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REFORMING THE INSOLVENCY SYSTEM IN SOUTH AFRICA

AN INTERPRETIVE SUMMARY

May 2011

This publication was produced for review by the United States Agency for International Development. It was prepared by Gerald E. Meyerman, Policy Advisor and Gordon W. Johnson, a consultant for Chemonics International Inc.

FINANCIAL SECTOR PROGRAM

REFORMING THE INSOLVENCY SYSTEM IN SOUTH AFRICA
AN INTERPRETIVE SUMMARY

Contract No.674-M-00-08-00043-00

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ACRONYMS

ACCA	Association of Chartered Certified Accountants
ADR	Administrative Dispute Resolution
AIPSA	Association of Insolvency Practitioners in South Africa
BRICS	Brazil, Russia, India, People's Republic of China, South Africa
BRT	Business Rescue Process
CA	Chartered Accountant
CCA	Close Corporations Act
CCIL	Committee on Consumer Insolvency Law
CE	Chief Executive
CEO	Chief Executive Officer
CIPC	Companies and Intellectual Property Commission
DC	Debt Counselor
DoJ	Department of Justice
DOJCD	Department of Justice and Constitutional Development
dti	Department of Trade and Industry
FNB	First National Bank
FSB	Financial Sector Board
FSP	Financial Sector Program
GoSA	Government of South Africa
IA	Insolvency Act
INSOL	International Federation of Insolvency Practitioners
IP	Insolvency Practitioner
MD	Managing Director
NCA	National Credit Act
NCR	National Credit Regulator
NDRC	National Debt Review Committee
NINA	No Income or No Assets
RIA	Regulatory Impact Assessment
SACCL	Standing Advisory Committee on Company Law
SAICA	South African Institute of Chartered Accountants
SALRC	South African Law Reform Commission
SME	Small and Medium Enterprise
TMA	Turnaround Management Association – South Africa
UKZN	University of KwaZulu-Natal
UNCITRAL	United Nations Commission on International trade Law
UNISA	University of South Africa
USAID	United States Agency for International Development
VAT	Value Added Tax

SECTION 1: BACKGROUND

The USAID's Financial Sector Program (FSP) supports the accomplishment of the U.S. Government's Economic Growth Objective for South Africa. As one of USAID's main vehicles to promote vibrant growth of historically disadvantaged small and medium enterprises (SMEs) and reduce unemployment and poverty, FSP seeks to expand access to financial services and lower financing costs for small and medium enterprises[1] (SMEs) through promoting improved SME credit assessment methodologies and financial products, increasing the financial literacy of SMEs to become more bankable, improving the quality of financial business support services, and reforming the legal and regulatory framework affecting the financial sector and business environment thereby improving the commercial viability of lending to historically disadvantaged SMEs in South Africa with the goal of expanding SME access to markets and a range of high quality and affordable financial services.

With the coming into force of the new Companies Act & Regulations, and with a review of the National Credit Act on the horizon, it seemed timely to renew the dialogue on unified insolvency reforms. To that end, FSP conducted a review of insolvency systems in South Africa, meeting with key public and private sector stakeholders, to take stock of current experience with informal restructuring and formal insolvency procedures in South Africa. The FSP team also met with stakeholders to review the effectiveness of the National Credit Act debt adjustment program and its impact on consumer insolvency procedures. Finally, the team met with a number of academics and professional associations in the field to evaluate the need for stronger regulation and identify new selection and licensing criteria for insolvency professionals, including debt counselors, insolvency practitioners and business rescue professionals.

In connection with this exercise, FSP and the University of Pretoria Law Faculty sponsored and convened a Roundtable at the University of Pretoria on December 6, 2010, with leading experts to discuss and take feedback on FSP's insolvency review findings and conclusions, and to identify important policy objectives for insolvency reform. The Roundtable was intended to provide a forum for more in-depth discussion of South Africa specific experience on all aspects of insolvency law and practice and to convert the "global best practice" vision of the FSP Report into a truly South African policy overview.

Discussion focused on three key areas: 1) The National Credit Act and Consumer Insolvency; 2) Business Rescue Mechanisms; and 3) Strengthening of the Regulatory Framework. The program allocated time for participants to break into separate working groups to discuss and identify key structural reforms needed in each of the above areas. Presentations and panel discussions were enriched by active intervention of all participants.

To promote further dialogue on this subject, FSP has prepared this Interpretive Summary, to concisely and accurately convey the key findings, conclusions and policy recommendations of the report, and the spirit of the discussions that took place at the Roundtable, around which there was considerable consensus among the participants.

[1] For the purpose of this program, an SME is defined broadly as a business engaged in activities generating annual turnover between R200,000 and R25,000,000. This definition was based on the Financial Sector Charter definition proposed and agreed to by the Banking Association and its member.

SECTION 2: INTRODUCTION –WHY INSOLVENCY SYSTEMS MATTER

South Africa struggles to overcome unemployment and reduce the high rate of poverty. Too many citizens are simply left out of the labor force. Many dynamic young entrepreneurs launch new businesses in order to create opportunities for themselves and the people they employ in such new SMEs. This is a critical step in overcoming unemployment. Recent studies show that small businesses have moved from employing 18% of the South African employable population in 1998 to more than 60% in 2011. This supports the notion that entrepreneurs and SMEs are vital to the future of SA's economy. Small businesses in other BRICS emerging market countries such as China and India constituted 99% and 95% of employment respectively.[2] The numbers are clear, successful entrepreneurs and the private sector they constitute, are essential to economic growth, poverty reduction and employment creation. Yet, these numbers reflect only the impact of those who succeed.

Starting a new business takes enthusiasm, dedication, hard work, long hours and … the ability to face the risk of failure. It is estimated that between 70 - 80% of all new SMEs fail within five years.[3] The causes of success or failure are myriad, many beyond the control of the "failed" entrepreneur. Yet, existing credit and insolvency laws in South Africa will frequently result in the "black listing" of such entrepreneurs. A valuable asset for growth and employment creation is thus sidelined – practically permanently – for trying and failing. Many countries, like South Africa, started from this point where insolvency was punished, sometimes by death, most often by debtors' prison but always by stigma and "black listing".

Over the last century severe punishment was abolished in most countries and, most countries, including the United States and Britain, modified their policies to provide for the "rehabilitation" of debtors provided that there was no fraud involved in the insolvency. Over the last three decades many countries have also developed programs for the restructuring of personal and corporate debt.

South Africa has been a leader in the restructuring of personal, consumer debt by the provisions of the National Credit Act and has recently embraced "business rescue" as Chapter 6 of the new Companies Act. Perhaps surprisingly, South Africa has not

Creditors Rights and Entrepreneurial Risk Taking

Traditional insolvency laws, including those in South Africa, were almost entirely designed to be "creditor friendly". A new balance between creditors and debtor rights must be struck. Entrepreneur friendly insolvency law can encourage entrepreneurial development at the societal level. If entrepreneurs "fail" and are excessively "punished" for such failure, they may let inherently high-risk but potentially high-return opportunities pass. There is ample empirical evidence that entrepreneur-friendly insolvency law, encourage more investment and more active and vibrant entrepreneurial development.

How can an entrepreneur-friendly insolvencylaw promote entrepreneurship?

Five aspects are particularly critical:

- availability of a consumer and business rescue options
- opportunity to have a temporary stay of assets
- opportunity for managers to stay on during rescue
- speed and recovery under insolvency procedures, and
- opportunity for a "fresh start" for consumers, firms and entrepreneurs should all fail

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[2]Bobby Malabie, CE of ABSA Small Business at launch of "Open Doors" initiatives. March 22, 2011.

[3]Business South Africa - Business solutions for the South African Entrepreneur. Starting a small business in South Africahttp://www.sabusinesswarrior.com/article3.html; also GroFin Founder and MD Mr. Jurie Willemse recently researched the failure rate of SMEs reporting that 71% of all SMEs are out of business by year 5, which reiterates the high failure rate of SMEs.

as yet addressed the rehabilitation of debtors and has not as yet taken those steps designed to rehabilitate debtors, be they consumers, firms or entrepreneurs.

Notwithstanding the progress made, some fundamental issues remain. Insolvency policy and law should NOT be seen as a "funeral policy" for failed debtors and firms. A modern, integrated insolvency regime is an integral part of a sound "business environment" designed to stimulate entrepreneurship and investment.[4] As pointed out above, such a business environment is absolutely essential for increasing economic growth, creating employment and reducing poverty in the private sector. The following Chapters will provide a brief oversight of the issues and what, in the opinion of a broad based group of South African experts, presents the best "way forward" in this critical policy area.

A study of stakeholder experience with insolvency systems in South Africa for businesses, entrepreneurs and individuals was conducted by USAID/Financial Sector Program in 2010.[5] The findings and conclusions of the report were discussed at a Roundtable where a number of key policy recommendations were identified by participants and other stakeholders. This Interpretive Summary is an attempt to more concisely and accurately reflect the report's findings and conclusions which resulted in a number of primary policy recommendations.

This Interpretive Summary addresses key points in the following areas:

1) The current landscape for insolvency and its impact on access to credit;
2) Effectiveness of winding-up a business under the Companies and Close Corporations Act or liquidating the business under the Insolvency Act;
3) The experience and effectiveness of business rescue mechanisms, including informal workouts, compromises, judicial management and the new business rescue procedures; Debt counseling and adjustment under the National Credit Act and its balance with consumer insolvency;
4) The regulatory framework for insolvency practitioners, rescue practitioners and debt counselors.

We end by summarizing a strategic reform agenda and key policy recommendations in the areas identified.

South Africa needs a modern, harmonized and integrated insolvency system. It is hoped that this brief publication provides an outline of best-practice policies and objectives.

[4] A bibliography for additional reading is attached as Annex I.

[5] *Insolvency Systems in South Africa, Strengthening the Regulatory Framework*, at www.fsp.org.za/blog.

SECTION 3: THE STARTING POINT FOR POLICY DISCUSSION

Effective insolvency and creditor rights systems support the following policy objectives in South Africa:

Promote financial sector stability and a sound investment environment. Insolvency and enforcement systems are vital to (i) maintain proper checks and balances on business behavior, (ii) reinforce accountability in contractual relationships, (iii) establish a reliable framework to manage risk, and (iv) provide mechanisms to rescue viable businesses and provide for swift and fair disposition in matters of insolvency.

Expand access to credit. Proper insolvency and enforcement systems promote wider access to credit at reasonable cost, which fuels economic growth, and promote responsible consumer credit-granting and borrowing behavior aimed at promoting a thriving consumer credit industry, while establishing an appropriate balance between meeting basic consumer needs and satisfying creditor obligations.

Enhance business rescue and job preservation prospects. Effective insolvency laws enable viable enterprises to be rehabilitated, restore solvency and preserve jobs where possible.

Strengthen practitioner skills and raise performance standards. Consistent with transformation goals to equip practitioners with the skills needed to maximize employment opportunities, proper regulation should aim to develop qualified practitioners held to appropriate standards of accountability, fairness, impartiality and transparency.

Timing for this policy initiative was opportune. The new Companies Act & Regulations modernize and include significant advances in corporate law, including, among others, a new chapter to promote the rescue of financially troubled businesses. The new business rescue process was introduced as part of broader dialogue on insolvency reforms over several decades and is designed to be more flexible and modern in approach, replacing the more restrictive and little used Judicial Management process. The new business rescue process will be administered by business rescue professionals who meet newly articulated criteria to be certified to handle business rescue cases.

Improved systems promote financial sector stability and a sound business environment, enhance access to credit, preserve businesses and jobs, and impose stronger discipline over corporate activity and credit behavior. The addition of a new category of business rescue professionals also offers an opportunity to examine the overall regulatory framework for insolvency and restructuring professionals in South Africa, which to date has been almost entirely unregulated and does not adequately address transformation of this professional area.

SECTION 4: CURRENT LANDSCAPE FOR INSOLVENCY IN SOUTH AFRICA

An Effective, Reliable Structure

Effective debtor-creditor regimes, the backbone of sound credit markets, establish the rules that set market expectations and risks. In today's global environment, with greater competition and commercial risk, investors are more keenly aware of the problems of recovery and more selective about where they invest or lend. They often favor markets with less risk and more reliable structures to support recovery.

Effective legal systems enhance credit access and protection, essential ingredients of growth in all markets, and enable stakeholders to act swiftly to mitigate losses when a debtor defaults on obligations. Such systems are thus pivotal in maintaining confidence in daily commercial transactions. They are also vital for prompt responses to deepening insolvency, economic decline or stagnation, or systemic financial distress.[6]

Role and Function of Commercial Insolvency Systems

Effective insolvency and creditor rights systems are vital to the stability of a country's financial system and form an important part of the framework that sustains a thriving investment climate. These systems are the foundation for certainty in commercial relationships, assuring access to affordable credit, preserving jobs for viable businesses and facilitating efficient asset transfers where necessary to more efficient market players. Proper systems ensure that market players and workers maximize their potential economic and business opportunities for employment.

Modern insolvency regimes offer flexible options to rehabilitate viable businesses and efficient mechanisms to liquidate the unviable. An insolvency law balances competing policies concerning how to allocate (or reallocate) the risk of loss among the different stakeholders of a company when a business becomes insolvent.

In general, a more efficient and less costly liquidation process will return higher dividends to creditors, thereby minimizing their losses. A debtor's inability to fully discharge its liabilities as they become due and ensuing insolvency often leads creditors on a race to recover against the company's assets as quickly as possible, to ensure a higher recovery. Slower to act creditors often go unpaid. Insolvency laws discourage this behavior and preserve fairness among creditors by prescribing equal treatment among creditors holding similar legal rights vis-à-vis the debtor and its assets. A liquidation of the debtor's assets and a distribution of the proceeds in bankruptcy results in equal, even if only partial, payment among similar creditors.

South Africa has a reasonably robust banking sector, although a majority of assets are concentrated in a handful of banks. Inefficiencies in the country's commercial law systems, however, pose ongoing risks for market participants and restrict access to credit for some participants while increasing the cost for others. This is especially apparent in the area of insolvency, where the general consensus among most stakeholders is that procedures are largely impractical – costly for liquidations and ineffective for business rescues. Reforms have been the subject of debate for at least two decades, but little progress has been made and the process has become even more fragmented with new procedures

[6] Johnson, Gordon W., 2007. Creating Effective Commercial Law Frameworks (Ch. 7).In Institutional Foundations for Sound Finance.

governing debt adjustment under the National Credit Act and a new business rescue procedure to come into effect with the new Companies Act.

Insolvency laws have evolved in a piecemeal fashion in South Africa, where there are at least six laws governing procedures for company exit, business rescue and insolvency.[7] The following laws govern company exit, rescue and insolvency procedures:

- **Companies Act 61 of 1973**, governing winding-up procedures for companies, unless insolvent (repealed in substantial part by Companies Act 71 of 2008, excepting provisions for winding-up procedures).
- **Companies Act 71 of 2008**, effective as of April 2011, repealing the former Companies Act with some exceptions and governing compromises (schemes of arrangement) and a new business rescue process (Ch 6).
- **Close Corporations Act 69 of 1984**, governing liquidation of close corporations, with the administrative process being defined, at least in part, by reference to the Companies Act.
- **Insolvency Act 24 of 1936**, governing procedures for insolvent companies, consumers, partnerships and other juristic entities.
- **Magistrates' Court Act 32 of 1944**, governing administration orders.
- **National Credit Act of 2005 (NCA)**, regulating debt adjustment for individuals (consumers) as to credits governed by the NCA.

The multiplicity of laws and procedures adds to regulatory complexity and prevents flexible seamless treatment of an insolvent. Adding to the confusion, multiple courts exercise independent (in some cases concurrent) jurisdiction over matters. Moving from one court to another creates unnecessary delays in the overall administration process, which is considered by some to be already too slow.

Company winding-up procedures have changed little over the years and remain fragmented. Principal criticisms of the liquidation process include procedural delays, high liquidation costs and low recoveries for general unsecured creditors. There are also complaints of high turnovers and a lack of experience among Masters of the High Court. A unified insolvency bill, as envisioned, could simplify and improve overall efficiency of insolvency procedures.

Business recovery mechanisms have fared even worse. While most corporate defaults aimed at rescue are reportedly handled on an informal basis, the system is hampered by having no centrally supported guidelines to promote informal restructurings or a rescue culture. On the formal side, compromises (schemes of arrangement) are not widely used due to the cumbersome nature of the procedure, high creditor approval thresholds, and other limitations in the statute, some of which have been addressed in the new Companies Act.

The judicial management procedure is even more impractical as a business rescue mechanism, numbering on average only about two cases annually. It has been repealed by the new Companies Act and replaced by a new business rescue procedure, which contains a number of noteworthy features consistent with effective modern business rescue procedures, such as: a moratorium against enforcement actions upon commencement, with relief from the moratorium by consent or for cause shown; a priority for post-commencement financing; greater creditor involvement and a more flexible plan process; and improved protections for a

[7] In addition, there are specific laws governing the insolvency of banks and insurance, but which have been considered for possible inclusion in a unified insolvency law.

secured creditor's collateral. Other provisions have been criticized as potentially detrimental to the process and will need to be examined by the Courts and interpreted to enhance functionality. Key to the successful implementation of the new business rescue process is ensuring that business rescue practitioners have the necessary skills and qualifications to undertake the business rescue.

The National Credit Act of 2005 was a sweeping piece of legislation creating a comprehensive framework for credit reporting activities, and containing measures to prevent reckless credit granting and provide debt relief for over-indebted consumers. Touted as a revolutionary advance when introduced in 2007, there is a growing backlog of debt relief applications, and results in renegotiated debt have been dismal with approximately 45% of consumers failing to perform under their restructured debt repayment plans. Debt renegotiation by debt counselors of debt incurred under the NCA regulated credit agreements has underscored some troubling trends, including intentional abuses, inadequate training and knowledge by debt counselors, and inconsistent treatment of issues. Recent findings by the National Credit Regulator's Task Force indicate, among other things, that stronger regulation of debt-counselors is needed to ensure the integrity of the process. Overlaps in issues of over-indebtedness and personal insolvency require a coordinated approach to better integrate and harmonize policies under both systems.

Insolvency also suffers from lax regulation, wide variances were found in the qualifications among insolvency practitioners, judicial managers, liquidators and debt counselors. While many liquidators are lawyers or accountants are held accountable to the disciplinary control of their professional bodies, most have no professional qualifications. Similarly, there are few prescribed qualifications for judicial managers and debt counselors apart from having the necessary skills to perform their duties. These issues are addressed in more detail in section 6.

One significant shortcoming in the insolvency area is the dual system of appointments in insolvency cases designed to ensure equal participation by previously disadvantaged practitioners. Rather than empowering newcomers, the system has been marked by inefficiencies and lack of training. It may provide short term income but little professional future for the few new practitioners while imposing high costs and inefficiencies on creditors. Strengthening the regulatory framework and adopting standardized training, licensing, monitoring and disciplinary rules will be essential to having an effectively functioning insolvency system going forward.

South Africa's Insolvency Framework

	Rescue	**Liquidation**
Business	• Informal Workouts • Compromises (CA, CCA) • Business Rescue (CA, Ch 6)	• Voluntary Winding-up (CA73, CCA) • Involuntary Winding-up (CA73, CCA, IA) • Insolvency, Liquidation (IA)
Individual	• Informal Agreements & Voluntary Compositions • Debt Adjustments (NCA) • Administration Orders (MA)	• Sequestration (IA)

SECTION 5: COMPANY EXIT MECHANISMS: WINDING-UP AND LIQUIDATION

The Companies Act establishes procedures to wind-up companies on a voluntary or involuntary basis, while the Insolvency Act establishes procedures for liquidation. These procedures also extend to close corporations under the Close Corporations Act. None of these acts apply to the insolvency of state-owned corporations, which frequently involve unique considerations.

Structurally, the Companies Act governs company activities where the company is solvent, while the Insolvency Act governs procedures involving liquidations of insolvent entities. The two procedures overlap where a company or close corporation finds itself in a state of financial distress but is not clearly insolvent. In such instances, the Companies Act offers mechanisms for returning the company to health by way of a compromise with creditors or through a judicial management. Where the company is clearly insolvent or unviable, however, it may be placed into liquidation procedures governed by the Insolvency Act. Once a company's estate is wound-up, the Master appoints a liquidator to realize and distribute the estate. Liquidators may be guided by creditors in how to realize the estate but not with respect to distributions, which are governed by strict priorities.

Voluntary and involuntary winding-up procedures provide for voluntary winding-up by resolution of the company, one or more of its creditors, or by its members upon 75% membership vote in favor of winding-up. The process becomes effective immediately upon registration of the resolution with the Company Registrar's office, at which point a moratorium is imposed on executions against the estate. Voluntary procedures for winding-up a company are supervised by the Company Registrar, while company insolvency cases are supervised by the High Court.

In cases where a company is undergoing rehabilitation, a judicial manager can petition the court to convert the case to a winding-up proceeding, which the court may or may not grant. Conversely, upon cause, the court may set aside a winding-up order and convert a case to a judicial management case.[8]Creditors also can apply for an involuntary winding-up order where the company is unable to pay its debts as they fall due.

Rules governing compulsory liquidations under the Insolvency Act apply to the winding-up process mutatis mutandis. While having similar liquidation procedures under two laws seems slightly confusing to an outsider, local practitioners have become accustomed to the process, which is not to say that it is the most efficient. In effect, there are two laws governing a single process with some of the process rules defined in the Insolvency Act and other rules defined in the Companies Act. A unified insolvency law likely would merge provisions on insolvent liquidation, while maintaining voluntary dissolution procedures for solvent companies wishing to go out of business.

The other option available to companies in liquidation or faced with involuntary winding-up is to apply for a compromise under section 311 of the Companies Act (discussed below). Where criteria for a compromise are satisfied, the court may set aside a winding-up or liquidation order and approve the compromise.

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[8]The judicial management procedure was repealed when the new Companies Act came into effect.

Effect of the New Companies Act of 2008

The new Companies Act will not materially alter the winding-up procedures. Former sections of the 1973 Act applicable to winding-up are replaced by new sections 79-81 of the 2008 Act. To avoid conflict between the 2008 Act and ongoing efforts to develop a unified insolvency law, the new Act provides for transitional arrangements that retain the current regime for winding-up of "insolvent" companies until such time as a new uniform insolvency law is adopted.[9]

The new Companies Act of 2008 also provides that a court may order the winding up of a solvent company upon request pursuant to a resolution of the company or by application of a "business rescue practitioner" in a business rescue proceeding. The company, one or more directors, or one or more shareholders may also apply to the court for winding-up where the directors are deadlocked in management of the company or shareholders are deadlocked in their voting rights.

Judicial Liquidations under the Insolvency Act

Concerns have been raised by stakeholders that the system is not conducive to maximizing returns for creditors and may be subject to a degree of mismanagement and even abuse by insolvency practitioners.

The number of liquidation cases has nearly doubled for companies from 2006-2010, while during the same period individual insolvencies have risen nearly 500%. The difficulty of effectively using restructuring mechanisms in practice gives creditors few incentives to attempt to save a business from liquidation. Thus, the overwhelming majority of judicial proceedings are liquidations. As indicated above, provisions in the Companies Act and the Insolvency Act govern compulsory liquidations, while liquidations of close corporations are governed by the Close Corporations Act 69 of 1984 and administrative procedures contained in the Companies Act, with jurisdiction vested in the Magistrate's Court or the High Court.

Principal criticisms of the liquidation procedures include process delays, high liquidation costs and lower recoveries for creditors.[10]

While the law contains many features that are generally compliant with international standards, cases are reportedly mismanaged due to insufficient qualification of liquidators. A number of features discourage creditor participation in the system, including:

- Inability of creditors to exercise control over liquidators or actively influence their decision-making, despite requirement to be consulted in realizing the estate;
- The fee structure for liquidations is reported to be unfair;
- Participating in liquidations exposes creditors to a risk of being compelled to contribute additional monies if the debtor has insufficient assets to cover the liquidator's expenses.

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[9]Section 224 (1) of the new Companies Act 2008 indicates that Companies Act of 1973 will be repealed subject to subsection (3), which provides that repeal will not affect transitional arrangements identified in Schedule 5 thereto. Schedule 5 clarifies that the Companies Act of 1973 will continue to apply to winding-up and liquidation of companies under the Act, as if the Act had not been repealed. Notwithstanding this exception to the repeal of the Act, section 343, 344, 346 and 348-353 will no longer apply to winding up of a solvent company, except to the extent necessary to give full effect to provisions of part G of Chapter 2 of the new Companies Act 2008. Where a conflict exists, the new law controls.

[10]Statistics on the average length of time for proceedings are not readily available in the Statistics office. The World Bank's *Doing Business 2011* report ranked South Africa's procedures for closing a business (i.e. liquidation and exit mechanisms) 74 out of 183 countries. Local practitioners apparently reported that the process takes 2 years on average, costs approximately 18% of the estate's value, and pays all creditors an average of 34% of claim value. These estimates have not changed over the last 4 years of the Doing Business rankings. By comparison in this area, South Africa ranked behind Botswana (27th), Namibia (53rd) and Mauritius (71st), and ahead of Kenya (85th) and Nigeria (99th).

- Creditors can be forced to accept VAT recoveries in lieu of a distribution on their liquidation claim; and
- The payment priority in liquidation is given to the costs of the liquidation, employee salary and wage claims, and income taxes, leaving little or nothing for unsecured creditors.

Are Masters Adequate Administrators?

High turnovers and a lack of experience among some Masters of the High Court contribute to inefficiencies in the administration of insolvency procedures

Examination and confirmation of accounts and other interventions by the Master are said to lead to delays. The Master of the High Court is typically involved in reviewing all aspects of the proceeding to ensure fairness, obviating the need for creditors to be involved.

There is a lack of confidence in a Master's exercise of discretion in appointing insolvency administrators or liquidators, often appointing practitioners lacking in adequate skills. A number of stakeholders report abuses by practitioners appointed by Masters in liquidation proceedings. The Master of the High Court is also responsible for monitoring the performance of liquidators, who account to the Master regarding the administrative process in every estate. The process relies on liquidators to provide periodic reporting regarding their performance (e.g., liquidation and distribution of accounts) and complaints by creditors or parties in interest, which is unrealistic.

Transformation is essential and to be encouraged in the field of insolvency. Unfortunately, the current system stifles meaningful progress. Complaints were heard that the appointment by Masters of inexperienced liquidators had the effect of serving as a "tax" of up to 50 percent on qualified liquidators as a result of the mandatory fee sharing arrangements. In practice, because the lead liquidator provides the requisite performance bonding and professional liability insurance, he is unwilling to increase performance exposure by having inexperienced persons "participate" in the liquidation. Other stakeholders complain of the opposite impact – receiving fees without being allowed to perform work assures that the less experienced liquidator has little chance to learn and gain the requisite experience and contacts to establish their own independent and viable liquidation practice.

Practitioners could benefit from certification/licensing requirements that establish entry level minimum technical training standards, as well as practicum opportunities to build experience toward becoming a fully qualified, bonded and insured practitioner.

In view of the important role that training plays in assuring a qualified, diverse and viable profession going forward, qualification programs should be integrated for insolvency, rescue and debt counseling practitioners, allowing for progressive responsibility based on knowledge, skills and experience.

Reform Proposals: A Unified Insolvency Act

A unified insolvency bill has been the subject of debate for over two decades. Despite some 20 amendments to Insolvency Act 24 of 1936, since it replaced Insolvency Act 32 of 1916, the law as a whole remains in need of a comprehensive review and reform to unify the numerous disparate insolvency procedures contained under the Insolvency Act, Companies Act, and Close Corporations Act.

In 2003, the Cabinet approved the Insolvency and Business Recovery Bill, designed to unify insolvency procedures, but held the bill back pending efforts to address business rescue proceedings in the new Companies Act.

The Bill was developed based on reports by the South African Law Reform Commission (SALRC) and the Standing Advisory Committee on Company Law (SACCL). Among other things, the Bill is designed to unify liquidation and rescue procedures for individuals, partnerships and trusts, and contains provisions for liquidation of companies and close corporations. With the Companies Act of 2008 now in effect, the unified insolvency bill should be conformed, updated and re-tabled for consideration.

Policy Recommendations: Winding-up and Insolvency Proceedings

1. Efforts should be renewed toward development of a unified insolvency law, including updating prior efforts to reflect the impact of the new Companies Act and taking into consideration policy objectives that overlap between the debt adjustment scheme under the NCA and those for liquidation.
2. A new unified insolvency law should be developed and adopted that is consistent with international standards of best practice, covering insolvent liquidations and rescues for legal entities and individuals. To the extent possible, such a law should simplify the number of proceedings available. Consideration should be given to accelerated liquidation procedures for small businesses and consumers.

Proposed insolvency reforms aim to promote a more effective, speedy and fair process, while striking a better balance among the various stakeholders in the insolvency process. In particular, reforms aim to improve efficiency in an effort to maximize distributions to creditors, and promote a better balance among stakeholders in the process – creditors, workers and the government.

Insolvency Law Proposed Reforms

- Liquidators must be members of a professional body recognized by the Minister having oversight and jurisdiction for the area.
- Liquidators may preside at meetings of creditors unless questioning is to take place at the meeting or an interested party requests the Master of the High Court or a Magistrate to preside.
- Resolutions can be adopted at the first meeting, to be convened by the initial liquidator as soon as possible following appointment, and not by the Master of the High Court after the final sequestration order.
- Creditors under financial lease agreements are treated as secured creditors and must prove their claims.
- Priority claims - SALRC recommended to abolish the priority in favor of governmental (e.g. taxes) claims, but this was not accepted by Government.
- Avoidable pre-bankruptcy transfers – extend the reach back period and presumption of insolvency for insiders to three years, shifting the burden to insiders to prove the contrary.
- Compositions – provide for a binding composition between an individual debtor and a majority of creditors without need of an application declaring a debtor's estate insolvent.

SECTION 6: BUSINESS RESCUE MECHANISMS

A restructuring of the debtor's operations or balance sheet is almost always preferable to liquidation, if the business is viable, because the value of the business as a going concern will generally result in a higher overall recovery by creditors. Business rescues also preserve jobs, which is better for labor and for the economy.

Over the past two decades, the trend in modernizing insolvency laws has been to adopt procedures that best promote the prospects for rehabilitating the debtor and rearranging its business affairs.

Business recovery mechanisms have not worked well in South Africa. There are three primary approaches to rescuing a business: informal workouts; compromises (schemes of arrangement); and judicial management. Each of these, for various reasons, encounters certain obstacles that make it difficult to achieve an effective rehabilitation of the business, which is why a new business rescue procedure has been introduced under the new Companies Act of 2008. The new "business rescue" procedure contains many features of a modern business recovery process, although as academics and practitioners point out, there is still room for improvement.

Informal Workouts

Approximately 75% of businesses encountering financial distress rely on informal workouts or a turnaround of the business to resolve their problems, according to stakeholders. There are drawbacks to informal restructuring that may make them impractical or unfeasible. For example, voluntary restructurings are purely contractual in nature, requiring affected creditors to agree or consent to any modifications in their legal rights. Creditors not agreeing to the proposal are not bound, since there is no statutory rule to bind dissenting or minority creditors to the decision of the majority (as is the case in a formal rescue proceeding). In addition, contractual rights of creditors under the terms of their agreements or the law may require the debtor to give notice of its intent or efforts to restructure debt to a much larger number of creditors than the debtor considers desirable, as publicity of financial distress could adversely affect the business.

Other formalities of a formal proceeding likewise are unavailable in an informal workout, such as the moratorium on creditor enforcement actions. To prevent creditors from pursuing enforcement actions, a debtor typically will enter into a standstill agreement with creditors by which creditors are contractually bound not to pursue enforcement, so long as the debtor complies with the terms of the standstill agreement. Similarly, informal workouts are not protected by a court order approving the transaction and may be vulnerable to challenge in a subsequent insolvency proceeding under the Insolvency Act on grounds that consideration paid or aspects of the transaction unfairly benefitted certain creditors. Strict tax rules restrict or discourage debt to equity exchanges. Labor rights are more difficult to affect informally where the rescue requires deeper operational restructuring. Finally, while informal workouts could be achieved by preparing a pre-negotiated compromise or rescue plan, compromises pose an additional layer of challenges and create a risk of loss of control over the transaction, potentially exposing the debtor to liquidation.

The GoSA has not adopted or endorsed a set of regulations supporting an informal workout process, like the "London Approach"[12] or INSOL Multi-Bank Workout Principles.[13] Adopting procedures that facilitate workouts is to be encouraged, whether through informal codes or formal regulations. In developing appropriate guidelines to support an informal restructuring process, consideration should be given to issues potentially impeding restructuring, and which might be the source of a regulatory override or waiver.

> *"A country's financial sector (possibly with the informal endorsement and assistance of the central bank, finance ministry or bankers association) should promote the development of a code of conduct on a voluntary, consensual procedure for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure, especially in markets where corporate insolvency has reached systemic levels."*[11]
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> -- World Bank

Legal Procedures Effecting Debt Restructurings

- Contract law - good faith requirements; rules governing debt modifications or transfers
- Enforcement regimes – effectiveness for recovery of secured and unsecured debt
- Formal insolvency proceedings – effectiveness and efficiency for rescue and liquidation
- Corporate governance laws - powers of the general meeting; directors' liability
- Corporate & financial disclosure requirements
- Corporate rules on suppression of pre-emption rights
- Foreign investment rules - restrictions on foreign ownership of shares or real estate
- Banking regulations - restrictions on types of assets that financial institutions may possess (e.g. real estate, shares or convertible debt); loan loss provisioning and classification of restructured debt; and capital adequate rules on asset valuations
- Securities regulation – public debt unanimity or reinforced majorities requirements; prospectus and disclosure obligations; related party control and takeover restrictions
- Tax legislation – treatment of sales, stamp and duty taxes, transfer taxes, debt exchanges, write-downs and write-offs, net-operating losses and loss carry-forwards
- Industry specific regulations applicable to a debtor's business
- Rules for mergers and acquisitions – treatment of creditor opposition to mergers
- Labor laws and restrictions on changes that impact the work force
- Pension regulations with respect to underfunded pensions or employee buyouts
- Competition law rules and exemptions
- Arbitration and mediation procedures
- Transaction risk for stakeholders and investors (e.g. director liability within the suspect period, under avoidance actions, director or lender liability for financing)
- New financing incentives or mechanisms available during workout negotiations; cash management options, and procedures for protecting cash collateral
- Accounting and auditing rules - treatment of non-performing loans, treatment of subordinated loans as capital, etc.
- Valuation requirements – for assets to be sold or auctioned.
- Auction rules and notice requirements

[11] See World Bank Principles *for Effective Creditor Rights and Insolvency Systems* (2005), Principle B.5.1 (and accompanying text).

[12] The London Approach was developed by the Bank of England as an unofficial set of guidelines to assist banks and their borrowers in reaching an agreement to restructure bank debt. The basic tenets of the London Approach have spawned variant models used in the context of financial crises (e.g. Indonesia, Malaysia, South Korea, Thailand, Turkey, and more recently Iceland and Latvia) or in use informally in countries.

[13] INSOL International published its *Statement of Principles for A Global Approach to Multi-Creditor Workouts*, articulating eight basic principles for multi-creditor workouts. The principles may be considered as fundamental to multi-creditor workouts and are general guidance to countries considering such a process.

Compromises (Schemes of Arrangement)

Compromises are not widely used due to the cumbersome nature of the procedure, high creditor approval thresholds, and other limitations in the statute. Section 311 of the Companies Act governs compromises, also known as schemes of arrangement, whereby a company reaches agreement with its creditors to restructure their obligations. Absent a winding-up order or liquidation, the court has no authority to order a moratorium on creditor enforcement actions during the period prior to approval of the composition.

While the procedures are generally sensible, in practice approval thresholds are so high that it is difficult to obtain the requisite numbers and value approval by creditors. The process requires a court order to call a creditors meeting and a separate order to sanction the compromise. Creditors must approve by majority holding 75% in value of the total claims. The compromise does not bind preferred and secured creditors without their consent. The process also results in revival of employment contracts that may have been terminated in a liquidation proceeding. There is limited scope for collective creditor action in the case of a failing, but potentially viable business, and it is frequently difficult to meet the 75% approval threshold.

Compromise Changes Introduced by the New Companies Act

The 2008 Companies Act introduces several changes that should make the Compromise process more effective, efficient and potentially afford greater flexibility for the parties.

- The compromise provisions are contained in Section 155 of the new Act, which now splits compromises involving shares and creditors.
- There is no longer a need for a court order to convene the creditors' meeting.
- There is no moratorium from the time of giving notice to creditors to the date of the creditors' meeting.
- Prescribed contents of the plan are almost identical to those for business rescues, and are not sufficiently flexible.
- The process still requires approval, in person or by proxy, by a majority in number representing 75% in value of the creditor class.
- Secured creditors are entitled to vote their full claim, leaving open the question of whether their secured rights can be altered by a vote of the class of unsecured creditors. If adopted, the proposal appears to bind dissenting minority creditors even without a court sanction of the proposal.
- Parties may apply to the court to sanction the proposal, which can be done on grounds that it is just and equitable, but this does not seem to be mandated.
- The sanction order is considered fully binding on parties from the date of filing.

Judicial Management

Judicial management procedures repealed with the Companies Act and will be replaced by the new business rescue process. It is worth examining the experience under the Judicial Management procedure, however, to determine what lessons can be learned to ensure that the new business process functions more effectively. Most of the shortcomings under the Judicial Management process have been addressed in the new business rescue procedure (discussed below).

The general consensus is that judicial management has proven ineffective as a rehabilitation mechanism over the past 75 years, and now numbers only about 1-2 proceedings annually. A company (but no other form of legal entity), or a shareholder or creditor of the company, could petition for a judicial manager to be appointed where the business could not pay its debts and a reasonable probability exists that judicial management would enable the debtor to pay all debts in full. A number of problems have been identified as impediments to achieving a successful rehabilitation of the business under the Judicial Management procedure, including the following:

- The procedure is too court-driven, providing insufficient opportunity for creditors to have meaningful input into the rehabilitation process.
- There is no requirement for a plan, nor provision for negotiation with creditors or monitoring by a creditors committee.
- The full payment requirement is mandatory even if creditors wish to write-down or exchange debt for equity, which makes the process unsuitable for a case where major financial or operational restructuring is needed.
- From appointment, the judicial manager has sole control of the business and is required to act in the best interest of creditors.

Policy Recommendations: Informal Workouts and Banking Regulations

1. Strong consideration should be given to adopting an informal set of guidelines by the Reserve Bank or the Bankers Association outlining procedures that support informal workouts and restructurings.
2. Risk management practices within financial institutions should be reviewed to ensure capacity and a proper approach for dealing with informal workouts.
3. Other rules and regulations affecting asset valuation and loan loss provisioning, tax treatment should be evaluated to ensure treatment conducive to promoting informal workouts and restructurings.

New Business Rescue Process

Chapter 6 of the new Companies Act introduces a much anticipated new, more flexible business rescue procedure for companies. The new procedure takes stock of shortcomings in other rescue mechanisms and attempts to redress those in the current procedure, which is defined as a proceeding to facilitate the rehabilitation of a company that is financially distressed. The process contains features generally consistent with international best practices for a modern business rescue procedure.

Administered under a temporary supervisor – referred to as a business rescue practitioner (BRP) – the new Business Rescue Process is easily commenced by filing a board resolution with the CIPC that replaces the Company Registrar. Affected persons may apply to the court to set aside the resolution or the appointment of the BRP. Key features of the process include:

- Upon commencement, the process is aided by a temporary moratorium to halt legal proceedings and enforcement actions against the company and its property. Stakeholders may obtain the consent of the BRP or leave of court to pursue such actions on any conditions imposed by the court.
- Setoffs are allowed.
- The company also now has the ability to obtain post-commencement financing with a statutory priority in the event of a subsequent liquidation.
- Secured creditors are protected against sales of their collateral, unless the proceeds of the sale fully discharge the creditor’s debt.
- The plan process affords greater flexibility to the parties in negotiating a restructuring or repayment plan.

The BRP’s rights are generally consistent with the duties of an insolvency practitioner. The BRP has authority to investigate voidable transactions, fraud and other reckless conduct related to the company. The BRP’s duties in connection with claims verification, resolution, allowance and satisfaction is not significantly different than existing practices and follows general international practice.

In preparing the plan, the BRP is obliged to consult with creditors, who must approve the plan by 75% of voting interests and 50% of independent creditors' voting interests – each interest being equivalent to the value of a claim to the total claims. The new formula does away with a numerical majority of creditors. Once a plan is adopted, it becomes binding on all parties and, on implementation, debts are discharged, unless otherwise provided in the plan. If rejected, the BRP must take steps to terminate the business rescue procedure. In short, the process is similar to other modern business rescue procedures.

Concerns Pertaining to the New Business Rescue Process

The new business rescue process contains some features that are unusual and could stifle the effectiveness of the rehabilitation procedure. The BRP is authorized to "suspend for the duration of the business rescue proceedings any obligation of the company" arising under agreements to which the company was a counterparty at the commencement of the proceeding and where the obligation would otherwise become due during the proceedings.[14] It is unclear whether this later result overrides the damage claim provision in section 136(3) of the new Companies Act. While the BRP alternatively may seek court approval to entirely, partially or conditionally cancel an agreement to which the company is a party on any terms that are "just and equitable.

The preference in favor of new money does not pre-empt employees or the BRP's costs. It is unclear whether the latter provision applies to any pre-commencement back wage or other employee claims, or merely to post-commencement employee claims. Employee contracts can only be amended as changes occur in the ordinary course of attrition or by agreement between the company and workers pursuant to applicable labor laws. The prospect of employee pre-emption over the new money lender makes it much less likely that lenders will be willing to lend to distressed businesses in a business rescue procedure.

Authority to pursue voidable dispositions is questionable. There is no express grant of authority to the BRP to apply for certain dispositions to be set aside, such as the judicial manager had under the Insolvency Act. Although there is a reference to voidable transactions, it is unclear to what extent the BRP may actually enforce such dispositions absent a court order.

The rights relating to secured creditors are particularly problematic. Such creditors are entitled to vote in the general creditor class based on the full amount of their claim irrespective of collateral.[15] That all creditors are placed in a single class is itself problematic. Similar claims should be classified together and treated accordingly. For example, secured creditors enjoy a higher priority than unsecured creditors by virtue of their collateral, which entitles them to a first in right priority of repayment from the proceeds of the collateral. Such rights could be undermined in placed in a common class of creditor where all creditors vote on a percentage dividend offered to all creditors. Requiring a secured creditor to accept a dividend amount lower than the value of its collateral amounts to a rewriting of the collateral agreement by virtue of a vote from creditors who are subordinate in repayment right to the secured creditor. The potential perverse effect of this approach is likely to cause secured

[14] Companies Act of 2008, S. 136(2).

[15] Ibid. S. 145(4)(a). Typically secured creditors may vote in respect of their claim in a class of similar claims, or may vote as an unsecured creditor only to the extent that the claim is unsecured.

creditors (typically the largest in amount) to vote against the plan in order to force a liquidation in which such creditors will be assured of realizing the full value of their collateral. A more likely outcome is that this treatment will be tested in the courts. Courts could well conclude that the statute is ambiguous and based on principles of equity conclude that the statute should be interpreted to mean that the right to vote related only to that portion of the secured creditor's claim that is effectively unsecured or under-secured.

Interim Licensing Rules for BRPs

Regulations accompanying the new Companies Act provide for prospective BRPs to be licensed by a designated Commission having certification, oversight and monitoring responsibilities for such professionals. Licensing is not automatic or guaranteed. A person wishing to serve as a BRP must first submit an application to the Commission, which grants the license (or a conditional license) if satisfied that the practitioner is of good character and integrity and has the requisite education and experience to perform the functions of a BRP. Persons who subsequently become disqualified from appointment may have their license revoked. A person who has been denied a license or had their license suspended or revoked may apply to the Tribunal established under the Companies Act to review the Commission's decision.

The draft regulations establish a three-tiered qualification system for BRPs based on the level of experience and complexity of cases. Novice practitioners, those having less than five years of relevant experience, may handle business rescues of private small companies. Experienced practitioners with 5-10 years of relevant experience may handle rescues of medium and small companies. And Senior Practitioners with at least 10 years relevant experience may handle any size rescue case.[16] The regulations also establish a tariff of fees for BRP categories. Regulations do not indicate what specific experience and skills should be adopted for purposes of assessing relevant education and experience, and it is expected that these will be fleshed-out in more detail following a transitional period.

Notably neither the new Companies Act nor implementing regulations indicate that a BRP must be a licensed professional from a particular profession, such as a lawyer or accountant. This is appropriate as the function of rescuing a business involves a number of inter-disciplinary skills, including knowledge of business management, accounting and financial procedures and techniques, and legal procedures, especially those unique to financially distressed businesses.

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[16] Medium and large companies also contain a category for public or state-owned companies of a particular size based on a public interest score of 750 or less, or 750 and above respectively. The public interest score is a new concept being put forward under the regulations to support new financial reporting standards.

Policy Recommendations: Business Rescue Proceedings

1. The new business rescue process should be implemented immediately with an interim procedure for licensing business rescue practitioners at appropriate levels, as indicated in the rules. Such a process will require elaborating the requisite application forms and interim licensing criteria.
2. BRP qualifications and entry requirements should be defined in as much detail as possible and "all practitioners" must demonstrate requisite knowledge and experience. Standardized qualifications are essential
3. Training programs should begin for professionals and officials who will be involved in the new business rescue process.
4. Training programs and bench books should be developed for judges and other administrative officials with oversight of business rescue cases.
5. Efforts should begin on developing training programs for BRPs to ensure they have the requisite knowledge and experience to carry out their functions in a business rescue. Such training programs can be developed and offered by independent trainers or by various associations and professional bodies to their constituents, but should be pre-qualified to ensure that they meet minimum requisite standards.
6. For practitioners not otherwise governed by a code of conduct or ethics, such a code of ethics for BRPs would be useful.
7. Adopt a simpler and faster dispute resolution process. Regulations should provide for specific reference to an accredited ADR agency in business rescue matters. As currently written, parties must resort to the courts to resolve most disputes. The Commission can accredit an agency for ADR purposes. (Is S 166 sufficient to confer authority on referral of disputed matters to an appropriate accredited forum?) Explore possibility of having Tribunal authorized to "adjudicate" disputes.
8. Need to amend S 136 suspension to make it apply to a very short period of time or repeal the provision altogether. As written, this provision constitutes a major impediment for secured creditors. Could suspend indefinitely if there are ongoing objections to the process, etc.
9. Amend act to clarify that rights of secured creditors with respect to security cannot be impaired. Allow separate classes for voting or allow creditors to waive security and vote as unsecured creditors.
10. Impose sanctions for BRPs acting unethically in accepting inappropriate cases, by disqualifying a BRP from serving in future cases. This should encompass cases involving potentially "friendly BRP".
11. Include provisions in the Companies Act or regulations allowing for pre-packaged plans.

SECTION 7: THE NATIONAL CREDIT ACT

Consumer credit legislation is usually the means by which credit grantor-credit consumer relationships are regulated. The main purposes of consumer legislation is said to be the protection of the consumer from exploitation. . . .

'What is equally, if not more important, is an actual balancing of the interests of both credit consumers and credit grantors. The reason for the emphasis on this balance is that over-protecting the consumer may result in the investor (credit grantor) withdrawing his funding from the consumer credit market, due to the fact that the general administrative expenses of making credit available no longer proves a lucrative venture due to the stringent consumer laws. Another feature of the over-protection of the consumer may be the passing on of administrative costs to the consumer. A subtle balance needs to be obtained. The risk of over-protecting the consumer could prove detrimental.[17]

Debt Counseling and Adjustments

The National Credit Act (NCA) of 2005, introduced in 2007, was a sweeping piece of legislation establishing rules on consumer lending and creating a legal framework for credit reporting activities, and establishing a database for registering credits, pledges and other types of security arising under the Act. Uniquely, the NCA introduced measures to prevent reckless credit granting, impose sanctions for reckless credit, and provide debt relief for over-indebted consumers. Notably, the NCA only applies to certain specified transactions of up to 1 million Rand with respect to agreements entered into by natural persons, or small and intermediate credits for small juristic persons. Only natural persons are entitled to seek debt relief due to over-indebtedness, a state of existing or future inability to satisfy all of one's obligations under credit agreements governed by the NCA. Other problems exist with trying to remove blacklisted consumers from the system.[18]

Since its implementation in 2007, there has been a growing backlog of debt relief applications and an estimated 45% of consumers fail to perform under their restructured debt repayment plans.

NCR statistics reveal that currently there are approximately 1,733 debt counselors registered with the NCR. At least 184,000 consumers have applied for debt counseling and relief under the NCA since its implementation, with another 7,500 applications being filed each month. Only 10% of new cases are being resolved through the courts. Payments under debt counseling arrangements have increased from R11 million in June 2008 to R192 million in June 2010. Yet, credit providers report a default rate of 48%, with the balance of contracts making payments at approximately 60% of the required levels.

NCR Debt Review Task Force Findings

In October of 2009, the NCR established a Task Team to review blockages in the debt review process where there is a growing backlog of debt relief applications. The Task Team engaged relevant stakeholders over a period of six months, including payment agencies, debt counselors, banks, retailers, micro lenders, credit provides, magistrates and industry specialists.

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[17]Desert Star Trading v. No..11 Flamboyant Edleen (98/10) [2010] ZASCA 148 (29 November 2010) (quoting Monica L. Vessio 'The Preponderance of the Reckless Consumer – The National Credit Bill 2005' (2006) 69 *THRHR* 649).

[18]In 2008, of the estimated 17 million then credit-active consumers owing approximately 1 Trillion Rand, at least 6.5 million had been blacklisted at credit bureaus. Since then the numbers are estimated to have risen.

NCR Task Force Findings

- severe capacity constraints, especially among magistrates, contributing to growing backlog of cases;
- process weaknesses;
- breakdown in role of and cooperation between players (e.g., credit providers and debt counselors); and
- abuse of process, negligence and improper exercise of authority by debt counselors and acts of willful fraud by consumers.

Concerning the respective roles of debt counselors and credit providers, the NCR Task Force found that debt counselors were not sufficiently motivated, engaged in improper practices, encouraged debt counseling for the wrong reasons, failed to cooperate with credit providers during debt negotiations, and that the overall system lacked an effective framework and regulation. To address the problems, a National Debt Review Committee (NDRC) is working to develop codes of conduct to regulate the behavior of debt counselors and a set of enhanced debt review guidelines to promote standardization. Such work should clearly be integrated and seek to harmonize with the regulation of insolvency practitioners and business rescue professionals.

Debt Adjustment Framework

The NCA provides for debt restructuring, but this does not "automatically" lead to a consumer discharge on simple, stated conditions such as after specific period of two or three years. Currently the NCA simply extends the payment period.

The purpose of the NCA is stated to be the promotion of responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers, and to discourage reckless credit granting by credit providers and contractual default by consumers. The Act aims to address and prevent over-indebtedness of consumers and provides mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations. Over-indebtedness is addressed by providing for debt review and the restructuring of credit agreement debt by extending payment terms.

The NCA limits the ability of credit providers to proceed with litigation to enforce security rights under a credit agreement against a consumer who is under debt review or subject to a debt restructuring order or agreement.

One of the NCA main objectives is to provide debt relief to over-indebted consumers by shifting the onus for over-indebtedness from the debtor to the creditor. Reckless credit granting may lead to a complete or partial setting aside or suspension of the credit agreement. Little empirical information is available on the impact of the NCA on access to credit, the cost of credit and on government priority policies, such as economic growth, employment creation and transformation. The five-year review of the NCA scheduled for 2011 will undoubtedly address these issues in detail.

Key Issues Affecting the Debt Adjustment Process

In addition to the foregoing problems, a number of key issues affecting the debt adjustment process are described below:

- Most debtor protection features of the NCA are limited to consumers and exclude juristic persons. This exclusion was included to avoid limiting access to credit for SMEs. The definition of 'juristic person' in the NCA includes "a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or the trustee itself is a juristic person, but does not include a stokvel." This definition lends itself to broad interpretation and blurs the line between a person borrowing for personal consumption and those borrowing for income producing activities.
- The NCA does not provide comprehensive relief to the over-indebted but rather limited debt postponement to some consumers who are subject to the Act. Relief will be effective only if a consumer has the ability to repay.
- Despite the NCA stated aim to assist over-indebted consumers, it perpetuates the over-indebtedness by not providing a simple debtor discharge mechanism.
- The Insolvency Act, despite appearing to be more creditor friendly, favors debtors by providing for a debt discharge, and provides specific terms for debtor "rehabilitation" permitting a fresh start for over-indebted consumers.
- The only real statutory discharge available to debtors remains the rehabilitation that follows sequestration. Consideration must be given to a more comprehensive and integrated provision for the discharge to some insolvent debtors and permit the broader rehabilitation of creditors, based on a plan that encompasses all liabilities and takes into account all assets and income.
- The NCA imposes no time limitation on payment under debt restructuring with the result that restructuring orders may run over unrealistically long periods – occasionally decades - are granted by courts. This leads to increasing numbers of consumers with "negative credit histories", undermines the ability of creditors to rely on collateral, may limit access to and increase the cost of credit for all.
- A person overburdened with debt, may wish to consider protection under the broader insolvency laws including sequestration by voluntary surrender or consider an application for compulsory sequestration. The interaction of overlapping legislation should be clarified.
- The debt relief measures in the NCA, providing for extended repayment periods may increase the over-indebtedness of many debtors rather than resolve it.
- The role and qualifications of debt counselors may need to be reviewed and harmonized and may need to be extended to encourage them to assist over-indebted consumers with all of their debts and direct them to the most appropriate insolvency mechanism for their specific situation.
- A comprehensive review of the insolvency policy should examine the impact of legislation on the interests of debtors as well as the interests of credit providers as well as the public interest considerations including the impact on economic growth, employment and transformation.

Consumer Insolvency: Administration Orders & Sequestrations

The administration order process, designed to enable an insolvent consumer to restructure his debts, is unduly restrictive of offers little genuine relief.

Administration orders are governed by section 74 of the Magistrates Courts Act of 1944. There are apparently about 100,000 applications per year, largely attributed to the prolific growth in the micro-lending industry. The process is restricted to debt relief of R50,000 maximum, excluding *in futuro* debt, and debts must be paid in full without reference to a specific timeframe. In most instances, the nominal debt is inflated by interest over time, making it difficult or impossible for consumers to repay under the agreed upon repayment plans. Moreover, no discharge is available. Frequently, no dividends are paid to creditors, who write off the debt, while the administrator continues to collect.

Administrators are unregulated and the fees charged in cases are often controversial. Another problem with the administration order procedure is that it results in an overburdening of the courts. Limitations in the administration order procedure explain in part why the NCA debt adjustment process has become the debt restructuring mechanism of choice. Because the NCA relates only to credits governed by the NCA, some debt counselors may use the debt adjustment process in combination with the administrative order process to achieve a wider, more effective outcome.

The consumer sequestration (liquidation) process is overly restrictive and offers little prospect for a debtor to obtain a discharge and a meaningful fresh start

A sequestration, South Africa's equivalent of liquidation, is governed by the Insolvency Act of 1936. The process is entirely pro-creditor. If the court, in its discretion, concludes that the process will benefit creditors, generally interpreted as a pecuniary benefit of some sort, it may open the case. Thus, the process is neither automatic nor assured. Cases in which the debtor has no income or no assets (NINA cases) are typically dismissed, because the debtor cannot demonstrate an advantage to creditors. Consequently, the debtor cannot receive a discharge. Again because of the pro-creditor orientation of the law, compulsory (involuntary) sequestrations are easier to obtain than voluntary sequestrations, as they have a lower threshold of proof. This has given rise to the practice of friendly sequestrations in which consumers will incur debts to friendly persons who will then commence the process. Once started, a debtor may try to convert to a rehabilitation, but this is not guaranteed. Another drawback of the sequestration process is that the consumer is allowed to retain only minimal assets with no assurance of getting even the basic necessities for tools and other means of subsistence, absent creditor approval.

Reform proposals have been recommended by several commissions both for the administration order and sequestration procedures

In 2002, a committee on consumer insolvency law (CCIL) made a number of recommendations to improve the administration order process, including: formation of debtors' courts; stronger regulation of administrators; introducing a repayment timeframe linked to a discharge; harmonizing of procedures; and emphasis on consumer education to prevent over-indebtedness. Other reform proposals have focused on establishing a pre-sequestration composition procedure, similar to that found in the Companies Act for companies, providing for a debt restructuring plan covering all debts, subject to approval of a 2/3 creditor majority. For sequestrations, recommendations have concentrated on the importance of identifying exempt assets, a discharge, debtor educational counseling, and provision for treating NINA cases.

Balancing Debt Counseling and Consumer Insolvency

Debt counseling and consumer insolvency procedures provide alternatives for addressing common policy concerns of consumer over-indebtedness.

While the Insolvency Act provides a means for individual sequestration and liquidation of an individual's estate for many years, debt counseling under the NCA was intended to help alleviate the burden on the courts by establishing a more efficient mediation process to address issues of consumer over-indebtedness with respect to debt under credit agreements governed by the NCA. As noted above, the original intention does not seem to have been achieved, as courts are still called upon to resolve at least 10% of all such cases, which have been increasing, and the backlog in unresolved cases with debt counselors continues to grow. More importantly, the two procedures should be designed to work in tandem for a comprehensive solution for debt counselors. Instead, the debt adjustment process contains loopholes that clearly invite abuse and create distortions in achieving the goal of efficient resolution of consumer over-indebtedness.

A consumer's inability to satisfy his or her obligations means that insolvency is based on an illiquidity test. The debt adjustment scheme is designed to restore the consumer to solvency by developing a plan that enables it to repay the debt on terms that the consumer can sustain and the credit provider is willing to accept. However, the theory falls short of achieving its objective, because debt counselors are given wide latitude to develop repayment plans, without necessarily having buy-in from a particular credit provider.

The bigger problem is one of creditor discrimination, which is something that the consumer insolvency law is designed to avoid under a principle of pari passu treatment for creditors holding similar debts. A consumer's inability to pay debts governed by the NCA is the result of a choice by the consumer regarding which debts to pay and which not to pay. Resolving the issues with respect to one or more credit agreements governed by the NCA does not ensure that the debtor is either solvent or engaging in responsible credit management with respect to other obligations and debts. Yet, absent a comprehensive review of the debtor's assets and debts, current economic position, and prospects for satisfying all obligations, it is difficult to ensure responsible credit behavior and avoid unfair treatment to other creditors, both those whose credits are being adjusted and those with agreements not governed by the NCA. A sound debt management practice must be carefully designed and implemented to integrate with other consumer policies, including consumer insolvency procedures.

A number of countries have now adopted comprehensive and integrated debt counseling systems. In many countries, debt counseling is considered a pre-bankruptcy alternative to be offered and evaluated by designated officers. Where the debt counseling procedure fails, the consumer would be required to file for insolvency. In other systems, the insolvency law provides the possibility of a comprehensive rehabilitation of the debtor's assets, proposing a plan for repayment of all creditors at some relevant percentage of the debt. Such systems may also require a form of debt counseling to avoid future credit mismanagement.

Policy Recommendations: National Credit Act Debt Adjustment Practices

1. A more thorough review of the NCA debt adjustment practices should be conducted with a view to identifying specific weaknesses and problems. Where the law is vague or contains loopholes that permit abuses, amendments should be introduced.
2. There is a need to standardize the application and court process for debt adjustments. For example, the NCA does not define a fixed process with respect to documents, process, and requirements. Standardized forms could define documents needed, possible claims, and other relevant matters.
3. Debt adjustments procedures for over-indebtedness and an inability to pay should be harmonized with conventional notions of insolvency and bankruptcy, so as to preclude abuses of the process by enabling insolvent consumers to renegotiate or adjust debts that they will be unable to repay.
4. Classification of "protected assets". Defined limits for exempt assets beyond which assets would have to be liquidated for the benefit of creditors (e.g., main or adequate housing). Exempt assets should be sufficient to satisfy a consumer's basic needs and harmonized with procedures under the uniform insolvency act.
5. Consider introducing to the NCA a discharge or specifying a reasonable term for repayment (e.g., 3-6 years). If the specified term is unrealistic, the consumer should be ineligible for debt adjustment and required to resort to alternative procedures to be elaborated in the NCA or as outlined in the uniform insolvency act.
6. Public interest policy objectives need to be defined. Sanctity of contract, reliance on collateral, access to credit and impact on cost of credit need to be considered.
7. NINA Cases. Recommend adopting defined procedures for expedited resolution of no income, no asset cases. Currently there is no process to address such cases.
8. Introduce compulsory periodic review to determine whether debtor/consumer can pay more toward his debts. Review could lead to debt readjustment payments of a higher or lower amount.
9. Rehabilitation options should be considered for debtors that are insolvent or unable to pay applying modern practices and options for consumer insolvency.
10. Pre-sequestration should replace administration orders, with prescribed procedures in the new uniform insolvency act.
11. Debt counselor licensing standards should be developed to ensure proper knowledge by debt counselors in carrying out their functions. More vigorous training programs should be considered, and stricter relevant work experience requirements applied.

SECTION 8: IMPROVING THE REGULATORY FRAMEWORK

Regulation of Insolvency Practitioners

South African insolvency practice is virtually unregulated, with wide variances in qualifications of insolvency practitioners, judicial managers, liquidators, business rescue practitioners and debt counselors.

All Acts have "regulations" to guide implementation. In this Chapter, we refer to the "regulatory framework" in the sense of institutions and professionals charged with the implementation of the overall insolvency process.

There are currently more than 1000 insolvency practitioners who demonstrate a broad range of knowledge and skills. Certainly, the number of practitioners is adequate to handle the existing caseload. However, the quality of skills among practitioners varies widely and there is inconsistent training and qualification requirements and inadequate regulation to ensure that all practitioners demonstrate the requisite skills. Clearly the veterans and those employed by large firms are considered to have the requisite expertise to handle cases effectively, including large, complex cases. The same cannot be said of many newcomers, who are perceived to lack both the knowledge and skills to effectively handle estate administrations, especially large, complex estates. Unfortunately, there has been little transfer of knowledge and skills among the veterans and newcomers outside of one's particular firm environment.

Many liquidators are lawyers or accountants who are subject to the disciplinary control of their own professional bodies. Most, however, have no professional qualifications nor peer supervision.

Consequently, the professional associations cannot ensure that their members have or maintain an acceptable level of knowledge and skill to perform the work of an insolvency practitioner. Indeed, there is no regulatory framework in South Africa to train, qualify, supervise and discipline insolvency practitioners. Although the Office of the Chief Master has been working on such a regulatory framework, it still does not exist. Nor is there a positive list of qualifications and experience for appointment of practitioners. To be appointed a liquidator, however, one need merely apply to the Office of the Master of the High Court, whose staff reviews the application, despite having no specific criteria for approval of an application.

There are no prescribed qualifications for judicial managers apart from having the skills to prepare annual and other financial statements for submission to meetings of shareholders and creditors.

The new Business Rescue chapter in the Companies Act of 2008 also provides for the appointment of "business rescue practitioners," another professional designation. To the government's credit, the new Companies Act makes provision for establishing criteria for licensing and monitoring the activities of business rescue practitioners by an independent body, the CIPC. Finally, although criteria exist for the qualification of debt counselors under the NCA, recent investigations disclosed serious problems in the skills levels of such practitioners, suggesting a need for stronger definition of criteria and regulation.

One significant problem involves the dual system of appointments in insolvency cases designed to ensure equal participation by previously disadvantaged and disempowered practitioners, which in fact limits the true transformation of the profession.

While on its face, the rules prescribing equal access and participation seem reasonably designed to achieve those goals, in reality, the absence of proper regulation has contributed to a weakening (as opposed to strengthening) of qualification, training and skills for previously disadvantaged practitioners. Moreover, the system creates perverse incentives that reward such practitioners for non-involvement and non-participation, establishing a dual system whereby the old, experienced practitioners do all or most of the work, but share the fees with those not doing the work. Those doing the work tend to be content to have the newcomers sit on the sidelines, so as to not increase their own liability and insurance costs by engaging in malpractice or providing sub-standard service. The process also creates opportunities for corruption, creating by having a single person – the Master – both qualify and appoint such "practitioners" to free ride on the system and receive sometimes very substantial fees.

The current system is unsustainable and untenable in a market where the fundamental objectives should be to empower new practitioners with real skills and qualifications to meet the demands of the future.

The current system is neither fair nor profitable for inexperienced professionals and other stakeholders. The system is not fair toward new professionals who wish to build a career based on legitimate qualifications and equal access to the system at all levels. An effectively integrated regulatory framework should ensure adequate skills and qualifications for the tasks performed, mentoring and trainee relationships, and individual but equal distribution of cases among qualified practitioners on an inclusive but regulated basis.

The other indirect penalty on the overall system is that a doubling of professional fees comes at the expense of creditors, whose interests are to be protected with the resulting increase in the cost of credit for all.

Failing to adequately equip less experienced liquidators places a tax on the entire system by raising liquidator costs and the costs for ensuring the system, and by allowing for inefficiencies in the process that contribute to greater loss (lower dividends) for stakeholders. Such losses are routinely transferred to market participants in the form of higher lending costs and fees, and a more restricted access to credit.

Regulating Business Rescue Practitioners

Regulations accompanying the new Companies Act provide for business rescue practitioners to be licensed by a Commission with certification, oversight and monitoring responsibilities for BRPs.

Practitioners must apply for a license and satisfy character and integrity, education and experience requirements. The regulations establish a three-tiered system of BRPs based on a person's level of experience and the complexity of cases. Provision is made for denying, suspending and revoking of licenses, and appeal to the Tribunal for review of Commission decisions. The regulations outline a basic framework for elaborating more detailed guidelines for regulating BRPs by the CIPC.

Overlaps in procedures for rescuing or disposing of a business require integration of regulations regarding BRP and insolvency practitioners.

Invariably there will be times when the business rescue fails or the business is not viable. It would be economically more efficient to have BRPs that are also duly qualified serve as liquidators in connection with a subsequent winding-up or liquidation procedure for the company. This would avoid having to engage a new professional to be reeducated on all aspects of the company, thereby minimizing costs and maximizing the dividends for creditors. The process of restructuring and liquidation is a dynamic one, and in some cases the best solution for a company is an outright sale of the business as a going concern. In the same way that businesses require integrated solutions to salvage the business or the economic value of its assets, the process of regulating professionals handling such cases requires an integrated framework.

Regulating Debt Counselors under The National Credit Act

Debt renegotiation by debt counselors of debt incurred under the NCA regulated credit agreements has underscored some troubling trends.

In order to obtain debt relief, a consumer may apply to a debt counselor for an evaluation of over-indebtedness and declared so by a court. The role of debt counselors in determining over-indebtedness and renegotiating debts is fundamentally important. Accordingly, debt counselors must meet minimum requirements for education (grade 12 certificate), experience (2 years in specified areas, including the "general business environment") and competence (passing an NCR approved course). Unfortunately, there are numerous reports of incompetence and corruption among the more than 1700 debt counselors, with many lacking the requisite skills to adequately review issues of over-indebtedness.

Regulating Masters

There have also been criticisms about the independence and qualification of Masters appointed under the Office of the Chief Master.

There was a severe shortage of masters to handle matters in early 2008, at which time the number of Masters was increased by 45%. Currently, only 90% of the posts for masters are filled. With recent increases in the number of filings, a further "right sizing" of the number of masters may be in order. Some masters are said to lack sufficient training and experience to perform the duties of their office, while there are reports that others have engaged in abusive and self-serving practices. Masters are trained by the Justice College on an ongoing basis, but the high turnover rate among masters means that there is a continuing problem in finding suitably trained, qualified, ethical persons.

Integrating the regulatory framework

South Africa's insolvency procedures require a more robust and integrated regulatory framework to achieve greater effectiveness and efficiency.

As noted throughout this summary, there are multiple insolvency, rescue or debt adjustment procedures that apply to businesses and consumers pursuant to a multiplicity of laws. Rules and criteria for appointment of such professionals are insufficient to properly monitor qualifications and performance, or impose discipline on practitioners. In order to address the current shortcomings, there is a need for a full review of all aspects of the regulatory framework, both at the level of regulatory bodies involved and at the level of competence qualifications for practitioners.

Policy Recommendations: Regulation of Insolvency

1. Conduct a full review of all insolvency regulatory bodies and procedures applicable to the qualification, appointment, supervision and disciplining of insolvency and business rescue practitioners, liquidators and debt adjustment counselors.
2. A new insolvency regulatory framework should be developed articulating a coherent set of integrated criteria for qualifying, licensing, monitoring and disciplining insolvency and business rescue practitioners and debt counselors.
3. Regulated practitioners should be held to minimum standards of qualification for knowledge and experience, and should be required to engage in continued educational requirements relevant to their field on a periodic basis (e.g., annually).
4. Centralize the “qualification” of all professionals and limit appointment to those independently determined to be qualified.
5. Integrate qualifications for IPs, BRPs and DCs.
    - BRP framework might serve as a model for other practitioner qualifications and skills. Entry level, mid-level and senior level. DC requirements might be lower.
    - Have common requirements at entry level. Separate more rigorous requirements at higher levels.
    - Maintenance of level by meeting annual continuing education requirements.
6. Emphasize principle of transfer of skill through apprenticeship or articling type capacity. Encourage senior BRPs to take on role of mentoring junior and unqualified professionals (alternative to fee sharing to promote goals of transformation and skills transfer).
7. Court access and role in each of the procedures might serve as a basis for establishing a common regulatory framework.
8. Training and education standards and experience qualification should be evaluated in the light of transformation objectives to ensure that all practitioners are adequately trained to discharge their functions capably, and to provide appropriate incentives for maintaining high standards of conduct and ethics.

SECTION 9: ROADMAP FOR INSOLVENCY REFORM IN SOUTH AFRICA

Three Pillar Approach

A three pillar approach to reform is recommended:

1. Implement new Business Rescue Process
2. Unify/Harmonize Insolvency Procedures
3. Strengthen Regulatory Framework

To best address immediate and future reforms, there was a general consensus among insolvency practitioners and stakeholders to adopt a three pillar (or phase) approach for strengthening insolvency and enforcement systems, as follows: 1) business rescue – implement the new procedure and investigate other measures for promoting more effective business rescue through informal workouts and other formal mechanisms; 2) unify and modernize insolvency procedures; and 3) strengthen regulation of the insolvency process and practitioners.

Pillar I: Implement Business Rescue

The new business rescue procedure only recently has come into effect with the new Companies Act. To ensure that the procedure is administered properly, business rescue practitioners need to be trained and qualified, and the judiciary and other officials participating in the process need to be adequately informed about the procedure. Among other things, this requires that the CIPC overseeing licensing of the BRPs be operational in the very short term. CIPC must be established as an independent body, and should include representatives from private sector, and held to appropriate standards of governance and conduct. Training programs for practitioners should be designed to meet transformation objectives and establish minimum standards of knowledge and experience set by the CIPC with business rescue oversight, with training to be administered by different associations, institutions and professional bodies. A second aspect of the effort to promote a stronger business rescue culture would involve an investigation of other reforms and measures that might be adopted to promote informal workouts, compromises and other techniques to restructure and turnaround businesses.

Pillar II: Unify and Harmonize the Insolvency Procedures

Now that the new Companies Act has become effective, efforts to unify and harmonize insolvency procedures can resume. Cabinet approved the 2003 Insolvency and Business Recovery Bill, but this was put on hold pending the adoption of a new business rescue procedure in connection with the Companies Act reform project. Given the multitude of laws and departments that have an oversight role, it would be advantageous to have an inter-departmental working group represented by the relevant government departments (e.g., DoJ, dti (and NCR), Treasury, etc.) to undertake a coordinated review of insolvency related procedures and propose reforms. It would also be advantageous to have private sector experts assist in addressing industry specific issues or concerns and provide feedback or reports to the governmental committee.

Pillar III: Strengthen Regulation of the Insolvency System

In 2005, the Cabinet appointed a Task Team to investigate issues affecting the industry and the need for overall regulation. Given the numerous overlaps in areas of qualifying, educating, monitoring and disciplining insolvency practitioners, there is a need for a comprehensive overhaul of the regulatory framework for insolvency systems. Implementing a new regulatory framework should also address transformation objectives and be supported by appropriate standards of qualification, education and knowledge requirements for all business rescue practitioners, insolvency practitioners and debt counselors. Regulatory oversight among different bodies should be evaluated to determine how best to coordinate and harmonize procedures.

SECTION 10: ANNEXURES

ANNEX I: SOURCES AND SELECT READINGS

1.South Africa Sources and Select Readings

Primary Sources

- Close Corporations Act 69 of 1984
- Companies Act 61 of 1973
- Companies Act 71 of 2008
- Insolvency Act 24 of 1936
- Magistrates Courts Act of 1944
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ANNEX II: LIST OF ROUNDTABLE PARTICIPANTS, ENTITIES AND PROFESSIONALS CONSULTED

NAME OF CONTACT	NAME OF INSTITUTION AND POSITION
AD Smith	University of South Africa (Unisa)
Adam Harris	Bowman Gilfillan, Director, Cape Town AIPSA
Alastair Smith	UP Law Clinic, Professor, Dept of Mercantile Law
Allan Pellow	Westrust/ Association of Insolvency Practitioners in South Africa (AIPSA) , Director
Andre Boraine	University of Pretoria, Professor, Department of Procedural Law; Centre for Advanced Corporate & Insolvency Law, Co-Director
Andrea Snyman	Consumer Assist, CEO
Anneke Smit	University of Pretoria, Head of Debt Relief Department
Anneli Loubser	University of South Africa, Professor and Subject Supervisor: Corporate & Insolvency Law
Benita Coetzee	Investec
Callie Lombard	ABSA Legal, Head of Business Support
Chunlin Zhang	World Bank, Lead Private Sector Development Specialist
Claire van Zuylen	Bowman, Gilfillan, Director, Johannesburg
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Desmond Ramabulana	Department of Trade and Industry, Consumer & Corporate Regulation Division
Eberhard Bertelsman	High Court of Justice, Judge
Eric Levenstein	Werkmans Attorneys, Director
Ewald Muller	South African Institute of Chartered Accountants (SAICA)
Frans Haupt	UP Law Clinic, Director
Fundi Tshazibana	National Treasury, Chief Director: RIA Division
Gabriel Davel	CEO, National Credit Regulator (NCR)
Gerry Anderson	COO, Financial Sector Board (FSB)
Gert Holtzhauzen	Nedbank, Special Operations Department
Hans Klopper	Corporate Recovery
Hermie Coetze	University of Pretoria, Lecturer
Hernriette Du Plessis	First Rand Bank
Ina Meiring	Werkmans Attorneys
J Engelbrecht	Insolvency Practitioner
Jan van der Walt	Corporate Renewal Solutions, CEO / Turnaround Management Association-South Africa, CEO and Director (TMA)
Janet Hofman	Standard Bank
Jeanne-Marie Venter	Nedbank
Johan de Ridder	National Credit Regulator, Debt Review Task Team
Juanite Steenkamp	South African Institute of Chartered Accountants (SAICA)
Juanito Damons	JMR Law/ AIPSA, Chairperson
Juanitta Calitz	University of Johannesburg, Senior Lecturer
Karl Gribnitz	CEO, Gandalf Trust

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Khashane Manamela	Manamela Marobela and Associates, Director/Attorney /AIPSA
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Lindelani Sogogo	Advocates Group 21, Advocate
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Mareesa Kreuser	University of Pretoria, Head of Research and Short Courses
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Marlene Heymans	National Credit Regulator/NCR Debt Review Task Team /FinMark Trust
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Mattie Kleyn,	Advocate and Insolvency Practitioner
McDonald Netshitenzhe	Consumer & Corporate Regulation Division, Director
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Miranda Feinstein	Edward Nathan Sonnenbergs, Chair, Company Law Committee, Law Society of South Africa
Navin Lalsab	South African Institute of Professional Accountants (SAIPA), Executive Accreditation, Compliance and Development
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Yolande Smit	National Treasury, Director: RIA Division
Yvonne Mbatha	Insolvency Committee, SA Law Society, Chair
Zodwa Ntuli	Department of Trade and Industry, Deputy Director General