HEADS OF ARGUMENT

RECOGNITION OF MALAWI’S FORMAL RESCUE REGIME IN SOUTH AFRICA, 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 insolvencies. 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 also operates in various jurisdictions, including South Africa where it is registered as a foreign company, trading as South Spice.

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 South Africa of the moratorium imposed by the Malawian reorganisation order and the duly approved reorganisation strategy.

2. THE UNICITRAL MODEL LAW ON CROSS-BORDER INSOLVENCIES

Ailola\(^1\) argues that the absence of a uniform approach to problems surrounding cross-border insolvencies does not bode well for countries seeking to increase trade and investments. Ailola suggests that harmonisation can be achieved through the adoption of the UNCITRAL Model Law on Cross-Border Insolvencies ("the Model Law") into domestic law, or through

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the adoption of a convention. In this regard, the United Nations Information Service confirms that the UNCITRAL Model Law on Cross-Border Insolvency is designed to assist states to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency\(^2\).

However, Ailola\(^3\) continues to argue that even where states have adopted the Model Law "harmonisation will remain a pipe dream", because states are still allowed the freedom thereunder to follow their own procedures and substantive laws.

South Africa has, for instance, adopted the Model Law into its national law in the form of the Cross Border Insolvency Act 42 of 2000. However, the Model Law was amended therein to provide in section 2 thereof that the South African Minister of Justice must designate the states to which the Act will apply. No such designation has as yet occurred leaving the Cross Border Insolvency Act\(^4\) inoperative.

Conversely, Part X of Malawi's Insolvency Act 9 of 2016 requires neither designation nor reciprocity in dealing with cross-border insolvencies. This part of Malawi's Insolvency Act is based on 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. If it could, however, then the Malawi reorganisation would be recognised in South Africa as the Main Proceedings thereunder.

3. THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

Malawi and South Africa 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


\(^3\) See supra footnote 1

\(^4\) Act 42 of 2000
social justice and peace and security for the peoples of Southern Africa\textsuperscript{5} (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, \textit{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, \textit{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.

The SADC Treaty then binds its member states\textsuperscript{6} 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"

\textsuperscript{5} 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.

\textsuperscript{6} 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.
- 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. 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.

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 economy. 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". In this instance, for example, South Africa subscribes to Roman Dutch law, whereas Malawi follows the British common law system.

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It is encouraging, however, to note that both Malawi and South Africa cater for the rescue of distressed businesses in one form or another.

For example, the South African Companies Act\textsuperscript{11} provides that business rescue proceedings, which includes a moratorium on legal proceedings, may be initiated by board resolution or an application to court if there is a reasonable prospect of the company being rescued.

Similarly, the Malawi Insolvency Act\textsuperscript{12} allows for the reorganisation of a distressed company and imposes a moratorium on all proceedings against the property of a company\textsuperscript{13}.

Any differences between the rescue regimes notwithstanding, the primary aim of both these proceedings are 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 Bank\textsuperscript{14}, 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 and its relevant member state’s economy.

5. RECOGNITION THROUGH THE SADC TREATY

Both South African and Malawi are common law countries. African common law countries are dualist states\textsuperscript{15}, which emphasize the difference between national and international

\textsuperscript{11} Chapter 6 of Act 71 of 2008

\textsuperscript{12} Act 9 of 2016


\textsuperscript{15}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 “[i]nternational law is mainly used as an interpretative tool”.

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law\textsuperscript{16}. That is, the adoption of the SADC Treaty by a dualist state requires that it first be enacted by the legislature into national law in order for the national courts to apply the treaty principles\textsuperscript{17}.

However, Killander\textsuperscript{18} points out a few common law countries have adopted monism with regard to treaties in their legislative framework. These include Malawi and South Africa. Killander states that "With the exceptions [of a few], 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". [my insertion and underlining]

An example of the courts' role in applying the SADC Treaty can be found in South African case law, specifically in the Constitutional Court case of The Government of the Republic of Zimbabwe versus Louis Karel Fick and 3 Others [2013] ZACC 22\textsuperscript{19}. The Constitutional Court found that, in light of the fact that South Africa was bound by the SADC Treaty, a decision of the SADC Tribunal against Zimbabwe was legally enforceable in South Africa, and that Zimbabwean owned property in Cape Town could be sold to satisfy a costs order issued against Zimbabwe by the SADC Tribunal. Although this decision came after the suspension of the SADC Tribunal, it remains relevant as the South African Constitutional Court affirmed the importance of international treaties\textsuperscript{20}.

South Africa also provides us with a relevant example of where laws have been developed through its court system to allow for the recognition of a foreign rescue regime. The example referred to is the case of Ex parte case of Overseas Shipholding Group, Inc. ("OSG") and 180 Others under Kwazulu Natal High Court of South Africa case number

\textsuperscript{16} Ibid
\textsuperscript{18} See supra footnote 17.
\textsuperscript{19} At http://www.saflii.org/za/cases/ZACC/2013/22.pdf, visited 14 December 2016
12827/2012\(^{21}\) (“the OSG case”). On 14 November 2012, OSG and its subsidiaries were placed into bankruptcy in the United States of America (“USA”) under chapter 11 of the United States' Bankruptcy Code\(^{22}\). Thereafter, on 7 December 2012, in the OSG case the Kwazulu Natal High Court of South Africa ordered\(^{23}\) that the USA bankruptcy of OSG and the 180 other companies be recognised in South Africa, and that the automatic moratorium provided for in section 362 of the United States Bankruptcy Code be applied in South Africa with full force and effect. The court also granted a stay on legal proceedings in South Africa against OSG\(^{24}\).

Prior to this case South African courts had previously only been prepared to recognise foreign liquidators or administrators and to give them certain powers in terms of South African laws. However, the order by the Kwazulu Natal High Court of South Africa made new law when it recognised both the foreign rescue regime itself and the application of certain provisions of foreign insolvency law\(^{25}\).

Many of the SADC member states' courts may therefore regard the SADC Treaty as binding, or should at least be guided by the SADC Treaty in interpreting their laws\(^{26}\). Therefore, the SADC Treaty should be used by the South African courts for recognising the rescue regimes implemented its fellow member state, Malawi, over businesses, such as Malawicious, that have a cross-border presence.

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-

\(^{21}\)Order under Kwazulu Natal High Court of South Africa case number 12827/12 provided by Kristian Gluck of Norton Rose Fulbright US LLP under cover of an email dated 17 June 2016

\(^{22}\)Bankruptcy Reform Act of 1978, as amended, codified in Chapter 11 of the United States Code (§§ 1101 to 1174) and commonly referred to as the "Bankruptcy Code"

\(^{23}\)See supra footnote 21

\(^{24}\)See supra footnote 21


\(^{26}\)See supra footnote 17 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."
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"\(^{27}\) 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.

South Africa should therefore recognise the moratorium and the reorganisation strategy of Malwicious. It must be front of mind that Malwicious is registered in South Africa as a foreign company. That is, South Spice operates more like a division than a subsidiary or related company.

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

\(^{27}\) Article 6(3) of the SADC Treaty.