THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA

REPORT ON THE REVIEW OF THE LEGAL FRAMEWORK GOVERNING INSOLVENCY IN TANZANIA

Presented to
The Minister for Constitutional and
Legal Affairs

JUNE, 2019

THE UNITED REPUBLIC OF TANZANIA

LAW REFORM COMMISSION OF TANZANIA

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DAR ES SALAAM.

10th June, 2019

Honorable Dr. Augustino P. Mahiga (MP),
Minister for Constitutional and Legal Affairs,
P. O. Box 315,
DODOMA.

Hon. Minister,

RE: **REPORT ON THE REVIEW OF THE LEGAL FRAME WORK GOVERNING INSOLVENCY IN TANZANIA**

In terms of section 4 (2) of the Law Reform Commission Act, Cap. 171 the Commission may, whether at its own instance or otherwise, review any law or branch of the law and propose measures necessary for:

i) bringing that law or branch of law into accord with current circumstances of Tanzania;
ii) eliminating anomalies or other defects in the laws; and
iii) proper codification and simplification of that law or branch of law.

By a letter with reference No. AB. 26/285/01/B dated 18th September, 2017, the Administrator General requested the Commission to undertake the review of the legal framework governing insolvency in Mainland Tanzania. Under the Terms of Reference, the Commission was requested to specifically look into:

i) scattered pieces of legislations governing insolvency issues;
ii) overlapping regulatory authorities;
iii) outdated legislation;
iv) cross border insolvency issues; and
v) prepare a Report and a Draft Bill on the legal framework governing insolvency.

The Commission has completed the review of the legal framework governing Insolvency after extensive literature review, consultative meetings and stakeholders' workshops for the purpose of collecting data, views and recommendations on how to improve the legal framework governing insolvency issues. That has made it possible for the Commission to prepare this Report.

I wish to take this opportunity to thank all relevant stakeholders whose contributions and recommendations have made possible to prepare and make this Report. Special thanks goes to the office of the Administrator General for their cooperation, commitment and facilitation which made it possible to accomplish this task. However, the Commission remains responsible for both the form and content of this Report.

Honorable Minister, allow me to present to you, the following documents for further consideration and action subject to section 14 (1) of the Law Reform Commission Act, Cap. 117 namely:

i) The Report on the Review of the Legal Framework on Insolvency in Mainland Tanzania.
ii) A Matrix on Stakeholders' views and recommendations; and

iii) A Draft Bill on the Insolvency Act, 2019.

I remain,
Yours sincerely,

Hon. Justice January H. Msoffe, (rtd)

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CHAIRMAN

Mr. Julius K. Bundala

.....

Commissioner

Mr. Idd R. Mandi

.....

Commissioner

c.c. The Attorney General,
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LAPF Building,
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Administrator General– RITA,
RITA TOWER,
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DAR ES SALAAM

PREAMBLE

"In a modern competitive market economy, which characterizes the global economy, and where business operations increasingly rely upon credit, insolvency is an inevitable aspect and a truism"[1]

[1] M. Balz, 'The European Union Convention on Insolvency Proceedings' (1996) Am Bankr L J 485; and K Anderson, 'The Cross-border Insolvency Paradigm: A Defense of Modified Universal Approach Considering the Japanese Experience.' (2000) 21 U Fa.J Int'l L 679.

EXECUTIVE SUMMARY

Pursuant to section 4 (2) of the Law Reform Commission Act, Cap. 171, the Commission may review any law or branch of the law and propose measures necessary for bringing that law into accord with the current circumstances of Tanzania. In this respect, the Administrator General by a letter with Reference No.AB.26/285/01/B dated 18th September, 2017, requested the Commission to undertake review of the Legal Framework on Insolvency in Tanzania.

The Administrator General was of the firm view that due to increased foreign direct investments, capital formation and private sector involvement, there is a need to call for renewed insolvency legal regime that would promote economic development by regulating national capital accumulation and provide robust machinery for liquidating investments.

Further, the current insolvency legal framework is dominated by scattered, fragmented and outdated laws with multiple regulatory authorities which make insolvency regime complex and counterproductive. Consequently, there are multiple insolvency regulators without an effective coordination. Some of the laws governing insolvency are outdated and do not adequately take on board the social, economic and technological changes within the insolvency portfolio, including emerging issues such as cross border insolvency and regulation of insolvency practitioners. The laws also do not address adequately the right of employees when their employers are insolvent and depositors during financial difficulties on banks or financial institutions and does not clearly define the role which Administrator General plays.

Under the Terms of Reference, the Commission was requested to specifically look into:

i) scattered pieces of legislation on insolvency issues;
ii) overlapping regulatory authorities;
iii) outdated legislation;
iv) cross border insolvency issues; and
v) prepare a Report and a Draft Bill on legal framework governing Insolvency.

Insolvency is defined as a financial condition in which one is unable to meet obligations as they mature in the course of the ordinary course of business. When a person is in this strain, he can either call his creditors together or endeavour to come to kind of private arrangement with them according to the nature of his assets or he can place himself in the hands of the Bankruptcy court which will then administer the estate and distribute the assets for the benefits of the creditors.[2]

From this perspective, it is evident that when an individual or a legal entity is insolvent it faces a lot of financial instabilities, thus, it is important to have in place a conducive or friendly legal procedure that can help to handle the situation promptly.

Insolvency legal regime has the role of preventing investments from pulling down efficient investments due to failure to meet monetary obligations as they fall due. Insolvency legislation, is therefore an essential instrument in the promotion of economic development as it regulates national capital accumulation by providing the machinery to liquidate investments which have proved inefficient and counterproductive in order to prevent such investment from eating into other investments engaged in the capital formation.[3]

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[2] S.L. Salmond U. Narrang, "Academic Legal Dictionary", New Delhi Academic (India) Publishers 23rd Ed, 2013.

[3] Prof . Chris M. Peter, et al, "Law and Justice in Tanzania, Quarter a Century of the Court of Appeal", Mkuki na Nyota publishers, Dar Es Salaam, 2007 pg .176.

A robust regulatory system of insolvency legal system will promote economic development by regulating national capital accumulation and provide machinery for liquidating investments that prove to be insufficient and counterproductive. This will also help promote the investment environment in Tanzania, hence, improving the country economy.

It is intended that the new law paves way to transparent and robust regulatory framework that supports sustainable economic growth and poverty reduction in the country. These reforms would create opportunities for investment to local and foreign investors.

Insolvency law, like any other branch of law, is not independent rather it reflects and interacts with existing general social and economic structures and trends of development of a particular society. Thus, introduction and development of insolvency legal regime in Tanzania can be traced and discussed under three historical periods, namely, Pre-Arusha Declaration phase (1920-1967), Arusha Declaration phase (1967-1985) and Post Arusha Declaration Economic Reforms phase (1986 to date).[4]

The scope of the review included study of relevant policies, international instrument and legislation on insolvency in Tanzania, particularly, on multiplicity of laws governing the area of insolvency; presence of multiple regulatory authorities with overlapping mandates and regulation of cross border insolvency; outdated laws; litigation on insolvency matters; protection of depositors in insolvency; protection of employees on insolvency, regulation of insolvency practitioners and the role of the Administrator General as official receiver.

[4] Prof. Chris M. Peter, et al, "Law and Justice in Tanzania, Quarter a Century of the Court of Appeal", Mkuki na Nyota publishers, Dar Es Salaam, 2007 p. 175.

The purpose of the review was to study the existing legal framework governing insolvency and make recommendations that would support sustainable economic growth and poverty reduction in the country and create opportunities for investment to local and foreign investors.

Preparation of this Report involved literature review, field research, consultative meetings, and group discussions. Amongst, the stakeholders were the Registration, Insolvency and Trusteeship Agency (RITA), Business, Registration and Licensing Agency (BRELA), Judiciary, Tanzania Private Sector Foundation (TPSF), Tanzania Insurance Regulatory Authority (TIRA), Regional Administrative Office, Association of Tanzania Employers (ATE), Trade Union Congress of Tanzania (TUCTA), Tanzania Union of Industrial and Commercial Workers (TUICO), Tanzania Bankers Association (TBA), Higher Learning Institutions, Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA), Tanganyika Law Society (TLS), Bank of Tanzania (BOT), Solicitor General (SG), Attorney General (AG), Law School of Tanzania (LST), Confederation of Tanzania Industries (CTI), National Board of Accountants and Auditors (NBAA), Deposit Insurance Board (DIB), as well as Insolvency Practitioners.

The present policy and legal framework consist of many pieces of legislation. For instance, insolvency issues under the Companies Act is administered by the Registrar of Companies while insolvency of bankrupt persons is administered by the Official Receiver under the Bankruptcy Act. Insolvency of Cooperative Societies is administered by the Registrar of Cooperative Societies established under the Cooperative Societies Act while insolvency matters on part of banks and financial institutions are administered by the Bank of Tanzania through the Banking and Financial Institutions Act. As for trusteeship of body corporate, insolvency is administered by the Administrator General of Trustee established by the Trusteeship Incorporations

Act. Insolvency by insurance companies is administered by the Commissioner of Insurance established under the Insurance Act.

Although these laws provide for governance of insolvency in different aspect, the current legal framework does not establish a system of collaboration and coordination between administrators of insolvency matters. Lack of coordination between administrators has led to a situation where a person may be declared insolvent under a certain law but continues to be solvent under another law.

The findings also revealed that countries like India, Uganda, Kenya and Mauritius have a single legislation on insolvency that provide for fast tracking avenues of corporate insolvency matters; cross border insolvency issues, receivership, administration, liquidation, arrangements, bankruptcy and regulation of insolvency practitioners. The Act regulates the bankruptcy and provides for alternative procedures to bankruptcy for the benefit of creditors.

The findings revealed that there are some outdated legislation governing insolvency matters. The research noted that the Trustees' Incorporation Act is outdated, and in some aspects, the Companies Act, the Deeds of Arrangement Act do not align with the current social and economic developments.

The review revealed that the legal regime on insolvency is multidiscipline having multiple sectoral regulators. Each regulator has powers and mandates under a distinctive sectoral laws. These scattered and uncoordinated legislation do not stipulate standards, qualifications, skills or professional ethics that insolvency practitioners need to possess. This to a great extent affects the quality of services delivered to a person. It has been noted that private advocates and accountants are allowed to practice as insolvency practitioners.

The review further indicated that there is no central data base of insolvent entities. Each administrator keeps information related to insolvency matters in a specific sector. Yet, it is clear that information related to insolvency is largely needed by investors in establishing the solvency status of a person they intend to partner in business affairs.

The review also indicated that, lack of proper insolvency laws and procedures on cross border insolvency has led to procedural complexities and uncertainties. This has been explicitly shown in the collapse of Zambia -Tanzania Road Services Ltd, a company incorporated in Zambia and having a subsidiary in Tanzania.[5] The collapse resulted in members' voluntary winding up of the company which eventually turned into creditors' voluntary winding up. The review also indicated that African countries such as Kenya, India and Uganda have adapted and customized UNCITRAL Model Law on cross border insolvency and related matters.

In addition to that, the review has also found that, foreign companies which have subsidiaries in Tanzania are given certificate of compliance by BRELA which do not create legal personality to subsidiaries unless the parent company is incorporated in Tanzania. As a result, this legal position has created difficulties in enforcing and determining insolvency issues about the affairs of the subsidiaries.

The review revealed further that, courts in Tanzania are vested with powers to adjudicate insolvency matters. Conversely, courts are

[5] See, BENHAJJ SHAABAN MASOUD, "Legal Challenges of Cross Border Insolvencies in Sub-Saharan Africa With Reference to Tanzania and Kenya: A Framework for Legislation and Policies" A thesis submitted in partial fulfillment of the requirements of Nottingham Trent University for the degree of Doctor of Philosophy, February, 2012 at pg. 202 para 3 and pg. 203 para 1. See also, Prof. Binamungu, et al, Liquidation Law and Practice in Tanzania Mainland, Mzumbe Book Project, 2003 at pg. 40 - 51.

characterized by piled cases, procedural complications and legal technicalities. The delay in disposal of insolvency cases is partly caused by unnecessary adjournments of cases, large backlog of cases, shortage of judges and lack of adequate skills in insolvency These problems contribute to delays in expeditious disposal of insolvency cases filed in courts. Nonetheless, in other countries such as India, the findings revealed that insolvency matters have a special mechanism of disposing cases expeditiously and has played a bigger role in economic growth of a country. The insolvency disputes resolution system in India, establishes the fast track corporate insolvency resolution process. In order for a matter to be treated as matter of track one has to apply to the Tribunal for the same. Once the matter has been placed in the fast track category, it has to be completed within a period not exceeding 90 days.[6]

Moreover, the findings revealed that the financial security of employees in the event of employer's insolvency is an issue capable of having a far-reaching societal effect. For example, employees holding pension benefits derived from their business' ongoing operations or stock, may discover that their pension plans have been tapped to cover expenses of the business or that their mutual funds (invested with the employer's stock) have become worthless. Thus, the insolvency of a company may cause workers to lose their retirement benefits.[7]

Through the review of the international legal instruments, the Commission noted that Tanzania needs to strengthen and putting in place the UNCITRAL Mode law. The Commission, therefore, strongly recommended for the Government to enact a single legislation on

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[6] The Insolvency and Bankruptcy Code, No. 31 of 2016, sections 55(1) and (2).

[7] Gordon W. Johnson, "Insolvency and Social Protection: Employee Entitlements In The Event Of Employer Insolvency" Meeting Held On 27-28 April 2006. At Pg. 2 Para 6 and Pg. 3 Para 1.

insolvency which will provide comprehensive roles on different parts each of which addressing specific category of insolvency matters.

Furthermore, the Government should amend laws such as Trustees Incorporation Act, the Companies Act and the Deeds of Arrangement Act in order to conform to the present situation. More importantly, the Commission recommends that Administrator General be designated as Official Receiver whose functions will be to provide policy and procedural guidance to insolvency practitioners, prepare and maintain a register of insolvency practitioners, establish and maintain database of insolvent entities and bankrupt persons. There should be established special tribunals which should be manned by persons with qualifications of a judge or retired judge given that training on insolvency matters.

THE COMMISSION

The Law Reform Commission of Tanzania ("the Commission"), is a permanent statutory body established by the Law Reform Commission, Cap.171. It has been in operation since 1983. Its functions include; taking and keeping under review all the laws of the United Republic of Tanzania with a view to its systematic development and reform. In the exercise of its powers, the Commission may review any law or branch of law and propose measures necessary for bringing that law or branch of law into accord with current circumstances. It may also consider such reforms of any laws or branch of laws of Tanzania as may from time to time after informing the Attorney General and the Minister responsible for legal affairs. The Commission also can undertake a review of any law upon the request to give legal advice by the Inter-ministerial Technical Committee.

LAW REFORM COMMISSION

1. Hon. Justice January H. Msoffe (Rtd)	Chairman
2. Mr. Julius K. Bundala	Commissioner
3. Mr. Idd R. Mandi	Commissioner

SECRETARIAT

1.	Mr. Casmir S. Kyuki	Executive Secretary
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12.	Mr. Shadrack M. Makongoro	State Attorney
13.	Dr. Kalekwa R. Kasanga	State Attorney
14.	Mr. Ismail J. Hatibu	State Attorney

REGISTRATION INSOLVENCY TRUSTEESHIP AGENCY (RITA) CO-OPTED MEMBERS

1.	Ms. Emmy K. Hudson	Ag. Administrator General
2.	Ms. Lina R. Msanga	Ag. Director of Legal Rights Protection
3.	Mr. Reginald S. Makoko	Ag. Manager of Insolvency and Trusteeship
4.	Ms. Edna E. Kamara	Senior State Attorney
5.	Ms. Stabua A. Babiker	State Attorney
6.	Ms. Jane W. Mgaya	State Attorney

ACKNOWLEDGEMENT

The Commission wishes to express sincere appreciation to all stakeholders for invaluable contribution during the review and writing of this Report. Among stakeholders were the Registration, Insolvency and Trusteeship Agency (RITA), Judiciary, the Attorney General's Office, the Office of Solicitor General, Regional Administrative Offices, the Bank of Tanzania (BoT), Depositors Insurance Board(DIB), the Business, Registration and Licensing Agency (BRELA), the National Board of Accountants and Auditors (NBAA) and the Law School of Tanzania (LST), the Tanzania Insurance Regulatory Authority (TIRA), Higher Learning Institutions, the Tanganyika Law Society (TLS), the Tanzania Private Sector Foundation (TPSF), Association of Tanzania Employers (ATE), the Trade Union Congress of Tanzania (TUCTA), Tanzania Union of Industrial and Commercial Workers (TUICO), the Tanzania Bankers Association(TBA), Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA), Insolvency Practitioners and the Confederation of Trade Industries (CTI).

Sincere gratitude goes to the Commission members of staff and colleagues from RITA who, in collaboration, blended well into a highly motivated team to undertake the review.

Finally, the Commission bears full responsibility for both form and content of this Report.

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LIST OF ABBREVIATIONS

BOT - Bank of Tanzania
BRELA - Business, Registration and Licensing Agency
CAP - Chapter
CEO - Chief Executive Officer
DGI - Director General of Insolvency
DIB - Depositors Insurance Board
EAC - East African Community
GN - Government Notice
ICT - Information Communication Technology
ILO - International Labour Organization
LART - Loans Advances Realization Trust Tribunal
PSRC - Parastatal Sector Reforms Commission
RITA - Registration Insolvency Trusteeship Agency
SADC - Southern African Development Community
UNCITRAL - United Nations Commission on International Trade Law

POLICIES

The National Trade Policy, 2003
Programme on Business Environment Strengthening for Tanzania (BEST)
National Five Years Development Plan 2016/17 -2020/21 (FYDP II)
Small and Medium Enterprise Development Policy, 2003
The National Economic Empowerment Policy, 2004

LAWS OF TANZANIA

The Bankruptcy Act, Cap. 25
The Banking and Financial Institutions Act, Cap. 342
The Companies Act, Cap. 212

The Cooperative Societies Act, Cap. 211
The Deeds of Arrangement Act, Cap. 26
The Law Reform Commission of Tanzania Act, Cap. 171
The Public Corporations Act, Cap. 257
The Public Trustees (Powers and Functions) Act, Cap. 3
The Insurance Act, Cap. 394
The Trustees' Incorporation Act, Cap. 318

INTERNATIONAL INSTRUMENTS

Protection of Workers' Claims (Employers Insolvency) Convention No. 173 of 1992
UNCITRAL Model Law on Cross Border Insolvency, 1997

REGIONAL INSTRUMENTS

The Southern African Development Community Treaty (SADC), 1981
The Treaty for the Establishment of the East African Community, 1999

FOREIGN LEGISLATION

The Insolvency Act, No. 14 of 2011, (Uganda)
The Insolvency Act, No.18 of 2015 Revised Edition 2016, (Kenya)
The Insolvency Act, No. 3 of 2009, (Mauritius)
The Insolvency and Bankruptcy Code, No. 31 of 2016, (India)

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Mandate of the Law Reform Commission

The mandate of the Law Reform Commission of Tanzania in undertaking the Review of the Legal Framework on Insolvency Law in Tanzania is in accordance with section 4 of the Law Reform Commission Act which empowers the Commission to undertake and keep under review all the laws of the United Republic of Tanzania with a view to its systematic development and reform.

The Commission performs its functions in two ways. First, on a reference from the Minister, the Attorney General or any other Department or Institutions of the Government. The Commission would normally examine the matter referred to it and make recommendations thereof.[8] Second, on its own initiative and subject to informing the Attorney General, the Commission may undertake the examination of any matter for the purpose of reform.[9]

1.1 Background to the Review

The Administrator General requested the Commission vide, a letter with Reference No. AB.26/285/01/B dated 18th September, 2017, to undertake the review of the Legal Framework on Insolvency in Tanzania. Based on the terms of reference, the Commission looked into the:

i) scattered pieces of legislation on insolvency issues;

[8] Section 8 Cap.171.

[9] *Ibid,* Section 9.

ii) overlapping regulatory authorities;
iii) outdated legislation;
iv) cross border insolvency issues, and
v) prepare a Report and a Draft Bill on legal framework governing Insolvency.

1.2 Historical Background of Insolvency

1.2.1 Global Perspective

The history of insolvency law can be traced way back to medieval times.[10] During this period, there were no procedures for administering insolvency estates. There was no machinery for sharing expenses. Insolvency was much dominated by punitive approaches until the notion of rehabilitation regained force.[11]

In 1542, the first English statute on insolvency was enacted for the purpose of absconding debtors and empowering any aggrieved party to procure seizure of the debtor's property, its sale and distribution to the creditors based on the quantities of their debts.[12] However, it was found that the statute did not discharge the bankrupt's liability for claims that were not fully paid. It was therefore found necessary to enact another statute.

In 1570 another statute was enacted to address the distinction between traders and others, including the definition of bankrupt traders and merchants. The statute also provided for equal distribution of assets among creditors.[13]

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[10] Corporate Insolvency Law: Perspectives and Principles, Vanessa Finch p.8.
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*

In the early 18th century, the idea that there was a need to discharge the existing liabilities of the bankruptcy arose actually came into force through the statute of 1705. The statute emphasized on the releasing traders' liability for existing debts. However, the idea was disputed throughout the 18th to 19th centuries, hence, arising the need for widening the scope of the definition of a trader while referring to the risks that traders incur after becoming unable to pay debts out of their liberty. In 1840 it was noted that the common law insolvency processes were frequently being used for small traders whose creditors were owed too little to justify bankruptcy proceedings.

During the 19th century, the pressure for reform was high due to dissatisfaction with the confinement of bankruptcy towards the trade credit and risk of default.[14] This led to the enactment of the Joint Stock Companies Act with the notion that credit might be raised on the institutional basis as capital throughout stocks rather than dealing with an individual. In the late 19th century two separate bodies of law governing individual and corporate insolvency were differentiated so as to enable dealing with different procedural rules while addressing different substantive remedies.

In the mid of 1970s, it was found that the reforms which were made did not suffice the degree of cross influence between personal bankruptcy and corporate insolvency. This led to the formation of a committee to review the laws dealing with credit, security and debt. The committee identified a number of shortcomings in the laws of bankruptcy and came up with a number of proposals for reform.[15] Proposals made by the committee led to the adoption of the Insolvency Act, 1976.[16] Since then, there have been a number of reviews in insolvency law due

[14] *Ibid, pg.10.*

[15] Op.cit, Vanessa Finch pg.11.

[16] Op.cit, Vanessa Finch pg.11

to a number of reasons including socio economic development and trade liberalization.

1.2.2. Evolution of Insolvency Law in Tanzania

Insolvency law, like any other branch of law, reflects and interacts with existing general social and economic structures and trends of development of a particular society. Thus, introduction and development of insolvency legal regime in Tanzania can be traced and discussed under three historical periods, namely, Pre-Arusha Declaration phase (1920-1967), Arusha Declaration phase (1967-1985) and Post Arusha Declaration Economic Reforms phase (1986 to date).[17]

The Pre-Arusha Declaration phase (1920-1967) witnessed the emergence and evolution of insolvency legal regime in Tanzania which was linked with the establishment of British Colonial Administration in Tanzania (Tanganyika, as then was). The colonial legislation related to insolvency was not introduced in Tanzania as a strategy to ameliorate specific legal issues in the economic activity or as a translation of a socio-economic set up in the colony. Instead, it was an extension of the British legal superstructure to support the colonial economy in the then Tanganyika.

In supporting the British colonial economy in Tanganyika, two pieces of legislation were introduced, namely, the Companies Ordinance[18] which was essentially a duplicate of the English Companies Act[19] and the Bankruptcy Ordinance.[20] The Office of Administrator General was

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[17] Prof. Chris M. Peter, et al, "Law and Justice in Tanzania, Quarter a Century of the Court of Appeal", Mkuki na Nyota publishers, Dar es Salaam, 2007 pg. 175

[18] Cap.212.

[19] 1929 (Imperial) of August 1929.

[20] Cap. 25.

empowered to administer the two laws.[21]

The Companies Ordinance was introduced to cater for corporate bodies, hence, insolvency provisions applied to corporate insolvency and the Bankruptcy Ordinance dealt with personal bankruptcy, that is, insolvency of entities other than companies such as partnership, trusts and cooperative societies.

Following independence in 1961, few amendments were made to the Companies Ordinance to adapt it to the changing circumstances. However, the economic forces did not stimulate the growth of requisite socio-economic relations or corporate formations that could trigger the application of insolvency or bankruptcy procedures.

During the Arusha Declaration phase (1967-1985) the insolvency legal regime was characterized by a strategy of economic growth through Ujamaa Villages and public enterprises.[22] The Companies Ordinance having evolved as an expression of intercompany relation in a capitalist socio-economic set up, thus the introduction of Ujamaa Socialism Ideology, though not totally anti-capitalists, stifled the development of company law in favour of a body of public enterprises. It is on the basis of this socio-economic set-up that insolvency law underwent a metamorphosis as insolvency per se was unique under Ujamaa Socialism. Insolvency presupposes private capital investment and competition.[23]

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[21] Other laws were registration of Documents Ordinance, 1920 (Cap.25), Registration of Documents Ordinance, 1923 (Cap.117), Administrator- General, 1921 (Cap.27) See. Government Notice No. 397 of 2005.

[22] Prof. Chris M. Peter, et al, "Law and Justice in Tanzania, Quarter a Century of the Court of Appeal", Mkuki na Nyota publishers, Dar es Salaam, 2007 pg.176.

[23] *Ibid.*

Insolvency legal regime has the role of preventing insufficient investments from pulling down efficient investments by failing to meet monetary obligations as they fall due. Insolvency legislation, therefore, is an essential instrument in the promotion of economic development as it regulates national capital accumulation by providing the machinery to liquidate investments which have proved inefficient and counterproductive and to prevent such investment from eating into other investments engaged in the capital formation.[24]

The principle that governed the economic set up under this phase was the social ownership of all major means of production which in turn had a dominant influence on the development of law in general and legal principles relating to insolvency in particular.

During the Post-Arusha Declaration Economic Reforms phase the insolvency legal regime was characterized by government initiatives towards revamping the private sector, promoting foreign direct investment and divestiture of the public sector. Besides promulgation of Investment Code, various pieces of legislation which translated economic objectives into enforceable legal framework were enacted. The Post – Arusha Declaration Economic Reforms brought about reconciliation of a contradiction between insolvency laws and economic policies and practices of the Arusha Declaration phase.[25] Thus, insolvency gained momentum among public enterprises.

In consequence, three new corporate insolvency legal regimes emerged in Tanzania, namely, corporate insolvency under Companies Ordinance which covers receivership, winding up by the court, voluntary winding

[24] Prof. Chris M. Peter, et al, "Law and Justice in Tanzania, Quarter a Century of the Court of Appeal", Mkuki na Nyota publishers, Dar Es Sa laam, 2007 pg .176.
[25] *Ibid,* Pg. 180.

up and winding up subject to the supervision of the court.[26] Alongside, corporate insolvency under the Public Corporations Act, the Parastatal Sector Reform Commission (PSRC) was formed and charged to liquidate all specified non-viable parastatal enterprises and corporate insolvency regime under the Loans and Advances Realization Trust (LART) had powers of a liquidator, to wind up affairs of creditors, whose non–performing assets have been transferred to LART pursuant to security investments created in favour of the state owned banks and financial institutions.

The applications of the state corporate insolvency legal regimes gave a new leaf of life to insolvency practice in Tanzania. Within the past fifteen years a large number of private companies, public corporations and cooperative societies have been put under receivership or liquidation.[27]

1.3 Statement of the Problem

The increased foreign direct investments, capital formation and private sector involvement call for renewed insolvency legal regime that would promote economic development by regulating national capital accumulation and provide machinery for liquidating investments that proved to be insufficient and counterproductive.

The current insolvency legal framework is dominated by scattered, fragmented and outdated laws with multiple regulatory authorities which make insolvency regime to be complex. Currently, issues related to insolvency of companies are governed by the Registrar of Companies under Companies Act,[28] matters related to insolvency of

[26] *Ibid,* Pg. 181.
[27] *Ibid.*
[28] Cap. 212.

banks and financial institutions are regulated by the Bank of Tanzania, matters related to cooperative societies are regulated by the Registrar of Cooperative Societies under the Cooperative Societies Act,[29] matters related to bankruptcy are regulated by the Administrator General under the Bankruptcy Act[30] and matters related to insolvency of insurance companies are regulated by the Commissioner for Insurance under the Insurance Act.[31] Consequently, there are multiple insolvency regulators without an effective coordination framework.

Some of the laws governing insolvency are outdated. They do not adequately take on board the social, economic and technological changes within the insolvency portfolio, including emerging issues such as cross border insolvency and regulation of insolvency practitioners. They do not provide for regulatory issues such as licensing, monitoring and evaluation, standards setting, investigating complaints and disciplining insolvency practitioners. The laws also do not address adequately the rights of employees when their employers are insolvent and depositors in the event of financial difficulties on a bank or financial institutions and the role which Administrator general plays.

These challenges call for a single comprehensive and robust insolvency legal regime that would promote economic development by regulating national capital accumulation and effectively prevent premature insolvency and protect rights of all persons affected by resolving insolvency.

[29] Cap. 211.
[30] Cap. 25.
[31] Cap. 394.

1.4 Scope of the Review

The review seek to study the legal framework governing insolvency law in Tanzania. It examines various policies, laws, international instruments and treaties governing insolvency regime, identifies gaps and challenges which affect the effective administration of insolvency issues for sustainable economic growth.

1.5 Objective of the Review

The main objective of the review is to examine the existing legal framework governing insolvency issues for the purpose of identifying gaps, and make recommendations for a better substantive and procedural insolvency law. It is intended that the new law paves way to transparent and robust regulatory framework that supports sustainable economic growth and poverty reduction in the country. These reforms would create investment opportunities for local and foreign investors.

1.6 Methodology of the Review

In conducting the review, the Commission used various methods to collect primary and secondary data. These methods included desk review and field research. Under desk review, various materials on insolvency issues were examined. These included policies, legislation, international instruments, articles, publications and reports. In addition, various websites and databases were accessed in order to gather information on insolvency issues from other jurisdictions.

Under field research, the Commission conducted several consultative meetings, personal interviews and focused group discussions to collect stakeholders views. In achieving this, various stakeholders were consulted from Arusha, Kilimanjaro, Morogoro, Mbeya, Dodoma,

Mwanza and Dar es Salaam regions. Stakeholders were drawn from the following institutions, namely, Registration, Insolvency and Trusteeship Agency (RITA), Business, Registration and Licensing Agency (BRELA), Judiciary, Tanzania Private Sector Foundation (TPSF), Tanzania Insurance Regulatory Authority (TIRA), Regional Administrative Office, Association of Tanzania Employers (ATE), Trade Union Congress of Tanzania (TUCTA), Tanzania Union of Industrial and Commercial Workers (TUICO), Tanzania Bankers Association (TBA), Higher learning institutions, Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA), Tanganyika Law Society (TLS), Bank of Tanzania (BOT), Solicitor General (SG), Attorney General (AG), Law School of Tanzania (LST), Confederation of Tanzania Industries (CTI), National Board of Accountants and Auditors (NBAA), Deposit Insurance Board (DIB)and Insolvency Practitioners.

The Commission also conducted a validation workshop by stakeholders to deliberate on what the Commission has recommended. Stakeholders for validation workshop were drawn from the following institutions: Registration, Insolvency and Trusteeship Agency (RITA), Business, Registration and Licensing Agency (BRELA), Judiciary, Tanzania Private Sector Foundation (TPSF), Tanzania Insurance Regulatory Authority (TIRA), Association of Tanzania Employers (ATE), Trade Union Congress of Tanzania (TUCTA), Tanzania Union of Industrial and Commercial Workers (TUICO), Tanzania Bankers Association (TBA), Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA), Bank of Tanzania (BOT), Solicitor General (SG), Law School of Tanzania (LST), Confederation of Tanzania Industries (CTI), National Board of Accountants and Auditors (NBAA), Deposit Insurance Board (DIB) and Insolvency Practitioners.

CHAPTER TWO

POLICY AND LEGAL FRAMEWORK GOVERNING INSOLVENCY IN TANZANIA

2.1 Introduction

This Chapter identifies and analyses policies and legal framework relevant and governing insolvency of both natural and legal persons in mainland Tanzania. The analysis is geared towards establishing the extent to which the current policies and legal framework address insolvency issues. It also analyses laws and highlights their coverage, strengths and weaknesses in relation to insolvency matters.

The National Trade Policy and other sectoral policies reflect on Tanzania's commitment to creating enabling environment that facilitate easy procedures in dealing with insolvency matters. The formulation of these policies, among other things, is intended to advocate and promote speeding up of insolvency proceedings, improving access to courts and enforcement of contracts.

2.2 Policies

2.2.1 National Trade Policy, 2003

The National Trade Policy was promulgated in response to developments in the international setting that led to globalization and liberalization, the new forces for trade expansion and rapid economic growth and technological innovation. Among other things, it aims at establishing an enabling business environment through a process of continuous adjustment of the legal and regulatory framework

impacting on the performance of the business sector.[32]

It points out that despite economic reforms sustained since the mid-eighties, there are still residual impediments that lead to high transaction costs, and therefore, discouraging the inflow of foreign domestic investment thereby hindering efficient performance of the trade sector. The Policy advocates for legal and regulatory reforms intended to lower transaction costs, enhance business compliance and improve efficiency and competitiveness. The Policy requires the Government to put measures to stimulate international competitiveness through, among other things, reduction of unnecessary bureaucratic procedures that lead to high transaction costs for the business sector and expediting the establishment of market-supporting institutions in the area of better regulation to ensure coordinated legal and regulatory reforms and improvement of commercial justice delivery.[33]

The general objective of the Policy is to enable Tanzania to identify ways and means of navigating through a viable and steady path towards competitive export- led growth for the realization of the goal of poverty reduction. Specific objectives are; stimulating a process of trade development as a means of triggering higher performance and capacity to withstand intensifying competition within domestic market; stimulating economic transformation towards an integrated, diversified and competitive entity capable of participating effectively in the Multilateral Trading System (MTS); stimulating and encouraging value adding activities on primary exports as a means of increasing national earnings; and stimulation of investment flows into export oriented areas.[34]

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[32] National Trade Policy 2003 pg. 21

[33] National Trade Policy 2003 pg. 21

[34] *Ibid.*

The Policy underlines the government's intention and direction towards achieving the goals of integrating the Tanzanian economy into the global economy through trade. The Government commits itself to provide enabling policy environment that will facilitate the private sector to become the engine of economic activity and growth through efficiency and better performance. In this respect, the Government pledges to implement measures to promote better regulation and enhance efficient commercial justice delivery with an objective of stimulating private sector service providers.[35]

Furthermore, the Government promises to establish the National Policy Harmonization Committee responsible to create enabling environment for coordination and harmonization of the thrust of key economic sector policies.[36]

2.2.2 Programme on Business Environment Strengthening for Tanzania (BEST)

The Programme was designed to create an enabling business environment which enhances economic growth for rapid and sustainable poverty reduction. The Programme aimed at reducing the burden on businesses by eradicating procedural and administrative barriers and improving the quality of services provided by the Government to the private sector.[37]

Under the component of commercial disputes resolution, the Programme aimed at improving access to the court system for formal and informal businesses, speeding up determination of commercial disputes and diversification of channels for commercial justice

[35] *Ibid.*

[36] *Ibid.*

[37] The Programme on Business Environment Strengthening for Tanzania, 2005.

delivery, including alternative dispute resolution. It pointed out that a well-functioning commercial justice system can encourage lenders to provide capital necessary for business growth.[38]

2.2.3 National Five Years Development Plan 2016/17 - 2020/21 (FYDP II)

One of the objectives of the Plan is improving the environment for doing business and positioning the country as a regional production, trade and logistic hub.[39] Among the key interventions provided under the Plan to achieve stated objectives includes; enhancing measures to promote conducive and enabling business environment through reduction of the cost of doing business; undertaking legal, institutional and regulatory reforms through amending laws and simplifying regulations.[40] Enforcing contracts and resolving insolvency matters are mentioned as areas for reform intended to embrace existence of conducive environment for doing business and promotion of investiment in the country. With regards to resolving insolvency issues, the Plan points out that there are long and cumbersome procedures which call for need to increase efficiency of the commercial courts.[41]

The Plan also aimed at ensuring that necessary measures are taken to ensure equal access and timely justice for all people. These measures includes improving efficiency of adjudication of cases and deepening of legal sector and law reform.

2.2.4 Small and Medium Enterprise Development Policy, 2003

The Policy points out that, the full potential of the small and medium

[38] *Ibid.*
[39] National Five Years Development Plan 2016/17-2020/21 pg.2.
[40] *Ibid, p.126*
[41] *Ibid.*

enterprises sector has yet to be tapped due to existence of a number of constraints hampering the development of the sector. Among the constraints mentioned include unfavorable legal and regulatory framework characterized by complex, bureaucratic and costly legal, regulatory and administrative environment.[42] It states that the high cost of compliance with regulations discourage potential entrepreneurs from formally setting up businesses, while, driving some existing enterprises out of business thereby resulting in unemployment.
The Policy provides further that, despite various interventions aimed at improving the business environment in Tanzania, the legal and regulatory framework is bureaucratic, costly and heavy costs of compliance. As a result, most of informal enterprises have failed to formalize and grow into Small and Medium Enterprises.[43]

The Policy aims at enhancing implementation of programmes aimed at simplification and rationalization of procedures and regulations so as to encourage compliance and minimize transaction costs.

2.2.5 The National Economic Empowerment Policy, 2004

The Policy notes that some of the laws, rules and regulations that are in place are not in line with the spirit of the economic empowerment and that there is a need for reviewing and streamlining these laws, rules and regulations in order to ensure that they are supportive of the National Economic Empowerment Policy. In order to achieve this objective, the Policy provides, among other things, enactment of the National Empowerment Law and rationalizing other laws to ensure that they support the economic empowerment initiatives.[44]

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[42] Small and Medium Enterprises Development Policy 2003, pg. 22
[43] Small and Medium Enterprises Development Policy 2003, pg. 22.
[44] The National Economic Empowerment Policy 2004, paragraph 4.2.2.

2.3 Laws

2.3.1 The Companies Act, Cap. 212

This Act provides for incorporation, management and administration of trading companies. It is the main legal regime which has provisions for insolvency for companies and other associations. The law covers insolvency procedures related to companies only.

According to the law, a company is deemed to be insolvent if it is indebted in a sum exceeding fifty thousand shillings or such other amount as may be prescribed by the Minister and has neglected to pay the said sum or secure or compound to reasonable satisfaction of the creditor. A company is also deemed to be insolvent if by execution or another process issued on a judgment decree or order of any court in favour of a creditor of the company it is returned unsatisfied in whole or in part. The company is also deemed insolvent if is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due or if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities taking into account the contingent and prospective liabilities of the company.[45]

The Companies Act provides four main types of formal procedures available for companies in financial difficulties, namely, compromise arrangements; voluntary arrangements; administration and winding up.[46]

[45] Section 280
[46] *Ibid.*

2.3.1.1 Compromise Arrangements

A compromise arrangement is a process whereby a company and its members and creditors reach an agreement on the reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes or both.[47] Additionally, a compromise arrangement can also take effect for the purpose of the reconstruction of one or more companies or the amalgamation of any two or more companies, whereby the whole or any part of the undertaking or the property of any company concerned in the scheme ("a transferor company") is transferred to another company ("the transferee company").[48]

A company may enter into a compromise arrangement, either involving reorganization of share capital or transfer of undertakings of the company either by applying to the court or on the application of any creditor or member of the company, or if the company is in liquidation, on the application of the liquidator.[49]

2.3.1.2 Voluntary Arrangement

Directors of a company not under administration or being wound up may make a proposal to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs ("voluntary arrangement").[50] A company may enter into a voluntary arrangement if it is viewed as advantageous for the satisfaction of its debts or the arrangement of its affairs.[51] A proposal

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[47] Section 229 (4) of the Companies Act, 2002.
[48] *Ibid,* Section 231.
[49] *Ibid*, Section 229 (1).
[50] *Ibid,* Section 240.
[51] Part VII Chapter 1 of the Companies Act, 2002.

for voluntary arrangement may also be made, when an administration order is in force in relation to the company by the administrator or where the company is being wound up by the liquidator.[52]

A proposal for voluntary arrangement must be made (either by the directors or by the administrator, if the company is in administration, or made by the liquidator if the company is being wound up) to the company and its creditors. The voluntary arrangement would then either be approved or rejected at a meeting of the company and its creditors.

2.3.1.3 Administration

In Tanzania, the High Court may make an administration order requiring the affairs, business and property of a company to be managed by a person appointed for that purpose by the court.[53] A petition for an administration order may be presented either by the company, its directors or by both.[54] An administration order cannot be made in relation to a company after it has gone into liquidation, nor where it is an insurer or a bank.[55]

The court will make an administration order if it is satisfied that a company is or is likely to become unable to pay or make order on its debts[56] and it considers that making the order would be likely to achieve, among other things, the survival of the company as a going concern; compromise or arrangement between the company and any such persons; and a more advantageous realization of the company's

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[52] Section 240 (3) of the Companies Act, 2002.
[53] *Ibid,* Section 247 (1).
[54] *Ibid,* Section 248.
[55] *Ibid,* Section 247 (4).
[56] *Ibid.,* Section 280.

assets than would be effected on a winding up. The order needs to specify the purpose or purposes for which it is made.[57]

2.3.1.4 Winding Up

2.3.1.4.1 Winding Up by Court

The High Court of Tanzania has jurisdiction to wind up any company registered in Tanzania as well as other body corporate incorporated outside Tanzania and carrying on business in Tanzania if winding up proceedings have been commenced in its country of incorporation or in any other country in which it has established a place of business. After making an order for winding up of a company, the High Court may direct all subsequent proceedings to be held in a Resident Magistrate's Court, which shall have, for the purpose of the winding up, have all the jurisdiction and powers of the High Court.[58]

Generally, there are five grounds for which a company may be wound up by the court. These grounds are: if a company by special resolution resolves to be wound up by the court; a company does not commence business within a year; the number of members falls below two; the company is unable to pay its debts; and where the court is of the opinion that it is just and equitable that the company should be wound up.[59]

Proceedings for winding up by the court commence upon presentation of a petition for winding up of the company. The petition may be brought by the company, creditors, contributories, administrators, or all of them together or separately if satisfied with the grounds upon which the petition is made. Where the court has issued a winding up order,

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[57] *Ibid,* Section 247(1) and (3).

[58] Section 276 of the Companies Act, 2002.

[59] *Ibid,* Section 279.

an official receiver is appointed to act as a provisional liquidator until that provisional liquidation or another person becomes the liquidator.[60]

2.3.1.4.2 Voluntary Winding Up by Members

The directors of a company may at a general meeting make a special resolution for the winding up of the company. This happens when the company is solvent and capable of paying its liabilities in full but resolves to voluntarily wind up its business. A declaration of solvency stating that the company is capable of paying its debts in full is necessary for voluntary winding up.

The creditors of a company may also, with the sanction of the court or the committee of inspection (or, if there is no committee of inspection, the creditors' meeting) wind up a company. This happens in a situation where the company is insolvent and no declaration of solvency is made and filed with the Registrar.

There are three grounds which may compel a company to enter into voluntary winding up. These grounds are, when the period fixed for the duration of the company by the articles of association expires or when an event occurs upon which articles of association provide that the company is to be dissolved and members pass a resolution requiring the company to be wound up voluntarily; the company resolves by special resolution that the company be wound up voluntarily; or the company resolves by special resolution to the effect that it cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up.

The Companies Act provides for various types of procedures to be taken when companies go into financial difficulties. However, the

[60] *Ibid,* Section 281.

law neither addresses matters related to cross border insolvency nor provides adequate rules and procedures regulating liquidators or receivers.

The Companies Act vests powers in the High Court or subordinate courts to deal with matters of insolvency in ordinary court proceedings which are characterized by long, cumbersome and costly procedures.

In terms of foreign companies intending to operate in Tanzania, the law provides for issuance of certificate of compliance[61] which does not confer corporate personality to branches. This has negative impact on resolving insolvency matters.

2.3.2 The Banking and Financial Institutions Act, Cap.342

This Act provides for comprehensive regulation of banks and financial institutions. It provides for regulation and supervision of activities of savings and credit co-operative societies and schemes with a view to maintaining the stability, safety and soundness of the financial system aimed at reducing risk of loss to depositors.[62] The Act sets special procedures and rules for liquidation of banks and financial institutions.

The law gives right to any bank or financial institution to voluntarily liquidate its operations in accordance with the provisions of its constitution and the requirements of the law. Any liquidation undertaken voluntarily needs to obtain approval of the Bank of Tanzania. The approval by the Bank of Tanzania may be given on such terms and conditions as it may determine. The main condition for voluntary liquidation is that the bank or financial institution need to be solvent with sufficient liquid assets to repay its depositors and

[61] Section 435(1) Companies Act, Cap. 212.

[62] Section 5 of the Banking and Financial Institutions Act, Cap. 342.

creditors in full and without delay.[63]

Where a bank or financial institution gets approval of the Bank of Tanzania, the bank or financial institution shall immediately cease all activities, except those which are incidental to the orderly realization, conservation and preservation of its assets and the settlement of its obligations. The bank or financial institution under liquidation must immediately surrender the licence to the Bank of Tanzania for revocation and repay in full its depositors and creditors before winding up operations.[64]

The Bank of Tanzania is required to take possession of the bank or financial institution concerned where it determines that the assets of a bank or financial institution under voluntary liquidation may not sufficiently discharge its obligations or that the completion of liquidation of the operations of a bank or financial institution is unduly delayed. Where the Bank of Tanzania takes possession of a bank or financial institution, it is required to take necessary measures leading to compulsory liquidation of the bank or financial institution concerned in conformity with required provisions.[65]

The Bank of Tanzania may also take possession of any bank or financial institution if the respective bank or financial institution refuses to comply with an order or directive of the BoT under the following circumstances:

i) if the bank or financial institution refuses to submit to or otherwise obstruct any inspection by the Bank of Tanzania;
ii) if the licence of the bank or financial institution has been revoked;

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[63] *Ibid,* Section 50.
[64] Section 51 of the Banking and Financial Institutions Act, Cap. 342
[65] *Ibid,* Section 55.

iii) if the bank or financial institution ceases to be an insured institution by the Depositors Insurance Board;
iv) if the bank or financial institution has been implicated of an offence under the Proceeds of Crime Act[66] or Prevention of Terrorism Act;[67]
v) if in the opinion of the Bank of Tanzania the capital of the bank or financial institution has fallen below the minimum required;
vi) if the bank or financial institution is insolvent;
vii) if the bank or financial institution is conducting its business in violation of any law or regulation; or
viii) if a bank or financial institution is engaging in any unsafe or unsound practice that is likely to cause insolvency or substantial dissipation of assets or serious prejudice to the interests of depositors or the Deposit Insurance Board (DIB).[68]

The law vests different powers in the Bank of Tanzania on taking possession of any bank or financial institution. These powers include the power to continue or discontinue operations as a bank or financial institution, notwithstanding that its licence has been revoked. The Bank of Tanzania may also stop or limit payment of its obligations and it may employ any necessary staff or discontinue employment of any staff of a bank or financial institution. The Bank of Tanzania may also execute any instrument in the name of the relevant bank or financial institution and may initiate, defend and conduct, in its name, any action or proceedings to which the bank or financial institution is a party. The Bank of Tanzania has power to merge the bank or financial institution with another bank or financial institution and it may transfer

[66] Act of 1991.
[67] Act, 2002.
[68] Section 56 of the Banking and Financial Institutions Act, Cap. 342.

any asset or liability of the bank or financial institution, including assets and liabilities held in trust, without any approval, assignment or consent with respect to such transfer. Finally, the Bank of Tanzania may reorganize or liquidate the bank or financial institution.[69]

After taking possession, the Bank of Tanzania is required to determine whether to restructure, reorganize or liquidate the bank or financial institution and it may establish a plan of resolution based upon any combination of restructuring, reorganization or liquidation of the bank or financial institution that provides for expeditious resolution.[70] The law provides that where the resolution plan calls for liquidation of the bank or financial institution, then, the liquidation need to proceed in terms of the provisions of section 41 and such regulations as the Governor may make.[71]

The law confers power to the Bank of Tanzania to appoint the Deposit Insurance Board (DIB) to be a liquidator where it determines that a bank or financial institution has become insolvent. That appointment has the same effect as the appointment of any other liquidator by the court. The law requires that, on the appointment of DIB, no other liquidator of a bank or financial institution may be appointed under the provisions of the Companies Act or the Companies Decree (Zanzibar) without approval of the High Court. It provides that, where a liquidator of a bank or financial institution has been appointed pursuant to the provisions of the Companies Act or the Companies Decree, the Bank of Tanzania may apply to the High Court for an order that the liquidator be removed and the DIB be appointed as liquidator in the first mentioned liquidator's place.[72]

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[69] *Ibid,* Section 58 (2).

[70] *Ibid,* Section 59 (4).

[71] *Ibid,* Section 61.

[72] Section 41 of the Banking and Financial Institutions Act, Cap. 342.

The law provides further that provisions of the Companies Act and any other relevant law may be applicable in liquidation of banks and financial institutions only to the extent not inconsistent with the Companies Act and any liquidation regulations, directives and circulars issued by the Governor of the Bank of Tanzania.

The analysis shows that the Bank of Tanzania is empowered to appoint DIB to be a liquidator where it determines that a bank or financial institution has become insolvent. On the other hand, the law provides DIB functions under the supervision and control

of the Bank of Tanzania. In this case, the Bank of Tanzania becomes the regulator and liquidator of banks and financial institutions at the same time.

2.3.3 The Cooperative Societies Act, Cap.211

The Cooperative Societies Act provides for the formation, constitution, registration and operation of cooperative societies. It sets special provisions for insolvency matters related to cooperative societies by providing procedures for dissolving cooperative societies, powers of liquidators and power of registrars in regulating liquidation process.

The law further provides powers to the Registrar of Cooperative Societies to cancel the registration of the society after undertaking an inquiry or inspection or on receipt of a request of three quarter of members of the society requesting for dissolution of the society or after the society has failed to comply with the provisions of the Act.[73] The Registrar may also cancel the registration of the society if it is proved that:

[73] Sections 96, 98 and 99 of the Cooperative Societies Act, Cap. 211.

i) the number of members has been reduced to less than the required minimum provided under the Act;[74]
ii) the society has not commenced business within six months of its registration;
iii) the society has ceased to carry business;[75] or
iv) the society has failed to comply with the requirement to present audited accounts as required by the BoT Act.[76]

On cancellation, the society ceases to exist as a corporate body except for the purpose of winding up.[77] When a society is cancelled or dissolved, the Registrar of Cooperative Societies is required to appoint a custodian of the assets and liabilities of the society and is also required to appoint a competent person or persons to be liquidator of the society's assets and liabilities.[78]

The law provides further that the liquidator needs to act under guidance and control of the Registrar. The Registrar's power and control over the liquidator includes power to rescind or vary any order made by the liquidator; remove a liquidator from office; limit the power of liquidator; call for books, documents and assets, require accounts to be rendered to him; audit liquidator's accounts, authorize distribution of the liquidator.[79]

The law confers powers to the liquidator to institute and defend suits on behalf of the society; determine contributions made by members to the society; investigate claims against the society and their priority;

[74] *Ibid,* Section 100 (1).
[75] *Ibid.,* Section 100 (2).
[76] Section 100 (3) of the Cooperative Societies Act, Cap. 211.
[77] *Ibid,* Section 102.
[78] *Ibid,* Section 103.
[79] *Ibid,* Section 105(5).

examine and investigate claims of the society against other persons; determine persons responsible for the cost of litigation; take possession of books, documents and assets of the society and giving directions on collection and disposal of assets, books and documents of the society for winding up the affairs of the society.[80]

The law likewise provides for stay of proceedings against the society after cancellation.[81] It prohibits disposition of properties after cancellation[82] and restricts attachment, distress or execution against any asset of the society after cancellation.[83]

The Bankruptcy Act applies in winding up a registered society which is insolvent. It applies in determining the rights of secured and unsecured creditors. It also applies in proving debts and valuation of annuities, future and contingent liabilities, or persons adjudged bankrupt and persons entitled to prove for and realize dividend in the assets of the society.[84]

During winding up of a society, priority of payment is given to Government taxes and local government rates; Government rents of a period not more than one year; wages and salary of employees within six months and compensation under any law not exceeding one hundred thousand Tanzania shillings. The law also provides that an appeal by any member of the society against cancellation order need to be made to the Minister. Upon receiving the appeal, the Minister may confirm or revoke the order.[85]

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[80] *Ibid,* Section 104.
[81] *Ibid,* Section 106.
[82] *Ibid,* Section 107.
[83] *Ibid,* Section 108.
[84] Section 112 of the Cooperative Societies Act, Cap. 211.
[85] *Ibid,* Section 101 (1) and (4).

Jurisdiction of courts is excluded in respect of any matter connected with the dissolution of a registered society unless it is expressly provided for by the law.[86]

2.3.4 The Bankruptcy Act, Cap. 25

The Bankruptcy Act was enacted in 1930 during British colonial administration to provide for matters relating to bankruptcy in Tanzania. It enumerates acts of bankruptcy which include:

i) where a debtor makes a conveyance or assignment of property to a trustee or trustees for the benefit of his creditors generally;
ii) makes a fraudulent conveyance, gift, delivery;
iii) transfer of property; departs out of Tanzania;
iv) being out of Tanzania remains out of Mainland Tanzania;
v) departs from a dwelling-house with intent to defeat;
vi) delay his creditors;
vii) if execution against him has been levied by seizure of goods in any civil proceedings in any court, and the goods have been either sold or held by the bailiff;
viii) if he files in the court a declaration of inability to pay his debts or presents a bankruptcy petition against himself;
ix) if a creditor has obtained a final judgment or final order against him for any amount and the debtor has failed to satisfy the judgment; or
x) if a debtor gives notice to any of creditors that he has suspended or that he is about to suspend payment of his debts.[87]

A creditor is restricted in presenting a bankruptcy against a debtor unless the debt owing by the debtor to the petitioning creditor or

[86] *Ibid,* Section 21.
[87] Section 3 of the Bankruptcy Act, Cap. 25.

creditors amounts to one thousand shillings; the debt is a liquidated sum, payable either immediately or at some certain future time; the act of bankruptcy on which the petition is grounded has occurred within three months before presentation of the petitioner; and the debtor is domiciled in Tanzania, or within a year before the date of the presentation of the petition the debtor or agent has ordinarily resided or had, resided, or had a dwelling house or place of business or has carried on business, in Tanzania.[88]

The court may make a receiving order for the protection of the estate on bankruptcy petition being presented by a creditor or a debtor.[89] When the receiving order has been granted the official receiver is constituted as a receiver of the property of the debtor and no unsecured creditor have any remedy against the property or person of the debtor in respect of the debt.[90]

The debtor may make a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangements of affairs containing the terms which he is desirous of submitting for the consideration by his creditors and setting out particulars of any sureties or securities proposed. The debtor or official receiver may apply to court for approval of the composition or scheme as accepted by the creditors. The court may refuse the proposal if is of the opinion that the terms of the proposal are not reasonable or do not benefit the general body of creditors.[91]

The court is required to adjudge a debtor bankrupt if creditors resolve that the debtor be adjudged bankrupt or if a composition or scheme is

[88] *Ibid,* Section 6 (1).
[89] *Ibid,* Section 5.
[90] *Ibid,* Section 9.
[91] *Ibid,* Section 18.

not approved or the debtor, with concurrence of the official receiver, consent in writing to be adjudged bankrupt. Upon adjudication, the property of the bankrupt become divisible among creditors and is vested in a trustee.[92] The trustee is appointed by creditors or committee of inspection through ordinary resolution.[93] The law gives room for creditors to appoint a committee of inspection for the purpose of superintending the administration of the bankruptcy property by the trustee.

Creditors may resolve to accept a composition or scheme after a debtor is adjudged bankrupt by the court. In such case, the court may also annul the bankruptcy order and vest the property of the bankrupt to the debtor on approval of the composition or scheme. Failure to comply with the composition or scheme may lead to adjudication of bankruptcy to the debtor.[94] The court may also annul adjudication of bankruptcy, if in the opinion of the court, a debtor ought not to have been adjudged bankrupt or the debts of the bankrupt are payable in full.[95]

The bankrupt may at any time apply to the court for an order of discharge and on hearing the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time or grant an order of discharge subject to any conditions on earning or income due to bankrupt or his properties.[96]

The law restricts employment of bankrupt persons. It also prohibits a person who has been adjudged bankrupt to manage, or assist or

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92 Section 20 of the Bankruptcy Act, Cap. 25.
93 *Ibid,* Section 21.
94 *Ibid,* Section 23.
95 *Ibid,* Section 33.
96 *Ibid,* Section 29.

take part in the management of or accept employment in any trade or business owned, either alone or together with any other person, by a relative by consanguinity or affinity of the bankrupt unless he shall first have made application to the court for permission to do so and obtained such permission.[97]

In the distribution of the properties of a bankrupt, priority for payment of debts is given to Government taxes and local rates due from the bankrupt at the date of the receiving order, Government rents of not more than five years in arrear; all wages or salary earned during the four months next before the date of the receiving order and not exceeding four thousand shillings.[98]

The law provides for appointment of official receiver and deputy official receivers of debtors' estates within the United Republic. Deputy official receivers exercise jurisdiction in such areas as may be specified by the Minister. The official receiver and the deputy official receivers are appointed and removed by the Minister responsible for legal Affairs.[99]

Duties of the official receiver include investigating the conduct of the debtor and reporting to the court if the debtors' conducts constitute an offence or justify the court in refusing, suspending or qualifying an order for his discharge. He is required to undertake public examination of the debtor and assist in prosecution of any fraudulent debtor. Official receiver has power to act as interim receiver or manager of the debtor's estate pending the appointment of a trustee or special manager. He has been given power to authorize the special manager to raise money or make advances for the purposes of the estate. He can summon and

[97] *Ibid,* Section 34.
[98] *Ibid,* Section 38.
[99] Section 74 of the Bankruptcy Act, Cap. 25.

preside at the first meeting of creditors and report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating affairs.[100]

The court may also appoint interim official receiver before making a receiving order if it is necessary for the protection of the estate after the presentation of a bankruptcy petition.[101] The official receiver may apply for the appointment of the special manager of the estate business if he is satisfied that the nature of the debtors' estate or business or the interests of creditors require the appointment of a special manager of the estate or business other than the official receiver.[102]

The law gives exclusive jurisdiction to the High Court over bankruptcy matters.[103] However, the Chief Justice may, by order, delegate all or any part of the jurisdiction of the High Court in bankruptcy to a subordinate court, either generally or for the purpose of any particular case or class of cases.[104] The law restricts a receiving order to be made against any corporation or against any association or company registered under the Companies Act.[105]

The Bankruptcy Act is outdated and does not adequately accommodate the current socio-economic development and fiscal policy changes. For example, a creditor can only present a bankruptcy against a debtor if the debt owing by the debtor to the petitioning creditor or creditors amounts to one thousand shillings. Also is the case of composition and scheme arrangement, the security required for all unsecured debts

100 *Ibid,* Section 76 and 77.
101 *Ibid,* Section 10.
102 *Ibid,* Section 12.
103 *Ibid,* Section 6 (1).
104 *Ibid,* Section 97.
105 *Ibid,* Section 118.

provable against the debtors estate in case of proposal for refusal, conditional discharge or suspension of bankruptcy is five shillings in pounds.[106] The debtor can be arrested if, after the service of petition or receiving order, he removes any goods in his possession above the value of one hundred shillings.[107] Wages and salaries payable for employees of the bankrupt in case of bankruptcy need not exceed four hundred shillings.[108]

2.3.5 The Insurance Act, Cap. 394

The Insurance Act provides for regulation of the insurance industry in the country. It regulates among others, insolvency to insurers registered under the law and any persons carrying on insurance business without being registered.[109] An insurer is deemed to be insolvent if, at any time, the requirement to maintain a minimum solvency is not observed by the insurer.[110] The law restricts voluntary winding up of an insurer transacting long term business.[111]

The law provides grounds under which the Commissioner may present to the Court an application for the winding-up of an insurer. The grounds include:

i) where the insurer has not issued a new policy within one year and the continuance of business of that insurer is likely to lead to insolvency or is otherwise contrary to the interest of the policy holder;

ii) if the insurer is unable to pay its debts or has failed to comply with any requirements of the law; or

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106 Section 18 of the Bankruptcy Act, Cap. 25.

107 *Ibid,* Section 26.

108 *Ibid,* Section 38.

109 Section 153(1) of the Insurance Act, Cap. 394.

110 *Ibid,* Section 153 (4).

111 *Ibid,* Section 153 (2).

iii) when the insurer is unable to fulfill the reasonable expectation of policy- holders or potential policy-holders and when it is just and equitable on the interests of policy-holders that the insurer should be wound up.[112]

The Commissioner in presenting a petition for winding-up is deemed to be a creditor of the insurer.[113] The liquidator is required to carry on the insurance business of an insurer with a view to being transferred as a going concern to another insurer whether an existing company or a company formed for that purpose.[114] The liquidator may apply to the court for appointment of a special manager of the business where is satisfied that the interest of the creditor in respect of liabilities of the insurer attributable to its business require the appointment of a special manager of the business.[115]

The law provides that where an insurer is a subsidiary of a company which is not an insurer and the holding company is wound up the subsidiary insurer should not be wound up except on the basis of a separate application for winding-up.[116] It further provides that, in case the insurance business of the principal company has been taken over by the secondary company, then, the secondary company may be wound up in conjunction with the principal company under court order and the same person may be appointed to be a liquidator for the two insurers.[117] The law requires that the winding up of a principal company shall commence winding up of a secondary company. However, when there is no order for winding up of secondary company

[112] *Ibid,* Section 153 (5).
[113] Section 153 (7) of the Insurance Act, Cap. 394.
[114] *Ibid,* Section 155 (1).
[115] *Ibid,* Section 155 (2).
[116] *Ibid,* Section 153 (8).
[117] *Ibid,* Section 156 (1).

then the secondary company cannot be wound up unless it is just and equitable for the two companies to be wound up together.[118]

The law provides that Rules made under the Companies Act may regulate the procedure and the practice in proceedings for winding up of insurers under the law.[119] The analysis above shows that in winding up of an insurer the Commissioner for insurance applies to the court for winding up order. It is the court that appoints the liquidator and administers the liquidation process. However, it is noted that courts are overwhelmed by backlog of cases and, therefore, causing delay in undertaking insolvency processes for insurance companies. Unlike the Cooperative Societies Act, where the Registrar appoints the liquidator and administers the liquidation process of cooperative societies and that an appeal against the decision of the Registrar lies to the Minister whose decision is final.

2.3.6 The Public Corporations Act, Cap. 257

The Public Corporations Act regulates establishment, management and streamlining of public corporations. A public corporation is defined as any corporation established under the Act or any other law and in which the Government or its agent owns fifty one percent or more of the shares but does not include an institution of learning, a district development corporation, a research institution or a sports institution.[120]

Among other issues, it provides for reorganization of public corporation and statutory corporation. It provides that a public corporation or statutory corporation may be reorganized where the President is

[118] *Ibid,* Section 156 (4).
[119] *Ibid,* 153 (10).
[120] Section 3 of the Public Corporations Act, Cap. 257.

satisfied that there exists any other existing public corporation or statutory corporation for the performance of all or any of the functions for which a public corporation or statutory corporation is or has been established, and such corporation is solely owned by the Government. In the course of reorganizing, the President may order that the existing corporation cease to exist or perform all or any of the functions which are conferred on the public corporation. The President may also order transfer of assets or liabilities of the existing corporation to the public corporation or the statutory corporation, as the case may be. He may also order transfer of any person who is an employee of the existing corporation to the service of the public corporation or the statutory corporation which is solely owned by the Government and such employee shall, as from the date of such transfer, be deemed to be an employee of the public corporation or statutory corporation to which he is transferred.[121]

The executive, through the President and in some cases, responsible Ministers are empowered to establish, dissolve public corporations. It is not clear in terms of procedure as to how creditors can proceed against the public corporation whose existence has been dissolved. The law does not adequately address the fate of employees whose employments are terminated in the course of reorganizing the public corporation. It does not also cover issues related to rights of creditors of the insolvent public corporation.

2.3.7 The Deeds of Arrangement Act, Cap. 26

A deed of arrangement refers to a written agreement between debtors and creditors, in the absence of a bankruptcy order, that arranges the debtors affairs, either for the benefit of the creditors generally or, when the debtors are insolvent at the date of the execution of the instrument,

[121] *Ibid,* Section 22.

for the benefit of at least three of the creditors.[122]

A deed of arrangement can be in the form of an assignment of property, a deed of agreement after a composition; deed of inspectorships for winding up a business; letter of licence to manage, realize in dispose of a business for payment of debts and any other agreement or instrument for winding up debtors business or authorizing debtor to manage business to pay debts[123]

The law requires that the deed need to be registered by the Registrar appointed by the Minister responsible for legal affairs[124] and that the deed of arrangement need to be assented to by a majority of the creditors.[125] The law further provides for appointment of assistant registrars to assist the Registrar in discharging duties.[126] The law establishes a Register of Deeds and provides its form.[127] It provides for rectification,[128] and inspection of the Register.[129]

The law makes provision for conducts of trustees and impose penalty on trustees acting on void deed of arrangement.[130] It provides for management of financial affairs by trustees and appointment of new trustees.[131] The law provides exclusive jurisdiction to the High Court to hear all applications by the trustee under a deed of arrangement.[132]

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122 Section 3 of the Deeds of Arrangement Act, Cap. 26.
123 *Ibid,* Section 3 (2).
124 *Ibid,* Section 4 of the Deeds of Arrangement Act, Cap. 26.
125 *Ibid,* Section 5.
126 *Ibid,* Section 6
127 *Ibid,* Section 8.
128 *Ibid,* Section 9.
129 *Ibid,* Section 11.
130 *Ibid,* Sections 12 and 13.
131 *Ibid,* Sections 14 and 18.
132 *Ibid,* Sections 14 and 18.

The main objective of deeds of arrangements is to afford a debtor an alternative way of settling financial affairs with his creditors rather than entering into bankruptcy. The law recognizes Dar es Salaam as the centralized registry.

The law allows the use of post office as a means of sending the deeds of arrangements. However, the world has advanced on the means of communication through the use of Information Communication Technology (ICT). The law, thus, needs to be flexible to the extent that it can accommodate socio-economic and technological development in order to create enabling environment for doing business in Tanzania. A well-functioning system which creates conducive environment for doing business requires services to be decentralized to service consumers to enable effective accessibility. It is thought that, the law governing deed of arrangements needs to be friendly to users

2.3.8 The Trustees' Incorporation Act, Cap. 318

The Trustees' Incorporation Act regulates incorporation of a trustee or trustees of a body or association of persons bound together by custom, religion, kinship or nationality, or established for any religious, educational, literary, scientific, social or charitable purpose, and any person or persons holding property in trust for any religious, educational, literary, scientific, social or charitable purpose.[133]

The law makes it compulsory for a trustee or trustees holding property in trust for any religious, educational, literary, scientific, social or charitable purposes who has not or have not been incorporated under any law or whose incorporation is not provided by any law to apply for incorporation.[134] Upon incorporation, the trustee or trustees become a

[133] Section 2 of the Trustee's Incorporation Act, Cap. 318.
[134] *Ibid,* Section 3.

body corporate with capacity to hold and acquire, and, by instrument under such common seal, transfer, convey, assign and demise, any land or any interest, therein, in such and in the like manner, and subject to the like restrictions and provisions, as such trustee or trustees might, without such incorporation, hold or acquire, transfer, convey therein, assign or demise any land or any interest.[135]

If after investigation, Registrar General discovers that the trust property has been used, or misused in circumstances which are prejudicial to the interests of members of the body corporate or organization, may suspend or remove the trustee and any person found in use or misuse of such property; appoint a receiver and manager or the Public Trustee to take care of such property and run the day to day affairs of the body corporate or organization for a period pending appointment of the new trustee or trustees; freeze the bank account of that body corporate or organization; stop further action by the trustee or trustees in dealing with the property of the body corporate or organization; refer the matter to a police officer of the rank of Inspector or above for further investigations with a view to taking further legal action in a court of law; or pursue trustee or trustees who have committed breach of trust and to recover trust property or seek damages.[136]

The Registrar General may revoke the incorporation of any incorporated trustee or trustees upon failure to furnish audited accounts or on failure to permit accounts to be inspected by the Registrar General or by a person authorized as such. The Registrar General may also suspend any application for incorporation of a trustee or trustees until such time an order for doing anything necessary has been complied with.[137]

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135 *Ibid,* Section 8.

136 Section 14 of the Trustee's Incorporation Act, Cap. 318.

137 *Ibid,* Section 8.

The Administrator-General may revoke the incorporation of a body corporate under the Act on being satisfied that the certificate of incorporation was obtained by means of fraud or false representation; or if there are no trustees comprising of a body corporate or the number of such trustees ordinarily resident has fallen below the minimum number; or the body corporate has ceased to hold any trust property and that it is improbable that it will hold such property in the future; or it has failed to fulfill or perform any of the conditions, directions, obligations or duties provided in the certificate of incorporation, the Act or any other enactment, the constitution and rules, the trust instrument or declaration of trust; or the trusts governing any such body corporate are so changed that they are no longer within the provisions of subsection (1) of section 2.[138] The Administrator-General may revoke the incorporation of a body corporate if, at any time, the body corporate requests the Administrator-General to revoke the incorporation of such body.[139]

The law confers power to the Registrar General to revoke or suspend, at any time, the incorporation of any trust if it is expedient so to do on the grounds that the body corporate or organization is being used for unlawful purposes or for any purpose prejudicial to or incompatible with the maintenance of peace, order and good governance; or has altered its objects or pursues objects other than declared objects; or failure to comply with an order issued by the Registrar General; or has breached, in any way, the trust.[140]

Generally, the law does not align with the current social, economic and technological developments. For example, a penalty for defaulting making any return or giving any notice by the body corporate is a

[138] *Ibid,* Section 23 (1) and (2).
[139] *Ibid,* Section 23 (3).
[140] *Ibid,* Section 24.

fine of not exceeding one thousand shillings for every month during which the default continues.[141] An offence for making willfully false statement attracts a fine of not exceeding two hundred thousand shillings.[142] Offences related to the late filing of returns attract a late filing fees of one thousand shillings for every month during which the default continues.[143]

2.4 Conclusion

The policies analyzed call for creation of an enabling business environment through legal and regulatory reform. They advocate for removal of procedural and administrative barriers with a view to reducing cost of doing business. The policies require creation of a business environment which is simple, result oriented and user friendly. The policies require effective framework for contract enforcement and resolving insolvency matters.

In terms of legislation, the analysis shows that there are multiple legislation that govern insolvency matters in Tanzania. Insolvency provisions are scattered in various sectoral laws thereby creating multiple regulators to administer insolvency matters. The analysis also shows that the existing legal framework does not adequately address various insolvency matters such as cross border insolvency and regulation of insolvency practitioners. Elsewhere, they do not adequately address the fate of employees, creditors and depositors when an entity becomes insolvent.

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141 *Ibid,* Section (1).
142 *Ibid,* Section 28 (2).
143 *Ibid,* Section 28 (3).

CHAPTER THREE

INTERNATIONAL INSTRUMENTS AND EXPERIENCES FROM OTHER JURISDICTIONS

2.0 Introduction

This Chapter explores international instruments and legislation on insolvency matters from selected countries. The overall aim is to examine different experiences and explore their suitability and adaptability to the Tanzanian context.

3. I International Level

3.1.1 UNCITRAL Model Law on Cross Border Insolvency

On 30th May, 1997 the United Nations Commission on International Trade Law adopted UNCITRAL Model Law on Cross Border Insolvency.[144] The purpose of the Model law is to provide an effective mechanism for dealing with insolvency cases of cross border nature so as to promote international cooperation. The Model Law is based on respecting different legal systems of Member States and a non-insistence on substantive unification of insolvency law.[145]

The objectives of the Model Law are stated in the Preamble, thus; to promote cooperation between the courts and other authorities of countries involved in cross border insolvency proceedings; to provide legal certainty for trade and investment; to ensure fair and

[144] 1997 - Model law-insol - 2013 - guide - enactment - e (2) pdf - reader accessed on 19th October, 2017.

[145] Uncitral, Uncitral Model Practice Guide on Cross Border Insolvency Cooperation 10 (2005), http:// www.uncitral.org/pdf/ english/texts/insolvency/.

efficient systems that "protect the interests of all creditors and other interested persons, including the debtor" in cross border insolvency proceedings.[146] The Model Law also seeks to protect and maximize the value of the debtors' assets; and to facilitate the rescue, restructure and reorganization of financially troubled businesses, thereby protecting investment and preserving employment.[147]

The Model Law sets principles for the achievement of its objectives. The first is the "access" principle which allows foreign representatives to initiate insolvency proceedings in a different state.[148] In other words, it gives representatives of foreign insolvency proceedings and creditors a right of access to the courts of an enacting state to seek assistance and authorize representatives of local proceedings being conducted in the enacting state to seek assistance elsewhere. The second is the "recognition" principle which envisages that the receiving court should have authority to make orders recognizing the foreign proceedings, either as a foreign "main" or "non-main" proceedings.[149]

The third is the "relief" principle which is considered necessary for the orderly and fair conduct of cross border insolvencies. The Model Law entails for the courts to have discretional powers of granting interim reliefs between the making of an application for recognition and the decision on that application.[150] The Model Law also provides for an automatic relief which is usually a stay or suspension of proceedings against the debtor. Interim relief may be granted where an application for recognition is pending for the protection of assets within the jurisdiction of the receiving court. Discretionary relief may be awarded

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146 The preamble to the Uncitral Model Practice Guide, 1997.
147 *Ibid.*
148 *Ibid*.
149 *Ibid*.
150 *Ibid*.

if the judge feels that the situation demands, and is available in both "main" and "non-main" proceedings.[151]

The fourth is "cooperation" and "coordination" principle. According to the Model Law, the principle requires both courts and insolvency representatives in different states to cooperate to the maximum to ensure efficient administration of debtor's estate.[152]

The Model Law applies where assistance is sought in the state by foreign court or a foreign representative in connection with foreign proceedings and assistance is sought in a foreign state in connection with proceedings under particular law of the state dealing with insolvency issues.[153]

The Model Law further provides for an access of foreign representatives and creditors to court in a particular state.[154] It gives foreign creditors the right on commencement and participation of proceedings on the same law of insolvency of that particular country.[155] The Model Law further provides for a foreign representative who may apply to court for recognition of the foreign proceedings in which the foreign representative has been appointed.[156] However, the law places mandatory recognition, on application of foreign proceedings, to be accompanied by a certified copy of decision commencing foreign proceedings and appointing foreign representative.[157]

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151 *Ibid*.
152 *Ibid*.
153 *Ibid,* chapter II.
154 *Ibid,* Article 1(a) and (b).
155 *Ibid,* article 13 (1).
156 *Ibid,* article 15 (1).
157 *Ibid,* article 15 (2).

The effect of the recognition of foreign proceedings is also provided under the law. Once commencement or continuation of individual actions of proceedings concerning debtor's asset, rights, obligations or liabilities, execution against debtor's asset right to transfer, encumber or dispose of any assets of the debtor is suspended.[158] Nevertheless, the right of individual to commence an action or proceedings to the extent necessary to preserve a claim against the debtor does not affect a claim.[159]

The Model Law envisages for cooperation among states. It requires the court to give maximum possible cooperation with foreign courts or foreign representatives directly or through an entity or person. The Model Law vests domestic court with a right to communicate directly with, or to request information or assistance from foreign courts or representative.[160]

3.1.2 Protection of Workers' Claims (Employers Insolvency) Convention No. 173 of 1992

Insolvency affects employees due to social and economic consequences it brings. When it became necessary to have in place international efforts which can safeguard interests of employees, the International Labour Organization (ILO) realized the significance of stressing the importance of the protection of workers' claims in the event of insolvency of employers through the Convention of Protection of Workers' Claims (Employers Insolvency).[161]

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158 *Ibid,* article 20 (1).

159 *Ibid,* article 20 (3).

160 *Ibid,* article 25 (1), and (2).

161 Protection of Workers' Claims (Employers Insolvency) Convention No. 173 of 1992.

The Convention provides protection of workers' in two ways: protection of workers claims by means of a privilege or by a guarantee institution. Member states are afforded two options to choose from one of the mentioned ways or implement both of them.[162] Protection by way of privilege requires that insolvency workers claims arising out of their employment be protected by way of a privilege so that workers are paid out of the assets of the insolvent employer before non-privilege creditors can be paid their share.[163]

This protection covers at least workers' claims for wages relating to prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment; the workers' claims for holiday pay due as a result of work performed during the year in which the insolvency or termination of the employment occurred and in the preceding year and severance pay due to workers' upon termination.[164] The Convention further guides member states to limit the protection by privilege of workers claims to a prescribed amount not below a social acceptable level.[165] It also provides for ranks of privilege of workers and direct that member states to put in national laws workers' claim in a higher rank of privilege than other privileged claims, and in particular, those of the State and social security system.[166]

Another way of workers' claims protection is by a guarantee institution which entails that payment of workers' claims against employer arising out of employment need to be guaranteed through a guarantee institution when payment cannot be made by the employer because

[162] *Ibid,* Article 3.
[163] *Ibid,* Article 5.
[164] *Ibid,* Article 6.
[165] *Ibid,* Article 7.
[166] *Ibid,* Article 8.

of insolvency. This type of protection covers workers claims for wages relating to a prescribed period, which need not be less than eight weeks, prior to the insolvency or prior to the termination of the employment; holiday pay due as a result of work performed during a prescribed period, which need not be less than six months prior to the insolvency or prior to the termination of the employment; amounts due in respect of paid absence from work place relating to a prescribed period, which should not be less than eight weeks and severance pay due upon termination of employment.[167]

Though Tanzania has not ratified this Convention it can borrow a leaf from some of principles laid down under the Convention so as to address the challenges facing employees when employers become insolvent.

3.2 Regional Level

3.2.1 Southern African Development Community Treaty (SADC)

In 1981, SADC member states adopted a Treaty whose objectives, inter alia, are to achieve development and economic growth, alleviation of poverty, enhancing standard and quality of life of the peoples of Southern Africa.[168] The Treaty identifies areas of cooperation necessary to foster regional development to be industry, trade, investment, and finance.[169]

In order to operationalize the SADC Treaty, the Southern Africa Development Community (SADC) Protocol on Trade was adopted in 1996. The Protocol focuses on liberalizing intra-regional trade in goods

[167] *Ibid,* Article 12.
[168] Article 5(1), (a) of the Southern African Development Community Treaty.
[169] Ibid, Article 21(1), (c).

and services on the basis of fair, mutually equitable and beneficial trade arrangements. The Protocol envisages ensuring efficient production within SADC reflecting the dynamic comparative advantages of its members that contribute towards the improvement of cross border and foreign investment, industrialization of the region and establish Free Trade Area in the SADC Region.[170]

The Protocol further permits cross border investments whereas member states are obliged to adopt policies which promote an open cross border investment thereby enhancing economic development, diversification and industrialization regime.[171] In that regard, member states are obliged to adopt comprehensive trade development measures that promote trade within the region.[172] The promotion of free trade and cross border investment within the SADC region entails for member states, including Tanzania, to develop mechanisms for dealing with cross border insolvency issues that emanate from cross border investment and intra-trade.

3.2.2 The Treaty for the Establishment of the East African Community

The Treaty for the Establishment of the East African Community was adopted and signed on the 30th November 1999[173] by the East African countries aiming at widening and deepening co-operation among the partner state in political, social, economic and other fields.[174] The EAC Treaty envisages attainment of sustainable growth and development of

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[170] Article 2(1), (2), (3), (4) and (5) of the Southern African Development Community Protocol 1996.

[171] *Ibid,* Article 22

[172] *Ibid,* Article 26.

[173] Entered into force on 7th July 2000.

[174] The Treaty for the Establishment of the East African Community, 1999, art. 5 (1 &2).

the partner states by the promotion of a more balanced and harmonious development of the Partner States.[175]

In order to attain the objectives of the Treaty, partner states adopted the Protocol on Establishment of the East African Community Common Market. The Protocol intended to enhance free movement of goods, labour, services and capital which will significantly boost trade and investments and make the East African region more productive and prosperous.[176] The Protocol envisages free movement of capital amongst partner states. It requires partner states to remove all restrictions and discrimination on movement of capital from persons who are residents within the region.[177]

The Protocol further provides for protection of cross border investments by requiring each partner state to protect cross border investment of other partner states which are within its territories.[178] The free movement of labour, capital and investment goes hand in hand with cross border insolvency within the region. Thus, all EAC partner states, including Tanzania, need to have in place legal mechanism of dealing with cross border issues arising from movement of capital, investment and labour.

3.3 Experiences from Other Jurisdictions

3.3.1 The Republic of Uganda

In 2011, Uganda adopted the UNCITRAL Model Law by enacting the Insolvency Act[179] which, among other things, provides for receivership,

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175 *Ibid.*

176 Protocol on establishment of the East African Community Common Market entered into force on 1st July, 2010.

177 Ibid, Article 24 (1).

178 *Ibid,* Article 29 (1).

179 No. 14 of 2011

administration, liquidation, arrangements, bankruptcy, and regulation of insolvency practitioners and cross border insolvency. The institution charged with insolvency matters is the Uganda Registration Service Bureau.

More importantly, the law stipulates qualifications of insolvency practitioners. According to the law, for a person to be appointed or act as insolvency practitioner that person must be a lawyer, or an accountant, or chartered secretary who is a registered member of the relevant professional body or is a registered member of any other professional body.[180] The law also establishes a professional body which regulates insolvency practitioners and prohibits unqualified persons to practise as insolvency practitioners.

Courts in Uganda are empowered to restrain unqualified persons from practising as insolvency professionals by making a prohibition order.[181] Once a person is prohibited by an order of the court, that person ceases to act as insolvency practitioner and has to be removed from the office.[182]

Regarding cross border insolvency, the law confers discretional powers to the Minister responsible for insolvency matters to declare the state to be a reciprocating state and the court in bankruptcy, to be a reciprocating court.[183] The law also obliges Uganda to enter into reciprocal agreements, treaties or arrangement for cross border insolvency using terms of that agreement, treaty or arrangement.[184]

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[180] *Ibid,* section 204 (1) (a).
[181] *Ibid,* section 209 (1), (a), (b) and (c).
[182] *Ibid,* section 209 (2).
[183] *Ibid,* section 212 (1).
[184] *Ibid,* section 212 (3).

The law provides for the effect of order of reciprocating court against property situated in Uganda.[185] According to the law, once a bankruptcy or any appointment of a special manager or interim receiver has been made in reciprocating territory in bankruptcy proceedings against a debtor with property in Uganda, it has the same effect as if it had been made in bankruptcy proceedings against the debtor in Uganda.

The law further provides for the procedure for recognizing foreign proceedings.[186] It allows a foreign representative to apply to a court for recognition of foreign proceedings in which foreign representative has been appointed. Accordingly, the application has to be accompanied by a certified copy of the foreign decision and the foreign proceedings appointing the foreign representative, certificate from the foreign court affirming the existence of the foreign proceedings and the appointment of foreign representative or any other evidence acceptable to the court of the existence of the foreign proceedings and the appointment of the foreign representative.[187]

The law requires cooperation and direct communication between courts of Uganda and foreign courts and foreign representatives.[188] Courts are required to cooperate to the maximum with foreign courts or representatives directly or through a trustee or liquidator.

In this respect, Tanzania can draw the following lessons from Uganda; first, the Ugandan insolvency regime is governed by a single legislation. Secondly, Uganda has already adopted the UNCITRAL Model Law on Cross border insolvency, hence, taking into account matters of cross- border insolvency. Thirdly, in Uganda insolvency practitioners are regulated by the Official Receiver.

185 *Ibid,* section 213.

186 *Ibid,* section 235 (1).

187 *Ibid,* section 235 (2), (a), (b) and (c).

188 *Ibid,* section 245 (1).

3.3.2 The Republic of Kenya

Matters related to insolvency in Kenya are governed by the Insolvency Act.[189] The Act regulates bankruptcy and provides for alternative procedures to bankruptcy for the benefit of creditors. It also provides for the liquidation of incorporated and unincorporated bodies.

The law stipulates qualifications for persons to act as insolvency practitioners. Accordingly, if a person meets the requirements of the insolvency regulations with respect to education, practical training and experience, a member of professional body and satisfies the requirements of the rules governing the body that person is eligible to be insolvency practitioner.[190]

The legislation further, empowers Cabinet Secretary to designate some professional bodies as insolvency professional.[191] A professional body may be designated as insolvency profession body upon fulfilling the following conditions; that the body regulates the practice of professionals, maintains and enforces rules authorizing its members to act as insolvency practitioners to ensure that members are fit and proper persons to act as insolvency practitioners and meet acceptable requirements relating to education, practical training and experience.[192] Therefore, insolvency law in Kenya recognizes professional bodies on insolvency matters. The law allows persons to apply to the Official Receiver to be insolvency practitioners.[193] Meanwhile, the Official Receiver has power to annul or cancel the authorization granted to an insolvency practitioner.[194]

189 No.18 of 2015 Revised Edition 2016.
190 Section 6 (1), (a), (b), and (c) of Insolvency Act No.18 of 2015 R.E 2016 [2015].
191 *Ibid,* section 7 (1).
192 *Ibid,* section 7 (2) (a) and (b).
193 *Ibid,* section 8 (1).
194 *Ibid,* section 10 (1).

With regard to cross border insolvency, the Kenyan Insolvency Act has adopted the UNCITRAL Model Law on cross border insolvency intended to promote co-operation between courts and other competent authorities of Kenya and foreign states involved in cases of cross border insolvency.[195]

On the issue of rights of workers in the event of the insolvency of an employer, the Employment Act[196] provides for protection. It requires employees whose employer is insolvent to apply in writing to the Minister responsible for labour so as to be paid any amount owed by the employer out of the National Social Security Fund.[197] Payments are issued by the Minister upon proof of insolvent the employer, the employee's contract has been terminated and that the employee is owed by the employer.[198]

Generally, Tanzania can learn the following from Kenya: first, adoption of the UNCITRAL Model Law of cross border; secondly, insolvency matters being governed by a single legislation. Thirdly, the law governing insolvency containing provisions for regulation of insolvency practitioners.

3.3.3 The Republic of Mauritius

In Mauritius, insolvency matters are regulated by Insolvency Act[199] which, among others, regulates persons involved in insolvency processes.[200] It empowers the court to make a prohibitory order

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195 *Ibid,* section 720.

196 Cap.226.

197 Section 66 of Employment Act.

198 *Ibid.*

199 Act No.3 of 2009.

200 Section 176(1), (a), (b) and (c) of Insolvency Act, No.3 of 2009.

against unqualified insolvency practitioners. According to the law, once a prohibition order is made, such person cannot act as insolvency practitioner and would be removed from the office.[201]

The law provides for the protection of the interests of employees when the company is under administration by prohibiting termination of an employment agreement to which a company is a party upon appointment of the administrator.[202] Also, the administrator is personally liable for payment of wages or salaries during administration of the company accruals or proceeds under contract of employment with the company that was entered into before administrator's appointment.[203]

The law adopts UNCITRAL Model Law, whereby the Minister responsible for trade and investment is obliged to ensure sufficient reciprocity in dealing with insolvencies with jurisdictions that have trading or financial connections with Mauritius or where it is for public interest to bring into operation.

The law establishes the office of the Registrar of Companies to deal with insolvency service among other things.[204] Statutorily, the Insolvency Service Division is charged with duty bound to monitor the performance of insolvency practitioners and discipline or remove an insolvency practitioner from practice.[205] The Division is empowered to set rules and guidelines governing the performance and conduct of insolvency practitioners. [206]

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201 *Ibid,* section 176 (2).
202 *Ibid,* section 225 (1).
203 *Ibid,* section 225 (3).
204 *Ibid,* section 369 (1).
205 *bid,* section 369 (3) (e).
206 *Ibid,* section 369 (3) (f).

The law further establishes the Register of Insolvency Practitioners[207] which is kept and maintained by the Director of Insolvency. The Director is empowered to keep under review the conduct and performance of persons appointed to be insolvency practitioners. At the same time the Director may require any document or information concerning insolvency practitioner to be provided to the Director by official receiver, or by court, or by Registrar of Companies, or by insolvency practitioner, or by any person who is or has been an auditor of a company in which the insolvency practitioner has held office.[208]

The Fourth Schedule to the Mauritius Insolvency Law provides for right to wages or salaries due to employees.[209] The Official Receiver or Liquidator is required by the law to ensure payment of all wages or salaries of any employee in respect of services offered. In this circumstance, the Mauritius law is protective of the interests of employees when the company goes into liquidation.

Tanzania can draw the following lessons from Mauritius: first, insolvency matters are regulated by single piece of legislation which comprehensively provide for co-operation between Mauritius authorities dealing with insolvency and foreign states involved in cases of cross border insolvency.[210] Secondly, insolvency regime protects the rights of employees against insolvent entities/employers and thirdly, the regulation of insolvency practitioners by establishing a register of practitioners and the administering authority.

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[207] *Ibid,* section 374 (1).

[208] *Ibid,* section 375 (1).

[209] Para 1(3), (a), (i) of fourth schedule.

[210] *Ibid,* section 720.

3.3.4 The Republic of India

Insolvency in India is regulated by the Insolvency and Bankruptcy Code.[211] Under Chapter II, the Code provides for insolvency resolution process through the Tribunal. The Code designates the National Company Law Tribunal,[212] as competent Tribunal to determine insolvency matters. A person aggrieved by the decision of the National Company Law Tribunal has the avenue of appeal to the National Company Law Appeal Tribunal.[213]

Where, if a party to insolvency proceedings is aggrieved by the decision of the National Company Law Appeals Tribunal that party has another avenue of lodging appeal to the Supreme Court of India only on matters of law.[214]

Moreover, the Code establishes the fast track corporate insolvency resolution process.[215] In order for a matter to be treated as matter of fast track, one has to apply to the Tribunal for the same pursuant to section 55 (1) and (2). Once the matter has been placed in the fast track category, it has to be completed within a period of not exceeding 90 days. The Code allows the extension of time only once for another period not exceeding 90 days.[216]

Likewise, the Code establishes the Insolvency and Bankruptcy Board vested with powers to acquire, hold and dispose of immovable and movable property.[217] The Board consists of a chairman, three members

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211 The Insolvency and Bankruptcy Code , No.31 of 2016.

212 Established under section 408 of the Companies Act, 2013.

213 Insolvency and Bankruptcy Code, section 61.

214 *Ibid,* section 62.

215 *Ibid,* Chapter IV.

216 *Ibid,* Proviso to Section 56 (3).

217 *Ibid,* section 188 (1).

representing Ministries responsible for finance, corporate and law; one member from Reserve Bank of India and other five members from the Central Government.[218] According to the Code, all members are required to be conversant with insolvency matters.

The Board has the following functions, namely; to register insolvency professionals' agencies, insolvency professionals and information utilities. It has powers to renew, withdraw, suspend and cancel registration. It can specify the minimum eligibility requirement for registration of insolvency professionals and insolvency professional agencies, specify regulations and standard for the functioning of insurance professionals.

The Code strictly prohibits rendering services as insolvency professional without enrolment as a member of an insolvency professional agency registered with the Board.[219]

Another feature of the Code is that it establishes the Insolvency and Bankruptcy Fund for the purposes of insolvency resolution of the liquidation and bankruptcy of persons.[220]

With regard to the cross border insolvency, India has not yet adopted the UNCITRAL Model Law on Cross Border Insolvency. However, the Code provides for the execution of bilateral treaties with other countries for enforcing its provisions. The code sets up a Tribunal which is empowered to issue letters of request to a court or any authority of another country for evidence or action in relation to assets or property of the debtor.

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218 The Insolvency and Bankruptcy Code, section 189.

219 *Ibid,* Section 206.

220 *Ibid,* Section 224.

Tanzania can draw from Indian insolvency regime the following lessons; the insolvency issues are governed by a single legislation which provides for; fast tracking of corporate insolvency matters, cross border insolvency issues; establishment of a special dispute resolution system for insolvency matters; and regulatory board for insolvency practitioners and a Fund for dealing with insolvency bankruptcy issues.

3.4 Conclusion

The international socio-economic developments have culminated in globalization and liberalization, rapid economic growth and technological advancement. These changes triggered the formation of integrated, diversified and competitive global business. In integrating Tanzania economy into global competitive economy, there is a need for creating an enabling business environment that would reduce costs for business processes and speed up determination of commercial disputes.

CHAPTER FOUR

RESEARCH FINDINGS AND ANALYSIS

4.1 Introduction

This Chapter presents the analysis of issues, observations and opinions gathered from stakeholders. It provides Commission's recommendations on each of the issue raised. The issues which the Commission articulated are; multiplicity of laws governing insolvency matters, presence of multiple regulatory authorities with overlapping mandates and regulation of cross border insolvency; outdated laws; litigation on insolvency matters; protection of depositors in insolvency; protection of employees upon insolvency, regulation of insolvency practitioners and the role of Administrator General as the official receiver.

The analysis of the findings is based on the policy statements, existing legislation, national and international instruments and experience from other jurisdictions.

4.1.1 Multiplicity of Laws

Stakeholders' Observations

Stakeholders stated that the insolvency regime in Tanzania is regulated by various sectoral legislation which pose serious problems that need immediate remedial measures. Multiplicity of laws have led to difficulties in choice of laws. This has led to the delay in finalizing insolvency matters whether in court or out of court.

Stakeholders further stated that multiple laws provide different

preferential treatments to creditors and other beneficiaries in insolvency. It creates difficulties in getting experts on insolvency practice, causes contradictory interpretations on similar issues and unnecessary cross references when dealing with insolvency matters. For example, the Insurance Act has elaborate provisions on liquidation of insurers while the Companies Act has elaborate provisions on winding up of companies including insurance companies as a result, some of insolvency cases are being dismissed on technical grounds.

Stakeholders proposed that there should be a single legislation on insolvency matters. Such law should have simplified rules of procedures for insolvency proceedings. This will avoid confusion on which law should be applied and diverse in handling insolvency matters.

Conversely, stakeholders stated that multiple laws on insolvency is healthy and important since the laws do provide sectoral expertise in insolvency matters. A general law often generalize issues thereby failing to adequately deal with other specific issues. They recommended that multiple laws should be maintained.

Commission's Observations

The Commission observes that the insolvency legal framework in Tanzania is a host of scattered and fragmented laws which make it difficult in resolving insolvency issues. The Tanzania insolvency legal framework is governed by the Bankruptcy Act, Cap. 25, the Companies Act, Cap. 212, the Cooperative Societies Act, 2014, the Deeds of Arrangement Act, Cap. 26, the Public Trustees (Powers and Functions) Act, Cap. 3, the Banking and Financial Institutions Act, Cap 342, the Insurance Act, Cap. 394 and the Trustees Incorporation Act, Cap. 318

The Commission noted that scattered insolvency legal regime, creates confusion to users since it leads to forum shopping. The process becomes time consuming and affects creditors who find it difficult to understand where and to whom they can seek remedies timely.

This can be illustrated by conflict of laws between the Companies Act and the Bankruptcy Act about who is an "official receiver". While the Companies Act gives powers to the court to appoint official receiver for bankruptcy purpose, the Bankruptcy Act gives powers to the Minister responsible for legal affairs to appoint the "official receiver" and deputy official receivers who are officers of the court. If there were a single legislation which governs insolvency matters this conflict would not arise.

The Commission is aware that corporate insolvency framework in Mauritius was previously governed by multiple laws which included; the Companies Act, 1984, the Insolvency Act, 1982 and the Protected Cell Companies Act, 1999. All these laws were oriented almost exclusively towards liquidation, which in practice, produced little or no return to unsecured creditors, and a comparatively low return even to non-bank secured creditors. However, reforms brought in by the Insolvency Act, 2009 changed the focus of the corporate insolvency framework with a thrust to consolidate and modernize the insolvency legal framework by updating and integrating a modern and comprehensive regime.[221]

The Commission draws lessons from India, Uganda, Kenya and Mauritius with regard to have a single legislation on insolvency that provides for fast tracking avenues of corporate insolvency

[221] Chepkemoi Too, "A Comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya? Fancy", A Thesis Submitted in Partial Fulfillment of the Requirements of Nottingham Trent University for the Degree of Doctor of Philosophy, 2015.

matters; cross border insolvency issues, receivership, administration, liquidation, arrangements, bankruptcy and regulation of insolvency practitioners.

Commission's Recommendations

The Commission recommends that:
i) The Government should enact a single legislation on insolvency which, among other things, should:

a) provide for and contain comprehensive rules articulated on different parts each of which addressing specific category of insolvency matters;
b) empower different authorities to determine insolvency matters falling on sectoral jurisdiction;
c) adopt and adapt UNCITRAL Model Law on Cross border issues;
d) establish a regulatory body to oversee insolvency practitioners;
e) set insolvency professional code of conduct and ethical standards for insolvency practitioners;
f) provide for functions, responsibilities and accountability for insolvency practitioners;
g) regulate training on insolvency profession in collaboration with related profession bodies;
h) provide for regulations on procedures for handling insolvency matters depending on sectoral requirement; and
i) provide a time limit for litigating insolvency cases.

ii) Sectoral aspects other than insolvency matters should be regulated under respective sectoral laws.

4. 1.2 Outdated Laws

Stakeholders' Observations

Stakeholders observed that the Companies Act and allied legislation on insolvency consist of outdated insolvency concepts which Tanzania inherited from England. These concepts are not applicable in England to date. An example was cited on the companies Act which does not have provisions recognising the decree holder as a creditor in insolvency, hence, giving hard time to liquidators in events of execution of the decree.

It was further observed that some of the provisions in insolvency legislation provide for outdated pecuniary sanctions. In the views of stakeholders, the outdated pecuniary sanctions do not serve the intended purpose. Stakeholders recommended that all sectoral laws on insolvency be reviewed to take on board the emerging socio-economic and technological changes.

Commission's Observations

The Commission acknowledges the observation by stakeholder that there are some outdated legislation governing insolvency matters. The Commission observes that the Trustees' Incorporation Act is outdated in some aspects as it does not align with the current social and economic developments. For example, a fine for defaulting to make a return or give a notice by a body corporate attracts a fine not exceeding one thousand shillings for every month during which the default continues.[222]

[222] Section (1) of the Trustee's Incorporation Act, Cap. 318.

Additionally, the Trustees' Incorporation Act provides for an offence for willfully making false statement. However, the punishment for the offence is a fine of not exceeding two hundred thousand shillings.[223] The Act creates an offence related to late filing of return which attracts a fine of one thousand shillings for every month during which the default continues. [224]

It is the firm view of the Commission that the amount provided as fines in most of legislation governing insolvency in Tanzania are not commensurate with the socio-economic development and currency depreciation.

The Commission is also aware of section 280 of the Companies Act, which provides for benchmark for company's insolvency. Under the Act, a Company is deemed to be insolvent if it is indebted in a sum exceeding fifty thousand shillings or such other amount as may be prescribed by the Minister and the Company has neglected to pay the said sum or failed to secure or compound for the said sum to the reasonable satisfaction of the creditor. The Commission is of the view that fifty thousand Tanzanian shillings is too low to be realistic in the current circumstances.

Furthermore, the Commission notes that, the Deeds of Arrangement Act,[225] which governs the arrangements between the debtor and the creditor on payment of debts in the absence of bankruptcy order, recognizes Dar es Salaam as the Central Registry. It is a centralized legislation leading to increased burden on insolvency process.

[223] *Ibid,* Section 28 (2).
[224] *Ibid,* Section 28 (3).
[225] Cap.26

Moreover, the Deeds of Arrangement Act allows only the use of post office as the means of sending deeds of arrangement. The legislation does not take on board the Information Communication Technology (ICT) development. The Commission is aware of technological advancement in information communication through the use of ICT. Thus, the law needs to be flexible to the extent that it can accommodate socio-economic and technological development in order to create enabling environment for doing business in Tanzania.

Commission's Recommendations

The Commission recommends that sectoral laws be amended in the following manner:

i) The provisions on pecuniary sanctions in the Trustees Incorporation Act and the Companies Act be reviewed upwards;

ii) The use of currency points in all provisions which have monetary/ pecuniary reference be preferred;

iii) The Deeds of Arrangement Act be reviewed to recognize other means of communication including the use of ICT;

iv) The Deeds of Arrangement Act be reviewed to provide for decentralization of registration processes across the country;

v) The Deeds of Arrangement Act should be amended to categorically state that the Official Receiver be responsible for registration of Deeds of Arrangement.

4.1.3 Multiple Regulatory Authorities

Stakeholders' Observations

Stakeholders pointed out that multiplicity of regulatory authorities is

not healthy to the insolvency regime in Tanzania. Multiple authorities may lead to issuance of multiple orders by different authorities on the same issue hence creating difficulties in executing the orders and prolong litigation. They further stated that multiple authorities on insolvency matters lead to difficulties in choice of the competent authority. Consumers are required to shop for a competent authority, thus, a lot of time and finances are required to procure the right authority.

Stakeholders further stated that cooperative societies have an element of public entity. This makes politicians to interfere and delay insolvency issues involving cooperative societies. For example, the liquidator of Mara Cooperative Union (MCU) wanted to liquidate MCU when it became insolvent. However, there was a Presidential Decree in 1997 to the effect that insolvency should not be undertaken in respect of MCU. Consequently, it has taken almost 20 years before the liquidation process has been accomplished. This has led to increase of liabilities on debts of preferential creditors, suppliers and wages, ruin of machinery, land encroachment and assets depreciation.

Stakeholders, recommended that, there should be a single regulatory authority on insolvency matters in Tanzania apart from the Administrator General. The Administrator General be given a mandate of being Insolvency Regulatory Authority (IRA) and that, the authority should be given powers similar or akin to tribunals dealing with matters related to public procurement and tax. Overall, Stakeholders recommended that a single law on insolvency be enacted but multiple authorities be retained to safeguard professionalism in different sectors.

Commission's Observations

The administrative and institutional structures for insolvency practice

in Tanzania are characterized by multiple regulators established by different sectoral legislation. Insolvency under the Companies Act is administered by the Registrar of Companies while insolvency of bankrupt persons is administered by the Official Receiver under the Bankruptcy Act. Insolvency of Cooperative Societies is administered by the Registrar of Cooperative Societies established under the Cooperative Societies Act. Insolvency matters on part of banks and financial institutions are administered by the Bank of Tanzania through the Banking and Financial Institutions Act. As for trusteeship body corporate, insolvency is administered by the Administrator General of Trustee established by the Trusteeship Incorporations Act. Insolvency by insurance companies is administered by the Commissioner of Insurance established under the Insurance Act.

The Commission is of the view that, the current legal framework does not establish a system of collaboration and coordination between administrators involved in insolvency matters. Lack of coordination between administrators has led to a situation where a person may be declared insolvent under a certain law but continues to be solvent under other laws. Information on bankrupt persons is not shared amongst administrators.

There is no central data base of insolvent entities. Each administrator keeps information related to insolvency matters in a specific sector. Yet, it is clear that information related to insolvency is largely needed by investors in establishing the solvency status of a person they intend to partner with in business affairs. There is, therefore, a need to reconcile and harmonize existing regulatory frameworks for insolvency regime with a view to creating an enabling environment for business in Tanzania.

Commission's Recommendations

The Commission recommends that the Administrator General be designated as Official Receiver whose functions should be to:

i) provide procedural guidance to insolvency practitioners;
ii) demand periodic returns on insolvency processes undertaken by insolvency practitioners;
iii) prepare and maintain a register of insolvency practitioners;
iv) establish and maintain database of insolvent entities and bankrupt persons;
v) intervene in any insolvency proceedings for purposes of upholding provisions of laws;
vi) inspect any insolvency practitioners and take any appropriate action; and
vii) set minimum eligibility for registration of insolvency professionals and professionals' agencies.

4.1.4 Procedures on Cross Border Insolvency

Stakeholders' Observations

Stakeholders were of the opinion that insolvency laws have inadequate procedures on cross boarder insolvency. The legal framework on insolvency in Tanzania does not adequately cover insolvency where assets or liabilities of an insolvent company are located outside Tanzania. For example, foreign companies which have subsidiaries in Tanzania are given by BRELA a certificate of compliance which does not confer legal personality on subsidiary companies. In this kind of situation, where there is an insolvency matter involving a subsidiary company located in Tanzania it becomes difficult to enforce any matter since the parent company which, has a legal personality, is

incorporated in a foreign country.

Stakeholders recommended that the Companies Act be amended to remove provisions allowing the grant of a certificate of compliance to companies incorporated outside Tanzania. Instead, the law should require any foreign company which wishes to have a subsidiary in Tanzania be incorporated in Tanzania. This will enable courts to enforce laws of Tanzania against that particular parent company as well as subsidiaries of that company.

Stakeholders also pointed out that procedures relating to cross border insolvency are offered by the principle of ring fencing of business entities. By this principle, financial information disclosed by auditors about a company incorporated outside Tanzania to some extent is not realistic. They pointed out the need for a comparative study to be undertaken to draw best practices from foreign jurisdictions on insolvency matters.

Commission's Observations

The Commission observes that, cross border insolvency arises in a situation where an insolvent debtor has assets and or creditors in more than one jurisdiction. The diversity that exists between the sovereign legal systems of the world and lack of a unified framework that is universally enforceable, contributes significantly toward existence of problems that present themselves in a cross border situation. The problems become more complicated where the insolvency laws of the jurisdictions involved are outdated, rigid and formalistic or have a strong bias in favour of the local interested parties. It is equally so, where there is no law in place, non-enforcement or lack of practical experience in administering the law. These lead to uncertainty, risk,

cost and injustice in insolvency matters.[226]

The Commission noted that, lack of proper insolvency laws and procedures on cross border insolvency has led to procedural complexities and uncertainties. This has been explicitly shown in the collapse of Zambia-Tanzania Road Services Ltd, a company incorporated in Zambia and having a subsidiary in Tanzania.[227] The collapse resulted in members' voluntary winding up of the company which eventually turned into creditors' voluntary winding up. This was caused by company's incapability to make a declaration of solvency because it was hopelessly insolvent.

As there was glaring lack of cross border insolvency provisions under the respective laws of Tanzania and Zambia. The liquidators between Tanzania and Zambia, creatively employed protocols and a scheme of arrangements and ably solved the cross border problems that had emerged with the collapse of the company. The scheme of arrangement proposed by the joint liquidators was made in accordance with Zambian laws, approved by all creditors and sanctioned by the court in Zambia before it was recognized and sanctioned by the court in Tanzania. The Zambian law under which the scheme of arrangement was made and sanctioned by the court was similar and had similar effect with the law under which the arrangement was consequently

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[226] Benhajj Shaaban Masoud, See, "Legal Challenges of Cross Border Insolvencies in Sub-Saharan Africa with Reference to Tanzania and Kenya: A Framework for Legislation and Policies" A thesis submitted in partial fulfillment of the requirements of Nottingham Trent University for the degree of Doctor of Philosophy, February, 2012 at pg. 25 para 2.

[227] See, Benhajj Shaaban Masoud, "Legal Challenges of Cross Border Insolvencies in Sub-Saharan Africa with Reference to Tanzania and Kenya: A Framework For Legislation And Policies" A thesis submitted in partial fulfillment of the requirements of Nottingham Trent University for the degree of Doctor of Philosophy, February, 2012 at pg. 202 para 3 and pg. 203 para 1. See also, Prof. Binamungu, et al, Liquidation Law and Practice in Tanzania Mainland, Mzumbe Book Project, 2003 at pg. 40 - 51.

sanctioned by the court in Tanzania.[228] The use of a protocol to facilitate implementation of the scheme of arrangement in Tanzania is a proof that the Bankruptcy Act and other insolvency laws are not adequate enough to accommodate cross border insolvency.

Another example involved the insolvency of Pepsi-Cola Bottling Group Company consisting of eight subsidiaries. There emerged key issues impliedly touching on cross border insolvency. Firstly, apart from local creditors, the case involved foreign creditors, largely consisting of Pepsi-Cola International and its associates, which claimed a total of 12,048,000.00 USD. The amount consisted of a loan, interest on the loan, and a claim for payment for concentrate. The debt was consequently written off following the foreign creditors' acquisition of Pepsi-Cola business in Tanzania under a scheme of arrangement proposed by the liquidator and approved by creditors.[229]

While creditors, inclusive of the foreign ones, unrestrictedly participated in such proceedings and the resulting scheme of arrangement, part played by the foreign creditors was crucially significant. They contributed to the conclusion of the arrangement by the undertaking to acquire the insolvent companies under a new company. During the commencement of proceedings, the Court of Appeal, while reacting to the appointment of one non-national liquidator in such domestic proceedings, stated that:

> *"... normally no person resident outside the jurisdiction of the court is qualified for appointment as a liquidator."*

The position of Court of Appeal proves that the Bankruptcy Act and other insolvency laws in Tanzania do not have explicit provisions

[228] *Ibid,* pg. 202 para 3 and pg. 203 para 1.

[229] *Ibid,* pg. 205 para 2 and 3, again at pg. 206 para 1.

to accommodate all circumstances arising out of cross border insolvency.[230]

The Commission further observes that, Tanzania has state owned enterprises (SOE) which obtained loans from international organizations through bilateral arrangement with the Government guaranteeing the loans. The legislation lacks a provision stipulating how cross border insolvency proceedings involving State owned enterprises could be commenced and conducted. Nevertheless, the executive, through the President and, in certain cases responsible Ministers, are empowered to establish, dissolve or reorganize a state owned enterprises as deemed fit. This means, it is still not clear, in terms of procedure, as to how a foreign creditor could proceed against state owned enterprises that fail to settle outstanding debts. Likewise, there is glaringly no provisions in other pieces of legislation whereby state owned enterprises can rely on in dealing with insolvent and their counterpart for cross border insolvency.

The Commission further observes that the Companies Act has detailed provisions stipulating procedures for rescue of an insolvent company. When compared with the existing legislation in developed countries, they are not clear and elaborate in the way that it attempts to address cross border insolvency. Notably, whereas the law was enacted five years after the promulgation of the UNCITRAL Model Law on Cross border Insolvency, no express reference was made by the law to the UNCITRAL Model Law on cross boarder insolvency.[231] Among objectives of the UNCITRAL Model Law is to: promote cooperation between the courts and other authorities of countries involved in cross border insolvency proceedings; provide legal certainty for trade and investment; ensure fair and efficient systems that "protects the interests

[230] *Ibid,* pg. 246 para 1-3.
[231] *Ibid.*

of all creditors and other interested persons, including the debtor" in cross border insolvency proceedings;[232] it also, seeks to protect and maximize the value of the debtors' assets and to facilitate the rescue, restructure, and reorganization of financially troubled businesses, thereby protecting investment and preserving employment.[233]

In the absence of clear and comprehensive law on cross border insolvency, a number of issues may arise: whether the Tanzanian court may extend to what extent recognition and co-operation to foreign proceedings; whether the Tanzanian court is prepared to defer extra-territorial insolvency jurisdictions in cross border insolvency involving multinational companies having investment in Tanzania; whether foreign creditors can prove in local proceedings and rank equally with the local creditors; whether foreign creditors can commence insolvency proceedings against a debtor in a Tanzanian court;[234] ; the extent to which an insolvency administrator may obtain access to assets held in a foreign country; the priority of payments whether local creditors may have access to local assets before funds go to the foreign administration or whether they are to stand in line with all the foreign creditors; recognition of the local creditors' in a foreign administration, whether local priority rules (such as employees claims) receive similar treatment under a foreign administration; recognition and enforcement of local securities over local assets where a foreign administrator is appointed and application of transaction avoidance provisions.

These issues pinpoint areas that may need to be filled up by the new legal framework on insolvency which accommodates issues on cross border insolvency.

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232 The preamble to the UNCITRAL MODEL PRACTICE GUIDE, 1997 accessed on 11th January, 2018

233 *Ibid.*

234 *Op-cit*, Benhajj Shaaban Masoud, Pg. 213 Para 2.

The Commission noted that, foreign companies which have subsidiaries in Tanzania are given certificate of compliance by BRELA. The certificates do not create legal personality to subsidiaries unless the parent company is incorporated in Tanzania. This legal position has created difficulties in enforcing and determining insolvency related issues about the affairs of the subsidiaries.

The Commission observed experience from Kenya, India and Uganda where the insolvency legislation has adapted and customized UNCITRAL Model Law on cross border insolvency and related matters.

Commission's Recommendations

The Commission recommends that:

i) The law to be enacted should take into consideration of UNCITRAL Model Law on Cross border Insolvency and provide for adequate procedures on cross border insolvency;

ii) The Companies Act should be amended to provide that any subsidiary of foreign company intending to operate in Tanzania must be incorporated in Tanzania as a local company.

4.1.5 Litigation on Insolvency Matters

Stakeholders' Observations

Stakeholders pointed out that insolvency regime vests power to the High Court to determine insolvency issues using ordinary courts' process. They stated that prolonged litigation is caused by insufficient number of Judges especially at the High Court - Commercial Division

which is situated in only few regions. They also said that there is lack of Judges and advocates experienced in insolvency matters. Inadequate knowledge in insolvency matters among insolvency practitioners and adjudicators elongates litigation process.

As a result, some insolvency cases take almost 20 years in courts. For example, insolvency case of TRITEL has taken almost 17 years. Stakeholders stated that prolonged litigations increase liabilities such as debts to preferential creditors, suppliers, wages, dilapidation of machines, land encroachment and assets value depreciation to the insolvent entity.

They further stated that during liquidation process, sometimes assets of the insolvent cooperative societies are lost or damaged. This is because after the society has been declared insolvent it is deregistered and its assets are placed under care-takers, who, in most cases, have no professional ability to administer all the assets of the society under liquidation. Delay in the liquidation process of cooperative societies also discourages members and investors from engaging in cooperative affairs. Consequently, it discourages formation and growth of cooperative societies.

Stakeholders recommended that the Judiciary of Tanzania should make regulations or rules that will regulate insolvency proceedings in court to ensure speedy delivery of justice. The regulations should provide for timeline for determining insolvency matters.

The Judiciary should establish a specific registry in the High Court for insolvency cases. The registries should be supported financially to handle insolvency cases expeditiously. Experienced Judges should be designated to handle insolvency cases in the registry. They also recommended that training on insolvency matters should be given to

Judges dealing with insolvency cases. Alternatively, courts should outsource experts on insolvency matters to act as amicus curiae.

On the other hand, stakeholders were of the opinion that in order to have an expeditious system of resolving insolvency matters there should be established special tribunals to handle insolvency matters similar to those handling public procurement and tax issues.

Commission's Observations

The Commission notes that, shortcomings in the enforcement of insolvency laws and creditor rights are due to the general weaknesses evident in the judicial system. Courts in Tanzania are vested with powers to adjudicate insolvency matters. However, courts are characterized by piled cases, procedural complications and legal technicalities. The delay in disposal of insolvency cases is partly caused by unnecessary adjournments of cases, backlog of cases, shortage of Judges and lack of adequate skills on practitioners. These problems contribute to delays in expeditious disposal of insolvency cases in courts.

With regard to inadequate skills to practitioners, it was pointed out that:

> *Over the past 15 years a large number of private companies, public corporations and cooperative societies have been put under receivership or liquidation. However, deficiency in skills and experience on the part of practitioners and the court has led to costly and useful irregularities and abuse of process.*[235]

[235] Alex T. Nguluma, "Court of Appeal and Development of Insolvency Law in Tanzania" – Published in the "Law and Justice in Tanzania: Quarter a Century of the Court of Appeal" by Prof. Chris. P Maina at pg. 181.

Moreover, procedural laws afford the parties with avenues of making various applications which some parties in insolvency cases misuse them thus leading to unnecessary prolongation. For instance, procedures on discovery of documents have led for parties to make a number of applications. As a result, a matter can stay pending for so long in court.[236] In some cases interlocutory proceedings, which in effect maintain status quo of parties pending determination of the main suit, have been invoked unnecessarily by parties involved in insolvency cases thus occasioning delay of cases in courts. Consequently, insolvency matters before courts of laws take so long before their disposal. IPTL case is a good example. It was filed in 2009, to date it has not came to an end.[237] There are still various issues that need to be addressed by the court.

The Commission observes that a strong insolvency resolution framework tends to minimize cost and time spent in adjudication. The Commission notes that in some countries, insolvency matters have a special mechanism of disposing expeditiously due to its role in economic growth of a country. In India, the Insolvency and Bankruptcy Code which governs insolvency matters establishes a special tribunal. Its hierarchy starts from the National Company Law Tribunal,[238] National Company Law Appeals Tribunal[239] and the Supreme Court of India which deals with matters of law only.[240]

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[236] See also, Felix G. Kibodya (2006) "The Taking And Enforcement Of Collateral – Financial Sector Review", Presented at World Bank Conference on Commercial Disputes and Enforcing Contracts: Improving the Legal Framework for Doing Business in Tanzania, New Africa Hotel May 29Th, 2006.

[237] The VIP Engineering Tanzania Limited Vs. IPTL, Miscellaneous Civil Application No. 5 of 2009

[238] Established under section 408 of the Companies Act, 2013.

[239] Insolvency and Bankruptcy Code, section 61.

[240] *Ibid,* section 62.

The insolvency disputes resolution system in India establishes the fast track corporate insolvency resolution process. In order for a matter to be treated as matter of fast track parties have to apply to the Tribunal for the same. Once the matter has been placed in the fast track category, it has to be completed within a period of not exceeding 90 days.[241]

Commission's Recommendations

The Commission recommends as follows:

i) There should be established special tribunals which should be:
   a) Regulated by specific regulations to be made by the Minister responsible for legal affairs;
   b) Manned by persons with qualifications of a Judge of the High Court;

ii) Training on insolvency matters be conducted to appointed members of the tribunals; and

iii) The intended insolvency resolution system should provide for a possibility of fast tracking of corporate insolvency resolution process.

4.1.6 Insolvency and Protection of Depositors

Stakeholders' Observations

It was the stakeholders' observation that in order to protect depositors in financial institutions, preference should be given to protect their interests and capital. According to stakeholders, where a bank or a financial institution becomes insolvent depositors are being paid a flat rate of a little amount after paying Government taxes and preferential creditors. Thereafter, depositors are paid a very little amount in per centum depending on the deposited amount.

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[241] *Ibid,* No. 31 of 2016, sections 55 (1) and (2).

Stakeholders were of the view that there is lack of adequate system that protects depositors from losing their money during insolvency. It was recommended that the law should be amended to provide preference to depositors for recovery of whole deposits by Bank of Tanzania (BoT) since the BoT is a lender of last resort. They suggested that amount of compensation payable by the Depository Insurance Board (DIB) to depositors for banks and financial institutions should be increased to allow depositors to recover whole deposits when financial institution becomes insolvent. Stakeholders also suggested that BOT should take responsibility of providing advice and perpetual supervision to financial institutions so as to reduce the effects of insolvency to depositors and the economy at large.

Stakeholders observed out that insurance premium to Depository Insurance Board (DIB) from banks and financial institutions is very low that is why depositors are paid the lowest amount once financial institutions become insolvent. They recommended that the law should require Banks to pay depositors by percentage on liquidation.
It was observed that the problem with most financial institutions is dishonesty as in most cases financial information disclosed by the banks is not accurate. In the opinion of stakeholders, the assets and liability test used to assess the solvency status of financial institution is unrealistic and misleading. They argued that insolvency cannot be assessed by the balance sheet.

Commission's Observations

The Commission observes that the backbone of the life of banks and sustainability of their operating capital rests on the deposits from the depositors. The depositors have decisive contributions to the banks liquidity. It is from the depositor's money that banks lend loans to clients (borrowers) from whose transactions banks generate income

from interests and other charges.

It is a general accepted principle that the life of banks depends solely on the interests accrued from the borrowers. In this regard, the life of banks rests on the shoulders of the depositors, however, when banks fall under financial difficulties the fate of the depositors becomes unpredictable and, in most cases, depends on third party interventions.

Cognizant to this anomaly, the Banking and Financial institutions Act provides for establishment of the Depositor Insurance Board of Tanzania[242] whose objectives is to protect the depositors against the risks of losing all or part of their deposits in the event of financial difficulties or banks or financial institutions failure, thus, maintaining public confidence in the financial system.[243] The Board maintains the stability of financial systems from the impact of failures. In case the bank or financial institution becomes insolvent the Bank of Tanzania may request DIB to step into the shoes of the depositors.

According to the Banking and Financial Institutions Act, the amount of protected deposit is the aggregate credit balance of any amount maintained by a customer at a bank or a financial institution less any liability of the customer to the bank or financial institution to the extent determined by the Minister for Finance from time to time by order published in the Gazette.[244] The amount of protected deposit rose from TZS 500,000.00 to TZS 1,500,000.00. Payment of any amount in excess of the protected deposit is not guaranteed under the DIB.

Furthermore, upon a bank or financial institution becoming insolvent, a customer of that bank or financial institution is required to lodge

[242] S. 36 – 42 of the Bank and Financial Institution Act, 2006 Available on www.bot.go.tz Accessed on 15th January, 2018.
[243] *Ibid,* Section 36.
[244] *Ibid,* Section 36.

claim with the Board before payment is made out of the Fund for any protected deposit which would have been paid had he demanded payment from the insolvent bank or financial institution. Before paying any claim lodged with the Board, the customer is supposed to furnish the Board with such documentary proof as may be proper to show that he is entitled to payment out of the Fund. Upon payment of a protected deposit, the Fund is entitled to receive from the bank, financial institution or liquidator, as the case may be, an amount equal to the insolvency payment paid by the Fund on account of its subrogation to the claims of any depositor.[245]

Despite the BOT mandate to maintain stability of banks or financial Institution, bank failures still do happen, causing serious consequences to depositors' for failure to recover their savings fully. Tanzania has recently witnessed the Bank of Tanzania declaring five banks being insolvent at a time.[246] This scenario explains the magnitude of risk that depositors experience in the event financial institutions becomes insolvent.

Commission's Recommendations

The Commission recommends that:

i) The depositors compensation be increased from time to time depending on prevailing social economic conditions;
ii) Payment to depositors be made reflective of the amount deposited by each customer; and
iii) Depositors should be treated as preferential creditors.

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[245] *Ibid,* Section 36.

[246] Covenant Bank for Women's, Efatha Bank Limited, Kagera Farmers' Cooperative Bank Limited and Meru Community Bank Limited. Available at www.thecitizen.co.tz/News/...bank-closes-five-banks-/.../index.htm-9thAccesses on February, 2018.

4.1.7 Insolvency and Protection of Employees

Stakeholders' Observations

It was observed by stakeholders that where a company or a cooperative society becomes insolvent, employees are being paid after paying government taxes and preferential creditors. Payment of debts, including payment benefits to employees, through preferential treatment is discriminatory as it favors secured creditors than employees. In some cases, no assets are left to cover employees' debts.

Stakeholders further observed that employees are paid depending on availability of the remaining assets after satisfying preferred creditors. According to stakeholders, creditors have the alternative of securing their debts through insurance policies while employees do not have security for payments. In the view of stakeholders, sequencing preferential creditors before employees leaves them without further recourse thus affecting employees' economies. They argued that the system on preferential payments has to be revised to ensure that employeesare paid first where no fraud has been established on part of any employee.

Stakeholders also observed that the formula of paying employees during insolvency is outdated as it does not take into account the current state of life. They recommended for revision of the formula so that it takes on board the needs of life at the time and proposed for amendment of the law to provide for friendly environment for employees to get their payment timely.

Stakeholders acknowledged that the current position that put preference of paying government tax before employees is good since tax is being used for country's development. They suggested that employees

should be ranked second after government tax.

It was also suggested that all debts, including employees, should be paid on percentage based on the available assets. Employees, creditors and depositors should be treated equally when it comes to payment of benefits. It was suggested that the law should require employers to insure their employees against the risk of failure to get payment in the event the company becomes insolvent.

Commission's Observations

Over time there have been a number of theories put forward to explain the rationale behind employees' priority in insolvency. It is broadly recognized that worker's wage deserve special protection, since the insolvency of an enterprise and consequently the suspension of payments directly threatens the means of livelihood of workers and their families.[247] Moreover, as employees do not have a share in the profits of the enterprise, they should not share its losses either. The preferential treatment of wage is by far the most widely accepted and most traditional method of protecting service-related claims in the event of the employer's bankruptcy or the judicial liquidation of an enterprise.[248]

The Commission observes that employees are the most valuable assets of any company or enterprise. Thus, socio-economic development and poverty reduction often hinge upon the degree to which the citizens of a country can be gainfully employed on a sustainable basis. In an increasingly global economy, businesses face enormous competitive pressures to minimize costs and maximize returns, often at the expense

[247] ILO "The Preferential Treatment of Workers Wage Claims in Case of Employer's Bankruptcy", Report of the Committee of Experts, Report III(1B)-2003 Chapter V at pg. 166
[248] *Ibid.*

of domestic labour.[249]

When employers fall into financial constraints and undergo receivership or liquidation processes, employee face threatening termination and uncertainty on their livelihood as they are much concerned with redundancy payments including repatriations costs, unpaid salaries and wages, and retirement benefits. Employees are commonly the silent voices in bankruptcy proceedings and often have little influence or bargaining power outside the collective bargaining process, yet they stand to lose the most.[250] In Parkin Elevator Co[251] the following observation was made:

> *Salaries and wages are generally needed for, and generally expended in, the support and maintenance of the persons earning them, their wives and families and others dependent on them, and so may well be given priority, for a short period, over debts due to other creditors in the ordinary course of business and generally more nearly related to the profit and loss account of the creditor than his sustenance or that of those dependent upon him.*

Again, employees have long been considered worthy of a special protection if a company becomes insolvent. This has been seen to be appropriate because employees are less able to manage the risk of the loss they suffer if their employer becomes insolvent[252] It is argued that

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[249] Gordon W. Johnson, "Insolvency and Social Protection: Employee Entitlements In The Event of Employer Insolvency" Meeting Held On 27-28 April 2006. At Pg.1 Para 1.

[250] *Ibid,* Pg.2 Para 2.

[251] (1916) 41 DLR 123 as quoted in David Newman, Ibid

[252] See Justice Simon Whelan and Leon Zwier, "Employee Entitlements and Corporate Insolvency and Reconstruction", Available at http://cclsr.law.unimelb.edu.au/news/protection%20employee%20entitlements%20 final.pdf last visited on 13th December 2005.

whilst shareholders can diversify their investment portfolio to eliminate or hedge against risk, and creditors may diversify their customer base by having guarantees or security, employees typically only have one employer and they are accordingly exposed to that employer for the entirety of unpaid wages, leave or redundancy entitlements with very little capacity to reduce that risk.[253]

The Commission observes that under the Companies Act, Cap.212, employees are given preference to "all wages or salary" of both full time employees and casual employees in respect of services rendered to the company during the four months preceding the date of commencement of winding up. Formerly, the preference was limited to a maximum of four thousand only, however, the new Companies Act has removed this maximum financial threshold,[254] and the only remaining limitation as regards employee's salary or wages preferential treatment, is the period of four months only.

The Employment and Labour Relations Act, 2004, defines the word employee to mean an individual who has entered into a contract of employment; or has entered into any other contract under which the individual undertakes to work personally for the other party to the contract and the other party is not a client or customer of the profession, business, or undertaking carried on by the individual.[255]

The law relating to employees' rights in receivership or liquidation situation is spread in different pieces of legislation, namely company laws, labour laws, employment laws and social security laws. This situation is a cause for misunderstanding, confusion and delay that expose employees of corporate entities to unsuspecting risk of misery

253 *Ibid.*

254 See section 367 (2) (c) of the Companies Act.

255 Section 4 of the Employment and Labour Relations Act, 2004, Act No 6 of 2004.

when insolvency strikes.

Under company liquidation, the rights of employees once the employer is declared bankrupt are governed under section 367(1) (2) (c) of the Companies Act. This section requires that in any winding up the company's preferential debts need to be paid in priority as regard to all other debts. According to this section preferential debt, among others, includes all wages or salary of any employee not being a director in respect of services rendered to the company during four months next before the winding up.

Arguing on this position of the law, Binamungu[256] is of the opinion that any amount in excess of this limit is treated as unsecured and unpreferred debts. One would, however, pose a question as to why any limit, in relation to the period or amount, should be imposed on employees' remuneration for preference purposes. Notwithstanding the limitation of amount, even that limited amount is payable to employees after long and unpredictable liquidation process.

Binamungu, C., argues further that, it is an indisputable fact that employees are the most acutely affected group of creditors when a company becomes insolvent and is put under liquidation. It is even more pronounced where a public corporation continues to operate while it is technically insolvent and is unable to pay its employees' salaries for long periods prior to being placed under liquidation. He further quotes the words of Fletcher (1996) who states that in the insolvency of any person who has been an employer of others, the plight of the employees in the critical period around the commencement of bankruptcy is often especially acute. In addition to the customary rigors, which accompany the onset of unemployment, a bankrupt's

[256] Prof. Binamungu, et al, "Liquidation Law and Practice in Tanzania Mainland", Mzumbe Book Project, 2003 at pg. 89 and 90.

employees frequently experience additional hardship because there is no money available to pay any outstanding installments of wages or salary for the period immediately prior to the making of the bankruptcy order.[257]

To avoid this, the Convention for International Labour Organization (ILO) (Protection of Wages) and ILO Convention on the on the Protection of Workers' Claims (Employers Insolvency) have treated employees as privileged creditors[258] and laws of other countries have established for an insurance fund[259] while others are using social

[257] Fletcher, I "The Law of Insolvency", (1996) Sweet and Maxwell, London, pg. 294.

[258] Article 11.1 of the Convention for International Labor Organization (Protection of Wages), 1949 states: "In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations." and Article 5 and 6 of the ILO Convention on the Protection of Workers' Claims (Employers Insolvency) No. 173 of 1992 which states: Article 5 In the event of an employer's insolvency, workers' claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share. Article 6 " The privilege shall cover at least:(a) the workers' claims for wages relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment; (b) the workers' claims for holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year; (c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment; (d) severance pay.

[259] See the UK Employment Rights Act, 1996 Chapter VI - requires the Secretary of State to pay to an employee out of the National Insurance Fund which is contributed jointly by employers and workers, the amount on which he decides that employee entitled in respect of a number of debts. The Secretary of State subsequently claims the amount so paid, as a preferred creditor, from the trustee of the estate of the bankrupt person or the liquidator or the insolvent company. In Uganda the terminal dues of the victims of redundancies arising from the implementation of public enterprise reforms are met from a fund established for that purpose. The Public Enterprises Reform and Divestiture Statute requires the Minister responsible for

security funds to handle employees on situations like these.[260]

Experiences have shown that the uncertainty as to applicable laws and subjecting insolvency matters to courts of laws results in the employees suffering sometimes, close to a decade litigating in courts of law just to lose the case at the end. It is the view of the Commission that the laws on insolvency should take on board the rights of employees during insolvency times.

In the firm view of the Commission, Tanzania should borrow the Mauritius position of insolvency law on the aspect of protecting the

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finance to ensure that provision is made for payment of compensation to employees who are declared redundant as a result of restructuring or liquidation of public enterprises through the establishment and operation of a Redundancy Account to be opened at a commercial bank approved by the Minister responsible for finance. Another way to ensure the payment of employee entitlements, while maintaining market confidence, is through an insurance fund. Insurance funds can reduce the burden of the unemployed on the state for interim social protection, on an economic level, an insurance fund may provide a higher degree of reliability to the markets while at the same time affording stronger protection to employees to fulfill social objectives. Clearly the most effective way to protect employees' entitlements on insolvency issues is a guarantee fund or insurance. For example, the Danish system gives the highest priority among unsecured creditors to claims for salaries, wages and other employee benefits, with a guarantee fund as a safety net, should the assets prove to be insufficient (See, See also, Gordon W. Johnson, "Insolvency and Social Protection: Employe Entitlements in the Event of Employer Insolvency" Meeting held on 27-28 April 2006. At pg. 6 and 7).

[260] In Kenya, the Employment Act under Part III provides that an employee whose employer is insolvent can apply in writing to the Minister responsible for labour matters so as to be paid any amount owed by the employer out of the National Social Security Fund (section 66). The Minister after being satisfied that the employer indeed is insolvent, the employees' contract has been terminated and the employee is owed by the employer (section 66). The amount payable by the Minister is restricted to apply to (i) salary arrears for a period not exceeding six months (ii) any compensation award for unfair dismissal (iii) payment in lieu of notice of termination of the contract of service for contracts where payment is made periodically at intervals of less than one month and iv) payment in lieu of leave for annual leave days earned but not taken (Section 68).

interests of employees when the company is under administration. The law prohibits termination of an employment agreement to which a company is a party upon appointment of administrator.

The administrator is liable for payment of wages or salaries during administration of the company accrues under contact of employment with the company that was entered into before administrator's appointment.[261] The Commission also should borrow experience from Kenya position where the law provides that if the company becomes insolvent, the Social Security Fund pays the employees.

Commission's Recommendations

The Commission recommends that:

i) employees of an insolvent employer should be paid amount owed by the insolvent employer out of the social security funds.

ii) Social security funds should subsequently claim money paid to employees of insolvent employer from the liquidator as preferred creditor;

iii) Employees should be paid-

   a) any arrears of wages or salary in respect of services rendered to the employee during five months before the relevant date;

   b) any payment in lieu of leave for annual leave earned but not taken;

   c) any basic award of compensation upon unfair termination;

   d) severance payment due to employees upon termination of employment; and

   e) repatriation allowance.

[261] Insolvency Act, No.3 of 2009 section225 (3) - Mauritius

4.1.8 Regulation of Insolvency Practitioners

Stakeholders' Observations

Stakeholders observed that knowledge and skills on jurisprudence on insolvency is important for insolvency practitioners in ensuring efficient handling of insolvency matters. Currently, there are no criteria for appointing persons to handle insolvency issues in terms of ensuring acquisition of necessary knowledge and skills. This vacuum leaves room for malpractices and unethical behavior which affects administration of justice. Most persons appointed to handle insolvency matters do not posses adequate knowledge and skill as a result, insolvency processes are prolonged unnecessarily.

Stakeholders observed that the Cooperative Societies Act, has its own liquidation procedure whereby the Registrar can appoint the liquidator. However, the Act does not provide for qualifications of the liquidator. In this case, the Registrar can even appoint a relative or a friend to liquidate properties of a cooperative society.

Stakeholders recommended that there should be a law that will set criteria for persons eligible for appointment as insolvency practitioners. The law should also establish an institution that will appoint insolvency practitioners subject to court approval. It was also suggested that in appointing insolvency practitioners, skills and knowledge on insolvency matters should be considered.

Stakeholders recommended also that the Commercial Court should have sections for liquidation where the liquidators would be required to submit the final report of assets of liquidated companies as is the case for probate cases whereby the administrator submits to the court a list of estate of the deceased.

Commission's Observations

The Commission observes that the current socio-economic set up is characterized by emerged private sector involvement and increased foreign direct investments that have revamped the life of insolvency practice in Tanzania.

The Commission also observes that the legal regime on insolvency is multidiscipline having multiple sectoral regulators, namely, the Bank of Tanzania for banks and financial institutions, Registrar of Companies for companies, Registrar of Cooperative Societies for cooperative societies and Insurance Regulatory Authority for insurance companies. Each regulator has powers and mandates under a distinctive sectoral law. These scattered and uncoordinated legislation do not stipulate standards, qualifications, skills or professional ethics that insolvency practitioners need to possess.

The Commission further observes that currently, private advocates and accountants are allowed to practice as insolvency practitioners. The mere fact that these are qualified lawyers and accountant respectively do not guarantee their competences to deal with the emerging complicated insolvency matters particularly those related with cross border insolvencies.

It is further observed that considering the roles of insolvency legal regime in the socio-economic development, the need to have a comprehensive regulatory framework for setting out prerequisite for insolvency practitioners and regulating ethical conducts is inevitably necessary.

The Commission further observes that experience from other jurisdictions such as Uganda shows that insolvency practitioners are

registered by Official Receiver[262] unlike Tanzania, where, insolvency practitioners are neither registered nor regulated. The Official Receiver in Uganda also has powers to revoke registration of an insolvency practitioner who ceases to be a registered member of the professional body to which he belongs, failed to provide security or professional indemnity to the satisfaction of the Official Receiver or failed to comply with any condition or directive issued by the Official Receiver.[263]

Commission's Recommendations

The Commission recommends that the Administrator General should be the regulator of insolvency practitioners whose functions shall be to:

i) prepare and maintain a register of insolvency practitioners;
ii) provide guidelines for insolvency practitioners;
iii) set the minimum eligibility requirements for registration as insolvency practitioner;
iv) prepare the code of conduct for insolvency practitioners;
v) discipline insolvency practitioners; and
vi) demand periodic returns from insolvency practitioners.

4.1.9 The Role of Administrator General as Official Receiver

It was observed by stakeholders that the Administrator General do act as Official Receiver (the practitioner) and Regulator of other official receivers. In the opinion of stakeholders, the dual functions of Administrator General is prone to attracting conflict of interests as one cannot act as regulator and practitioner at the sametime. Stakeholders recommended for seperation of the two functions performed by the

[262] Part II (Register and Registration of Insolvency Practitioners) of the insolvency Practitioners Regulation No.55 of 2017 made under section 260 of the Uganda Insolvency Act, 2011.
[263] Regulation 12 of the insolvency Practitioners Regulation No.55 of 2017.

Administrator General. In the view of stakeholders, there should be another body other than the Administrator General to perform regulatory functions for insolvency matters.

Commission's Observations

The Commision observes that official receivership is the function of the Governement due to its impact to the national economy. It therefore requires utmost responsibility to uphold the laws and serve the interests of the public. Cognisant of the role of the Administrator General, the Government of Tanzania designated the Administrator General to be responsible for official receivership under the Bankruptcy Act and Companies Act.[264]

The Commission notes that in England, an Official Receiver has to be a public servant and an officer of the court dealing with insolvency service.[265] The Official Receiver has the role of acting as provisional liquidator, or as liquidator and may investigate circumstances that led to the company's insolvency. The investigation is done to find out whether there were any instances of misconduct or fraudulent activity that caused the company to fail.[266]

In Malaysia, the Director General of Insolvency (DGI) who is also recognized as Official Receiver is a designated government official in the administrations of backruptcy. DGI also administers companies wound up by the court, either as provisional liquidator or a liquidator where private sector practitioner is not appointed. The dual roles requires utmost responsibility to uphold the laws and serve the interests of the

[264] G.N. No.397 of 2005.

[265] Real Business Rescue; Licensed Insolvency Practitioners: pg.2 www.realbusiness rescue.co.uk : Accessed on 18th day of October, 2018

[266] *Ibid*

public. In relation to winding up, the Official Receiver administers and investigates the affairs of companies and partnership wound-up by the court, and may take forward reports of directors miscounduct. In relation to bankrupcy the Official Receiver has powers to administer and investigate the affairs of bankruptcy and report any misconduct. The Official Reciver may also act as receiver of the debtors' estates and may also take part and give assistance in public prosecution any flaudulent debtrors or any other persons charged under the bancruptcy law.[267]

From the foregoing, it is the Commission's observation is that matters of insolvency cannot be left outside public domain. In the circumstances, there is no justification to let the Administrator General cease from acting as Official Receiver on behalf of the Government. The Commission is of the firm view that the Administrator General should remain as the Official Receiver and Regulator of all insolvency practitioners.

Commission's Recommendations

The Commission recommends that the Administrator General should remain the Official Receiver charged with the following mandates, namely, to:

i) regulate insolvency practitioners;
ii) Investigate circumstances that led to the company's insolvency;
iii) investigate the affairs of companies and partnership wound-up by the court;
iv) take forward reports of directors miscounduct;
v) administer and investigate the affairs of bankruptcy and report any misconduct

[267] Role of Director General of Insolvency of Malaysia pg.2.

to relevant authorities in relation to bankruptcy; and

vi) take part and give assistance in public prosecution of any fraudulent debtors or any other persons charged under the bancruptcy law.

4.2 Conclusion

From the foregoing, it is crystal clear that multiplicity of laws governing insolvency; presence of multiple regulatory authorities with overlapping mandates; regulation of cross border insolvency; prolonged litigation on insolvency matters; protection of depositors in insolvency; the extent to which employees are protected when entities become insolvent and the manner insolvency practitioners are to be regulated are major challenges facing the insolvency regime in Tanzania.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Mindful of the decision to revamp private sector, promote foreign direct investment and faster capital formation, the Government has taken various policy and legal reforms intended to pave way to departure from state owned economic policies to market controlled economic policies.

The legal reforms include; the promulgation of the Investment Policy of 1988 which followed by the enactment of the National Investment (Promotion and Protection) Act, 1990, which for the first time, liberalized the economy, promoted and protected private foreign and local investments. Other laws include the Banking and Financial Institution Act, the Foreign Exchange Act and the Public Corporations Act. These reforms intended to address the challenges facing the insolvency regime in Tanzania.

Besides all these legal reforms, the legal regime on insolvency still faces various legal, institutional, regulatory and procedural challenges as elucidated in Chapter Four.

5.2 Recommendations

In consequent and in order to address the challenges facing insolvency in Tanzania, the Commission recommends the following:

5.2.1 Multiplicity of Laws

The Commission recommends that:

i) The Government should enact a single legislation on insolvency which, among other things, should:
   a) provide for and contain comprehensive rules articulated on different parts each of which addressing specific category of insolvency matters;
   b) empower different authorities to determine insolvency matters falling on sectoral jurisdiction;
   c) adopt and adapt UNCITRAL Model Law on Cross border issues;
   d) establish a regulatory body to oversee insolvency practitioners;
   e) set insolvency professional code of conduct and ethical standards for insolvency practitioners;
   f) provide for functions, responsibilities and accountability for insolvency practitioners;
   g) regulate training on insolvency profession in collaboration with related profession bodies;
   h) provide for regulations on procedures for handling insolvency matters depending on sectoral requirement; and
   i) provide a time limit for litigating insolvency cases.

ii) Sectoral aspects other than insolvency matters should be regulated under respective sectoral laws.

5.2.2 Outdated Laws

The Commission recommends that sectoral laws be amended in the following manner:

i) The provisions on pecuniary sanctions in the Trustees Incorporation Act and the Companies Act be reviewed upwards;
ii) The use of currency points in all provisions which have monetary/ pecuniary reference be preferred;
iii) The Deeds of Arrangement Act be reviewed to recognize other means of communication including the use of ICT;
iv) The Deeds of Arrangement Act be reviewed to provide for decentralization of registration processes across the country;
v) The Deeds of Arrangement Act should be amended to categorically state that the Official Receiver be responsible for registration of Deeds of Arrangement.

5.2.3 Multiple Regulatory Authorities

The Commission recommends that the Administrator General be designated as Official Receiver whose functions should be to:

i) provide procedural guidance to insolvency practitioners;
ii) demand periodic returns on insolvency processes undertaken by insolvency practitioners;
iii) prepare and maintain a register of insolvency practitioners;
iv) establish and maintain database of insolvent entities and bankrupt persons;
v) intervene in any insolvency proceedings for purposes of upholding provisions of laws;
vi) inspect any insolvency practitioners and take any appropriate action; and
vii) set minimum eligibility for registration of insolvency professionals and professionals' agencies.

5.2.4 Procedures on Cross Border Insolvency

The Commission recommends that:

i) The law to be enacted should take into consideration of UNCITRAL Model Law on Cross border Insolvency and provide for adequate procedures on cross border insolvency;

ii) The Companies Act should be amended to provide that any subsidiary of foreign company intending to operate in Tanzania must be incorporated in Tanzania as a local company.

5.2.5 Litigation on Insolvency Matters

The Commission recommends as follows:

i) There should be established special tribunals which should be:
   a) Regulated by specific regulations to be made by the Minister responsible for legal affairs;
   b) Manned by persons with qualifications of a Judge of the High Court;

ii) Training on insolvency matters be conducted to appointed members of the Tribunals; and

iii) The intended insolvency resolution system should provide for a possibility of fast tracking of corporate insolvency resolution process.

5.2.6 Insolvency and Protection of Depositors

The Commission recommends that:

i) The depositors compensation be increased from time to time depending prevailing social economic conditions;

ii) Payment to depositors be made reflective of the amount

deposited by each customer; and

iii) Depositors should be treated as preferential creditors.

5.2.7 Insolvency and Protection of Employees

The Commission recommends that:

i) employees of an insolvent employer should be paid amount owed by the insolvent employer out of the social security funds.

ii) Social security funds should subsequently claim money paid to employees of insolvent employer from the liquidator as preferred creditor;

iii) Employees should be paid-

iv) any arrears of wages or salary in respect of services rendered to the employee during five months before the relevant date;

v) any payment in lieu of leave for annual leave earned but not taken;

vi) any basic award of compensation upon unfair termination;

vii) severance payment due to employees upon termination of employment; and

viii) repatriation allowance.

5.2.8 Regulation of Insolvency Practitioners

The Commission recommends that the Administrator General should be the regulator of insolvency practitioners whose functions shall be to:

i) prepare and maintain a register of insolvency practitioners;

ii) provide guidelines for insolvency practitioners;

iii) set the minimum eligibility requirements for registration as insolvency practitioner;

iv) prepare the code of conduct for insolvency practitioners;

v) discipline insolvency practitioners; and
vi) demand periodic returns from insolvency practitioners.

5.2.9 The Role of Administrator General as Official Receiver

The Commission recommends that the Administrator General should remain the Official Receiver charged with the following mandates, namely, to:

i) regulate insolvency practitioners;
ii) Investigate circumstances that led to the company's insolvency;
iii) investigate the affairs of companies and partnership wound-up by the court;
iv) take forward reports of directors miscounduct;
v) administer and investigate the affairs of bankruptcy and report any misconduct to relevant authorities in relation to bankruptcy; and
vi) take part and give assistance in public prosecution of any fraudulent debtors or any other persons charged under the bancruptcy law.

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