

# **NOTES / AANTEKENINGE**

## **SOME NOTABLE DIVERGENCES IN THE DEVELOPMENT OF SOUTH AFRICAN AND NAMIBIAN INSOLVENCY LAW**

### **1 Introduction**

It is a well-known fact that the legal systems of South Africa and Namibia, or rather the former South West Africa, were rather identical until the advent of independence of the latter on 21 March 1990.

This note thus deals with aspects of the development of insolvency law in South Africa and Namibia since Namibia became independent. What is also important is the fact that both Namibia and South Africa adopted a constitution that is based on a Bill of Rights (see the Constitution of the Republic of Namibia of 1990 and the South African Constitution of 1996). Some developments in insolvency law based on these features are therefore also considered in this note.

As indicated, upon independence Namibia retained significant portions of South African law including its legislation (see s 140 of the Namibian Constitution). Owing to the shared background of Roman-Dutch-law and English-law influences, both Namibia and South Africa can still be classified as having mixed legal systems.

Like South Africa, Namibian insolvency law is not contained in one single statute although it is still largely regulated by the South African inherited Insolvency Act 24 of 1936 (hereinafter "the Insolvency Act"), which deals first and foremost with the sequestration of individuals and related matters. Namibia also inherited the South African Companies Act 61 of 1973 but the South African Close Corporations Act 69 of 1984 was largely adopted as the Close Corporation Act 26 of 1988 that came into operation on 25 July 1994. These pieces of legislation, amongst others, deal with the liquidation or winding-up of companies and close corporations respectively. Apart from these statutory enactments, precedents and common-law principles also apply in the absence of specific statutory provisions.

The Insolvency Act of 1936, however, remains the principal source of both South African and Namibian insolvency law and the other enactments render certain provisions of the Insolvency Act applicable. At present and as far as the principles are still comparable, precedents set by South African and Namibian courts remain relevant in both jurisdictions. In order to align some of the terminology with structures and developments in Namibia, the 1936

Insolvency Act was amended in a number of respects by the Namibian Insolvency Amendment Act 12 of 2005. The wording of the Insolvency Act was also thereby amended to make it gender-friendly.

However, when dealing with either system it is important to ascertain to what extent statutes that applied in both jurisdictions have been adopted, subsequently amended and/or replaced. The Namibian government has for instance introduced a new Companies Act 28 of 2004 that is bound to replace the South African-based Companies Act of 1973. Although a new insolvency statute is not in the pipeline in Namibia, an amendment act to the 1936 Insolvency Act has been published during 2005 (the 2004 Companies Act was assented to on 19 December 2004 but it will only come into operation once so proclaimed).

In South Africa a new Companies Act 71 of 2008 has been introduced but it is also still due to come into operation. New insolvency legislation that will unify the insolvency of individuals and companies is on the table in South Africa but it is not clear when this process will come to fruition (see the South African Law Reform Commission's Report *Review of the Law of Insolvency* Project 63 (2000) Report, Vol I Explanatory Memorandum, and Vol II Draft Bill.)

Another general feature is that judgments of the South African and Namibian high courts are clearly still influential in both jurisdictions but as amendments and separate legal developments will deviate from the former common norm, judgments will clearly have to be treated with circumspect in future (see, eg, *Bekker NO v Kotze* 1996 4 SA 1287 (NmHC) that dealt with the recognition of a foreign provisional trustee and is often quoted in South Africa). In the absence of a comprehensive textbook dealing with the Namibian version of insolvency law, South African textbooks will remain of some use to that jurisdictions but also subject to the same qualifications expressed above (see Kunst, Magid, Boraine and Burdette *Meskin Insolvency Law and Its Operation in Winding-up* (2009 update); Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* (2007); and Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008)).

## **2 The structure of the Insolvency Act 24 of 1936 and some other legislation and concepts**

### **2 1 General**

Although the Insolvency Act remains the basis of insolvency law in both Namibia and South Africa it is not the sole source of insolvency law in these two jurisdictions. As stated above, in both systems principles of the common law, precedent as well as other pieces of legislation, must also be considered in order to get a comprehensive picture of the relevant insolvency structures.

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The point of departure remains that in both systems, the estates of debtors as defined in section 2 of the Insolvency Act may be sequestrated, but that certain debtors such as companies that are rather wound up or liquidated in terms of company legislation may therefore not be sequestrated. Certain provisions of insolvency law that include both common law and the Insolvency Act will, however, apply *mutatis mutandis* (see s 339 of the Companies Act of 1973).

In international terms insolvency systems usually refer to consumer insolvency as those rules of insolvency that apply to natural persons or individuals, and corporate insolvency as being applicable to companies etcetera. It must therefore be understood that in both jurisdictions insolvency dealing with consumers is largely regulated by the Insolvency Act and corporate insolvency in principle by the applicable company legislation.

## 2.2 *Broad structure of insolvency*

The broad scheme of insolvency following the initiating procedure, that is, sequestration or winding-up, is largely similar in that the following aspects and are dealt with in both jurisdictions since the commencement of formal insolvency, namely:

### (a) Consequences or effects re:

- Estate assets (both local and foreign assets);
- voidable dispositions;
- unexecuted contracts;
- personal consequences for consumer insolvent or directors/officials of a company.

### (b) Aspects of insolvent estate administration procedure:

- Involvement of Master;
- insolvency offences;
- proof of claims;
- meetings of creditors;
- appointment of trustee or liquidator;
- duties of trustees and liquidators;
- investigations and interrogations;
- tracing and realisation of assets;
- distribution of proceeds;
- compromises and compositions.

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(c) Rehabilitation of consumer debtor

When comparing consumer and corporate insolvency it is important to note that there are certain principal differences, for instance, insolvency laws usually provide for certain assets to be excluded or exempt from the insolvent estate in favour of the individual whilst this notion has no place in corporate insolvency. An individual may also be rehabilitated following sequestration but final liquidation signifies the termination of the existence of a company (for a comprehensive overview of the above-mentioned aspects, see Kunst *et al*; Sharrock *et al*; and Bertelsmann *et al*).

### 2.3 Business or corporate rescue

Apart from the sequestration and liquidation procedures above, business or corporate rescue is a major aspect of modern corporate insolvency law and is, whenever feasible, to be preferred to liquidation of a company (see Westbrook, Booth, Paulus and Rajak *A Global View of Business Insolvency Systems* (2009) 122 *et seq.*)

### 2.4 The regulator and representative of the estate

The Namibian government has retained the South African institution of the Master of the High Court who, amongst other statutory duties, also acts as the supervisor of the administration of insolvent estates (see s 2 of the Administration of Estates Act 66 of 1965). The Master of the High Court is a public official whose functions include the supervision of the administration of deceased and insolvent estates. In the latter case the Master appoints trustees or liquidators in the case of companies and gives them directions as to certain aspects of the administration of insolvent estates and the confirmation of the formal estate accounts.

Masters' offices are obliged to keep certain documentation that may have a bearing on the rights of members of the public in certain circumstances. In this regard, section 32(1) of the South African Constitution confirms the right of access to any information held by the state and information held by another person that is required for the exercise or protection of any rights. The Promotion of Access to Information Act 2 of 2000 finds its roots in section 32(2) of the Constitution and gives effect to this right by facilitating the process of obtaining such information. It is to be noted that, subject to legal constraints, this right may be exercised against the Master as an organ of state.

As part of its statutory duties, the Master has to perform and exercise various administrative actions and discretions. Section 151 of the Insolvency Act provides for a general judicial review regarding such decisions, rulings, orders or taxations. Examples of administrative action include the Master's role when presiding at a creditors' meeting to act as first adjudicator to decide on the acceptance or rejection of claims submitted by creditors

against the insolvent estate, and the Master's decision to appoint trustees and liquidators.

In performing these administrative actions, the Master is clearly bound by section 33 of the South African Constitution. Section 33(1) entrenches the right to administrative action that is lawful, reasonable and procedurally fair, and section 33(2) confirms the right of everyone whose rights have been adversely affected by administrative action to be given reasons in writing. The Promotion of Administrative Justice Act 3 of 2000 has also been enacted in order to give effect to section 33(3) of the Constitution that requires national legislation to be enacted to give effect to the right to fair administrative action.

The Master has a statutory discretion to appoint trustees in terms of section 57 of the Insolvency Act. The *proviso* to section 57(1) does not require the Master to give reasons for a refusal to appoint a particular person as a trustee. This seemingly militates against fair administrative action as does section 57(7) that excludes judicial review by the courts in favour of a review by the relevant Minister.

In Namibia the 2005 Insolvency Amendment Act will amend some of the provisions of the Insolvency Act of 1936 when it comes into operation. Some provisions of the Amendment Act will align certain provision of the Insolvency Act with their Bill of Rights. One example is an attempt to align some administrative duties of the Master of the High Court with section 18 of the Bill of Rights that deals with administrative justice, in that when a trustee disputes a claim, the trustee is required to furnish the claimant with reasons, and the Master of the High Court must give the actual reason for declining to confirm the election of a trustee (see the amended ss 45 and 57 of the Insolvency Act.)

Although trustees and liquidators need no special licence to act as such under South African or Namibian law, the Master's office usually keeps a list of persons who are eligible for appointment based on their knowledge and experience in the field. In South Africa a dispensation is in the process of being implemented in an attempt to ensure the appointment of previously disadvantaged individuals as trustees and liquidators (see amended s 158(2) of the South African version of the Insolvency Act).

### **3 Liquidation (winding-up) of companies**

#### *3 1 General*

At present the liquidation of companies in South Africa and Namibia is still dealt with in terms of Chapter XIV of the Companies Act of 1973, but this Act is due to be replaced in the near future with the South African Companies Act 71 of 2008 and in Namibia by the 2004 Companies Act when this act comes into operation. The 1973 Companies Act nevertheless provides for

winding-up by a court order or voluntary winding-up by members or creditors and still apply as such in both jurisdictions.

As far as winding-up is concerned, sections 79 to 83 of the 2008 Companies Act provide for the winding-up and deregistration of a *solvent* company. The current winding-up provisions contained in the 1973 Companies Act will, however, in terms of Schedule 5 of the 2008 Act still apply – apparently pending the introduction of a new harmonized Insolvency Act. The idea is that winding-up provisions relating to insolvent companies should in future be regulated by the new insolvency legislation.

The liquidation or winding-up of companies in Namibia will in future and in terms of the 2004 Companies Act once it comes into operation be regulated in terms of Chapter 14 thereof consisting of sections 342 to 432. This Act will, however, maintain the *status quo* to a large extent.

In case of the liquidation of a company that is unable to pay its debts the provisions of the law relating to insolvency, therefore including the Insolvency Act of 1936, shall, in so far as such provisions may be applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by the Companies Act (see s 344 of the 2004 Namibian Companies Act for a similar provision).

Foreign companies registered as external companies in Namibia may also be liquidated in terms of a High Court order (see ss 328 and 342 of the 2004 Companies Act and see s 337 of the Companies Act of 1973.)

South Africa and Namibia have similar legislation dealing with close corporations and some provisions of the winding-up of companies and insolvency law will also apply to the liquidation of these entities. Suffice to say for the purposes of this note that the 2008 South African Companies Act provides for the gradual phasing out of close corporations whilst Namibia seems to retain this business form (one of the aims of the 2008 Act is to phase close corporations out as a business form – see Item 4 Schedule 5).

### 3.2 *Liquidation by court*

Section 344 of the Companies Act of 1973 provides seven grounds for applying to a High Court for the winding-up of a company. As stated above, if such a company is unable to pay its debt, the insolvency law will then apply *mutatis mutandis* in terms of section 339 of the Companies Act of 1973.

Namibian companies will after the coming into operation of the 2004 Companies Act be wound up following a High Court application under any one of eight stated grounds for winding-up, for instance where the company is unable to pay its debts; where a foreign company, registered as an external company, is dissolved in the country in which it has been incorporated; or where it appears to the court that it is just and equitable that the company should be wound up (see s 349 of the 2004 Companies Act).

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In terms of section 350 of the 2004 Act a company is deemed to be unable to pay its debts when:

- (a) a creditor to whom the company is indebted in a sum not less than the prescribed amount then due has served on the company a demand requiring the company to pay the sum so due and the company or body corporate has for 15 days thereafter neglected to pay the sum; or
- (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that there is not sufficient disposable property to satisfy the judgment or that any disposable property found did not upon sale satisfy such process; or
- (c) it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts.

In terms of section 353 of the 2004, Act winding-up commences at the date of presentation of such application to the court and not at the time of the granting of the order.

To conclude, the new Namibian Companies Act of 2004 largely resembles the basic winding-up procedures when compared to the current South African Companies Act of 1973. Even when the 2008 South African Companies Act comes into operation this situation will remain the same until South Africa introduces its envisaged new harmonized insolvency legislation.

### 3.3 *Voluntary liquidation*

The 2004 Namibian Companies Act basically follows the current provision in the Companies Act of 1973 by providing that a company, except an external company, may also be voluntarily liquidated, either by members or creditors. The voluntary liquidation by members will be the case where the company is able to pay its debts, whilst the voluntary liquidation by creditors will be when the company is insolvent. In both instances the process is initiated by a special resolution by members. The liquidation will commence at the time of the registration of the resolution at the offices of the Registrar of Companies (see ss 354 to 358 of the 2004 Companies Act.)

Sections 79 to 81 of the Companies Act of 2008, however, contain provisions for voluntary winding-up by both members and creditors. It is not clear whether the South African legislature deems a liquidation by creditors to be under solvent conditions, but if so the belief is clearly wrong. On a principle level the 2008 Act nevertheless still provides for a system of voluntary winding-up.

### 3.4 *Consequences of liquidation*

The more important consequences of the commencement of a liquidation are the following: any share transfer – except with the consent of the liquidator – is void; every disposition of property after commencement of

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liquidation is void unless the court orders otherwise; all civil proceedings against the company are suspended; any attachment or execution put into force is void; and the powers and duties of the directors, except for certain residual powers, come to an end. The company, however, remains the owner of its property but the control over the company goes to the Master, and after his or her appointment to the liquidator. These seem to remain the same in both jurisdictions (see, eg, s 361 of the 1973 Companies Act and s 366 of the 2004 Companies Act).

## **4 The effect of certain legislation on insolvency**

### *4.1 The position of employees in insolvency*

The protection of the rights of employees is paramount in both South Africa and Namibia. The Labour Relations Act of 66 1995 (hereinafter “the LRA”) was thus one of the first pieces of legislation to address this issue in the new South Africa. In short, it introduced the now amended section 197 that provided for an automatic transfer of the contracts of employment from a former insolvent employer to a new employer if the business was transferred as a going concern.

The previous section 38 of the South African version of the Insolvency Act provided for the termination of contracts of employment on sequestration of the estate of the employer. The employees would then enjoy a limited preferential claim regarding wages and some other benefits in arrears in terms of the repealed section 100 of the Act. With the acceptance of the LRA, employees obtained additional protection in that the previous section 197 of the LRA provided for the automatic transfer of their contracts of employment if the business (of the insolvent employer) was transferred as a going concern. This led to interpretational problems since section 38 of the Act clearly stated that the contracts of employment would terminate on sequestration of the estate of the employer (see in general with regard to the previous position Lombard and Boraine “Insolvency and Employees: An Overview of Statutory Provisions” 1999 *De Jure* 300; and *SA Agricultural Plantation & Allied Workers Union v HL Hall & Sons Group Services Ltd* 1990 20 ILJ 399 (LC), where the court attempted to reconcile s 38 of the Act and the previous s 197 of the LRA).

During 1999 the Department of Labour reviewed aspects of labour and related laws. As a result, the relevant provisions in the LRA, the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Insolvency Act were amended. The outcome of these amendments regarding insolvency law was an improved package for employees when the estate of their employer was sequestrated. In brief the amendments amounted to a new section 38 that now provides for an initial suspension of contracts of employment, provision for unemployment benefits for the employees during the period of suspension, and an amended section 197 of the LRA that regulates the transfer of a business as going concern. Before the



introduction of these amendments, section 100 of the Insolvency Act was replaced by section 98A of this Act that improved the preferential claims of employees against the estate of the insolvent employer.

The substituted section 38(1) provides that the sequestration (or winding-up in the case of companies or close corporations) of an employer will only *suspend* obligations between employers and employees in terms of their contracts of service. The suspension will become effective as from the commencement date of sequestration. The immediate effect of the suspension is that employees will not be required to tender their services in terms of their contracts of employment. Consequently the trustee is also not obliged to remunerate them in terms of section 38(2). Such employees are, however, entitled to unemployment benefits in terms of the Unemployment Insurance Act 63 of 2001. In terms of section 38(3) they will therefore be entitled to register for unemployment benefits as if they are unemployed.

Section 38(4), however, empowers the (*final*) trustee (or liquidator) to *terminate* the contracts of service of the employees subject to subsections 38(5) and 38(7). The power to terminate may, however, not be exercised unless the trustee has entered into consultations with the relevant parties referred to in section 38(5), such as a registered trade union or the employees themselves, with the view of receiving proposals in order to save or to rescue the business or a part thereof, for instance to save the contracts of service when the business is sold and transferred to a new owner as provided for in section 197A of the LRA (s 38(6), see further Boraine and Van Eck "The New Insolvency and Labour Legislative Package: How Successful was the Integration?" 2003 *ILJ* 1840; and Van Eck, Boraine and Steyn "Fair Labour Practices in South African Insolvency Law" 2004 *SALJ* 902).

Although South Africa did not introduce a wage-guarantee fund to deal with wages and other claims by employees against the insolvent employer, the Insolvency Act was amended in that section 100 of the Insolvency Act was replaced with the current section 98A that improved both the position of the ranking of employee claims by increasing the amount of the preferential portion that can be claimed as such against the estate of the insolvent employer.

Section 38 of the Namibian version of the Insolvency Act still follows the former wording of the South African version in that it states that contracts of service are terminated on sequestration and thus also winding-up. The 2005 Insolvency Amendment Act that has not come into operation yet, attempts to align section 38 with section 31 of the Labour Act of 2004 by providing for the termination of an employee's contract of service one month after the sequestration of the estate or liquidation of the employer. (It must be noted that the 2004 Labour Act was replaced by the Labour Act 11 of 2007 that came into operation on 1 November 2008, and s 31 of the 2004 Act was replaced by s 32 of the 2007 Act that is similarly worded.) Section 32(1) of the Namibian Labour Act 11 of 2007 (NLA) therefore now stipulates that contracts of employment terminate one month after the sequestration or winding-up of an employer. Section 32(3) of the NLA also refers to a

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preferential right of employees whose contracts have terminated, by specifically referring to any remuneration due or monies payable in terms of the NLA. Since these preferences override any other law, it seems that they prevail over the preferences created under the Insolvency Act, and hence may rank first in the order of preference prescribed by the Insolvency Act. Section 32(3) clearly states that “despite the provisions of any law to the contrary, an employee whose contract is terminated in the circumstances referred to in subsection (1) is a preferential creditor in respect of any remuneration due or monies payable to the employee in terms of this Act”. The proposed amended section 38(2) of the Insolvency Act, however, attempts to reconcile section 32(3) with the preferences of the employees in terms of section 100 of the Namibian Insolvency Act that still seems to regulate these claims except that the preferential portion may in terms of the proposed amended section 100 following the 2005 Amendment Act be determined by regulation after this amendment Act comes into operation. It must meanwhile be noted that a number of interpretational difficulties may arise due to section 32 of the 2007 Labour Act that is at present not aligned with sections 38 and 100 of the Insolvency Act of 1936.

#### 4.2 *Credit regulation*

South Africa replaced its former Credit Agreements Act 75 of 1980 and certain other related pieces of legislation with the National Credit Act of 34 of 2005 (NCA). This Act has a marked influence on various aspects of the credit industry and debt-relief measures. In terms of the NCA, credit providers must first carry out a financial-risk assessment in order to determine whether a consumer will be able to afford credit granted to him or her (see ss 81-82 of the NCA). The Act lays down penalties for entering into reckless credit agreements with consumers and it contains a new debt-relief measure in the form of debt review with the possibility of debt restructuring. In sections 86-88 the NCA also provides for a system of debt review that may lead to a debt restructuring of a debtor’s credit-agreement debts. Suffice to say that its impact on sequestration procedures has been considered by the High Courts already, and it is clear that its provisions cannot be ignored before attempting to bring a sequestration application (see Van Heerden and Boraie “The Interaction Between Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law” 2009 *PELJ* 22). Section 84 of the Insolvency Act of 1936 has also been amended to reflect the new instalment agreement provided for by the NCA rather than the instalment-sales transaction as that was regulated by the former Credit Agreements Act. In Namibia both the Credit Agreements Act of 1980 as well as the section 84 of the Insolvency Act that refers to instalment agreements in terms of the first-mentioned legislation still apply.

### 4.3 *Bill of Rights*

In South Africa, the Bill of Rights has directly affected some of the provisions of the Insolvency Act and the Companies Act of 1973. To name but a few examples: In particular certain amendments were brought about regarding aspects of insolvency interrogations in order to reflect certain values in the Bill of Rights (see “The Law of Insolvency and the Bill of Rights” in the *Bill of Rights Handbook* (2009 update) par 4A7). The constitutional attack on section 21 of the Insolvency Act passed constitutional muster (see *Harksen v Lane NO* 1997 11 BCLR 1489 (CC)).

The author could not find reported Namibian case law that dealt with basic rights and insolvency law directly but the 2005 Insolvency Amendment Act also attempted to align some provisions in the 1936 Insolvency Act with their basic rights (see paragraph 2.4 above and see also the 2005 amendment of s 65 of the Namibian version of the Insolvency Act of 1936).

## 5 **Rescue procedures**

### 5.1 *Judicial management and compromises in terms of the Companies Act of 1973*

An application for a judicial management order may be brought in the High Court when any company by reason of mismanagement or for any other cause is unable to pay its debts or is probably unable to meet its obligations, and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern. In the above circumstances the court may, if it appears just and equitable, grant a judicial-management order in respect of that company (Chapter XV of the Companies Act of 1973).

The main object of section 311 of the 1973 Companies Act is to rearrange the company's liabilities by compromise. With the 311-procedure the proposer usually attempts to improve the insolvency situation of the company by agreeing to subordinate its debt in favour of later creditors, subject to the solvency of the company being restored. The court also evaluates the efficacy of the subordination in exercising its discretion to cancel the liquidation or judicial-management order. If cancelled, the company would be able to resume business. The section can therefore also be utilized in a rescue situation.

### 5.2 *Business rescue and compromises in terms of the South African Companies Act of 2008*

Chapter 6 of the 2008 Companies Act contains a new business-rescue provision that will replace the current judicial-management procedure since it is believed that the latter procedure is ineffective (see Kloppers “Judicial

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Management – A Corporate Rescue Mechanism in Need of Reform” 1999 *Stell LR* 417; cf Loubser “Judicial Management as a Business Rescue Procedure in South African Corporate Law” 2004 *SA Merc LJ* 137; and see *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (under curatorship) Intervening)* 2001 2 SA 727(C)). Some highlights of the new dispensation include a company resolution to begin business-rescue proceedings in addition to the issuing of a court order to begin such procedures. Section 131(7) read together with section 132(1)(c) also proposes that a rescue application may be brought to court even where a company is already subject to liquidation. Judging from sections 136(1) and 144(2) for instance, job preservation and the protection of employees are extremely important and employees may participate in the business rescue and they enjoy protection as a distinct class of creditors. Section 133 also introduces an automatic general moratorium and although the Act does not provide for a compulsory statutory discharge in case of business rescue, the creditors may consent to a discharge of their debt in terms of section 154.

Section 114 of the 2008 Companies Act makes provision for a proposal for a scheme of arrangement and section 155 provides for a compromise between a company and its creditors.

### *5.3 Judicial management and compromises in terms of the Namibian Companies Act of 2004*

The 2004 Companies Act essentially retains the much criticised judicial-management procedure as a rescue provision that may be instituted by way of a High Court application (see Chapter 15, ss 433 to 447 of the 2004 Companies Act). An application for judicial management is based on the fact that a company by reason of mismanagement or for any other cause is unable to pay its debts or is probably unable to meet its obligations; that it has not become or is prevented from becoming a successful concern; and that there is a *reasonable probability* that, if placed under judicial management, it will be enabled to pay its debts or to meet its obligations and thus to become a successful concern. The court may then, if it appears just and equitable, grant a judicial management order in respect of that company.

If the order is granted the control of the company passes to the Master and thereafter to the judicial manager. The judicial manager must compile a report on the financial position of the company and on the prospects of the company becoming successful and submit it to meetings of creditors and members. The wishes of the creditors and members will be taken into account by the court in the exercise of its discretion to grant a final judicial-management order. Creditors may also decide on subordinating pre-filing debt to new capital (debt). If a final judicial-management order is granted, the judicial manager assumes the management of the company and must apply the assets of the company with the object of restoring the company to a successful concern. The directors are therefore not left in possession of the company at all.

The judicial manager or any other interested party may apply to court for the cancellation of the judicial-management order if it appears that the purposes of the order were fulfilled and that the company is a successful concern. If it appears that it is undesirable that the order should remain in force and that the company should be wound up, an application can be brought for the cancellation of the judicial-management order and the liquidation of the company.

The 2004 Companies Act retains the section 311 compromise procedure in that section 317 provides for a similar procedure.

## **6 Cross-border Insolvency rules**

As in South Africa, current cross-border insolvency rules are not codified in Namibia and principles of international private law thus still regulate this area of the law. Foreign insolvent estate representatives thus have to apply to the South African or Namibian High Court to be recognized as such before they will be allowed to attach property situated in these jurisdictions in favour of foreign creditors whom they represent.

Although the above position regarding foreign assets still applies in South Africa as well, this jurisdiction has adopted the UNCITRAL Model Law on Cross-border Insolvency in the form of the Cross-Border Insolvency Act 42 of 2000 that will take practical effect as soon as the Minister of Justice designates states to which it will apply in terms of this Act. On designation this Act will regulate this area of the law with regard to designated states whilst the non-designated states will still be governed by the current rules as described in the previous paragraph. Namibia does not seem to have any immediate reform initiative regarding the reform of its cross-border insolvency rules.

## **7 Conclusion**

South African bankruptcy law that is still largely the backbone of Namibian bankruptcy law has developed with a division between insolvency of natural persons and winding-up of corporations such as companies, which was not always a logical development. The influence and interaction between English law and Roman-Dutch law also had a profound effect on the development of this insolvency-law system.

Unlike South Africa, Namibia has seemingly decided to follow a rather moderate approach to the renewal of its insolvency laws, in particular corporate bankruptcy, in that the current liquidation and rescue provisions provided for by the 1973 Companies Act have to a large extent been retained in the 2004 Companies Act that has been approved but is not in operation yet, whilst the Insolvency Act of 1936 remains largely the same. In fact the 2004 Companies Act can be seen as an attempt by the Namibian government to put its own footprint on this branch of the law whilst still keeping the essential principles of the 1973 Companies Act intact.

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In this regard the Namibian reform initiative has deviated from the South African model in that Namibia has opted to retain the current situation where various statutes cover different aspects of bankruptcy of different types of debtors. The proposed South African reform process entails a unified insolvency statute option that would encompass both personal and corporate insolvency – at least as regards the administration of the liquidation procedure.

Within the sphere of business rescue the 2004 Companies Act has largely retained the judicial-management system which system has been met with rather severe criticism in South Africa. In this regard South Africa has therefore opted for an altogether new business-rescue procedure to be introduced by its new Companies Act of 2008.

Although both countries have adopted constitutions that are based on a bill of rights, no precedents dealing with the impact of the Namibian Bill of Rights on insolvency law could be found whilst the South African Bill of Rights already had a marked impact on some aspects of insolvency law – especially interrogations.

Related legislation is also steering the two systems in different direction, such as the replacement of the Credit Agreements Act of 1980 with the NCA in South Africa, and different labour Acts were introduced in the two countries. In the meantime precedents from the two jurisdictions will still be influential in both but will ask for more circumspect application in future as the deviations increase.

Although cross-border insolvency rules are still the same in both jurisdictions, South Africa has adopted the UNCITRAL Model Law on Cross-border Insolvency but subject to a system of designation. Even when designation of selected jurisdictions takes place in South Africa, it will still share the current cross-border rules with Namibia since these will still apply to those countries that will not become designated countries in terms of the Cross-Border Insolvency Act 42 of 2000.

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