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Business rescue a success or a failure? An analysis on the effectiveness of business rescue in South Africa

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FORMAL DECLARATION

I, Leona Ruvimbo Kahamba, hereby declare that this thesis is based on my original work, and all my sources of information have been acknowledged. To my knowledge, neither the substance of this dissertation, nor any part thereof, is being submitted for a degree in any other University.

Leona R Kahamba (214531869)

Signature

Date

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Sometimes I look back and marvel on how far I have come. I would not have made it this far, had it not been for the grace and love of God. He deserves all the praises and honor. All I can say is: MY GOD DID AGAIN FOR ME. God has blessed me with such wonderful people, who have made an impact in my life. Many gratitude goes to the following people:

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CHAPTER ONE

GENERAL INTRODUCTION

I. BACKGROUND INFORMATION

Recently there has been a global financial crisis, which has affected most companies and has subsequently led to bankruptcy and liquidation of many companies.[1] South Africa has been adversely affected by the economic crisis and most companies have shut down due to the tough economic climate.[2] For example the Companies and Intellectual Property Commission (hereafter referred to as the Commission) has suggested that the economic crisis in South Africa has led to companies filing for bankruptcy or applying for their deregistration.[3] The Commission has an important role to ensure continual development of the business rescue proceedings.

Before the introduction of judicial management in terms of the Companies Act 46 of 1926[4] (hereafter referred to as Companies Act 1926), winding up or liquidation of a company were the only options available to financially distressed companies. Winding up and liquidation had some drastic economic and legal consequences.[5] The introduction of business rescue implied that winding up and liquidation should be used as a measure of last resort. Liquidation is a drastic measure that impacts on the economic and social wellbeing of the country. Judicial management in South Africa was under the Companies Act 61 of 1973 (hereafter referred to as Companies Act 1973).[6]

Judicial management was a failure and this led to its replacement with business rescue in 2008.[7] The introduction of business rescue paved a way for companies and close corporations to use the remedy when facing financial difficulties. Business rescue was introduced in the

[1] R Baxter 'The global economic crisis and its impact on South and the country's mining industry', available at *https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/51/Roger+Baxter.pdf,* accessed on 1 October 2018 at 112.

[2] Ibid at 112.

[3] R Davies 'Companies and intellectual property commission: Situational analysis', available at *www.cipc.co.za/files/2113/9445/5169/CIPC_strategy_2013_2018*, accessed on 1 October 2018.

[4] Companies Act 46 of 1926.

[5] B Van Niekerk 'Launching business rescue applications in liquidation proceedings- (successfully) flogging a dead horse?' 2015 *De Rebus* 50.

[6] Companies Act 61 of 1973.

[7] P.C Osode 'Judicial implementation of South Africa and business rescue model: A preliminary assessment' (2015) 4 (1) *Penn State Journal of Law and International Affairs* 459.

Companies Act 71 of 2008 (hereafter referred to as Companies Act 2008)[8]. The move from judicial management was influenced by the US Bankruptcy Code Act 1978 (hereafter referred to as USBCA).[9]

However, immediately after the introduction of business rescue in terms of the Companies Act 2008, there were no major changes identifiable, it was regarded as a failure just like its predecessor. The fruits of the implementation of the doctrine are now starting to show and thus, a comparison between the Companies Act 1973 and the Companies Act 2008 is of importance in order to explain and analyze the doctrine in depth.

Additionally, business rescue is more effective because it provides with efficient rescue mechanisms and recovery of distressed companies or close corporations in such a way that would balance out the rights interested stakeholders. In *Welman vs Marcelle Props 193 CC & another*[10] the court held that business rescue should not be used merely for terminally-ill nor chronically-ill close corporations. Business rescue is for financially distraught companies, which given time will be rescued and become solvent. The company should make an application for business rescue before the financial position of the company becomes impossible to rehabilitate. Hence, if the company becomes bankrupt and not 'financially distressed', options other than business rescue become more attractive such as liquidation.[11]

A comparison between judicial management and business rescue in terms of s427 of the Companies Act 1973 and s131 (4) of the Companies Act 2008 is essential in making an assessment on the effectiveness of business rescue. Section 427[12] states that for judicial management to take place the court must look at the 'reasonable possibility' of rescue proceedings succeeding, whilst under section 131(4)[13], the Companies Act 2008 takes into account the 'reasonable prospect'. The differences between the two sections were identified in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments (Southern Palace).*[14] The court held that there was a difference between reasonable probability and reasonable prospect. Therefore, the courts ought to take such differences into account. The approach in business rescue is different because it is a substantive approach. The courts thus

[8] Companies Act 71 of 2008.
[9] Bankruptcy Reform Act 1978.
[10] *Welman vs Marcelle Props 193 CC and Another* (33958/2011) [2012] ZAGPJHC 32 (24 February 2012).
[11] K Caine, et al 'Business rescue', available at *https://www.saipa.co.za/wp-content/uploads/2017/06/Business - Rescue-Slides.pdf* accessed on 16 March 2018.
[12] Section 427 of the Companies Act 1973.
[13] Ibid.
[14] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* (15155/2011) [2011] ZAWCHC 442; 2012 (2) SA 423 (WCC) (25 November 2011) para 21 – 22.

have the discretion to weigh the circumstances of each case and decide whether or not to grant rescue proceedings.

Business rescue application suspends any liquidation petitions or proceedings against the company. Winding up or liquidation is permissible after the company or the business rescue practitioner has failed to convince the courts or creditors that there are reasonable prospects to successfully rescue the company. The business rescue practitioner may prove that the company is no longer facing mere financial difficulties but is on the verge of bankruptcy or insolvency.[15]

II. RESEARCH OBJECTIVES

- To evaluate and analyse judicial management in terms of the Companies Act 1973 and the Companies Act 2008.
- To critically discuss and analyse the effectiveness of business rescue in South Africa in terms of the Companies Act 2008 and the Close Corporations Act 69 of 1984 (hereafter referred to as the Close Corporations Act 1984).[16]
- To compare and contrast business rescue in South Africa with an administration order in United Kingdom.
- To make propositions and recommendations on how the legislation may improve business rescue in order to facilitate effective and successful rescue mechanisms.

III. ACADEMIC AND PRACTICAL JUSTIFICATIONS FOR CHOOSING THE TOPIC

Business rescue is a concept that is of economic importance, which means any loopholes in the doctrine should be guarded against and attempts must be sought in order to improve the doctrine. The purpose of this study is to investigate whether business rescue is fulfilling its purpose in facilitating successful rehabilitation of companies that are facing financial difficulties. This will be achieved by analysing the legal, economic and social effect of business rescue. Additionally, the reason for choosing the topic is in order to investigate whether there are any hindrances or setbacks limiting the full potential of the doctrine. These

[15]C Strime 'Summary companies act amendments dealing with business rescue', available at *http://www.fluxmans.com/summary-companies-act-amendments-dealing-with-business-rescue-by-colin-strime/*, accessed on 16 March 2018.

[16] Close Corporations Act 69 of 1984.

procedures should be protected to serve their intended purposes. Thus, this research will look at the legal, economic and social effect of business rescue.

The intent of the research is also to investigate whether companies facing financial difficulties have access to adequate funds that would help in facilitating the successful rescue of the company. In general there must be adequate insolvency frameworks that facilitate successful business rescue mechanisms. This may be achieved by accessing whether there are any insolvency frameworks in place which would then enable the restructuring of the company at an earlier stage rather than to drag the financial crisis unnecessarily. The insolvency frameworks are of importance as they try to avoid financially distressed companies from falling into insolvency and try to maximise returns for shareholders and creditors.[17]

In *Southern Palace v Midnight Storm Investments*[18] the court had to compare judicial management and business rescue. The court pointed out that the replacement of judicial management was because of its utter failure. Moreover, it was stated that liquidation should be a measure of last resort taking into consideration the negative impact it has on the economy. Hence, taking into account the positive impact of business rescue, it raises room for concern and perfection of the doctrine[19] when the success rate is relatively low.

An assessment on whether business rescue is achieving its intended purposes is essential. The research will analyse whether business rescue has been susceptible to abuses in certain instances. According to L Omarjee, "Business rescue should be about ensuring the survival of a business, and not be seen as an opportunity for the business rescue practitioners to make a profit…"[20]

Creditors want to get the most out of the process, filling their pockets instead of the objective of business rescue, for example, the retaining of jobs and the resumption of normal business activities.[21]

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[17]P McGhee, J Suarez & G Simmons 'The importance of better EU insolvency regimes', available at *https://voxeu.org/article/importance-better-eu-insolvency-regimes* , accessed on 5 October 2018.

[18] Southern Palace supra note 14 para 22.

[19] R Bradstreet 'The leak in Chapter 6 lifeboat: inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22 *SA Mercantile Law Journal* 197.

[20] L Omarjee 'Why business rescue practitioners get a bad rap accessed', available at *www.fin24.com/Companies/Financial-Services/why-business-rescue-practioners-get-a-bad-rap-2017/07/30*, accessed on 27 February 2018.

[21] P.C Osode 'Judicial implementation of South Africa and business rescue model: A preliminary assessment' (2015) 4 (1) *Penn State Journal of Law and International Affairs* 459.

Moreover, business rescue is associated with many advantages, but studies have shown that there is too much negativity towards business practitioners, as businesses put their faith in business rescue plans.[22] Usually businesses suffer major losses from the failure of the business rescue plans, but, at the same time the practitioners having earned huge margins from a failed process. However, the practice of business rescue should be designed mainly to 'heal' businesses.[23]

This dissertation will analyse the setbacks within business rescue. Business rescue is mostly susceptible to abuse by companies when they intend to evade the payment of debts. Companies undergoing restructuring are protected from legal action by third parties. Business rescue has a lower success rate, this is evidenced by the fact that it is considered a measure of last resort attracting the less economically viable companies. This is especially true if economic viability is more apparent and financial distress has not reached crisis levels.[24]

The study will investigate whether it is viable for both small and larger companies to use business rescue when facing any financial difficulties or whether there are any problems to be fixed. Companies that are either large or small and close corporations may utilise business rescue when their financial problems are already well known by suppliers, customers and staff i.e. there already exists reputational damage. Companies and close corporations must be in serious financial distress with economic viability that is not apparent up front[25].In this sense, business rescue becomes the measure of last resort if all other options failed, hence its low success rate.

a) Aims and objectives of the research

The main aim of the research is to provide an analysis on whether business rescue has managed to succeed as an effective corporate rescue tool. Moreover, to identify the strength and weaknesses of the remedy and make recommendations as to what steps may be taken to improve the success rate of the doctrine. Business rescue is an important concept taking into account, the economic and its social advantages. Hence, rescue proceedings should not be taken as a measure of last resort but companies should utilise the doctrine to its full potential.

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[22] Omarjee op cit note 20.

[23] Ibid.

[24] I Le Roux & K Duncan 'The naked truth: creditor understanding of business rescue: a small business perspective' (2013) 6 (1) *SAJESBM*, available at http://dx.doi.org/104102/sajesbm.v6il.33, accessed on 28 February 2018.

[25] A Loubser 'Business rescue in South Africa: A procedure in search of a home' (2007) 40 (1) *Comparative and International Law Journal of Southern Africa* 157-171.

IV. BRIEF OVERVIEW OF THE CHAPTER

Business law in South Africa has been guided by English law, Roman Dutch law and South African law.

(a) Analysis on the reasons behind the implementation of business rescue in South Africa, by taking into account the following aspects:

Business rescue replaced judicial management hence, a critical analysis of the two doctrines is of importance in a bid to determine whether business rescue has managed to achieve its objectives in the Companies Act 2008. It is important to make an assessment on whether business rescue practitioners are not abusing the process e.g. by using business rescue as a money-making scheme rather than placing value on the main objective of the Companies Act 2008. Abuse has been prevalent on the side of rescue practitioners as they are forfeiting the main objective of business rescue.[26]

Judicial management in South Africa had become a complete and utter failure, and caused many compromises to the interested stakeholders and particularly creditors. Judicial management as per section 427[27] was on 1 May 2011 replaced by business rescue provisions in Chapter 6 of the Companies Act 2008, the Companies Amendment Act 3 of 2011 (hereafter referred to as the Companies Amendment Act)[28], and the Companies Regulations.[29] Therefore, the question that remains is whether business rescue has achieved its main aims according to the goals of the legislature.

This dissertation will analyse why business rescue is preferred to liquidation or winding up of the company. The analysis will be conducted by analysing the advantages and disadvantages of the procedure e.g. it is a mechanism used to preserve employment thereby ensuring protection of employees from retrenchment.

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[26] A Loubser 'The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part2)' 2010 (4) *TSAR 501* at 689-701.

[27] Section 427 of the Companies Act 1973.

[28] Companies Amendment Act 3 of 2011.

[29] Companies Regulations 2011.

V. RESEARCH TOPIC AND KEY QUESTION TO BE ANSWERED, BROAD PROBLEM AND ISSUES TO BE INVESTIGATED

The main focus of the research is to critically analyse and establish whether the business rescue procedure has been an effective tool in helping financially struggling businesses. South Africa moved from judicial management and introduced business rescue in 2011. Business rescue in South Africa was influenced by the US Bankruptcy Code Act 1978 (hereafter referred to as USBCA).[30]

(a) Research question

The introduction of business rescue has to some extent proved to be an effective tool in corporate rescue taking into consideration the worldwide economic crisis in 2008 that led to liquidation of many companies due to severe liquidity crunches.[31] However, there are still major challenges associated with business rescue that needs to be addressed in order to improve the doctrine.[32]

- Is there a relationship between business rescue and its predecessor judicial management?
- Has the doctrine achieved its expected outcome?
- Does the Companies Act 2008 among other Acts sufficiently protect businesses and other stakeholders involved?
- Whether businesses and stakeholders are facing any challenges when applying for business?
- What are the possible solutions and recommendations?

Prior to the introduction of business rescue corporate rescue was governed by s427 of the Companies Act 1973. The remedy was available to registered companies.[33] The introduction of business rescue in the Companies Act 2008 widened the scope on who may apply for business rescue for example whether close corporations may apply for business rescue.[34]

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[30] Bankruptcy Reform Act 1978.

[31] M Odendaal 'Choice between business rescue and liquidation yours', available at *https://www.news24.com/SouthAfrica/Local/Express-News/choice-between-rescue-and-liquidation-yours-20170905*, accessed on 30 May 2018.

[32] Loubser op cit note 25 at 152.

[33] Section 427 (2) of the Companies Act 1973.

[34] H Stoop 'When does an application for business rescue proceedings suspend liquidation proceedings?' (2014) 47 (2) *De Jure* 5.

However, even though the scope of businesses that could use the remedy had widened there are still problems and limitations for small business and close corporations.[35]

(b) Limitations or legal problems that businesses and other stakeholders face in application for the remedy:

Most business are facing major setbacks in applying for business rescue. Therefore, there is great need for the Companies Act 2008 to be structured in such a way that would mitigate or try to widen the scope of rescue proceedings application. Some of the limitations of the process include:

(c) Difficulties in raising post-commencement finance

Most businesses find it difficult to acquire financial backup to ensure successful implementation of the business rescue proceedings. Post-commencement finance is important. However due to loss of trust from investors or banks, companies find it difficult to acquire post-commencement finance. This is mostly prevalent to small business.

(i) Abuse of the process

Business rescue is prone to abuse by creditors, rescue practitioners and companies. In a bid to circumvent the current debts of the company, a company may apply for business rescue to delay the liquidation proceedings granted against the company and suspend any legal actions against them.[36] Abuse has also been prevalent on the side of the practitioners due to the fact that they forfeit the main objective of the business rescue objective and rather use the process as a means to acquire profits.[37] Additionally, creditors may frustrate the process in order to protect their own interests therefore straining the process in its entirety.

[35]A Steenekamp 'Business Rescue and Thresholds for Small Businesses', available at *http://www.mondaq.com/southafrica/x/155946/Corporate+Company+Law/Business+Rescue+And+Thresholds+For+Small+Businesses,* accessed on 1 June 2016.

[36]J Bell & J Barnett 'South Africa: Business rescue: Open for abuse', available at *http://restructuring.bakermckenzie.com/2017/01/11/south-africa-business-rescue-open-for-abuse/,* accessed on 30 May 2018.

[37] Ibid.

(ii) Business rescue is relatively expensive

First, there are additional direct costs e.g. legal fees.[38] This is why business rescue may turn out to be too expensive for small companies'.[39] Secondly, the biggest disadvantage are the indirect costs, which arise in the form of adverse publicity; disruption; loss of reputation, sales, customers, employees, suppliers, and credit; and difficulty to enter into new contracts due to uncertainty.[40]

(iii) It has a lower success rate

There has been an improvement in the utilising of business rescue rather than judicial management. However, low success rates is demonstrated by the fact that it is considered a measure of last resort attracting the less economically viable companies. This is especially true if economic viability is more apparent and financial distress has not reached crisis levels.[41]

VI. JUSTIFICATION FOR A COMPARISON BETWEEN SOUTH AFRICA AND THE UNITED KINGDOM

The main focus of the research is to critically analyse and compare judicial management in terms of the Companies Act 1973 and business rescue in terms of the Companies Act 2008. However, to assess whether business rescue meets the international provisions a comparison with a progressive restructuring procedure is essential. The United Kingdom (hereafter referred to as the UK) is among the countries that has made major developments to its restructuring procedure and this has helped improve their system. The Insolvency Act 1986 is almost similar to judicial management in South Africa. The Enterprise Act 2002 made some amendments to the Insolvency Act 1986 thereby improving the system.

Therefore, a comparison with the UK is to assess whether South Africa may also adopt some of the positive changes that has contributed to the success rate of administration in the UK.

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[38] A Loubser 'The business rescue proceedings in the Companies Act of 2008: concerns and questions (Part 1)' (2010) (3) *TSAR 505*.

[39] Pretorius 'The debtor- friendly fallacy in business rescue: agency theory moderation and quasi relationship' (2016) 19 (4) *South African Journal of Economic and Management Sciences*, available at *https://doi.org/10.40102/sajems.v19i4.1385,* accessed on 28 February 2018.

[40] J Rushwart 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008: Business rescue Part III' (2010) 1 *Acta Juridica* 375-408.

[41] I Le Roux & K Duncan op cit note 24 at 58 - 71.

The UK initiated a modern corporate rescue trend that focusses on the rehabilitation of a business's instead of winding up.[42]

VII. STRUCTURE OF THE STUDY

The dissertation consists of seven chapters. The dissertation will conduct a full assessment of whether business rescue is a success or a failure and has been effective in conducting successful rescue mechanism.

VIII. DEFINITION OF TERMS AND KEY REFERENCES

The terminology used in the dissertation is derived from the Companies Act 1973 and the Companies Act 2008. Therefore, it is essential to provide definitions of the terms.

(a) A Company

A company is a juristic person incorporated in terms of the Companies Act 2008, or a juristic person that has rights.[43] A company consists of either a public or private company. A juristic company has rights that is the right to sue or be sued.[44] It is within the rights of a company to apply for commencement of rescue proceedings through its directors. The directors of the company may pass a resolution to commence rescue proceedings.[45]

(b) Close Corporation

A close corporation means a juristic person incorporated under the Close Corporations Act, 1984.[46] In terms of the Companies Act 1973 only companies were allowed to apply for judicial management but the introduction of business rescue conferred upon close corporations the right to apply for business rescue.[47] A close corporation enjoys same rights as that of companies, in that, it may also sue or be sued. A close corporation needs only to comply with the statutory requirements in order to qualify for business rescue.

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[42] F HI Cassim et al *Contemporary Company Law* 2 ed (2012) at 25; 856-867.
[43] Section 1 of the Companies Act 2008.
[44] Section 20 (9) *(a) – (b)* of the Companies Act 2008.
[45] Section 129 of the Companies Act 2008.
[46] Ibid.
[47] Section 66 of the Close Corporations Act 1984.

(c) Financial distress

Financial distress is a condition where a company cannot meet, or has difficulty paying off, its financial obligations to its creditors.[48] A company or a close corporation can be financially distressed because of high fixed costs, illiquid assets or revenues sensitive to economic declines. Hence, a company under financial distress, will be in a difficulty position in that it becomes more expensive financing the company's operations thereby, leading to an increase in the opportunity costs. The disadvantages of a financially distressed company is that it lead to lower morale in employees because of the increased chance of bankruptcy, which would eventually result in loss of jobs.[49]

(d) Insolvency

Insolvency is a situation whereby the company's liabilities exceeds the assets, also known as balance sheet insolvency.[50] Insolvency may also be a situation where a company is no longer capable of meeting its financial obligations, thus suffering from cash-flow insolvency. Therefore, insolvency may merely be a financial crisis for the company. An insolvent company may take steps to avoid bankruptcy. The company may rectify its financial position by formulating ways to generate cash, renegotiating debts by negotiating repayment of such debts and reduce costs by cutting back expenses.[51]

(e) Liquidation proceedings

Liquidation proceedings are the procedure of bringing a business to an end and distributing its assets to petitioners.[52] Liquidation is a process that follows when a company becomes insolvent and unable to meet financial obligations when they become due.[53] Moreover, proceeds generated from the liquidation proceedings are used to pay creditors and shareholders, based on the priority of their claims.

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[48] Section 128 (1) *(f)* of the Companies Act 2008.

[49]'Investopedia financial distress', available at *https://www.investopedia.com/terms/financial_distress.asp*, accessed on 20 March 2018.

[50] Section 2 of the Insolvent Act 24 of 1936.

[51]R Lamprecht 'Definition Insolvency v bankruptcy', available at *www.bankruptcy24.co.za/index.php?option=com_content&view=article&id=63:definition-insovency-vs-bankruptcy&catid=48:general-articles&itemid=65*, accessed on 20 March 2018.

[52] Section 79 of the Companies Act 2008.

[53] Ibid.

The United States Chapter 7 of the U.S. Bankruptcy Code governs liquidation proceedings. Solvent companies may also file for Chapter 7, but this is uncommon.[54] The company by becoming bankrupt does not automatically mean that the company should be liquidated. Chapter 11 of the U.S. Bankruptcy Code involves rehabilitating the bankrupt company and restructuring its debts.[55]

(f) Judicial management

This is a method of debt restructuring where an independent judicial manager is appointed to manage the affairs, business and property of a company under financial distress.[56] The company is also temporarily shielded from legal proceedings by third parties, giving it the opportunity to rehabilitate.[57] Judicial management was governed by the Companies Act 1973 and was abolished and replaced with business rescue in terms of the Companies Act 2008.

(g) Business rescue

As defined by the Companies Act 2008, rescue proceedings aims to facilitate the rehabilitation of a company that is 'financially distressed'.[58] Business rescue proceedings tries to facilitate temporary supervision of the company's affairs, business and property. The business rescue practitioner plays an important role during the proceedings.[59]

[54] Chapter 7 of the U.S. Bankruptcy Code.
[55]'Investopedia Liquidation', available at *https://investopedia.com/terms/l/liquidation.asp*, accessed on 20 March 2018.
[56] Section 427 of the Companies Act 1973.
[57] 'Judicial management: what is it and how does it work', available at *https://singaporelegaladvice.com/law-articles/judicial-management,* accessed on 20 March 2018.
[58] Section 128 of the Companies Act 2008.
[59]Stubbings 'Business rescue explained', available at *https://www.fin24.com/Enterpreneurs/Resources/Business-rescue-explained_20150119*, accessed on 20 March 2018.

CHAPTER TWO

BUSINESS RESCUE IN TERMS OF THE COMPANIES ACT 71 OF 2008

I. BRIEF HISTORY

Prior to the introduction of judicial management, winding up of a company was the only option available to companies experiencing any financial distress in terms of the Companies Act 1926.[1] Liquidation of a company is a drastic measure that must be avoided at all costs, as the option does not have any advantages legally, economically and socially, hence leading to the introduction of judicial management in terms of Companies Act 1973.[2]

In terms of the Companies Act 1973 the definition for judicial management was regarded as a situation when any company by reason of mismanagement or for any other cause-

i.) "is unable to pay its debts or is probably unable to meet its obligations; and

ii.) Has not become or is prevented from becoming a successful concern".[3]

In other definitions judicial management is a method of debt restructuring where an independent judicial manager is appointed to manage the affairs, business and property of a company under financial distress. The company is also temporarily shielded from legal proceedings from third parties, giving it the opportunity to rehabilitate.[4]

Additionally, this implies that a company could only be placed under judicial management if it had satisfied the definition of judicial management and the application was brought on any of the grounds listed in s427(1).[5] In order to qualify for judicial management, the business was to satisfy the requirements and be defined as a company in terms of the Companies Act 1973.[6] This means that under the old system close corporations could not qualify for judicial management. Judicial management was a remedy available to companies in terms of Companies Act 1973, however, even though corporate rescue could be offered to companies that had met the requirements it did not make any provisions for close corporations' rescue.[7]

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[1] Act 46 of 1926.

[2] Act 61 of 1973.

[3] Sections 427 (1) *(a) & (b)* of the Companies Act 1973.

[4] 'Judicial management: what is it and how does it work', available at *https://singaporelegaladvice.com/law-articles/judicial-management,* accessed on 20 March 2018.

[5] Section 427 (1) of the Companies Act 1973.

[6] JJ Henning 'Judicial management and corporate rescue in South Africa' (1992) *17 Journal for Juridical Science* 103.

[7] Ibid at 103.

In Le *Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (Le Roux)*[8] judicial management was described as a "system which has barely worked since its initiation in 1926". Most companies facing financial difficulties were not aware of judicial management and this led to underutilisation of the doctrine in South Africa.[9] The only option that was available to companies facing financial difficulties was liquidation or winding up of the company. There were no other means available to rescue the company and ensure continuity and survival of the company. Thus, the main aim of judicial management was to avoid the dissolution of a company by taking various factors into account.[10] However, judicial management was regarded as a failure[11] and led to the introduction of business rescue under the Companies Act 71 of 2008[12] (hereafter referred to as Companies Act 2008) and this being almost similar to Chapter 11 of the US Bankruptcy Code.[13]

(a) Comparison between judicial management and business rescue

An analysis on whether business rescue has been an effective corporate rescue mechanism can only be achieved by conducting a comparison between judicial management and business rescue.[14] The implementation of business rescue has resulted in some great improvements being evidenced in the business arena. A comparison of the two doctrines is of importance in order to analyse whether business rescue has managed to achieve its full potential.[15] Hence, a comparison should be drawn to assess similarities and progressions that have been made. Major distinctions between judicial management and business rescue were provided for in *Merchant West Working Capital Solutions v Advanced Technologies and Engineering Company (Pty) Ltd and another.*[16] Judicial management unlike business rescue was a 'creditor-oriented solution', which meant that its main focus was the protection of creditors

[8] Le *Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C) para 55.
[9] RC Williams *Concise Corporate and Partnership Law* (1997) 311.
[10] A Loubser 'Judicial management as a business rescue procedure in South Africa Corporate law' (2004) 16 (2) *Merc LJ* 134.
[11] *Diener v The Minister of Justice* (926/2016) [2017] ZASCA 180 para 1.
[12] 71 of 2008.
[13] Bankruptcy Reform Act 1978.
[14] R Bradstreet 'The leak in the Chapter 6 Lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders willingness and the growth of the economy' 2010 (22) *SA Merc LJ* 195.
[15] GM Museta 'The development of Business Rescue in South African Law', available at *https://repository.up.ac.za/bitstream/handle/2263/27867/dissertation.pdf?sequence=1*, accessed on 4 June 2018.
[16] *Merchant West Working Capital Solutions v Advanced Technologies and Engineering Company (Pty) Ltd and another* (2013) 1 SA GNP 109.

than the actual rescue of the company as a going concern.[17] Whilst, on the other hand business rescue is 'debtor-oriented solution' which means that it seeks to protect the interests of all interested stakeholders by balancing their rights in terms of s7*k* of the Companies Act 2008.[18] However, even though the Companies Act 2008 seeks to balance these rights there is some sufficient protection offered to creditors in order to make the process fair to a greater extent.[19]

In *Merchant West Working Capital Solutions v Advanced Technologies*[20] the court was of the view that even though it is part of the objectives of business rescue to restore a company to solvency, unlike judicial management business rescue does not require the company to be restored to solvency. The aim of business rescue was to dispose of the company for the maximum value as a going concern in order to fully benefit all interested stakeholders, particularly creditors and shareholders.[21]

There were many formalities and strict requirements to be satisfied under judicial management, which resulted in the complexity of the doctrine. First, it was a requirement for a company to launch an application with the high court in order for a company to be placed under judicial management.[22] Secondly, the company had to establish that there was a reasonable possibility for rescue proceedings succeeding.[23] Thirdly, courts could not easily grant any court order for commencement of judicial management. Judicial management was regarded as an extraordinary remedy. Lastly, the court was obliged to appoint a provisional judicial manager, and latter a final judicial manager[24]. The judicial manager had to investigate the affairs of the company and the likelihood of success.[25] The judicial manager's report together with the creditors view were taken into account by the court when considering whether or not to grant a final order of judicial management.[26] Hence, because of the many procedures and the strict formalities under judicial management, it led to its failure. Moreover, most academics describe judicial management as 'a dismal failure'.[27]

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[17] Bradstreet op cit note 14 at 197.
[18] Section 7 of the Companies Act 2008.
[19] Loubser op cit note 10 at 167.
[20] *Merchant* supra note 16 above para 3.
[21] F H I Cassim, F Cassim et al *The Law of Business Structures* (2012) 459.
[22] *Merchant* supra note 16 para 10.
[23] Ibid para 11.
[24] Section 428 and 433 of the Companies Act 1973.
[25] Section 433 (*j*) of the Companies Act 1973.
[26] *Merchant* supra note 16 para 11.
[27] *Oakdene Square Properties (Pty) Ltd and Others v Form Bothasfontein (Kyalami) (Pty) Ltd* 2012 (3) SA 273 (GSJ) para 7.

Whilst on the other hand, the requirements set out for the granting of business rescue proceedings are less complex. The introduction of business rescue reduced the complexities that existed under judicial management. First, it is not necessary for the company to launch any application with the court to utilise the rescue proceedings, unless an affected person utilises s129 of the Companies Act 2008.[28] Business rescue may either be passed by the directors as a resolution[29] or any interested party may launch an application in terms of the Companies Act 2008.[30] Secondly, for a business to be eligible for business rescue, the business has to establish that there is a reasonable prospect of the business rescue plan succeeding in the rehabilitation of the business.[31]

A business rescue practitioner is appointed during rescue proceedings. The practitioner is given the full powers and responsibilities. This means that the old management is stripped of all its powers. Creditors are not empowered as per the judicial management.[32] Their only power is to vote for or against the plan and make suggestions. This means that the court does not take the views of the creditors into consideration, unless it is in the interest of justice to do so.

Therefore, a major difference between judicial management and business rescue is the test used to determine whether the company should undergo the rescue procedure. The test under judicial management was whether there was 'reasonable possibility', whilst in business rescue is whether there are any 'reasonable prospect' to rescue the company. In *Oakdene Square Properties v Farm Bothasfontein*[33] the courts had to make a distinction between the two thresholds of proof required by the two doctrines.

Business rescue is a preferred remedy rather than judicial management because major positive changes have been seen since the implementation of business rescue. Most companies are now opting for business rescue because it is relatively less costly than judicial management. Hence, in comparison to judicial management most companies are opting the use of the remedy rather than applying for liquidation proceedings. According to R Bradstreet[34] "the growing recognition is prompted, at least in part, by a global increase in corporate insolvencies in the twentieth century".

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[28] Section 129 of the Companies Act 2008.
[29] Section 129 of the Companies Act 2008.
[30] Section 131 of the Companies Act 2008.
[31] *Merchant* supra note 16 para 12.
[32] Loubser op cit note 10 at 168.
[33] *Oakdene* supra note 27 para 7.
[34] Bradstreet op cit note 14 at 195.

(b) Definition of business rescue

Business rescue as defined by the Companies Act 2008, aims to facilitate the rehabilitation of a company that is 'financially distressed'.[35] The main aim of business rescue is not only to rescue a company but to ensure that the company may be valued as a going concern. The rescue mechanism can only achieve its goal if there is allowance to conduct total restructuring of the business, including its property, debt, affairs, other liabilities and equity.[36]

In terms of s 128(1) *(b)*[37] business rescue is a temporary supervision that provides a company with temporary moratorium on the rights of claimants against the company, in order to allow development and undisturbed rescue of the company, under which a business rescue plan is approved of[38]. The definition of business rescue was supported in *Diener v Minister of Justice*[39] and in *Oakdene Square Properties v Farm Bothasfontein.*[40] Therefore, it is important to ensure that the temporary supervision of the company, and management of company's affairs, business and property yield successful results.[41]

The main aim of the doctrine is to ensure continual existence of the company on a solvent basis and ensure better return for the company's creditors or shareholders.[42] The aims of the doctrine are achieved by an appointment of a business rescue practitioner. The rescue practitioner must lead the process in such a way that would maximise the likelihood of the company continuing on a solvent basis.

(c) Entities that may apply for business rescue

Business rescue is a procedure or remedy that is open to different business enterprises. There are different types of business enterprises.[43] Entities that may apply for business rescue include, limited liability companies such as private companies, public companies and

[35] Section 128 (1) (*f*) of the Companies Act 2008.
[36]Stubbings 'Business rescue explained', available at *https://www.fin24.com/Enterpreneurs/Resources/Business-rescue-explained_20150119*, accessed on 20 March 2018.
[37] Section 128 (1) *(b*) of the Companies Act 2008.
[38] Ibid.
[39] *Diener Supra* Note 11 para 2.
[40] *Oakdene* supra note 27 para 7.
[41] F H I Cassim, F Cassim et al *The Law of Business Structures* (2012) 458.
[42] Ibid.
[43] 'Companies and Intellectual Property Commission (CIPC) 'Status of business rescue proceedings in South Africa', available at *http://www.cipc.co.za/files/3915/2639/0127/Business_Rescue_Status_Report_March_2018_v1.0.pdf* , accessed on 6 June 2018.

incorporated companies, close corporations, non-profit companies and state enterprises. Business rescue is a remedy available to all businesses either small or large, provided that the requirements stipulated by the Companies Act 2008 have been satisfied.

II. IMPORTANCE OF BUSINESS RESCUE

Section 5 of the Companies Act 2008[44] must be read together with Chapter 6[45] of the Companies Act 2008. The courts must interpret and apply the Companies Act 2008 in a manner that would support s7[46] of the Companies Act 2008. Section 7[47] is a reflection of the objectives of the Companies Act 2008. Chapter 6 governs the procedures to be followed in business rescue proceedings.[48] According to Patrick Osode, [49]"the fact that both social and economic objectives impelled the enactment of the Companies Act 2008 and Chapter 6 can be gleaned from the twelve objectives of the Companies Act 2008 set out in s7".

Since the implementation of business rescue major positive changes have been evidenced in the business world. Most companies have been greatly affected by the economic recession, which has led to closure of some companies due to tough economic conditions. However, business rescue is being used as a tool to help businesses facing financial difficulties.

Business rescue has major economic advantages. In South Africa the unemployment rate is relatively high.[50] In every economy high employment rate means contribution to the fiscus through income tax etc. Business rescue is a mechanism used to save jobs. According to A Loubser, "An efficient and well-functioning business rescue procedure has clear advantages for every country and every type of economy, but these advantages are even more relevant in developing countries where the preservation of jobs is of primary concern".[51]

The successful rescuing of a financially distressed company has some socio-economic benefits, in that, there is transformation by creating conditions that would enable increased participation of the formerly excluded black majority in the main stream.[52]Therefore, the

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[44] Section 5 of the Companies Act 2008.
[45] Chapter 6 of the Companies Act 2008.
[46] Section 7 of the Companies Act 2008.
[47] Ibid.
[48] Ibid.
[49] P.C Osode 'Judicial implementation of South Africa and business rescue model: A preliminary assessment' (2015) 4 (1) *Penn State Journal of Law and International Affairs* 462.
[50] M Masutha 'SA unemployment rate stable at 26.7%', available at *http://ewn.co.za/2018/05/15/sa-unemployment-rate-unchanged-for-q1*, accessed on 22 July 2018.
[51] A Loubser 'Business rescue in South Africa: A procedure in search of a home?' 2007 40 (1) *Comparative and International Law Journal of Southern Africa* 152.
[52] Osode op cit note 49 at 462.

process helps maintaining and promoting employment especially for previously disadvantaged individuals.

In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments*[53] the court had to identify the advantages of business rescue and this was achieved by identifying the disadvantages of judicial management. It was described as a 'cumbersome and ineffective procedure'. The fact that judicial management required a 'high threshold of proof', namely a reasonable probability for the granting of the order[54] contributed to the failure of the doctrine. A stigma which was attached to judicial management led to its under-utilisation and failure because close corporations were not protected by the remedy. Additionally, judicial management was an extraordinary remedy which infringed on the rights of creditors.[55]

Business rescue is of major importance and core to the Companies Act 2008. The main aim of business rescue was to rectify most of the disadvantages of judicial management. The objectives of business rescue as contained in s7 of the Companies Act 2008 is that, provision must be made to rehabilitate companies that struggle financially in a manner that balances the rights of all stakeholders involved.[56]

The main purpose of s7 *(k)* of the Companies Act 2008 is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders". In *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others*[57], the court stated that the 'purpose and context' of business rescue are not aimed at the destruction of the rights of a secured creditor'.

A company in financial difficulties may be worth more as a going concern than when it is liquidated. Liquidation results in the property of the company not being given its actual or fair value, the assets may be 'realised on a piecemeal basis'. A company as a going concern might be worth more than a company undergoing liquidation.[58]

In business rescue, where a company cannot be rescued, an application is brought to discontinue the business rescue proceedings and place the company in liquidation. In comparison with judicial management the practitioner in developing the business rescue plan is entitled to work with the set management structures of the company as opposed to having

[53] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* 2012 2 SA 423 (WCC) par 20.
[54] Burdette 'Unified Insolvency legislation in South Africa: Obstacles in the path of the unification process' 1999 *De Jure* 57-58.
[55] T Joubert 'Reasonable possibility versus reasonable prospect: Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 550-563.
[56] Section 7 (*k)* of the Companies Act 2008.
[57] *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* 2017 (3) SA 539 (GJ) para 18
[58] FHI Cassim, M Femida *The Law of Business Structures* (2012) 459.

to place the existing management of a company. This will increase the probability of a successful business rescue.[59] The directors of the company must cooperate with the rescue practitioner and supply the practitioner with all information pertaining the company.

III. FINANCIAL DISTRESS v INSOLVENCY

(a) Insolvency

Insolvency is not essentially bankruptcy. A distinction must be made between the two. An act of insolvency may lead to bankruptcy. There are different acts of insolvency. When a company is declared to be insolvent or bankrupt this means that it no longer qualify for business rescue. The acts of insolvency are stated in s8 of the Insolvency Act 24 of 1936 (hereafter referred to as the Insolvency Act).[60]

Therefore, in cases of transfer of a company during the business rescue proceedings the requirements in terms of s34 of the Insolvency Act should be complied with. A business should not be sold immediately before any attempts to rescue the company has been made. The rescue practitioner and the creditors must assess whether it is not worth delaying the sale of the business so that the requirements stipulated in s34 of the Insolvency Act may be complied with. This is to avoid the issues that may be raised by the liquidator should the

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[59] F Leppan &M Yeates 'Business rescue: Company law' (2010) 10 (11) *Without Prejudice* 17.

[60] Section 8 states that " A debtor commits an act of insolvency-

(a) If he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
(b) If a court has given judgement against him and he fails, upon the demand of the officer whose duty it is to execute that judgement, to satisfy it or to indicate to the officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgement;
(c) If he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
(d) If he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;
(e) If he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;
(f) If, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of subsection (3) of section dour or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;
(g) If he gives notice in writing to any one of his creditors that he is unable to pay any of his debts,
(h) If, being a trader, he gives notice in the Gazette in terms of subsection (1) of section thirty-four, and is thereafter unable to pay all his debts."

business be liquidated in terms of s141 (2) *(a) (ii)* of the Companies Act 2008.[61] An example of an issue that may be raised by a liquidator is that of failure to comply with the requirements of s34 of the Insolvency Act.[62]

Insolvency is a financial condition or state experienced by a legal entity when the liabilities exceed the assets, thus resulting in balance sheet insolvency.[63] Insolvency may also be a situation whereby a legal entity is no longer capable to meet its financial obligations as they become due and thus resulting in cash-flow insolvency.[64]

A notice may have to be served once a person or an entity becomes insolvent. This means that steps to rectify the situation might be taken and ensures that possible bankruptcy is avoided at all costs. Some of the ways to rectify insolvency is by generating cash, minimizing overhead costs, cutting back on living expenses and settling or renegotiating current debts and debt repayments. In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*[65] the court had to make a distinction in the types of insolvencies with respect to the interpretation of s79 - 81 of the Insolvency Act[66] (winding up of solvent companies). Additionally, the court[67] explained the difference between factual solvency (where on the balance sheet the assets exceed the liabilities) and commercial solvency (where the company is able to pay its debts). The court confirmed that the principle that a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time.[68]

Bankruptcy is a procedure that a legal entity or affected person may apply to declare the company as bankrupt and unable to meet its financial obligations.[69] Classes of persons who may apply for an order to declare a company bankrupt includes creditors, employees, directors, shareholders or the company.[70] A legal entity may file a special resolution with the

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[61] R Modise 'Do the Requirements of Section 34 of the Insolvency Act 24 of 1936 have to be complied with in a Transfer during Business Rescue Proceedings?', available at *https://www.hoganlovells.com/en/publications/do-the-requirements-of-section-34-of-the-insolvency-act-24-of-1936-have-to-be-complied-with-in-a-transfer-during-business-rescue-proceedings,* accessed on 16 April 2018.

[62] Section 34 of the Insolvency Act.

[63] R Lamprecht 'Definition Insolvency v bankruptcy', available at *http://www.bankruptcy24.co.za/index.php?option=com_content&view=article&id=63:definition-insolvency-vs-bankruptcy&catid=48:general-articles&Itemid=65,* accessed on 18 April 2018.

[64] Ibid.

[65] *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* (936/12) [2013] ZASCA 173 para 10.

[66] Sections 79 – 81 of the Insolvency Act.

[67] *Boschpoort* supra note 65 para 11.

[68] Ibid.

[69] Ibid para 10.

[70] Ibid at 11.

Registrar of the company to be declared bankrupt.[71] Therefore, bankruptcy can warrant liquidation of a company.

(b) Financial Distress

Section 128*(f)* of the Companies Act 2008 provides a definition as to what encompasses 'financial distress'.[72] A company will be in financial distress if, first, it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the following six months[73] or it appears to be reasonably likely that the company will become insolvent within the following six months.[74]

Moreover, this implies that s128 *(f)*[75] will act as a test in analysing whether the company or close corporation has not already reached the level of insolvency or bankruptcy.[76] There is a slight distinction between financial distress, insolvency and bankruptcy. A company has first to reach the level of financial distress before it can become insolvent but however in most instances insolvency will lead to bankruptcy if necessary steps are not taken to guard against such an occurrence.[77]

Therefore, a company can be regarded as financially distressed if there is reasonable likelihood that the company within a period of the next six months will be incapable of paying its debts as they become due and payable.[78] However, it is clear that a business set up cannot be invoked wherever an organisation is already insolvent. Proceedings may be started six months before, once the signs begin to materialise. For example, an organisation that is trading profitably and is cash positive, but have the flexibility to repay an oversized debt which can become due and collectable within six months and would qualify to be classified as being financially distressed and thus being a candidate for business rescue.[79]

The word 'reasonable likelihood' in terms of the Companies Act 2008 implies that there must be a rational basis for the conclusion that the company may not be able to pay its debts within the stipulated period of six months. This may only be measured using the financial records of

[71] Section 79 of the Insolvency Act.
[72] Section 128 (1) (*f*) of the Companies Act 2008.
[73] Section 128 (1) *(f) (i)* of the Companies Act 2008.
[74] Section 128 (1) *(f) (ii*) of the Companies Act 2008.
[75] Ibid.
[76]R Modise 'The determination of financial distress for purposes of business rescue', available at *https://www.hoganlovells.com/publications/the-determination-of-financial-distress-for-purposes-of-business-rescue*, accessed on 22 June 2018.
[77] B Wassman 'Business rescue: Getting it right' (2014) 36 *DEREBUS* 4.
[78] Ibid.
[79] *Merchant* supra note 16 para 8.

the company and also taking into account other relevant factors that may impact on the company's liquidity in the foreseeable future.[80]

Section 5(1)[81] states that the Companies Act 2008 must be interpreted and applied in a manner that gives effect to the purposes set out in s7.[82] As such, when interpreting these provisions one needs to consider the purpose and the intention of the legislation. The aim being to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. In turn, 'rescuing the company' means achieving the goals set out in the definition of 'business rescue'.[83]

IV. INTERESTS OF STAKEHOLDERS

(a) Rights of affected persons

Business rescue is a procedure that can only be used limited to the confines set out by the Companies Act 2008. There are three groups of persons affected with rescue proceedings, namely[84] creditors, holders of the company's securities and the employees. The Companies Act 2008 tries to protect persons with a direct interest in the affairs of the company. Moreover, the Companies Act 2008 protects persons that may be affected directly or indirectly by the rescue practitioner's decisions. The list however is not limited only to those with a direct interest but with substantial interests in the company, for example directors, shareholders and any other contractual parties.

Affected persons may exercise certain rights during the proceedings. First, they may launch an application for commencement of the business rescue proceedings.[85] Secondly, they must receive information and notices of decisions by the rescue practitioner. The rescue practitioner is obliged to inform the creditors if he intends to sell a particular property provided that it is in the best interests of the company.[86] Thirdly, they ought to participate in the process in order to enable transparency and accountability. Fourthly, they must be given updates as to the progress of the rescue proceedings. Frequent updates enables stakeholders to

[80] J Erasmus 'Analysis: When is a company financially distressed', available at *https://www.accountancysa.org.za/analysis-when-is-a-company-financially-distressed/*, accessed on 18 April 2018.

[81] Section 5 (1) of the Companies Act 2008.

[82] Section 7 of the Companies Act 2008.

[83] Erasmus op cit note 80.

[84] FHI Cassim, M Femida et al *Contemporary Company Law* 2 ed (2012) 899.

[85] Section 131 of the Companies Act 2008.

[86] Section 134 of the Companies Act 2008.

decide on whether there still exists reasonable prospects to rescue the company or alternatively apply for liquidation proceedings to commence.[87] Lastly, they have the right to lodge objections against the business rescue plan, for example when proceedings are in violation of the stakeholders' rights, proceedings are contrary to the statutory provisions and there are any objections on the appointment of the rescue practitioner.[88]

(i) Creditors

A creditor is an entity or a person to whom money is owing. A creditor can be a bank, person or a supplier.[89] Additionally, a creditor is a body of legal nature, which has rights to sue or to be sued. A creditor includes those who have supplied any goods, services, or a monetary loan to the company. An 'affected person', in relation to a company, means any shareholder or creditor of the company that has a direct and substantial interest in the affairs of the company.[90]

During business rescue proceedings creditors play a major role in the process.[91] However, there should be balance between the rights of the creditors and the company's rights. There are different types of creditors in terms of the Companies Act 2008 and all of them have different rights during business rescue proceedings. The claims of the creditors are of importance as was held in *DH Brothers Industries (Pty) Ltd v Gribnitz No and others.*[92] This means that if the rights of creditors were overlooked this would undermine the core principles and purposes of the Companies Act 2008.[93] The Companies Act 2008 aims to ensure development of the South African economy by promoting and supporting investment,[94] creating best conditions that allow or attract investment in the South African markets and providing effective, reliable environment that regulates companies amicably.[95]

[87] Section 130 of the Companies Act 2008.
[88] Section 153 of the Companies Act 2008.
[89]H Averkamp 'What is the distinction between debtor and creditor?', available at *https://www.accountingcoach.com/blog/debtor-creditor,* accessed on 30 July 2018.
[90] Ibid.
[91] R Bradstreet 'Lending a helping hand- the role of creditors in business rescues?', available at *http://www.derebus.org.za/lending-helping-hand-role-creditors-business-rescues/*, accessed 20 June 2018.
[92] *DH Brothers Industries (Pty) Ltd v Gribnitz No & others* 2014 (1) SA 103 (KZP) para 48.
[93] Ibid para 54.
[94] Section 7 *(b)* of the Companies Act 2008.
[95] Section 7 *(c)* of the Companies Act 2008.

There are different types of creditors in terms of the Companies Act 2008 and these include concurrent creditors, secured or unsecured creditors.[96] These creditors have rights during business rescue proceedings and that is in terms of s145.[97] An independent creditor includes employees of the company in terms of s144 (2) of the Companies Act 2008 and should not be related to the company for example a director or practitioner of the company.[98]

In *Swart v Beagles Run Investments 25 (Pty) Ltd (four creditors intervening)*[99] the sole director and shareholder of the respondent, a chartering business dealing in exotic wildlife species, applied for an order to place the company in business rescue based on the fact that the respondent was financially distressed as envisaged in s128*(f)* of the Companies Act 2008.[100] A number of creditors opposed the application indicating that it abused the process and that it was an attempt by the company to avoid or postpone the payment of debts.[101] The creditors also alleged that the company had been trading recklessly for some time.

The court indicated that business rescue proceedings are new in terms of the Companies Act 2008. The court held that the purpose of chapter 6 of the Companies Act 2008 is to assist a financially distressed company and this is achieved by means of a business rescue plan. Rescue proceedings thus aim at maximising the possibility of the company continuing on a solvent basis, or to achieve a better return for its shareholders and creditors compared to liquidation.[102]

The court held that when weighing up the interests of the company and creditors, the interests of creditors should prevail.[103] To determine whether the applicant complied with the requirements listed in s131[104] mentioned above, the court stated that the business rescue proceedings are new and there is no previous case law on the matter to consider.[105] The court then turned to the previous 'judicial management provisions', especially regarding the meaning of 'successful concern'.[106] In other words, it must be reasonably probable that the

[96] *ABSA Bank Limited v Etienne Jacques Naude N.O. & others* (66088/2012, 66087/2012) [2014] ZAGPPHC 181 para 12.
[97] Section 145 of the Companies Act 2008.
[98] Section 144 (2) of the Companies Act 2008.
[99] *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP).
[100] Ibid para 10.
[101] Ibid para 12.
[102] Ibid para 18.
[103] Ibid para 41.
[104] Section 131 of the Companies Act 2008.
[105] *Swart* supra note 99 para 23.
[106] Ibid para 25.

company is viable and capable of ultimate solvency, and that it will, within a reasonable time, become a 'successful concern' and yield a return for its shareholders and creditors.[107]
Section 145[108] governs participation of creditors[109] during business rescue proceedings. This means creditors are entitled to a notice of commencement of rescue proceedings and participate in each court meeting. Creditors are entitled to vote on the proposed business rescue plan and this means that they also have the rights to make amendments.[110] Creditors may propose on the development of an alternative plan or reject the proposal in totality, if it is not favourable to the interests of the creditors and the company as a whole.[111]

(ii) Advantages of s145

Section 145[112] allows transparency between the creditors, the practitioner and the company. Transparency is a necessary tool in facilitation of rescue proceedings as it leads to progress. The Companies Act 2008 helps in ensuring that there is no abuse by the practitioner, in serving his or her own interests at the expense of the company and other interested stakeholders.[113]Secondly, participation by creditors helps the practitioner to come up with effective strategies that most likely will improve the prospect of rescue and will be of advantage to all the creditors.[114]

(iii) Disadvantages of s145

Creditors have participation rights and this includes the rights to make proposals, vote for or against the business rescue plan proposal by the practitioner. Hence, in most instances creditors usually take up a defensive position to protect their own interests rather than encourage successful implementation of the business rescue plan. Creditors may be too rigid in a bid to frustrate the whole process and in particular the rescue practitioner. This is because even though the Companies Act 2008 moved from being creditor-oriented to debtor-oriented, creditors still have the power to approve or reject the business rescue proposal.

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[107] Ibid.
[108] Section 145 of the Companies Act 2008.
[109] Ibid.
[110] Bradstreet op cit note 14 at 352-380.
[111] BRX 'Affected persons in business rescue proceedings part 3', available at *https://brexchange.co.za/affected-persons-business-rescue-part-3-creditors-continued/* , accessed on 24 April 2018.
[112] Section 145 of the Companies Act 2008.
[113] S Beswick 'Business rescue practitioner friend or foe?' available at *http://sbassociates.co.za/2016/04/07/business-rescue-practitioner-friend-foe/* , accessed on 23 April 2018.
[114] Bradstreet op cit note 91 at 234.

In *Collard v Jatara Connect* [115] the court had to set aside the creditors vote against the rescue plan and was of the view that business rescue should be conducted in a fair manner and curb against abuse of the process.[116] The creditors' decision may be set aside if it is inappropriate and unreasonable. It is the duty of the courts to determine whether the vote by the creditors is appropriate or not.[117] It would be reasonable, just and in the interests of justice for the court to set aside a vote that is prejudicial to the rescue proceedings. In *Shoprite Checkers (Pty) Ltd v Berryplum Retailers*[118] the court had to adopt a two-stage approach in analysing whether it could set aside a vote under s153 (7) of the Companies Act 2008. However, in *Collard v Jatara*[119] the court adopted a holistic approach in considering which remedy is more beneficial to creditors between rescue proceedings and liquidation proceedings.

Therefore, the practitioner and other interested stakeholders must act in such a way that would support the goal and ensure that the company comes back to its feet again, hence, making the process to have more advantages and not disadvantage the company in the long run. Creditors are entitled to form their own creditors' committee, by following the proper channels. The committee may consult with the rescue practitioner on the development or the amendment of the business rescue plan.[120]

The Companies Act 2008 does not specifically address whether a creditor may lose their claim against a surety during rescue proceedings. It is the duty of courts to determine whether or not a creditor loses their claim or claims against a surety when rescue proceedings have already begun.[121] A business rescue plan must provide for the creditor's claim against the principal debtor. The rescue plan must stipulate the amount to be comprised in order for the claim to be regarded as being settled. Creditors are of importance in business rescue proceedings however the court may have to take the interests of the company and other interested stakeholders into consideration in order to improve effectiveness and efficiency of the process.[122]

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[115] *Collard v Jatara Connect* (23510/2016) [2017] ZAWCHC 45 (14 March 2017) para 21.
[116] Y Kleitman 'When creditors reject business rescue' (2014) 8 *Without Prejudice* 6.
[117] *Collard* supra note 115 para 26.
[118] *Shoprite Checkers (Pty) Ltd v Berryplum Retailers* (47327/2014) [2015] ZAGPPHC 255 (11 March 2015) para 40.
[119] *Collard* supra note 115 para 26.
[120] Ibid.
[121] Section 133 (2) of the Companies Act 2008.
[122] Section 128 of the Companies Act 2008.

The potential business rescue plan in terms of s 128(1) *(b) (iii)*[123] contemplates that there are two objects or goals: a primary goal, which is to facilitate the continued existence of the company in a state of insolvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation.[124]

(iv) *Creditors meetings*

Creditors have the right to participate in the business rescue process.[125] The rescue practitioner may within a period of ten business days after appointment arrange and preside over the first meeting of the creditors.[126] In *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and another*[127], the court stated that a decision made during creditors' meetings can be set aside if it is held to be inappropriate. The courts may not overlook and grant every claim of the creditors but a thorough analysis is a requirement in reaching a decision to set aside the rescue plan.

The rescue practitioner is under an obligation to ensure that publication of the rescue plan is within 25 working days after his appointment or in such time as is granted by the court or the majority of the creditors' voting interests[128]. Voting interest is calculated as equal to the value of the amount owed by the company to a creditor. An adopted business rescue plan is binding on the company and each of its creditors irrespective of whether such creditor was present at the meeting to consider the plan.

In *Nedbank Ltd v Bestvest*[129] the court held that 'a creditor who simply votes against any plan in an effort to advance its own self-serving interests, faces the risk of sanction by the court'. If the plan is a good one, the fact that a creditor may have voted against the plan, and in so doing managed to achieve rejection of the plan as contemplated in s152,[130] will not prevent the plan being set in, under the authority of the court. The Companies Act 2008 demonstrates the lengths to which the legislature has gone to ensure that business rescue is explored prior

[123] Section 128 (1) *(b) (iii)* of the Companies Act 2008.
[124] *Oakdene* supra note 27 para 7.
[125] Section 145 of the Companies Act 2008.
[126] Section 147 of the Companies Act 2008.
[127] *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd & another* (365/2014) [2014] ZAGPPHC 688; 2014 (6) SA 214 (LP) (9 May 2014) para 26.
[128] Section 152 of the Companies Act 2008.
[129] *Nedbank Ltd v Bestvest* 2012 (5) SA 497 (WCC) para 55.
[130] Section 152 of the Companies Act 2008

to liquidation. Therefore, despite what the majority of creditors may require, in certain instances the court may take the interest of the creditors into consideration in making a decision.[131]

The court has to follow and adhere to the provisions of chapter 6 of the Companies Act 2008. The courts should try and uphold the intention of the legislature in the implementation of business rescue. Steps should be taken to minimise the failure rate of the procedure like its predecessor judicial management. The aim of the new business rescue is to achieve its goals rather than be termed as 'a spectacular failure' and 'an abject failure' for the same reasons as its predecessor judicial management.[132]

The Companies Act 2008 sets limits on creditors rights. This is to ensure that the creditors do not make the process difficult for all stakeholders. The court when granting business rescue, it looks at the long term goals for example whether the process is capable of successfully resuscitating the company's business activities. The Companies Act 2008 was construed in such a way that allows a company to ensure that there is reduction in potential future risk of financial distress for the debtor.[133]

(v) Whether there are any preferential creditors in business rescue

The Companies Act 2008 does not specifically state whether there are any preferent creditors. However, in terms of s150(2) *(b)*[134] it permits a rescue plan to be construed in such a way that creates or specifies the order of preference in which proceeds of property sold in pursuant to the plan will be applied subject to preferences conferred by the Companies Act 2008 in s135.[135] This section provides for different classes of post-commencement creditors.[136]

This issue was brought before the court in *Commissioner, South African Revenue Services (SARS) v Beginsel No & others.*[137] The court had to determine whether SARS enjoys special status to be a preferent creditor in the rescue proceedings. In this case SARS relied on s96

[131] R Bradstreet 'Business rescue proves to be creditor-friendly: C J Claassen J's analysis of the new business rescue procedure in Oakdene Square Properties' (2013) 130 (1) *South African Law Journal* 48.
[132] D Mahon 'The test to be applied when considering an application for business rescue', available at *https://sacommerciallaw.com/2013/02/10/the-test-to-be-applied-when-considering-an-application-for-business-rescue-by-don-mahon/*, accessed 24 April 2018.
[133] Ibid.
[134] Section 150 (2) *(b)* of the Companies Act 2008.
[135] Section 135 of the Companies Act 2008.
[136] Osode op cit note 49 at 459.
[137] *Commissioner, South African Revenue Services (SARS) v Beginsel No and Others* 2012 (1) SA 3017 (WCC).

and s103 of the Insolvency Act which states that SARS is to be regarded as preferent creditor above any concurrent creditors.[138] In its reasoning the court pointed out that the claim by SARS was illogical as it will not balance interests and the rights of other interested stakeholders as envisaged in s7k of the Companies Act 2008.[139] The fact that there was no mention of such a right in s150 (2) *(b)*[140] was a clear indication that the Companies Act 2008 did not intend to extend those rights to SARS.

Therefore, the court held that SARS enjoyed no greater voting interest than other concurrent creditors of the company, with the exception of the category of concurrent creditors mentioned in s145(4)*(b)*[141] who have subordinated their claims in a liquidation in terms of a subordination or back-ranking agreement.[142] Thus, the court does not give preference to any creditor unless it has been stipulated in such a manner in the rescue plan in terms of s150 (2) *(b)*.[143]

(vi) Cession of creditors' rights

Cession refers to a bilateral juristic act whereby the cedent transfers its rights to the cessionary.[144] This means that for the cession of rights to be valid there must be voluntary cession of such a right without any fear or duress. Compulsory cession in business rescue is unlawful in terms of s154 (1)[145].

A secured creditor may thus agree to accede a certain percentage of the claim. The percentage acceded will not be recovered by the creditor.[146] This means that the cession of the creditors' claim must be done voluntarily by the creditor. In *DH Brothers v Gribnitz No*[147] the court had to consider whether compulsory cession of the creditors' rights in the rescue plan would be valid and the court held that where cession was not voluntary but imposed on the creditors then the business plan would be regarded as invalid.

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[138] Osode op cit 49 at 459.
[139] Section 7*(k)* of the Companies Act 2008.
[140] Section 150 (2) (*b*) of the Companies Act 2008.
[141] Section 145 (4) *(b)* of the Companies Act 2008.
[142] M Seligson 'The impact of business rescue on tax claim: does SARS enjoy a preference under s135 of the Companies Act against a company in business rescue proceedings?' (2014) 5 (3) *Business Tax and Company Law Quarterly* 7.
[143] Section 150 (2) *(b)* of the Companies Act 2008.
[144] A Kariem 'The nature of cession in security', available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/Finance/finance-and-banking-alert-20-september-the-nature-of-cession-in-security-*.html, accessed on 12 May 2018.
[145] Section 154 (1) of the Companies Act 2008.
[146] D Wasso 'Business rescue: the position of secured creditors' (2014) 34 *De Rebus* 168.
[147] *DH Brothers* supra note 92 para 67.

(b) Shareholders and Directors

(i) Shareholders

Section 128(1) *(b)*[148] defines an 'affected person' as a shareholder or creditor of the company. This means that the shareholders although they do not have control over the company, they are entitled to be informed of any business rescue proceedings intended by the company. According to Don Mahon:

> "The aforesaid provisions of the Companies Act 2008 enjoin the business rescue practitioner to provide the shareholders of the company in business rescue with sufficient information (including documentation) so as to enable them to meaningfully participate in the company's business rescue proceedings, to carry out meaningful and effective consultation with the business rescue practitioners as contemplated in s150 (1)[149] and to enable the shareholders to accept or reject the plan, as contemplated in s150 (2)."[150]

Shareholders in a company under business rescue have a substantial interest in the manner in which the business rescue practitioners intend to rescue the company and, more particularly, the manner in which they intend to part with any of the assets of the company.

The company or rescue practitioner must serve a notice concerning business rescue application to holders of company's securities.[151] Any affected persons and particularly holders of securities has the right to participate in the court proceedings for rescue proceedings and participate during execution of the rescue proceedings.[152]

Shareholders are more influential than the board of directors during rescue proceedings. In *Gqwaru & another v Magalela Architects CC & another*,[153] the court held that "the willingness of the company shareholders is determinative in voluntary business rescue, it is not a consideration for purposes of a business rescue through a court order", and hence the application can also be brought by persons who are not shareholders but just 'affected persons'.

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[148] Section 128 (1) *(b)* of the Companies Act 2008.
[149] Section 150 (1) of the Companies Act 2008.
[150] Don Mahon 'Do Shareholders Have a Remedy Where They Have Not Been Consulted in Regard to the Contents of a Business Rescue Plan?' available at *http://maiselsgroup.co.za/shareholders-remedy-not-consulted-regard-contents-business-rescue-plan/* ,accessed on 25 April 2018.
[151] Section 146 of the Companies Act 2008.
[152] Ibid.
[153] *Gqwaru and Another v Magalela Architects CC & another* (19959/2016) [2017] ZAGPJHC 32 (23 February 2017) para 8.

Commencement of rescue proceedings by way of resolution entitles shareholders to receive written notice of such resolution, the appointment of a business rescue practitioner and all relevant events relating to the rescue proceedings.[154] A shareholder may apply to court for an order setting aside such resolution on any of the grounds listed in s130 (1) *(a)*.[155] Shareholders may apply to set aside the resolution if the company has failed to satisfy the procedural requirements of the Companies Act 2008.[156]

(ii) Directors

The board of directors may pass a resolution to commence business rescue proceedings provided that the 'requirements' stipulated in s129[157] are met. The board of directors must therefore have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company.[158] It is accepted that executive directors are employees of the company and therefore affected persons as defined in s128.[159]

An individual director also has the right to apply for an order commencing business rescue proceedings in terms of s131[160] without being a shareholder or creditor of the company. This means that although directors have been excluded from the list of affected persons in their capacity as such and possibly were not intended to have the power to apply for a business rescue order, that they will have this power as employees.[161]

As affected persons, directors also have the right to participate in the hearing of an application for commencement of business rescue proceedings brought by a creditor or shareholder, and this would include the right to oppose such an application. Directors have inside knowledge of the company's financial situation and business prospects and would be in a strong position to refute allegations of financial distress or prospects of rescue on which the

[154]CD Hofmeyr 'Shareholders involvement in business rescue proceedings', available at *https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/shareholder-invovlement.html,* accessed on 21 July 2018.

[155] Section 130 (1) *(a)* of the Companies Act 2008.

[156] Section 130 (1) *(a) (iii)* of the Companies Act 2008.

[157] Section 129 of the Companies Act 2008.

[158] B Wassman 'Business rescue: Getting it right' (2014) 36 *De Rebus* 4.

[159] Section 128 of the Companies Act 2008.

[160] Section 131 of the Companies Act 2008.

[161] EP Joubert & A Loubser 'Executive directors in business rescue: Employees or something else?' available at *www.scielo.org.za/scielo.php?script=sciarttext&pid=S225-71602116000100007#backfn26*, accessed on 26 April 2018.

application is based, or at least create doubt as to whether these requirements have been met.[162]

Moreover, the directors of the company are subject to the authority of the practitioner. Hence this implies that in order for the directors to exercise any powers there is need for express authorisation from the rescue practitioner. The rescue practitioner during business rescue is in the position of authority and this means that any conduct of the directors without the authorisation of the rescue practitioner are regarded as null and void thus, invalid.[163] The main aim of rescue proceedings is to limit the powers of those that contributed to the financial mayhem of the company.[164]

The legislation therefore gives limited powers to the directors in order to enable the practitioner enough room to conduct his work thoroughly and investigate the financial position of the company and come up with an effective plan thereof.[165] The moment a company is placed under rescue proceedings this means that it cannot be business as usual, this means that the practitioner may choose to seize certain operation in the best interest of the company.[166]

(c) Employees and Contracts

(i) Employees

An employee is any person that is employed for wages or salary, who works part-time or full-time and has recognised rights. In business rescue an employee may be represented by any trade union[167] or they may represent themselves in their own capacity. Employees are classified as part of affected persons. This means that employees may apply for the commencement of rescue proceedings.[168] The Companies Act 2008 offers substantive protection to the rights of the employees that is specifically their employment contracts.[169] Employees possess the right to participate in the business rescue process, this is to protect their rights and ensure that the process is fair and transparent.

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[162] Ibid.
[163] *Van Jaarsveld No v Q-Civil (Pty) Ltd & another* (675/2017) [2017] ZAFSHC (30 March 2017) para 20.
[164] Section 137 (2) *(b)* of the Companies Act 2008.
[165] Section 137 of the Companies Act 2008.
[166] *Van Jaarsveld* supra note 163 para 21.
[167] Section 128 (1) *(ii)* of the Companies Act 2008.
[168] Section 131 of the Companies Act 2008.
[169] Sections 5 – 7 of the Companies Act 2008.

Termination of employment contracts is not permissible during business rescue. The terms and conditions that existed before commencement of business rescue has to be maintained, unless there is an agreement in the contrary.[170] However s136 (1) *(a)*[171] provided with an exception in the case of commencement of business rescue proceedings. The employees will thus continue to be employed on the same conditions. This is because the aim of business rescue is to protect other stakeholders that may be affected upon liquidation of the company. The Companies Act 2008 mainly seeks to encourage employment and other social-economic benefits derived from the procedure.[172] The business rescue plan is subject to s189 of the Labour Relations Act 66 of 1995[173] which mainly focuses on protecting the rights of the employees. Therefore, the practitioner may not just dismiss employees in a bid to reduce costs.[174]

Employees of a company have a direct and substantial interest towards the company and may apply for a company to be placed under business rescue. In *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others*[175] the court identified the fact that the applicant who were a registered trade union which represented employees, had an automatic right to participate in the proceedings without the need for an order authorising them to do so in terms of s130(4).[176]

Liquidation of a company mostly results in retrenchment which is not beneficial to employees. In a bid to protect the employment contracts s128 of the Companies Act 2008 allows employees to apply for business rescue taking into account their substantial interests in the affairs of the company.[177] In *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Limited*[178] the employees of the company sought relief for business rescue

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[170] Section 136 (1) *(a)* of the Companies Act 2008.
[171] Section 136 (1) *(a) (i) – (ii)* of the Companies Act 2008.
[172] Ibid.
[173] Labour Relations Act 66 of 1995.
[174] B Fleming 'Analysis: Business rescue potential obstacles to employee reduction', available at *https://www.accountancysa.co.za/analysis-business-rescue-potential-obstacles-to-employees-reduction*, accessed on 30 April 2018.
[175] *G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd & others* 2012 (5) SA 515 (GSJ) para 4.
[176] Section 130 (4) of the Companies Act 2008 states that 'each affected person has a right to participate in the hearing of an application in terms of this section'.
[177] WJC Swart 'Business Rescue: Do employees have better (reasonable) prospects of success? Commentary on Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGI Operations Limited (North Gauteng high court, Pretoria (unreported) 2012-05-16 Case no 6418/2011; 18624/2011; 66226/2011; 66226A/11)' (2014) 35 (2) *Obiter* 406.
[178] *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Limited* [2012] ZAGPPHC 359 para 35.

proceedings to be granted. The court went on to state that under the business-rescue regime the right of a creditor to liquidate must be carefully weighed against the interests of other stakeholders in the company. Usually these stakeholders are other creditors, employees and shareholders.

Dismissal of employees during business rescue proceedings is not beneficial to a financially distressed company, taking into account the nature and complexity of legal processes were labour disputes are involved. The dispute may exceed the window period on which the company might have an opportunity to get its way back to sustainability. Chapter 6[179] of the Companies Act 2008 protects employees' rights. In terms of s144[180] it gives employees the right to be formally consulted. It is essential for the rescue practitioner to consult with the employees and other affected persons because not doing so can nullify the rescue plan.[181] Section 148 of the Companies Act 2008 requires the practitioner to formally meet employees within ten working days of being appointed, and thereafter to consult, listen to their concerns and find common ground.[182]

(d) Disadvantages of including employees in business rescue proceedings

In certain instances, it might be difficult for the practitioner to be able to achieve his or her goals due to the strict rules imposed by the Companies Act 2008. During the rescue proceedings, the practitioner may be of the view that it is advantageous to retrench employees in a bid to reduce costs of the company. Additionally Loubser[183], submits that the involvement of the employees in the process of business rescue or allowing employees to bring forward such applications may open the business rescue process to abuse by employees, which would not be ideal for the business and other creditors.

The object of business rescue is to guard against the negative socio-economic consequences associated with liquidation of companies.[184] Liquidation proceedings are a drastic measure and should be used as a measure of last resort. The Companies Act 2008 specifically states that, 'the Companies Act 2008 must be interpreted and applied in a manner that gives effect

[179] Ibid.
[180] Section 144 of the Companies Act 2008.
[181] Ibid.
[182] Fleming op cit note 174.
[183] A Loubser 'The business rescue proceedings in the Companies Act of 2008: concerns and questions (Part 1)' 2010 (3) *TSAR* 509-510.
[184] *Oakdene* supra note 27 para 18.

to the purposes set out in s7.'[185] In *Southern Palace v Midnight Storm Investments*[186] the court held that, the courts in exercising their discretion on whether or not to grant business rescue, it should give weight to the legislative preference for rescuing struggling companies if reasonably possible.

There must be a balance between the competing interests of creditors and employees.[187] In balancing the interests of creditors and employees there are factors to be taken into account that is, the time the creditor already had to wait for the payment of its claim; the attitude of creditors towards proposed business rescue proceedings; and the socio-economic impact the liquidation of a company would have on the employees and the community.[188]

(e) Contracts

During rescue proceedings the rescue practitioner has the power to cancel or suspend entirely, partially or conditionally any provision of an agreement[189] to which the company is party subject to s35A and 35B of the Insolvency Act.[190] Any agreement of employment before commencement of rescue proceedings is excluded. Therefore, this means that the practitioner has the power to cancel any other provision of agreement to the contrary or that may be of disadvantage to the company.

Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, may assert a claim against the company for damages only'. This means that it is the discretion of the practitioner to decide which contract to cancel or suspend, in consideration of the best interests of the company.

In *LA Sport 4X4 Outdoor CC & another v Broadsword Trading 20 (Pty) Limited & others,*[191] the court stated that, "the cancellation of an agreement does not limit the performance of juristic acts and thus cancellation in terms of s133 of the Companies Act 2008 is valid". Section 133[192] provides for a general moratorium on legal proceedings against a company in

[185] Section 7 of the Companies Act 2008.
[186] *Southern Palace* supra note 53 para 22.
[187] *Oakdene* supra note 27 para 12.
[188] Ibid para 15.
[189] Section 136 (2) – (3) of the Companies Act 2008.
[190] Section 35A and 35B of the Insolvency Act.
[191] *LA Sport 4X4 Outdoor CC & another v Broadsword Trading 20 (Pty) Limited & others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) para 43.
[192] Section 133 of the Companies Act 2008.

business rescue.[193] Prior to commencement of business rescue a creditor can lawfully cancel a contract concluded with a company.[194] Although a creditor is generally entitled to lawfully cancel a contract during business rescue, the validity of a specific cancellation turns largely on whether the business rescue practitioner has suspended any obligation in terms of the agreement prior to the notice of cancellation.

V. CONCLUSION

The introduction of business rescue has managed to reduce the complexities and the strict rules that existed in judicial management. Chapter 6 of the Companies Act 2008 has been structured in such a way that is beneficial to a number of players in the business arena, for example close corporations were previously not given a chance to redeem themselves of financial difficulties.

Business rescue is a transparent remedy in that it allows many affected persons to be part of the execution of the rescue plan. Transparency and accountability in rescue proceedings has improved the efficiency and effectiveness of business rescue. Measures have been put in place to curb against any potential abuse of business rescue. Furthermore, due to the tough economic climate, business rescue should be used as an aid to resuscitate the company's insolvent state.

[193] Hogan Lovells 'Cancellation or suspension of agreements during business rescue', available at https://www.hoganlovells.com/en/publications/cancellation-or-suspension-of-agreements-during-business-rescue, accessed on 30 April 2018.

[194] *Cloete Murray No & another v FirstRand Bank* (20104/2014) [2015] ZASCA 39 (26 March 2015) or 2015 (3) SA 438 (SCA) para 1.

CHAPTER THREE

COMMENCEMENT OF BUSINESS RESCUE

I. INTRODUCTION

The commencement of business rescue is of importance as it helps to guard against the collateral damages both economically and socially that may arise from liquidation proceedings.[1] Companies, courts and other interested stakeholders must guard against the consequences of liquidation proceedings where it is reasonably possible.[2] A company may only commence rescue proceedings in compliance with various requirements in the Companies Act 2008. Requirements are of importance and form a substantial part of rescue proceedings.[3]

Business rescue is an important concept in the business arena, weighing the benefits derived from the procedure than liquidation proceedings. Commencement of rescue proceedings is dependent on the financial position of the company. An assessment on whether the company is facing any financial distress is important.[4] Rescue proceedings are dependent on the insolvency test and the test for reasonableness, that is, whether there are any reasonable prospects of successfully rescuing the company.[5] It is vital to note that non-compliance with the requirements when applying for rescue proceedings may render the proceedings null and void.[6]

Business rescue may commence either voluntarily or by way of application by any interested party. Voluntary business rescue this is when the company's directors passes a resolution for commencement of business rescue proceedings. Directors of a company may pass a resolution to place a company under business rescue proceedings if the company is facing any financial distress or if there is a foreseeability that the company may not be able to pay its

[1] A Nortje 'To liquidate or commence business rescue proceedings: Reasonable prospects recovery or not', available at *http://www.polity.org.za/article/to-liquidate-or-commence-business-rescue-proceedings-reasonable-prospects-of-recovery-or-not-2017-02-23,* accessed on 10 July 2018.

[2] Ibid.

[3] Section 130 (1) *(b)* of the Companies Act 2008.

[4] Section 128 of the Companies Act 2008.

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

[6] J Scholtz 'Commencement of business rescue proceedings', available at http://succeedblog.co.za/JoubertScholtz/?p=455, accessed on 10 July 2018.

debts for the next six months[7]. On the other hand, business rescue by court order is when any interested party applies for business rescue proceedings to begin[8].

An application for business rescue by court order may thus terminate any liquidation proceedings if the court has a reasonable basis to believe that there are any reasonable grounds.[9] Companies should not use business rescue as a mere basis to avoid meeting their financial obligations owed to creditors.[10] There is need for concrete information that support the application for business rescue. Therefore, information provided should show the reasonable grounds that exists and the true financial situation of the company.[11] In *Propspec Investment (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another*,[12] the court held that, "mere speculation and vague averments would not suffice for business rescue proceedings. A factual foundation is required for the existence of a reasonable prospect to be established".

(a) Goals for commencement of business rescue proceedings

The Companies Act 2008 tries to facilitate an effective and efficient mechanism to ensure rescue and recovery of a financially distressed company into financial solvency, in a manner that will benefit to all interested stakeholders.[13] Hence, commencement of business rescue proceedings promotes the development of the South African economy by helping financially struggling companies.[14]

The goal of business rescue is to make the procedural and financial barriers that existed under judicial management to be relatively low.[15] Therefore, upon satisfaction of the requirements prescribed by the Companies Act 2008 commencement of the rescue proceedings is easier. Commencement of rescue proceedings gives leeway to temporary supervision of the company affairs and property.[16]

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[7] Section 129 of the Companies Act 2008.
[8] Section 131 of the Companies Act 2008.
[9] Ibid.
[10] J Bell & J Barnett 'South Africa: Business Rescue: open for abuse?' available at *http://restructuring.bakermckenzie.com/2017/01/11/south-africa-business-rescue-open-for-abuse/, accessed 10* July 2018.
[11] Section 131 (1) of the Companies Act 2008.
[12] *Propspec Investment (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 11.
[13] Section 7 *(k)* of the Companies Act 2008.
[14] Section 7*(b)* of the Companies Act 2008.
[15] G Cremen 'Business rescue: the South African perspective', available at *https://solidariteit.co.za/en/business-rescue-south-african-perspective/* , accessed on 24 July 2018.
[16] Section 128 (1) *(b) (i)* of the Companies Act 2008.

Additionally, the unemployment rate in South Africa is currently relatively high.[17] In a bid to curb against the effects of termination of employment contracts, business rescue is a better remedy the company may use. Social benefits are attainable by ensuring preservation of employment contracts.[18] Business rescue prohibits termination of employment contracts prior to commencement of rescue proceedings. Hence, the company should avoid drastic consequences that follow liquidation proceedings. One of the consequences of liquidation is termination of employment contracts.[19]

Moreover, the goal of business rescue is the development and implementation of a successful rescue plan by conducting a thorough investigation that can show the loopholes that exists within the company.[20] Commencement of rescue proceedings allows the rescue practitioner an opportunity to investigate the affairs of the company and provide with permanent successful solutions.[21]

The courts have emphasised on the importance of the procedure economically and socially. In *Redpath Mining South Africa (Pty) Ltd v Marsden NO & others* the court also pointed out some of the major goals of business rescue, for example business rescue aims at protecting financially distressed companies temporarily and also aims at rescuing companies in an environment that is not stalled by litigation.[22] Even though business rescue mainly aims at resuscitation of normal business activities, in certain instances it aims at selling property at a much fair price than it may get in the case of liquidation.

II. VOLUNTATY BUSINESS RESCUE APPLICATION

Voluntary business rescue is when the board of directors passes a resolution placing the company under business rescue proceedings[23]. A resolution to commence business rescue is only permissible when the directors have reasonable grounds to believe that the company is facing any financial distress[24]. The directors have to make a formal decision in the best

[17] M Masutha op cit note 50.
[18] Section 7 *(d)* of the Companies Act 2008.
[19] 'What is insolvency', available at *https://corporatebusinessrescue.co.za/insolvency/* , accessed on 24 July 2018.
[20] Section 128 (1) *(b) (iii)* of the Companies Act 2008.
[21] Section 141 of the Companies Act 2008.
[22] *Redpath Mining South Africa (Pty) Ltd v Marsden NO & others* (18486/2013) [2013] ZAGPJHC 148 paras 43 and 70.
[23] Section 129 (1) of the Companies Act 2008.
[24] Section 129 (1) *(a)* of the Companies Act 2008.

interests of the company. However, the resolution is not permissible when liquidation proceedings have commenced[25].

A resolution to commence rescue proceedings is permissible once the company adheres to the requirements stipulated by the Companies Act 2008.[26] Non-compliance with statutory requirements for adoption of the resolution results in lapsing and nullity of the resolution.[27] The question that arises is whether the requirements stipulated in s129 of the Companies Act 2008 are either procedural or substantive requirements. In *Panamo Properties (Pty) Ltd v Nel & another,*[28] the directors of the company took a resolution to commence with business rescue proceedings. The reason for business rescue application was to avoid execution of the company's property by the Bank.[29]

The granting of rescue proceedings could enable the company to find alternative sources of finance to discharge the company's debt. The business practitioner then sold the property in compliance with the business rescue. The respondent contended non-compliance with the procedural requirements stipulated in s129[30] and thus the business rescue becomes invalid in its entirety.[31] The court held that, 'the passing of a resolution to commence business rescue cannot be readily described as a procedural requirement'. Hence, s129 of the Companies Act 2008 forms a substantial ground to deny or accept the resolution to commence rescue proceedings.

(a) Requirements for commencement of rescue proceedings

There must be reasonable grounds to believe that the company is in financial distress. This means that mere speculation does not warrant passing of a resolution to commence rescue proceedings.[32] Reasonable grounds imply that credible evidence should be the basis for the claim. The grounds should lead any ordinary person of sensible judgement to believe that the application is credible, and warrants acceptance of the application.[33]

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[25] Section 129 (2) *(a)* of the Companies Act 2008.
[26] Section 129 of the Companies Act 2008.
[27] Section 129 (5) *(a)* of the Companies Act 2008.
[28] *Panamo Properties (Pty) Ltd v Nel and another* 2015 (5) SA 63 (SCA) para 4.
[29] Ibid.
[30] Section 129 of the Companies Act 2008.
[31] *Panamo* supra note para 8.
[32] *Propspec* supra note 12 para 11.
[33] 'What are reasonable grounds', available at *http://justiceofthepeace.org.nz/site/jpfed/files/JP_IssuingOfficers_20120615/sections/considering-the-application/what-are-reasonable-grounds.html*, accessed on 25 July 2018.

Furthermore, it must be relatively clear that there are reasonable prospects of rescuing the company. An assessment of whether there exists any reasonable prospect is an important factor that the courts take into account in rescue proceedings.[34] The practitioner has to establish the existence of the prospects by conducting a thorough investigation on the affairs of the company.[35] In *Oakdene Square Properties v Farm Bothasfontein (KYALAMI)*[36] the court held that, a high threshold of proof is required in either voluntary business rescue or business rescue by court order. The courts needs to assess whether there are reasonable prospects of business rescue succeeding.[37] Business rescue commence upon approval of the business rescue plan, satisfaction of the requirements in terms of the Companies Act 2008 and when there are reasonable prospects of success.[38]

Additionally, a resolution to commence rescue proceedings is only permissible when the company is not undergoing any liquidation proceedings. Thus, this means that the board of directors may not initiate adoption of a resolution once liquidation proceedings have begun.[39] However, there have been uncertainties as to what 'initiated' means. It is uncertain whether the word 'initiate' has the same meaning as 'commenced.'[40] The case however might be different in cases where commencement of business rescue was through application or by court order.[41] In *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd,*[42] the court considered the interpretation of the word 'initiated' as used in s129 (2) of the Companies Act 2008. The court held that the Companies Act 2008 bars a company from initiating business rescue proceedings by means of a company resolution once 'liquidation proceedings had been initiated by or against the company'.

The company has a statutory obligation to publish a notice of the resolution, and its effective dates, within five business days.[43] The notice of resolution should contain a sworn statement that stipulates the reasons and the grounds that motivated adoption of the resolution.[44] All affected persons have a right to receive such a resolution.[45] Moreover, within five days the

[34] Section 129 (1) *(b*) of the Companies Act 2008.
[35] Section 141 (1) of the Companies Act 2008.
[36] *Oakdene Square Properties v Farm Bothasfontein (KYALAMI)* 2012 (3) SA 273 (GSJ) para 13.
[37] Ibid.
[38] Section 131(4) *(a)* - *(b)* of the Companies Act 2008.
[39] Section 129 (2) *(a)* of the Companies Act 2008.
[40] D Davis, A Loubser et al *Companies and other Business Structures in South Africa* 3 ed (2013) 238.
[41] Section 131 (8) of the Companies Act 2008.
[42] *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 256 (KZD) para 17.
[43] Section 129 (3) of the Companies Act 2008.
[44] Section 129 (3) *(a)* of the Companies Act 2008.
[45] Ibid.

company must appoint a rescue practitioner that satisfies the statutory requirements of s138 of the Companies Act 2008.[46] Within two business days, the company has to publish a notice of appointment of the rescue practitioner[47] and any affected person has the right to receive a copy the appointment of the rescue practitioner, within five business days.[48]

(b) Objections to the resolution to commence business rescue

The resolution adopted by the board of directors is not automatically binding on the stakeholders of the company.[49] Any affected person may apply for the setting aside of the resolution subject to s152 of the Companies Act 2008. Reasonable grounds are required to enable the courts to successfully set aside the resolution. The resolution is set aside if there is no reasonable basis to regard the company as being in financial distress.[50] One of the important considerations that enables the courts to grant commencement of business rescue is whether there are any reasonable prospects of rescuing the company.[51] Lastly, in terms of s129[52] failure to comply with the requirements set out will result in the lapsing and nullity of the resolution. Therefore, this implies that the procedural requirements stipulated in s129[53] are of importance; hence, any affected person may launch an application to set aside the resolution based on non-compliance with the procedural requirements.[54]

However, a director who voted in favour of the adoption of the resolution to commence business rescue may not apply for the setting aside of such a resolution[55] and may not apply to set aside appointment of an appointed rescue practitioner.[56] However, the court may grant such an application if the court is satisfied that the director by applying for setting aside of the resolution he or she will be acting in good faith or for the best interests of the company.[57]

Any interested party may file an application to set aside the resolution to commence business rescue. There is no rational reason for such a distinction. The relevant sections contained in chapter 6 of the Companies Act 2008 states that a substantial degree of urgency is clear once

[46] Section 129 (3) *(b)* of the Companies Act 2008.
[47] Section 129 (4) *(a)* of the Companies Act 2008.
[48] Section 129 (4) *(b)* of the Companies Act 2008.
[49] Section130 (1) of the Companies Act 2008.
[50] Section 130 (1) *(a) (i)* of the Companies Act 2008.
[51] Section 130 (1) *(a) (ii)* of the Companies Act 2008.
[52] Section 129 of the Companies Act 2008.
[53] Ibid.
[54] Section 130 (1) *(a) (iii)* of the Companies Act 2008.
[55] Section 130 (2) *(a)* of the Companies Act 2008.
[56] Section 130 (2) *(b)* of the Companies Act 2008.
[57] Ibid.

a company has decided to adopt the resolution beginning rescue proceedings.[58] The purpose of s129 (5)[59] is very plain and direct. There can be no argument that substantial compliance can never be sufficient in the given context. If there is non-compliance with s129 (3) or (4),[60] the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to 'substantial compliance'.

In *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd & others (Golden Dividend)*[61] the respondent, Golden Dividend, had applied for voluntary business rescue by a resolution, and the majority of the creditors approved the rescue plan. Absa launched an application for an order that the business rescue plan was invalid. The argument of the applicant was that the company did not pass a board resolution to place the company under business rescue. Moreover, there was non-compliance with the statutory requirements pertaining to the publication of the rescue plan within the prescribed period. Additionally, there were no reasonable prospect for rescuing the company. The court held that the contention was unnecessary because it was only a way to avert business rescue in its totality to serve its own interests.[62] Therefore, setting aside the resolution for non-compliance with any of the statutory requirements provisions under s129 of the Companies Act 2008 could not suffice.

The Companies and Intellectual Property Commission[63] (hereafter referred to as Commission) deals with applications for business rescue initiated by way of company resolution.[64] Any interested party may challenge passing of a resolution to commence business rescue proceedings at any time after and before implementation of the business rescue plan. Additionally, the preconditions for the passing of such a resolution should be present.[65]

If there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity and is liable to be set aside under s130 (1) *(a) (iii)*.[66] Availability of this provision eliminates absurdity that would arise from trivial non-compliance with a time. For example, the appointment of a business rescue

[58] Section 129 (7) of the Companies Act 2008.
[59] Section 129 (5) of the Companies Act 2008.
[60] Section 129 (3) – (4) of the Companies Act 2008.
[61] *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd & others* 2015 (5) SA 272 (GP) para 5.
[62] Ibid.
[63] 'The Companies and intellectual property commission, Republic of South Africa', available at *http://www.cipc.co.za/za/*, accessed on 03 May 2018.
[64] *Panamo* supra note 25 para 10.
[65] Ibid.
[66] Section 130 (1) *(a) (iii)* of the Companies Act 2008.

practitioner one day late as a result of failure by Commission[67] to licence the practitioner timeously in terms of s138 (2),[68] may bring about the termination of the business rescue. In *Panamo Properties v Nel* the court had to decide whether non-compliance with statutory requirements would nullify a resolution to commence rescue proceedings. The court held that the business rescue resolution by the directors must comply with s129[69] and that s129 of the Companies Act 2008 must be in context with s130.[70] The SCA adopted a purposive approach and channelled a way to interpret certain provisions in Chapter 6 of the Companies Act 2008 in the future.[71] According to Hogan Lovells, "the SCA clarified certain provisions of Chapter 6 dealing with business rescue proceedings with which our courts have been grappling since its inception."[72] However, this judgement may yield deep implications for the business rescue industry.[73]

In *Panamo Properties v Nel*[74] the court held that the consequence of an improperly constituted board of directors would be that the resolution was not a resolution of the board of directors. Therefore, this may result in nullity and ineffectiveness for commencement of business rescue proceedings. Hence, equally in the absence of a resolution, there was nothing to set aside in terms of s 130(1) *(a) (iii*) of the Companies Act 2008.[75] A declaration that does not uphold the effect of the statutory provision for non-compliance with the requirements would be contrary to s130 (1) *(a) (iii)*.[76]

In addition, nullity of the resolution to commence business rescue would only be applicable if there is non-compliance with the requirements. In *Newton Global Trading v Corte*[77] the court held that nullity dates back to the date of the original resolution and thus not replaceable by any further resolution.[78] This means that once a resolution faces nullity the proceedings should not proceed and the directors may not come up with another resolution in order to rectify the first resolution.[79]

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[67] CIPSA op cit note 59.
[68] Section 138 (2) of the Companies Act 2008.
[69] Section 129 of the Companies Act 2008.
[70] Section 130 of the Companies Act 2008.
[71] Hogan Lovells 'Hot off the business rescue press', available at *https://www.hoganlovells.com/en/publications/hot-off-the-business-rescue-press,* accessed on 03 May 2018.
[72] Ibid.
[73] Ibid.
[74] *Panamo Properties* supra note 28 para 22.
[75] Ibid.
[76] Section 130 (1) *(a) (iii)* of the Companies Act 2008.
[77] *Newton Global Trading v Corte* [2014] ZAGPPC 668 para 12.
[78] Section 129 (5) *(b)* of the Companies Act 2008.
[79] *Panamo Properties* supra note 28 para 9.

III. BUSINESS RESCUE BY COURT ORDER

The courts may place a company under temporary supervision or commencement of rescue proceedings when an affected person applies for such proceedings.[80] The applicant may serve a copy of such an application on the company and Commissioner.[81] The applicant must notify any other affected persons of the application in accordance with the prescribed manner.[82] The Companies Act 2008 affords every affected person with the right to participate in the hearing of the application;[83] this is to afford transparency and fairness of the procedure.

An affected person in terms of s128[84] refers to a shareholder or creditor of the company, a registered trade union representing employees of the company or the representatives of employees not affiliated to a trade union.[85] It may happen that affected persons would wish to approach the court with an application to commence business rescue proceedings after liquidation proceedings had already commenced.

An affected person does not need leave of the court in order to intervene and make applications for business rescue. The application to commence business rescue proceedings in terms of s131 (1)[86] can be initiated also on an ex parte basis. This means that application may be by employees, shareholders, sole shareholders, creditors, and directors of the company as affected persons.

(a) Requirements for a court order to commence rescue proceedings

An order granting commencement business rescue proceedings may only be permissible once there is compliance with the requirements stipulated in s131 (4).[87] The court may only grant an application for commencement of business rescue when the court is satisfied that the company is undergoing financial distress.[88] Financial distress refers to when a company is reasonably likely to be unable to pay its debts payable within six months[89] or when within a

[80] Section 131 (1) of the Companies Act 2008.
[81] Section 131 (2) *(a)* of the Companies Act 2008.
[82] Ibid.
[83] Section 131 (3) of the Companies Act 2008.
[84] Section 128 of the Companies Act 2008.
[85] Section 129 of the Companies Act 2008.
[86] Section 131 (1) of the Companies Act 2008.
[87] Section 131 (4) of the Companies Act 2008.
[88] Section 134 (4) *(a) (i)* of the Companies Act 2008.
[89] Section 128 (1) *(f) (i)* of the Companies Act 2008.

period of six months the company is likely to become insolvent.[90] This implies that a company that is already at the verge of bankruptcy or insolvency may not qualify for an application for commencement of rescue proceedings. Reasonable likelihood implies that there must be a rational basis for reaching such a decision that the company may not be able to pay its debt within the next six months.[91]

Furthermore, the court may grant an application if it is satisfied that the company has failed to meet its financial obligation that is, paying over any amount in terms of a public regulation, contract etc[92]. Contracts form an important part in the business arena. The main aim of the legislation is to offer protection of other parties before worsening of the financial position of the company.

Moreover, the court grants an application to commence rescue proceedings if it is satisfied that there are just and equitable reasons to allow commencement of rescue proceedings for financial reasons.[93] *In Oakdene Square Properties v Farm Bothasfontein,*[94] the court held that financial reasons must relate to a situation where there must be financial basis to support business rescue and which will be in the best interest of all interested stakeholders. The courts in so doing must consider the competing interests when deciding a business rescue order. It is just and equitable to ensure protection of the employment contracts, creditors rights and other affected persons rights.[95] It is justifiable for courts to prefer commencement of rescue proceedings in place of liquidation proceedings.[96] The aim of the Companies Act 2008 is to ensure that there are reasonable prospects of successfully rescuing the company.[97] The courts may have to consider various factors to help determine whether there are any reasonable prospects to rescue the company.[98]

In addition, when the court grants the application to commence rescue proceedings, it may appoint an interim rescue practitioner.[99] The practitioner must satisfy the requirements

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[90] Section 128 (1) *(f) (ii)* of the Companies Act 2008.

[91] J Erasmus 'The Companies Act: when is a company financially distressed and what does it mean?' available at *https://www2.deloitte.com/za/en/pages/governance-risk-and-compliance/articles/financial-distress.html,* accessed on 26 July 2018.

[92] Section 131 (4) *(a) (ii)* of the Companies Act 2008.

[93] Section 131 (4) *(a) (iii)* of the Companies Act 2008.

[94] *Oakdene* supra note 36 para 17.

[95] Ibid para 7.

[96] Ibid.

[97] Section 131 (4) *(a) (iii)* of the Companies Act 2008.

[98] *Southern Palace Investment 265 (Pty) Ltd v Midnight Storm Investment 386 Limited & others* 2012 (2) SA 423 (WCC) para 24. See also *Oakdene* supra note 36 para 18.

[99] Section 131 (5) of the Companies Act 2008.

stipulated in s138.[100] However, the appointment of the practitioner is subject to ratification by holders of majority creditors' voting interests in terms of s147 of the Companies Act 2008.[101]

IV. CONVERSION OF LIQUIDATION PROCEEDINGS INTO BUSINESS RESCUE

Liquidation proceedings refers to a process whereby a company enters into voluntary winding[102] or whereby a court initiate commencement of liquidation proceedings.[103] A company that is insolvent or declared insolvent may commence liquidation proceedings. Hence, the company may not adopt a resolution to commence business rescue when a company is on the verge of bankruptcy and incapable of meeting its financial obligations. However, successful application for commencement of rescue proceedings by court order suspends the liquidation proceedings.[104]

Application for commencement of rescue proceedings suspends the liquidation proceedings until the courts have adjudicated upon the rescue proceedings application.[105] Therefore, a mere application for rescue proceedings would suspend the liquidation proceedings.[106] An application for business rescue in terms of s131 (6) of the Companies Act 2008 would suspend any liquidation proceedings if a provisional or final order was previously granted.[107]

In terms s136 (4) of the Companies Act 2008 if liquidation proceedings have been converted into business rescue proceedings. The liquidator is a creditor of the company to the extent of any outstanding amounts owing to him or her for any remuneration due for work performed, or compensation for expenses incurred before the commencement of business rescue proceedings.[108]An assessment on whether there is a reasonable prospect to rescue the company and the insolvency test should be the basis for commencement of the proceedings either by resolution or by court order.[109] During this process, the court restricts any action or

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[100] Ibid.
[101] Ibid.
[102] Section 79 (1) *(a) (i) – (ii)* of the Companies Act 2008.
[103] Section 79 *(b)* of the Companies Act 2008.
[104] Section 131 (6) of the Companies Act 2008.
[105] Section 131 (6) *(a)* of the Companies Act 2008.
[106] *ABSA Bank Ltd v Summer Lodge (Pty) Ltd, ABSA Bank Ltd v JVL Beleggings (Pty) Ltd.* See also *ABSA Bank Ltd v Earthquake Investments (Pty) Ltd* 2014 (3) SA 90 (GP) para 18.
[107] H Stoop 'When does an application for business rescue proceedings suspend liquidation proceedings?', (2014) 47 (2) *De Jure* 329.
[108] B Van Niekerk 'Launching business rescue application in liquidation proceeding- (successfully) flogging a dead horse?' available at *http://www.derebus.org.za/launching-business-rescue-applications-liquidation-proceedings-successfully-flogging-dead-horse/*, accessed on 1 June 2018.
[109] J Rushworth op cit 5 at 375.

court proceedings by third parties, against the company's property and against any liquidation proceedings.

In *ABSA Bank Ltd v Summer Lodge,*[110] the applicant applied for the liquidation of the three respondents who were insolvent. Moreover, there was an application to place the company under business rescue proceedings by affected persons, in terms of s131 of the Companies Act 2008. Therefore, the court had to decide on whether to grant liquidation proceedings in terms of s131 (6)[111] or to grant commencement of rescue proceedings. The court considered the ordinary grammatical meaning of the words 'liquidation' and 'proceedings' and concluded that 'liquidation proceedings in s131 (6) of the Companies Act 2008 deals with the actual process of winding-up by the liquidator after the winding-up order has been granted'.[112]

Where a company has been placed under liquidation, any interested person in terms of s128 (1) (*d*)[113] may apply for business rescue proceedings to ensue then the liquidation may be set aside for consideration of the business rescue application. In *Richter v Bloempro CC*[114] confirmed this by stating that the courts seem to accept that an application for business rescue will serve to suspend liquidation proceedings even after granting of a final liquidation order and the company placed in the hands of the liquidator(s). However, the Companies Act 2008 seeks to avoid a doctrine that would allow debtor companies to use business rescue proceedings in a deceitful manner in order to defraud or frustrate their creditors

The SCA held that where it is evident that there are prospects of rescue for a financially distressed company during liquidation there is no reason for a court to deny business rescue. In the event that business rescue would yield a better return for shareholders, creditors and retaining of jobs, then the courts should grant an order for commencement of business rescue even though a final liquidation order is in place.[115] Therefore, the courts should suspend the liquidation proceedings when it is in the best interests for the courts to suspend such proceedings.

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[110] *ABSA Bank* supra note 106 para 4.

[111] Section 131 (6) of the Companies Act 2008.

[112] Stoop op cit 104 at 330.

[113] Section 128 (1) *(d)* of the Companies Act 2008.

[114] *Richter v Bloempro CC* (69531/2012) [2014] ZAGPPHC 120; 2014 (6) SA 38 (GP) (14 March 2014) para 18.

[115] L Lewis 'Is business rescue possible after liquidation', available at *www.polity.org.za/article/is-business-rescue-possible-after-final-liquidation-2015-07-03*, accessed on 4 May 2018.

However, H Stoop submits that the decision is not a very desirable outcome and the divergent stance taken.[116] The process may be subject to abuse especially from companies that are under any liquidation proceedings, in a bid to delay the process in general. The main aim of business rescue proceedings is to ensure preservation of jobs during and after the process, to benefit other interested stakeholders from the process. The main aim is to uphold the intention of the legislation in the implementation of business rescue in the Companies Act 2008.

A company may thus not pass any resolution to place itself under liquidation proceedings until the rescue proceedings have terminated in terms of s132 (2) of the Companies Act 2008.[117] Any affected person must be notified of the suspension of liquidation proceedings and commencement of rescue proceedings within five business days.[118]

V. GENERAL MORATORIUM ON LEGAL PROCEEDINGS AGAINST A COMPANY

Business rescue proceedings suspend any legal proceedings against the company and this includes any enforcement action against the company in relation to any property in lawful possession of the company.[119] The 'general moratorium', is some form of protection granted to companies under rescue proceedings in a bid to protect the interests of the company temporarily. The moratorium is important because it places a provisional hold on the enforcement of creditor rights against the debtor.[120]

The company is subject to the authority of the rescue practitioner and this implies that in order for every decision to be valid it needs ratification of the practitioner; otherwise, such a decision is invalid. Hence, in order for any legal proceedings to be valid the written consent of the rescue practitioner is of importance.[121] In certain instances, legal proceedings are permissible with the leave of the courts.[122] The courts may grant such leave if there are any reasonable grounds to permit the legal proceedings against the company. The courts have the duty to balance out the interests and rights of the parties involved, thus the courts have to uphold the statutory duty placed on them.[123]

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[116] Stoop op cit note 107 at 329.
[117] Section 131 (8) *(a)* of the Companies Act 2008.
[118] Section 131 (8) *(b)* of the Companies Act 2008.
[119] Section 133 (1) of the Companies Act 2008.
[120] H Beukes 'Business rescue and the moratorium on legal proceedings' (2012) *De Rebus* 34
[121] Section 133 (1) *(a)* of the Companies Act 2008.
[122] Section 133 (1) *(b)* of the Companies Act 2008.
[123] Section 5 of the Companies Act 2008.

The Companies Act 2008 provides an exception with regards to set off against any claim made by the company in any legal proceedings. Any set off is permissible, regardless of whether such set off was before or after proceedings had commenced.[124] Additionally, the moratorium does not stop any criminal proceedings in relation to the company, its directors or officers because it is not in the interest of justice for the courts to interfere in such proceedings.[125] Interpretation of the Companies Act 2008 should be in a way that would promote provisions in s7*k*[126] and in terms of s39 (2) of the Constitution of the Republic of South Africa.[127]

The Companies Act 2008 tries to value and place importance on the interests and rights of the affected parties. The temporary moratorium against a company under business rescue is effective upon commencement of business rescue proceedings.[128] According to Tsusi, "there is an automatic and general moratorium on legal proceedings or executions against the company, its property, assets and on the exercise of the rights of creditors of the company".[129]

The Companies Act 2008 makes a distinction between the company's rights and property rights. In *Murray N.O & another v FirstRand Bank Ltd t/a Wesbank*[130] it gave an interpretation on what s133 of the Companies Act 2008 entails and the court made a distinction between real and personal rights. A court may not allow the use of moratorium in the case were there has been an illegal occupation of a property in any circumstances. There must be a balance between rights. The rights of the company must not take precedent were it does not have a right over the property.

This means that the legal moratorium is applicable effectively when the company has a real right and ownership of the property. The court recognised the importance of a general moratorium as it allows for business rescue proceedings to go smoothly without any other legal interference that may be costly to the company. The court went on to state that where an application involves rei vindicatio against a company undergoing business rescue, the court

[124] Section 133 (1) *(c)* of the Companies Act 2008.
[125] Section 133 (1*(d)* of the Companies Act 2008.
[126] Section 7 of the Companies Act 2008.
[127] Constitution of the Republic of South Africa, 1996.
[128] R Tsusi 'Interpretation of s133 (1) of the Companies Act 71 of 2008: The principle redefined under business rescue' (2015) 51 *De Rebus* 20.
[129] FHI Cassim *Contemporary Company Law* (2012) 2ed 878.
[130] *Murray N.O and Another v FirstRand Bank Ltd t/a Wesbank* [2015] (3) SA 438 (SCA) 39 para 13.

in those circumstances may allow such a legal proceeding against the company.[131] Rei vindication this refers to an application seeking to recover property or a real right. The court may not enforce any contractual obligation or any personal right.

Therefore, these sections make it clear that during business rescue proceedings no person may exercise any right in respect of any property in the lawful possession of the company, unless the practitioner consents to this in writing. Section 136(2)[132] makes it clear that a contract excluded prior to the commencement of the business rescue proceedings is not suspended or cancelled by virtue of the business rescue. However, the practitioner may suspend, or apply to the court, to cancel any obligation of the company under the contract.[133]

In *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others,*[134] the court was of the view that the courts must guard against abuse of the moratorium where a company is in unlawful possession of a property. Legislation was plain and clear on how to deal with actions in relation to property 'not lawfully' in the possession notwithstanding the moratorium.

This means that any possession of a property by the company on which it does not have any real right on, is an unlawful possession thus not protected by the law.[135] Therefore, the purpose of the provision was to give breathing space to the practitioner to get the company's financial affairs back to normal. General moratorium affects any persons who supplies any goods, services or inputs. There must be continuation of supply of the goods and services if they are essential to the conduct of the business by management. However, this must be subject to the same conditions before the proceedings, except the court orders otherwise.[136] The procedure must be in such a way that would not violate or prejudice the supplier in the end.

Section 133(1)[137] helps to protect a company under business rescue against claims from creditors, up until the rescue proceedings terminate. The main aim of the Companies Act 2008 is to prevent the practitioner from being overwhelmed with legal proceedings without sufficient time within which to consider whether the company should resist them.

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[131] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Another* (16139/2015) [2015] ZAWCHC 174 para 28.

[132] Section 136 (2) of the Companies Act 2008.

[133] Ibid.

[134] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd & others* 2016 (6) SA 448 (KZD); [2016] 3 All SA 813 (KZD) para 11.

[135] D Matlala 'Business rescue – moratorium on legal proceedings against a company' (2017) *De Rebus* 40.

[136] S Kopel *Guide to Business Law* 4 ed (2009) 322.

[137] Section 133 of the Companies Act 2008.

Furthermore, the statutory provisions governing business rescue helps to protect the company from further legal proceedings or litigation while it tries to recover from its financial woes.[138] In *Merchant West Working capital solutions v Advanced technologies and engineering company (Pty) Ltd & another (Merchant)*[139], the court held that section 133(1) of the Companies Act 2008 allows for a complete moratorium. The courts may not permit 'legal proceedings' including any 'enforcement action' against a company under rescue proceedings because of the protection offered by the moratorium. One of the objects of the Companies Act 2008 is to provide for efficient rescue of financially distressed companies.[140]

(a) Effects of moratorium in employment related disputes

Section 5(1) of the Companies Act 2008 requires that interpretation and application of the Companies Act 2008 should be in a manner that gives effect to the purposes set out in s7[141] in order to balance out the rights of any interested persons and in particular, any stakeholders involved. Employees are affected persons in terms of the Companies Act 2008. A debate is essential in determining whether business rescue proceedings also affect any arbitration proceedings.

Business rescue proceedings does not terminate employment contracts that where in existence before the commencement of the proceedings.[142] The employees contracts remains bound by the same conditions that existed before commencement of rescue proceedings.[143] However, these contracts are subject to exceptions in terms of the Companies Act 2008.[144] First, the contracts are subject to any changes in the regular progress of attrition.[145] Secondly, the employer and employee may reach a consensus on different terms and conditions between the employee and the company. However, the terms and conditions agreed on are subject to the labour laws.[146]

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[138] *Chetty v Hart* (20323/14) [2015] SA 112 SCA (4 September 2015) para 39.
[139] *Merchant West Working capital solutions v Advanced technologies and engineering company (Pty) Ltd and another* 2013 (1) SA GNP 109 para 60.
[140] Preamble of the Companies Act 2008.
[141] Section 7 of the Companies Act 2008
[142] Section 136 (1) *(a)* of the Companies Act 2008.
[143] Ibid.
[144] Section 136 (1) *(a) (i) – (ii)* of the Companies Act 2008.
[145] Section 136 (1) *(a) (i)* of the Companies Act 2008.
[146] Ibid.

Moreover, in *Chetty v Hart*[147] the court had to decide on the meaning of legal proceedings in relation to arbitration. The question before the courts was, "whether arbitration proceedings fall within the general moratorium on legal proceedings against a company under business rescue in s133 (1)." The court held that the phrase legal proceeding is dependent on the context within which it is used, and must be interpreted more restrictively or broadly, to include proceedings before other tribunals including arbitral tribunals.[148] This means that moratorium does not only apply on legal proceedings but even on arbitrary proceedings.

In *Sondamase & another v Ellerine Holdings Limited (in business rescue) & another,*[149] the court was in support of the *Chetty* decision. The court held that the provisions of the Companies Act 2008 concerning moratorium were clear. The Companies Act 2008 offers such protection to the company and helps to create some breathing space to the business and allow the successful rescue of the business.

Moratorium on legal proceedings exists to protect the company from unnecessary legal proceedings that may strain the company even more. However, it the court's duty to ensure that the concept is not susceptible to abuse. In *Kythera Court v Le Rendez-Vous Café CC & another,*[150] the court was of the view that 'moratorium' is not actually applicable to all legal proceedings and enforcement actions. The moratorium is not applicable in two instances that is in terms of s136 (2) and s133 (1) of the Companies Act 2008.[151]

VI. COSTS OF BUSINESS RESCUE

The feasible success of rescue proceeding is dependent on financial assistance. There are many sources under which a company in rescue proceedings may obtain financial assistance e.g. banks. Hence, financial assistance is a critical component of the business rescue plan, as

[147] *Chetty* supra note 138 para 35.
[148] Ibid para 35.
[149] *Sondamase & another v Ellerine Holdings Limited (in business rescue) & another* Unreported Case (C669/2014) [2016] ZALCCT 53 (22 April 2016) para 11.
[150] *Kythera Court v Le Rendez-Vous Café CC & another* 2016 (6) SA 63 (GJ) para 16.
[151] J Jones & J Matthews 'Saved at the expense of others: Company Law' (2016) 16 (9) *Without Prejudice* 11. *'In terms of s136 (2) where a business rescue practitioner has not suspended the obligations of the tenant under a lease and the landlord had validly cancelled the lease due to non-payment, the landlord may bring ejectment proceedings to evict the tenant, despite being in business rescue and when the business is not in lawful possession of the property in terms of s133 (1).'*

it helps in meeting short-term trade obligations, covering turnaround and restructuring costs, and restoring the company's balance sheet to solvency.[152]

The Companies Act 2008 has a limited breakdown concerning all costs incurred during rescue proceedings. However, the Companies Act 2008 only refers to the rescue practitioner costs in detail. In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd & others*[153] the court pointed out the fact that the Companies Act 2008 does not contain any express provision that addresses the issue of all costs associated with business rescue. However, it was held that the mere absence of express provision for the court to make a cost order does not mean that the court does not have the power to grant such an order. This is because it is part of the court's inherent powers to make such orders in terms of common law or under express statutory authority.[154]

The courts have to consider various factors into account before granting business rescue costs. This allows the court to weigh out whether such costs would worsen the financial position of the company. In *Nedbank v Bestvest*[155] the court laid out the factors that needed consideration for granting of any business rescue costs, that is:

- "Brief reasons for the company finding itself commercially insolvent.
- What reasonable costs will be of bringing the building the building to completion in order that it can be commercially viable?
- What are the prospects of raising the finances needed to complete the building?
- How best the building, when completed, can attain commercial viability e.g. whether it can be developed as a sectional title block or given a letting agent for the procurement of commercial and/ or residential tenants or sold to a prospective purchaser."

Business rescue's aim is to save significant costs. Saving costs enables financially distressed companies to opt for business rescue as a viable alternative and apply for liquidation as a measure of 'last resort'.[156]

In *Diener v Minister of Justice*[157], the court considered whether the costs for professional services rendered by a business rescue practitioner had to be included and deemed as administration costs in the liquidation.

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[152] W Du Preez 'Post commencement finance: The silver bullet for business rescue?' available at *http://www.deloitteblog.co.za/post-commence-finance-the-silver-bullet-for-business-rescue/*, accessed on 15 May 2018.

[153] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd & others* 2011 (5) SA 600 (WCC) para 5.

[154] Ibid.

[155] [2012] 4 All SA 103 (WCC) para 43.

[156] *Merchant* supra note 139 para 4.

[157] *Diener v Minister of Justice* (926/2016) [2017] SCA 180.

(a) Post-commencement finance

The ability to raise funds during rescue proceedings determines the success rate of rescue proceedings. The ability to raise funds should facilitate continual operation of the company.[158] Money regarded as post-commencement finance includes, any remuneration, reimbursement expenses or money relating to employment that has become due and payable during rescue proceedings but not paid.[159] Post-commencement finance is subject to a preference order set out in Section 135 (3) (b) of the Companies Act 2008.[160]

The company may negotiate with the existing creditors to take a loan or debt before the commencement of the rescue proceedings in order for adequate finances to be available during the rescue proceedings.[161] There are certain business activities that require funding e.g. insurance, goods and services from suppliers, labour cots etc. This is to sustain the business as a going concern.[162] Therefore, certain business activities are imperative to obtain source of finance.

Most companies struggle with raising post commencement finance this is because a mere commencement of rescue proceedings affects the creditworthiness of the debtor. Hence, this also creates a lot of uncertainty regarding third parties' dealings with the debtor[163]. Post commencement finance 'is potentially one of the most important, and most problematic, aspects of a successful business rescue model.[164]

However, in terms of the Companies Act 2008, in post-commencement, there is an order of preference and this means that there is priority to all unsecured claims against the company.[165] In *Merchant West Working Capital Solutions v Advanced Technologies*[166]and *Redpath v Marsden NO* [167] the court supported the provisions stated in the Companies Act 2008[168] and stipulated the ranking of claims in business rescue[169]. According to, J Jones and

[158] Rushworth op cit 5 at 385.
[159] Section 135 (1) *(a)* of the Companies Act 2008.
[160] Section 135 (1) *(b)* of the Companies Act 2008.
[161] Rushworth op cit 5 at 386.
[162] J Calitz & G Freebody 'Is post-commencement finance proving to be a thorn in the side of business rescue proceedings under the 2008 Companies Act' 49 (2) 2016 *De Jure* 266.
[163] D A Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 2)' 16 (2004) *South African Mercantile Law Journal* 422.
[164] Calitz & Freebody op cit note 162 at 266.
[165] Section 135 (3) - (4) of the Companies Act 2008.
[166] *Merchant* supra note 139 para 20.
[167] *Redpath Mining* supra note 19 para 59.
[168] Section 135 (3) - (4) of the Companies Act 2008.
[169] *Merchant* supra note 139 para 59.

R Wellcome[170], "the ranking means that the pre-business rescue creditors who hold security would rank below post-commencement financiers regardless of whether the post-commencement hold security or not".

The courts in both *Merchant West Working Capital Solutions v Advanced Technologies*[171] and *Redpath v Marsden NO*[172] did not provide an analysis on how it arrived with the ranking preferences. The judgement is not reconcilable with s134 (3).[173] The company may only dispose property of the person that has security over the property, if it obtains consent, or may pay the proceeds up to the amount owed to that person or provide with security for proceeds to the reasonable satisfaction of that person.[174] This is to ensure fairness and avoid exploitation or infringement of the creditor's rights. The information in the business rescue plan shows the background, proposals and the assumptions and conditions. This information helps the rescue practitioner to obtain post commencement finance. The rescue practitioner may apply for post commencement finance in terms of s135.[175] Post commencement is of importance to the rescue practitioner considering the fact that the rescue practitioner takes over the management of the company, controls the company and needs finance to enable him to do so.

The rescue practitioner must be able to determine the costs of the company by conducting thorough investigations as to the financial state of the company. According to Keith Braatvedt, "rescue practitioners often experience difficulties in deciding what costs can be paid by the company in business rescue and in respect of what services."[176] The practitioner needs a proper previous financial report of the company and avoid inheriting a financial disaster. In most instances the pre-existing management often resigns or is not co-operative with the initiative of the practitioner.[177] Therefore, practitioners commonly face a company with a dysfunctional management and unreliable or incomplete information.[178]

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[170] J Jones & R Wellcome 'The elephant in the room: post-commencement financing and whether pre-business rescue creditors' right to their security are compromised', available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/dispute/dispute -resolution-alrt-20-july the-elephant-in-the-room-post-commencement-financing.html, accessed on 28 June 2018.

[171] *Merchant* supra note 139 above para 19.

[172] *Redpath Mining* supra note 22 above para 59.

[173] Section 134 (3) of the Companies Act 2008.

[174] Ibid.

[175] Section 135 of the Companies Act 2008.

[176] K Braatvedt 'Costs of business rescue: Company Law' (October 2014) 14 (9) *Without Prejudice* 23

[177] Ibid.

[178] Ibid.

In determining the costs of the company, the rescue practitioner may appoint an advisor in terms of s140.[179] The advisor must help the practitioner in determining effective ways to rescue the company without incurring more costs than necessary. In *Oakdene Square Properties v Farm Bothasfontein,* the court emphasised that whether or not there is independent control over costs during business rescue will be a matter for the legislature to consider.[180]

The business rescue plan and the drafting process of the rescue plan must be cost effective to ensure that the business does not incur any more costs during the proceedings. The rescue practitioner must be able to compile the estimated costs that the company may incur during the process in order for the court and other interested stakeholders to be able to reach a decision beneficial to all parties. In *Redpath v Marsden NO*[181] the court held that business rescue also aims at ensuring that the business is disposed of for the maximum or the highest value as a going concern. The proceeds should yield a better return for the creditors and shareholders than it would be under liquidation proceedings.

The company might have to explain on the circumstances that led to its insolvency in order to ensure that the rescue practitioner does not follow the same steps that would not be of any help to the company in the end.[182]

The court when considering the costs of the company during business rescue it does not just place a blanket imposition. The courts have to consider various factors when determining the costs of rescue proceedings. The court is the upper guardian and its focus is to ensure that costs incurred are not exploitative in general hence worsening the current state of the company.[183]

In *Kritzinger v Standard Bank of South Africa Ltd*[184] where there was an overdraft agreement between the company and the bank. The agreement contained a clause that entitled the bank to revoke this facility at any time, should the financial position of the applicant deteriorate. The company then confirmed its liquidity crunch and the bank decided to withdraw as per the agreement. The court confirmed that the respondent bank had merely exercised its contractual powers in a lawful and acceptable manner in terms of the recognised hierarchy of creditors.

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[179] Section 140 of the Companies Act 2008.
[180] *Oakdene* supra note 33 para 30.
[181] *Redpath Mining* supra note 22 para 43.

[182] Stoop H & Hutchison A 'Post commencement finance - domiciled resident or uneasy foreign transplant?' (2017) 20 (1) Potchefstroom Electronic Law Journal 1 - 41
[183] *Cape Point Vineyards* supra note 153 para 5.
[184] *Kritzinger v Standard Bank of South Africa Ltd* 2013 ZAFSHC 215 (19 September 2013) para 41.

However, it has proved to be difficult for companies undergoing business rescue proceedings to obtain any financial assistance, as banks are afraid of the uncertainty. Investors are uncertain of the future of the company and its inability to pay back the money upon failure of the proceedings. According to Calitz and Freebody

> "It can be extremely difficult for a company to secure funding when it is the subject of business rescue proceedings; this is due to the fact that lenders have the valid concern that they may not see a return on their investment. Where the classic common pool problem presents itself, creditors will generally prefer the relative certainty afforded by insolvency proceedings which usually facilitate normative objectives that include the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors."[185]

Therefore, obtaining of post-commencement finance is important for successful business rescue proceedings.

VII. DURATION AND TERMINATION OF BUSINESS RESCUE PROCEEDINGS

(a) Duration of business rescue proceedings

Business rescue proceedings commence upon adoption of the resolution by directors and successful application for commencement of rescue proceedings by any affected person. The proceedings are supposed to last for three months but if the plan does not succeed within the stipulated time then the practitioner might have to follow the procedure set out in the Companies Act 2008.[186] However, in certain instances business rescue proceedings must be complete within a reasonable time and that is within three to six months.

In terms of s132 (1) (c) of the Companies Act 2008, it provides that business rescue proceedings will commence only when a court makes an order placing the company under supervision.[187] According to Stoop,[188] "Once a liquidation order has been granted, the bringing of an application for business rescue will not be suspended; liquidation proceedings will continue until such time as the court grants an order as contemplated in s132 (1) (*c*)."

[185] Calitz & Freebody op cit 162 at 65.
[186] Section 132 (3) of the Companies Act 2008.
[187] Section 132 (1) (*c)* of the Companies Act 2008.
[188] Stoop op cit 107 at 329.

Therefore, the courts may not nullify an order that is in the best interests of the company or in the interest of justice.

(b) Termination of business rescue

Many circumstances may lead to termination of business rescue proceedings. The court has the power to convert rescue proceedings into liquidation proceedings, when there are no longer any prospects of a successful rescue, or when there has been abuse of the doctrine.[189] Secondly, commencement of business rescue usually terminates any liquidation proceedings against the company. However, if the court or the rescue practitioner[190] is of the view that there no longer is reasonable prospects to rescue the company, the court may thus convert the business rescue proceedings into liquidation proceedings.[191]

Business rescue proceedings commence when directors of a company adopt a resolution to place the company under business rescue. The court may set aside the resolution to commence business rescue[192] thereby, terminating the business rescue proceedings.[193]

Furthermore, an application by any interested party may lead to termination of rescue proceedings. In terms of s130 (1) *(a) (i) - (iii)*[194] a resolution may be set aside, first, when there are no reasonable basis for believing the company is financially distressed. Secondly, there are no reasonable prospects for rescuing the company. Lastly, the company has failed to satisfy the procedural requirement. In *Climax Concrete Products CC t /a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd & others*[195] the court held that the fact that the applicant seeks to have a resolution to commence rescue proceedings set aside is a matter of urgency. Moreover, if the application to commence rescue proceedings were successful that would provide a 'temporary moratorium' on the rights of claimants against the companies or in respect of property in its possession.

Moreover, the practitioner may file a notice of termination of the proceedings with the commission.[196] A file for termination of rescue proceedings is possible when the practitioner believes that there no longer are reasonable grounds to believe that the company is financially

[189] Section 132 (2) *(a)* of the Companies Act 2008.
[190] Section 141 (2) *(a)* of the Companies Act 2008.
[191] *Diener* supra note 157 para 27.
[192] Section 131 of the Companies Act 2008.
[193] Section 129 of the Companies Act 2008.
[194] Section 130 (1) *(a) (i) – (iii)* of the Companies Act 2008.
[195] *Climax Concrete Products CC t /a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd & others* Unreported Case No (812/2012) [2012] ECP 39 (21 June 2012) para 16.
[196] Section 132 (2) *(b)* of the Companies Act 2008.

distressed.[197] The practitioner may file for such an application if there is reason to believe that there no longer exists any reasonable prospects of success[198] and, this implies that failure of rescue proceedings leads to termination of the rescue proceedings.

Additionally, the rescue practitioner is to prepare a business rescue plan stipulating how he proposes to conduct the rescue proceedings. Affected persons namely, creditors have a chance to review and vote in favour or against the business rescue plan. Therefore, termination of rescue proceedings may follow after the proposed business plan does not garner majority votes stipulated in the Companies Act 2008[199]. The courts do not always easily grant conversion of rescue proceedings into liquidation proceedings. In *Commissioner, South African Revenue Service v Beginsel NO & others*[200] the court held that it may grant rescue proceeding in preference to liquidation taking into consideration that the continuation would result in better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[201] The court held that SARS would not enjoy preference over other creditors, thus claims would be in the 'usual order of preference'.[202]

VIII. JURISDICTION OF A COURT TO PLACE A COMPANY UNDER BUSINESS RESCUE

Jurisdiction is the power of the court to exercise its power or authority over a person or an entity subject to territory.[203] An application to commence rescue proceedings should be in the correct court that has jurisdiction over the matter. Any affected person may launch an application in the correct court for commencement of rescue proceedings. In terms of s23 (3)[204] it provides that, 'each company or external company must continuously maintain at least one office in the Republic which it should be registered'.

In terms of the Companies Act 1973,[205] a company should have a principal place of business and a registered office. Therefore, a company could conduct its business at one office and

[197] Section 141 (2) *(b)* of the Companies Act 2008.
[198] Section 141 (2) *(a)* of the Companies Act 2008.
[199] Section 152 (2) *(a) (b)* of the Companies Act 2008
[200] *Commissioner, South African Revenue Service v Beginsel NO & others* 2013 (1) SA 32017 (WCC) para 11.
[201] J Van Staden 'Cutting the line: The termination of business rescue proceedings' (2014) 14 *De Rebus* 240.
[202] Section 135 (2) of the Companies Act 2008.
[203] 'Jurisdiction', available at *www.businessdictionary.com/definition/jurisdiction.html* , accessed on 16 May 2018.
[204] Section 23 (3) of the Companies Act 2008.
[205] Section 431 of the Companies Act 1973

have a registered office with its auditors.[206] The Companies Act 1973 states that, any division of the high court where a company has registered office or its principal place of business was located had jurisdiction over the matter concerning the company.[207] Consequently, more than one court had jurisdiction in proceedings where a company was involved. However, the Companies Act 2008 does not have a statutory provision-governing jurisdiction in the same way as its predecessor had, nor does it expressly exclude the jurisdiction of the high court in respect of a company whose principal place of business is within the Court's territorial jurisdiction.[208] However, the courts should try to minimise its involvement in the proceedings unlike its predecessor.

In *Sibakhulu Construction (Pty) Ltd vs Wedgewood Village Golf Country Estate (Pty) Ltd,*[209] the court dealt with the issue of jurisdiction. The court had to decide on which court would have jurisdiction where a company had a registered address different from its principal place of business. The court held that, "the power to make a determination on a question of status involves a 'ratio jurisdictionis' exercisable only by the court within whose jurisdiction the company 'resides' or is domiciled."[210]

The issue of jurisdiction is of importance as it helps to give effect to section 7k of the Companies Act 2008. In *Sibakhulu*, the court held that jurisdiction in business rescue and liquidation proceedings is dependent only on the registered address.[211] Moreover, the court pointed out that, the question of jurisdiction involves a two-stage enquiry. First, it should be determined if the court is, as matter of principle, competent to take cognisance of the particular case. Secondly, whether the defendant is subject to the court's authority, and whether the court is capable of granting an effective judgment.[212] However, on the other side it is always advisable to seek resolution of business rescue in the court that has jurisdiction over the business's address as per the *Sibakhulu* case.

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[206] ESI 'Jurisdiction of courts in matters involving companies', available at *esilaw.co.za/2016/03/07/jurisdiction-of-courts-in-matters-involving-companies*, accessed on 05 July 2018.

[207] Ibid.

[208] Section 128 (1) of the Companies Act 2008; Section 431 and 432 of the Companies Act 1973.

[209] *Sibakhulu Construction (Pty) Ltd vs Wedgewood Village Golf Country Estate (Pty) Ltd* 2013 (1) SA 191 para 8.

[210] Ibid para 23.

[211] B Van Niekerk & A Parker 'Beware of double edged sword in litigation with a company in business rescue', available at *https://www.derebus.org.za/beware-the-double-edged-sword-in-lighting-with-a-company-in-business-rescue/*, accessed on 6 June 2018.

[212] *Sibakhulu Construction* supra note 209 para 11.

IX. CONCLUSION

Business rescue is a self-administrating procedure which is normally done by a company or a close corporation under the direct control of the 'business rescue practitioner' and this is done within the bounds set out by the Companies Act 2008 and in certain instances may be subject to court intervention[213]. It is an important procedure within the business arena. The growing recognition of the remedy has helped in curbing the corporate insolvencies.

The Companies Act 2008 seeks to uphold the rights of the stakeholders by balancing out those rights in such a way that do not infringe any party's rights. The main aim of the Companies Act 2008 in particular is to balance out the rights of the company or close corporation in terms of the Companies Act 2008, the Labour Law and the Constitution. Corporate rescue is of major importance as it seeks to protect the business, preserve employment and manage to yield a higher return for both creditors and shareholders.

However, even though the process is an attractive procedure that has been so far successful, there is still need for some amendments in order to perfect the doctrine. The process is still subject to some limitations e.g. it is susceptible to abuse e.g. from creditors that may seek to frustrate the process to serve their own interests etc. The courts however, may guard against such abuses by applying the provisions of the Companies Act 2008 strictly. The doctrine has been under much scrutiny, which has been a great help in improving the procedure.[214]

[213] *Merchant* supra note 139 above.

[214] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* (2012) 2 SA 423 (WCC). See also *Oakdene Square Properties* (2012) (3) SA 273 (GSJ). See also *Swart v Beagles Fun Investments 25 (Pty) Ltd and others* (2011) 5 SA 422 (GNP).

CHAPTER FOUR

A DISCUSSION OF THE ROLE OF THE BUSINESS RESCUE PRACTITIONER

I. INTRODUCTION

A business rescue practitioner is an important role player in the successful rehabilitation of a company or a close corporation. In judicial management, the courts had to first appoint a provisional judicial manager and then appoint the final judicial manager who had to investigate the company's affairs and the likelihood of successful rehabilitation of the company.[1] The judicial manager would acquire the powers and duties of the directors.[2]

Judicial managers were appointed by the Master of the high court.[3] The court had the discretion to vary the appointment of the judicial manager, upon application by any of the affected persons.[4] However, the Master of the high court lacked practical ability to source out whether a person had the proper qualifications enabling him to perform the task. In judicial management there was too much involvement of the court in the rescue process. There was inadequate regulation of judicial managers and this contributed to the failure of judicial management. Judicial management was abolished and was replaced with business rescue in terms of the Companies Act 2008.[5] In business rescue proceedings, businesses rescue practitioners (hereafter referred to as rescue practitioners) were appointed to manage the affairs of the company and effect the rescue proceedings.

II. BUSINESS RESCUE PRACTITIONER COMPARED TO JUDICIAL MANAGER

There are major differences between rescue practitioners and judicial managers. Therefore, for an effective assessment of whether business rescue has been effective in South Africa a differentiation between judicial mangers and rescue practitioners is of essence. Previously under judicial management there was no sufficient regulation of judicial managers however, the introduction of business rescue has managed to ensure that rescue practitioners are adequately regulated. Regulation of rescue practitioners has led to practitioners being accountable for certain conducts e.g. gross misconduct or negligence. A comparison between the two is of importance as, it helps in assessing whether there has been any improvement since the implementation of the doctrine or whether there might be need for any

[1] Section 432 of the Companies Act 1973.
[2] Section 433 of the Companies Act 1973.
[3] Section 428 of the Companies Act 1973.
[4] Ibid.
[5] Chapter 6 of the Companies Act 2008.

improvements. Judicial management had a negative effect on the credit worthiness of the company, thereby undermining financial assistance from financial institutions to recapitalise the company.[6]

Moreover, unlike judicial management, business rescue is considered to have been more successful. In *Oakdene Square Properties v Farm Bothasfontein* [7] the court held "that under judicial management, judicial managers were appointed largely from practicing liquidators, many of whom lacked the mind set of saving the company, invariably resulting in its liquidation".[8]

Compared to judicial managers, business rescue practitioners are given extensive powers to handle the day to day activities of the company for example, property of the business and its financial obligations. This in turn imposes greater responsibilities on the practitioners as they now act as the directors of the company. The practitioners make decisions that may be of great impact to the company, in order to ensure sustainability.[9]

Therefore, unlike in judicial management, during business rescue there is minimal intervention of the courts and the previous management of the company.[10] The courts may only remedy the problems that arise during rescue proceedings.[11] The courts may only interfere in rescue proceedings if there is reason to believe that it is in the interests of justice for the courts to do so. Hence, the approach adopted in rescue proceedings is preferable as it offers the practitioner with enough independence in decision making.[12]

A judicial management order could be converted into liquidation proceedings once it had been established that there were no longer any prospects of a successful rescue. In terms of the Companies Act 2008, the courts may convert rescue proceedings into liquidation proceedings upon failure of the rescue proceedings or when an affected person successfully applies to set aside the rescue proceedings. The rescue practitioner may not become the liquidator of such a company. However, the case was different for judicial managers. The

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[6] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (3) SA 273 (GSJ) para 7.

[7] Ibid para 8.

[8] R Bradstreet 'The leak in the chapter 6 Lifeboat: Inadequate regulation of business rescue practitioners may adversely affect the lenders willingness and the growth of the economy' (2010) *SA Merc LJ* 207. The business practitioner as the 'weakest link' for creditors in a business rescue proceeding, at 211.

[9] E Levenstein & L Barnett 'Basics of business rescue', available at *https://www.werksmans.com/wp-content/uploads/2013/04/Werksmans-Basics-of-Business-Rescue.pdf* , accessed on 30 August 2018.

[10] *Redpath Mining South Africa (Pty) Limited v Marsden NO & others* (18486/2013) [2013] ZAGPJHC 148 para 42.

[11] Ibid.

[12] M Pretorius 'A competency framework for the business rescue practitioner profession' (2014) 14 (2) *Acta Commercii* 230.

Companies Act 1973 allowed the appointment of the judicial manager as the liquidator. This means that the same person would qualify for payment of fees twice.[13] This was also, a contributing factor of the failure of judicial management as there was no efficiency and no rules regulating the conducts of judicial managers.

In order to qualify as a rescue practitioner, the practitioner must comply with the requirements stipulated in the Companies Act 2008. There are qualifications required for an appointment as a rescue practitioner. In terms of the Companies Act 1973, there were no other requirements required for the appointment of either a provisional or final judicial manager. According to Loubser,[14] "Most of judicial managers are appointed from the ranks of liquidators, whose field of specialisation is the dismantling and liquidation of companies and they generally do not have the required skills to turn around a company".

(a) Similarities between judicial managers and business rescue practitioners

However, even though there are differences between judicial managers and rescue practitioners there are still similarities that can be identified. These loopholes are considered to be the contributing factors to the failure of the judicial management. The introduction of qualifications and requirements in the Companies Act 2008 has also helped in improving the efficiency and effectiveness of rescue practitioners.

III. THE BUSINESS RESCUE PRACTITIONER

A 'business rescue practitioner' refers to a person(s) appointed for the temporary supervision of a company in a 'financial distress'. A rescue practitioner is defined in s128 (*d*)[15] as a person or persons appointed jointly. The rescue practitioner has the duty to oversee a company during business rescue proceedings and the definition of 'practitioner' has a corresponding meaning.[16]The functions and terms of appointment of a practitioner are a relevant consideration in assessing the merits of a corporate rescue regime and on whether the doctrine has been successful.[17] The rescue practitioner play an important role, thus the practitioner must be independent enough to make decisions concerning the company without

[13] A Loubser 'Judicial management as a business rescue procedure in South Africa' (2004) *South African Mercantile Law Journal* 156.The non-regulation of judicial manager, meant that there was no control over the negligent, dishonest and incompetent judicial managers.
[14] Ibid at 155.
[15] Section 128 *(d)* of the Companies Act 2008.
[16] Ibid.
[17] Bradstreet op cit 8 at 201.

bias.[18] Therefore, it implies that the decisions of the rescue practitioner must not be affected by the directors, shareholders or owners of the business. A rescue practitioner must investigate the company's affairs, business, property and financial situations in a way that is fair and not prejudicial to any interested party.

The Companies Act 2008 attempts to make the practitioners as independent as possible by granting them with the full powers and responsibilities to make any decision that is in the best interests of the company. Appointment of rescue practitioners that are not independent may yield negative results that are not in favour or not in the best interests of the company.[19] The courts should ensure that the appointment of a rescue practitioner was not conducted in a fraudulent way. Unfairness in the appointment of practitioners is a threat to the success of the procedure as other interested parties may lose trust in the process. The rescue practitioners must be adequately regulated to improve the effectiveness of the doctrine.[20]

In *Van Jaarsveld v Q-Civils (Pty) Ltd & another*[21] the court recognised the importance of the appointment of a rescue practitioner in terms of the Companies Act 2008. The court held that the intention of the legislature in prescribing the appointment of a business rescue practitioner for a company under financial distress was to give authority to an individual who will provide an objective and independent analysis of the financial status of the company.[22] Additionally, the court held that, "directors may exercise their powers as directors but such powers may only be exercised with the express authorisation of the rescue practitioner. In essence, the rescue practitioner assumes a position of authority over the directors as their actions are invalid unless authorised by him."[23]

Business rescue is aimed at limiting the powers of the people who played a role in plunging the company into the position it finds itself in. The legislature gives the directors limited powers so as to afford the practitioner enough room to investigate the financial position of the company and formulate the best way to return the company into financial solvency[24].

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[18] T Brewis 'Business rescue practitioner: A new vocation', available at *https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/business-rescue-practitioner.html,* accessed on 14 June 2018.

[19] R Papaya 'Are business rescue practitioners adequately regulated' (2014) 29 *De Rebus* 241.

[20] Ibid.

[21] *Van Jaarsveld v Q-Civils (Pty) Ltd & another* (675/2017) [2017] ZAFSHC para 19.

[22] Ibid para 20.

[23] Ibid.

[24] Ibid para 21.

IV. REGULATION OF RESCUE PRACTITIONERS

To determine the person to be appointed as a rescue practitioner the Commission takes into consideration whether the company is a large, medium or a small company.[25] In terms of the Companies Act 2008, it places a restriction on who may or may not become a rescue practitioner. Persons eligible to be appointed as practitioners are classified into senior, experienced and junior practitioners.[26] Hence, even though there are different categories of rescue practitioners, compliance with section 138 (1)[27] is essential for rescue practitioners.[28] Even though the size of the company in terms of Regulation 127[29] is of importance when determining the seniority of a rescue practitioner, the difficulty of the business the company conducts must be taken into consideration when appointing a rescue practitioner.[30]

Senior practitioners are those that has previously been involved in any turnaround practice before the effective date of the Companies Act 2008, for more than ten years.[31] An experienced practitioner is a rescue practitioner that has previously been appointed as a rescue practitioner and has previously engaged in business turn around practice before effective date of as a rescue practitioner in terms of the Companies Act 2008[32]. Five years' experience is the minimum experience for the experienced practitioner[33]. Whilst a junior practitioner may necessarily not previously engaged in business turnaround practice before the effective date of the Companies Act 2008, or acted as a rescue practitioner in terms of the Companies Act 2008 and has less than five years' experience in the field.[34]

Discipline of the rescue practitioners is important as it helps to ensure regulation of rescue practitioners and to make practitioners accountable for decisions made during rescue proceedings.[35] The Commission takes into account the ability of a professional board to discipline its members for decisions made during business rescue. Hence, this implies that the ability of a professional board to discipline its members is a requirement in terms of the

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[25] Companies Regulation 2011 - Regulation 127 (2) *(b) (i) – (iii).*
[26] Regulation 127 (1) (2011).
[27] Section 138 of the Companies Act 2008.
[28] Ibid.
[29] Regulation 127 (2011)
[30] R Smerdon & BK Morabe 'Business rescue may be in need of rescue', available at *http://www.polity.org.za/article/business-rescue-may-be-in-need-of-rescue-2016-10-11,* accessed on 20 July 2018.
[31] Regulation 127 (2) *(c) (i)* (2011).
[32] Regulation 127 (2) *(c) (ii)* (2011).
[33] Ibid.
[34] Regulation 127 (2) *(c) (iii)* (2011).
[35] Ibid.

Companies Regulation 2011.[36] The Commission has the power to revoke accreditation of a rescue practitioner if there are reasonable grounds to believe the profession is no longer able to monitor or discipline members.[37]

The Commissioner is responsible for the issuing of licenses to rescue practitioners. However, the Commission may not grant licenses to persons limited or excluded in terms of Companies Act 2008.[38] Additionally, the Commission has the authority to revoke or withdraw a license if it reasonably finds that there has been a contravention with requirements stipulated in s138 of the Companies Act 2008.[39] However, such annulment is open to review.[40]

Therefore, the Companies Act 2008 and the Companies Regulation 2011 places importance on the regulation of the rescue practitioners by their respective professional bodies and minimizes the effects of ripple effects of continual failure of the procedure due to the lack of regulation by their bodies as envisaged by the Companies Act 2008.[41] Thus, there is much dependence on the manner in which the professional bodies are regulated.[42]

(a) Appointment and qualification of a practitioner

(i) Qualifications of a rescue practitioner

The qualifications of a rescue practitioner are an important consideration courts take into account. Section 138 of the Companies Act 2008 states that in order to qualify for appointment as a rescue practitioner, an individual or individuals have to be "a member in good standing of a legal, accounting or business management profession accredited by the Commission."[43] A rescue practitioner must be in good standing with any professional body that regulates rescue practitioners.[44] Section 138 of the Companies Act 2008 deduces membership to an established profession and adds the requirement of approval. The Commission has been tasked with the approval of rescue practitioners.[45] Consequently s138 (3) *(a)* and (*b*) empowers the Minister to promulgate regulations prescribing:

[36] Regulation 126 (1) *(a)* (2011).
[37] Ibid.
[38] Section 138 of the Companies Act 2008.
[39] Regulation 126 (7) *(a)* - *(b)* (2011).
[40] Regulation 126 (8) (2011).
[41] Papaya op cit 19 at 241.
[42] Ibid.
[43] Papaya op cit 19 at 241.
[44] Section 138 (1) *(a)* of the Companies Act 2008.
[45] Ibid.

(a) "Standards and procedures to be followed by the Commission in carrying out its licensing functions and powers in terms of this section; and

(b) Minimum qualifications for a person to practise as a business rescue practitioner, including different minimum qualifications for different categories of companies".[46]

Any person that is under probation on any of the listed grounds in terms of the Companies Act 2008 may not qualify as a rescue practitioner.[47] A person who has previously been incapable of directing or controlling the financial obligations of another company may not be entrusted to successfully execute the rescue proceedings.[48] A practitioner who is appointed must be impartial, and must have integrity, neutrality, the necessary skills and the ability to hold office.[49] Thus, no relationship should exist between the rescue practitioner and the company or any other person with direct or substantial interest in the affairs of the company.[50]

Therefore, in order to improve regulation of rescue practitioners changes have been made to the legal framework and regulation of business rescue especially in regard to those that govern the qualifications and appointments of practitioners. The aim of such improvements is to ensure that the system improves the way rescue practitioners conduct their work since they play a major role in rescue procedures.[51]

A liquidator can be appointed as a rescue practitioner if he or she meets the requirements set out in s 138(1).[52] However, a rescue practitioner may not be appointed as a liquidator of the company under which he was the rescue practitioner. This is to eliminate bias and non-commitment to the goals of successful rescue of the company in order to receive double compensation from rescue and liquidation proceedings simultaneously.[53]

(ii) Appointment of a rescue practitioner

There are a number of ways in which a business rescue practitioner may be appointed. A company may appoint a rescue practitioner, within five business days after the company has

[46] Section 138 *(a)* and *(b)* of the Companies Act 2008.
[47] Section 138 (1) *(b)* of the Companies Act 2008.
[48] Section 162 (7) of the Companies Act 2008.
[49] *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others* 2015 (5) SA 192 (SCA) 69 (20 May 2015) para 38.
[50] Section 138 (1) *(d)* and *(e)* of the Companies Act 2008.
[51] Fin24 'Tougher stance towards business rescue practitioners', available at *https://www.fin24.com/Money/Debt/tougher-stance-towards-business-rescue-practitioners-20170629,* accessed on 14 June 2018.
[52] Section 138 (1) of the Companies Act 2008.
[53] Section 346 (1) *(f)* of the Companies Act 1973.

adopted and filed the resolution with Commission.[54] The courts may appoint an alternate practitioner after an application to set aside the appointment of a rescue practitioner was successful. However the decision must be on the basis of an endorsement by holders of a majority of the independent creditors, voting interests who were represented in the hearing before the court.[55]

An interim practitioner may be appointed by the courts upon successful application to commence rescue proceedings by an affected party. The appointment of the rescue practitioner is subject to fulfilment of the requirements stipulated in the Companies Act 2008. However, there is need for ratification of such appointment by the holders of a majority of the independent creditors voting interests at the first meeting of the creditors,[56] the company or any affected person who nominated the practitioner. Moreover, a new appointment of the practitioner is permissible, if the rescue practitioner dies, resigns or is removed. The new appointment is subject to the rights of affected person to bring a fresh application to reject the appointment and set aside the new appointment.[57]

Therefore, this implies that a rescue practitioner may be appointed in two ways that is through appointment by an 'affected person' or appointment by company resolution.[58] Appointment by an affected person is subject to ratification by creditors that have veto power, if it appears that the rescue practitioner may not be able to conduct a successful rescue of the company.[59] However, with regards to appointment upon successful adoption of a company resolution any person may launch an application setting aside appointment of the practitioner in terms of s130[60] or by court order in terms of s139 of the Companies Act 2008.

Qualified rescue practitioners are competent enough to help in the restoration of the company's financial affairs. These competencies are required in the development and implementation of a business rescue plan as the process involves a high degree of expertise in management[61] and business strategy rather than legal knowledge, although some legal expertise is crucial, particularly in regard to issues of compliance.[62]

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[54] Section 129 (3) of the Companies Act 2008.
[55] Section 130 (6) of the Companies Act 2008.
[56] Section 131 (5) of the Companies Act 2008.
[57] Section 139 (3) of the Companies Act 2008.
[58] Bradstreet op cit 8 at 203.
[59] Ibid at 202.
[60] Section 130 of the Companies Act 2008.
[61] Section 150 (2) of the Companies Act 2008.
[62] R Bradstreet 'Lending a helping hand: The role of creditors in business rescues?' available at http://www.saflii.org/za/journals/DEREBUS/2013/234.pdf , accessed on 14 June 2018.

The appointment of a rescue practitioner should be transparent procedure to ensure fairness of the procedure. Within two business working days after the appointment of a rescue practitioner, the company should submit a file of notice of appointmentt.[63] The copy of notice is to be published within five working days to affected persons.[64] This allows affected persons to have access and make decisions on whether or not to accept the rescue practitioner's appointment.[65] In rescue proceedings affected person's play a vital role during the process.

In *Newton Global Trading (Pty) Ltd v Da Corte*[66] there was non-compliance with the provisions stipulated in s129 (3) and (4) of the Companies Act 2008. The applicant had failed to publish a copy of appointment of the rescue practitioner in terms of s129 (4) (b)[67] and omitted to publish notice of the resolution to commence rescue proceedings. The court held that non-compliance with subsection (3) and (4) of s129[68] results in nullity and lapsing of the resolution and this is in terms of s129 (5) of the Companies Act 2008. In *Madodza (Pty) Ltd v Absa Bank Ltd & others*[69] the court held that the wording of s129 (5)[70] is clear and thus non-compliance is a ground to nullify the rescue proceedings. However, the appointment of the rescue practitioner remains existent until the resolution due to non-compliance with the statutory provisions has been set aside.[71] In *African Banking Corporation v Kariba Furniture Manufacturers*[72] were it related to the appointment of a rescue practitioner who did not have a licence to practise when she was appointed. The court stated that the requirements stated in Chapter 6 of the Companies Act 2008 are strict and must be adhered with. The court also stated that substantial compliance should not be allowed

V. THE DUTIES AND RESPONSIBILITIES OF A RESCUE PRACTITIONER

Section 140 of the Companies Act 2008 stipulates the duties, responsibilities and the extent of the powers of the rescue practitioner when conducting the business rescue proceedings. The duties and responsibilities of the rescue practitioner forms a core basis on what is

[63] Section 129 (4) *(a)* of the Companies Act 2008.
[64] Section 129 (4) *(b)* of the Companies Act 2008.
[65] Ibid.
[66] *Newton Global Trading (Pty) Ltd v Da Corte* (104/15) [2015] SCA 199 para 5.
[67] Section 129 (4) *(b)* of the Companies Act 2008.
[68] Section 129 (3) and (4) of the Companies Act 2008.
[69] *Madodza (Pty) Ltd v Absa Bank Ltd and others* (38906/2012) [2012] ZAGPPHC 165 para 24.
[70] Section 129 (5) of the Companies Act 2008.
[71] *Madodza* supra note 69 above para 23.
[72] *Kariba* supra note 49 above para 35.

expected of the rescue practitioner. The rescue practitioner may be held accountable for gross negligence for failure to exercise his powers, failure to perform duties and responsibilities.[73] Hence, the rescue practitioner has to appreciate the importance and the significance of his role in the rehabilitation of the company and ensuring success of the process. In *African Banking Corporation v Kariba Furniture Manufacturers*[74] the court held that the rescue practitioner did not appreciate the responsibilities placed on him under the Companies Act 2008. A rescue practitioner must be held to a 'high professional and ethical standard'. Therefore, the conduct of the rescue practitioner should not be of any prejudice to the company or affected persons.

Emphasis is placed on the core responsibility of the rescue practitioner which is the investigation of the company's affairs in order to provide an effective business rescue plan.[75] The decisions made by the rescue practitioner during rescue proceedings should be of advantage to the company at the end of the proceedings.[76] The practitioner has to conduct a thorough investigation and not rely on speculation. In *African Banking Corporation v Kariba Furniture Manufacturers*[77] the court had to set aside the business plan because the rescue practitioner had failed to thoroughly investigate the financial reports of the company. The financial reports in this case were more than five years old. Thereby the court had to set aside the resolution on those terms.[78]

A rescue practitioner is of critical significance to all stakeholders and not limited to creditors only, the practitioner has statutory obligations imposed on him by the Companies Act 2008.[79] The main concern of stakeholders is pursuing an effective rescue mechanism under individual supervision. Chapter 6 of the Companies Act 2008 depends basically on the capacity of the expert, for example the qualifications and experience of the rescue practitioner.[80] The success rate of the procedure is impacted by the rescue practitioner's capabilities and furthermore the procedure set up to encourage the full and appropriate exercise of his office in terms of the Companies Act 2008.[81]

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[73] Section 140 (3) *(c) (ii)* of the Companies Act 2008.
[74] *Kariba* supra note 49 above para 36.
[75] Section 141 of the Companies Act 2008.
[76] Ibid.
[77] *Kariba* supra note 49 above para 54.
[78] Ibid para 55.
[79] Section 140 (3) of the Companies Act 2008.
[80] Bradstreet op cit note 8 at 201.
[81] Ibid.

(a) The right to discontinue business rescue proceedings if the rescue practitioner is of the view that there are no prospects of rescue

The rescue practitioner has an obligation to discontinue the rescue proceedings if there no longer exists any prospects to successfully rescue the company.[82] This is because rescue proceedings are a costly procedure,[83] thus continuation of the rescue proceedings were there no longer exists any prospects of rescuing the company may worsen the financial burden of the company. The Companies Act 2008 provides some guidelines on the maximum duration of rescue proceedings.[84] Therefore, if the rescue proceedings are not successful within the stipulated time, the rescue practitioner will apply for the termination of the rescue proceedings.

The rescue practitioner may be held liable for gross negligence, if his neglect of duty and responsibilities becomes detrimental to the financial well being of the company, plunging the company into more debts and financial distress.[85] Therefore, the rescue practitioner may not unnecessarily continue rescue proceedings were there are no prospects of successful rescue.

(b) The right to full management control of the company in substitution for its board and pre-existing management

The rescue practitioner has fiduciary duties towards the company during the rescue proceedings and these duties include loyalty, acting in good faith, utmost trust and confidence.[86] The practitioner assumes the role of directors of the company. The standard of conduct by the rescue practitioner should be higher than any casual business person.[87] During rescue proceedings all stakeholders are dependent on the qualification and experience of the practitioner to yield more positive results.[88] Moreover, it is the duty of the practitioner to take full control by remedying any material omission that may have existed and contributed to the financial position of the company.[89]

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[82] Section 141 (1) *(a)* of the Companies Act 2008.

[83] S Oosthuizen 'Business rescue an expensive exercise', available at *https://lowelder.co.za/55099/business-rescue-an-expensive-exercise/* , accessed on 20 July 2018.

[84] Section 132 of the Companies Act 2008.

[85] Section 140 (3) *(c) (ii)* of the Companies Act 2008.

[86] L Koen 'Appointing the best BRP', available at *https://withoutprejudice.co.za/free/article/5047/view,* accessed 18 July 2018.

[87] Section 140 (3) *(b)* of the Companies Act 2008.

[88] Koen op cit note 86 above.

[89] CIPC 'Duties and responsibilities of the BRP', available at *www.cipc.co.co.za/index.php?cID*, accessed on 19 July 2018.

In *Ragavan & others v Klopper N.O. & others*[90] the practitioners sought unrestricted access to the premises of the company in order to be able to execute their statutory obligations in terms of s140 (1) *(a)*.[91] The court held that unrestricted access forms a very important part in rescue proceedings for the rescue practitioner.[92] This is because all the relevant and important documentation of the company relating to the rescue of the entity are kept at the premises of the company e.g. the company's invoices etc. Therefore, denial of unrestricted access for the rescue practitioner would subvert the very essence of the rescue proceedings which is to retain full management and control of the company. Therefore granting the rescue practitioner full management control to the premises of the company is the nerve centre of the whole process.[93]

(c) The right to delegate

Delegation refers to the granting of power and authority to another person for agreed purposes under the concept of vicarious liability.[94] The Companies Act 2008 permits the rescue practitioner to delegate any power or function of the practitioner, however such delegation is permissible to any person that was part of the board of the company.[95] The Companies Act 2008 by granting the practitioner some delegation powers does not automatically qualify the practitioner to neglect his core duties and powers. In *Murgatroyd v Van Den Heerver N.O. & others*[96] the applicants argued that the practitioner must perform his functions personally and had no authority to delegate any of his powers and functions to outside professionals. The argument was based on s140 (1) (*b*) of the Companies Act 2008[97], thus any delegation of the functions and powers of the practitioner will be contrary to the statutory provisions.

The court held that in terms of s140 (1) (*c*)[98] the practitioner has the power to remove and appoint new managers however this is subject to an exception maxim delegatus non potest

[90] *Ragavan & others v Klopper N.O. & others* (12897/2018) [2018] ZAGPJHC 137 (3 May 2018) para 17.
[91] Section 140 (1) *(a)* of the Companies Act 2008.
[92] *Ragavan & others* supra note 90 para 18.
[93] Ibid.
[94] 'Delegation', available at *http://www.businessdictionary.com/definition/delegation.html*, accessed on 1 August 2018.
[95] Section 140 (1) *(b)* of the Companies Act 2008.
[96] *Murgatroyd v Van Den Heerver N.O. & others* 2015 (2) SA 514 (GJ) para 16.
[97] Section 140 (1) *(b)* of the Companies Act 2008 states that the practitioner 'may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company'.
[98] Section 140 (1) *(c)* of the Companies Act 2008.

delegare[99] which means that 'no delegated powers can be further delegated'.[100] Only express or implied authorisation is allowed, provided that the practitioner is legally authorised to do so. Furthermore, the court held that Chapter 6 of the Companies Act 2008 does not strictly state that all the functions of a rescue practitioner are required to be assumed and satisfied by the practitioner personally.[101] Chapter 6 of the Companies Act 2008 is not duly rigid or restraining as far as the practitioner's functions and duties are concerned.

Additionally, taking into account the importance of rescue proceedings, the functions and duties of the practitioner are broad and may require some expertise in order to achieve the main aim of the doctrine.[102] Therefore, the appointment of professionals by the practitioner should not be mistaken as neglect of his functions and powers. The appointment of professionals facilitates the rescue practitioner to conduct a fair and thorough assessment of the company's affairs and does not involve delegation of the rescue practitioner's core powers and responsibility. Delegation is a power that merely flows from powers given under Chapter 6 of the Companies Act 2008.[103]

(d) The right to investigate the company's affairs

Rescue proceedings aims at giving authority to an individual in order to provide an objective analysis of the financial status of the company without any prejudice and bias.[104] The rescue practitioner has the duty to investigate the company's affairs and decide whether there are any reasonable prospects for successful rescue of the company.[105] In *African Banking Corporation v Kariba Furniture Manufacturers*[106] the court had to set aside the business plan because the rescue practitioner had failed to thoroughly investigate the financial reports of the company. The financial reports in this case were more than five years old.

The practitioner has an obligation to investigate the company's affairs, property and financial position.[107] In order for the practitioner to successfully conduct a thorough investigation, he must be given access to all the company's financial documents, property documents and the

[99] P W Duff & H E Whiteside 'Delegata Potest Delegari A maxim of American Constitutional Law' (1929) 14 (2) *Cornell Law Review* 169.
[100] *Murgatroyd* supra note 96 para 17.
[101] Ibid.
[102] Ibid para 18.
[103] Sections 140 (1) *(a)*, *(b)* and *(c)* of the Companies Act 2008.
[104] *Van Jaarsveld* supra note 21 para 20.
[105] *Redpath* supra note 10 para 52.
[106] *Kariba* supra note 49 para 54.
[107] Section 141 (1) of the Companies Act 2008.

company's business affairs.[108] The practitioner has to reasonably decide on whether it is possible to conduct successful rescue proceedings.[109]

The practitioner's duty is to investigate the conduct of the directors before the commencement of rescue proceedings. In addition, upon investigation the rescue practitioner may held directors or management of the company accountable for voidable transactions, failure to perform material obligations in relation to the company, reckless trading or fraud. Thus, based on the negative findings of the rescue practitioner concerning the directors or company management, further investigation is conducted and possibly prosecution of involved parties.[110] Therefore, in order for the practitioner to effectively conduct an investigation of the company affairs there is need to use professional expertise. The practitioner may delegate some of his powers but however, he may not completely delegate his core powers and functions.[111]

In *African Banking Corporation v Kariba Furniture Manufacturers*[112] the court commented briefly on the duty of a practitioner. According to the court it is the duty of the practitioner to conduct a thorough and careful assessment of the affairs of the company.[113] The practitioner may only prepare a rescue plan that can adequately reflect whether there are any prospects of success and how such is to be achieved. A rescue practitioner is held to be of high ethical and professional standards thus, such an assessment may not be based on biased considerations. The rescue practitioner has the same duties and liabilities as directors in terms of s140 (3) of the Companies Act 2008. A practitioner must comply with high professional and ethical standards. A practitioner has the duty to act objectively and impartially in the conduct of rescue proceedings.[114]

The practitioner after conducting a thorough investigation has the duty to declare that, there are no prospects of rescuing the company.[115] The practitioner may apply for termination of rescue proceedings, if there are reasonable grounds to believe that the company is no longer facing any financial distress.[116] Lastly, the rescue practitioner may take action when the company management was involved in any voidable transactions, failure by the company to

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[108] Ibid.
[109] Section 141 (2) of the Companies Act 2008.
[110] Section 141 (2) *(c) (i) – (ii)* of the Companies Act 2008.
[111] *Murgatroyd* supra note 96 para 16.
[112] *Kariba* supra note 49 paras 35 and 38.
[113] Ibid para 35
[114] Section 140 (3) *(a)* and *(b)* of the Companies Act 2008.
[115] Section 141 (2) *(a)* of the Companies Act 2008.
[116] Section 141 (2) *(b)* of the Companies Act 2008.

perform material obligations or reckless trading, fraud.[117] The findings of the practitioner pave way for further investigation when there are any unlawful irregularities found by the practitioner.[118]

In *Propspec Investments v Pacific Coasts Investments 97 Ltd*[119] the court held that in order for an application for business rescue to succeed there must be factual foundation for the existence of a reasonable prospect. Hence, mere speculative suggestions will not suffice. The rescue plan must thus be based on substantial and reasonable reasons that came out from the investigations conducted by the rescue practitioner.[120] The court held that the bar set out in application for rescue proceedings must not be too high, which makes it difficult for firms to apply for rescue proceedings.

Therefore, the court may grant an application to terminate the rescue proceedings and commence liquidation proceedings, based on the findings of the rescue practitioner. The court takes into account the surrounding circumstances of the company in making such a declaration.[121]

VI. WHEN DOES THE BUSINESS RESCUE PRACTITIONER'S DUTY TERMINATE?

A rescue practitioner's duty terminates under different circumstances. The grounds for removal of the rescue practitioner includes lack of the necessary skills, conflicts of interest, lack of independence and the practitioner being involved in illegal conducts.[122] The duties and responsibilities of the rescue practitioner terminates in three ways that is by removal and replacement of the rescue practitioner.[123]

Additionally, the rescue practitioner's duty terminates if there was an application for removal of the practitioner by any interested party and the application was successful.[124] Any affected person based on reasonable grounds has the right to apply for the removal of a rescue practitioner[125]. Lastly, the duty of the practitioner terminates if the business rescue proceedings have come to an end and is now functus officio. Any affected person may apply

[117] Section 141 (2) *(c)* of the Companies Act 2008.
[118] Section 141 (2) (*c) (ii) (aa) – (bb)* of the Companies Act 2008.
[119] *Propspec Investments v Pacific Coasts Investments 97 Ltd* 2013 (1) SA (FB) 542 para 11.
[120] Ibid.
[121] Section 141 (3) of the Companies Act 2008.
[122] Bradstreet op cit note 8 at 208.
[123] Section 139 of the Companies Act 2008.
[124] Section 130 (1) *(b)* of the Companies Act 2008.
[125] Ibid.

for the removal of the rescue practitioner on any of the listed grounds in the Companies Act 2008.[126]

The court may remove a rescue practitioner by court order in terms of s130 of the Companies Act 2008.[127] The rescue practitioner is removed on the grounds that there was a failure to comply with requirements in s138 of the Companies Act 2008, the rescue practitioner is not independent or lacks the necessary skills.[128] The courts in appointment of the rescue practitioner, should take the best interests of the company into consideration. The skills and qualification of the practitioner forms the core basis of the procedure. Therefore, a lack of the necessary skills undermines the whole process.[129] A practitioner is regarded as incompetent if they lack the skills to execute their duties and responsibilities.[130]

Conflict of interest refers to a situation whereby the practitioner has incompatible interests with that of the company or affected persons. Incompatible interests are those that are contrary to the objectives of the company or business rescue proceedings. A practitioner should act in the best interests of the company and not be in conflict with the aim of the company in commencing the rescue proceedings.[131] Moreover, the practitioner's decision should be compatible with the interests of the company and uphold the intention of the legislation.

The duty of the rescue practitioner terminates either when the rescue proceedings were successful or when the courts convert the rescue proceedings into liquidation proceedings. During the rescue proceedings a practitioner is regarded as nomine officio and functus officio upon termination. Functus officio refers to the situation whereby, the mandate of the practitioner has expired or the duty has come to an end, when the practitioner has fulfilled his purpose.[132] In *Landosec (Pty) Ltd v McLaren (ECP)*[133] the court held that the rescue practitioner during business rescue proceedings is nomine officio. A rescue practitioner is nomine officio as defined in s128 (1) (*d*).[134] Once the business rescue proceedings end, so does the practitioner's term, rendering him or her functus officio. This is not the only case

[126] Section 130 (2), Section 139 of the Companies Act 2008.
[127] Section 139 (1) of the Companies Act 2008.
[128] Section 130 (1) *(b)* of the Companies Act 2008.
[129] Section 139 (2) of the Companies Act 2008.
[130] Section 139 (2) *(a)* of the Companies Act 2008.
[131] Section 139 (2) *(e)* of the Companies Act 2008.
[132] 'Legal definition of functus officio', available at *https://www.merriam-webster.com/legal/functus%20officio, a*ccessed on 1 August 2018.
[133] *Landosec (Pty) Ltd v McLaren (ECP)* (Unreported case no 2231/2015, 3-11-2015).
[134] Section 128 (1) *(d)* of the Companies Act 2008.

where s 132(2) *(c) (i)* of the Companies Act 2008 applies, but in all instances where business rescue proceedings end.[135]

The removal of a rescue practitioner may be based on different grounds in terms of the Companies Act 2008[136] and this was supported in *Beer NO v Fozsa Logistics CC.*[137] In *African Banking Corporation v Kariba Furniture Manufacturers*[138] the court took into consideration the conduct of the practitioner and how they are expected to behave and conduct their work in general. The court went on to further state that it is not necessary to consider the application by the bank for the setting aside of the practitioner's appointment in terms of s130 (1*) (b) (ii*) of the Companies Act 2008. In addition to the powers and duties of the business rescue practitioners in terms of Chapter 6 of the Companies Act 2008, rescue practitioners are officers of the court[139]and have legislated responsibilities. It is the duty of the practitioner to conduct a careful assessment of the affairs of the company and to prepare a plan that adequately reflects the prospects of the rescue.

Therefore, the Companies Act 2008 allows for the removal and replacement of the practitioner on reasonable grounds. The courts may set aside any application to remove a practitioner if there is no reasonable basis that warrants such removal.

VII. REMUNERATION OF THE RESCUE PRACTITIONER

The duty of the rescue practitioner is to ensure success of the rescue proceedings. A successful procedure not only benefits the creditors, employees etc, but help in avoiding costs that may flow from liquidation proceedings.[140] Liquidation proceedings demand payment of both the rescue practitioner's fees and expenses of liquidator's fees and disbursements.[141] The practitioner is entitled to remuneration and expenses as stipulated by the Minister. The practitioner's remuneration ranks top of the post-commencement finances.[142] The remuneration of the practitioner must be lawful and within the confines stipulated by the Companies Act 2008 or the amount by the minister. However, the case is different when the

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[135] B Van Niekerk & H Smith 'When does a business rescue practitioner become functus officio', available at *http://www.derebus.org.za/business-rescue-practitioner-become-functus-officio/,* accessed 4 May 2018.
[136] Section 139 of the Companies Act 2008.
[137] *Beer NO v Fozsa Logistics CC* Unreported case (23039/2013) [2013] ZAGPPHC 195 para 27.
[138] *Kariba* supra note 49 para 35.
[139] Section 140 (3) *(a)* of the Companies Act 2008.
[140] P Van Zyl 'The remuneration of business rescue proceedings', available *https://bvrbusinessrescue.co.za/cost-of-business-rescue-proceedings/*, accessed on 02 August 2018.
[141] Section 135 of the Companies Act 2008.
[142] Ibid.

company converts rescue proceedings into liquidation proceedings. In *Murgatroyd v Van Den Heerver N.O.*[143] the court provided a test to determine whether the remuneration and expenses incurred by the practitioner are lawful. The courts has the duty to determine:

> "whether the costs were reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings".

The court held that the question on whether remuneration was reasonable is a factual one which must be assessed on the facts and circumstances of each case with reference to different factors.[144] The factors includes the size of the company, the functionality of its management, the accuracy and currency of its financial and accounting data and the difficulties involved and the scope of the work required to be undertaken by the rescue practitioner.[145]

The courts thus needs not place a blanket imposition when determining the costs of the company but has the duty to take these factors into account, in order to make the process fair. The size of the business is important, because reasonably it would be detrimental especially to small companies to be charged the same fees as that of larger firms.[146] Hence, reasonableness as a test is important as it helps in mitigating against the abuse of the process by practitioners, especially in the case of failure of the rescue plan. Therefore, remuneration of rescue practitioners must be closely regulated to guard against potential abuse of the fee charged by the rescue practitioners.[147] According to Q Vorster, P.A Delport,[148] "it seems unwise not to make provision for the amounts claimed to be scrutinized by an independent party in order to ensure that there is no abuse by practitioners claiming excessive fees".

Section 143(1)[149] provides that a practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed.[150] A practitioner's claim for remuneration and expenses enjoys preferential ranking. Section 143(5)[151] provides that, to the extent that the rescue practitioner's

[143] *Murgatroyd* supra note 96 para 21.
[144] Ibid.
[145] Ibid para 21.
[146] Companies Regulation 2011- regulation 128 (1) *(a) – (b)*.
[147] *Papaya* op cit 19 at 241
[148] Q Vorster, P.A Delport, et al *Henochsberg on the Companies Act 71 of 2008* (2012) 499.
[149] Section 143 (1) of the Companies Act 2008.
[150] Section 143 (6) of the Companies Act 2008.
[151] Section 143 (5) of the Companies Act 2008

remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.[152]

In *Oakdene Square Properties v Farm Bothasfontein* [153] the court held that there are no statutory provision that adequately provides for the taxation fees of rescue practitioners, whereas there is a provision that subjects a liquidator's costs to taxation. In liquidation proceedings there is independent control over the costs. Whereas there are no provisions that controls rescue proceedings. It is the duty of the legislature to consider the issue of taxation and costs aspect when further amendments to the Companies Act 2008 are proposed.[154]

The Companies Regulation 2011 specifies the rescue practitioner's fees and the practitioner may not exceed the specified amounts. The basic remuneration of a business rescue practitioner, as contemplated in section 143 (1),[155] is to be determined at the time of the appointment of the practitioner by the company, or the court, however it may not exceed the following:

> *(a)* "R 1250 per hour, to a maximum of R 15 625 per day, (inclusive of VAT) in the case of a small company.
>
> (b) R 1500 per hour, to a maximum of R 18 750 per day, (inclusive of VAT) in the case of a medium company; or
>
> (c) R 2000 per hour, to a maximum of R 25 000 per day, (inclusive of VAT) in the case of a large company, or a state owned company."[156]

VIII. THE RANKING OF THE RESCUE PRACTITIONER'S REMUNERATION IN LIQUIDATION PROCEEDINGS

The court may convert rescue proceedings into liquidation proceedings upon failure of the rescue process. The court may grant the liquidation proceedings if the court finds reasonable grounds to believe that the rescue proceedings will not yield any positive results in favour of the company.[157] The rescue practitioner may also apply for the setting aside of the rescue proceedings. The practitioner's fees ranks first in terms of the post-commencement

[152] Section 130 of the Companies Act 2008.
[153] *Oakdene* supra note 6 above Para 49.
[154] Ibid.
[155] Section 143 (1) of the Companies Act 2008.
[156] Companies Regulation 2011 – regulation 128 (1) *(a) – (c).*
[157] Section 130 (5) *(c) (i)* of the Companies Act 2008.

finance.[158] The preference order remains in force except to the extent of any claims arising out of the costs of liquidation.[159]

The case of *Diener v The Minister of Justice*[160] dealt with ranking of rescue practitioners in liquidation proceedings. The court held that s143 (5) of the Companies Act 2008 has not raised the business rescue practitioner's claim for fees and expenses incurred in business rescue to enjoy 'super-preference' in liquidation proceedings. The court had to decide on the ranking of a business rescue practitioner's fees and expenses incurred in business rescue in the event of business rescue proceedings being discontinued and where the company is placed in liquidation in terms of s 141(2) *(a)* (*ii*) of the Companies Act 2008.[161]

The court held that s135 (4) and s143 (5) of the Companies Act 2008 does not create a 'super preference'. The effect of this is that a rescue practitioner would be considered a creditor of the company within the ambit of s44 of the Insolvency Act and would be required to submit and prove their claim in respect of their remuneration and expenses. The court held that there was nothing in the Companies Act 2008 indicating that it contemplated the dilution of the rights of any secured creditors. In essence, the claim by the rescue practitioner would be treated as an unsecured claim.[162]

The Companies Act 2008 does not regulate the rescue practitioner's remuneration during liquidation proceedings but in rescue proceedings only. The practitioners are not offered sufficient protection when rescue proceedings are converted.[163] The practitioners in certain instances are not willing to take any risks in relation to their fees arrangement.[164]

IX. DIRECTORS' DUTIES TO THE RESCUE PRACTITIONER

A director is a person that has the powers and authority to handle the affairs of the company and perform any functions to the extent conferred by the Companies Act 2008 or according to

[158] Section 135 of the Companies Act 2008.
[159] Section 135 (4) of the Companies Act 2008.
[160] *Diener NO v Minister of Justice and Others* [2018] 1 All SA 317 (SCA) para 7.
[161] R Van Der Merwe & M Buitendag 'The risky business of a business rescue practitioner', available at *http://www.derebus.org.za/the-risky-business-of-a-business-rescue-practitioner/*, accessed on 19 June 2018.
[162] T Jegels & C Lewis 'Preferred or not preferred- the super preferent status of a business rescue practitioner in subsequent liquidation proceedings', available at *https://www.lexology.com/library/detail.aspx?g=4bf11646-3583-42a1-826c-d909f105d2fc*, accessed on 19 June 2018.
[163] T Baker & S Mcetywa 'Remuneration of business rescue practitioners- the requirement to prove claims against the insolvent estate', available at *https://www.lexology.com/library/detail.aspx?g=052c8b41-3a7c-4fb3-ae9d-74da9132a5f0*, accessed on 6 August 2018.
[164] Ibid.

the company's memorandum.[165] The directors of the company have the duty to make any decisions that are material or vital to the operations of the company.[166] During the rescue proceedings the powers and duties of the directors are limited and transferred to the rescue practitioner, to enable him to execute the rescue proceedings successfully.[167] Transfer of powers and responsibilities of the directors allows the rescue practitioner space to conduct a clear investigation of the affairs of the company and come up with an effective rescue plan.[168] The director has an obligation to deliver all the books and records that relate to the affairs of the company.[169] The practitioner must be given access to all the books that he is not aware of their whereabouts but is within the knowledge of the directors.[170] The practitioner has to know any material transactions that the company was involved in or any assets of the company. Material transactions these are transactions that are important pertaining the development of the business.[171] Therefore, it is the discretion of the practitioner to determine whether certain transactions are material to the company.

A company in rescue proceedings is protected by the moratorium, this means that the company may not be involved in any legal proceedings unless such proceedings fall within the exceptions stipulated by the Companies Act 2008.[172] Therefore, the directors of the company are under an obligation to notify the rescue practitioner of any court or administrative proceedings against the company.[173] The unfavourable economic climate of the company does not permit for any legal proceedings against the company. Hence, the rescue practitioner should be aware of such proceedings to enable him decide on such proceedings.

The rescue practitioner has the duty to investigate the company's affairs.[174] The directors of the company have vast knowledge on all the assets, liabilities and transactions that the company might have been involved in. The directors have to show the practitioner the assets, liabilities, income and expenses for the previous twelve months.[175] All relevant information

[165] Section 66 of the Companies Act 2008.
[166] Ibid.
[167] Section 142 of the Companies Act 2008.
[168] Section 141 of the Companies Act 2008.
[169] Section 142 (1) of the Companies Act 2008.
[170] Section 142 (2) of the Companies Act 2008.
[171] 'Definition of material transactions', available at *https://www.lawinsider.com/dictionary/material-transaction,* accessed on 6 August 2018.
[172] Section 133 (1) of the Companies Act 2008.
[173] Section 142 (3) *(b)* of the Companies Act 2008.
[174] Section 141 (1) of the Companies Act 2008.
[175] Section 142 (3) *(c)* of the Companies Act 2008.

that is of assistance to the practitioner has to be availed to the rescue practitioner upon appointment.

The directors have to comply with the decisions of the rescue practitioner. The Companies Act 2008 tries to limit the powers of the people who contributed to the financial mayhem of the company. The practitioner is conferred the full powers to manage the company and make decisions that are in the best interests of the company and the directors have the duty to assist and support the practitioner. It is within the powers of the rescue practitioner to remove any person from office if the practitioner has the reason to believe that the person is a hindrance to the overall goal of the company.[176]

X. CONCLUSION

In judicial management there was inadequate regulation of rescue practitioners, which was also a contributing factor to the failure of the process. The Companies Act 2008 conferred fiduciary duties on the rescue practitioners to improve the effectiveness of their role in rescue proceedings. The Companies Act 2008 and the Companies Regulation 2011 have been the necessary tools used to ensure sufficient regulation of rescue practitioners. In terms of the statutory provisions rescue practitioners are held accountable for any negligent intentional misconduct during rescue proceedings. Rescue practitioners are obliged to act in the best interests of the company. Therefore, sufficient regulation of practitioners helps the practitioner to adequately recognise interests of shareholders, employees and creditors.

The success of the rescue proceedings is dependent on the qualification, skills and experience of the practitioner. The rescue proceedings require high level of trust and confidence between the practitioner and other affected persons. The Companies Act 2008 allows for the removal of the practitioner on account of misconduct or any breach of trust between the practitioner and any affected person. There is sufficient protection to the practitioner during the rescue proceedings. However, the Companies Act 2008 does not offer sufficient protection when rescue proceedings are converted into liquidation proceedings, which is a risk to the practitioners.

[176] Section 140 (1) *(c) (i)* of the Companies Act 2008.

CHAPTER FIVE

A DISCUSSION OF THE BUSINESS RESCUE PLAN

I. INTRODUCTION

A business rescue plan is a proposal roadmap that outlines the goals and details on how the rescue practitioner intends to formulate a plan that leads to a successful rescue of the company. The duty arises on the practitioner after consultation with creditors, other affected persons and the company management.[1] The rescue practitioner has the duty to make a proposal of the business plan after conducting a thorough investigation into the affairs of the company.[2]

The Companies Act 61 of 1973 (hereafter referred to as the Companies Act 1973) did not specifically direct the judicial manager to draft a rescue plan even though it required the judicial manager to conduct an investigation into the affairs of the company. The duty of the provisional and the final judicial manager was to prepare a report and thereafter convene a meeting to consider the report in place.[3] The report would be an analysis of the affairs of the company and these include the company's assets, reasons for the company's inability to pay its financial obligations, list of the creditors and the opinion of the judicial manager.[4] The judicial manager had to prove that there was a reasonable possibility of a successful rescue.

The investigation under the Companies Act 1973 had to prove that there was a 'reasonable possibility' to rescue the company.[5] In terms of the Companies Act 2008 a business rescue plan must contain all the relevant factors and prove that there are reasonable prospects of successfully rescuing the company.[6] The business rescue plan must contain detailed information that enables creditors and other affected persons to decide whether to accept the rescue plan.[7]

In *Southern Palace Investment 265 (Pty) Ltd v Midnight Storm Investment 386 (Pty) Ltd*[8] the court held that failure of the rescue plan is inevitable when the rescue plan does not address

[1] Section 150 (1) of the Companies Act 2008.
[2] Section 141 of the Companies Act 2008.
[3] Section 433 *(j) – (k)* of the Companies Act 1973
[4] Section 430 *(c)* of the Companies Act 1973.
[5] Section 427 of the Companies Act 1973.
[6] Section 141 (1) of the Companies Act 2008.
[7] Section 150 (2) of the Companies Act 2008.
[8] *Southern Palace Investment 265 (Pty) Ltd v Midnight Storm Investment 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 24.

the cause of failure of the company's business. The rescue plan should offer remedies that reflect a reasonable prospect of being sustainable. The rescue plan must not merely substitute the company's debt without there being any reasonable prospects. The rescue plan must give impartial ascertainable facts beyond mere speculation.[9]

II. BUSINESS RESCUE PLAN PROPOSAL

The rescue practitioner has the powers and duties to draft a proposed business rescue plan upon appointment.[10] The rescue plan would be open for consideration by affected persons. The rescue plan only becomes successful if the proposed rescue plan is adopted according to the rules set out in the Companies Act 2008.[11] The rescue practitioner may not prepare the rescue plan in isolation but there must be consultation with creditors and other affected persons.[12] The duty of the rescue practitioner is to ensure that the proposed rescue plan is in the best interests of the company, creditors and affected persons.[13]

A rescue plan proposal must consist of a detailed background, proposals, assumptions and conditions.[14] The proposal must set out details on how the practitioner intends to perform his duties. The proposal gives any interested stakeholder chances to review the rescue plan and decide on whether to adopt or reject the rescue plan. The business rescue plan serves as a medium or a mechanism of communication between the rescue practitioner and stakeholders.[15] A company undergoing business rescue is in financial distress and has limited resources, hence the rescue plan acts as a guide which clarifies and safeguards the limited resources.[16] The rescue plan is based on facts and not merely on speculations.

The rescue plan should establish a concrete strategy formulating on how the company rescue is to be initiated. The rescue plan must be a clear indication on why the business is in need of rescue and identify a clear way that shows an effort to perform a successful turnaround for the company.[17] Therefore, once the rescue plan is accepted it becomes binding on the

[9] Ibid.
[10] Section 140 (1) *(d)* of the Companies Act 2008.
[11] Section 140 (1) *(d) (i) (ii)* of the Companies Act 2008.
[12] Section 150 (1) of the Companies Act 2008.
[13] Ibid.
[14] Section 150 (2) of the Companies Act 2008.
[15] M Pretorius & W Rosslyn-Smith 'Expectations of a business rescue plan: international directives for Chapter 6 Implementation' (2014) 18 (2) *Southern African Business Review* 129.
[16] Ibid.
[17] Ibid.

company and its stakeholders, hence thorough scrutiny of the proposed rescue plan is of essence.[18]

The proposals, assumptions and conditions needs to be clear and unambiguous in order to avoid confusion and ensure that the process and the consequences attached thereto are clear to the parties involved. The proposal must also be based on concrete information and not on mere speculations.[19]

(a) Background of the rescue plan proposal

The business rescue proposal must contain background information which identifies the nature, structure and history of the company. The company's background helps in assessing and investigating the current affairs of the company. The background information is a clear indication of the list of the material assets in possession of the company.[20] Material assets are those assets that are necessary for carrying out the day to day business of the company.[21]

The rescue plan has to indicate whether such material assets are held as security by any creditor.[22] Moreover, the rescue plan must indicate the complete number of creditors.[23] The creditors can be classified into secured or unsecured creditors. A clear indication of the company's creditors helps the practitioner in determining the ranking of the creditors in terms of the Companies Act 2008.[24]

The rescue plan must reflect necessary useful means to achieve the goal in a less costly manner that would not worsen the financial burden of the company. Hence, the rescue practitioner should be in a position to look for cost effective mechanisms to rescue the company. In general, the rescue plan must be a reflection of the interests of the stakeholders and the company.

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[18] Section 152 (4) of the Companies Act 2008.

[19] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] 3 All SA SCA 303 para 29.

[20] Section 150 (2) *(a) (i)* of the Companies Act 2008.

[21] 'Material Assets: Management resources management', available at *https://www.matmoz.si/?p=188&lang=en*, accessed on 11 August 2018.

[22] Section 150 (2) *(a) (i)* of the Companies Act 2008.

[23] Section 150 (2) *(a) (ii)* of the Companies Act 2008.

[24] Section 135 of the Companies Act 2008.

(b) Proposals

A rescue plan proposal is a suggestion that is formal and in written form which is put forward for consideration by stakeholders and specifically the creditors.[25] Therefore, the proposals by the practitioner need to be transparent enough for stakeholders to make a concrete decision. Moratorium on legal proceedings forms an important part of rescue proceedings hence the nature and duration of such moratorium is essential.[26]

Moreover, the rescue practitioner needs to stipulate mechanisms to be used to obtain post-commencement finance. Stakeholders must reach an agreement on how the practitioner is to obtain finance. Post-commencement finance is of importance during rescue proceedings because it stipulates the order of preference in which property proceeds will be applied.[27]

A proposal is a way used to convince the stakeholders on why the company would benefit from the rescue proceedings. The proposal is a reflection of the benefits derived from rescue proceedings other than in liquidation proceedings. Hence, the proposal must clearly stipulate the benefits to be derived from the rescue proceedings.[28] There must be transparency on the effects of rescue proceedings on holders of company securities.[29]

(c) Assumptions and Conditions

The practitioner must thus set out any conditions to be attached in the plan, e.g. the effects of the plan on interested stakeholders like employees, creditors, and any contracts.[30] The rescue plan has to set out conditions that lead to the termination of the rescue proceedings.

Assumptions are conditions accepted as true or certain to happen from known existence of other facts.[31] The balance sheet and statement of income and expenses for the ensuing three years is prepared on assumption that the proposal is adopted.[32] The contribution of those affected is of greater importance during the process. The creditors have to vote for the rescue plan proposal.

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[25] Section 152 of the Companies Act 2008.
[26] Section 150 (2) *(b) (i)* of the Companies Act 2008.
[27] Section 150 (2) (*b) (v)* of the Companies Act 2008.
[28] Section 150 (2) *(b) (vi)* of the Companies Act 2008.
[29] Section 150 (2) *(b) (vii)* of the Companies Act 2008.
[30] Section 150 (2) *(c) (i) – (ii)* of the Companies Act 2008.
[31] 'Assumptions', available at *http://www.businessdictionary.com/definition/assumptions.html,* accessed on 14 August 2018.
[32] Section 150 (2) (*c) (iii) – (iv)* of the Companies Act 2008.

Therefore, any other information required to assist affected persons to decide whether to accept or reject the plan is essential in the rescue proposal.[33] In business rescue information is of essence. In order to ensure success of the rescue proceedings the practitioner must provide adequate information on how the practitioner intends to achieve the goal. The proposal must be clear and direct to all affected persons. Clear and unambiguous information allows clarity and transparency of the process.

III. DETERMINING THE FUTURE OF THE COMPANY

The proposal drafted by the practitioner is the threshold used to determine whether the creditors or any affected persons are willing to be bound by the conditions stipulated in the proposed rescue plan.[34] Hence, a meeting is convened to determine and guarantee the future of the company. Persons that are mostly affected by the outcome of the rescue proceedings are obliged to scrutinize the rescue proposal. The proposal by the rescue practitioner is not simply rubber stamped on the company but is open for consideration and scrutiny.[35] The scrutiny of the proposal by affected persons may only be taken into account to the extent that it is in the best interests of the company. The rescue practitioner has the duty to balance the rights of affected persons and that of the company.[36]

The business rescue procedure is a procedure that is limited or controlled by the time constraints within the Companies Act 2008. Hence, the practitioner must within the prescribed times convene the meetings and draft the rescue plan proposals.[37] The time limits fall within the procedural requirements and failure to adhere to the time limits may lead to the rescue proceedings being nullified.[38]

The practitioner must within ten business days arrange a meeting to consider the proposed rescue plan with the creditors and holders of a voting interest.[39] The meeting is to consider the proposed rescue plan in terms of s150 of the Companies Act 2008. The meeting helps to

[33] Section 152 (2) of the Companies Act 2008.
[34] Section 151 of the Companies Act 2008.
[35] T Naidoo 'Business rescue in South Africa: an exploration of the views of business rescue practitioner' (unpublished MCOM thesis, University of Witwatersrand, 2016) 54.
[36] Section 5 of the Companies Act 2008.
[37] Section 150 (5) of the Companies Act 2008.
[38] Section 130 (1) *(a) (iii)* of the Companies Act 2008.
[39] Section 151 (1) of the Companies Act 2008.

determine the future of the company and make concrete decisions that have positive results on the company's future.[40]

The rescue practitioner must within five days before calling the meeting in terms of s151 (1),[41] deliver notice of the meeting to all affected persons. The notice must consist full details of how the meeting is conducted and a summary on the rights of the affected persons.[42] The details include the date, time, agenda and place of the meeting.[43] The meeting is open to adjournment until finalisation of the proposed rescue plan and determination of the company's future.[44]

(a) Possible outcomes from the rescue plan proposal

There are many outcomes that may ensue from the meeting convened by the practitioner with the creditors and holders of voting interests. The meeting convened in terms of s151 of the Companies Act 2008 serves as a way to determine the future of the company.[45] Creditors have a right to decide on the rescue proposal. The Companies Act 2008 specifically grants the creditors the right to vote for or against the proposed rescue plan. The proposal must obtain 75 per cent vote in favour of the business rescue plan.[46] Failure to obtain the proposed percentage renders the proposal a nullity unless the courts find that the vote was unreasonable.

The proposal may either succeed or may not be approved by any affected person. If the rescue plan succeed the Companies Act 2008 allows any affected person to apply for the setting aside of the rescue plan.[47] However, if the rescue plan is not approved, any affected person may apply for the decision not to approve the rescue plan to be set aside.[48]

In *Collard v Jatara Connect (Pty) Ltd & others*[49] the court held that the court may set aside a vote that is inappropriate in terms of s153 (1)[50]. The court may also set aside such a vote if it reasonably believe that there are reasonable and just reasons to set aside such a decision.[51]

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[40] Section 150 of the Companies Act 2008.
[41] Ibid.
[42] Section 151 of the Companies Act 2008.
[43] Section 151 (2) of the Companies Act 2008.
[44] Section 151 (3) of the Companies Act 2008.
[45] Section 151 of the Companies Act 2008.
[46] Section 152 (2) *(a)* of the Companies Act 2008.
[47] Section 152 (3) of the Companies Act 2008.
[48] Ibid.
[49] *Collard v Jatara Connect (Pty) Ltd & others* (23510/2016) [2017] (WCC) 45 para 19.
[50] Section 153 (1) *(a) (i)* of the Companies Act 2008.

IV. CONSIDERATION OF THE RESCUE PLAN

The rescue plan is not simply imposed on the stakeholders but is open for consideration. Consideration of the plan helps in ensuring transparency of the process and perfection of the rescue plan. The meeting convened by the practitioner in terms of s151 of the Companies Act 2008 is in order to introduce the plan to creditors and shareholders for consideration.[52] The practitioner has the duty to inform the creditors and affected persons whether he still believes that there are any reasonable prospects to rescue the company.[53]

In *Industrial Development Corporation of South Africa Ltd v Van Den Steen N.O. & others*[54] the court held that the meeting in terms of s151 and s152 of the Companies Act 2008 requires procedural and substantive requirements for consideration, approval or rejection of the rescue plan. Therefore, s152[55] serves an important role in ensuring credibility of the rescue process.

The employees or their representatives are given the chance to air out their views during consideration of the rescue plan.[56] Employees are affected directly by any outcome of the rescue process. Hence, the views of the employees are of importance and should ensure protection of employment contracts on existing terms and conditions.[57]

Consideration of the rescue plan involves the process of voting. The practitioner must entertain and conduct a vote concerning any amendments in the rescue plan proposal.[58] Support of the creditors is essential and this should be to the satisfaction of the practitioner. The practitioner may adjourn the meeting for further consideration of the plan until the plan has been revised.[59] The practitioner must ensure that there is preliminary approval of the proposed plan.

Therefore, the rescue plan is approved on a preliminary basis if it obtains more than 75 per cent of the creditors voting interest[60] and at least 50 per cent of independent creditors.[61] In order for the rescue plan to be approved the percentage stipulated by the Companies Act 2008 must be adhered with. The rescue plan is regarded as a failure if it is rejected and fails to

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[51] Section 153 (1) *(a) (ii)* of the Companies Act 2008.
[52] Section 152 (1) *(a)* of the Companies Act 2008.
[53] Section 152 (1) *(b)* of the Companies Act 2008.
[54] *Industrial Development Corporation of South Africa Ltd v Van Den Steen N.O. & others* (9935/18) [2018] ZAGPJHC 70 para 2.
[55] Section 152 of the Companies Act 2008.
[56] Section 152 (1) *(c)* of the Companies Act 2008.
[57] Section 145 of the Companies Act 2008.
[58] Section 152 (1) *(d) (i)* of the Companies Act 2008.
[59] Section 152 (1) *(d) (ii)* of the Companies Act 2008.
[60] Section 152 (2) *(a)* of the Companies Act 2008.
[61] Section 152 (2) *(b)* of the Companies Act 2008.

secure the majority vote.[62] The approved rescue plan is binding on creditors, and holders of the company's securities and this is in spite of whether they were available, not available, voted for or against the rescue plan.[63]

The rescue practitioner must ensure that the rescue plan satisfy or comply with the conditions under which it is reliant.[64] Implementation of the plan must be in a way that has been agreed upon in terms of the s152 of the Companies Act 2008. The practitioner may not alter the rescue plan without the consent of the affected persons. Hence, a practitioner may convene a meeting if the practitioner intends to alter any of the rights or benefits of the creditors.[65] The practitioner may file a notice of substantial implementation of the rescue plan when the rescue plan has been implemented.[66]

V. REASONABLE PROSPECTS TO RESCUE THE COMPANY

In terms of the Companies Act 1973 a company could only apply for judicial management if it was unable to meet its financial obligations[67] or was unable to continue operating as a going concern[68] and there was a reasonable possibility that judicial management would make the company to operate as a going concern. Reasonable possibility meant that the financial situation of the company was supposed to be capable of being redeemed.[69] A company already declared bankrupt could not qualify for judicial management because there were slim chances of a successful rescue.

In *Oakdene Square Properties v Farm Bothasfontein* [70] the court held that reasonable prospect is a lesser requirement than reasonable possibility which was a measure for placing the company under judicial management in terms of s427 (1) of the Companies Act 1973. Hence, mere possibility or prima facie was insufficient to warrant the courts granting judicial management and this is applicable also to reasonable prospect in terms of the Companies Act 2008. In *Oakdene Square Properties v Farm Bothasfontein* the court also placed emphasis on the word reasonable.[71] Reasonable grounds are viable reasons required to assess whether

[62] Section 152 (3) *(a)* of the Companies Act 2008.
[63] Section 152 (4) of the Companies Act 2008.
[64] Section 152 (5) *(a)* of the Companies Act 2008.
[65] Section 152 (3) of the Companies Act 2008.
[66] Section 152 (8) of the Companies Act 2008.
[67] Section 427 (1) *(a)* of the Companies Act 1973.
[68] Section 427 (1) *(b)* of the Companies Act 1973.
[69] Ibid.
[70] *Oakdene* supra note 19 para 29
[71] Ibid para 30.

there are prospects to rescue a company.[72] This means that investigation of the company affairs is essential to determine whether such prospects exist.[73]

Therefore, when determining whether there are reasonable prospects it is inevitable that the courts may come up with different interpretations on what encompasses a reasonable prospect.[74] The courts may have to assess and judge a case based on its circumstances or merits.[75] Submission of what constitutes reasonable prospect is based on the knowledge available to different applicants as to the different routes.[76] The courts may have to take various factors into account in assessing whether there truly exists any reasonable prospects.

In judicial management the applicant or the company had the onus to prove to the courts that there was a reasonable possibility of a successful rescue. The courts could thus grant judicial management if it reasonably believed that there were just and equitable reasons to grant commencement of the procedure.[77] However, the Companies Act 2008 changed from reasonable possibility to reasonable prospects. In *Southern Palace v Midnight Storm Investments* [78] the court held that the difference in the language in terms of the Companies Act 1973 and the Companies Act 2008 indicated a major difference between the two tests. A reasonable prospect shows a much less strict requirement than when the company had to establish that there was a reasonable possibility.

The courts requires the company to establish that there are reasonable prospects to rescue the company regardless of whether commencement of rescue proceedings was either by way of application by an affected person or by directors adopting a company resolution to commence rescue proceedings.[79] Section 129 of the Companies Act 2008 requires the directors to pass a resolution to commence rescue proceedings if there are reasonable prospects to rescue the company[80] and s131 (4) of the Companies Act 2008 also requires the rescue practitioner to establish that there are reasonable prospects to rescue the company.[81] This means that there must be just and equitable reasons to allow commencement of rescue proceedings.[82] Mere

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[72] Section 131 of the Companies Act 2008.
[73] Section 141 of the Companies Act 2008.
[74] E P Joubert 'Reasonable possibility versus reasonable prospect: Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *THRHR* at 555.
[75] Ibid.
[76] Ibid.
[77] Section 427 (1) *(b)* of the Companies Act 1973.
[78] *Southern Palace Investments* supra note 8 para 21.
[79] Section 129 & section 131 of the Companies Act 2008.
[80] Section 129 (1) *(b)* of the Companies Act 2008.
[81] Section 134 (4) of the Companies Act 2008.
[82] Section 131 (4) *(a) (iii)* of the Companies Act 2008.

speculation would not suffice in determining whether there are reasonable prospects, hence concrete and actual information must be the basis of the claim.

The test to determine whether there are any reasonable prospects is a measure used to ensure that the process is not easily abused and that rescue proceedings are utilised for its proper purpose in terms of the Companies Act 2008. However, while the test for assessing whether there are reasonable prospects is flexible than the previous, the parties are still required to provide and identify reasonable prospects accompanied by factual support to ensure success of the process.[83] The application for business rescue fails if the company or the practitioner fails to prove existence of any prospects to rescue the company. Once an application to commence rescue proceedings is not approved liquidation proceedings will commence.[84]

An assessment of what business rescue constitutes was first assessed in *Southern Palace v Midnight Storm Investment.*[85]The court had to analyse what reasonable prospects encompasses in comparison to reasonable possibility.[86] The court held that reasonable prospect was a recovery requirement that is of essential in assessing an application.[87] The interpretation of the words 'reasonable prospects' were analysed by the courts and the reasoning of the courts in this case has been widely adopted. The comparison between 'reasonable possibility' and 'reasonable prospect' helped in drawing a clear line between the two.[88]

The courts had to point out to some of the factors that may be taken into account in analysing whether the rescue proceeding would be effective. First, the likely costs of rendering the company able to commence rescue proceedings and resume its core business.[89] Secondly, day to day to expenditure of the company is of importance even during rescue proceedings, hence the courts have to take into account availability of the cash resources that help keep the company operational.[90] Thirdly, the company will still be in need of raw materials and human capital, thus availability of these resources is a necessary factor to take into account.[91] The practitioner has the duty to support by stating why there are reasonable prospects to rescue

[83] B Wassman 'Business rescue- getting it right' (2014) *De Rebus* 36.
[84] Section of the Companies Act 2008.
[85] *Southern Palace* supra note 8 para 20.
[86] Ibid.
[87] Ibid para 24.
[88] Ibid para 20.
[89] Ibid para 24.1.
[90] Ibid para 24.2.
[91] Ibid para 24.3.

the company.[92] It is important for a court to make an assessment by taking these factors into account in order to avoid worsening the financial position of the company or allow companies to use the doctrine only as a delaying tactic.

In *Koen & another v Wedgewood Village*[93] the court held that the factors stipulated in *Southern Palace v Midnight Storm Investments* are of importance as they permit the courts to scrutinise the court application to commence rescue proceedings. The factors help in analysis whether to adopt the rescue plan and whether it contains a proper breakdown on how the practitioner intends to achieve these goal. The strategy formulated by the practitioner acts as a measure used to assess whether there are reasonable prospects to rescue the company.[94]

The court held that the evidence on whether there is a reasonable prospect will depend on the object of the proposed business rescue. The rescue practitioner must place before the courts a convincing and clear evidential foundation to support the existence of a reasonable prospect that the desired conduct can be achieved.[95] This means that any unclear and speculative averments in the application cannot suffice.[96]

In *Oakdene Square Properties v Farm Bothasfontein,*[97] it involved an application for commencement of rescue proceedings.[98] The company was facing potential liquidation in case of failure of rescue proceedings. The court had to interpret on what encompasses reasonable prospects to rescue the company and whether there were such prospects in this case.[99]

The court held that unlike judicial management, the test stipulated for commencement of rescue proceedings in terms of the Companies Act 2008 was a lesser requirement.[100] This meant that the complexities that existed under judicial management had been reduced. Determining whether there are reasonable prospects requires more than a prima facie case. The court has the duty to take into account the reasonable reasons or factors in granting commencement of rescue proceedings.

Furthermore, the court held that the practitioner has the duty to conduct thorough investigation into the company affairs, in order to assess whether there are reasonable

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[92] *Koen & another v Wedgewood Village & Country Estate (Pty) Ltd* 2012 (2) SA (WCC) 378 para 18.
[93] Ibid.
[94] Ibid para 20.
[95] Ibid para 17.
[96] Ibid para 20.
[97] *Oakdene* supra note 19 para 4.
[98] Ibid.
[99] Ibid.
[100] Ibid para 7.

prospects to rescue the company.[101] In cases of a court application to commence rescue proceedings, the applicant has the onus to establish whether there are reasonable grounds and prospects in accord with rules of motion proceedings.[102] Reasonable grounds would justify commencement of rescue proceedings. However, reasonable grounds must be adequate enough to show that there are prospects to rescue the company.

In *FirstRand Bank Ltd v Normandie Restaurants Investments & another*[103] the court had to decide on what constitutes fair, equitable reasons and reasonable prospects of re-organisation the business. The case involved an application for commencement of rescue proceedings. The argument was that there were no reasonable prospects of a successful rescue[104].

The SCA agreed with the argument of the bank by taking various factors into account and took into account the decisions in *Oakdene* and *Southern Palace.*[105] First, the court considered the fact that the company only owned one immovable property, and placing it under business rescue would not save any jobs or livelihoods.[106] Secondly, the company did not provide any services that needed to be preserved, neither did it provide any goods or products to the public.[107] Lastly, the company's only income was derived from the rental it received for the property.[108]

In *Oakdene Square Properties v Farm Bothasfontein*[109] the court had to make a comparison between the effects of granting the business rescue plan and granting a liquidation order. Hence, there were no major negative effects that could be felt from not granting the plan. The rescue plan in general did not provide any reasonable grounds for approval of the business rescue plan. The court had to weigh the benefits and limitations and try to strike a balance in ensuring that all the stakeholders involved benefit from the process.

In African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others[110] the court held that there can be no dispute that the directors voting in favour of a business rescue must truly believe that prospects of rescue exist and such belief

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[101] Ibid para 29
[102] Ibid.
[103] *FirstRand Bank Ltd v Normandie Restaurants Investments & another* (189/2016) [2016] SCA 178 para 13.
[104] Ibid para 9.
[105] Ibid para 14.
[106] A Nortje 'To liquidate or commence business rescue proceedings: reasonable prospects of recovery or not?' available at *http://www.polity.org.za/article/to-liquidare-or-commence-business-rescue-proceedings-reasonable-prospects-of-recovery-or-not-2017-02-23,* accessed on 7 May 2018.
[107] *Propspec Investments v Pacific Coast Investments* (189/2016) [2016] SCA 178 para 14.
[108] Ibid.
[109] *Oakdene* supra note 19 para 13.
[110] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* [2013] ZAGPPHC 258 para 3.

must be based on a concrete foundation. The rescue plan must not fell short of the requirements in s150 (1) and (2)[111] in order to make it possible to determine whether there are truly any reasonable prospect.

However, in *Propspec Investments v Pacific Coast Investments* [112] the courts agreed with the factors set out in *Southern Palace v Midnight Storm Investments*, in determining whether there were reasonable prospects of the rescue plan succeeding. However, the court was of the view that the bar set out in *Southern Palace v Midnight Storm Investments* was too high.[113] The word prospect was said to mean an expectation. Therefore, an expectation may come true or it may not. It thereby signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable. A reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds.[114]

Hence, comparing judicial management from business rescue, shows that there is a slight difference between the meanings of reasonable prospect and reasonable possibility. Both tests require a company to be able to continue on a solvent basis before it can be regarded as qualifying for business rescue.[115] According to Pretorius:[116]

> "the rescue practitioner must determine the existence of reasonable prospect and thus starts within the current situation of distress, which is subject to the uncertainties of the zone of insolvency. The financial distress as event was brought on by either operational or strategic causes but the extent (severity) of the distress remains unclear – therefore the concept referred to as the zone of insolvency is crucial for the BRP to consider by identifying causality and its specific business consequences for a 'normal' business".

This means that the issue of reasonable prospect is of importance though it cannot be considered as final. In most instances an application to commence rescue proceeding would fail even though the rescue plan is attractive but lacks necessary tools to device the policies.

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[111] Section 150 (1) – (2) of the Companies Act 2008.

[112] *Propspec Investments v Pacific Coast Investments* 2013 (1) SA 542 (FB para 10.

[113] Ibid para 12.

[114] E Joubert op cit 74 at 554.

[115] Propspec supra note 107 above para 15-"It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business and the likely availability of the necessary cash resource in order to enable the company to meet its day to day expenditure or 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, is tantamount to requiring proof of a probability and unjustifiably limits the availability of business rescue proceedings."

[116] M Pretorius 'A framework for turnaround practitioners to assess reasonable prospect for ventures operating in the zone of insolvency' (2017) 48 (4) *South African Journal of Business Management* 58.

Hence, a lack of a reasonable prospect to rescue the company, thereby, results in the failure of the rescue plan.[117]

However, even though there exists reasonable prospects to rescue the company, the rescue practitioner may launch an application setting aside the rescue proceedings once such prospects no longer exists.[118]

VI. REASONABLE GROUNDS TO COMMENCE RESCUE PROCEEDINGS

Reasonable grounds mean that the application to commence rescue proceedings should be based on enough credible evidence.[119] The applicant for commencement of rescue proceedings bears the onus to prove that the application is based on reasonable grounds.[120] The evidence must be clear and ordinary to any ordinary person. Hence, relevance and credible reasons forms an important part for granting commencement of rescue proceedings. In order to determine what reasonableness constitutes the courts must take various factors into account. The grounds should be material, objective and factual.[121] Business rescue is not an instrument used as a quick fix to avoid the financial obligations of the company.[122] There is a link between reasonable grounds and reasonable prospects in that the reasonable prospects emanate or originates from reasonable grounds.[123]

Commencement of rescue proceedings is only permissible if the courts reasonably believe that there are any reasonable grounds.[124] The courts have the duty to ensure that business rescue is not merely used as a basis to avert payment of any financial obligations by the company or as a mere means to delay the liquidation proceedings against the company.[125] A concrete rescue plan based on factual reasons is required for assessment and to ensure that there is existence of any reasonable grounds to commence rescue proceedings.[126]

Commencement of rescue proceedings without establishing whether there are any reasonable prospects is contrary to the intention of the legislation. Lack of any reasonable prospects to

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[117] Section 130 (1) of the Companies Act 2008.
[118] Ibid 58.
[119] 'What are reasonable grounds?' available at *http://justiceofthepeace.org.nz/site/jpfed/files/JP_IssuingOfficers_20120615/sections/considering-the-application/what-are-reasonable-grounds.html*, accessed on 27 September 2018.
[120] *Oakdene* supra note 19 para 38.
[121] Wassman op cit note 83 at 4.
[122] Ibid.
[123] *Oakdene* supra note 19 para 29.
[124] Ibid.
[125] Ibid.
[126] Section 150 (3) *(a) – (b)* of the Companies Act 2008.

rescue a company means that rescue proceedings are inevitably meant to fail dismally. Lack of any reasonable prospects allows the courts to grant liquidation proceedings.[127] The courts protects the interests of stakeholders were there are reasonable prospects to rescue the company. The courts try to protect stakeholders where there exists any reasonable grounds and reasonable prospects to rescue the company, in order to avoid the drastic consequences of liquidation proceedings.[128]

VII. FAILURE TO ADOPT A RESCUE PLAN

The practitioner has the duty to draft a rescue plan, which is presented to the creditors and other interested stakeholders for consideration.[129] As a proposal rescue plan it implies that it is not automatically binding on the stakeholders. Hence, a rescue plan may fail upon consideration by affected persons. It is inevitable for a business rescue plan to fail if the rescue practitioner fails to prove that there are reasonable prospects to rescue the company,[130] that application for commencement of rescue proceedings is based on reasonable grounds,[131] fails to garner the required majority vote,[132] fails to prove that the company is under financial distress[133]and fails to satisfy substantial or procedural requirements.[134]

(a) Circumstances that results to failure of the business rescue plan

The rescue plan is destined to fail if the requirements set out in s130 (1) *(a)* of the Companies Act 2008 are not met. The courts may only grant an application for commencement of rescue proceedings once it is submitted that there are reasonable prospects of successfully rescuing the company.[135] Continuation of rescue proceedings without any prospects of success would be contrary to the intention of the legislature. Additionally, it might lead to abuse of the process in a bid to delay liquidation proceedings or paying any financial obligations due to creditors.[136]

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[127] Section 130 (5) of the Companies Act 2008.
[128] Ibid.
[129] Section 153 of the Companies Act 2008.
[130] Section 130 (1) *(a) (ii)* of the Companies Act 2008.
[131] Section 131 (4) *(a) (iii)* of the Companies Act 2008.
[132] Section 152 (2) *(a)* of the Companies Act 2008.
[133] Section 130 (1) *(a) (i)* of the Companies Act 2008.
[134] Section 130 (1) *(a) (ii)* of the Companies Act 2008.
[135] Section 131 (4) *(a) (iii)* of the Companies Act 2008.
[136]Hogan Lovells 'Abuse of business rescue proceedings', available at *https://www.hoganlovells.com/publications/abuse-of-business-rescue-proceedings*, accessed on 29 August 2018.

Moreover, continuation with rescue proceedings without any prospects in place may possibly worsen the financial position of the company which is not the main aim of the legislation. Hence, failure to establish existence of reasonable prospects would automatically lead to the failure of the rescue plan.[137] Any party may launch an application to the courts contending that there are no reasonable prospects to rescue the company.[138] Creditors have the power to reject the rescue plan when considering the rescue plan in terms of s152 of the Companies Act 2008.[139]

Reasonable grounds are required to supplement and support an application for rescue proceedings. Clear and substantial evidence is required to warrant such proceedings. This means that speculative suggestions would not suffice.[140] It must be evident that the company is facing financial distress and it is beneficial for the company to commence rescue proceedings. The practitioner has the duty to state such reasonable grounds when proposing the rescue plan to the stakeholders.[141]

Therefore, failure to provide the courts with the sufficient reasons would lead to failure of the application.[142] The practitioner or the company has the duty to establish in the proposed rescue plan that there are reasonable grounds for adopting the plan and what are the benefits for commencement of the application and the consequences for not doing so.[143] Failure to give adequate reasonable grounds to the creditors may also lead to failure of the procedure.

Additionally, in order for a rescue plan to be successfully adopted it must be able to acquire the majority votes in terms of the Companies Act 2008. The creditors and holders of securities have the right to vote for or against the rescue plan. A vote of more than 75 per cent is required in order to successfully adopt the proposed rescue plan.[144] Thus, this implies that failure to acquire the necessary votes from the interested parties e.g. from creditors, holders of company securities would result in the failure of the rescue plan.[145]

Furthermore, failure of the proposed rescue plan to acquire the necessary votes does not automatically mean that the rescue plan will be terminated.[146] The practitioner has the duty to make a revised rescue plan, amending and taking into consideration the proposals of the

[137] *ABSA Bank Limited v Caine N.O & another* (3813/2013) [2014] FB 46 para 30.
[138] Section 130 of the Companies Act 2008.
[139] Section 152 of the Companies Act 2008.
[140] *Koen & another* supra note 92 para 20.
[141] Section 150 (2) of the Companies Act 2008.
[142] Section 131 (4) (*b*) of the Companies Act 2008.
[143] Section 150 (2) *(b)* of the Companies Act 2008.
[144] Section 152 (2) *(a)* of the Companies Act 2008.
[145] Section 152 (3) of the Companies Act 2008.
[146] Section 153 of the Companies Act 2008.

creditors'.[147] However, in certain instances the rescue practitioner may decide not to take such steps. Thus, the rescue plan fails if the business plan has been rejected and no further steps taken to ensure that a revised plan is presented.[148]

The rescue practitioner's duty is to propose a rescue plan and once the rescue plan is adopted, the practitioner has an obligation to adhere to the conditions of the plan and not make any amendments without the knowledge of the creditors or affected persons.[149]

(b) Steps to be taken once the rescue plan fails

Failure to adopt a rescue plan at first instance or introduction does not necessarily mean that the plan will automatically be forfeited. The rescue practitioner or any affected persons has various remedies in case of failure to adopt the proposed rescue plan. In a bid to make the process fair and transparent the Companies Act 2008 has provided for further remedies to the practitioner or any affected person to challenge the creditors vote. The vote can be challenged if it is unjust or unreasonable.[150] The Companies Act 2008 takes the best interests of the company and other stakeholders into account when considering a rejected rescue plan.[151]

(c) Revising the rescue plan

The practitioner has the duty to revise the rejected rescue plan and make amendments. The practitioner may make any amendment in accordance with what was agreed on in the meeting by the stakeholders. Hence, the practitioner may suspend the meeting in order to revise the rescue plan.[152] Once, the practitioner has made the amendments, the practitioner must then convene a second meeting and seek a second vote from creditors and shareholders in order to present a revised plan. If the rescue plan is supported, then the approval of the plan renders it binding.[153]

Additionally, where the rescue plan proposal fails to be adopted and the rescue practitioner does not take any steps to revise the rescue plan, any affected person who was present at the initial meeting may thus request for the practitioner to make a revised rescue plan but this is

[147] Section 153 (1) *(a)* of the Companies Act 2008.
[148] Section 153 (1) *(b)* of the Companies Act 2008.
[149] Section 152 (3) of the Companies Act 2008.
[150] Section 153 of the Companies Act 2008.
[151] Ibid.
[152] Section 153 (1) *(a) (i)* of the Companies Act 2008.
[153] Section 152 (4) of the Companies Act 2008.

subject to voting by holders of voting interests.[154] The rescue practitioner is obliged to publish the revised rescue plan within ten business days.[155] Hence, once the rescue plan obtains majority votes for a revised rescue plan, the practitioner is obliged to make a revised plan, which will be open for consideration again by the holders of the voting interests.[156]

(d) Setting aside the decision not to adopt the rescue plan

The Companies Act 2008 permits affected persons to apply for setting aside of the vote to adopt or reject the proposed rescue plan.[157] The courts may only set aside the decision if the vote was unreasonable, not in the interests of the company or other stakeholders and not in the interests of justice.[158] In *Collard v Jatara*[159] the court had to set aside the vote on the basis that the vote was unjust and unreasonable. Some creditors will try to protect their own interests at the expense of other affected persons without taking into account the best interests of the company and other stakeholders.[160] Hence, in order to eradicate any abuses of the voting power of the creditors, the court has the power to set aside the decision only if it is in the interest of justice and in the best interests of the company or affected persons. There are remedies in place to ensure that holders of the voting interests do not frustrate the process.[161] The courts will take such an application into consideration when the vote against the rescue plan is inappropriate or unjustifiable.[162]

(e) A binding offer

In African Banking Corporation v Kariba Furniture Manufacturers[163] the court held that 'a binding offer predominantly is similar in nature to the common law offer, save that it may not be withdrawn by the offeror until the offeree responds thereto'. The affected persons may

[154] Section 153 (1) *(b) (i) (aa)* of the Companies Act 2008.
[155] Section 153 (3) *(a) (ii)* of the Companies Act 2008.
[156] Section 153 of the Companies Act 2008.
[157] *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC & others* (47327/2014) [2015] ZAGPPHC 255 para 40.
[158] Section 153 (1) *(a) (ii)* of the Companies Act 2008.
[159] *Collard* supra note 49 para 2.
[160] Ibid para 38.
[161] Ibid para 20.
[162] Section 153 (1) *(b) (i) (bb)* of the Companies Act 2008.
[163] *Kariba* supra note 112 para 21.

thus purchase the voting interests of those opposing at a fair and reasonable value if the company was to be liquidated.[164]

Therefore, a binding offer is valid if it complies with the common law requirements. In terms of the common law requirements there must be an establishment of the identity of the offeror, there must be a clear agreement that is not vague and understandable to the offeror and must comply with the statutory provisions.[165] Thus, it must not merely be an offer but must be binding on the parties and may not be withdrawn by the offeror.

Any of the affected persons may choose to make a binding offer to the parties opposing adoption of the rescue plan proposal.[166] Hence, once an offer has been made to any party by an affected party, the rescue practitioner must in no more than five days adjourn the meeting, to afford him time to revise the rescue practitioner and reflect on the offer.[167]

The value of the binding offer may be determined at the request of the rescue practitioner. The binding offer's main aim is to ensure that it prevents the obstacle to a viable rescue plan. According to Levenstein, "it does not make sense that a small group of dissenting creditors should be allowed to dictate to the majority group of creditors who favours the implementation of the plan."[168] The binding offer in terms of the Companies Act 2008 seeks to promote and protect the interests of the majority.

However, in *DH Brothers Industries (Pty) Ltd v Gribnitz NO & others*[169] the court held that the binding offer does not necessarily create a 'set of statutory rights'. The legislature by using the word offer it intended to make an offer devise from one party. An offer can only be valid once a party has accepted the conditions stipulated by the offer. The court held that 'the words binding offer can only mean that the offeror may not withdraw the offer until it is accepted or rejected.'[170] Hence, the statutory provisions do not warrant an automatic loss of a voting interest to the majority.[171] The court held that the interpretation on what constitutes a binding offer in *African Banking Corporation v Kariba Furniture Manufacturers* was incorrect.

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[164] Ibid.

[165] Fluxmans 'The meaning of the term binding offer per section 153 (1) *(b) (ii)*', available at *http://www.fluxmans.com/the-meaning-of-the-term-binding-offer-per-section-1531bii-judgment-delivered-on-20-may-2015/* , accessed on 27 August 2018.

[166] Section 153 (1) *(b) (ii)* of the Companies Act 2008.

[167] Section 153 (4) *(a)* of the Companies Act 2008.

[168] E Levenstein 'The Kariba case- the watering down of the binding offer in South African business rescue proceedings' (2019) 50 (2) *De Jure* 242.

[169] 2014 (1) SA 103 (KZP) para 39.

[170] Ibid para 60.

[171] Ibid para 46.

Furthermore, even though the Companies Act 2008 protects and places value on the majority votes, the minority voters and any affected persons may utilise the remedies under the Companies Act 2008 to set aside the adopted rescue plan.[172] The adopted rescue plan may be set aside on the basis that there was non-compliance with certain statutory provisions in the Companies Act 2008.[173] It is thus the duty of the courts to ensure that the minority rights are also protected by taking various factors into account.

The concept of 'binding offer' tries to ensure that the rescue plan is ultimately approved and implemented by the rescue practitioner. According to Loubser, "a binding offer is one of the most disturbing provisions regulating business rescue because a lack of any explanation or clarification of this concept would possibly enable expropriation without any compensation of a concurrent creditor's claim or shareholder's shares."[174]

The courts in deciding whether the creditors or affected persons are bound by the rescue plan the court may take into account the procedures followed, the necessary approval of the plan, and any procedures contrary to the statutory provisions.[175] The binding offer is a way to force the dissenting creditors to sell their voting interests, therefore the courts have to make various considerations to ensure that such a procedure is fair and not contrary to any statutory provisions.[176]

(f) Consequences of the failure of the rescue plan

The rescue practitioner in terms of s152 (2)[177] must take necessary steps to ensure that the plan is executed as adopted and satisfy the conditions on which the plan is conditional to. The failure by the practitioner to do so will render the plan as if it was not adopted to begin with, thereby nullifying the rescue plan.[178] If necessary steps are not taken to revise the proposed rescue plan, the rescue proceedings come to an end. Failure of the rescue plan inevitably leads to an end of the rescue proceedings.

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[172] Ibid.
[173] Section 153 (1) (b) (ii) of the Companies Act 2008.
[174] A Loubser 'The business rescue proceedings in the Companies Act 2008: Concerns and questions part 2' (2010) *TSAR* 697- 698.
[175] Ibid.
[176] Levenstein op cit note165 at 242.
[177] Section 152 (2) of the Companies Act 2008.
[178] Z Buba 'Possible consequences of the failure of an adopted business rescue plan' (2017) *De Rebus* 20.

Therefore, failure to comply with s154 of the Companies Act 2008 in terms of compensation of creditor as per the proposed rescue plan[179] may result in the rescue plan being nullified. In *New Port Finance Company v Nedbank Limited*[180] the court held that failure to adhere to the conditions agreed to during the proposal of the rescue plan would nullify the rescue plan. A creditor in those circumstances should be able to enforce the balance of its claim even where a notice of substantial implementation has been filed.[181]

Moreover, if the rescue plan proposal is rejected and not adopted, any affected party has the right to apply for the setting aside of the decision not to adopt the rescue plan. The rescue plan is a failure if any of the affected persons has not extended to use the remedy as provided for in s153 of the Companies Act 2008.[182]

VIII. DISCHARGE OF DEBTS AND CLAIMS

Discharging of debts is a permanent ban that abolishes the ability of creditors to attempt to collect any discharged debts from the debtor.[183] Discharge of the debts in part or in full is permissible provided that it is in accordance with the terms and conditions.[184] A discharge of debts is valid if there was a voluntary cession of such rights. The creditor forfeits the right to sue the debtor for the debts, once the creditor and debtor reach an agreement.

Cession of the creditor's rights may only be done voluntarily and not imposed on the creditors. It is within the rights of the creditor to be paid a financial obligation that is owed. The Companies Act 2008 tries to protect the rights of the creditors and balancing such rights by providing for voluntary discharge of the debts by the creditor. Generally imposing a discharge of the debts on the creditors would be in contravention with s7 and s5 of the Companies Act 2008. In *DH Brothers v Gribnitz No*[185] the court dealt with a rescue plan that made provision for discharge of 75,75per cent of the claims of all creditors.[186] The court held that were a rescue plan make provision for the compulsory cession of the rights, and where the cedent does not voluntarily accede to the cession, such a rescue plan will not be valid.

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[179] Section 154 of the Companies Act 2008.
[180] *New Port Finance Company v Nedbank Limited* (2015) 2 All SA 1 (SCA).
[181] Buba op cit 178 at 20.
[182] Section 132 (2) *(c) (i*) of the Companies Act 2008.
[183] T Troutman 'A discharge of debts can give you a fresh financial start', available at *https://www.muir-troutman.com/bankruptcy/discharge-of-debts,* accessed on 28 August 2018.
[184] Section 154 (1) of the Companies Act 2008.
[185] *DH Brothers Industries (Pty) Ltd* supra note 169 para 67.
[186] Ibid

The creditor loses the right to enforce the relevant debt or a part of it if the creditor acceded to the discharge of the whole or part of the debt. Majority of the rescue plan does not necessarily deprive the claims of a secured creditor.[187] The majority has no right to discharge entirely or partially the claim of another creditor unless the creditor acceded to such a discharge.[188]

The rescue plan must indicate clear and fairly on whether there is any voluntary discharge of debts. Failure to provide such proof would invalidate the rescue plan. In *ABSA Bank Limited v Haremza*[189] the court held that, "the rescue plan was not reasonably capable of interpretation that the company's indebtedness to it has been discharged and thus the surety's accessory obligation has also been extinguished".

A rescue plan is invalid and unenforceable against the creditors who opposed the rescue plan, if the plan simply makes a provision for the discharge of creditors' claims without their approval.[190] The practitioner may not make a provision unilaterally without obtaining consent from the affected creditors.[191]

Additionally, if the creditors agree to the discharge of debts and the rescue plan is approved and adopted, the creditor may not enforce any debt that the company owes before the beginning of the rescue proceedings.[192] The creditors may immediately enforce the debt if such a provision is provided for in the rescue plan.[193]

IX. COMPROMISE WITH CREDITORS

A compromise tries to resolve disputes regarding rights and enforcement of rights. A compromise required an arrangement between the company, its members and creditors.[194] The procedure required a court application by a creditor, judicial manager or the company. A compromise that is sanctioned by the courts is binding on all affected person and the company.[195] A compromise does not affect the liability of any person who is surety for the company.[196] The courts had to take into account the number of persons that were, available at

[187] D Wesso 'Business Rescue: The position of secured creditors' (2014) 34 *De Rebus* 168.
[188] Ibid.
[189] *ABSA Bank Limited v Haremza* (12189/2014) [2014] WCC 73 para 35.
[190] Wesso op cit note 187 at 168.
[191] Ibid.
[192] Section 154 (2) of the Companies Act 2008.
[193] Ibid.
[194] Section 311 (1) of the Companies Act 1973.
[195] Section 311 (2) *(a) (b)* of the Companies Act 1973.
[196] Section 311 (3) of the Companies Act 1973.

the meeting in determining whether there should be a compromise with the creditors.[197] The court had the discretion to sanction the compromise, regardless of whether it obtained a majority vote.[198] However, an application for a compromise was expensive because it involved a court application and the company had to pay for the court application.[199]

Business rescue is not the only option for companies facing financial difficulties but may also compromise with creditors in terms of s155 of the Companies Act 2008. A compromise is an alternative to rescue proceedings.[200] Compromising with creditors is an option open to a company regardless of the financial position of the company.[201] If the company is being wound up, the board of a company or a liquidator may propose a compromise of the company's financial obligations to its creditors.[202] The liquidator or the board of the company may propose a compromise by drafting a proposal that would be open for consideration with the creditors[203] and the Commission.[204]The proposal must reasonably enable creditors to make a decision on whether to accept or reject the proposal.[205] The proposal must contain the background, proposal, assumptions and conditions.[206]

(a) Background

The background of the proposal must contain the list of the material assets of the company, the list of all creditors, probable dividend, and list of the holders of company securities. The Companies Act 2008 does not offer an explanation on what encompasses material assets. According to Loubser, it may be assumed that the list of material assets should include a valuation.[207]

[197] Section 311 (5) of the Companies Act 1973.

[198] A Loubser 'Some comparative aspects of corporate rescue in South African Company Law' (unpublished LLM thesis, University of South Africa, 2010) 148.
[199] Ibid.
[200] Ibid 149.
[201] Section 155 of the Companies Act 2008.
[202] Loubser op cit note 198 at 149.
[203] Section 155 (2) *(a)* of the Companies Act 2008.
[204] Section 152 (2) *(b)* of the Companies Act 2008.
[205] Section 155 (3) of the Companies Act 2008
[206] Section 155 (3) *(a) – (c)* of the Companies Act 2008.
[207] Loubser op cit note 198 at 152

(b) Proposals

The proposal must be a detailed suggestion or offers on how the board of a company or liquidator intends to execute or carry out the compromise between the company and the creditors. The information contained in the proposal should be reasonable and based on factual suggestions.[208] The nature and duration of any proposed debt moratorium[209] is of important because the creditors would be able to decide whether a delay in the payment of debts or obligations is viable or opt for discharge of the debts.[210] The list of all creditors in their classes, such as secured or unsecured creditors helps to decide on the order of preference applied to pay the creditors.[211] A contract is a binding agreement between two or more parties thus, the proposal of a compromise must clearly state how it intends to treat contracts in place.[212] The proposal is used to convince creditors to agree with a compromise hence, the proposal must indicate clearly the benefits to be derived from accepting the proposed compromise.[213]

(c) Assumptions and conditions

The proposal must disclose whether there are any conditions to be adhered with, the effect of the compromise on any affected persons e.g. the employees,[214] the estimated financial obligations of the company.[215] The estimated balance sheet should include a detailed explanatory report.[216]

The new compromise procedure and the old offer of compromise bear a number of similarities.[217] According to Delport,[218] "the question of compromise or arrangement is no defined and the meaning given thereto under s311[219] may apply." Once the formal and procedural requirements are met then the company may opt for compromise with its creditors. The difference between compromise in terms of the Companies Act 1973 and

[208] Section (3) of the Companies Act 2008.
[209] Section 155 (3) *(a) (i)* of the Companies Act 2008.
[210] Loubser op cit note 198 at 155.
[211] Section 155 (3) *(b) (v)* of the Companies Act 2008.
[212] Section155 (3) *(b) (iii)* of the Companies Act 2008.
[213] Section 155 (3) *(b) (vi)* of the Companies Act 2008.
[214] Section 155 (3) (*c) (ii)* of the Companies Act 2008.
[215] Section 155 (3) *(c) (i)* of the Companies Act 2008.
[216] Loubser op cit note 198 at 158.
[217] *Turning Folk (Pty) Ltd t/a Balanced Audio v Greef & another* (Unreported Case no 18136/13) 2014
[218] P Delport *The New Companies Act Manual including Close Corporations and Partnerships* (2011) 2 ed 153.
[219] Section 311 of the Companies Act 1973.

Companies Act 2008 is that under the Companies Act 2008 there is no provision for a court application to sanction a compromise.

X. CONCLUSION

A 'business rescue plan' is an important concept during 'business rescue proceedings' and they form the core basis on whether the procedure would be allowed or rejected and of benefit to the company.[220] It is the duty of the practitioner to draft a rescue plan within the statutory requirements and time limits stipulated in the Companies Act 2008.[221] A rescue plan is a draft that is used to convince affected persons or the courts whether the plan would be feasible taking the company's circumstances into account.[222]

The rescue plan should be drafted in such a way that balances the rights of all affected persons and the company. The procedure generally tries to minimize the company taking any risks of plunging into more financial distress. The rescue practitioner has the duty to show that there exists reasonable prospects to rescue the company but the prospects must be justified by reasonable grounds.[223]

The rescue plan's duty is to indicate the effects of the plan on employees, creditors, shareholders and the company.[224] Drafting of the rescue plan tries to incorporate all affected persons in the procedure. In a bid to include affected persons into the procedure, the rescue practitioner may consult with affected persons when drafting a rescue plan proposal or a revised rescue plan.[225]

Therefore, the rescue practitioner may not simply impose the rescue plan on the company and affected persons. Moreover, the courts may also not impose a rejected rescue plan on affected persons.[226] The proposed rescue plan is open for consideration and approval by affected persons.[227] Hence, this implies that the rescue plan may either be rejected or accepted. The Companies Act 2008 provides with remedies to affected persons when a rescue plan proposal is rejected or setting aside an adopted rescue plan.[228]

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[220] J Jones &T Mokgorwane 'Importance of business rescue plan when instituting rescue operation', available at *http://www.bizcommunity.com/Article/196/547/84042.html,* accessed on 29 August 2018.
[221] Section 150 (5) of the Companies Act 2008.
[222] Section 150 (2) of the Companies Act 2008.
[223] *Newcity Group (Pty) Limited v Allan David Pellow & others* (577/2013) [2014] SCA 162 para 9.
[224] *African Banking Corporation of Botswana* supra note 106 para 14.
[225] Loubser op cit note 174 at 369.
[226] *FirstRand Bank Ltd v KJ Foods CC* (734/2015) [2015] SCA 50 para 40.
[227] *African Banking Corporation* supra note 112 para 14.
[228] Ibid para 54.

However, the Companies Act 2008 provides an alternative for a company in financial distress. The company may either apply for business rescue, compromise with the creditors or apply for liquidation proceedings. A company should however apply for liquidation proceedings as a measure of last resort.[229]

[229] S Bezuidenhout 'Rescue the business before liquidation is considered' (2016) *De Rebus* 22.

CHAPTER SIX

A COMPARATIVE ANALYSIS OF SOUTH AFRICA AND UNITED KINGDOM JURISDICTIONS: BUSINESS RESCUE

I. INTRODUCTION

This chapter aims to compare business rescue in South Africa with the relevant law in the United Kingdom (hereafter referred to as UK). A comparison is essential to identify whether South Africa may adopt some business rescue concepts from the UK. An assessment on the similarities and differences is essential and aids in assessing whether business rescue has been an effective rescue mechanism. Moreover, a comparison is important to assess whether the South African rescue mechanism is closely related to the international standards.

Another justification for using the UK as a viable legislative comparator to South Africa is that both jurisdictions seek to fulfil the same objectives and have similar aims.[1] The aims of both legislative frameworks are to facilitate successful restructuring of companies which in turn impacts positively on the economy. A comparison is essential where one jurisdiction may have a history that may show how proposed legislation in another may operate.[2]

II. UNITED KINGDOM

The rescue procedure or the administrative procedure in the UK is governed by the Insolvency Act 1986 Chapter 45 (hereafter referred to as the Insolvency Act 1986) and is the keystone of UK's business rescue regime.[3] The corporate insolvency elements of the Enterprise Act 2002 Chapter 40[4] (hereafter referred to as the Enterprise Act 2002) and Insolvency Act 1986 attempt to revitalise the 'rescue culture' in the UK. The introduction of Insolvency Act 1986 was influenced by the Cork Report.[5] However, the British government

[1] C Anderson 'Viewing the proposed South African business rescue provision from an Australian perspective' (2008) 11 (1) *Potchefstroome Elektroniese Regsblad* 104.
[2] Ibid.
[3] 'Business rescue in the UK: Administrative outcomes', available at *www.opusllp.com/wp-content/uploads/2016/10/DOC-161101-NRH-research-report-pdf1.pdf* , accessed on 10 September 2018.
[4] Chapter 40 of the Enterprise Act 2002.
[5] K Cork & Sir (Chairman) 'Insolvency law and practice: Report of the review committee (Cmnd.8558) (HMSO. 1982) (Cork Report).

amended the Insolvency Act 1986 through the Enterprise Act in 2002[6]. This helped to remedy against personal bankruptcy, corporate insolvency and allow for the reconstruction of the law relating to forms of insolvency.

At the core of the new administration regime introduced by the Enterprise Act 2002 lays a statutory list of aims available to the administrator or the insolvency practitioner presiding over the insolvency proceedings.[7] The Enterprise Act 2002 aims to attempt a successful rescue of the company, or keep the business as a going concern, or avoid the liquidation of that business for piecemeal for distribution to creditors.[8]

A company that is facing financial difficulties has many options at their disposal to utilise. Any remedy imposed is dependent on the circumstances of each case. A financially distressed company may apply to place a company under administration, voluntary arrangements, scheme of arrangement or liquidation or dissolution proceedings.[9] A business in financial mayhem usually opts to apply for an administration order or simultaneously apply for company voluntary agreement whilst under administration.

(a) The duties of the directors

The directors of the company are obliged to assess and monitor the company's financial situation. The directors may apply for an administration order if there is a reasonable prospect of the company avoiding insolvent liquidation upon commencement of administration proceedings.

A director, who neglects his duties, may be held liable for wrongful trading.[10] The duties of the director include application assessing and applying for administration proceedings. However, for a director to be held liable for wrongful trading he must have known that there

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[6] 'New administration procedure enterprise act 2002', available at *https://www.lawteacher.net/free-law-essays/business-law/new-administration-procedure-enterprise-act-2002-business-law-essay.php?vref=1*, accessed on 6 September 2018.

[7] R Jameel Mokal & J Armour 'The new corporate rescue procedure- The Administrator's duty to act rrationally', available at *https://poseidon01.ssrn.com/delivery.php?ID=765078021102092116098016096071114096056012093049062087109125091007119068065094108088011062005012058022097126086076093120067061053054053049093002068070098111094023054016083068024031004019118004103003000089070097125087010102124112076091069125078094&EXT=pdf*, accessed on 6 September 2018.

[8] Ibid.

[9] L Conway 'Company Administration', available at *file:///H%/business%20rescue%20comparing%20with%20other%20countries%20Australia%20and%20United%20Kingdom/SN0491.pdf,* accessed on 10 September 2018.

[10] 'Case law: Court clarifies when directors of insolvent company can be personally liable for company's debts', available at *https://www.icaew.com/archive/library/subject-gateways/law/legal-aalert/2015-12/case-law-court-clarifies-when-directors-of-insolvent-company-can-be-personally-liable*, accessed on 11 September 2018.

was no reasonable prospect of the company avoiding insolvent liquidation or administration. In *Brooks & another v Armstrong; Re Robin Hood Centre plc (in liquidation) (Brooks)*[11] it involved a company that went into liquidation, and the liquidators alleged the directors were guilty of wrongful trading and eventually leading to insolvency. The court held that an objective test and subjective test is to be applied to assess whether the director may be held liable for wrongful trading.

(b) Taking a prepack as an option

Prepacking refers to a negotiation to initiate sale of the business or assets before filing of business rescue.[12] The directors of the company have to identify whether the company is under financial distress.[13] The sale can be negotiated before the appointment of administrators and completes upon such an appointment.[14] This means that prepacks may be used by an insolvency officer or an administrator, only if the preparatory works are done before the appointment of the administrator.[15] According to Pretorius, "the prepacks have helped to address the risks pertaining to a lack of working capital for trading purposes once a company has filed for administration".[16]

In *Re Kayley Vending Limited*[17] the proposed administrators were of the view that the company should take prepack administration into account because the principle competitors of the company were likely to pay the most for the company's assets. Administrators intended to start prepack administration immediately after appointment. The courts had to analyse and give guidelines as to what prepacks entails. The court held that the onus is on the applicant to provide the courts with information to assist the courts. Prepacks can be granted only if the courts are convinced that the value likely to be achieved is appropriate for the benefit of the company.

The courts in *Kayley* cautioned that courts, in exercising discretion when granting prepack administration should be alert to see that the procedure is not obviously abused to

[11] *Brooks & another v Armstrong; Re Robin Hood Centre plc (in liquidation)* [2015] EWHC 2289.
[12] S Makhondo & M Pretorius 'Prepackaged application in business reorganizations: International principles' (2017) 21 *Southern African Business Review* 100.
[13] J Palmer 'Prepack administration', available at *https://www.begbies-traynorgroup.com/pre-pack-administration*, accessed on 12 September 2018.
[14] Ibid.
[15] Makhondo op cit note 12 at 103.
[16] Ibid.
[17] *Re Kayley Vending Limited* [2009] EWHC 904 para 2.

disadvantage the creditors.[18] Prepack administration must be transparent to creditors because prepacks require a more detailed consideration as to whether they should be effected through a court process.[19]

In *DKLL v HM Revenue and Customers*[20] the court had to point out to some of the disadvantages of prepack administration. These include lack of accountability in that prepack administration may be executed without any prior consent from the courts, lack of transparency and no maximised returns in that there is no time for full exposure to the business to the market.[21]

However even though prepacks may be associated with various disadvantages, they are meant to be advantageous to businesses in financial distress. Prepacks allow sale of the business as a going concern without having negative effects on continuity of business operations of the administrator.[22] Prepacks helps in preserving the value of assets. They are advantageous in that during administration of the company it is difficult to preserve value of the assets.[23] Furthermore, prepacks preserve publicity of the company hence achieving the results intended for application of an administration order.[24] Moreover, prepacks help directors and insolvency practitioners to come up with solutions on how to rescue the company from financial distress quickly, in a manner that is convenient for the company and its interests.[25]

The management of the company is responsible for initiating voluntary administration where the company is under financial distress. The administrators may thus work with the company's management to arrange the sale of the business or its assets under prepacks arrangements.[26]

III. ADMINISTRATION

Administration of the company is a process that provides any viable company in financial difficulty a breathing space to rescue the company from any financial difficulties. The introduction of the Enterprise Act 2002 provided a much simpler procedure for obtaining an

[18] Ibid para 6.
[19] Ibid.
[20] [2007] EWHC 2067 (Ch)
[21] Ibid para 22.
[22] Palmer op cit note 13 above.
[23] Ibid.
[24] Ibid.
[25] *Re Kayley Vending Limited Supra* Note 17 above para 11.
[26] Makhondo op cit note 12 at 103.

administration order.[27] An administration order may be brought in terms of Schedule B1 of the Insolvency Act 1986.[28] The order may be granted in relation to a company or an insolvent partnership.[29]

The company, directors or creditors may separately or jointly apply for an administration order.[30] An administration order is not applicable to a company that has already gone into liquidation,[31] an insurance company,[32] a recognised bank or licenced institution.[33] The court may grant the administration order if it is satisfied that the company complied with statutory requirements.[34] The courts ought to be satisfied that it is likely that the company will be unable to pay its debts in terms of s123.[35] Moreover, for a company to be declared as unable to meet its financial obligations, the courts have to be satisfied that the value of the company's assets is less than the liabilities.[36]

In *Highberry Limited v Colt Telecom Group plc*[37] the court had to decide on the definition of 'likely'.[38] The court held that to put a company under an administration order is a serious matter. An administration order exposes a company to various expenses, danger and problems. The words 'likely' must be in compliance with s123 of the Insolvency Act 1986.[39] The court held that the word 'likely' meant that there need to be real prospect of insolvency rather than where the insolvency was more probable or not.

An administration order aims to ensure the survival of the company as a going concern,[40] which means that the company will continue to operate and will not be liquidated or forced to discontinue its operations. A company voluntary agreement may be granted whilst a company

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[27] All Answers ltd, 'New administration procedure enterprise act 2002', available at https://www.lawteacher.net/free-law-essays/business-law/new-administration-procedure-enterprise-act-2002-business-law-essay.php?vref=1, accessed on 12 September 2018.

[28] Section 359 Schedule 17 of the Enterprise Act 2002.

[29] Ibid.

[30] Section 9 of the Insolvency Act 1986.

[31] Section 4 of the Insolvency Act 1986.

[32] Section 4 *(a)* of the Insolvency Act 1986.

[33] Section 4 *(b)* of the Insolvency Act 1986.

[34] Section 9 (3) of the Insolvency Act 1986.

[35] Section 123 of the Insolvency Act 1986- in terms of Insolvency Act 1986 the company must be able to pay its debts or meet its financial obligations.

[36] Section 123 (2) of the Insolvency Act 1986.

[37] *Highberry limited v Colt Telecom Group plc* [2002] EWHC 2815 (Ch) para 15.

[38] Ibid para 52.

[39] Ibid para 34.

[40] Section 8 (3) *(a)* of the Insolvency Act 1986.

is under administration.[41] A company voluntary agreement is an agreement between the creditors and the company regarding the repayment of the debts.

In *Bowen Travel Limited* [42] it involved an application for an administration order. The court had to assess whether there was any real prospect for the administration order yielding better results. The court held that the question on whether there is any real prospect is not a question that did not lead to an automatic order one way or the other because of the discretionary powers the courts have.

The Insolvency Act 1986 permits a company or an administrator to arrange a compromise of the debts between the company and its creditors but the compromise needs to be a voluntary act.[43] The intention of an administration order is to ensure that the company benefits more by implementation of advantageous steps e.g. realisation of the company's assets than it would have been in the case of winding up the company.[44]

(a) Commencement of an administration procedure

A company or its directors may apply for the commencement of administration proceedings. An appointment of an administrator indicates commencement of the administration procedure.[45] Commencement of administration procedure suspends or dismisses any petition to wind up the company[46] and the administrative receiver vacates office.[47] This means that the order suspends any resolution to wind up the company. It is not permissible to enforce security over the company.[48] Commencement of administrative proceedings offers a company a moratorium hence legal proceedings against the company are terminated.

Additionally, commencement of administration proceedings empowers the administrator with the powers to handle and manage the company's affairs and property of the company.[49] Any person who defies the powers of the administrator and defaults complying with the

[41] Section 8 (3) *(b)* of the Insolvency Act 1986.
[42] *Bowen Travel Limited* [2012] EWHC 3405.
[43] Section 8 (3) *(c)* of the Insolvency Act 1986.
[44] Section 8 (3) *(d)* of the Insolvency Act 1986.
[45] G. M Museta *The Development of Business Rescue in South African Law* (unpublished thesis, University of Pretoria, 2011) 58.
[46] Section 11 (1) *(a)* of the Insolvency Act 1986.
[47] Section 11 (1*) (b)* of the Insolvency Act 1986.
[48] Section 11 (3) *(a)* of the Insolvency Act 1986.
[49] Section 12 (1) of the Insolvency Act 1986.

administrative procedure and rules without any reasonable excuse or permission is liable to a fine.[50]

(b) Effects of an administration order

An administration order is one of the effective rescue mechanisms in the UK. The administration order has an effect on creditors, directors, shareholders and members of the company. The administration order suspends the winding up petition against the company, allows the dismissal of an administrative receiver that was responsible for the winding up of the company, the interim and final moratorium comes into effect, meaning any insolvency proceedings or legal proceedings are stayed.[51] Moreover, once an application for an administration order has been launched, such an application may not be withdrawn without the consent of the courts.[52]

IV. APPOINTMENT OF AN ADMINISTRATOR

An administrator may be appointed in terms of para 14 and 22 of Schedule B1 of the Insolvency Act 1986. A court application or filing of papers with the courts is the requirements for the appointment of an administrator. The Insolvency Act 1986 makes provision for joint or separate appointment of more than one administrator.[53]However, the directors or creditors of the company may launch an application for the appointment of an administrator.[54]

The Enterprise Act 2002 allows the appointment of administrators without filing for any court order. However, the appointment is valid if the proper procedure was followed and the correct papers were filed. In *Pillar Securitisation SARL & Ors v Spicer & Anor (Court Administrator) CHD*[55] , it involved the appointment of administrators out of court. The company filed wrong forms. The court held that it was mandatory to follow the prescribed procedure. The court held that where wrong papers were filed the appointment of the

[50] Section 12 (2) of the Insolvency Act 1986.
[51] Schedule 16 para 40 of the Enterprise Act 2002.
[52] Schedule 16 para 11 of the Enterprise Act 2002.
[53] Section 13 of the Insolvency Act 1986.
[54] Slaughter & May 'Companies in administration: an overview', available at *https://www.slaughterandmay.com/media/808906/companies-in-administration-an-overview.pdf,* accessed on 14 September 2018.
[55] *Pillar Securitisation SARL & Ors v Spicer & Anor (Court Administrator) CHD* [2010] EWHC 836 (Ch) para 29 – 30.

administrator would be invalid. The court invalidated the appointment but allowed the administration order to have a retrospective effect.

In *Stares v Elgin Legal Ltd*[56] the courts had to answer whether a former administrator could apply for an administrative order with retrospective effect. The courts can grant an administration order to apply retrospectively if the relevant criteria were met in applying for an administration. The court held that an order with retrospective effect may not be granted if the order would have unequal and unfair effects on creditors. For example, a retrospective effect is detrimental to creditors if it will lead to creditors losing out on interest.

The court may grant an administration order or appoint an administrator with retrospective effect.[57] A retrospective effect is an order that takes effect in point of time. In *Re G-Tech Construction Ltd*[58] the court supported the making of an administration order taking retrospective effect. The courts may thus validate and ratify earlier actions of persons who were purportedly administrators at the time.

The administrator must have vast knowledge and experience in dealing with companies in financial difficulty.[59] Hence this allows the administrator with the opportunity to make objective decisions on what is best for the company. The Enterprise Act 2002 made it legal for an appointment of an administrator without any reference to the courts.[60] The administrator need only be a licensed insolvency practitioner.[61]

(a) The functions and the duties of an administrator

The amendment of the Insolvency Act 1986 introduced a new and improved administration regime. Finance plays a major role in the success of corporate rescues as it drives the rescue process. The process of convincing potential lenders to fund a business which appears unsuccessful may amount to a difficult job for the administrators.[62] Hence, the administrative regime extends the powers and functions of the administrator in that it allows the

[56] *Stares v Elgin Legal Ltd* [2016] EWHC 2523 (Ch).
[57] Para 13 of Schedule B1 of the Insolvency Act 1986.
[58] *Re G-Tech Construction Ltd* [2007] BPIR 1275 para 12.
[59] Francis Wilks & Jones 'What are advantages and disadvantages of company administration?' , available at *https://www.franciswilksandjones.co.uk/site/our_services/company-services/insolvency-solicitors/company-administration/further-information-compadmin/what-are-advantages-and-disadvantages-of-company-admin.html*, accessed on 11 September 2018.
[60] A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (unpublished thesis LLM University of South Africa 2010) 217.
[61] Ibid.
[62] A Aruoriwo 'Financing corporate rescues, where does the UK stand' (2014) 1 (2) *IALS Student Law Review* 12.

administrator to borrow funds, grant security and prioritise the repayment of debts owing under contracts entered into by the administrator.[63] This process allows the administrator to easily obtain finances and contracts that may help to restore the company to its solvency.[64]

An administrator is obliged to make decisions that are not prejudicial to the company or worsen the financial position of the company.[65] The business transactions or conducts of the practitioner need to be necessary in bettering the company.[66] The administrator may remove a director of the company from office and appoint a director. The Insolvency Act 1986 seeks to confer upon the administrator the necessary powers that would help achieving the goals as stipulated in terms of Schedule 1 of the Insolvency Act 1986[67].

However, the Insolvency Act 1986 makes provision for the removal of an administrator when the administrator is no longer qualified to hold such a position[68] and when the administration order is discharged.[69] The fees and expenses of the administrator are payable in relation to property that the administrator has security over.[70]

V. INVESTIGATION OF THE COMPANY'S AFFAIRS

An administrator has the duty to conduct a thorough investigation into the affairs of the company. Any person that was affiliated with the company before the administration order has the duty to assist the practitioner in his investigation by providing him with a statement of affairs of the company e.g. the assets, liabilities of the company, the list of creditors, securities, and any information that is necessary for the investigation.[71] The duty of the administrator is to assess the actual position of the company and determine whether the circumstances of the company permit an administration order.

(a) The administrator's proposal

A proposal is generally a statement that shows the strategy that the administrator is proposing to use for company rescue process. The administrator is obliged to write a proposal on how

[63] 'Business rescue in the UK: Administrative outcomes', available at www.opusllp.com/wp-content/uploads/201/10/DOC-161101-NRH-research-report-pdf1.pdf, accessed on 10 September 2018.
[64] Aruoriwo op cit note 13 at 10.
[65] Section 14 (1) *(b)* of the Insolvency Act 1986.
[66] Section 14 (1) *(a)* of the Insolvency Act 1986.
[67] Section 14 (2) of the Insolvency Act 1986.
[68] Section 19 (2) *(a)* of the Insolvency Act 1986.
[69] Section 19 (2) *(b)* of the Insolvency Act 1986.
[70] Section 19 (4) of the Insolvency Act 1986.
[71] Section 22 of the Insolvency Act 1986.

he intends to achieve the purpose of administration.[72] The administrator has three months to draft a proposal that is sent to the registrar of the company, the creditors[73] and to all members of the company.[74] The administrator must comply with the time limit stipulated by the Insolvency Act 1986 otherwise, the administrator will be liable for a fine.

The administrator may make revision to the proposal once the creditors have approved the proposal without modifications.[75] However, the administrator must notify creditors of such revisions. The administrator may not continue to implement the revisions unless the creditors consent to such revisions.[76]

The administrator has the duty to conduct the administrative process in a manner that is legal and not prejudicial to the creditors, members of the company or the company. Any creditor and member of the company has the right to launch an application if the administrator acts in a way that is prejudicial to the creditors or members of the company.[77]

(b) Creditors meeting

The Enterprise Act 2002 provides for a creditors meeting that is summoned by the administrator.[78] The meeting enables voting for the administrator's proposal. The administrator must thus send invitations and the proposal to all creditors. Hence, it is the duty of the administrator to ensure that the meeting is conducted within a reasonable time. The creditors during the meeting may either approve or reject the proposal.

The administrator does not simply impose the proposal but has to convene a meeting with the creditors for approval of the proposal.[79] Creditors may approve the proposal with modifications as to how they propose the proposal ought to be structured however, the administrator must consent to the modifications.[80] This means that the administrator may either approve or reject the modifications. The duty of the administrator is only to ensure that the proposal contains necessary information that enables creditors to decide on the proposal.

[72] Schedule 16 para 49 (1) of the Enterprise Act 2002.
[73] Section 23 (1) of the Insolvency Act 1986.
[74] Section 23 (2) of the Insolvency Act 1986.
[75] Section 25 (1) of the Insolvency Act 1986.
[76] Section 25 (2) (*b*) of the Insolvency Act 1986.
[77] Section 27 (1) *(a)* of the Insolvency Act 1986.
[78] Schedule 16 para 50 of the Enterprise Act 2002.
[79] Section 24 (1) of the Insolvency Act 1986.
[80] Schedule 16 para 53 of the Enterprise Act 2002.

VI. TERMINATION OF ADMINISTRATION PROCEEDINGS

The administrator has the duty to assess the position of the company on appointment and until the end of the proceedings. This means that the administrator may discharge the proceedings when the company has been successfully rescued or it is no longer possible to continue with the procedure. The administrator may not automatically dismiss the proceedings but have to convene a meeting with the creditors. Termination of the administration proceedings obliges the administrator to make a copy of such a discharge to the registrar of companies within fourteen days.[81] Hence, without sufficient reason, the administrator may be fined in the event of failure to launch such a copy within the set time limit.[82]

The courts may discharge the administration order if the proposal is rejected by the creditors.[83] Therefore, discharge of an administration order terminates the rescue proceedings. The administrator has the duty to effect the discharge within fourteen days. The copy of the discharge must be sent to the registrar of companies, failure which the administrator is liable to a fine.[84]

VII. COMPANY VOLUNTARY AGREEMENTS

Company voluntary agreements are part of rescue options stipulated by the Insolvency Act 1986. In terms of Insolvency Act 1986 company voluntary agreements (hereafter referred to as the CVA) refer to a statutory agreement between the company in financial distress and its creditors.[85] The agreement includes payment of debts over a fixed period of time. The company will have time to address management and operational systems that are not fully functional.[86] CVAs are mostly open to limited companies.[87] The directors, administrator or

[81] Section 18 (4) of the Insolvency Act 1986.
[82] Section 18 (5) of the Insolvency Act 1986.
[83] Section 24 (4) of the Insolvency Act 1986.
[84] Section 24 (7) of the Insolvency Act 1986.
[85] S Renshaw 'What is a company voluntary agreement (CVA)?' available at *https://www.companydebt.com/company-rescue-solutions/company-voluntary-arrangement/*, accessed on 17 September 2018.
[86] Begbies Traynor 'Advantages and disadvantages of a CVA', available at *https://www.begbies-traynorgroup.com/articles/rescue-options/what-are-the-advantages-and-disadvantages-of-a-company-voluntary-arrangement*, accessed on 18 September 2018.
[87] Renshaw op cit note 85.

liquidator may propose to its creditors for a voluntary agreement.[88] The agreement becomes legally binding once parties agree to the terms and conditions stipulated.

The CVA proposal may only be monitored and implemented by a qualified insolvency practitioner.[89] The insolvency practitioner acts as a representative. The CVA can last for three to five years. Commencement of CVA allows for a moratorium to be put in place and protects the company from legal proceedings by its creditors.

Implementation of a CVA is permissible even where there is administrative order in terms of s8 of the Insolvency Act 1986[90] or where the company is being wound up or liquidated.[91] An administrator who was part of the administrative order, may convene a meeting with the creditors to propose a CVA and this may be done without the approval of the court.[92] The nominee may submit a report to the court within 28 days, stipulating his opinions and meeting of the company.[93] The nominee may make a proposal and convene a meeting with creditors to consider the proposal.[94] The nominee must be given access to the statement of company's affairs containing a list of creditors, liabilities, assets and any relevant information.[95] The CVA needs approval of about 75 per cent and thereafter the directors remain in control of the company.[96]

VIII. COMPARISON BETWEEN SOUTH AFRICA AND UK

(a) The differences between South Africa and the UK

There are major differences between the UK and South Africa's rescue proceedings.

(i) Commencement of administrative proceedings and business rescue proceedings

The Companies Act 2008 permits commencement of rescue proceedings when the directors of the company pass a resolution to commence rescue proceedings or if any interested party

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[88] Ibid.
[89] Section 2 of the Insolvency Act 1986.
[90] Section 1 (3) *(a)* of the Insolvency Act 1986.
[91] Section 1 (3) *(b)* of the Insolvency Act 1986.
[92] L Conway 'Company voluntary arrangements (CVAs) Common Library Briefing', available at *file:///C:/Users/214531869/Downloads/SN06944.pdf* , aaccessed on 18 September 2018.
[93] Section 2 of the Insolvency Act 1986.
[94] Ibid.
[95] Section 3 *(a) – (b)* of the Insolvency Act 1986.
[96] 'What is a CVA (Company Voluntary Agreement)?' available at *https://www.companyrescue.co.uk/guides-knowledge/what-is/what-is-a-cva-or-company-voluntary-arrangement/,* accessed on 17 September 2018.

applies to the court.[97] The rescue proceedings commence when the court or creditors and affected persons are satisfied that there exists reasonable grounds and reasonable prospects to successfully rescue the company,[98] whilst, in the UK creditors or directors may apply for an administrative order.[99] However, the administrative proceedings commence upon appointment of the administrator. The administrator may upon appointment investigate whether the company may continue with the rescue proceedings.[100]

Additionally, the Companies Act 2008 makes provision for affected persons to apply for commencement of rescue proceedings. The list of affected persons includes employees, registered trade unions, shareholders or creditors.[101] Whereas, the Enterprise Act 2002 and Insolvency Act 1986, limit application for administration order to the company, directors, creditors or justices' chief executive.[102]

In the UK the Enterprise Act 2002 prioritises the repayment of debts that were incurred by the administrator during the rescue procedure of the company.[103] The Companies Act 2008 makes provision for the order of preferences in payment debts i.e. a hierarchical approach to the payment of debts however secured creditors are paid after the payment of the business rescue practitioner's fees and expenses.[104]

(ii) Time limits for administrative procedure and business rescue proceedings

The Insolvency Act 1986 and Enterprise Act 2002 provide for an initial period of twelve months for a successful administration of the company.[105] The administrators may thus take a positive action to extend the process.[106] This means that the administrators may extend the process for more than one year. Whilst the Companies Act 2008 provides that a rescue procedure should be within a reasonable time and that is from three to six months.[107] The rescue practitioner may apply for the termination of rescue proceedings if there no longer

[97] Section 129 of the Companies Act 2008.
[98] Section 131 (4) of the Companies Act 2008.
[99] Section 9 of the Insolvency Act 1986.
[100] Section 21 of the Insolvency Act 1986.
[101] Section 128 (1) *(a)* of the Companies Act 2008.
[102] Schedule 16 Para 12 of the Enterprise Act 2002.
[103] Section 9 of the Insolvency Act 1986.
[104] Section 135 of the Companies Act 2008.
[105] 'Business rescue in the UK: Administrative outcomes', available at *www.opusllp.com/wp-content/uploads/201/10/DOC-161101-NRH-research-report-pdf1.pdf*, accessed on 10 September 2018.
[106] Slaughter and May op cit note 54 at 1.
[107] Section 132 of the Companies Act 2008.

exists reasonable prospects to rescue the company or the courts may thus terminate rescue proceedings that last longer than expected.

(iii) Administrator vs the business rescue practitioner

In terms of the Enterprise Act 2002 a professional insolvent practitioner is appointed as the administrator responsible to handle the administration process of the company.[108] Whilst, the Companies Act 2008 permits the appointment of a qualified rescue practitioner.[109] Once, the rescue proceedings are terminated and replaced by liquidation proceedings the rescue practitioner will be replaced by a liquidator.

(iv) Prepack administration

The administrative system in the UK allows the use of prepack administration which is a remedy available to a company in financial distress but has not yet began the rescue proceedings.[110] Prepack administration is a strategy used to sell a property at a realised value before announcement of an administration order against the company. However, the administrator may continue with prepack administration transactions upon appointment. In the Companies Act 2008 it does not make provision for such a procedure. A company facing any financial distress may either apply for liquidation proceedings or business rescue proceedings.[111]

(v) Administrator's proposal and business rescue proposal

An administrator when drafting the proposal in terms of the Insolvency Act 1986 is not obliged to consult with the creditors. The administrator may assess on the financial position of the company and decide on how he is to deal with the situation of the company.[112] Whilst, in terms of the Companies Act 2008 the rescue practitioner may consult with the creditors or any affected person when drafting the business rescue proposal.[113]

The UK and South Africa's rescue procedures confer certain rights upon creditors e.g. voting rights. The only difference between the two mechanisms is the extent of the powers of

[108] Slaughter & May op cit note 54 at 5.
[109] Section 138 of the Companies Act 2008.
[110] Makhondo & Pretorius op cit note 12 at 103.
[111] Ibid 109.
[112] Museta op cit note 45 at 62.
[113] Section 151 of the Companies Act 2008.

creditors and the powers of the administrators or rescue practitioners. The Insolvency Act 1986 confers powers to an administrator in relation to any suggested modification to the proposal.[114] Creditors may approve the proposal with modifications as to how they propose the proposal ought to be however, the administrator must consent to the modifications. The Companies Act 2008 allows the creditors to either reject or approve a rescue proposal but may thus make suggestions or proposals in relation to a rejected rescue plan.[115] The rescue practitioner needs to revise the plan taking into consideration the proposal by creditors.
The UK and South Africa both require creditors to vote for the proposal. The Insolvency Act 1986 does not specifically stipulate the percentage needed for approval of the proposal, unlike the Companies Act 2008 that requires 75per cent of the creditors to vote for the proposal.[116]

(vi) Orientation of the rescue mechanisms

The UK's rescue mechanisms do not take into account private benefits of stakeholders. This means that the system gives absolute priority to repayment of creditors' claims. In comparison to South Africa's rescue system, business rescue in terms of the Companies Act 2008 has moved extensively from being creditor oriented. The Companies Act 2008 tries to balance rights of all affected persons. The courts may still look at the creditors rights however; creditors are not the centre of attraction as was during judicial management. The Companies Act 2008 moved from being creditors-oriented and became more debtor-oriented taking into account the major objectives of the Companies Act 2008 e.g. protecting employment contracts.

(vii) Moratorium

The Insolvency Act 1986 and the Enterprise Act 2002 offers an interim moratorium to protect the company from any actions against creditors. The interim moratorium is applicable before the administration starts from the time of application for an administrative order[117]. The interim moratorium halts the creditors' rights however, these rights are just temporarily

[114] Section 24 (1) – (2) of the Insolvency Act 1986.
[115] Section 152 of the Companies Act 2008.
[116] Section 152 (2) *(a)* of the Companies Act 2008.
[117] Schedule B1 para 44 Insolvency Act 1986.

frozen.[118] A successful application will convert the interim into a final or permanent moratorium until the end of the administration proceedings.

The Companies Act 2008 makes provision for a general moratorium during rescue proceedings.[119] Hence, this means that the company is protected from any legal proceedings that may hinder the rescue process.[120] However, the Companies Act 2008 suspends liquidation proceedings of the company upon application for rescue proceedings. The Companies Act 2008 does not distinguish between interim or final moratorium like in the UK.

(b) The similarities between South Africa and the UK

The UK rescue mechanism is almost similar to that of South Africa and this has been shown by a couple of significant similarities between the two doctrines. The introduction of business rescue in the Companies Act 2008 and abolishment of judicial management in terms of the Companies Act 1973 has resulted in the improvement of the rescue mechanisms in South Africa.

The creditors are prevented from taking any enforcement action and prevent the restoration of the business to viable financial viability.[121] Both the Companies Act 2008 and the Enterprises Act 2002 aim to prevent the creditors from unnecessarily hindering the success of the rescue process. However, in terms of the Companies Act 2008, unlike the Companies Act 1973, it aims to balance the rights of all affected persons though it tries to place more preference on the rights of the creditors. The processes aim to ensure the maximum financial return for the general body of creditors.

The rescue mechanisms offered according to the Companies Act 2008, Enterprise Act 2002 and the Insolvency Act 1986 try to protect a company undergoing the restructuring process to be protected by the moratorium on rights. This means that no legal proceedings may be brought against the company or by the company without the consent of the rescue practitioner and the administrator or without the leave of the court. However, the UK goes further to distinguish between the interim and final moratorium.

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[118]A Bradstock 'When and why is a moratorium required in an administration?' available at *https://www.companydebt.com/company-rescue-solutions/company-administration/moratorium-required-administration/* ,accessed on 18 September 2018.

[119] Section 133 (1) of the Companies Act 2008.

[120] Ibid.

[121]'Business rescue in the UK: Administrative outcomes', available at *www.opusllp.com/wp-content/uploads/201/10/DOC-161101-NRH-research-report-pdf1.pdf* , accessed on 10 September 2018.

The reason why judicial management in terms of the Companies Act 1973 was abolished in South Africa was because it was an utter failure and one of the causes was the massive involvement of the courts in the rescue proceedings. The introduction of business rescue in the Companies Act 2008 reduced the involvement of courts in the rescue proceedings and this has proved to be successful so far. The UK in terms of the Insolvency Act 1986 and Enterprise Act 2002 have sought to minimise the involvement of the courts in administrative proceedings e.g. appointment of an administrator without the interference of the courts. The minimal interference of the courts in rescue proceedings has helped to reduce the complexities involved with court proceedings. Hence improving the rescue mechanisms in the long run.

IX. CONCLUSION

The UK has one of the most progressive rescue procedures. The UK has developed their rescue mechanisms, which has helped in making the process more effective and efficient. The amendments of the Insolvency Act 1986 with the Enterprise Act 2002 have helped in remedying the loopholes that existed within the Insolvency Act 1986. Company voluntary agreement is a process that involves debtor-creditor negotiation and is similar to informal workout. CVA aims at providing an inexpensive, quick and efficient method of dealing with financial distress.[122]Alternately, a company is under administration when an administrative order is granted. It is a formal process that is directed by an administrator and overall supervision by the courts[123].

The Enterprise Act 2002 tried to minimize the involvement of the courts in the rescue process e.g. the directors and company have the power to appoint an administrator without the interference of the courts.[124] Moreover, the Enterprise Act 2002 has improved the rescue mechanisms by introduction of additional options for financially distressed companies e.g. the introduction of prepack administration.

South Africa may incorporate some of the rescue mechanisms or systems in the UK in order to make restructuring of companies more reliable and effective.

[122] PJ Omar & J Grant 'Corporate rescue in the United Kingdom: past, present and future reforms', available at *irep.ntu.ac.uk/id/eprint/27854/1/Pubsub5402_Omar.pdf*, accessed on 18 September 2018.
[123] Ibid.
[124] Loubser op cit note 46 at 212.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

I. A CRITICAL EVALUATION OF THE BUSINESS RESCUE PROCEDURE

Business rescue has been recognised to be an important concept in the Companies Act 2008 and the economy. It has come to the rescue of many business enterprises, including companies and close corporations. Comparing it to its predecessor, business rescue has proved to be showing major positive improvements by having contributions to the economy and the social well-being of many stakeholders, particularly employees.

The remedy has clear goals and this enables it to succeed in achieving the main objectives of the legislation in accordance with its intention. The unemployment rate in South Africa is currently relatively high at 27.2 per cent.[1] Chapter 6 of the Companies Act 2008 has been construed in such a way that would support the government in achieving the macro-economic and social goals.[2] In order for business rescue to succeed, there is need of more exposure of the remedy, other than its predecessor. The intention of the legislation is to ensure a reduction in business liquidations and encourage businesses to utilise rescue proceedings.[3]

Companies are obliged to react quickly in utilising rescue proceedings and formulate strategies on how the company is to be rescued. This means that filings for business rescue proceedings to commence must be done while there are still greater chances of success. The Companies Act 2008 is an effective corporate rescue tool but it can only be effective if the company and directors take steps to redeem the company before the financial position of the company worsens. However, in most instances companies are reluctant to admit any financial distress until it is too late. This is because such admittance leads to loss of trust from creditors, investors and the general market and public. Therefore, in a bid to protect the company's goodwill companies do not easily admit to financial distress.

Business rescue in the South African Companies Act 2008 has a more unique feature in that it gives more power to the employees and the trade unions in comparison to other international

[1] 'SA unemployment rate rises to 27.2%', available at *https://ewn.co.za/2018/07/31/sa-unemployment-rate-rises-to-27-2-in-q2*, accessed on 3 October 2018.

[2] S Conradie & C Lamprecht 'Business rescue: How can its success be evaluated at company level' (2015) 19 (3) *Southern African Business Review* 22.

[3] M Pretorius & W Du Preez 'Constraints on decision making regarding post-commencement finance in business rescue' (2013) *South African Journal of Entrepreneurship and Small Business Management Science* 189.

countries, for example the UK.[4] The Companies Act 2008 is more progressive than the Companies Act 1973 and this has contributed to its effectiveness. Moreover, the Companies Act 2008 essentially seeks to protect employment contacts, and this is one of the main objectives for the implementation of the procedure. However, too much involvement of employees in the process may be problematic,[5] in that the process may be open to abuse and delays thus diverting it from its intended purpose.

Moreover, the procedure may be abused when companies seek to avoid liquidation proceedings. Application for business rescue suspends liquidation proceedings against the company. Suspending liquidation proceedings means that the company would have to continue trading at an insolvent basis which would not be of any advantage to the business as the debts of the company will continue to mount up. According to Van Niekerk,[6] "to accept that a mere application for business rescue would suspend liquidation proceedings ex lege could yield manifestly unjust results". The Companies Act 2008 makes provision to avoid abuse of the process since before the court grants business rescue proceedings the company and the rescue practitioner must conduct thorough investigation into the affairs of the company.

The Companies Act 2008 attempts to avoid abuse of business rescue by providing remedies to guard such abuses, for example, any interested party may apply to set aside business rescue applications on account of abuse. However, the complexity of the legal procedure is a hindrance to parties that may seek to be protected by the law. The remedies are costly and time consuming which reduces the effectiveness of the Companies Act 2008.[7] The mere existence of these remedies shows the positive impact of the Companies Act 2008 and also, the fact that the courts have the power to determine whether to grant or dismiss an application will help in guarding against abuse of the procedure.[8]

II. AFFECTED PERSONS

[4] R Bradstreet 'The leak in the Chapter 6 Lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22 (2) *SA Mercantile Law Journal* 196.

[5] A Loubser 'The business rescue proceedings in the Companies Act 2008: Concerns and questions (Part 1)' (2010) 3 *TSAR* 510.

[6] B Van Niekerk 'Launching business rescue applications in liquidation proceedings- (successfully) flogging a dead horse?' (2015) *De Rebus* 50.

[7]Hogan Lovells 'The abuse of business rescue: beware the serial debtor', available at *https://www.hoganlovells.com/en/publications/the-abuse-of-business-rescue-beware-the-serial-debtor* accessed on 8 June 2018.

[8] *Gomley v West City Precinct Properties (Pty) Ltd.* See also *Anglo Irish Bank Corporation v West City Precinct Properties (Pty) Ltd* (2012) SA 33 (WCC) para 7.

Affected persons in the Companies Act 2008 include creditors, employees and shareholders. In terms of s7 of the Companies Act 2008 it aims to balance rights of affected persons. Therefore, the following discussion will be an assessment of whether business rescue has been an effective remedy to affected persons.

(a) Creditors

A creditor is a person or entity to whom the company owes a financial obligation and there exists an obligation to repay. The Companies Act 1973 was creditor-oriented meaning the creditors were the sole priority during judicial management.[9] The introduction of business rescue moved from being creditor-oriented to debtor-oriented. Therefore, the courts when assessing the company no longer solely prioritise the rights of creditors but takes into account employees, shareholders and interests of the company.[10]

The Companies Act 2008 has so far proved to be effective by trying to balance rights of interested stakeholders in a way that does not infringe rights of another entity or person. The Companies Act 2008 tried to limit the creditor's powers during rescue proceedings and this has led to an effective and more sophisticated rescue mechanism.[11] Creditors may not unreasonably vote against the business rescue proposal. In *Collard v Jatara*[12] the court had to set aside the creditor's vote on the basis that the vote was unreasonable.

The improved rescue mechanism has led to an effective rescue procedure in that the Companies Act 2008 balances stakeholders' rights in a way that is not detrimental to the rescue proceedings or the company. However, the Companies Act 2008 tries to ensure that creditor's rights are not overlooked thereby, undermining the core principles and purposes of the Companies Act 2008.[13]

The Companies Act 2008 tries to protect creditors' rights in a way that would promote and support investments.[14] Any affected person may apply for commencement of rescue proceedings. The Companies Act 2008 permits creditors to utilise the remedy and this has helped to increase investors trust in the economy. Therefore, accessibility, accountability and

[9] R Bradstreet 'The leak in the Chapter 6 Lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders willingness and the growth of the economy' 2010 (22) *SA Merc LJ* 197.
[10] Ibid.
[11] Ibid 195.
[12] *Collard v Jatara Connect* (23510/2016) [2017] ZAWCHC 45 para 21.
[13] *DH Brothers Industries (Pty) Ltd v Gribnitz No & others* (2014) 1 SA 103 (KZP) para 48.
[14] Section 5 of the Companies Act 2008.

security helps regulate companies amicably hence protecting other stakeholders such as employees.

(b) Employees

In relation to business rescue an employee is a person that was hired with a contractual obligation to perform a job before the initiation or application for rescue proceedings.[15] Unlike judicial management, business rescue tries to incorporate employees or registered trade unions in rescue proceedings.[16] One of the reasons for the implementation of business rescue was to protect employment contracts hence, benefitting the economic wellbeing of the country. Inclusion of employees in the rescue proceedings has contributed to the effectiveness of business rescue proceedings in safeguarding a successful rescue mechanism.[17]

Business rescue has been effective in ensuring that employees' contributions are taken into consideration. The employees have the right to launch an application for commencement of rescue proceedings. Therefore, the Companies Act 2008 widened the scope of persons that may apply for rescue proceedings hence, improving transparency and accountability in the proceedings.[18] Business rescue has been effective because it involves a lot of transparency. In *A G Petzetakis International Holdings Ltd v Petzetakis Africa*[19] it was held that employees have an automatic right to participate in the rescue proceedings, thus improving transparency of the procedure.[20]

The aim of business rescue is to contribute positively to the economy. The Companies Act 2008 has been an effective rescue tool in that it does not permit the rescue practitioner to unilaterally terminate employment contracts in a bid to cut costs for the company. Preservation of employment contacts is a social and economic benefit.

However, the Companies Act 2008, by having massive involvement of employees in the rescue proceedings, may hinder the effectiveness of the procedure because of the process being susceptible to abuse by the employees. Additionally, the protection of employment

[15] Section 128 *(a)* of the Companies Act 2008.
[16] Ibid.
[17] P Faul *The impact and origin of employee rights in Chapter 6 of the Companies Act 2008* (unpublished thesis, University of KwaZulu Natal, 2015) 50.
[18] J Rushworth 'A critical analysis of the business regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 375 – 380.
[19] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd & others* (2012) 5 SA 515 (GSJ) para 4.
[20] Ibid para 20.

contract restricts the rescue practitioner from terminating employment contracts that are no longer beneficial to the company.[21]

Therefore, it is beneficial for the Companies Act 2008 to restrict the rescue practitioner from terminating employment contracts. Allowing rescue practitioners to terminate employment contracts would not make rescue proceedings any different from liquidation proceedings. The main aim of rescue proceedings is to ensure that the effects of liquidation proceedings are not felt and that liquidation proceedings become a measure of last resort.

(c) Shareholders

Shareholders are affected persons with direct and indirect interests in the affairs of the company in terms of the Companies Act 2008. Shareholders' powers are limited when rescue proceedings are initiated by way of court order.[22] Business rescue has been an effective remedy in ensuring that creditors and shareholders benefit from the procedure. The Companies Act 2008 does not place much emphasis on the rights of shareholders.

However, the statutory provisions in the Companies Act 2008 were construed in such a way that protect investments, hence promoting investors' confidence. Therefore, the statutory provisions in the s5 and s7 of the Companies Act 2008 has contributed to the effectiveness of the procedure and encouraging investors to invest in the economy.

(d) Directors

Directors of the company are those that were responsible for the management of the company's affairs.[23] Directors have an obligation to protect and ensure the wellbeing of the company. Hence, directors may be held liable for any unreasonable decisions that prove to be detrimental to the wellbeing of the company. The directors have the duty to pass a resolution to commence proceedings if the company is in financial distress. The option of passing a resolution to commence rescue proceedings is effective in that it gives directors the opportunity to allow restructuring of the company before the financial position worsens.[24] The Companies Act 2008 has been effective in ensuring that directors are held liable if the financial position of the company were to worsen without taking steps to guard against the financial mayhem.

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[21] Section 136 of the Companies Act 2008.
[22] Section 128 (1) *(b)* of the Companies Act 2008.
[23] Section 137 (3) of the Companies Act 2008.
[24] B Wassman 'Business rescue: Getting it right' (2014) 36 *De Rebus* 4.

Additionally, the Companies Act 2008 has been an effective tool because during business rescue it limits powers of those that contributed in plunging the company into financial distress. Limiting powers of directors helps the rescue practitioner to come up with new ideas without any hindrances or conflicts with the directors.[25] Hence, this option is one of the reasons why business rescue has been more successful and effective than judicial management.

III. RECOMMENDATIONS

The main aim of the Companies Act 2008 is to provide a feasible rescue system. Business rescue unlike judicial management has provided the country with an effective rescue system. However, there still exist some loopholes that may need to be rectified within the system. South Africa may adopt some of the rescue mechanisms from progressive countries e.g. United Kingdom, United States or Australia. For the purposes of this study United Kingdom will be used as a point of reference for some recommendations.

(a) Business rescue practitioners

A business rescue practitioner plays an important role during rescue proceedings. However, powers and duties of the rescue practitioner should be within the statutory confines. The United Kingdom has conferred a broader extent of powers upon administrators, which has contributed to a successful restructuring process. The Companies Act 2008 must confer upon rescue practitioners the power to acquire finances for the purposes of rescue proceedings and grant security over such monies.

(b) Post-commencement finance

Business rescue proceedings may only be successful if there is adequate financial support. The Companies Act 2008 does not specifically stipulate how the rescue practitioner may raise post-commencement finance. The issue of post-commencement is one of the hindrances that may hamper on the overall success of the rescue mechanism. The Companies Act 2008 must give first preference in payment to creditors that gave financial support to a company in rescue proceedings. Granting security to such creditors makes it easier for the rescue practitioner to obtain post-commencement finance during rescue proceedings. Any new

[25] EP Joubert, A Loubser 'Executive directors in business rescue: Employees or something else?' (2016) 49 (1) *De Jure* 99.

financing provided to ensure successful implementation of the rescue plan should not be declared void, voidable, or unenforceable as the act is detrimental to the entire procedure.

(c) Introduction of prepack administration

The Companies Act 2008 does not have an option of prepack administration. Prepack rescue proceedings should be open to companies that have passed the test of illiquidity or that qualify for commencement of rescue proceedings. Prepacks would be advantageous in that they address the risks pertaining to a lack of working capital. The UK is one of the countries with a successful prepack administration. Prepacks are used to preserve goodwill of the company and ease selling of property or the business.

(d) Other recommendations

Encouraging greater communication between the shareholders, directors, creditors and the business rescue practitioner is of paramount importance. The Companies Act 2008 must try to guard against conflicts which usually result in failure of the rescue plan.[26] The Companies Act 2008 must confer upon the rescue practitioner with the power to accept or reject certain modifications by the creditors. Conferring such powers on the rescue practitioner helps to guard against unreasonable rejections or modification of the rescue plan.[27] The Companies Act 2008 may adopt such a procedure from the UK's Enterprise Act 2002.[28]

The Companies Act 2008 must be construed in such a way that would encourage greater consistency of courts when granting business rescue. Consistency in rescue proceedings reduces deviations and inefficiencies which hamper viable rescue of companies in financial difficulties. Consistency helps with lowering the cost of restructuring for the company, creditors and other affected persons. Moreover, consistency and efficiency in the Companies Act 2008 would maximise the returns to creditors and investors and encourage investment. Consistency in the process can facilitate companies to be confident in the process, hence companies would easily and confidently utilise the restructuring mechanism.[29]

Additionally, the Companies Act 2008 must contain additional precautionary restructuring frameworks. Preventative frameworks would act as a guideline on the minimum requirements

[26] S Madaus 'The EU Recommendation on business rescue: Only another statement or a cause for legislative action across Europe?' (2014) 27 (6) *Insolvency Intelligence* 81-85.
[27] Schedule 16 para 53 of the Enterprise Act 2002, s25 (1) of the Insolvency Act 1986.
[28] Ibid.
[29] Ibid

to be adhered with, for example a business rescue plan must meet up with minimum standards on preventive measures that have been in place.[30]

When constructing a plan to guard against insolvency, the company should try to come up with restructuring programs that limit court involvement.[31] The company should seek to take out of court resolutions to avoid the complexities of court proceedings. Therefore, the opening of court proceedings should not be mandatory during the rescue process, for example the Companies Act 2008 must consequently not make it compulsory to launch court application for the appointment of a rescue practitioner on a case by case basis.

The moratorium is an important concept in rescue proceedings. However, the Companies Act 2008 does not offer adequate protection to ensure that companies do not abuse the moratorium.[32] The moratorium affects the rights of secured and preferential creditors and should be granted in any case where the rescue plan proposal is feasible and supported by major creditors. The stay would suspend any obligation of a debtor to file for insolvency and should be lifted as soon as it is not required anymore to facilitate the adoption of the rescue plan.[33] Hence, in a bid to protect the moratorium, the duration for moratorium on legal proceedings or any enforcement should not exceed four months, but a stay can be extended up to a total duration of twelve months.

Business rescue in South Africa has proved to be an effective company rescue mechanism in comparison with judicial management. It is difficult to establish whether business rescue has been successful because statistics provided by the CIPC are not consistent, hence, difficult to measure the success rate of business rescue. However, South Africa may thus try to develop the rescue mechanism by adopting some of the restructuring processes from countries with progressive rescue mechanisms.

[30] Madaus op cit note 25 at 81-85.

[31] Ibid.

[32] J Bell, J Barnett 'South Africa: Business rescue: Open for abuse?' available at *http://restructuring.bakermckenzie.com/2017/01/11/south-africa-business-rescue-open-for-abuse/,* accessed on 15 October 2018).

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