**THE RED LIGHT TO ENTRY INTO CORPORATE RESCUE: THE STANDARD NOTICE TO ALL AFFECTED PERSONS**

The Insolvency Act [Chapter 6:07][[1]](#footnote-1) [the Act] introduced to Zimbabwean corporate law, a novelty in the form of corporate rescue.[[2]](#footnote-2) This procedure was described as a “profound change” and “an innovation” when it was introduced in South Africa under the Companies Act 71 of 2008.[[3]](#footnote-3) The philosophy behind business rescue is the recognition of the fact that a company has greater value to all stakeholders as a going concern rather than in liquidation.[[4]](#footnote-4) The definition of corporate rescue in s121 of the Act illustrates that there are three levels of business rescue procedure namely, the temporary supervision of the business, a temporary moratorium on claimants and the crafting and implementation of a business rescue plan.[[5]](#footnote-5)

A key feature of the corporate rescue regime is its bias towards reorganization or reconstruction of financially distressed companies as evidenced by provisions dealing with the moratorium, post commencement finance and suspension or cancellation of contracts among others. These are designed to provide breathing space to a financially distressed company to enable its rehabilitation primarily to ensure its continued existence as a solvent business or alternatively to achieve a better return to its creditors and shareholders than would be achieved under liquidation.[[6]](#footnote-6) In contrast with the traditional pro-creditor culture which held that a creditor had a right *ex debito justitiae* to liquidate a company,[[7]](#footnote-7) the new procedure seeks the rescue of the business in a manner that balances the interests and rights of all the stakeholders.[[8]](#footnote-8)

Despite the accepted purpose of this new procedure, it has been saddled with numerous problems which threaten its efficacy just like its predecessor, judicial management which failed dismally.[[9]](#footnote-9) Critics in South Africa have often pointed at the poor drafting and interpretation of Chapter 6 of the Companies Act 71 of 2008 as the major threats to its chances of succeeding where judicial management failed.[[10]](#footnote-10) In particular, the hurdles to entry into business rescue are central to the efficacy of this rescue regime.

A key success factor of any rescue proceeding is the ease with which financially distressed businesses can access it.[[11]](#footnote-11) It is widely accepted that timing of entry into rescue is a critical success factor to any business rescue as any delayed response leads to financial hemorrhage and consequently, the demise of the company.[[12]](#footnote-12) This issue overshadows most of the other shortcomings of the Act because it creates an impediment to access to the procedure by financially distressed companies thereby defeating the very purpose for which the law was created for. While the majority of the shortcomings may only weaken the rescue process itself, barriers to entry may sound a death knell to any financially distressed company.

## NOTICE RQUIREMENTS

An affected applicant is expected to notify each affected person of the application in by standard notice.[[13]](#footnote-13) It is important to note that the affected persons referred to, as defined in s121 of the Act, include shareholders, creditors, registered trade unions with members within the company or non-unionized employees or their representative.[[14]](#footnote-14) It may be extremely difficult for the applicant who has no access to company records to identify and find the addresses of all affected persons especially if they include thousands of shareholders and non-union workers who may be located all over Zimbabwe.[[15]](#footnote-15) Notification of all affected persons was held to be a substantive matter and not a mere procedural step.[[16]](#footnote-16) The notice requirement has so far seen the still birth a several compulsory applications for corporate rescue. In the seminal Metallon Gold case Malaba CJ stated that the notice requirements enshrined in S124[2] were couched in peremptory language and non-compliance with those requirements rendered the application a nullity. More critical is the observation by the court that the notice is supposed to by way of standard notice which is defined in s2 of the act as notice by way of a registered mail, email or personal delivery and not by way of publication in a newspaper. One observes that under the repealed procedure of judicial management there was no requirement to give notice to any of the new class of affected persons. Furthermore, any notice were supposed to be given by way of publication in the Government Gazette and/or any national newspaper. The burdensome and costly notice requirement prescribed in S124[2][b] adds further costs of entry into business rescue an issue which was of concern with judicial management.[[17]](#footnote-17). One can safely conclude that it is not only more onerous to obtain a court order of business rescue but even more expensive than what was required to obtain a court order of judicial management under the previous regime despite the low hurdle required as noted in the *Metallon Gold* case.

Comparing the position with the similar South African provision indicates an even worse situation. In South Africa notice is designed to be given in the prescribed manner. R124 provides that a copy of the court application must be delivered in terms of R7. R7 prescribes for delivery in terms of S6[10] of the Companies Act 71 of 2008 or Table CR3 which like the standard notice definition in the Zimbabwean Insolvency Act lists the methods as including facsimile, electronic email, registered or physical delivery. The difference between the two pieces of legislation is that whilst in Zimbabwe the applicant is only required to give a notice the South African position required delivery of the court application as per R124. One observes therefore, that the South African position is more onerous than the Zimbabwean position. The subsidiary legislation dealing with the S131[2][b] notice requirement Reg124 prescribes that each affected person must be served with a copy of the application. [[18]](#footnote-18) In *Cape Point Vineyards [Pty] Ltd v Pinnacle Point Group Ltd [Advantage Projects Managers [Pty] Ltd Intervening*][[19]](#footnote-19) it was correctly noted that Reg124 as a piece of subsidiary legislation went beyond what was provided for by the Act which only requires notice of the application. The court correctly pointed out that there was a clear distinction between S131[2][a] of the Act which requires service of the application upon the company and the CIPC and S131[2][b] of the Act which requires notice of the application on all affected persons. It recommended that an order of substituted service be sought in terms of Reg 7[3] for compliance purposes in future. In the case of *Kalahari Resources [Pty] Ltd v Arcelormittal SA [Pty] Ltd*[[20]](#footnote-20) it was held that compliance with Reg124 was required until the regulation was declared invalid by a court of competent jurisdiction.

**RECOMMENDATIONS**

One observes that the notice requirements prescribed in the Insolvency Act create a huge hurdle for entry into corporate rescue through the compulsory route. There is also nothing to learn from our South African counterparts as the position in South Africa is even more onerous. Consequently, since the Supreme Court has already stated the position of the law and confirmed a literal interpretation of the provision there is need for legislative reform. One notes that the notice to all affected persons is required to ensure that all stakeholder interests covered. Nevertheless, a notice in the government gazette and a national newspaper as the was position with notices under judicial management would suffice. This would then be coupled with a requirement that the order of corporate rescue is served on all affected persons by the Corporate Rescue Practitioner within a stipulated period after his or her appointment. The Corporate Rescue Practitioner will have access to company information. As a result he or she will not have difficulties which currently work against the court applicant.

**CONCLUSION**

In conclusion, one observes that a critical success factor of any business rescue procedure is the easy with which the financially distressed companies have access to it. This is crucial because entry into business rescue must not only be simple but also less costly. A company in financial distress does not only need urgent resuscitation interventions but also at the least cost as financial distress has all to do with lack cashflow problems. The earlier the intervention, the better the chances of a successful rescue. On the contrary prolonged litigation and regulatory hurdles create undesirable costs and increase the risks of failure as result of delayed intervention. Consequently, one recommends legislative reforms to curtail the procedure and reduce costs. This can be done through prescription of a less onerous notice method like advertising notice of the application in the Government Gazette and national Newspaper coupled with delivery of the court order by the Corporate Rescue Practitioner.

1. Hereinafter referred to as the “the Act.” [↑](#footnote-ref-1)
2. Metallon Gold Zimbabwe [Pvt] Ltd & Ors v Shatirwa Invetsments [Pvt] Ltd SC107/21 P8 [Metallon Gold], Levenstein E, “*South African Business Rescue Procedure”* (2021) 7-1,*Oakdene Square Properties (Pty)Ltd vs Farm Bothasfontein (Pty) Ltd* (*Kyalami*)2013 (4) SA 539 (SCA) para 5 (*Oakdene*). [↑](#footnote-ref-2)
3. *Swart v Beagles Rum Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 (5) SA 422 (GNP) para 14 (*Swart*)*; Southern Palace Investment 265 (Pty) Ltd v Midnight Storm Investment 386 (Pty) Ltd* 2012(2) SA 423 (WCC) para 1 (*Southern Palace Investments*) [↑](#footnote-ref-3)
4. Metallon Gold Zimbabwe [supra] P8-13, Cassim FHI, “Contemporary South African Company Law,” 2nd Edition (2017) 862, Oakdene Para 12 [↑](#footnote-ref-4)
5. Cassim FHI “Contemporary South African company law,” P865, Boraine A, Kunst JA & Burdette DA, Insolvency law and its operation in winding-up, LexisNexis 2017 P18-8 [↑](#footnote-ref-5)
6. *Mettallon Gold [supra] P8-13, Oakdene* para 6,*Southern Palace Investment* para 3. [↑](#footnote-ref-6)
7. Cilliers HS, Benade ML, Henning JJ, Du Plesiss JJ, Delport PA, De Koker L & Pretorius JT, Corporate Law, 3rd Ed. [Durban: LexisNexis Butterworths 2000] [↑](#footnote-ref-7)
8. Metallon Gold [supra] P12, S7[k] Companies Act 71 of 2008, Laubscher M, Cloete Murray & Anor v Firstrand Bank Ltd t/a Wsbank 2015 ZASCA 39, PELJ 2015[18] 5 P1881 at 1884 [↑](#footnote-ref-8)
9. Gewer D, “Legal aspects of turnaround in Harvey N [ed] Turnaround management and corporate renewal: A South African Perspective,” Wits Univeristy Press [2011] P73 [↑](#footnote-ref-9)
10. Barends RH A critical analysis of S129 pf the Companies Act 71 of 2008 Unpublished LLM thesis University of Western Cape Town [2017] P83 [↑](#footnote-ref-10)
11. Burdette D, “Legislative framework for the facilitation of turnarounds in South Africa in Harvey N [ed] Turnaround management and corporate renewal: A South African Perspective” P132 [↑](#footnote-ref-11)
12. Kloppers P, “Judicial management reform-steps to initiate a business rescue,”[2001] 13 SA MERC LJ 358 at 375, Uncitral Legislative Guide to Insolvency Law Part5:Insolvency law for micro-and small enterprises Para 373 [↑](#footnote-ref-12)
13. S131[2][b] Insolvency Act 71 of 2008 [↑](#footnote-ref-13)
14. Delport P,Vorster, Burdette D, Esser I & Lombard S, “Henochsberg on the Companies Act 71 of 2008,” LexisNexis 2015 P444 [↑](#footnote-ref-14)
15. Levestein E, “South African business rescue procedure,” LexisNexis 2021, P8-31, Delport P, Vorster, Burdette D, Esser I & Lombard S, “Henochsberg on the Companies Act 71 of 2008,” LexisNexis 2015 P482[2] [↑](#footnote-ref-15)
16. Taboo Trading 232 [Pty] Ltd v Pro Wreck Scrap Metal CC, Joubert v Pro Wreck Scrap Metal CC & Ors 2013 [6] 141 [KZP] Para 11.3 [↑](#footnote-ref-16)
17. Merchant West Capital Solutions [Pty] Ltd v Advanced Technologies & Engineering Company [Pty] Ltd [2013] ZAGPJHC 109 Paras 3 [↑](#footnote-ref-17)
18. Companies Regulations of 2011 [↑](#footnote-ref-18)
19. 2011 [5] SA 600 [↑](#footnote-ref-19)
20. 2012 [3] ALL SA 555 [GSJ] [↑](#footnote-ref-20)