

**A COMPARATIVE STUDY OF SOME ISSUES RELATING TO CORPORATE
INSOLVENCY LAW IN NIGERIA AND SOUTH AFRICA**

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CHAPTER 1: GENERAL INTRODUCTION

1.1 BACKGROUND OF STUDY

It has been noted that in modern times, corporate structures have become an increasingly dominant part of the economy geared towards economic and social developments. This is because companies all over the world cannot exist independently, and form an integral part of our society. The development of a new rescue culture in developing countries, have created a new innovation aimed at creating other options for a financially ailing company, rather than liquidation.

Furthermore, companies in their corporate development have noted that they have to take risks for their growth and success, which in turn leads to the development of a corporate rescue regime aimed at rescuing not only financially ailing companies but also at ensuring the continued development of the economy and society as a whole. This is because the failure or success of any company in a particular country has huge repercussions for the management of the company as well as the stakeholders in society such as the members, creditors, shareholders, employees, suppliers, and etcetera.

South African corporate insolvency laws have clearly joined the global international trend of providing for a corporate business rescue regime, which can be seen in the introduction of Chapter 5 (Fundamental transactions) and Chapter 6 (Business rescue) of the Companies Act 71 of 2008. It has been noted by academics that the provisions in these two chapters were modelled on the United States Chapter 11 of the United States Bankruptcy Reform Act 1978, otherwise known as the United States Bankruptcy Code, which has been amended and is now known as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, that applies to the reorganization of companies,¹ and the US experience on statutory mergers.

On the other hand, through its Companies and Allied Matters Act Cap C20 LFN 2004, Nigeria has incorporated the provisions of receivership, a concept similar to the UK system and arrangement and compromise through sections 537 to 539 of the Companies and Allied Matters Act², which although are regarded as business rescue procedures, but are not structured like the

¹ Note that individuals may decide to make use of Chapter 11 of the Bankruptcy Reform Act 1978, but it is rarely used.

² Companies and Allied Matters Act Cap C20 LFN 2004.

US Chapter 11³ or Chapter 6 under the new South African Companies Act.⁴ Other transactions such as mergers and acquisitions provided for under the Investment and Securities Act 2007, are however not regarded as rescue procedures under the Companies and Allied Matters Act,⁵ but have assisted immensely in the rescue of banks in Nigeria. However, the Nigerian corporate insolvency and restructuring provisions still lags behind the current standards of global international trends/developments, which has prompted a research to be undertaken for purposes of this dissertation.

Therefore, the purpose of this dissertation is to compare the corporate insolvency regimes, having regard to the corporate insolvency provisions, business rescue/debt restructuring provisions, cross border insolvency provisions and law reform provisions currently taking place in South Africa and Nigeria.

1.2 PURPOSE OF STUDY

One of the main purposes of this study is to compare the corporate insolvency regimes in South Africa and Nigeria with particular emphasis on the general framework of corporate insolvency procedures in both countries, the business rescue procedures that currently exist in both countries, the current rules on cross border insolvency, and highlights of certain recent law reform initiatives which is being undertaken. The research also in a way aims to encourage the unification of the insolvency and corporate insolvency law provisions in a single enactment in South Africa, which has been underway since way before 2003, when the Bill was approved by parliament.

The study also aims to propose the adoption of the South African insolvency/corporate insolvency law regime in Nigeria, aimed at aiding in the development and restructuring of the Nigerian corporate insolvency structure. This includes the possible adoption of the South African business rescue regime as enacted in chapter 6 of the new Companies Act.⁶

³ United States Bankruptcy Reform Act 1978.

⁴ Companies Act 71 of 2008.

⁵ Companies and Allied Matters Act Cap C20 LFN 2004.

⁶ Companies Act 71 of 2008.

Another focus point of this study is to analyse the problems associated with the appointment of insolvency practitioners in South Africa and Nigeria and to suggest how a system for such appointments can be regulated.

Furthermore, this study aims to look at the cross border insolvency law provisions in both countries and the adoption of the UNCITRAL Model Law in South Africa through the enactment of the Cross Border Insolvency Act 42 of 2000. However, it must be emphasised that the Minister of Justice has not yet designated countries to which the Cross Border Act 42 of 2000 will apply. It should also be noted that the UNCITRAL Model law has not been adopted in Nigeria. Such adoption should however be encouraged.

Finally this research examines the current law reforms taking place in each country, having regard to global and international trends. It concludes with the question whether the South African corporate insolvency structure can serve as a model for Nigeria.

1.3 RESEARCH QUESTIONS

1. Can the South African corporate insolvency law regime serve as model for the Nigerian corporate insolvency structure?
2. How can the South African business rescue regime be adopted in Nigeria and how effective are the Nigerian corporate rescue provisions in Nigeria, namely, receivership, arrangement and arrangement and compromise?
3. How can South Africa and Nigeria develop a regulated system for the licensing and appointments of insolvency practitioners/liquidators?
4. How has the South African cross border insolvency laws (common law) and the adoption of the UNCITRAL Model Law on cross border insolvency impacted on the cross border regime in South Africa, compared with the impact of the Foreign Judgments (Reciprocal Enforcements) (FJRE) Cap F53 LFN 2004 on the cross border insolvency regimes in Nigeria?

1.4 SIGNIFICANCE OF STUDY

The significance of the study is to determine whether South Africa has a standing corporate insolvency regime that can be adopted by other African countries, especially Nigeria, and to determine whether the corporate structure in Nigeria is in need of modification.

1.5 DELINEATION AND LIMITATION OF STUDY

This study focuses mainly on companies and briefly on close corporations – although the latter are being phased out by the new South African Companies Act.⁷ The introduction of the new Companies Act⁸ is used to highlight the innovation of business rescue in South Africa and how it can be adopted by the Nigerian corporate structure. The Companies and Allied Matters Act⁹ and the Winding-up rules 2001, made pursuant to the Companies and Allied Matters Act¹⁰ which are regarded as the core laws which apply to corporate insolvency in Nigeria, and other relevant statutes such as the Land Use Act Chapter 202, LFN 1990, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No 18 of 1994, the Investment and Securities Act 2007, the Banks and Other Financial Institutions Act (BOFIA) 1991 and the Asset Management Corporation of Nigeria (AMCON) Act 2010 etcetera shall be used to analyse the provisions for the winding-up of companies in Nigeria. In general, articles, books and the internet are the major sources of this research. It should be borne in mind that the new business rescue culture being practised in South Africa is constantly evolving, which makes it necessary to constantly change the research to be in line with recent developments.

1.6 METHODOLOGY

This dissertation is a comparative analysis of the corporate insolvency regime that currently exists in Nigeria and South Africa, having regards to the corporate insolvency laws and procedures, and the current business rescue and cross border insolvency provisions that exist in both countries. Contributions made by different authors, organisations, books, journals, articles etcetera and how they have influenced the success or failure of corporate insolvency issues are

⁷ Companies Act 71 of 2008.

⁸ Companies Act 71 of 2008.

⁹ Companies and Allied Matters Act Cap C20 LFN 2004.

¹⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

also reviewed. Most of the information has been gathered from data published on the topic, unpublished works of authors, published books, articles and searches conducted via the internet.

1.7 STRUCTURE (OVERVIEW OF CHAPTERS)

Chapter 1: General introduction

Chapter 2: Framework of corporate insolvency law

Chapter 3: Business rescue proceedings

Chapter 4: Cross border insolvency

Chapter 5: Law reform initiatives

Chapter 6: Conclusion

Bibliography

1.8 KEY REFERENCES

The following are certain key references used throughout the research. They are derived from the Companies Act 61 of 1973, the Companies Act 71 of 2008, the Companies and Allied Matters Act Cap C20 of 2004, etcetera and include the following:

- **Business rescue**¹¹ means “proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for (i) the temporary supervision of the company, and of the management of its affairs, business and property; (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.”
- **Company**¹² means a juristic person incorporated in terms of the section 1 of the Companies Act.¹³

¹¹ Section 128(1) (b) Companies Act 71 of 2008.

¹² Section 1 Companies Act 71 of 2008.

¹³ Companies Act 71 of 2008.

- **Affected person**¹⁴ in relation to a company means a shareholder, creditor of a company, any registered trade union representing employees of the company or employees themselves.
- **Financially distressed**¹⁵ means that it appears to be reasonably unlikely that a company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- **Rescuing a company**¹⁶ means achieving the goals set out in the definition of business rescue in paragraph (b).
- **Close corporation** means a juristic person incorporated under the Close Corporation Act 69 of 1984.¹⁷
- **Liquidator**¹⁸ is a person appointed for the purpose of conducting the winding-up proceedings and performing any such duties as may be imposed on him.
- **Solvency and liquidity test**¹⁹ Section 4 of the Companies Act,²⁰ provides that “for the purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time- (a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and (b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of- (i) 12 months after the date on which the test is considered; or (ii) in the case of a distribution contemplated in paragraph (a) of the definition of ‘distribution’ in section 1, 12 months following that distribution.”
- **Official receiver**²¹ means the deputy Chief Registrar of the Federal High Court of Nigeria or an officer designated for that purpose by the Chief Judge of the court.
- **Master**²² means an officer of the High Court in South Africa.

¹⁴ Section 128(1) (a) Companies Act 71 of 2008.

¹⁵ Section 128(1) (f) Companies Act 71 of 2008.

¹⁶ Section 128(1) (h) Companies Act 71 of 2008.

¹⁷ Section 1 Companies Act 71 of 2008.

¹⁸ Section 1 Companies Act 71 of 2008; section 422(1) Companies and Allied Matters Act Cap C20 LFN 2004.

¹⁹ Section 4(1) Companies Act 71 of 2008.

²⁰ Companies Act 71 of 2008.

²¹ Section 419(1) Companies and Allied Matters Act Cap C20 LFN 2004.

CHAPTER 2: FRAMEWORK OF CORPORATE INSOLVENCY LAW

2.1 STRUCTURE OF CORPORATE INSOLVENCY LAW IN SOUTH AFRICA

South African insolvency law is not contained in a single unified Act. The Insolvency Act 24 of 1936 deals mainly with the sequestration of individuals while the former Companies Act 61 of 1973, the Companies Act 71 of 2008 and the Close Corporations Act 69 of 1984 deal with the liquidation of companies and close corporations.²³ An investigation into unifying both the Insolvency Act²⁴ and the Companies Act²⁵ was completed in 2000 by the Centre for Advanced Corporate and Insolvency Law of the University of Pretoria which was accepted by Cabinet in March 2003 as the Draft Insolvency and Business Recovery Bill, but this Bill has not yet been adopted as legislation. Note that the Cross Border Insolvency Act,²⁶ and all other laws governing cross border insolvency in South Africa, has not been included in the unification process. The South African Law Reform Commission is currently reviewing the insolvency law with a view of enacting a new insolvency law.²⁷

South African corporate insolvency laws are mainly regulated by the Companies Act 61 of 1973, the Companies Act 71 of 2008, the Close Corporations Act 69 of 1984,²⁸ which applies to the winding-up of close corporations (having regard to the fact that the new Companies Act 71 of 2008 has gradually removed close corporations from its provisions) and the Insolvency Act²⁹ in terms of section 339 of the companies Act 61 of 1973, which makes the provisions of the Insolvency laws to apply mutatis mutandis to any matter not specifically provided for by the Act.

²² Section 1 Companies Act 71 of 2008.

²³ Other Acts such as the Banks Act 94 of 1990 deal with the liquidation of Banks. There are also special provisions which deal with the winding-up of other special entities such as pension funds, building societies, medical funds, insurance companies and cooperatives. Other sources include judgments of the High Court and Constitutional Court which create precedents that are being followed, as well as the principles of the common law which are very helpful in cases of for example the *actio Pauliana* and unexecuted contracts.

²⁴ Insolvency Act 24 of 1936.

²⁵ Companies Act 61 of 1973.

²⁶ Cross Border Insolvency Act 42 of 2000.

²⁷ See as background Boraine A and Van der Linde K “The Draft insolvency Bill-an Exploration” (Part 1) 1998 4 *TSAR* 621 and (Part 2) *TSAR* 38; Burdette DA “Unified Insolvency Legislation in South Africa: Obstacles in the path of the unification process” (1999) *De Jure* 44 at 57 and 58.

²⁸ Section 66(1A) Close Corporations Act 69 of 1984, section 68 Close Corporation Act 69 of 1984 which imitated section 344(f) of the Companies Act 61 of 1973 & section 69 of the Close Corporations Act 69 of 1984; See also *Herman v Set-Mak Civils* (5495/2011) (2012) ZAFSHC 58 (5 April 2012).

²⁹ Insolvency Act 24 of 1936.

. It is noteworthy to say that the new Companies Act³⁰ 71 has had a great impact on the liquidation of both solvent and insolvent companies aimed at ensuring the rescue of those companies rather than their liquidation. The Companies Act³¹ was replaced by the new Companies Act³² as from 1 May 2011. Note however that the new Companies Act,³³ clearly provides in Item 9 Schedule 5 of the Act that “despite the repeal of the provisions of the previous Act, until the date determined in terms of sub item (4), Chapter 14 of the Companies Act,³⁴ shall continue to apply with respect to the winding-up and liquidation of solvent companies under this Act, as if that Act had not been repealed subject to section 343,344,346 and 348 to 353 which do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2 of the new Companies Act.³⁵ The reasoning behind this is that while the Companies Act³⁶ contains provisions that apply to the liquidation of insolvent companies, the new Companies Act³⁷ to date only makes provision for the initiation of the liquidation process for the winding-up of a solvent company,³⁸ but does not make provision for the subsequent liquidation/administration procedures necessary for the administration of a solvent company. Note that in the case of a conflict between the two old and the new Companies Acts, the provisions of the new Companies Act,³⁹ which applies to solvent companies, will prevail.⁴⁰

The Companies Act⁴¹ also introduced business rescue in Chapter 6 which replaced judicial management. The introduction of a new business rescue regime in South Africa under the new Companies Act⁴² was due to the acute failure of judicial management as a form of business rescue, which emanated from the fact that the initiation of the process provided for no automatic moratorium, there was a lack of regulatory control over the appointment and qualifications of a judicial manager, there were very strict requirements for a provisional and final order to be

³⁰ Companies Act 71 of 2008.

³¹ Companies Act 61 of 1973.

³² Companies Act 71 of 2008.

³³ Companies Act 71 of 2008.

³⁴ Companies Act 61 of 1973.

³⁵ Companies Act 71 of 2008.

³⁶ Companies Act 61 of 1973.

³⁷ Companies Act 71 of 2008.

³⁸ Sections 79–81 Companies Act 71 of 2008.

³⁹ Companies Act 71 of 2008.

⁴⁰ Item 9(3) Schedule 5 Companies Act 71 of 2008.

⁴¹ Companies Act 71 of 2008.

⁴² Companies Act 71 of 2008.

granted, before a judicial management procedure, as a form of business rescue could commence, etcetera.⁴³

In this dissertation, the impact of the new Companies Act⁴⁴ on close corporations is briefly discussed. A new close corporation has since the 1st of May 2011, become impossible to be incorporated in South Africa. Note however that there are still hundreds of thousands of them still in existence; they are usually regulated by the Close Corporation Act.⁴⁵ One of the aims of the new Companies Act⁴⁶ is to remove close corporations as a form of business entity in South Africa. Note that the real intention behind the phasing out of close corporations is to with time have one uniform set of rules governing corporate entities in South Africa.⁴⁷

With regard to the winding-up of close corporations, the new Companies Act⁴⁸ ensures that the winding-up and liquidation of close corporations are regulated by the provisions of the Close Corporations Act,⁴⁹ Chapter 14 of the Companies Act,⁵⁰ some sections of the new Companies Act,⁵¹ which applies to the liquidation of solvent companies and the Insolvency Act,⁵² which will all apply *mutatis mutandis* to the liquidation of both solvent and insolvent close corporations.⁵³ A close corporation has been defined as a juristic person incorporated under the Close Corporation Act 69 of 1984.⁵⁴ There are two types of companies that may be formed and incorporated under the Companies Act,⁵⁵ and they include profit companies i.e. state owned companies, private companies and public companies and personal liability companies, and non profit companies. A close corporation differs from a public or private company in a close corporation as a juristic person is distinct from its members, and does not deal with shares and share capitals, but instead have what is known as a member's interest which is determined as a

⁴³ Loubser A “ Judicial Management as a Business Rescue Procedure in South African Corporate Law” 2004 *South African Mercantile Law Journal* 137

⁴⁴ Companies Act 71 of 2008.

⁴⁵ Close Corporation Act 69 of 1984.

⁴⁶ Companies Act 71 of 2008.

⁴⁷ COX / YEATS Attorneys Circular No 2 Close Corporation PDF June 2011

⁴⁸ Companies Act 71 of 2008.

⁴⁹ Close Corporations Act 69 of 1984.

⁵⁰ Companies Act 61 of 1973.

⁵¹ Companies Act 71 of 2008.

⁵² Insolvency Act 24 of 1936.

⁵³ Item 7 of Schedule 3 Companies Act 71 of 2008 which amended section 66 of the Close Corporations Act 69 of 1984 and which also rendered certain provisions of the Companies Act 61 of 1973 applicable.

⁵⁴ Section 1 Companies Act 71 of 2008.

⁵⁵ Section 8 Companies Act 71 of 2008.

percentage of ownership.⁵⁶ Public companies on the other hand are companies who can offer its shares, to the public, and its shareholders enjoy free transferability of shares and interest in companies. A private company is however prohibited by its memorandum of association from offering any of its securities to the public and restricts the transferability of its securities.⁵⁷

Note that a close corporation can be converted into a private company/registered company, when the members believe that the close corporation has grown substantially and that there is a need to expand the corporation through the injecting of additional capital by shareholders or in a bid to place the corporation on equal footing with other large proprietary limited companies with which they compete with.

The provisions for the winding-up of solvent companies under the new Companies Act⁵⁸ and the provisions of Chapter 14 of the Companies Act,⁵⁹ which provides for the winding-up of insolvent companies, have replaced sections 67 (voluntary winding-up) and 68 (winding-up by order of court) of the Close Corporations Act⁶⁰. It is thus very important to ascertain which provisions of which Act applies in each case, having regard to the fact that where the Close Corporations Act⁶¹ provides for a particular aspect of the liquidation process, that Act must be applied. If, however, there are no such provisions, the Companies Act 61 of 1973 will apply and, if not, the insolvency laws will apply. The apparent impact of the new Companies Act,⁶² on section 66 of the Close Corporations Act,⁶³ which provides for the incorporation of certain provisions of the Companies Act⁶⁴ as well as the insolvency law to apply *mutatis mutandis* to the winding-up of close corporations, by referring to section 339 of the Companies Act,⁶⁵ is that Part G of Chapter 2 of the new Companies Act,⁶⁶ will apply to the winding up of solvent close corporations, while the

⁵⁶ <http://en.wikipedia.org/wiki/south-Africa-Company-law-html>. (Accessed 17th July 2013)

⁵⁷ Section 8(2) (b) (i) & (ii) Companies Act 71 of 2008.

⁵⁸ Companies Act 71 of 2008.

⁵⁹ Companies Act 61 of 1973.

⁶⁰ Close Corporations Act 69 of 1984.

⁶¹ Close Corporations Act 69 of 1984.

⁶² Companies Act 71 of 2008.

⁶³ Close Corporation Act 69 of 1984.

⁶⁴ Companies Act 61 of 1973.

⁶⁵ Companies Act 61 of 1973.

⁶⁶ Companies Act 71 of 2008.

provisions of Chapter 14 of the Companies Act,⁶⁷ will apply to the liquidation of insolvent close corporations.

2.1.1 WINDING-UP OF SOLVENT AND INSOLVENT COMPANIES

There are two types of companies that can be wound up in South Africa, namely, solvent and insolvent companies. These two types of companies are distinguished and the rules applicable to them are discussed in some detail below. A solvent company may be wound up either voluntarily by the adoption of a special resolution by the company as contemplated in section 80 of the Companies Act,⁶⁸ or by an application brought by the company for an order of court as contemplated in section 81 of the Companies Act,⁶⁹ where the company has resolved by a special resolution that it be wound up by the court, or applied to court to have its voluntary winding-up continued by the court.⁷⁰ An insolvent company, may in terms of section 343 of the Companies Act,⁷¹ provides for the different modes of winding-up, which includes a winding-up by the court – which is usually called a compulsory winding-up and is usually brought by a creditor – and a voluntary winding-up of a company which could be either through a creditors' voluntary winding-up or a member's voluntary winding-up, usually initiated by the passing of a special resolution of members.

Procedural aspects of the corporate insolvency law structure in South Africa such as meetings of creditors, statement of affairs, etcetera, are further discussed below.

2.1.1.1 Winding-up of solvent companies

The winding-up of solvent companies in South Africa, is regulated by sections 79 to 81 in Part G of Chapter 2 of the new Companies Act.⁷² It should however be noted that, as was mentioned above that certain sections of the Companies Act⁷³ do not apply to the winding-up of solvent companies, but may apply when necessary to give full effect to the provisions of Part G Chapter

⁶⁷ Companies Act 61 of 1973.

⁶⁸ Section 80 Companies Act 71 of 2008.

⁶⁹ Companies Act 71 of 2008.

⁷⁰ Section 81(1) (a) (i) (ii) Companies Act 71 of 2008.

⁷¹ Companies Act 61 of 1973.

⁷² Companies Act 71 of 2008.

⁷³ Companies Act 61 of 1973.

2 of the new Companies Act.⁷⁴ The meaning of “solvent companies” in the new Companies Act,⁷⁵ is not clear, but it has in terms of the common law, been presumed to refer to a company whose assets exceeds its liabilities, but which cannot pay its debts as they fall due in the ordinary course of business.⁷⁶ Note however that due to the provision of a solvency and liquidity test as provided under section 4 of the Companies Act,⁷⁷ whether a company will be wound up as solvent or insolvent, would be determined on whether the solvency or lack of solvency of the company would be a ground for winding up. The court also held in *Standard Bank of South Africa Ltd v R-Bay Logistics CC*⁷⁸ “that the intention of the legislature when it used the term “solvent” in item 9 was that the company must be solvent at least in the commercial sense, before any winding-up of that company could take place under Part G”.

A solvent company may be wound up either voluntarily by the adoption of a special resolution by the company,⁷⁹ or by an order of court by way of an application. A solvent company may also be wound up voluntarily, where the company has resolved by the adoption of a special resolution that the company be wound up, which winding-up may either be by the company itself or by the creditors.⁸⁰ A solvent company may also be wound up by an order of court, where an application is brought by the company itself where it has resolved by special resolution that the company be wound up by the court, or has applied to court for its voluntary winding-up to be continued by the court,⁸¹ or an application brought by a business rescue practitioner during business rescue proceedings for the company to be placed under liquidation,⁸² or an application brought by one or more of the company creditors,⁸³ or an application brought by one or more of the directors or one or more shareholders on certain grounds as contemplated in section 81(d) of the Companies Act,⁸⁴ a shareholder has applied with the leave of court for the company to be wound where the directors or prescribed officer or persons in charge of the company are acting in a fraudulent

⁷⁴ Companies Act 71 of 2008.

⁷⁵ Companies Act 71 of 2008.

⁷⁶ See Delpont *et al Henochsberg on the Companies Act, 71 of 2008* (2012) 309 & 312; Bertelsmann E *et al Mars the law of insolvency in South Africa* (2008) 2.

⁷⁷ Companies Act 71 of 2008.

⁷⁸ (2012) JOL 29674 (KZD).

⁷⁹ Section 80 Companies Act 71 of 2008.

⁸⁰ Section 80(1) Companies Act 71 of 2008.

⁸¹ Section 81(1) (a) or (b) Companies Act 71 of 2008.

⁸² Section 81(1) (b) Companies Act 71 of 2008.

⁸³ Section 81(1) (c) Companies Act 71 of 2008.

⁸⁴ Section 81(1) (d) (i) (ii) (iii) Companies Act 71 of 2008.

manner, or company assets are being misapplied or wasted,⁸⁵ or the Commission (Companies and Intellectual Property Commission-CIPC) has applied to court for the company to be wound up based on certain grounds as contemplated in section 81(f) of the Companies Act.⁸⁶

With regards to the provision of section 81(d)(iii) of the Companies Act,⁸⁷ i.e. the winding up of a company by the directors or shareholders of the company based on the fact that it is just and equitable to do so, Coetzee J (as he then was)⁸⁸ in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*,⁸⁹ also made reference to five categories which postulates the need for a winding-up order to be granted based on the just and equitable requirement. They include the disappearance of the company's substratum; illegality of the objects of the company;⁹⁰ fraud; deadlock between the directors and the shareholders of the company; grounds analogous to those for the dissolution of a partnership; oppression. According to Henochsberg on the Companies Act 71 of 2008,⁹¹ these categories do not constitute a closed list, leaving it open for the courts to devise other categories in future.

The granting of a winding-up order by the court is solely in the court's discretion, and aspects which the court considers when exercising its discretion include the financial position of the company or whether the company has creditors or not, as that will go a long way in determining the extent of the company's indebtedness to them, and also to ascertain the value of the assets of the company. This is because the existence of creditors in a company is very important due to the real interest they have in the continued existence or demise of the company, usually, the court ensures that those creditors are not prejudiced during the winding-up process, by requiring that the creditors be given notice of the application.⁹² Kriek J in *Ex parte Three Sisters*⁹³ formulated a rule of practice to ensure that creditors are not prejudiced by stating that the most effective way of preventing the creditors from being prejudiced is by giving them notice of the application.

⁸⁵ Section 81(e) (i) or (ii) Companies Act 71 of 2008.

⁸⁶ Companies Act 71 of 2008.

⁸⁷ Companies Act 71 of 2008.

⁸⁸ Delpont PA *et al Henochsberg on the Companies Act 71 of 2008* (2012) 319.

⁸⁹ 1985 (2) SA 534 (W).

⁹⁰ *Cunninghame v First Ready Development 249 (Association incorporated in terms of section 21)* [2010] 1 All SA (SCA).

⁹¹ *Supra* note 88.

⁹² Delpont PA *et al Henochsberg on the Companies Act 71 of 2008* (2012) 316.

⁹³ *Ex parte Three Sisters (Pty) Ltd* 1986 (1) SA 592 (D) at 593; *supra* note 96.

The new Companies Act⁹⁴ also creates a forum whereby an interested party, who has at any time determined that the solvent company has become insolvent, may apply to court for an order to convert the voluntary winding-up of a solvent company in terms of the provisions of the new Companies Act⁹⁵ to a winding-up in terms of the provisions of chapter 14 of the Companies Act⁹⁶. This provision which allows for an interested party to intervene was considered with approval in *Ansari and Another v Barakat and Others In re: Barakat v Cooper Sunset Trading 424 (Pty) Ltd (In liquidation)*.⁹⁷

2.1.1.2 Winding-up of insolvent companies

In terms of the new Companies Act⁹⁸, chapter 14 of the Companies Act⁹⁹ will continue to apply to the liquidation of insolvent companies subject to the introduction of new legislation to the contrary, as contemplated in item 9(4) Schedule 5 of the new Companies Act.¹⁰⁰ A company could be wound up either by the High Court, or voluntarily through the passing of a special resolution by the members, be it a creditor's voluntary winding-up or a member's voluntary winding-up.¹⁰¹ Chapter 14 of the Companies Act¹⁰² provides for the initiation, commencement and administration of the liquidation of an insolvent company. As was mentioned earlier, section 339 of the Companies Act,¹⁰³ provides that with regard to the winding-up of an insolvent company, that is a company which is unable to pay its debts, the provisions of insolvency law must be applied *mutatis mutandis* in respect of matters not specifically provided for by the Companies Act. These areas of the Companies Act to which the insolvency laws will apply *mutatis mutandis* include section 340 (voidable dispositions), section 342 (application of assets to cost and claims), section 366 (proof of claims), section 412 (meetings), and section 416 (interrogation).

⁹⁴ Companies Act 71 of 2008.

⁹⁵ Companies Act 71 of 2008.

⁹⁶ Companies Act 61 of 1973.

⁹⁷ (2012) JOL 29516 (KZD).

⁹⁸ Companies Act 71 of 2008

⁹⁹ Companies Act 61 of 1973

¹⁰⁰ Companies Act 71 of 2008: *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 (5) SA 197 (FB).

¹⁰¹ Section 343 Companies Act 61 of 1973.

¹⁰² Companies Act 61 of 1973

¹⁰³ Companies Act 61 of 1973

There are different modes of winding-up and this is provided for by section 343 of the Companies Act.¹⁰⁴ They include a winding-up by the court which is usually called a compulsory winding-up and is usually brought by a creditor, and a voluntary winding-up of a company which could be either through a creditor's voluntary winding-up or a member's voluntary winding-up, initiated by the passing of a special resolution of members

A) Winding-up by the court in terms of the Companies Act 61 of 1973

Section 344(a) to (h) of the Companies Act¹⁰⁵ provides for the grounds upon which a company may be wound up by the court and they include, if the company has by special resolution resolved that it be wound up by the Court; the company commenced business before the Companies and Intellectual Properties Commission (Formerly the Registrar under the previous Companies Act 61 of 1973) certified that it was entitled to commence business; the company has not commenced business within a year from its incorporation or has suspended its business for a whole year; in the case of a public company, the number of members have fallen below seven; seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company¹⁰⁶ the company is unable to pay its debts,¹⁰⁷ in the case of a foreign company, registered as an external company in South Africa, in which case such a company may be liquidated as a separate entity in South Africa even if the foreign company to which it is a subsidiary is not liquidated,¹⁰⁸ and it appears just and equitable that the company be wound up.¹⁰⁹

Section 344(f) of the Companies Act,¹¹⁰ which is read together with section 345 of the same Act, provides that a company shall be deemed to be unable to pay its debt where a creditor, to whom the company is indebted for at least R100, has left a demand for payment at the company's registered office and the company has neglected for three weeks thereafter to pay, secure or compromise the claim to the satisfaction of the creditor;¹¹¹ a warrant of execution (or other process) issued on a judgment against the company has been returned by the sheriff with an

¹⁰⁴ Companies Act 61 of 1973

¹⁰⁵ Companies Act 61 of 1973

¹⁰⁶ *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T)

¹⁰⁷ Sec 344(f) & section 345 Companies Act 61 of 1973.

¹⁰⁸ *Sackstein NO V Proudfoot SA (Pty) Ltd* 2003 (4) SA 348 (SCA) 357

¹⁰⁹ *Rand Air(Pty) Ltd v Ray Bester Investment(Pty) Ltd* 1985 (2) SA 345 (W)

¹¹⁰ Companies Act 61 of 1973

¹¹¹ Section 345(1) (a) Companies Act 61 of 1973.

endorsement that he did not find disposable property sufficient to satisfy the judgment, or that the disposable property he found did not upon sale satisfy the process;¹¹² or it is proved to the satisfaction of the court that the company is unable to pay its debts.¹¹³ Here, the court looks at the liabilities of the company and the circumstances to determine whether the company is unable to pay its debts.¹¹⁴

A winding-up of a company by the court shall be deemed to have commenced at the time the application for liquidation was presented.¹¹⁵ The affidavit supporting the application for winding-up of an insolvent company will broadly cover those aspects provided for by sections 344, 345 and 346 of the Companies Act.¹¹⁶ Parties who may apply for the winding-up of a company by the courts include the company, one or more creditors, one or more of the company's members, jointly by all or some of the parties mentioned above, the Master, and a provisional or final judicial manager (if the company was placed under judicial management).¹¹⁷

Note that the court has discretion when hearing the matter to grant a provisional or final liquidation order. The court can dismiss the application, adjourn the matter conditionally or unconditionally or make any such orders as it deems just.¹¹⁸ In practice, the court first makes a provisional order before it makes a final order. However, it should be noted that the Act does not oblige the court to make a provisional order and it may, if it deems fit, make a final order immediately. It has, however, been noted that although the powers of the court to grant a winding-up order is discretionary, a court's discretion to refuse a winding-up order when the creditor proves that the company is unable to pay its debt is limited even though the company's assets exceeds its liability. In *Absa Bank Ltd v Rhebokskloof (Pty) Ltd*,¹¹⁹ Berman J remarked that "the court has a discretion to refuse to a winding-up order in these circumstances but it is one which is limited where the creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order." 'Circumstances' in this remark is presumed in my opinion to be when it is evident that the assets of the company exceeds its

¹¹² Section 345(1) (b) Companies Act 61 of 1973.

¹¹³ Section 345(1) (c) Companies Act 61 of 1973.

¹¹⁴ *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) 933-4

¹¹⁵ Section 348 companies Act 61 of 1973.

¹¹⁶ Companies Act 61 of 1973.

¹¹⁷ Section 346 Companies Act 61 of 1973.

¹¹⁸ Section 347(1) Companies Act 61 of 1973.

¹¹⁹ 1993 (4) SA 534 (W).

liabilities, the court is usually not required to grant a winding up order, but may do so when it is shown that the company is unable to pay its debts.

B) Voluntary winding-up of insolvent companies

Voluntary winding-up of a company is a process usually commenced by the members, through the passing of a special resolution registered with CIPC,¹²⁰ for a company to be put under a members' voluntary winding-up or creditors' voluntary winding-up in terms of sections 349 to 351 of the Companies Act.¹²¹ It is paramount to say that a voluntary winding-up application must state whether the voluntary winding-up is a member's voluntary winding-up or a creditor's voluntary winding-up. This is because a voluntary winding-up by members applies when the company is able to pay its debts in full and the members have resolved through the passing of a special resolution that the company be wound up.¹²² A creditors' voluntary winding-up on the other hand applies when the company is unable to pay its debts and the creditors have resolved through the passing of a special resolution that the company be wound up.¹²³

2.1.2 Consequences of Liquidation

Some of the consequences of liquidation include that the control of the company is vested in the Master and thereafter in the liquidator upon his final appointment. Note however that the court may, where for any reason it appears expedient, direct in terms of section 361(3) of the companies Act, that all or any part of the property, immovable and movable belonging to the company, or to trustees on its behalf, vest in the liquidator in his official capacity, and the liquidator may after giving such indemnity, as the court may direct, bring or defend in his official capacity any action or legal proceedings relating to that property.¹²⁴

Some of the other consequences of liquidation include the fact that any transfer of shares after liquidation is void except with the consent of the liquidator;¹²⁵ every disposition of property after

¹²⁰ Formerly the Registrar under the previous Companies Act 61 of 1973.

¹²¹ Companies Act 61 of 1973.

¹²² Section 350 Companies Act 61 of 1973.

¹²³ Section 351 Companies Act 61 of 1973

¹²⁴ Section 361(3) Companies Act 61 of 1973

¹²⁵ Section 341(1) Companies Act 61 of 1973.

the commencement of liquidation is void, unless the court orders otherwise;¹²⁶ all civil proceedings against the company are suspended until the appointment of a liquidator;¹²⁷

Note however in terms of section 359(2) of the Companies Act¹²⁸ every person who has instituted legal proceedings against the court which was suspended by the winding up of the company, or intends to institute legal proceedings for the purpose of enforcing a claim against the company, which arose before the commencement of the winding-up, shall be entitled to within four weeks after the appointment of the liquidator, give the liquidator a not less than three weeks notice in writing, before continuing or commencing the proceedings.¹²⁹ Any attachment or execution in force after the commencement of winding-up is void;¹³⁰ and the powers and duties of the directors are vested in the liquidator except for certain residual powers.¹³¹

2.1.3 Statement of affairs

The directors or officers of any company wound up must draw up a statement of affairs of the company in question, listing all the assets and liabilities of the company.¹³² The statement of affairs must be lodged with the Master within 14 days after the final winding-up order has been granted or within 28 days after the special resolution for the voluntary winding-up of the company by the creditors has been registered.¹³³ Note, however, that once the liquidator is appointed, the Master must send a copy of the statement of affairs lodged with him to the liquidator.¹³⁴

2.1.4 Meetings

2.1.4.1 Meetings of creditors

Meetings of creditors are usually held in two instances, namely, during the winding-up of a company by the court and also in the case of a creditors' voluntary winding-up. The first meeting of creditors is usually convened by the Master after a final winding-up order has been granted by

¹²⁶ Section 341(2) Companies Act 61 of 1973).

¹²⁷ Section 359(1) (a) Companies Act 71 of 2008.

¹²⁸ Companies Act 61 of 1973

¹²⁹ Section 359(2) Companies Act 61 of 1973

¹³⁰ Section 359(1) (b) Companies Act 61 of 1973).

¹³¹ *Volkskas Ltd v Darrenwood Electrical (Pty) Ltd* 1973 2 SA 386(T).

¹³² Section 363(2) (a) Companies Act 61 of 1973.

¹³³ Section 363(2) & 356(2) (a) (ii) Companies Act 61 of 1973.

¹³⁴ Section 363(5) Companies Act 61 of 1973.

the court, or a special resolution for a creditors' voluntary winding-up has been registered and lodged with the CIPC (formerly the Registrar).¹³⁵ The main reason why the Master convenes the meeting of creditors of the company is for creditors to consider the statement of affairs of the company, prove their claims and to nominate a person to be appointed as the liquidator of the company. The provisions of the insolvency law with regard to first meetings of creditors, voting and voting by an agent at a meeting of creditors, shall apply *mutatis mutandis* to any meeting of creditors.¹³⁶

The second meeting of creditors is usually appointed by the Master after the first meeting of creditors and after a liquidator has been appointed, but is usually convened by the appointed liquidator.¹³⁷ At the second meeting, the report of the liquidator in terms of section 402 of the Companies Act¹³⁸ is considered, claims are proved against the company and the liquidator is given directions and instructions with regard to the affairs of the company.

2.1.4.2 Meeting of members

The first meeting of members is usually convened by the Master after a final winding-up order has been granted by the court, or a special resolution for a creditors voluntary winding-up has been registered and lodged with CIPC.¹³⁹ The main purpose of the meeting is for the members to consider the statements of affairs of the company and also to nominate a person as a liquidator of the company.¹⁴⁰ Note, however, that in a member's meeting no claims are proved and this has been evidenced by section 364(1) (b) of the Companies Act,¹⁴¹ which makes no mention of claims to be proved at the first meeting of members. Where the members nominate two people in two separate meetings held by them, the Master has the discretion to appoint one such person or even refuse to appoint anyone nominated for the office.

After the first meeting of creditors, the Master shall appoint a second meeting of creditors, which shall be convened by the liquidator upon his appointment after the first meeting of creditors, for

¹³⁵ Companies and Intellectual Properties Commission.: section; section 364(1) (a) Companies Act 61 of 1973.

¹³⁶ Section 364(2) & section 365(2) (a) Companies Act 61 of 1973; section 39, 40, 52-54 Insolvency Act 24 of 1936.

¹³⁷ Section 339 Companies Act 61 of 1973 & section 40(3) (a) Insolvency Act 24 of 1936.

¹³⁸ Companies Act 61 of 1973.

¹³⁹ Supra note 135; Section 364(1) (a) (i) (ii) (iii) Companies Act 61 of 1973.

¹⁴⁰ Section 364(1) (b) Companies Act 61 of 1973.

¹⁴¹ Companies Act 61 of 1973.

the purpose of proving further claims of the creditors against the company, and to ascertain the current status of the company.

2.1.5 Proof of claims

The creditors of the wound-up company usually prove their claims at the meeting of the creditors in accordance with the provisions of section 366(1) (a) of the Companies Act.¹⁴² Note that the liquidator may request the Master to set a time limit within which all claims must be proved.¹⁴³ Where a creditor fails to prove his claim before the account had been lodged with the Master, such a creditor will be excluded from benefiting from the account.¹⁴⁴

2.1.6 Appointment of a provisional liquidator/liquidator of company

The appointment of a provisional liquidator occurs as soon as the winding-up order has been made or a special resolution for the creditors' voluntary winding-up has been registered. Note that the appointment of a provisional liquidator is usually conducted by the Master in terms of section 368 of the Companies Act,¹⁴⁵ who holds the office of the liquidator pending the final appointment of a liquidator.¹⁴⁶ With regard to the appointment of a liquidator, once the final winding-up order has been granted by the court or a special resolution for a creditor's voluntary winding-up has been registered, the Master is required to convene a first meeting of creditors to consider the statement of affairs of the company, allow creditors to prove their claims and also to appoint a liquidator for the company.¹⁴⁷ In most cases a person appointed as provisional liquidator is finally appointed as the liquidator of the same estate. Note that where the same person who is appointed as a provisional liquidator has been nominated as a liquidator, the court may in terms of section 370 of the Companies Act¹⁴⁸ appoint such a person as a liquidator. Once a person has been appointed as a liquidator, the Master issues a certificate to such a person and

¹⁴² Companies Act 61 of 1973.

¹⁴³ Section 366(2) Companies Act 61 of 1973.

¹⁴⁴ Note that in a member's voluntary winding-up, creditors do not have to prove their claims. The liquidator simply settles all outstanding debts, realises the assets and submits his liquidation and distribution account to the Master.

¹⁴⁵ Companies Act 61 of 1973.

¹⁴⁶ Section 368 Companies Act 61 of 1973.

¹⁴⁷ Section 364 Companies Act 61 of 1973.

¹⁴⁸ Companies Act 61 of 1973.

the person appointed must then publish a notice of his appointment in the *Government Gazette* and give notice of his appointment to the Registrar,¹⁴⁹ now the CIPC.

There are two ways by which the Master can appoint a liquidator, although not regulated by any statute in South Africa. They include either through the Master's panel, of trustees or liquidators, or through the requisition system. The Master's panel is a register of suitable persons whom the Master is of the view, are qualified to be appointed after, an application has been made by such individuals to the Master, to be included on his panel, and an interview of such individuals has been conducted by personnel from the Master's office, and one or two members of the South African Restructuring Insolvency Practitioners Association(SARIPA, formerly known as AIPSA), or the Association of Black Insolvency Practitioners(AABIP), or both.

The requisition system on the other hand entails the submission of nominations by the creditors of the estate as to who they want to be appointed as a liquidator. The requisitions are then scrutinised to find out which insolvency practitioner received the majority votes in number or value, and the person with the highest votes is usually in some cases appointed as a provisional liquidator or a liquidator. Some of the challenges faced by the requisition system as stated by Calitz¹⁵⁰ include the fact that the Master is not bound by the requisition system, and has an unfettered discretion to appoint anyone, even someone who received no requisition from the creditors of the estate. There have also been cases of the submission of false requisitions and the duplication of requisitions in various estates. Some of the inherent weaknesses associated with the system include the fact that requisitions are not made under oath which makes the content of many of them questionable, the requisition system encourages active touting amongst insolvency practitioners, in that creditors are actively canvassed for their support in the 48 hours following the granting of a sequestration or liquidation order, there is no credible system at the master's office for the monitoring of requisitions submitted, which often results in submitted requisitions being "lost" in the system, since there is actually no way of verifying the requisitions that have been submitted in the 48-hour period, which in a way allegedly results in false requisitions being submitted.

¹⁴⁹ Section 375 Companies Act 61 of 1973.

¹⁵⁰ Calitz JC and Burdette DA "The appointment of insolvency practitioners in South Africa: A time for change?" (2006) 4 TSAR 734-735

It would be fair to state that the appointment of insolvency practitioners/liquidators in insolvent estates or companies in South Africa is a controversial subject, and this is due to the continuous allegations of the irregularities and corruption that accompany such appointments. One such controversy is the lack of a regulatory body tasked with the appointment of insolvency practitioners in South Africa.

There has also been a lot of controversy surrounding the Master's reputation as an insolvency regulator in South Africa, and Calitz¹⁵¹ submits that this is due to the fact that the Master is burdened with the task of not only regulating the appointment of insolvency practitioners in South Africa, but also with preserving the good name of the field without all the necessary infrastructure and resources to do so which puts the Master in a very difficult position. Loubser¹⁵² also stated that although the provisions of section 381 of the Companies Act¹⁵³ provides for some form of control over liquidators by the Master, it is doubtful whether the Master's office has the capacity to exercise any powers under this provision. Further, the unfettered discretion of the Master to appoint a person as a liquidator is checked by the provisions of section 5(1) of the Promotion of Administrative Justice Act 3 of 2000, which provides that "Any person whose rights have been materially and adversely affected by an administrative action, and who has not been given reason for the action, may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action. In light of the above provisions, the Master may be compelled to provide reasons for appointing a specific person or refusing to appoint a specific person as provisional liquidator, thus putting the Master in a difficult position with regard to appointments.

In a bid to regulate the appointment of some of these functionaries in insolvency, Loubser¹⁵⁴ highlights the introduction of the Judicial Matters Amendment Act 16 of 2003 which authorises the Minister to determine policies aimed at creating a uniform procedure for the appointment of insolvency practitioners in all offices of the Masters of the High court' thereby promoting fairness, transparency and equality in the appointment of insolvency practitioners.

¹⁵¹ Calitz JC "Some thoughts on state regulation of South African insolvency law" (2011) *De Jure* 19

¹⁵² Loubser A "An International perspective on the regulation of insolvency practitioners" (2007) *South African Mercantile Law Journal* 123

¹⁵³ Companies Act 61 of 1973.

¹⁵⁴ *Supra* note 152.

Loubser¹⁵⁵ also stated that due to the unregulated methods involved in the appointment of insolvency practitioners in South Africa, and in a bid to regulate insolvency procedures in South Africa, the Draft Insolvency Bill¹⁵⁶ sought to include a provision that any person who was not a member of a professional body recognised by the Minister of Justice for this purpose would be disqualified from appointment.¹⁵⁷ It is worth mentioning to say that the new Companies Act¹⁵⁸ in terms of section 138(1) (a) of the Companies Act,¹⁵⁹ makes similar provisions with that stated above, by providing that a person may be appointed as a business rescue practitioner, only if that person is a member in good standing of a legal, accounting or business management profession accredited by the Commission...”.¹⁶⁰

Another policy document was introduced by the Minister aimed at creating transformation in the insolvency industry regarding race and gender. This policy document sought to ensure the participation of previously disadvantaged insolvency practitioners in the administration of insolvent estates by the appointment of a previously disadvantaged insolvency practitioner with an experienced insolvency practitioner. The policy document stipulates that in all estates above R5 million, the Master is obliged to appoint a previously disadvantaged individual as co-trustee or co-liquidator. The idea behind the policy document is to ensure that previously disadvantaged individuals are co-appointed with experienced practitioners who can in turn train the previously disadvantaged insolvency practitioners co-appointed in an insolvent estate a type of in-house training. Once the previously disadvantaged insolvency practitioner has gained sufficient experience, he or she can take up appointments on his or her own.¹⁶¹

2.1.7 General Powers and duties of liquidator

One of the first duties of the liquidator after his appointment is to take control of the affairs of the company,¹⁶² to take possession of the assets of the company and to realise those assets, to

¹⁵⁵ Supra note 152.

¹⁵⁶ South African Law Reform Commission *Review of the law of insolvency: Draft insolvency bill and explanatory memorandum*, working paper 66, Project 63 (1996).

¹⁵⁷ Clause 53(1) (a) Draft Insolvency Bill.

¹⁵⁸ Companies Act 71 of 2008.

¹⁵⁹ Companies Act 71 of 2008.

¹⁶⁰ Section 138(1) (a) Companies Act 71 of 2008.

¹⁶¹ Calitz JC and Burdette DA “The appointment of insolvency practitioners in South Africa: A time for change?” (2006) 4 TSAR 721-751.

¹⁶² Section 363(5) Companies Act 61 of 1973.

distribute the proceeds of the assets among the creditors in accordance with their claims and to distribute the surplus that remains after all the creditors have been paid among the members or shareholders of the company. Other duties include collecting the debts of the company, paying the cost of liquidation and all other charges associated with the liquidation process,¹⁶³ ensuring that the creditors of the company receive a not negligible dividend,¹⁶⁴ furnishing the Master with all necessary information, in a bid to assist him in the performance of his duties,¹⁶⁵ keeping records in a book of all monies, goods, books, etcetera received by him in the exercise of his duty on behalf of the company, opening a current account on behalf of the company, depositing all monies received by him and also opening a savings account or an interest-bearing account in which all monies which are not being used by the liquidator at that point are deposited. The liquidator may not withdraw any money from the interest-bearing account or saving account except if he wants to transfer the money to the current account.¹⁶⁶ He reports on the affairs of the company by examining the affairs of the company to determine whether any of the directors has contravened any provision of the act or has committed any offence.¹⁶⁷ The liquidator must, except in the case of a members' voluntary winding-up, submit a report to a general meeting of creditors within three months of his or her appointment.¹⁶⁸

The powers of the liquidator, provided for by section 386 of the Companies Act 61 of 1973, include the following: the power to make an arrangement with creditors, submit disputes to arbitration, sell any movable or immovable property of the company by public auction, public tender or private treaty and to deliver the property, terminate a lease under which the company has hired movable or immovable property, and to execute any deed in the name of the company, receipt or other document using the companies seal, etcetera.

2.1.8 Interrogation and inquiry

In a bid to obtain information's regarding the affairs of a company which is unable to pay its debts and under winding-up, section 414(1)(a) or (b) of the Companies Act,¹⁶⁹ makes provision

¹⁶³ Section 391 Companies Act 61 of 1973.

¹⁶⁴ *James v The Magistrate of Wynberg* 1995 (1) SA 1 (C).

¹⁶⁵ Section 392 Companies Act 61 of 1973.

¹⁶⁶ Section 394 Companies Act 61 of 1973.

¹⁶⁷ Sections 400-401 Companies Act 61 of 1973.

¹⁶⁸ Section 402(a) (i) Companies Act 61 of 1973 establishes in detail the issues the report deals with.

¹⁶⁹ Companies Act 61 of 1973.

to the fact that every director and officer of the company shall be required to attend the first and second meeting of the creditors, and any such meetings which the liquidator has requested him to attend, except if the liquidator after due consultation, has authorised him to be absent from the meeting. The Master may also subpoena any person who is known to be in possession of the property of the company, or is indebted to the company, or is in the opinion of the Master able to give valuable information regarding the affairs of the company.¹⁷⁰

The Master or officer presiding at the meetings of creditors, may in terms of section 415(1) of the Companies Act¹⁷¹ call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who might have been subpoenaed to the meeting.¹⁷² The Master or such officer and any liquidator or any creditor who has proved his claim may interrogate any director or subpoena any person for interrogation for the purpose of finding out about the company, its business or affairs or its property.¹⁷³ Note, however, that a person being interrogated is not entitled to refuse to answer any question solely on the basis that the answer could incriminate him.¹⁷⁴ If, however, he refuses to answer such questions on the grounds that it could incriminate him, the Master or presiding officer may compel him to answer such questions, after due consultation with the Director of Public Prosecutions having jurisdiction.¹⁷⁵

An inquiry may be conducted by the Master or the court and is similar to an interrogation in many ways. The Master or the court may at any time after the winding-up order has been granted, hold an inquiry or appoint a commissioner to hold an inquiry into the affairs, property, dealings or trade of the company, etcetera.¹⁷⁶ Note that unlike an interrogation where only the director or any person who has knowledge about the company is subpoenaed, an inquiry allows a director or officer of the company, any person known or suspected to have in his possession any property of the company or who is indebted to the company or any person who is capable to give information concerning the trade, dealings affairs or property of the company to be summoned.

¹⁷⁰ Section 414(2) (a) or (b) Companies Act 61 of 1973.

¹⁷¹ Companies Act 61 of 1973.

¹⁷² Section 414(2) (a) & section 415(1) Companies Act 61 of 1973.

¹⁷³ Section 415(1) Companies Act 61 of 1973.

¹⁷⁴ Section 415(3) Companies Act 61 of 1973.

¹⁷⁵ Note that section 415(5) & section 415(5) Companies Act 61 of 1973 which provides that incriminating evidence obtained directly from an interrogation is not admissible in criminal proceedings against the examinee/person examined or the company of which he was an officer, other than proceedings for perjury and related offences.

¹⁷⁶ Section 417 Companies Act 61 of 1973.

The presiding officer in an inquiry must see to it that the inquiry is not conducted in an oppressive, vexatious or unfair manner.¹⁷⁷

2.1.9 Impeachable transactions

As was mentioned earlier, the Companies Act¹⁷⁸ and the new Companies Act,¹⁷⁹ provides for the application of the Insolvency Act,¹⁸⁰ to apply *mutatis mutandis* to certain aspects not covered by the new Companies Act,¹⁸¹ and the Companies Act,¹⁸² by virtue of section 339 of the Companies Act.¹⁸³ Section 340 of the Companies Act,¹⁸⁴ which deals with the setting aside of voidable transactions entered into by the companies, also makes use of the provisions of the insolvency laws in terms of section 26(Disposition without value), section 29(Voidable preference), section 30(Undue preference) and section 31(Collusion) to apply *mutatis mutandis* to the disposition and setting aside of impeachable transactions regarding a company under liquidation.¹⁸⁵

2.1.10 Application of proceeds of securities and contribution

Section 342 of the Companies Act,¹⁸⁶ makes provision to the effect that in the winding up of a company, the assets shall be applied in the payment of cost, charges and expenses incurred in the winding-up, including claims of creditors, as they would be applied in the payment of cost of sequestration and claims of creditors under the laws relating to insolvency and unless their memorandum of incorporation or articles of association provides otherwise, shall be distributed amongst members according to their rights and interest in the company.¹⁸⁷ The provisions for the application of proceeds of securities vis a vis the ranking of claims in the Insolvency Act,¹⁸⁸ are provided for in sections 96 to 102 of the Act, which shall be ranked according to that provided in

¹⁷⁷ *Lategan & Others v Lategan NO & Others* 2003 (6) SA 611 (D) 623-625.

¹⁷⁸ Companies Act 61 of 1973.

¹⁷⁹ Companies Act 71 of 2008.

¹⁸⁰ Insolvency Act 24 of 1936.

¹⁸¹ Companies Act 71 of 2008.

¹⁸² Companies Act 61 of 1973.

¹⁸³ Companies Act 61 of 1973.

¹⁸⁴ Companies Act 61 of 1973.

¹⁸⁵ Section 340(1) of the Companies Act 61 of 1973, provides that “Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition”.

¹⁸⁶ Companies Act 61 of 1973.

¹⁸⁷ Section 342(1) Companies Act 61 of 1973.

¹⁸⁸ Insolvency Act 24 of 1936.

the Insolvency Act¹⁸⁹. Section 103 of the Insolvency Act,¹⁹⁰ makes provision for the payment of non preferent claims, while section 106 of the insolvency Act,¹⁹¹ makes provisions for contribution by creditors towards the cost of sequestration, when the amount in the free residue is not sufficient to defray the cost, which has also been made applicable to the winding-up of companies in terms of section 343(2) of the Companies Act.¹⁹²

2.1.11 Liquidation and distribution account

In the winding-up of any company, the liquidator must prepare liquidation and distribution account within six months of his appointment and lodge it with the Master. The Master may grant the liquidator an extension of time within which to lodge the account.¹⁹³ The account must lie open for inspection for a period of no less than 14 days at either the Master's office or the office of the district where the registered office of the company is located, and if there is no Master's office in that district the office of the magistrate in any district in which the company carried on its business will suffice.¹⁹⁴ Any person having an interest in the company may inspect the account and lodge a motivated objection to it.¹⁹⁵ The Master has discretion to either reject the objection or sustain it, in which case the Master may direct the liquidator to amend the account.¹⁹⁶ Any person aggrieved by the decision of the Master may apply to the High Court within 14 days after the Master's decision.¹⁹⁷

¹⁸⁹ Section 96 to 102 of the Insolvency Act 24 of 1936 provides as follows, funeral and deathbed expenses-section 96, cost of sequestration-section 97, cost of execution-section 98, preference in regards to certain statutory obligations example, amount for value added tax etc-section 99, salary and wages of former employees of the insolvent-section 100, preference in regards to taxes on persons or the income or profits of persons-section 101, preference under a general bond-section 102.

¹⁹⁰ Section 103 of the Insolvency Act 24 of 1936 makes provision for non preferent claims to be paid.

¹⁹¹ Insolvency Act 24 of 1936.

¹⁹² Companies Act 61 of 1973.

¹⁹³ Sections 403(1) & section 404 Companies Act 61 of 1973.

¹⁹⁴ Section 406(1) Companies Act 61 of 1973.

¹⁹⁵ Section 407(1) Companies Act 61 of 1973.

¹⁹⁶ Section 407(2) Companies Act 61 of 1973.

¹⁹⁷ Section 407(4) Companies Act 61 of 1973; *Van Zyl NO v The Master* 2000 (3) SA 602 (C) 607 where the court held that in the exercise of its powers under section 407(4) of the Companies Act 1973, it is always reluctant to interfere with the Master's ruling and substitute its opinion for that of the Master, and will do so only if new facts have been placed before it or the ruling in question is clearly tainted with irregularities or errors.

After the account has been laid open for inspection and all objections against the account have been disposed of, the Master confirms the account and such confirmation has the status of a final judgment.¹⁹⁸

2.1.12 Distribution of assets of a company

The distribution of the assets of the company occurs after the account has been confirmed. The liquidator is required to distribute the assets or collect any contribution, if necessary, in accordance with section 409 of the companies Act¹⁹⁹ and, except where the articles of association of the company or the memorandum of association of the company provides otherwise, distribute any asset that remains after all the creditors and all cost has been paid among the members according to their rights and interests in the company.²⁰⁰ Once a liquidator has performed all his prescribed duties and met all the requirements of the Master, he is entitled to a certificate releasing him from any further duties.²⁰¹

2.1.13 Dissolution, deregistration of companies and removal from register

When an insolvent company has been completely wound up, the Master must send a copy of the certificate of winding up to the commission who shall in turn upon receipt of the certificate, record the dissolution of the company in the prescribed manner, and remove the company's name from the companies register.²⁰² Note however that an interested party may apply to reinstate the registration of a company which had been deregistered by the commission.²⁰³

The effects of the removal of the company name from the register, is that the removal of the company's name from the register, does not affect the liability of any former director or shareholder of the company or any other person, in respect of any acts or omission that took place before the company was removed from the register.²⁰⁴ Any liability of the company continues and may be enforced as if the company had not been removed from the register.²⁰⁵

¹⁹⁸ Section 408 Companies Act 61 of 1973.

¹⁹⁹ Companies Act 61 of 1973.

²⁰⁰ Section 342 Companies Act 61 of 1973.

²⁰¹ Section 385 Companies Act 61 of 1973.

²⁰² Section 82(1) & (2) (a) & (b) Companies Act 71 of 2008.

²⁰³ Section 82(4) Companies Act 71 of 2008.

²⁰⁴ Section 83(2) Companies Act 71 of 2008.

²⁰⁵ Section 83(3) Companies Act 71 of 2008.

2.1.14 Personal liability of directors

The personal liability of directors in a company has become a very important issue to be considered and has gained a lot of momentum due to the coming into effect of the new Companies Act.²⁰⁶ The Act has a significant impact on the liabilities of a director in the corporate world in South Africa and it places an obligation on directors to take immediate action to place their companies into business rescue or liquidation or to stop trading altogether when they see the warning signs; failure to do so will result in the personal liability of the directors for the debts of the company in instances where the company is liquidated. Section 424(1) of the previous Companies Act²⁰⁷ which provides for the personal liability of a director in the liquidation of a company, provides that if it appears that during a winding up of a company or otherwise, the business of the company has been carried on recklessly or with the intent to defraud creditors or officers concerned for all of the debts of the company, the directors shall be held personally liable for their negligent behaviours in handling the affairs of the company.²⁰⁸ Note however that section 424 of the Companies Act,²⁰⁹ which contains provisions for the personal liability of directors who carried on the business of the company recklessly or fraudulently, shall continue to apply where relevant, in spite of the introduction of the new companies Act²¹⁰ due to the provisions of section 79(2) of the Companies Act,²¹¹ read with item 9 of Schedule 5 which makes it applicable as mentioned earlier in this research.

Important sections in the Companies Act²¹² which apply to the directors of a company are sections 76 of the Companies Act,²¹³ which sets standards of director's conduct, and section 77 of the Companies Act,²¹⁴ which provides for the liability of the director and prescribed officer for loss or damage against the company, read together with section 22(1) of the Companies Act,²¹⁵

²⁰⁶ Companies Act 71 of 2008.

²⁰⁷ Companies Act 61 of 1973.

²⁰⁸ Fourie NO v Newton (2011) 2 All SA 265 (SCA).

²⁰⁹ Companies Act 61 of 1973.

²¹⁰ Companies Act 71 of 2008.

²¹¹ Companies Act 71 of 2008.

²¹² Companies Act 71 of 2008.

²¹³ Companies Act 71 of 2008.

²¹⁴ Companies Act 71 of 2008.

²¹⁵ Section 22(1) of the Companies Act 71 of 2008 provides that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person, or for any fraudulent purpose.

²¹⁵ Companies Act 71 of 2008.

which provides that a company must not carry on its business recklessly, with gross negligence, and with intent to defraud any person, or for any fraudulent purpose.

A director has a duty to request the board in terms of section 129 of the Companies Act²¹⁶ to voluntarily pass a resolution to put the company under supervision, if the board has reasonable grounds to believe that the company is financially distressed or that there appears to be a reasonable prospect of rescuing the company²¹⁷ or decide to apply for the winding up of the company as soon as he or she becomes aware that the company is either financially distressed or is trading in insolvent circumstances. However, where a company is financially distressed and the board of the company decides not to place the company under business rescue the board must in terms of section 129(7) of the Companies Act²¹⁸ deliver a written notice to each affected person, providing reasons as to why the financially distressed company is not being placed under business rescue. Levenstein in his article “South Africa: The new Companies Act, No 71 of 2008-Reckless Trading And The Personal Liability of Directors”,²¹⁹ stated that the test for determining whether the affairs of the company is being carried on in a reckless or negligent manner as contemplated in section 22(1) & section 77(3)(b) of the Companies Act,²²⁰ and to ascertain whether the directors of the company should be held personally liable, is whether a reasonable businessman standing in the shoes of the director, is of the opinion that there is no likelihood of the creditors of the company receiving any payment when due.²²¹

There are, however, certain defences available to the directors in terms of section 77(9) and (10) of the Companies Act.²²² A reasonable behaviour on the part of the directors of the company can be deduced from the fact that the director, in carrying out the business of the company, has shown a genuine concern for the future growth of the company and has made certain decisions in the interest of the company. This test is regarded as an objective test, and therefore means that if it can be shown that the directors of the company have fulfilled all their common-law fiduciary

²¹⁶ Companies Act 71 of 2008.

²¹⁷ Section 129(1) (a) & (b) Companies Act 71 of 2008.

²¹⁸ Companies Act 71 of 2008

²¹⁹ <http://www.mondaq.com/x/140688/corporate+company+law+the+new+Company+Act+71+of+2008+Reckless+Trading+And+The+Personal+Liability+Of+Director.html> (accessed 17 July 2013)

²²⁰ Companies Act 71 of 2008

²²¹ Section 214 of the Companies Act 71 of 2008 provides that a director (or any person) shall be guilty of a criminal offence if he or any other person carries on the business of the company while fully aware that the company can no longer pay its debts.

²²² Companies Act 71 of 2008

duties towards the company and has conducted the affairs of the company in accordance with a sound business practice, the directors can use provisions set out in section 77(9) of the Companies Act²²³ as a defence.²²⁴

Finally, it is worth mentioning that directors could in terms of section 78 of the Companies Act²²⁵ be indemnified from certain actions taken by them during the course of the running of the company. Such indemnity could take the form of an insurance taken on behalf of the director to protect him from cases of negligence, wilful misconduct or breach of trust that may occur during the running of the company.²²⁶

2.2 STRUCTURE OF CORPORATE INSOLVENCY LAW IN NIGERIA

The Nigerian corporate insolvency procedures are regulated mainly by the Constitution of the Federal Republic of Nigeria 1990, the Companies and Allied Matters Act Cap C20 LFN 2004, and Winding-up Rules 2001 otherwise known as The Rules made pursuant to the Companies and Allied Matters Act²²⁷ provides for rules governing the winding-up of companies in Nigeria.

The liquidation, bankruptcy, restructuring and business rescue processes have been very slow on the economic growth of the society, which has led many commentators such as members of the Business Recovery Insolvency Practitioners Association of Nigeria (BRIPAN, similar to SARIPA-South African Restructuring Insolvency Practitioners Association, and is also a member of INSOL), to include as part of their objectives, the urgent need to impact legislative reform by evaluating and focusing attention on the development of the Nigerian law in areas of bankruptcy, receivership and liquidations, business restructuring and turn around management.²²⁸

²²³ Companies Act 71 of 2008.

²²⁴ Section 77(9) of the Companies Act 71 of 2008 provides that “In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or in part, from any liability set out in this section, or on any terms the court considers just, if it appears to the court that the director has acted honestly and reasonably, or having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.”

²²⁵ Companies Act 71 of 2008.

²²⁶ Section 78(2), (3), (4), (5) & (6) (a)-(b) Companies Act 71 of 2008.

²²⁷ Companies and Allied Matters Act Cap C20 LFN 2004; Others Acts which could be made applicable include the Investment and Securities Act 2007, which makes provisions for mergers and acquisitions, and the Asset Management Corporation of Nigerian Act 2010 (AMCON), which has assisted greatly in the rescue of banks in Nigeria

²²⁸ Akinwunmi S and Busari T “Insolvency Practice in Nigeria: The Nigerian Experience”

<http://www.akinwunmibusari.com/images/documents/insolvency%20practice%20in%20The%20Nigerian%20experience.pdf>. (accessed 17 July 2013)

The gateway to corporate insolvency in Nigeria is the Federal High Court of Nigeria by virtue of section 251 of the Constitution of the Federal Republic of Nigeria, which vests the Federal High Court with exclusive jurisdiction to handle all matters relating to insolvency.²²⁹

2.2.1 WINDING-UP OF INSOLVENT COMPANIES

A company may either be wound up:

- by the court;
- by a voluntary winding-up or
- Under the supervision of the court.²³⁰

2.2.1.1 Winding-up by court

Section 408 of the Companies and Allied Matters Act Cap C20 LFN 2004 specifically sets out circumstances in which a company would be wound up by the court and this has been provided for as follows:

The company has by special resolution resolved that the company be wound up by the court where

- a) default is made in delivering the statutory report to the Commission or in holding the statutory meeting;
- b) the number of members is reduced to below two;
- c) the company is unable to pay its debts;
- d) the court is of the opinion that it is just and equitable that the company should be wound up.

With regard to instances where the company is unable to pay its debts, section 409 of the Companies and Allied Matters Act Cap C20 LFN 2004 further provides for circumstances in which a company is unable to pay its debt:

- a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding 2,000 Naira then due, has served on the company, by leaving it at its registered

²²⁹ Section 407 Companies and Allied Matters Act Cap C20 LFN 2004(CAMA) & section 251 of the Constitution of the Federal Republic of Nigeria.

²³⁰ Section 401 Companies and Allied Matters Act Cap C20 LFN 2004.

office or head office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

- b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- c) The court, after taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debts.

In terms of Rule 16 of The Rules,²³¹ the Registrar after consultation with the Chief Judge or any other Judge in charge shall appoint the time and place at which a petition presented at the court's registry will be heard.²³² The petition shall, unless it was presented by the company, be served upon the company at their registered office and if there is no registered office, then at the last known place of business of the company.²³³

2.2.1.2 Voluntary winding-up

Section 457 of the Companies and Allied Matters Act Cap²³⁴ provides for the voluntary winding-up of a company.²³⁵ It further provides that a voluntary winding-up could be either through a creditors' voluntary winding-up, the procedures of which are governed by sections 472 to 478 of the Companies and Allied Matters Act,²³⁶ or through a members' voluntary winding-up to which sections 463 to 470 of the Companies and Allied Matters Act²³⁷ apply.

Declaration of solvency

In the voluntary winding-up of a company, directors of the company may make a statutory declaration – known as a declaration of solvency – that they have made full inquiry into the affairs of the company and that in their opinion the company will be able to pay its debt in full

²³¹ The Winding up Rules 2001.

²³² Rule 16(1) The Winding up Rules 2001.

²³³ Section 17(1)-(2) The Winding-up Rules 2001.

²³⁴ Companies and Allied Matters Act Cap C20 LFN 2004.

²³⁵ “[W]hen the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on occurrence of which the articles provided that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;” or “If the company resolves by special resolution that the company be wound up voluntarily; and references in this Decree to a ‘resolution for voluntary winding-up’ means a resolution passed under any of the paragraphs of this section”.

²³⁶ Companies and Allied Matters Act Cap C20 LFN 2004(CAMA)

²³⁷ Companies and Allied Matters Act Cap C20 LFN 2004(CAMA)

within a period not exceeding 12 months after the commencement of the winding-up proceedings.²³⁸ However, the declaration of solvency must have been made five weeks immediately after the resolution for winding-up of the company was made, delivered at the Corporate Affairs Commission (similar to CIPRO at the Department of Trade and Industry in South Africa), and registered at the CAC, within that period.²³⁹ The Corporate Affairs Commission is a regulatory body charged with the regulation and supervision of the formation, incorporation, registration, management and winding-up of companies in Nigeria. Furthermore, the declaration of solvency must in terms of section 462(2) (b) of the Companies and Allied Matters Act²⁴⁰ contain a statement of the company's assets and liabilities.²⁴¹

Note that in making a declaration of solvency, a director could be held guilty of an offence, and liable on conviction to a fine of a certain amount or imprisonment for a term of three months, or both, if such a director made a declaration without having reasonable grounds supporting the opinion that the company will be able to pay its debts in full within the time specified in the declaration, or if however the company is wound up in pursuance of a resolution passed within the period of five weeks after the making of such declaration, where in terms of section 462(3) of the Companies and Allied Matters Act,²⁴² the company's debts are not paid in full within the period stated in the declaration, it shall be presumed until the contrary is proved, that the directors did not have reasonable grounds for his opinion.

2.2.1.3 Winding-up subject to supervision of court

This occurs where a company has passed a resolution for the voluntary winding-up of the company, but based on a petition the court may make an order that the voluntary winding-up process shall continue, but subject to the supervision of the court.²⁴³

²³⁸ Section 462(1) Companies and Allied Matters Act Cap C20 LFN 2004.

²³⁹ Section 462(2) (a) & (b) Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴¹ Section 462 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴² Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴³ Sections 486–490 Companies and Allied Matters Act Cap C20 LFN 2004.

2.2.2 Commencement of winding-up process

A winding-up by the court shall be deemed to have commenced at the presentation of the petition for winding-up at the court,²⁴⁴ while a voluntary winding-up shall be deemed to have commenced at the time of the passing of a resolution by the directors.²⁴⁵

Some of the consequences of presenting a petition for winding-up have been provided for in section 412, 413, 414 and 417 of the Companies and Allied Matters Act,²⁴⁶ as follows. Section 412 of the Companies and Allied Matters Act²⁴⁷ provides that “where a winding-up petition has been presented and an action or other proceeding against a company is instituted or pending in any court (in this section referred to as “the court concerned”), the company or any creditor or contributory may, before the making of the winding-up order, apply to the court concerned for an order staying proceedings; and the court concerned may, with or without imposing terms, stay or restrain proceedings, or if it thinks fit, refer the case to the court hearing the winding-up petition. Section 413 of the Companies and Allied Matters Act,²⁴⁸ further provides that “in a winding-up by the court, any disposition of the property of the company, including things in action and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up shall, unless the court otherwise orders, be void”. So also, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void.²⁴⁹

Note however that section 412 as stated above differs from the provisions of section 417 of the Companies and Allied matters Act.²⁵⁰ This because section 417 of the Companies and Allied Matters Act,²⁵¹ provides that “If a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the Court may impose”. This section serves

²⁴⁴ Section 415(2) Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴⁵ Section 459 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴⁶ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴⁷ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴⁸ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁴⁹ Section 414 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁵⁰ Section 417 Companies and Allied Matters Act Cap C20 LFN 2004 provides as follows “If a winding up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the Court may impose”.

²⁵¹ Companies and Allied Matters Act Cap C20 LFN 2004.

as a moratorium to a company under winding up proceedings, and serves to protect the general interest of all the creditors in the winding-up.

2.2.3 Statement of affairs

In the winding-up of a company subject to an order of the court, the official receiver may require a person under section 420 of Companies and Allied Matters Act,²⁵² to submit a statement of affairs for the purpose of ascertaining the affairs of the company.²⁵³ Where any person requires an extension of time to submit the statement of affairs, he can apply to the official receiver for an extension of time within which to lodge the statement of affairs. The official receiver may, if he thinks fit, give a written certificate extending the time within which to lodge the statement.²⁵⁴ The official receiver may also request that certain persons be called to give information regarding the statement of affairs.²⁵⁵

2.2.4 Proof of claims

In a winding-up of a company subject to an order of court, every creditor shall prove his debt except if the judge in any particular winding-up procedure states that the debt of any creditor or class of creditor shall be admitted without proof.²⁵⁶ A debt may be proved in any winding-up process by delivery of the proof, sending the proof through the post or by lodging an affidavit verifying the debt.²⁵⁷ Note that in a winding-up by the court, the affidavit verifying the debt to prove a claim against the company, is usually sent to the Official receiver or if a liquidator has been appointed, to a liquidator, and in the case of any other winding-up procedures i.e. voluntary winding-up and winding-up subject to the supervision of the court, the affidavit is sent to the liquidator.²⁵⁸ The liquidator can accept or reject the claims proved and any creditor or contributory who is dissatisfied with the liquidator's decision can apply to court to have it reversed.²⁵⁹

²⁵² Companies and Allied Matters Act Cap C20 LFN 2004.

²⁵³ Rule 35 The Winding-up Rules 2001.

²⁵⁴ Rule 36 The Winding-up Rules 2001.

²⁵⁵ Rule 35(3) & 37 The Winding-up Rules 2001.

²⁵⁶ Rule 74 The Winding-up Rules 2001.

²⁵⁷ Rule 75(1) The Winding-up Rules 2001.

²⁵⁸ Rule 75(2) Winding-up Rules 2001.

²⁵⁹ Rules 90-91 The Winding-up Rules 2001.

2.2.5 Meetings

The timing of any meeting in the winding-up process is based on the type of winding-up process that is being applied to the winding-up of the company. The court may also direct that a meeting of creditors or contributories be held in terms of section 519(1) of the Companies and Allied Matters Act²⁶⁰ solely for the purpose of ascertaining the wishes of the creditors,²⁶¹ And may appoint a person to act as a chairman of the meeting and report the result of the meeting to the court. At a meeting of creditors, a resolution shall be deemed to have been passed when a majority in number and value of the creditors present personally, or by proxy, has voted in favour of the resolution. At a meeting of the contributories a resolution shall be deemed to have passed when a majority in number and value of the contributories present personally, or by proxy, have voted in favour of the resolution – the value of the contributories being determined according to the number of votes conferred on each contributory by the regulations of the company.²⁶²

2.2.6 Appointment of official receiver, provisional liquidator, special manager and liquidator

The Companies and Allied Matters Act Cap C20 LFN 2004 (CAMA) and the Winding-up Rules 2001 made pursuant to the Companies and Allied Matters Act,²⁶³ provides for the appointment of an official receiver, provisional liquidator, special manager and liquidator in any winding-up process.

2.2.6.1 Appointment of official receiver

The official receiver is the deputy Chief Registrar of the Federal High Court, or an officer of the court designated for that purpose by the Chief Justice of the Federal High Court, in the winding up of a company.²⁶⁴ Section 420 to 421 of the Companies and Allied Matters Act²⁶⁵ makes provisions for the appointment of an official receiver in a winding-up of a company by the court. The Official receiver has been observed in my opinion, to be similar to the Master of the High

²⁶⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁶¹ Section 110 The Winding-up Rules 2001.

²⁶² Rules 117-118 The Winding-up Rules 2001.

²⁶³ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁶⁴ Section 419 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁶⁵ Companies and Allied Matters Act Cap C20 LFN 2004.

Court in South Africa, because of the functions he performs in a winding-up of a company. Note that an official receiver is not usually appointed in a voluntary winding-up of a company, or a winding-up of a company subject to the supervision of the court, and is only appointed in a winding-up by the court. He may, however, be appointed where an application is made to the court to appoint a receiver on behalf of debenture holders or other creditors of a company which is being wound up.²⁶⁶

2.2.6.2 Appointment of provisional liquidator

Under the Winding-up Rules 2001, a provisional liquidator is usually appointed based on the discretion of the court and upon application by a creditor, a contributory or the company itself. A provisional liquidator is usually appointed after the advertisement of a petition for the winding-up of the company. The order appointing the provisional liquidator usually states the nature and a short description of any other property in respect of which the provisional liquidator is to perform certain duties on as prescribed by the Winding-up Rules 2001.²⁶⁷

2.2.6.3 Appointment of liquidator

Section 422 of the Companies and Allied Matters Act,²⁶⁸ widely provides for the appointment of a liquidator in the liquidation of a company. A liquidator is also appointed by the court for the purpose of conducting the winding-up proceedings and performing such duties as the court may impose., and in the case of a vacancy, the official receiver shall by virtue of his office act as a liquidator, until such a time that the vacancy is filled.²⁶⁹

Where a person other than the official receiver has been appointed, he shall not in terms of section 422(3) (d) of the Companies and Allied Matters Act,²⁷⁰ be able to act in that capacity, until he has notified the Corporate Affairs Commission of his appointment, and furnished security in the prescribed manner to the satisfaction of the courts., who is an officer of the courts. The Winding-up Rules 2001, further provides that the Registrar is required to issue a certificate stating that security has been furnished by the liquidator or special manager and a copy of the

²⁶⁶ Section 388 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁶⁷ Rule 21 The Winding-up Rules 2001.

²⁶⁸ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁶⁹ Section 422(1) Companies and Allied Matters Act Cap C20 LFN 2004.

²⁷⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

certificate is to be filed in the case file.²⁷¹ If a liquidator or special manager fails to furnish any security, the official receiver shall report such failure to the court which may thereupon rescind the order appointing the liquidator or special manager.²⁷²

The Winding-up Rules 2001 prescribe certain duties of the liquidator, which include, to collect the assets of the company and the power to use those assets in the discharge of the company's liabilities subject to the control of the court,²⁷³ provided all amounts due to the official receiver, i.e. charges, fees, etcetera, incurred by the official receiver while in possession of the assets of the estate or in the discharge of his duty, are paid by the liquidator. The Winding-up Rules 2001 provide that the official receiver has a lien on all the assets of the company until the balance due to him has been paid.²⁷⁴ In selling the assets of the estate, the liquidator or any member of the committee of inspection shall not purchase any of the assets except with leave of court,²⁷⁵ and where it is sold by an auctioneer or agents, all charges or expenses associated with the sale are paid over to the auctioneer or agent after the gross proceeds of the sale have been handed over to the liquidator.²⁷⁶

Note that in the case of a winding up by the courts, the liquidator shall be remunerated with an amount fixed by the committee of inspection or the creditors. If, however, the Minister is of the opinion that the remuneration fixed by the committee of inspection or creditors is too high, he may apply to court to fix a reasonable remuneration for the liquidator.²⁷⁷

2.2.6.4 Appointment of special manager

A special manager is appointed by the official receiver, where the official receiver after his appointment whether as a provisional liquidator or otherwise, may bring an application to court, if satisfied that the nature of the estate is of such that requires the necessary expertise or skills of

²⁷¹ Rule 42 Winding-up Rules 2001.

²⁷² Rule 43 Winding-up Rules 2000; Rule 41(8) of The Winding-up Rules 2001 & section 431 of the Companies and Allied Matters Act Cap C20 LFN 2004 regarding the resignation, removal, etc of a liquidator.

²⁷³ Rule 61-63 Winding-up Rules 2001; sections 439-440 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁷⁴ Rule 149 The Winding-up Rules 2001.

²⁷⁵ Rule 144 The Winding-up Rules 2001.

²⁷⁶ Rule 164 The Winding-up Rules 2001.

²⁷⁷ Rule 142 The Winding-up Rules 2001. Note also Rule 150-151 (resignation of a liquidator from office) of the Winding-up Rules 2001.

an individual to be appointment as a special manager, to handle certain matters relating to the liquidation of the company.²⁷⁸

2.2.7 Impeachable transactions

The Companies and Allied Matters Act,²⁷⁹ provides in terms of section 413 of the Companies and Allied Matters Act,²⁸⁰ that “in a winding-up by the court, any disposition of the property of the company, including things in action and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up shall, unless the court otherwise orders, be void”. Sections 496,497 and 498 of the Companies and Allied Matters Act,²⁸¹ also makes provisions for certain instances where a disposition of an asset of a company under liquidation, shall be regarded as void such as any attachment, execution or sequestration of an estate, after the commencement of a winding-up subject to the supervision of the court shall be regarded as void,²⁸² any floating charge on the property of the company created within three months after the commencement of the winding-up shall also be invalid, except if it can be proved that the immediately after the charge was made, the company was still solvent,²⁸³ and any transaction which constitute fraudulent preference in terms of section 496 of the Companies and Allied Matters Act,²⁸⁴ shall be void.²⁸⁵

2.2.8 Protection of the interest of creditors

The concept of concursus creditorium under the South African laws of insolvency, also finds similar applicability in the Nigerian corporate insolvency system, through the provisions of section 500 of the Companies and Allied Matters Act,²⁸⁶ which aims to protect the overall interest of the creditors of the estate, by providing that “a creditor shall not be entitled to retain the benefit of the execution or attachment against any of the property of the company for any debt due to him by the company provided he had completed such attachment or execution before the commencement of the winding-up proceeding”.

²⁷⁸ Rule 33 The Winding-up Rules 2001.

²⁷⁹ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸¹ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸² Section 497 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸³ Section 498 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸⁴ Section 496(1) & (2) Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸⁵ See section 496 of Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸⁶ Companies and Allied Matters Act Cap C20 LFN 2004.

The court further protects the interest of the creditors, by directing that meetings of creditors be held in order to ascertain their wishes,²⁸⁷ or based on an application by the creditors or contributories of the company; appoint a committee of inspection to act with the liquidator in the winding up process, which shall consist of creditors and contributories.²⁸⁸ Note also section 417 of the Companies and Allied Matters Act,²⁸⁹ which prevents any action or proceedings from being commenced or proceeded against the company, once a winding up order has been granted except with the leave of the court and on such terms as the court may impose. The aim of this section is to provide for a fairer distribution of the assets of a liquidated company amongst its creditors, where the debtor has insufficient assets to settle its debt in full.²⁹⁰

2.2.9 Finalisation of winding-up process

The court's schedule, the estate, creditors and members of a company play a big role in determining when a winding-up process will be finalised. Section 467(1) provides that "subject to the provisions of section 469 of this Decree, in the event of the winding-up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up, and of each succeeding year, or at the first convenient date within 3 months from the end of the year or such longer period as the Commission may allow, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year". Note however that the liquidator may in terms of section 467(2) Companies and Allied Matters Act²⁹¹ be guilty of an offence and liable to a fine, if he fails to comply with this section.

²⁸⁷ Section 519(1)-(3) Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸⁸ Section 433 Companies and Allied Matters Act Cap C20 LFN 2004.

²⁸⁹ Companies and Allied Matters Act Cap C20 LFN 2004.

²⁹⁰ *FMBN v NDIC* (1999) 2 NWLR 591 p 333, where the Supreme Court held that what was prohibited by section 417 of the Companies and Allied Matters Act Cap C20 LFN 2004, where a provisional liquidator is appointed for a company, except with the leave of court, is an action or proceeding pending or instituted in the Federal High Court.

²⁹¹ Companies and Allied Matters Act Cap C20 LFN 2004.

CHAPTER 3: BUSINESS RESCUE PROCEEDINGS

3.1 STATUTORY FRESH START PROCEDURES FOR COMPANIES UNDER THE COMPANIES ACT 71 OF 2008: BUSINESS RESCUE AND COMPROMISE

The introduction of the concept of business rescue is an innovation in South African law. Although the new Companies Act,²⁹² has only been in force for just over 2 years now, the new business rescue procedure provided for in Chapter 6 of the new Companies Act,²⁹³ has already been well utilised. This is evidenced by the decline in the number of liquidations as stated by Cronje,²⁹⁴ in his presentation, that statistics showed in 2012, that about 162 companies were implementing business rescue while only about 104 companies were under liquidation.. Although figures from the Companies and Intellectual Properties Commission (CIPC) based on an audit conducted in August 2012 indicated a 55% increase in the number of businesses that have successfully concluded their rescue operations.²⁹⁵

The new business rescue procedure aims to rescue financially ailing companies which are on the verge of becoming insolvent, where there appears to be a reasonable prospect of rescuing the company or that there could be a better return on the realisation of the assets of the company than would not have been possible under the immediate liquidation of the company as was stated in the definition of business rescue under section 128(b) of the new Companies Act.²⁹⁶ Section 7 which provides for the purpose of the new Companies Act²⁹⁷ provides in subsection (k) of the Companies Act²⁹⁸ “for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all the stake holders”. The Cork Report²⁹⁹ in the United Kingdom also emphasised the importance of ensuring that a viable business is preserved instead of liquidated. According to the Cork report, one of the aims of modern insolvency law is to diagnose and treat an imminent insolvency at an early stage rather than at a later stage.³⁰⁰ In

²⁹² Companies Act 71 of 2008.

²⁹³ Companies Act 71 of 2008.

²⁹⁴ Cronje T M “Liquidation: Its role & place” paper presented at the Business rescue workshop on the 2nd of May 2013.

²⁹⁵ Lothringen A “Going out of business or get rescued what are the odds?” paper presented on behalf of the Companies and Intellectual Properties Commission at the Business rescue workshop on 2nd May 2013.

²⁹⁶ Companies Act 71 of 2008.

²⁹⁷ Companies Act 71 of 2008.

²⁹⁸ Companies Act 71 of 2008.

²⁹⁹ Sir Kenneth Cork CBE *Insolvency law and practice: Report of the review committee* (Cmnd 8558 (1982)).

³⁰⁰ *Supra* note 326.

my opinion, the earlier a company reorganises itself, the better the chances are of it succeeding as a going concern. The procedure under Chapter 6 of the new Companies Act³⁰¹ has been said to be flexible, thereby making it applicable to both companies and close corporations in South Africa.³⁰²

The Companies Act³⁰³ initially provided for judicial management as a form of rescue device, but this has been replaced by Chapter 6 of the new Companies Act.³⁰⁴ The concept of judicial management as a form of rescue device was a process designed to give a company an opportunity to reorganise its affairs and avoid being wound-up. In practice, however, judicial management today is considered as having been a failure and an ineffective mechanism of corporate rescue which thus made it obsolete. The Companies Act,³⁰⁵ in terms of section 311, also provided for a scheme of arrangement with shareholders of the company or a compromise with creditors of a company which has also been replaced by two sections, namely, section 114 of the Companies Act 71 of 2008, which now provides for a scheme of arrangement with shareholders and section 155, which now provides for a compromise with creditors. In certain instances, interested parties do work out a form of rescue plan in advance, that is, a pre-packed arrangement or plan, whereby either the formal rescue procedures or the statutory compromise will be used to implement the plan.³⁰⁶

The new business rescue provision has undoubtedly been considered to be an improvement on the judicial management model that previously existed in South African law as it provides for a form of rescue procedure for financially distressed companies that have the opportunity to escape being liquidated.³⁰⁷

One of the other contributions of the Companies Act³⁰⁸ was the introduction of Chapter 5 of the Act which provides for fundamental transactions and takeovers, such as mergers and schemes of

³⁰¹ Companies Act 71 of 2008.

³⁰² Item 6 Schedule 6 Companies Act 71 of 2008.

³⁰³ Companies Act 61 of 1973.

³⁰⁴ Companies Act 71 of 2008.

³⁰⁵ Companies Act 61 of 1973.

³⁰⁶ Nagel CJ *et al Commercial law* (2012) 594 par 33.158.

³⁰⁷ See *Le Roux Hotel Management (Pty) Ltd v East Rand (Pty) Ltd (FBC Fidelity Bank Ltd (under curatorship) intervening)* 2001 (2) SA 727 (C) at par 37, where it was stated that the concept of judicial management was introduced into South African law in the Companies Act 46 of 1926 as a business rescue provision.

³⁰⁸ Companies Act 71 of 2008.

arrangements. Section 112 to 116 of the Companies Act 71 of 2008 provide for mergers, amalgamations and schemes of arrangements. All these fundamental transactions as stated in the Act are regarded as procedures which have rescue as their peripheral goal which in one way or the other may help to rescue any financially distressed company.

3.1.1 Business rescue in terms of Chapter 6 of the Companies Act 71 of 2008

The term business rescue “means any proceeding aimed at facilitating the rehabilitation of a company that is financially distressed”.³⁰⁹ A company is said to be financially distressed when it appears that it is reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing six months or when it appears that the company is reasonably likely to become insolvent within the immediately ensuing six months.³¹⁰ This means that the companies to which business rescue under Chapter 6 applies are companies which are not yet insolvent but which are nearing insolvency. In order to determine whether a company is insolvent or not, the Act allows the use of a balance sheet or cash flow test to check the actual state of the company.

Business rescue, as provided for under chapter 6 of the new Companies Act,³¹¹ does not apply to business enterprises such as a trust³¹² and this has been regarded as one of the limitations to its applicability in all areas. This is because, owing to the expenses involved in conducting a business rescue i.e. the involvement of the court in almost the whole process, thereby making it expensive, even close corporations may be excluded from making use of the procedure, even if they have access to it. However, some of the characteristics of a modern and effective business rescue mechanism as provided for in the Companies Act³¹³ do postulate the need for its existence in the South African corporate system.³¹⁴

³⁰⁹ Section 128(1) of the Companies Act 71 of 2008.

³¹⁰ Section 128(1) (f) Companies Act 71 of 2008.

³¹¹ Companies Act 71 of 2008.

³¹² Note the definition of company in section 1 of the Companies Act 71 of 2008, read with Schedule 5 item 9. See also *Melville v Busane A.O* [2012] 1 All SA 675(ECP), 2012 (1) SA 233 (ECP).

³¹³ Companies Act 71 of 2008.

³¹⁴ It provides for both a voluntary and compulsory initiation of a business rescue procedure, a general moratorium, post commencement finance to be made available to the company so as to enable it continue trading, the development and implementation of a business rescue plan which is usually devised by the business rescue practitioner after due consultation with all the relevant stakeholders in the company, all the stakeholders to be bound by the terms of the business rescue plan once the plan has been accepted by the majority, and finally provides for very short timeframes within which the business rescue procedure is to be completed.

Another very important thing to note under Chapter 6 of the new Companies Act,³¹⁵ is the meaning of the phrase ‘reasonable prospect of rescuing the company’, which has been regarded as a controversial topic as to its exact meaning. The phrase “reasonable prospect of rescuing the company”, provided for in section 129(1) (b) and section 131(4) (a) of the Companies Act,³¹⁶ requires that before a company can be restructured under business rescue, there must appear to be a reasonable prospect of rescuing the company.³¹⁷ The meaning of the phrase has been considered in the recent case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*,³¹⁸ where the court held that the phrase “reasonable prospect” used in both section 129(1) and section 131(4) had the same meaning, in that whether it is the board or an affected person initiating the business rescue process, the requirement of reasonable prospect must be satisfied prior to the adoption of a business rescue resolution or prior to obtaining a court order placing the company under supervision.³¹⁹ The court in interpreting the phrase in the Southern Palace case, indicated that something less is required than that the recovery should be a reasonable probability. In other words, if there is a reasonable possibility of rescuing the company the court may in the exercise of its discretion place the company under business rescue. Although the court’s decision in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*³²⁰ has been questioned as to the meaning of the phrase “reasonable prospect”,³²¹ it has been stated that the court’s interpretation of the phrase should only be useful where the business rescue practitioner is expected to express an opinion as to whether there is a reasonable prospect of rescuing the company.³²²

3.1.2 Commencement, initiation, duration and termination of rescue procedure

The rescue procedure can be initiated by means of a resolution of the board filed with the Companies and Intellectual Property Commission or by means of a court order applied for by an

³¹⁵ Companies Act 71 of 2008.

³¹⁶ Companies Act 71 of 2008.

³¹⁷ *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* [2012] 4 All SA 103 (WCC), 2012 (5) SA 497 (WCC).

³¹⁸ 2012 2 SA 423 (WCC); Meskin PM Insolvency law and its operation in winding-up Chapter 18 (2012 Updated).

³¹⁹ Section 131(4) Companies Act 71 of 2008.

³²⁰ Supra note 318

³²¹ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 (3) SA 273 (GSJ); Meskin PM Insolvency law and its operation in winding-up Chapter 18 (2012 Updated).

³²² Meskin PM Insolvency law and its operation in winding-up Chapter 18-34 (2012 Updated).

affected party, etcetera.³²³ The initiation of a business rescue proceeding includes, where the board passes a resolution (otherwise known as voluntary initiation), and files same at the Companies and Intellectual Properties Commission,³²⁴ where they have reasonable grounds to believe that the company is financially distressed as defined in terms of section 128(1)(f) of the Companies Act,³²⁵ and that there is the possibility of rescuing the company;³²⁶ when an affected person applies to court in terms of section 131 of the new Companies Act,³²⁷ otherwise known as compulsory initiation; or when the court during the course of liquidation proceedings makes an order to enforce a security interest. In terms of section 131(6) of the new Companies Act,³²⁸ liquidation proceedings that have already commenced by or against a company, at the time an application for business rescue is being brought by an affected person against the company, shall be suspended by the application for business rescue until the court has adjudicated upon the application or the business rescue procedure ends.

However, a resolution by the board initiating a voluntary business rescue proceeding cannot be adopted if a liquidation proceeding has already been initiated by or against the company.³²⁹ Note that the inability of a board to initiate a business rescue proceeding when a liquidation proceeding has already commenced, does not prevent an affected person³³⁰ to make an application to the court for an order to be granted, which will place the company under business rescue. Roger AJ intimated in *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group*³³¹ that he “did not think that the legislature contemplated that an affected person would have to apply for leave to participate in the proceeding”, although he did concede that the courts will need to regulate the procedure to be followed.

Under the new Companies Act,³³² a business rescue proceeding is expected to end within three months, but this can be extended by the court. Where the proceeding has not ended within three

³²³ Sections 129–132 of the Companies Act 71 of 2008.

³²⁴ Section 129 Companies Act 71 of 2008.

³²⁵ Companies Act 71 of 2008.

³²⁶ Section 128(1) (h) read together with section 128(1) (b) Companies Act 71 of 2008.

³²⁷ Companies Act 71 of 2008.

³²⁸ Companies Act 71 of 2008.

³²⁹ Section 129(2) Companies Act 71 of 2008.

³³⁰ An affected person includes the shareholders, employees not represented by any trade unions, any trade union representing the employees of the company and the creditors of the company.

³³¹ 2011 (5) SA 600 (WCC); Meskin PM *Insolvency law and its operation in winding-up* Chapter 18 (2012 Updated).

³³² Companies Act 71 of 2008.

months or within the time extended by the court, the business rescue practitioner must prepare a report on the progress of the proceeding and follow it with updates at the end of each subsequent month until the business rescue proceeding is terminated. The business rescue proceeding can be terminated for various reasons as provided for by section 132(2) (a)-(d) of the Companies Act.³³³

3.1.3 Legal consequences of business rescue

Some of the consequences of a business rescue procedure are as follows:

- An application by an affected person for a company to be put under business rescue suspends a liquidation proceeding which has already commenced until the court has adjudicated upon the application or the business rescue proceedings end.³³⁴
- A moratorium or stay is introduced on any legal proceeding in terms of section 133 of the Companies Act 71 of 2008.
- The liquidation proceeding can also be converted to a business rescue proceeding at any time after liquidation.³³⁵

3.1.4 Moratorium or stay of proceedings

A moratorium or a stay of proceedings is a means by which a company under business rescue is given some breathing space during the subsistence of the business rescue process, and is mainly aimed at preventing a rush of creditors from claiming against what little is left in the company. One of the reasons why informal creditors- work-outs are rarely thought about as a form of rescue process to be initiated by companies in South Africa, is that creditors are not prevented from taking enforcement action against the company, including bringing an application for winding-up, while the informal creditor work-out procedure is still in the process of being negotiated.

Section 133 of the new Companies Act,³³⁶ provides for a general moratorium on legal proceedings including enforcement action against a company or in relation to any property belonging to the company, or lawfully in its possession while the company is subject to a

³³³ Companies Act 71 of 2008.

³³⁴ Section 131(6) Companies Act 71 of 2008.

³³⁵ Section 131(7) Companies Act 71 of 2008; *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd* (24850/11) (2011) ZAWCHC 464 (9 December 2011) par 8.

³³⁶ Companies Act 71 of 2008.

business rescue. However, section 133(1)(a)-(f) of the new Companies Act³³⁷ goes further in providing certain exceptions to the general moratorium accorded to a company undergoing business rescue. The court in *Investec Bank Ltd v Bruyns*³³⁸ held that the moratorium under section 133(1) is a defence in personam and would not have the effect of extinguishing or discharging the obligation of the principal debtor to sureties and guarantees in respect of debts of company subject to a moratorium during business rescue.³³⁹ This therefore means that a moratorium does not avail a surety for the debts of companies subject to business rescue. Owners of property in the lawful possession of the company under business rescue are also prevented from exercising their proprietary rights unless the business rescue practitioner or the court grants leave to proceed with such actions.³⁴⁰

Creditors usually view the moratorium as prejudicing the recovery of what is owed to them, but in the real sense, a moratorium is actually designed to facilitate the recovery of the company which will ultimately lead to the creditors being paid in full.

3.1.5 Post commencement finance

This refers to the funding made available to a company to enable it to continue trading after the commencement of business rescue proceedings. Section 135 of the Companies Act 71 of 2008 provides for post commencement finance³⁴¹ by requiring new lenders to take security for their loans on those assets of the company not encumbered. In view of this, however, creditors and financial institutions are usually reluctant to provide additional new finance to a company under business rescue, and new finance after the commencement of business rescue is very critical to the survival and turnaround of the company.

The Act provides for three preferential claims to the post commencement financing which include the business rescue practitioner's remuneration, the employees' claims and finally the lenders of the post commencement finance in priority to all pre commencement creditors (which

³³⁷ Companies Act 71 of 2008.

³³⁸ 2012 (5) SA 430 (WCC); Meskin PM *Insolvency law and its operation in winding-up* Chapter 18 (2012 Updated).

³³⁹ Section 133(2) Companies Act 71 of 2008.

³⁴⁰ *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012).

³⁴¹ “[A]ny remuneration, reimbursement for expenses or other amounts relating to employment that becomes due and payable by a company to an employee during the company’s business rescue proceedings, but is not paid to the employee, (a) the money is regarded to be post-commencement financing; and (b) will be paid in the order of preference set out in section 135(3) (a) of the Companies Act 71 of 2008.”

in a way infringes their rights, but they accept the preferential treatment accorded to post commencement creditors, as this will go a long way in ensuring that finances will be made available for the implementation of the plan which will in the long run lead to the repayment of their debt). One reason for the above preferential treatment being afforded by the legislature in section 135 to induce new lenders towards injecting loans into a company under business rescue is that they are guaranteed that they would receive a preferential repayment of their loans from the post commencement finance. Regarding the preferential payment of the employee's claims, it is necessary for employees to be motivated to work by prioritising their payments which thereby ensures that a struggling business is not faced with the extra burden of potential resignation and desperate employees who have no motivation to work.

In my view, the ranking of claims under section 135 of the Companies Act³⁴² is absurd. This is due to the fact that this ranking of claims as provided for under the new Companies Act,³⁴³ has in a way hindered the opportunity for companies under business rescue to progress during the business rescue proceeding. Most companies under business rescue get stuck, when it comes to obtaining funds necessary for the continuation of their business or the business rescue process, because most lender are usually sceptical about lending post commencement funds to an already ailing company under business rescue, having regards to the fact that in terms of the provisions of section 135(3) of the new Companies Act,³⁴⁴ they are to be paid after the business rescue practitioner and the employees have been paid. In my opinion, the business rescue practitioners should be paid after the employees and the lenders have been paid.

3.1.6 Rights of affected persons during business rescue process

These rights include the right to apply for the commencement of the business rescue, the right to lodge objections against it or the appointment of the practitioner, the right to receive notices of the business rescue decisions,³⁴⁵ the right to participate in the business rescue proceedings by both creditors and for employees by their employees representatives. Roger AJ held in *Cape*

³⁴² Companies Act 71 of 2008.

³⁴³ Companies Act 71 of 2008.

³⁴⁴ Companies Act 71 of 2008.

³⁴⁵ *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd* (2011) 5 SA 600 (WCC) where the Security and Exchange News Services (SENS) of the Johannesburg Securities Exchange (JSE) was used to announce a pending application for business rescue; Meskin PM *Insolvency law and its operation in winding-up* Chapter 18 (2012 Updated).

*Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd*³⁴⁶ that he did not think that the legislature contemplated that an affected person would have to apply for leave to intervene in order to participate in the legal proceedings and the right to receive updates of the progress of the process in terms of section 132(3) (b) of the Companies Act.³⁴⁷

However, there are specific rights accorded to both the creditors and employees of the company apart from the general rights accorded to an affected person as mentioned above. Specific rights of the creditors include the right to influence the manner in which the affairs of the company are regulated and the right to vote on the approval or rejection of the plan, the right to participate in the business rescue proceedings by making proposals for a business rescue plan,³⁴⁸ the right to commence the business rescue proceedings with an application to court where the directors fail to pass a resolution for the company to be placed under business rescue, the right to object to the passing of a resolution placing a company under business rescue where it is merely an overzealous decision to plunge a teetering business into the perceived security of a Chapter 6 lifeboat, the right to apply to court to set aside the proposal of the business rescue practitioner for additional fees if the amount asked for is either unreasonably high or is not just and equitable. Bradstreet,³⁴⁹ submits that creditors do not really have a problem if the practitioner's fee is ranked in priority to all other claims, they will, however, have a problem if the practitioner becomes expensive enough to drain the assets of the company leaving even the secured creditors with a secondary claim.

3.1.7 Effect of business rescue on employees and contracts

The new Companies Act is very sensitive to the rights of employees, and this is because one of the purposes of the new Companies Act,³⁵⁰ is to ensure that the Bill of Rights of the Constitution are complied with, which in turn enshrines every employee's rights to fair labour practices,³⁵¹ which are not only to be adhered to, but are to be protected. Other aims of the Companies Act³⁵² is ensure that there is a balance between the interest of all the affected parties and ensuring the

³⁴⁶ Supra note 331.

³⁴⁷ Companies Act 71 of 2008.

³⁴⁸ Section 145(1) (d) Companies Act 71 of 2008.

³⁴⁹ Bradstreet R "The new business rescue: Will Creditors sink or swim?" (2011) 2 *South African Law Journal* 363.

³⁵⁰ Companies Act 71 of 2008.

³⁵¹ Section 7(a) Companies Act 71 of 2008: Tronel J *et al* " Impact of labour law on South Africa's new corporate rescue mechanism" *International journal of comparative labour law* (2011) 73

³⁵² Companies Act 71 of 2008.

rescue of the financially distressed company. Thus when there is a conflict between the provisions of the Companies Act³⁵³ and the Labour Relations Act 1995, it has been stipulated that the provisions of the Labour Relations Act will prevail.³⁵⁴

Section 136(1)(a) and (b) of the Companies Act³⁵⁵ aims at protecting employees of a company under business rescue, by ensuring that the employees of the company immediately before the business rescue proceedings, shall continue to be employed, and in the case of any retrenchment of any employee as contemplated in the business rescue plan, the business rescue practitioner must ensure that the provisions of section 189 and 189A of the Labour Relations Act 1995, and other applicable employment related legislations are adhered to.³⁵⁶

With regards to contracts other than employment contracts, the business rescue practitioner may in terms of section 136(2)(a) & (b) of the Companies Act,³⁵⁷ suspend for the duration of the business rescue, any obligation of the company that arises under an agreement to which the company was a party to at the commencement of business rescue proceedings, or may urgently apply to court to cancel any obligation of the company to an agreement, on terms that are just and equitable in the circumstances.

3.1.8 Business rescue practitioner

The concept of a business rescue practitioner was introduced by the Companies Act 71 of 2008.³⁵⁸ A person maybe appointed as a business rescue practitioner of a company, only if the person satisfies the requirements listed in section 138(1) (a) to (f). Note that this requirements are lengthy, and only a one or two of them shall be mentioned in this dissertation, such as that the person is a member in good standing of a legal, accounting or business management profession accredited by the commission,³⁵⁹ has been licensed as such by the Companies and Intellectual Properties Commission, otherwise known as the Commission,³⁶⁰ etc. A business rescue practitioner once licensed by the Commission, may then act as a business rescue practitioner

³⁵³ Companies Act 71 of 2008.

³⁵⁴ Section 5(4) (b) (i) (bb) Companies Act 71 of 2008;Supra note 355 .

³⁵⁵ Companies Act 71 of 2008.

³⁵⁶ Section 136(1) (b) Companies Act 71 of 2008.

³⁵⁷ Companies Act 71 of 2008.

³⁵⁸ Section 138 of the Companies Act 71 of 2008.

³⁵⁹ Section 138(1) (a) Companies Act 71 of 2008.

³⁶⁰ Section 138(1) (b) Companies Act 71 of 2008.

under a business rescue proceedings,³⁶¹ and the Commission may also withdraw any licence given in the prescribed manner.³⁶² The Commission must in terms of Regulation 126(1) of the Companies Regulations, 2011,³⁶³ have regards to the qualification and experience as set out as conditions for membership into the profession, and the ability of such profession to monitor or discipline its members. A person may however apply directly to the commission to be licensed as a business rescue practitioner together with a fee³⁶⁴ and the Commission may when considering the application, request for further information relevant to the application, or evidence in support of the facts in the application.³⁶⁵ Note that once a company is placed under business rescue proceedings, the business rescue practitioner will have the full management and control of the company and the board will be subject to the directives of the business rescue practitioner. This can be deduced from the fact that the rescue practitioner can apply to court to have a director removed or he/she may also appoint any person who was part of the pre-existing management.³⁶⁶ Develop a business plan for consideration by all affected persons, and implement a business rescue plan after its adoption.³⁶⁷

3.1.9 Implementation of business rescue plan

The most important function of a business rescue practitioner is to prepare and implement a business rescue plan for the company. The approval of the business rescue plan is the ultimate goal of the business rescue process. The rescue practitioner in drawing up a business plan aimed at rescuing an ailing company must first consult with all the affected parties such as the creditors, employees and shareholders. This is done through a first meeting of creditors and employees' representatives, which in practice are held on the same day and at the same place but at different times. The business rescue practitioner usually consults with these affected persons so as to ensure that he acquires their approval for the plan to be implemented by giving them the opportunity of making their own contributions towards the business plan to rescue the company.³⁶⁸ In terms of Chapter 6 of the Companies Act,³⁶⁹ creditors have the strongest right to

³⁶¹ Section 138(2) Companies Act 71 of 2008.

³⁶² Supra note 361.

³⁶³ Regulation 126 Companies Regulations, 2011.

³⁶⁴ Regulation 126(2) Companies Regulations, 2011.

³⁶⁵ Regulation 126(3) Companies Regulations, 2011.

³⁶⁶ Section 140(1) (c) (i)-(ii) Companies Act 71 of 2008.

³⁶⁷ Section 140(d) (i) (ii) Companies Act 71 of 2008.

³⁶⁸ Section 150 & 152 Companies Act 71 of 2008.

be consulted regarding the development of the plan because they have a lot to lose or gain financially if the plan is adopted. The business rescue practitioner must devise the business plan within 25 days after his appointment. This period can be extended through an application to court or by the holders of the majority of the creditor's voting interest.³⁷⁰

The plan can either be approved or rejected by the affected parties. Once the plan has been approved by means of a vote and voting interest which is determined by the value of a creditor's claim,³⁷¹ and supported by the holders of 75% of the creditors' voting interest that voted, 50% of which must be independent creditors' voting interest,³⁷² the business rescue practitioner is granted the necessary powers to implement the plan. If the plan is not adopted, section 153 of the provides for steps which could be taken by the business rescue practitioner or any affected person where the business rescue practitioner does not take any steps, by seeking a vote of approval from the holders of the voting interest for the practitioner to prepare the plan; or applying to court to set aside the result of the vote by the holders of voting interests or shareholders as inappropriate; or any affected person or a combination of affected persons, may make a binding offer to purchase the voting interest of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined on the request of the practitioner to be a fair and reasonably estimated of the return to that person or persons, if the company were to be liquidated.³⁷³

Note that where no person takes any of the actions contemplated above, the practitioner is required to promptly file a notice of the termination of the business rescue proceeding.³⁷⁴

A plan once accepted is binding on the company, whether a person was present at the meeting or not, voted in favour of the adoption of the plan or in the case of creditors had proven his or her claim against the company.³⁷⁵ This is otherwise known as cram down, and has the effect of discouraging creditors from resisting or holding out for better treatment and therefore encourages business rescue to continue even where a few disgruntled creditors object to it. However, where

³⁶⁹ Companies Act 71 of 2008.

³⁷⁰ Section 150(2) Companies Act 71 of 2008.

³⁷¹ Section 145(4) Companies Act 71 of 2008.

³⁷² Section 152(2) Companies Act 71 of 2008.

³⁷³ Section 153(1) (a)-(b) Companies Act 71 of 2008.

³⁷⁴ Section 153(5) Companies Act 71 of 2008.

³⁷⁵ Section 152(4) Companies Act 71 of 2008.

the plan is rejected, the Act prescribes some remedies in that the affected person or the practitioner may apply to court to set aside the result of the vote as being inappropriate.³⁷⁶

Once the business plan has been approved and implemented, the rescue practitioner must file notice of such implementation.³⁷⁷ Section 154(2) also comes into play by prescribing that a creditor is only entitled to enforce a debt owed by the company prior to the commencement of the business rescue. The general rule is that the rescue proceeding must be executed within three months and in the case of an extension of time after the three-month period has elapsed, an application may be made to the court.³⁷⁸

The effect of the adoption of the plan is that the business rescue plan may provide that every creditor who has agreed to the discharge of the whole or part of his debt, loses his right to enforce his debts, or part of it.³⁷⁹

Other forms of business rescue procedures also provided for in Chapter 6 of the Companies Act³⁸⁰ includes a compromise with creditors³⁸¹ and a composition with creditors,³⁸² which are not fully discussed in this chapter, as the main focus of the study is on business rescue.

3.2 BUSINESS RESCUE PROCEDURES IN NIGERIA

There are two formal rescue procedures available for a company in financial difficulties under the Companies and Allied Matters Act³⁸³ which include receivership or manager ship and arrangement or compromise. The Investment and Securities Act 2007 (which repealed the Investment and Securities Act 1999) on the other hand provides for mergers acquisitions and takeovers. The procedures provided for by the Investment and Securities Act 2007 i.e. mergers and acquisitions are not necessarily rescuing procedures, under the Companies and Allied Matters Act³⁸⁴ but have assisted greatly with the rescue of banks in Nigeria.

³⁷⁶ Section 153(1) (b) (ii) Companies Act 71 of 2008.

³⁷⁷ Section 152(8) Companies Act 71 of 2008.

³⁷⁸ Section 132(2) (b) or (c) Companies Act 71 of 2008.

³⁷⁹ Section 154 Companies Act 71 of 2008.

³⁸⁰ Companies Act 71 of 2008.

³⁸¹ Section 155 Companies Act 71 of 2008.

³⁸² Section 72 Close Corporations Act 69 of 1984.

³⁸³ Companies and Allied Matters Act Cap C20 LFN 2004.

³⁸⁴ Companies and Allied Matters Act Cap C20 LFN 2004

The current provisions of section 118 of the Investment and Securities Act 2007, which provides that any merger or acquisition or business between or among companies must be subject to the approval of the Securities and Exchange Commission, may see a decline of the use of a formal procedures provided for under Companies and Allied Matters Act.³⁸⁵

The main aim of these merger provisions, however, is to encourage the creation and protection of smaller companies against intervention by larger companies in times of distress. It thereby encourages an interventionist regime that would ensure efficiency that is technology-based, scientific economies of scale and the “ability of small businesses to become competitive” as envisaged by the Investment and Securities Act 2007.³⁸⁶ Furthermore, it would allow for the ability of national industries to be able to compete in the international market, and the encouragement of a competitive environment for companies aimed at ensuring that it will yield an advantage to consumers’ etcetera.³⁸⁷

Each of these procedures i.e. arrangement or compromise as provided under the Companies and Allied Matters Act,³⁸⁸ and mergers and acquisitions provided for under the Investment and Securities Act, shall each be analysed in order for one to gain a better understanding of the different procedures that exist and are currently being applied in the Nigerian corporate insolvency regime.

3.2.1 Arrangement and compromise

The Companies and Allied Matters Act³⁸⁹ specifically provides for an arrangement, and an arrangement or compromise.

An arrangement provided for in section 538 of the Companies and Allied Matters Act³⁹⁰ is usually entered into voluntarily by the company for the sale of the company’s assets, during a members’ voluntary winding-up, through the passing of a special resolution that the company be

³⁸⁵ Companies and Allied Matters Act Cap C20 LFN 2004; Idigbe A “Schemes of arrangement as a tool for business rescue and restructuring: topical commercial and legal issues” paper presented at the NBA section of Business Law on the 19th of June 2012 with research assistance from Chiwete C and Okorie K <http://www.internationallawoffice.com/newsletter/detail.aspx?g=16d9f2ea-6025-4c15-a6c>. (Accessed 17 July 2013)

³⁸⁶ Section 121(3) Investment and Securities Act LFN 2004.

³⁸⁷ Oladele OO & Adeleke MO “*The legal intricacies of corporate restructuring and rescue in Nigeria*” (2009) *Volume 20, Issue 5 ICCLR* Sweet & Maxwell, London.

³⁸⁸ Companies and Allied Matters Act Cap C20 LFN 2004

³⁸⁹ Companies and Allied Matters Act Cap C20 LFN 2004.

³⁹⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

put into a members' voluntary winding-up and that the liquidator be authorised to sell the whole or part of its undertaking or assets to another body corporate or in consideration or part consideration of fully paid shares, and to distribute same among the members of the company in accordance with their rights in the liquidation..³⁹¹ An arrangement provided for by section 538 of the Companies and Allied Matters Act³⁹² has been described by Idigbe³⁹³ as being similar to a merger and acquisition as envisaged under Part XII of the Investment and Securities Act 2007. He noted that the only difference between the two is that the rescue aspect envisaged under section 538 of the Companies and Allied Matters Act³⁹⁴ is that although the company is wound up, the business is to some extent preserved or at least a better realisation of assets than would be possible in the immediate liquidation of the company.³⁹⁵

A compromise or arrangement is in terms of section 539(1), proposed between a company and its creditors or a class of them, which shall be binding on all the creditors if accepted by a majority of the creditors, where the court is satisfied with the fairness of the compromise or arrangement.³⁹⁶

In terms of section 539(2) of the Companies and Allied Matters Act³⁹⁷, the court may refer the compromise or arrangement to the Securities and Exchange Commission (SEC) who must then appoint one or more inspectors to investigate the fairness of the arrangement or compromise, and file a written report with the court.³⁹⁸ Where the required majority of votes are not obtained or if the court does not sanction the scheme on the grounds that the terms of the scheme are not fair or are not calculated to benefit the general body of creditors, or the objections of a dissenting party are upheld, the scheme is defeated and unsuccessful. In any of the above situations, the court

³⁹¹ Section 538 Companies and Allied Matters Act Cap C20 LFN 2004.

³⁹² Companies and Allied Matters Act Cap C20 LFN 2004.

³⁹³ Idigbe A "Schemes of arrangement as a tool for business rescue and restructuring: topical commercial and legal issues" paper presented at the NBA section of Business Law on the 19th of June 2012 with research assistance from Chiwete C and Okorie K. <http://www.internationallawoffice.com/newsletter/detail.aspx?g=16d9f2ea-6025-4c15-a6c>. (Accessed 17 July 2013)

³⁹⁴ Companies and Allied Matters Act Cap C20 LFN 2004.

³⁹⁵ Supra note 393.

³⁹⁶ Section 539(2) of the Companies and Allied Matters Act Cap C20 LFN 2004.

³⁹⁷ Companies and Allied Matters Act Cap C20 LFN 2004.

³⁹⁸ See *Oceanic International Bank v Victor Odili & Others*, FHC/L/CS/1361/2005. On appeal as CA/L/171M/08, where a merger/scheme was sanctioned by the court on grounds of unfairness, but on appeal, the fairness of the merger was achieved in favour of the minority shareholders, although this decision raised questions about the finality of a sanctioned scheme of merger (see Boraine A and Chiwete C "Aspects of business rescue and cross-border insolvency in South Africa and Nigeria compared" Paper on file, accepted for publication.

may refuse to approve the scheme or direct that it be amended if the amendment will best serve the interests of justice.³⁹⁹ While section 537 of the Companies and Allied Matters Act⁴⁰⁰ defines “arrangement” expressly as “any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected thereby”, one would have to look at the meaning of a compromise from the received common law jurisprudence applicable in Nigeria. In *Sneath v Valley Gold Ltd*,⁴⁰¹ a compromise was described as an agreement which terminates a dispute between parties as to the rights of one or more of them or which modifies the undoubted rights of one or more of them or which modifies the undoubted rights of a party which it has difficulty in enforcing.

Akinwunmi⁴⁰² states that the difficulties attached to entering into a scheme of arrangement or compromise are as follows:

1. The procedures used for putting the scheme into place take too long and cause individual creditors to grow tired and instead opt to exercise all their rights against the debtor.
2. Formalities and complexities – such as the convening of a necessary meeting, the approval or investigation by the Securities and Exchange Commission and the petition to court for the sanctioning of the scheme by the approved majority of creditors at the meeting – make it impossible to establish a scheme.
3. The management loses interest in the scheme due to the fact that the company has become insolvent and there is no one ready to revive it.
4. The scheme may require secured creditors to agree to modify their rights which may not be acceptable to them and may cause them to prevent the scheme from operating.

Akinwunmi⁴⁰³ suggests that the procedures for entering into a scheme of arrangement under the Companies and Allied Matters Act,⁴⁰⁴ which included the court, members, creditors and the Securities and Exchange Commission, may be streamlined and improved by the appointment of

³⁹⁹ Section 539(3) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴⁰⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴⁰¹ (1893) 1 Ch 447 at 494.

⁴⁰² Akinwunmi S “Corporate insolvency law in Nigeria – A need for reform” <http://www.akinwunmibusari.com/images/documents/corporate20%/practice20%-.html>. (accessed 15 November 2010)

⁴⁰³ Supra note 402.

⁴⁰⁴ Companies and Allied Matters Act Cap C20 LFN 2004.

an administrator of the scheme of arrangement which should be incorporated into our Nigerian law. It is also suggested that the court should play no part in the formulation of the scheme of arrangement or compromise which should only be dealt with by the administrator. This would limit the court's involvement to the sanctioning of the scheme.

In my view, some of the challenges with an arrangement or compromise which shall be briefly highlighted include the fact that the provisions for section 538 of the Companies and Allied Matters Act,⁴⁰⁵ is best suited for solvent companies, and cannot be utilised by insolvent companies who may have wanted to make use of it. In my view however, the provision of this section should be amended to serve as a procedure which could apply to both solvent and insolvent companies prior to their liquidation. There is also a lack of moratorium under a scheme of arrangement which makes companies under a scheme of arrangement vulnerable to enforcement claims against it by its creditors, the level of involvement of the court, tends to make the scheme a very expensive process to embark on, and finally the current provisions of section 118 of the Investment and Securities Act 2007, which provides that any merger or acquisition or business between or among companies must be subject to the approval of the Securities and Exchange Commission, may see a decline of the use of a formal procedures provided for under Companies and Allied Matters Act.⁴⁰⁶

3.2.2 Receivership in Nigeria

Another form of rescue procedure in Nigeria is receivership. This procedure is aimed at preserving the assets and management of the ailing company primarily for all affected persons involved with the company and is regulated by Part XIV of the Companies and Allied Matters Act.⁴⁰⁷ Although every corporate rescue procedure is aimed at preserving a company as a going concern, it should be noted that where the company faces a threat to its substratum it may opt for receivership rather than the extreme option of liquidation.

A receiver can either be appointed by the courts based on an application, for such appointment, to be made on behalf of the debenture holders or creditors of the company which is to be wound up, or based on an application by an interested person in terms of section 389 of the Companies

⁴⁰⁵ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴⁰⁶ Companies and Allied Matters Act Cap C20 LFN 2004; Supra note 425.

⁴⁰⁷ Companies and Allied Matters Act Cap C20 LFN 2004.

and Allied Matters Act,⁴⁰⁸ if the principal sum borrowed by the company is in arrears or the security or property of the company is in arrears.

A receiver or receiver manager of any property or undertaking appointed by the court shall be deemed to be an officer of the court and shall act in accordance with the directions and instruction of the court.⁴⁰⁹ A receiver or receiver manager of any property or undertaking appointed out of court, for example, by a holder of the security pursuant to the powers contained in the instrument, shall be deemed to be an agent of the person or persons on whose behalf he was appointed and shall act in accordance with the directions and instructions of the holders of the security.⁴¹⁰ A receiver or receiver manager appointed out of court may, in terms of section 391 of the Companies and Allied Matters Act,⁴¹¹ “apply to the court for direction in relation to any particular matter arising in connection with the performance of his functions, and on any such application, the court may give such directions or make such order declaring the rights of persons before the court or otherwise, as it thinks just”.

A company is usually placed under a receivership when the principal sum borrowed by the company or the interest is in arrears; the security or property of the company is in jeopardy, for example where they are at risk of being seized to pay the claims of other creditors or debenture holders; or a receiver or receiver manager is being appointed on behalf of a debenture holder, etcetera.⁴¹²

Section 166 of the Companies and Allied Matters Act⁴¹³ allows a company to “borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party”. The Companies and Allied Matters Act⁴¹⁴ also allows companies to secure the loans obtained by using their property, which may be through a fixed charge, a floating charge, a hybrid charge of both, or unsecured by any charge. A floating charge crystallises and becomes a

⁴⁰⁸ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴⁰⁹ Section 389(2) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹⁰ Section 390(1) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹¹ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹² Sections 388 and 389(1) & (2) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹³ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹⁴ Companies and Allied Matters Act Cap C20 LFN 2004.

fixed equitable charge on the company's assets subject to the charge⁴¹⁵ if the company goes into liquidation; the court appoints a receiver or receiver manager of such assets on the application of the holder, or if the holder of the security pursuant to the powers in the debenture or deed, appoints a receiver or manager or takes possession of such assets.⁴¹⁶ In such instances the courts may, upon the enforceability of the security, appoint a receiver in the case of a fixed charge, and a receiver manager in the case of a floating charge.⁴¹⁷ The court usually bases its judgment on the appointment of a receiver or receiver manager (even in instances where the floating charge is not yet enforceable) where the court is satisfied that repayment of the principal money borrowed by the company or interest thereon is in arrear;⁴¹⁸ or if the security of the debenture holder is in jeopardy.⁴¹⁹ Such security shall be deemed to be in jeopardy if the court is satisfied that events have occurred or are about to occur which render it unreasonable in the interests of the debenture holder that the company should retain the power to dispose of its assets. An example is the apparent liquidation of the company.⁴²⁰ The receiver or receiver manager is required by sections 392(1) & 396(1)(a) of the Companies and Allied Matters Act,⁴²¹ to give notice of his appointment to the Corporate Affairs Commission(CAC) and to the company if he is appointed over the whole or a substantial part of the property of the company secured by a floating charge.

A receivership may be combined with a manager ship by the appointment of a receiver manager at the same time,⁴²² i.e. where a receiver has been appointed, and the body charged with his appointment has conferred on him the powers to run the company's business and sell the company's assets as the case may be. However, in *Ponson Enterprises (Nig) Ltd v Njigha*⁴²³ the court held that even though the word "receiver" is interpreted under the Companies and Allied Matters Act,⁴²⁴ to include a "manager", it does not vest a receiver with the powers of a manager and such power must be conferred on him or her by the person who appoints him.

⁴¹⁵ Section 178(2) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹⁶ Section 178(1) (a), (b) & (c) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹⁷ Section 180(1) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹⁸ Section 389(1) (a) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴¹⁹ Section 180(2) [can also be found in section 389(1) (b)] Companies and Allied Matters Act Cap C20 LFN 2004.

⁴²⁰ Section 180(2) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴²¹ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴²² Section 567 Companies and Allied Matters Act Cap C20 LFN 2004.

⁴²³ (2000) 15 NWLR part 686, 46; Boraine A and Chiwete C "Aspects of business rescue and cross border insolvency in South Africa and Nigeria compared" Paper in file, Accepted for publication.

⁴²⁴ Companies and Allied Matters Act Cap C20 LFN 2004.

A receiver manager who is appointed is vested with a fiduciary responsibility towards the company to act in the best interest of the company, such as preserving the company's assets, further the business of the company, promoting the purposes for which it was formed, and acting faithfully, diligently and carefully. In other words he should act in the manner in which an ordinarily skilful manager would act in those circumstances (an objective test is to be used here).⁴²⁵ When acting in the best interest of the company, the manager is also expected to have regard to the interest of the employees, members of the company and, when appointed by, or acting as a representative of a special class of members or creditors, he may give special, but not exclusive, consideration to the interests of that class.⁴²⁶

The powers of a person appointed as a receiver or receiver manager shall not be limited to those powers conferred on by the debentures or instruments⁴²⁷ by virtue of which he was appointed, but shall include all those powers (except in so far as they are inconsistent with any of the provisions of those debentures) specified in Schedule 11 of the Companies and Allied Matters Act Cap C20 LFN 2004.⁴²⁸

Effects of appointment of receiver

- In a members' voluntary winding-up, the powers of the liquidators and directors to deal with the property of the company over which a receiver is appointed, cease from the date of appointment of the receiver until the latter is discharged.⁴²⁹ In *O.B.I Ltd v U.B.N Plc*,⁴³⁰ the court held that the board of directors cannot carry on business or deal with the assets of the company while the company is in receivership. The court said that the appointment of a receiver does not mean that the company loses its personality as an entity, or loses its title to the goods covered by the receivership. In the case of a creditors' voluntary winding-up, section 393(5) provides: "Where a receiver or manager is

⁴²⁵ Section 390(1) (a) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴²⁶ Section 390(1) (b) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴²⁷ Power to "take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed, but unless appointed manager he shall not have power to carry on any business or undertaking".

⁴²⁸ Schedule 11 listed 23 powers of the receiver and manager, which include the power to take possession of assets; power to sell or dispose of an asset, the power to raise or borrow money; power to institute or defend a legal action in the name and on behalf of the company; power to carry on the business of the company; power to make arrangements and compromises on behalf of the company etc.

⁴²⁹ Section 393(4) Companies and Allied Matters Act Cap C20 LFN 2004.

⁴³⁰ (2009) 3 NWLR part 1127, 129.

appointed where the company is being wound-up under the provisions relating to a creditor's voluntary winding-up, or the property concerned is in the hands of some other officers of the court, the liquidator or officer shall not be bound to relinquish control of such property to the receiver or manager except under the order of the court.”

- Upon the appointment of the receiver, the floating charges crystallise and become fixed a charge which means that the company can no longer deal with the assets without the consent of the receiver.

In view of the enormous powers conferred on a receiver/manager in Schedule 11 of the Companies and Allied Matters Act,⁴³¹ a receiver/manager appointed under a receivership could with the necessary skills and expertise, imbibe the position of a business rescue practitioner appointed under Chapter 6 of the Companies Act,⁴³² in bringing about a turnaround for most financially distressed companies in Nigeria. A receivership could, with the necessary amendments to the relevant statute, i.e. qualifications requirements necessary for the appointment of receiver/manager under a receivership in Nigeria, could be modelled in line with section 138 of the Companies Act,⁴³³ and the Corporate Affairs Commission (CAC) could be saddled with the duty of licensing a receiver or receiver/manager in a receivership, as is the case with the powers vested on the Companies and Intellectual Properties Commission(CIPC, similar to the CAC IN Nigeria) in terms of section 138(2) of the Companies Act,⁴³⁴ and Regulations 126 of the Companies Regulation 2011, which provides for the accreditation of professions and licensing of business rescue practitioners.

Other challenges associated with a receivership however, include the fact that the lack of relevant provisions of a moratorium being included in a receivership, and an arrangement or compromise as stated above creates a very huge impediment in the application of these rescue procedures in the Nigeria corporate insolvency regime. In a receivership for example, with regards to the private appointment of a receiver/manager or receiver, a debtor company could easily apply to court to obtain an injunction against the debenture holders and the receiver or receiver manager, restraining the receiver or receiver manager from acting in his capacity or

⁴³¹ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴³² Companies Act 71 of 2008

⁴³³ Companies Act 71 of 2008.

⁴³⁴ Companies Act 71 of 2008.

entering the premises, thereby creating a long litigation process over the matter concerned which could span for a number of years, thereby leaving the debenture holders with no hope of recovering their fees, and the fees of the receiver or receiver manager which are determined by the amount received by the debenture holder, is left to only claim his expenses, in spite of the long number of years of his appointment.⁴³⁵

In my view, the moratorium provisions provided for in section 133 and 134 of the Companies Act⁴³⁶ should be included in the various provisions relating to corporate restructuring in Nigeria. Note that although section 417 of the Companies and Allied Matters Act,⁴³⁷ provides for a moratorium for companies that are being wound up, such moratorium does not apply to an arrangement or compromise or receivership in Nigeria, and only apply to winding up proceedings.⁴³⁸

3.2.3 Mergers and amalgamations and takeover bids and acquisitions

As was mentioned above, mergers and amalgamation and takeover bids and acquisitions are not necessarily regarded as rescue procedures in terms of the Companies and Allied Matters Act,⁴³⁹ they are procedures which have the rescue of a financially distressed company as a peripheral goal, but have assisted greatly in the rescue of banks in Nigeria. They are provided for by the provisions of the Investment and Securities Act 2007 and are sometimes regarded as very expensive to enter into. Note, however, that due to the provisions of section 118(1) of the Investment and Securities Act 2007, Part XVI of the Companies and Allied Matters Act,⁴⁴⁰ which provide for arrangements and compromises, shall continue to be subject to the directives of the Investment and Securities Act 2007 and the Securities and Exchange Commission, if the

⁴³⁵ Akinwunmi S & Busari T “Receivership & Business Recovery” <http://www.akinwunmibusari.com/images/documents/receivership%20&%20business%20recovery.pdf>. (Accessed 17 July 2013)

⁴³⁶ Companies Act 71 of 2008.

⁴³⁷ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴³⁸ *FMBN v NDIC* (1999) 2 NWLR 591, p 333, where the Supreme Court held that what is prohibited by section 417 of the Companies and Allied Matters Act where a provisional liquidator is appointed for a company, except with the leave of court, is an action or proceedings pending or instituted in the Federal High Court; Supra note 411.

⁴³⁹ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴⁴⁰ Companies and Allied Matters Act Cap C20 LFN 2004.

legislature does not clarify and settle the interplay between the Companies and Allied Matters Act,⁴⁴¹ and the Investment and Security Act 2007 provisions.

3.2.3.1 Mergers and amalgamations

The development of the regulations for merger and acquisition as a form of business rescue under the Investment and Securities Act 2007, which repealed the Investment and Securities Act 1999, and the establishment of the Securities and Exchange Commission which serves as a regulatory authority for the Nigerian Capital market, has also gone a long way in assisting the Nigerian economy especially in the area of capital markets, banking, insurance, etcetera, by ensuring the protection of investors, maintain fair, efficient and transparent market and the reduction of systemic risk.⁴⁴² The current legislation that regulates mergers and acquisitions in Nigeria are the Investment and Securities Act 2007, read together with the Securities and Exchange Commission Rules made pursuant to the Investment and Securities Act 2007.

A merger is defined by the Investment and Securities Act 2007 as “any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings of part of one or more companies and one or more body corporate”. The Investment and Securities Act 2007 also provides for different types of mergers and they include mergers of value below the lower threshold otherwise known as smaller merger, intermediate mergers and a large merger. The amended Securities and Exchange Commission rules made pursuant to the Investment and Securities Act 2007, provides that the threshold for smaller merger or mergers below the lower threshold, shall now be in the amount of N250 000 000.00 instead of the previous N500 000 000.00 provided for.⁴⁴³ Intermediate merger have a threshold of between NGN 500,000,000 and NGN 5,000,000,000.00, and a large merger which has a threshold of NGN 5,000,000,000.00 and above.⁴⁴⁴

⁴⁴¹ Companies and Allied Matters Act Cap C20 LFN 2004.

⁴⁴² Adefule A “Nigeria: Mergers and acquisition under the Investment and Securities Act 2007” <http://www.mondaq.com/x/85466/M+A+Private%20equity/Merger+And+Acquisitions+2007>. (Accessed 17th July 2013)

⁴⁴³ Ojuawo G “The Securities and Exchange Commission amend its rules” <http://www.aalex.com/media/newsletter/1/SECamend.pdf>. (Accessed 17th July 2013)

⁴⁴⁴ Section 120 Investment and Securities Act LFN 2007.

Oladele and Adeleke⁴⁴⁵ submit that there are various reasons why a merger is entered into, such as, to reduce production costs and to eliminate duplicate productivity, to enhance competitiveness by expanding the service range and productivity capabilities of the company thereby creating a strong company with increased competitive abilities, etcetera.⁴⁴⁶ However, in spite of the fact that the entry into any merger or acquisition by a company comes with a lot of positive impacts on the coalition/merging of companies, it also brings with it a lot of challenges which have to be considered before a merger is entered into. Such challenges include loss of jobs so as to prevent duplicating positions, possible resistance by the employees, shareholders etcetera as is the case in any rescue environment.

In spite of its challenges, the use of mergers and acquisitions has gone a long way in rescuing a lot of banks in Nigeria which suffered a blow during the global financial crisis.⁴⁴⁷ As stated by Oladele and Adeleke,⁴⁴⁸ the Nigerian guidelines on mergers and acquisitions as postulated by the provisions of the Investment and Securities Act 2007 and the Securities and Exchange Commission share the same philosophical views as the US Sherman Act passed by the congress in 1890, which is aimed at favouring and protecting small businesses and entrepreneurs against the “encroaching economic leverage” of larger competitions, even if consumers may be affected by increased cost.

Ahmed⁴⁴⁹ states that the CBN’s careful consolidation of the Nigerian banking sector has already proven itself to be essential to the future stability and growth of the Nigerian economy. He states that the consolidation activity that the CBN has encouraged and regulated to date was intended to safeguard capacity within the Nigerian banking sector. This would otherwise have been lost if the relevant banks were not rescued and regulated in accordance with best practice.

⁴⁴⁵ Oladele OO and Adeleke MO “*The legal intricacies of corporate restructuring and rescue in Nigeria*” (2009) I.C.C.L.R 182.

⁴⁴⁶ Peterside A N, "Mergers and Acquisitions: The Nigerian Experience" in Securities and Exchange Commission (ed.), *Stimulating corporate growth through mergers and acquisition, proceedings of a seminar on mergers and acquisitions organized by the Securities and Exchange Commission in conjunction with the Association of Issuing Houses of Nigeria* (Abuja: Securities and Exchange Commission, 2004) 25-27.

⁴⁴⁷ The rescued banks which abided by the rescue provisions of merger and acquisition as a means of preventing liquidation include Intercontinental Bank Plc, Equitorial Trust Bank Limited, Spring Bank Plc, Union Bank of Nigeria Plc, Bank PHB Plc, Afribank Plc, Finbank Plc and Oceanic Bank International Plc. The Central Bank of Nigeria disclosed in an advertorial on Friday 10 June 2011 that these rescued banks are still technically insolvent.

⁴⁴⁸ Supra note 445.

⁴⁴⁹ Ahmed I “Rescued banks surviving regulators’ surgical knife” <http://www.allfrica.com/stones/2011081509466-.html>. (accessed 15 August 2011)

Apart from the Investment and Securities Act 2007, which is being regarded as a penal statute,⁴⁵⁰ several specific Acts (such as the Banks and Other Financial Institutions Act 1991,⁴⁵¹ the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act Cap F2 LFN 2004, the Economic and Financial Crimes Commission (Establishment) Act 2004, the Money Laundering (Prohibition) Act 2004, the Asset Management Corporation of Nigeria (AMCON) Act LFN 2010 which provides for the rescue of banks, and the Criminal Code Act 1990) have enshrined certain powers on banking regulators such as the Central Bank of Nigeria, the Nigerian Deposit Insurance Corporation and the Economic and Financial Crimes Commission (EFCC) to institute criminal actions against banks directors/officers and customers. Idigbe⁴⁵² states that “these state authorities and bodies which have been mentioned above have adopted a collaborative approach to tackle the insolvency issues raised by the huge debt portfolio of banks and the fall-out problems arising in terms of management of the banks and the protection of depositors’ interests, the protection of the financial system and the recovery of assets that have been fraudulently misappropriated”.

The Governor of the Central Bank of Nigeria (CBN) noted that the near insolvency of certain banks, which necessitated the Central Bank’s intervention in eight cases, stemmed principally from a lack of corporate governance and weak credit management practices, and has therefore devised various strategies needed to protect depositors in the banking sector. This strategy includes a closer oversight by the Central Bank, the enhancement of corporate governance and prudential guidelines in the financial industry, etcetera. The Central Bank has also argued for the establishment of an asset management company i.e. the Asset Management Corporation of Nigeria (AMCON) to manage toxic assets held by deposit banks. The Central Bank recognised the need for legislative reform of several obsolete statutes on insolvency laws, creditors’ rights, corporate workouts and restructurings (e.g. the Companies and Allied Matters Act⁴⁵³ and the Bankruptcy Act Cap C20 LFN 1990), and credit risk issues (e.g. the Dishonoured Cheques

⁴⁵⁰ *FRN v Ifegwu* (2003) 15 NWLR Pt 842, 113 at 214 paragraph D.

⁴⁵¹ Section 35 of the Banks and Other Financial Institution Act (BOFIA) 1991, in particular, empowers the Central Bank of Nigeria, upon being notified of the troubled state of a bank, to take rescue an initiative, which includes removing the existing manager or officers of the bank, and appointing someone to advise the bank in relation to the proper conduct of its business.

⁴⁵² Idigbe A “Dealing with bank insolvency: regulatory intervention and criminal prosecution” <http://www.internationallawoffice.com/newsletter/detail.aspx?gf3ba-html>. (accessed 28 May 2010)

⁴⁵³ Companies and Allied Matters Act Cap C20 LFN 2004.

(Offences) Act Cap D11 LFN 2004).The governor of CBN noted that insolvency practitioners have a crucial role to play in restructuring and obtaining new capital.

3.2.3.2 Takeover bids and acquisitions

The Investment and Securities Act 2007, defines “takeover” as “the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company”.⁴⁵⁴ This shows that an acquisition and a takeover do mean the same thing. Sections 131-151 of the Investment and Securities Act 2007, provides for these procedures of restructuring, but some of the important aspects to note, includes the fact that the Securities and Exchange Commission, plays an important role in granting the authority to proceed with a takeover bid. If such authority is refused by the Securities and Exchange Commission, the applicants could approach the Investment and Securities Tribunal for a judicial review of the Securities and Exchange Commissions’ decision.⁴⁵⁵

Other rescue or restructuring plans being used by most companies in Nigeria who do not want to go through the liquidation route apart from those rescue procedures mentioned above include informal workout programmes, which are mostly common in practice in Nigeria; a marketing programme for ‘visible’ companies; a transfer of toxic assets to asset management companies i.e. the Asset Management Corporation of Nigeria (AMCON) and a procurement of distressed funds (as opposed to contemplating foreclosure); a pre-pack arrangement, which could be combined with other rescue options such as receivership, scheme of arrangement, informal workout etcetera; and a transfer of full regulatory recognition to the distressed fund investor.

⁴⁵⁴ Section 117 Investment and Securities Act LFN 2007.

⁴⁵⁵ Section 135(4) Investment and Securities Act LFN 2007.

CHAPTER 4: CROSS BORDER INSOLVENCY

4.1 OVERVIEW OF CROSS BORDER INSOLVENCY LAW IN SOUTH AFRICA

Cross border insolvency has grown in importance worldwide over the past 30 years and has become a major issue in international private law.⁴⁵⁶ Insolvency with foreign creditors brings with it a lot of unavoidable issues both in theory and in practice. The biggest issue may come from insolvencies where not only the creditors but also the debtor's assets are spread over several countries. It became not only a matter of fairness to decide how to divide assets so that some creditors, due to their location, do not receive any preferential treatment over the others, but also an issue of efficiency in determining how to maximise the distribution of proceeds and how to maintain the going concern value of a multinational company whose assets are spread worldwide. Propelled by such rising practical problems, academic disputes among theorists gained momentum.⁴⁵⁷

Due to these issues of cross border insolvencies, and due to the fact that a single set of domestic insolvency laws cannot be immediately and exclusively applied without one having regard to the issues raised by the foreign elements in the various cases,⁴⁵⁸ the United Nations Commission on International Trade Law(UNCITRAL) initiated the Model Law. The introduction of the Model Law was due to the fact that national laws were ill-equipped to deal with cases of cross border insolvency which often resulted in inadequate and inharmonious legal approaches in handling the case. This, in effect, affected the rescue of troubled businesses, increased the protection of the assets of an insolvent debtor against equal distribution amongst his creditors, etcetera. The main aim of the Model Law was to provide an interface between the insolvency laws of different countries with a main focus on four major areas which include access, recognition, assistance and cooperation. It was meant to assist countries to achieve a fair and cost-effective decision in any cross-border insolvency case. The Model Law has been adopted by several countries such as Great Britain, known as the Cross Border Insolvency Regulations 2006, United States of America, known as chapter 15 of the Bankruptcy Code, Romania, New Zealand, South Africa,

⁴⁵⁶ O'Brien P "Transnational aspects in South African insolvency law" in *Conference on reform of South African insolvency law* (Rand Afrikaans University 1995) 1.

⁴⁵⁷ O'Brien P "Transnational aspects in South African insolvency law" in *Conference on reform of South African insolvency law* (Rand Afrikaans University 1995) 1.

⁴⁵⁸ Fletcher IF "International Insolvency: The way ahead" 1993 *International Insolvency Review* as quoted in Mr Justice Zulman's *First interim report on trans-national insolvency*(1995) 9-10.

known as the Cross Border Insolvency Act of 2000 (although not yet in force), Serbia, Mexico, and Australia.

South Africa is not a party to any international treaties or conventions although it has recently been accepted as a “relevant country” in terms of section 426(5) of the United Kingdom Insolvency Act 1986. Prior to the adoption of the UNCITRAL Model Law, through the enactment of the Cross border Insolvency Act⁴⁵⁹ which came into force on 28 November 2003⁴⁶⁰ (although it is not yet in operation due to the fact that the Minister of Justice has to designate countries to which the Act will apply), cross border insolvency in South Africa is still regulated by common law. To date no state has been designated by the Minister of Justice in South Africa, although once the designation occurs, South Africa will have to follow a dual approach which includes the fact that those countries which have been designated by the Minister will have to be governed by the provisions of the Cross Border Insolvency Act⁴⁶¹ while those countries which have not been designated will have to be governed by the common law. This therefore means that in order for one to understand the South African legal system with regard to cross border insolvency, it is necessary to understand the position under the South African common law as well as the Cross Border Insolvency Act.⁴⁶²

4.1.1 Cross Border Insolvency Act 42 of 2000

The UNCITRAL Model Law, which can be said to postulate the characteristics of a modern insolvency system all over the world, served as the basis for the enactment of a national Act known as the Cross Border Insolvency Act⁴⁶³ in South Africa. The Model Law is not a treaty but a template which individual states are free to adopt and adapt. The Act is divided into six chapters which consist of 32 sections. The chapters include: Chapter 1: Interpretation and fundamental principles; Chapter 2: Access of foreign representatives and creditors to South African courts; Chapter 3: Recognition of foreign proceedings and relief; Chapter 4: Cooperation with foreign courts and foreign representatives; Chapter 5: Concurrent proceedings, and Chapter 6: General provisions.

⁴⁵⁹ Cross Border Insolvency Act 42 of 2000.

⁴⁶⁰ By Proclamation No R73 of 2003 published in *GG* 25768 of 27 November 2003.

⁴⁶¹ Cross Border Insolvency Act 42 of 2000

⁴⁶² Cross Border Insolvency Act 42 of 2000

⁴⁶³ Cross Border Insolvency Act 42 of 2000

One of the notable changes in the adoption of the UNCITRAL Model Law by the South African legislature, however, is the deviation of South Africa from the UNCITRAL Model Law by introducing the concept of reciprocity. The requirement of reciprocity introduced into the Cross Border Insolvency Act⁴⁶⁴ limits the scope of operation of the Act to only those states which have been designated by the Minister of Justice in South Africa. This meant that the Act can only become operational when certain countries have been designated by the Minister of Justice, by notice in the *Government Gazette*, which does not seem likely to occur in the near future as it has not been tabled in Parliament, despite the fact that the Act came into force on 28 November 2003. The Minister of Justice designates a country where he is satisfied that the recognition accorded by the laws of such country to proceedings conducted under the laws of the Republic of South Africa relating to insolvency justifies the application of the Act to foreign proceedings in such a state.⁴⁶⁵ Although the Minister may by way of a notice in the *Gazette* withdraw any notice, this does not affect any pending legal proceeding which continues as if no withdrawal was made.⁴⁶⁶

As stated above, the designation by the Minister of certain countries to which the Act will apply, will in a way introduce a dual-system approach in the South African Insolvency law system. This means that certain legal proceedings will be governed by the Cross Border Insolvency Act⁴⁶⁷ while those countries which were not designated by the Minister of Justice will be governed by the South African common law on cross border insolvency.⁴⁶⁸

Despite the abovementioned hurdles that may be experienced once the Act becomes effective it is important to highlight some of the main aims of the Act. They include providing for an appropriate mechanism for dealing with cross-border related issues, regulating all provisions meant for the recognition of foreign representatives or creditors so as to ensure that they are able to obtain easy access to South African legal proceedings and also for South African representatives to gain access to foreign legal proceedings, ensuring that there is no abuse of process by foreign representatives and creditors which has the possibility of prejudicing local

⁴⁶⁴ Smith A and Boraine A “Crossing Border into South African Insolvency Law from the Roman-Dutch Jurists to the UNCITRAL Model Law” (2002) 10 *American Bankruptcy Institute Law Review* 135 at 190–192.

⁴⁶⁵ Section 2(2)-(5) Cross Border Insolvency Act 42 of 2000.

⁴⁶⁶ Section 2(5) Cross Border Insolvency Act 42 of 2000.

⁴⁶⁷ Cross Border Insolvency Act 42 of 2000

⁴⁶⁸ Smith A and Boraine A “Crossing Border into South African Insolvency Law from the Roman-Dutch Jurists to the UNCITRAL Model Law” (2002) 10 *American Bankruptcy Institute Law Review* 135 at 191, 214.

creditors, ensuring co-operation between South African courts and foreign courts in cross-border issues, creating an improved legal certainty for trade and investment, the protection and maximisation of the value of the debtor's assets, and the facilitation of rescuing financially distressed businesses.

As regards South Africa's international obligations, the Cross border insolvency Act yields to obligations under any treaty or other agreements with which the Cross Border Insolvency Act is in conflict.⁴⁶⁹ The South African High Courts cooperate with and recognise both foreign proceedings and foreign courts, and in such instances give South African representatives (trustees, judicial managers, liquidators, including business rescue practitioners)⁴⁷⁰ the leverage to act in a foreign state in respect of a South African insolvency proceedings if those foreign laws allow it.⁴⁷¹ Also, the Cross Border Insolvency Act does not prevent a South African representative from assisting a foreign representative under other South African laws,⁴⁷² and a court may refuse to carry out any action falling under the Cross Border Insolvency Act which has the likelihood of conflicting with the South African public policy.⁴⁷³ The bottom line therefore is that in a bid to ensure that the Act yields to treaties and agreements concluded by South Africa in terms of section 231(4) of the Constitution, the Act must be interpreted in such a way, having regard to its international origin, so as to ensure its uniformity and maintenance of good faith.⁴⁷⁴

4.1.1.1 Foreigners' access to South African courts

A foreign representative may apply directly to a High Court and thereafter seek to institute insolvency proceedings here if all the South African requirements for doing so are met.⁴⁷⁵ Once a foreign representative and his proceedings are recognised he may partake in the South African proceedings concerning the debtor.⁴⁷⁶ This is because the application of the foreign representative directly to the South African courts, does not automatically subject him or the debtor's matters to the jurisdiction of that court. He must still institute insolvency proceedings if all requirements are met.

⁴⁶⁹ Section 3 Cross Border Insolvency Act 42 of 2000.

⁴⁷⁰ Section 5 Cross Border Insolvency Act 42 of 2000.

⁴⁷¹ Sections 4-5 Cross Border Insolvency Act 42 of 2000.

⁴⁷² Section 7 Cross Border Insolvency Act 42 of 2000.

⁴⁷³ Section 6 Cross Border Insolvency Act 42 of 2000.

⁴⁷⁴ Section 8 Cross Border Insolvency Act 42 of 2000.

⁴⁷⁵ Sections 10-11 Cross Border Insolvency Act 42 of 2000.

⁴⁷⁶ Section 12 Cross Border Insolvency Act 42 of 2000.

Foreign creditors have the same rights as their South African counterparts in participating in or commencing insolvency proceedings. The South African ranking of claims as contained in section 96 to 103 of the Insolvency Act⁴⁷⁷ will continue to apply, to determine the foreign creditors ranking and class, irrespective of a foreign creditor's ranking in his own foreign state,⁴⁷⁸ provided they are not ranked lower than a non-preferment claim, provided for under section 103 of the Insolvency Act.⁴⁷⁹

4.1.1.2 Recognition of foreign proceedings

A foreign representative may also apply directly to a High Court for the recognition of a foreign proceeding in which he was appointed. In such an instance, all relevant documentary confirmation⁴⁸⁰ of the existence of such proceeding and the appointment of the foreign representative to such proceedings must be supplied to the South African courts before the proceedings can be recognised. Once the definitions of “foreign proceedings” in section 1(*h*) and “foreign representative” in section 1(*g*) and the documentary requirements provided for in section 15(2) of the Cross Border Insolvency Act⁴⁸¹ are met, foreign proceedings must be recognised by the South Africa courts.

In the recognition of a foreign proceeding, a distinction must be drawn as to whether they are foreign main proceedings, that is, where the debtor has the centre of his main interest (COMI) or foreign non-main proceedings, that is, where the debtor has an establishment as defined in section 1(*c*) of the Cross Border Insolvency Act.⁴⁸²

Pending the decision of a High Court in recognition of the foreign proceeding, the court may grant certain provisional relief based on an application of the foreign representative, aimed at protecting the assets of the debtor or the interest of the creditors, and which also has certain effects on the affairs of the debtor. However, this relief may be refused if the granting of the

⁴⁷⁷ Insolvency Act 24 of 1936.

⁴⁷⁸ Stander (1999) 62 THRHR 508 at 519.

⁴⁷⁹ Section 13(2) Cross Border Insolvency Act 42 of 2000.

⁴⁸⁰ Section 15, especially section 15(2) Cross Border Insolvency Act 42 of 2000.

⁴⁸¹ Cross Border Insolvency Act 42 of 2000

⁴⁸² An establishment as defined by section 1(*c*) of the Cross Border Insolvency Act 42 of 2000 is “[a]ny place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.

relief shall hinder the administration process.⁴⁸³ The relief includes a stay of execution against the debtor's assets;⁴⁸⁴ entrusting of perishables, depreciating or endangered assets to the representative or another court designee for the purpose of preserving the value of the debtor's assets, or realising some or all of the assets;⁴⁸⁵ suspension of the debtor's right to transfer, encumber or dispose of his assets;⁴⁸⁶ the examination of witnesses for information concerning the debtor's assets, affairs, rights, obligations and liabilities, and the collection of evidence necessary in the administration of the estate;⁴⁸⁷ and the granting of any other relief available to a South African representative under the South African laws.⁴⁸⁸ In addition, regardless of the granting of the abovementioned relief, the effect of the recognition of a foreign proceeding as a foreign main proceeding includes a stay of the commencement or continuation of any individual action against the debtor's affairs;⁴⁸⁹ a stay of execution against that debtors assets;⁴⁹⁰ a suspension of the rights of the debtor to transfer, encumber or dispose of any of his assets;⁴⁹¹ and the provisions of section 21 of the Insolvency Act⁴⁹² are made applicable to assets situated in South Africa as if the debtor had been sequestrated by the courts there.⁴⁹³ Provisional relief may terminate if not extended, once the recognition of the foreign proceeding has been decided upon.⁴⁹⁴

The recognition of a foreign main proceeding does not prevent the institution of a South African insolvency proceeding. The latter proceeding can be instituted where the debtor has assets in South Africa, provided that those proceedings shall be limited to those assets and to any other assets of the debtor which, in so far as is necessary for cooperation and coordination under sections 25-27 of the Cross Border Insolvency Act,⁴⁹⁵ should under the South African laws be administered in those proceedings.⁴⁹⁶ Also, the recognition of a foreign main proceeding is proof

⁴⁸³ Section 19(4) Cross Border Insolvency Act 42 of 2000.

⁴⁸⁴ Section 19(1) (a) Cross Border Insolvency Act 42 of 2000.

⁴⁸⁵ Section 19(1) (b) Cross Border Insolvency Act 42 of 2000.

⁴⁸⁶ Section 19(1) (c) but also mentioned in 21(1) (c) Cross Border Insolvency Act 42 of 2000.

⁴⁸⁷ Section 19(1) (c) but also mentioned in 21(1) (d) Cross Border Insolvency Act 42 of 2000.

⁴⁸⁸ Section 19(1) Cross Border Insolvency Act 42 of 2000.

⁴⁸⁹ Section 20(1) (a) Cross Border Insolvency Act 42 of 2000.

⁴⁹⁰ Section 20(1) (b) Cross Border Insolvency Act 42 of 2000.

⁴⁹¹ Section 20(1) (c) Cross Border Insolvency Act 42 of 2000.

⁴⁹² Insolvency Act 24 of 1936.

⁴⁹³ Section 20(1) (d) Cross Border Insolvency Act 42 of 2000.

⁴⁹⁴ Section 21(1) (f) Cross Border Insolvency Act 42 of 2000.

⁴⁹⁵ Cross Border Insolvency Act 42 of 2000

⁴⁹⁶ Section 28(1)-(2) Cross Border Insolvency Act 42 of 2000.

of the debtor's insolvency which can cause the commencement of a South African insolvency proceeding.⁴⁹⁷

After the recognition of a foreign proceeding (whether it is a foreign main or foreign non-main proceeding), the court may grant discretionary relief⁴⁹⁸ such as a stay of the commencement or continuation of any individual action against the debtor's affairs;⁴⁹⁹ a stay of execution against that debtors assets;⁵⁰⁰ suspension of the rights of the debtor to transfer, encumber or dispose of any of his assets;⁵⁰¹ entrusting of perishables, depreciating or endangered assets to the representative or court designee for the purpose of preserving the value of the debtor's assets, or realising some or all of the assets;⁵⁰² the examination of witnesses for information concerning the debtor's assets, affairs, rights, obligations and liabilities, and the collection of evidence necessary in the administration of the estate;⁵⁰³ and granting any other relief available to a South African representative under the South African laws.⁵⁰⁴

The court may in certain circumstances, after the recognition of the foreign proceedings, permit the distribution of the debtor's assets by the representative or any court designee, provided the court is satisfied that the interests of the creditors are protected.

4.1.1.3 Cooperation with foreign courts and foreign representatives

The court shall cooperate with foreign courts and foreign representatives, directly or through a trustee, liquidator, curator, receiver, etcetera.⁵⁰⁵ The court may also directly communicate with or seek information or help from a foreign court or representative.⁵⁰⁶ South African representatives are also expected to give similar cooperation to the maximum extent possible to foreign courts and representatives subject to the supervision of the High Courts.⁵⁰⁷ UNCITRAL makes certain recommendations regarding communication, by stating that the subject matter of the

⁴⁹⁷ Section 31 Cross Border Insolvency Act 42 of 2000.

⁴⁹⁸ Section 21 Cross Border Insolvency Act 42 of 2000.

⁴⁹⁹ Section 20(1) (a) Cross Border Insolvency Act 42 of 2000.

⁵⁰⁰ Section 20(1) (b) Cross Border Insolvency Act 42 of 2000.

⁵⁰¹ Section 20(1) (c) Cross Border Insolvency Act 42 of 2000.

⁵⁰² Section 19(1) (b) Cross Border Insolvency Act 42 of 2000.

⁵⁰³ Section 19(1) (c) but also mentioned in 21(1) (d) Cross Border Insolvency Act 42 of 2000.

⁵⁰⁴ Section 19(1) Cross Border Insolvency Act 42 of 2000.

⁵⁰⁵ Section 25(1) Cross Border Insolvency Act 42 of 2000.

⁵⁰⁶ Section 25(2) Cross Border Insolvency Act 42 of 2000

⁵⁰⁷ Section 26(1) Cross Border Insolvency Act 42 of 2000.

communication include exchange of formal court orders or judgments; supply of informal writings of general information, questions and observations; and transmission of transcripts of court proceedings,⁵⁰⁸ while the methods of communication might include telephone, fax, e-mail, video and video conferencing to facilitate the granting of suggested relief.⁵⁰⁹

4.1.1.4 Concurrent proceedings

Since the recognition of a foreign main proceeding does not prevent the launch of a South African proceeding, the concurrent running of a recognised foreign proceeding and a South African proceeding could prompt a court to seek cooperation and coordination as provided for under sections 25 to 27 of the Cross Border Insolvency Act.⁵¹⁰

4.1.1.5 Hotchpot rule or principle

In a bid to avoid situations whereby a creditors obtains a favourable treatment at the expense of other creditors of the same class, by obtaining payment of his claim from both his foreign jurisdiction and the South African jurisdiction, the Cross Border Insolvency Act⁵¹¹ provides for the application of the ‘hotchpot rule’. This has the effect that a creditor who has been paid part of his claim in foreign insolvency proceedings, is not entitled to be paid for the same claim in South African insolvency proceedings regarding the same debtor while other creditors of the same class are paid proportionally less than what that creditor has already received.⁵¹²

4.1.2 Cross border insolvency laws in terms of common law principles

The South African common laws on cross border insolvency are based on the doctrine of comity and convenience, such as the principles of humanity and equity. Under the doctrine of comity, foreign laws will be given local effect not out of courtesy or respect for the foreign country but in order to ensure that the foreign country may do justice to the private litigants before his courts and also accord reciprocal treatment to the South African laws.

⁵⁰⁸ UNCITRAL *Guide*, para 178.

⁵⁰⁹ Smith A and Boraine A “Crossing Border into South African Insolvency Law from the Roman-Dutch Jurists to the UNCITRAL Model Law” (2002) 10 *American Bankruptcy Institute Law Review* 135 at 201-202. See also Wessels B *International insolvency law* (2006) para 10327.

⁵¹⁰ Cross Border Insolvency Act 42 of 2000

⁵¹¹ Cross Border Insolvency Act 42 of 2000

⁵¹² Section 32 Cross Border Insolvency Act 42 of 2000.

There are four basic principles at work in the South African common law which constantly conflict with one another. These conflicts arise at the doctrinal level in cross border insolvency. The first is the conflict between the “unity of proceedings” principles which allows only one set of proceeding to be started against the insolvent debtor. This principle excels tremendously in situations where countries share a similar law or are bound by a treaty which governs them such as the European Union regulation. In this regard, the council of the European Union issued Regulation 1346/2000 of May 2000 on insolvency proceedings,⁵¹³ which binds all member states of the union, except Denmark, and which applies to any insolvency proceeding between member states. The main insolvency proceedings take place in the centre of main interest which is also known as the COMI, that is, where the principle office of the company is situated. The other principle which is in conflict with the unity of proceedings principle is the “plurality of proceedings” principle which allows several sets of proceedings to be launched against the insolvent debtor.

The second set of principles which are also constantly in conflict with each other is the “universality” principle which extends the effect of one set of proceedings internationally and the “territoriality” principle which limits the jurisdiction of the court granting the order involved.⁵¹⁴ These principles of universality and territoriality both apply to the effect of a sequestration order on the different types of property such as movable or immovable property.⁵¹⁵

4.1.2.1 Movable and immovable property and inward and outward bound request

The South African common law on cross border insolvency draws a distinction between movable and immovable property and between an inward and outward bound request:

- A. **Movable property:** Here, the debtor is sequestrated by the court of the debtor’s domicile. The sequestration order granted by the court divests the debtor of all his movable property wherever in the world it is and thereby creates a single *concursum creditorum*,⁵¹⁶ which has the effect of limiting the sequestration order to the universality principle discussed above. In the case of a company, the jurisdiction of a court to grant a

⁵¹³ http://ec.europa.eu/justice/policies/civil/insolvency/policies_civil_1346_en.html (accessed 14 August 2011).

⁵¹⁴ Trautman DT *et al* “Four models for international bankruptcy” (1993) *American J of Comparative Law* 573-576.

⁵¹⁵ See section 2 of the Insolvency Act 24 of 1936 for the definition of both movable and immovable property.

⁵¹⁶ *Viljoen v Venter NO* 1981 (2) SA 152 (W) 155.

liquidation order is determined by the place of the company's incorporation or the place of business of the company if the registered office is situated somewhere else.

- B. Immovable property:** Immovable property is governed by the *lex rei situs*, that is, the law of the place where the property is situated or located, and the effect of the sequestration order is limited to the territoriality approach which limits the jurisdiction of the court granting the order to the place where the property is situated.

In case of both movable and immovable property, the foreign trustee/representative must seek recognition from the court in the jurisdiction where the property is situated before he will be allowed to deal with the property, whether movable or immovable, even though some cases have held that recognition is not necessary in case of movable assets.⁵¹⁷

- C. Outward-bound request:** Here, a South African trustee or liquidator of the debtor's estate situated in South Africa who aims to retrieve some of the assets of the debtor situated in other countries must first and foremost ensure that he/she meets the requirement for that state's laws and procedures for his recognition.⁵¹⁸ The South African trustee then files in the foreign court a request by the South African court to recognise the South African trustee/liquidator.⁵¹⁹

- D. Inward-bound request:** This kind of request depends on whether the properties are movables or immovable. In case of immovable property, however, the trustee or liquidator, in order to be recognised, must first seek recognition of his/her appointment in the jurisdiction where the property is situated. The recognition of a foreign representative in South Africa to deal with the debtor's immovable property is solely within the discretion of the court which is usually granted in the interest of comity and convenience. This enables the foreign trustee/liquidator to perform his duties effectively, which can be

⁵¹⁷ *Ex parte Palmer: In re Hahn* 1993 (3) SA 359 (C) 364E.

⁵¹⁸ See Meskin PM *Insolvency law and its operation in winding-up* (by Kunst J *et al*) (eds) loose-leaf, from 1990 para 4.58; 17.3.1. The courts of the United Kingdom may exercise discretion to assist South African proceedings if requested to do so by South African court (section 426 Insolvency Act 1986(c 45). Since 1 March South Africa has been a 'relevant country' for the purposes of section 426 (Co-operation of Insolvency courts (Designation of Relevant Countries) Order SI 1996/253).

⁵¹⁹ *Ex parte Wessels and Venter NNO: In re Pyke-Nott's Insolvent Estate* 1996 (2) SA 677 (O); *Gardener v Walters: In re Ex parte Walters (In re Ex parte Walters NNO)* 2002 (5) SA 796 (C).

achieved through seeking the assistance of the local courts and their administrative officials.⁵²⁰

4.1.2.2 Procedures for recognition of foreign trustee or liquidator in South Africa

A South African court has the discretion to recognise foreign trustees/liquidators, subject to the doctrine of comity, convenience and equity. It has been suggested that a foreign trustee or liquidator who seeks recognition from the South African courts must first apply to the High Court for his/her recognition. A South African representative who seeks recognition from a foreign court, must apply to a South African court for ‘letters of request’ recognising his appointment as a step towards approaching the relevant foreign authorities. In practice, letters of appointment are not usually issued by the Master to the foreign representatives for their recognition; the Master merely endorses the court’s order to the effect that security to his/her satisfaction has been furnished by the foreign representative. The fact that a foreign trustee/liquidator who seeks recognition is a person who has been disqualified from holding the office of a trustee under the South African law is not a ground for refusing recognition of such foreign trustee in South Africa.⁵²¹ The court may, however, be reluctant to recognise a foreign trustee/liquidator if the court is not certain that the foreign trustee’s appointment shall be made final. However, the court may in the exercise of its discretion grant interim relief aimed at protecting the debtor’s local assets.⁵²²

4.1.2.3 Effect of recognition of foreign representative

The effect of the recognition of the appointment of a foreign representative is that the debtor’s assets in South Africa will be treated as if the foreign debtor was declared insolvent by the South African courts in terms of the Insolvency Act.⁵²³ By virtue of his recognition, a foreign representative will be allowed to conduct interrogations of the insolvent and other individuals; for the purpose of enabling him trace assets of the debtor or to enable him obtain information from certain individuals about the local assets of the debtor.

⁵²⁰ *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste Intervening* 1990 (1) SA 954 (A) at 959G-H.

⁵²¹ *Ex parte Robinson’s Trustee* 1910 TS 25.

⁵²² *Bekker NO v Kotze* 1996 (4) SA 1287 (NMHC).

⁵²³ Insolvency Act 24 of 1936; *Ex parte Steyn* 1979 (2) SA 309 (O). See also *Herman NO v Tebb* 1929 CPD 65 at 76 and *Chaplin NO v Gregory* 1950 (3) SA 555 (C) 562A-B.

One very important point to note is that certain statutes, such as the Insolvency Act, are only enforceable in the state where they are enacted. The court explained in *Viljoen v Venter NO*⁵²⁴ that section 21 of the Insolvency Act 24 of 1936 which vests the assets of the solvent spouse in the trustee of the insolvent estate was never intended to operate extraterritorially. Note that for the foreign sequestration order to vest on the assets of the solvent spouse in South Africa, the foreign representative will be required to bring a sequestration application in a South African court.⁵²⁵

4.1.2.4 Priorities and preference of creditors

The law of the place of the debtor's domicile is used to decide which creditors have priority over the others in respect of movable property. As regards movables situated outside the debtor's domicile and immovable property, the *lex rei sitae* is to govern.⁵²⁶ Local creditors do not enjoy any preference over foreign creditors.⁵²⁷

In order to prevent one creditor from obtaining a favourable treatment over the other, Mars submits,⁵²⁸ that the hotchpot principle will apply where "the creditor who has seized or recovered property of the insolvent in proceedings abroad may not prove in local proceedings for any balance of debts due to the creditor unless he or she is prepared to bring into the common fund for distribution what he or she received abroad".⁵²⁹

4.1.2.5 Protection of local creditors

In a bid to curb the abuse of the process, South African courts strive to protect local creditors by imposing certain conditions on the realisation/removal of assets within the Republic. These conditions include the local creditors being notified of the intention of the foreign representative to deal with local assets, the estate as a whole being divided equally and any dividend due to local creditors is paid to them from the local assets of the debtor if sufficient.⁵³⁰ In certain instances, the court may make an order that all the administration costs as well as the cost of the

⁵²⁴ 1981 (2) SA 152 (W) at 154H.

⁵²⁵ *Ex parte Steyn* 1979 (2) SA 309 (O) at 311E-F; *Supra* note 229.

⁵²⁶ *Paterson's Marriage Settlement Trustees v Paterson's Trustees in Insolvency* 2 Buch 95 at 111; *Ex parte Link's Trustees* 1904 TS 251 at 253; *In re Harry Fielding, Ex parte C Greatrex and Sons Ltd* 1906 NPD 577 at 578 (preference has to be determined by the local law).

⁵²⁷ *In re Testate Estate of Edwin Allan Skeen* 27 NLR 127; *Ex parte Steyn* 1979 (2) SA 309 (O).

⁵²⁸ Bertelsmann E *et al Mars The law of insolvency in South Africa* (updated October 2012) 670.

⁵²⁹ Edwards AB "Conflict of laws" (updated by Ellison Kahn) in WA Joubert (ed) *Law of South Africa* Volume 2(2) 2 ed (2003) para 326 and 26; *supra* note 172, 173.

⁵³⁰ *Supra* note 518; *Ward v Smit: In Guru v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) AT 179 G-I.

application and local debts must be paid, etcetera and any remaining assets or money may be removed from the republic with the consent of the Master,⁵³¹ or with the consent of the court.⁵³² In such instances, the local concurrent creditors must be paid in full before foreign creditors can be paid.⁵³³

4.1.2.6 Application for sequestration or winding-up in South Africa

Where a court in its discretion refuses to recognise of a foreign representative or where the latter has not applied for a recognition order, a foreign creditor may apply for the sequestration or winding-up of the debtor or company as the case may be.⁵³⁴

4.1.2.7 Concurrent sequestration proceedings

Where the insolvent resides in two countries and insolvency proceedings have commenced in both countries, the proceedings must continue in the country in which they were first instituted provided that the insolvent was domiciled in the foreign countries and the local South African creditors shall not be prejudiced nor lose their right of preference which has been accorded to them before the insolvency of the debtor.⁵³⁵

4.1.2.8 Effect of rehabilitation

The effect of rehabilitation on a debtor granted in one country does not have an extra-territorial effect, that is, it does not extinguish the debts of the debtor in the other country. The rehabilitation order cannot be enforced in any other country and as such, a debtor may be sued in South Africa for a debt even though it was contracted in a foreign country and he has been rehabilitated.⁵³⁶

⁵³¹ Supra note 525; Bertelsmann E *et al Mars The law of insolvency in South Africa* (updated October 2012) 670.

⁵³² *Re Greatrex & Sons Ltd* 1907 TS 538 at 540.

⁵³³ Section 9 of the Foreign Trustees and Liquidators Recognition Act 7 of 1907(Transvaal) provided that “the balance after payment of the local preferent creditors was available for distribution among the general body of creditors, including the local concurrent creditors, provided that the balance had to remain in the Colony until the dividend of local concurrent creditors had been paid in so far as the balance allowed such payment”.

⁵³⁴ Section 149 Insolvency Act 1936; section 12 Companies Act 1973; *Sackstein NO v Proudfoot (Pty) Ltd* 2003 (4) SA348 (SCA) at 357.

⁵³⁵ *Trustee of Howse, Sons & Co v Trustee of Howse, Sons & Co; Jocelyne v Shearer & Hine* 3 SC 14 at 22-23; *Re Estate Morris* 1907 TS 657 at 668.

⁵³⁶ *Cape of Good Hope Bank (in liquidation) v Melle* 10 SC (1893) 230; *Dyer v Carlis* 4 Official Reports (1897) 67; *Ex parte Steyn* 1979 (2) SA 309 (O).

4.2 CROSS BORDER INSOLVENCY LAWS IN NIGERIA

The theory of reciprocity and the doctrine of obligation serve as the basis for the recognition of foreign judgments in Nigeria and form the common ground for dealing with cross border issues. The decision to confer reciprocal status to a foreign procedure is based on the powers vested on the Minister of Justice of the federation of Nigeria, if satisfied that substantial reciprocity will be accorded to the enforcement of judgements given in superior courts in Nigeria. There are a number of decisions by the courts as regards the enforcement of foreign judgments in Nigeria, but it should be noted that the UNCITRAL Model Law which was adopted in other countries, has not yet been adopted in Nigeria. An issue of great concern to the Nigerian courts in cases of registering a foreign judgement in Nigeria or registering a Nigerian judgement in a foreign country is to ensure that no conflict arises between the foreign courts and the registering courts.⁵³⁷

The statutes that govern the enforcements of foreign judgments in Nigeria are the Reciprocal Enforcement of Foreign Judgments Ordinance 1958 and the Foreign Judgments (Reciprocal Enforcement) Act (FJ Act) Cap F.35 LFN 2004. There have been various arguments by legal practitioners, text writers, etcetera as to which statute applies to the enforcement of foreign judgments. This is because the Ordinance gives the Nigerian courts the power to enforce judgments obtained in England, Ireland, Scotland and the parts of Her Majesty's Dominion to which the ordinance applies, while the Foreign Judgments (Reciprocal Enforcement) Act (FJ Act)⁵³⁸ gives the Nigerian courts the power to enforce judgments obtained from any country in respect of which the Minister of Justice has by order extended the application of the Act. *Dale Powers System PLC V Witt & Bush Ltd*,⁵³⁹ and *Halaoui v Grosvenor Casinos Ltd*⁵⁴⁰ are some of the cases which illustrate the confusion as to which statute is to apply in the enforcement of a foreign judgment.

⁵³⁷ *Adwork Limited vs Nigeria Airways Limited Court of Appeal* (2000) 2 NWLR (part 645).

⁵³⁸ Foreign Judgments (Reciprocal Enforcement) Act (FJ Act)⁵³⁸ Cap F35 LFN 2004

⁵³⁹ (2001) 8 NWLR (p.716) 699.

⁵⁴⁰ (2002) 17 NWLR (p.795)28.

It seems that this uncertainty as to which statute applies is due to the fact that, despite the provisions of section 9(1) of the Foreign Judgments (Reciprocal Enforcement) Act (FJ Act)⁵⁴¹ the Minister of Justice has not made an order extending the provisions of this Act to the United Kingdom and other foreign jurisdictions, which makes the Ordinance applicable pending the issuance of such order by the Minister.⁵⁴²

Part 1 of the Foreign Judgments (Reciprocal Enforcement) Act (FJ Act)⁵⁴³ provides for instances where a foreign judgment can be enforced by a superior court. They include the following:

1. The judgment must be final and conclusive between the parties (section 3(2)(a)); and
2. The sum payable is a money judgment (section 3(2) (b)).

The party who asserts that the judgment is final and conclusive must prove it,⁵⁴⁴ and must pay the registration fees (which must be in naira and if in another currency must be converted to naira at the exchange rate prevailing as at the date of judgment) before the foreign judgment can be registered by the registering court.⁵⁴⁵ The effect of the registration of a foreign judgment in Nigeria is such that the judgment sum carries with it interest and the registering court has the same control over the registered court as if the judgment was given in that high court on the date of registration.⁵⁴⁶ It is also important to note that a judgment debtor may also apply to court to have a foreign judgment set aside and the court if satisfied may set such judgment aside.⁵⁴⁷

As regards countries which do not accord reciprocal treatment to the enforcement of judgments given by Nigerian courts, a foreign creditor may then use the foreign judgment to procure another judgment in Nigeria by instituting a fresh petition in the Nigerian courts for winding up

⁵⁴¹Foreign Judgments (Reciprocal Enforcement) Act (FJ Act)⁵⁴¹ Cap F35 LFN 2004; Section 9(1) Foreign Judgments (Reciprocal Enforcement) Act (FJ Act) Cap F.35 LFN 2004 provides that: “This part of this Act shall apply to any part of the Commonwealth other than Nigeria and to the judgments obtained in the courts thereof as it applies to foreign countries and judgments obtained in the courts of foreign countries, and the Reciprocal Enforcement of Judgments Ordinance shall cease to have effect except in relation to those parts of Her Majesty’s Dominion other than Nigeria to which it extended at the date of the commencement of this Act.”

⁵⁴² *Macaulay v R.Z.B Austria* (2003) 18 NWLR (PT 852) 282.

⁵⁴³ Foreign Judgments (Reciprocal Enforcement) Act (FJ Act)⁵⁴³ Cap F35 LFN 2004

⁵⁴⁴ *Zeiss Stiftung v Rayner & Keller Ltd* (1996) 2 All ER 536 at 555,587.

⁵⁴⁵ Section 4(3) Foreign Judgments (Reciprocal Enforcement) Act (FJ Act) Cap F.35 LFN 2004

⁵⁴⁶ Section 4(2)(a)-(c) Foreign Judgments (Reciprocal Enforcement) Act (FJ Act) Cap F.35 LFN 2004

⁵⁴⁷ See section 6(1) (a) (i)-(vi) of the Foreign judgment (Reciprocal Enforcement) Act Cap F35 2004; *Hyppolite v Egharevba* (1998) 11 NWLR (pt 575)598 at 613F-614C, where the court held in light of section 6(1) (a) (iii) that a foreign judgment could be set aside based on the ground that one of the court processes leading to the judgment was not served on the judgment creditor.

of the company, by using any procedure provided for in section 408,457 & 486-490 of the Companies and Allied Matters Act.⁵⁴⁸ This necessity for a fresh petition to be instituted by a foreign creditor in the Nigeria courts, is due to the fact that a winding up order from a foreign court, when brought to the Nigerian courts cannot be enforced like a monetary judgement, and would not necessarily award any judgement to the creditor for debts incurred by the Debtor, rather it simply declares that the company is insolvent and be wound up after such a creditor has proved to the courts that a debt exist, which is due and remains unpaid by the company even after a statutory demand has been made.⁵⁴⁹

Alade⁵⁵⁰ noted that section 51(1) of the Arbitration & Conciliation Act of 1988 Cap A18 LFN Nigeria⁵⁵¹ provides that an arbitral award will be enforced by the Nigerian courts irrespective of the country in which it was made if a written application made by the person seeking its enforcement is being made to the Nigerian courts. He continued that, as regards the enforcement of foreign awards arising from an International Commercial Arbitration, Nigeria is also a signatory to the New York Convention on the Recognition & Enforcement of Foreign Arbitral Awards of 17 March 1970 which, applies to awards made in a country which is a party to the convention and which has made reciprocal legislation recognising the enforcement of such arbitral awards in Nigeria in accordance with the provisions of the Convention. Foreign arbitral providers such as the ICC, the SCC, the ICDR and other bodies may also operate in Nigeria. International arbitrations under the rules of the ICC are usually conducted in Nigeria from time to time. Nigeria is also a signatory to the ICSID Convention which means that ICSID awards are enforced in Nigeria pursuant to the International Centre for settlement of Investment Disputes (Enforcement of Awards) Act Cap 120, Laws of the Federation of Nigeria 2004. An ICSID award has the effect of a final judgment of the Supreme Court for purposes of enforcement.

In trying to analyse the adoption of the Organization pour l'Harmonisation en Afrique (Ohada) in Nigeria, Akinbote, the President of Ohada Nigeria, at a workshop in Kampala in January 2010

⁵⁴⁸ Companies and Allied Matters Act Cap C20 LFN 2004.

⁵⁴⁹ Cross Border Insolvency Chapter 28 NIGERIA-

<http://www.nigerianlawguru.com/articles/commercial%20law/CROSS%20BORDER%20INSOLVENCY%20-%20NIGERIA.pdf>. (Accessed 17 July 2013)

⁵⁵⁰ Alade I "Nigeria informed decision: 2011 guide to Project Finance in Nigeria (1 June 2011) <http://www.iflr.com/article/2855514/Nigeria-informed-decision-html> (accessed 1 July 2011).

⁵⁵¹ Note that this Act is based on the UNCITRAL Model Law and applies to all arbitrations with their seats in Nigeria except ICSID arbitrations.

stated⁵⁵² that the opening up of the membership of Ohada to non-French speaking states such as Nigeria and Ghana will go a long way towards promoting investment, creating legal certainty, creating the unification of business laws such as bankruptcy law, debt recovery and enforcement law, etcetera, and the establishment of a common court of justice and arbitration for all insolvency matters all over Africa.

An example of a case where the Nigerian representatives sought recognition in the foreign country is the case of *Diamond Bank Plc v Alan Dick & Company West Africa Ltd (ADWA)*.⁵⁵³ Idigbe⁵⁵⁴ mentioned here that the insolvency practice in Nigeria was offered the opportunity to make use of the UK cross border insolvency provisions to follow the assets of an insolvent in the United Kingdom, which includes the power to call United Kingdom based directors to account for those assets. He went on to say that both the Nigerian proceedings and the powers of the liquidators would be recognised and enforceable in the United Kingdom, subject to the concept of reciprocity, and based on an application for recognition of the foreign proceedings and the foreign representative.⁵⁵⁵

The Court of Appeal also stated in *Adwork Limited vs Nigeria Airways Limited Court of Appeal*,⁵⁵⁶ that *“The original court that gave judgment does not lose its jurisdiction in relation to the execution process in the suit just because the judgment has been registered in a foreign country. But once it is recognized that a registering court has the same power with respect to execution as the original court, it becomes important to monitor closely what the registering court is doing in relation to the execution of a particular registered judgment in order to ensure that there is no conflict in the exercise of powers as to execution between the registering court and the court which originally gave the judgment”*.

Although Nigeria have not yet adopted the UNCITRAL Model Law as regards cross border issues, the courts have through the Foreign Judgments (Reciprocal Enforcement) Act (FJ Act)

⁵⁵² Akinbote A “The Ohada & Ecowas treaties as a tool for regional integration and regulatory reforms” <http://www.ohada.com/fichiers/newsletter/811/ohada-an-Ecowas-treaties-as-tool-html> (15 August 2011)

⁵⁵³ Suit no FHC/L/CP/654/08).

⁵⁵⁴ Idigbe A “Alan Dicks: Bridging the gap between domestic & cross-border best practice” <http://www.internaitonallawoffice.com/newsletters/details.aspx?g=6a008f27-850d-html>. (Accessed 27 March 2010)

⁵⁵⁵ Articles 21 and 23, Schedule 1 of the Cross-Border Insolvency Regulation 2006.

⁵⁵⁶ (2000) 2 NWLR (part 645).

CAP F35 LFN 2004 made several judgments⁵⁵⁷ that have helped the Nigerian cross-border insolvency regime to some extent.

⁵⁵⁷ Supra note 556.

CHAPTER 5: LAW REFORM INITIATIVES

5.1 LAW REFORM IN SOUTH AFRICAN CORPORATE INSOLVENCY LAW

As was mentioned earlier, the South African insolvency law is not contained in a single unified Act, although an investigation into unifying both the Insolvency Act,⁵⁵⁸ and the Companies Act,⁵⁵⁹ was completed in 2000 by the Centre for Advanced Corporate and Insolvency Law of the University of Pretoria which has been accepted by Cabinet in March 2003 as the Draft Insolvency and Business Recovery Bill. The adoption of this piece of legislation is regarded as one of the major reforms that could take place in the South African insolvency legal system. The South African Law Reform Commission is, however, currently reviewing the insolvency law with a view of enacting a new Insolvency Act which would include the provisions of the Insolvency Act⁵⁶⁰ which applies to individuals, and the provisions of the Companies Act⁵⁶¹ and the new Companies Act,⁵⁶² which applies to companies. Note that the provisions relating to cross border insolvencies shall not be included in this unification process, and shall be limited to that stated above.

Some of the other major reforms that have taken place in South Africa recently, and which have steered the view of south Africans from the liquidation of a company to the possible rescue of the ailing company, include the enactment of chapter 6 of the new Companies Act⁵⁶³ which introduced a new corporate rescue regime known as business rescue of financially distressed companies. This chapter is aimed primarily at either rescuing a financially distressed company which has the possibility of being rescued, or achieving a better return on the realisation of the assets of the company than would result from the immediate liquidation of the company.⁵⁶⁴ The whole chapter on business rescue has already been discussed in other chapters in this research. The main aim of the discussion of business rescue was to pinpoint the fact that the introduction of business rescue into the South African Companies Act⁵⁶⁵ was a huge reform in the South African corporate insolvency law system. This is because the introduction of business rescue

⁵⁵⁸ Insolvency Act 24 of 1936.

⁵⁵⁹ Companies Act 61 of 1973.

⁵⁶⁰ Insolvency Act 24 of 1936.

⁵⁶¹ Companies Act 61 of 1973

⁵⁶² Companies Act 71 of 2008.

⁵⁶³ Companies Act 71 of 2008.

⁵⁶⁴ Section 128(b) (iii) Companies Act 71 of 2008.

⁵⁶⁵ Companies Act 71 of 2008

reflects a deviation of South African insolvency law from the creditor friendly approach which had always existed in South Africa to the fresh start approach, which already exists in the USA.

Finally the introduction of mergers, amalgamations, take-overs and acquisitions into the corporate regime in South Africa under chapter 5 of the Companies Act 71 of 2008 also in a way highlighted the need for a fresh start approach for all ailing companies to succeed and be rescued from liquidation.

5.2 LAW REFORM IN NIGERIAN CORPORATE INSOLVENCY LAW

It is a well known fact that one of the best ways of ascertaining business growth and crisis management in any society is by establishing a good and effective insolvency and business rescue procedure.

The reforms being undertaken by the Business Recovery and Insolvency Association of Nigeria (BRIPAN), an initiative engaged in the capacity building of individuals, with the aim of equipping them with the necessary skills and knowledge to deal with corporate insolvency and business rescue, include the establishment of a mechanism for the recognition and appointment of insolvency practitioners in Nigeria, a simple and accessible procedure for the adoption of a scheme of arrangement, the creation of a simple and accessible procedures for dealing with insolvency in the Federal High Court as regards ordinary debtors and the encouraging of corporate rescue of companies instead of winding-up etcetera. These reforms have been welcomed with open arms and have been seen as a way forward for the corporate insolvency regime in Nigeria. It has been stated that there is a need for a set of insolvency laws in Nigeria that will define the insolvency process aimed at providing regulations that will be easy to understand and can be practised without any conflict involved, and which could be accurately controlled by certain control measures. BRIPAN has called on the government to reform the insolvency laws in Nigeria and one of the reasons for the organisation's suggestion is that because many companies are presently growing and have assets outside the country, steps need to be taken by the government to reform those laws so as to give a form of security to Nigerians investing outside Nigeria and any prospective investors in the country.⁵⁶⁶

⁵⁶⁶ Akinwunmi S "Corporate insolvency law in Nigeria – The need for urgent reform"
<http://www.akinwunmibusari.com/images/documents/corporate20%-practice20%-html> (accessed 15/11/2010):

Akinwunmi⁵⁶⁷ suggested some reforms that should be undertaken by the Nigerian government which have been highlighted above include ensuring that the procedures for entering into a scheme of arrangement under the Companies and Allied Matters Act which included the court, members, creditors and the Securities and Exchange Commission be streamlined and improved by the appointment of an individual to conduct the scheme of arrangement which should be incorporated into our law; and also the fact that the court should play no part in the formulation of the scheme of arrangement or compromise which should only be dealt with by the appointed person to monitor the scheme i.e. the liquidator, thereby limiting the court's involvement to the sanctioning of the scheme.

Iyiola O O "Imperative of a vibrant insolvency practice in Nigeria" (2008)
http://www.papers.ssrn.com/s013/papers.cfm?abstract_id=1089345-html (accessed 01/02/2011).
⁵⁶⁷ Supra note 402

CHAPTER 6: CONCLUSION

6.1 Summary of findings

Some of my finding after undergoing this research, shall be briefly highlighted, before recommendations shall be given below as to the way forward for the corporate insolvency regime in Nigeria and South Africa

In South Africa, a summary of my finding include the following: the unification of the Insolvency Act,⁵⁶⁸ which applies to individuals and the Companies Act,⁵⁶⁹ and also the new Companies Act,⁵⁷⁰ which applies to companies, contained in a Draft Insolvency and Business Recovery Bill is yet to be adopted as a piece of legislation in South Africa, even after it was approved by Cabinet in 2003; The enactment of a new Companies Act,⁵⁷¹ which makes provision for business rescue of companies and the liquidation of solvent companies in terms of section 79 to 82 of the new Companies Act,⁵⁷² and further provides in terms of the provision of section 79(2) read together with Item 9 Schedule 5 of the Companies Act,⁵⁷³ that Chapter 14 of the Companies Act,⁵⁷⁴ will continue to apply to the winding up of companies in South Africa; There is still no regulation in South Africa for the appointment of insolvency practitioners by the Master of the High Court, which appointments have been marred with a lot of irregularities. Section 5(1) of the Promotion of Administrative Justice Act⁵⁷⁵ however makes provisions which checks the powers of the Master of the High Court, by providing that the Master may be compelled to give reasons as to why a specific person was either appointed or not appointed; Liquidation proceedings can be converted to business rescue proceedings at any time after liquidation;⁵⁷⁶ Section 311 of the Companies Act⁵⁷⁷ which provided for both a scheme of arrangement and compromise, has been divided under the new Companies Act⁵⁷⁸ into section

⁵⁶⁸ Insolvency Act 24 of 1936

⁵⁶⁹ Companies Act 61 of 1973

⁵⁷⁰ Companies Act 71 of 2008.

⁵⁷¹ Companies Act 71 of 2008.

⁵⁷² Companies Act 71 of 2008.

⁵⁷³ Companies Act 71 of 2008.

⁵⁷⁴ Companies Act 61 of 1973

⁵⁷⁵ Promotion of Administrative of Justice Act 3 of 2000.

⁵⁷⁶ Section 131(7) Companies Act 71 of 2008.

⁵⁷⁷ Companies Act 61 of 1973.

⁵⁷⁸ Companies Act 71 of 2008.

114 of the Companies Act⁵⁷⁹ which provides for a scheme of arrangement, and section 155 of the Companies Act⁵⁸⁰ which provides for a compromise; Finally, the Cross Border Insolvency Act⁵⁸¹ which adopted the UNCITRAL Model law, is yet to become an active piece of legislation in South Africa, having regards to the fact that the Minister of Justice has not yet designated countries to which the Act will apply.

In Nigeria, a summary of my finding include the following: The country has two pieces of legislations which actively makes provisions for the winding-up of companies in Nigeria, and no investigation is underway to unify the Companies and Allied Matters Act,⁵⁸² The Winding-up Rules 2001 with the Bankruptcy Act Cap 30 LFN 1990, which applies to individuals; formal rescue procedure that exist in the Companies and Allied Matters Act,⁵⁸³ do not provide for a moratorium, which is only provided to a company which has been wound up,⁵⁸⁴ the appointments of insolvency practitioners are not regulated by any statute in Nigeria, which has prompted The Business Recovery Insolvency Practitioners Association in Nigeria(BRIPAN, a member of INSOL, and which is similar to The South African Restructuring Insolvency Practitioners Association in South Africa, also a member of INSOL), to embark on the capacity building of practitioners to ensure that they are well equipped to deal with insolvency in Nigeria; the UNCITRAL Model law is yet to be adopted in the cross border insolvency system in Nigeria, which is currently being regulated by the provisions of the Foreign Judgment (Reciprocal Enforcement) Ordinance 1958 and the Foreign Judgment (Reciprocal Enforcement) Act Cap F35 LFN 2004.

6.2 Recommendations

Some of the recommendations put forth by me in light of the above findings shall include the following:

- the need to reform and restructure the insolvency laws and practices under the Nigerian insolvency laws such as the inclusion of the corporate insolvency laws i.e. the Companies

⁵⁷⁹ Companies Act 71 of 2008.

⁵⁸⁰ Companies Act 71 of 2008.

⁵⁸¹ Cross Border Insolvency Act 42 of 2000.

⁵⁸² Companies and Allied Matters Act Cap C20 LFN 2004.

⁵⁸³ Section 538,539 Companies and Allied Matters Act Cap C20 LFN 200, and Receivership.

⁵⁸⁴ Section 417 Companies and Allied Matters Act Cap C20 LFN 2004.

and Allied Matters Act,⁵⁸⁵ and the Winding up Rules 2000, with the Bankruptcy Act⁵⁸⁶ in a unified insolvency Act, or a total review of all the laws governing bankruptcy/insolvency in Nigeria, by the removal of certain impediments in the Act, which are not necessary;

- The re-enactment of the Draft Insolvency Bill in South Africa to provide for business rescue to apply to debtors, having regards to the unification of the Insolvency Act,⁵⁸⁷ with the Companies Act⁵⁸⁸ and to amend the insolvency Act to provide that regarding impeachable dispositions, preference to associates be regarded as a disposition which could be set aside.
- the inclusion of personal liability on directors of failed companies in Nigeria, who have acted irresponsibly, by making them liable for the insolvency of the company, as was introduced in the new South African Companies Act;⁵⁸⁹
- the introduction of a moratorium in the current formal rescue procedures in Nigeria, as is provided under Chapter 6 of the Companies Act;⁵⁹⁰
- The capacity buildings of all officers involved in the insolvency process and imbibe in them the extreme urgency with which all insolvency proceedings are being treated. Ensuring consistency in the judicial decisions that are being given by the courts, regarding each insolvency matter that arises, and the introduction of special rules and guidelines aimed at enhancing a quick and speedy resolution of disputes are paramount;
- the need to organise more local and international training programmes for insolvency practitioners as is currently being conducted by the Business Recovery Insolvency Practitioners Association of Nigeria (BRIPAN), so as to promote discipline and ensure an improved development practice aimed at regulating the appointments of insolvency practitioners in Nigeria;

⁵⁸⁵ Companies and Allied Matters Act Cap C20 LFN 2004.

⁵⁸⁶ Bankruptcy Act Cap 30 LFN 1990.

⁵⁸⁷ Insolvency Act 24 of 1936.

⁵⁸⁸ Companies Act 71 of 2008; Companies Act 61 of 1973.

⁵⁸⁹ Section 22(1) and section 77 Companies Act 71 of 2008.

⁵⁹⁰ Companies Act 71 of 2008.

- the incorporation of certain powers on the Corporate Affairs Commission to be responsible for the licensing of a receiver or receiver manager or liquidator under any of the formal rescue procedures provided for in the Companies and Allied Matters Act,⁵⁹¹ as is provided for under section 138(2) of the Companies Act⁵⁹² and Regulation 126 of the Companies regulations 2011;
- the licensing system of the Companies and Intellectual Properties Commission for the appointments of business rescue practitioners under any business rescue, be introduced in the appointments of insolvency practitioners in both Nigeria and South Africa, which could in my opinion, bring about a reduction of the irregularities that currently exist in the making of such appointments in South Africa.
- A review of the approval requirement of Securities and Exchange Commission with regard to the entering into a merger or acquisition⁵⁹³ and a reduction of the high cost of entering into a merger or acquisition should also be addressed;
- The adoption of the United Nations UNCITRAL Model Law into the Nigerian legislation to handle cross border insolvencies in no uncertain terms, which will be a step towards being in line with current international practices currently underway in most foreign jurisdictions, for example the United Kingdom and the USA, but most importantly, will reduce the challenges faced with the enforcement of the Nigerian insolvency proceedings or judgements in a foreign jurisdictions, and vis versa.

Despite the various reforms taking place currently in Nigeria as a whole, the various recommendations highlighted above postulate a strong need for the professionalization of the insolvency practice in the country, and a need for an urgent reform which should be something of a concern for all well-meaning Nigerians if foreign investment is to continue. It has been noted that there is a need for associations such as BRIPAN, the Capital Market Solicitors

⁵⁹¹ Section 538 & 539 Companies and Allied Matters Act Cap C20 LFN 2004.

⁵⁹² Companies Act 71 of 2008.

⁵⁹³ The provisions of section 118(1) of the Investment and Securities Act 2007 which provides that for any merger, acquisition or business combination between or among companies to take place, shall be subject to the prior review or approval of SEC, have reduced the use of sections 538 and 539 of the Companies and Allied Matters Act Cap C20 LFN 2004 which provide for mergers. The provision of ISA regarding SEC's approval before a merger or acquisition can be effected, placing the Companies and Allied Matters Act Cap C20 LFN 2004 (Part XVI) at the whims and caprices of the Investment and Securities Act 2007 and the Securities and Exchange Commission.

Association and the private sector to consider the harsh reality of how backward Nigerian insolvency laws are and instead aim at making effective laws in the relevant areas aimed at reforming the corporate insolvency processes that currently exist. There may be a lot of challenges in bringing about some of these reforms, but it should not be forgotten that they are aimed at promoting economic freedom and security by recognising the global challenges that exist, and at the same time, ensuring that the basic needs of the individuals concerned are being provided for.

6.3 Conclusion

In conclusion, one of the question being asked in this research is as to whether South Africa can serve as a model for the Nigerian corporate insolvency law regime. In answering this question, I would like to highlight some of the innovations in the South African corporate insolvency law regime, which could serve as a model. One of such innovations is the introduction of a corporate business rescue provision in Chapter 6 of the Companies Act.⁵⁹⁴ This innovation was highly appreciated by well-meaning South Africans, because it clearly envisaged a move towards incorporating the global trend of the rescue of financially ailing companies rather than their apparent liquidation which was what previously existed in most parts of the world. Nigeria on the other hand is yet to incorporate the modern trend of business rescue into the corporate insolvency regime that currently exists in the country. The use of the South African corporate insolvency laws on business rescue could, however, serve as a model for the Nigerian corporate insolvency structure, as it incorporates a procedure akin to Chapter 11 of the US Bankruptcy Reform Act of 1978.

Another aspect of the South African corporate insolvency laws which could serve as a model for the Nigerian corporate insolvency law structure is the introduction of insolvency law as a module in the undergraduate level at the law faculties in universities, by the Nigerian Federal Ministry of Education, and the Nigerian Universities Commission (NUC). I strongly believe that the introduction of this module in South African universities have gone a long way in broadening the mindset of most law undergraduates as to what insolvency is all about. The adoption of this module in the undergraduate levels in Nigeria would also remove the notion that lawyers are not

⁵⁹⁴ Companies Act 71 of 2008.

accountants, which at present causes accounting issues to be left to the accountants in Nigeria. If such a module is introduced the drafting of the liquidation and distribution accounts would be taught to most upcoming insolvency practitioners in Nigeria.

Finally, the procedure being adopted by the Master in the appointment of an insolvency practitioner, could serve as a model to the appointment of insolvency practitioners in Nigeria. Note that the appointment system by the Master of the High Court in South Africa includes the registering of a suitable and qualified person onto the Master's panel, and the requisition system discussed above, could assist in the appointments of insolvency practitioners in Nigeria for now, pending when there is a set of regulations to that effect...

The second question asked in this research was how effective the rescue procedure in Nigeria was. In my opinion, the rescue procedures in Nigeria could become very effective if there was a reduced involvement of the court in the rescue procedure, which involvement tends to make the procedure slow and very expensive, and the inclusion of a moratorium in the relevant provisions relating to rescue/restructuring of companies in Nigeria i.e. section 538 and 539 Companies and Allied Matters Act⁵⁹⁵ and receivership as provided under section 133 and 134 of the Companies Act,⁵⁹⁶ and finally a review of section 118(1) of the Investment and Securities Act 2007, which provides that any merger, acquisition or business combination between or among companies shall be subject to prior review and approval of the Security and Exchange Commission, thereby reducing the application of formal rescue procedure under the Companies and Allied Matters Act⁵⁹⁷

Thirdly, the question as to how the appointment of insolvency practitioners can be regulated in both Nigeria and South Africa in my opinion, can be addressed by the appointment of well qualified individuals with either a diploma in insolvency law and practice, or a degree in law with the relevant Masters in Insolvency, and the adoption of the licensing system currently being used by the Companies and Intellectual Properties Commission for the appointments of business rescue practitioners under a business rescue. In Nigeria however, the introduction of in-house training and symposiums for most insolvency practitioners and practising attorneys in Nigeria

⁵⁹⁵ Companies and Allied Matters Act Cap C20 LFN 2004.

⁵⁹⁶ Companies Act 71 of 2008.

⁵⁹⁷ Companies and Allied Matters Act Cap C20 LFN 2004.

with regard to a better understanding of the insolvency and corporate laws that exist in the country such as how to identify impeachable dispositions, drafting of liquidation and distribution accounts, as is being practised in South Africa, would go a long way in shaping the insolvency systems in the country.

Finally the adoption of the UNCITRAL Model law has had a huge impact on the cross border insolvency regime in South Africa, which has been evidenced by the enactment of the Cross Border Insolvency Act 42 of 2000. The designation of countries requirement, to be done by the Minister of Justice in South Africa, which has not yet been done, has prevented the Act from coming into operation. In my opinion, the designation requirement should be removed and the Act be made applicable to all countries. In Nigeria however, the UNCITRAL Model law has not yet been adopted and the current laws which apply to cross border insolvency in the country are the Foreign Judgment (Reciprocal Enforcement) Ordinance 1958 and the Foreign Judgment (Reciprocal Enforcement) Act Cap F35 LFN 2004, which provides for the enforcement of foreign judgements in Nigeria based on the concept of reciprocity. Note that there is a dearth of authorities in Nigeria regarding cross border insolvencies, but there have been various pronouncements by the courts regarding the enforcement of foreign judgements in Nigeria,⁵⁹⁸ and an issue of great concern to the courts in Nigeria as was mentioned earlier, regarding the registration of foreign judgements in Nigeria, or the registration of Nigerian Judgements in other foreign jurisdictions, is the ability to ensure that there is no conflict between the courts of the original jurisdiction and the registering courts.

⁵⁹⁸ Adwork Limited vs Nigerian Airways Limited Court of Appeal (2000) 2 NWLR 645.

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