

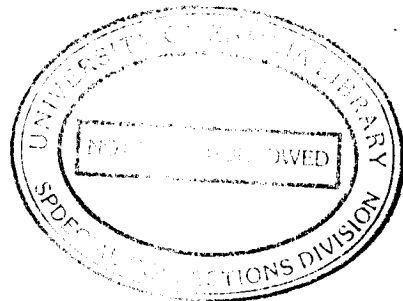
**AN EXPOSITION OF THE FATE OF
DISTRESSED COMPANIES IN ZAMBIA. IS
LIQUIDATION THE ONLY WAY OUT?**

BY

MAPANGE NSAPATO

A paper presented in partial fulfilment of the requirements for the Award of the Degree of
Bachelor of Laws of the University of Zambia.

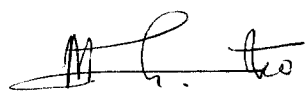
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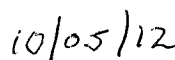
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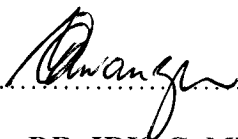
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ABSTRACT

There is nothing in the character of our current commercial and business world more striking and challenging to the legal framework than the rate at which the practices of commerce are moving. These drifting changes in the world of commerce demand an up to date legislation to police the carrying out of business while at the same time encourage business.

The question that forms the basis of this paper is whether when a company registered and carrying out business in Zambia is in financial distress, liquidation is the only way out. The paper sets off by giving an overview of the life cycle of a company from incorporation to winding up. In addition, this paper also discusses and analyses the salient provisions of the Companies Act including the history and development of company law in Zambia, which discourse overwhelmingly confirms that company law in Zambia traces its roots in the English Company Law.

Furthermore, the paper considers the law and consequences of insolvency of a company registered under the Companies Act of Zambia. In this regard, particular attention is drawn to the legislative safeguard provided in the Companies Act of Zambia to avoid liquidating a company prematurely. An analysis of the effect of amendment number 12 of 2008 which repealed sections 15 and 18 of the Companies Act requiring a company to have minimal capital for it to start operating established that the repeal has made it very fluid for start-up companies to go into insolvency. The amendment overlooked the purpose which the requirement for minimal capital saved namely to ensure that for a company to start operating it must have a certain minimum capital.

It has been established that the state of the law in Zambia is that when a company is insolvent liquidation is the ultimate answer. A case study was conducted to compare the practice of other jurisdictions namely: South Africa, USA and the UK with regards to their treatment of

insolvent companies. It has been found that the said jurisdictions have formal systems whereby an attempt can be made to nurse back to health a company that is insolvent. It is therefore the recommendation of this paper that Zambia enacts a similar rescue package. This is particularly important to our present time because of the compelling desire by developing countries to keep companies afloat so as to sustain economic development.

ACKNOWLEDGEMENTS

Heartfelt thanks go to my Supervisor, Dr. Iris C. Mwanza, for her supervision and guidance without which, it would not have been possible to put up this scholarly work.

Many thanks to Chewe P. Chilufya for proof reading this piece of academic writing and ensuring that all the corrections that were highlighted by Dr. Iris C Mwanza are taken care of.

I'm also grateful to Kennedy Mwansa, Diana Majokwe, Choonga Simulyamana, Jeremiah Phiri, Reymond Musumali, Mukate Kasompe and Mwendalubi Billiard for their invaluable comments, suggestions and criticisms that helped improve the structure and content of this paper.

Finally, I'm indebted to the scholastic prowess prevailing in the School of Law at the University of Zambia.

DEDICATION

This paper is dedicated to my late father and mother, Mr and Mrs Nsapato who greatly believed in me from my childhood. Dad, I still remember the gentle whisper of your voice telling me that I can be whoever I want as long as I put my mind to it. Mum you inspired in me the virtues of kindness and the precept of living for others. I wish destiny had given you chance to see the man I have become.

This paper is also dedicated to my cousin, Daniel Mutale who had to forego so much financially so that I could finally close the gap between the dream and the reality of being a lawyer. To you, I'm forever grateful.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

Charles Darwin, the English natural scientist, in his celebrated treatise, the origin of species propounded how people came into being and how they continue to stay in existence. It was Darwin's contention that evolution by natural selection was responsible for the development of man and his ensuing extinction. No doubt, Darwin's exposition suitably accounts for the creation and extinction of natural persons. Unlike a natural person, however, an artificial person, like a company, comes into being through incorporation in accordance with the relevant legislation and ceases to exist when liquidated and subsequently removed from the register. Various reasons account for the death of a company, predominant among them is insolvency.

The significant question of the true effect of insolvency on the life of a company is one that has exercised the minds of eminent jurist and distinguished lawyers. One thing settled today is that insolvency of a company leads to liquidation of a company; however, in various countries including Zambia, it remains unclear as to whether liquidation is the only answer to insolvency.

A company is one of the many forms of business association in Zambia. It is formed by registration under the companies Act, chapter 388 of the laws of Zambia. The application for registration is set out in a prescribed form which must be submitted when completed together with the list of directors and declaration of compliance with the registrar of companies and business names. A registered company comes into existence when its name has been entered

in a register meant for the purpose of registration of companies and a certificate of incorporation is issued. The certificate of incorporation is in a prescribed form and states that the company is on and from the date specified in the certificate incorporated as a company specified in the certificate. Incorporation brings to life a new person distinct from its promoters.

One of the primary characteristics of a company when incorporated is that it has perpetual succession. This simply means that the company continues in existence and could outlive its members. *The death or withdrawal of membership by a shareholder does not affect the existence of a company.* Members of a company come and go but the company lives on. Although it is intended that a company should live in perpetuity its life can come to an end. This happens through a process called liquidation or winding up.

One of the reasons that could end the life of a company is insolvency. According to section 271(b) of the Companies Act, a creditor may by way of petition filed with the necessary affidavit in support commence winding up proceedings in the High Court. Further, Section 272(c) of the Companies Act states that a company may be wound up if it is unable to pay its debts. The effect of the two sections is that a company that fails to pay its debts could be wound up. In this kind of liquidation the court is called upon to balance the interest of the creditor petition for winding up with that of the need to have the company continue running for the greater good of society. The major question of concern regarding a winding up petition by a creditor on the ground that a company is unable to pay its debt is whether, apart from the remedy being sought, an alternative one could be granted. The Companies Act contains no option when the company is unable to pay debts. If a company is unable to pay its debts, the judge's hands are tied and the only way forward is liquidation. The danger and repercussion of this is far reaching. The obvious danger is that it leads to premature death of

companies. This is evident from the case of *Backloads (Zambia) Limited v Freight and Liners (Zambia) Limited*¹ where a winding up order was given without representation from the company itself, let alone inquiring on the solvency or otherwise of the company.

Hence, the essence of this discourse is to critically analyse whether liquidation is the only answer when a company is insolvent in Zambia. In light of this, the paper will also consider a comparative analysis between the Zambian practice and that of other jurisdictions. In addition, the paper will investigate the life of a company from incorporation to liquidation and all the legal issues associated with the aforementioned.

1.2 STATEMENT OF THE PROBLEM

Company law in Zambia traces its roots from the colonial times. The colonial legacy of our laws is public knowledge. The first company statute of Zambia was the Companies Ordinance modelled on the 1929 English Companies Act and it continued to exist without any far-reaching amendments until 1994² when the then Companies Act Chapter 686 of the Laws of Zambia was repealed and replaced by the current Act, Chapter 388 of the Laws of Zambia. The company law of Zambia is based on principles of common law and doctrines of equity. The fact that it has hardly undergone substantial amendments until its repeal shows that it remained archaic for a long time, unmatched with many changes taking place in the economic development of the country. Although the Companies Act was repealed and replaced, most onerous provision inspired by our British heritage still remain. One such heritage is the liquidation of a company on ground of insolvency without consideration to the economic realities of modern commerce.

¹ 2008/HPC/0261

² The repeal was affected through Statutory Instrument no. 26 of 1994

This is therefore a ripe moment to assess such onerous provisions in the interest of saving companies from premature liquidation, and enable such companies live on to stir economic growth for developing countries like Zambia.

1.3 PURPOSE AND OBJECTIVE OF STUDY

- a. To investigate the life of a company from incorporation to liquidation.
- b. To conduct a comparative analysis on the practice of Zambia and other states with regards to a company in insolvency.
- c. To critically analyse compulsory liquidation in Zambia vis-a-vis a petition by a creditor.
- d. To render an analytical hypothesis of the law governing liquidation in Zambia.
- e. To analyze the effect of amendment № 12 of 2010 to the Companies Act on the life and solvency of companies
- f. To conclusively determine whether liquidation is the only way out to a company in insolvency.

1.4 SIGNIFICANCE OF THE STUDY

This exposition is being undertaken at the time when a lot of companies in Zambia are undergoing what could properly be termed premature liquidation. With the liberalization of the economy, a lot of companies have mushroomed in the country to participate in the economy. As at 31st December 2010, there were 18 registered financial companies in Zambia compared to 13 as at 31st December, 2005 and the number is likely to increase as predicted by

the central bank (Bank of Zambia)³. According to the 2005 statistics, 27% of the total assets of all registered banks were in the form of loans and advances to borrowers especially companies.⁴ This shows not only the increase in the number of companies, but also the increase in lending activities between these companies and the banks. No doubt the increase in companies has stirred economic growth due to increased economic activities; however, the treatment of ailing companies in our law has negatively affected the much needed economic growth. Hence, it is of great importance that an investigation be carried on to ascertain whether if a company is insolvent liquidation is the only way out and if so what legislative changes should be proposed to change the status quo.

1.5 METHODOLOGY

This discourse is for the most part qualitative in nature as opposed to a quantitative one. Consequently, the research utilized primarily desk research attained through the collection of secondary data in the form of local and foreign legislation, Law reports of both local and foreign jurisprudence, text books, newspaper articles, journals, internet, dissertations and obligatory essays.

³ Anonymous" Access to Financial Services in Zambia, World Bank Policy Research Working Paper by, José de Luna Martínez" www.boz.zm. (Accessed 12th October, 2011).

⁴ ibid

CHAPTER TWO

THE LIFE CYCLE OF A COMPANY; INCORPORATION, MANAGEMENT AND WINDING UP.

2.1 Introduction

This chapter is an analysis of the life cycle of a company in Zambia. It encompasses the law policing companies as a form of business association and a succinct yet exhaustive overview of the key principles governing company law in Zambia. First, the chapter will provide the history and development of modern company law in Zambia. Second, it will discuss the formation and administration of a company. And last, a conspectus of the various forms of winding up a company will be provided.

2.2 The History and Development of Modern Company law in Zambia

The Companies Act¹, the primary law governing companies in Zambia, traces its roots from the English Company Law. The colonisation of Northern Rhodesia, now Zambia by Britain accounts for this history and it is the reason that the jurisprudence on this area of law in both Zambia and Britain is similar, with only minor variations.

In so far as the historical development of company law in Zambia is concerned, the first law governing companies in Zambia was the Companies Ordinance, which became an Act after independence. This Act was modelled on the 1929 English Companies Act and remained on the statute books until 1994 when it was eventually repealed and replaced by the current Companies Act, Chapter 388 of the Laws of Zambia². The jurisprudence of company law in Zambia is based on common law principles and the doctrines of equity.

¹ Chapter 388 of the Laws of Zambia

² The repeal was affected through Statutory Instrument no. 26 of 1994

As earlier mentioned, the major changes to the Companies Act occurred in 1994 when the current Companies Act was enacted. One of the primary reasons that necessitated the repeal and replacement of the Companies Act in 1994 was the influence of the MMD's government economic policy which differed significantly to that of its predecessor, the UNIP government. While the MMD government advocated for a liberalised economy the UNIP government with its humanism philosophy believed in a command economy. In order for the MMD government to implement its free market economy policy, there was need to bring legislation into conformity with its policy including a change to the Companies Act.

A second reason was the need to simplify the Companies Act, Chapter 686 to reduce the task which would confront the lawyer and those who were to undertake the management and administration of companies but also to significantly reduce the cost to help attract investors. The new government further felt that there was an urgent need for the participation of the ordinary citizen in the economic development of the country by simplifying the enabling law. In order to arrive at the desired degree of simplicity of the law dealing with companies, it was necessary to enact a new law that aligned with the above stated government policies and objectives.

Consequently, in 1994 the Companies Act was enacted (Cap 388). This enactment brought with it a variety of changes notable among them is the abolishment of the requirement for a memorandum of association. Another complexity in the old Act which was changed was the number of types of shares permissible as under the English model company law principles. Zambia's business world is not so sophisticated as to warrant complex capital structures and this simplified the returns of allotments and annual returns which the Act required companies to submit. Further, it simplified most of the provisions of the articles of association of Zambian companies.

However, desirable as the above changes may have been, they must always be weighed against the *raison d'être* of incorporating a company namely, to protect the providers of capital. Oversimplification should not be the exclusive target because it may turn out to be that less information is in fact given to prospective investors and to the Government. Hence the need under the current Act for a public company to issue a prospectus or a statement in lieu of prospectus to guarantee full disclosure of the business by the company managers.

All in all, the Companies Act has been simplified and made more relevant to the business world in Zambia than it previously stood.

2.3 Incorporation of a company

In Zambia, a registered company is one formed and registered under the Companies Act³. It also includes existing companies that were formed before this Act was passed. A company comes into existence at a definite point in time. It is deemed to come into existence when it is registered under the Act; that is, when its name is entered into the register meant for that purpose under the Act and the Registrar of Companies issues a Certificate of Incorporation. This certificate is in the prescribed form and states that the company is, on and from the date specified in the certificate, incorporated. Registered Companies are governed by the provisions of the Companies Act and by the rules made there under as well as by the Articles of Association of the Company itself.

There is no strict or technical definition of the word "company". Section 2 of the Companies Act defines a company as "a company incorporated under this Act or an existing company". This definition is certainly less useful and rather vague. Notwithstanding the fact that Statute offers no decisive definition of the word company, the jurisprudence of common law

³ Chapter 388 of 1994

provides a definition. In *Tennant v Stanley*⁴, Buckley J attempted to define the word “company”. His Lordship conceded that the word “company” has no strict technical meaning. He posited however that “the word company involves two ideas namely, first that the association is of persons so numerous as not to be aptly described as a firm, and secondly that the consent of all the other members is not required for the transfer of a member’s interest”. In *Darmouth v Warword*⁵, Marshall C.J. defined a company as “A person, artificial, invisible, intangible and existing only in the contemplation of the law being a mere creature of the law. It possesses only those properties which the charter of its creation confers upon it, either expressly or incidental to its existence.”

Despite the various attempts made by the courts to put a general legal definition to the word “company” the effort has been an exercise in futility for the simple reason that the precise meaning of the term company should be understood in light of the particular legislation creating it. As legislation creating companies in the world is not uniform, there cannot be a uniform definition of the term company. It suffices, however, to make mention that once a company is incorporated, regardless of the legislation pursuant to which it is formed: it is endowed with certain characteristics that are common to most companies of a similar type.

In Zambia, therefore, a registered company is one formed and registered under the Companies Act⁶. It also includes existing companies that were formed before this Act.

Section 13 of the Act lists the types of companies that can be incorporated under the Act. By the said section a company incorporated under the Companies Act may be a public company, or a private company limited by shares, or private company limited by guarantee, or unlimited liability.

⁴ [1906] 1 CHD 131

⁵ 4 Wheat (US) 518

⁶ Chapter 388 of the Laws of Zambia.

Before a company is formed someone would have conceived the idea alone or in association with others. These are called promoters. It is interesting to note that the term promoter is nowhere defined in the Act, despite being referred to in a number of sections in the Act. The status of promoter is equally nowhere enounced in the Act. It must be emphasized however that a promoter is not an agent of the company, as an agency relationship cannot be formed before a principal is formed. This was extensively discussed in *Kelner v Baxter*⁷. Equally, a promoter is not a trustee of the company as there is no settler, namely the company, to make it capable of creating a trust. This was established in *Erlanger v New Sombrero Phosphate Co*⁸. Even though the Act is silent on the legal position of promoters *vis a vis* the company, common law has developed considerably on this subject. The position is that the promoter stands in a fiduciary relationship with the company. .

The promoters will decide such matters as: (a) the company name, (b) the kind of business the company will engage in, (c) whether the company will be public or private (d) whether the company will be limited by shares or guarantee, and many other preparatory matters. After deciding on these issues the promoter(s) will then take steps to incorporate the company.

It must be stated that the Companies Act Cap 388 has simplified the procedure for the formation of companies in Zambia and introduced a departure from the practice in the previous Act and many other Commonwealth countries including the UK.

The first step in the formation of a company is name clearance as provided for by S 37(5). In terms of section 37(3) and (4), the Registrar of Companies shall not register as the name of a company a name that is likely to cause confusion with the name of an existing company or one that suggests that the company will enjoy the patronage of the President.

⁷ [1866]. LR 2 CP 174

⁸ [1878] 3 App Cas 1218

Once the issue of name clearance is concluded a person wishing to incorporate a company must then complete a number of forms each requiring separate details to be furnished. This is, unlike the position before 1994, when incorporation of a company was by subscription to the Memorandum and Articles of Association. Today, incorporation is done by an application by the persons wishing to incorporate a Company subscribing their names to an application for incorporation.

The application for incorporation is in a prescribed form requiring the applicant to furnish very specific details. Several other documents have to be filed along with the application for incorporation including a document called the Articles of Association. Section 6 through to section 12 of the Companies Act is clearly instructive on the procedure for incorporation.

On receipt of the complete application documents the Registrar shall issue a certificate of incorporation (and, in relevant cases, a certificate of share capital) in the prescribed form stating that the Company is on and from the date specified in the certificate, incorporated as a Company of the type specified in the application for incorporation.

2.4 Corporate Governance

Once incorporated, a company becomes a separate legal entity. This signifies that an incorporated company is separate from its members and promoters. In essence, a new legal person at law is born. Despite the status of a person, a company is metaphysical, it is abstract, overly theoretical and exists only in law. Therefore, it requires natural persons to enable it carry out the activities of its business. The need to police the institutions and individuals that facilitate the carrying out of the business for which the company is incorporated has given rise to a body of company law called Corporate Governance. Corporate governance is the

system by which companies are directed and managed⁹. More specifically, it is the set of processes, customs, policies, laws, and institutions affecting the way a company (or corporation) is directed, administered or controlled. It also includes the relationships among the many stakeholders involved and the goals for which the corporation is governed. The principal stakeholders are the shareholders, the board of directors, employees, customers, creditors, suppliers, and the community at large¹⁰. Corporate governance is, therefore, a compliance framework aimed at ensuring that those responsible for steering the corporate ship conform to codes, standards, controls and principles to maintain and protect the resources of the organisation¹¹.

The Companies Act sets certain minimal standards that should be adhered to in the management of the company. The company also, by its incorporation form and articles of association, prescribes the manner, mode and extent of managing the affairs of its business.

As mentioned earlier, a company as an artificial legal entity can only function through the medium or agencies of human beings. The two primary corporate governance organs of the company are the general meeting and board of directors. At general meetings, members act collectively to make decisions for the company. The board of directors is yet another cardinal management organ of the company. In theory, it is primarily through these organs that the company functions. Section 215(1) of the Companies Act enacts that the directors manage the business of a company. By and large, the function of the board of directors is of an intermittent nature so much that the management team consisting of a management board carry out functions on behalf of the board of directors.

⁹ Cadbury Committee of 1992 on Corporate Governance, UK.

¹⁰ Anonymous "corporate governance definition" www. Corporategovernancedefinition.org (accessed, 14th February, 2012)

¹¹ Anonymous "Definition Corporate Governance", www.searchfinancialsecurity.techtarget.com. (Accessed, 3rd January, 2012)

Part X of the companies Act provides for the primary officers of the company who are the directors and the secretary. Section 215(1) provides that the business of a company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by the act or the articles, required to be exercised by the company by resolution. The section prescribes the powers of directors as defined by the Act. Section 215(3) specifically states that directors may exercise the powers of the company or all or any of its uncalled capital and to issue debentures or give any other security for a debt, liability or obligation of the company or of any other person.

The companies Act does not define who a director is but suggests in section 203(1) that any person who is appointed by the members of a company to direct and administer the business of the company shall be a director of the company, whether or not he is called a director. In charitable companies, a person may not be known by the title of director but he will for purpose of company law be known as such. In the corporate world, there are also persons who are known as directors but who in the context of company law are not directors.

The relationship of the director with the company is that of principal and agent. Although directors are appointed by members they only stand in a fiduciary relationship with the company they serve and not to the members. It must further be understood that although directors are not necessarily trustees, they do occupy a position of trust so that they owe all those common law duties of care, good faith and loyalty to the company as opposed to the members who will have appointed them. In so far as the scope of the director's authority is concerned, the starting point is that a limitation will be ineffective as against a third party with no knowledge of the limitation. However, where the third party had actual knowledge, he shall be bound. The Act in section 204(1) requires every company to have at least two

directors regardless of whether it is a public limited company or private limited company. It is an offence according to section 204(2) for a company to operate for more than two months with fewer than two directors. In accordance with section 209(1) of the Act, there is no requirement that a director or prospective director must be a member of the company, or hold any shares in the company in which the appointment relates.

The Companies Act does not give a distinction between the types of directors. It however gives recognition to the fact that a company can have both executive and non-executive directors in section 208.

Another very important office of a company is that of company secretary. Section 205 of the Act creates the position of company secretary and every company is expected to have a secretary. It is a requirement under the Companies Act that the secretary of a company shall be resident in Zambia. It is interesting to note that even though the office of company secretary is mandatory and created by the Act, the companies Act does not set out the duties of a secretary. However, the primary role of a company secretary is to ensure that the company operates in accordance with the Companies Act, the Incorporation Form and its Articles of Association.

A company is governed through two collective bodies, namely the board of directors, and the shareholders acting through a general meeting. A company general meeting is one of the media through which shareholders can make their voices heard by management though shareholders can also privately meet management to present their views. Since general meetings are the mechanism by which shareholders participate in management and government of their companies, the law, which regulates the summoning, and conduct of meetings is very important to the company. Because of the importance of these meetings, the

rules which govern them are now part of the main body of the Companies Act, unlike in the repealed Act where they were provided for in the articles of individual companies.

Section 137(1) classifies general meetings into three categories, namely: annual general meeting, extraordinary general meeting and class meeting. It is important to take note that the current Companies act has abandoned the requirement of statutory meetings at which the company was required to transact certain pre-incorporation business.

2.5.0 Winding up of a company

The procedure for winding up a company is provided for under Part III of the Companies Act¹². This is supplemented by the Companies (winding up) rules of 2004¹³. Basically, there are two modes by which a company may be wound-up. These are provided for under section 263 of the Companies Act. These modes are: winding up by the court, and voluntary winding up which may take either the form of a members winding-up or a creditors winding-up.

2.5.1 WINDING-UP BY THE COURT

The High Court has jurisdiction under section 269 of the Companies Act to wind-up any company incorporated in Zambia, or a company incorporated outside Zambia but registered in Zambia as a foreign company, or a company that has business undertaking or assets in Zambia. According to section 3 of the Companies (winding up) rules,¹⁴ an application to wind up a company by the court is commenced by way of petition and it is filed with an affidavit in support. Section 271(1) of the Companies Act lists the persons who may petition for the company to be wound-up compulsorily. These are: the company itself, any creditor, member, shareholder, any person who is the personal representative of a deceased member:

¹² Chapter 388 of the Laws of Zambia.

¹³ Made pursuant to Statutory Instrument number 86 of 2004

¹⁴ *ibid*

the trustee in bankruptcy of a bankrupt member, any liquidator of the company appointed in a voluntary liquidation and finally the registrar of companies.

Furthermore, Section 272 enacts the circumstances when a company may be wound-up by court. These are: if the company has by special resolution resolved that it be wound-up by the court; if the company does not commence its business within twelve months after its incorporation or suspends its business for twelve months; if the company is unable to pay its debts, if the period, if any, fixed for the duration of the company by the articles expires, if the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved, if the number of members is reduced below two, and lastly if in the opinion of the court, it is just and equitable that the company should be wound-up.

It follows, therefore, that a petitioner under Section 271(1) will have to rely on any of the grounds listed in Section 272 in his petition.

Section 275 adumbrates the powers of the court upon hearing a winding-up petition. The court may dismiss the petition with or without costs, or it may adjourn the hearing conditionally or unconditionally. The court may also make an interim order, or other order that it thinks fit. It is interesting to note that a winding-up order is not one of the orders which the court could make in section 275 despite the purpose of the petition being one of getting the winding-up order. Does this, therefore, mean that a winding-up order is not available despite being the purpose of the petition? It would be absurd to make such an assertion notwithstanding that it is the literal inference possible. The court will therefore construe "other order that it thinks fit" as to include the winding-up order. It is also possible that if such a provision did not exist the High Court could invoke its original and unlimited jurisdiction given in Article 94(1) of the constitution to make the winding-up order.

When a company is being wound-up by the court, any creditor or member may apply to court for a stay or restraint of the proceedings at any time after the presentation of the winding-up petition and before an order in that regard has been made. This is enacted in section 276 of the Companies Act. After the commencement of winding-up by the court, section 277 further enacts that any disposition or sale of the property of the company or transfer of shares shall be void unless it is otherwise ordered by the court. Similarly, section 278 provides that any attachment or execution of the assets of the company effected after the commencement of a winding-up by the court shall be void. The design of sections 276, 277 and 278 are meant to maintain the status quo of the affairs of the company from the beginning of the winding-up proceedings to the moment the proceedings are completed.

2.5.2 MEMBERS' VOLUNTARY WINDING-UP

After the commencement of a voluntary winding-up of a company, one or more liquidators have to be appointed. The appointment is made by ordinary resolution. Once a liquidator has been appointed, all the powers of directors come to an end and become vested in the liquidator.

By section 311¹⁵, a liquidator appointed under a members' voluntary winding-up has a duty to call a meeting of creditors and present to them a statement of the assets and liabilities of the company if he is of the opinion that the company will not be able to pay its debts in full within the period stated in the declaration of solvency. At such a meeting, the creditors may appoint someone else as liquidator of the company instead of the one appointed by the company. After a liquidator has convened a meeting of creditors, the winding-up of the company proceeds as if it were a creditors' voluntary winding-up.

¹⁵ Chapter 388 of the Laws of Zambia.

However, before a company is dissolved, section 312 enacts that it may pass a special resolution at any time during the course of the voluntary winding-up that the winding-up proceedings should be stayed. After such a resolution has been passed, the liquidator or any member of the company can make an application to court and the court may make an order to stay the winding-up. The order may also contain a directive that the liquidator be discharged and the directors resume the management of the company. Within twenty-one days of the court's confirmation of the resolution, the company must lodge a copy of the court order with the registrar of companies, who in turn shall publish it in the Government Gazette. Once the Gazette notice has been published, the members winding-up comes to an end and the company continues as a going concern, subject of course to any other conditions the court may impose. The Companies Act in section 312 provides for penal sanctions against the company and each officer if there is default in lodging the court order and the resolution with the Registrar of companies.

2.5.3 CREDITORS' VOLUNTARY WINDING-UP.

Section 313 provides for creditors' voluntary winding of a company. Accordingly, when a resolution for the voluntary winding-up of a company has been proposed but the directors have not made a declaration of solvency, the company must convene a meeting of its directors. The notice convening the meeting must be accompanied by a statement showing the names of all creditors and the amounts they are owed.

The Notice of meeting of creditors must be published in the Government Gazette and in any daily newspaper at least seven days before the date of the meeting. At this meeting, the company must disclose its affairs and the circumstances leading to the proposed winding-up. The meeting may be chaired by one of the creditors or a director of the company.

Where the company has nominated a liquidator but the creditors also nominate a different liquidator, the one nominated by the creditors shall be the liquidator. If the creditors do not nominate any liquidator, the one nominated by the company shall be the liquidator.

Section 315 enacts that the creditors so decide by ordinary resolution, they may appoint a committee of inspection whose membership shall not be more than five. Where the company had appointed a committee of inspection at the passing of the resolution for voluntary winding-up, the creditors may either resolve to accept the appointment or not. If the committee of inspection appointed by the company is disqualified by the creditors, they will not act as such unless the court otherwise directs.

The liquidators' remuneration is determined and fixed by the committee of inspection but where there is no such committee, it is fixed by the creditors. Once a liquidator has been appointed, all powers of the directors' vest in him and the authority or powers of every director ceases. After the commencement of a creditors' voluntary winding-up any attachment, distress or execution against the assets of the company shall be void. In addition, no legal action can be commenced or continued against the company without the leave of the court.

2.6 Conclusion

This chapter was aimed at analyzing the life cycle of a company and the law policing companies as a form of business association in Zambia. True to this intended purpose, this chapter has exhaustively given an overview of the key principles governing company law. The chapter has provided the history and development of company law in Zambia, which demonstrated that company law in Zambia traces its roots in the English Company Law. This chapter has also discussed and analysed the salient provisions governing the life of a company from incorporation to winding-up.

CHAPTER THREE

ANATOMY OF THE LAW AND CONSEQUENCES OF INSOLVENCY OF COMPANIES IN ZAMBIA

3.1 Introduction

This chapter analyses the law and consequences of insolvency of companies in Zambia. From this footing, it shall be necessary to discuss the law governing insolvency in the Zambian legal system with particular emphasis on insolvency of companies. The chapter also considers the consequences of insolvency of a company. This chapter will further discuss liquidation as an option when the company is insolvent. It shall conclude by investigating whether liquidation is the only way out when a company registered and carrying out business in Zambia is insolvent.

3.2 The Law Governing Insolvency in Zambia

Insolvency is generally defined as a financial state in which a company can no longer pay its debts and other obligations when they become due. This occurs when liabilities or debts exceed assets and cash flow. Once a company becomes insolvent, legal wisdom demands that it takes immediate action to generate cash and settle or renegotiate its current debts. Companies which cannot successfully pull themselves out of insolvency face far-reaching ramifications. Often-times, insolvency is confused with bankruptcy. At a conceptual level, these words are similar, but have a very thin line of difference between their meanings and so they are not parallel words with similar meanings but are two different words with an altogether different meaning used in very similar situations¹. Both insolvency and bankruptcy deal with liabilities exceeding assets, but insolvency is a state of being and bankruptcy is a matter of law. Companies can be insolvent but not legally bankrupt. Insolvency can lead to

¹ Anonymous" Difference between Bankruptcy and Insolvency", www.articledashboard.com/Article. (Accessed, 3rd January, 2012)

bankruptcy, but the condition may also be temporary and fixable without legal protection from creditors².

At a conceptual level, Bankruptcy and Insolvency mean the same thing. The technical legal definition of Bankruptcy and Insolvency varies between jurisdictions. In Zambia as is also the position in Australia, it means that the person cannot pay their debts as and when the debts fall due. Commonly the distinction will depend on the identity of the 'person', as it is notoriously known that a person could either be a natural or legal person³. If the person in contention is a natural person it will be Bankruptcy. If the 'person' is a company or other corporate entity it is called Insolvency.

In Zambia there is no specific statute dealing with insolvency. Much of the law is scattered in various provisions of different statutes. Even then, most of the provisions which have a bearing on insolvency law scattered in several statutes is either an adoption of the British statutory provision on insolvency, or a codification of the common law position on the same. Arising from this observation, it is evident that the extent to which British insolvency law influence Zambia's is enormous. Therefore, the jurisprudential understanding of insolvency law is similar both in Zambia and Britain.

3.3 Consequences of Insolvency of a Company in Zambia.

The Companies Act⁴ does not define insolvency. However, the Act does recognize insolvency and its repercussions. This is captured by Section 272(1) (c)⁵ which allows the court to wind up a company if that company is unable to pay its debts. Section 272(3) goes further to define what is meant by a company being unable to pay its debts. This section provides for three instances in which a company will be deemed to be insolvent. These

² Anonymous" Insolvency and Bankruptcy", www.insolvencybankruptcy.co.uk. (Accessed, 4th April, 2012)

³ Section 3 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.

⁴ Chapter 388 of the Laws.

⁵ *ibid*

instances are worth of consideration to determine the extent to which the statutory understanding of insolvency has departed away from the common law position. Grounds (b) and (c) of Sections 272(3) are a mere enactment of the common law position. Ground (b) encompasses insolvency arising from the company failing to satisfy, in whole or in part, an order of the court to a judgment creditor. Ground (c) covers generally a situation where a company is unable to pay its debts when they become due. It is difficult to discern the difference between grounds (b) and (c). It is however clear that ground (b) is envisaged in (c), this is because even after an order of the court, insolvency will not be deemed unless the company is unable to settle its due by the date started in the court order. This therefore, ultimately means the company is unable to pay its debts when they become due as provided for in ground (c). Perhaps, the legislature saw it fit to consider the two as separate instances of insolvency to avoid the doubt that might arise when considering whether or not a judgment creditor of the company who is returned unsatisfied would amount to failure to pay a debt and consequently lead to insolvency. In addition, ground (a) is a new instance of insolvency not previously known to common law. The other two grounds are very restrictive and impose difficult conditions on the part of the petitioner to fulfill. A petitioner does not have to prove all the three instances that a company is unable to pay its debts; proof of any one of them will suffice to wind up the company. A creditor petitioning for winding up of a company will therefore most certainly prefer to establish ground (c).

3.4 Liquidation; The Only Option When a Company Is Insolvent in Zambia.

As earlier stated, the Companies Act does not mention the word insolvency however Section 272(3) captures the instances in which a company will be deemed to be insolvent. The question which arises therefore is what is the effect of insolvency on the life of a company? The Companies Act provides for no other alternative to an insolvent company other than

liquidation. It therefore follows that liquidation is the only option when a company registered and carrying out business in Zambia is insolvent.

3.5 The effect of amendment № 12 of 2010 to the Companies Act on the life and solvency of companies

13th April 2010 saw the assent of a bill to law culminating into amendment № 12 of 2010 which significantly amended the Companies Act since the enactment of the principle Act in 1994. This Amendment made key changes to the Companies Act however, for purposes of this paper it shall be relevant to look at those changes that affect the life and solvency of a company. The two notable amendments are the repeal of sections 15 and 18 of the principle Act. Section 15 provided that a public limited company could not transact any business, exercise any borrowing powers or incur any indebtedness, except for purposes that are incidental to its incorporation or obtaining of subscription to, or payment for its shares unless the Registrar has issued it with a certificate confirming that minimum capital requirements are satisfied. In a nutshell, Section 15 provided that a public capital company newly formed could not commence its operation until it has raised the minimum capital required. Section 18 was a similar provision to Section 15 except that Section 18 applied to private companies. By section 18 a private company newly formed could not commence its operations unless it raised the minimum capital required. At the time that Section 18 was repealed, the minimum capital required for private company limited by shares to commence operating was K5 000 000. The repeal of Sections 15 and 18 entails that a newly incorporated company need not have any capital for it to commence operation.

Before considering the effect of repeal of Sections 15 and 18, it is important to look at some policy decisions that influenced the repeal of these Sections. Sections 15 and 18 were seen to be an impediment to the carrying on of business through the vehicle of a company

incorporated under the Companies Act. Therefore, it was seen desirable to repeal the said sections to encourage the incorporation of companies for business. The quest by the legislature to encourage business could be confirmed by the repeal in the same amendment of section 6 which provided for the procedure of incorporation of a company and replaced it with a new section 6 providing for a more simplified procedure of incorporating a company. Despite the good intentions for repealing sections 15 and 18, the legislature overlooked the purpose that these sections had initially intended to remedy, namely to ensure that a newly incorporated company has sufficient capital to cater for cost during its early stages of life and thus avoid premature insolvency. The requirement for a minimum capital was rooted in the economic theory stating that economies of scale are higher for a company that has newly entered the market; therefore newly incorporated companies required a minimum capital to cater for the higher economies of scale at the start of the operations. This requirement was a safeguard against insolvency of newly incorporated companies. With the repeal of Sections 15 and 18 which required a newly incorporated company to have minimum capital most companies have been left exposed to insolvency. This is likely to see a lot of companies failing within a short period of time after incorporation.

3.6 Conclusion

This Chapter has analyzed the law and consequences of insolvency of companies in Zambia and it has been tentatively concluded that when a company is insolvent in Zambia, liquidation is the only way out. The Chapter also considered the effect of amendment № 12 of 2010 to the Companies Act on the life and solvency of companies. It has been shown that the repeal of Sections 15 and 18 which required a newly incorporated company to have minimum capital has left newly incorporated companies more susceptible to insolvency.

CHAPTER FOUR

CORPORATE RESCUE PACKAGES; THE PRACTICE OF OTHER COUNTRIES

4.1 Introduction

Every time a company is in financial distress, liquidation can sound like the only option. There are however many other routes to be taken into consideration before liquidation. This chapter looks at the rescue packages employed by various jurisdictions to salvage a company which is in financial distress before liquidation is contemplated.

4.2 Rescue Packages employed by various countries

4.2.1 The South African Judicial Management

Judicial management is provided for under Section 427 of the South African Companies Act. When judicial management is given to an ailing company under Section 427, the directors of the company are replaced by judicial managers and all claims against the company are frozen. The freezing of all the judicial claims against the company gives chance to the newly appointed judicial managers to concentrate on how best they can save the company from liquidation. The only challenge with the South African system is when obtaining the judicial management order. It is required that the court satisfies itself that adequate financial resources will be available to the judicial managers. This requirement somewhat frustrates the very purpose of the order which is to save an ailing company from liquidation. Therefore, the requirement that the court satisfies itself that adequate financial resources will be available to the judicial managers is too demanding, especially given that the company is in financial distress.

4.2.2 The American Chapter 11

Chapter 11 of the American Bankruptcy Act is designed to nurse back to health a company unable to pay its debts owing to cash flow or similar difficulties. Chapter 11 plan of reorganization as it is often called in the American corporate world seeks to reorganize the debts of corporation that is at the brink of liquidation. In effect, the Chapter 11 basics of reorganization entails that rather than liquidate the assets of the debtor, the debts are restructured or renegotiated. How is this done? To begin with, a petition is filed with the bankruptcy court either voluntarily or under certain circumstances involuntarily, by creditors, in which case the request for relief is called an order for relief. A number of documents are also required at this stage, such as details of income and expenditure, assets and liabilities, leases, contracts and other financial matters. Applications under Chapter 11 should also file a certificate showing that the applicant has been through credit counselling.

Once the petition has been filed the debtor becomes a debtor in possession. This means that the debtor has the powers and rights of a trustee. The debtor must however report monthly income, operating expenses and other matters to the United States trustee, who monitors the progress of the case, as well as supervise how the business is run. Failure to comply with the reporting requirements or failure to act to have the plan confirmed entitles the United States trustee to apply to have the case dismissed or converted to another bankruptcy code chapter.

As soon as the petition is filed, an automatic stay comes into effect. This means that creditors are not entitled to pursue foreclosures, repossessions, judgments and other debts. This period of time allows the debtor to try to negotiate with creditors to help to alleviate financial problems. However, there are certain circumstances in which a secured creditor's debt will not apply to the stay. If property is not required to effect the reorganization, and the debtor has no equity in it, the court has the power to order foreclosure and sale of the property on

application by the creditor. Once an order for relief has been granted, the debtor has a limited period of time within which to file a plan.

The trustee and/or the debtor in possession has the ability to negate or undo a transfer of money or other property made prior to the filing of the petition, usually 90 days. Once this money has been reclaimed, it can be used to pay all creditors. Although there are certain defences to this, the procedure is intended to prevent one creditor from being favoured over the others during the period prior to the filing of the petition.

Once a reorganization plan is put forward, creditors have the chance to vote on it. Not all creditors' votes have the same sway as they are classed by the characteristics of their claims.

Chapter 11 therefore offers the company a chance to work out payment plans and schedules and stay in business while attempting to pay off creditors with the assistance of the bankruptcy court. Except for its complex filing procedures, this rescue operation has proved to be a great alternative to liquidation and has kept a number of companies in the United States afloat. The learned author, Gower¹ opines that Chapter 11 is the best rescue system as compared to the South African judicial management and the UK's Administration order.

4.2.3 The UK's Administration Order

Until the Insolvency Act 1986, UK had no formal system such as the South African judicial management, the Australian official management, or the American Chapter 11 of the Bankruptcy Act where an attempt can be made to nurse back to health a company unable to pay its debts owing to cash flow or similar difficulties². This new development is contained in

¹L. B. C Gower. Gower's principles of Modern Company Law.(London: Sweet and Maxwell Ltd,1992),243

² ibid

Part II (Sections 8-27) of the Insolvency Act and supplemented by the insolvency rules made pursuant to Statutory Instrument number 1925 of 1986 as amended from time to time. This new alternative to liquidation implements the recommendations of the Cork Committee. The reasons that necessitated the recommendation of this rescue operation by the Cork Committee are worth considering. It was observed that in most cases an ailing company will have granted its bankers a floating charge over all its undertaking and assets, and if the company is unable to meet its obligations the first step for the bank was to appoint an administrative receiver. As it is well known, the mandate of the administrative receiver is to realize the assets in the interest of the debenture holders and his powers of management are only ancillary to that mandate. Therefore, the administrative receiver will tend only to concentrate on realizing sufficient assets to enable the preferred creditors to be paid. As a result of this, companies were forced into liquidation and potentially viable businesses capable of being rescued were closed down. This experience of the UK is similar to the Zambian scenario where the appointment of a receiver is much more a curse to the life of company than a blessing. Accordingly, the recommended solution was to empower the court to appoint an administrator, whether or not there was a holder entitled to appoint an administrative receiver. This is however without prejudice to the right of such a holder to appoint an administrative receiver before an administrative order is made. This is what led to the enactment of the UK's administration order contained in Part II of the Insolvency Act 1986. This new operation has saved many companies in the UK from liquidation. According to a report by Mark Homan for the Research Board of the Institute of Chartered Accountants in England and Wales, A Survey of the Administration Order under the Insolvency Act 1986: the Result of Administration Orders made in 1987 (1989), in 55% of the companies subject to administration order, all or part of the business has survived as a going concern either in the

original company or in new hands. This, further, in economic sense shows the number of jobs that have been spared.

Perhaps the other issue that merits attention is the difference between administration and administrative receivership. Although the objective of administration is to provide generally something similar to administrative receiverships, there are important differences to note. Administrators can be appointed only by the court and are officers of the court, act in the interest of the company as a whole and in the public interest in its survival. An administrative receiver, in contrast, is normally appointed out of court by a holder of a floating charge. And even if he is appointed by the court, his duty is limited, namely to realize the assets in the interest of the debenture holder.

There are only two instances in which administration can be ordered. First, if the court is satisfied that the company is or is likely to become unable to pay its debts; and second, if the court considers that the making of the order would be likely to achieve one or more of the purposes mentioned in S.8(3)³. These purposes mentioned in the latter section generally deal with what is in the best interest of the survival of the company as a going concern.

The administration has safeguards to ensure the survival of the company from liquidation. During the period beginning with the presentation of the petition and ending with making of an order or dismissal of the same, all actions against the company are suspended. This means that the no resolution for winding up, or compulsory winding up order by the court can be made. Equally, no securities against the company can be enforced. When the order is given the further protection is that any administrative receiver vacates his office.

³ The Insolvency Act 1986, UK

The administrator will then take over the management of the company with a view to keeping it as a going concern. This rescue operation enables the company to be managed by a professional who will act in the best interest of the company as a whole.

4.3 ALTERNATIVE MODES OF TREATING AILING COMPANIES

4.3.1 RECEIVERSHIP

A receiver is a court appointed fiduciary who takes possession of a company's assets in order to protect the rights and interests of creditors. Receivership almost invariably means the assets will be sold, although the receiver may have latitude to operate the business and sell it as a going concern rather than shutting it down and conducting a liquidation sale. Standards for appointing receivers vary from jurisdiction to jurisdiction, and in some instances are set by statute. Generally, only a secured or judgment creditor may seek appointment of a receiver. A receiver may be available whenever requested by a secured party to aid in liquidation of collateral, or only upon showing that the petitioning creditor will suffer significant harm in the absence of a receiver, such as by the threat of the debtor's concealment or impairment of assets. In some instances, the petitioning creditor may select the receiver, in others: receivers are appointed by the court. Although receivership is a creditors' remedy, the debtor company might through negotiation assent to the receivership in exchange for achieving some of its goals. For example, the company and secured creditor might agree on who will serve as receiver, how the sale process will be conducted, and whether the secured creditor will give up a portion of the net proceeds to provide a distribution for unsecured creditors. The company may have a significant role to play in these discussions because of management's ability to assist the receiver in maximizing value and, conversely, the company's ability to file a winding up petition that would supersede, or at least delay the receivership.

Receivership is an alternative to liquidation because in most instances the person who appoints a receiver equally has a choice of petitioning for winding up. This is not a reliable way of avoiding liquidation because whether a person a creditor goes for receivership or winding up cannot be controlled by the company, except in a situation where there is an express provision in the debenture agreement binding the creditor to appoint a receiver if there is default by the debtor company. In addition, the primary duty of a receiver is to secure only the interest of the secured creditors, and not that of the company as whole as a result most companies go into liquidation after receivership. This means receivership is not a safeguard against liquidation.

4.3.2 CREDITOR COMPOSITION

A creditor composition is an agreement between a debtor and its creditors, and among the creditors. The basic deal in a creditor composition is for the company to make one or more payments to creditors and for creditors to forbear from legal action so long as the company makes the scheduled payment(s) and complies with any other agreed upon obligations or restrictions. Normally, if the composition provides less than payment in full, creditors agree to discharge the unpaid balance. The company may initiate the composition process by simply distributing a proposal to its creditors, negotiating with key creditors, or by inviting creditors to a meeting for the purpose of organizing a committee to represent the interests of all similarly situated creditors. The terms of any particular creditor composition can be quite varied, depending on the underlying business and financial situation. For example, a creditor composition might contemplate the sale of the company and payment of proceeds to creditors, the continued operation of the company with the debtor making periodic payments to creditors, or settlement of creditors' claims for a lump sum, perhaps supplied by investors or refinancing. The composition agreement can establish operating and financial benchmarks for the troubled company as well as place restrictions on certain activities such as transactions

with affiliates, executive compensation, and asset dispositions. A composition will be binding only on creditors who elect to be bound, and this makes a creditor composition not to be a favoured safeguard against liquidation. As for non-assenting creditors, they pose a great challenge, not only from the perspective of the company but also the assenting creditors who typically are willing to make concessions only if other similarly situated creditors do so too. For this reason, most composition agreements are drafted so as only to take effect if assented to by a very high percentage of creditors, normally 90 per cent. The challenge here again is getting a 90 per cent support.

4.3.3 SECURED PARTY SALE

A secured party sale entails the secured creditor exercise his right to foreclose his collateral by way of public or private sale. However, a secured party sale may serve as a vehicle to quickly and inexpensively implement a financial restructuring under which the company's business is sold as a going concern, free and clear of the company's liabilities. This therefore spares the company from liquidation which continues as a going concern under new ownership. Perhaps it is important to understand in what respect this type of transaction is a restructuring rather than a liquidation. If managers and employees retain their jobs, and perhaps even receive stock options or other performance incentives from the new entity, then from their perspective the transaction looks nothing like liquidation. If the foreclosing lender owns or provides financing for the new entity, then from the lender's perspective the transaction is also a restructuring. *If a secured party sale is successful, it acts as a very good option to continue the company as a going concern.*

4.3.4 LENDER WORKOUT

Normally it is difficult to obtain the near unanimity required for a successful out of court composition and to surmount operating problems that could arise if the company

acknowledged its inability to pay its suppliers: therefore, a more realistic approach will be for the company to seek concessions solely from financial creditors such as the company's bank group, equipment lessors and bondholders. An agreement to restructure the debt of a particular creditor particularly a bank group is sometimes called a workout agreement. In a workout agreement, lenders may agree to postpone their interest or principal payments to an extended time of repayment or to reduce the principal amount of indebtedness or a combination. A workout agreement might call for asset dispositions, granting of additional collateral, operation benchmarks, financial reporting requirements and other items. Under this arrangement, the lenders might even agree to advance new funds in exceptional circumstances.

The question that might arise is, why would a bank group agree to significant concessions while trade creditors make none? Normally if the bank group is unsecured, then obtaining a lien on the company's assets might be a significant incentive. If the banks are already secured, then their usual perspective is that trade creditors should be making not just reciprocal but disproportionate concessions in recognition of the banks' right to be paid first in an event of a liquidation.

4.4 Conclusion

This chapter was a case study of the rescue packages and other possible options available to a company that is insolvent as practised by various jurisdictions. This chapter considered the practice of three countries namely: South Africa, USA and UK. Each of these countries has a special system either in the Companies Act or the Insolvency Act which provides an alternative remedy to liquidation. This chapter also discussed provisional options to liquidation namely: receivership, creditor composition, secured party sale and lender workout. The general conclusion in this chapter is that South Africa, USA and UK have

substantial rescue packages for ailing companies. Of the three rescue packages, the American Chapter 11 seems to be best.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The aim of this chapter is to draw conclusions from the findings of the research and based on these conclusions come up with recommendations on the topic at hand with the aim of changing the situation prevailing currently. This chapter is therefore divided into two parts. The first part deals with the general conclusion including the findings of the research paper and the second part covers the recommendations of the paper.

5.2 General conclusions

This paper has examined various principles of both company law and insolvency law in a quest to establish whether, when a company registered and carrying out business in Zambia is insolvent, liquidation is the only way out. This inquiry was particularly important to our present time because of the compelling need by developing countries to keep companies afloat so as to sustain economic development. It was therefore relevant to examine the Companies Act of Zambia in relation to the treatment of ailing companies and how this compares with other jurisdictions.

Chapter one was an introductory chapter. This chapter outlined the roadmap of the research paper including the aims and objectives.

Chapter two of this paper gave an overview of the law policing the life cycle of a company in Zambia. In addition, this chapter discussed and analysed the salient provisions of the Companies Act. Chapter two also discussed the history and development of company law in

Zambia, which discourse overwhelmingly confirmed that company law in Zambia traces its roots to the English Company Law.

Chapter three dealt with the law and consequences of insolvency of a company registered under the Companies Act of Zambia. This chapter also considered the legislative safeguard provided in the Companies Act of Zambia to avoid liquidating a company prematurely. In addition, chapter three looked at the effect of amendment number 24 of 2008 which repealed sections 15 and 18 of the Companies Act requiring a company to have minimal capital for it to start operating. On this it was established that the repeal has made it very fluid for start-up companies to go into insolvency. The amendment overlooked the purpose which the requirement for minimal capital served namely to ensure that for a company to start operating it must have a certain minimum capital.

Chapter four looked at the corporate rescue packages available in other jurisdictions for an ailing company. In this regard, the following countries were considered: South Africa, United States of America and The United Kingdom. Each of these countries has a special scheme either in the Companies Act or the Insolvency Act which offers viable alternatives before liquidation of an insolvent Company could be contemplated. South Africa has a judicial management system, the United States has Chapter 11 and The United Kingdom has administration order. These rescue packages have on average saved many companies in financial difficulties from liquidation.

From the detailed exposition of this paper a number of observations and findings could be outlined.

The first finding is that company law in Zambia traces its roots in English Company law. This is attributable to the political history of Zambia which has also influenced the legal

system. However, while the law on company law and insolvency law has been growing rapidly in other jurisdictions like the UK to match with the demands of the current world of commerce, in Zambia the law on these subjects has remained moribund. This has made carrying on business through a company as a form of business association either risky or too complex.

It has also been established that Zambia does not have a rescue system for companies in financial distress. Therefore, if a company registered and carrying out business in Zambia is insolvent, liquidation is the only way out. This certainly works against the attitude of developing countries to keep companies afloat so as to sustain economic development. The lack of a rescue system has further made the carrying out of business through a company as a form of business association risky. Unlike Zambia, South Africa, USA and UK have formal systems whereby an attempt can be made to nurse back to health a company that is insolvent. In South Africa, if a judicial management order is given to a company in financial distress, the directors of the company are replaced by judicial managers who are professionals and all claims against the company are frozen. Equally, in the UK when an administration order is given to ailing company external managers who are professionals take over the management of the company and no claims could be brought against the company. Similarly, in the USA once a petition under Chapter 11 succeeds, the company has a chance to work out payment plans and schedules and stay in business while attempting to pay off creditors with the assistance of the bankruptcy court. These operations have greatly helped to salvage ailing companies. This, in economic terms means that jobs will be spared and they will be a sustained tax base for the country. The finding of this paper is therefore that Zambia lacks a rescue operation for companies that are in financial distress. This measure is important in modern commerce.

Further, this paper has established that Zambia does not have a consolidated statute on insolvency. The law on this important branch of law is scattered in different statutes and much of it is still common law.

This paper also considered the effect of amendment number 12 of 2010 which repealed sections 15 and 18 of the Companies Act requiring a company to have minimal capital for it to start operating. It was established that the repeal has made start-up companies vulnerable to insolvency. The amendment overlooked the purpose which the requirement for minimal capital served, namely to ensure that for a company to start operating it must have a minimal capital. However, what this amendment has done is to do away with the requirement that for a company newly registered to start operating it must have minimum capital.

5.3 Recommendations

Having established that when a company registered and carrying out business in Zambia is insolvent liquidation is the only way out it is the spirit of this paper to recommend an amendment to the legal framework to provide for a rescue package. On the form that the rescue operation will take, it is recommended that the Zambian rescue package to ailing companies should be a blend of the South African judicial management, the American Chapter 11 and the UK's management order. This will enable the Zambian system avoid the challenges faced with the rescue packages in the three jurisdictions referred to, while assimilating all the good attributes associated with them. In this regard, the following should be the benchmarks of the proposed rescue package for Zambia:

First, it must provide for a wide class of individuals who could bring a petition for a rescue package. This should include; the company through its board of directors, the individual members and any creditor of the company. Despite the principle of separate legal entity

individual members should have standing to petition for a rescue package subject to the rule in *Foss V Harbottle*¹ which restricts actions by individual members. To avoid multiplicity of actions, considering that a wide class of interested parties could petition, it should be provided for that once a petition has been brought in respect of a particular company in financial distress, further petitions should be considered as consolidated to the first petition as such the success or otherwise of the first petition will bind the subsequent ones.

Second, the conditions which the court should satisfy itself with before granting the rescue order should not be strenuous. Unlike, the South African Judicial management order which requires the court to satisfy itself that adequate financial resources will be available to the judicial managers if the order is given, it is recommended that this system should only require that it be shown that the company is in financial distress and the granting of the order is in the interest of the company to continue operating as a going concern. Further, Unlike the American Chapter 11 which requires creditors to make the final determination by voting on the reorganization plan, in the recommended Zambian rescue package the court, should be empowered to ascertain the modalities of the rescue plan subject to legislative guidelines.

Third, the rescue system should provide a simple and straight forward petition plan. A complex petitioning procedure like that one provided in the American Chapter 11 should be avoided. The American system is heavily criticized for its complexity in terms of petitioning procedure which actually cannot be done without the aid of a legal practitioner. In light of this challenge the Zambian system should provide for a procedure that could easily be understood even by a layman.

Fourth, the rescue system should retain the interim measure provided in the South African, American and UK system. These interim measures includes an automatic stay the moment a

¹(1843) 67 ER 189

petition is filed so that creditors are not entitled to pursue foreclosures, repossessions, judgments and other debts. In addition, when a petition for a rescue package is filed, it should act as a bar to any resolution or petition to wind up the company.

In addition to the recommendation of a rescue system discussed above, it is desirable that Zambia enacts a consolidated statute on insolvency. Much of the law dealing with insolvency is scattered in different statutes and another big part is common law. Codifying and consolidating the law on insolvency will provide a one stop shop of reference to all matters on insolvency. The chance of a separate statute dealing with insolvency will also give the legislature a chance to revise the law on this subject that has become archaic.

5.4 Conclusion

One of the celebrated attributes of incorporation is that the body corporate becomes a separate legal entity with perpetual succession. This theoretically entails that the corporate entity will live on until time infinity. In practice, however, corporate bodies do not live on forever, they die by way of winding up. One of the causes of a company being wound up is insolvency. The question that formed the basis of this paper is whether when a company registered and carrying out business in Zambia is insolvent, liquidation is the only way out. It has been established that the state of the law in Zambia is that when a company is insolvent liquidation is the ultimate answer. A case study was conducted to compare the practice of other jurisdictions namely; South Africa, USA and the UK with regards to their treatment of insolvent companies. It has been found that the said jurisdictions have formal systems whereby an attempt can be made to nurse back to health a company that is insolvent. It is therefore the recommendation of this paper that Zambia enacts a similar rescue package. This is particularly important to our present time because of the compelling desire by developing countries to keep companies afloat so as to sustain economic development.

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