

UNIVERSITY OF KWAZULU-NATAL

BUSINESS RESCUE: *a delay tactic for liquidation?*

By

MISIWE M. NXUMALO

214502161

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Supervisor: Mr S. Phungula

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1. INTRODUCTION

1.1 THE IMPORTANCE OF COMPANIES

Companies are extremely important to a country's economy because they provide goods, services and jobs, more efficiently than individuals could on their own.¹ Almost everything that is being used in everyday life was or is produced by a business.² That business is mostly owned by a company. Therefore, it can be said that in a situation where a company is unable to trade, there may be a shortage of goods and services. Even more, the company may face a risk of being insolvent and this could result in it shutting down, causing unemployment levels to increase and this could cause a ripple effect on the country's economy. Lack of employment will increase and thereafter lead to people living in poverty which would then lead to the decline in the standard of living within communities. In the end, there would be an increase in the crime rate and other illegal activities will become a means that people resort to for survival.³ Consequently, it is submitted that in a country like South Africa, companies play a vital role in wealth creation, social renewal and sustaining livelihood of citizens.⁴ The more jobs a company provides, the increase in the number of people that have the ability to participate in the economy by buying products and hiring services. When people participate in the economy, companies make profit to sustain the business and they are in a position to continue trading on a solvent basis. As a result of this, if a company is facing liquidation, one must use every possible means to save that company from liquidation.

At the aid of ailing companies, the Companies Act 71 of 2008 (the 2008 Act) placed a new business rescue phenomenon into South African company law.⁵ In South Africa, business rescue is a means

¹'Why is business so important to a country's economy?' *eNotes*, 17 February 2015, available at <https://www.enotes.com/homework-help/why-business-important-country-economy-474583>, accessed 18 November 2018.

² *Ibid.*

³GM Museta, *The Development of Business Rescue in South African Law* (unpublished LLM thesis, University of Pretoria, 2011) 1.

⁴Cassim, FHI. ...et al. *Contemporary Company Law* 2 ed Cape Town: Juta (2012) p 3.

⁵J Rushworth 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 375, 375.

of saving a financially distressed company.⁶The function of business rescue is to enable the rescue and rehabilitation of a financially distressed company.⁷ There was a realization that the complete shutdown of companies does more damage than good to the economy and is therefore illogical.

1.2 PROBLEM STATEMENT

Business rescue is at the forefront of South African commercial and company law, evidently it has featured promptly in case law since the introduction of the 2008 Act.⁸ This phenomenon has struck the attention of many academics, accountants and has opened up new opportunities for business rescue practitioners. Lawyers like Eric Levenstein⁹ who, after observing the application of the business rescue provisions over the years, expressed that business rescue has a potential of fabricating more and more positive outcomes than the process of liquidation would.¹⁰ He further states that this would be possible once the directors of the company have sufficient understanding of how the process works.¹¹ Considering the fact that the company's use of the liquidation process is discouraged at first glance, as well as the process of judicial management¹² was repealed by the new business rescue provision; due to the fact that both liquidation and judicial management are guilty of leaning more in favour of the creditor than they did well to the company which was experiencing financial difficulties. As a result, business rescue has created a

⁶Companies Act 71 of 2008, section 128(1)(b).

⁷*Supra* note 5.

⁸See *Swart v Beagles Run Investments 25 (Pty) Ltd and others* 2011 (5) SA 422 (GNP), which was one of the first reported business rescue judgements in the same month as the one in which the Companies Act 71 of 2008 came into effect. Also see *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2012 (3) SA 273 (GSJ) and *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and others* 2013 (6) SA 141 (KZP).

⁹Director: Head of insolvency, business rescue and restructuring practice at Werksmans Attorneys.

¹⁰Eric Levenstein 'The current status of business rescue' *Business Brief* 6 February 2018, available at <https://www.bbrief.co.za/2018/02/06/the-current-status-of-business-rescue/>, accessed on 19 September 2018.

¹¹*Ibid.*

¹²The predecessor of business rescue; a method of debt restructuring carried out by an independent judicial manager under the Companies Act 46 of 1926 (section 195) and the Companies Act 61 of 1973 (section 427).

drastic move away from “pro-creditor”¹³ system to one which favours the debtor, as seen in chapter 11 of the United States Bankruptcy Code. In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, at paragraph 22, the court held that it would thus be unfitting for a court deciding a business rescue application to continue with the decision-making followed in the earlier regime. The previous regime stated that, a creditor is entitled to be paid, in full, the amount owed to him or have the company placed under the liquidation process. The above statement by the court supports and gives life to the shift envisaged upon the application of the 2008 Act.

It may, however, be submitted that this interpretation could be incorrect. Considering the fact that even though the major theme of the 2008 Act is to rescue the business, persons should not fail to remember that the implementation of a business rescue plan to achieve the secondary objective is also an aim of business rescue. More importantly, section 7(k) states that the 2008 Act envisages the benefit of all stakeholders under business rescue. If business rescue is not going to be beneficial to the creditors and shareholders, or in fact all the stakeholders, the aim of the 2008 Act will not be achieved. The question which will also arise is; what is the purpose of implementing business rescue in the first place if it is known that the set aim is not going to materialise? Some may argue that this is justified, and a balance is made where the creditors are given the right to vote the plan in action and that had they not voted the plan in action during their meetings, this argument would then not materialise because they would have prevented themselves from possibly being prejudiced. At some point we have to understand that the legislature is playing the mediator in this situation. Not all the provisions will satisfy the needs of the debtor company so too will they all not please the creditor, or any other relevant stakeholder but a balance has to be struck.

¹³Eric Levenstein ‘Business rescue brings hope to creditors’ *Business Report* 16 January 2017, available at <https://www.iol.co.za/business-report/opinion/business-rescue-brings-hope-to-creditors-7416399>, accessed on 19 September 2018.

1.3 PURPOSE OF STUDY

Due to the failure of many business in South Africa and the stagnant economic growth of the country, investigation into the rescue provisions becomes relevant to determine whether the set provisions envisaged to save businesses fulfils its purpose, if not, should we consider other measures which could work more effectively? It is thus submitted that it is of important for sufficient and extensive research to be directed in the field of business rescue legislation, this is more so to fulfill the goal of better understanding company decline and lead to a more positive response to financial distress by companies.¹⁴

The aim of this study is focused on chapter 6 of the 2008 Act, more specifically, section 128(1)(b). This study will discuss whether the process of business rescue has, since the commence of the 2008 Act, resulted in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company as set out in section 128(1)(b)(iii). The problem is that there have been conflicting court judgments on whether taking the business rescue process does in fact result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.¹⁵ It will also look at whether the aim of business rescue can be read as one purpose, or it is to be read as two separate aims; firstly, to facilitate the rescue of a company to bring it to a solvent state and secondly, to result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. It further looks at whether the definition of business rescue in the 2008 Act also incorporates the concept of liquidation or indirectly gives liquidation

¹⁴Rajaram R, Singh AM, Sewpersardh NS 'Business Rescue: Adapt or die' (2018) 21 1 *SAJEMS* 1-13 available at <https://sajems.org/index.php/sajems/article/view/2164/1664>, accessed on 10 January 2018 p 1.

¹⁵See *Swart v Beagles Run Investments 25 (Pty) Ltd and others* 2011 (5) SA 422 (GNP); *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC); and *Koen and another v Wedgewood Village Goff and Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC), as oppose to *AG Petzetakis International Holdings Ltd v Patzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)* 2012 (5) SA 515 (GSJ) and *Gormley v West City Precinct Properties (Pty) Ltd and another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and another* [2012] ZAWCHC 33.

as an option? And whether section 128(1)(b) of the 2008 Act was introduced as a delay tactic for liquidation? The definition of business rescue set out above is problematic because it is phrased in such a manner that it might steer the impression that liquidation is also incorporated in the process of business rescue. The question which then arises is why does the legislature still include liquidation in the innovatory provision if there are claims to do away with it? Lastly, it looks at whether business rescue is a more prominent process for a company to partake in rather the process of liquidation?

1.4 THE HISTORY OF THE RESCUE PROCEDURE IN SOUTH AFRICA

Prior to 2011, in South Africa, a financially distressed company had to choose between one of two 'evils'; it could either elect to undergo judicial management, which was in utilized under the Companies Act 61 of 1973¹⁶ (the 1973 Act) or alternatively to go into liquidation.¹⁷ This was the case even though judicial management was not successful for a number of reasons and liquidation resulted in unpleasant and consequences. One of the major reasons which led to the failure of judicial management was that it did not really cater for the debtor company in distress; there was an unrealistic anticipation that all claims of the company be paid in their totality as an outcome of its process.¹⁸ Companies that struggled to honour their debts, would mostly apply for the liquidation of the entity, appoint a liquidator and proceed to sell off assets at a value far less than their fair market value. This procedure leads to substandard consequences, not only for the business entity, shareholders, creditors and employees but also for the community and economic growth of the country.

¹⁶Judicial management was originally introduced under the Companies Act of 1926.

¹⁷Amanda Visser 'Faith in business rescue process is on the rise' *Business Report* 4 September 2017, available at <https://www.iol.co.za/business-report/faith-in-business-rescue-process-is-on-the-rise-11068445>, accessed on 18 November 2018.

¹⁸Eric Levenstein 'South Africa's business rescue regime- firing on all cylinders?' *INSOL* 12 July 2016, available at <https://www.werksmans.com/zh/legal-briefs-view/south-africas-business-rescue-regime-firing-on-all-cylinders/>, accessed on 19 November 2018.

For many years, South African companies were governed by the melancholy of an outdated judicial management system.¹⁹ Prior to the enactment of business rescue provisions, judicial management was used for this purpose of “saving companies”, with few alternatives other than liquidation. Judicial management was however seen as a forerunner to liquidation; bearing almost the similar consequences. In *Millman, NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd Intervening* the court held that, “... even though it might be more advantageous to dispose of the business of the company as one under judicial management rather than as one in liquidation, this is not a factor that should influence the court to grant an order of judicial management in respect of a company which will in all probability never be able to discharge more than a percentage of its liabilities”.²⁰ The legislatures identified a gap in South African company law; having to choose between two process which did not only have a negative impact on the on the company, its shareholders, creditors or employees but had a negative impact on the county’s economy as well²¹ was not effective.

The 1973 Act 2008 Act was thus repealed, and it was replaced by the 2008 Act which was signed into law on 8 April 2009²² and came into effect on 1 May 2011. The latter introduced a large number of new legal concepts, philosophies and rules that a wide range of persons may find perplexing.²³ Among them were the business rescue provisions introduced through chapter 6. Business rescue constitutes a major theme of the 2008 Act and is amplified by section 7(k) under the same Act.²⁴

¹⁹*Ibid.*

²⁰*Millman, NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd Intervening* 1972 (1) SA 741 (C), para 745A.

²¹See *Koen and another v Wedgewood Village Goff and Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WWC) para 14.

²²GN 421 GG 32121.

²³*Supra* note 4 at 2.

²⁴*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) para 1.

1.5 THE CURRENT RESCUE PROCEDURE IN SOUTH AFRICA

Business rescue is defined under section 128(1)(b) of the 2008 Act to mean, “proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.”²⁵

The commencement of the 2008 Act is believed to have introduced profound changes to the legislation governing companies in this country.²⁶ One such change is the new remedy available for ailing companies i.e. business rescue.²⁷ It is also believed that business rescue is more efficient than judicial management and would result in far more advantages for the company and its business. The business rescue provision enables a company which is “financially distressed”²⁸, but still has the potential to be rescued, to place itself and or be placed under the supervision of a business rescue practitioner²⁹, who will make an effort to assist the company to make a financial

²⁵*Supra* note 6.

²⁶*Supra* note 24.

²⁷*Ibid.*

²⁸“financially distressed”, in reference to a particular company at any particular time means that- (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months”. *Supra* note 6 at section 128(1)(f).

²⁹ “Business rescue practitioner” means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings...” *Supra* note 6 at section 128(1) (d).

recovery, through a workable and understandable business rescue plan, voted into action by the creditors of the company. The plan requires the creditor's vote because they have the biggest financial interest in the outcome of the proposed business rescue.³⁰ This revolutionary plan is to ensure that the company continues to exist on a solvent basis or, in the alternative, results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company.³¹ This regime is welcomed because it means that South African companies that are financially distressed can no longer rely on the old judicial management system as they now can reorganise and reform their affairs within the confines of the 2008 Act whilst also preserving jobs for the employees of the company to have the fiscal ability to place themselves back into the country's economy. During this process, the company is given breathing space from the massive and unmanageable debts by way of a *moratorium* from all claims, subject to exceptions³², against it or in respect of its property or property lawfully in its possession and through possible suspension of contractual obligations³³ that the company was a party to at the commencement of the business rescue which become due at the time of its supervision.

In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, the court stated business rescue does not necessarily have to result in a complete recovery of a company in the sense that, after the implementation of business rescue, the company will be at complete solvency.³⁴ It is a gradual process that will be achieved in due course, however, what is important is for the company to be place some sort of solvency not necessarily to immediately being 100 percent solvent. It is however not discouraged for the company to regain complete solvency.

This definition also sets out the intended outcome of the process of business rescue as envisaged by the legislature. In *Henochsberg on the Companies Act 71 of 2008*³⁵, Piet Delpont states that

³⁰*Gormley v West City Precinct Properties (Pty) Ltd and another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and another* [2012] ZAWCHC 8.

³¹*Supra* note 6 at section 128(1)(b)(iii).

³²*Supra* note 6 at section 133(1)(a)-(f).

³³*Supra* note 6 at section 133(1).

³⁴*Supra* note 24 at para 2.

³⁵P Delpont... et el 'Henochsberg on the Companies Act 71 of 2008' (2018), available at <https://www.mylexisnexis.co.za/index.aspx>, accessed on 19 September 2018.

the definition of business rescue should be read together with section 7(k)³⁶ of the 2008 which sets out the purposes of this Act but more especially gives mention of the purpose of business rescue. I agree with Delport's statement because both the sections are very compatible; section 7(k) is parallel to the aim of business rescue. More importantly, Delport further asserts that section 7(k) does not mean that the 2008 Act rejects liquidation proceedings within the business rescue provisions. Later in the interpretation of the provision by the court, Coetzee AJ in *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)* ordered liquidation instead of business rescue based on section 131(7) of the 2008 Act. This section also provides that liquidation can also be ordered in the business rescue proceedings.³⁷ This then answers the question posed above as of whether the definition of business rescue somehow includes the liquidation process.

This long-awaited provision aimed to address the shortcomings inherent in judicial management and demands new objectives from its implementation, mainly, through the enforcement of chapter 6 of 2008 Act. Chapter 6 acknowledges that companies that are already labeled as insolvent must immediately be placed under the liquidation process, because there is no prospect of rescuing such companies and those which still have a potential of being rescued must be placed under business rescue to be saved. "If there is no chance of rescuing the company, then there is no need to continue to "flog the proverbial dead horse""³⁸, says Levenstein. If liquidation is the only alternative, then the business rescue practitioner, shareholders and the creditors must allow for to side step the business rescue proceedings and straight away, place it into liquidation.³⁹ In my opinion, this statement supports what was held in *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)* and that which was re-iterated by the authors of Henochsberg on the

³⁶"Provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders."

³⁷*AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)* 2012 (5) SA 515 (GSJ) para 32.

³⁸*Supra* note 18.

³⁹*Ibid.*

Companies Act 71 of 2008 that it is not irregular for the judge to order liquidation in a business rescue application.

The theme of business rescue, contained in the 2008 Act, was imported from foreign jurisdictions hence its similarity with the restructuring systems in the United States⁴⁰, Australia⁴¹, Canada⁴² and the United Kingdom.⁴³ Even though the foreign pieces of legislation are way broader and lengthy than the 2008 Act, Cassim⁴⁴ asserts that the 2008 Act is a concise piece of legislation. He further states that there is much more to legislation than brevity⁴⁵; clarity and comprehensiveness of the legislation is paramount, and the 2008 Act furnishes these characteristics. It is submitted that the 2008 Act was engineered to meet international standards of company law as it is intended to be the modern corporate law tool, suitable for use in the modern commercial world.⁴⁶ The world is getting smaller and smaller through trade and business activities. These trading activities are playing a huge role on many areas of our company law, also taking into account the global economic crisis, which had the effect on companies throughout the world.⁴⁷

1.6 HOW DOES BUSINESS RESCUE HELP COMPANIES?

⁴⁰Chapter 11 of the United States Bankruptcy Code.

⁴¹Voluntary administration under the Corporations Act 2001.

⁴²Companies' Credit Arrangement Act 1985.

⁴³Administration process under the United Kingdom Insolvency Act 1986.

⁴⁴The managing editor of Cassim, FHI. ...et al. *Contemporary Company Law 2* ed Cape Town: Juta (2012).

⁴⁵*Supra* note 4 at p 2.

⁴⁶*Ibid.*

⁴⁷Calitz & Freebody 'Is post-commencement finance providing to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?' 2016 *De Jure* 265-289, available at <https://dx.doi.org/10.17159/2225-7160/2016/v49n2a5>, accessed on 19 September 2018.

The new business rescue philosophy supports the view that, there is always a need to a give second chance to the debtor companies that are submitted for business rescue. This is only possible if there is a reasonable prospect to secure their financial recovery and or the rescue will result in a better return for creditors and shareholders of the company than would result in the immediate liquidation of the company.⁴⁸

A company can undergo business rescue using one of two methods. Either by a resolution adopted by the board of directors of the company for the voluntary commencement of business rescue proceedings⁴⁹, where the board has a reasonable prospect to believe that the company is financially distressed. It must be noted that this is the only ground on which the board of directors can adopt a resolution for commencement of business rescue; grounds under section 131(4)(a) of the 2008 Act can only be relied upon by affected persons. This is deliberate because the definition of affected person can include shareholders; in the instance where a director is a shareholder he can still utilise section 131(4) of the 2008 Act to commence business rescue. The only difference is that it will no longer be voluntary commencement of business rescue but will be done through a formal court procedure. Thus, there is no reason to debate that once directors miss the first boat, they cannot get another one. If there is a reasonable prospect to believe that the company is financially distressed, and the board does not adopt a resolution to commence business rescue, the board must furnish written notice to each affected person with relation to the relevant aspects of the company's financial condition, and their reasons for not executing the commencement of the resolution.⁵⁰ The written notice will allow for an affected person to apply to the court to commence business rescue proceedings⁵¹, because the board has failed to do so. The Act sets out grounds on which there may be objections to the court by certain interested parties if the proceedings are commenced by the directors.⁵²

⁴⁸*Supra* note 13.

⁴⁹*Supra* note 6 at section 129.

⁵⁰*Supra* note 6 at section 129(7).

⁵¹*Supra* note 5 at 379.

⁵²*Supra* note 6 at section 130.

The later satisfies the purpose set out in section 7 of the 2008 Act; all relevant stakeholders are given an opportunity to partake in the proceedings. The fact that the voluntary entry into business rescue occurs by the mere passing of a board resolution, shows that the legislature has the intention to make business rescue and the reforming of the company an easier mechanism to secure a “fresh start”, and supports the move to a more debtor-friendly (company focused) approach.⁵³

In many instances, the creditors of the company would oppose the application business rescue; vote against the business rescue plan and would rather apply to the court for the immediate liquidation of the company; to avoid the delay of being paid at a later stage. If this is the case, a formal application for a court order can be made, by an affected person⁵⁴, to place the company under supervision and commencing business rescue proceedings. Affected persons can also make the application if the creditors have not yet adopted a resolution for voluntary business rescue after making a finding that the company is financially distressed.⁵⁵ If the liquidation proceedings have already been commenced by or against the company, at the time the business rescue application is made, by an affected person, it will suspend those liquidation proceedings until the court has adjudicated upon the application or the business rescue proceedings end; if the court makes the order applied for.⁵⁶ It must be noted that the grounds on which an affected person can apply for commencement of business rescue are more extensive than those in respect of which the board may pass a resolution commencing business rescue proceedings; they are not limited to the company being financially distressed. This encourages the application for rescue of the business because it creates a wider scope. Again, some may argue that the difference in the

⁵³*Supra* note 18.

⁵⁴“affected person”, in relation to a company, means- (i) a shareholder or creditor of the company; (ii) any registered trade union representing employees of the company; and (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives”. Companies Act 71 of 2008, section 128(1)(a).

⁵⁵*Supra* note 6 at section 131.

⁵⁶*Supra* note 6 at section 131(6)(a)-(b).

procedure of making the application because if director is also a shareholder, he or she can still make an application in terms of section 131(4) of the 2008 Act.

Upon the application and granting of business rescue, the company will receive a general *moratorium* against creditors' claims.⁵⁷ This means that an intervening application for business rescue proceedings, against liquidation proceedings, by affected persons, could be used as an abuse of the business rescue process.⁵⁸ The courts are flooded with applications by companies claiming that they are in financial difficulties just to oppress the liquidation application already pending. Companies use the *moratorium* to buy time until the matter is finally decided by the court.⁵⁹ This is evident in one of the first business rescue judgment⁶⁰ reported in 2011, the same month as the 2008 Act came into effect. Many had followed after this application even though the court has seen this trick from the beginning.

It is submitted that there is no doubt that the process business rescue is more beneficial to companies than the process of liquidation. It is, however, arguable if the same amount of benefit can be labeled on the creditor during this process. As a result of this, one might argue that the courts did not ignore this argument and, therefore, have given creditors some sort of certainty or guide against abuses of the business rescue process by the company i.e. when a company applies for the commencement of business rescue proceedings for other reasons either than the objects set out in terms of section 128(1)(b) of the 2008 Act, the court will be reluctant to grant the application sought.⁶¹ The court held that section 128(1)(b) of the 2008 Act prescribed the objectives which a reasonable prospect of materialising must be shown by the applicant upon

⁵⁷*Supra* note 6 at section 133(1).

⁵⁸ENS Africa's insolvency, business rescue and debt recovery department 'South Africa's new business rescue law-the courts' view' available at <https://www.ensafrica.com/news/South-Africas-new-business-rescue-law-the-courts-view?Id=1412&STitle=insolvency%20ENSight>, accessed on 17 September 2018.

⁵⁹*Ibid.*

⁶⁰See *Swart v Beagles Run Investments 25 (Pty) Ltd and others* 2011 (5) SA 422 (GNP).

⁶¹*Supra* note 30 at para 33.

application to the court.⁶² The court was not prepared to grant the commencement business rescue proceedings because the objective that the applicant based its application on did not fall within the section 128(1)(b) of the 2008 Act, instead, the applicant's objective was to acquire the *moratorium* of three to five years. This was earlier dealt with by the court in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* where it was said that, "...it is necessary that an application for business rescue be carefully scrutinised so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy".⁶³

Levenstein⁶⁴ advises South African companies, directors and bankers against the temptation of "sinking the Titanic" and for them not to be quick to place the financially distressed company into liquidation.⁶⁵ He submits that management of the company must be mindful of the disadvantages that are attached to the implementation of the business rescue process. These disadvantages may affect the reputation of the company; i.e. being labeled as "becoming insolvent" and the sense of failure and shame which goes with it.⁶⁶ They cannot, however, exceed ones that could be created if the company undergoes liquidation proceeding. Companies must also have faith in business rescue so that confidence in the process will increase. As time goes on and we continue to utilise the business rescue regime, significant results will be evident.

Instances where business rescue was a success was in the cases of *Pearl Valley Golf Estate* in the Western Cape where Dubai world had the golf estate under business rescue. Standard bank of South Africa acquired *Pearl Valley Golf Estate* out of the business rescue procedure.⁶⁷ Advanced Technologies and Engineering Company in Gauteng (ATE) was also acquired out of business rescue proceedings, by the Paramount Group and many more businesses were acquired out of

⁶²*Ibid.*

⁶³*Supra* note 24 at para 2.

⁶⁴*Supra* note 9.

⁶⁵*Supra* note 18.

⁶⁶*Ibid.*

⁶⁷K2015068356 (South Africa) (Pty) Ltd v Pearl Valley Golf Estates (Pty) Ltd and Another (LM149Oct15) [2015] ZACT 72 (3 December 2015).

business rescue. The statistics in the years 2012 and 2013 show that there was and growing trend towards business rescue being on the increase and liquidations on the decrease.⁶⁸ The Companies and Intellectual Property Commission reported that in June 2016, the rate of company's dependent on liquidation had decreased by 22.8 percent when compared with the same period in 2015.⁶⁹ These results prove that confidence in the business rescue regime will increase and there is no doubt that it will gain power in South African companies suffering from financial distress. The banks will play a significant role like Standard bank did in the cases of *Pearl Valley Golf Estate*.

1. BUSINESS RESCUE

2.1 DEFINING BUSINESS RESCUE

The purpose of business rescue is incorporated in its definition above; under section 128(1)(b)(iii) of the 2008 Act. It is thus not easy to discuss the purpose without giving effect to the definition itself. Business rescue provisions are one the most important and innovatory sections of the Companies Act 71 of 2008⁷⁰; they are designed to lead the companies out of financial difficulty and place them on the path of recovery⁷¹, free from the burden of debt.

In *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd*, the court looked at meaning of 'rescuing a company' in terms of section 131(4) of the 2008 Act which originates from the definition section 128(1)(h) and stated that it must be read with section 128(1)(b)(iii) of the 2008 Act. It has been agreed to by the courts that, 'rescuing a company'

⁶⁸Companies and Intellectual Property Commission 'Status of business rescue proceedings in South Africa' March 2018, available at https://www.cipc.co.za/files/3915/2639/0127/Business_Rescue_Report_March_2018_v1.0.pdf, accessed on 20 November 2018.

⁶⁹*Ibid.*

⁷⁰*Supra* note 4 at p 17.

⁷¹*Supra* note 4 at p 19.

means achieving the goals set out in the definition of business rescue in section 128(1)(b) of the 2008 Act.⁷² The court further held that, by reading section 128(1)(b), it is clear that the purpose of business rescue is not only to prevent a company from being liquidated and restore it to commercial certainty but a secondary goal can be achieved if better returns for the creditors and shareholders, result from the implementation of business rescue than would result under immediate liquidation.⁷³ Thus there are two objectives in section 128(1)(b)(iii); a primary and a secondary objective. If interpreted in this way, a debate which would then arise is whether a business rescue application can succeed where the proposed rescue plan provides for the secondary goal only.⁷⁴

In determining the answer to this question, the court looked closely at one of the foreign jurisdictions where our business rescue was imported and compared it to some decisions made by the courts in South Africa. In an Australian case, *Dallinger v Halcha Holdings (Pty) Ltd*⁷⁵, the federal court held that the statutory rescue machinery 'should be available in a case where, although it is not possible for the company to continue in existence, an administration is likely to result in a better return for creditors than would be the case with an immediate winding-up'.⁷⁶ This approach accords with the country's Corporations Act 50 of 2001, which also states that 'rescuing a company' need not necessarily be to save the company from liquidation.⁷⁷ A similar approach was also followed by South African courts in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* at paragraph 7 and *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* at paragraph 17. As oppose to the approach also followed by another South African court, In *A G Petzetakis14 International Holdings Ltd v Petzetakis Africa (Pty) Ltd*. This question was answered in the negative.⁷⁸ In paragraph 2 of the judgment the court held that Section 131(4)

⁷²*Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd; Farm Bothasfontein(Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd* 2012 (3) SA 273 (GSJ), para 22.

⁷³*Supra* note 72 at para 23.

⁷⁴*Ibid.*

⁷⁵*Dallinger v Halcha Holdings (Pty) Ltd* [1995] FCA 1727, para 28

⁷⁶*Supra* note 72 at para 24.

⁷⁷*Ibid.*

⁷⁸*Supra* note 73.

does not incorporate two objectives; it only includes one objective i.e. 'rescuing a company'. The secondary objective is only referred to in section 128(1)(b).⁷⁹ The court further held that, it seems that the intention of the legislature was that the requirements for the permitting of a section 131 business rescue order includes that the company under consideration must have a reasonable prospect of recovery and that once a company is undergoing business rescue, its rescue plan may be aimed at the alternative object, namely a better return than the return of immediate liquidation.⁸⁰

If one follows the approach in *AG Petzetakis14 International Holdings Ltd v Petzetakis Africa (Pty) Ltd*, it would thus mean that, "section 128(1)(b) proceedings must be aimed at the achievement of the primary goal; to restore the company to the normal, healthy state of solvency or alternatively, the secondary objective, to provide a better deal for creditors and shareholders than liquidation, can only be an alternative goal of the proposed rescue plan. A plan which holds out no hope for a return of the company to a state of solvency but provides at best for achievement of the secondary goal but does not amount to 'rescuing the company' as defined by section 128(1)(h) read with section 128(1)(b). In consequence, such a plan would fail to satisfy the requirement to that effect in section 131(4)(a)".⁸¹

The court in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd* disagreed with the decision taken in *A G Petzetakis14 International Holdings Ltd v Petzetakis Africa (Pty) Ltd* and stated that, section 128(1)(b) gives its own meaning to the term 'rescuing' a company which does not coincide with the ordinary dictionary meaning of the term. It was the intention of the legislature that the definition in the term be used in the interpretation of the term upon its application. The judge concluded to say that, "...as I understand the section, it says that 'business rescue' means to facilitate 'rehabilitation', which in turn means the achievement

⁷⁹*Ibid.*

⁸⁰*Ibid.*

⁸¹*Supra* note 72 at para 25.

of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation. This construction would also coincide with the reference in s 128(1)(h) to the achievement of the goals (plural) set out in s 128(1)(b). It follows, as I see it, that the achievement of any one of the two goals referred to in s 128(1)(b) would qualify as ‘business rescue’ in terms of s 131(4).”⁸²

The court in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd* also stated that the interpretation of the business rescue must further extend to its historical context; putting right what judicial management could not. If one is claiming that ‘rescue’ under section 131(4) does not include the secondary requirement, it only refers to the primary. The anticipated outcome on an eventual return of the company to complete solvency was one of the reasons why the institution of judicial management turned out to be an ‘abject failure’.⁸³ The court believes that the legislature did not intend on repeating the errors made in the past.⁸⁴ The legislature has drafted these provisions in such a way that the main focus is shifted from the creditor; previously, the creditor with a valid unpaid claim against the debtor company was entitled to a liquidation order against that company; equivalent to a right⁸⁵; and currently the need for a workable acknowledgement of creditors’ claims has been compromised. The Companies Act 71 of 2008 has adopted a stance which will result in financial recovery of the debtor company by placing the debtor at the center. Judge Claassen⁸⁶ supported the method used by the legislature and elaborated that, “The general philosophy permeating the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name ‘business rescue’ and not ‘company rescue’”.⁸⁷ This is in line with the most recent trends in rescue regimes applied in other jurisdictions.

⁸²*Supra* note 72 at para 26.

⁸³*Supra* note 72 at para 28.

⁸⁴*Ibid.*

⁸⁵*Supra* note 58.

⁸⁶*Supra* note 72 at para 12.

⁸⁷*Ibid.*

The process seeks to consider various rescue options, when a company is in financial trouble, rather than liquidation if there is potential for it to be rescued “or” if the company cannot be rescued, bring about a method which can lead to a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company. Because of the use of the conjunction; “or” which also means “alternatively”, it can be accepted that the intention of the legislature was that the process of business rescue have two objectives where either one of them is satisfied in a single application. An applicant, in his application, can either induce evidence to satisfy the court that there is a reasonable prospect that the company could be rescued “or” that in the implementation of the business rescue process, there is a reasonable prospect that it could result in a better return for the creditors and shareholders of the company. It must be noted that whatever the object of the proposed business rescue, to succeed in the application, the applicant must be able to place before the court a cogent evidential foundation to support the existence of a “reasonable prospect” that the desired object can be achieved.⁸⁸

Besides saving the company, business rescue tries to shelter and balance the opposing interests of creditors, shareholders and employees, like stated in section 7(k). It puts emphasis on a shift from creditors’ interests to a broader range of interests.⁸⁹ The thinking is that, it would be more beneficial to the company, its shareholders, creditors, and employees to preserve the business together with the experience and skill of its employees in achieving either of the objectives set out in the Companies Act 71 of 2008. The Companies Act 71 of 2008 has tried to balance the rights and interests of all the relevant stakeholders in the life of a company⁹⁰; a good illustration of this is that preferred creditors and concurrent creditors are on the same level when a company undergoes business rescue proceedings than they would be under liquidation.

⁸⁸*Supra* note 21 at para 17.

⁸⁹Eric Levenstein ‘Helping Companies stay afloat’ *Business Day* 11 January 2017, available at <http://www.pressreader.com/south-africa/business-day/20170111/281960312439105>, accessed on 19 November 2018.

⁹⁰*Supra* note 58.

More importantly, rescue of companies is also envisaged to solve one of South Africa's major problems; that is unemployment. Business rescue, as opposed to what one would see in liquidation, has the advantage of job retention. The aim was to preserve jobs so that losses only occur in the ordinary course and must be in accordance with the labour laws applicable in South Africa. Business rescue was also aimed at aligning South Africa's rescue procedure with those of international jurisdictions.⁹¹ Even though the theme of chapter 6 is adopted from foreign jurisdiction⁹², carrying different traits from those of South Africa, the legislature did not fail to bear in mind South Africa's individual socio-economic and employment conditions.

2.2 REQUIREMENTS IN TERMS OF SECTION 131 OF THE COMPANIES ACT 71 OF 2008

At the time of the court application, the provision that is directly relevant is section 131 of the 2008 Act.⁹³ This section does not only contain the requirements that must be satisfied by the applicant to prove his case to the court in order to receive the relief sought but it is also the source of the court's power to make a rescue order. The prospects of success for this application depend on the object of the rescue; meaning that one of the requirements which has to be satisfied is a reasonable prospect of achieving the either one of the set objectives of business rescue. The applicant would have to provide to the court with a 'cogent evidential foundation' to support the existence of a reasonable prospect so that the desired object can be achieved.⁹⁴ The founding papers in a business rescue application need to contain sufficient facts and contains specific detail to enable the court to determine whether the business rescue practitioner will probably have a feasible basis to undertake the task.⁹⁵

⁹¹ EP Joubert "Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *THRHR* 550, 550.

⁹²For example, Australia's unemployment rate may not be as high as South Africa's unemployment rate.

⁹³*Supra* note 37 at para 13.

⁹⁴*Supra* note 21 at para 17.

⁹⁵*Ibid.*

As mentioned earlier, section 131 of the 2008 Act allows an affected person to make a formal application to court requesting that the company be placed under supervision and commencement of business rescue proceedings. This cannot, however, be done if the board of directors have adopted a resolution for commencement of voluntary business rescue. And it is the only time where an application for business rescue suspends liquidation proceedings, if they already commenced by or against the company.⁹⁶ It is important that the applicant notifies the company together with other affected person of the application. This is to effect active participation of all the relevant stakeholders of the company. It is also one of the ways that the legislature tries to encourage that all stakeholders to work together to fulfill the desired outcome of the process. 'Affected persons' is defined in section 128(1)(a) of the 2008 Act and have an automatic right to participate in the proceedings without a need for an order authorizing them to do so.⁹⁷ For example, the 2008 Act allows for the debtor company to prepare a rescue plan with some kind of protection from the action which could be brought by the creditors, and the creditors themselves have a right to vote on the plan.⁹⁸

Section 131(4) of the 2008 Act states that, "after considering an application in terms of section 131(1) of the 2008 Act, the court may (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that (i) the company is financially distressed; (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or (b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation."⁹⁹

⁹⁶*Supra* note 6 at section 131(6).

⁹⁷*Supra* note 37 at para 4.

⁹⁸J Rushworth 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 375, 376.

⁹⁹*Supra* note 6 at section 131(4).

The prerequisites for a business rescue order are firstly that, any one of section 131(4)(a)(i),(ii) or (iii) must be fulfilled; and secondly, the court must be satisfied that there is a reasonable prospect of rescuing the company concerned.¹⁰⁰ Reasonable prospect is not only required where the applicant shows the object he is trying to achieve by seeking the rescue but it is equally important to show reasonable prospect when laying out the grounds on which the business rescue application is sought; either in terms of section 131(4)(a)(i),(ii) or (iii).¹⁰¹ This means that the applicant must show reasonable prospect regardless of the ground used to support the relief sought. This is true because the quoting of section 131 accords with the form of that section as it appears in *Government Gazette* 32121 of 9 April 2009.¹⁰² In *AG Petzetakis International Holdings Ltd v Patzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)* the court held that “an interpretation that the second requirement i.e. reasonable prospect only needs to be present if section 131(4)(a)(iii) is relied upon would be illogical”¹⁰³ because on such an interpretation a financially distressed company and a company which failed to pay its debts could be placed under rescue irrespective of the reasonable prospects of their recovery. Yet a company which requires rescue for other just and equitable reasons of a financial nature can only be placed under rescue if there is a reasonable prospect of its recovery.¹⁰⁴

‘Financially Distressed’

According to the definition section of chapter 6 of the 2008 Act “financially distressed”, with reference to a particular company at any particular time, means that (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or (ii) it appears to be reasonably likely that

¹⁰⁰*Supra* note 37 at para 13.

¹⁰¹*Supra* note 37 at para 14.

¹⁰²*Supra* note 37 at para 15.

¹⁰³*Ibid.*

¹⁰⁴*Supra* note 37 at para 16.

the company will become insolvent within the immediately ensuing six months. This defines the state of commercial insolvency and factual insolvency, respectively.¹⁰⁵

One of the requirements that can be satisfied by the applicant in order to convince the court to place a company under business rescue is whether or not a company is financially distressed as defined in section 128(1)(f) of the 2008 Act. Even though the legislature has defined this term, it is however problematic because the chapter is silent on the manner in which it should be concluded that the company is not in a position to pay all its debts as they fall due in the immediately ensuing six months or how it should be decided that the company is likely to become insolvent during the same period.¹⁰⁶ For this reason we have to look at how the courts and other sources have determined this.

Given that the 2008 Act is a recent Act. The courts are trying to find solutions to some of the provisions which cause a problem in practice and those which are not clearly defined by the legislature. It is important that in doing so, the court makes use the general interpretation section¹⁰⁷, the purpose and application section¹⁰⁸ together with the definition section.¹⁰⁹ Section 5 states that the 2008 Act must be interpreted and applied in a manner which gives effect to its purposes. One of the purposes includes provision for the efficient rescue and recovery of financially distressed companies, in a manner which balances the rights and interests of all relevant stakeholders. The detailed provisions contained specifically in this Act with particular reference to business rescue must, therefore, be addressed in the context of these requirements. All the above-mentioned sections work in harmony to reveal the true intention of the legislature.

¹⁰⁵*Supra* note 6 at section 128(1)(f).

¹⁰⁶*Supra* note 35.

¹⁰⁷*Supra* note 6 section 5.

¹⁰⁸*Supra* note 6 section 7.

¹⁰⁹*Supra* note 6 section 128.

The first part of the test for ‘financial distress’ refers to cash-flow insolvency. Its meaning is generally clear; when a company cannot pay its debts from its cash-flow. This test applies on a day-to-day basis. Whereas, the second part of the test is concerned with a balance sheet enquiry.¹¹⁰ Trying to establish this part of the test is not an easy task, taking into account that it requires the consideration of many variables and is subject to uncertainties. For example, it is not clear whether a surety that a company holds can be treated as a liability. Cassim interprets that the definition of a financially distressed company points to a probable failure in the near future of the business of the company.¹¹¹ He argues that at this stage the company is not factually insolvent (where the liabilities exceed the assets) or commercially insolvent (where the company is unable to pay its debts) but is rather on the verge of insolvency or is experiencing liquidity problems.¹¹²

In April 2012, the Deputy Judge President of the Cape High Court in *Gormley v West City Precinct Properties (Pty) Ltd and another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and another*¹¹³, highlighted the fact that business rescue should apply only to companies that are “financially distressed” as defined in the 2008 Act... if the company is not so financially distressed, the provisions of chapter 6 will not apply”. In the present case, it was argued that the company is insolvent and cannot pay its debts unless a moratorium of three to five years is granted to that the respondent will be able to pay its debts on a day to day basis. The court held that this matter does not bring West City’s financial situation within the meaning of financially distressed in the Act, therefore, financially distressed was unsuccessful when used as a ground for an order commencing business rescue in this matter.

In *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd*, It was common cause that the company is factually solvent i.e. that the value of its assets at least

¹¹⁰*Supra* note 5 at p 377.

¹¹¹*Supra* note 4.

¹¹²*Ibid.*

¹¹³*Supra* note 30.

on the face of it, exceeds its debts, however, it was unable to satisfy the judgment debt in favour of Nedbank. This meant that it was commercially insolvent and financially distressed within the requirements of section 131(4)(a)(i) of the 2008 Act.¹¹⁴ Meaning that the company does need not be both factually and commercially insolvent to make an application for business rescue; one of the two will suffice.¹¹⁵

The company should commence business rescue proceedings at the first signs of it being financially distressed, if the company delays this application it might find itself in a position where it is more than financially distressed and the only option that is left is to undergo liquidation or compromises.¹¹⁶ In *Swart v Beagles Run Investments 25 (Pty) Ltd and others 2*, after looking at the facts, the court held that the company has been financially distressed for at least a year.¹¹⁷ The applicant did not do anything about it. He “refused to sell any assets, incurred further debts, making loans and refused to sell any assets to make payment to his creditors”.¹¹⁸ It is therefore important for the company to make note of the element of an ‘immediate ensuing six months threshold that is looked at to assess whether the company is suffering from commercial or factual insolvency.

‘Failure to pay any amount...’

Another way in which the application for the commencement of business rescue, in terms of section 131(1) of the 2008 Act, can be triggered is if the company fails to pay over any amount of an obligation under or in terms of a public regulation, or contract, with respect to employment related matter. This requirement may read self-explanatory; however, there may also be some

¹¹⁴*Supra* note 72 at para 7.

¹¹⁵Also see *Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd & others*.

¹¹⁶Eric Levestein & Lauren Barnett ‘Basics of Business Rescue’ available at <https://www.werksmans.com/wp-content/uploads/2013/04/Werksmans-Basics-of-Business-Rescue.pdf>, accessed on 19 September 2018. For an example, see *Gormley v West City Precinct Properties (Pty) Ltd and another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and another* [2012] ZAWCHC 33 and see *Welman v Marcelle Props 193 CC JDR 0408* (GST).

¹¹⁷*Supra* note 60 at para 40.

¹¹⁸*Ibid*.

discrepancies in its application. The 2008 Act is not clear on how long the company will have to have missed payment of any amount. It is not clear on whether the company can be given a chance; for example, if it does not pay for a periods of 3 months only then can the affected party bring an application for business rescue. It would, however, be ridiculous if the court would rule in favour of the business rescue application in a case where the company has failed once to pay a particular employee; i.e. where non-payment was a result of human error of the failure in technology. It could be argued otherwise if the company, in any case, has failed to pay all the employees of the company even if it was just one payment that is missed. It is likely that trade unions or employees would bring an application for business rescue based on this particular ground. It is not, however, one the grounds which the business rescue application is often brought.

‘Just and equitable’

The term is not defined in the 2008 Act, it is thus not clear what the legislature intended when he drafted this particular provision. However, the courts and academics have interpreted it to mean discretion incurred upon the court. Richard Bradstreet¹¹⁹ refers to the phrase as a ‘catch-all’ phrase which confers a wide power on the court enabling it to prevent abuse of process by the debtor, or any other party seeking to have the resolution set aside. This is one of the requirements that do not concern the applicant. The courts may use this discretion where there is reasonable prospect for the company to be rescued or alternatively achieving the second objective of business rescue.

It is a power given to the court for making a determination based on a case by case basis. After a consideration of the facts in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, the court held that it was hesitant to use the discretion incurred upon it in

¹¹⁹A Commercial Law, academic and lecturer.

terms of section 131(4) of the 2008 Act to grant the business rescue application.¹²⁰ The judge found the applicant's argument to be startling when he raised that, "...in considering the exercise of such a discretion, some weight was to be attached to the fact that a similar discretion would in due course be exercised by the proposed business rescue practitioner"¹²¹ and said that it then mean that courts will have to delegate its statutory discretion to a person not yet appointed as a business rescue practitioner. This approach would be incorrect and as the court described it, it would "seek to place the cart before the horse."¹²²

'Reasonable prospect'

The term "reasonable probability" dates back to the Companies Act 46 of 1926.¹²³ This term remained unsettled in the 1973 Act. The main issue was that it was not defined in the Act, therefore, it was left to the courts to determine its meaning. The courts had different interpretations of it which lead to uncertainty.

Commentators such as Burdette¹²⁴ preferred that "reasonable possibility" would have sufficed instead of "reasonable probability". Others found it to be unfortunate that "reasonable prospect", under the 2008 Act, is not a defined the term. It was then left to the courts to determine the meaning, thereof. Chapter 6 of the 2008 Act uses the term "reasonable prospect"¹²⁵ as one of the requirements which the affected party must prove in order for the court to grant business rescue proceedings. The "poor" drafting of this section by the legislature has been criticised, taking into account the fact the term "reasonable probability" (used in the

¹²⁰*Supra* note 24 at para 18.

¹²¹*Ibid.*

¹²²*Ibid.*

¹²³See *NoordkaapLewendhaweKo-operasieBpk v Schreuder* 1974 3 SA 102 (A).

¹²⁴In Burdette "Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)" (2004) *SA Merc LJ* 249.

¹²⁵*Supra* note 91 at p 553.

similar context as reasonable prospect) had caused uncertainty in the process of company rescue for a long time.¹²⁶ It was believed that the 2008 Act will correct the wrongs of the past but it has failed in this instance.

In the exercise of this discretion, the court must give due weight to the 'reasonable prospect' of the company being rescued to continue trade in a solvent basis or achieve the secondary objective.¹²⁷ On the other hand, Joubert set to find the true meaning of the words: "probability"¹²⁸, "probable"¹²⁹ and "prospect"¹³⁰ and concluded that they all have different meanings and therefore, would reap different outcomes. The use of the term "prospect" by the legislature under the 2008 Act was a technique to change the approach, which was used under the 1973 Act so that the company will be able to return to trade on a sound financial footing after the business rescue plan was implemented.¹³¹ The same explanation was discussed by Eloff AJ in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, he said that the reason for the change in the phrasing of the words was because of a different mind-set in association with business rescue.¹³² The mind-set that accompanied judicial management in the previous corporate rescue regime was one that favoured liquidation versus a rescue regime that is evident from section 7(k) of the 2008 Act.¹³³

The Onus rests on the applicant to prove to the court that there is a reasonable prospect that the company may be rescued by being placed under supervision. This requirement must be read together with the definition of business rescue in terms of section 128(1)(b).¹³⁴ In one of the first application for business rescue, *Swart v Beagles Run Investments 25 (Pty) Ltd and others*,

¹²⁶*Ibid.*

¹²⁷*Supra* note 24 at para 22.

¹²⁸"The extent to which something is probable". See *supra* note 91 at p 554.

¹²⁹"Likely to happen or be the case". See *supra* note 91 at p 554.

¹³⁰"The possibility or likelihood of some future event occurring". See *supra* note 91 at p 554.

¹³¹*Supra* note 91 at p 554.

¹³²*Supra* note 24 at para 21.

¹³³*Supra* note 91 at p 556.

¹³⁴*Supra* note 58.

Makgoba J held that the requirement of a “reasonable prospect” for rescuing a company must mean a “reasonable probability” of rescue: in this, he followed the law relating to the judicial management of companies under the 1973 Act. This was unfortunate because it was right after he referred to business rescue as “a new innovation”.¹³⁵ The object of the Companies 2008 Act does not restrict the success of rescue to a company becoming a “successful concern” as envisaged in the 1973 Act, instead the 2008 Act contains various objectives according to section 128(1)(b)(iii) of the 2008 Act.¹³⁶ In the exercise of his discretion, after weighing the facts as to whether there was such a “reasonable probability” of rescue, Makgoba J dismissed the application for business rescue. Judge Magkoba’s judgment was considered to be correct on the facts of the case¹³⁷ but it was heavily criticised by some, asserting that the learned judge had disregarded the start of a new era of balancing the interests of all stakeholders and rather than adopting an approach which is pro creditor, adopt one that is debtor friendly.

Six months down the line, Eloff AJ, in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, the court had to consider the meaning of “reasonable prospect”, it was held that it must mean “something less than the recovery of “reasonable probability””¹³⁸ under the 1973 Act.¹³⁹ Delpont, states that if the facts indicate a reasonable possibility of a company being rescued, a court may then exercise its discretion in favour of granting an order of the commencement of business rescue proceedings. The test is less stringent than the one that was applied under judicial management.¹⁴⁰ Delpont further asserts that emphasis must be placed on “reasonableness”; meaning that the prospect must be based on reasonable grounds. A mere speculative suggestion is not enough.¹⁴¹ The judge emphasised the importance of making a shift away from the pro-creditor approach which was applied under judicial management. However, this case again, there was an unfortunate handling of the very important recovery

¹³⁵Supra note 60.

¹³⁶Supra note 91 at p 555.

¹³⁷Supra note 58.

¹³⁸Supra note 24 at para 21.

¹³⁹Under Judicial Management in terms of section 427(1).

¹⁴⁰Supra note 138.

¹⁴¹Supra note 35.

requirement;¹⁴² in its decision, the court applied the burden of proof that was required in terms of judicial management and completely ignored the alternative object created in section 128(1)(b)(iii). Even though the new approach suggests that the in terms of the 2008 Act must be fully utilised, the court still has discretion to decide whether or not to grant an order for business rescue.¹⁴³ The court held that, the applicant's allegations in this regard must contain some "concrete and objectively ascertainable details going beyond mere speculation"¹⁴⁴ of the following factors: "the likely costs of rendering the company capable of resuming its business, the likely availability of the necessary cash resources and any other necessary resource, and why the proposed plan will have a reasonable prospect of success".¹⁴⁵ Based on the facts, the business rescue application was dismissed by the court. It was held that there is no reason to believe that there is any prospect of the respondent being restored to a successful one.

This judgment received a lot of criticism by judgments that followed¹⁴⁶, even though the development of the factors was a step in the right direction. Eloff AJ had placed the benchmark too high. The detail required to meet the factors is often not available at the stage where the application for business rescue is brought before the court. It is the duty of the business rescue practitioner to develop and implement a workable business plan, after various stakeholders have voted on the plan.¹⁴⁷ Many of the judgments that followed this approach were flawed because of the misunderstanding of the meaning of reasonable prospect.

In *Koen and another v Wedgewood Village Goff and Country Estate (Pty) Ltd and others*, Binns-Ward J followed the requirements laid down by Eloff AJ¹⁴⁸ and stated that in order for the applicant to be successful in the application for business rescue, he must place before the court

¹⁴²*Supra* note 91 at p 556.

¹⁴³*Supra* note 24 at para 22.

¹⁴⁴*Supra* note 24 at para 24.

¹⁴⁵*Ibid.*

¹⁴⁶See *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 1 SA 542 (FB).

¹⁴⁷*Supra* note 91 at p 557.

¹⁴⁸*Supra* note 58.

a cogent evidential foundation to support the existence of the requirement of “reasonable prospect”, whatever the result of the proposed business rescue application, that the desired object can be achieved¹⁴⁹, however, in *AG Petzetakis International Holdings Ltd v Patzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)* Coetzee AJ held that, “the absence of a final plan at the court application phase will not necessarily be fatal to the application” the only requirement is that the approach used must be correct at the time the matter is brought before court. The finer details of business rescue have to be worked out before the company is placed under supervision. Only after a number of judgments was there a shift in approach noticed.¹⁵⁰

In *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd*, the court, just like in *Koen and another v Wedgewood Village Goff and Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC) and in other previous cases, emphasised the that courts may still exercise discretion in favour for granting business rescue proceedings. The court preferred liquidation over business rescue. When Claassen J dealt with the meaning of the phrase “reasonable prospect”, he agreed with Eloff AJ that “something less” is required in terms of the provisions of the Companies 71 of 2008 than was the case in the Companies Act 61 of 1973.¹⁵¹

From the above court judgments, decided in the Cape and in Gauteng, it is clear that the courts have not tolerated business rescue applications brought to evade orders of liquidation especially in instances where the companies have been in such dire financial circumstances that they are incapable of being rescued.¹⁵² This forms the current position of the South African company law. Eloff AJ’s explanation¹⁵³ in paragraph 21 is welcome and used in most judgments. Delport

¹⁴⁹*Supra* note 21 at para 17.

¹⁵⁰*Supra* note 147.

¹⁵¹*Supra* note 72 at para 18.

¹⁵²*Supra* note 58.

¹⁵³*Supra* note 24.

supports this and states that this requirement is the objective observation of the creditors based on subjective facts.¹⁵⁴

2. JUDGEMENTS IN THE DEFINITION

Chapter 6 of the 2008 Act has featured promptly in case law since the commencement of the Act on May 1 2011.¹⁵⁵ However, what has been a challenge is the inconsistency in the decisions of the courts with regards section 128(1)(b)(iii) of the 2008 Act; South African courts have differed on the issue regarding whether or not business rescue proceedings may be used to secure a better return for creditors or shareholders where there is no clear prospect of the company continuing to operate on a solvent basis of being restored to solvency.¹⁵⁶

In *Swart v Beagles Run Investments 25 (Pty) Ltd and others*, it could not be said that the business rescue application would achieve the secondary objective, let alone the primary objective. The court dismissed the application to grant an order for commencement of business rescue proceedings sought by the applicant and the fourth intervening creditor. In this case the applicant, who is the sole director and only shareholder of the respondent, claims that the respondent is “financially distressed” in terms of section 128(1)(f) of the 2008 Act. He also claims that if the respondent is placed under business rescue, all creditors will be paid in due course.¹⁵⁷ It can be suggested that he intends to achieve the primary objective which will then lead to the fulfillment of the second objective of business rescue i.e. results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.¹⁵⁸ The second and third intervening creditors oppose this on the basis that the

¹⁵⁴*Supra* note 35.

¹⁵⁵Kleitman, Y ‘Evolving Business Rescue: Company Law’ (2014) 14 (6) *Without Prejudice* 28-29.

¹⁵⁶Sharrock, R. ...et al. *Hockly’s Insolvency Law* 9 ed Cape Town: Juta, (2012).

¹⁵⁷*Supra* note 60 at para 10.

¹⁵⁸*Supra* note 60 at para 11.

applicant's claim is an abuse of the business rescue process just to avoid paying debts that are due to them. They claim that the applicant had continued with the operations of the business in a reckless manner even though the respondent is hopelessly insolvent. The court looked at the requirements laid down in section 131(4)(a)(i) -(iii) of the 2008 Act to determine whether the respondent meets these requirements. After looking at the evidence given by the parties, Mokgoba J concluded, his judgment, by stating that there is "no basis for contending that the respondent will be able to carry on business on a solvent basis or that there is any prospect thereof".¹⁵⁹ The interests of the creditors be paramount, however, the applicant did not take his creditors into his confidence in running the business even when he made the application.

In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, the creditor of the Midnight storm applied for its winding-up because of its inability to pay its debt¹⁶⁰ in opposition to the business rescue application by Southern Palace to place the respondent under supervision and commence business rescue. There was no reason for the winding-up application not to be granted.¹⁶¹ The court dismissed business rescue application and placed the respondent in provisional winding-up.¹⁶² In relation to the two objects of business rescue, that either could be a result, the court stated that it expects the applicant to provide the court with concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available.¹⁶³ The court emphasised that mere speculative suggestions are unlikely to suffice. In this case, the applicant produced insufficient facts, which were vague and uninformative, of the likely amount that will be required in order to enable the respondent to complete the construction of the hotel and to commence with its intended business.¹⁶⁴ The court held that an instance where either of the objectives of business rescue are unlikely to materialise, is where a "company substitutes one

¹⁵⁹*Supra* note 60 at para 42.

¹⁶⁰*Supra* note 24 at para 4.

¹⁶¹*Ibid.*

¹⁶²*Supra* note 24 at para 5.

¹⁶³*Supra* note 24 at para 25.

¹⁶⁴*Supra* note 24 at para 26.

debt for another without there being light at the end of a not too long tunnel".¹⁶⁵ It is nothing more than prolonging agony.¹⁶⁶ Mr. Hassim was prepared to advance money to the company but this was not enough to convince the court that it can continue trade in a solvent basis or alternatively result in the secondary objective of business rescue.

Mr. and Mrs. Koen applied for the respondent to be put under supervision and commencement of business rescue in *Koen and another v Wedgewood Village Goff and Country Estate (Pty) Ltd and others* based on the grounds that liquidation would be detrimental to the company and diminish its chances of getting funding from the undisclosed third party to complete the golf course village. The court agreed with the element laid by Eloff AJ, at paragraph 24 in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, and stated that if the applicant intended to achieve the second object of business rescue, it is necessary that in its founding affidavit no vague and speculative averments are made but rather 'a reasoned factual basis for the alternative scenarios that the court will have to consider, and lay a cogent foundation to enable the court to determine that there is a reasonable prospect that the better returns evident on one of those scenarios can be achieved'.¹⁶⁷ In this matter it was clear from the papers that the company's expenditure in the development of the estate exceeded the receipts received in respect of the sale of plots that even with the company obtaining a loan, it was unable to sustain its development operations.¹⁶⁸ The company is currently indebted to Nedbank who later refused to extend its exposure which then led to the development site consequently ground to a halt.¹⁶⁹ "It was thus not clear which of the two possible objects of business rescue the applicants seek to achieve by having the company placed under supervision; in their founding papers it appeared to be to restore it to solvency, while in their reply it appeared that a better return for creditors".¹⁷⁰ The court concluded, however, that this does not really matter because

¹⁶⁵*Supra* note 24 at para 24.

¹⁶⁶*Ibid.*

¹⁶⁷*Supra* note 21 at para 19- 20.

¹⁶⁸*Supra* note 21 at para 22.

¹⁶⁹*Ibid.*

¹⁷⁰*Supra* note 21 at para 25.

on either approach, the applicants have failed to satisfy the court with the material required to make the assessment of whether a reasonable prospect of business rescue succeeding exists.¹⁷¹ The applicant's dependence on the mysterious potential investor of the means to enable a business rescue practitioner to draw up a feasible rescue plan was merely a speculative averment which will not suffice in an application as such. The application was thus dismissed.

In the *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd* case, the court also in dismissed the application for business rescue at the South Gauteng High Court and at the Supreme Court of Appeals. The applicants based their application on the fact that liquidation proceedings, granted by the High Court, would be detrimental to the company's shareholders and creditors.¹⁷² The company's assets and properties will be sold at a value far less than they are worth. It was thus clear that the application envisaged the secondary objective rather than the primary objective of business rescue. It was interesting to see that even when Nedbank decided to stop the sale in execution, the court continued to look at the application for business rescue on the basis of the secondary objective.¹⁷³ The continuation, in my view, was not justified as the applicants made it clear that their aim was to achieve the secondary objective, not the primary objective based on opposing the sale in execution. This means that if there was no sale in execution, on behalf of Nedbank, the applicants would not have had a case to begin with. After both parties have argued, the court in paragraph 40 stated that the court a quo cannot be criticized for finding that business rescue was not appropriate, and that liquidation of the company was the better option.¹⁷⁴

¹⁷¹*Ibid.*

¹⁷²*Supra* note 72 at para 15.

¹⁷³*Supra* note 72 at para 16.

¹⁷⁴*Supra* note 72 at para 40.

On the other hand, some courts followed a different route than the above cases.¹⁷⁵In *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)*.The court decided against the business rescue application sought even though it argued in favour of the secondary objective being a means of achieving business rescue. Patzetakis Africa was financially distressed, for this reason Petzetakis Holdings applied for commencement of business rescue, seeking to achieve the primary objective of business rescue. NUMSA (a registered trade union, representing the employees) argued that, based on the evidence that Petzetakis Holdings brought before the court, seeking to achieve the second objective would be much more realistic.¹⁷⁶ The Judge agreed with NUMSA, however, was still sceptical about the fact that the secondary objective makes specific reference to creditors and shareholders, leaving out the employees. The court maintained that the employees of the company are covered under the secondary objective taking into account that that the employees have not been paid their remuneration for a number of months. Even though employees have been excluded from the secondary objective in section 128(1)(b) of the 2008 Act, they still qualify as creditors to the extent of their unpaid remuneration. The court agreed on the fact that section 131(4) of the 2008 Act does not include the achievement of the secondary objective and interpreted the intention of the legislature on this point is that, “the requirements for the granting of a section 131 rescue order include that the company under consideration must have a reasonable prospect of recovery. Once a company is under business rescue, its rescue plan may be aimed at the alternative object, namely a better return than the return of immediate liquidation.”¹⁷⁷ The court referred to the requirements set out by Eloff J in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* and concluded that “the important defect in the founding papers is that, as pointed out above, they do not demonstrate a reasonable prospect that Petzetakis Africa can be saved or (to the extent that this might have sufficed) that there is a prospect that the alternative object is achievable.”¹⁷⁸

¹⁷⁵From court decisions made in 2012 and the years which then followed.

¹⁷⁶*Supra* note 37 at para 11.

¹⁷⁷*Supra* note 37 at para 17.

¹⁷⁸*Supra* note 37 at para 23.

3. ACADEMIC COMMENTS

The authors who undertook research in South Africa between 2015 and 2017, under the document titled *Business Rescue: Adapt or die*¹⁷⁹ have discovered that the success rate of business rescue has not improved since 2013¹⁸⁰ and suggest that the low success rate of business rescue is due to the country's lack of knowledge, necessitating more research in the field.¹⁸¹ It was also noted by Burke-le Roux and Pretorius¹⁸² that revisions are done to the 2008 Act as it presents a lot of gaps and more especially, a lot of problems were presented by the provisions of the stated Act. One of the methods for nursing this issue lies in utilising the services and skills of a reliable business rescue practitioner. This could however be a solution that is not yet possible in South Africa, taking into account that the field of business rescue is still in its infancy, and the role of business rescue practitioners have not been completely researched.¹⁸³ The primary solution was then to first research on the business rescue provisions to develop knowledge about the practical process of planning and performing a business rescue, specifically in relation to the establishment of the factors of success.¹⁸⁴

Another very important form of research which should be undertaken by the company itself is the market in which it operates in order to have true and lasting competitive advantage to survive.¹⁸⁵ "The development of knowledge relating to the initial failure and subsequent rescue

¹⁷⁹Supra note 14.

¹⁸⁰Supra note 14 at p 2.

¹⁸¹Supra note 14 at p 1.

¹⁸²Supra note 14 at p 3.

¹⁸³Brinkley M, Le Roux I 'Role Conflict of Business Rescue Practitioners' (2018) 15 1 *Journal of Contemporary Management*, 127-157 page 1, available at https://journals.co.za/content/journal/10520/EJC-10061e719a?fromSearch=true#related_content, accessed on 10 January 2018.

¹⁸⁴Supra note 180.

¹⁸⁵*Ibid.*

of a firm would serve as an enabler for a distressed firm to return to profitability and sustainability.”¹⁸⁶

It was also suggested by Pretorius that another factor that slows down the success rate of the business rescue regime is the drastic shift from a creditor-friendly approach, which was the desired outcome for a very long time, to a debtor-friendly approach which must now be the projected outcome.¹⁸⁷ Calitz and Freebody agree that this sudden change will not yield positive results in the short term.¹⁸⁸ It is submitted that the creditors have not warmed-up to this sudden change and would therefore oppose business rescue proceedings since it is seen as yielding better results for the debtor company than the creditors. On the other hand, Kastrinou and Jacobs suggest that there is a balance created in the 2008 Act because the process would only continue if more than 75 percent of the creditors accept the business rescue plan, so creditors are also role players as to their returns under business rescue.¹⁸⁹

With regards to the business rescue practitioner, South African business rescue legislation followed the United Kingdom system of appointing an “administrator”. Loubser advises that there should be a system of accreditation for business rescue practitioners.¹⁹⁰ The absence of this system is one other contributing factor to the low success rate of the regime. If the persons trusted with this vital role are not competent to perform their duties, the process is bound to fail. The business rescue practitioner plays a very important role, as mention above, with the assistance of the directors of the company, he or she takes over all decision making and running of the company. The behaviour of the business rescue practitioner is a significant driving or restraining factor on entrepreneurial learning and the success of the business rescue process.¹⁹¹

¹⁸⁶*Ibid.*

¹⁸⁷*Supra* note 14 at p 3-4.

¹⁸⁸*Supra* note 14 at p 4.

¹⁸⁹*Ibid.*

¹⁹⁰*Ibid.*

¹⁹¹*Ibid.*

Beside the knowledge and accreditation of a business rescue practitioner, Joubert found that there was uncertainty by the courts regarding the meaning of 'reasonable prospect' when permitting an order of business rescue to be examined through case law. This confusion could very well also be a contributing factor to the stagnant success rate of business rescue. For example; in the instance that Eloff AJ applied a standard that was later said to be set too high and similar to one used under judicial management. Even though there is no clear definition of this recovery requirement, the threshold has been lowered to an approach which matches the purpose of business rescue and one that is more constructive. Courts need to also play a role in the process of simplifying business rescue and to contribute to it being a growing success. We look to the courts to set precedent and if there is little attention paid to this, we might yield outcomes which are opposite to those set by the 2008 Act.

There are many other success factors which South Africa can look at, adopted in countries which developed this regime, such as the speed at which the cases are resolved. The faster the cases are resolved, the more attractive this system will be. Creditors would sometimes shy away from voting for business rescue because it would then mean that they have to wait for a very long time before they can see results; they normally chose the liquidation process because it is much faster process than business rescue. Some else that can be done is publicize the number of success stories in the utilization of business rescue and the comparison of the creditors' actual returns as oppose to those under the liquidation process.

One other important way to make managing business rescue more efficient and effective is to establish a separate body which will manage the business rescue sector. This is true to a large degree firstly because we should bear in mind that the 2008 Act is the only Act that which governs company law and companies in South Africa. The department of Trade and Industry together with the CIPC are not enough to manage all aspects of the Act on their own. There is a huge possibility that one of the reasons that the business rescue has a low success rate is because it is not given enough attention. Hence, a sector dedicated to it might be a step in the right direction more so because it is a major part of company law.

4. CONCLUSION

A lesson learnt through this research is that, the legislature's good intentions must not be camouflaged by the directors or company's abuse of the provisions of chapter 6, especially with companies having general moratorium at the implementation of business rescue. We cannot put blame on the legislature for tricks formulated by the directors to dodge liquidation of the company. The legislature's intention is simply to rehabilitate the company and make sure it continues trade on a solvent basis, at the very same effort give creditors certainty for their debts owed to them by the ailing company.

As I read through the applications for business rescue, it was evident in most of them that directors try to manipulate the process, either by way of postponing the matter; as done in the *Koen and another v Wedgewood Village Goff and Country Estate (Pty) Ltd and others* case or by way of bring an application for business rescue, which they know very well would not survive the requirements of the relevant provisions like in the case of *Gormley v West City Precinct Properties (Pty) Ltd and another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and another* [2012] ZAWCHC 33.

It thus came to my realization that the legislature did not intend for the 2008 Act to be a delay for the process of liquidation; rather the legislature wants it to be consulted after all other methods have been exhausted. The delay is rather caused by business rescue applications made in futility. In *Koen and another v Wedgewood Village Goff and Country Estate (Pty) Ltd and others*, the court said that there was no reason to postpone the matter for a further two months '...in hopes that a tenuously defined consentience might salvage their position'¹⁹² as the applicant had already made out a case for business rescue and time has already been waited by the parties delivering four sets of affidavits. This delay is doing more harm than good as interest on the debts

¹⁹²*Supra* note 21 at para 8.

of the company continue to mount to the prejudice of creditors whereas the company has not been in business since 2009. There is no way forward as liquidation proceedings are also suspended by this application.¹⁹³

In section 131(4) of the 2008 Act, the legislature firstly lays down the requirements that should be considered by the court when deciding whether or not to order business rescue. We can all agree, as I stated in the introduction, that companies are vital not just to the shareholders or directors, they are important for the economy of the country. Therefore, the legislature should not be blamed for suggesting that the business rescue procedure be taken before the liquidation of the company. After a complete scrutiny of the facts, the legislature, in section 131(4)(b) of the 2008 Act, gives the court the power to rule against the application if it is not satisfied that the company can be rescued or that in the implementation of the business that, better returns for the company's creditors and shareholders will not be the outcome. This should not be taken as a delay instead; it should be treated as a procedure like all other procedures. For example, the Labour Relations Act states that, when it comes to labour related matters, one must first exhaust all avenues set out in the act before approaching the court. This is not regarded as a delay but a way of dealing with labour related matters. It is in the same manner that business rescue proceedings should be treated in relation to liquidation proceedings.

It is clear that section 128(1)(b) of the 2008 Act refers to a primary and a secondary objective of business rescue. The decided cases¹⁹⁴ seem to suggest, however, that when an applicant approaches the court seeking to achieve the secondary objective, he must present to the court a more compelling argument than would if he was seeking to achieve the primary objective.¹⁹⁵ This should not be encouraged because firstly, it is not evident in the Act. Should this have been the intention of the legislature, it would have been clearly stated in the Act. Secondly, no evidence in the Act suggests that the objectives should be treated differently i.e. that one would yield higher results than the other, therefore, the standard of proof should be increased. The Act

¹⁹³*Ibid.*

¹⁹⁴*Supra* note 24 at para 25.

¹⁹⁵*Supra* note 37 at para 12 and para 18.

merely suggests that either of the two objectives materialize, business rescue would be achieved. The argument made out by NUMSA in *AG Petzetakis International Holdings Ltd v Patzetakis Africa (Pty) Ltd and others (Marley Pipe Systems (Pty) Ltd and another intervening)*, paragraph 11.2 was welcomed by the Judge, stating that it constitutes an important element of the argument on behalf of NUMSA. NUMSA argued that, in Australia it is accepted that it is the rescue procedure despite there being no intention to have the company or its business survive. They considered the alternative object a worthwhile goal in it so as to justify rescue in preference to moving directly into liquidation.¹⁹⁶ It would be illogical to adopt a procedure that has been tested and evidently works, from a foreign jurisdiction, and then twist it around. It will obviously not yield the same result which got our attention to adopt in the first place.

With the present gaps in the 2008 Act contributing to its loss of confidence, South African legislatures are moving in the right direction. On the 21st September 2018, the South African Companies Amendment Bill was published with comments being welcomed by 20 November 2018 to the SA Department of Trade and Industry. Amongst the key proposals are the business rescue provisions. Significant changes should be made to this piece of legislation, again considering that it is the only available piece of legislation which governs companies that in turn play a major role in the economy but is very flawed.

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