

UNIVERSITY OF KWAZULU-NATAL

A DISCUSSION OF THE SUCCESS AND FAILURES OF BUSINESS RESCUE AS A  
REMEDY FOR AILING COMPANIES

By

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## DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

I declare that this Dissertation contains my own work except where specifically acknowledged

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## ABSTRACT

Companies are constantly facing risks, including financial constraints, which may contribute to companies being unable to trade in the manner desired. Unfortunately, companies that find themselves in this predicament have, in reality, been without a remedy from as early as statutory provisions regulating company law were promulgated in 1926. Judicial management, as a remedy, is notorious for being an outright failure, but the current Companies Act 71 of 2008 introduced the remedy of business rescue for financially distressed companies. The scrutiny and spotlight on the new remedy turns on whether it can be truly accessible for the companies in question and what significant changes it has made to favour financially distressed companies. This mini dissertation will aim to discuss whether the remedy of business rescue has been a success or failure.

## CHAPTER ONE

### I. INTRODUCTION

In any given environment, the sustaining of a particular region can be successful, or at least manageable, through the growth of its economy. In recent times, and becoming more prevalent in the twentieth century, is the significant role played by business entities in the stimulation of the economy. Section 22 of the Constitution of the Republic of South Africa, 1996<sup>1</sup> provides that ‘everyone has the right to pursue the trade or occupation or profession of his or her choice’, and such a right is afforded to juristic entities as well.<sup>2</sup> A consequence of business ventures is the looming probabilities of failure in the risks that have been taken, and one can only wonder if the supreme law<sup>3</sup> has made any provisions to resuscitate a business that has suffered economically in its business ventures.

### II. COMPANIES ACT 46 OF 1926

In a scenario where a company has incurred liabilities that exceed the assets of the company, it is inevitable that the company will face several obstacles when trading, with the possibility of a flow of income being stifled, thereby affecting the overall trade and operation of the company. The controversy arises when a company is not insolvent but foresees the possibility of an inability to pay its debts when they become due and enforceable, although such a company remains a participant in the economic spectrum. It is my submission that the issue that arises is whether such a company should be pronounced as insolvent, and therefore proceed with liquidation.

Fortunately, there were inroads that came to facilitate companies experiencing financial difficulties, with the intention to veer away from the ‘fatal’ reality of insolvency. The South African legal system was one of the first countries to identify this need and make provisions for it through the birth of judicial management.<sup>4</sup> The remedy of judicial management provided

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<sup>1</sup> This is the highest law of the Republic of South Africa.

<sup>2</sup> Section 8 (1) of the Constitution of the Republic of South Africa, 1996, provides that, ‘[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state’. Section 8 (2) further states that ‘[a] provision of the Bill of rights binds a natural or a juristic person, if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.

<sup>3</sup> The Constitution of the Republic of South Africa, 1996.

<sup>4</sup> EP Joubert “‘Reasonable possibility’ versus ‘reasonable prospect’: Did business rescue succeed in creating a better test than judicial management?’ (2013) 76 *THRHR* at 550; Anneli Loubser ‘Business rescue in South Africa: A procedure in search of a home’ 2007 *XL CILSA* at 153.

that an application could be made for an ailing company to be placed under judicial management if there was a reasonable probability that the company would be able to pay off all its debts when they become due and enforceable, and yield a successful concern.<sup>5</sup>

The operation of judicial management was intended that the business of a company would be placed in the hands of the judicial manager,<sup>6</sup> who would then come up with a management plan to be accepted by creditors that stipulates how the company purports to pay off the creditors' debts in full. This management plan is the compass of the company for the duration that the business is under judicial management- it cannot be interfered with by the directors or shareholders at any time, even if they do not approve of the judicial management style.

The reality of judicial management, however, was anything but a positive response, or a response at all, to an urgent SOS call for financially constrained companies. Writers<sup>7</sup> have criticised judicial management for being extremely cumbersome and ineffective<sup>8</sup> in its operation, first, the burden of proof has been to show a 'reasonable probability' that the business will stay afloat if and after it has been placed under judicial management. The court in *Noordkaap Bpk v Schreuder (Noordkaap)*<sup>9</sup> held that the meaning of the words 'probable' and 'possible' are material to the application;<sup>10</sup> the latter making reference to one being less sure to happen whilst the former required a level of certainty that the business would turn around and return a company to its solvent status.

It becomes evident that a business cannot actually show that it is certain that judicial management will keep it afloat, and thus, the onus is not discharged; the court will then be expected to reject the application.<sup>11</sup> If an application for judicial management is dismissed, the court also indirectly pronounces that such a business is insolvent, which inevitably leads to the liquidation and winding-up of the company.<sup>12</sup> The controversy that is created by this requirement in practical situations raises several eyebrows as to why the legislature would create a provision that is neither attainable nor expedient and cost effective for an ailing

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<sup>5</sup> Section 195 of the Companies Act 46 of 1926.

<sup>6</sup> A judicial manager is an external person who possesses the skills to manage a business in an effective manner.

<sup>7</sup> These writers include EP Joubert, Richard Bradstreet and Anneli Loubser.

<sup>8</sup> Joubert op cit note 4; Anneli Loubser 'Business rescue in South Africa: a procedure in search of a home' 2007 *XL CILSA* at 153.

<sup>9</sup> *Noordkaap Bpk v Schreuder* 1974 (3) SA 102 (A).

<sup>10</sup> *Ibid* para 110.

<sup>11</sup> Loubser op cit note 8 at 155; Joubert op cit note 4; and Richard Bradstreet 'The new business rescue: Will creditors sink or swim?'(2011) 128 *SALJ* at 354.

<sup>12</sup> *Ibid*.

company. It is thus my submission that the conduct of the legislature is both questionable and disappointing if the exercise of such a remedy would lead to the liquidation of the company, because it is the very same predicament that the company was desperately seeking to avoid in making the aforementioned application.

Secondly, a company had to show that, once placed under judicial management, the company would trade and be able to discharge all of its obligations towards its creditors in full. This is yet another unrealistic obstacle placed before a company because an ailing company would seek to discharge and pay off as many debts as possible, and it is my submission that agreements such as set-off and compromise with the creditors would have weighed in the favour of the business because it would be placed under judicial management for a shorter interval and also get an opportunity to yield a better return in profits to inject the much needed finances to the would-be solvent business.

Richard Bradstreet<sup>13</sup> suggested that the remedy of judicial management was heavily creditor-oriented because it focused on the full payment of the creditors' debts more than it did in trying to keep the company in engagement in the economic arena.<sup>14</sup> Additionally, persons who were appointed judicial managers were mostly liquidators, thus meaning that a creditor-oriented management plan would inevitably lead to liquidation, where creditors could make full claim of the debt due to him or her.<sup>15</sup> The operation of a remedy in such a manner shows that there is no regard given to the company but that creditors are the focal point, even though they already have a remedy in winding-up a company.

Lastly, and in contradictory fashion, an order of placing a company under judicial management can only be granted if the company is able to show that the company will be a 'successful concern'. The meaning of this phrase begs the question, 'will the company be able to carry on business as usual, make a profit and discharge its liabilities?', and it is quite a difficult question to answer because the remedy requires too much of an ailing company. A business seeking judicial management must show that it will be able to pay off its debts, paying all of them in full and still operate to make a profit. The remedy seems to overlook, in my view, the fact that a business seeking judicial management already has a supple amount of obligations on its plate and further burdens would only push it closer to insolvency. A failure to meet this

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<sup>13</sup> Bradstreet op cit note 11 at 352-83.

<sup>14</sup> Ibid at 354.

<sup>15</sup> Ibid.



requirement is conclusive evidence that the company can no longer operate in the economic arena, leading to the insolvency of the company and being inevitably wound-up.

### III. COMPANIES ACT 61 OF 1973

The remedy of judicial management has been the subject of much criticism than it has been used to actually keep any businesses afloat, thus allowing them to retrieve a solvent status. The legislature was presented with an opportunity to fix the financial and juristic losses created by the remedy that perpetuated with its inefficiency for 47 years, nearly five decades of outright failure to aid financially pressured companies, through the drafting of the new Companies Act that would repeal the 1926 Act. When the Companies Act 61 of 1973 was promulgated, the legislature surprisingly failed to take into cognisance any of the criticisms and recommendations made about judicial management; the remedy was directly imported into the new Act.<sup>16</sup>

Unsurprisingly, the remedy under the 1973 Act continued to be ineffective because of the onerous burden created, whereby more and more companies seeking to exercise the remedy still failed to discharge the obligation and inevitably faced liquidation. Bradstreet suggests that, by the year 1980, few companies still used judicial management;<sup>17</sup> and it is clear therefore, that the remedy automatically led to liquidation, and the decrease in its use meant that companies preferred liquidation instead as a first option when faced with financial difficulties. This is conclusive proof that the remedy has been promulgated, more than once, in futility. Furthermore, by the year 1980, less than twenty per cent of the companies that were successfully placed on judicial management avoided liquidation,<sup>18</sup> meaning that a majority of helpless companies were liquidated nonetheless.

### IV. COMPANIES ACT 71 OF 2008

The termination of a company's juristic status through judicial management from as early as 1926 clearly and devastatingly, for South African company law jurisprudence, fell on deaf ears,<sup>19</sup> the legislature only started making changes to the remedy once it became evident through international jurisdictions that rescue platforms are and should be available and

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<sup>16</sup> Joubert op cit note 4 at 552.

<sup>17</sup> Bradstreet op cit note 11 at 353.

<sup>18</sup> Ibid.

<sup>19</sup> Joubert op cit note 4 at 553.

accessible to companies because of the crucial impact and contribution of the companies.<sup>20</sup> Additionally, rescue remedies also have the advantage of resolving the future prospects and trajectory of a company in a swift manner.<sup>21</sup>

The main criticisms that were advanced against judicial management were offered with recommendations that seek to genuinely afford ailing companies a second chance at solvency, and one such suggestion was amending the duty on the applicant to show that there is a 'reasonable probability' to a 'reasonable possibility'.<sup>22</sup> The current Companies Act<sup>23</sup> creates a new remedy that is located in Chapter 6, and section 129 (1) and section 131 (4) (a) contemplate that a company that is financially distressed can be placed under business rescue where the applicant can show that, in placing the business under rescue, there are reasonable prospects of recovery<sup>24</sup> of the business or that if the business is placed under business rescue, it will yield a better return for creditors than in a circumstance where the business is placed in liquidation.<sup>25</sup>

The creation of the business rescue as a remedy was largely influenced by international jurisdictions<sup>26</sup> because South African company law urgently required a development that cemented the notion that a business fares more favourably and carries a grand value when it is a going concern rather than when it is undergoing liquidation.<sup>27</sup> This development is consistent with section 7 (k) of the 2008 Companies Act, which clearly states that the purpose of statute is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'.

Business rescue has been favoured more by the courts because the standard imposed on the applicant is less onerous, as 'something less is required', in comparison to the burdensome standard imposed by judicial management, which ultimately rendered the remedy as inoperative from the outset.<sup>28</sup> In discharging this onus, the applicant must prove the existence

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<sup>20</sup> Bradstreet op cit note 11 at 353; Loubser op cit note 8 at 158.

<sup>21</sup> M Pretorius & W Rosslyn-Smith 'Expectations of a business rescue plan: international directives for Chapter 6 implementation' (2014) 18 *South African Business Review*, 109-39.

<sup>22</sup> Joubert op cit note 4 at 554.

<sup>23</sup> Companies Act 71 of 2008.

<sup>24</sup> The standard of proof for business rescue is captivated in the phrase 'reasonable prospects', and it can be compared to judicial management's 'reasonable probability'.

<sup>25</sup> Section 128 (b) (iii) of Act 71 of 2008.

<sup>26</sup> Such as Australia, Canada, the U.S and the U.K.

<sup>27</sup> Pretorius & Rosslyn-Smith op cit note 21 at 109; Loubser op cit note 8 at 152 and 158.

<sup>28</sup> *Southern Palace Investments v Midnight Storm Investments*; *Koen v Wedgewood Village & Country Estate* ; *Oakdene Square Properties v Farm Bothasfontein*; *Swart v Beagles Run Investments*; *Propspec Investments v Pacific Coast Investments* and *Nedbank v Bestvest*.

of two elements, that is, the company is financially distressed<sup>29</sup> and there appears<sup>30</sup> to be a reasonable prospect of rescuing the company.<sup>31</sup> With regards to the former, section 128 defines ‘financially distressed’ as an appearance of a reasonable unlikelihood that a company will be capable of making payments for all of its debts as they become due and enforceable in the next six months<sup>32</sup> whilst the latter concept is not defined in the Act, for which such interpretation has been left fully to the courts.<sup>33</sup>

In one of the earliest applications for business rescue, the court in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Southern Palace)*,<sup>34</sup> held that the remedy is for an ailing business that can be recovered through the ordinary trade of the business under the supervision of a business rescue practitioner.<sup>35</sup> In subsequent applications made, the courts have been reluctant to place a company under business rescue which had ceased trading long before it was in the financially distressed position.<sup>36</sup> In the case of *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd; in re: Mabe v Cross Point Trading 215 (Pty) Ltd (Lidino)*,<sup>37</sup> the court held that a company that gained profit through the procurement of tenders and has not traded in a number of years cannot possibly show a reasonable prospect of recovery because there is nothing to recover and there is no guarantee that a sufficient number of tender deals could be procured for the period that the business was placed under rescue, and thus, the court dismissed the application for lack of merit.<sup>38</sup>

Chapter 6 makes provision for business rescue applications to be placed before the courts by directors or affected persons. Section 129 contemplates that an application for business rescue can be made by the board of the company when a resolution has been passed to voluntarily place the company under business rescue. This would be dependent on the satisfaction of the abovementioned requirements.<sup>39</sup>

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<sup>29</sup> Section 129 (1) (a) of Act 71 of 2008.

<sup>30</sup> The relevance of this wording will be returned to at a later stage for further discussion.

<sup>31</sup> Section 129 (1) (b) of Act 71 of 2008. Shelley Mackay-Davidson & Michael Crystal suggest that financial distress is the trigger in ‘Saving graces: liquidation, compromise or business rescue?’ (2015) 9 *Without Prejudice* at 18.

<sup>32</sup> Section 128 (1) (f) (i) of Act 71 of 2008.

<sup>33</sup> Mackay-Davidson & Crystal op cit note 31 at 19; Yaniv Kleitman & Courtney Masters ‘Better return for creditors- business rescue’ (2013) 8 *Without Prejudice* at 34.

<sup>34</sup> *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC).

<sup>35</sup> *Ibid* para 23.

<sup>36</sup> *AG Petzetakis International Holdings v Petzetakis Africa*; and *Gormley v West City Precinct Properties*.

<sup>37</sup> *Mabe v Cross Point Trading 215 (Pty) Ltd* (2012) ZAFSHC 155.

<sup>38</sup> *Ibid* para 24.

<sup>39</sup> The procedure that the company must follow is set out in section 129 (2) and subsequent provisions.

This section provides a better position for business rescue to be granted because the board of directors of a company are the most educated and well-versed about the financial state of the company and they can clearly state whether the application is for restoring the business into solvency or to yield a better return for creditors before winding up the company.<sup>40</sup> Section 131, however, bestows an affected person<sup>41</sup> to make the application to place a company under business rescue, and once such an application has been made, notice must be given to other affected persons so that they can join in the proceedings<sup>42</sup> since their financial interests are affected by the discretion exercised by the court.

The interpretation of Chapter 6 has been tried by several high courts around the country, leading to several important landmark judgments that have developed and catapulted South African company law jurisprudence. In the first ever recorded case of an application for business rescue, the court in *Swart v Beagles Run Investments (Swart)*,<sup>43</sup> regarded business rescue as a new remedy in South African law keeping with the purpose of the 2008 Companies Act, but when it came to the application of the requirements for business rescue, the court turned to section 427 of the 1973 Companies Act and dismissed the application on the ground that the applicant failed to show that there would be ‘a successful concern’ if business rescue is granted.<sup>44</sup>

The court in the *Swart* judgment has been heavily criticised for the blunder of applying a repealed remedy to an application for a new form of relief, particularly the finding in terms of a phrase that is foreign to Chapter 6 of the 2008 Companies Act,<sup>45</sup> and as a result, the first ever proper interpretation of business rescue proceedings was achieved in *Southern Palace*<sup>46</sup> where it was held that the courts must be cautious of applying a strict standard on applicants brought down from the remedy of judicial management when business rescue essentially required something less so that companies can be given a breathing space to restore themselves back to a state of solvency.<sup>47</sup> In showing that there are reasonable prospects of recovery, the court introduced several requirements that the applicant must satisfy that show that the

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<sup>40</sup> Joubert op cit note 4 at 555.

<sup>41</sup> Section 128 (1) (a) defines an affected person to be a shareholder, creditor, a registered trade union representing employees of the company and any employees of a company that are not represented by a trade union (or their representatives).

<sup>42</sup> *Golden Dividend 339 (Pty) Ltd v Absa Bank Limited; Cape Point Vineyards v Pinnacle Point Group and Kalahari Resources v Arcelormittal*.

<sup>43</sup> *Swart v Beagles Run Investments* 2011 (5) SA 422 (GNP).

<sup>44</sup> *Ibid* para 42.

<sup>45</sup> Joubert op cit note 4 at 555.

<sup>46</sup> *Southern Palace* supra note 34 para 31.

<sup>47</sup> *Ibid* para 3.

proposed rescue plan is not merely speculative.<sup>48</sup> Lastly, the court also stated, in passing, that where an application has been dismissed because no reasonable prospects have been shown, the applicant is not barred from making an application again after taking into account the suggested amendments offered by the courts.<sup>49</sup>

Gamble J in *Nedbank Limited v Bestvest 153 (Pty) Ltd; Essa & another v Bestvest 153 (Pty) Ltd & others (Bestvest)*<sup>50</sup> confirmed the findings of *Southern Palace*, in addition to an extensive and thorough explanation of the importance and necessity of business rescue, particularly advancing the opinion that a strong and swift deviation from the interpretation and application of judicial management for business rescue, so that the remedy is valid and operative for businesses.<sup>51</sup> In the interpretation of ‘reasonable prospects’, the court went as far as making reference to the requirements enunciated in *Southern Palace*<sup>52</sup> The requirements laid down in *Southern Palace* have been criticised for creating hard and fast rules for what may be deemed to be a ‘reasonable prospect’, thereby placing a heavier burden on applicants,<sup>53</sup> and this criticism is valid because in most cases where the requirements were applied, the application was dismissed. This created a threat for the remedy altogether as it posed a looming possibility that it is no different from judicial management.

In *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others (Oakdene)*,<sup>54</sup> the court held that a court must assess the relevant facts and make a value judgment that is consistent with the purpose of business rescue rather than formulating a checklist approach that leads to the granting of liquidation orders of companies, thereby covertly illustrating that the companies were better off having made no attempt to seek assistance from the courts.<sup>55</sup>

Subsequent case law has shown, however, that courts are moving away from applying the requirements and elect to consider the merits of the application.<sup>56</sup> In *Koen & another v*

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<sup>48</sup> *Southern Palace* supra note 34 para 24. These are succinctly stated as; the cause of the failure needs to be addressed, a remedy for the failure needs to be offered, there is a reasonable prospect that the remedy advanced will be sustainable, and the above aspects prove, based on ‘concrete and objective ascertainable details beyond speculation’, that the remedy is sustainable.

<sup>49</sup> *Southern Palace* supra note 34 para 23.

<sup>50</sup> *Nedbank Limited v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC).

<sup>51</sup> *Ibid* paras 18 and 27.

<sup>52</sup> *Nedbank v Bestvest* supra note 50 para 48.

<sup>53</sup> *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) para 28.

<sup>54</sup> *Oakdene* supra note 53.

<sup>55</sup> *Ibid* para 21.

<sup>56</sup> *AG Petzetakis International Holdings v Petzetakis Africa & others* 2012 (5) SA 515 (GSJ); *Climate Concrete Products CC v Evening Flame Trading & others* [Unreported case no 812/2012 (21 June 2012)]; *Firststrand Bank*

*Wedgewood Village & Country Estate & others (Koen)*,<sup>57</sup> the court commented on ‘reasonable prospects’, holding that there must be cogent proof that a business will return to a state of solvency where business rescue is granted rather than speculative or hopeful prospects.<sup>58</sup> Interestingly, in the case of *Gormley v West City Precinct Properties (Pty) Ltd & another; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd & another (Gormley)*,<sup>59</sup> an application for business rescue was made solely for the purpose of pausing an application of the liquidation of the company, the applicant failed to show any reasonable prospects of success of business rescue.<sup>60</sup> The application was accordingly dismissed.

## V. PURPOSE OF THIS STUDY

In this paper, the business rescue remedy will be analysed as to whether it has made a meaningful contribution to the South African economy and providing companies with the much-needed relief that judicial management was unable to provide for an alarmingly extensive period of 85 years. To facilitate this analysis, the remedy will be observed within the relevant legislative background, unpacking the rights to the remedy available to the company and affected persons. Additionally, the court’s discretion in granting or refusing an order will be commented on through the lens of a few cases decided since its inception. Chapter three will take a closer look on the moratorium, international jurisdictions and controversial cases involving the moratorium. Lastly, chapter four will deal with the great debate of business rescue versus liquidation, each of these remedies will be compared and contrasted to deduce whether they can co-exist.

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*Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD); and *Madodza v Absa & others* [Unreported case no 38906/2012 (15 August 2012)].

<sup>57</sup> *Koen & another v Wedgewood Village & Country Estate & others* 2012 (2) SA 378 (WCC).

<sup>58</sup> *Ibid* para 17.

<sup>59</sup> *Gormley v West City Precinct Properties (Pty) Ltd & another; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd & another* (2012) ZAWCHC 33.

<sup>60</sup> *Ibid* paras 12 and 14.

## CHAPTER TWO

### I. LEGISLATIVE BACKGROUND

Prior to 1994, the corporate arena was governed by the common law<sup>61</sup> and legislation,<sup>62</sup> and to a great extent, such regulation was concerned with the economic and juristic status of corporate entities, and thus, there was hardly any regard for any issues of fairness in the facilitation of companies.<sup>63</sup> Since the constitutional advent, the legislature has put in more effort in giving effect to the rights enshrined in the Constitution, in addition to creating laws that seek to redress historical disadvantages.<sup>64</sup>

One right that is particularly relevant in corporate law is the right to ‘choose a trade, occupation or profession’,<sup>65</sup> which comes with the consequence that such a right ought to be exercised freely.<sup>66</sup> This right is quite controversial in the private law area, with specific reference to contract law<sup>67</sup> but is not limited to contractual undertakings in so far as it covers the scope of corporate entities. For corporate entities, the right to choose a trade *and* to trade so freely becomes paramount at the infancy of a company; when it is a financial risk, facing insolvency, and even in the day-to-day administration and effective management of a company.

A company that is in a financial crisis needs such a right more than ever to avert the termination of its legal status, and it is thus clear that this right requires the enforcement of sui generis protection in respect of companies. This cry of desperation and helplessness was attended to when the legislature was drafting a new Act to govern corporate entities in light of the Constitution,<sup>68</sup> and the end product was Chapter 6 of the Companies Act<sup>69</sup> which came into effect on 1 May 2011.

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<sup>61</sup> This relates to notions such as, ‘lifting or piercing the corporate veil’, the business judgment rule, duties of directors, liability of directors and partnerships.

<sup>62</sup> The Companies Act 46 of 1926, which was repealed by the Companies Act 61 of 1973, and the Close Corporations Act 69 of 1984.

<sup>63</sup> The only exceptional circumstance where this factor came into consideration was in relation to the business judgment rule.

<sup>64</sup> Such as the facilitation of BEE (‘black economic empowerment’)-owned companies through the platforms of the current legislation.

<sup>65</sup> Section 22 of the Constitution.

<sup>66</sup> *Ibid.*

<sup>67</sup> This right is widely debated on in relation to the common law right to freedom of contract and the cornerstone principle of *pacta sunt servanda*—which gives to the expression that contracts entered freely into must be enforced.

<sup>68</sup> The Constitution *op cit* note 65.

<sup>69</sup> Act 71 of 2008.

Chapter 6 of the 2008 Companies Act focuses largely on the new remedy of business rescue; this remedy was intended to save companies from the brink of insolvency, and these intentions were purposefully drafted in light of the constitutional values.<sup>70</sup> It is my submission that the constitutional value of freedom takes preference over equality and human dignity in business rescue proceedings because business rescue is seeking to enforce the constitutional rights and interests of companies, something that the remedy of judicial management was unable to take into the slightest consideration.

In this chapter, what will be explored is how the 2008 Companies Act gave effect to and extended the constitutional right to freely trade to companies through the creation of the business rescue remedy, with precise reference to the procedure for making an application for business rescue. Additionally, this chapter will also delve into the interpretations of the courts on its discretion regarding the remedy to illustrate the trajectory of the corporate platform within the constitutional framework; a novel albeit exciting narrative for South African jurisprudence.

## II. THE PROCEDURE CONTEMPLATED IN CHAPTER 6

As previously stated above, Chapter 6 of the 2008 Companies Act encapsulates the remedy of business rescue in skeletal fashion, and it is up to the courts to determine and give direction to the remedy, thereby casting light on the future of ailing companies.<sup>71</sup> Section 128 introduces the remedy by providing a clear and concise definition of the terms to be used throughout the chapter such as ‘business rescue’, ‘financially distressed’ and ‘affected person’, whilst section 129 and section 131 deal specifically with access to the remedy—which is the focal point in the following analysis.

### *(a) Section 129: Voluntary application by resolution*

Chapter 6 provides for two methods of filing for business rescue, an application can be brought before a High Court where the company has passed a resolution that the company is, in fact, ‘financially distressed’, and it would be in the best interests of the company to commence business rescue proceedings.<sup>72</sup> An application made in terms of section 129 demonstrates that the company, through its directors,<sup>73</sup> have taken cognisance that the strategies and plans for the

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<sup>70</sup> These are: equality, human dignity and freedom.

<sup>71</sup> Loubser op cit note 8 at 153.

<sup>72</sup> Section 129 (1) of Act 71 of 2008.

<sup>73</sup> Alongside the co-operation of the company’s shareholders.



company, both implemented with success or failure (as is the risk that comes with running a business), have been ineffective and the company would do much better if a restructuring of the business<sup>74</sup> would be done by an external person.<sup>75</sup>

It has been suggested that the voluntary application for business rescue is a step in the right direction for an ailing company, because the reasonable prospects of a successful recovery are more likely since the directors of the company possess the documentation that clarifies financial affairs of the business.<sup>76</sup> Furthermore, once a resolution has been taken, it must be communicated to all of the affected parties,<sup>77</sup> and such communication must contain a comprehensive explanation of why business rescue is necessary to ensure the continued trade of the company,<sup>78</sup> and the method chosen by the company must be one that is sufficient to reach all the relevant affected persons so that such persons can have the election of challenging the resolution or to abide by it.<sup>79</sup>

Once the directors have communicated the notice, section 130 allows the affected person to object to the voluntary application for business rescue if the affected person genuinely believes that the company is not financially distressed according to the definition provided for in the Act,<sup>80</sup> that is, there are no reasonable prospects of recovery, or that the voluntary application failed to comply with the requirements necessary for the company to be placed under business rescue.<sup>81</sup>

If an application to set aside the resolution is granted, the affected person still has two further rights available to him or her regarding the status of the company, that is, the affected person is presented with a platform to make an application for the company to be wound-up in terms of section 345 of the 1973 Companies Act, or to place the company under business rescue

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<sup>74</sup> Bradstreet op cit note 11 at 352; Eric Levenstein 'Getting clever with business rescue' (2012) 8 *Without Prejudice* at 30; and *Oakdene* supra note 53 para 33.

<sup>75</sup> That is, the business rescue practitioner.

<sup>76</sup> Joubert op cit note 4 at 555. This is also supported by the caution given by the court in *Absa v Newcity Group; Cohen v Newcity Group* (2012) ZAGPJHC 144 at para 20, where it was suggested that the court must have solid information at its disposal, and not only visionary information.

<sup>77</sup> *Cape Point Vineyards v Pinnacle Point Group* 2011 (5) SA 600 (WCC) para 12; Harvey E Wainer 'The Insolvency conundrum in the Companies Act' (2013) 132 *SALJ* at 512.

<sup>78</sup> Wainer *ibid*.

<sup>79</sup> *Cape Point Vineyards* supra note 77 para 13. In this judgment it was held that communication of notice via electronic messaging was sufficient; Wainer op cit note 77 at 512.

<sup>80</sup> FHI Cassim et al *Contemporary Company Law* (2011) 785.

<sup>81</sup> These include, but are not limited to- giving notice to affected persons, appointing a business rescue practitioner, and after the application is granted, the company fails to adopt a business rescue plan.

if the affected person can show that the company will yield a better return for creditors than if it was faced with liquidation.<sup>82</sup>

*(b) Section 130: Opposing a resolution*

It is very obvious, from the notions advanced above, that business rescue is not entirely relating to the company but maintains a certain rank of being creditor-oriented,<sup>83</sup> so that creditors<sup>84</sup> can enforce the rights conferred to them by the Constitution, the 2008 Companies Act or any other source of law. It has been argued that the application to set aside the resolution adopted does not reflect the expeditious encounter for affected persons, and it would be a rather exorbitant tariff on them to settle in legal costs just to enforce their rights,<sup>85</sup> it is my submission, however, that this argument is flawed because it undermines the competence of the courts to comment on an application for business rescue that is showing that the company is neither financially distressed nor capable of showing reasonable prospects of recovery.<sup>86</sup>

Furthermore, an affected person need not approach the court to set aside the resolution where the abovementioned factors are not complied with, since the court is likely to order liquidation of the company;<sup>87</sup> the notice of the adoption of the resolution is sufficient for the affected party to be present in court to hear the proceedings and then he or she may decide what is the next move for his or her interests.

In the following cases, an application in terms of section 130 had been made:

*Golden Dividend 339 (Pty) Ltd & another v Absa Bank Limited (Golden Dividend)*<sup>88</sup>

A loan agreement was entered into between the parties for R8 million, but the appellant had ceased payment of the loan in 2012, and by July 2013, R6 million plus interest was still outstanding. On 27 August 2013, a resolution was adopted to place the appellant under business

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<sup>82</sup> Section 128 (1) (b) (iii) of Act 71 of 2008; *Oakdene* supra note 53 paras 17 and 23; *Gormley* supra note 59 para 12; H Stoop ‘When does an application for business rescue proceedings suspend liquidation proceedings?’ 2014 *De Jure* at 334; and Levenstein op cit note 74 at 30.

<sup>83</sup> Loubser op cit note 8 at 157; Bradstreet op cit note 11 at 364.

<sup>84</sup> Or affected persons.

<sup>85</sup> Lara Khan ‘Business rescue-panacea or poison pill?’ (2010) 3 *Siber Ink* at 20.

<sup>86</sup> *Oakdene* supra note 53 para 18.

<sup>87</sup> *Oakdene* supra note 53; *Newcity Group* supra note 76; *Petzetakis* supra note 56; *Gormley* supra note 59 ; and *Nedbank* supra note 50.

<sup>88</sup> *Golden Dividend 339 (Pty) Ltd & another v Absa Bank Limited* [2016] ZASCA 78.

rescue.<sup>89</sup> The respondent served notice on the appellant of the respondent's application to declare the resolution to be unlawful and invalid.<sup>90</sup>

In the contentions before the court, the appellant raised a point in limine that notice of the opposition application should have been given to other affected persons so that they could join in on the respondent's application because of the direct and substantial interest that the affected persons held<sup>91</sup>, whilst the respondent advanced that notice had been given to affected persons but such persons failed to show any interest in the setting aside of the resolution.<sup>92</sup> The court a quo rejected the defence raised in limine for lack of merit, and granted the section 130 application, thereby setting aside the resolution and placing the company in final liquidation.<sup>93</sup>

On appeal before the SCA, the appellant argued that the court a quo had made an incorrect ruling in rejecting the defence in limine since the respondent had failed to give notice to the creditors.<sup>94</sup> The court held that it was necessary and of paramount importance that the other creditors be given notice of the application to oppose the resolution adopted to voluntarily place the company under business rescue.<sup>95</sup> The court accordingly accepted that the failure to give notice was a fatal flaw to the application;<sup>96</sup> and this failure impeded the court from hearing the opposition application on its own merits, essentially setting aside the order of the court a quo.<sup>97</sup>

*Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd & others*<sup>98</sup>

This was an urgent application for the setting aside of a resolution in terms of section 130 of the 2008 Companies Act, the facts were that the respondent owed the applicant R629 088.27, and the respondent had failed to make payments. On 27 February 2012, the respondent filed a notice of commencement of rescue proceedings; at the hearing<sup>99</sup> the court highlighted that the applicant had to show that-

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<sup>89</sup> The resolution was adopted by 89 per cent of the creditors with voting rights.

<sup>90</sup> *Golden Dividend* supra note 88 para 2.

<sup>91</sup> *Golden Dividend* supra note 88 para 5.

<sup>92</sup> *Ibid* para 6.

<sup>93</sup> *Ibid* para 8.

<sup>94</sup> It must be borne in mind that these creditors are the ones who adopted the resolution, thus, it was imperative that they should have been made aware of any attempts to undo their decision.

<sup>95</sup> *Golden Dividend* supra note 88 para 10.

<sup>96</sup> *Ibid*.

<sup>97</sup> This order, therefore, set aside the application of opposition in terms of section 130 and re-instated the adopted resolution to place the under business rescue.

<sup>98</sup> *Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd & others* unreported case no 812/2012 (21 June 2012).

<sup>99</sup> Of the opposition application by *Climax Concrete Products*.

1. It has a prima facie right;
2. A reasonable apprehension of harm would result in the event that the interim relief is not granted;
3. There was a balance of convenience; and
4. There was no alternative relief available to the applicant.<sup>100</sup>

Regarding the prima facie right, the court accepted that the applicant had established its existence because the respondent was indebted to the applicant;<sup>101</sup> secondly, the applicant argued that the business rescue application was illegitimate because no notice was given to interested parties and there was a strong likelihood that the respondent would dissipate its assets once placed under business rescue.<sup>102</sup> The court accepted that there was a balance struck between the interests of the company and those of the affected persons,<sup>103</sup> and found there was no alternative relief available to the applicant as a creditor, and thus the interdict was granted to set the resolution aside.<sup>104</sup>

*Madodza (Pty) Ltd (in business rescue) v Absa Bank Limited & others (Madodza)*<sup>105</sup>

The respondents made an application to remove their vehicles from the applicant's possession because the latter failed to appoint a business rescue practitioner after the company had been placed under business rescue.<sup>106</sup> The company had failed to comply with section 129 (3) (b), which stated that,

‘[w]ithin *five business days* after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow that, the company must appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment’ [*my emphasis*].

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<sup>100</sup> *Climax Concrete Products* supra note 98 para 17.

<sup>101</sup> *Ibid* para 18.

<sup>102</sup> *Climax Concrete Products* supra note 98 para 19.

<sup>103</sup> *Climax Concrete Products* supra note 98 para

<sup>104</sup> *C Climax Concrete Products* supra note 98 para 34.

<sup>105</sup> *Madodza (Pty) Ltd (in business rescue) v Absa Bank Limited & others* unreported case no 38906/2012 (15 August 2012).

<sup>106</sup> The company was placed under business rescue on 22 November 2011 but the practitioner was appointed on 20 January 2012.

The applicant now makes an application in terms of section 133<sup>107</sup> to cease the removal of the vehicles in question until business rescue is complete.<sup>108</sup> The respondents argued that the return of the vehicles fell outside of the moratorium<sup>109</sup> whilst the applicant argues that the removal of the vehicles would make business rescue impossible for the company business since it needed the vehicles to operate its business, and the granting of the respondents' application would be contrary and inconsistent with the purpose of business rescue and the resolution.<sup>110</sup> The court held that aspects of business rescue cannot be enforced when there is non-compliance, and in this scenario, with particular reference to the failure to appoint a business rescue practitioner timeously to commence the rescue process,<sup>111</sup> since this would be the unfortunate conduct that stands to oppose the rescue process in its entirety, and thus the relief sought by the applicant could not be granted.<sup>112</sup>

From the case law mentioned above, it can be observed that the courts employ a flexible approach that gives proper enforcement to the right of opposing a resolution when an application for the latter is made by an affected person. It is also clear that the courts have made an attempt to strike a balance, in light of the paramount constitutional values; between the interests of affected persons and those of the company,<sup>113</sup> and this balance is appropriate because it does not cause the remedy of business rescue to skew severely in favour of one party.

It is my submission that there are implicit lessons and cautionary steps that can be learned by the company and affected persons in the exercise of section 130. First, it is clear that an opposition must be communicated to all affected persons by notice and in writing, so that the other affected persons can decide to join in on the application or to abide by the resolution, thereby placing emphasis on collective co-operation by the affected persons who hold a common interest on the company. The failure to give such notice, as shown in *Golden Dividend v Absa supra*, hinders the affected party opposing the resolution from properly exercising the relief before a court of law.

Secondly, in *Climax Concrete Products v Evening Flame Trading supra*, it is quite clear that the courts intend to give effect to legitimate rights, without wavering from the considerations required for an application for business rescue. Similarly, the court does not

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<sup>107</sup> This section relates to the moratorium, to be discussed in isolation in a subsequent chapter.

<sup>108</sup> *Madodza supra* note 105 para 1.

<sup>109</sup> *Madodza supra* note 105 para 7.

<sup>110</sup> *Madodza supra* note 105 para 11.

<sup>111</sup> *Madodza supra* note 105 para 17.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Stoop op cit* note 82 at 336.

consider the remedy of business rescue to trump the rights and interests of creditors where there are no compelling reasons to resuscitate an ailing company. It has been suggested that directors of a company must be cautious in making an application for business rescue simply out of panic, when in reality, the company is not financially distressed.<sup>114</sup> Lastly, the facts in *Madodza v Absa supra* point out the classic example of non-compliance that allows affected persons, particularly creditors, to oppose a resolution adopted in terms of section 129 successfully.<sup>115</sup>

*(c) Section 131: Application by affected persons*

A further question thus arises: what if the company fails to take cognisance of the ailing status of its business, consequently passing an opportunity to adopt a resolution to save the business? Will the company continue to trade aimlessly<sup>116</sup> until it reaches a state of insolvency? The forward-thinking and progressive legislature can be applauded in this regard because it has averted this dilemma through the obtaining of a court order for placing a company under business rescue by an affected person.

It is clear from Chapter 6 that the rights of affected persons supplement the limited rights of the company itself, that is, where a company is curtailed in exercising a legally recognised opportunity or has no juristic justification for some conduct, section 131 provides such opportunities through affected persons. For example, section 131 enables an affected person to apply for business rescue whilst the company has been placed in liquidation,<sup>117</sup> thereby suspending the liquidation proceedings for the duration of the rescue process.<sup>118</sup>

It is my submission that the logic and rationale behind this right is to prevent advancing conflicting notions by the company, thereby undermining the rights of affected persons and interested persons,<sup>119</sup> furthermore, directors no longer have control over the business once they've placed the company under liquidation.<sup>120</sup> This blockade, however, does not apply to

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<sup>114</sup> Jakomien van Staden 'Cutting the lifeline: the termination of business rescue proceedings' (2013) 12 *De Rebus* at 14.

<sup>115</sup> Yaniv Kleitman 'Evolving business rescue' (2014) 7 *Without Prejudice* at 29; Blair Wassman 'Business rescue: getting it right' (2014) 2 *De Rebus* at 37; Alex Elliott & Kylene Weyers 'Hot off the business rescue press' (2015) 7 *Without Prejudice* at 10.

<sup>116</sup> This is from an objective angle since the company has failed to see or foresee a financial crisis that can be overturned.

<sup>117</sup> Cassim op cit note 80 at 790. This provision is contemplated in section 131 (6) (b) and finds further support in Stoop op cit note 82 at 330; and Mackay-Davidson & Crystal op cit note 31 at 19.

<sup>118</sup> *Richter v Absa* 2015 ZASCA 100 para 15; Stoop op cit note 82 at 330.

<sup>119</sup> For example, a company that makes an application to be wound-up cannot thereafter make an application for business rescue in a 'last-ditch' attempt for the company to remain trading, simply because this would be a blatant abuse and disregard of the court process.

<sup>120</sup> MacKay-Davidson & Crystal op cit note 31 at 19.

affected persons, and this is the intention of the legislature to create an equilibrium for the remedies accessible to corporate entities and the rights of affected persons.<sup>121</sup>

Affected persons, thus, have the right to make an application for business rescue even if liquidation proceedings have already begun—this is because the secondary meaning of ‘reasonable prospects’ requires that an applicant for business rescue must show that ‘...results in a better return for the company’s creditors or shareholders than would result from an immediate liquidation of the company’.<sup>122</sup> It is my submission that this provision creates the analogy that business rescue should be granted where creditors will be able to receive almost the total sum of their claim through the trade of the business, instead of the portions that will be received through the realization of the company’s assets.<sup>123</sup>

It is, thus, my submission, that the alternative object is much easier to be demonstrated by affected persons seeking a company to be placed under business rescue to be a ‘reasonable prospect of recovery’. There is no additional obligation on affected persons to show the successful trade of the company after business rescue has been complete because the objective of the application would have already been achieved by then.<sup>124</sup> The alternative object, however, has received an alarmingly low focus, despite its vast positive and possible results,<sup>125</sup> even in case law<sup>126</sup> it has been side-lined, even to the extent of being recognised as an under-utilised and self-standing remedy.<sup>127</sup> The position remains to create better opportunities to seek specific performance from a business through business rescue, and although the obligation will be discharged after a delayed period, the return in full will still be more impressive than the compromised settlement through liquidation.

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<sup>121</sup> Dominique Wesso ‘Business Rescue: the position of secured creditors’ 2014 (9) *De Rebus* at 35; *Oakdene* supra note 53 para 28.

<sup>122</sup> Act 71 of 2008 op cit note 23.

<sup>123</sup> *Oakdene* supra note 53 para 23; and Bradstreet op cit note 11 at 358.

<sup>124</sup> This aim would have been to pay off creditors’ debts, Bradstreet suggests at 378, that this will be the case for all creditors since they are expected to act as a collective. Additional duties relating to the company do not befall on the affected persons who made the application initially.

<sup>125</sup> Povey & Kent ‘Rescuing dead horses’ (2017) 8 *Without Prejudice* at 6 The alternative object is discussed as a foreign concept to such an extent that it has become a shock factor for it to be a primary reason for business rescue.

<sup>126</sup> *Petzetakis* supra note 56.

<sup>127</sup> *Ibid* para 11.

### III. THE COURT'S DISCRETION AND INTERPRETATION OF APPLICATIONS

In this concluding section, the court's discretion on applications for business rescue will be briefly analysed since the landmark judgments of *Southern Palace Investments v Midnight Storm Investments* and *Oakdene Square Properties v Farm Bothasfontein*, that is, where something less is required and the alternate object is to the benefit of the creditors respectively.

(a) *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*<sup>128</sup>

On 20 May 2011, a creditor (Zoneska) applied to wind up the respondent since it was unable to pay its debt of R 561 656.45 in terms of a loan agreement. On 27 July 2011, the applicant made an application to rescue the respondent in terms of section 131 of the 2008 Companies Act.<sup>129</sup> The applicant contended that the respondent will negotiate new agreements with stakeholders to pay off debts as well as enter into further agreements with investors regarding buying more shares.<sup>130</sup>

Zoneska raised the points that the respondent is indebted to investment companies, has no source of income and is not actually carrying out any work, thus showing that there are no reasonable prospects of success if the respondent were to be placed under business rescue.<sup>131</sup> The applicant further argued that the respondent has been able to raise R 120 million thus far to pay off its debts.<sup>132</sup>

Eloff J stated that the point of business rescue is to give a financially distressed company a 'breathing space' to implement and carry out the rescue plan in the control of the business rescue practitioner.<sup>133</sup> In explaining the meaning of 'reasonable prospects', a comparison was made between judicial management and business rescue, and it was found that 'something less is required' for the latter.<sup>134</sup> In assessing the facts of the case, it was held that there were no reasonable prospects of recovery because there was no concrete rescue plan to be implemented and the previous plans that had been used had all failed,<sup>135</sup> and thus the application was dismissed.

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<sup>128</sup> *Southern Palace* supra note 34.

<sup>129</sup> *Ibid* para 4.

<sup>130</sup> *Southern Palace* supra note 34 para 15.

<sup>131</sup> *Southern Palace* supra note 34 para 16.

<sup>132</sup> *Southern Palace* supra note 34 para 17.

<sup>133</sup> *Southern Palace* supra note 34 para 2.

<sup>134</sup> *Southern Palace* supra note 34 para 21.

<sup>135</sup> *Southern Palace* supra note 34 para 23.



*(b) Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others*<sup>136</sup>

In this judgment, the appeal against a dismissed business rescue application came before the SCA for the first time since the remedy came into existence. Brand JA set out the two goals of business rescue, that is, for the financially distressed company to continue trading as a going concern after business rescue has come to an end, and to yield a better return for affected persons than liquidation if the primary goal is impossible to achieve.<sup>137</sup> For the operation of the alternate goal, it was held that ‘it must be clear that the company can never be saved from immediate liquidation, and a better return is the only hope for the company’.<sup>138</sup>

For the requirement of ‘reasonable prospects of recovery’, the court held that mere speculation will not suffice and a concrete plan must be in existence by the time the application has been made,<sup>139</sup> and based on the facts of this case, the court held the plan that the appellant had did not indicate whether it was going to succeed or fail, and such a plan has held to inadequate.<sup>140</sup> The appeal was dismissed as the court held that liquidation of the appellant would be more appropriate than business rescue.<sup>141</sup>

*(c) Employees Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd and Solar Spectrum Trading 83 (Pty) Ltd (Solar Spectrum)*<sup>142</sup>

In this unreported judgment, an application was made in terms of section 131, that is, the employees of the company in question had become creditors when the company failed to remunerate them for services rendered in accordance with their employment contracts. In assessing whether there were any reasonable prospects of recovery, the court noted that whether the burden of proof is onerous or not in an application brought by affected persons would depend on the position that the affected person held in the company.<sup>143</sup>

This is relevant because it advances forth whatever information that is within the knowledge and possession of the affected person to be what the affected person thinks and/or believes to have caused the company to be in a financially distressed position and in need of

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<sup>136</sup> *Oakdene* supra note 53.

<sup>137</sup> *Ibid* para 23.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Oakdene* supra note 136 para 29.

<sup>140</sup> *Oakdene* supra note 53 para 31.

<sup>141</sup> *Oakdene* supra note 53 paras 35 & 40.

<sup>142</sup> *Employees Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd and Solar Spectrum Trading 83 (Pty) Ltd* unreported case no 6418/2011, 18624/2011 and 66226/2011.

<sup>143</sup> *Ibid* para 17.

rescue mechanisms. The court observed such information and held that the employees had discharged the onus in showing that there were reasonable prospects of recovery, and the application was granted.<sup>144</sup>

(d) *Koen & another v Wedgewood Village Golf & Country Estates & others*<sup>145</sup>

In this unnecessarily complex case, the applicants launched an application to place the respondent under business rescue in terms of section 131 (6),<sup>146</sup> when the application came before Binns-Ward J, it had been postponed so that it could be transferred from being heard in the Eastern Cape High Court to the Western Cape High Court, thereby suspending the liquidation proceedings. The court accepted that the respondent was financially distressed, and all that remained for determination was whether there were any reasonable prospects of recovery.<sup>147</sup>

The applicant contended that the respondent succeeded in procuring an unnamed investor to inject the crucial financial contribution to alleviate the financial distress of the company, and allowing the company to be liquidated would prejudice the investment.<sup>148</sup> The court commented on various aspects of the application, first, the court attacked the postponement applications, explicitly stating that the latter application was an obvious factor that the application was vexatious, truly intended to suspend liquidation proceedings because the High Court in Eastern Cape was competent to hear the application.<sup>149</sup>

Secondly, the court held that the requirement of ‘reasonable prospects of recovery’ must not only be appealing to be in existence in paper, thus being highly speculative, but must show concrete and cogent evidence that there are reasonable prospects.<sup>150</sup> Lastly, in establishing the abovementioned requirement, the court relied in the ‘checklist requirements’ formulated in *Southern Palace*, and came to the conclusion that, since the company had ceased to trade in 2009 and the winding-up proceedings commenced in December 2010, the reasonable prospects of recovery seemed bleak at best.<sup>151</sup>

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<sup>144</sup> *Solar Spectrum* supra note 142 para 34.

<sup>145</sup> *Solar Spectrum* supra note 142 note 57.

<sup>146</sup> This section contemplates a business rescue application even when liquidation proceedings have begun.

<sup>147</sup> *Koen* supra note 57 para 5.

<sup>148</sup> *Koen* supra note 57 para 6.

<sup>149</sup> *Koen* supra note 57 para 8.

<sup>150</sup> *Koen* supra note 57 para 17.

<sup>151</sup> *Koen* supra note 149.

Furthermore, the unnamed investor who had no relationship with the company was clearly a vague response to avoid the liquidation of the company, because the investor's contribution was heavily reliant on the ceasing of liquidation proceedings, and not on the company being able to bounce back and continue trading.<sup>152</sup> The court found that the furnishing of such proof was 'vague and speculative',<sup>153</sup> and as a result, there were no reasonable prospects of recovery. The application was thus dismissed.

*(e) AG Petzetakis International Holdings v Petzetakis Africa (Petzetakis)*<sup>154</sup>

The respondent had a debt of R225 million to discharge, but because the company had stopped trading in 2010, stopped paying its employees in 2011, the company was consequently facing liquidation. The applicant applied for business rescue of the respondent company in terms of section 131; whilst the trade union representative for the unpaid employees advanced that the alternative object would be more appropriate in the present circumstance<sup>155</sup>. The court held that the application of the alternative object in South Africa depends on the primary interpretation of the Act<sup>156</sup> that is, giving preference to applications that would be granted if the company were to operate as a going concern.

The court found that there were no reasonable prospects of recovery shown by any of the parties for the main or alternative object,<sup>157</sup> thereby dismissing the application and granting an order for provisional liquidation.<sup>158</sup>

*(f) Nedbank Limited v Bestvest 153 (Pty) Ltd; Essa & another v Bestvest 153 (Pty) Ltd & others (Bestvest)*<sup>159</sup>

A loan agreement had been entered into between the parties in 2010, but the respondent subsequently ceased trading and failed to pay off the loan as contemplated, which prompted the application for liquidating the respondent company in 2011.<sup>160</sup> An application for business rescue was made in terms of section 131, and in the evaluation of the application, the court discussed the remedy of business rescue and why it was needed in the corporate industry.<sup>161</sup>

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<sup>152</sup> *Koen* supra note 57 para 9.

<sup>153</sup> *Koen* supra note 57 para 20.

<sup>154</sup> *Petzetakis* supra note 56.

<sup>155</sup> *Petzetakis* supra note 56 para 11.

<sup>156</sup> *Petzetakis* supra note 56 para 12.

<sup>157</sup> *Petzetakis* supra note 56 para 19.

<sup>158</sup> *Petzetakis* supra note 56 para 34.

<sup>159</sup> *Bestvest* supra note 50.

<sup>160</sup> *Ibid* para 7.

<sup>161</sup> *Bestvest* supra note 50 para 18. This necessity was clearly and comprehensively linked to section 7 (*k*).

Reference was made to the checklist requirements formulated in *Southern Palace* and was used to establish whether the respondent had discharged the onus of reasonable prospects of recovery,<sup>162</sup> where Gamble J dismissed the application for business rescue because, in his view, the onus had not been discharged.<sup>163</sup>

(g) *Richter v Absa Bank Limited (Richter)*<sup>164</sup>

In this SCA decision, the issue before the court was whether an affected person (the appellant) is competent to make an application for business rescue in terms of section 131 (6) after liquidation has been granted against a company.<sup>165</sup> The findings of the court a quo were in the negative, and the respondent accepted the finding by contending that there were no reasonable prospects of recovery that can be shown where a liquidation order has already been granted.<sup>166</sup>

The court explained how liquidation proceedings operate,<sup>167</sup> and cautioned that the proper practice of such proceedings need not be considered final because section 136 (4) foreshadowed the conversion of a liquidation proceedings to a business rescue application.<sup>168</sup> The reasoning behind this provision, in my view, is because business rescue was intended to be a ‘flexible and effective process of extending the lifespan of a company and its business’.<sup>169</sup>

Thereafter, the court accepted that although an application conversion is a remote possibility, it must be given full effect where there is a radical financial improvement to the extent that it would be *beneficial for the company* if it were to continue to trade as a going-concern.<sup>170</sup> The SCA found this to be a compelling reason and allowed the liquidation proceedings to be converted into business rescue proceedings.<sup>171</sup>

The unreported judgment of *Employees Solar Spectrum Trading v Afgri Operations Ltd and Solar Spectrum Trading* was one of the earliest cases to shed light that the remedy of business rescue was and should be less cumbersome than judicial management when assessed practically, and this was the case because the applicants were able to show reasonable prospects

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<sup>162</sup> Bestvest supra note 50 para 48.

<sup>163</sup> Bestvest supra note 50 para 53.

<sup>164</sup> Richter supra note 118.

<sup>165</sup> Ibid para 4.

<sup>166</sup> Ibid para 7.

<sup>167</sup> Ibid para 10.

<sup>168</sup> Ibid para 13.

<sup>169</sup> Ibid.

<sup>170</sup> Richter supra note 118 para 15.

<sup>171</sup> Richter supra note 118 para 17.

of recovery. Furthermore, the applicants (who were affected persons), managed to show these reasonable prospects with the limited information at their disposal. It is my submission that the findings of the case illustrate that the remedy of business rescue is not disproportionately skewed in favour of the company for successful results.

The judgment of Binns-Ward J in *Koen v Wedgwood Village Golf & Country Estate* was one of the earliest interpretations of Chapter 6 by the courts after *Southern Palace*, thus, there was a reliance on the latter case for guidance. The findings of the court were founded on the much-criticised ‘checklist requirements’—thereby threatening the effectiveness of the judgment. It is my submission that this judgment should not be easily cast aside because the findings of the court would have led to the same conclusion if the checklist requirements were left out altogether from the analysis of reasonable prospects of recovery.

Additionally, the judgment in *AG Petzetakis International Holding v Petzetakis Africa* is problematic in that it rejects business rescue for the purposes of operating the business as a going concern and where it would yield a better return for creditors in comparison to liquidation. This myopic view undermines the purpose of Chapter 6 gravely because it fails to give a company an opportunity to salvage its business—instead the court sunk the business by granting a liquidation order. However, Eloff J in *Southern Palace Investments v Midnight Storm Investments* signalled the importance of the alternative object to be supported by cogent evidence through the ‘source, nature and extent of the resources that are likely to be available to the company’.<sup>172</sup> Additionally the SCA has rejected the findings of *AG Petzetakis International Holding v Petzetakis Africa* regarding the alternative object by succinctly stating that the business rescue remedy contemplated the achievement of both the primary and alternative goals.<sup>173</sup>

Lastly, the SCA in *Richter* presented an opportunity for the classic example of the ‘different but equal’ interests of affected persons whereby one affected person sought liquidation of the company whilst another wanted to place the company under business rescue. The findings of the court showed that other aspects of the business rescue remedy contemplated in the Act should not be ignored or undermined since the rights of creditors ought to be enforced without contradictory notions. Special reference must be made, in my view, to section 136 (4)

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<sup>172</sup> *Southern Palace* supra note 34 para 25.

<sup>173</sup> *Oakdene* supra note 53 para 26; Section 128 (1) (h); Section 128 (1) (b) (iii); Kleitman op cit note 115 at 28.

because it still pursues the primary objects of business rescue, thereby facilitating Chapter 6 to operate in seamless fashion.

## CHAPTER THREE

### I. THE CONSEQUENCES OF BUSINESS RESCUE

In business rescue, the granting or refusal of an application has far-reaching consequences for a company, and where a court has refused an application, the court usually grants the application made for liquidation of the company,<sup>174</sup> or places the company under provisional liquidation *mero motu*.<sup>175</sup> Where the court grants an application, section 132 makes provision for the time of commencement of rescue proceedings—thereby transferring the business of the company to a business rescue practitioner to administrate and facilitate a rescue plan for a successful recovery of the company.

In this chapter, the discussion is strictly restricted to the consequences of business rescue where the application has been granted by the courts. To begin with, the discussion will relate to the operation and general impact of the moratorium, secondly, the different interpretations of the moratorium in international jurisdictions will be observed for the assessment of whether they can offer any guidance on the approach to be adopted or integrated into South African law. Lastly, a study on the lacuna in the remedy leading to an abuse of the court process of the general remedy of through case law.

### II. THE MORATORIUM

To properly facilitate business rescue and give full effect to section 7 (k)<sup>176</sup> of the 2008 Companies Act, Chapter 6 makes provision for a stay or delay in legal proceedings against a company placed under business rescue through the moratorium. Section 133 (1) provides that,

‘[d]uring business rescue proceedings, no legal proceeding, including enforcement action, against a company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum...’

The effect of the moratorium, primarily, is to circumvent any legal proceedings launched by any member of the company or a third party, such as a creditor, against the company whilst the business is placed under rescue. It has been suggested that a moratorium

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<sup>174</sup> *Newcity Group* supra note 76; *Petzetakis* supra note 56; *Gormley* supra note 59; and *Lidino* supra note 37.

<sup>175</sup> *Koen* supra note 57; *Madodza* supra note 105; *Bestvest* supra note 50.

<sup>176</sup> The aim and purport of the new Companies Act, promulgated under the Constitution, is to ‘provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders’.

not only provides the company with a breathing space to enforce the rescue plan adopted by all the relevant parties,<sup>177</sup> but the breathing space is also extended to the appointed business rescue practitioner, so that he or she is able to facilitate and administrate the rescue process to the best of his or her ability, without the additional pressure of defending and simultaneously launching litigation against and in favour of the company.<sup>178</sup> It is my submission that the moratorium is part and parcel with implementing the primary goal of the rescue process, regardless of whether the end goal is for the company to continue as a going-concern or to yield a better return for creditors.

The moratorium is also extended to enforcement actions, that is, a creditor seeking relief through the courts against the company for a legally recognised right, such as a contractual obligation, a compromise, cession, damages etc. This means that a creditor is halted from seeking performance or relief from the company through the courts or appointed tribunals for the duration of the rescue process. Likewise, a company is also blocked by the moratorium from enforcing an obligation due to company from a third party through litigation.

Contractual obligations are also impacted by the existence and operation of the moratorium, that is, the business rescue practitioner has been empowered to act independently and with the best interests of the company in mind, and this function occasionally includes pausing the enforceability of a contract.<sup>179</sup> It has been argued that this power may be to the detriment of certain creditors because the rescue practitioner, in carrying out his or her duties, may unilaterally terminate contracts that are considered to be unnecessary for the business or inconsistent with the rescue plan adopted.<sup>180</sup> It is my submission that, although this power is not as sympathetic to creditors, the purpose of Chapter 6 of the 2008 Companies Act has been to provide a platform for distressed companies to have an opportunity to resurrect its business when circumstances appear gloomy, and because of the dismal failure of judicial management, Chapter 6 was necessitated to be company-oriented rather than creditor-oriented. It is noteworthy that this right does not extend to employment agreements, and thus, some creditors and personnel of the company remain protected from the rescue practitioner's power.<sup>181</sup>

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<sup>177</sup> Ane` Potgeiter 'The business rescue moratorium' (2016) 3 *Without Prejudice* at 20.

<sup>178</sup> Jonathan Swanepoel & Chandni Gopal 'An inappropriate business rescue mess' (2013) 7 *Without Prejudice* at 17.

<sup>179</sup> For example, if the company had intended to extend its building or make improvements to the building, such as renovations, and had enlisted the services of an independent contractor to carry out this task, such a contract can be put on hold by the business rescue practitioner in preference to carrying out the rescue plan adopted.

<sup>180</sup> Khan op cit note 85 at 21.

<sup>181</sup> *Ibid.*



The provision also enumerates exceptional circumstances where proceedings against a company may be brought regardless of the moratorium, such as, ‘with written consent of the practitioner’,<sup>182</sup> with ‘leave of the court’,<sup>183</sup> and ‘criminal proceedings against the company or any of its directors or officers’.<sup>184</sup>

It has been held that the moratorium is the cornerstone of business rescue,<sup>185</sup> however, it has remained controversial with regards to the timing for the moratorium take effect.<sup>186</sup> It is now a settled matter in our law that the moratorium begins to operate once business rescue proceedings have commenced<sup>187</sup> or liquidation proceedings have been converted to business rescue proceedings.<sup>188</sup> Judging by the rapid increase in case law,<sup>189</sup> the now looming question relates to, at which point are business rescue proceedings deemed to have ‘commenced’?

The courts have been uniform and consistent in providing guidance to the abovementioned issue, the court in *Investec Bank Ltd v Bruyns (Bruyns)*<sup>190</sup> held that business rescue proceedings commence when an application is made to court,<sup>191</sup> and subsequent cases have drawn the same conclusion.<sup>192</sup> It is noteworthy that this consistency is drawn from the provisions of the moratorium itself, to wit, section 132 (1) provides that ‘business rescue proceedings begin when the company files a resolution to place itself under supervision...’;<sup>193</sup> an affected person applies to court for an order placing the company under supervision...<sup>194</sup> a

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<sup>182</sup> Section 133 (1) (a) of Act 71 of 2008; *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another* (2017) 1 All SA 862 (WCC).

<sup>183</sup> Section 133 (1) (b) of Act 71 of 2008; *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd & another* (2017) 1 All SA 862 (WCC); *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd & another (Merchant)* [2013] ZAGPJHC 109 ; and *Redpath Mining South Africa (Pty) Ltd v Marsden NO & others* [2013] ZAGPJHC 148

<sup>184</sup> Section 133 (1) (d) of Act 71 of 2008; Cassim op cit note 80 at 792. It has been suggested in *Merchant* supra note 183 para 53, that the listed exceptions are not exhaustive since the remedy is novel to South Africa.

<sup>185</sup> *Cloete Murray & another v Firstrand Bank Ltd t/a Wesbank* [2015] ZASCA 39; *Merchant* supra note 183 para 62

<sup>186</sup> Swanepoel & Gopal op cit note 168 at 16.

<sup>187</sup> *Firstrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD); Povey & Kent op cit note 125 at 7.

<sup>188</sup> Section 131 (6) of Act 71 of 2008; *Van Staden v Angel Ozone Products CC (In liquidation)* (2013) 4 SA 630 (GNP).

<sup>189</sup> *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others (Kariba)* (2013) 6 SA 471 (GNP) ; *Merchant*[2013] ZAGPJHC 109 supra note 183; *Bruyns* 2012 (5) SA 430 (WCC) ; and *Firstrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD).

<sup>190</sup> *Bruyns* supra note 189.

<sup>191</sup> *Ibid* para 12.

<sup>192</sup> *Bruyns* supra note 189.

<sup>193</sup> Section 132 (1) (a) (i) of Act 71 of 2008.

<sup>194</sup> Section 132 (1) (b) of Act 71 of 2008.

court makes an order placing a company under supervision during the course of liquidation proceedings...'.<sup>195</sup>

The automatic effect of the moratorium also includes legal proceedings that are already taking place by the time the application for business rescue is made,<sup>196</sup> in particular, liquidation proceedings to wind-up the struggling company.<sup>197</sup> This is often problematic for creditors because they become barred from enforcing their rights against the company but this has been countered by the fact that the moratorium does not take away the creditor's right against the company but simply temporarily suspends the enforcement of such right until the rescue is complete.<sup>198</sup>

It has been advanced that caution must be taken to avoid giving the moratorium such an excessive amount of powers that have the potential of having unintentionally far-reaching consequences when it becomes operative. Dominique Wesso states that '...in terms of the deprivation of rights, the legislature [by creating the rescue remedy] does not intend to change the existing law more than necessary'.<sup>199</sup> Furthermore, Wesso warns against incorporating restrictive and prejudicial obligations that the legislature did not anticipate,<sup>200</sup> thereby further drawing the attention to the pre-existing reality that the legislature is still competent and in possession of law-making powers to expressly create provisions for such obligations.

Once the moratorium has become operative, what remains for consideration are the duties and obligations imposed on the company to carry out whilst placed under business rescue to 'ensure the continued existence of the company as a solvent entity'.<sup>201</sup> This is paramount for South African jurisprudence in the provision of clear guidelines, which will be indicative of the deviation from and complete discarding of judicial management. Like most global concepts which reflect the societal changes of a territory or region, South Africa has entered the race of rescue remedies for corporate entities late, and thus lags behinds the countries that have implemented this particular global concept.

The legislature allows South Africa to catch up on the race by taking or considering the values and norms of the nations ahead of the race through section 39 of the Constitution. The

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<sup>195</sup> Section 132 (1) (c) of Act 71 of 2008.

<sup>196</sup> Cassim op cit note 80 at 792; Stoop op cit note 82 at 329; *Bestvest* supra note 50; *Newcity Group* supra note 76; *Petzetakis* supra note 56; *Gormley* supra note 59; *Lidino* supra note 37; and *Koen* supra note 57.

<sup>197</sup> *Newcity Group* supra note 76; *Petzetakis* supra note 56; *Gormley* supra note 59; and *Lidino* supra note 37.

<sup>198</sup> Povey & Kent op cit note 125, at 9; Bradstreet op cit note 11 at 371.

<sup>199</sup> Wesso op cit note 121 at 35.

<sup>200</sup> Wesso op cit note 121 at 36.

<sup>201</sup> Pretorius & Rosslyn-Smith op cit note 21 at 109.

provision empowers the courts to consider international law<sup>202</sup> and foreign law<sup>203</sup> where there is no domestic law equivalent. In the upcoming section, a concise comparison will be made on different international jurisdictions on how the moratorium is meant to cause the business rescue plan to be successful, or at least create a platform where the future of the struggling company becomes clear.<sup>204</sup>

### III. INTERNATIONAL JURISDICTIONS ON THE MORATORIUM

As stated earlier, corporate entities contribute significantly to any region's economy,<sup>205</sup> and thus, it has become a necessity for a country or nation to facilitate the continued existence of companies.<sup>206</sup> In the United States, the business rescue remedy is intended to 'restructure the business of the company for successful operation in the future by creating jobs, discharging obligations to creditors and produce a return for the owner'.<sup>207</sup> The moratorium is available to a company under business rescue for three months—this means that the failure to rescue the business within that time-frame enables the creditors to make an application to have the company liquidated.<sup>208</sup>

When the rescue application is made, as part of the rescue plan, the court must consider a feasible plan intended to be in the best interests of the creditors that is 'fair, equitable and complete in good faith'.<sup>209</sup> The idea of a rescue plan that is in the best interests of the creditors, is to ensure that a realistic and objective plan is adopted.<sup>210</sup> A successful rescue plan in the United States must lead to the restructuring of the company, and not to liquidation.<sup>211</sup>

The moratorium in the United Kingdom places more emphasis on the appointment of an administrator to run the business once the company is placed under business rescue.<sup>212</sup>

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<sup>202</sup> Section 39 (1) (b) of the Constitution.

<sup>203</sup> Section 39 (1) (c) of the Constitution.

<sup>204</sup> Pretorius & Rosslyn-Smith op cit note 21 at 109.

<sup>205</sup> Ibid.

<sup>206</sup> Pretorius & Rosslyn-Smith op cit note 204; Joubert op cit note 4 at 550.

<sup>207</sup> Pretorius & Rosslyn-Smith op cit note 21 at 113; Loubser op cit note 8, at 153; see also

[https://www.r3.org.uk/media/documents/policy/policy\\_papers/corporate\\_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf](https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf), (accessed on 24 October 2018).

<sup>208</sup> Ibid.

<sup>209</sup> Pretorius & Rosslyn-Smith op cit note 21 at 115; 'Business Rescue: UK v US, dispelling the myths of a 'UK chapter 11' available at

[https://www.r3.org.uk/media/documents/policy/policy\\_papers/corporate\\_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf](https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf) (accessed on 24 October 2018)

<sup>210</sup> Ibid.

<sup>211</sup> 'Business Rescue: UK v US, dispelling the myths of a 'UK chapter 11' available at

[https://www.r3.org.uk/media/documents/policy/policy\\_papers/corporate\\_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf](https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf)

<sup>212</sup> Pretorius & Rosslyn-Smith op cit note 21 at 118.

Additionally, the company is expected to have additional funding so that the business rescue plan is properly executed because the rescue remedy is considered to be expensive to carry out,<sup>213</sup> with the additional expectation for creditors to have an active involvement in the business rescue to benefit.<sup>214</sup> The moratorium will become operative to essentially give the company a breathing space to create a ‘positive environment for the company to sort out its difficulties’ within a one year time frame.<sup>215</sup>

In Australia, the moratorium is expected to last between 28 to 35 days, and within that time stipulation, all relevant parties are given 21 days to reach consensus on executing the rescue plan that has been accepted.<sup>216</sup> If no plan is accepted or the stipulated time lapses, the company will face liquidation,<sup>217</sup> it is thus clear that, the remedy is designed to be creditor-oriented, and unlike U.S law, the judicial involvement is limited to its barest minimum,<sup>218</sup> and this approach is accredited with the rise in the number of companies that seek rescue.<sup>219</sup>

It can be easily deduced from the differing international jurisdictions that a moratorium plays a vital role in returning a company to solvency. It is my submission that the purport and objective under the U.S law is legitimate but the operation of the moratorium leaves much to be desired because the courts are expected to come up with a rescue plan that is in the best interests of the creditor, and such power gravely exceeds the judicial oversight required in consideration of a business rescue application because the court must now adjudicate on the application and take on the role of the business rescue practitioner. South Africa has taken cues of opposite effect by allowing court oversight of the application to relate to the actual application itself,<sup>220</sup> a business rescue practitioner is an external person appointed in terms of section 138, who is expected to carry out his duties as an officer of the court.

Conversely, in U.K law, there are unrealistic and questionable expectations in that a company seeking business rescue must have ‘additional funding’ to execute the rescue plan,

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<sup>213</sup> ‘Business Rescue: UK v US, dispelling the myths of a ‘UK chapter 11’ available at [https://www.r3.org.uk/media/documents/policy/policy\\_papers/corporate\\_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf](https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/103593%20R3%20A%20UK%20Chapter%2011%20D8.pdf); ‘Business rescue in the UK’ available at <http://www.opusllp.com/wp-content/uploads/2016/10/DOC-161101-NRH-research-report-pdf1.pdf> (accessed on 24 October 2018).

<sup>214</sup> Pretorius & Rosslyn-Smith op cit note 21 at 118; Khan op cit note 85 at 23; and Bradstreet op cit note 11 at 378.

<sup>215</sup> ‘Business rescue in the UK’ available at

<http://www.opusllp.com/wp-content/uploads/2016/10/DOC-161101-NRH-research-report-pdf1.pdf>

<sup>216</sup> Pretorius & Rosslyn-Smith op cit note 21 at 119; *Southern Palace* supra note 34 para 2.

<sup>217</sup> Ibid.

<sup>218</sup> Pretorius & Rosslyn-Smith op cit note 21 at 120; *Oakdene* supra note para 24.

<sup>219</sup> Ibid.

<sup>220</sup> Bradstreet op cit note 11 at 378.

this raises questions of whether such a company is truly financially distressed. It is worth mentioning that the remedy anticipates that creditors participate in the rescue process to protect their interests. The moratorium on Australian soil is formulated in such a way that the rescue must be brought to completion swiftly—from adopting the resolution to implementation and execution. South Africa does not require a company to have any money to execute the rescue plan, but makes provision for post-commencement finances to take priority in the discharging of obligations to creditors,<sup>221</sup> and like Australia, encourages the affected parties to participate in the rescue process.<sup>222</sup>

Even in post-constitutional settings, South African law remains to be a hybrid system in seeking guidance from foreign law, as stated above. South African moratoriums for rescue applications are thus influenced by the abovementioned international jurisdictions, even where our law deviates slightly from the approach of the international jurisdiction so that the principle adopted is accommodative of the circumstances in South Africa.<sup>223</sup> For example, section 132 (3) posits that ‘...a company’s business rescue proceedings have not ended within *three months* after the start of those proceedings, or *such a longer time as the court...may allow...*’ [*my emphasis*], shows that influence is from the U.S system, but because the South African economy and corporate arena differs significantly to the States’, the addition that the courts have discretion to determine for how long a business should be placed under business rescue makes the remedy uniquely South African.

#### IV. APPLICATIONS MADE IN ABUSE OF THE COURT PROCESS

There has been a repeated reference to Australian law in a myriad of South African cases<sup>224</sup> that have made a significant impact on the remedy itself, the reality is, however, even with guidance from international jurisdictions, a remedy such as business rescue is not exempt from abuse,<sup>225</sup> by attempting to keep the juristic entity in existence whilst it is very obvious that the company is neither financially distressed nor are there any reasonable prospects of recovery. This section will assess applications for business rescue before the court as a blatant abuse of the court process.

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<sup>221</sup>Section 135 of the Act 71 of 2008.

<sup>222</sup>Sections 142, 145, 151 of Act 71 of 2008.

<sup>223</sup> Povey & Kent op cit note 125; Bradstreet op cit note 11 at 366.

<sup>224</sup> *Petzetakis* supra note 56; *Bestvest* supra note 50; *Southern Palace* supra note 34; and *Oakdene* supra note 53.

<sup>225</sup> Elliott & Weyers op cit note 115 at 10.

(a) *Koen & another v Wedgewood Village Golf & Country Estates & others*<sup>226</sup>

In this case, as previously discussed, the financially distressed company was facing liquidation proceedings which were automatically suspended when an application was made for business rescue, and in the meantime, a further application was made to transfer the rescue proceedings from one High Court to another. When the applicant had to argue the case for reasonable prospects of recovery, the primary contention was that an unnamed investor was willing to inject money into the company if the liquidation proceedings are abandoned.<sup>227</sup>

Binns-Ward J remarked that the application for business rescue was not legitimate because, if the company had reasonable prospects of recovery, the Eastern Cape High Court would have been competent to hear the application, and essentially, the transfer of proceedings was a delay tactic to further suspend the liquidation proceedings.<sup>228</sup> Furthermore, it was held that the investment of an unnamed person subject to the abandonment of the liquidation proceedings was not only an attempt to ‘twist the court’s arm’ into granting the rescue application but also an unnecessary restriction on the rights of other creditors.<sup>229</sup>

(b) *Investec Bank Ltd v Bruyns*<sup>230</sup>

The plaintiff wanted to obtain summary judgment against the defendant for a debt of approximately R 11 million,<sup>231</sup> and the defence raised by the defendant was that the company was placed under business rescue in terms of section 131, thereby meaning that the moratorium barred the plaintiff from instituting legal proceedings against the company.<sup>232</sup> The contentious issue before the court was whether business rescue had commenced since the rescue application had not been adjudicated on,<sup>233</sup> and Rogers AJ held that business rescue commenced when the application for business rescue was made.<sup>234</sup>

Based on this finding, the moratorium became applicable, thus meaning that the application for summary judgment was barred, but because the rescue application had not been

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<sup>226</sup>*Koen* supra note 57.

<sup>227</sup> *Ibid* para 9.

<sup>228</sup> *Koen* supra note 57 para 8.

<sup>229</sup> *Koen* supra note 57 paras 9, 10, 17 & 27.

<sup>230</sup> *Bruyns* supra note 189.

<sup>231</sup> *Ibid* para 1.

<sup>232</sup> *Bruyns* supra note para 11.

<sup>233</sup> *Bruyns* supra note para 12.

<sup>234</sup> *Ibid*. This is in accordance with section 132 (1) (b).

heard at that point, and that there was no evidence that the rescue application was likely to be granted,<sup>235</sup> the moratorium could not be used as a defence against summary judgment.<sup>236</sup>

(c) *Kalahari Resources (Pty) Ltd v Arcelormittal S.A & others (Kalahari)*<sup>237</sup>

The respondent, who holds 50 per cent of the shares in a company ('Kgalagadi Manganese (Pty) Ltd'), made an application for business rescue, to which the applicant, who holds 40 per cent of the shares of the same company, has made a counter-application to oppose the rescue application in terms of section 130.<sup>238</sup> The respondent argued that the company was financially distressed and would perform much better trading under the guidance and facilitation of a business rescue practitioner,<sup>239</sup> whilst the applicant advanced that business rescue was inappropriate because the financially distressed status of the company was mainly caused by the respondent, who deliberately withheld its obligations in terms of the shareholder's agreement that had been agreed upon when the company was formed.<sup>240</sup>

After the assessment of evidence, the court accepted the applicant's contentions that the respondent was the cause of the company's financial difficulties by deliberately avoiding to discharge its obligations to the company,<sup>241</sup> thereby making the company and its creditors vulnerable.<sup>242</sup> Consequently, the court found this non-performance and seeking relief from the court to be an abuse of the court process, and proceeded to strike off the counter-application off the roll<sup>243</sup> so that it could adjudicate on the unfortunate business rescue application.

(d) *Gormley v West City Precinct Properties (Pty) Ltd & another; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd & another (Gormley)*<sup>244</sup>

Anglo Irish Corporation made an application to place West City Precinct Properties under liquidation because the respondent had a due and enforceable debt of R 219 million towards the applicant as a result of a loan agreement between the parties, and the respondent had no flow of cash because it ceded any source of income to the applicant.<sup>245</sup> Gormley then made an application to place the respondent under business rescue, arguing that the respondent would

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<sup>235</sup> *Bruyns* supra note 189 para 21.

<sup>236</sup> *Bruyns* supra note 189 para 19.

<sup>237</sup> *Kalahari Resources (Pty) Ltd v Arcelormittal S.A & others* 2012 (3) All SA 555 (GSJ).

<sup>238</sup> *Ibid* para 3.

<sup>239</sup> *Kalahari* supra note 237 para 69.

<sup>240</sup> *Kalahari* supra note 237 para 70.

<sup>241</sup> *Kalahari* supra note 237 para 71.

<sup>242</sup> *Ibid*.

<sup>243</sup> *Kalahari* supra note 237 para 74.

<sup>244</sup> *Gormley* supra note 59.

<sup>245</sup> *Ibid* para 3.

be solvent if the moratorium would be enforced against the first applicant (Anglo Irish Corporation) only for a period of three to five years so that the respondent would be able to pay off its debt to the first applicant, the respondent's largest creditor.<sup>246</sup>

The court held that the respondent was not financially distressed—it was insolvent, and this nullified the application.<sup>247</sup> Furthermore, the court held that even if the company was financially distressed, the second applicant (Gormley) did not have a business plan in mind that would change the respondent's financial status for the better,<sup>248</sup> the rescue application was made solely for the benefit of the moratorium that would inhibit the first applicant from instituting liquidation proceedings for an unreasonably long time.<sup>249</sup> Regarding the five-year moratorium, the court held that Chapter 6 envisages a short-term approach to business rescue so that the rights of creditors are not unnecessarily restricted.<sup>250</sup>

The court also cautioned against such an application that was exercised in futility<sup>251</sup> since no creditor would consent to such a long moratorium, and if such an application were to be granted just for the moratorium, it would communicate to companies that business rescue is open to abuse to frustrate the rights of creditors and avoid liquidation.<sup>252</sup> The application was essentially dismissed and the company was placed under provisional liquidation.

*(e) Absa Bank Ltd v Newcity Group (Proprietary) Ltd; Cohen v Newcity Group (Proprietary) Ltd & another (Newcity)*<sup>253</sup>

On 20 January 2010, the first applicant (Absa) and the respondent entered into a loan agreement of R30 million so that the respondent could build, own and run a hotel,<sup>254</sup> but the loan was not repaid and on 29 November 2011, the first applicant made an application to liquidate the respondent.<sup>255</sup> On 6 February 2012, the second applicant (Cohen) applied for the business rescue of the respondent, causing liquidation proceedings to be delayed until 12 June 2012.<sup>256</sup> On 11 June 2012, the second applicant withdrew the rescue application, conceding all the

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<sup>246</sup> *Gormley* supra note 59 para 4.

<sup>247</sup> *Gormley* supra note 59 para 11.

<sup>248</sup> *Gormley* supra note 59 paras 12 and 14.

<sup>249</sup> *Gormley* supra note 59 para 5.

<sup>250</sup> *Gormley* supra note 247. This statement finds support in the writings of Wesso op cit note 121 at 35.

<sup>251</sup> *Gormley* supra note 59 para 22.

<sup>252</sup> *Gormley* supra note 59 para 15.

<sup>253</sup> *Absa Bank Ltd v Newcity Group (Proprietary) Ltd; Cohen v Newcity Group (Proprietary) Ltd & another* 2013 (3) All SA 146 (GSJ).

<sup>254</sup> *Ibid* para 5.

<sup>255</sup> *Ibid* para 9.

<sup>256</sup> *Ibid* para 10.



material facts relating to the respondent's failure to repay the loan<sup>257</sup> and that the rescue application was a delay mechanism so that the respondent could procure funds to repay the loan.<sup>258</sup> The provisional liquidation order was granted, and the return date was scheduled for 31 July 2012.<sup>259</sup>

On 30 July 2012, the second applicant launched another rescue application for the respondent with the condition that the application would be withdrawn if the court discharges the provisional liquidation, the first applicant objected to the rescue application, arguing that it was an abuse of the court process.<sup>260</sup> On assessing the rescue application, the court held that the application was not genuine because the second applicant admitted that the first application was a delay tactic, the second application is conditional and the timing of launching and withdrawing the rescue applications was questionable.<sup>261</sup> The court eventually found that there was no merit to the rescue application, and thus refused it.<sup>262</sup>

The respondent had, however, made attempts to repay the loan, and by the second rescue application was heard, 30 per cent of the loan had been repaid.<sup>263</sup> The court took the view that, despite the abusive rescue application coupled with ulterior motives, the second applicant genuinely wanted to save the business of the respondent, and instead of granting a final liquidation order, the court discharged the provisional liquidation order on condition that the respondent would repay the loan, and upon default, the first applicant can approach the court for a liquidation order.<sup>264</sup>

*(f) Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd, In re: Mabe v Cross Point Trading 215 (Pty) Ltd (Lidino)*<sup>265</sup>

The applicant was a contracting company that worked with the respondent when the latter had procured tenders. On 25 May 2012, the applicant applied to have the respondent liquidated,<sup>266</sup> and on 25 July 2012, the day before the liquidation hearing, the director of the respondent applied for the business rescue of the respondent.<sup>267</sup> One of the director's contentions was that

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<sup>257</sup> *Newcity Group* supra note 253 para 10.

<sup>258</sup> *Ibid* para 12.

<sup>259</sup> *Ibid*.

<sup>260</sup> *Newcity Group* supra note 253 para 15.

<sup>261</sup> *Newcity Group* supra note 253 para 22.

<sup>262</sup> *Newcity Group* supra note 253 para 28.

<sup>263</sup> *Ibid* para 26.

<sup>264</sup> *Ibid* para 34.

<sup>265</sup> *Lidino* supra note 37.

<sup>266</sup> *Ibid* para 3.

<sup>267</sup> *Lidino* supra note 37 para 6.

the applicant sought to liquidate the respondent because the former owed the latter some payment for work done—which was promptly denied by the applicant.<sup>268</sup> The court held that the respondent had no employees and had not procured any tenders in recent times,<sup>269</sup> and thus there was no cogent evidence that the respondent could be rescued.<sup>270</sup> The court also revealed to the respondent that the rescue application was not the appropriate remedy that would allow the company to enforce the debt that the applicant allegedly owes the respondent, and suggested the remedy of oppressive or prejudicial conduct in terms of section 163 of the 2008 Companies Act would be more appropriate.<sup>271</sup>

It is my submission that the courts are vigilant in their discretion, making sure to ‘sift the good from the bad’ applications for business rescue,<sup>272</sup> thus avoiding to ‘rubber stamp’ applications without considering the merits of each application.<sup>273</sup> The courts are strict in ensuring that frivolous applications will not pass even the first hurdle,<sup>274</sup> and this is easily supported by the abovementioned case law, where it has been enunciated that the courts will not entertain applications that are intended to take advantage of the rescue process, and so the courts strive to grant applications that contemplate the remedy laid down in the four corners of Chapter 6 of the Companies Act. It has been suggested that parties seeking business rescue should be cautious in implying restrictions that the legislature did not intend.<sup>275</sup>

The courts in *Lidino* and *Newcity Group* have not shied away from adjudicating with more appropriate remedies for applications that stem from an abuse of the court process. The concept of the moratorium has many advantages for a company that is seeking business rescue, such as providing a breathing space to implement the rescue plan that is intended and trusted to rapidly change the trajectory of a company’s business. The disadvantage with the flexibility contemplated in section 132 (3) is that there is essentially no time frame set out for the operation of the moratorium, meaning that it has the possibility of operating indefinitely,<sup>276</sup> thereby contradicting the speedy and expedient approach contemplated by the legislature. The

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<sup>268</sup> *Lidino* supra note 265 para 13.

<sup>269</sup> *Ibid* para 21.

<sup>270</sup> *Lidino* supra note 265 para 23.

<sup>271</sup> *Lidino* supra note 268.

<sup>272</sup> Kleitman op cit note 115 at 28.

<sup>273</sup> *Ibid*.

<sup>274</sup> Wassman op cit note 115 at 38.

<sup>275</sup> Wesso op cit note 121 at 35.

<sup>276</sup> Wassman op cit note 115 at 37.

moratorium, being company-oriented, contains no remedy for affected persons,<sup>277</sup> it merely suspends their rights.

## CHAPTER FOUR

### I. THE DIFFERENCES BETWEEN WINDING-UP AND BUSINESS RESCUE

In the previous chapters, it arose, on more than one occasion, that unsuccessful applications for business rescue have the unavoidable consequence of placing the company under liquidation. The notion of liquidation is not novel to our law; it is typically the concluding step of terminating the existence of a juristic entity.<sup>278</sup> Unlike business rescue, the rules governing the termination of a company have managed to be exclusively exist in the four corners of the 1973 Companies Act.<sup>279</sup>

In this final chapter, a comparative analysis of business rescue and winding-up of a company will be made to respond to the ancient question of whether the remedies can practically co-exist, taking into account that South African law has been drafted and promulgated in such a manner that both remedies have been accommodated.

### II. WINDING-UP

Chapter 2 of the 2008 Companies gives effect to section 7 (*f*) in that the Act purports to ‘promote the development of companies within all sectors of the economy, and *encourage active participation in economic organisation, management and productivity*’ [*my emphasis*]. Part G makes provisions for the winding-up of a solvent company for any reason and those enumerated in section 82. A company that manages to reach an ‘insolvent’ status is unable to take advantage of section 7 (*f*), but rather, must reconcile itself to the inevitable task of being wound-up.

The general understanding in the law of the phrase ‘insolvent’ makes reference to a situation where a person’s (natural or juristic) liabilities exceed the assets, and to such an extent that the insolvent person is backed into a corner of alienating and realizing these assets in order

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<sup>277</sup> Ibid.

<sup>278</sup> The counterpart or equivalent procedure for natural persons is the declaration of the estate of a person to be ‘insolvent’—and thus proceeding to wind-up the insolvent estate. Section 339 of the 1973 Companies Act dictates that the rules of insolvency will apply *mutatis mutandis* in the winding-up of a company where the Act itself does not make any applicable and specific provisions.

<sup>279</sup> Although the 1973 Companies Act has been repealed by the 2008 Companies Act, provisions relating to the winding-up of the company as well as reckless and fraudulent trading, have not been repealed but continue, as an exception, to operate and co-exist with the current Act.

to discharge and reduce the obligations. To find oneself in such a predicament is far from favourable in any spectrum—it clearly fulfils the idea that liquidation and winding up of a juristic person is a drastic and irrevocable measure.<sup>280</sup>

It is trite in South African law that liquidation proceedings leading up to the winding-up of the company are creditor-oriented<sup>281</sup> in that preference is given to the rights of creditors over the ‘active participation’ of a company in the ‘economic organisation, management and productivity’ that would ensure the continued subsistence of the company<sup>282</sup> and as a contributing member of society<sup>283</sup> in the strengthening and stimulation of the South African economy.

Section 344 of the 1973 Companies Act lists the circumstances where the courts are competent to grant an order winding-up a company, such as ‘the company has by special resolution resolved that it be wound up by the court’;<sup>284</sup> ‘the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year’;<sup>285</sup> 75 per cent of the issued share capital of the company has been lost or has become useless for the business of the company,<sup>286</sup> and the company is unable to pay its debts.<sup>287</sup>

Section 345 formally begins the winding-up of a company theoretically by categorising circumstance whereby a company would be considered to be ‘insolvent’. Section 345 states that,

‘[a] company...shall be deemed to be unable to pay its debts if a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due;<sup>288</sup> or any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process’.<sup>289</sup>

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<sup>280</sup> Bradstreet op cit note 11 at 352.

<sup>281</sup> Bradstreet op cit note 11 at 356; and Richard Bradstreet ‘Business rescue proves to be credit-friendly: CJ Claassen’s analysis of business rescue procedures in *Oakdene Square Properties*’ (2013) 130 *SALJ* at 46.

<sup>282</sup> Cassim op cit note 80 at 782; Joubert op cit note 4 at 550.

<sup>283</sup> Ibid; Pretorius & Rosslyn-Smith op cit note 21 at 109.

<sup>284</sup> Section 344 (a) of Act 71 of 2008.

<sup>285</sup> Section 344 (c) of Act 71 of 2008.

<sup>286</sup> Section 344 (e) of Act 71 of 2008.

<sup>287</sup> Section 344 (f) of Act 71 of 2008.

<sup>288</sup> Section 345 (1) (a) (ii) of Act 71 of 2008.

<sup>289</sup> Section 345 (1) (b) of Act 71 of 2008.

Once it is obvious that a company neatly fits into the ‘insolvent’ category, the company may adopt a resolution to wind-up the company,<sup>290</sup> and afterwards give notice to its creditors so that they may come forward with their claims.<sup>291</sup> Alternatively, the creditors can act as a unit and make the application to court to have the company wound-up.<sup>292</sup>

Once a company is wound-up, section 358 makes provision for a moratorium to take effect from the date that winding-up proceedings are considered to have commenced. The moratorium is not a fringe benefit only attached to business rescue<sup>293</sup> but a ‘tried and tested’ system intended to facilitate rescue and dissolution proceedings without additional difficulties.<sup>294</sup> The moratorium in liquidation proceedings is purported to circumvent unwarranted and unproven claims from creditors<sup>295</sup> against a company seeking to conclude its existence in the corporate sphere.

Additionally, the 1973 Companies Act requires that there must be a transfer of the company in its entirety from its directors and officers to the liquidator, who has been chosen and appointed by the directors or creditors, depending on which party brought the liquidation application; and must be accepted to be competent by the Master of the High Court,<sup>296</sup> for the facilitation and administration of the company. The liquidator is appointed to realize assets in favour of claims that have been proved in a hierarchal manner,<sup>297</sup> with preference being given to secured creditors and creditors with concurrent claims whilst unsecured creditors are considered last on the liquidator’s list.

Lastly, once the claims of creditors have been discharged<sup>298</sup> and all assets of the company have been realized, section 419 of the 1973 Companies Act proceeds to capture and relay the consequences of a company that has been wound-up. Once a company has been wound-up; it no longer holds a juristic personality and can no longer trade in its previous area of expertise or interest, therefore, such a company is considered to have been dissolved and no longer carries any legal status to benefit itself or anyone else.

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<sup>290</sup> Section 343 (1) (b) and (2) of Act 71 of 2008.

<sup>291</sup> Section 364 (1) (a) (ii) of Act 71 of 2008. .

<sup>292</sup> Bradstreet op cit note 11 at 352-83.

<sup>293</sup> Povey & Kent op cit note 125 at 6; Khan op cit note 85 at 21.

<sup>294</sup> Povey & Kent op cit note 12, at 7; Khan *ibid*; Bradstreet op cit note 281 at 46; Bradstreet op cit note 11 at 364.

<sup>295</sup> Bradstreet op cit note 11 at 352.

<sup>296</sup> Sections 367 and 369 of Act 71 of 2008.

<sup>297</sup> Sections 366 and 409 of Act 71 of 2008.

<sup>298</sup> Or as best as could be discharged, depending on the proceeds from the sale of assets.

### III. BUSINESS RESCUE

The remedy of business rescue, however, was created to give effect to section 7 (k), which highlights the objectives of the remedy as ‘to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all the relevant stakeholders’. As previously stated, South African corporate law, since the inception of statutory regulation,<sup>299</sup> has not failed in providing a remedy for companies placed in constraints because of the downward spiral of its finances.<sup>300</sup> What has failed dismally, is the practical application of the remedy of judicial management, which, for an unreasonably long time, remained to be a theoretical right for companies.

The promulgation of Chapter 6 of the 2008 Companies Act seeks to create a remedy that is practicable and genuinely accessible for companies,<sup>301</sup> by placing a less burdensome onus on the applicant to show that a company is financially distressed and there are reasonable prospects of recovery.<sup>302</sup> It is my submission that the business rescue remedy is a bridge for companies that wish to continue trading and participate in the economic arena, but for the financial constraints, it is unable to do so and inevitably faces liquidation. The remedy also seeks to point out that ‘financially distressed’ does not equate to ‘insolvent’, the trigger for business rescue is that a company must be ‘financially distressed’,<sup>303</sup> and the earlier a company is found to fall within the former category,<sup>304</sup> the easier it will be to recover the company’s business as a going concern instead of letting the company ‘plummet into extinction’.<sup>305</sup>

Like liquidation proceedings, an application can be made for business rescue by the adoption of a resolution by the company<sup>306</sup> or an affected person makes an application to court.<sup>307</sup> A successful application will result in an automatic moratorium for legal proceedings against the company for as long as the company is placed under business rescue,<sup>308</sup> and when the moratorium is in place, the business affairs of the company must be handed over to the

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<sup>299</sup> Starting with the Companies Act 46 of 1926.

<sup>300</sup> Loubser op cit note 8 at 153.

<sup>301</sup> *Southern Palace* supra note 34; *Bestvest* supra note 50; *Richter* supra note 118; *Koen* supra note 57; and Joubert op cit note 4 at 550.

<sup>302</sup> *Ibid.*

<sup>303</sup> Mackay-Davidson & Crystal op cit note 31 at 19.

<sup>304</sup> Cassim op cit note 80 at 782; Bradstreet op cit note 11 at 364; Bradstreet op cit note 281 at 47; *Madodza* supra note 105; *Lidino* supra note 37; *Gormley* supra note 59; and *Newcity Group* supra note 76.

<sup>305</sup> *Newcity Group (Proprietary)* supra note 253 para 20.

<sup>306</sup> Section 129 of the 2008 Companies Act.

<sup>307</sup> Section 131 of the 2008 Companies Act.

<sup>308</sup> Section 133 of Act 71 of 2008.

external person appointed as the business rescue practitioner<sup>309</sup> to formulate and adopt a rescue plan that is meant to place the company towards a path of solvency.<sup>310</sup>

The effect of a successful rescue application is that the financially distressed company will continue to trade in accordance with the rescue plan in place so that the business is more valuable as a going-concern,<sup>311</sup> alternatively, the company will continue to trade in accordance with the rescue plan in place so that the company yields a better return for creditors than liquidation.<sup>312</sup> In the case of an unsuccessful application, whether the company was not financially distressed or there are no reasonable prospects of recovery, such a company is labelled as insolvent and faces liquidation.

#### IV. CAN BUSINESS RESCUE AND LIQUIDATION CO-EXIST?

The concept of business rescue as a ‘go-between’ remedy between solvency and insolvency creates the unavoidable probing of whether the remedy is a mere delay for liquidation proceedings that inevitably takes place in most instances. The remedies are on opposite ends of the spectrum, business rescue is for ailing companies that need a breathing space<sup>313</sup> so that the company can take positive steps to restore the company to its former glory and be capable of trading as a going-concern after business rescue has ended.<sup>314</sup> Liquidation, on the other hand, is the procedure designed to dissolve a company and terminate its existence in the corporate industry, and it is appropriate where the company has been declared insolvent.<sup>315</sup>

It is my submission, however, that the remedy of business rescue from the legislature caters specifically to companies that fall in the middle—not insolvent but the financial difficulties are so rife that the company is struggling to trade as a solvent entity. Previously, financially distressed companies were coerced into liquidation due to the practical unavailability of a remedy fashioned specifically for their plight. Chapter 6 of the 2008

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<sup>309</sup> Section 138 of Act 71 of 2008; *Booyesen* supra note 182; and *Bradstreet* op cit note 11 at 355.

<sup>310</sup> Section 150 of Act 71 of 2008; *Bradstreet* op cit note 11 at 353 & 355; *Gormley* supra note 59; and *Newcity Group* supra note 76.

<sup>311</sup> *Cassim* op cit note 80, at 782; *Pretorius & Rosslyn-Smith* op cit note 21 at 109.

<sup>312</sup> *Bradstreet* op cit note 281 at 46; *Bradstreet* op cit note 11 at 364; *Stoop* op cit note 82 at 334; *Richter* supra note 118; *Oakdene* supra note 53; *Climax Concrete* supra note 98, and *Gormley* supra note 59.

<sup>313</sup> From legal proceedings, discharging obligations and performances in terms of agreements or transactions concluded with a third party.

<sup>314</sup> *Cassim* op cit note 80 at 782; *Pretorius & Rosslyn-Smith* op cit note 21 at 113; *Joubert* op cit note 4 at 550 & 554; *Bradstreet* op cit note 11 at 353; *Newcity Group* compared to *Gormley* case.

<sup>315</sup> Section 345 of Act 61 of 1973.

Companies Act seeks to redress this plight by placing business rescue in the middle of the spectrum that balances solvency and insolvency on opposite ends.<sup>316</sup>

Academic writers have advanced that the remedy of business rescue should be allowed to overtake and have preference over liquidation of a company where the facts show that it would be in the best interests of the company to be saved because, even in its financially distressed state, it is still appealing to be financially and economically viable to continue trading.<sup>317</sup> The 2008 Companies Act, holistically supports business rescue over liquidation,<sup>318</sup> a dynamic perspective that cements and confirms the remedy to be company-oriented, and this view is supported by case law where it would be reasonable for business rescue to be used instead of liquidation.<sup>319</sup>

The consequence of both business rescue and liquidation is the automatic operation of the moratorium, the difference, however, presents itself in the steps taken once the moratorium is in place. Section 138 of the 2008 Companies Act provides for the appointment of a business rescue practitioner, whose duties include formulating a business rescue plan to be adopted by the directors of the company and the affected persons,<sup>320</sup> and to implement the adopted rescue plan to the benefit of the company<sup>321</sup> and affected persons.<sup>322</sup> Essentially, the management and facilitation of the business is handed over to the business rescue practitioner who acts with the participation of the directors and affected persons.<sup>323</sup>

Section 367 of the 1973 Companies Act, however, regulates the appointment of the liquidator who will facilitate the dissolution of the company, and as part of his duties, the liquidator must create a platform for all potential creditors to prove their claims against the company—an unproven claim is abandoned and will not be discharged by the company.<sup>324</sup> The liquidator must dispose of all the company assets in a manner that will result in all the creditors' claims being settled in a manner that is just and equitable.<sup>325</sup> The remedy of

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<sup>316</sup> Stoop op cit note 82 at 335.

<sup>317</sup> Stoop op cit note 82 at 336; Wassman op cit note 115 at 36; Swanepoel and Gopal op cit note 168 at 17; Bradstreet op cit note 11 at 364.

<sup>318</sup> Wassman op cit note 115 at 38.

<sup>319</sup> *Southern Palace* supra note 34, paras 21 and 22 contrasted with the findings in *Oakdene* supra note 53 paras 33, 34 and 35.

<sup>320</sup> Sections 145 and 146 of Act 71 of 2008.

<sup>321</sup> The case of *Gormley* elaborately illustrates this point.

<sup>322</sup> The cases of *Booyesen* and *Newcity Group* show the interests of affected persons.

<sup>323</sup> Khan op cit note 85 at 23; Bradstreet op cit note 11 at 362; Pretorius & Rosslyn-Smith op cit note 21 at 118; and Swanepoel & Gopal op cit note 168 at 16.

<sup>324</sup> Section 366 of Act 61 of 1973.

<sup>325</sup> Bradstreet op cit note 11 at 369.



liquidation relates to finality, thus the claims of creditors can be reduced and altered in accordance with the proceeds from the sale of assets, and the liquidator is tasked with the tedious and taxing endeavour of reaching a compromise with the creditors so that they can exercise their rights.<sup>326</sup>

The status of a company placed under business rescue is that it remains a viable and trading entity for the purposes of ensuring that it will be trading as a going-concern after the rescue period has come to an end, if the rescue plan is unsuccessful, the company is then liquidated.<sup>327</sup> The status of a company after it is wound-up, however, is the total dissolution and elimination of the company as a juristic entity, the company is further unable to trade when it is under liquidation. It is thus clear, that liquidation has drastic and far-reaching consequences for a company in comparison to business rescue, which alleviates the financial constraints on the company by allowing the company to trade whilst the moratorium is in place—and liquidation becomes a possibility only when the rescue plan has been unsuccessful.

It has been suggested that the insolvency system in South Africa is creditor-oriented, thereby reducing the prospects of a corporate rescue,<sup>328</sup> it is my submission, however, in that this argument holds very little merit because the purpose of business rescue is to assist financially distressed companies whilst insolvency is designed to protect and enforce the rights of creditors. Furthermore, the Constitution and the 2008 Companies Act have been drafted in such a way that the rights of the company do not disregard the rights of creditors, thus there is a balance in the rights held by these relevant parties. It is a fundamental and inevitable consequence that if business rescue is company-oriented, then an insolvency system must be creditor-oriented. The manner in which the latter remedy is structured, in any event, does not reduce the applicability of the former remedy, and as important as business rescue is as a remedy, winding-up and liquidation proceedings are still necessitated to exist in company law.<sup>329</sup>

It is my submission, therefore, that the remedies of business rescue and liquidation serve different and important functions in the corporate industry. Liquidation is a viable and necessary remedy for a company that is insolvent whilst business rescue comes to the aid of companies with complex financial circumstances. The remedies are neither contradictory nor

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<sup>326</sup> Sections 383, 386, 387, 390, 397 and 398 of the Companies Act 61 of 1973.

<sup>327</sup> *Koen supra note 57; Madodza supra note 105; and Bestvest supra note 50.*

<sup>328</sup> Loubser *op cit* note 8 at 157.

<sup>329</sup> *Ibid* at 159.

mutually destructive, and thus, despite their controversies, can peacefully co-exist in South African law currently and for the future.

## V. CONCLUSION

In the short span of seven years since its inception, business rescue made remarkable and advantageous changes that judicial management would not have been able to do. Progress from business rescue cannot fully erase the decades of failure created and perpetuated as a result of judicial management, and in addition, business rescue is a self-standing remedy for ailing companies primarily, thus meaning that the remedy places emphasis on rescuing ailing companies and providing a framework for that company to reach a state of solvency.

Chapter 6 of the 2008 Companies Act introduced a lower threshold for the applicant to show that a company is financially distressed and there are reasonable prospects of recovery. Furthermore, the remedy remains creditor-friendly by creating rights for affected persons, so that they are not side-lined whilst the remedy is in pursuit of the company's interests, provided that the affected persons act as a collective so that they may benefit from the remedy when it has been enforced.

In the wake of business rescue, numerous rescue applications mushroomed overnight, and attention shifted to the courts on how the courts would exercise their discretion. The courts have been intolerant of applications launched just for the benefits of the rescue remedy, such as the moratorium or suspend liquidation proceedings, and over the years, the number of abusive applications have dwindled significantly because of the precedent created by the courts.

Lastly, the controversy between liquidation and business rescue remains overcast on the new remedy, with the latter favoured more where, whilst the former remains a drastic remedy, applicable over business rescue in circumstances where it would be more appropriate to grant liquidation, and thus, the remedy has shown to be reserved for companies that have truly run out of their luck. Surprisingly, the remedies have continued to co-exist without crossing paths that would cause one remedy to be preferred over the other, and this is positive feedback because it shows that there is both an important and fundamental place for both remedies in company law.

In conclusion, it is my submission that the business rescue remedy has and continues to come to the rescue of financially distressed companies, through the drawing of a line in the sand on the future of the company. And like any other remedy, business rescue is not without hiccups here and there in its journey, but one thing is certain, business rescue has and will continue to impress on South African jurisprudence. The concluding remarks of this dissertation is that business rescue, as a remedy, has succeeded in creating an accessible platform for companies to remain economically viable, and this is in line with international jurisdictions on the importance of companies in company law.

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