

FORMAL DEBT-RELIEF, RESCUE AND LIQUIDATION OPTIONS FOR EXTERNAL COMPANIES IN SOUTH AFRICA

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<https://doi.org/10.21684/2412-2343-2020-7-4-85-126>

This article discusses how foreign companies doing business in South Africa during periods of financial distress and registered locally as external companies are, as a recent High Court decision confirms, denied the formal debt-relief measures of business rescue and therefore a compromise with creditors because of being excluded by the definition of “company” in the Companies Act 71 of 2008. Nor, for the same reason, may these companies, if solvent, rely on the current liquidation procedures. But they may possibly use the procedure preserved in the otherwise repealed Companies Act 61 of 1973 for liquidation as far as the transitional arrangements in the Companies Act 71 of 2008 allow. The purposive solution suggested in this article for the interplay between the two Acts may need legislative attention. This article surveys other possibilities relevant to these companies such as informal voluntary arrangements, applications for winding-up, ordinary debt collection, and perhaps compulsory sequestration applications. Finally, it raises the policy issue for the legislature to consider why these companies should be denied business rescue and/or a compromise with their creditors when these formal debt-relief measures might help them survive their financial stress and emerge stronger, to the advantage of themselves, their creditors, their stakeholders and communities, and the entire nation. It is submitted that these issues could and should be considered as part of the current law reform process of South African insolvency law.

Keywords: external companies; formal debt-relief policy; business rescue; compromise with creditors.

Recommended citation: André Borainé, *Formal Debt-Relief, Rescue and Liquidation Options for External Companies in South Africa*, 7(4) BRICS Law Journal 85–126 (2020).

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Introduction

Cross-border trade and business typify contemporary economies. Companies expand their reach by establishing a presence in foreign states, investing in property and creating places of business elsewhere while maintaining their main place of business and/or headquarters commonly in the state of their original incorporation. These companies contribute in various ways to the local economy of the states in which they establish a presence. Unfortunately, a further reality of business is the risk of financial distress and failure, whether at home or abroad, as happened in a recent case in the Gauteng North Division of the High Court of South Africa: *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others* (“CMC(SA)”).¹ In its judgment the court held that the business rescue procedure in Chapter 6 of the Companies Act 71 of 2008 (“the 2008 Act”) does not apply to a foreign company conducting business in South Africa where it has also been recognised and registered as an external company. Based on this interpretation, it is clear that the compromise with creditors provided for by section 155 of the 2008 Act will also not apply to external companies, and it may even cast doubt on the application of local liquidation procedures in relation to external companies. The judgment turns on interpreting the relevant provisions of the South African legislation on companies,² which are discussed in this article. Within this context a need to liquidate such external branch may also arise, either because of its insolvency or because it wants to terminate its presence locally, and the question is then whether South African law enables such a process.

¹ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, 2020 (2) S.A. 109 (GP). See, in general, Eric Levenstein & Roxanne Webster, *Are South African Rescue Proceedings Applicable to South African Registered External Companies?*, 2020 INSOL Small Practice Newsletter (forthcoming, on file with the author); Siviwe Mcetywa & Timothy Baker, *No Business Rescue Option for Financially Distressed Foreign and External Companies*, Cliffe Dekker Hofmeyr, 8 April 2020 (Sep. 7, 2020), available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-8-april-no-business-rescue-option-for-financially-distressed-foreign-and-external-companies.html>; Tessa Brewis & Elnalene Cornelius, *More Foreign Investment and Economic Growth – Less Red Tape*, 20(2) Without Prejudice M&A Feature 14 (2020).

² The Companies Act 71 of 2008 repealed the previous Companies Act 61 of 1973 (“the 1973 Act”) on 1 May 2011 except for Chapter 14, which deals with the liquidation of companies (see Item 9 of Schedule 5 to the Companies Act 71 of 2008).

1. Background

1.1. *The Choice of Methods of Conducting Business in South Africa*

Foreign companies wishing to conduct business in South Africa can choose a variety of vehicles to do so. They may for instance incorporate a company under South African law; they may obtain shares in a South African company; or, as in the *CMC(SA)* case, they may establish a place of business in South Africa and register a branch office as an external company in terms of South African company law. Section 13(5) of the 2008 Act also allows a foreign company to transfer its registration in order to be recognised in terms of the 2008 Act as though it had originally been incorporated and registered in South Africa. (In the case under discussion, *CMC(SA)* concluded construction contracts, one of them worth about €255 million, that would contribute to the South African economy and create jobs.) In this article, the term “foreign company” means a company incorporated elsewhere, and the term “external company” means a foreign company that has established a branch in South Africa and meets the definition of an “external company” in South African company laws.

1.2. *The Registration Requirements for the External Company*

Section 23 of the 2008 Act requires a foreign company not only to register with the Companies and Intellectual Property Commission (“CIPC”) within 20 days after beginning to do business in South Africa but also to indicate its registered address. For failing to register, this company may be issued with a compliance notice by the CIPC that may lead to its being prevented from continuing with its business should it fail to heed the notice.³

This company does not acquire legal personality or become a body corporate merely by this registration, because its status in this regard is determined in its country of incorporation and according to the principles of private international law and such registration is intended to be of a procedural rather than a substantive nature.⁴ Its registered address is the place where it can be found and served with court processes:⁵ its registered office is thus its domicilium.⁶

³ Sec. 23(6) of the Companies Act 71 of 2008.

⁴ Piet Delpport et al., *Commentary on the Companies Act of 2008* 107 (electronic version, Durban: LexisNexis, 2019) (Sep. 7, 2020), available at <https://www.mylexisnexis.co.za/Index.aspx>, state: “Generally speaking, bodies corporate are recognised throughout the commercial world. In South Africa, in terms of s 14, a company becomes a body corporate when it is registered with the Commission. Such a company does not necessarily have a corporate existence in every foreign country, although by the generally established principles of international private law a body corporate duly created in one country is usually recognised as a body corporate by other countries.”

⁵ *Id.* at 109, with reference to *Basfour 3752 (Pty) Ltd. v. KVL Developments* [2015] Z.A.K.Z.P.H.C. 29, 2015 J.D.R. 1061 (KZP), para. 11.

⁶ Delpport et al. 2019, at 109.

It must be noted that the 2008 Act contains a number of definitions relating to “foreign companies” and “external companies.” Section 1 of the Act defines a “foreign company” as “an entity incorporated outside the Republic, irrespective of whether it is – (a) a profit, or non-profit, entity; or (b) carrying on business or non-profit activities, as the case may be, within the Republic.” A “juristic person” is defined to include a foreign company and a trust (irrespective of whether or not the trust was established within or outside South Africa), and an external company means a foreign company that is “carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2).” It must be noted that an external company must register its office in terms of section 23 of the 2008 Act. But despite such registration, the external company is not deemed to be formally incorporated in South Africa and remains incorporated elsewhere, that is, at the jurisdiction where the foreign company has been incorporated. In this sense neither the foreign company nor its South African branch, the external company, falls within the definition of “company” as defined in the 2008 Act. As stated above and in practical terms when the external company is registered, the CIPC must in terms of section 23(5) of the 2008 Act assign a unique registration number to such external company that has registered and must maintain a register of external companies.

1.3. The Company Under Principles of Private International Law: The Single Entity Approach

Under private international law, a company properly established or incorporated in terms of the laws of a state as a distinct body corporate or juristic person is usually acknowledged as one. Companies operating within different states or jurisdictions are one and the same body corporate: this is known as the single entity approach.⁷ But when the company operates across borders, the local laws of the foreign state in which it operates determine whether it is recognised and how far and on what conditions it is acknowledged and allowed to operate within that jurisdiction.

Local laws may nevertheless treat the external company *for certain purposes* as if it is an independent entity without granting it a substantive status as such. It is to be noted that the external company may sue or be sued in South Africa although it may be said that the litigation will then be deemed to be litigation by or against the foreign company itself. In practice and if this company fails to meet a local judgment debt, it will normally be sued at its registered local address, and execution will first be levied against

⁷ *Wiseman v. Ace Table Soccer (Pty) Ltd.*, 1991 (4) S.A. 171 (W), at 173E; Christopher Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court* 182 footnote 280 (3rd ed., Cape Town: Juta, 1996), and *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 210 footnote 304 (5th ed., Cape Town: Juta, 2012); and Alastair Smith & André Borainé, *The Grab Rule Foils the Foreign Liquidator in His Own Jurisdiction*, 14(3) *South African Mercantile Law Journal* 566, 570 (2002) (where the authors also point out that this approach to companies in international law is tempered by the application of territoriality and by the relevant definitions in local laws). See also Delpont et al. 2019, at 108.

its local assets before alternatives such as approaching the jurisdiction where the foreign company is situated with a view to applying for recognition and enforcement of the South African court order, or perhaps a local liquidation court order, will be considered. The Registrar of Deeds will also register immovable property against the name of the external company registered at the CIPC, and the local allocated registered number will be used to identify it as such.⁸ It is evidently to the benefit of South African creditors to be able first to attempt to obtain satisfaction of their debts locally before embarking on cross-border recognition and/or enforcement. The foreign law will nevertheless determine to what extent the South African creditors will be assisted in their quest to get the South African court order recognised and enforced should it become necessary for them to approach the home jurisdiction of the foreign company. It must also be remembered that all actions by or against the external company in South Africa remain actions by or against the foreign company in principle, because despite such exceptions it remains one and the same entity. But some liquidation procedures will also apply in relation to the external company as if it is a separate entity.⁹ In the case of liquidation, the South African liquidation order will most probably not be deemed to be a liquidation order of the foreign company as such because it is mainly intended to deal with the South African-based assets and liabilities.

1.4. The Choice of Proceeding Against the Company in South Africa or at Home

It is important to note that these companies conducting business in South Africa may also be recognised as external companies by the current company laws, even if they do not yet have a registered office here.¹⁰ Included in this consideration is the question how far the local law of the state – in this instance, South Africa – in which the foreign company operates will allow the external company to use debt-relief measures available by local rescue and insolvency laws to assist the local operations of the foreign company if it suffers financial distress.

In this respect and on the basis of the single entity principle,¹¹ that as the local branch remains part of the company incorporated elsewhere – thus one and the same company – the debt should therefore rather be dealt with in the forum where this foreign company was incorporated. This would be where the registered office, headquarters, or main place of business is, for instance, situated: in other words, the centre of its main

⁸ See para. 4.9.7 of the Chief Registrar's Circular No. 28 of 2013 *read with* sec. 23(5) of the Companies Act 71 of 2008.

⁹ See also Delpont et al. 2019, at 115, *referring to* rule 4(1)(a)(v) of the Uniform Rules of Court and rule 9(3)(e) of the Magistrates' Courts Rules *read with* regulation 20(1)(d) of the Regulations to the Companies Act 71 of 2008 that provide for service of process that may be effected at the registered office of an external company; to this end, these rules most probably only deal with procedural matters.

¹⁰ See the definitions of "external company" in section 1 of the Companies Act 61 of 1973 and section 1 of the Companies Act 71 of 2008.

¹¹ See *supra* note 7.

interests (“COMI”). But if local procedures are not available which may, for instance, compel local creditors or the external company to approach a foreign jurisdiction where the COMI of the foreign company is located, that step may in some instances be risky, impractical and/or very expensive for the local creditors in South Africa. It may also be the case that only the local branch operating in South Africa is in financial distress, a situation which in some instances could be addressed in South Africa.

1.5. A Snapshot of South African Company Laws on External Companies

A brief contrast between the legal positions under the Companies Act 61 of 1973 (“the 1973 Act”) and the 2008 Act is helpful. The 1973 Act provided a procedure by which foreign companies operating in South Africa might register as external companies,¹² a step that made these external companies bodies corporate under South African law.

Chapter 14 of the 1973 Act also provided for the winding up (liquidation) of companies. Section 337(1) specifically included an external company for the purposes of winding-up in terms of the 1973 Act. In other words, although a foreign company registered in South Africa remained one and the same company registered elsewhere (under the single entity theory¹³), its local branch in South Africa could, for winding-up purposes, be treated as a separate entity capable of being wound up as though it were a separate entity. This process provides a practical solution to deal with the local assets and liabilities.

The 1973 Act also provided two formal procedures for rescuing companies in terms of that Act. The first was judicial management, in terms of its Chapter 15. The second was compromise and arrangements with creditors, in terms of section 311.

Under the 2008 Act, by contrast, the position is different. Registration as an external company under section 23 does *not* make the external company a body corporate in terms of South African law. Further, the 2008 Act deals mainly with solvent companies, and thus it provides for the winding up of solvent companies. By way of transitional arrangements in a schedule, though, it also preserves the provisions of the 1973 Act on the winding up of insolvent companies. And as regards its formal procedures for saving (solvent) companies, the 2008 Act also provides two options. The first is business rescue, in terms of (most of) its Chapter 6. At the end of that chapter, in section 155, the 2008 Act also provides for a statutory compromise with creditors.

1.6. The Problem: How to Help an External Company in its Hour of Need

Suppose the foreign company incorporated outside South Africa – such as CMC(Italy) – is subjected to a debt-enforcement procedure by its local creditors or slides into insolvency proceedings in its home jurisdiction. Either of these

¹² See secs. 322 & 323 of the Companies Act 61 of 1973.

¹³ See *supra* note 7.

procedures may then have an effect in other jurisdictions too, such as South Africa. The foreign creditors or insolvency representatives may seek assistance and assets situated in foreign jurisdictions – such as South Africa – by applying the rules of cross-border insolvency or of the enforcement of foreign judgments regarding the debtor company. The branch company in South Africa – such as CMC(SA) – may conceivably also suffer financial distress. It may also happen that the local branch in South Africa may face financial distress in relation to its South African business endeavours. How, then, might South African law help a foreign company doing business in South Africa as an external company in its hour of need? To answer this question, this article will analyse the *CMC(SA)* judgment; discuss the relevant law on financial distress and winding up of foreign companies under the 1973 and 2008 Acts; and propose possible amendments to the current law.

2. The Judgment in the *CMC(SA)* Case

2.1. *The Facts of the Case*

2.1.1. *The Business Rescue Application in South Africa: The Main Application*

The first applicant, CMC(SA), was a company incorporated under the laws of Italy. It was a branch of a foreign company, CMC(Italy), and, in law, the same company operating through CMC(SA), as a branch office, in South Africa. Because CMC(SA) conducted business in South Africa, it was registered under section 23(1) of the 2008 Act as an “external company” at the CIPC and so it met the definition of an “external company” in section 1 of that Act. In fact, CMC(SA) was registered as an external company under the 1973 Act but was deemed to have been registered as an external company under the 2008 Act in terms of the transitional arrangements of the 2008 Act.¹⁴

On 14 December 2018, the board of directors of CMC(SA) resolved to place it under voluntary business rescue in terms of section 129 of the 2008 Act. So the board filed the appropriate forms with the CIPC and began the process on 24 December, and filed its Form CoR123.1 attaching all the necessary documents. The notice of the resolution was published on 15 January 2019, and its effective date was published too. CMC(SA) appointed its two business rescue practitioners on 11 January.¹⁵

A problem arose when the CIPC withdrew the proceedings, ruling that “an external company cannot be placed into business rescue as envisioned under Chapter 6 of the Act.”¹⁶ So CMC(SA) and its business rescue practitioners applied to the High Court for a declaratory order that CMC(SA) was validly under business rescue as contemplated by section 129 of the 2008 Act pursuant to the resolution of the board of directors. The main relief sought by the applicants was therefore a court ruling confirming that

¹⁴ See sec. 6 of Item 2 of Schedule 5 to the Companies Act 71 of 2008.

¹⁵ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, paras. 5–8.

¹⁶ *Id.* paras. 3, 10.

CMC(SA) might use the business rescue procedure in Chapter 6 of the 2008 Act for the financially distressed branch, CMC(SA), registered as an external company and operating in South Africa.¹⁷

2.1.2. The Arrangement or Compromise in Italy, and the Alternative Relief Sought in South Africa

In the meantime, and before the CMC(SA) application in South Africa, CMC(Italy) approached an Italian court with a request to initiate an arrangement or compromise with its creditors. The company apparently experienced financial difficulties across various jurisdictions in which it operated. The Italian process was provided for by the Italian Bankruptcy Code,¹⁸ and appeared to be an attempt to reorganise the company's debts under Italian bankruptcy law.¹⁹ The relief was granted, and representatives called judicial commissioners were appointed to manage the process, which envisaged an offer of compromise to creditors, who could ultimately vote on it, and, if it were accepted, it could then be sanctioned by the Italian court. Everything was in place in Italy because the court granted the request and the postponements requested by CMC(Italy). However, when the South African application was heard, the Italian court had not yet given its final approval because the creditors' meeting was still to be held. These facts about the Italian proceedings were provided to the South African court when CMC(SA) and its business rescue practitioners, in their alternative prayer, sought a court order for the recognition and enforcement of the order issued by the Court of Ravenna (Bankruptcies Office), dated 6 December 2018, granting the Preventative Arrangement which CMC(Italy) had sought in the Italian proceedings ("the Italian order").²⁰

2.1.3. The South African Creditor's Intervening Counter-Application

An intervening creditor of CMC(SA)'s opposed the company's application and brought a counter-application to liquidate the company.²¹ This counter-application,

¹⁷ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 1.

¹⁸ *Id.* paras. 1, 11–22.

¹⁹ *Id.* para. 13, and see para. 43: "CMC's expert on Italian bankruptcy law enlightens this court that the Italian bankruptcy laws provide that CMC's board retains the power to administer and run its business. Furthermore, the Italian bankruptcy laws provide for only an automatic stay on attachments or other precautionary measures. Judicial property mortgages enrolled 90 days prior to the registration cannot be enforced and penalties and forfeitures are not imposed. CMC's expert opines that the Italian order was issued in anticipation of CMC's proposed plan to, inter alia, restructure the debt, set out whether assets and/or shares were to be sold and if financial instruments were to be offered to satisfy creditors. The plan must set out a subdivision of creditors into various classes and how these classes of creditors' debt are to be satisfied. Details of secured and unsecured creditors and how these classes' claims are to be satisfied must be reflected. CMC can thus still run its business and there is no general moratorium on legal proceedings against or for CMC."

²⁰ *Id.* para. 1.

²¹ *Id.* para. 49.

which was heard together with the other applications, was not granted by the court but postponed indefinitely.²² The winding up (liquidation) of companies and more particularly of external companies in South Africa is nevertheless discussed in this article because it casts an interesting light on aspects of the interplay between the 1973 Act and the 2008 Act.

2.2. The Arguments in the Main Application Regarding Business Rescue

As regards the main relief sought by CMC(SA), the confirmation that it was validly in business rescue, the following aspects were raised in argument:

– Section 129 of the 2008 Act provides for voluntary business rescue proceedings initiated by the board of directors regarding “companies.”²³ The critical question for the court was whether CMC(SA) was therefore a “company” for the purposes of section 129;

– Section 1 of the 2008 Act defines “company” to include “a juristic person incorporated in terms of this Act,” “a domesticated company,” or a “juristic person that, immediately before the effective date was registered in terms of the [1973 Act], *other than as an external company as defined in that Act*”;²⁴

– CMC(SA) argued that, as an external company registered under the 2008 Act, it was included in the general definition because it was “a juristic person incorporated in terms of the Act.”²⁵ Further, an external company, when “registered” in South Africa, was “notionally” incorporated in South Africa in terms of the 2008 Act. So CMC(SA) met the definition.²⁶ The words “juristic person” included a foreign company conducting business in South Africa;

– The CIPC indicated that the resolution to put the company into business rescue was erroneously adopted and withdrew the documents for registering the resolution because the CIPC argued that registration as an external company did not result in the incorporation of a secondary legal entity in South Africa. The external company was therefore subject to the laws of the jurisdiction in which it was first incorporated, namely, Italy. Accordingly, the external company was not a “company” for the purposes of the 2008 Act, and so was not subject to business rescue proceedings under that Act.²⁷

²² *Id.* para. 55.

²³ *Id.* para. 23. Note that the initiation of business rescue by means of a court application as provided for in section 131 of the Companies Act 71 of 2008 also refers to “a company” and “the company.”

²⁴ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 23 (emphasis supplied).

²⁵ *Id.* para. 29.

²⁶ *Id.*

²⁷ *Id.* para. 10.

2.3. The Reasoning and Decision of the Court

2.3.1. The Main Application Concerning Business Rescue

The court rejected CMC(SA)'s argument by finding that external companies did not qualify for business rescue under the 2008 Act.²⁸ The court reasoned as follows:

As to the status of CMC(SA), it was initially registered as an external company under the 1973 Act in 2004. Under the transitional arrangements provisions of the 2008 Act,²⁹ CMC(SA) would be regarded as having been registered as an external company in terms of the 2008 Act. So CMC(SA) was deemed to be an external company under the 2008 Act because it was an external company in terms of the 1973 Act.³⁰ The court elaborated as follows:

As Chapter 6 of the 2008 Act did not specifically define a “company” for its purposes, the general definition of “company” in section 1 of that Act applied.³¹ This general definition, for the purposes of the Act, includes:

- a company *incorporated* in terms of the provisions of the Act;
- a domesticated company which is a foreign company that has transferred its registration to South Africa; or
- a juristic person that was incorporated under legislation repealed by the 2008 Act and entities previously recognised as companies under the 1973 Act.³²

The court noted that CMC(SA) was also not a domesticated company because it had not transferred its registration to become such a company in South Africa. Nor was CMC(SA) a company incorporated under the 2008 Act, because it was incorporated under Italian law.³³

The court referred to the distinction between an external company, a foreign company, and a company that existed in terms of the 1973 Act.³⁴ In this context, “incorporation” and “registration” had always been regarded as two separate processes. There was simply no “notional” *incorporation* when a foreign company was *registered* in South Africa as an external company.

²⁸ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 40.

²⁹ *Id.* para. 30. Section 6 of Item 2 of Schedule 5 to the Companies Act 71 of 2008 states: “An external company that, immediately before the effective date [of the Companies Act 71 of 2008], was registered as such in terms of the previous Act [of 1973] must be regarded as having registered on the effective date as an external company in terms of this Act.”

CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others, para. 31.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* para. 32.

³³ *Id.* paras. 32–33.

³⁴ *Id.* para. 34.

In interpreting the meaning of “company” for the purposes of section 129 of the 2008 Act, the court³⁵ followed the interpretational approach in *Natal Joint Municipal Pension Fund v. Endumeni Municipality*,³⁶ namely:

The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The “inevitable point of departure is the language of the provision itself,” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

In doing so, the *CMC(SA)* court³⁷ also acknowledged the fact that the 2008 Act must be interpreted to give effect to the purposes set out in its section 7, which provides, amongst other things, that the purposes of the Act are to promote compliance with the Bill of Rights in the application of company law. In particular, sections 7(c) and (k) were referred to, namely:

- (c) promote innovation and investment in the South African markets; . . .
- (k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders;

But, in essence, the court found that the definition of “company” in section 1 of the 2008 Act does not include an external company, and that section 129 does not expressly include an external company for the purposes of the business rescue chapter in the Act. In this context the court also drew from the fact that the provisions of the 2008 Act, unlike those of the 1973 Act, only apply to external companies to

³⁵ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 24.

³⁶ *Natal Joint Municipal Pension Fund v. Endumeni Municipality*, 2012 (4) S.A. 593 (SCA), at 603–604, para. 18.

³⁷ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 25.

the extent that such provisions are specifically made applicable.³⁸ In this regard, the court concluded:

[T]he background to business rescue proceedings with regard to an external company is thus that, despite the old Act making provision for an external company, the new Act does not; the probable interpretation is that the legislature intentionally did not include an external company.³⁹

Although it was not strictly necessary to explore any further, the court⁴⁰ nevertheless found further support for its approach in the observations of Cassim,⁴¹ namely,

that there was a specific legislative intent with the 2008 Act to reduce the regulation of external companies to promote investment in South African markets.

And the court also referred to the “paradigm shift from the 1973 Act, where external companies would be treated on the same footing as South African companies, to that of the 2008 Act, where overregulation of external companies would be reduced to cut the red tape to entice external companies.”⁴² There was also some reliance on the argument on behalf of the CIPC that an external company is not eligible for business rescue because “[r]egistration as an external company by CIPC does not result in the incorporation of a secondary legal entity.”⁴³

In particular, in rejecting the argument on behalf of CMC(SA) that an external company is included in the definition of “company” in section 1 of the 2008 Act because its registration causes a notional incorporation, the court reasoned:⁴⁴

Even though CMC(SA) was registered in terms of the 1973 Act, and it is therefore deemed to be an external company under the 2008 Act because it was an external company under the 1973 Act,⁴⁵ the definition of a company and whether it includes an external company must be sought in the 2008 Act. There is no definition of “company” under Chapter 6 of the Act, and therefore the interpretation of “company” must bear the meaning assigned to it in section 1.

³⁸ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 26.

³⁹ *Id.*

⁴⁰ *Id.* para. 27.

⁴¹ Farouk H.I. Cassim, *The Companies Act 2008: An Overview of A Few of its Core Provisions*, 22(2) South African Mercantile Law Journal 157, 164 (2010).

⁴² *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 27.

⁴³ *Id.* para. 28.

⁴⁴ *Id.* paras. 29–30.

⁴⁵ *Id.* paras. 30–31 with reference to the Transitional Arrangements of the Companies Act 71 of 2008, contained in section 6 of Item 2 of Schedule 5 to the Companies Act 71 of 2008.

In this respect the court also found that an external company was not included in the definition of “company” because it was not incorporated as such in South Africa, and the court rejected CMC(SA)’s argument regarding notional incorporation.⁴⁶

In reaching this conclusion, the court mentioned that its interpretation is not insensible and does not attain unbusinesslike results; neither does it undermine the apparent purpose of the Act. Such interpretation does not impede the purposes of the Act as set out in s 7 of the Act. Certain specified sections do extend to external companies. The legislature thus reduced the red tape but maintained some “control”: the duty to file an annual return, certain provisions on fundamental transactions, requirements for a special resolution by external holding companies, the obligation to maintain at least one office in South Africa and register the address or principal office, to mention a few.⁴⁷

The court also mentioned that there is no case law on whether an external company can apply for business rescue in South Africa, but relied on commentators on insolvency and company law who hold the view that external companies do not qualify for business rescue because of the wording of the 2008 Act.⁴⁸

The court thus explained that, as locally registered foreign (i.e. “external”) companies were specifically excluded from the definition of a “company” in section 1 of the 2008 Act, an external company could not use the business rescue provisions in Chapter 6.⁴⁹ [This was the crux of the court’s refusal of the main application.]

Accordingly, business rescue proceedings under section 129 of the 2008 Act were not available to CMC(SA) as an external company. The business rescue initiated by the board resolution under section 129 was therefore invalid, and the application failed.⁵⁰

2.3.2. *The Alternative Prayer for the Recognition of the Italian Order*

As regards the alternative prayer regarding the recognition of the Italian order, the Italian court had sanctioned a compromise offer to creditors. CMC(SA) requested the South African court to recognise the Italian order under the principles for recognising and enforcing foreign judgments.⁵¹ First, CMC(SA) argued that the Italian process

⁴⁶ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, paras. 34–35.

⁴⁷ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 36.

⁴⁸ *Id.* paras. 37–39 with reference to Delpont et al. 2019, at 458; Jennifer A. Kunst et al., *Meskin: The Law of Insolvency* (electronic version, Durban: LexisNexis, 2019), para. 18.3.3 (Sep. 7, 2020), available at <https://www.mylexisnexus.co.za/Index.aspx>; Jeffrey Salant, *Business Rescue Operations and the New Companies Act*, De Rebus (August 2009) (electronically accessed); and R.C. Williams, *Companies in The Law of South Africa. Vol. 4. Part 1* (W.A. Joubert (ed.), 2nd ed., Durban: LexisNexis, 2012), para. 275 (Sep. 7, 2020), available at <https://www.mylexisnexus.co.za/Index.aspx>.

⁴⁹ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 35.

⁵⁰ *Id.* para. 40.

⁵¹ At the time of the South African application, the Italian court only granted an order whereby by CMC(Italy) was assigned a deadline of 60 days to file the agreement with a creditors’ proposal,

resembled the scheme of arrangement under section 311 of the 1973 Act; but CMC(SA) retracted this argument.⁵² Next, CMC(SA) argued that the Italian process resembled the South African business rescue procedure under the 2008 Act. The South African court rejected this comparison⁵³ and went on to hold that the Italian order was not a final court order as required by South African law for the recognition and enforcement of a foreign court order.⁵⁴

The South African court observed that a foreign judgment was not directly enforceable in South African law but constituted a cause of action.⁵⁵ [This means that a judgment creditor may apply to a South African court with a view to the recognition and enforcement of the foreign court order in South Africa against the debtor which has a presence in South Africa.] A foreign judgment would only be enforced in South Africa when

(i) ... the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by [South African] law with reference to the jurisdiction of foreign courts (sometimes referred to as “international jurisdiction or competence”); (ii) ... the judgment is final and conclusive in its effect and has not become superannuated; (iii) ... the recognition and enforcement of the judgment by [South African] Courts would not be contrary to public policy; (iv) ... the judgment was not obtained by fraudulent means; (v) ... the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) ... enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended.⁵⁶

So, the application for the alternative prayer failed as well. (It is notable that this prayer was based on the recognition of a foreign judgment as such and that the rules of cross-border insolvency to recognise a foreign insolvency procedure and/or the appointment of a foreign estate representative were apparently not considered although the Italian procedure was based on Italian bankruptcy laws. It is assumed

alternatively a possible restructuring agreement, that CMC(Italy) must send a monthly summarised report, and three judicial commissioners were appointed. *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 41.

⁵² *Id.* para. 46.

⁵³ *Id.*

⁵⁴ *Id.* para. 44: “CMC does not pass the basic hurdle for enforcement of a judgment or order; the Italian order granted is not final and conclusive, simply because there is no finality to the order. It is correct that one has to look predominantly to substance or the effect of the order rather than the form of the order, but the effect of the order granted is not final.”

⁵⁵ *Id.* para. 42.

⁵⁶ In this regard the court (*CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 42) referred to *Jones v. Krok*, 1995 (1) S.A. 677 (A), at 685A–E; *Society of Lloyd’s v. Price*, 2006 (5) S.A. 393 (SCA); and *Richman v. Ben-Tovim*, 2007 (2) S.A. 283 (SCA).

that the South African creditors participated in the Italian procedure because the court was informed from the bar by counsel to this effect.⁵⁷⁾

The relevant aspects of the 1973 and 2008 Acts will now be discussed.

3. Relevant Aspects of the 1973 and 2008 Acts

3.1. The Practical Benefits of an External Company Being Treated as a Local Company⁵⁸

This part of the article examines some aspects of the local treatment of debt owed by an external company recognised as such in South Africa. A company, such as CMC(SA), has *locus standi* to sue and be sued in a South African court, its registered office serving as its place of domicile. It can be a taxpayer under South African law and be liquidated under South African liquidation law as explained below. It is treated as though it were a South African incorporated company.

These choices bring practical benefits. The local creditors and the local branch can instead wind down its local affairs when circumstances so warrant, without involving the foreign parent and the foreign court and saving local creditors both time and expense in having to institute their claims against the (parent) company in its country of incorporation. Alternatively, if the appropriate remedies in South African law can be made available to the local branch of the company, it may be helped to survive its financial distress and emerge stronger rather than sliding into liquidation, thus preserving the local branch and enabling it to continue playing an important role in the economy of South Africa and the lives of her people. These considerations about practicalities form a consistent theme running through this article, which is written during the COVID-19 coronavirus pandemic when unemployment in South Africa, which was already running at little over 27 per cent towards the end of 2019,⁵⁹ is forecast to rise to 35 per cent by the end of 2020⁶⁰ or even perhaps as high as 50 per cent.⁶¹ The preservation of jobs is one of the “felt necessities”⁶² of our time.

⁵⁷ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 46.

⁵⁸ The ideas expressed in this section of this article will be referred to *infra* in the text accompanying footnotes 61, 76, and 85.

⁵⁹ See the graph in H. Plecher, *Unemployment Rate in South Africa 2019*, Statista (October 2020) (Sep. 7, 2020), available at <https://www.statista.com/statistics/370516/unemployment-rate-in-south-africa/>. Plecher states: “This statistic shows the unemployment rate in South Africa from 1999 to 2019. In 2019, the unemployment rate in South Africa was around 27.32 percent.”

⁶⁰ South Africa Forecast: Unemployment Rate, CEIC (no date) (Sep. 7, 2020), available at <https://www.ceicdata.com/en/indicator/south-africa/forecast-unemployment-rate>: “South Africa’s Unemployment Rate is forecasted to be 35.313% in Dec 2020 as reported by International Monetary Fund.”

⁶¹ Staff Writer, *South Africa’s Unemployment Rate Could Hit 50%: Report*, BusinessTech, 3 May 2020 (Sep. 7, 2020), available at <https://businesstech.co.za/news/business/394654/south-africas-unemployment-rate-could-hit-50-report/>.

⁶² Oliver Wendell Holmes said: “It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The

In the *CMC(SA)* case, the court mentions the paradigm shift in the treatment of external companies from the provisions of the 1973 Act to those of the 2008 Act.⁶³ The 1973 Act provides an external company with its relief except where the governing provisions expressly exclude that company or where it militates against the nature of that company. Blackman and others,⁶⁴ referring to section 2(2) of the 1973 Act, apparently support the broad application of the 1973 Act to external companies registered in South Africa. The authors also refer to the principles of private international law underpinned by the principle of comity which prescribes that bodies corporate duly created in one country are recognised as bodies corporate by other countries.⁶⁵ Next, the authors elaborate on the status enjoyed by these external companies in South Africa, explaining that a “further guideline is the principle that foreign companies should be placed on the same footing, as far as possible, as South African companies in relation to the Act.”⁶⁶ In the authors’ opinion, a foreign company recognised as a body corporate in South Africa and thus taking part in business and economic activity should, on the one hand, not receive preferential treatment under the Companies Act but, on the other hand, should also not be subjected to

felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.” See Oliver W. Holmes, Jr., *The Common Law* 5 (first published 1881, P.J.S. Pereira & D.M. Beltran (eds.), Toronto: University of Toronto Law School Typographical Society, 2011), available at <http://www.general-intelligence.com/library/commonlaw.pdf>.

⁶³ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 27.

⁶⁴ See M.S. Blackman et al., *Commentary on the Companies Act* (electronic version, Cape Town: Juta, 2012), at ch1p1–ch1p2 (Sep. 7, 2020), available at [https://www.mylexisnexis.co.za/Index.aspx](https://jutastat-juta-co-za.uplib.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&v.id=Publish:10.1048/Enu:“The definition of ‘external company’ read together with s 2(2) shows that the Act applies to a company incorporated outside the Republic once it acquires a place of business in the Republic, subject to those provisions of the Act which expressly or by implication exclude external companies from their application. Special provisions governing external companies are to be found in ss 322–36.” See also Jennifer A. Kunst et al., <i>Henochsberg on the Companies Act 61 of 1973</i> 642 (electronic version, Durban: LexisNexis, 2011), available at <a href=).

⁶⁵ See the extracts from the Supplementary Report of the Van Wyk De Vries Commission as referred to by Blackman et al. 2012, at ch13-p2. In fact, the court in *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others* seems to have followed the approach taken by Blackman et al.: see para. 26 (“Section 129 of the Act does not expressly include an external company. As background it is relevant to note that the old Companies Act, 1973, under s 2(2), had a catch-all phrase which provided that the sections of that Act would apply to every company, including external companies”). See also the commentary by Kunst et al. 2011, at 14(5)–15 on section 2(2) of the Companies Act 61 of 1973.

⁶⁶ Blackman et al. 2012, at ch13-p2.

disadvantages that do not also apply to South African companies. For this proposition the learned authors rely on the principles of the comity of nations when these appear to be unobjectionable.

By contrast, the 2008 Act takes a much more restricted approach: only those provisions of the Act that are specifically made applicable to an external company will govern it.⁶⁷ It is submitted that whichever approach is followed, i.e. the 1973 or the 2008 Act, the external company remains one and the same as the foreign company⁶⁸ but that the South African legislature is at liberty to make rules regarding their treatment in terms of South African law. It is not clear whether it was indeed the intention of the legislature in the 2008 Act that all debt-related matters arising within the context of an external company in South Africa should be dealt with in the foreign jurisdiction, but it is submitted that a clear policy is required in order to direct the legislative provisions in this regard.

Here, besides considering the implications of the *CMC(SA)* judgment, questions are raised about the fact that the external company registered in South Africa is excluded from relief under Chapter 6 of the 2008 Act. It helps to discuss the 1973 Act before the 2008 Act.

3.2. The 1973 Act

The discussion relates to aspects of the definition of a company, winding-up (liquidation), and formal methods of corporate rescue.

3.2.1. Winding-Up (Liquidation)

Regarding liquidation under the 1973 Act, external companies recognised in South Africa under that Act were subject to its Chapter 14 providing for the liquidation of both solvent and insolvent companies.⁶⁹ Section 337(1) made it clear that, for the purposes of liquidation, an external company was included as such, except that it could not invoke the provisions on voluntary liquidation by resolution because of the exclusion in section 349.⁷⁰

⁶⁷ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, paras. 26–27.

⁶⁸ See *Sackstein NO v. Proudfoot S.A. (Pty) Ltd.*, 2003 (4) S.A. 348 (SCA), para. 15.

⁶⁹ See the definition of “external company” (in section 1 of the Companies Act 61 of 1973), and Kunst et al. 2011, at 642, 664 and Blackman et al. 2012, at ch14-p3.

⁷⁰ See André Boraine & Jani van Wyk, *The Application of ‘Repealed’ Sections of the Companies Act 61 of 1973 to Liquidation Proceedings of Insolvent Companies*, 46(3) De Jure 644 (2013). See also Delpont et al. 2019, at APPI-5, who maintain that both registered external companies and those not so registered were eligible for the liquidation procedure: “But even a company or other association of persons incorporated outside South Africa which complies with s 23 (2A) (and is therefore within the definition of “external company” in s 1) is, it is submitted, subject to the provisions of Chapter XIV even if it is not registered as such under the Act (see s 23 ssv Subsections (1), (2), (2A) and (6) and Registered external company of the 2008 Act; and see *Wiseman v ACE Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) at 175, 177).”

In view of the definition of “external company” in section 1 read with sections 2(2), 322 and 323 of the 1973 Act, Kunst and others⁷¹ explain that a foreign company incorporated elsewhere is recognised as an “external company” if it falls within the definition in section 1: in other words, if, first, its memorandum of incorporation was lodged with the (then) Registrar of Companies in South Africa, under the former 1926 Companies Act, and, secondly, where such a company has, since the commencement of the 1973 Act, established a place of business in South Africa. Regarding the applicability of the 1973 Act, Kunst and others⁷² also indicate that section 2(2) applies the 1973 Act to the defined external companies but section 323(1) indicates which provisions only apply to external companies registered as such under that Act.

It is important to note that section 337(1) specifically provides for the liquidation of external companies – foreign companies registered as such in South Africa – while section 349 excludes them from the application for voluntary liquidation by resolution.⁷³

Furthermore, it is necessary to remember that although the external registered branch and the foreign company (incorporated) elsewhere – the foreign parent or “main branch” – are the same company, the local branch can for practical purposes be liquidated in South Africa as though it is a South African incorporated company. This practical possibility still does not create a separate legal persona, and the locally based branch, the external company, is treated as if it has a separate existence for the purposes of liquidation as such.⁷⁴ A concurrent liquidation could also occur where the foreign company is subjected to a liquidation order in the country of the centre of its main business (its COMI), while the local branch, as the external company in South Africa, is subjected to a South African liquidation procedure, even though the foreign (parent) company and the external (local branch) company remain one and the same company.⁷⁵ The grounds for liquidating a company in South Africa under the 1973 Act are listed in a footnote below so as not to interrupt the flow of the argument in this section of the article.⁷⁶

⁷¹ Kunst et al. 2011, at 642.

⁷² *Id.*

⁷³ *Id.* at 664.

⁷⁴ *Id.* See *supra* notes 7 and 9.

⁷⁵ Kunst et al. 2011, at 664 with reference to *Ward v. Smit*, 1989 (3) S.A. 175 (SCA); *Sackstein NO v. Proudfoot S.A. (Pty) Ltd.*, 2003 (4) S.A. 348 (SCA), para. 15.

⁷⁶ Section 344 states the circumstances in which the external company as a company may be wound up by the court:

“(a) the company has by special resolution resolved that it be wound up by the Court;

(b) the company commenced business before the Registrar certified that it was entitled to commence business;

It may seem to be a contradiction to liquidate an external branch of a company in South Africa because it is one and the same as the foreign incorporated company; but the availability of the liquidation procedure rather deems the branch to be treated as a separate, South African incorporated company for practical reasons.⁷⁷ So it is, for instance, sensible to have a process in place to end the presence of this company in South Africa when it wishes to withdraw from the country or when it is insolvent, without the need to liquidate the foreign incorporated company in terms of foreign law in a foreign court.⁷⁸ This process thus enables the dead branch to be severed from the foreign “tree” if it is no longer useful to it.

It must also be noted that, where the external company is put into liquidation because of its inability to pay its debts, the insolvency law will apply *mutatis mutandis* as provided for under section 339 of the 1973 Act.⁷⁹ This step will benefit local creditors: for example, a South African liquidator will attend to the affairs of the company, and rules on the payment of claims will apply. So, too, would the provisions on the personal civil and criminal liability of, for instance, delinquent directors and/or other company officers in terms of sections 423 to 426 in Chapter 14 of the 1973 Act. But the enforcement of such provisions in relation to, for instance, directors based outside South Africa will, of course, be problematic.

In passing, it may be noted that if the foreign company is put into a formal state of bankruptcy in its home jurisdiction, the foreign estate representative may, of course, in terms of South African cross-border insolvency law apply for recognition by a South African court in order to enable him to deal with local assets or apply for a local liquidation order in terms of South African insolvency law. This aspect is

(c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;

(d) in the case of a public company, the number of members has been reduced below seven;

(e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;

(f) the company is unable to pay its debts as described in section 345;

(g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(h) it appears to the Court that it is just and equitable that the company should be wound up.”

If the company is wound up because of its inability to pay its debts (see sec. 344(f) read with sec. 345), the insolvency law would apply *mutatis mutandis* in view of section 339 of the Companies Act 61 of 1973 because the company’s inability to pay its debts would turn the liquidation into an insolvency liquidation. For practical reasons (cf. *supra* note 58), it is sensible to provide a liquidation mechanism for the external company in South Africa. The grounds listed *supra* in section 344 will be referred to *infra* in the text accompanying footnote 104.

⁷⁷ See Kunst et al. 2011, at 842–843.

⁷⁸ Cf. the practicalities mentioned *supra* note 11.

⁷⁹ Kunst et al. 2011, at 667–70(2); Blackman et al. 2012, at ch-p13–ch14-p22.

not directly under discussion for the purposes of this article, and it suffices to say that when the external company is put into liquidation, the South African liquidator appointed to deal with the matter will first and foremost deal with its assets and liabilities in South Africa.

The discussion now moves from the winding up of an external company to the formal methods available to attempt dealing with its debts without liquidating it under the 1973 Act.

3.2.2. Judicial Management as the First Formal Method of Corporate Rescue

The 1973 Act also provided two formal methods of corporate rescue: judicial management, and compromises and arrangements with creditors. Judicial management was never considered to be very effective in practice,⁸⁰ and was replaced by business rescue for companies defined in the 2008 Act.⁸¹

It is still interesting to ask whether judicial management was available to external companies. Section 427 (now repealed) made it clear that judicial management was available when *any* company by reason of mismanagement or for any other cause was unable to pay its debts or was probably unable to meet its obligations, and it had not become or was prevented from becoming a successful concern, and there was a reasonable probability that, if it was placed under judicial management, it would be enabled to pay its debts or to meet its obligations and become a successful concern. This procedure was initiated by an application to the High Court, which was entitled to grant the order to place the company under judicial management if it appeared just and equitable to do so.

What is interesting is that neither in its definitions section 1 nor in its Chapter 15 did the 1973 Act define a company for the purposes of judicial management as that Act (still) does for the purposes of winding-up. However, section 427(1)(a) did make it clear that the judicial management procedure would apply to *any* company. It is submitted that one would first examine the definition of “company” in section 1, which included all companies incorporated under Chapter 4 and also anybody which, prior to the commencement of that Act, was a company in terms of any law repealed by that Act. It is concluded that, on the basis of this definition, the external company registered in South Africa is not a South African incorporated company and does not qualify as a company for the purposes of the 1973 Act. But Blackman and others⁸² mention that it is not clear whether judicial management would apply

⁸⁰ See Anneli Loubser, *Some Comparative Aspects of Corporate Rescue in South African Company Law*, LLD thesis, University of South Africa (2010), at 3 (Sep. 7, 2020), available at <http://hdl.handle.net/10500/3575>: “judicial management was never regarded as an effective rescue measure for companies in financial distress.”

⁸¹ See sec. 224 of the Companies Act 71 of 2008.

⁸² Blackman et al. 2012, at ch15-p4 n. 38.

to external companies.⁸³ This point of view is most probably due to the fact that section 427(1) uses the adjective “any” company read with the authors’ views on the implications of section 2(2) of the 1973 Act.

It is not clear why section 427(1) described a company as “any” company. An interpretational approach to include external companies could find support in section 2(2), which makes the 1973 Act generally applicable to external companies. Some provisions, such as sections 63 and 64, are by their nature not applicable.⁸⁴ Thus the special provisions of the Act governing external companies do not apply to an external company whose branch has been incorporated as a section 21 company. So it could be argued that judicial management could, in fact, have applied to an external company in terms of the 1973 Act, but that, in the absence of clear authority, one may merely agree with Blackman and others, who mention that the position is not clear. As judicial management under the 1973 Act is no longer in force, this issue will not be explored further in this article.

3.2.3. *Compromises and Arrangements as the Second Formal Method of Corporate Rescue*⁸⁵

As regards the second formal method of corporate rescue under the 1973 Act – compromises and arrangements between a company, its members, and its creditors – section 311 provided for this procedure which was sanctioned and supervised by the court.⁸⁶ The point raised but then abandoned in the *CMC(SA)* application, that the Italian compromise procedure resembled this section 311 process, therefore has some merit. Still, it is interesting to note that, although this relief is no longer available in this form in South African company and insolvency law, section 311(8) indicated that “company” for the purposes of section 311 meant *any company liable to be wound up in terms of the 1973 Act*.⁸⁷ So it seems that an external company would have been eligible to invoke this process because section 337(1) of the 1973 Act

⁸³ Forsyth 2012, at 276 states: “A court had jurisdiction under chapter 15 of [the Companies Act 61 of 1973] to place a company under judicial management [note 784 citing section 427]. But since item 5 saves only the provisions of chapter 14 of [the Companies Act 61 of 1973], an external company may no longer be placed under judicial management.” It is submitted that in this passage, Forsyth intended to refer to Item 9 of Schedule 5 to the Companies Act 71 of 2008 (as he does on the preceding page 275) rather than to Item 5, which is a short item dealing with pre-incorporation contracts.

⁸⁴ Blackman et al. 2012, at ch1-p1–ch1-p2. See also the commentary by Kunst et al. 2011, at 14–15 on section 2(2) of the Companies Act 61 of 1973.

⁸⁵ On section 311, see Blackman et al. 2012, at p12-1 *et seq.* and Kunst et al. 2011, at 601 *et seq.* This passage of the article accompanying footnotes 85–88 is referred to *infra* in the text accompanying footnote 94.

⁸⁶ Kunst et al. 2011, at 604 mention that the procedure has been used for a special or alternative means of winding-up or for the termination of a winding-up. A company liquidator of a company in liquidation also had the power if appropriately authorised to use it.

⁸⁷ Kunst et al. 2011, at 608 discuss the inclusion of the external company in this section but indicate that the section 311 procedure will only be available to companies registered as external companies in South Africa.

specifically refers to companies eligible for the winding-up process and includes external companies for this purpose.

It is sensible that the section 311 provisions on compromise and arrangements were in principle available to the external company because they would at least offer some formal process for dealing with (local) debt, particularly where the branch company had several local creditors.⁸⁸

3.3. The 2008 Act

3.3.1. External Companies and the Interpretation of the Word "Company" in Relation to Business Rescue

The *CMC(SA)* judgment has clearly demonstrated that the South African business rescue procedure in Chapter 6 of the 2008 Act is not available to external companies, even if they are registered as external companies in South Africa.

In interpreting the definition of "company" for the purposes of this procedure, the *CMC(SA)* court easily found that the definition of "company" in section 1 does not include "external company".⁸⁹ The court further compared section 2(2) of the 1973 Act, referred to as a catch-all phrase "which provided that the sections of that Act would apply to every company, including external company", and indicated that the 2008 Act had no such provision. The court then pointed out that Parliament would have been aware of section 2(2) of the 1973 Act but "chose to only make certain sections [of the 2008 Act] applicable to external companies". The court then concluded on this point:

The background to business rescue proceedings with regard to an external company is thus that, despite the old Act making provision for an external company, the new Act does not; the probable interpretation is that the legislature intentionally did not include an external company.⁹⁰

For its interpretation the court found support in Cassim's observation "that there was a specific legislative intent with the 2008 Act to reduce the regulation of external companies to promote investment in South African markets."⁹¹ The court remarked that there was in fact a paradigm shift from the 1973 Act, where external companies would be treated on the same footing as South African companies, to that of the 2008 Act, where over-regulation of external companies would be reduced to cut red tape so as to entice external companies.⁹² The aptness of relying on these salient

⁸⁸ See *supra* the reasons mentioned in the passages accompanying footnotes 58 and 78.

⁸⁹ *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 26.

⁹⁰ *Id.*

⁹¹ *Id.* para. 27, citing Farouk H.I. Cassim et al., *Contemporary Company Law* 97 (2nd ed., Cape Town: Juta, 2012).

⁹² *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 27, citing Cassim 2010, at 164.

points raised by Cassim with regard to the applicability of business rescue will be further discussed later in this article in relation to the purposes of the 2008 Act.⁹³

3.3.2. *The Compromise with Creditors*

Although Chapter 6 of the 2008 Act contains the main procedure for business rescue, section 155 also provides for a compromise between the company and its creditors. It is clear from the reasons advanced in the *CMC(SA)* judgment that this compromise will likewise also not be available to external companies such as *CMC(SA)* because the same reasons provided by the court in relation to business rescue will apply to section 155. This position contrasts with that under section 311 as stated above in this article.⁹⁴

3.3.3. *The Liquidation of an External Company: Only a Solvent Company*

A further significant change to South African company law is that sections 79 to 83 of the 2008 Act provide for a liquidation procedure for solvent companies.⁹⁵ Again, it seems that the reasoning in the *CMC(SA)* case may also apply regarding which type of company is covered by the liquidation procedures for solvent companies, and that external companies are therefore also excluded from the (solvent) liquidation procedures in the 2008 Act. The wisdom of this exclusion following the reservation of the provisions on solvent liquidation for companies in terms of the 2008 Act is questionable. A local liquidation even where it is solvent would be sensible where the foreign company, for instance, ceases to do business in South Africa.⁹⁶ (It must be noted again that the external company remains part of the foreign company but it may for certain purposes be treated as if it is a separate entity.⁹⁷)

3.3.4. *The Liquidation of Insolvent Companies and the Transitional Arrangements*⁹⁸

The sections of the main body of the 2008 Act do not directly provide for the liquidation of an insolvent company. Nor do they provide the administrative procedure to execute a liquidation after a solvent company has been put into liquidation. In this regard, it must be noted that Item 9 of Schedule 5 to the 2008 Act, as part of the transitional arrangements of that Act, keeps Chapter 14 of the 1973 Act alive with respect to the winding up and liquidation of companies under the 2008 Act, as though

⁹³ See *infra* the text accompanying footnote 113.

⁹⁴ See *supra* note 85.

⁹⁵ Sections 79 to 83 make up Chapter 2 Part G Winding-up of solvent companies and deregistering companies (secs. 79–83).

⁹⁶ See *supra* the reasons discussed in the text accompanying footnote 58.

⁹⁷ See *supra* notes 7, 9 and 13.

⁹⁸ The text accompanying this heading is referred to *infra* in the text accompanying footnote 101 of this article and also in the text accompanying footnote 146 regarding South African insolvency law reform.

the 1973 Act had not been repealed.⁹⁹ These transitional arrangements state that sections 343, 344, 346, and 348 to 353 of the 1973 Act 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 – the procedures to initiate the liquidation of solvent companies.¹⁰⁰ This aspect will be discussed directly below,¹⁰¹ but the use of the term “companies” under the 2008 Act may perhaps also cast doubt whether an external branch in South Africa can be liquidated at all – even if unable to pay its debts.

3.3.5. *The Transitional Arrangements as Applied to External Companies*¹⁰²

The further question is therefore whether an external company is eligible for liquidation in terms of the 2008 Act in terms of the transitional arrangements relating to liquidation as was the case in terms of the 1973 Act. Chapter 14 of the 1973 Act still applies in principle: it regulated liquidations of companies, both solvent and insolvent. And in terms of the 1973 Act, an external company could be liquidated under Chapter 14 because section 337(1) made it clear that Chapter 14 applied to an external company. Although voluntary liquidation following a members’ resolution was not possible in terms of section 349 of the 1973 Act, the liquidation by application to the court as envisaged by sections 343 to 347 was available. Section 344 stated various grounds¹⁰³ for such a liquidation application, in particular the ground in section 344(g) where the foreign company has been dissolved in the country of its incorporation or has ceased to carry on business or is only carrying on business for the purposes of winding up its affairs. The further grounds for liquidation would also probably exist, such as a special company resolution to wind up the company, for instance, when it wishes to cease business in South Africa, a failure to commence business within twelve months, or the cessation of such business in South Africa, or when it may be just and equitable to liquidate the company. The inability of the external company to pay its debts would establish a ground for a creditor to apply for a liquidation order in terms of section 344(f) read with section 345: the insolvency law would apply *mutatis mutandis* because of section 339 of the 1973 Act because the inability of the company to pay its debts would turn the liquidation into an insolvency liquidation.¹⁰⁴

⁹⁹ See Item 9(1) of Schedule 5 to the Companies Act 71 of 2008.

¹⁰⁰ *Id.*

¹⁰¹ See *infra* the text accompanying footnote 102.

¹⁰² This passage was referred to *supra* note 101.

¹⁰³ See *supra* note 76 for the grounds on which the court might wind up a company.

¹⁰⁴ From discussions with a practitioner (Mr Geoff Ferreira) who kindly commented on a draft of this article, it appears that liquidation applications would in the past frequently be based on section 344(a), in which the resolution simply states (without giving reasons) that the shareholders have resolved by special resolution that the company should be wound up by the court in terms of section 344(a). The case of *Ex parte Three Sisters (Pty) Ltd.*, 1986 (1) S.A. 592 (D) is instructive, the court holding that creditors had to be given notice of the application. Nowadays, because Regulation

The immediate question is whether Chapter 14 of the 1973 Act still applies to external companies under the transitional arrangements in the 2008 Act. In this regard it must be noted that Item 9(1) of Schedule 5 to the 2008 Act also states that it applies to companies – by implication, “companies” in terms of the 2008 Act. Item 9(2) of Schedule 5 then states that “despite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to winding-up of a solvent company, except to the extent to give full effect to the provisions of Part G of Chapter 2.” Delpont and others state that

[w]hether an external company or a registered external company will be subject to winding up in South Africa, will depend on whether Chapter XIV of the 1973 Act or the 2008 Act applies.¹⁰⁵

On a strict interpretation and according to the reasoning of the court in the *CMC(SA)* case, one could conclude that, despite section 337(1) of the 1973 Act, the external companies not registered in terms of the 1973 Act are not included because of the reference in Item 9(1) to “companies” presumably defined in the 2008 Act. This question has not yet arisen in the courts. What is clear, though, is that the grounds for liquidation by court order and voluntary liquidation in terms of Chapter 14 will only apply to companies that are not solvent. Yeats and others, whilst also appreciating the difficulty, hold the view that a purposive interpretation of Item 9(1) would include external companies for the purposes of Chapter 14 of the 1973 Act.¹⁰⁶ This opinion is respectfully shared.

20 requires the filing of Form COR 20.1 (clearly referring to an “External Company”), the question arises whether the court will *mero motu* query whether the company is solvent or not. It appears that, although a solvent external company cannot be wound up in terms of Part G of Chapter 2 of the Companies Act 71 of 2008, it can be wound up in terms of Appendix I to the Companies Act 71 of 2008 (Part 1 Chapter XIV of the Companies Act 61 of 1973), specifically if the external company is wound up in terms of section 344(a) read with one or more of the other grounds in section 344. An application based on section 344(a) alone might suffice, because this is a separate substantive ground for the winding up of a company (including an external company) by the court; then it will be for the liquidator to decide, as he is entitled to do, whether the company is solvent or not and, if it is insolvent, then at which stage the company became unable to pay its debts. It appears that ultimately the answer would lie in the interpretation or application of Item 9 of Schedule 5 to the Companies Act 71 of 2008. If the purposive interpretation preserving the full scope of Chapter 14 of the Companies Act 61 of 1973 is applied (and not confined to insolvent companies), then it appears that a solvent external company can simply be wound up in terms of section 344(a) without giving any reason why the shareholders have resolved to wind up the company. The problem seems to lie in the fact that, in terms of Item 9(2) of the Companies Act 71 of 2008, there is an obligation to determine whether the company is solvent or not, and that if it is solvent, then a resolution in terms of section 344(a) of the Companies Act 61 of 1973 is prohibited.

¹⁰⁵ Delpont et al. 2019, at APPI-5, in relation to sec. 337 of the Companies Act 61 of 1973.

¹⁰⁶ J.L. Yeats et al., *Commentary on the Companies Act of 2008* (electronic version, Cape Town: Juta 2017), Sched.-166–Sched.-167 (Sep. 7, 2020), available at <https://0-jutastat-juta-co-za.oasis.unisa.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&v.id=Publish:10.1048/Enu>. The authors state (*Id.* at Sched.-166): “On a technical level, item 9 is an exception to the repeal of [the Companies Act 61 of 1973] and

Delpont and others mention that the “purely procedural” nature of the registration of the external company is important for the purposes of the continued application of Chapter 14 of the 1973 Act because section 337(1) of this Act included external companies for the purposes of liquidation. They add:

[N]otwithstanding that the registration of an external company in South Africa does not create a separate legal persona ... such a company may be wound up in South Africa as an independent entity even if the foreign entity is not wound up.¹⁰⁷

But they state that Chapter 14 will only apply to these external companies where the provisions of section 322 and 323 of the 1973 Act continue to apply. In such instances, the winding up of a South African registered company would therefore apply. [If the authors are correct, this may mean that the liquidation provisions in Chapter 14 will only apply to external companies initially registered in terms of the 1973 Act and recognised as such in terms of the 2008 Act.] The authors go on to state:¹⁰⁸

But even a company or other association of persons incorporated outside South Africa which complies with s 23 (2A) (and is therefore within the definition of “external company” in s 1) is, it is submitted, subject to the provisions of Chapter XIV even if it is not registered as such under the Act (see s 23 ssv **Subsections (1), (2), (2A) and (6)** and **Registered external company** of the 2008 Act; and see *Wiseman v ACE Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) at 175, 177).

From this remark it seems that it may be accepted that Chapter 14 will still apply not only to external companies that are registered in South Africa but also to external companies that are not registered in South Africa.

Again, on the policy shift between the 1973 and 2008 Acts concerning the recognition and treatment of external companies, Delpont and others highlight the

therefore Chapter XIV of [the Companies Act 61 of 1973] can only have application in so far as item 9 permits. From this, it can be asserted that the exception is limited by the use of the term ‘company’ in item 9 and, for all other purposes, Chapter XIV of [the Companies Act 61 of 1973] is repealed.” However, after stating that “this literal reading does not sit well,” the authors argue, with reference to canons of interpretation, that “the preferred view is that a purposive reading of item 9(1) supports a conclusion that the legislature intended to preserve the full scope of chapter XIV of [the Companies Act 61 of 1973] with regard to insolvent companies as defined in s 337 of [the Companies Act 61 of 1973], rather than as defined under [the Companies Act 71 of 2008].” For this broad interpretation the authors cite (*Id.* at Sched.-166–Sched.-167) Borainé & van Wyk 2013; *Botha NO v. Van den Heever NO*, 2012 J.D.R. 1202 (GNP); and *Van Der Merwe v. Duraline (Proprietary) Ltd.* [2013] Z.A.W.C.H.C. 213, paras. 16–30, especially para. 20.

¹⁰⁷ See Delpont et al. 2019, at 124 read with APPI-1-I and APPI-5, referring to *Sackstein NO v. Proudfoot S.A. (Pty) Ltd.*, 2003 (4) S.A. 348 (SCA), para. 15.

¹⁰⁸ *Id.* at APPI-5 (bolding and italics in the original).

fact that section 23 of the 2008 Act “does not afford (South African) legal personality as the position was under s 323 of the 1973 Act.”¹⁰⁹ It is noted that this question will have to be settled by a judgment and that, depending on the interpretational approach followed, the decision could go either way. Should a court decide that external companies are not eligible for liquidation in terms of the 2008 Act read with Chapter 14 of the 1973 Act, these companies may in principle still be eligible for sequestration in terms of the Insolvency Act¹¹⁰ because they may be treated as “debtors as provided for in section 2 of the Insolvency Act” but the sequestration may then be directed to the foreign company and not the external branch as such.¹¹¹

It is further submitted that external companies, when they do not have legal personality, should still be eligible for liquidation in South Africa. For practical purposes, they would then be wound up in South Africa even though still part of the foreign company, and the South African assets treated as a separate distinct estate. Where these external companies do not have legal personality, the situation can be compared with the sequestration of a partnership as provided for in section 13 of the Insolvency Act 1936, which deems the partnership to be a separate entity as if it were a body corporate, without clothing the partnership with legal personality for the purposes of sequestration. But this may be questionable in the absence of a specific statutory provision.

It must also be mentioned that the court in the *CMC(SA)* case did not raise this issue but postponed the liquidation counter-application indefinitely for other considerations. If Chapter 14 of the 1973 Act still applies to external companies, several matters must then be considered, namely:

- Will the term “external company” in section 337(1) of the 1973 Act be deemed to be an external company recognised by the 1973 Act or by the 2008 Act? It is submitted that a purposive interpretation regarding Item 9(1) of Schedule 5 to the 2008 Act would mean that the definition of the 2008 Act should be followed.
- It is clear from the exclusions in Item 9(2) of Schedule 5 to the 2008 Act that the grounds provided for liquidation in section 344 of the 1973 Act will generally not be available to the external company if it is solvent. So, to rely on any of these grounds, the inability of the company to pay its debts will have to be established, and that inability will clearly remain a ground for liquidation as provided by section 344(g) read with section 345 of the 1973 Act.

¹⁰⁹ *Id.* at 124.

¹¹⁰ Insolvency Act 24 of 1936.

¹¹¹ *Lawclaims (Pty) Ltd. v. Rea Shipping Co. S.A.*, 1979 (4) S.A. 745 (N), at 755A–B; Eberhard Bertelsmann et al., *Mars: The Law of Insolvency in South Africa* (10th ed., Cape Town: Juta, 2019), para. 2.2.8 & footnote 174.

But, as mentioned before, a purposive interpretation is supported, and on such a basis an external company would at least be eligible for liquidation as envisaged in Item 9(1) of Schedule 5 to the 2008 Act read with section 337 of the 1973 Companies Act. It is, in fact, submitted that the external company should still be eligible for liquidation as provided for in the transitional measures of the 2008 Act. This procedure remains a prime example where the external company is treated as if it is a separate entity without in fact being one.

3.3.6. An Imaginative Purposive Interpretation of the 2008 Act: Sections 158, 5, and 7¹¹²

It must be remembered that, unlike the 1973 Companies Act, the 2008 Companies Act only applies to external companies in those instances where the Act clearly indicates this application. The court in the *CMC(SA)* case did acknowledge the purposes of the 2008 Act that must be considered when interpreting the Act, but in essence found that the Act was clear that external companies were not included for the purposes of business rescue.

It may well be asked whether a more imaginative argument and interpretation could not have been followed in the matter. For such a broader approach and to some extent one could also consider section 158 of the 2008 Act, which obliges a court to develop the common law and as necessary to improve the realisation and enjoyment of rights established by this Act. Amongst other things, the court is also obliged to promote the spirit, purpose, and objects of this Act, and where any provision in this Act or other document in terms of the Act, read in its context, can be reasonably construed to have more than one meaning, the meaning that best promotes the spirit and purpose of the Act and will best improve the realisation and enjoyment of rights should be promoted.

The interpretation of the 2008 Act is too extensive a subject to be squeezed into this article, and so only a few aspects will be raised here. Section 5(1) requires the Act to be interpreted and applied in a manner that gives effect to the purposes set out in section 7. One of those purposes, in section 7(k), is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. The 2008 Act introduced the notion of business rescue with a view to keeping companies that could be saved afloat rather than liquidating them; and the socio-economic benefits of the preservation of jobs are clear.¹¹³ In the *CMC(SA)* judgment, the court refers to, amongst other

¹¹² Cf. *supra* the text on the “felt necessities” of our time accompanying footnote 62.

¹¹³ Cf. *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 4, where it is stated that the external company had concluded lucrative contracts for the reconstruction of the port of Durban and work on the toll roads, which it may be assumed would have contributed to the South African economy and created a significant number of job opportunities for South Africans. It is submitted that *CMC(SA)*'s contracts may also therefore be regarded as giving tangible form to the purpose of section 7(d) of the Companies Act 71 of 2008 “to reaffirm the concept of the

authorities, Cassim's observation that Parliament, in regulating external companies in the 2008 Act, intended to do away with burdensome procedures and red tape.¹¹⁴ This observation can be supported because it is aligned with the stated objectives of the 2008 Act. But the court's view is, with respect, questionable whether it is indeed burdensome to make the business rescue procedure (or at least the compromise with creditors) in Chapter 6 as such available to external companies and whether the provision of these remedies would deter these companies from entering the South African economy. On the contrary: these companies would thus be provided with the opportunity of dealing with their local debts in South Africa while it would still be possible for them to manage at least some instances of financial distress.¹¹⁵ This more welcoming approach to foreign companies would also benefit South African creditors in providing a local platform to deal with the debt instead of approaching a foreign jurisdiction, for instance. Far from burdening these foreign companies, these remedies might in appropriate circumstances even lighten their burdens and help them to emerge stronger than before. But it is conceded that a purposive interpretation regarding business rescue as such is probably a stretch too far in view of the rather clear language relating to the type of companies to which Chapter 6 of the 2008 Act applies. The purposive approach may nevertheless be useful in considering and establishing a policy regarding the treatment of financial distress of external companies.

Another aspect to be considered as part of this discussion is the position of employees. The meaning of "company" could perhaps be expanded for the purposes of procedures such as business rescue, compromise and liquidation if one could further adopt an imaginative and broad purposive interpretation that could, for instance, be based on the approach to statutory interpretation that was followed by the Johannesburg Labour Court in the recent case of *National Union of Metalworkers*

company as a means of achieving economic and social benefits." Cf. also the text *supra* on the "felt necessities" of our time accompanying footnote 62.

¹¹⁴ See *supra* the text accompanying footnotes 91–93. It should also be noted that Forsyth 2012, at 274, having summarised the duties imposed on external companies under the Companies Act 71 of 2008 and the fact that the provisions governing voluntary winding up and deregistration of solvent companies do not apply to external companies and so they cannot be voluntarily wound up and deregistered under that Act, goes on to state: "This potential freeing of external companies from the ordinary consequences of doing business in the Republic is not as far-reaching as at first appears." Having then discussed the transitional arrangements, Forsyth concludes (*Id.* at 275): "The upshot is that as far as insolvent companies are concerned the old Act [i.e. the Companies Act 61 of 1973] will continue to apply until alternative arrangements are made, and that the old law applicable to the treatment of insolvent external companies will continue to apply to them."

¹¹⁵ Cf. the affidavit supporting the CMC(SA) board resolution commencing business rescue (*CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 5): "Based on the above, the board of directors and I are of the opinion that there is a reasonable prospect of rescuing the company with business rescue proceedings. Business rescue proceedings will, it is hoped, allow the company to reorganise its affairs so that the Company can complete its projects and remain viable."

of *South Africa v. South African Airways (SOC) Ltd.* (“*Numsa*”),¹¹⁶ applying the approach laid down by the Constitutional Court in *Cool Ideas 1186 CC v. Hubbard*.¹¹⁷

A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.¹¹⁸ There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

The *Numsa* court then held that it was obliged¹¹⁹ to interpret section 136 of the 2008 Act¹²⁰ to promote the spirit, purport, and objects of the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (“the Constitution”) because section 136 of the 2008 Act implicated a right in the Bill of Rights, namely, the right to fair labour practices as prescribed in section 23(1) of the Constitution.¹²¹ In turn, that right included the right to security of employment, itself a

“core value” of the [Labour Relations Act],¹²² the statute that primarily gives effect to section 23 of the Constitution (see *National Education Health & Allied*

¹¹⁶ *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, 2020 (7) B.C.L.R. 888 (LC), paras. 26–28. It must be noted that this judgment was upheld on appeal but the Labour Appeal Court mentioned that the wording of section 136(1)(a) of the Companies Act 71 of 2008 was in fact clear and unambiguous – see *South African Airways (SOC) Ltd. (In Business Rescue) and Others v. National Union of Metalworkers of South Africa obo Members and Others* (JA32/2020) [2020] Z.A.L.A.C. 34 (9 July 2020), paras. 27, 31 & 40.

¹¹⁷ *Cool Ideas 1186 CC v. Hubbard*, 2014 (4) S.A. 474 (CC), para. 28.

¹¹⁸ For this principle the Constitutional Court (*Id.* para. 28, footnote 18) cited *SATAWU v. Garvas*, 2013 (1) S.A. 83 (CC), para. 37; *S v. Zuma*, 1995 (2) S.A. 642 (CC), paras. 13–14; and *Dadoo Ltd. v. Krugersdorp Municipal Council*, 1920 A.D. 530, at 543. This principle is relied on *infra* in the text accompanying footnote 136.

¹¹⁹ *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, para. 27, explaining that this obligation created by section 39(2) of the Constitution of the Republic of South Africa, 1996 is “a mandatory constitutional canon of statutory interpretation” (*Fraser v. ABSA Bank Ltd.*, 2007 (3) S.A. 484 (CC), para. 43) so that “courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation” (*Makate v. Vodacom (Pty) Ltd.*, 2016 (4) S.A. 121 (CC), para. 88).

¹²⁰ Section 136 of the Companies Act 71 of 2008 deals with the effect of business rescue on employees and contracts (see its heading).

¹²¹ *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, paras. 27–28.

¹²² Labour Relations Act 66 of 1995.

Workers Union (NEHAWU) v. University of Cape Town [...] ¹²³). Section 39(2) of the Constitution is thus of necessity implicated, and section 136 (1) of the Companies Act must thus be read purposively in the light of the provisions of the Constitution. In short, if there is an interpretation of section 136(1) that better promotes the preservation of work security, that interpretation ought to be preferred. ¹²⁴

A rather different approach was taken when the case reached the Labour Appeal Court. ¹²⁵ That court upheld the decision of the Labour Court that the business rescue practitioners' issuing of the notice under section 189 of the Labour Relations Act, without a business rescue plan, was "premature, unfair and had to be withdrawn." ¹²⁶ In reaching this conclusion, the Labour Appeal Court held ¹²⁷ that, in accordance with the subsidiarity principle, ¹²⁸ the employees could not rely directly on section 23 of the Constitution regarding the right to fair labour practices or section 9 regarding the right to equality ¹²⁹ but must first rely on the Labour Relations Act, passed in order to give effect to the right to fair labour practices, and challenge that statute if it did not adequately give effect to that constitutional right, which covered the interests of employers and employees. ¹³⁰ The court went on to hold:

There can be no question that s 23 recognises the rights of employers but simultaneously protects a range of rights of employees that are central to the democratic model promoted by the Constitution read as a whole. ¹³¹

It is therefore submitted that, on the basis of the constitutionally supported reasoning applied above to one section of Chapter 6 of the 2008 Act, it is possible to argue that all the provisions of Chapter 6 of the 2008 Act on business rescue and compromise with creditors should similarly be interpreted in a way that better promotes the employees' right to fair labour practices, including the preservation of work security, when those employees are employed by external companies.

¹²³ *National Education Health & Allied Workers Union (NEHAWU) v. University of Cape Town*, 2003 (3) S.A. 1 (CC), para. 42.

¹²⁴ *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, para. 28.

¹²⁵ *National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, [2017] 9 B.L.L.R. 867 (LAC) ("SAA").

¹²⁶ *Id.* para. 40.

¹²⁷ *Id.* para. 38.

¹²⁸ *Baron v. Claytile (Pty) Ltd.*, 2017 (5) S.A. 329 (CC), para. 10.

¹²⁹ *Safcor Freight (Pty) Ltd. v. S.A. Freight & Dock Workers Union*, (2013) 34 I.L.J. 335 (LAC), para. 18.

¹³⁰ *Amcu v. Royal Bafokeng Platinum Ltd.*, 2020 (3) S.A. 1 (CC), at 17, para. 50.

¹³¹ *National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, para. 39.

The rights of employees form an important feature of the business rescue process¹³² and the compromise with creditors.¹³³ The scope for the application of these rights and obligations is intentionally excluded by the definition of “company” in the Act when those employees work for an external company. Nevertheless, the extension of the rescue provisions in Chapter 6 to external companies through including those companies in the definition of “company” may perhaps also by a stretch of the imagination find support by reliance on the Constitution¹³⁴ and other statutes when it is remembered that, if there is an inconsistency between any provision of the 2008 Act and a provision of any other national legislation, the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, any applicable provisions of, among other named statutes, the Labour Relations Act prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in

¹³² André Borainé and Roger Evans explain: “In line with developments elsewhere, the new Companies Act of 2008 ... introduced a new business rescue procedure with the rights of employees being paramount. In fact this Act provides that a rescue application may be brought to court even where a company is already subject to liquidation. It is clear that job preservation and the protection of employees are extremely important to the extent that rights of employees to receive their wages when the business is subject to such a rescue procedure, even trumps the rights of secured creditors in certain instances. These developments are indicative of the importance of what could be deemed to be fair labour practices as well as socio-economic rights. ... The introduction and implementation of a new business rescue dispensation as proposed by the Companies Act of 2008 is ... clearly rooted in fair labour practices and the rights of employees in general.” André Borainé & Roger Evans, *The Law of Insolvency and the Bill of Rights in The Bill of Rights Compendium* (electronic version, Durban: LexisNexis, 2014), para. 4A8(d) (Sep. 7, 2020), available at <https://www.mylexisnexis.co.za/Index.aspx>. Cf. the summary: “Various sections of the Act also expressly recognise rights of employees as stakeholders, also through trade unions.” Delpont et al. 2019, at 54–54(1). See also *National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, para. 29: “The primary aim of a corporate rescue procedure is not merely to rescue a company business or potentially successful parts of the business. The procedure aims to rescue the whole company or corporate entity. This will naturally include preservation of jobs. Indeed one of the main drivers for the introduction of the business rescue regime in place of the system of judicial management was the rescue of an ailing business and thus the retention of jobs.” The Labour Appeal Court then quoted commentary that “[t]he preservation of jobs is widely regarded as one of the many economic and social benefits that could result from the successful rescue of a company or business ... the saving of jobs is a high priority for South Africa and the introduction of an effective and successful business rescue procedure was seen by government as an important measure to prevent further job losses”; and that employees enjoy a pre-eminent position in relation to other stakeholders of the company such as the creditors or shareholders. See Anneli Loubser & Tronel Joubert, *The Role of Trade Unions and Employees in South Africa’s Business Rescue Proceedings*, 36(1) *Industrial Law Journal* 21, 21–22 (2015). Consider also the reference to the “felt necessities” of our time (*supra* note 62).

¹³³ See sec. 155 of the Companies Act 71 of 2008. Thus the assumptions and conditions of the required proposal must include the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment (sec. 155(3)(c)(iii)).

¹³⁴ The supreme law of South Africa (see sec. 2 of the Constitution of the Republic of South Africa, 1996).

sections 30(8) or 49(4).¹³⁵ So it could be argued that, by excluding external companies from the companies authorised to use the rescue provisions in Chapter 6 of the 2008 Act, the restricted definition of “company” in section 1 of the Act therefore also excludes the employees of those companies from enjoying their right to fair labour practices, including the preservation of work security – a right advanced by the Constitution and the Labour Relations Act – in relation to business rescue and compromise with creditors under Chapter 6, and that, in this respect, the definition of “company” in section 1 of the 2008 Act ought to be interpreted so as to make it possible for the external company’s employees to enjoy those rights in the context of their relationships with the external company in a business rescue or a compromise with creditors. If too far-fetched to be adopted by a court of law, this argument could at least also be raised in considering the development of a firm policy regarding the treatment of external companies in relation to these statutory procedures.

3.3.7. A More Traditional Reply to the Purposive Interpretation of the Definition of “Company” in Section 1 of the 2008 Act

Against this overbroad and imaginative purposive interpretation of the definition of “company” in section 1 of the 2008 Act for the purposes of business rescue and compromise, it could be argued that the definition is clearly expressed and so the exclusion of external companies from Chapter 6 is also clear. This is, in essence, the approach of the court in the *CMC(SA)* matter. If the words of the definition are given their ordinary grammatical meaning, an exclusion but not an absurdity is the result.¹³⁶ The exclusion cannot be reasonably construed to have more than one meaning. Employees of external companies cannot enjoy their constitutional right to fair labour practices in terms of Chapter 6 because Chapter 6 simply does not apply to their employers. The *Numsa* case is distinguishable on its facts because the parties to it were all South African, whereas *CMC(SA)* in *CMC(SA)* was not. Clear statutory provisions cannot be rendered unclear by a purposive interpretation based on disapproval of the restrictions and exclusions in those clear provisions. Only Parliament, not the courts, can alter clearly expressed provisions such as the definition of “company” in section 1. By interpreting the unambiguously excluding definition of “company” in section 1 so as to include external companies and thus create the possibility for them to rely on the business rescue and compromise provisions of Chapter 6, the courts, even the Constitutional Court, would be making legislation¹³⁷ and thus infringing the principle of the separation of powers.

¹³⁵ See sec. 5(4) of the Companies Act 71 of 2008, especially sec. 5(4)(b)(i)(bb) regarding the Labour Relations Act 66 of 1995.

¹³⁶ Cf. *supra* the main principle stated in *Cool Ideas 1186 CC v. Hubbard*, para. 28, footnote 18, in the text accompanying footnote 118.

¹³⁷ Cf. Delpont et al. 2019, at 53, discussing *Smyth v. Investec Bank Ltd.*, 2018 (1) S.A. 494 (SCA), para. 28, “where the statement is made (with reference to *Standard Bank Investment Corporation v. Competition*

3.3.8. *The Policy Considerations for a Constitutional Evaluation of Parliament*

Such a response would nicely raise the question of whether a constitutional evaluation by, for instance, the Constitutional Court, exercising its considerable authority and powers in terms of the Constitution, could strike down the exclusion of external companies in the definition of “company” in section 1 of the 2008 Act for the purposes of business rescue and compromise, or to apply reading in for the purposes of Chapter 6 and liquidation. Failing that, and probably the better route to go, is to make a case for the necessary alteration to the definition by Parliament for the stated purposes. The current mindset is that foreign companies registered as external companies in South Africa and conducting business here can only do so for very limited purposes. So it is a policy consideration whether the formal debt-relief measures such as business rescue or the section 155 compromise with creditors should also be available to those external companies. The same question may arise should a court find that the liquidation provisions are also no longer available to external companies.

In instances where the external company experiences a setback and suffers financial distress, the same considerations to help it to return to profitability as for a South African company should apply. It may also be more convenient for local creditors to deal with the matter locally, rather than approaching a foreign court or authority. As it stands, without the possibility of entering into business rescue or a compromise with creditors in South Africa, the external company will have to resort to voluntary creditor workout procedures.¹³⁸ And if the company is neither registered in South Africa nor subject to local liquidation law, the recourse open to South African

Commission ... 2000 (2) SA 797 (SCA) referring to the judgment of Innes CJ in *Dadoo Ltd & Others v. Krugersdorp Municipal Council* [1920 AD 530 at 543] ... that it would be wrong for courts to ignore the clear language of a statute under the guise of adopting a purposive interpretation as doing so would be straying into the domain of the legislature: see *Natal Joint Municipal Pension Fund v. Endumeni Municipality* [2012 (4) SA 593 (SCA)] para. 18 but see *Panamo Properties (Pty) Ltd and Another v. Nel NO and Others ...* 2015 (5) SA 63 (SCA) para. 31. “The statement is echoed in *National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, para. 27. The Labour Appeal Court later added that “the language adopted by the legislature remains the starting point for any interpretative inquiry. Where the words employed admit of more than one plausible interpretation, the purpose of the legislation must be employed as a tiebreaker” (*Id.* para. 28). After considering sections 5(1), 7(k) and 128(1)(b) of the Companies Act 71 of 2008 and academic commentary as well as the Constitution of the Republic of South Africa, 1996 and the Labour Relations Act 66 of 1995, the Labour Appeal Court concluded that section 136(1) of the Companies Act 71 of 2008 should be construed so as to permit the retrenchment of employees only in terms of the company’s business rescue plan, which in compliance with section 150(2) must specify, amongst other things, its effect on those employees (see *Id.* paras. 28–40).

¹³⁸ In this instance, the workout principles of INSOL may be helpful: see INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts II* (2nd ed., London: INSOL International, 2017) (Sep. 7, 2020), available at https://www.insol.org/_files/Publications/StatementOfPrinciples/Statement%20of%20Principles%20II%2018%20April%202017%20BML.pdf. Informal creditor workouts and their contribution to business rescue are discussed in Eric Levenstein, *South African Business Rescue Procedure* (electronic version, Durban: LexisNexis, 2017), para. 3.3 (Sep. 7, 2020), available at <https://www.mylexisnexis.co.za/Index.aspx>.

creditors locally is also limited, as in the circumstances of a case such as *Lawclaims (Pty) Ltd. v. Rea Shipping Co. S.A.*,¹³⁹ and they may then wish to consider pursuing the enforcement of debt by way of ordinary enforcement procedures or else even an application for the sequestration of the debtor's estate in terms of the Insolvency Act if the requirements for compulsory sequestration can be met. Alternatively, those creditors will have to pursue the more extensive and expensive route of debt enforcement in a foreign jurisdiction where the COMI of the foreign company is situated. It may be doubted whether such voluntary procedures, individual debt-enforcement initiatives by creditors, or applications for compulsory sequestration offer the extensive benefits that could be achieved for the external company, its local creditors, its stakeholders, and the nation by means of making the business rescue procedure, or at least the local compromise with creditors as provided for in section 155 of the 2008 Act, available.

4. Corporate Governance Structures of External Companies

As pointed out above,¹⁴⁰ the external company registered in South Africa remains part and parcel of the foreign company but for liquidation purposes is deemed to be a separate entity with a view to being eligible to be liquidated in South Africa as provided for in current legislation. (It is submitted that the same way of thinking applied in terms of the former section 311 procedure in terms of the 1973 Act that also applied to external companies.¹⁴¹)

In this article the point is raised that the availability of statutory debt-relief measures such as business rescue and/or the section 155 compromise in terms of the 2008 Act could be considered for external companies but that in order to make such procedures available, and even in the case of the liquidation of such a company, certain governance structures need to be considered as well.

The directors of the external company are, in fact, the directors appointed and (mainly) based at the COMI of the foreign company. And although the external company will receive its instructions from the head office, it will need a local managerial structure as well. Although there may be variations, there will most probably be at least a local manager, being the corporate operating officer, and several other officers such as a finance officer. Some of them may even be directors of the foreign company too, but the (main) board of directors will not be seated in South Africa.

It is important to note that in the case of the liquidation of the external company in terms of South African company law, the directors will no longer be able to act on behalf of the company and that they are in fact replaced by the liquidator because

¹³⁹ *Lawclaims (Pty) Ltd. v. Rea Shipping Co. S.A.*, *supra* note 111.

¹⁴⁰ *See supra* notes 9 and 13.

¹⁴¹ *See supra* note 87.

the control over the company and its assets will ultimately vest in the liquidator.¹⁴² It should be clear that this principle will not apply to the directors situated outside South Africa but that the liquidator should nevertheless assume control of the external branch in so far as it relates to its South African affairs.

As discussed,¹⁴³ Chapter 14 of the 1973 Act will apply to external companies to the extent provided for by Item 9(1) of Schedule 5 to the 2008 Act. This chapter includes provisions in sections 424 and 425 relating to the personal and criminal liability of directors and other officers of companies for the fraudulent conduct of business. Although such situations may arise, it will be difficult to apply these provisions against directors and other officers on an extra-territorial basis by means of South African court orders. But local officers of such an external company will be subject to these provisions.¹⁴⁴

In the case of a business rescue, it is important to note that the directors remain in their positions but that the appointed business rescue practitioner will take control of the company.¹⁴⁵ Currently this is not possible, but should the legislature consider making the business rescue procedure available to external companies, the relationship between the business rescue practitioner and the directors of the company should also be adjusted to avoid absurdities.

5. South African Insolvency Law Reform

As was mentioned above,¹⁴⁶ the transitional measure in Item 9(1) of Schedule 5 to the 2008 Act activates the use of Chapter 14 of the otherwise repealed 1973 Act for, amongst other things, the liquidation of insolvent companies because the 2008 Act does not deal with liquidations exhaustively in view of the envisaged new insolvency legislation. The background to this new insolvency legislation is that the review of South African insolvency law has been going on for some years.¹⁴⁷ During 1987 the then South African Law Commission commenced an investigation of the law of insolvency in its entirety, and a Project Committee was appointed to conduct and direct the review as Project 63. A series of working papers for discussion dealing with

¹⁴² See sec. 361 of the Companies Act 61 of 1973.

¹⁴³ See *supra* note 98.

¹⁴⁴ Section 22 of the Companies Act 71 of 2008 also contains a provision on reckless trading but it refers to a "company." So, if the judgment in *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others* is applied, it seems that section 22 of the Companies Act 71 of 2008 will not apply to external companies.

¹⁴⁵ Sec. 140(1)(a) of the Companies Act 71 of 2008.

¹⁴⁶ See *supra* the text accompanying footnote 98.

¹⁴⁷ Prior to 1987, some *ad hoc* working documents were published, such as the South African Law Commission, Preferences on Insolvency, Working Paper 1, Project 37 (1982) and its subsequent Report on the Review of Preferent Claims in Insolvency, Project 37 Interim Report (1984).

selected topics, followed by reports, culminated in the Draft Insolvency Bill of 1996.¹⁴⁸ This first draft was replaced by an Explanatory Memorandum and a Draft Bill that were published by the South African Law Reform Commission during 2000. Paragraph 5 of the Explanatory Memorandum expressed support for the development of uniform insolvency legislation to deal with both corporate and individual insolvency but did not provide for corporate insolvency as such. Although the concept of a unified insolvency statute enjoyed the support of the South African Law Reform Commission and was accepted by the Cabinet in March 2003, this initiative has stalled for some time. However, probably because of the new interventions by the Companies Act 2008, further work was done and a working document containing a draft bill titled the Draft Insolvency and Business Recovery Bill dated 30 June 2010 compiled by the Department of Justice followed. An updated version of the working document was completed in 2015. It is, however, unclear when this initiative will be taken forward by the government.

Although the proposed bill contained in the 2015 working document is in the format of uniform insolvency legislation which provides for insolvency procedures relating to various types of debtors, including companies, it has no explicit provision dealing with external companies. It is submitted that this aspect and the problems relating to external companies in this respect in view of the current legal position should be considered before a draft bill is published for commentary. It must, however, be grasped that in order to consider all the relevant aspects concerning external companies, namely, liquidation of solvent and insolvent external companies, and statutory measures to deal with the debt, both the insolvency law as well as company law need to be considered because the statutory position seems to continue with a dual approach in that business rescue and compromises with creditors, for instance, have been inserted into the 2008 Companies Act rather than ideally forming part of all the insolvency-related procedures that should be covered by new uniform insolvency legislation.

The treatment of the debt of the external company, and the fact that the company remains one and the same company as the foreign company, should also be considered with a view to developing a clear policy in this regard to inform and direct the law reform process for the treatment of external companies in this regard.

¹⁴⁸ The 1996 Draft Insolvency Bill and Explanatory Memorandum were published for comment by the South African Law Commission as the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum, Working Paper 66, Project 63 (1996). On these documents, see André Boraine & Kathleen van der Linde, *The Draft Insolvency Bill – An Exploration (Part 1)*, 4 *Journal of South African Law* 621 (1998) and *The Draft Insolvency Bill – An Exploration (Part 2)*, 1 *Journal of South African Law* 38 (1998).

Conclusion

This article has discussed the formal debt-relief and liquidation measures available in South African law to assist foreign companies doing business in South Africa during periods of financial distress, in particular in relation to their locally established branches, registered as external companies in South Africa.

Formerly, the 1973 Companies Act provided for judicial management as its primary method of corporate rescue. Although it can be argued that this rather inadequate process was perhaps available to external companies, the position is not clear and in the absence of reported cases on the point a case could be made that it was not. What is clear, though, is that the section 311 scheme of arrangement and compromise procedure was available to such companies.

It is also clear that South African law now offers more limited debt-relief measures to foreign companies registered in South Africa as external companies than it used to in terms of the 1973 Companies Act. The *CMC(SA)* judgment convincingly concluded that these companies are not entitled to the business rescue procedure in the 2008 Companies Act as the Act stands currently, and by similar reasoning one may conclude they are also denied the statutory compromise with creditors contained in section 155 of this Act. Nor is it certain to what extent and to which types of external companies the liquidation procedures of South African law are available, though it does seem that those procedures provided for solvent companies in the 2008 Act are not available to external companies for the same reasons accepted by the *CMC(SA)* court. Only the procedure for the winding up of a company by the 1973 Act may possibly still be available for liquidation purposes, as far as the 2008 Act allows; and it seems that this procedure is still used in practice.

Clearly, and following the reasoning of the court in the *CMC(SA)* judgment relating to the meaning of “company” in the 2008 Act, the liquidation procedures for solvent companies in the 2008 Act are closed to external companies. So the process of liquidating solvent external companies may still have to be based on Chapter 14 of the 1973 Act, assuming that these companies may still invoke it. But they may face another interpretational problem because Item 9(1) of Schedule 5 to the 2008 Act activates the use of Chapter 14 of the otherwise repealed 1973 Act for, amongst other things, the liquidation of insolvent companies but the transitional arrangements refer to companies in terms of the 2008 Act. A purposive interpretation is therefore proposed so as to include all external companies recognised by the 2008 Act; but should this approach fail to convince a court, this aspect will also need legislative attention.

Lacking formal debt-relief measures, external companies can possibly conclude a voluntary but informal settlement with their creditors following a creditors’ workout. To finalise their business operations when unable to pay their debts, it seems that they can still file for liquidation in terms of South African law because they can be wound up even though still part of their foreign parent companies. Obviously, should

they not be registered in South Africa and not be subject to the South African law of liquidation as such, recourse against them is more limited, as in the rather rare *Lawclaims* instance, when their local creditors may most probably collect their debts by relying on ordinary debt-enforcement procedures or by proving the requirements of an application for compulsory sequestration under the Insolvency Act – assuming that all requirements set by South African law can be met.

Whilst acknowledging that local creditors will in principle also be entitled to make use of cross-border insolvency in case of foreign insolvency procedures or debt-enforcement measures, it is clear that these procedures will make the process much more cumbersome and costly if local creditors always have to follow up on their claims in a foreign jurisdiction, which will be the logical alternative route should local procedures be found to be inadequate or lacking. The position to allow local debt enforcement and possibly still the liquidation of an external company serves as proof that there may be good reason to enable such a company to deal with its local debt in South Africa. It must be noted, though, that local court orders, in so far as they are not met or cannot be enforced locally, need to be recognised and enforced in the jurisdiction of the foreign company. This comes with an element of risk and cost for the South African creditors because their fate regarding recognition and enforcement will be determined by the law of the foreign jurisdiction. It is also clear that the recognition of an ordinary judgment order will not be treated in the same way as a local liquidation order in that the liquidation order relating to the external company will not be deemed to apply to the foreign company as such.

It is said that the legislature adopted a new approach towards external companies in the 2008 Act in that they are only entitled to rely on provisions in the Act that specifically apply to them. It may also be argued that they are in fact treated as foreign companies with no special rules applicable to the local branches registered as external companies in terms of South African law. But it must be noted that they can be treated as separate entities for specific purposes such as ordinary debt enforcement, liquidation or, under the 1973 Act, the former section 311 scheme of arrangement and compromise. It is submitted that even liquidation is still available to an external company unable to pay its debt in spite of a paradigm shift in their treatment from the former 1973 Act to the current 2008 Act.

In closing, the question may be raised, as a policy decision possibly for the legislature, why business rescue or at least the section 155 compromise should not be available as formal debt-relief measures to external companies under given circumstances when several reasons suggest that they should be. These companies, especially if registered here, will act and operate as though they are local incorporated companies, become liable to pay local taxes, employ locals, benefit locals, and take part in and strengthen the local economy.

Should the 2008 Act be amended by clearly providing that “company” for the purposes of Chapter 6 includes these external companies for specific purposes such as local liquidation procedures and rescue, or at least the section 155 compromise

procedure, they would be given the tools to deal with their debt problems in ways that would benefit them, their creditors (who would be saved the time and expense of collecting from the foreign parents), their local stakeholders and communities, and ultimately the entire nation. Foreign investment¹⁴⁹ remains a desirable goal for all South Africans, now more than ever, and the convenient availability of these formal methods of debt relief to external companies suffering financial stress has its own part to play in the achievement of this urgent goal.

Finally, the legislature should attend to these issues and in doing so consider related issues concerning the governance of external companies as well in so far as the application of, for instance, local liquidation and debt-relief measures may lead to an absurd consequence. The aspects raised could be considered as part of the ongoing reform relating to new insolvency legislation referred to in Item 9(1) of Schedule 5 to the 2008 Companies Act and which has been under construction since 1987. Although this article raises some imaginative arguments regarding a purposive interpretation of the application of statutorily prescribed business rescue and compromise procedures, a clear policy regarding the treatment of external companies in this regard is needed. There are some firm proposals on the table and even a commitment from the Cabinet to develop uniform legislation that provides for both corporate and individual insolvency, but the latest working documents do not deal with external companies in particular. The alternative approach could, of course, be to follow the single entity approach strictly and thus to compel local creditors and the external branch under almost all circumstances to follow up against and/or through the jurisdiction of the foreign company as such – although some special rules to deal with local debt by or against the external company will not necessarily exclude such relief. But it is submitted that practical considerations of cost, time and the risks to litigate or apply for the opening of a foreign insolvency proceeding in a foreign jurisdiction should be considered when developing a policy in this regard. Nevertheless, the issues raised in this article clearly need further investigation and could perhaps be addressed as part of the ongoing reform efforts of South African insolvency law. To this end this article could hopefully serve as a starting point to consider the position of financially ailing external companies in greater depth and to develop a clear policy to direct statutory reform in this regard.

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¹⁴⁹ For a recent report, see Export Entreprises SA, Foreign Investment in South Africa, Santander Trade (October 2020) (Sep. 7, 2020), available at <https://santandertrade.com/en/portal/establish-overseas/south-africa/foreign-investment>. And section 7(c) of the Companies Act 71 of 2008 reminds us that the Act should be interpreted to “promote innovation and investment in the South African markets.”

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