Chapter 5

Corporate Insolvency Law and Reforms in South Africa

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ABSTRACT

Every country has provided business recuse system and a regime for the protection of insolvent debtors. South Africa has had this legal infrastructure since 1926 when the statutory procedure of judicial management was introduced by the Companies Act 1926. The chapter discusses the judicial management, mechanisms to secure unpaid debts, carrying on business during insolvency, and the new corporate rescue procedures applicable for South African companies as provided in Companies Act 2008. The chapter also puts a light on corporate insolvency informs in South Africa.
INTRODUCTION

Recent years have perceived a remarkable improvement in commercial law of
developing countries, especially with respect to corporate insolvency law. As the
insolvency law was a matter of great concern within the international corporate
community, policy makers from all over the world got aggressively involved in
emphasising the significance of efficient bankruptcy law for promoting ease of doing
business. For the development of global business culture and promoting foreign
investment, the framework for quick transparent and cost effective solutions for
the resolution of financial distress was of paramount importance. Along with this,
promotion of a synergetic environment conducive for the proliferation of healthy debt
repayment practices and a better survival rate for viable businesses was inevitable.

Focusing the discussion on how the insolvency regime worked in South Africa,
it stands at 82nd rank for ease of doing business as per World Bank Report 2018.
(World Bank Group Report, 2018) With respect to insolvency law, South Africa
has undergone many changes in the procedure for windup of company & debt
recovery but still it is not considered as a promising destination for investments. For
corporate insolvency, South Africa doesn’t have separate legislation but proceeds
under the Companies Act. South African companies which are financially distressed
or which trade in insolvent circumstances in South Africa now have an opportunity
to reorganise and restructure. In addition to the winding up proceedings, there is
an additional opportunity available to distressed business entities in the form of
business rescue proceedings. The purpose of business rescue in South Africa is to
maximise the likelihood of the company continuing in existence on a solvent basis.

The insolvency regime in South Africa is primarily based on the principle of
“concursus creditorum” i.e. the position of the insolvent entity as at the date of
sequestration must be crystallized and safeguarded for transmission to creditors. The
statement of objective and reasons provides that the Insolvency Act of 1936 (“Act
of 1936”) aims for a collective debt collecting process that would ensure an orderly
and fair distribution of assets on the event of inability to satisfy creditors’ claims.
(al, Mars: The Law of Insolvency, 2008; Fey NO and Whiteford NO v Serfontein,
1993) The aim of the Act of 1936 is to act in the benefit of the creditors and not to
provide relief to the debtors (Pepler, 2013; Hoskins, 1990). With this background,
the manuscript provides an overview of the laws governing insolvency resolution
procedure in South Africa, how systematically the corporate insolvency law in
South Africa evolved gradually during the course of time and lastly, the reforms
that have been brought about in wake of Cross Border Insolvency System and ease
of doing business.
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