribunals is informed by the fact that Zambia is a common law jurisdiction.

² Lord Justice Carnwath & Murray Chitra et al ‘An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom’ in Robin Creycke (ed) *Tribunals in the Common Law World* (2008) 2.

ordinary usage, for example, the term ‘tribunal’ includes ‘a court of justice ... [and] a seat for a judge or judges’³. However, in the context of this dissertation, a tribunal does not include a court or the seat for a judge. This being the case, a consideration of the meaning of ‘tribunal’ for purposes of this dissertation is well founded.

A tribunal is a body ‘with judicial or quasi-judicial functions set up by statute and existing outside the usual judicial hierarchy of the [courts]’⁴. While this definition has been criticised as not being comprehensive on account that ‘... in current legal parlance “tribunal” has been described as a “basket word” embracing many different institutions’⁵, it largely suffices for purposes of this dissertation as will become evident in due course.

It is noteworthy that, in terms of the nature of matters they deal with, tribunals are generally concerned with resolving claims against the State.⁶ However, it is not uncommon for them to handle disputes between private persons – both natural and juristic.⁷ The cases dealt with by tribunals range from simple to complex matters such as tax issues.⁸

That tribunals are an integral part of the justice systems of many countries is undeniable. The establishment of a unified tribunal system in the United Kingdom;⁹ the existence of the Administrative Appeals Tribunal in Australia;¹⁰ the creation of the National Consumer Tribunal

³ Catherine Soanes & Angus Stevenson (eds) *Concise Oxford English Dictionary* 11 ed (2008) 1539.

⁴ Mick Woodley (ed) *Osborn’s Concise Law Dictionary* 10 ed (2005) 406.

⁵ J R S Forbes *Justice in Tribunals* (2002) 1.

⁶ LJ Carnwath & M Chitra et al op cit note 2 at 20.

⁷ Ibid.

⁸ Ibid at 21.

⁹ The Tribunals, Courts and Enforcement Act 2007, provides for a unified tribunal system in the United Kingdom. The Act is available at http://www.legislation.gov.uk/ukpga/2007/15/pdfs/ukpga_20070015_en.pdf accessed on 22 February 2015.

¹⁰ The Administrative Appeals Tribunal was established by s 5 of the Administrative Appeals Act 91 of 1975, available at <http://www.comlaw.gov.au/Details/C2013C00449> accessed on 22 February 2015.

and the Companies Tribunal in South Africa;¹¹ and the recent institution of the Competition and Consumer Protection Tribunal in Zambia¹² all suggest that tribunals play a pivotal role in a justice system.

Tribunals provide a welcome alternative to the often expensive, tedious, complex, rigid and lengthy litigation in the courts for a number of reasons. First, tribunals are seen as a flexible dispute resolution mechanism which allows for the development and adaptation of ‘procedures to suit the characteristics of the jurisdiction, and the needs of its users, be they unrepresented individuals or sophisticated city institutions’¹³. Secondly, there is an assertion that public interest is served by allowing ‘questions arising under public Acts or consensual rules to be resolved as privately and expeditiously as possible’¹⁴. Lastly, Lord Wilberforce, in *Anisminic Ltd v Foreign Compensation Commission*,¹⁵ characterised tribunals as being ‘set up to deal with matters of a specialised character, in the interest of economy, speed, and expertise’¹⁶. Indeed tribunals are credited for being ‘cheaper, more accessible and informal, speedier and [affording relevant expertise] ...’¹⁷

3. Rationale for the topic

The Zambian Government has been undertaking reforms aimed at easing the doing of business in the country. These reforms appear to have been stimulated by a recognition that the private sector in general

¹¹ The National Consumer Tribunal is a creation of s 26 of the National Credit Act 34 of 2005; the Companies Tribunal was established by s 193 of the Companies Act 71 of 2008.

¹² The Competition and Consumer Protection Tribunal is a creature of s 67 of the Competition and Consumer Protection Act 24 of 2010 available at http://www.parliament.gov.zm/index.php?option=com_docman&task=cat_view&gid=135&dir=DESC&order=date&limit=5&limitstart=20 accessed on 22 February 2015.

¹³ LJ Carnwath et al op cit note 2 at 21.

¹⁴ J Forbes op cit note 5 at 2.

¹⁵ (1969) 2 A.C. 147

¹⁶ Ibid at 207.

¹⁷ LJ Carnwath et al op cit note 2 at 19.

and companies in particular are engines of economic growth¹⁸ in a liberalised economy like that of Zambia. A number of laws have, in the reform process, been repealed, amended or enacted in order to ensure a thriving private sector and attendant economic growth. Among the laws that have been amended in the course of this reform process is the Companies Act Cap 388¹⁹ (hereafter referred to as ‘the Companies Act’) in order to, inter alia, make incorporation of a company cheaper and easier²⁰ as well as to enhance the Registrar’s enforcement powers²¹.

While the reforms undertaken thus far are commendable, they appear to have focused more on relaxing regulatory requirements in order to, inter alia, reduce the cost of doing business in Zambia and less on the equally important matter – in so far as the cost of doing business is concerned – of dispute resolution in business generally, and in the context of company law particularly.

It is generally agreed that a speedy, cheap, efficient, flexible, simple and effective dispute resolution framework for businesses tends to promote their growth and consequently the economic growth of a

¹⁸ The preamble of the Private Sector Development Reform Programme II at 3 acknowledges this point. The document is available at http://psdzambia.org/uploads/3/0/7/4/3074051/psdrp_ii_programme_document.pdf accessed on 27 August 2014.

¹⁹ Available at <http://www.zamlii.org/zm/legislation/consolidated-act/388> accessed on 24 November 2014.

²⁰ For example, the Companies (Amendment) Act 12 of 2010, repealed the Companies Act provisions that required public limited companies and private companies limited by shares to comply with minimum capital requirements before commencing business operations. The repealed s 15 of the Companies Act prohibited a public limited company from commencing business operations without the registrar of companies’ certificate confirming that the nominal value of the allotted shares of the company is not less than a prescribed minimum capital. In terms of the repealed s 18 of the Companies Act, a private company limited by shares could only commence business operations once consideration, to a prescribed value, was paid to the company for the issue of its shares. Act 12 of 2010 has effectively made it cheaper to incorporate a company in that a company is no longer required to meet a statutory minimum capital threshold prior to commencement of business operations. The said Act is available at <http://www.zambialii.org/files/zm/legislation/act/2010/12/Companies%20%28Amendment%29%20Act.PDF> accessed on 22 February 2015.

²¹ According to s 109A of the Companies Act introduced by the Companies (Amendment) Act 24 of 2011, for instance, the registrar of companies is empowered to disqualify a non-compliant receiver from acting as such. The registrar did not have such powers prior to this amendment.

country. A number of countries have – apparently in a bid to create business-friendly environments and promote economic growth through speedy, simpler and cost-effective dispute resolution²² – established or provided for tribunals to hear and determine certain matters and disputes arising from their respective laws regulating companies.²³

However, the primary forum – arguably the only forum of first instance – for dispute resolution in terms of the Companies Act is the High Court of Zambia²⁴. It is universally accepted that litigation tends to be costly, complex, and lengthy; this fact holds for Zambia as it holds for many other countries. Therefore, the need for cheaper, simpler and efficient mechanisms for settling certain disputes or matters that arise from the Companies Act – in the interest of further easing the doing of business and consequently promoting economic growth – cannot be overemphasised.

4. The research question

That specialised tribunals are seen as ideal for the determination of certain company law matters is evident from their establishment in some countries as pointed out earlier. This dissertation postulates that establishment of a specialised tribunal for the determination of certain

²² For instance, one of the compelling reasons for the establishment of the Companies Tribunal in South Africa was the need for expedition of the adjudicative process. See Department of Trade and Industry *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* General Notice 1183 of 2004 49 available at http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf accessed on 11 February 2015. Even though this General Notice did not expressly state that the rationale behind the need for expedition of the adjudicative process was partly to ensure a more business-friendly environment and promote economic growth, the general theme of the corporate law reform process – revolving around rationalising South African company law in keeping with international trends and economic changes – implicitly encompassed these issues.

²³ Some of the countries that have established or provided for tribunals or special adjudicative bodies for certain disputes or enforcement matters in their respective companies laws are Australia, India, South Africa and the United Kingdom.

²⁴ For example, s 379 of the Companies Act provides that an appeal against a decision of the registrar of companies lies to the High Court. The issue of the current dispute resolution framework in Zambia is given more detailed consideration in chapter two.

matters and disputes arising from the Companies Act would answer to the need for reform – as demonstrated in the next chapter – in this area of law in Zambia. The question then is: what kind of tribunal is best suited for Zambian company law in the light of international best practices?

In answering this question, the dissertation will discuss the current dispute resolution framework as provided for in the Companies Act. It will also be necessary to compare the relevant frameworks in some countries that have set up tribunals to deal with certain matters and disputes arising from their respective laws regulating companies in order to establish international best practices. The countries whose frameworks will be compared are Australia, India and South Africa. While the comparative study is expected to aid the making of a case for the establishment of a Zambian Companies Tribunal, caution will be urged against wholesale importation of a particular framework but a framework that best suits the Zambian circumstances will be argued for.

5. Justification for the choice of jurisdictions discussed

The reasons for the choice of the countries for the comparative study are varied but one that is common to all of them is the shared common law heritage or influence. Australia is ideal for the comparison because the Administrative Appeals Tribunal²⁵, which hears and determines certain matters arising from the Corporations Act 50 of 2001²⁶ (hereafter referred to as ‘the Corporations Act’), has been in existence for well over three decades and is likely to offer insightful lessons from its many years of existence.

²⁵ Established by s 5 of the Administrative Appeals Tribunal Act 1975.

²⁶ Available at <http://www.comlaw.gov.au/Details/C2013C00003> accessed on 22 February 2015.

It is necessary to consider the South African model because it is the only African country, in so far as the author could ascertain, that has a Companies Tribunal and therefore the only one available for consideration or discussion in Africa.

A study of the Indian model is necessary because it provides for the most extensive, jurisdictionally, company law tribunal and would thus offer valuable insights regarding the framework that Zambia could adopt.

6. Literature review

A review of literature on the subject revealed that not much has been written on it. In fact, in so far as dispute resolution in terms of the Companies Act is concerned, the author did not find any scholarly writings. The dissertation is arguably the first scholarly work on the subject with regard to *Zambian company law*.

The literature review also established that, while tribunals have generally been the subject of scholarly writing²⁷, not much has been written specifically in relation to them in the context of dispute resolution in company law. For example, in the case of Australia, there are scholarly writings on the Administrative Appeals Tribunal in general²⁸ but not much, if anything has been written on it in the context of the Corporations Act.

The findings stated in the immediately preceding two paragraphs notwithstanding, some scholars have touched on the subject of company law tribunals in respect of India and South Africa. In the case of India, Datar Arvind²⁹ discusses the National Company Law Tribunal

²⁷ Some of the books that have addressed the subject of tribunals include: LJ Carnwath & M Chitra et al op cit note 2; J Forbes op cit note 5; and Chantal Stebbings *Legal Foundations of tribunals in Nineteenth-Century England* (2006).

²⁸ Peter Cane *Administrative Tribunals and Adjudication* (2009)

²⁹ Datar Arvind 'The Tribunalisation of Justice in India' 2006 *Acta Juridica* 288 available at

for India and undertakes a brief comparative analysis of administrative justice tribunals in selected jurisdictions, namely the United States of America, Jamaica, Canada and Australia.³⁰ However, Arvind's comparative analysis, in addition to being brief, does not involve companies tribunals or their equivalent in the named jurisdictions. This dissertation undertakes a comparative study – albeit not involving all the jurisdictions compared by Arvind – in the context of company law tribunals as opposed to administrative justice tribunals generally.

In the case of the South African Companies Tribunal, much of the commentary has been on the welcome broadening of options for adjudication and dispute resolution in the Companies Act 71 of 2008 (hereafter referred to as 'the Companies Act 2008') as well as a restatement of the functions of the tribunal.³¹ Detailed scholarly analyses of the Companies Tribunal's mandate and its performance so far appear to be non-existent or difficult to find. This dissertation focuses on these unexplored aspects of the Companies Tribunal.

It is clear from the literature reviewed that the dissertation will not only provide sound proposals for the reform of the Zambian company law dispute resolution framework but also offer a hitherto not explored comparative perspective of international best practices in determining certain matters and disputes arising from laws regulating companies.

http://reference.sabinet.co.za/webx/access/electronic_journals/ju_jur/ju_jur_2006_a13.pdf accessed on 28 March 2014.

³⁰ Ibid at 297 – 301.

³¹ See Farouk HI Cassim 'Introduction to the New Companies Act: General Overview of the Act' and Maleka Femida Cassim 'Enforcement and Regulatory Agencies' in Farouk HI Cassim (ed) *Contemporary Company Law* 2 ed (2012) 25, 837 – 40 and 852 – 3 respectively; and Dorothy Farisani 'The potency of co-ordination of enforcement functions by the new and revamped regulatory authorities under the new Companies Act' 2010 *Acta Juridica: Modern company law for a competitive South African economy* 433 – 45 available at

http://reference.sabinet.co.za/webx/access/electronic_journals/ju_jur/ju_jur_2010_a22.pdf accessed on 28 March 2014.

7. Methodology

The research will mainly be desk-based involving a review and analysis of relevant statutes, books, journal articles and websites.

8. A synopsis of chapters

Chapter two will discuss the dispute resolution framework provided for in the Companies Act. It will also highlight the nature of disputes that may arise in terms of the Companies Act through an examination of the registrar's, and the High Court's, powers. In addition, some of the challenges with the current dispute resolution mechanism will be discussed and it will be argued, *inter alia*, that the status quo does not aid the quest for further ease of doing business and attendant economic growth. The chapter will bring to the fore the need for reform in this area of company law.

The third chapter will consider current trends in dispute resolution mechanisms employed in the area of company law in selected jurisdictions, namely Australia, India and South Africa. The intention will be to compare these jurisdictions' tribunal systems in the context of company law with a view to identifying a model that would be best suited to Zambia.

Chapter four, which is the last chapter, will argue for the establishment of a Companies Tribunal for Zambia, drawing on best practices highlighted in the previous chapter. The chapter will, in this regard, make proposals for amendment of the Companies Act.

CHAPTER TWO – THE COMPANIES ACT DISPUTE RESOLUTION FRAMEWORK

1.0. Introduction

The number of companies being incorporated in Zambia has been on the rise in recent years. For example, the number of companies incorporated in 2012 was 9 678 whereas 2013 saw 10 143 companies being incorporated.³² It is arguable that the simplified incorporation procedures introduced through the several amendments made to the Companies Act – some of which were highlighted in the previous chapter³³ – are partly responsible for these welcome statistics.

That the surge in companies being incorporated would likely see a rise in Companies Act disputes matters may not be a far-fetched assertion. Therefore, it is necessary to appreciate the nature and extent of possible Companies Act disputes or matters as well as the suitability of the current dispute resolution framework generally and in relation to Zambia's competitiveness in its quest to further ease the doing of business in particular. This chapter answers to this need by giving a general overview of the Companies Act dispute resolution framework; and highlighting the possible Companies Act disputes in the context of decisions of the registrar of companies (hereafter referred to as 'the registrar'), powers of the High Court and offences.

This chapter posits that the Companies Act dispute resolution framework does not accord with the much touted ideals of speedy, cost-effective and efficient dispute resolution models for businesses. It is also argued that the status quo is an impediment to Zambia's quest to further ease the doing of business. In other words, the chapter reveals the need for reform in the area of resolution of Companies Act disputes.

³² Patents and Companies Registration Agency (PACRA) '2013 Annual Report' (2014) 6, available at <file:///C:/Users/zambia/Downloads/Annual%20Report%202013.pdf> accessed on 5 December 2014.

³³ *Supra* 4 (note 20).

2.0. Companies Act dispute resolution framework

The High Court of Zambia (in this chapter referred to as ‘court’) is the major dispute resolution platform in the context of the Companies Act. This is so because the definition of court in section 2 of the Companies Act is ‘the High Court for Zambia’ unless the context in which the word is used requires otherwise; and there are several references to the word court in the Act.

The civil registry of the court is divided into two lists – the general list and the commercial list. The commercial list, as the name suggests, is reserved for disputes of a commercial nature. While the High Court Rules made pursuant to the High Court Act, Cap 27³⁴ are generally applicable to the commercial list, there are additional rules applicable only to the commercial list³⁵ designed to ensure the speedy disposal of cases to suit the needs of commerce.

Be this as it may, filing an action in the commercial list is more expensive than doing so in the general list. Therefore, while companies may prefer to file actions of a commercial nature in the commercial list on account of the possibility of speedier resolution thereof than in the general list, the costs associated with commercial list actions may be an impediment especially for small companies. In other words, one can validly argue that the commercial list of the High Court does not enhance the ease of doing business in that it makes dispute resolution expensive whereas lowering the cost of dispute resolution is one of the factors that enhance the ease of doing business.³⁶

³⁴ Available at <http://www.zamlii.org/zm/legislation/consolidated-act/27> accessed on 22 February 2015.

³⁵ High Court (Amendment) Rules statutory instrument No. 29 of 1999 introduced Order 53, which contains provisions governing the filing and prosecution of causes arising from transactions ‘relating to commerce, trade, industry or any action of a business nature’. See O 53(1) of the said rules.

³⁶ The cost of litigation contributed to the World Bank’s ranking Zambia at 98 out of 189 economies on the ease of enforcing contracts for 2015. See World Bank *Doing Business 2015: Going beyond Efficiency* (2014) 68 available at

That the court is the major dispute resolution forum for Companies Act disputes entails that alternative dispute resolution mechanisms such as arbitration³⁷ and mediation³⁸ are, to the extent that their trigger is a court action, relegated to the periphery. These two alternative dispute resolution mechanisms and their place in the resolution of Companies Act disputes are discussed under this heading.

Arbitration clauses are quite common in commercial agreements partly because of the private nature of arbitration and the relative speed at which disputes are generally resolved as compared to the public and lengthy nature of the litigation process. The resolution of disputes through arbitration in Zambia is primarily governed by the Arbitration Act 19 of 2000.³⁹ Other Acts may provide for the resolution of disputes, in the context of such Acts, through arbitration; and section 5(1) of the Arbitration Act provides that the Act ordinarily applies to arbitration conducted in terms of such other Acts.

However, where the provisions of another Act regarding arbitration under that Act are at variance or inconsistent with the provisions of the Arbitration Act, the provisions of the other Act prevail.⁴⁰

Section 322(4) of the Companies Act, which requires the submission of disputes to do with the price at which dissenting members' shares should be sold by a liquidator in certain instances, is an example of a statutory provision in an Act other than the Arbitration

http://www.doingbusiness.org/~media/giawb/doing%20business/documents/profiles/country/ZMB.pdf accessed on 22 February 2015. While this ranking relates to enforcement of contracts, it is indicative of the general impact of the cost of litigation on the ease of doing business.

³⁷ Arbitration can generally be defined as '[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding'. See Bryan A Garner (ed) *Black's Law Dictionary* 9 ed (2009) 119.

³⁸ In general terms, mediation is '[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution'. Ibid 1070 – 1.

³⁹ Available at

http://www.zambialii.org/files/zm/legislation/act/2000/19/aa2000137.pdf accessed on 22 February 2015.

⁴⁰ Arbitration Act s 5(3).

Act that requires the determination of a dispute through arbitration. To the extent that section 322(7)(c) of the Companies Act empowers the court to give binding directions to the parties regarding the commencement and conduct of the arbitration, the section excludes the application of the Arbitration Act to the arbitration unless the court gives a direction that the arbitration be conducted in accordance with the Arbitration Act.

Order 45 of the High Court Rules made pursuant to the High Court Act is another example of a statutory provision in an Act other than the Arbitration Act that provides for arbitration of disputes. Order 45 empowers the court to refer a matter to arbitration on the application of the parties thereto. Therefore, notwithstanding that the Companies Act only expressly provides for arbitration in terms of section 322, any other civil matter brought before the court in terms of the Companies Act is capable of determination through arbitration pursuant to Order 45.

Mediation in Zambia is provided for in Order 31 of the High Court Rules. Unlike arbitration, there is no stand-alone piece of legislation that provides for this process of dispute resolution. Therefore, mediation of a formal nature in Zambia is court-annexed. According to Order 31(4), a judge may refer a matter set down for trial to mediation. It should be noted that court actions involving constitutional issues, individual liberties, injunctive relief or matters deemed by a judge not to be suitable for such reference cannot be referred to mediation.⁴¹ Therefore, Companies Act civil disputes brought to court may be referred to mediation as long as they do not fall into the stated excluded categories.

It is noteworthy that, whereas the court's reference to arbitration may only be made on the application of the parties to an action, a judge may refer a matter to arbitration on the judge's own motion; and to this

⁴¹ High Court Rules O 31(4).

extent it can be said that, at the point of making the reference, arbitration is party-driven while mediation is court-driven. In addition, while Order 45(3) leaves it to the court's discretion to determine the period within which the arbitration should be completed, Order 31(7) prescribes a 60-day period for the completion of mediation from the date a mediator collects the relevant file from the mediation office. To the extent that the period for completion of mediation is fixed, mediation is more predictable than court-ordered arbitration.

In any case court-ordered arbitration rarely, if ever, takes place in practice. This is probably because it is supposed to be triggered by the parties to an action and not the court. The most common instances of court-ordered arbitration are where the parties had a prior arbitration agreement and one of them raises a preliminary objection to the dispute in question being resolved by the court.

It is important to note further, that court-ordered arbitration has the advantage that an application for a reference may be made to the court (a Deputy Registrar of the court may make such an order) or judge at any time after the filing of the action while court-annexed mediation is only available on the order of a judge (a Deputy Registrar of the court cannot make such an order) after the matter has been settled for trial. That settlement of pleadings takes long in many cases, casts doubt on the efficacy of court-annexed mediation in Zambia generally – let alone in respect of Companies Act disputes. In any case, where a matter referred to mediation is not resolved during that process, the matter goes to trial and precious time is lost along the way.

It is clear from the foregoing discourse, and was pointed out in chapter one,⁴² that Companies Act disputes must almost always be brought to court for resolution if the parties thereto feel strongly about them. Recourse to mediation and arbitration in the first instance is

⁴² Supra 5 (note 24).

unlikely under the current dispute resolution framework. The question then is whether reform of the current dispute resolution framework is necessary. This question can best be answered by considering, as the next section does, the nature and magnitude of disputes provided for in the Companies Act.

3.0. Companies Act disputes

The Companies Act provides for both civil and criminal disputes. In the case of civil disputes, some may generally arise from decisions made by the registrar in the performance of the registrar's functions while others can be gleaned from the powers accorded to the court. Other civil disputes may arise between members of the company inter se or between members of the company and the company. Consideration of these other civil disputes is beyond the scope of this paper. Criminal disputes are basically offences created by the Companies Act. This section considers decisions of the registrar, powers of court and offences in a bid to determine whether or not reform in respect of the Companies Act dispute resolution framework is necessary.

3.1. Decisions of the registrar

According to section 379 of the Companies Act, a person aggrieved by the decision of the registrar in the exercise or purported exercise of the registrar's powers in terms of the Act may generally appeal against such a decision to the court. It is necessary to highlight the decisions that are appealable in terms of this section for two principal reasons. First, such an exercise offers a concise summary of appealable decisions of the registrar in terms of the Act. It follows that the decisions highlighted under this heading are appealable. Secondly, the undertaking is useful for purposes of the comparative study in the next chapter as well as for informing the conclusions and recommendations made in the last chapter.

3.1.1. Decisions relating to incorporation and conversion

Section 9(2) provides that the registrar may accept a statutory declaration filed with an application for incorporation in terms of that section as prima facie evidence of compliance with statutory requirements in respect of incorporation of a company.

It is doubtful, however, from a practical perspective that anybody would challenge the registrar's refusal to accept the statutory declaration as prima facie evidence of compliance because such an undertaking would most likely be an academic exercise as it is difficult to see what valuable right one would be seeking to protect in evidence that is not conclusive as to compliance.

Section 16 limits the maximum number of members a private company may have to 50 persons. In addition, it provides that offering of securities to the public must be done in accordance with section 122 of the Act. If the registrar determines that a private company has breached the threshold for membership or has offered securities to the public in contravention of the said section 122, the registrar may issue a notice to the company requiring the latter to give reasons the company should not be converted to a public company.⁴³

In addition, section 16(6) empowers the registrar to apply to court for an order deeming the company to have been converted to a public company if the company does not rectify the contravention indicated in the registrar's notice within one month of its having been issued.

The Act does not state whether or not the company concerned must be a party to an application in terms of this section. However, it is inevitable that the company should be a party to such an application because the company has a right to respond to and be heard on the

⁴³ Companies Act s 16(5).

application. Therefore, while it is arguably open to the company to challenge the registrar's decision to issue a notice in terms of this section at any time before the registrar applies to court for an appropriate order, it is unlikely that the court would be moved at the instance of the company.

According to section 41(1) as amended by section 5 of the Companies (Amendment) Act 24 of 2011 (in this chapter referred to as 'Act 24 of 2011'), the registrar may refuse to register a proposed company name if the name is likely to cause confusion with a well-known name or the name of an existing company; if the registration is intended to prevent a person legitimately entitled to use the name from using it; or if registering the name is otherwise undesirable or not in the public interest. The registrar may also refuse to reserve a proposed company name if the name is not acceptable to the registrar and does not meet the criteria set out in section 38(2).

The registrar may refuse a company limited by guarantee permission to dispense with the requirement to include the word 'limited' in its name⁴⁴ or indeed revoke permission granted to a company limited by guarantee to dispense with the inclusion of the word 'limited' in its name⁴⁵. Where the registrar grants permission pursuant to an application made in terms of section 38(1), the registrar may impose conditions to the permission.⁴⁶

Section 40(3) empowers the registrar to either accept a proposed change of name by a company or reject it if the registrar is of the view that it is likely to cause confusion with another company's name or is otherwise undesirable.

⁴⁴ The registrar's power of refusal is necessarily implied in the express power to grant written permission to dispense with the inclusion of the word 'limited' in the name of a company limited by guarantee that applies for such permission in terms of section 39(1).

⁴⁵ Companies Act s 39(3).

⁴⁶ Ibid s 39(2).

The registrar undoubtedly enjoys wide discretionary powers in relation to the registration of, or refusal to register, company names. While the Act provides that a person aggrieved by any decision of the registrar may appeal to the court, this route is not suitable for disposing of disputes related to company names or proposed company names for a number of reasons. First, litigation is usually lengthy and costly. For instance, it took close to two years to dispose of an interlocutory application in the nature of a summons for an interim injunction in the case of *Airtel Holdings Limited and Others v Patents and Companies Registration Agency and Others*⁴⁷. The plaintiffs in this case sought to prevent the registration of a company name they contended was confusingly similar to theirs.

Secondly, while an appeal against the registrar's decision regarding a proposed company name is pending, the company risks losing out in terms of building goodwill on account of the company's use of its incorporation number instead of a proper name.⁴⁸

Lastly, it is unlikely that a proposer of a company name that is rejected for registration by the registrar will take the matter to court even when they have a strong conviction against such rejection. The more likely course of action would be to submit another name for approval and registration.

3.1.2. Decisions relating to receivers and liquidators

The registrar is the accrediting authority for receivers and liquidators.⁴⁹ In addition, section 109A(9)(b) as amended by section 8 of Act 24 of 2011 empowers the registrar to disqualify a receiver from

⁴⁷ 2010/HP/1216 available at <http://www.zambialii.org/zm/judgment/high-court/2012/45> accessed on 8 January 2015.

⁴⁸ The registrar is empowered, by s 41(3) as amended by Act 24 of 2011, to register a company whose proposed name is not accepted for registration by its registration number.

⁴⁹ Companies Act ss 111(1) and 332(1) as amended by Act 24 of 2011 ss 9 and 27, respectively.

acting as such.⁵⁰ Further, the power of the registrar to remove an erring receiver from the register of receivers is implied in section 111(4)(b) as amended by section 9 of Act 24 of 2011. The said section requires the registrar to notify a professional body to which a receiver belongs, of the removal of such receiver from the register of receivers. It is noteworthy also that the registrar is expressly empowered to remove a receiver, to whom any of the disqualifications listed in section 111(3) as amended by section 9 of Act 24 of 2011 applies, from the register of receivers.⁵¹

The registrar may also disqualify a liquidator from acting as such by removing such liquidator's name from the register of liquidators if the liquidator does not comply with a notice to submit a report required of the liquidator by section 288(1) as amended by section 26 of Act 24 of 2011.⁵² It is noteworthy that, on removal of a liquidator's name from the register of liquidators, the registrar must notify the professional body to which the liquidator belongs of such removal.⁵³

Further, section 117(1) as amended by section 12 of Act 24 of 2011 empowers the registrar to extend the time for lodging of a receiver's accounts from time to time during the receivership as well as after ceasing to be a receiver. It follows, for example, that where a receiver requests for an extension of time for lodging accounts and the registrar rejects the request, the receiver may appeal to the court against the refusal.

Most of the decisions the registrar may make under this subheading border on the integrity of not only receivers and liquidators

⁵⁰ It should be noted that the reference, in s 109A(9), to non-compliance with subsec (1) thereof as the basis upon which a receiver may be disqualified from acting as such is erroneous because the said subsec (1) does not impose an obligation on the receiver to submit any report to the registrar as stated in s 109A(9). It would appear that there was an oversight on the part of the legislators in this regard as subsec (7)(b) is the one that obliges a receiver to lodge copies of the relevant statements with the registrar and not subsec (1).

⁵¹ Companies Act s 118A(1)(d) as amended by Act 24 of 2011 s 13.

⁵² Companies Act s 288(3)(b) as amended by Act 24 of 2011 s 26.

⁵³ Companies Act s 332(4)(b) as amended by Act 24 of 2011 s 27.

but also the receivership and liquidation processes. Recourse to court against such decisions may thus be justified. However, it is arguable that the long time it usually takes to conclude court cases militates against its justification.

3.1.3. Decisions relating to the offer of securities to the public

According to section 123(2)(c), an invitation to the public to purchase shares or debentures in a company intended to be published in a newspaper or magazine summarising the contents of a prospectus must be approved in writing by the registrar. In addition, the registrar is obliged to decline to register a non-compliant prospectus in terms of section 126.

Where a prospectus is registered but the registrar later determines that the prospectus contains a misleading statement, omits or conceals a material fact or does not comply with any relevant statutory requirement, the registrar may apply to court for any of the following orders, namely cancellation of the registration of the prospectus; declaration of contracts of purchase of any securities voidable; an order to the issuers of the prospectus to re-issue an amended prospectus; or an order protecting the rights of persons adversely affected by the issue of the prospectus.⁵⁴

Section 260(2) stipulates that the provisions relating to invitation of the public to subscribe for securities in a company apply, with necessary changes, to foreign companies. However, the registrar may waive or modify these provisions in relation to a foreign company if the foreign company makes an application to that effect.⁵⁵

Offers of securities to the public are by their nature time-sensitive and appealing against the registrar's decisions in respect thereof may

⁵⁴ Companies Act s 131(1) and (2).

⁵⁵ Ibid s 260(3).

not be ideal. However, looked at from the need to protect the investing public from incurring losses on account of lapses in the relevant processes, it is perhaps justifiable that anybody aggrieved with the registrar's decision should go to court so that the court has an opportunity to ensure that the offer to the public is above board.

3.1.4. Accounts, audit and annual returns

Section 165(1) generally requires a holding company to prepare group accounts covering its group of companies at the end of a financial year. However, a subsidiary's accounts may be omitted from the group accounts where each director of the holding company files a statutory declaration with the registrar to the effect that inclusion of a subsidiary's accounts may be, among other possible reasons, impracticable, expensive, or harmful to the company or any of its subsidiaries.⁵⁶ The registrar's written approval of such an omission is necessary.⁵⁷

The registrar may, in terms of section 171(9) and (10), appoint and fix the remuneration of an auditor for a company that goes three months without one.

Section 184(1) requires companies to file annual returns within specified periods of time after the end of each financial year. The registrar may publish in the Gazette or any newspaper, a list of companies whose annual returns are overdue and is not liable for such publication if done in good faith.⁵⁸ This means that the registrar is liable for bad faith publication of a list of companies whose annual returns are overdue.

The registrar may, according to section 188A(3) as amended by section 14 of Act 24 of 2011, cause the inspection of a company's

⁵⁶ Ibid s 165(3).

⁵⁷ Ibid.

⁵⁸ Ibid s 184(4) and (5).

records the registrar considers necessary for the better carrying out of the provisions of the Act notwithstanding the filing by such company of a no-change return.

According to section 189A as amended by section 16 of Act 24 of 2011, the registrar may strike out the name of a company from the register of companies or disqualify an officer of a company from forming, or becoming a director of, a company for a period of five years where the company or officer does not comply with the provisions of the Act relating to the filing of annual returns.

3.1.5. Foreign companies

Section 249(2) requires a foreign company to state the names of its local directors on trade circulars and business correspondence containing its name. However, the registrar may by notice in the Gazette exempt the foreign company from this requirement if special circumstances exist that justify it.⁵⁹

According to section 251(1) a foreign company must file annual accounts and auditor's report in respect of the operations and assets in Zambia within three months after the end of its financial year. However, on the application or with the consent of the local directors of a foreign company, the registrar may modify any of the requirements of the Act in respect of the annual accounts and auditor's report as long as doing so does not cause the accounts and reports to give a false view of the profit or loss on the company's operations, or the company's state of affairs, in Zambia.⁶⁰

Further, the registrar may in terms of section 252(8) exempt a foreign company, generally or in a particular financial year, from any of the requirements in relation to the keeping of accounting records if the special circumstances of the company justify such exemption.

⁵⁹ Ibid s 249(3).

⁶⁰ Ibid s 251(6).

A foreign company's name must, in terms of section 253(1), generally be the same as its name in the country of its incorporation or a translation or transliteration thereof depending on whether the name is in English or another language that uses or does not use Roman characters. However, a foreign company may apply to the registrar to be allowed to have a different name in Zambia.⁶¹ In other words, the registrar may permit a foreign company to have a name that is different from the company's name in the country of its incorporation. Where the name of a foreign company is likely to 'cause confusion with the name of another body corporate or is otherwise undesirable'⁶², the registrar may order the company to adopt another name for use in Zambia.⁶³

According to section 253(4), the registrar cannot register a body corporate applying for registration as a foreign company if the registrar has ordered that it changes its name. It is interesting to note that whereas a rejection of a proposed company name for a local company is not a bar to the incorporation of the company by its designating number in the event of non-compliance with a directive to change the name,⁶⁴ a foreign company ordered to adopt a different name can only be registered once it complies with the order.⁶⁵

Section 253(5) provides that where the order for adoption of a different name is made in respect of an already registered foreign company and the company does not comply with the order within 42 days of being ordered to do so, the registrar must register the designating number of the company together with the words 'Foreign Company'⁶⁶ as the name of the company.

⁶¹ Ibid s 253(2).

⁶² Ibid s 253(3).

⁶³ Ibid.

⁶⁴ Supra 18 (note 48).

⁶⁵ There is no justification for this differential treatment between foreign companies and local companies. It is hoped that the ongoing Companies Act review process will ensure harmonious treatment of foreign and local companies on this issue.

⁶⁶ Companies Act s 253(5).

3.1.6. Other decisions

Section 138(2) provides that the registrar may, on the application of any member of a company, convene or direct the convening of an annual general meeting of the company if none is held within three months after the end of the company's financial year. The registrar may also give further directions in relation to the convening and holding of an annual general meeting.

Section 361 empowers the registrar to strike out the name of a defunct company from the register of companies. In addition, the registrar may in terms of section 361(1) as amended by section 30 of Act 24 of 2011 – not less than five years after it was struck out – re-issue the name of a company struck out from the register of companies to an applicant therefor.

The registrar may refuse to register a document lodged with the registrar in compliance with the requirements of the Act on any of the grounds set out in section 370(5). In addition, section 370(7) provides that the registrar may direct that information contained in a document lodged with the registrar be verified by a statutory declaration.

In theory, a company aggrieved by the registrar's refusal to register its documents or an order to verify information contained in a document lodged with the registrar can appeal to the court against such a decision. It is unlikely though, from a practical viewpoint, that a company would take this route considering the cost and time implications of litigation in comparison to the less costly option of doing the registrar's bidding even if the company does not agree with the reasons for refusal or the basis for demanding a statutory declaration.

Further, section 371(2) clothes the registrar with power to extend the time for filing of a document on the application of a company made before the expiration of the prescribed period for filing of such a document.

Section 372A(1) as amended by section 31 of Act 24 of 2011 authorises the registrar to issue notices in respect of issues for which notices are required under the Act.

Lastly, the registrar may order an officer or employee of a company, a company, companies or a class of companies to furnish certain information or statistics to the registrar in respect of the company's or companies' operations during specified periods.⁶⁷

It is doubtful that anybody would consider seeking redress in court in respect of most of the decisions highlighted under this subheading. Indeed the wisdom in making some of these decisions appealable to court is questionable given their administrative nature.

3.1.7. General comments

The blanket provision that decisions of the registrar are only appealable to court is certainly problematic especially considering the administrative nature of some of these decisions. There is no doubt that the registrar is a very powerful person in so far as administration of the Companies Act and regulation of companies are concerned.

While it is necessary to clothe the registrar with the power to make the decisions highlighted under this heading, making recourse against all such decisions to court is hardly ideal. In many of the cases an aggrieved person will most likely not go to court because going to court is academic or does not make economic sense (the cost and time involved in court cases militate against this option). In reality, most of the decisions the registrar is empowered to make in terms of the Companies Act are final as they are unlikely to be challenged for the reasons just given. Therefore, it is necessary to relook at the issue of recourse against the registrar's decisions to ensure a responsive and relevant dispute resolution framework.

⁶⁷ Ibid s 380.

3.2. Powers of court

That there are several references to the word 'court' in the Companies Act has already been stated in this chapter. Suffice to say that the nature and magnitude of disputes or applications over which the court has jurisdiction (with the exception of the court's jurisdiction in respect of appeals against the registrar's decisions, which have already been considered) can largely be gleaned from the several references to the word 'court'. This section highlights the powers possessed of the court in terms of the Act.

3.2.1. Powers relating to incorporation and membership of companies

According to section 16(5), the registrar may notify a private company of the need for the company to explain why it should not be converted to a public company on account of having more members than the maximum allowed by its articles of association or offering securities to the public in contravention of the relevant provisions of the Companies Act. In the event of the company so notified not making good the contravention within one month from the date of the notice, the court – on the registrar's application – is empowered to order, inter alia, that the company be deemed to have been converted to a public company and that the costs of the application and conversion be borne by the company.⁶⁸

Section 6(1) as amended by section 3 of Act 24 of 2011 requires a company to have a minimum of two members. If the company carries on business for more than six months with less than two members, the member or a director of the company who allows this state of affairs is personally liable for the debts of the company incurred after the first six

⁶⁸ Ibid s 16(6).

months of such non-compliance.⁶⁹ It is necessarily implied from the wording of section 26(2) – particularly the reference to court – that the court has jurisdiction to hear and determine an action for the payment of a debt incurred by the company during the period referred to above.

In terms of section 28(4), the court is empowered – on the application of a party to a pre-incorporation contract – to make any order regarding the liability of the company or any person who entered or purported to enter into the pre-incorporation contract on behalf of the company on such contract.

Where a person sufficiently interested in a company or a member of the company notices a mistake in the register of members, the person or member may ask the company to correct the mistake. Section 50(1) provides that failures by the company to correct the mistake or loss occasioned by the mistake are actionable at the instance of the person or member of the company. Further, in terms of section 92(2), the provisions relating to correction of members' registers apply – with necessary changes – to registers of debenture holders. In other words, the court is empowered to hear and determine an action brought in respect of a failure to rectify the register of members or debenture holders or loss occasioned by such failure.

It appears that a section 50 or 92 action is available to an aggrieved person, member or debenture holder irrespective of the nature and effect of the mistake in the register. While it may be justifiable to take the matter to court where the alleged mistake in the register hinges on the question of a person's being entitled to have their name entered in or removed from the register,⁷⁰ it is doubtful whether the devotion of a court's time and resources to hearing applications for the rectification of

⁶⁹ Ibid s 26(1).

⁷⁰ Section 50(3) of the Companies Act empowers the court to decide questions regarding entitlement to be entered in or removed from the register.

register mistakes that do not affect the applicant's rights or obligations in the company is justifiable.

3.2.2. Powers relating to securities

Section 62(4) provides that where a company's articles of association do not expressly prohibit the variation of rights associated with a particular class of shares or if the articles specify the manner in which such rights may be varied, the rights may be varied by the written consent of holders of three-quarters of the issued shares of that class or through a special resolution of the holders of that class of shares passed at a separate general meeting of those holders. However, holders of an aggregate of at least 15 per cent of shares of the class whose rights have been varied by special resolution may apply to court for cancellation of the resolution within 21 days from the date of the resolution; and the court may confirm or cancel the resolution.⁷¹

A reduction of a company's share capital cannot, in terms of sections 76(1) and 77(1), take effect without the court's confirmation. In addition, where the proposed share capital reduction would either require the payment of any paid up share capital to a shareholder or result in the decrease of liability for unpaid share capital, creditors whose claims or debts would entitle them to benefit from a distribution on a company's winding up may object to the share capital reduction unless the court orders otherwise.⁷² If the court does not order otherwise, the court is obliged to compile a list of creditors entitled to object to a share capital reduction involving the decrease of liability on unpaid shares or payment of paid up share capital without the need for an application to that effect by any creditor.⁷³ Section 77(3) stipulates that an order of the court disentitling creditors from objecting to a

⁷¹ Companies Act s 62(5).

⁷² Ibid s 77(2) and (5).

⁷³ Ibid s 77(2) and (6).

proposed share capital reduction and absolving the court from the duty to compile a list of creditors entitled to object to the reduction may be in respect of a particular class or classes of creditors.

The court is, by section 83(12), authorised to confirm or cancel a special resolution approving the provision of financial assistance by a company. An application for the cancellation of such a resolution must be made by no less than ‘... one fifth of members, being persons who did not consent to or vote in favour of the resolution...’⁷⁴

Section 88(4) provides that the court may, on application by a debenture holder, remove a trustee for debenture holders from office and replace them if the trustee’s interests conflict or are likely to conflict with those of the debenture holder or where it is not proper for the trustee to continue in office.

Whereas an officer or auditor of a company is ordinarily disqualified from appointment as a trustee for debenture holders, section 89(1)(e) bestows on the court discretionary power to grant leave for the appointment of the officer or auditor as a trustee. Similarly, section 111(3)(h) as amended by section 9 of Act 24 of 2011 provides that a director or officer of a company or related body corporate, or a person who was a director or officer of the company or related body corporate within the preceding two years, may be appointed receiver with leave of the court.

The court has power, in terms of section 94(2), to order the holding of a debenture holders’ meeting and to give directions regarding the manner in which the meeting should proceed. It is unclear whether the court in such a case moves on its own motion or at the instance of the company or debenture holder concerned. However, it is likely that the company or debenture holder has to move the court for such an

⁷⁴ Ibid s 83(12).

order because the relationship between the chargor and debenture holder is a contractual one not supervised by the court.

According to section 108(1), the court is empowered to appoint a receiver or receiver and manager on the application of a debenture holder once a charge over a company's property becomes enforceable. Crystallisation of a floating charge is an example of a charge over a company's property becoming enforceable.

Section 109A(1) as amended by section 8 of Act 24 of 2011 requires directors of a company in respect of which a receiver has been appointed to prepare and avail the receiver, within three months of the receiver's appointment, a statement of the company's affairs as at the date of such appointment. However, the said section empowers the court to abridge or extend the period for the preparation and submission of the statement of affairs. In addition, subsection (4) authorises the court to give directions regarding notices to officers, former officers or incorporators of a company to make statutory declarations verifying matters capable of being verified by such persons. Further, in terms of subsection (6), the court may extend the period for the submission of such statutory declarations.

It is also noteworthy that section 113(3) as amended by section 11 of Act 24 of 2011 empowers the court to fix and vary the remuneration payable to a receiver on the application of the company concerned or its liquidator subject to the prescribed fees payable to a receiver. In other words, the court's power to fix or vary a receiver's remuneration cannot be exercised without regard to the prescribed fees.

Section 118(2) provides that a receiver may be required by court, on its own motion or on the application of the registrar or an interested person, to make a report to the registrar on a matter the receiver may have information about in relation to the company. The court has power, in terms of section 118A(1)(c) and (3) as amended by section 13 of Act 24

of 2011, to remove a receiver from office on the application of the holder of a debenture in respect of which the receiver was appointed.

According to section 122(2)(b), the court has supervisory jurisdiction in respect of offers to the public to acquire shares in a company that is not a public company.

Lastly, the court may, on the application of the registrar, make any of the following orders: an order cancelling the registration and halting the offer of shares to the public; an order declaring voidable any contract for the acquisition of shares offered in the prospectus; an order for the reissue of the prospectus with amendments; or an order protecting the rights of any persons adversely affected by the issuance of the prospectus.⁷⁵ In addition, section 131(3) empowers the court to make such interim orders in relation to a prospectus as are necessary on the application of the registrar.

Most of the powers highlighted under this subheading are properly within the province of the court. However, some of the powers – such as the power to order the holding of a debenture holders’ meeting – should probably not lie with the court; they could properly be vested in a regulatory body better suited to perform functions of an administrative nature.

3.2.3. Powers relating to management and administration

Section 144(1) empowers the court to order the convening of a meeting of a company on its own motion or on the application of a director or member of the company.

A company must avail to members and other persons, such books or records as the Companies Act requires it to make available. According to section 193(6), non-compliance with this requirement entitles a

⁷⁵ Ibid s 131(1) and (2).

dissatisfied person to apply to court for an order compelling the company to be compliant and imposing liability for costs of the application on the company and any officer thereof in breach of the said requirement.

Section 207(1) provides that a person may be disqualified or prevented from being appointed a director of a company by the court.

It is also noteworthy that, in terms of section 211(1), the court has jurisdiction to hear a claim for damages at the instance of a director of a company removed from office by way of an ordinary resolution of the company in breach of contract. According to subsection (3), where it is proposed to remove a director from office by ordinary resolution, the director is entitled to a hearing on the proposed resolution; to send a written statement on the matter to the company; and to require the written statement to be read to the meeting at which the director's removal is to be proposed. The court is empowered by subsection (5), on application by the company or any other aggrieved person alleging unreasonable length of the director's statement or abuse of the rights conferred on the director proposed to be removed from office, to order that the statement should neither be circulated nor read to the relevant meeting.

Subsections (1) and (7) of section 225 require a company to maintain a register of securities held by or in trust for directors and the company secretary and make it available for inspection by a member, debenture holder or agent of the registrar. Subsection (11) provides that the court may order immediate inspection of the register if the company fails to avail it for the purpose.

Lastly, section 230(1) empowers the court, on its own motion or on the application of the registrar, trustee in bankruptcy of the person concerned or liquidator of a body corporate, to permit the appointment of a person found guilty of fraudulent activities to an office of trust in a company.

The majority of the powers in relation to the management and administration of companies can properly be exercised by an administrative regulatory body as opposed to the current situation where the court may be called upon to make such orders as directing a company to avail certain books and records for inspection by its own members or ordering a company to hold a meeting of the company.

3.2.4. Powers relating to fundamental transactions

Fundamental transactions for present purposes are schemes of arrangement, take-overs and protection of minority rights in companies.

According to section 234(2), a company, creditor, member or liquidator of a company party to a proposed compromise or arrangement may apply to court for an order to convene and hold a meeting of creditors or class of creditors, or of members or class of members to consider the compromise or arrangement. In other words, the court may order the convening and holding of a meeting of interested parties to consider a compromise or arrangement. Further, the court may approve a compromise or arrangement.⁷⁶ Where the compromise or arrangement involves a reconstruction or amalgamation of companies, section 236(1) empowers the court to make orders additional to approval of a compromise or arrangement including provision for transfer of undertaking and property or liabilities of a transferor company to the transferee company.

Section 239 empowers the court to make orders to protect a member or members of a company from oppressive⁷⁷ conduct of the company's affairs or exercise of directors' powers.

⁷⁶ Ibid s 234(6)(b)(i), (7), (9) and (10).

⁷⁷ Section 239(1) of the Companies Act defines the term 'oppressive' to mean conduct that is 'oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members of a company; or ...contrary to the interests of the members as a whole; whether in the capacity of the member or members concerned as a member or members of the company, or otherwise'.

The powers vested in the court in respect of fundamental transactions are properly within the court's jurisdiction. However, some fundamental transactions may be time-sensitive and the courts may not always be responsive to this issue.

3.2.5. Powers relating to winding-up

Section 269(1) provides that the court generally has jurisdiction to wind-up companies in Zambia. The court may, in terms of section 257(4), also wind-up a foreign company on a number of grounds including trading for an unlawful purpose in Zambia. According to section 280(1), it is also within the court's power to appoint a provisional liquidator after the filing of a winding-up petition but prior to issuance of a winding up order. Further, section 297(1) empowers the court to appoint a special manager of the business or estate of a company in liquidation on the request of the company's liquidator. In addition, section 297(2)(d) empowers the court to remove a special manager from office.

The court may, in terms of section 285(1) as amended by section 24 of Act 24 of 2011, fix the remuneration of a liquidator if the liquidator and committee of inspection (where there is one) fail to agree on the remuneration or, where there is no committee of inspection, if creditors fail to pass an extraordinary resolution fixing the remuneration.

According to section 298(1), the court has power to set a date by which creditors ought to prove their debts or claims and beyond which they would lose their right to prove such debts or claims. In addition, subsection (3) stipulates that where the assets of a company in liquidation are not enough to meet the company's liabilities, the court may set the perking order for the payment of winding-up costs and expenses.

Section 299 provides that after a winding-up order has been made, the court may order that the company being wound-up make

available its books and other records for inspection by members of the company and its creditors.

It is also within the court's power to summon a person – presumably to furnish certain information about a company being wound-up – the court thinks is capable of availing information regarding the incorporation, undertaking, affairs or property of the company.⁷⁸

Further, section 301(1) provides that a liquidator who determines that a wrong has been done against the company in respect of which the liquidator has been appointed may render a report to that effect to the court and the court may order the examination before it of any person capable of giving information regarding the incorporation or business dealings of the company. In addition, the court has power to order the arrest of a member, officer, former member or former officer of a company being wound-up where it is proved to the court that the person in question is likely to leave the country, abscond or transfer the person's property in order to evade payment of a debt that may be due from the person to the company.⁷⁹

Section 312(1) clothes the court with the discretion to order the stay of a voluntary winding up on the application of the liquidator or member of the company following a special resolution by the company staying the winding-up proceedings.

Where it is proposed to sell or dispose of the whole or part of the undertaking or property of a company the subject of a creditors' voluntary winding-up to another body corporate, the court may, in terms of section 322(1), approve the receipt by the company's liquidator of fully paid shares or debentures in the other body corporate as consideration for the sale or disposal. The court is further empowered to give binding directions to the parties concerned for the initiation and conduct of arbitration where a member of the company expresses

⁷⁸ Companies Act s 300(1).

⁷⁹ Ibid s 302(1).

dissent to the liquidator regarding a special resolution in a members' voluntary winding-up authorising the liquidator to receive fully paid shares or debentures of an acquiring body corporate where it is proposed to sell or dispose of the company's undertaking or property.⁸⁰

Section 325(2) empowers the court to settle a dispute regarding 'the value of any security or lien or the amount of a debt or set-off'⁸¹ at the centre of an arrangement between a company about to be, or in the course of being, wound-up on the one hand and its creditors on the other. Subsection (3) authorises the court to determine – by way of amendment, variation or confirmation of arrangement – an appeal by a member of such a company or its creditor against a completed arrangement if brought within 21 days from the date of the arrangement's completion.

According to section 328, a company the subject of a compulsory winding-up on account of inability to pay its debts can only resolve to be wound-up voluntarily if the court grants it leave to do so.

The court is empowered, in terms of section 358(1), to order an officer or liquidator of a company who has misapplied or misused the company's money or property to pay back the money or restore the property to the company.

Lastly, section 362(1) provides that the court may declare the dissolution of a company void at the instance of the company's liquidator or any other interested person.

The winding-up of a company is both a serious and time-sensitive matter. While the time factor may make maintenance of the status an unattractive idea, it is suggested that the nature of winding-up makes recourse to the court a necessary evil.

⁸⁰ Ibid s 322(7)(c).

⁸¹ Ibid s 325(2).

3.2.6. Other powers

The court may, in terms of section 376(2), compel a company in breach of its duty to file returns or other documents to do so on the application of the registrar, a member or creditor of the company.

Section 379 grants jurisdiction to the court to reverse, confirm or vary a decision of the registrar that has been appealed against. It is also within the court's jurisdiction, on the application of a member, creditor or liquidator of a company, to attach civil liability to a person who knowingly acquiesced to fraudulent trading by the company.⁸² Further, section 387 provides that where persons are jointly liable in damages or costs for any breach of the Companies Act, the court may order each person so liable to contribute towards the settlement of the damages or costs, or exempt a person from liability. Section 388(1) empowers the court to grant relief from civil liability to certain persons such as officers of a company for their honest but actionable deeds or omissions.

3.3. Companies Act offences

It is interesting to note that the Companies Act arguably creates more offences than the possible civil actions it expressly provides for.⁸³ This being the case, only some of the offences are highlighted under this subheading;⁸⁴ and to this end a deliberate attempt is made to balance

⁸² Ibid s 383(1).

⁸³ There are about 86 provisions in the Act creating offences as compared to a combined estimate of 80 provisions on appealable decisions of the registrar and powers of the court.

⁸⁴ As this is not a treatise on criminal law, it is not necessary to describe albeit briefly all offences created by the Act. That said, the provisions of the Act that create offences and are not highlighted under the subheading are ss 64(4) and (5), 66(3), 74(6), 81(1) and (2), 82(8), 83(14) and (15), 87(4), 89(2), 90(2), 91(2), 92(4), 97(4), 104(3), 105(2) and (3), 111(5) as amended by s 9 of Act 24 of 2011, 115(2), 117(2), 118A(7) as amended by s 13 of Act 24 of 2011, 125(6), 138(3), 151(9) and (10), 155(4), 158(4) and (5), 160(4), 162(7), 169(2), 170(3) and (4), 171(7), 172(8), 176(3) and (4), 182(5) and (6), 192(5), 193(6), 194(2), 203(3) and (5), 204(2), 205(9), 207(3), 212(2), 218(10), 219(6), 223(2) and (3), 224(3) and (4) as amended by section 20 of Act 24 of 2011, 225(9) and (10), 226(3), 228(3), 234(12) and (13), 235(7) and (9), 236(4), 239(9), 246(2), 256(3), 259(1) and (2), 279(3), 286(4), 287(8) and (11), 292(6), 296(4), 305(4), 308(4), 311(6),

between a highlight of the minor offences punishable only by a fine and the apparently more serious offences punishable by either a fine or imprisonment, or both a fine and imprisonment. It should be noted on the one hand that most offences are punishable by a fine, and those highlighted hereunder and punishable only by a fine do not contain a statement indicating the punishment. On the other hand, the offences that may be punishable by imprisonment and considered hereunder are expressly stated to be so punishable.

Subsections (1) and (3) of section 5 provide that if a business association or partnership that is not a body corporate has more than 20 members or partners, the members or partners thereof commit an offence.

A failure by a company or officer thereof to lodge a copy of a special resolution amending the company's articles of association within the prescribed timeframe after its passage is, according to section 8(4), an offence. Interestingly, it is also an offence in terms of section 189 as amended by section 15 of Act 24 of 2011 for a company to fail or neglect to file annual returns or any other documents required to be filed under the relevant division.

It is also an offence, according to section 19(7), for a company limited by guarantee to carry on business for purposes of making a profit for its members. In addition subsections (4) and (8) provide that a company limited by guarantee commits an offence if it does not notify the registrar – within seven days of its occurrence – of a person's becoming, or ceasing to be, a member of the company.

312(7), 314(15) and (16), 323(3), 324(8), 337(4), 338(6), 339(2), 340(4), 362(4), 380(9), 382(1) and (2), and 391(7).

A failure by a company to avail copies of the certificate of incorporation, share capital or articles of association to a member within a prescribed period after the member's request for them is an offence.⁸⁵

Subsections (1) and (7) of section 36 make it an offence for a company not to lodge an application for conversion to another company type within the prescribed period after meeting the conversion criteria.

According to section 36(8) a director, secretary or auditor of a company commits an offence if they make a declaration of solvency without a reasonable basis.

Further, section 44(2) provides that a company that does not notify the registrar of the fact of another body corporate becoming related to the company within the prescribed period after becoming related commits an offence.

Section 47 stipulates that it is an offence for a private company to have more or fewer members than prescribed by its articles of association. A company's failure to maintain a register of members is, according to section 48(3), an offence. Section 50(5) provides that where a company is ordered by the court to rectify its register of members and the company does not lodge a copy of the order with the registrar within the prescribed period, the company commits an offence. In addition, section 51(6) makes it an offence for a company required to maintain a branch register of some of its members, to neglect or fail to maintain such a register.

It is an offence, in terms of section 59(13), for a company that redeems any redeemable shares not to notify the registrar of the redemption within the prescribed period. A company that varies any rights associated with a class of shares ought to lodge relevant documentation relating to the variation with the registrar within the

⁸⁵ Companies Act s 29(1) and (4).

prescribed period failing which the company commits an offence.⁸⁶ Section 63(1) provides that when a company makes an allotment of shares, it must file a return of the allotment with the registrar within one month of the allotment failing which the company commits an offence.

The offer of securities to the public in contravention of section 122 is an offence for which an offender may be sentenced to imprisonment for up to two years. In addition, the authorisation of publication of a prospectus that contains untrue statements or omissions of truthful statements is – according to section 130(1) – a serious offence for which one can be imprisoned for up to seven years.

According to section 230(1), a court⁸⁷ may order a person convicted of an offence involving fraud, breach of duty during winding-up of a company, or in relation to the creation or management of a body corporate not to be involved in the management of a company or become a director thereof. Subsection (7) makes it an offence to disobey such an order; and a person who disobeys the order may be sentenced to imprisonment for up to two years. In addition, section 239(8) provides that a person who disobeys an oppressive remedy order applicable to the person commits an offence for which the person may be sentenced to imprisonment for a maximum period of one year. In any case disobeying a court order is contempt of court.

Section 252(7) stipulates that a failure by a foreign company to, among other things, maintain accounting records is an offence for which an officer of the company may be sent to prison for up to two years.

Section 287(9) provides that a person who does not verify a statement of affairs of a company being wound-up within the prescribed period when properly required to do so, commits an offence and may be

⁸⁶ Ibid s 62(10).

⁸⁷ The term 'court' in this context may, in terms of section 230(2) of the Act, include the subordinate courts of foreign courts.

imprisoned for a period of up to three months. Section 109B(a) as amended by section 8 of Act 24 of 2011 makes it an offence to, among others, neglect or fail to verify a statement of affairs of a company in receivership; and a person found guilty thereof may be sentenced to imprisonment for a maximum period of one year. It is interesting to note the different maximum prison terms prescribed for these similar offences.

It is also an offence for a person to act or continue acting as a receiver or liquidator when ineligible for appointment or incompetent to continue as such.⁸⁸ In the case of an ineligible or incompetent person acting as a liquidator, a sentence of up to six months in prison may be imposed whereas an ineligible or incompetent person acting as a receiver may be sentenced to a prison term of up to two years.⁸⁹

Section 353(1) provides for a plethora of offences – generally bordering on dishonesty – that may be committed by officers or members (past and present) of a company that is being wound-up. The maximum period of imprisonment for these offences is two years. In addition, subsection (3) makes it an offence for a person to knowingly accept in pledge or otherwise, property pledged in circumstances constituting an offence in terms of the section. A prison term of up to six months may be imposed for this offence.

Moreover, section 354 provides that a person who seeks to secure appointment as liquidator by inducement or reward to a creditor or member of a company commits an offence for which the person could be sentenced to imprisonment for a maximum of two years.

An officer or member of a company being wound-up who falsifies any document of the company with fraudulent or deceptive intention commits an offence for which the officer or member may be imprisoned

⁸⁸ Companies Act s 111(5) as amended by Act 24 of 2011 s 9; and s 332(4).

⁸⁹ Ibid.

for up to two years.⁹⁰ Further, section 356 provides that a failure by a company being wound-up to maintain proper accounts is an offence for which a defaulting officer of the company may be sentenced to imprisonment for a maximum period of one year. In addition, it is an offence in terms of section 357(1) for an officer of a company to knowingly allow the company to contract a debt the officer does not reasonably expect the company to pay. The officer could go to prison for up to three months for this offence.

Section 360 provides for a number of fraud-related offences an officer of a company that ends up passing a voluntary winding-up resolution or being compulsorily wound-up may commit. The maximum sentence for these offences is two years.

According to section 380(9), it is an offence for a company to either disobey an order of the registrar for the company to furnish certain information and statistics about itself or furnish incomplete or wrong information and statistics. An officer of a company may be imprisoned for up to three months for this offence. Subsection (10) makes it an offence for a person to wilfully disobey the Registrar's order; and such a person may suffer imprisonment for a maximum period of three months.

It is also an offence, in terms of section 381(1), for a person to make a false statement in any 'document required by or for the purposes of' the Act. The maximum sentence of imprisonment for this offence is two years.

Lastly, section 384 criminalises fraudulent trading and prescribes a maximum prison sentence of one year.

It is clear that the Companies Act creates many offences. As the discourse above has shown, some of the breaches of the Act for which criminal sanctions are imposed can be dealt with administratively. There

⁹⁰ Companies Act s 355.

is need to amend the Act in order to reclassify some, if not most, of the offences as civil wrongs that attract non-criminal sanctions as the status quo may arguably have a chilling effect on enterprise growth and development – let alone the ease of doing business.

4.0. Conclusion

It cannot be denied that the Companies Act dispute resolution framework is predominantly court-based. Resolving disputes through the courts is generally expensive and time consuming. Reforms aimed at enhancing Zambia's competitiveness vis-à-vis the ease of doing business ought to seriously look into the cost of dispute resolution. The Zambian business environment can be a lot friendlier if progressive alternative means of resolving company law disputes are introduced.

The courts are inundated with all manner of cases; and reforming the Companies Act dispute resolution framework would provide some welcome relief on them. It has been demonstrated that there are matters – especially the registrar's decisions – of such an administrative nature that the courts are hardly the suitable fora for their resolution.

It has been acknowledged that, given the gravity and substantive nature of some matters, the courts are arguably the appropriate fora for them. These include matters to do with offers of securities to the public and winding-up of companies.

The Companies Act can almost be classified as a penal law because it creates too many offences for a business regulation statute. Some of the offences, especially those attracting only minimal fines as sanctions, can properly be dealt with administratively. To this end, the need for amendments to be made to the Act so as to reclassify some of the offences as civil wrongs that can be redressed administratively has been canvassed.

The exact nature or form of the required reforms remains to be determined. This being the case it is only proper that jurisdictions

whose company law dispute resolution regimes provide for fora additional to the traditional courts be studied with a view to recommending a suitable model for Zambia. The next chapter offers a comparative perspective of company law dispute resolution frameworks of selected jurisdictions.

CHAPTER THREE – CURRENT TRENDS IN COMPANY LAW DISPUTE RESOLUTION: A COMPARATIVE PERSPECTIVE

1.0. Introduction

The famous adage that ‘no man is an island’ applies as much to persons as it does to nations. There is not a single country that can claim to have a perfect justice system. Even those countries that have fairly successful justice systems have had to ‘borrow’ an idea or two from another country. It is common practice – almost standard – for countries to undertake studies of other countries in respect of sectors that the former countries intend to effect reforms.

That the Zambian company law dispute resolution framework is in need of reform has been established in the preceding chapter. This chapter offers a comparative perspective of current trends in company law dispute resolution with a view to informing the specific proposals for reform in respect of the Zambian company law dispute resolution framework.

The Australian, South African and Indian company law dispute resolution frameworks are discussed seriatim. The justification for the choice of these jurisdictions was given in the first chapter and is not repeated in this chapter.

It will be discovered that the three jurisdictions discussed are unanimous in so far as the use of a tribunal for the resolution of certain company law disputes is concerned. However, some marked variations in the extent of the jurisdiction vested in the respective tribunals will be evident, with India’s National Company Law Tribunal and South Africa’s Companies Tribunal being found to be more than just administrative tribunals.

2.0. Australia

2.1. Corporations Act dispute resolution framework

Part 9 of the Corporations Act 50 of 2001 (in this paper referred to as 'the Corporations Act') contains fairly detailed provisions on dispute resolution. The courts play a central role in the resolution of criminal and civil Corporations Act disputes. The Corporations Act provides for certain decisions to be reviewed by the Administrative Appeals Tribunal. As the Administrative Appeals Tribunal is the focus of the next subheading, it is not discussed under this subheading. However, some brief comments are apt on the civil and criminal jurisdiction of the courts in relation to Corporations Act disputes before highlighting some of the disputes reserved for the courts are highlighted.

Australian courts have both civil and criminal jurisdiction vis-à-vis the Corporations Act.⁹¹ With the exception of matters reserved for the tribunal, civil and criminal Corporations Act disputes are amenable to the courts' jurisdiction. The powers of the courts, in so far as they are relevant for present purposes, are highlighted in respect of civil matters as an indication of the nature of disputes that the Act reserves to the courts. Some of the offences are also highlighted in order to give an indication of the extent to which Australian company law, in so far as is material to this paper, provides for criminal sanctions in respect of some matters.

It is interesting to note that section 58AA(2) of the Corporations Act provides that civil or criminal proceedings in terms of the Act may generally be brought in any court. This is unlike in Zambia where civil proceedings in terms of the Companies Act can only be brought before the High Court.⁹² While the option of bringing proceedings before any court has the advantage of possibly enhancing the speedy disposal of

⁹¹ See Part 9.6A of the Corporations Act.

⁹² Supra 11.

cases, there is a risk of conflicting decisions being made in respect of materially similar cases.

2.2. Selected Corporations Act matters reserved for the courts

2.2.1. Civil matters

The courts' powers in selected civil matters are instructive in so far as giving an indication of the nature of civil matters reserved or left to the courts. First, the court is empowered, in terms of sections 206C, 206D and 206E of the Corporations Act, to disqualify a person from managing corporations on the application of the Australian Securities and Investment Commission (ASIC). It should be noted in addition that the court may grant a disqualified person permission to manage corporations.⁹³

According to sections 232 and 233, the court may make such orders as provide redress against the oppressive conduct of a company's affairs.

Further, section 249G empowers the court to order the convening of a meeting of the members of a company where it is not practicable to convene the meeting another way. The court is also empowered to order the holding of a debenture holders' meeting to give directions to a trustee.⁹⁴ Section 1319 of the Act provides that the court may give necessary directions regarding the convening and holding of these meetings.

Section 425 empowers the court to fix a receiver's remuneration. It is also within the court's power, in terms of section 434A and 434B, to remove a receiver or controller of a company's property from office for misconduct or redundancy.

⁹³ Corporations Act s 206G.

⁹⁴ Ibid s 283EC.

The court may wind-up a company in certain circumstances.⁹⁵ The court may also make a wide range of orders in connection with winding-up. For example, the court may stay a company's winding-up in terms of section 482; make an order preventing an officer of a company or related person avoiding liability in certain instances;⁹⁶ and declare certain transactions voidable⁹⁷.

The court has power, in terms of section 1303, to compel a person refusing to avail certain books or records for inspection when required to do so by the Act, to avail such books or records for inspection.

Section 1318 confers on the court a general power to grant relief from liability to a person who acts honestly but in breach of a duty owed by the person to a company or another person.

It is noteworthy that there are striking similarities between the jurisdiction of the Australian courts and that of the Zambian High Court in respect of company law matters. The Corporations Act matters that have been highlighted above are similar to some of the Companies Act matters over which the High Court has jurisdiction.⁹⁸

2.2.2. Criminal matters

The Corporations Act creates a plethora of offences spread over several sections. A few of the offences are highlighted here. According to section 184(1), it is an offence for a director or other officer of a company to be reckless or intentionally dishonest and act in bad faith in the discharge of their duties. A director or other officer of a company also commits an offence if they use their position as such to dishonestly or recklessly benefit themselves.⁹⁹

⁹⁵ Ibid s 461.

⁹⁶ Ibid s 486A.

⁹⁷ Ibid s 588FF.

⁹⁸ Supra 26 – 37.

⁹⁹ Corporations Act s 184(2).

Section 595 provides that a person who gives another person valuable consideration with the view of securing an appointment as liquidator commits an offence.

A company that publishes or advertises ‘a statement of the amount of its capital that is misleading’¹⁰⁰ commits an offence.¹⁰¹ According to section 1309, it is an offence for an officer or employee of a company to avail false information relating to the affairs of the company to certain persons.

It is also an offence, in terms of section 1310, to hinder or obstruct ASIC in the performance of its functions.

Lastly, it is interesting to note that except where a provision prohibiting certain conduct states otherwise in terms of the specified chapters¹⁰² of the Act, any conduct prohibited by the Act is an offence. It is clear from this one provision that, with a whopping 1 525 sections containing a myriad of prohibitions and requirements, the Corporations Act may not be the best example of a company law dispute resolution model that emphasises non-criminal sanctions. It is probably worse than the Companies Act, which has just about 86 provisions relating to offences.¹⁰³

2.3. Matters reserved for the Administrative Appeals Tribunal

2.3.1. General overview

The Administrative Appeals Tribunal is a creature of the Administrative Appeals Tribunal Act and consists of ‘a President, the other presidential members, the senior members, and other members’¹⁰⁴

¹⁰⁰ Ibid s 1308.

¹⁰¹ Ibid.

¹⁰² Ibid s 1311(1A).

¹⁰³ Supra 38 (note 83).

¹⁰⁴ Administrative Appeals Tribunal Act s 5.

appointed by the Governor-General¹⁰⁵. The Act does not prescribe a fixed number of members the tribunal should have. It appears that the number of members the tribunal should have at any time is demand driven. It would have been better for the Act to contain a provision relating to the effect that such number of members as is considered necessary shall be appointed. There is potential for abuse of discretion when parameters regarding the number of members the tribunal should have are not properly defined.

The tribunal had 89 members as of June 2014,¹⁰⁶ representing a marginal increase of two in the membership from the previous year.¹⁰⁷

Section 7 sets out the qualifications for appointment as member of the tribunal, with enrolment as a legal practitioner featuring as a qualification for most of the categories of membership. Apart from members who are judges and whose membership terminates on their ceasing to be judges, the tenure of office for members is a maximum of seven years with eligibility for re-appointment.¹⁰⁸

The tribunal's mandate is to review administrative decisions of '...Government ministers, departments, agencies and some other tribunals'¹⁰⁹. The tribunal reviews the merits of administrative decisions;¹¹⁰ and in doing so, it takes a fresh look at the factual, legal and policy considerations at play in the making of the decisions being reviewed. The tribunal may 'affirm, vary or set aside'¹¹¹ a decision the

¹⁰⁵ Ibid s 6(1).

¹⁰⁶ Administrative Appeals Tribunal (AAT) 'Annual Report 2013 - 14' (2014) 13 available at <http://www.aat.gov.au/docs/Reports/2014/AR1314-complete.pdf> accessed on 11 February 2015.

¹⁰⁷ Administrative Appeals Tribunal (AAT) 'Annual Report 2012 - 13' (2013) 14 available at <http://www.aat.gov.au/docs/Reports/2013/AR2013.pdf> accessed on 11 February 2015.

¹⁰⁸ Administrative Appeals Tribunal Act s 8.

¹⁰⁹ AAT op cit note 107 at 12.

¹¹⁰ Margaret Allars 'The nature of merits review: a bold vision realized in the Administrative Appeals Tribunal' (2013) 41 *Fed. L. Rev.* 197 available at <http://www.heinonline.org.ezproxy.uct.ac.za/HOL/Page?public=false&handle=hein.journals/fedlr41&page=197&collection=journals> accessed on 11 February 2015.

¹¹¹ AAT op cit note 107 at 12; see also Administrative Appeals Tribunal Act s 3(3).

subject of review. It should be noted that the tribunal can only review decisions that legislation makes amenable to review by it.¹¹² According to section 19(1) and (2), the tribunal's powers are exercised through its various divisions. An appeal from a decision of the tribunal lies to the Federal Court.¹¹³

According to section 33, the tribunal is required to conduct its proceedings 'with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the [t]ribunal permit'¹¹⁴. The tribunal is designed to deliver justice in a flexible and timely manner at low cost to the parties.¹¹⁵ It is noteworthy that the tribunal is not bound by strict rules of evidence.

Further, and to enhance the number of applications resolved without a hearing, the tribunal 'uses alternative dispute resolution to help the parties try to reach agreement about how their case should be resolved'¹¹⁶. It also strives to conclude cases within 12 months from the date of their being lodged. Possibly due to its case management system, the tribunal concluded 82 per cent of cases filed within 12 months of their being filed and resolved 82 per cent of cases without a hearing in the 2013 – 14 financial year.¹¹⁷

While its performance appears to be generally encouraging, the tribunal sometimes fails to deliver within set timelines due to delays occasioned by several factors, including the need to accord parties more time to resolve issues without a hearing; the need for parties to get expert evidence; the need to stay proceedings pending conclusion of a similar matter by the responsible government agency or court;

¹¹² Ibid; see also Administrative Appeals Tribunal Act s 25(1).

¹¹³ Administrative Appeals Tribunal Act s 44.

¹¹⁴ AAT op cit note 107 at 12.

¹¹⁵ Administrative Appeals Tribunal Act s 2A.

¹¹⁶ AAT op cit note 106 at 29; see also Administrative Appeals Tribunal Act ss 34 – 4H.

¹¹⁷ Ibid at 30.

unavailability of parties due to such factors as illness; and delays in delivering of tribunal decisions after the hearing.¹¹⁸

It is illusory to think that tribunals are free from some of the challenges that contribute to delays in the disposal of cases by the courts. The tribunal has been operational for close to 40 years but, as indicated in the preceding paragraph, still experiences some challenges in delivering on its mandate within set timeframes.

These challenges notwithstanding, the tribunal appears – to a large extent – to provide ‘independent merits review of administrative decisions ... [in a] fair, just, economical, informal and quick [manner]’¹¹⁹. To the extent that it has been largely successful, the tribunal presents a useful case study for a country looking to address the perennial problem of delays in the dispensation of some aspects administrative justice.

2.3.2. Jurisdiction in relation to the Corporations Act

Part 9.4A of the Corporations Act contains provisions on review by the tribunal of certain decisions. Section 1317B provides that certain decisions of the Minister, ASIC and the Companies Auditors and Liquidators Disciplinary Board are amenable to review by the tribunal. For purposes of this paper, only the relevant reviewable decisions of ASIC are highlighted due to the nature of the study.

It should be noted from the outset that section 1317C exempts some decisions of ASIC from review by the tribunal. The list of these non-reviewable decisions is fairly long and is not reproduced herein. However, it is interesting to note that a decision of ASIC to deregister or refuse to deregister a company in terms of section 601AB is not reviewable.¹²⁰ Suffice to reiterate that the ASIC decisions highlighted herein are reviewable by the tribunal.

¹¹⁸ Ibid at 32.

¹¹⁹ AAT op cit note 107 at 12.

¹²⁰ Corporations Act s 1317C(d) and (e).

One of the decisions ASIC is empowered to make is registration of a company in terms of section 118. A refusal by ASIC to register a company is reviewable by the tribunal. In addition, a person who is aggrieved by the decision of ASIC to register or refuse to register a company limited by guarantee without the word “Limited” in its name may apply to the tribunal for review of the decision.¹²¹ ASIC’s change of a company name to include the word “Limited” where a company granted an exemption from the use of the word breaches any requirement or obligation based upon which the exemption was granted is a reviewable decision. Further, section 152 provides that a refusal by ASIC to reserve a name is reviewable. The tribunal may also, in terms of section 158(1), review a decision of ASIC to direct a company to change its name. Section 164 empowers ASIC to change a company from one type to another.

Further, the power of ASIC to disqualify a person from managing corporations in certain circumstances is reviewable.¹²²

According to section 739, ASIC may make an order stopping the offer, issue, sale or transfer of securities to members of the public where the disclosure documents (the equivalent of the prospectus in the Zambian context) lodged with ASIC contain, among other things, misleading or ambiguous statements. Such a decision is reviewable. In addition, the tribunal may also review a decision by ASIC to exempt a person from the application to the person of the provisions of chapter 6D (relating to the raising of funds by companies) of the Act.¹²³

Sections 1279 and 1282 provide that ASIC is empowered to register liquidators. It follows that the registration of, or refusal to register, a liquidator by ASIC is amenable to review. A decision of ASIC

¹²¹ Ibid s 150(1).

¹²² Ibid s 206F.

¹²³ Ibid s 741.

to cancel or suspend the registration of a liquidator if not made at the request of the liquidator is also reviewable.¹²⁴

The tribunal, it is clear, can only review those decisions of ASIC that the Corporations Act allows it to. It is reiterated that the tribunal reviews administrative decisions. In this regard, the Australian company law dispute resolution model differs from the Zambian paradigm, which makes all decisions of the registrar amenable to appeal to the High Court and not a tribunal.

3.0. South Africa

3.1. Companies Act 2008 dispute resolution framework

The Companies Act 71 of 2008 (in this paper referred to as ‘the Companies Act 2008’) provides for four dispute resolution options, namely: voluntary dispute resolution through mediation, conciliation¹²⁵ or arbitration; adjudication by the Companies Tribunal; bringing an action in the High Court; or filing a complaint before the Companies and Intellectual Property Commission (CIPC).¹²⁶ This approach contrasts with the Australian approach where the courts and the Administrative Appeals Tribunal are the principal dispute resolution fora.

The courts and the tribunal as dispute resolution fora are considered under later subheadings. Therefore, a few comments on the other dispute resolution fora are apt. A person entitled to relief in terms of the Companies Act 2008 may, instead of seeking redress in the High Court or filing a complaint before the CIPC, refer a matter to mediation, conciliation or arbitration before the tribunal, an accredited alternative

¹²⁴ Ibid ss 1290 and 1290A(1).

¹²⁵ Conciliation has been defined as ‘[a] process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved; ... a relatively unstructured method of dispute resolution in which a third party facilitates communication between the parties in an attempt to help them settle their differences’. B Garner *op cit* note 37 at 329.

¹²⁶ Companies Act 2008 s 156.

dispute resolution provider ('ADR provider') or other person.¹²⁷ Where this process fails, the tribunal or ADR provider must issue a certificate to that effect.

The Act does not expressly state what recourse a party to a failed mediation, conciliation or arbitration process has thereafter. However, it appears that – in the absence of an express bar to the use of the other dispute resolution options – a party to a failed mediation, conciliation or arbitration may have recourse to one of the other dispute resolution options. It is unlikely though that the tribunal adjudication option would be tenable if the tribunal was involved in the mediation, conciliation or arbitration process. This is because of the possibility of the tribunal sitting twice as an arbiter in the same matter, especially if it was an arbitrator in the dispute. This being the case, the courts would be the probable avenue to pursue for recourse where the mediation, conciliation or arbitration process fails.

According to section 167, a section 166 dispute resolution process may culminate in a consent order, which must be confirmed by a court. It is noteworthy that the Administrative Appeals Tribunal is also mandated to and uses alternative dispute resolution mechanisms to resolve Corporations Act matters in its purview without the need to conduct a hearing.¹²⁸

That the CIPC can, in terms of section 168(1)(b), hear and determine complaints alleging contravention of the Act or infringement of an applicant's rights, memorandum of incorporation or company's rules is an interesting innovation. The CIPC has a broad mandate in respect of complaints other than those specifically reserved for the Take-Over Regulation Panel. It is also interesting to note that the CIPC may initiate a complaint to itself on its own motion or at the request of

¹²⁷ Ibid s 166(1).

¹²⁸ Supra 51.

another regulatory body.¹²⁹ This is rather strange because it makes the CIPC a judge in its own cause contrary to rules of natural justice. If the intention – as it probably was – was to ensure the CIPC’s proactivity in its enforcement role in terms of the Act, requiring the CIPC to file a complaint before the tribunal for instance would have implemented the intention without attacking the rule of natural justice against being a judge in one’s own cause. Perhaps amendments to the Act to address this anomaly should be considered.

The Take-Over Regulation Panel’s mandate is specific to consideration of complaints relating to take-overs.¹³⁰

The four-pronged approach to dispute resolution is innovative and progressive. However, the risk inherent in this approach is the possibility of conflicting decisions being arrived at by the arbiters or adjudicators on similar matters brought by different persons before different dispute resolution fora. While ‘a predictable and effective environment for the efficient regulation of companies’¹³¹ is one of the objectives of the Act¹³², the risk of unpredictability in the law is real because of the possibility of a lack of clear precedents on certain matters. This may make it difficult for legal practitioners to advise their clients with sufficient clarity and confidence. Therefore, proper coordination of the various dispute resolution fora is a potent tool for ensuring predictability and effectiveness of the enforcement aspect of the regulatory environment and framework.¹³³

3.2. Selected Companies Act 2008 matters for the courts

The term ‘court’ is not defined in the interpretation section of the Companies Act 2008. The only definition of the word in the Act is in

¹²⁹ Companies Act 2008 s 168(2).

¹³⁰ Ibid s 168(1)(a).

¹³¹ Ibid s 7(l).

¹³² Ibid; see also MF Cassim op cit note 31 at 825.

¹³³ D Farisani op cit note 31 at 445.

relation to the chapter on business rescue and compromises with creditors where it is defined as the High Court, a designated judge of the High Court or a judge of the High Court, with jurisdiction over a matter.¹³⁴ This is unlike the Corporations Act of Australia, which defines court with reference to the whole Act.¹³⁵

While scholars and the Department of Trade and Industry appear to be unanimous that by court is meant the High Court ostensibly on the basis of section 156(c),¹³⁶ this is rather a simplistic view of the issue. This is because, as will be noted in due course, in several sections of the Act a reference is made to court and yet in some of the provisions there is specific reference to the High Court. If the intention was that a reference to court indicated a reference to the High Court, there would have neither been a need for the definition in section 128(1)(e) nor provisions specifically requiring that certain matters should be brought in the High Court. In other words, it can be validly argued that references to court are not restricted to the High Court but any court of first instance. It would have made for greater certainty and clarity if the legislators had ascribed a specific meaning to court.

The debate on what court means aside, the discussion under this subheading centres on relevant matters amenable to the courts' jurisdiction. However, before the discussion on the said matters is embarked on, it should be pointed out that by virtue of section 156, seeking recourse from the courts is generally optional in that the Act provides for other avenues of getting disputes or matters resolved. The

¹³⁴ Companies Act 2008 s 128(1)(e).

¹³⁵ Supra 46 – specifically Corporations Act s 58AA(1) and (2).

¹³⁶ See for example D Farisani op cit note 31 at 434; MF Cassim op cit note 31 at 825; and The Department of Trade and Industry (DTI) *'The Companies Act, No. 71 of 2008: An Explanatory Guide'* (2010) at 15 available at <http://www.thedti.gov.za/DownloadFileAction?id=548> last accessed on 11 February 2015.

exercise of this right is said to be generally optional because there are provisions that make it mandatory to seek redress from the courts.¹³⁷

3.2.1. Civil matters

One of the matters over which courts have jurisdiction in terms of section 16(1)(a) is amendment of a company's memorandum of incorporation. A court may order that a memorandum of incorporation be amended. A court is also empowered to grant appropriate relief to a person whose interests would, among others, be adversely affected by a change of company type from a personal liability company arising by way of amendment of the company's memorandum of incorporation.¹³⁸

In Australia, the jurisdiction to hear and determine disputes relating to change of company type lies with the Administrative Appeals Tribunal.¹³⁹

It is interesting to note that subsections(4) and (5) of section 20 expressly place the power to restrain a company or its directors from doing anything at variance with the memorandum of incorporation or the Act in the High Court.

According to section 61(12), where a company fails to convene a shareholders' meeting for reasons other than the lack of persons competent to convene such a meeting, a shareholder may apply to a court for an order that the meeting be convened.¹⁴⁰ Similarly, the court is empowered to convene a shareholders' meeting in terms of the Corporations Act.¹⁴¹

Section 69(8)(a) provides that a court is empowered to disqualify a person from being a director of a company. In the case of Australia, it is

¹³⁷ Companies Act 2008 s 48(5)(a) and (6).

¹³⁸ Ibid s 16(10) and (11).

¹³⁹ Supra 53.

¹⁴⁰ Section 61(11) requires an application for such a meeting to be made to the tribunal. This effectively means that a failure to convene the meeting for other reasons can only be redressed by a court.

¹⁴¹ Supra 47.

not only the court that may disqualify a person from being a director but ASIC as well.¹⁴² However, as is the case in Australia,¹⁴³ a court may permit a person who is ineligible to be a director of a company, to be a director in certain circumstances.¹⁴⁴

Further, the courts are empowered to order the winding-up of companies in circumstances specified in section 81(1). These circumstances include the passage of a special resolution by a solvent company to the effect that the company be wound-up by a court and where an application is made to court by a company 'to have its winding-up continued by the court'¹⁴⁵. It is also within the court's jurisdiction to wind-up companies in certain circumstances in Australia.¹⁴⁶

It is also noteworthy that a court may, according to section 83(4), declare the dissolution of a company void. It is argued that the courts in Australia also have power to make such a declaration considering that ASIC's decision to deregister a company is not amenable to review by the Administrative Appeals Tribunal.¹⁴⁷

Moreover, a merger, amalgamation, scheme of arrangement or disposal of the whole or substantial part of a company's assets cannot be implemented without, among others, the approval of a court where a resolution for any of those transactions is opposed by not less than 15 per cent of voting rights exercised on the resolution.¹⁴⁸ In addition, section 116(1) provides that a court may review an approved amalgamation or merger agreement on the application of a creditor alleging material prejudice of the transaction to the creditor.

¹⁴² Ibid at 47 and 52.

¹⁴³ Ibid at 47.

¹⁴⁴ Companies Act 2008 s 69(8)(b) and (11).

¹⁴⁵ Ibid s 81(1)(a).

¹⁴⁶ Supra 47

¹⁴⁷ Supra 52.

¹⁴⁸ Companies Act 2008 s 115(2)(c) and (3)(a).

Section 155(7) provides that a court is empowered to sanction a duly adopted compromise between a company and its creditors on the application of the company.

According to section 160(4), a court may review a decision of the tribunal or notice issued by the CIPC in relation to company name registration. To the extent that an appeal from the decision of the Administrative Appeals Tribunal – which is empowered to review ASIC’s company name related decisions¹⁴⁹ – lies to the Federal Court,¹⁵⁰ it is arguable that the courts in the two countries are similarly empowered vis-à-vis company name dispute resolution.

Furthermore, section 162 empowers a court to make an order protective of a securities holder’s rights. In addition, a court may in terms of section 163 make an order redressing oppressive or prejudicial conduct of a company’s affairs. The position is similar in Australia.¹⁵¹

A court also has jurisdiction to determine the value of certain shares and order payment of the value so determined pursuant to shareholders’ appraisal rights provided for in section 164.

According to section 195(7), a court has review and appellate jurisdiction in respect of decisions of the CIPC. Australian courts also have review and appellate jurisdiction in respect of decisions of the Administrative Appeals Tribunal.¹⁵²

It is interesting to note that a court may impose an administrative fine for a company’s failure to comply with a compliance notice.¹⁵³ It would be neater if the jurisdiction to impose administrative fines, given their nature, were left to administrative regulatory bodies such as the tribunal.

¹⁴⁹ Supra 53.

¹⁵⁰ Supra 51.

¹⁵¹ Supra 47.

¹⁵² Supra 52.

¹⁵³ Companies Act 2008 s 29(6).

3.2.2. Criminal matters

In so far as offences are concerned, the Companies Act 2008 creates far fewer offences than the Corporations Act of Australia.¹⁵⁴ one of the offences provided for in the Companies Act 2008 is in section 26(9), which stipulates that a failure to enable reasonable access to a record a company is obliged to make available for inspection or copying is an offence. It is also an offence, in terms of section 28(3), for a company to keep inaccurate or incomplete accounting records, or to falsify such records.¹⁵⁵

The preparation, approval or publication of materially false or misleading financial statements is an offence.¹⁵⁶ A denial of access to a company's financial statements or related records is, according to section 31(4), an offence.

Section 32(5) provides, among other things, that a company that does not avail its registered name or number to a person on demand, or one that misleadingly misstates its name or registration number commits an offence. It is also an offence, in terms of the said section, for a company to use its name deceptively.

According to section 213(1), disclosure of confidential information in certain instances is an offence punishable by a fine or a term of imprisonment of up to ten years.¹⁵⁷ This provision obviously gives an indication of the significance attached to confidentiality in respect of certain information.

The offering of securities to the public in violation of section 99 is an offence.¹⁵⁸ The offence is punishable by a fine or a period of imprisonment not exceeding ten years.¹⁵⁹ It will be recalled that

¹⁵⁴ Supra 48 – 9.

¹⁵⁵ Companies Act s 214(1).

¹⁵⁶ Ibid s 29(6).

¹⁵⁷ Ibid s 216(a).

¹⁵⁸ Ibid s 214(1).

¹⁵⁹ Ibid.

issuance of a prospectus containing misleading or false information is an offence in Australia.¹⁶⁰

Lastly, it is an offence to impede or interfere with the administration of the Act.¹⁶¹ A person convicted of this offence may, in terms of section 216(6), be fined or sentenced to imprisonment for up to 12 months.

3.2.3. General comments

It is clear that the courts still have, albeit non-exclusive in most cases, jurisdiction over a wide array of Companies Act matters. As compared to Australia though, the South African courts certainly have limited jurisdiction. This is perhaps due, in part, to the voluminous nature of the Corporations Act as compared to the Companies Act 2008.

3.3. The Companies Tribunal

3.3.1. General overview

The Companies Tribunal is a creature of section 193 of the Companies Act 2008. It is a legal person with jurisdiction throughout the country. Unlike the Administrative Appeals Tribunal, it is a novel innovation in the context of South African company law. The rationale underlying it is similar to that underpinning the Administrative Appeals Tribunal – the speedy, efficient, easy and cheap resolution of disputes within its purview.¹⁶² The tribunal does not currently charge fees for its services¹⁶³ and to this extent it certainly is a cheap dispute resolution forum.

¹⁶⁰ Supra 47.

¹⁶¹ Companies Act 2008 s 215.

¹⁶² Ibid s 180.

¹⁶³ Companies Tribunal *Companies Tribunal Annual Report for the year ended March 2014* (2014) 5 available at http://www.companiestribunal.org.za/images/pdfs/ct_annual%20report2013-2014.pdf accessed on 11 February 2015.

The Act provides that the tribunal comprises ten members and a chairperson appointed by the Minister responsible for trade and industry on a fulltime or part-time basis.¹⁶⁴ There are currently ten members – excluding the chairperson – nine of whom have qualifications in law and one is a chartered accountant.¹⁶⁵ It is interesting that the Administrative Appeals Tribunal Act prescribes neither a minimum nor a maximum number of members of the Administrative Appeals Tribunal.¹⁶⁶

3.3.2. Jurisdiction

The jurisdiction of the tribunal, as has been pointed out already, extends throughout South Africa. Section 195(1) mandates the tribunal mainly to adjudicate on matters falling within its province as well as aid in alternative dispute resolution as provided for in the Act.

The tribunal's mandate with regard to alternative dispute resolution has already been highlighted. Therefore, a further detailed consideration is not necessary here. However, it is noteworthy that the tribunal has not seen much activity on the alternative dispute resolution front in its first two years of existence. For instance, it was not called upon to assist in alternative dispute resolution in its first six months of operations¹⁶⁷ and the picture appears to have remained the same as of March, 2014 despite the publication of Alternative Dispute Resolution

¹⁶⁴ Companies Act ss 193(4) and 194.

¹⁶⁵ Companies Tribunal op cit note 163 at 10.

¹⁶⁶ Supra 49. The number of members of the Administrative Appeals Tribunal is obviously much higher than the tribunal's because whereas the former's mandate is not just limited to review of certain decisions in terms of the Corporations Act but other pieces of legislation as well, the mandate of the tribunal is mainly resolution of certain disputes in terms mainly of the Companies Act 2008.

¹⁶⁷ Companies Tribunal '*Companies Tribunal Annual Report 2012/13*' (2013) 6 available at <http://www.companiestribunal.org.za/images/pdfs/annualreport1213.pdf> accessed on 11 February 2015.

Guidelines¹⁶⁸ but due, perhaps in part, to the non-finalisation of the relevant rules for the conduct of mediation, conciliation and arbitration.¹⁶⁹

The tribunal is enjoined by section 180(1) to adjudicate on matters brought before it with expedition and in conformity with rules of natural justice, without the need for formality in the proceedings. It is also noteworthy that section 182 confers on the tribunal such powers in respect of the conduct of adjudication proceedings as are conferred on courts in the course of trying cases. In other words the tribunal may, for example, summon witnesses and examine them on oath or affirmation. The tribunal may also make determinations as to procedural issues regarding matters before it.

While it is generally guided by the High Court rules in the conduct of its hearings, the tribunal has published Practice Guidelines that ‘simplify the process of filing applications with the tribunal’.¹⁷⁰

The tribunal also strives to make a decision on a matter within 30 days from the date of allocating the matter or within a similar period from the date of hearing the matter. In the year ended March 2014, the tribunal is reported to have concluded 69 per cent of the 159 finalised cases within 30 days from the date of allocation and 80 per cent ‘of the decisions were issued within 30 days from date of hearing’.¹⁷¹ When compared to its performance in the first year of its operations, the tribunal made a marked improvement in its decision-making turnaround time in its second year of operations.¹⁷²

¹⁶⁸ Companies Tribunal ‘*Alternative Dispute Resolution Guidelines*’ available at http://www.companiestribunal.org.za/images/pdfs/adr_guidelines.pdf accessed on 11 February 2015.

¹⁶⁹ Companies Tribunal op cit note 163 at 5.

¹⁷⁰ Ibid at 4; see also Companies Tribunal ‘*Practice Guidelines of the Companies Tribunal*’ (2014) available at <http://www.companiestribunal.org.za/images/pdfs/companies%20tribunals%20practice.pdf> accessed on 11 February 2015.

¹⁷¹ Ibid at 4.

¹⁷² Ibid at 4; see also Companies Tribunal op cit note 167 at 6.

These measures are undoubtedly intended to ensure informality and expedition in accordance with the requirements of sections 180 and 182 of the Act. It is asserted that these measures make for a flexible and commendable adjudication process.

For an institution that has been operational for slightly just over two years, the tribunal has been fairly successful in ensuring the speedy, cheap and efficient resolution of disputes notwithstanding the funding constraints it has faced during the said period.¹⁷³ At the risk of rendering too early a verdict on its prospects for the future based on the past two years' performance, the tribunal is likely to impact positively on South Africa in so far as its 'competitiveness with regard to the ease of doing business'¹⁷⁴ is concerned. That the tribunal is a welcome and progressive innovation is, therefore, not a misplaced assertion and a detailed consideration of its mandate is necessary.

There are a number of provisions that specifically require that certain matters be brought before the tribunal for resolution by way of adjudication – presumably. These, in so far as they are relevant, are highlighted hereunder. However, it is noteworthy that in most cases an interested person has the option of either going to court or bringing their matter to the tribunal – at least in theory.

Section 12(3), read with section 160(1), confers jurisdiction on the tribunal to hear and determine disputes regarding name reservation and registration. Name disputes appear to constitute the biggest portion of cases handled by the tribunal so far. For instance, in the year ending March, 2014, the tribunal had resolved close to 80 name disputes – the highest number of subject-specific disputes resolved during the said period.¹⁷⁵ The tribunal's jurisdiction to hear and determine name-related disputes is similar to the Administrative Appeals Tribunal's power to

¹⁷³ Companies Tribunal op cit note 163 at 22.

¹⁷⁴ Ibid at 4.

¹⁷⁵ Ibid at 17.

review decisions of ASIC in relation to name reservation and registration.¹⁷⁶

According to section 61(7), the tribunal has power to extend the time within which a public company should hold a shareholders' annual general meeting. The tribunal is also mandated, in terms of section 61(11), to make an administrative order – on the application of a shareholder – that a meeting of a company be convened where the meeting cannot be convened because the company does not have directors or has incapacitated directors, or the company's memorandum of incorporation does not authorise a person other than directors to convene the meeting. In Australia, substantially similar mandates are bestowed on the courts and not the Administrative Appeals Tribunal whose mandate is limited to the review mostly of some ASIC decisions in terms of the Corporations Act.¹⁷⁷

Further, where a company has less than three directors, a director or shareholder may apply to the tribunal for a determination regarding the disqualification, incompetence or incapacity of a director for purposes of deciding whether or not to remove the director from office.¹⁷⁸ Similarly, the Administrative Appeals Tribunal may review ASIC's decision to disqualify a person from managing corporations.¹⁷⁹ In addition, the court in Australia may also disqualify a person from managing a corporation.¹⁸⁰

Lastly, the tribunal has power to set aside a compliance notice issued by the CIPC on the application of the addressee of the notice.¹⁸¹

¹⁷⁶ Supra 52.

¹⁷⁷ Supra 47.

¹⁷⁸ Companies Act 2008 s 71(8)(b).

¹⁷⁹ Supra 52.

¹⁸⁰ Supra 47.

¹⁸¹ Companies Act 2008 ss 171(5)(a)(i) and 172(1).

4.0. India

The operationalisation of the National Company Law Tribunal (NCLT), established by section 408 of the Companies Act, 18 of 2013 (in this paper referred to as ‘the Companies Act 2013’)¹⁸², has been delayed owing to a petition in the Supreme Court challenging the eligibility requirements for members of the tribunal¹⁸³. It should also be pointed out from the outset that the jurisdiction of the tribunal is far much wider than the Administrative Appeals Tribunal and Companies Tribunal.¹⁸⁴ Therefore, the discussion of the Companies Act 2013 dispute resolution framework focuses on the general features that distinguish the tribunal from the Administrative Appeals Tribunal and Companies Tribunal. It also follows that highlights of specific matters over which the tribunal has jurisdiction are not included in the discussion.

Unlike the Administrative Appeals Tribunal and Companies Tribunal scenarios where appeals lie to the Federal Court of Australia¹⁸⁵ and a court¹⁸⁶ respectively, appeals from decisions of the tribunal do not

¹⁸² Available at <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf> accessed on 21 February 2015.

¹⁸³ Rajat Arora ‘Government may beef up company law board as tribunal plan hangs fire’ *Economic Times* 25 December 2014 available at <http://economictimes.indiatimes.com/news/economy/policy/government-may-beef-up-company-law-board-as-tribunal-plan-hangs-fire/articleshow/45637561.cms> accessed on 11 February 2015.

¹⁸⁴ Perhaps to give an indication of the extent of the tribunal’s jurisdiction, some of the provisions of the Companies Act 2013 that empower the tribunal to hear and determine matters specified in them are: ss 7(7)(d) empowering the tribunal to make a winding-up order; 14(1) relating to approval of alteration of articles of a Public Limited Company; 24(1) on regulation of prospectuses; 48(2) relating to variation of shareholders’ rights; 55(3) on approval of issue of redeemable preference shares; 56(4) regarding prohibition of delivery of securities certificates; 58(3) and (4) on refusal by company to register a transfer or transmission of securities; 59(1) and (3) in respect of rectification of members’ register and suspension of voting rights respectively; 61(1) relating to approval of share consolidation or division; 66(1) regarding confirmation of share capital reduction; 97(1) authorising the tribunal to call an annual general meeting; and 119 empowering the tribunal to order inspection of a company’s books.

¹⁸⁵ Administrative Appeals Tribunal Act s 44.

¹⁸⁶ Section 195(7) of the Companies Act 2008 provides that an appeal from the decision of the Companies Tribunal regarding an order or notice of the CIPC lies to a court. The

lie to a court with appellate jurisdiction. An appeal from the decision of the tribunal lies to the National Company Law Appellate Tribunal established by section 410 of the Act. An appeal from the appellate tribunal lies to the Supreme Court.¹⁸⁷ In this regard the Indian and Australian models provide for a faster route to the conclusion of matters with finality as opposed to the South African paradigm where the appeal process may result in delays in bringing matters to an end with finality.

It is worth noting that a number – specified by the Central Government – of benches of the tribunal shall be constituted.¹⁸⁸ It has been reported that the tribunal will ‘have 63 members and 21 benches’¹⁸⁹. The size of the country perhaps justifies such a set up. However, it is suggested that South Africa should consider adopting a similar approach with time because it is likely to become expensive for people and companies to pursue their matters in Pretoria irrespective of which part of the country they reside in or carry on business whenever their physical presence or attendance before the Companies Tribunal is required or necessary. Alternatively, the Companies Tribunal could sit as a circuit tribunal to ensure that the philosophy of a cheap dispute resolution mechanism remains relevant.

Further, it is also noteworthy that the members of the tribunal and the appellate tribunal will enjoy security of tenure much like judges in many commonwealth countries do.¹⁹⁰ This is not the case with the Companies Tribunal whose members can only hold office for a maximum of two five-year terms¹⁹¹ and the Administrative Appeals

Act does not specify which court has appellate jurisdiction in this respect or in respect of any other decision of the Companies Tribunal. However, it is suggested that where a decision of the Companies Tribunal is filed in the High Court as an order of that court, an appeal from such an order lies to the Supreme Court of Appeal. In all other cases, an appeal should properly lie to the High Court.

¹⁸⁷ Companies Act 2013 s 423.

¹⁸⁸ Ibid s 419.

¹⁸⁹ R Arora op cit note 183.

¹⁹⁰ Companies Act 2013 s 413(2) and (4).

¹⁹¹ Companies Act 2008 s 194(7).

Tribunal on which a member serves for a renewable term of seven years¹⁹².

Moreover, it is interesting to note that section 430 expressly provides that courts have no jurisdiction to hear and determine matters in respect of which the tribunal or appellate tribunal have jurisdiction in terms of the Act. This differs somewhat from the Companies Act 2008 approach in terms of section 156, which leaves it to an interested person to decide which dispute resolution forum to take a matter to in most cases. However, the Indian model is in a sense similar to the Australian paradigm in so far as the jurisdiction to review certain decisions of the ASIC is the exclusive preserve of the Administrative Appeals Tribunal.

Finally, according to section 435, offences under the Act are tried by courts and the Central Government is empowered to set up fast-track courts to try such offences. This is unlike the South African and Australian models where offences in terms of their respective legislation regulating companies are tried by the courts that have criminal jurisdiction in other offences.

5.0. Conclusion

There appears to be a paradigm shift in company law dispute resolution, ostensibly in reaction to the need for certain disputes to be resolved speedily and in a cost effective manner. No longer are some countries content with resolving all company law disputes through the courts.

As to the matters to subject to tribunals and those to be left to the courts, there appear to be variations – with Australia restricting the Administrative Appeals Tribunal to reviewing select decisions of the ASIC and other public officers in terms of the Corporations Act; South Africa clothing the Companies Tribunal with jurisdiction to adjudicate

¹⁹² Administrative Appeals Tribunal Act s 8(3).

on matters not purely administrative; and India's National Company Law Tribunal basically having jurisdiction over almost all civil matters that are traditionally in the realm of the courts in many commonwealth jurisdictions.

It is clear from the discourse in this chapter that the Administrative Appeals Tribunal, the Companies Tribunal and National Company Law Tribunal offer welcome relief for the often overburdened courts in so far as resolution of disputes is concerned. In the case of the Companies Tribunal, it has arguably enhanced South Africa's competitiveness vis-à-vis the ease of doing business owing to its charge-free and often timely delivery of decisions. It is yet to be seen what kind of impact on company law dispute resolution the National Company Law Tribunal will have considering that it is not yet operational. There is a possibility, if efficient case management systems are not employed, of its getting clogged up in much the same way that courts often do because of its extensive jurisdiction.

The questions then are whether Zambia should establish a tribunal for the resolution of Companies Act disputes and, if so, what model should be adopted. The next chapter, apart from providing a succinct summary of the conclusions arrived at in this paper, addresses these questions.

CHAPTER FOUR – REFORMING THE COMPANIES ACT DISPUTE RESOLUTION FRAMEWORK: A COMPANIES TRIBUNAL FOR ZAMBIA

1. Introduction

Law reform is an indispensable imperative in any functioning legal system. There seems to be wide acceptance globally that law can be employed in the promotion of commerce and economic growth and development. This philosophy seems to have taken hold in Zambia as several business sector reforms have taken place since the early 1990s. The major theme of these reforms has been making the business regulatory environment investor friendly. The cost of doing business in general and the cost of dispute resolution in particular, have been among the focus areas of these reforms. On the dispute resolution front, the commercial list of the High Court was set up in order to expedite the disposal of commercial matters.¹⁹³

This chapter proposes further reform in the area of commercial dispute resolution in the context of the Companies Act. It recommends the establishment of a Companies Tribunal in a bid to make Zambia more competitive with regard to the ease of doing business. Thus, a summary of key conclusions drawn from the preceding chapters precedes the arguments around establishment of a tribunal and proposals regarding the nature of tribunal suitable for Zambia.

2. Summary of findings

The High Court of Zambia is the primary dispute resolution forum for Companies Act matters, particularly civil matters as most offences under Zambian laws are tried in the subordinate courts. The court

¹⁹³ High Court (Amendment) Rules 1999 op cit 11 (note35).

process can be long, complex and expensive. Alternative dispute resolution mechanisms are left to the periphery in terms of the Act. For example, arbitration – while possible by order of the High Court – is mostly resorted to where a prior agreement requires the parties to subject disputes arising from a contract to arbitration; and mediation is court-annexed in the sense that it is initiated by the High Court.

An examination of relevant provisions of the Companies Act has found problematic, the blanket provision that decisions of the registrar in the performance or purported performance of the registrar's functions under the Act are only appealable to the High Court given the administrative nature of some of these decisions. In addition, the registrar is practically as good as the final voice in respect of many of the decisions the registrar is empowered by the Act considering that seeking recourse from the High Court when one is dissatisfied with a decision of the registrar may not be economically prudent. A need to relook at the issue of recourse against the registrar's decisions to ensure a responsive Companies Act dispute resolution framework has been identified.

Apart from having appellate jurisdiction over the registrar's decisions, the High Court has original jurisdiction over all other Companies Act civil matters, including the power to order rectification of registers of members and debenture holders; convene debenture holders' and members' meetings; and inspection of companies' records or books. It has been argued that some of the matters over which the High Court has original jurisdiction can properly be within the province of an appropriate administrative regulatory body.

Moreover, the proliferation of offences in the Companies Act has been identified as another aspect of the Act's dispute resolution framework that needs reform. It has been observed that some of the breaches of the Act for which criminal sanctions are imposed can be dealt with administratively. The argument advanced in support of non-

criminal sanctions, particularly for offences punishable only by fine, is that the status quo may arguably have a chilling effect on enterprise growth and development – let alone the ease of doing business.

In order to inform the nature of reform, a comparative study of current trends in company law dispute resolution has been undertaken. The countries studied are Australia, South Africa and India. The notorious fact that these countries are bigger than Zambia geographically, demographically and economically is acknowledged. However, the justification for their study has been indicated mainly as the common law heritage shared among them as well as, in the case of South Africa, its geographical proximity to Zambia.

It has been established that not all Corporations Act matters are amenable to the courts' original jurisdiction. For example, specified administrative decisions of ASIC are amenable to review by the Administrative Appeals Tribunal. These include ASIC's refusal to reserve a proposed company name; disqualification of persons from managing corporations; and registration of, or refusal to register, a liquidator.

The Corporations Act's blanket provision that a contravention of the Act is an offence unless stated otherwise has been criticised as not being in line with the spirit of emphasising non-criminal sanctions in company law dispute resolution.¹⁹⁴

The South African model of company law dispute resolution affords four avenues of redress depending on the nature of the matter to be considered. Notwithstanding the noted inherent risk of uncertainty in the law in so far as the potential for conflicting decisions on materially similar cases by the different dispute resolution fora, the South African paradigm of company law dispute resolution has been lauded as being innovative and progressive.

¹⁹⁴ The South African company law reform process noted that the use of criminal sanctions for breaches that could be redressed by administrative means was not appropriate. See Department of Trade and Industry op cit note 22 at 12.

That said, it has been noted that the courts in South Africa still have, albeit non-exclusive in most cases, jurisdiction over a wide array of matters in terms of the Companies Act 2008. As compared to Australia though, the South African courts have been found to have limited jurisdiction. It has also been established that there are very few offences in the Companies Act 2008 as compared to the Corporations Act. The matters over which South African courts have jurisdiction include convening a shareholders' meeting; disqualifying a person from being a director of a company; and to order the winding-up of a company.

The Companies Tribunal, it has been noted, is both an alternative dispute resolution and adjudication body even though the indication is that the tribunal is yet to be approached for alternative dispute resolution. The tribunal has jurisdiction in respect of such matters as company name disputes; extension of time for filing annual returns; and convening a shareholders' meeting. Like the Administrative Appeals Tribunal, it has been found that the Companies Tribunal has so far performed fairly well in so far as timeous delivery of decisions is concerned.

India, it has been discovered, represents a radical departure from the predominantly court-based company law dispute resolution models in many common law countries. Not only does the Companies Act 2013 clothe the National Company Law Tribunal with jurisdiction over a wide array of matters, it provides that an appeal from a decision of the tribunal lies to the National Company Law Appellate Tribunal. It has also been discovered that the Indian model grants to members of the two tribunals such tenure as is applicable to judges.

The study of the Indian company law dispute resolution model has also revealed that offences in terms of the Companies Act 2013 are tried by courts and the central government may set up fast-track courts to try the offences.

A clear indication has emerged that the Administrative Appeals Tribunal, the Companies Tribunal and National Company Law Tribunal offer welcome relief for the often overburdened courts in so far as resolution of disputes is concerned. In the case of the Companies Tribunal, the feeling is that it has arguably enhanced South Africa's competitiveness vis-à-vis the ease of doing business owing to its charge-free services and often timeous delivery of decisions. It is yet to be seen what kind of impact on company law dispute resolution the National Company Law Tribunal will have considering that it is not yet operational.

3. In support of a Companies Tribunal for Zambia

The starting point is a general reiteration of the arguments advanced in the first chapter on the advantages associated with tribunals.¹⁹⁵ On the specific advantage of affording a cheaper alternative to court litigation, the paper has indicated that lowering the cost of dispute resolution is one of the factors considered as enhancing the ease of doing business.¹⁹⁶ A Companies Tribunal that assures low cost dispute resolution, like the South African Companies Tribunal, would most likely influence Zambia's ranking with regard to ease of doing business positively especially against the backdrop of an expensive commercial court process.¹⁹⁷

Secondly, the flexibility and informality associated with tribunal proceedings assist in ensuring speedy disposal of matters – an attribute widely accepted as preferred by the business community.

Thirdly, if the qualifications for appointment as member of the South African Companies Tribunal are anything to go by, a Companies Tribunal for Zambia presents an opportunity for the appointment of

¹⁹⁵ Supra 3.

¹⁹⁶ Supra 12.

¹⁹⁷ Ibid note 36.

members who have expertise in company law as well as commerce generally. This is generally in contrast with the current situation where a judge of the High Court can be allocated a matter in any branch of law irrespective of the judge's area of expertise.

Further, the registrar currently wields too much unchecked power in terms of the Companies Act. This presents the risk of lack of accountability and may result in arbitrary decisions being made on the understanding that it is unlikely that an aggrieved person would go to court to challenge such decisions in most cases. Therefore, making the registrar's decisions amenable to the jurisdiction of the proposed tribunal would go a long way in assuring accountability and availing a platform to people to challenge decisions they may be aggrieved with in a friendly, flexible, cheap and informal setting.

Fifthly, the need to provide for non-criminal sanctions in respect of some of the offences created by the Companies Act would result in an overburdening of the courts if not implemented. This would likely have the effect of making litigation more costly and time consuming. Conversion of some of the offences to civil wrongs in respect of which the proposed tribunal would have jurisdiction would certainly make the courts' burden lighter.

Sixthly, as the comparative study in the preceding chapter has shown, there seems to be recognition internationally that the courts may not be adequately responsive to the need for speedy, informal, flexible and cheap resolution of disputes. It is asserted that Zambia's establishment of a Companies Tribunal would be in tune with growing international best practice in the area of company law dispute resolution.

Seventhly, as the African continent pursues regional integration, harmonisation of business laws to boost intra-regional trade is ever

becoming more imperative.¹⁹⁸ It is posited that, with South Africa leading the way in setting up a Companies Tribunal for the resolution of some company law disputes and Zambia – to the extent possible and appropriate for the jurisdiction – following suit, some more ground would have been laid for the harmonisation of countries' company law dispute resolution frameworks owing to similarities in approach. The idea might seem remote presently but could prove useful in informing the harmonisation agenda vis-à-vis dispute resolution in regional company law.

Lastly, tribunals are not a strange phenomenon in Zambia. A number of statutes dealing with certain specialised areas of the law provide for tribunals.¹⁹⁹ The operations of the existing tribunals have not been without challenges.²⁰⁰ However, these challenges should not be seen as an indication that tribunals have no place in Zambia. Rather, the challenges should be examined and measures proposed to ensure that the proposed Companies Tribunal is not beset by similar challenges if avoidable. In any case, it has been stated that the Administrative Appeals Tribunal and the South African Companies Tribunal, though fairly successful, face some challenges in the performance of their respective mandates.

¹⁹⁸ For more on the developments in Africa regarding harmonisation of business laws, see Salvatore Mancuso 'Trends on the Harmonization of Contract Law in Africa' (2007) 13 *Annual Survey of Internal and Comparative Law* 157 – 78 available at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1115&context=annlsurvey> accessed on 11 February 2015.

¹⁹⁹ Examples include the Revenue Appeals tribunal Act 11 of 1998 available at <http://www.zambialii.org/files/zm/legislation/act/1998/11/rata1998256.pdf> accessed on 11 February 2015; and the Lands Tribunal Act 39 of 2010 available at <http://www.zambialii.org/files/zm/legislation/act/2010/39/The%20lands%20tribunal%20Act%2C%202010.%201.PDF> accessed on 11 February 2015.

²⁰⁰ See for example Kelvin Mpembamoto *An Evaluation of the Revenue Appeals Tribunal* (unpublished LLB Obligatory Essay, University of Zambia, 2009) 20 – 33 available at <http://dspace.unza.zm:8080/xmlui/bitstream/handle/123456789/2419/MPEMBAMOT0001.PDF?sequence=1> accessed on 11 February 2015.

4. A Companies Tribunal for Zambia: some recommendations

It is not in doubt that a Companies Tribunal is necessary for Zambia. The question that remains is: what kind of tribunal should it be? In answering this question, recommendations regarding its membership and jurisdiction are given hereunder. These recommendations obviously draw from the Companies Act dispute resolution framework against the backdrop of the comparative perspective presented in chapter three.

In so far as membership or composition of the respective tribunals considered in this paper is concerned, only India makes provision for tenure similar to the tenure enjoyed by judges generally. South Africa and Australia provide for fixed terms. The practice with regard to tenure of tribunal members in Zambia is similar to the Australian and South African approach.²⁰¹ Therefore, the members of the proposed tribunal should serve for fixed terms as has been the practice with other tribunals.

In Australia, a prominent qualification for appointment as a member of the Administrative Appeals Tribunal is enrolment as a legal practitioner. In the case of South Africa, qualifications in law and commerce related fields suffice. In India – and perhaps that is why there is a petition pending in the Supreme Court regarding membership eligibility requirements – the qualifications include eligibility for appointment as a judge. The South African eligibility criteria are recommended for Zambia because of their representativeness in terms of relevant expertise in the field not only of law but commerce as well.

It is also recommended that members be appointed on a part-time basis for a start because retaining fulltime members may be very costly to the government. The legislation to establish the proposed tribunal should empower the Minister responsible for trade and industry to

²⁰¹ See Lands Tribunal Act 2010 s 6(1); and Revenue Appeals Tribunal Act 1998 s 4(3).

appoint members on fulltime or part-time basis so that, with time, there is flexibility in the nature of appointment depending on cost sustainability and demand for the proposed tribunal's services. The South African approach is informative in this regard.

On territorial jurisdiction, it is suggested that the proposed tribunal have jurisdiction throughout Zambia just like the South African Companies Tribunal. As is the case with Lands Tribunal,²⁰² the proposed tribunal should be authorised to have circuit sittings in order to enhance access by those who may not be in the immediate vicinity of the ordinary seat of the tribunal. In India the approach is to set up benches of the National Company Law Tribunal in various places. While this approach suits India because of its large population and geographical area, it may be costly for Zambia to maintain permanent structures in the various provinces or districts.

Caution is urged in determining the nature of tribunal suitable for Zambia so that there is no wholesome transplantation of a particular jurisdiction's approach. A hybrid tribunal suitable to Zambia is recommended. In this regard, it is proposed that decisions of the registrar relating to incorporation and conversion of companies, company accounts, audit, annual returns, and foreign companies should no longer be appealable to the High Court. They should be amenable to the exclusive jurisdiction of the proposed tribunal in order to render the remedies envisaged in the right to challenge such decisions relevant and practicable. In other words the proposed tribunal should, somewhat like the Administrative Appeals Tribunal, be clothed with authority to review decisions of the registrar falling in the categories specified above.

In addition to the power to review most of the decisions of the registrar, it is recommended that the proposed tribunal be empowered to

²⁰² Lands Tribunal Act 2010 s 10(4).

determine matters – currently vested in the High Court – relating to the incorporation, membership (except in respect of rectification of members or debenture holders registers where the issue hinges on entitlement to be entered in or removed from the register), management and administration of companies. This is because most of these are of such an administrative nature as to be best resolved by an administrative tribunal as opposed to the courts.

It is also recommended that Companies Act offences punishable by a fine should be made civil wrongs over which the proposed tribunal should have jurisdiction and be empowered to impose administrative fines. Conferring power on the proposed tribunal to impose administrative fines would be a departure from the South African approach where only the courts can impose such fines. In the Zambian context, it would not be a novel development for a statutory body to have power to impose administrative fines.²⁰³ It is noteworthy that a close look at most of these minor offences reveals that they are infractions that need not be criminal in nature and thus suited to resolution by an administrative tribunal.

The status quo should be maintained in respect of the High Court's jurisdiction over securities, fundamental transactions and winding-up. In addition, the more serious offences – those punishable by fine or imprisonment – should be maintained as such and remain within the province of the courts. This is obviously because a largely administrative tribunal is not the appropriate forum for dealing with such complex matters and offences.

The South African innovation, though yet to be tested, of mandating the Companies Tribunal to be an alternative dispute

²⁰³ Sections 73 and 74 of the Civil Aviation Authority Act 7 of 2012 empowers the Civil Aviation Authority to impose administrative fines in respect of certain contraventions of the Act. The Act is available at http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=1041 accessed on 11 February 2015.

resolution forum is recommended for Zambia in light of the peripheral role alternative dispute resolution appears to be playing under the current company law dispute resolution model.

It is expected that these recommended reforms to the *Zambian* company law dispute resolution framework will contribute to enhancing the country's competitiveness with regard to the ease of doing business. These proposed reforms could not have come at a better time than now when the Companies Act is undergoing review. It is hoped that the proposals will be taken on board and eventually be incorporated in the legislation that will come out of the review process.

BIBLIOGRAPHY

Primary Sources

Cases

Airtel Holdings Limited and Others v Patents and Companies Registration Agency and Others 2010/HP/1216.

Anisminic Ltd v Foreign Compensation Commission (1969) 2 A.C. 147.

Statutes

Australia

Administrative Appeals Act 91 of 1975.

Corporations Act 50 of 2001.

India

Companies Act 18 of 2013.

South Africa

Companies Act 71 of 2008

National Credit Act 34 of 2005

United Kingdom

Tribunals, Courts and Enforcement Act 2007

Zambia

Arbitration Act 19 of 2000.

Civil Aviation Authority Act 7 of 2012.

Companies (Amendment) Act 12 of 2010.

Companies (Amendment) Act 24 of 2011.

Competition and Consumer Protection Act 24 of 2010.

High Court Act Cap 27.

Lands Tribunal Act 39 of 2010.

Revenue Appeals tribunal Act 11 of 1998

Secondary Sources

Books

Cane, Peter *Administrative Tribunals and Adjudication* (2009) Hart Pub., Oxford.

Cassim, Farouk HI (ed) *Contemporary Company Law* 2 ed (2012) Juta, Claremont.

Creycke, Robin (ed) *Tribunals in the Common Law World* (2008) Federation Press, Annandale.

Forbes, JRS *Justice in Tribunals* (2002) Federation Press, Sydney.

Garner, Bryan (ed) *Black's Law Dictionary* 9 ed (2009) West, St. Paul.

Soanes, Catherine & Stevenson, Angus (eds) *Concise Oxford English Dictionary* 11 ed (2008) Oxford University Press, Oxford.

Stebbing, Chantal *Legal Foundations of tribunals in Nineteenth-Century England* (2006) Cambridge University Press, Cambridge.

Woodley, Mick (ed) *Osborn's Concise Law Dictionary* 10 ed (2005) Sweet & Maxwell, London.

Journals

Allars, Margaret 'The nature of merits review: a bold vision realized in the Administrative Appeals Tribunal' (2013) 41 *Fed. L. Rev.* 197.

Farisani, Dorothy 'The potency of co-ordination of enforcement functions by the new and revamped regulatory authorities under the new Companies Act' 2010 *Acta Juridica: Modern company law for a competitive South African economy* 433.

Mancuso, Salvatore 'Trends on the Harmonization of Contract Law in Africa' (2007) 13 *Annual Survey of Internal and Comparative Law* 157

Reports and other sources

Administrative Appeals Tribunal (AAT) *'Annual Report 2012 - 13'* (2013)

Administrative Appeals Tribunal (AAT) *'Annual Report 2013 - 14'* (2014)

Arora, Rajat 'Government may beef up company law board as tribunal plan hangs fire' *Economic Times* 25 December 2014

Companies Tribunal *'Companies Tribunal Annual Report 2012/13'* (2013)

Companies Tribunal *'Companies Tribunal Annual Report for the year ended March 2014'* (2014)

Companies Tribunal *'Practice Guidelines of the Companies Tribunal'* (2014)

Companies Tribunal *'Alternative Dispute Resolution Guidelines'*

Department of Trade and Industry *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* General Notice 1183 of 2004

Department of Trade and Industry (DTI) *'The Companies Act, No. 71 of 2008: An Explanatory Guide'* (2010)

Mpembamoto, Kelvin *An Evaluation of the Revenue Appeals Tribunal* (unpublished LLB Obligatory Essay, University of Zambia, 2009)

Patents and Companies Registration Agency (PACRA) *'2013 Annual Report'* (2014)

World Bank *Doing Business 2015: Going beyond Efficiency* (2014)