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An Overview Analysis of Corporate Rescue Proceedings in Zimbabwe during the COVID-19 Pandemic

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Abstract

Corporate rescue refers to proceedings that facilitate the rehabilitation of a company that is in financial distress. The concept of corporate rescue was introduced into Zimbabwean law in 2018 by the enactment of the Insolvency Act 7 of 2018. Corporate rescue proceedings replaced judicial management proceedings which were provided for in the old Companies Act 47 of 1951. Corporate rescue proceedings provide relief to companies in financial distress by providing temporary supervision of the company by a rescue practitioner; a temporary moratorium on the rights of the creditors against the company and the development and implementation of a plan to rescue the company. Corporate rescue proceedings have been lauded in other jurisdictions like South Africa as more flexible and financially distressed company friendly compared to judicial management. This article considers the implications of the coronavirus disease (COVID-19) and its containment

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measures on corporate rescue proceedings in Zimbabwe. To this end, the authors discuss corporate rescue proceedings in Zimbabwean law and how they have been affected by COVID-19 containment measures. Additionally, the authors suggest recommendations on how corporate rescue proceedings can be employed to circumvent the negative consequences of COVID-19 and related containment measures.

Keywords: Corporate rescue; COVID-19; creditors; rehabilitation; company; financial distress

1 INTRODUCTION

On 11 February 2020, the World Health Organization (WHO) officially declared the coronavirus disease (COVID-19) a global pandemic making it a public health emergency of international concern.¹ The Zimbabwean government responded to this public health emergency by placing a series of national lockdowns and other containment measures to combat the spread of COVID-19. The measures to contain the COVID-19 pandemic have had unprecedented effects on the already pressured Zimbabwean economy. For example, COVID-19 has affected numerous business operations with some companies falling into financial distress.² Additionally, Zimbabwe's gross domestic product (GDP) contracted by approximately eight per cent in 2020. The COVID-19 pandemic contributed significantly to this contraction.³ Moreover, numerous businesses in Zimbabwe have been facing significant cash-flow challenges due to the national lockdown regulations which were enforced since March 2020.⁴ Corporate rescue or business rescue proceedings have become an important mechanism needed by companies suffering from the impact of COVID-19 and the resultant lockdown regulations in Zimbabwe and many other countries.⁵

This article discusses the implications of COVID-19 and its containment measures on corporate rescue proceedings in Zimbabwe. To this end, the authors discuss corporate rescue proceedings in Zimbabwean law and how they have been affected by COVID-19 containment regulations or measures. The article also provides some recommendations on how corporate rescue proceedings can be employed to circumvent the negative consequences of COVID-19 and related containment measures.

2 CORPORATE RESCUE PROCEEDINGS IN ZIMBABWE

Corporate rescue refers to proceedings that facilitate the rehabilitation of a company that is in financial distress.⁶ The concept of corporate rescue was introduced into Zimbabwean law in

1 United Nations Zimbabwe "Immediate Socio-economic Response to COVID-19 in Zimbabwe: A Framework for Integrated Policy Analysis and Support" (July 2020) <https://unsdg.un.org/resources/immediate-socio-economic-response-covid-19-zimbabwe> (accessed 06-09-2021).

2 *Ibid.*

3 Kantor Immerman Legal Practitioners "Corporate Rescue – A Consideration for Companies Affected by COVID-19?" 15 March 2021 <http://www.kantorimmerman.co.zw/corporate-rescue-a-consideration-for-companies-affected-by-covid-19/> (accessed 11-10-2021).

4 It is, nonetheless, regrettable that there is no empirical research pertaining to the actual number of companies that have fallen into distress due to the COVID-19 pandemic.

5 The terms "corporate rescue" and "business rescue" are used interchangeably in this article.

6 See s 121(1)(b) of the Insolvency Act [Chapter 6:07] 7 of 2018 (hereinafter "the Insolvency Act or the Act"). See also Lamprecht "Business Rescue Replacing Judicial Management: An Assessment of the Extent of Problems Solved" 2008 *South African Journal of Accounting Research* 183 186; Levenstein "Business Rescue – Help is at Hand" 2008 *Without Prejudice* 12 12; Pretorius and Rosslyn-Smith "Expectations of a Business Rescue Plan: International Directives for Chapter 6 Implementation" 2014 *Southern African Business Review* 108 112.

2018 by the enactment of the Insolvency Act.⁷ Corporate rescue proceedings replaced judicial management proceedings which were provided for in the old Companies Act.⁸ Corporate rescue proceedings provide relief to companies in financial distress by providing them with temporary supervision through a rescue practitioner; a temporary moratorium on the rights of the creditors against the company, and the development and implementation of a plan to rescue the company.⁹ Corporate rescue proceedings have been lauded in other jurisdictions like South Africa as more flexible and financially distressed company friendly compared to judicial management.¹⁰

There are two ways to initiate corporate rescue proceedings in Zimbabwe which require the alternative functions of the Master of the High Court or Registrar of Companies.¹¹ Furthermore, corporate rescue proceedings require the implementation of an approved plan that can save the company by restructuring its affairs, business, property, debt, and other liabilities and equity in a way that maximises the likelihood of the company continuing to exist on a solvent basis.¹² In a case where the company cannot continue in existence, corporate rescue proceedings aim to secure a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.¹³ The Zimbabwean legislature has recognised that liquidation causes significant harm economically and socially with concomitant destruction of wealth and livelihoods.¹⁴ Consequently, corporate rescue proceedings are intended to avoid the deleterious consequences of liquidation in cases where there are reasonable prospects of saving

- 7 See part XXIII of the Insolvency Act. It is noteworthy that Zimbabwean corporate rescue law borrows substantially from South Africa's business rescue law provided for under the Companies Act 71 of 2008. For a detailed discussion of business rescue in South Africa, see Levenstein *An Appraisal of the New South African Business Rescue Procedure* (Unpublished LLD-thesis, University of Pretoria, 2015); Rushworth "A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008" 2010 *Acta Juridica* 375 and Rajak and Henning "Business Rescue for South Africa" 1999 *SALJ* 262. It is not uncommon for Zimbabwean courts to cite South African legal authorities in interpreting Zimbabwean laws. See for instance, *N.M.B Bank Ltd v Selemani* 2004 ZWHHC 176. Furthermore, decisions of superior courts of South Africa are usually of high persuasive value, especially when interpreting legislation dealing with the same subject matter. See Madhuku *An Introduction to Zimbabwean Law* (2010) 177.
- 8 [Chapter 24:03] 47 of 1951. Judicial management was abandoned because it only applied to companies to the exclusion of other business entities like partnerships, trusts and private business corporations. In addition, judicial management was too formal and over-regulated which made it too costly, slow, and cumbersome. Furthermore, judicial management prioritised the interests of creditors over other important societal concerns. See *Metallon Gold Zimbabwe (Pvt) Ltd v Shatirwa Investments (Pvt) Ltd* [2021] ZWSC 107. See also Dzvimbo "Should the Zimbabwean Companies Act Move Away from Judicial Management and Adopt Business Rescue" (LLM-thesis, UCT, 2013) and Chatsanga *Judicial Management as a Business Rescue Scheme: A Critique of Judicial Management as a Rescue Scheme* (LLM-thesis, University of Zimbabwe, 2017) 65–66.
- 9 See s 121(1)(b) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186; Pretorius and Rosslyn-Smith 2014 *Southern African Business Review* 113.
- 10 See *ABSA Bank Limited v Caine* 2014 ZAF SCH 48. See also Harmer "Comparison of Trends in National Law: The Pacific Rim" 1997 *Brooklyn Journal of International Law* 139 147. It is significant to note that Zimbabwean courts are not bound by the decisions of foreign courts. Nonetheless, due to the fact that Zimbabwe is a Roman-Dutch law jurisdiction, superior court decisions from other Roman-Dutch law jurisdictions like South Africa carry high persuasive value. See Madhuku *Zimbabwean Law* (2010) 23.
- 11 It is important to note that co-operative societies in Zimbabwe can also apply for corporate rescue, but for the purposes of this study, reference will only be made to companies.
- 12 See s 121(1)(b)(iii) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186; Levenstein 2008 *Without Prejudice* 12; Levenstein "The New Companies Act: Business Rescue Now an Option" 2010 *Management Today* 1 2.
- 13 *Ibid.*
- 14 *Metallon Gold Zimbabwe (Pvt) Ltd v Shatirwa Investments (Pvt) Ltd* [2021] ZWSC 107.

the business of a company in financial distress in Zimbabwe.¹⁵

2.1 Placing a Company under Corporate Rescue Proceedings in Zimbabwe

There are two main ways of placing a company under corporate rescue in Zimbabwe. Firstly, the board of directors may resolve on its own that the company be placed under rescue in terms of section 122 of the Insolvency Act. This is known as voluntary corporate rescue proceedings. Second, a court can order that a company be placed under corporate rescue upon application by an affected person in terms of section 124 of the Insolvency Act.¹⁶

The substantive and procedural requirements for voluntary corporate rescue are the same whether or not there is a COVID-19-induced national lockdown.¹⁷ The Insolvency Act provides that the board of a company may resolve that the company voluntarily commence corporate rescue proceedings and place the company under supervision if the board has reasonable grounds to believe that the company is financially distressed and there appear to be reasonable prospects of rescuing the company.¹⁸ The board is not permitted to adopt such a resolution if liquidation proceedings have already been initiated by or against the company.¹⁹ Furthermore, the resolution is of no force or effect until it has been filed with the Master of the High Court and the Registrar of Companies.²⁰

Upon filing with the Master of the High Court, a company must within five days give notice of the resolution and its effective date to every affected person.²¹ Secondly, the company must appoint a corporate rescue practitioner who meets the criteria set out in section 131 of the Insolvency Act.²² The corporate rescue practitioner must accept the appointment in writing.²³ Once a corporate rescue practitioner has been appointed, the company is required to file a notice of appointment within two business days with the Master of the High Court and the Registrar of Companies.²⁴ Thereafter, within five business days, the company must publish a copy of the filed notice to each affected person.²⁵ If a company fails to adhere to the stipulated

15 *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd* 2012 2 SA 378 (WCC) 382–383 para 14; *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd* 2011 5 SA 600 (WCC) 603; *South African Airways (SOC) Ltd (In Business Rescue) v National Union of Metalworkers of South Africa obo Members* 2021 2 SA 66 (LAC). See also Joubert “Executive Directors in Business Rescue: Employees or Something Else?” 2016 *De Jure* 95; and Loubser and Joubert “The Role of Trade Unions and Employees in South Africa’s Business Rescue Proceedings” 2015 *ILJ* 21.

16 Affected persons refer to shareholders or creditors of a company, registered trade union, or employee representative. See s 121(1)(a) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186; Levenstein 2010 *Management Today* 2.

17 See s 122 of the Insolvency Act. For a detailed discussion of related provisions see Loubser “The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions Part 1” 2010 *TSAR* 501; Loubser “The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions Part 2” 2010 *TSAR* 689.

18 See s 122(1) of the Insolvency Act; also see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186; Levenstein 2008 *Without Prejudice* 12; Levenstein 2010 *Management Today* 2.

19 See s 122(2)(a) of the Insolvency Act; also see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186.

20 See s 122(2)(b) of the Insolvency Act. The court in *Sivan v Der N.O* HH 13/22 noted that all directors must be consulted in terms of s 196 of the Companies and Other Business Entities Act [Chapter 24:31] 4 of 2019 (the COBE Act) for the resolution placing a company under business rescue to be valid. Sidelining other directors when making the resolution is contrary to s 196 of the COBE Act and everything done pursuant to this violation falls away.

21 See s 122(3)(a) of the Insolvency Act.

22 See s 122(3)(b) of the Insolvency Act.

23 *Ibid.*

24 See s 122(4)(a) of the Insolvency Act. See also Rushworth 2010 *Acta Juridica* 382.

25 See s 122(4)(b) of the Insolvency Act.

time requirements, the resolution filed will lapse and become a nullity.²⁶ The company may not file a further resolution for three months unless an urgent chamber application to file another resolution is granted by a court on good cause shown.²⁷ Strict timelines provided in the Act indicate the legislature's recognition that corporate rescue must be conducted expeditiously to save companies in financial distress.²⁸

Furthermore, the Insolvency Act provides affected persons with an opportunity to object to a company resolution placing the company under corporate rescue.²⁹ Affected persons may object to the company resolution at any stage after the adoption of the company resolution but before the adoption of the corporate rescue plan.³⁰ An affected person is permitted to apply to a court for an order setting aside the resolution on the grounds that there is no reasonable basis for believing that the company is financially distressed, or that there are no reasonable prospects for rescuing the company, or that the company has failed to satisfy the procedural requirements for initiating voluntary corporate rescue proceedings as contemplated in section 122 of the Insolvency Act.³¹

Affected persons may also challenge the appointment of a corporate rescue practitioner on the grounds that the practitioner does not meet the qualifications specified in section 131 of the Act, or is not independent of the company and its management, or lacks the requisite skills having regard to the circumstances of the company.³² The applicant objecting to the corporate rescue resolution must serve a copy of the application on the company and the Master, and also notify each affected person of the application by standard notice.³³ The Insolvency Act must be commended as far as it permits notification of affected persons by registered mail, fax, email, or personal delivery. Promoting the use of technology makes compliance with both the Insolvency Act and COVID-19 containment measures easy. It is, however, regrettable that the Insolvency Act does not adopt the same stance when it comes to filing corporate rescue papers with the Master of the High Court or Registrar of Companies.³⁴ The authors are of the considered view that permitting online filing and notices by email balances the need to curb COVID-19 and also ensures that corporate rescue provisions are complied with expeditiously.³⁵ It is pleasing to note that since 1 May 2022 the High Court Rules, particularly the Commercial Division of the High Court, have been amended to facilitate the online filing of processes and virtual hearing of applications and actions.³⁶

Each affected person is allowed to participate in a hearing where an objection has been raised

26 See s 122(5)(a) of the Insolvency Act.

27 See s 122(5)(b) of the Insolvency Act.

28 See *Koen v Wedgewood Village Golf and County Estate (Pty) Ltd* 2012 2 SA 378 (WCC).

29 See s 123 of the Insolvency Act. Directors of a company who once voted in support of a resolution cannot later object to it unless they provide the court with satisfactory proof that they voted in good faith on the basis of information that has been subsequently found to be false. See s 123(2) of the Insolvency Act.

30 See s 123(1) of the Insolvency Act.

31 See s 123(1)(a) of the Insolvency Act.

32 See s 123(1)(b) of the Insolvency Act.

33 See s 123(3). Standard notice means notice by registered mail, email, fax or by personal delivery. See s 2 of the Insolvency Act. The Supreme Court of Zimbabwe in *Metallon Gold Zimbabwe (Pvt) Ltd v Shatirwa Investments (Pvt) Ltd* [2021] ZWSC 107 24, held that a publication in a newspaper does not constitute standard notice and such notice vitiates the entire corporate rescue proceedings.

34 See for instance s 122(2)(b) of the Insolvency Act.

35 See part 4 below.

36 See for instance rules 3 and 7 of the High Court (Commercial Division) (Amendment) Rules, 2022 (No.2) Statutory Instrument 79 of 2022. For a related discussion of virtual court systems see Bannon and Keith "Remote Court: Principles for Virtual Proceedings during the COVID-19 Pandemic and Beyond" 2021 *North Western University Law Review* 1875.

against corporate rescue.³⁷ When considering objection(s) raised against a resolution to place a company under corporate rescue the court may set aside the resolution and if necessary and appropriate, make a further order placing the company under liquidation or make an order of costs against any director who voted for the resolution in bad faith.³⁸ The court may also make an order setting aside the appointment of a corporate rescue practitioner and appoint an alternate rescue practitioner recommended by or acceptable to the holders of a majority independent creditors' voting interest represented in the hearing before the court.³⁹ However, it is noteworthy that such timelines may be difficult to comply with since lockdown restrictions limit movement, physical contact of people, and operations of the High Court, the Master of the High Court and the Registrar of Companies.⁴⁰ Thus, lockdown restrictions call for innovation and remotely accessing courts to avoid overcrowding courts and spreading COVID-19 while complying with strict time limits.⁴¹

Similar to voluntary corporate rescue proceedings, the requirements for court-ordered corporate rescue are the same whether or not an application has been made during the national lockdown.⁴² An affected person may apply to a court for an order placing a company under supervision and commencing corporate rescue proceedings.⁴³ After making the application, the applicant is then required to serve a copy of the application on the company, the Master of the High Court, and the Registrar of Companies and notify each affected person by standard notice.⁴⁴ The Insolvency Act provides each affected person with a right to participate in the hearing of an application seeking the court to place a company under corporate rescue.⁴⁵ After considering the application, the court may make an order placing the company under supervision and commencing rescue proceedings if it is satisfied that: (i) the company is financially distressed; or (ii) the company has failed to satisfy its obligations in terms of public regulation, or contract concerning employment-related matters; or (iii) if it is just and equitable to do so for financial reasons.⁴⁶ It is noteworthy that the court will grant this application if it is satisfied that there are reasonable prospects of rescuing the company.⁴⁷ On the other hand, the court may make an order dismissing the application for corporate rescue together with any necessary order which may include placing the company under liquidation.⁴⁸

An application for corporate rescue has the effect of suspending liquidation proceedings until the court has decided on the application for rescue, or until corporate rescue proceedings end.⁴⁹

37 See s 123(4) of the Insolvency Act.

38 See s 124(4) of the Insolvency Act.

39 See s 123(6)(a) of the Insolvency Act.

40 See part 4 below for a discussion of COVID-19 containment measures.

41 See Lokur "COVID-19, Technology and Access to Justice" <https://www.unodc.org/dohadeclaration/en/news/2020/04/cpvid-19-technology-and-access-to-justice.html> (accessed 03-09-2021).

42 See s 124 of the Insolvency Act. For a detailed discussion of related provisions see Rushworth 2010 *Acta Juridica* 375; and Timme and Henderson "South Africa: Increasing Adoption of the Rescue Culture" in Fessey (ed) *Business Restructuring and Insolvency Report* (2015) 89.

43 See s 124(1) of the Insolvency Act. The legislature only limited the application for corporate rescue to affected persons. This is done to curb abuse of process by parties who may not have a substantial interest in the rehabilitation of the company and persons who will only be interested in their personal financial gain to the detriment of the company. See *Metallon Gold Zimbabwe (Pvt) Ltd v Shatirwa Investments (Pvt) Ltd* [2021] ZWSC 107 22.

44 See s 124(2) of the Insolvency Act.

45 See s 124(3) of the Insolvency Act.

46 See s 124(4)(a) of the Insolvency Act.

47 *Ibid.*

48 See s 124(4)(b) of the Insolvency Act.

49 See s 124(6) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186.

A company that has been placed under corporate rescue by a court order may not adopt a resolution placing itself under liquidation until rescue proceedings have ended.⁵⁰ After a company is placed under corporate rescue, it is required to notify each affected person of the order within five business days after the day of the order.⁵¹ The Supreme Court of Zimbabwe in *Metallon Gold Zimbabwe (Pvt) Ltd v Shatirwa Investments (Pvt) Ltd*⁵² held that failure to notify affected persons is not only a breach of peremptory provisions of the Insolvency Act but it prejudices affected persons who have substantial and legitimate interest in the future of the company since they are not allowed to respond to the application. It was further held that the effect of non-compliance by an applicant for corporate rescue with the provisions of the Insolvency Act relating to notifying affected persons by standard notice renders the application a nullity.⁵³ This shows that applicants must conduct proper due diligence and ensure that all affected persons are properly notified when making applications for corporate rescue, especially during a national lockdown when movement and physical interaction is limited.

2.2 Duration of Corporate Rescue Proceedings in Zimbabwe

Due to the serious consequences of corporate rescue proceedings on the rights of shareholders, creditors, employees, and other stakeholders, the legislature deemed it appropriate to prescribe its duration.⁵⁴ However, this noble intention may be difficult to realise because of COVID-19 restrictions. As stated above, corporate rescue proceedings commence when a company files a resolution to place itself under supervision or when a company applies to a court for consent to file a further resolution after the initial has lapsed.⁵⁵ Corporate rescue proceedings also begin when an affected person applies to the court for an order placing the company under supervision.⁵⁶ Furthermore, corporate rescue proceedings commence when a court makes an order placing a company under supervision during liquidation proceedings, or during proceedings to enforce a security of interest in terms of section 124(7) of the Insolvency Act.⁵⁷

On the other hand, corporate rescue proceedings end when the court sets aside the resolution or order that began those proceedings or when the court has converted rescue proceedings into liquidation proceedings.⁵⁸ Also, corporate rescue proceedings end when the rescue practitioner has filed a notice of termination of rescue proceedings with the Master of the High Court.⁵⁹ Lastly, rescue proceedings end when the proposed rescue plan is rejected and no affected person has acted to extend the proceedings, or when a rescue plan has been adopted and the practitioner

50 See s 124(8) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186.

51 *Ibid.*

52 [2021] ZWSC 107 25–26.

53 *Ibid.*

54 See s 125 of the Insolvency Act.

55 See s 125(1)(a) as read with ss 122(1) and 122(5)(b) of the Insolvency Act. For a discussion of related provisions see Anderson and Morrison “The Commencement of the Company Rescue: How and When Does It Start?” in Omar (ed) *International Insolvency Law: Themes and Perspectives* (2008) 83.

56 See s 125(1)(b) read together with s 124(1) of the Insolvency Act.

57 See s 125(1)(c) of the Insolvency Act.

58 See s 125(2)(a) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186–187. Courts do not lightly set aside an order placing a company under corporate rescue. For an order to be set aside, credible and compelling evidence has to be presented showing that the company can operate as a going concern outside corporate rescue. See *King’s Daughter Mining Company UK Limited v Redwing Mining Co. (Pvt) Ltd (under corporate rescue)* HH 133/22 para 13.

59 See s 125(2)(b) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186–187.

has filed a notice of substantial implementation of that plan.⁶⁰

Corporate rescue proceedings are expected to be completed within three months or within such a time as the court may allow upon application by a corporate rescue practitioner.⁶¹ If rescue proceedings have not ended within the permitted period, the rescue practitioner is obliged to prepare a progress report and update it at the end of each subsequent month until the end of those proceedings.⁶² The practitioner is also required to deliver each update by standard notice to each affected person and the court if the proceedings are subject to a court order, or to the Master in the case of a voluntary corporate rescue.⁶³ The corporate rescue proceedings should be conducted with the maximum possible expediency.⁶⁴ However, lockdown regulations may affect compliance with time limits since movement is restricted, and courts, the Master of the High Court, and the Registrar of Companies operate at a small scale and on a limited time.⁶⁵ This means that courts may be more inclined to offer time extensions for rescue proceedings conducted during COVID-19-induced lockdown. Nonetheless, the authors are of the view that technology can be leveraged to ensure compliance with both corporate rescue time limits and COVID-19 regulations.⁶⁶

2.3 The Duties of the Corporate Rescue Practitioner

A corporate rescue practitioner is a very crucial player since the successful rehabilitation of a company is dependent on his/her competency.⁶⁷ Appointing an astute rescue practitioner has become very crucial in light of business and economic challenges that have been brought about by the COVID-19 pandemic. A corporate rescue practitioner is a person who oversees the company during corporate rescue proceedings.⁶⁸ The practitioner investigates the company's affairs, business property, and financial situation and thereafter considers whether there are reasonable prospects of rescuing the company.⁶⁹ The practitioner must not have a relationship with a company in a way that would lead a reasonable person to conclude that the integrity,

⁶⁰ See s 125(2)(c) of the Insolvency Act.

⁶¹ See s 125(3) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 187.

⁶² See s 125(3)(a) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 187.

⁶³ See s 125(3)(b) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 187.

⁶⁴ See *Koen v Wedgewood Village Golf and County Estate (Pty) Ltd* 2012 2 SA 378 (WCC) 382.

⁶⁵ For instance, Practice Direction 6 of 2021 provided that civil and criminal registries shall be open for litigants on weekdays only between 08:00 to 15:00. Furthermore, Practice Direction 4 of 2021 and Practice Direction 6 of 2021 limited access to courts to litigants, their legal practitioners, necessary witnesses, and identified members of the press.

⁶⁶ See part 4 below.

⁶⁷ The success or failure of an insolvency regime is to a larger degree dependent on insolvency practitioners. See Bradstreet "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioner may Adversely Affect Lender's Willingness and Growth of Economy" 2011 *SA Merc LJ* 195 201.

⁶⁸ See s 121(1)(d) of the Insolvency Act; see related discussion by Levenstein "Business Rescue - Help is at Hand" 2008 *Without Prejudice* 13; see further related discussion by Burdette "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 2)" 2004 *SA Merc LJ* 409 430.

⁶⁹ See s 134 of the Insolvency Act; see related discussion by Levenstein 2008 *Without Prejudice* 13; see further related discussion by Burdette 2004 *SA Merc LJ* 430.

impartiality and objectivity of the corporate rescue practitioner are compromised.⁷⁰ The practitioner is responsible for the full management of the company in substitution of the board of directors and pre-existing management.⁷¹ Most importantly, the practitioner is responsible for developing a corporate rescue plan to be considered by affected persons and implementing the plan that has been adopted.⁷² In a nutshell, the rescue practitioner takes charge of the affairs of the company and is responsible for charting the revival process. The rescue practitioner is therefore required to act in the best interests of the company and its stakeholders.⁷³

The corporate rescue practitioner can be sued for performing his or her duties fraudulently or in a grossly negligent manner which is prejudicial to creditors, shareholders, and the company.⁷⁴ The practitioner is permitted to delegate his or her powers and functions to a person who was part of the board of directors or pre-existing management of the company.⁷⁵ During corporate rescue proceedings, the practitioner also acts as an officer of the court and must report to the court.⁷⁶ In addition, the corporate rescue practitioner has the responsibilities, duties, and liabilities of a director of a company.⁷⁷ A corporate rescue practitioner may only be removed by a court order, or by the Master of the High Court upon request by an affected person.⁷⁸

A practitioner may be removed for numerous reasons which, among others, include incompetence, conflict of interest, engaging in illegal acts, and lack of independence.⁷⁹ The employees of Redwing Mining Company (Pvt) Ltd (Redwing), through their trade union, filed an application in terms of section 124 of the Insolvency Act in the High Court of Harare and obtained an order placing Redwing under corporate rescue.⁸⁰ However, King's Daughter Mining Company UK Limited (King's Daughter) the sole shareholder in Redwing, *inter alia*, challenged the appointment of the corporate rescue practitioner (Cecil Hondo Madondo) on the basis that he failed to prepare a proper corporate rescue plan as required by sections 142 and 143 of the Insolvency Act.⁸¹ King's Daughter stated that Madondo entered into joint venture agreements and tribute agreements with third parties without consulting it (King's Daughter) as the sole shareholder. King's Daughter also contended that Madondo was facing criminal allegations for parceling out the same mine to several joint venture partners without the latter's knowledge.⁸² King's Daughter further contended that, for his fees, Madondo was billing both

70 Under the Insolvency Act, a person may be appointed as a practitioner if they met certain criteria. The person should not be disqualified from acting as a liquidator. Furthermore, the person must be registered and licensed as an insolvency practitioner and should not be disqualified from acting as a company director. See s 131 of the Insolvency Act. Although the Insolvency Act only provides broad qualifications for rescue practitioners, this is commendable compared to the position under the old Companies Act where insolvency practitioners were hardly regulated. See Chatsanga 2010 LLM-thesis 62.

71 See s 133(1)(a) of the Insolvency Act; see related discussion by Lamprecht 2008 *South African Journal of Accounting Research* 186; Levenstein 2008 *Without Prejudice* 13.

72 See s 133(1)(d) of the Insolvency Act; see related discussion by Levenstein 2008 *Without Prejudice* 14.

73 See s 133 of the Insolvency Act; see related discussion by Levenstein 2008 *Without Prejudice* 13–14.

74 See s 133(4)(c)(ii) of the Insolvency Act.

75 See s 133(1)(b) of the Insolvency Act; see related discussion by Levenstein 2008 *Without Prejudice* 13; Levenstein 2010 *Management Today* 2.

76 See s 133(4)(a) of the Insolvency Act.

77 See s 133(4)(b) of the Insolvency Act; see related discussion by Levenstein 2008 *Without Prejudice* 13.

78 See s 132 of the Insolvency Act. See also *Kurt Robert Knoop v Chetaalia Gupta* 116/2020 ZASCA 163.

79 See s 132 of the Insolvency Act.

80 See *King's Daughter Mining Company UK Limited v Redwing Mining Co. (Pvt) Ltd (under corporate rescue)* HH 133/22 para 5.

81 See *King's Daughter Mining Company UK Limited v Redwing Mining Co. (Pvt) Ltd (under corporate rescue)* HH 133/22 paras 3 and 17.

82 See *King's Daughter Mining Company UK Limited v Redwing Mining Co. (Pvt) Ltd (under corporate rescue)* HH 133/22 para 10.

Redwing and the joint venture partners. Following concerns raised by King's Daughter, the High Court ordered that Madondo be removed from office as a corporate rescue practitioner for Redwing.⁸³

The appointment and dismissal of corporate rescue practitioners is something that companies can hardly afford during COVID-19 because of the delays it causes in conducting business rescue.⁸⁴ Although section 131 of the Insolvency Act sets qualifications for practitioners, they are not adequate to ensure that fit and proper persons are appointed as rescue practitioners.⁸⁵ This is because section 131 of the Insolvency Act mainly focuses on the independence and integrity of the corporate rescue practitioner and pays little to no attention to the practitioner's competency and managerial skills to execute a corporate rescue.⁸⁶ There is an urgent need, especially in light of the COVID-19 pandemic, to establish a framework for continuous development training for corporate rescue practitioners to ensure that they remain up to date with changes in legislation and industrial trends.⁸⁷ There is no doubt that the COVID-19 pandemic has created an urgent need for competent practitioners with adequate skills to facilitate the timeous rehabilitation of financially distressed companies.⁸⁸ There is, therefore, a need to put in place a completely separate body regulating the business of rescue practitioners.⁸⁹ This will ensure that rescue practitioners are properly appointed, trained, and monitored.⁹⁰

2.4 Effects of Corporate Rescue on Business Activities and Stakeholder Interests

Corporate rescue proceedings affect the company and various stakeholders in different ways. This may be even worse during the COVID-19 pandemic when many stakeholders are struggling to make ends meet. When a company is under supervision no legal proceedings may be instituted against the company in any forum.⁹¹ This includes enforcement of orders against the company or any property belonging to such a company. The moratorium provided to the company is meant to provide it with the necessary space and time to restructure its affairs.⁹² The moratorium also allows the practitioner in conjunction with other affected persons to formulate and implement a corporate rescue plan, which is the blueprint of how the company is going to

83 See *King's Daughter Mining Company UK Limited v Redwing Mining Co. (Pvt) Ltd (under corporate rescue)* HH 133/22 para 19.

84 When a rescue practitioner is dismissed, it means another one must be appointed causing delays, and this is contrary to the purpose of the Insolvency Act which requires rescue proceedings to be conducted with expediency. See s 132(3) of the Insolvency Act. See also *Koen v Wedgewood Village Golf and County Estate (Pty) Ltd* 2012 2 SA 378 (WCC).

85 Bradstreet 2011 SA Merc LJ 206.

86 Bradstreet 2011 SA Merc LJ 205.

87 Papaya "Are Business Rescue Practitioners Adequately Regulated?" 2014 *De Rebus* 29; and Bradstreet "Exploring the Possibility of a Composite Business Rescue Practitioner" 2010 *De Rebus* 48.

88 For more discussion of regulation of rescue practitioners, see Veldhuizen "Regulation and Control of Business-rescue Practitioners: Is there a Suitable Legal Framework" 2015 *BTCLQ* 24.

89 South Africa is in the process of establishing a Business Rescue Practice Regulatory Board that will *inter alia* oversee the appointment, removal, and training of rescue practitioners. See Bradstreet 2011 SA Merc LJ 206; and Papaya 2014 *De Rebus* 29.

90 Bradstreet 2011 SA LJ 206; Papaya 2014 *De Rebus* 29.

91 See s 126 of the Insolvency Act. Legal proceedings against a company under rescue can only be instituted in the following circumstances: (i) with the written consent of the practitioner; or (ii) with the leave of the court and under conditions the court considers suitable; or (iii) set off against any claim made by a company in legal proceedings; or (iv) criminal proceedings against the company and its directors; or (v) proceedings concerning property/rights over which the company exercises the powers of a trustee; or (vi) proceedings by a regulatory authority in the execution of its duties after written notification to the corporate rescue practitioner. See s 126(1) of the Insolvency Act.

92 *Metallon Gold Zimbabwe (Pvt) Ltd v Shatirwa Investments (Pvt) Ltd* [2021] ZWSC 107 16.

be rescued.⁹³ This general moratorium is very crucial because it provides breathing space for companies facing financial challenges during the COVID-19 pandemic.⁹⁴ The court in *Duatlet Investments (Pvt) Ltd v Hofisi*⁹⁵ stated that if companies are not protected from the rights of claimants it will be difficult if not impossible for them to recover from financial distress. Instead of granting the applicant leave to institute legal proceedings against the company under rescue, the court in *Duatlet Investments v Hofisi* decided to refer the matter for arbitration in accordance with the joint venture agreement between the parties.⁹⁶

Employees of a company under rescue continue to be employed on the same terms and conditions except to the extent that changes occur in the ordinary attrition or if employees and the company agree on different conditions of service in accordance with applicable labour laws.⁹⁷ The Insolvency Act also provides that any retrenchment of employees contemplated under corporate rescue proceedings is subject to the Labour Act⁹⁸ and any other applicable employment-related legislation.⁹⁹ The Insolvency Act must be applauded for protecting employees because before the Act came into law, Zimbabwean insolvency law was not concerned with the rights of employees during the insolvency of the employer.¹⁰⁰

The corporate rescue practitioner may entirely, partially, or conditionally suspend, for the duration of corporate rescue proceedings, any contractual obligations that a company may have entered into at the commencement of rescue proceedings or that may become due during proceedings.¹⁰¹ In addition, the practitioner may make an urgent application to the court for an order to entirely, partially, or conditionally cancel the contractual obligations of the company.¹⁰² Any party whose agreement has been suspended or cancelled may assert a claim against the company only for damages.¹⁰³

During corporate rescue proceedings, any alteration in the classification or status of issued securities of a company, other than by way of transfer of securities in the ordinary course of business, is invalid except to the extent that the court directs or as contemplated in an approved

93 See s 142 of the Insolvency Act.

94 In Zimbabwe numerous companies have lost revenue and have cut back on business spending due to COVID-19 and containment measures. The pandemic has impacted firms by reducing demand for products and services, disrupting supply of goods and limiting the availability of credit. Chirisa *et al* "The Impact and Implications of Covid-19: Reflections on the Zimbabwean Society" 2021 *Social Sciences and Humanities Open* 1 2; and Menezes and Muro "COVID-19 Outbreak: Implications on Corporate and Individual Insolvency" (13 April 2020) *World Bank Group* <https://pubdocs.worldbank.org> (accessed 16-08-2021). See also *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 6 SA 448 (KZD) 448 where the court dealt with the moratorium on business rescue proceedings in South Africa. See further Laubscher "*Cloete Murray and Another v Firstrand Bank Ltd T/A Wesbank* [2015] ZASCA 39" 2015 *PELJ* 1; and Tsusi "Interpretation of Section 133(1) of the Companies Act 71 of 2008: The Principle of Moratorium Redefined under Business Rescue" 2015 *Without Prejudice* 51.

95 HH 74/22.

96 Although the court took the view that there were justified reasons for granting leave to institute proceedings against the company under rescue, it refrained from doing so because the contract concluded by the parties provided for alternative dispute resolution. The court also considered that it was in the best interests of the company under business rescue for the matter to go for arbitration; a process that is time and cost-efficient. See *Duatlet Investments (Pvt) Ltd v Hofisi* HH 74/22.

97 See s 129(1)(a) of the Insolvency Act.

98 [Chapter 28:01] 16 of 1985.

99 See s 129(1) of the Insolvency Act.

100 Kasuso and Sithole "Protection of the Rights of Employees in Insolvency Law: A Zimbabwean Perspective" 2020 *Journal of African Law* 47.

101 See s 129(2)(a) of the Insolvency Act.

102 See s 129(2)(b) of the Insolvency Act.

103 See s 129(4) of the Insolvency Act.

corporate rescue plan.¹⁰⁴ On the other hand, the company's board of directors is deemed to be dissolved and the directors may not exercise their functions as directors.¹⁰⁵ The directors may only exercise management functions within the company in accordance with the express instructions or directions of the corporate rescue practitioner.¹⁰⁶ Directors have an obligation to assist the practitioner at all times and provide him with information about the company's affairs.¹⁰⁷ If a director takes any action on behalf of the company after the commencement of corporate rescue, such action will be void unless approved by the corporate rescue practitioner.¹⁰⁸

Although corporate rescue has drastic temporary effects on the rights of various stakeholders involved, its ultimate goal is to facilitate the rehabilitation of a company in distress.¹⁰⁹ Providing a company with a second chance is very crucial and beneficial to concerned stakeholders.¹¹⁰ Salvaging a company is very important especially during the COVID-19 pandemic because it does not only protect the interests of shareholders and creditors but it also protects employment and the economy at large.¹¹¹ It is imperative that corporate rescue proceedings are conducted by sufficiently qualified practitioners so that all stakeholders involved benefit from the process.¹¹²

3 COVID-19 CONTAINMENT MEASURES

In Zimbabwe, the first case of COVID-19 was recorded on 21 March 2020 and by 13 April 2020 Zimbabwe had recorded fourteen cases with three deaths from COVID-19.¹¹³ By 11 June 2020, COVID-19 cases had increased to 279 most of which were recorded among returnees from South Africa which had the highest level of recorded infections in Africa.¹¹⁴ Other COVID-19 cases were associated with in-bound travellers mainly from Dubai, the United Kingdom, and the United States of America, and contact cases of people who had travelled.¹¹⁵ More than one year since COVID-19 was detected in Zimbabwe, an estimated 40 318 cases were recorded in the country while 1 637 fatalities were recorded.¹¹⁶

To curb the spread of COVID-19, governments across the globe, closed their national borders while restricting international migrations.¹¹⁷ Like other countries, the government of Zimbabwe adopted lockdown measures to reduce the spread of COVID-19. The Civil Protection (Declaration

104 See s 130(1) of the Insolvency Act.

105 See s 130(2) of the Insolvency Act.

106 *Ibid.*

107 See s 130(3) of the Insolvency Act.

108 See s 130(4) of the Insolvency Act.

109 See s 121(1)(b) of the Insolvency Act.

110 Olver "Judicial Management – A Case for Law Reform" 1986 *THRHR* 84 86.

111 Bradstreet "Business Rescue Proves to be Creditor-friendly: CJ Claassen J's Analysis of the New Business Rescue Procedure in *Oakdene Square Properties*" 2013 *SALJ* 44; Bradstreet "The New Business Rescue: Will Creditors Sink or Swim" 2011 *SALJ* 352–380 and Omar 1997 *Journal of International Banking Law* 127.

112 See Bradstreet 2011 *SA Merc LJ* 201.

113 Rahman and Shaban "Coronavirus in Africa: Close to 8000 Cases, 334 Deaths, 702 Recoveries" *Africa News* 4 April 2020 <https://www.africanews.com/2020/04/04/coronavirus-in-africa-breakdown-of-infected-virus-free-countries/> (accessed 04-08-2021).

114 Jokwiro "COVID-19: Which Way for Zimbabwe" (2020) <https://www.herald.co.zw/covid-19-which-way-for-zimbabwe/> (accessed 13-07-2021); Weyers "Business Rescue during the COVID-19 Pandemic: How to Make it Work" 2021 *Without Prejudice* 14.

115 Chirisa *et al.* 2021 *Social Sciences and Humanities Open* 2.

116 United States Embassy in Zimbabwe "COVID -19 Questions: Country-specific Information" (2021) <https://zw.usembassy.gov/covid-19-information-2/> (accessed 16-09-2021).

117 Alonso-Zaldivar, Burns and Fox "State Demand Ventilators as Feds Ration Limited Supply" *US News* (4 April 2020) <https://www.google.com/amp/s/www.usnews.com/news/health-news/articles/2020-04-02/states-demand-ventilators-as-feds-ration-limited-supply%3fcontext=amp> (accessed 04-09-2021).

of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020 declared a state of disaster in all rural and urban areas in Zimbabwe with effect from 23 March 2020.¹¹⁸ In addition, COVID-19 was declared a formidable epidemic disease in terms of section 3 of the Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020.¹¹⁹ Pursuant to that declaration a 21-day national lockdown was ordered in terms of section 4 of the COVID-19 Prevention, Containment and Treatment (National Lockdown) Order, 2020.¹²⁰ Regardless of the measures taken to combat the spread of COVID-19 in the early days, the pandemic continued to spread in Zimbabwe and that led to extended lockdowns and closure of national borders and certain businesses from time to time. This article briefly discusses essential services in the Zimbabwean context and mainly focuses on level IV COVID-19 containment measures because Zimbabwe had been under that level for most of the national lockdown and because level IV had some of the most stringent rules which have negatively affected businesses and corporate rescue proceedings.

3 1 Essential Services in the Zimbabwean Context

During a COVID-19-induced national lockdown only institutions, businesses, and persons providing essential services are allowed to operate in Zimbabwe. Essential services include any hospital services and transport services operated by Zimbabwe United Passenger Company (ZUPCO) or vehicles operated by or on behalf of the Public Service Commission, Police Service, and other civil protection authorities.¹²¹ Furthermore, vehicles for the carriage of staff for essential services, sick persons to hospitals, and the transport of water, food, fuel, basic goods, and medical supplies are included in the definition of essential services. Services relating to the generation and distribution of electricity, water, and any sewerage services are also included as essential.¹²²

In addition, banking institutions, fire brigade services, the coal mining industry, and all arms of the State involved in the security of the State are considered essential services during the national lockdown.¹²³ All criminal courts are allowed to operate during the national lockdown to the extent directed by the Chief Justice through a practice direction.¹²⁴ Other institutions which are permitted to operate during the national lockdown include the Zimbabwe Stock Exchange or other licensed stock exchanges, the Parliament of Zimbabwe, the Zimbabwe Electoral Commission, the ZIMSTAT, the Vehicle Inspectorate Department, and the Chief Immigration Officer.¹²⁵ It is noteworthy that during the national lockdown, Zimbabwe only permits a limited number of institutions, businesses, and persons to operate, especially those providing the most basic needs that people cannot do without. However, the definition of essential services provided under section 2 of Statutory Instrument 200 of 2020 excludes the Registrar of Companies. This

118 See s 3 of Statutory Instrument 76 of 2020.

119 See Statutory Instrument 77 of 2020.

120 See Statutory Instrument 83 of 2020.

121 See s 2(a) and (b) of the Public Health COVID-19 Prevention, Containment and Treatment (National Lockdown) (No.2 Order, 2020 Statutory Instrument 200 of 2020. For a discussion of essential health services in Zimbabwe during COVID-19 see Murewanhema and Makurumidze “Essential Health Services Delivery in Zimbabwe during the COVID-19 Pandemic: Perspectives and Recommendations” 2020 *Pan African Medical Journal* 1; and Kurevakwesu “COVID-19 and Mental Health Services Delivery at Ingutsheni Central Hospital in Zimbabwe: Lessons from Psychiatric Social Practice” 2021 *International Social Work* 702.

122 See s 2(c)–(e) of Statutory Instrument 200 of 2020.

123 See s 2(g)–(k) of Statutory Instrument 200 of 2020. For a discussion of employees’ rights during COVID-19 see Kasuso and Ngwenya “Zimbabwe: Employees’ Rights during the Covid-19 and National Lockdown” *Sunday Mail* 3 May 2020 <https://www.business-humanrights.org> (accessed 29-05-2022).

124 See s 2(m) of Statutory Instrument 200 of 2020.

125 See s 2(u)–(z) of Statutory Instrument 200 of 2020.

exclusion could be detrimental to companies that seek to use the services of the Registrar of Companies during the national lockdown. Considering the important commercial and social interests involved in saving a company from financial distress, there is a greater need to include the Registrar of Companies in the definition of essential services.¹²⁶

3.2 Level IV Regulations

Since the onset of the COVID-19 pandemic, the government of Zimbabwe has instituted several policies as well as institutional and operational mechanisms to combat and contain COVID-19 and reduce its negative impact.¹²⁷ On 30 March 2020, the Zimbabwean government declared the national lockdown¹²⁸ and prohibited gatherings for 21 days.¹²⁹ Lockdown rules have since then been amended from time to time depending on the prevalence of COVID-19 cases.¹³⁰

In terms of section 2(m) of the Public Health (COVID-19 Prevention, Containment and Treatment (National Lockdown) (No.2) Order 2020¹³¹ courts are an essential service, and they retain the same status under level IV lockdown. Lockdown regulations must be celebrated for protecting the right of litigants to legal representation during national lockdown by including legal practitioners in the definition of essential services.¹³² Although courts ordinarily remain open under level IV, they are constrained by COVID-19 containment measures and the need to save lives. The Chief Justice of Zimbabwe is empowered to issue practice directions regulating court operations during the national lockdown.¹³³ The practice directions by the Chief Justice only apply to the Constitutional Court, Supreme Court, High Court (including the Master of the High Court), the Labour Court, Administrative Court and the Magistrates' Court in Zimbabwe.¹³⁴ It is noteworthy that the practice directions do not apply to the Registrar of Companies. From a corporate rescue perspective, it is regrettable that the Registrar of Companies is not included in the definition of essential services because the Registrar of Companies will be closed under level IV lockdown thereby hindering the filing and processing of corporate rescue applications.¹³⁵

Under level IV, the filing of new cases, all processes, and pleadings are suspended.¹³⁶ Courts only accept urgent applications, initial remand matters, and bail applications.¹³⁷ Courts operate

126 See s 2 of Statutory Instrument 200 of 2020.

127 United Nations Zimbabwe *Immediate Socio-economic Response to COVID-19 in Zimbabwe: A Framework for Integrated Policy Analysis and Support* (2020) 8.

128 National lockdown refers to restrictions on movement of persons on intercity, airborne or cross-border traffic. See s 2 of Statutory Instrument 200 of 2020.

129 See s 4(1) of Statutory Instrument 200 of 2020.

130 This article does not discuss lockdown regulations in their entirety. It only focuses on level IV rules which are also referred to as "hard lockdown". For a definition of "hard lockdown" see Ebhuoma "COVID-19 Hard Lockdown in South Africa: Lessons for Climate Stakeholders Pursuing the Thirteenth Sustainable Development Goal" 2021 *Journal of Asian and African Studies* 1.

131 See Statutory Instrument 200 of 2020.

132 See s 2(y) of Statutory Instrument 200 of 2020.

133 This article only provides an analysis of a few practice directions issued by the Chief Justice of Zimbabwe during level IV. Full details of various practice directions are available at <http://www.jsc.org.zw/practicedirections.php>.

134 See for instance para 1 of Practice Direction 6 of 2021 (Court Operations for the Courts during Level IV National Lockdown).

135 See part 4 below.

136 See for instance para 6 of Practice Direction 3 of 2021 (Operational Directions for the Courts during the Extended COVID-19 Level IV National Lockdown)

137 See para 4 of Practice Direction 1 of 2020 (Court Operations during the 21 Day COVID-19 National Lockdown).

for limited hours, that is, from 08:00 to 15:00.¹³⁸ Entry into court premises is restricted to litigants, their practitioners, necessary witnesses, and identified members of the press.¹³⁹ Under level IV an affected person applying for a company to be placed under corporate rescue has to prove that the application is urgent.¹⁴⁰ To avoid overcrowding at courts, a judge may consider an urgent application on papers without calling the parties.¹⁴¹

Smith J held in *Silver's Trucks (Pvt) Ltd v Director of Customs and Excise*¹⁴² that urgent matters are not only limited to where there is a serious threat to life or liberty but also where the urgency arises out of the need to protect commercial interests. In this case, the applicants brought an urgent application to obtain the release of goods that were seized by the Director of Customs and Excise. The applicants contended that if the seized goods were not released immediately, they will be forced into liquidation.¹⁴³ They further contended that liquidation would result in their employees losing their jobs.¹⁴⁴ The court took the view that this matter should be treated with urgency because of the probable risk of applicants falling into liquidation and their employees losing employment.¹⁴⁵ This shows that courts are concerned with saving companies from liquidation and protecting employment. However, the urgency of a case depends on the circumstances of each case.¹⁴⁶

Generally, the affairs of a distressed company are handled with urgency to avoid the company sinking deeper into liquidation.¹⁴⁷ There is no doubt that if a company is in financial distress especially as a result of COVID-19 or during COVID-19-induced lockdown, courts will be inclined to find such corporate rescue applications urgent.¹⁴⁸ In the past courts have emphasised the need to conduct rescue proceedings with the maximum possible expediency.¹⁴⁹ Since delays undermine the prospects of effective rescue, chances are that corporate rescue applications will

138 See para 9 of Practice Direction 1 of 2021 (Operational Directions for the Courts during the 30-Day Level IV National Lockdown).

139 See para 13 of Practice Direction 1 of 2021.

140 Urgent applications are made in terms of rule 60(3)(d) of the High Court Rules 2021 (Statutory Instrument 202 of 2021). For requirements that must be met in an urgent application, see *Pichving v Zimbabwe Newspapers* 1991 1 ZLR 71 (H) 93E; *Kuvarega v Registrar General* 1998 1 ZLR 188 (H); and *Gwarada v Johnson* 2009 2 ZLR 159 (H).

141 See para 4 of Practice Direction 2 of 2021 (Operational Directions and Hearing Urgent and Bail Applications during the Level IV COVID-19 Lockdown Period).

142 1999 1 ZLR 490 491. The *Silver's Trucks* case was cited with approval by Mafusire J in *Manline Freight (Pty) Ltd v Kanengoni* HH 139/15. See also *Duatlet Investments (Pvt) Ltd v Hofisi* HH 74/22; and *Nzara v Tsanyau* 2014 1 ZLR 674 (H).

143 See *Silver's Trucks* 491.

144 *Ibid.*

145 *Ibid.*

146 See *20th Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 3 SA 582 (W) 586. See also *Shandong Taishan Sunlight Investments Limited v Yunnan Linkun Investments Group Company Limited* HH 6/16.

147 See *Absa Limited v Caine* NO 2014 ZAF SCH 46; and *Cape Point Vineyards (Pvt) Ltd v Pinnacle Point Group Limited* 2011 SA 5 600 (WCC); and *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Pty) Ltd* 2012 3 SA 273.

148 See Scriba and Jordaan "Practically, What has COVID-19 meant for the Business Rescue Process?" (12 May 2020) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/business-rescue-newsletter-12-may-Practically-what-has-COVID19-meant-for-the-business-rescue-process.html> (laccessed 02-08-2021).

149 *Koen v Wedgewood Village Golf and County Estate (Pty) Ltd* 2012 2 SA 378 (WCC).

be treated as urgent, unless the facts of the particular case contradict urgency.¹⁵⁰

Although the practice directions issued by the Chief Justice also apply to the Master of the High Court, there are no further guidelines on how the Master has to deal with cases where the board of a company files a resolution for corporate rescue.¹⁵¹ It can however be argued that under level IV the Master of the High Court can only deal with cases it considers to be urgent as provided for under the level IV practice directions.¹⁵² In addition to the dearth of guidelines, the Master does not provide for online filing as in the case of the South African Companies and Intellectual Property Commission (CIPC).¹⁵³ This creates a major challenge in light of intercity travel bans and the fact that the Master is only accessible in major cities like Harare and Bulawayo.¹⁵⁴

The Minister of Health and Child Care also has the power to declare any other service to be essential by means of general notice.¹⁵⁵ It is nonetheless regrettable that the Registrar of Companies has not been declared an essential service by the Minister. This, therefore, means that the Registrar of Companies is closed to the public during level IV lockdown with no processing of documents and acceptance of filings. This creates a huge challenge since section 122 of the Insolvency Act requires the board resolution for corporate rescue to be filed with both the Master and the Registrar of Companies. This is further accentuated by the fact that the Registrar of Companies does not provide for online filing of corporate rescue resolutions.¹⁵⁶ There is no doubt that the lack of and/or paucity of lockdown guidelines from a corporate rescue perspective creates confusion and makes compliance with the Insolvency Act very difficult. There is, therefore, a need to reform insolvency laws and regulations and provide adequate guidelines to ensure that corporate rescue proceedings are conducted during lockdown without risking the spread of COVID-19.

4 RECOMMENDATIONS

The continued existence of companies is vital to every country and their failure has far-reaching consequences not only for shareholders and creditors but for other stakeholders like employees and the economy of any country.¹⁵⁷ However, COVID-19 and the resultant containment measures have necessitated the need to use corporate rescue as a remedy to salvage companies in distress. On the other hand, the same COVID-19 containment measures hinder the successful implementation of the corporate rescue proceedings in Zimbabwe.¹⁵⁸ The need to contain the spread of COVID-19 has negatively affected the effective and efficient implementation of corporate rescue proceedings in Zimbabwe.¹⁵⁹ Therefore, there is a need to put in place

150 Scriba and Jordaan “Practically, What has COVID-19 meant for the Business Rescue Process?” (12 May 2020) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/business-rescue-newsletter-12-may-Practically-what-has-COVID19-meant-for-the-business-rescue-process.html> (accessed 02-08-2021).

151 See for instance para 1 of Practice Direction 6 of 2021.

152 See para 7 of Practice Direction 1 of 2021.

153 See Scriba and Jordaan “Practically, what has COVID-19 meant for the Business Rescue Process?” (12 May 2020).

154 United Nations Zimbabwe “Immediate Socio-economic Response to COVID-19 in Zimbabwe: A Framework for Integrated Policy Analysis and Support” (July 2020) <https://unsdg.un.org/resources/immediate-socio-economic-response-covid-19-zimbabwe> (accessed 06-09-2021).

155 See s 2 of Statutory Instrument 200 of 2020.

156 See <https://justice.gov.zw/departments/deeds-companies-and-intellectual-prperty/> for online services provided by the Registrar of Companies Zimbabwe.

157 Kasuso and Sithole 2020 *Journal of African Law* 47.

158 See Mukwekwezeka “COVID-19 Restrictions: Implications on the Access to Judicial Organs” (2021) <https://www.mondaq.com/operational-impacts-and-strategy/1107262/covid-19-restrictions-implications-on-the-access-to-judicial-organs-> (accessed 21-08-2021).

159 See part 3 above.

legislative and other innovative mechanisms that ensure that COVID-19 is contained while at the same time ensuring that companies that fall into financial distress are rescued without delay.

Taking into account that COVID-19 containment measures such as intercity travelling bans, curfews, and closure of certain government institutions like the Registrar of Companies place numerous barriers in the implementation of corporate rescue proceedings; it is submitted that the justice delivery system should adopt and acquire appropriate technology to counter these challenges.¹⁶⁰ The Judicial Service Commission of Zimbabwe has introduced the integrated electronic case management system (IECMS) which became operational on 1 May 2022.¹⁶¹ The IECMS is a web-based case management system that automates and tracks all aspects of the case life cycle from initial filing, disposition, and appeal of matters.¹⁶² Furthermore, the IECMS decreases paperwork and can be remotely accessed by court users.¹⁶³ Currently, the system is operational in the Constitutional Court, Supreme Court, and the Commercial Division of the High Court.¹⁶⁴

The IECMS is a step in the positive direction and can assist in circumventing numerous barriers brought about by the COVID-19 pandemic and containment regulations. Access to justice through online filing and video conferencing can ensure that parties comply with travelling restrictions while at the same time complying with time limits set out in corporate rescue proceedings.¹⁶⁵ The introduction of the IECMS system is commendable since it enables interested parties to prosecute corporate rescue proceedings in compliance with COVID-19 containment measures. It is suggested that the Registrar of Companies be included in the IECMS to ensure that parties that use voluntary corporate rescue will benefit from this system.¹⁶⁶ Therefore, the High Court Rules of Zimbabwe and the Insolvency Act should be aligned to the new Commercial Division Rules in order to facilitate video conferencing and online filing of applications with the High Court and the Master of the High Court.¹⁶⁷

Nonetheless, it is regrettable that the COVID-19 regulations in Zimbabwe, especially, level IV containment measures, are not open enough to facilitate the proper implementation of corporate rescue proceedings. There is a need to include the Registrar of Companies in the definition of essential services to ensure that it is open for acceptance of filings and processing of applications during level IV lockdown.¹⁶⁸ Without including the Registrar of Companies in the definition of essential services, compliance with corporate rescue rules under the Insolvency Act will be impossible since the Registrar of Companies will be closed to the public under

160 See Cabral *et al.* “Using Technology to Enhance Access to Justice” 2012 *Harvard Journal of Law and Technology* 241 246.

161 See Rules of the High Court (Commercial Division) (Amendment) Rules, 2022 (No. 2) Statutory Instrument 79 of 2022. See also Mudzingwa “Judicial Service Commission to Introduce Electronic Case Management System” (2020) *TechZiM* <https://www.techzim.co.zw/2020/10/judicail-servie-commission-to-introduced-eletronic-case-management-system/> (accessed 23-08-2021).

162 *Ibid.*

163 *Ibid.*

164 See for instance Rules of the High Court (Commercial Division) (Amendment) Rules, 2022 (No. 2) Statutory Instrument 79 of 2022.

165 Lokur “COVID-19, Technology and Access to Justice” <https://www.unodc.org/dohadeclaration/en/news/2020/04/cpvid-19-technology-and-access-to-justice.html> (accessed 03-09-2021).

166 The IECMS in its current state does not include the registrar of companies. See Anon “Zimbabwe and Synergy Announce Partnership to Accelerate the Digital Transformation of the Judiciary” <https://www.synisys.com/zimbabwe-and-synergy--announce-partnership-to-accelerate-digital-transformation-of-the-judiciary/> (accessed 02-08-21).

167 It is noteworthy that India has been hearing certain cases through video conference. See Lokur “COVID-19, Technology and Access to Justice” <https://www.unodc.org/dohadeclaration/en/news/2020/04/cpvid-19-technology-and-access-to-justice.html> (accessed 03-09-2021).

168 See current definition of essential services as provided for in s 2 of Statutory Instrument 200 of 2020.

level IV lockdown.¹⁶⁹ The Registrar of Companies should thus be included in the definition of essential services. It is also recommended that guidelines be provided regulating the operations of the Registrar of Companies and the Master of the High Court during level IV lockdown. These guidelines will ensure that there is certainty and consistency in complying with corporate rescue rules and containment measures.

It is also submitted that section 122 of the Insolvency Act which deals with voluntary corporate rescue proceedings be amended so that board of companies only deals with a single regulator. Currently, parties to corporate rescue proceedings are required to file their papers with both the Master of the High Court and the Registrar of Companies.¹⁷⁰ This makes compliance difficult especially during level IV lockdown where both these departments operate under restricted conditions.¹⁷¹ The authors are of the view that the Registrar of Companies is better placed to deal with voluntary corporate rescue proceedings in that it takes a more administrative approach compared to the Master of the High Court.¹⁷² This amendment could enable the Registrar of Companies to deal with voluntary corporate rescue proceedings as a single regulator.¹⁷³ Lastly, there is a need to establish a separate body that regulates the appointment, continued training, and monitoring of corporate rescue practitioners that are competent to prosecute corporate rescue in a dynamic legal and economic environment.¹⁷⁴

5 CONCLUDING REMARKS

Corporate rescue is a progressive insolvency mechanism whose superiority lies in its attempt to salvage the business of a company rather than liquidating it.¹⁷⁵ The continued existence of a company rather than its liquidation does not only protects the interests of creditors, but it also protects the interests of shareholders, employees, and the community among others.¹⁷⁶ The COVID-19 pandemic and resultant containment measures have placed unprecedented pressure on companies.¹⁷⁷ Accordingly, corporate rescue is a beacon of hope for financially distressed companies affected directly or indirectly by COVID-19 and its containment measures in Zimbabwe.¹⁷⁸ Corporate rescue is a means to safeguard business continuity and offer relief to financially distressed companies by affording them an opportunity to restructure in such a way that they are in a better position to navigate the COVID-19 challenges.¹⁷⁹ This will enable companies to circumvent the challenges that are caused by COVID-19 regulations

¹⁶⁹ See part 3 above.

¹⁷⁰ See s 122(2)(b)(i) of the Insolvency Act.

¹⁷¹ See part 3 above.

¹⁷² Besides corporate rescue matters, the Master of the High Court also deals with numerous cases including administration of deceased estates. See s 3 of the Administration of Estates Act [Chapter 6:01]. Furthermore, the Master of the High Court takes both regulatory and judicial functions in insolvency cases while in other countries these roles are undertaken by separate agencies. See also Fitzpatrick *et al. Enhancing Zimbabwe's Regime for Resolving Corporate Financial Distress: Current Challenges and Possible Solutions* (2018) Zimbabwe Economic Policy and Research Unit 17 and 33.

¹⁷³ In South Africa the CIPC deals with voluntary business rescue proceedings as a single regulator. See s 129 of the Companies Act 71 of 2008.

¹⁷⁴ See Veldhuizen 2015 *BTCLQ* 24; Bradstreet 2011 *SALJ* 206; and Papaya 2014 *De Rebus* 29.

¹⁷⁵ See Wood *A Critical Analysis of its Fundamentals and Existence* (PhD-thesis, University of Leeds, 2013) 82.

¹⁷⁶ Loubser "Tilting at Windmills: The Quest for an Effective Corporate Rescue Procedure in South Africa" (2013) 25 *SA Merc LJ* 437.

¹⁷⁷ Chirisa *et al.* 2. See also Chamunogwa *The Impact of COVID 19 on Social Economic Rights in Zimbabwe* (2021) Zimbabwe Peace Project 12.

¹⁷⁸ Brown and Haynes "Can Business Rescue Minimise the Effects of COVID-19 on Your Business?" (18 May 2020) <https://www.werkmens.com/legal-updates-and-opinions/can-business-rescue-minimise-the-effects-of-covid-19-on-your-business/> (accessed 02-08-2021).

¹⁷⁹ See parts 3 and 4 above.

in Zimbabwe.¹⁸⁰ The government should relax level IV regulations to ensure that corporate rescue proceedings are conducted without undue delay.¹⁸¹ Furthermore, IECMS and related innovative technology must be effectively employed to ensure that financially distressed companies are enabled to utilise corporate rescue in Zimbabwe.¹⁸² It is important to note that the recommendations made by the authors in this article are not only relevant during the COVID-19 era but can also be very useful beyond the pandemic.

180 *Ibid.*

181 See part 4 above.

182 See part 4 above.