Insolvency Reforms Across Africa: Is it Happening Fast Enough?

A fitting introduction to the Editors Highlight Article would be this extract of the speech from the Hon. Minister of Justice, Hon. Wynter Kabimba, SC, of the Republic of Zambia given as an opening address to the delegates of the INSOL Africa Round Table in October 2013 in Lusaka, Zambia

“There are currently fewer insolvency reforms across Africa than in any other region of the world. In many African countries insolvency laws are antiquated and restructuring laws do not exist. Doing Business 2011 data demonstrates that debt recovery in Sub-Saharan Africa averages only 23.2 cents on the dollar, compared to 69.1 cents on the dollar in OECD countries.

Clearly, there are many different issues facing countries in the region and the solutions are complex. For example:

- there are inadequate mechanisms to prevent the stripping of assets of companies in financial difficulty heading towards insolvency, which means that a business rescue culture is minimal;
- many directors lack accountability and in some cases robust Corporate Governance structures are lacking;
- the insolvency profession is neither institutionalised nor regulated;
- delays in finalising cases by courts negatively affect the efficiency of the system but are also a cause of concern to Lenders;
- non-court based methods are underdeveloped and out-of-court restructuring is not prevalent;
- the skills of stakeholders including the judiciary and insolvency practitioners need to be developed, and countries need to focus on both institutional and infrastructure reforms that will seek to preserve value in financially distressed businesses.”

The pain of insolvency and business failures continues to haunt many Governments particularly where the corporate failures are large entities employing a sizeable number of staff. It’s no secret and this is common in most African countries; the African family system is built on the extended family model and consequently one working person is at times responsible for feeding five/six mouths and sometimes even more. Deprive the breadwinner of his livelihood and with no immediate prospect of another job, a socio-economic calamity is imminent where the employer is large.
With the dismantling of the Communist bloc countries, the African economies desire to move towards more liberalised and open economies, saw the advent of large number insolvencies particularly in the mid to late 90’s. Pressure continued to mount on Governments from the Bretton Woods Institutes to stop the funding of cash haemorrhaging, non-performing, inefficiently and ineffectively run state owned enterprises. The scene was being set for economic transformation and people empowerment. Entrepreneurism was unleashed, private sector investment moved in and state owned lothario’s just couldn’t compete. A new dawn was heralded.

However the pains of dealing with under performing business still remains. In as much as the economies went through the macro-economic changes, and some would say drastic shifts from Keynesianism to Capitalism, the resultant legislative changes did not follow suit. Instead what prevailed were archaic Insolvency Acts left by the colonial predecessors in most countries.

Added to that problem was the level of skills required to manage insolvent or distressed businesses; these were deemed to be inadequate. Stories emerged of liquidators / receivers / administrators selling assets to themselves, unaccounted disposal proceeds, inadequate documentation of work performed and the general inability to diligently discharge their duties.

But the pressure continued to mount for some time with public policy makers demanding for change to the antiquated legislation, lenders demanding pro-active solutions from private practitioners, and private practitioners happy to accede to requests from stakeholders but equally seeking protection from a more robust legal framework and fair reward and recognition for the complex and usually difficult work, sometimes beset by political interferences.

That said, thanks to the Investment Climate Facility arm of the World Bank and through their engagement with public policy makers, legislators, lenders and private practitioners in several countries, great strides have been made towards enacting insolvency reforms. Furthermore the revised reforms in some cases encapsulate a pro-active approach to supporting businesses in distress much higher up the corporate demise curve, borrowing from the famed American Chapter 11 Bankruptcy Protection Act and the recently enacted Chapter 6 Business Rescue in South Africa.

It would be amiss not to mention INSOL’s involvement in Insolvency Reforms across Africa through the Africa Round Table (ART) initiative. In what started as a Round Table discussion in February 2010 in Dubai at INSOL’s Annual Conference with around twenty (20) participants has now almost reached close to hundred (100) participants. Annual ART meetings have been held in Abuja, Nigeria in 2010, in Cape Town, South Africa in 2011, in Nairobi, Kenya in 2012 and in Lusaka, Zambia in 2013. The next ART is scheduled for Kampala, Uganda in October 2014.

The objectives of the ART were (and continue to be) threefold:

- to have a high level dialogue with both private practitioners and public policymakers regarding insolvency reform in Africa, thereby encouraging reform experiences to be shared and challenges to be discussed in an open and frank forum;
- to elevate insolvency reform on the African policy agenda; and,
- to encourage insolvency policymakers and professionals to establish an annual forum to stimulate discourse and learning across the region.

Without a doubt, the ART is a resounding success and from the basics of getting insolvency right, discussions have reached the complex realms of regional cross border issues.

For example, in most of East Africa and some parts of West Africa, namely Ghana and Nigeria which are premised on the English Common Law system, new legislation has already been enacted or bills are before Parliaments.

In Mauritius, The Insolvency Act was enacted in June 2009. Prior to that the administration concept did not exist and the new Act now provides for this. This in the Act has been referred
to as business rescue.

In South Africa, the provisions are aptly titled Business Rescue Proceedings, Chapter 6 of the Companies Act 2008 (Act 71 of 2008). Both the South African and Mauritian Acts are becoming reference points for new bills elsewhere.

The regulation of private practitioners has also been under the spotlight and still in a lot of countries there is no clear definition of which the insolvency practitioner should be; though in most cases it tends to be accountants or lawyers. Countries such as Ghana, Nigeria and South Africa have regulated the conduct of insolvency practitioners by setting up regulatory bodies, i.e. Ghana Association of Restructuring and Insolvency Professionals (GARIA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) and South African Restructuring and Insolvency Practitioners Association (SARIPA), respectively.

As Africa’s emerging economies continue to grow, business require more and more funding, be it through debt or private equity. Whatever the case may be, every stakeholder needs a sense of protection, and equally comfort, that in the event of distress, competent and qualified professionals will be at hand. So in as much as the public policy makers are doing their bit, by providing the much-needed pro-active legislative support, the bigger spotlight lies squarely on the private practitioners and their regulators to respond.

In closing, again I borrow an extract from the Hon. Minster of Justice of the Republic of Zambia’s, Hon. Kabimba’s Lusaka ART opening address and quote:

“My sincere urge is therefore that the Africa wide insolvency harmonization process must be collective requiring the indulgence of all concerned stakeholders, namely the respective Governments, public policy makers, private practitioners, banks etc

Despite the ongoing process of insolvency legislative reforms, we should be cautious and should not in the least assume that the insolvency environment in Africa is necessarily any more hostile than in Europe or USA. Every continent has a different culture in dealing effectively with insolvency. But we must not relent and press on ahead with the reform process.

Simply putting in place new legislation and regulations copied from another region or country is unlikely to succeed. There must be a commitment to the process of reform and meaningful implementation; one which engages at a local level with stakeholders - a departure from the “one size fits all” solution.”

Nitesh Patel
Partner – Business Recovery Services & Deals
PwC Zambia