

The future paradigm for insolvency

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Unpacking the impact of distressed corporates, economic uncertainty and director apathy on insolvency practitioners in South Africa.

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Dr Eric Levenstein joined approximately 30 South Africans and several hundred delegates from around the globe at the World Insolvency Conference hosted by INSOL International in Tokyo from 11 – 13 September. Members included insolvency and restructuring practitioners, lawyers, financial advisors, distressed debt funds, regulators and a number of stakeholders involved in the insolvency and restructuring profession.

INSOL International has approximately 10 000 members from over 70 countries, and where delegates gather once a year to discuss cutting edge issues involving the insolvency and restructuring profession.

SARIPA is the 5th largest member organisation of INSOL International and South African delegates attending the conference (insolvency practitioners and business rescue practitioners) were very much involved in cross-border insolvency discussions and certainly gained a better understanding of how restructuring and insolvency regimes operate in multiple jurisdictions across the globe.

An issue which is of concern to insolvency practitioners across the globe and in South Africa (and which was discussed at the conference) is the ever increasing level of corporate distress and uncertainty, and which impacts the role of insolvency practitioners (liquidators and business rescue practitioners) and the manner in which they can assist in the restructuring of companies that might be on the brink of insolvency.

The way insolvency practitioners approach their appointments in distressed companies and deal with directors that are increasingly resistant to an intervention, is challenging and not for the faint hearted.

The approach to modern day restructuring of insolvent companies requires a unique skill set on the part of the practitioner and where crisis management and people skills are becoming paramount, if that practitioner wants to successfully restructure a company's affairs, its debt and in order to avoid a full scale insolvency.

Looking at fallout in South Africa in the past year, we have seen major filings for business rescue by Tongaat-Hulett's and the South African Post Office. Nampak has appointed a CRO (a Chief Restructuring Officer) and Rebosis Property Fund (a listed REIT) continues to go through its business rescue process.

With ever increasing economic pressure (both in South Africa and globally), we continue to see companies being left with little choice but to consider either an insolvency or a business rescue process. The cost of trading a business in 2023, caused by the

ongoing pressure of sustained loadshedding, is impacting companies in just about every sector of the economy.

Stats SA recently reported that 140 companies were placed into liquidation in South Africa in July 2023, and where financing, insurance, real estate and business services led the charge (at 54 companies) followed by trade, catering and accommodation (22), by manufacturing (10) and construction (8). Clearly distress remains agnostic and cuts across all sectors of the economy.

At INSOL, Tokyo, delegates debated where the next wave of financial and operational distress will hit sectors of the global economy. Sectors where delegates expect increased distressed activity in 2023/2024 included; construction (18.18%), consumer goods (9.09%), crypto (5.45%), financial (3.64%), real estate (40%), retail (18.18%) and technology (5.45%).

What is common across international jurisdictions is the level of trust that stakeholders place in insolvency/rescue mechanisms and the role of insolvency practitioners and their advisors.

Boards of directors are generally very against approaching an independent restructuring/insolvency professional for assistance when the company enters a period of financial distress.

Appointing an insolvency practitioner would be admitting defeat and where by doing so, directors would be acknowledging their failure as directors (managers) of the company. So resistance to such an intervention is often the case.

Directors are generally very unwilling to "open up the kimono" and where they risk uncomfortable questions being asked about how the company reached its position of financial distress.

The stigma and negative connotation of having to admit financial constraints often leads to procrastination (kicking the can down the road), and where directors leave the appointment of an advisor too late.

So for the next generation of appointment takers, insolvency professionals and their advisors, we really have to start looking critically at their roles and responsibilities in educating corporate South Africa, and try to work out how do we get South African boards to buy into the need for a "restructuring" process/mechanism at an early stage in the distress process and without the negative connotations.

Educating directors of distressed companies to be accepting and open to an intervention will continue to be an uphill battle!

Of course as we all know, early intervention is required, and where there remains something left to rescue, and not when the company is too far gone with very little left to rescue – and where we would be looking at a full scale bankruptcy or liquidation.

That default position (worldwide) is not where we want to be, if we are to keep a company afloat, keep jobs intact and where we can ensure a greater number of companies survive their restructuring and turnaround processes.

The answer is quite simple. We have to be talking constantly to the general public, directors of corporates and the greater business community about successful rescues and restructurings.

Being able to mention successes is vital to this objective and we have to talk about the "good news stories" as often as possible. Success stories such as the rescue of Edcon, Andalusite Mine, Phumelela Gaming and Leisure, Ster Kinekor and others need to be spoken about as often as possible.

The challenge for organisations such as SARIPA and for INSOL, is to do away with the negative perceptions of the restructuring profession that might be out there.

Criticisms such as the time taken for the process to reach a conclusion, incompetent practitioners taking appointments, and that the costs/fees generated by a restructuring/business rescue mandate are too high, should be discussed and dealt with. After all, insolvency practitioners are there to problem solve and to assist corporates when they are facing the cliff of insolvency.

Impeccable technical, operational and financial acumen is required. Identifying insolvency practitioners and training them to have these skill sets is what the profession has to think about in the years to come.



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