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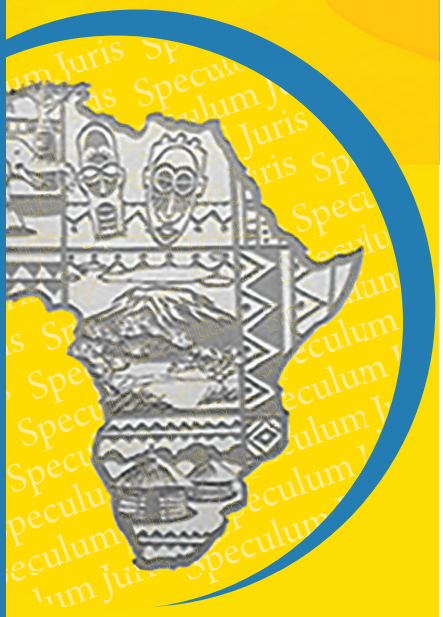

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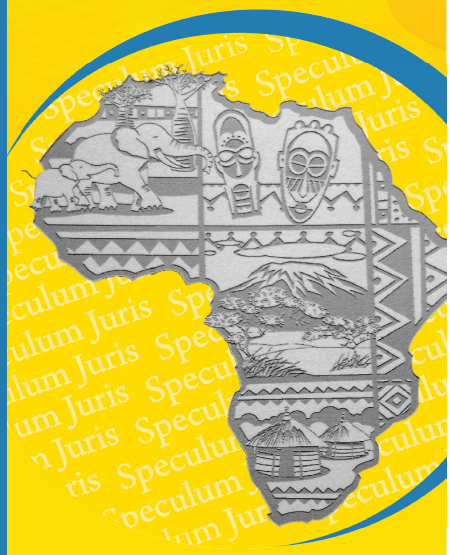

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Potential Challenges Associated with Enforcing Cross-border Business Rescue Plans in the SADC Region

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Abstract

The preservation of value in a financially distressed company is a fundamental catalyst for modern business rescue and insolvency law. The reasoning for this proposition is evident — by restructuring a going-concern firm, there is a potential to preserve value for all stakeholders that might otherwise be lost if the company is liquidated. In order to achieve an efficient restructuring solution, it is imperative to have a comprehensive restructuring strategy in place, coupled with a process that effectively engages and involves all pertinent stakeholders in adhering to said plan. However, when a multinational company is in financial distress, it requires coordination and collaboration from multiple jurisdictions. The paper focuses on business rescue regimes in selected SADC member states to establish if there are any possible bases for collaboration. It is argued that attempting to rescue a multinational company within the SADC region will face multiple difficulties, including opposition from foreign creditors, determining which country has jurisdiction, and lack of post-commencing finance. Through a doctrinal analysis of different rescue regimes in South Africa, Botswana, Zimbabwe and Mozambique, it is

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suggested that to provide an effective rescue procedure for multinational companies, it is necessary to create a protocol for cross border business rescue.

Keywords: cross-border business rescue plan; foreign jurisdiction; post-commencement finance; multinational companies; centre of main interest

1 INTRODUCTION

The primary objective of establishing the Southern African Development Community (SADC) region was to facilitate regional cooperation and integration among its member states in the Southern Africa region.[1] Member states sought to confront economic challenges collectively, foster trade and investment, and advance industrialisation and infrastructure development by promoting regional cooperation and integration.[2] As a result of this cooperation, the region has become home to many multinational corporations operating in several industries, capitalising on the region's abundant natural resources, advantageous geographical position and expanding consumer markets.

However, the region has experienced a decline in its growth rate, estimated at 3.4 per cent in 2022.[3] This is lower than the growth rate of 4.5 per cent recorded in 2021 and the average growth rate of two per cent for the past ten years.[4] This can be attributed to many factors, including climate change, limited access to finance, infrastructure deficits, low levels of industrialisation, regional trade barriers and tariff restrictions. Consequently, some multinational companies in financial distress attempt to salvage their businesses by commencing business rescue or winding up proceedings. The main goal of business rescue is to establish a system for restoring financially troubled firms to guarantee their ongoing existence or to attain a higher financial benefit for creditors and shareholders, compared to what would be obtained by the prompt liquidation of the company.[5] Whereas, winding up proceedings, also known as liquidation, involve the necessary legal steps to sell a business's assets and distribute the proceeds to creditors and shareholders, ultimately resulting in the closure of the company.[6] Basically, winding up occurs when a company cannot meet its financial obligations, or it becomes impractical to continue its

1 The member states are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, the United Republic of Tanzania, Zambia, and Zimbabwe. SADC headquarters are located in Gaborone, Botswana.

2 The Treaty of SADC, Windhoek, 17 August 1992. After citing the objectives previously enunciated in "Southern Africa toward Economic Liberation" (A declaration by the governments of independent states of Africa made at Lusaka, 1 April 1980), the treaty established the SADC. See also Sands and Klein *Bowette's Law of International Institutions* (2009) 16.

3 SADC Macroeconomic Report. *Macroeconomic Statistics Bulletin Year 2022* (November 2023) 8.

4 *Ibid*.

5 See UNCITRAL "Insolvency Legislative Guide" 2005, 27; In South Africa, business rescue proceedings are regulated in terms of Ch 6 of the Companies Act of 2008; in Botswana, the Companies Act 32 of 2004, Part XXVI, ss 471−477 provides for judicial management; in Zimbabwe, the Insolvency Act (Chapter 6:07) 121 provides for corporate rescue proceedings; the bankruptcy and corporate reorganisation legal regime in Mozambique is governed by Decree-Law No 1/2013 of 4 July 2013.

6 See UNCITRAL "Insolvency Legislative Guide" 2005, 30 which states that "liquidation is regulated by the insolvency law and generally provides for a public authority (typically, although not necessarily, a judicial court acting through a person appointed for the purpose) to take charge of the debtor's assets, with a view to terminating the commercial activity of the debtor, transforming non-monetary assets into monetary form and subsequently distributing the proceeds of sale or realization of the assets proportionately to creditors. Although generally requiring the sale or realization of assets to occur in a piecemeal manner as quickly as possible, some insolvency laws permit liquidation to involve sale of the business in productive units or as a going concern; under other laws that is only permissible in reorganization. Liquidation usually results in the dissolution or disappearance of a debtor that is a commercial legal entity and discharge of a natural person debtor."

business activities.

In 2022, Tongaat Hulett faced the same predicament, by choosing to rescue or liquidate its parent company in South Africa, which also inspired the writing of this article. On 27 October 2022, Tongaat Hulett Limited and Tongaat Hulett Development Proprietary Limited initiated voluntary business rescue proceedings.[7] The company promptly advised the public that its other operations in Botswana, Mozambique, and Zimbabwe were not experiencing financial hardship and would continue their normal trading activities.[8] At the time of writing, Tongaat Hulett was still under business rescue and had not commenced business rescue in other countries. Nonetheless, it is the author's assumption that if Tongaat Hulett wishes to restructure its operations in different countries, this would raise pertinent questions: Which laws would apply, which courts would have jurisdiction and, most importantly, would the business rescue practitioner be allowed to implement the business rescue plan in other jurisdictions? Therefore, this article examines the effectiveness of cross-border business rescue laws in assisting a company in financial distress and assets in different jurisdictions, with a particular focus on selected countries in the SADC region, namely South Africa, Botswana, Zimbabwe, and Mozambique.

2 BUSINESS RESCUE AND CROSS BORDER INSOLVENCY LEGISLATION IN THE SADC REGION

Business rescue has become an essential mechanism for companies in financial distress, offering a structured approach to rehabilitation and protecting them from immediate liquidation. This legal process allows a company to reorganise and potentially return to profitability, safeguarding jobs, investments, and the broader economy. Though each state in Southern Africa has created its laws and policies, the idea of corporate rescue has changed dramatically in several countries, such as South Africa, Zimbabwe, and Mozambique. This section compares the legal frameworks for business rescue that have been implemented in these jurisdictions.

2 1 Chapter 6 Business Rescue in South Africa

In South Africa, the business rescue process is regulated in Chapter 6 of the Companies Act of 2008.[9] Business rescue is a legal process aimed at helping a financially distressed company recover by temporarily taking control of its operations and assets.[10] During this process, the company is granted a temporary moratorium on any claims against the company or its assets.[11] The goal is to develop and implement a plan that restructures the company's operations, debts, and other obligations to increase the chances of the company remaining solvent.[12] Should it not be possible for the company to continue operating, the plan should at least result in a better

7 Tongaat Hulett is a leading agribusiness in sugar, ethanol, animal feeds and cattle, with a significant asset base and footprint in Southern Africa.

8 See Tongaat Hulett media press release https://www.tongaat.com/business-rescue/ (accessed 30-01-2024).

9 See ss 128 to 154 Companies Act 2008.

10 See s 128 Companies Act 2008.

11 See s 133 Companies Act 2008. See also Cassim "The Effect of the Moratorium on Property Owners during Business Rescue" 2017 (29) *SA Merc LJ* 421–422; Nwafor "Moratorium in Business Rescue Scheme and the Protection of Company's Creditors" 2017 (13) *Corporate Board: Role. Duties & Composition* 59–67; Levenstein "An Appraisal of the New South African Business Rescue Procedure" (Doctoral thesis, University of Pretoria 2016).

12 See s 150 Companies Act 2008. That section divides the rescue plan into three parts: Part A deals with the background, Part B provides the basic contents of the business rescue proposal, and Part C deals with the assumptions and conditions. See also Mutsa "The Development of Business Rescue in South African Law" (LLM Dissertation University of Pretoria 2011) 31; Snyman-Van Deventer and Jacob "Corporate Rescue: The South African Business Plan Examined" 2014 (2) *NIBLeJ* 104–115.

financial outcome for its creditors or shareholders, compared to immediate liquidation.[13]

If a business rescue plan raises issues related to cross-border restructuring, the litigants have to rely on the Cross-Border Insolvency Act of 2002,[14] which gives effect to the United Nations Commission on International Trade Law Model Law[15] on cross-border insolvency in 2000.[16] The purpose of the Cross-Border Insolvency Act is to establish effective procedures for handling instances of cross-border insolvency.[17] It aims to govern the authority of the High Courts in relation to cross-border insolvency issues, enhancing collaboration between South African and foreign courts in managing insolvent estates, facilitating the recovery of financially distressed companies, and safeguarding investments and employment.[18]

In terms of section 2(2), the minister must designate states and publish such designation in the *Government Gazette*.[19] The minister has not made any such designations. This means the legislature does not recognise insolvency and business rescue procedures from other countries. Practitioners have argued that because of the lack of designation, the Cross-Border Insolvency Act remains stillborn and inoperative and has remained so for over twenty years.[20] Due to the absence of a local statutory dispensation, South Africa is compelled to permit cross-border insolvency matters to be governed by principles of private international law and common law,

13 See s 128 Companies Act 2008. See also *Oakdene Square Properties Pty Ltd v Farm Bothasfontein (Kyalami) Pty Ltd* 2013 4 SA 539 (SCA) para 26, the court held that "[a]lthough I have no problem with the dictionary meaning of 'rescue' and 'rehabilitation' on which the argument relies, it fails to recognize, I think, that s 128(1)*(b)* gives its own meaning to these terms, which does not coincide with these definitions. As I understand the section, it says that 'business rescue' means to facilitate 'rehabilitation', which in turn means the achievement of one of two goals: (a) to return the company to solvency or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation. This construction would also coincide with the reference in s 128(1)*(h)* to the achievement of the goals (plural) set out in s 128(1)*(b)*. It follows, as I see it, that the achievement of any one of the two goals referred to in s 128(1)*(b)* would qualify as 'business rescue' in terms of s 131(4)."

14 See Chitimira "Aspects of The Regulation of Cross-Border Insolvency in South Africa" 2018 *Obiter Law Journal* 173–196. In this article, the author explains the different aspects of the current Cross-Border Insolvency Act 2002.

15 United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency (1997), hereinafter (Model Law).

16 See Olivier and Boraine "Some Aspects of International Law in South African Cross-border Insolvency Law" 2005 *CILSA* 373 373–383. For a commentary on the Model Law, see Fletcher *Insolvency in Private International Law: National and International Approaches* (2 edn 2005) Ch 8; Wessels *International Insolvency Law* (2006) Ch III.

17 See s 2 South Africa Cross-Border Insolvency Act 2000.

18 See ss 2 and 4 South Africa Cross-Border Insolvency Act 2000.

19 See s 2(2) South Africa Cross-Border Insolvency Act 2000, which provides that "[t]his Act applies in respect of any State designated by the Minister by notice in the Gazette, The Minister may only designate a State as contemplated in paragraph (a) if he or she is satisfied that the recognition accorded by the law of such a State to proceedings under the laws of the Republic relating to insolvency justifies the application of this Act to foreign proceedings in such State."

20 Levenstein and Harduth "South Africa Lagging behind when it comes to Cross-border Insolvency" *Legal Brief* 2 February 2022.

as developed by case law.[21]

2 2 Judicial Management in Botswana

The present corporate rescue system in Botswana is based on judicial management, which is governed by the Companies Act Cap 42:02 of 2003.[22] This is a system in which the court can issue an order if an application for liquidation is made and the court is convinced that there is a high likelihood that placing the firm under judicial management will prevent the need for liquidation.[23] The court may grant an order upon the request of any member or creditor if it is evident to the court that it is necessary to place the company under judicial management due to mismanagement or any other reason.[24] Therefore, this regime is entirely governed by legislation and overseen by the court. One of the downsides of judicial management is that the legal system is a rigid method for rescuing corporations.[25] Furthermore, the Act does not contain any provisions that facilitate the cooperation and input of local and foreign stakeholders regarding debt restructuring. In other countries, such as South Africa and Zimbabwe, judicial management has been abandoned because of its reliance on the court.[26] It is not surprising that foreign creditors would be reluctant to collaborate with a Botswana-based company that has been placed under judicial management.

Concerning cross-border insolvency issues, Botswana has not yet ratified the UNCITRAL Model Law.[27] Moreover, Botswana lacks a formal legislative framework; however, the enforcement of foreign judgments is facilitated under Chapter 11:04 of the Judgments (International

21 See *Bekker v Kotzé* 1996 4 SA 1287 (Nm) dealing with the recognition of foreign judgments; *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) dealing with movable property; *Ex parte Wessels & Venter: In re Pyke-Nott's Insolvent Estate* 1996 2 SA 677 (O) dealing with requests for assistance from overseas courts; *Nahrungsmittel Gmbh v Otto* 1991 4 SA 414 (C) and *Re Estate Morris* 1907 TS 657 dealing with jurisdictional matters; *Donaldson v British South African Asphalt and Manufacturing Co Ltd* 1905 TS 753 and *In re Leydsdorp & Pietersburg Estates Ltd (in liquidation)* 1903 TS 254 dealing with the refusal of a winding-up order where an order has already been granted in another jurisdiction; *Herman v Tebb* 1929 CPD 65 and *Chaplin v Gregory* 1950 3 SA 555 (C) dealing with the status of persons in South Africa where they have been sequestrated in a foreign jurisdiction; *Ex parte Robinson's Trustee* 1910 TPD 25 dealing with the qualifications of liquidators; *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste Intervening* 1990 1 SA 954 (A) for an example of the type of order that the court may grant when a foreign representative applies for recognition; *Cape of Good Hope Bank (in liquidation) v Mellé* 10 SC (1893) 280 and *Dyer v Carlis 4 Official Reports* (1897) 67 dealing with the effect of rehabilitation; *North American Bank Ltd (in liquidation) v Grant* 1998 3 SA 557 (W) dealing with the discharge of foreign debt after rehabilitation in South Africa. *Viljoen v Venter* 1981 2 SA 152 (W) dealing with South African legislation and its extraterritorial operation (*cf Ex parte Steyn* 1979 2 SA 309 (O)); *Ex parte Palmer: In re Hahn* 1993 3 SA 359 (C) dealing with the "domicile" of corporations; Levenstein and Harduth *Legal Brief* 2022, 1; Bertelsmann *et al. The Law of Insolvency in South Africa* (2008) 660.

22 Part XXVI ss 471 to 477 Botswana Companies Act 2003. See also Levenstein "Business Recovery Procedures in South Africa, Namibia and Botswana and the Possible Introduction of Unified Procedures for the Region" 2008 (18) *INSOL International Technical Series* 8–9.

23 See s 471 Botswana Companies Act 2003.

24 Section 471(1) Botswana Companies Act 2003. See also *Macdonald v Coin Botswana (Pty) Limited* 2004 1 BLR 415(H).

25 See Mmopi "Judicial Management in Botswana: Is it a Time for Change?" (Master of Laws Thesis, University of Cape Town, 2015) 3.

26 See Mpofu and Moolman "A Case for Specialised Insolvency and Business Rescue Courts in South Africa" 2023 (37) *Speculum Juris* 308–323; Chatsanga "Judicial Management as a Business Rescue Scheme: a Critique of Judicial Management as a Rescue Scheme" (LLM dissertation, University of Zimbabwe, 2017) 65–66; Burdette "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)" 2004 *SA Merc LJ* 246; Loubser "Judicial Management as a Business Rescue Procedure in South African Corporate Law" 2004 *SA Merc LJ* 137; *In Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd and Another* 2001 1 SA 223 (C) para 39 the Court provides a comprehensive explanation for the failure of judicial management.

27 Leonard "Restructuring & Insolvency: Getting the Deal Through" 2016 *Law Business Research* 9–10.

Enforcement) Act.[28] Chapter 11 plays a critical role in promoting the country's recognition and enforcement of foreign judgments.[29] This Act is central to Botswana's approach to international cooperation in civil and commercial matters, ensuring that valid judgments issued by courts outside the country can be enforced within its jurisdiction.[30] Although there are no case laws relevant to cross-border issues, Chapter 11 sheds light on Botswana's approach to recognition of foreign decisions.

2 3 Corporate Rescue in Zimbabwe

The Zimbabwean parliament introduced the idea of corporate rescue, commonly referred to as business rescue, through the Insolvency Act 2018 [Chapter 6:07]. The primary objective of the approach was to eliminate judicial management, as it had shown to be ineffective in successfully reviving companies in financial distress.[31] The Supreme Court of Appeal in *Metallon Gold Zimbabwe (Pvt) Ltd & Ors v Shatirwa Investments (Pvt) Ltd & Anor SC*[32] held that over time, judicial management, as provided under section 300 of the former Companies Act, became outdated and no longer met the needs of the modern business environment.[33] In contrast, corporate rescue is viewed as a more effective solution, aiming to prevent a company's liquidation and maintain its solvency for the benefit of security holders, creditors, employees, and the broader society.[34] This approach is more comprehensive than judicial management, as it considers the interests of all stakeholders who stand to gain from the continued operation of the business.[35]

A defining characteristic of the corporate rescue regime is its predilection for the reorganisation or reconstruction of financially troubled companies, as evidenced by provisions pertaining to the moratorium, post-commencement financing, and suspension or annulment of contracts.[36] The primary purpose of corporate rescue is to facilitate the rehabilitation of a financially distressed company, thereby granting it a period of respite from liquidation.[37] Alternatively, this may be implemented to secure a more favourable return for the company's shareholders and creditors

28 Botswana Judgements (International Enforcement) Act 16 of 1982 [Chapter 11:04].

29 See ss 3(1)–(3) Botswana Judgements (International Enforcement) Act of 1981 states that"[w]here the President is satisfied that, in the event of the benefits conferred by this Part being extended to judgments given in the superior courts of any country, substantial reciprocity of treatment will be assured as respects the enforcement in that country of judgments given in the High Court of Botswana, the President may, by statutory instrument, order (*a*) that this Part shall extend to that country; and (*b*) that such courts of that country as are specified in the order shall be the superior courts of that country for the purposes of this Part. (2) Any judgment of a superior court of a country to which this Part extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies, if (*a*) it is final and conclusive between the parties thereto; (*b*) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and (*c*) it is given after the coming into operation of the order directing that this Part shall extend to that country. (3) For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding at an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court."

30 Leonard 2016 *Law Business Research* 9–10.

31 See Nhemwa "Unpacking the Business Rescue Procedure: The Importance of a Cost-effective Solution" *De Rebus* (1 March 2024); Manyuchi "A Brief Commentary on the *Metallon Gold Zimbabwe (Pvt) Ltd & Ors v Shatirwa Investments (Pvt) Ltd & Anor SC* 107/21" 2021 available at https://lexafrica.com/2021/10/the-correct-approach-to-corporate-rescue-explained-in-zimbabwe/ (accessed 06-03-2024).

32 *Metallon Gold Zimbabwe (Pvt) Ltd & Ors v Shatirwa Investments (Pvt) Ltd & Anor SC* 2021 107 of 2021 [2021] ZWSC 107 (7 October 2021).

33 *Metallon Gold Zimbabwe (Pvt) Ltd & Ors v Shatirwa Investments (Pvt) Ltd & Anor SC* 2021: 9–10

34 *Ibid.*

35 *Ibid.*

36 See ss 121–146, Zimbabwe Insolvency Act 2018.

37 See s 121 Zimbabwe Insolvency Act 2018.

than would be possible through liquidation.[38] If the implementation of the corporate rescue plan extends across borders, Zimbabwe addresses cross-border insolvency cases primarily through its domestic legislation, particularly the Insolvency Act [Chapter 6:07].[39] Zimbabwe has not yet fully adopted international frameworks like the Model Law. However, Part XXV of the Insolvency Act, titled "Cross-Border Insolvencies," is specifically devoted to handling cases involving cross-border insolvency.[40] Generally, this Part aims to establish effective mechanisms for addressing cross-border insolvency cases, aiming to promote cooperation between Zimbabwean courts and competent foreign authorities involved in such cases.[41] It seeks to ensure fair and efficient administration of cross-border insolvencies that safeguards the interests of creditors, debtors, and other stakeholders, protects and maximises the value of the debtor's assets, and, where possible, facilitates the rescue of financially distressed businesses in Zimbabwe.[42] Since this Act is relatively new, no cases have been decided yet.

2 4 Judicial and Extra-judicial Rcovery Procedures in Mozambique

Business re-organisation in Mozambique is governed by *the Regime Juridico da Insolvencia e da Recuperacao de Empresarios Comerciasis (Insolvency Law)*.[43] This legal framework establishes the procedures and objectives for dealing with insolvency and the restructuring of businesses in Mozambique.[44] The Insolvency Law represents a significant effort to modernise and streamline the legal processes related to business insolvency and recovery, aiming to balance the interests of debtors, creditors, and other stakeholders.[45] The primary aim of judicial restructuring under Article 46 of the Insolvency Law is to enable the debtor to meet their overdue obligations.[46] This process seeks to rehabilitate the financially troubled company rather than liquidating its assets,

38 Metallon Gold Zimbabwe paras 8–13.

39 See Part XXV ss 150–182 Zimbabwe Insolvency Act 7 of 2018 [Chapter 6:07].

40 See Part XXV ss 150–182 Zimbabwe Insolvency Act 7 of 2018 [Chapter 6:07].

41 Section 151, Zimbabwe Insolvency Act 2018. Section 152 defines the scope of this Part, providing that it applies where assistance is sought by or from Zimbabwe in relation to foreign insolvency proceedings, where foreign and Zimbabwean insolvency proceedings concerning the same debtor run concurrently, or where foreign creditors or interested parties seek to participate in insolvency proceedings under Zimbabwean law. The Part applies to all States unless excluded by the Minister through a Gazette notice, which may occur where a State does not afford sufficient recognition to Zimbabwean insolvency proceedings.

42 Section 151, Zimbabwe Insolvency Act of 2018.

43 Under the principle of separation of powers, the Mozambican Parliament holds legislative authority as outlined in Art 169 of the Constitution of the Republic. However, Art 179(3) of the Constitution allows the legislature, through a law, to authorise the executive to legislate on specific matters. In accordance with this provision, Parliament, through Decree-Law 9/2013, granted the executive the authority to enact legislation on insolvency and business reorganisation. Consequently, the executive introduced the *Regime Jurídico da Insolvência e da Recuperação de Empresários Comerciais*, which translates to the Legal Regime of Insolvency and Recovery of Commercial Enterprises (Mozambique Insolvency Law). Art 1 of the Decree Law 2013 states that "[t]he Legal Regime of Insolvency and Recovery of Commercial Entrepreneurs, which is published in the annex to the present Decree-Law, is approved."

44 See Joconias and Fernandes "Mozambique Law and Practice" 2019 *Global Practice Guide* 5; Cyrne aqnd Donat "The Legal Framework for Restructurings and Insolvencies in Mozambique" 2017 *Emerging Markets Restructuring Journal* 1–10.

45 Almeida "Court-supervised Restructuring: Africa – Mozambique" 2015 *Without Prejudice* 64.

46 See Art 46 of the Mozambique Insolvency Law.

thereby preserving the business, protecting employment and maintaining economic value.[47]

There are two approaches to business reorganisation in Mozambique: the judicial[48] and extra-judicial recovery procedures.[49] The former is provided in terms of Chapter III of the Insolvency Law.[50] The judicial recovery procedure allows only debtors to initiate proceedings by filing a claim with the court.[51] Once the court accepts the request for judicial recovery, the debtor's assets are protected from creditors, while a recovery plan is submitted by the debtor and subsequently approved by the creditors.[52] Directors of the debtor company continue to manage the business unless they are implicated in mismanagement, fraudulent activities, or other offences against the company or its estate.[53] The recovery plan may include actions such as increasing share capital, altering the company's control, or selling assets.[54] Creditors have thirty days from the publication of the creditors' list to challenge the plan.[55] If no challenges are made and the court accepts the claim, the plan is approved, and the restructured obligations of the company become binding on both the debtor and creditors.[56] In cases where the plan is contested, a creditors' meeting is convened to review the plan, which will only be approved if it gains the necessary support from the creditors.[57]

Whereas, the latter, ie the extra-judicial recovery procedure, is a form of special mediation in which the debtor's assets remain unprotected from creditors' claims.[58] However, if the procedure is approved and a recovery agreement restructuring the debtor's obligations is filed with a judicial court, the agreement effectively becomes an enforcement order, subject to

47 Kathrada "The Mozambican Insolvency Law" Financial Institutions Legal Snapshot available at https://www.financialinstitutionslegalsnapshot.com/2015/10/20/the-mozambican-insolvency-law. (accessed 14-03-2024)

48 Judicial business reorganisation proceedings are regulated in terms of Chs III and IV, arts 46–68 of Mozambique Insolvency Law.

49 See Ch VI Mozambique Insolvency Law. The out-of-court procedure is processed under the rules Arbitration, Mediation and Conciliation Law No 11/99 of 8 July.

50 Article 1 of Mozambique Insolvency Law. The insolvency and business reorganisation regime is designed to help financially distressed companies, and other covered entities, overcome their inability to meet due obligations. Its primary objective is to preserve the business as a going concern where possible, protect jobs, and balance the interests of creditors, thereby sustaining the company's economic activity and social role. Where rescue is not feasible, the regime shifts its focus to achieving a prompt, economically and socially efficient liquidation of the business, coupled with a fair and orderly distribution of the insolvent estate among creditors.

51 Article 47, 1 Mozambique Insolvency Law provides for the criteria for an application for judicial organisation. In terms of that provision, only debtors may apply for reorganisations.

52 Article 56, 1 Insolvency Law. See also art 56 read with art 44 Mozambique Insolvency law, which states that the plan for rehabilitation is approved and modified by the majority of creditors of all classes.

53 Article 62 of Mozambique Insolvency Law stipulates that: "During the process of judicial recovery, the debtor or his administrators are kept in the conduct of the business activity, under the supervision of the Comité, se houver, and the Insolvency Administrator."

54 See arts 46–68 of Mozambique Insolvency Law.

55 *Ibid.*

56 *Ibid.*

57 See arts 56 of Mozambique Insolvency Law provides for the requirements for the approval of plan (by the court) of a plan rejected by the majority of the company´s creditors. All the following criteria must be fulfilled: "(a) in a general meeting of creditors, the plan must receive a favorable vote by more than half of all creditors present at the meeting, regardless of the classes which they belong to; b) an approval by two classes of creditors, in the terms provided by article 44, and if there are only two classes of creditors, the approval of at least one of them; and c) from the class that rejected the plan, there must be a favorable vote by more than one-third of creditors computed as prescribed by nº 2 article 44, nº 2 and 3."

58 Article 47 of Mozambique Insolvency Law; Joconias and Fernandes 2019 *Global Practice Guide* 6.

specific enforcement.[59] Approval of the recovery plan requires the consent of creditors from each class, representing at least three-fifths of the total value of the debts, excluding labour and tax credits, which are considered to be of public interest and thus not subject to extra-judicial arrangements.[60] As a mediation process, extra-judicial recovery is governed by the provisions of the Arbitration, Mediation, and Conciliation Law (Law No. 11/99 of 8 July).[61]

Pertaining to cross-border insolvency cases, there appears to be no documented evidence of Mozambican courts establishing protocols or agreements with foreign courts to coordinate proceedings.[62] Given the relative unfamiliarity with insolvency proceedings in Mozambique, there is a lack of established tradition for handling cross-border insolvencies.[63] Consequently, there are no specific rules, standards, or guidelines in place to determine the recognition or application of decisions, rulings, and laws from other jurisdictions. However, Mozambique has rules on the recognition of a foreign judgment.

The above brief analysis reveals that South Africa is unique among Southern African countries in having adopted the Model Law through specific legislation. This proactive approach has been formalised with the enactment of the Cross-Border Insolvency Act, which provides a framework for international cooperation in insolvency matters. In contrast, Zimbabwe has not adopted the Model Law but integrated cross-border insolvency provisions within its domestic legislation. This approach demonstrates an effort to address international insolvency issues within the existing legal framework, though it lacks the comprehensive framework provided by the Model Law. Botswana and Mozambique, on the other hand, have not established dedicated cross-border insolvency legislation. Instead, their legal frameworks focus on the recognition of foreign judgments and proceedings. This limited scope indicates a gap in addressing cross-border insolvency issues directly, which is crucial for effective international cooperation. Basically, the Southern African region's preparedness to handle cross-border insolvency remains limited. Creditors and investors navigating cross-border insolvency face challenges due to the reliance on domestic laws, which are often inadequately equipped to handle the complexities of business rescue plans that extend across borders. The following section explores the potential challenges associated with implementing cross-border business rescue plan.

3 CHALLENGES FOR IMPLEMENTING A CROSS-BORDER BUSINESS RESCUE

The above discussion shows that all the selected countries have legislation that oversees the commencement and development of a business rescue/reorganisation plan. However, implementing a cross-border business rescue plan in the SADC region faces significant challenges. These include a lack of cooperation among stakeholders, courts, and state officials, as well as jurisdictional complexities arising from the absence of comprehensive cross-border

59 Article 50 of the Mozambique Arbitration, Mediation and Conciliation Law No 11/99 states that "[t]he process of enforcement follows the terms of the most summary execution proceedings, irrespective of the amount in dispute, with the specificities of the following articles. 2. The party applying for the enforcement of an award shall include with its application duly authenticated copies of the following documents: a. arbitration agreement; b. arbitration award, its correction, interpretation and additional award; c. confirmation of the notification to the parties and of the deposit of the award."

60 Article 162 of the Mozambique Insolvency Law.

61 Article 1 of the Mozambique Arbitration, Mediation and Conciliation Law No 11/99 of 8 July states that "[t]his Law governs Arbitration, Conciliation and Mediation as alternative means of conflict resolution that persons may adopt prior to or as an alternative to submitting their disputes to the judicial power."

62 Joconias and Fernandes 2019 *Global Practice Guide* 13.

63 *Ibid.*

insolvency laws in some member states.

3 1 Lack of Cooperation Among Foreign Stakeholders

The first problem when dealing with a multinational company is that its operations and activities are sustained by a variety of contracts established with and between stakeholders in different jurisdictions.[64] If it is established that the company is in financial distress, stakeholders will evaluate its financial distress in light of their respective contractual or other legal entitlements.[65] This includes their security interests and extra-contractual bargaining power, such as being critical suppliers to the company. As a result, any stakeholders may be able to initiate enforcement proceedings against the company.

A company in financial distress may attempt to serve its business while servicing its debts by entering into informal workouts, also known as out-of-court debt restructuring.[66] Informal workouts require the company to enter into new or modified agreements with a portion or all of its equity or debt stakeholders to ensure the continued operation of its primary business.[67] The insolvency literature describes this procedure as "informal reorganisation," which functions "in the periphery of the legal framework" of formal liquidation.[68] In its most basic form, "informal" restructuring refers to a voluntary and mutually agreed upon arrangement between stakeholders to modify or reshape their contractual rights through a consensual process.[69]

The issue of restructuring becomes more pronounced when one or more stakeholders who are impacted by the changes are unwilling to accept any modifications or alterations to their contractual or statutory rights.[70] The reason for this is that most legal systems operate under the assumption that the choice to engage in or modify a contract is a voluntary action that originates from the independent and unrestricted will of the contracting party. Therefore, out-of-court debt restructuring cannot resolve a lack of cooperation, especially when the creditors or affected persons are in different jurisdictions. It is difficult to gain the cooperation of stakeholders without the assistance of legislation. The purpose of restructuring legislation is to enforce changes or modifications to the contractual rights of stakeholders who disagree through a collective process that alters various individual rights and connections.[71]

The study shows that the selected jurisdictions have domestic legislation that oversees business rescue procedures. These legislative frameworks are instrumental in securing the cooperation of creditors and other stakeholders involved in the implementation of a business rescue plan. In South Africa, the Chapter 6 rescue process attempts to secure the cooperation of all stakeholders

64 Castle "Enforcement Risk: Solving the Restructuring Challenge for Extra-territorial Plan" 2023 *INSOL International Technical Paper* 1.

65 *Ibid* 1; See also Torous "How Firms Fare in Workouts and Chapter 11 Reorganizations, 1991 Working Paper, UCLA.

66 Garrido "Out-of-Court Debt Restructuring" 2012 *The World Bank Study* 2–6.

67 Sundarsnam and Lai "Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis" 2001 (12) *British Journal of Management* 183–199.

68 Garrido 2012 *The World Bank Study* 2–6.

69 Blazy, Martel and Nigam "The Choice between Informal and Formal Restructuring: The case of French Banks Facing Distressed SMEs" 2014 (44) *Journal of Banking and Finance* 248–26.

70 Blazy *et al.* 2014 *Journal of Banking and Finance* 250. See also Gertner and Scharfstein "A Theory of Workouts and the Effects of Reorganization Law" 1991 (46) *Journal of Finance* 1189–1222; Bulow and Shoven "The Bankruptcy Decision" 1978 (9) *Bell Journal of Economics and Management Science* 437–456.

71 Blazy *et al.* 2014 Journal of Banking and Finance 250. See also Gertner and Scharfstein 1991 Journal of Finance 1189–1222; Bulow *et al.* 1978 Bell Journal of Economics and Management Science 437–456. Jackson The Logic and Limits of Bankruptcy Law (1986) 8–13.

by providing for a "cramdown" of dissenting creditors.[72] Section 152(4) provides that:

> [a] business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person- (a) was present at the meeting; (b) voted in favour of adoption of the plan; or (c) in the case of creditors, had proven their claims against the company.[73]

The cram-down provision in South African business rescue law ensures that a plan can be implemented even if it is not approved by all stakeholders. This means that all parties involved, including foreign creditors, are legally bound to follow the plan, regardless of their participation in the process. This is crucial for the success of restructuring as it prevents minority stakeholders from hindering the rescue process.

In Botswana, there are no formal procedures for formulating and approving a business rescue plan. Instead, the judicial management order includes directives on the management of the company, which the court may consider fair and equitable to all creditors and shareholders.[74] It is opined that since under judicial management, the rescue of the company is sanctioned by court order. Thus, the judicial management order is binding on both domestic and foreign creditors. However, if creditors oppose an application for judicial management, it appears that the courts are more inclined to place the company under liquidation than judicial management. In *Builders Merchants Botswana v Botoka Construction (Pty) Ltd*,[75] a group of creditors sought the liquidation of a company, while another group opposed and applied for judicial management. The court granted a provisional liquidation order, holding that there was no sufficient evidence that the company would have reasonable prospects of recovering.[76] Kiggundu observes that an applicant for judicial management bears a heavier burden to prove that judicial management may be successful in recovering the company.[77] This strongly suggests that if the Tongaat Hulet's business rescue practitioner attempts to implement a business rescue plan in Botswana, creditors may disrupt the rescue process by applying for liquidation proceedings in Botswana. Judges have sought to provide a rationale for their reluctance to grant judicial management as a remedy. In *BP Distributors (Pty) Ltd v Gladen Supplies (Pty) Ltd and others,*[78] the court held that judicial management is a severe remedy, often accompanied by a moratorium that restricts legal actions against the company without court approval. This can hinder litigation, making judicial management a significant intervention.[79]

In Zimbabwe, after consulting the creditors and the management of the company, the corporate rescue practitioner must prepare a corporate rescue plan for consideration and possible adoption at a meeting in terms of section 143.[80] To secure the cooperation of foreign and domestic creditors, section 144(4) provides that

72 Section 152(4) of the Companies Act 2008. See also *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 6 SA 471 (GNP) (29 August 2013) para 59.

73 Section 152(4) of the South African Companies Act 2008.

74 See ss 265(1) and (2) of the Botswana Companies Act 2003.

75 *Builders Merchants Botswana v Botoka Construction (Pty) Ltd* 1979-70 BLR 1.

76 *Ibid*.

77 Kiggundu *Company and Partnership Law in Botswana* (2 edn 2010) 209.

78 *BP Distributors (Pty) Ltd v Gladen Supplies (Pty) Ltd and others* 168-1970 BLR 30.

79 *Ibid*.

80 Section 142 of the Zimbabwe Insolvency Act 2018. See s 143, which states "within ten business days after publishing a corporate rescue plan in terms of section 142, the corporate rescue practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan."

> [a] corporate rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—(a) was present at the meeting; or (b)voted in favour of adoption of the plan; or (c) in the case of creditors, had proved their claims against the company.[81]

Section 144 is particularly significant as it makes adopted corporate rescue plans binding on all creditors and security holders, regardless of their participation in the adoption process. This provision is crucial for ensuring that the plan can be implemented effectively, even if foreign creditors or security holders may object to some of the terms.

With regards to Mozambique, to ensure the cooperation of foreign stakeholders, the recovery plan must be submitted to the court within ninety days of the decision granting judicial recovery.[82] The judge hearing the matter is required to order the publication of an edict notifying creditors of the receipt of the recovery plan, providing them with an opportunity to review the plan and submit any objections.[83] Any creditor can challenge the plan of judicial recovery within a period of thirty days, counting from the publication of the list of creditors.[84] It is argued that the thirty-day period is not sufficient for foreign creditors to raise their objections. In the deliberations on the judicial recovery plan, all classes of creditors must approve the proposal.[85] A restructuring plan requires approval from creditors of all classes.[86] For creditors with common credit rights and those holding *in rem* rights, the plan must be approved by creditors representing more than half the total value of claims submitted to the creditors' assembly and, cumulatively, by a simple majority of attending creditors.[87] The restructuring plan binds the debtor and all domestic and foreign creditors.[88] There are no special proceedings or impediments, or protections that apply to foreign creditors.[89]

It appears from the above discussion that domestic legislation in the selected SADC member states oversees the approvals of business rescue plans and attempts to secure the cooperation of all stakeholders. However, the downside of domestic legislation is that it only applies within its jurisdiction, meaning that a foreign creditor could still apply for enforcement orders against the company under business rescue in their respective jurisdictions. The cooperation of foreign creditors is difficult if the concerned country or countries do not have existing cross-border insolvency agreements.[90] Furthermore, the coordination process with foreign creditors could present difficulties as a result of variations in creditor priorities, rights, and legal procedures. Thus, the only way to guarantee stakeholder cooperation in the absence of uniform legislation in the SADC is to apply for the recognition of foreign proceedings. For instance, the Tongaat Hulet's business rescue practitioner will have to apply in Mozambique, Botswana and Zimbabwe for recognition of South Africa's Chapter 6 business rescue to prevent foreign creditors from commencing enforcement proceedings. This presents jurisdictional challenges. The ensuing

81 Section 144(4), Zimbabwe Insolvency Act 2018.

82 Article 52, Mozambique Insolvency Law.

83 Article 52(2), Mozambique Insolvency Law.

84 Article 54 (1), Mozambique Insolvency Law.

85 Article 44, Mozambique Insolvency Law.

86 *Ibid*.

87 *Ibid*.

88 Article 44 of the Mozambique Insolvency Law.

89 Joconias and Fernandes 2019 *Global Practice Guide* 9.

90 Mason "Cross Border Insolvency and Legal Transnationalisation" 2012 *International Insolvency Review* 105–126.

discussion explores the establishment of jurisdiction in the selected SDAC countries.

3 2 Jurisdictions to Hear Cross-border Restructuring Matters

The primary concern in any court-supervised business rescue attempt is the matter of jurisdiction. Deciding the jurisdiction of courts in cross-border insolvency matters could result in conflicts and complexities, particularly since the assets and creditors are distributed across various jurisdictions. Companies may engage in forum shopping, a practice where they deliberately select jurisdictions that are considered more advantageous to apply for business rescue.[91] This conduct can undermine the fairness and predictability of cross-border insolvency processes. As pointed out above, unlike South Africa and Zimbabwe, which have cross-border legislation, Botswana and Mozambique do not have legislation that provides for the recognition of foreign proceedings. Hence, this discussion only compares South Africa's and Zimbabwe's cross-border insolvency approaches to the establishment of jurisdiction.

In South Africa, the issue of jurisdiction concerning the implementation of a restructuring plan was dealt with in *Standard Chartered Bank, Johannesburg Branch and Others v Mapula Solutions (Pty) Limited*.[92] In that case, in 2010, the Blue Group of companies was declared insolvent.[93] The creditors entered into a debt restructuring agreement to provide Blue Group with the necessary financing for restructuring.[94] The finance was provided by the African Banking Corporation Zambia (ABC Zambia), the African Banking Corporation Of Botswana Limited (ABC Botswana) and the Standard Chartered Bank Botswana (SCB).[95]However, in 2014, the lenders commenced proceedings against some of the Blue Group companies, with ABC Zambia in February 2014 in Zambia, ABC Botswana in March 2014 in Botswana and SCB Botswana sending a letter of demand in Botswana in January 2014. One of the creditors in South Africa, Maibuye, ceded and sold its shares to Mapula Solutions. It follows that Mapula Solutions approached the High Court in South Africa, which granted a default judgment in favour of Mapula Solutions for the payment of R162 million in damages.[96] The foreign lenders immediately applied for a recession of judgment, arguing that the South African court did not have jurisdiction to hear the matter.

The lenders argued that the jurisdiction is lacking as ABC Zambia and ABC Botswana were foreign *peregrine*.[97] They stated that it is an essential requirement, in order to establish a court's jurisdiction, that the assets of the applicants be attached to found or confirm jurisdiction, for the purposes of effectiveness.[98] The court ruled that it had jurisdiction to hear the matter and remarked that the principle of effectiveness of judgments (in the sense of those judgments being enforceable in a foreign jurisdiction) had been substantially eroded.[99] The court relied on the

91 See Juenger "Forum Shopping: Domestic and International" 1988–1989 (63) *Tulsa LR* 553.

92 *Chartered Bank, Johannesburg Branch and Others v Mapula Solutions (Pty) Limited In Re: Mapula Solutions (Pty) Limited v African Banking Corporation of Zambia Limited and Others* (2016/33936) [2017] ZAGPJHC 247 (11 August 2017) (Chartered Bank Case.)

93 *Chartered Bank* case 2017 para 7.

94 *Ibid.*

95 *Ibid* para 4–7.

96 *Ibid* para 1.

97 *Ibid* para 8.

98 *Ibid* para 8.

99 *Ibid* para 9.

decision in *Bid Industrial Holdings v Strang*.[100] In that case, the court held that:

> The responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff … and if the plaintiff decides in favour of suing here, it is open to the defendant to contest, among other things, whether the South African court is the forum conveniens and whether there are sufficient links between the suit in this country to render litigation appropriate here rather than in the court of the defendant's domicile.[101]

Essentially, the decision highlights the balance between the plaintiff's right to choose a forum and the defendant's right to contest the jurisdiction of that court. It appears that if the debtor is in South Africa and has foreign creditors, the debtor may apply to the court for any possible relief, including business rescue. Nonetheless, foreign creditors may object to the jurisdictions by establishing "sufficient links" between the debtor and its assets in the court of the creditor's domicile. South Africa seems to lean towards the English approach in terms of the England Companies Act 2006,[102] which stipulates in section 895(2)(b) that an English court has the authority to accept schemes or restructuring plans for both registered and unregistered companies if there is sufficient connection between the debtor and England.[103] This approach empowers the courts to authorise a rescue plan for any corporation, regardless of location and avoids asserting excessive jurisdiction.

In Zimbabwe, a foreign representative, in this case, a business rescue practitioner, is allowed to approach the High Court for an application for the recognition of foreign proceedings.[104] The court is required to consider the guidelines provided in section 167 which states that:

> Subject to section 146, the Court must recognise foreign proceedings if—(a) the foreign proceedings are proceedings defined in terms of section 150; and (b) the foreign representative applying for recognition is a person or body defined in terms of section 150; and (c) the application meets the requirements of section 155(2). (2) The Court must recognise the foreign proceedings—(a) as foreign main proceedings if they are taking place in the State where the debtor has the *centre of his or her or its main interests*; or (b) as foreign non main proceedings if the debtor has an establishment in the foreign State. (3) An application for recognition of foreign proceedings must be decided upon at the earliest possible time. (4) Sections 155, 156, 157 and 158 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.[105] Emphasis added.

The Zimbabwean lawmaker incorporated the concept of "centre of main interest" as contemplated by the Model Law. According to Model Law, the insolvency proceedings of a debtor are primarily managed by the debtor's main centre of interest (COMI), regardless of the number of states where the debtor has assets and creditors.[106] In principle, the insolvency proceedings initiated in the debtor's (COMI) should take the lead in managing the debtor's

100 *Bid Industrial Holdings v Strang* 2008 3 SA 355 (SCA).

101 *j* 2008 para 55.

102 See Part schemes of arrangement, Part 26 or restructuring plan in Part 26A, England Companies Act 2006.

103 See, by way of example, In the matter of *Rodenstock GmbH* [2011] EWHC 1104 (Ch); *Primacom Holding GmbH v Credit Agricole* [2012] EWHC 164 (Ch); In the matter of *Magyar Telecom BV* [2013] EWHC 3800 (Ch); in a recent case, Johnson J made a ruling in the issue of *Safari Holding Verwaltungs GmbH* [2022] EWHC 781 (Ch), [9], [57]–[63] where it was ruled that a "sufficient connection" existed when the governing law of the notes was changed from New York law to English law.

104 Section 159 Zimbabwe Insolvency Act 2018 states that "[a] foreign representative may apply directly to a Court in Zimbabwe for relief."

105 Section 167 Zimbabwe Insolvency Act 2018. See s 150; foreign proceedings means: "collective judicial or administrative proceedings in a foreign State, including interim proceedings, pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign Court, for the purpose of reorganisation or liquidation."

106 Article 17 UNCITRAL Model Law on Cross-Border Insolvency, U.N. Doc. A/RES/52/158 (1997).

insolvency, regardless of the debtor's global reach, subject to coordinated procedures to address local concerns.[107] It is generally indicated that when the debtor's COMI is in the same location as its place of registration, there is usually no need to challenge the presumption.[108] In *Shierson v Vlieland-Boddy*,[109] it was emphasised that when assessing whether a third party can determine the debtor's COMI interests, special attention should be paid to the creditors and their understanding of where the debtor manages its affairs.[110] If the debtor's COMI shifts, creditors should be promptly informed of the new location, such as through updated commercial correspondence or public announcements. Basically, the approach adopted by Zimbabwe seems to align with international practices, and Southern African countries may emulate its guidelines.

It is argued that the most effective approach to establishing a centre of main interest or sufficient connections in SADC countries, would be to adopt the presumption that the court where the company is registered or incorporated, has jurisdiction over its business rescue proceedings. This approach offers the following advantages: First, establishing a clear rule that the court in the country of incorporation has jurisdiction, provides predictability for businesses, creditors, and other stakeholders. This clarity reduces disputes over which court should handle the business rescue proceedings. Second, by having a predetermined jurisdiction, legal processes can be streamlined, avoiding delays caused by jurisdictional disputes and ensuring that business rescue plans can be implemented more swiftly. The company is likely to be more familiar with the legal environment of its place of incorporation, which can expedite the preparation and submission of the necessary documentation and improve the overall efficiency of the process. Third, and most importantly, this presumption reduces the incentive for companies to engage in forum shopping, where they may seek out jurisdictions with more favourable legal environments, potentially undermining fairness and consistency in insolvency proceedings.

Lastly, the idea that the country where the company is incorporated should have jurisdiction, is in harmony with the territorial theory. According to this theory, every country should enforce its own domestic bankruptcy rules with respect to the debtor's assets, debts, and creditors that fall under the jurisdiction of its courts.[111] Therefore, the territorial approach does not permit the application of insolvency rules outside of the designated territory.[112] The territorial approach indirectly safeguards local creditors by prioritising the payment or preference of their claims over those of other foreign creditors of the same insolvent debtor.[113] In other words, any country that is affected will take control or seek to take control of the assets of the insolvent debtor inside its borders, with the intention of benefiting and distributing them among the creditors within that country.[114] This prevailing situation is seen in the majority of international insolvency cases where the assets of the debtor are seized in various jurisdictions.

3 3 Implementing a Restructuring Plan Across Borders

Should a company successfully apply for business rescue in a foreign court and is admitted to the proceedings, its implementation is still dependent on financing.[115] Many jurisdictions have

107 Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, vii para 1.

108 Article 16 UNCITRAL Model Law on Cross-Border Insolvency, U.N. Doc. A/RES/52/158 (1997).

109 *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966.

110 *Ibid* para 55.

111 Stroebel "Protocols as a Possible Solution to Jurisdiction Problems" 4.

112 Chitimira 2018 *Obiter* 185.

113 *Ibid*. See also Halimi "An Analysis of the Three Major Cross-Border Insolvency Regimes" 2017 *International Immersion Program Papers* 5.

114 *Ibid.*

115 Wessels and Madaus "Business Rescue in Insolvency Law in Europe: Introducing the ELI Business Rescue Report" 2018 (27) *International Insolvency Review* 255–280.

now acknowledged that any going concern strategy necessitates financing the business until the rescue plan can be effectively devised and implemented, provided that the option of rescuing a business is available. [116] However, it has been asserted that post-commencement finance "is potentially one of the most important, and most problematic, aspects of a successful business rescue model."[117]

Securing capital for a company admitted to business rescue can be highly challenging, as lenders are understandably worried about the possibility of not receiving a return on their investment.[118] In order to maintain the business as a going concern, funding is necessary for specific business activities, including the provision of goods and services from suppliers, labour costs, insurance, rent, maintenance of contracts, and other operating expenses, as well as the cost of maintaining the value of assets.[119] Consequently, it is crucial to secure a source of finance timeously. It is imperative to underscore that post-commencement financing encompasses both short-term objectives and the long-term strategy that will be implemented to achieve a successful turnaround.[120]

In some SADC states, access to the funds and resources necessary to implement business rescue plans may be restricted. The cost of borrowing can be prohibitively high, making it difficult for distressed companies to access the funds needed for restructuring and recovery. Furthermore, there is often a lack of alternative financing options such as venture capital, private equity, and government grants that can support business rescue efforts. To remedy the lack of post-commencement financing, the World Bank published guidelines for post-commencement finance.[121] One of its principles pertains to the maintenance of business operations while stabilising distressed enterprises. In this principle, it is stipulated that, subject to specific safeguards, a business should have access to commercially viable forms of funding.[122] Additionally, these "loans" should be subject to terms of agreement that prioritise repayment under exceptional

116 See Pillay, Rajaram and Ramnanun "Ascertaining the Impact of Post-commencement Finance on Business Rescue in Kwazulu-Natal, South Africa" 2020 (6) *The Journal of Social Sciences Research* 236–244; Calitz and Freebody "Is Post-commencement Finance Proving to be the Thorn in the Side of Business Rescue Proceedings under the 2008 Companies Act" 2016 (49) *De Jure* 265–287; Pretorius and Smith "Expectations of a Business Rescue Plan: International Directives for Chapter 6 Implementation" 2014 (18) *SABR* 108–132; Du Preez "The Status of Post-commencement Finance for Business Rescue in South Africa" (Unpublished MBA thesis, University of Pretoria, 2012); Mkhondo and Pretorius "Funding Structures in Business Reorganisations: Locating the Role of Pre-packaging as a Restructuring Tool" 2017 (14) *Journal of Contemporary Management* 831–863.

117 Burdette "The Development of a Modern and Effective Business Rescue Model for South Africa: Pre-consultation Working Document" 2004 51; see also Prins "Priority Issues in Business Rescue" (LLM dissertation University of Cape Town 2015) 3–5; Calitz and Freebody 2016 (49) *De Jure* 265–287; Pretorius and Smith 2014 *SABR* 108–132.

118 Davis *et al.* Companies and other Business Structures in South Africa (2011) 170.

119 Pretorius and Rosslyn-Smith "Expectations of a Business Rescue Plan: International Directives for Chapter 6 Implementation" 2014 *SABR* 132.

120 See Calitz and Freebody 2016 *De Jure* 265–287.

121 World Bank "Principles for Effective Creditor Rights and Insolvency Systems" (revised 2015) available from http://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-andcreditor-right (accessed 02-04-2024).

122 See Principle C9.2, World Bank 17.

circumstances, thereby enabling the debtor to meet its daily operational expenses.[123]

It is recommended that post-commencement finance loans for multinational companies be issued by the African Development Bank (AfDB).[124] This recommendation is predicated on the assumption that the failure of multinational companies does not only adversely affect the economy of the country in which they operate, but also the general performance of the region.[125] In 2023, the bank approved thirty-eight multinational operations[126] loans in support of the recovery efforts following the Covid-19 epidemic.[127] Furthermore, the 2023 annual reports indicate that the Bank will invest USD10 million in Dhamana, a limited liability company that will be located in Kenya and have a regional mandate to offer credit guarantees on debt capital market instruments.[128] This investment will help meet the investment needs for industrialising Africa and decrease the financing gap for infrastructure in the continent.[129] This demonstrates that the idea of post-commencement financing is not unrealistic, with regard to the bank's objectives. The AfDB is the ideal financier for the following reasons: first, the bank provides more than just financial support; it also offers technical assistance and advisory services. This can include help with restructuring, improving operational efficiency, and implementing best practices, which can be crucial for companies in distress. Secondly and most importantly, receiving a loan from the AfDB can help a multinational company leverage additional funding from other development finance institutions, commercial banks, and international investors, creating a multiplier effect.

4 THE WAY FORWARD: ESTABLISHING A UNIFIED BUSINESS RESCUE AND INSOLVENCY LEGISLATION IN THE SADC

It is imperative to establish a harmonised regional legal framework on insolvency and company rescue within the SADC. This is essential for fostering economic stability, attracting investment, and easing cross-border commercial operations. To achieve this, the following steps can be taken.

First, it is necessary to conduct a thorough study and analysis of the current insolvency and company rescue legislation and procedures in the SADC member states, as well as globally recognised best practices.[130] This research should encompass an evaluation of the advantages and disadvantages of existing legislation, identification of deficiencies in the legal structure, and comprehension of the particular requirements and obstacles faced by the region. Second, SADC member states should foster discourse and cooperation among each other, as well as among legal scholars, decision-makers, and interested parties. The objective of this collaboration should be

123 See Principle C9.2, World Bank 17.

124 The African Development Bank (AfDB) was founded in 1964 by the Organisation of African Unity, which is the predecessor of the African Union. Since September 2014, the Bank has been a multilateral development finance institution headquartered in Abidjan, the Ivory Coast. The AfDB is a financial institution that provides financial support to African governments and private corporations that invest in the member countries of the region.

125 African Development Bank 2023 Annual Report 1.

126 Multinational refers to projects in more than one country in the same region. Multiregional refers to projects in countries in different regions.

127 African Development Bank 2023 Annual Report 5.

128 *Ibid* 21.

129 *Ibid* 21.

130 In South Africa, business rescue proceedings are regulated in terms of Chapter 6 of the Companies Act of 2008; in Botswana, the Companies Act 32 of 2004, Part XXVI, ss 471−477 provides for judicial management; in Zimbabwe, the Insolvency Act (Chapter 6:07) s 121 provides for corporate rescue proceedings; the bankruptcy and corporate reorganisation legal regime in Mozambique is governed by Decree-Law No 1/2013 of 4 July 2013.

to build a collective comprehension of the significance of harmonised legislation, tackle the concerns and interests of various countries, and establish agreement on fundamental concepts and provisions that ought to be incorporated in regional legislation.[131]

Third, promoting the development of skills and the exchange of information among SADC member states. One way to achieve this is by arranging seminars, training sessions, and conferences where legal professionals and practitioners may interact, exchange knowledge, address difficulties, and trade successful strategies in the fields of insolvency and company rescue. Fourth, it is suggested that a regional working group or task force consisting of legal experts and delegates from SADC member states should be established. The primary task of this working group would be to create comprehensive regional legislation regarding insolvency and company rescue. In addition, the working group may obtain technical assistance and support from international organisations such as the World Bank Group and Model Law to receive guidance and experience in formulating regional legislation. The working committee should also cooperate with these organisations to assess and harmonise the regional legislation with worldwide benchmarks and norms. In a nutshell, by working together and cooperating, the SADC can successfully create a unified insolvency and business rescue legislation.

5 CONCLUDING REMARKS

The restructuring of a multi-national company in financial distress is complex due to its operations spanning multiple jurisdictions. While domestic insolvency laws in SADC countries provide tools for restructuring, their effectiveness in securing the cooperation of foreign stakeholders is limited. Since each state has diverse approaches to restructuring, it is difficult to achieve a unified approach. More so, determining the appropriate jurisdiction for restructuring can be complex, especially when foreign creditors are involved. This is mainly attributed to the absence of a regional framework, which hinders cooperation and coordination among stakeholders from different countries. It is recommended that SADC countries should consider adopting Model Law. The Model Law provides a unified framework for cross-border insolvency proceedings, reducing legal uncertainty and increasing predictability for businesses and creditors operating across borders. It outlines clear procedures for the recognition and enforcement of foreign insolvency proceedings, minimising disputes and delays. Furthermore, the Model Law promotes cooperation among courts and insolvency practitioners in different jurisdictions, facilitating the efficient handling of cross-border insolvency cases. By streamlining procedures and minimising delays, the Model Law could help reduce the costs associated with cross-border insolvency proceedings. Basically, Model Law provides a predictable and efficient cross-border insolvency regime that can attract foreign investment by providing a stable legal environment for businesses operating in the SADC region.

131 Chisha and Ahmed Al-Asfour and Dana, "The Role of Regional Economic Communities in Africa: Perspectives from Stakeholders in Urban Zambia" 2016 (17) *International Journal of Business and Globalisation, Inderscience Enterprises Ltd* 33–44.