HEADS OF ARGUMENT

RECOGNITION OF MALAWI'S FORMAL RESCUE REGIME IN MOZAMBIQUE, AS BETWEEN MEMBER STATES OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

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1. INTRODUCTION

It is becoming more common for companies in one member state in the Southern African Development Community ("SADC") to have a presence in other member states. Oftentimes a formal restructuring process in one member state may require that subsidiary companies and/or divisions situate in other member states be restructured and rescued as well.

However, the member states of the SADC lack a uniform approach to cross-border bankruptcies. Not only do the legal systems of the member states differ, but their bankruptcy procedures and their rescue regimes (if any) in particular, differ as well.

Malawicious, a company registered in Malawi, operates as a manufacturer of spices and food sweeteners from a modern and fully automated factory in Blantyre, Malawi, which was commissioned in 2014. It operates in various jurisdictions including a division in Mozambique.

As a result of Malawicious' financial distress, the directors of Malawicious have filed for insolvency under the reorganisation mechanism provided under the Malawian Insolvency Act 2016. The reorganisation order was granted and the administrator, Mr Tofera, was appointed thereafter on 20 September 2017. The administrator filed a reorganisation strategy that was duly approved.

For the reasons set out below, recognition is sought in Mozambique of the moratorium imposed by the Malawian reorganisation order and the duly approved reorganisation strategy.

2. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCIES

Malawi has adopted the Model Law into its national law in the form of Part X of Malawi's Insolvency Act 9 of 2016.

However, Mozambique is not a signatory to the Model Law.

That is, recognition of the moratorium imposed by the Malawian reorganisation order and the duly approved reorganisation strategy thereunder cannot be based on the Model Law.
3. THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

Malawi and Mozambique are member states of the SADC.

The SADC was formed from the Southern African Development Coordination Conference in 1992 with a vision of “a common future, a future in a regional community that will ensure economic wellbeing, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa” (underlining for emphasis).

With this vision in mind, the SADC’s sets out in Article 5(1) of the SADC's Treaty its main objectives, which include, inter alia, promoting sustainable and equitable economic growth. The SADC hopes to achieve these objectives through the broad strategies as contained in Article 5(2) of the SADC Treaty. These include strategies, inter alia, which:

- encourage the member states and their institutions to take initiatives to develop economic, social and cultural ties across the region;

- develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among member states;

- improve economic management and performance through regional co-operation; and

- promote the coordination and harmonisation of the international relations of member states.

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1 South African Development Community's Regional Indicative Strategic Development Plan ("RISDP"), para 1.2.2. In addition to the SADC Treaty, which is the constitutive document establishing the SADC and the framework from which all subsequent instruments are derived., there is also the SADC's RISDP which is the guiding document for the SADC's regional integration and development program over the period 2005 to 2020.
The SADC Treaty then binds its member states\(^2\) by providing for the following general undertakings, amongst others:

- **Article 6(1)** - "Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty"

- **Article 6(3)** – "SADC shall not discriminate against any member state"

- **Article 6(4)** – "Member states shall take all steps necessary to ensure the uniform application of this treaty"

- **Article 6(5)** – "Member states shall take all necessary steps to accord this Treaty the force of national law"

Article 7 of the SADC Treaty provides that States listed in the preamble thereto shall, upon signature and ratification of the SADC Treaty, be members of SADC. Put differently, in order to qualify as a member state, the SADC Treaty, once signed, must have been ratified in accordance with the laws of that member state. Therefore, the treaty is legally binding on the SADC's member states\(^3\).

Importantly, therefore, it is incumbent upon SADC member states to adopt adequate measures to promote the achievement of the objectives of the SADC, which include sustainable and equitable economic growth.

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\(^2\) Currently the SADC has a membership of 15 member states, namely Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. It is worth noting that Madagascar's membership is, however, currently suspended.

4. RESCUE REGIMES

The importance and effect of the SADC Treaty should not be underestimated, especially in light of the fact that the SADC as a whole makes up a significant proportion of Africa’s economy⁴.

However, despite the SADC member states sharing the common vision of economic wellbeing for their people, they lack a uniform approach to cross-border insolvencies and their "diverse, fragmented, archaic and inaccessible laws are major barriers to the free flow of goods in the region and therefore affecting both intra-regional and international trade as well as the attraction of foreign investment"⁵. For instance, Mozambique follows the continental legal system, and Malawi the British common law system⁶.

The absence of a uniform approach to cross-border insolvencies is problematic in particular because many companies, like Malawicious, have a presence in various SADC member states and oftentimes a restructuring process in one member state may require intervention in subsidiary companies and/or divisions situated in other member states. It is encouraging, however, to note that in the SADC most member states cater for the rescue of distressed businesses in one form or another.

For example, the Malawi Insolvency Act⁷ allows for the reorganisation of a distressed company and imposes a moratorium on all proceedings against the property of a company⁸. Mozambique makes provision for business rescue (judicial and extrajudicial)⁹ and the commencement of a judicial business rescue will impose a stay, for a period of 180 days from the date on which the court accepts the petition for business rescue, on all pending and

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⁷ Act 9 of 2016
⁹ Decree–Law no. 1/2013, dated July 4, 2013
new claims and all actions and executions against the debtor company (including arbitration proceedings), except regarding credits derived from labour relationships.¹⁰

Any differences between the rescue regimes in the SADC member states notwithstanding, the primary aim of any rescue regime is to reorganise the affairs of a company in a way that maximises the likelihood of the company continuing in existence on a solvent basis, that is, to help viable businesses survive. Indeed, according to the World Bank¹¹, a well-balanced insolvency system distinguishes companies that are financially distressed but economically viable from inefficient companies that should be liquidated.

It is self-evident that the ability of any country to rescue viable businesses, especially businesses with a cross border presence, will go a long way towards aiding the growth of its economy.

5. RECOGNITION THROUGH THE SADC TREATY

African civil law countries have traditionally been seen as monist states, and common law countries as dualist states¹².

Malawi is common law country. African common law countries are dualist states¹³, which emphasize the difference between national and international law¹⁴. That is, the adoption of the SADC Treaty by a dualist state would ordinarily first require that it be enacted by the legislature into national law in order for the national courts to apply the treaty principles¹⁵.


¹² Killander, M (ed.), International Law and Domestic Human Rights Litigation in Africa, 2010 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708483, visited 29 December 2016. Note: With common law countries Killander includes those with a Roman Dutch common law heritage (South Africa, Namibia, Botswana, Lesotho, Swaziland and Zimbabwe). Note that Killander concludes that "African civil law countries have a monist constitutional framework but their judicial cultures create dualism in practice" and that "]International law is mainly used as an interpretative tool".

¹³ Ibid. Note that Killander concludes that "African civil law countries have a monist constitutional framework but their judicial cultures create dualism in practice" and that "International law is mainly used as an interpretative tool".

¹⁴ Ibid

¹⁵ Ibid
However, Killander\(^{16}\) points out a few common law countries have adopted monism with regard to treaties in their legislative framework. One such country is Malawi. In this regard, Killander states that "African common law countries do not have constitutional or statutory provisions including international law as relevant to the interpretation of the constitution or statutes. However, this should not prevent courts from using international law. The common law provides that 'wherever possible the words of a statute will be interpreted so as to be consistent with a treaty obligation'.

On the other hand, Mozambique, as a civil law country and, therefore as a monist state, should accept that national and international legal systems form a unity, and therefore the act of ratifying the SADC Treaty by a monist state immediately incorporates the treaty into national law and may be applied directly by a national judge as if it were national law\(^{17}\).

Both Malawian and Mozambican courts should therefore regard the SADC Treaty as binding, or should at least be guided by the SADC Treaty in interpreting their laws\(^{18}\). As such, the SADC Treaty should be used by the Mozambican courts for recognising the rescue regimes implemented by its fellow member state, Malawi, over businesses that have a cross-border presence.

Furthermore, as the reorganisation in Malawi was commenced by way of a reorganisation order, this foreign judgment should also be recognised\(^{19}\) in Mozambique, as there is no doubt about the authenticity of the order that was handed down by a competent court in Malawi and executed in accordance with the laws of Malawi, and the import of the order is not against the public policy of Mozambique and will not be regarded as offending the provisions of Mozambican law if it should have been resolved according to Mozambican conflict laws.

\(^{16}\)Ibid.


\(^{18}\)See Killander, M (ed.), International Law and Domestic Human Rights Litigation in Africa, 2010 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708483, visited 29 December 2016. Note: With common law countries Killander includes those with a Roman Dutch common law heritage (South Africa, Namibia, Botswana, Lesotho, Swaziland and Zimbabwe) which provides at its footnote 79 that "Higgins (n 55 above) 42. Cf the 1988 Bangalore Principles, adopted at a judicial colloquium of commonwealth judges, which provided that ‘[i]t is within the proper nature of the judicial process ... for national courts to have regard to international obligations ... for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.’ Quoted in Waters (n 2 above) 646."

6. CONCLUSION

Although the SADC as a regional body does not have any international instruments (whether it be in the form of a model law or treaty) that provide for the legal harmonisation of cross-border rescue regimes, it should still be possible for SADC member states to recognise cross border rescue regimes of fellow member states having due regard to the SADC Treaty itself.

As mentioned above, Article 6(5) of the SADC Treaty (which has been ratified by all member states) places a duty on the member states to accord the SADC Treaty the force of national law and further requires that the SADC member states promote sustainable and equitable economic growth "without discriminat[ing] against any member state"\(^{20}\) by, *inter alia*, encouraging their institutions (*which would include their courts*) to take initiatives to develop economic ties across the region, to promote the coordination and harmonisation of the international relations, to improve economic management and performance through regional co-operation, and to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services.

Mozambique should therefore recognise the moratorium and the reorganisation strategy of Malawicious in terms of the reorganisation order. It must be front of mind that Malawicious is registered in Malawi and operates a division, and not a separate juristic entity such as a subsidiary, in Mozambique.

Insofar as considerations of comity, equity and convenience are relevant, the recognition of the Malawian reorganisation strategy of Malwicious in terms of the reorganisation order will not prejudices local creditors, in fact, under the Malawian law secured creditors retain the right to take possession of, realise, and otherwise deal with the secured assets. Further, Mozambican creditors will be treated the same as Malawian creditors under the reorganisation strategy.

\(^{20}\) Article 6(3) of the SADC Treaty.