

**THE REQUIREMENTS OF BUSINESS RESCUE PROCEEDINGS IN SOUTH  
AFRICA: A CRITICAL ANALYSIS OF 'REASONABLE PROSPECT' IN LIGHT OF  
BUSINESS RESCUE PROCEEDINGS IN TERMS OF COMPANIES ACT 71 OF 2008**

**BY**

**NJABULO MHLONISHWA KUBHEKA**

**STUDENT NUMBER: 213528313**

This research project is submitted in partial fulfilment of the regulations for  
LLM Degree at the University of KwaZulu-Natal

**SUPERVISOR: ADVOCATE DARREN C SUBRAMANIEN**



## **DECLARATION**

I, Njabulo Mhlonishwa Kubheka, (213528313) do hereby declare that unless specifically indicated to the contrary in this text, this mini - dissertation is my own original work and that I have not plagiarised. This mini - dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws (LLM) in the Faculty of Law, University of Kwa-Zulu Natal. It has not been submitted for any other degree or examination at any other University.

---

NJABULO MHLONISHWA KUBHEKA

DATE: \_\_\_\_\_

## **ACKNOWLEDGMENTS**

For I know the plans I have for you declares the Lord,

Plans to prosper you and not harm you,

Plans to give you hope and future.

Jeremiah 29:11

I am highly indebted to my supervisor Advocate Darren C Subramanien for his assistance throughout the completion of this research. Your support, encouragement and immediate response to my queries is highly appreciated.

I would like to thank my parents Lucas and Khombisile Kubheka for their unconditional love, support, understanding through this journey and everything that they have done for me throughout my academic career. Words cannot convey my gratitude for what you have done for me. To my sister Sinenhlanhla Kubheka thank you for your encouragement and motivation.

To the rest of my family, friends and my colleagues thank you very much, your unfailing support is highly appreciated. This was impossible without you all.

## ABSTRACT

This paper will analyse the requirements of business rescue as provided in the Companies Act 71 of 2008 (hereinafter referred to as Companies Act 2008). During the course of the discussion the paper will also provide an analysis of the ways in which the Courts have specifically interpreted the phrase ‘reasonable prospect’ of rescuing a company as provided in section 129(1) of the Companies Act 2008.

The provisions of business rescue apply to all the companies and close corporations which in terms of the Companies Act 71 of 2008 are financially distressed.<sup>1</sup> In terms of the Companies Act 71 of 2008, the company is financially distressed at any time if it reasonably appears to be unlikely that the company will be able to pay its debts when they become immediately due and payable within the ensuing six months,<sup>2</sup> or it appears to be reasonably likely that the company will become insolvent immediately within the ensuing six months.<sup>3</sup> The main objective of the business rescue is to ensure that companies do not immediately get liquidated when they are in financial difficulty. The business rescue provisions aim at rendering it possible for the companies under financial constraints to be reinstated to commercial viability.<sup>4</sup>

The Companies Act 2008 provides two pathways in which business rescue may be initiated. The first one is by a resolution of the board of directors of the company. The board of directors will adopt this resolution if there are reasonable grounds to believe that the company is financially distressed and that there is a reasonable prospect that the company will be rescued if it is placed under business rescue<sup>5</sup>. The second way in which business rescue proceedings may be initiated is when an affected person applies to court and seek an order placing the company under business rescue proceedings.<sup>6</sup>

The Companies Act 2008 has provided a new test under which the company may be placed under business rescue proceedings. The test is a requirement of reasonable prospect which

---

<sup>1</sup> Cassim et al *Contemporary Company Law* 2ed (2012) 15.

<sup>2</sup> Section 128 (f) (i) and (ii) of Act 71 of 2008.

<sup>3</sup> Ibid.

<sup>4</sup> *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* (15155/2011) [2011] ZAWCHC 442; 2012 (2) SA 423 (WCC) (25 November 2011)

<sup>5</sup> Section 129(1) (a) of the Companies Act 71 of 2008.

<sup>6</sup> Section 131(1) of the Companies Act 71 of 2008. In terms of the Companies Act the affected person includes shareholder or creditors of the company, any registered trade union representing the employees of the company and any of the employees which are not represented by a registered trade union.

has been considered to be a more lenient test by our courts.<sup>7</sup> The Companies Act 61 of 1973<sup>8</sup> (hereinafter referred to as Companies Act 1973) did not use the phrase reasonable prospect. Instead, this act used the phrase ‘reasonable probability’ in respect of rescue proceedings which was referred to as judicial management. The Companies Act 1973 provided that ‘when any company by reason of mismanagement or for any other cause a company is unable to pay its debts or is probably unable to meet its obligations; and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the court may, if it appears just and equitable, grant a judicial management order in respect of that company’.<sup>9</sup>

The courts were faced with difficulties when interpreting the phrase reasonable probability. This was consequently due to the fact that the Companies Act 1973 did not provide for the meaning of the phrase reasonable probability. This issue has found its way in the new Act as well, although phrases are defined in chapter 6 of the Companies Act of 2008, the phrase reasonable prospect is not defined in the Companies Act 2008. This has given rise to difficulties to the courts when interpreting this phrase and has led to inconsistent interpretation amongst different jurisdictions in the country.

This paper therefore aims at analysing the requirements of business rescue proceedings, why there was a need for incorporation of business rescue provisions in the Companies Act of 2008, discuss the reasons for the failure of judicial management and to look at how the Courts have interpreted the phrase ‘reasonable prospect’ of rescuing a company as provided in section 129(1) of the Companies Act of 2008.

---

<sup>7</sup> In *Southern Palace* supra note 4 para 21 judge Eloff stated that the use of different language in the Companies Act 2008 than that used by the Companies Act 1973 indicates that something less is required than that the recovery should be a reasonable probability. Classen J concurred with Eloff AJ in *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others, Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events & Exhibitions (Pty) Ltd & others* [2012] 2 All SA 433 (GSJ) at para 18.

<sup>8</sup> Act 61 of 1973.

<sup>9</sup> Section 427(1) of Act 61 of 1973.

## TABLE OF CONTENTS

<b>DECLARATION</b> .....	ii
<b>ACKNOWLEDGMENTS</b> .....	iii
<b>ABSTRACT</b> .....	iv
<b>CHAPTER ONE</b> .....	8
I.    BACKGROUND INFORMATION.....	8
II.   INTRODUCTION.....	9
III.  METHODOLOGY.....	10
<b>CHAPTER TWO</b> .....	11
I.    THE NEED FOR BUSINESS RESCUE IN SOUTH AFRICA.....	11
II.   JUDICIAL MANAGEMENT.....	12
<b>CHAPTER THREE</b> .....	17
I.    THE REQUIREMENTS FOR BUSINESS RESCUE IN TERMS OF THE COMPANIES ACT 2008.....	17
<b>CHAPTER FOUR</b> .....	26
I.    COMMENCEMENT OF BUSINESS RESCUE PROCEEDINGS IN TERMS OF THE COMPANIES ACT 2008.....	26
II.   COMMENCEMENT OF BUSINESS RESCUE BY A RESOLUTION OF THE BOARD OF DIRECTORS.....	26
III.  COMMENCEMENT OF BUSINESS RESCUE PROCEEDINGS BY AN AFFECTED PERSON.....	31
<b>CHAPTER FIVE</b> .....	33
I.    REASONABLE PROSPECT OF RESCUING A FINANCIALLY DISTRESSED COMPANY IN TERMS OF THE COMPANIES ACT 2008.....	33

II. CONCLUSION.....	44
<b>BIBLIOGRAPHY.....</b>	<b>46</b>
BOOKS.....	46
ARTICLES .....	46
GOVERNMENT NOTICES.....	47
CASE LAW.....	48
LEGISLATION.....	49
THESES.....	50

## CHAPTER ONE

### I. BACKGROUND INFORMATION

Most companies commence business with their shareholders and directors having no other goal other than making profit for the company. Along the way, the company will fall in a trap of buying equipment they cannot afford at that stage or it will be induced by the creditors to buy more and more expensive goods. In the end, the company will be floating in large amounts of debts which will be unbearable for the company. The consequences of that will be that shareholders will be selling their shares at a very low rate; the company will retrench its employees which will lead to unemployment. Financial difficulties will ensue until the company can no longer survive and goes into liquidation.<sup>10</sup>

The period of financial distress is a gradual decline after the peak of a speculative bubble that precedes the final and massive panic and crash, driven by the insiders having exited but the pushover outsiders hanging on hoping for revival, but finally giving up in the final collapse.<sup>11</sup> Where the company goes into liquidation or where the directors of the company cut or postpone dividends, it is typically because the company is in financial distress and having cash flow difficulties and can no longer continue functioning.<sup>12</sup>

For many years, South Africa has relied on the procedure of liquidation as an instrument to be used when a company is in financial difficulty and approaching the risk of insolvency. The procedure of liquidation did not attempt to solve the company's financial issues or help it to regain its solvency status. Instead, it sold all the property that was left under the company's name with the intention of paying the creditors of the company. This led to many people getting into large amounts of debts, people getting unemployed, increase in the rate of poverty and eventually to crime as the society at this stage becomes the survival of the fittest. In order to overcome these issues there was a need for the legislature to step in and in the Companies Act of 71 of 2008, the legislature introduced a remedy called business rescue. Business Rescue as legislated in the Companies Act 2008 replaces judicial management which has its origins from 1926<sup>13</sup> which was also incorporated in the Companies Act 1973.<sup>14</sup>

---

<sup>10</sup> T Clarke 'The impact of financialization on international corporate governance: The role of agency theory and maximising shareholder value' (2014) *Law and Financial Markets Review* 39.

<sup>11</sup> H Minsky 'Falling from the period of financial distress into the panic and crash: Reappraisal of the Federal Reserve discount mechanism' (1972) 3 at 97-136, available at <http://econospeak.blogspot.com/2008/07/falling-from-period-of-financial.html>, accessed on 17 July 2018.

<sup>12</sup> Ibid.

<sup>13</sup> Companies Act 46 of 1926.

<sup>14</sup> Companies Act 61 of 1973.

## II. INTRODUCTION

Business rescue regime is incorporated in chapter 6 of the Companies Act 71 of 2008. This regime means facilitating the rehabilitation of a company that is financially distressed.<sup>15</sup> The aim of this regime is to restructure the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company.<sup>16</sup> The primary objective with business rescue provisions is to save the company as a going concern. If this is not possible, then the secondary object or goal is to restructure the company in such a way that shareholders and creditors will still get a return on their investments, which is better than the return that they would have received should the company be liquidated.<sup>17</sup>

The court will place the company on business rescue if it appears to be reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing six months which is referred to as commercial insolvency, or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months which is referred to as factual insolvency.<sup>18</sup> Furthermore, amongst other reasons the court will grant business rescue if it appears that there is a reasonable prospect of rescuing a company.<sup>19</sup> Therefore, this paper seeks to clarify the meaning of reasonable prospect and the factors that the court will take into account when interpreting this phrase. Furthermore, the paper will make recommendations as to which interpretation should be followed and provide reasons for that submission.

As stated above, the business rescue regime originated from both old Companies Act of 1926 and the 1973 Act. Judicial management did not succeed in achieving its purpose as set out in the 1973 Act. As a result, there was a need for incorporation of business rescue provisions in the Companies Act of 2008.

---

<sup>15</sup> Section 128(1) (b) of Act 71 of 2008.

<sup>16</sup> Section 128(1) (b)(iii) of 71 of 2008.

<sup>17</sup> T Naidoo, A Patel, & N Padia *Exploring Various Business Rescue Practices in South Africa* (2009) at 71. Section 7(k) of the Companies Act 2008 states that one of its purposes of the Act 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. See further section 128(1) (b) (iii) of Act 71 of 2008.

<sup>18</sup> Section 128(1) (f) of Act 71 of 2008.

<sup>19</sup> Section 131(3) (ii) of Act 71 of 2008.

### III. METHODOLOGY

This paper will not dwell on experimental submissions and study approach. This paper includes methods and data collected using primary sources and secondary sources including case law and journal articles. This paper will be mainly based on critical analysis of existing legal principles relating to the objectives of the paper. The paper will mainly explore the requirements of business rescue as provided in chapter 6 of the Companies Act 71 of 2008. This paper will further dwell on the interpretations adopted by the courts when interpreting the business rescue provisions particularly the phrase ‘reasonable prospect’ of rescuing a company.

There have been many suggested reasons by academics and the courts as to why judicial management failed as a rescue mechanism. This paper will explore such suggested reasons and also provide reasons why there was a need for a need for business rescue provisions in the Companies Act of 2008.

This paper is consisting of five chapters. Chapter one is based the introduction and laying out the foundation and background of the topic. Chapter two is based on explaining in a nutshell why there was a need of incorporation of the business rescue provisions in Chapter 6 of the Companies Act 71 of 2008 and to provide reasons why judicial management failed in the Companies Act 61 of 1973. Chapter three is based on setting out and explaining the requirements of business rescue proceedings. Chapter four is based on explaining commencement of business rescue proceedings by the board of directors of the company and also set out the requirements and the procedure to be followed when commencing business rescue proceedings by the affected persons of the company. Chapter five mainly focuses on the crux of this paper as it provides how the courts have interpreted the phrase reasonable prospect and how other legal scholars have interpreted this phrase and provide concluding remarks and recommendations to the difficulty of interpreting the phrase reasonable prospect.

## CHAPTER TWO

### I. THE NEED FOR BUSINESS RESCUE IN SOUTH AFRICA

‘We must be honest enough to admit the depth of the political, economic and social challenges our country faces. And we must be courageous enough to recognise the domestic and global conditions that give rise to these challenges.’<sup>20</sup>

The above quote explains and clarifies the economic position of South Africa currently. As set out below in this chapter, the company becomes part of the community and the economic constraints on the company have direct impact to the members of the community. Liquidation was an extreme step taken before the enactment of the Companies Act 71 of 2008 whenever the company was in financial distress. This was due to the fact that it was not easy to convince the courts to grant judicial management order as judicial management placed a heavy burden on the applicant to prove on the balance of probabilities why the order should be granted.<sup>21</sup> It was therefore necessary for the South African legislature to incorporate business rescue proceedings in the Companies Act 2008 to assist financially distressed companies not to undergo liquidation proceedings.

In the post-apartheid era in South Africa, the social, economic and political issues have caused a need of major restructuring of the legislative framework governing the companies to ensure that it is capable of addressing the challenges faced in domestic and international circles, and to also meet the demands of globalisation.<sup>22</sup> One of the major developments include transformation from the culture of liquidation of companies to a commercial renewal of companies under financial distress.<sup>23</sup> Business rescue provisions were therefore legislated to achieve this goal.

The business rescue provisions were legislated in order to make it easy for the companies under financial distress to be rescued.<sup>24</sup> Due to the incorporation of business rescue proceedings in the Companies Act 71 of 2008, the companies can now avoid insolvency and

---

<sup>20</sup> A quote by Cyril Ramaphosa taken from an address delivered to the Black Business Council dinner, 19 April 2017.

<sup>21</sup> Kloppers ‘Judicial management – A corporate rescue mechanism in need of reform’ (1999) *Stellenbosch Law Review* 417.

<sup>22</sup> Department of Trade and Industry Guidelines for Corporate Law Reform: South African Company Law Reform for the 21st Century GN 1183 in GG 264493 of May 2004 at 5.

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

<sup>24</sup> Cassim et al *Contemporary Company Law* 2ed (2012) at 783.

immediate winding up and to continue as a commercially viable entity.<sup>25</sup> The companies when formed they become an integral part of the community where such company is situated. If anything happens to the company it has a direct effect on the people living in that community and creditors of that company. When the company goes into liquidation the country's economy suffers as this lead to an increase on the unemployment rate, poverty and crime. The rescue provisions ensure that the companies are not immediately liquidated and attempt to secure jobs for the employees and at the same time providing a return for the creditors and reinstate the company to continue run on solvent basis.

There was a need to incorporate rescue regime in the Companies Act because this is one of the major factors which influence foreign investors to invest in South African companies.<sup>26</sup> Business rescue ensures that the companies does not immediately go into liquidation but gives a breathing space to the companies when the courts grant an order commencing business rescue proceedings.<sup>27</sup> This attracts international investors to know that should the period of financial distress strike, there will be an option to rescue the company rather than immediately going into liquidation.

## II. JUDICIAL MANAGEMENT

Judicial management was introduced in South African law to allow companies which were in financial difficulty to rearrange its financial affairs by providing a relief which was an alternative to liquidation. The Companies Act 61 of 1973 states that judicial management was to be used by a company where there has been mismanagement or any other reason it was unable to pay its debts. Furthermore, judicial management was used when the company was unable meet its obligations and has not or is prevented from becoming a successful concern.<sup>28</sup> Judicial management provided breathing space to companies on the edge of a downfall to allow them to restructure their affairs. Judicial management attempted to achieve this by providing for a moratorium against creditors, divesting the control of the company from previous management who assumedly had run it stranded, and by providing for the

---

<sup>25</sup> Ibid.

<sup>26</sup> E Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (unpublished PHD thesis, University of South Africa, 2010) 2.

<sup>27</sup> *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 2 SA 378 par 14.

<sup>28</sup> Section 427(1) of Act 61 of 1973.

appointment of a judicial manager who attempted to turn the company around.<sup>29</sup> It was a requirement that there had to be a reasonable probability that if placed under judicial management the company will be able to pay its debts or meet its obligations and become a successful concern. In terms of the Companies Act 2008 the court had to grant the judicial management order in respect of the company if it appeared to be just and equitable to do so.<sup>30</sup> What is just and equitable meant that the interests of the creditors and shareholders must be considered when granting the order.<sup>31</sup>

The Companies Act 2008 further provides that the court will not however grant the judicial management order in instances where the company itself will be able to overcome the financial issue it is facing. This will be instances where for example the board of directors could easily vote on a decision that will be in the best interest of the company and help it to solve its financial difficulty. The court could only intervene in instances where the shareholders and the directors are unable on themselves to remedy the difficulty that the company is facing.<sup>32</sup> The application for judicial management was to be made by any person who fell within the ambits of the Companies Act 1973.<sup>33</sup>

The judicial management order when granted by the court proved to be a breathing spell for companies which successfully applied for it. The judicial management order allowed the company to arrange its affairs without the interference of its creditors. This was so because the Companies Act 1973 stipulated that where the company is under judicial management, all actions, proceedings, the execution of all writs summonses and other processes against the company must be stopped, and not proceed without the leave of the court.<sup>34</sup> It was therefore a requirement that needed to be proved by the applicant to the court that there are reasonable grounds that the company will become a successful concern if the order was granted. In

---

<sup>29</sup>Under the Companies Act 61 of 1973, s 427 states that judicial management was to be used by a company when due to mismanagement or any other reason it was unable to pay its debts, meet its obligations and has not or is prevented from becoming a successful concern. There had to be a reasonable probability that if placed under judicial management, it would be enabled to pay its debts or meet its obligations and become a successful concern. See further section 428(2) (a) of Act of 61 of 1973.

<sup>30</sup> Ibid.

<sup>31</sup> *Repp v Ondudu Goldfields Ltd* 1937 CPD.

<sup>32</sup> *Makhuva v Lukhoto Bus Service (Pty) Ltd* 1987 3 SA 565 (v) at 586.

<sup>33</sup> An application to the court for the winding-up of a company may, subject to the provisions of this section, be made (a) by the company; (b) by one or more of its creditors (including contingent or prospective creditors); (c) by one or more of its members, or any person referred to in section 103(3), irrespective of whether his name has been entered in the register of members or not; (d) substituted by s 11(a) of Act 70 of 1984; (e) jointly by any or all of the parties mentioned in paragraphs (a), (b) and (c); (f) in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company; or (g) in the case of the discharge of a provisional judicial management order under section 428 (3) or 432 (2), by the provisional judicial manager of the company.

<sup>34</sup> Ibid.

*Tenowitz v Tenny Investment (Pty) Ltd (Tenowitz)* the court refused to grant a final judicial management order because it considered that the applicant had not discharged the onus of proving that the company would become a successful concern in a reasonable time if the judicial management order was granted.<sup>35</sup>

Where a judicial management order has been granted meant that all persons who were in the management positions and had the powers to make decisions on behalf of the company shall be deprived those powers and they shall be conferred to the provisional judicial manager.<sup>36</sup> The terms or conditions that were placed on the order were revocable. The provisions of the Companies Act 1973 provided that the court which gave the order was authorised to vary the terms of the order at any time or discharge the terms of such an order. This had to be done on application to the court.<sup>37</sup> The property of the company before and after the appointment of the judicial officer was deemed to be in the custody of the master until the judicial manager has assumed office.<sup>38</sup>

With all that have been said, it should be noted that even though judicial management attempted to assist companies with mismanagement, it failed to achieve its objective.<sup>39</sup> The Court referred to Judicial Management as a system which has barely worked since its initiation in 1926.<sup>40</sup> Although judicial management has existed for a long time in the South African law before the enactment of the Companies Act of 2008, it was never considered as a success.<sup>41</sup> There are many suggested reasons why judicial management failed as a rescue regime to assist companies which were in financial distress.

Judicial management was considered to be taking into account the interests of creditors more than the interest of the company. By doing so judicial management was considered not to aim at restructuring the affairs of the company to continue trade as a viable commercial company. Loubser states that the South African insolvency system under judicial management appeared to benefit the creditors more than it did to the company in instances where the company becomes insolvent. Loubser thus argue that the judicial management system was introduced

---

<sup>35</sup> *Tenowitz v Tenny Investment (Pty) Ltd* 1979 2 SA 684 - H.

<sup>36</sup> Section 428(c) of Act 61 of 1973.

<sup>37</sup> Section 428(3) of Act 61 of 1973.

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

<sup>39</sup> In *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C) Josman J stated that ‘for me as a judge trying to regenerate a system which has barely worked since its initiation in 1926 would not only be inappropriate, but would also require me to disregard the body of precedent that has been established incorporating a very conservative approach to judicial management.’

<sup>40</sup> *Ibid.*

<sup>41</sup> E Loubser op cit note 26 at 16.

to protect the interest of the creditors which was similar to the winding up of the business rather than rescuing the business.<sup>42</sup>

Judicial management relied heavily on the courts as compared to the judicial management officers. The reason for the failure of the judicial management is said to be the fact that many companies which were in mismanagement of its affairs and in financial difficulty could not approach the courts to seek relief because it meant more costs for them as legal proceedings are costly to these companies.<sup>43</sup> This also raised a fear to the interested parties to apply to courts for the judicial management order because there was heavy burden that was placed on the applicant to prove that indeed the business will be a successful concern if the judicial management order was granted.<sup>44</sup>

Furthermore, judicial management was also criticised for having low successful rate.<sup>45</sup> This submission was made by the Van De Vries Commission which submitted that

‘We have thoroughly examined the system of judicial management and the characteristics of the alleged abuses, and we have arrived at the conclusion that the principal deficiency is that at the time of the granting of the order, there is no proper and reliable assessment of the likelihood of the rehabilitation of the company. The test in our view should be whether the company will be able to overcome its present difficulties and to become a successful concern. In too many cases this is determined by the applicant alone who may not be qualified to make such assessment.’<sup>46</sup>

This submission by the Van De Vries Commission clearly shows that the judicial management service offered no relief for the debtors and no rehabilitation procedure for the company. Instead it provided relief for the creditors and ranked them above to the debtors and only cared about the profit for the creditors.<sup>47</sup> The commission also stressed the abovementioned difficulty associated with the judicial management service that there was a heavy burden on the applicant to prove that the business will be a successful concern, which was unlikely based on the rate and application that the judicial management was going under.<sup>48</sup>

---

<sup>42</sup> E Loubser ‘Judicial management as a business rescue procedure in South Africa’ (2004) *SA Merc LJ* 162.

<sup>43</sup> H Rajak & J Henning ‘Business rescue for South Africa’ (1999) *SALJ* 268.

<sup>44</sup> Kloppers op cit note 21

<sup>45</sup> T Naidoo, A Patel, & N Padia op cit note 17.

<sup>46</sup> Shrand & Keeton *Company Law and Company Taxation in South Africa* (1974) 305.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

Loubser argues that another factor which added a value in the failure of the judicial management was that there was no express statutory provision for the development or drafting of a formal rescue plan. There was no specified structure or plan. The judicial management officer was not under any pressure to complete his tasks within determined objectives as provided by the Companies Act 1973. This really had a negative impact on the company because the judicial management officer still received remuneration regardless of whether the entire process was successful or not. This inevitably opened the floodgate for the abuse of the entire judicial management process. The judicial management officer, who was without sufficient expertise or qualification, was left to carry out his or her functions without any real oversight or control from the independent bodies.<sup>49</sup> Furthermore, the directors of a company lost their powers and authority to manage the company as soon as the company was placed under provisional judicial management.<sup>50</sup> There was no specific mention of any duties to be fulfilled by the directors; it must therefore be assumed that the directors of a company would be automatically stripped of their office, when the company was placed under judicial management.<sup>51</sup>

One of the other factors which contributed in the failure of the judicial management was the fact that there was a lack of qualified judicial management officers which resulted in the companies getting into more debts and problems rather than finding solutions. Due to the factors mentioned above, there was a need for reform of the South African Company law.<sup>52</sup>

---

<sup>49</sup> T Naidoo, A Patel, & N Padia op cit note 17.

<sup>50</sup> Sections 428(2) (a) of Act 61 of 1973. See further Section 432(3) (a) of the Companies Act 61 of 1973.

<sup>51</sup> Loubser op cit note 42.

<sup>52</sup> In *Le Roux Hotel Management (Pty) Ltd & Another v E Rand (PTY) Ltd (FBC Fidelity Bank Ltd (under Curatorship), Intervening)* 2001 (2) SA 727 (C) in par 55 Josman J stated that the review of the cases reveals the limited scope of judicial management in this country. Mr Steenkamp, in a very able argument, urged me to try to breathe some new life into this moribund old horse and to take a cue from developments in other parts of the world. Clearly one must take note of the fact that in the first world countries referred to above, the need for a business rescue provision in company law has been recognised. Nor can one overlook the distinct possibility that the flourishing economies in the countries mentioned might have something to do with the progressive attitude adopted towards assisting an enterprise that encounters difficulty which is capable of being overcome.

## CHAPTER THREE

### I. THE REQUIREMENTS FOR BUSINESS RESCUE IN TERMS OF THE COMPANIES ACT 2008

Business rescue proceedings are proceedings aimed to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company, and the management of its affairs, business and property by a business rescue practitioner. This management of the company will be done by a business rescue practitioner and there will be a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities and equity.<sup>53</sup>

The provisions of the Companies Act 2008 portray business rescue as a process rather than a concept.<sup>54</sup> In *Panamo Properties (Pty) Ltd & another v Nel N.O. & others (Panamo)*<sup>55</sup> the court held that business rescue proceedings under the Companies Act 71 of 2008 are intended 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. The court further held that these proceedings contemplate the temporary supervision of the company and its business by a business rescue practitioner. During business rescue proceedings, there is a temporary moratorium on the rights of claimants against the company and its affairs are restructured through the development of a business rescue plan aimed at it continuing in operation on a solvent basis, or if that is unattainable, leading to a better result for the company's creditors and shareholders than would otherwise be the case.

The aim of business rescue is to restructure the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on a solvent basis or results

---

<sup>53</sup> Section 128(1) (b). One of the aims set out in section 7 of the Companies Act 71 of 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 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC)* the court held that 'the scheme created by the business rescue provisions in Chapter 6 of the new Act envisages that the company in financial distress will be afforded an essential breathing space while a business rescue plan is implemented by a business rescue practitioner. It is, however, necessary to caution against the possible abuse of the business rescue procedure, for instance, by rendering the company temporarily immune to actions by creditors so as to enable the directors or other stakeholders to pursue their own ends'.

<sup>54</sup> A O Nwafor 'Exploring the goal of business rescue through the lens of the South African Companies Act 71 of 2008' (2017) *Stell LR* 599.

<sup>55</sup> *Panamo Properties (Pty) Ltd & another v Nel N.O. & others* (35/2014) [2015] ZASCA 76; 2015 (5) SA 63 (SCA); [2015] 3 All SA 274 (SCA) (27 May 2015) para 1.

in a better return for the creditors of the company than would ordinarily result from the liquidation of the company.<sup>56</sup> There has also been a suggestion that the aim of business rescue is either advertently or inadvertently portray the company as an entity and not so much as the business of the company as is done by other international jurisdictions.<sup>57</sup> In the case of *Welman v Marcelle Props 193 CC*<sup>58</sup> Tsoko J stated that business rescue proceedings are not for the terminally ill close corporations and they are not for the chronically ill. The learned judge stated that business rescue proceedings are for ailing corporations, which, given time, will be rescued and become solvent.<sup>59</sup>

In *Swart v Beagles Run Investments 25 (Pty) Ltd*<sup>60</sup> the court stated that the significant feature of business rescue as distinguished from liquidation is that the company will continue to exist on a solvent basis after payment of creditors. In *Chetty v Hart*<sup>61</sup> the court held that the obvious purpose of placing a company under business rescue is to give it breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability. In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*<sup>62</sup> the court held that the overall attitude permeating through the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence, the name business rescue and not company rescue.<sup>63</sup>

The Companies Act 71 of 2008 now contains the provisions which are in many aspects different from the judicial management which was incorporated in the Companies Act 71 of 2008. The provisions of chapter 6 of the new Act now provides an advanced rescue regime for financially distressed companies by allowing them to trade as a going concern and therefore complying with the provisions of section 7 of the Companies Act 2008. These provisions are also in line with other international rescue regimes particularly the first world countries.

---

<sup>56</sup> Section 128(1) (b) (iii) of Act 71 of 2008. See further Rushworth 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 376. Business Rescue in terms of chapter 6 brings South Africa into line with modern jurisdictions. The aim is to mirror the approach reflected in the international jurisdictions by giving a distressed company the opportunity to place itself onto a sound financial footing, thereby saving the underlying business, with the right of employees and interest of the society generally being recognised.

<sup>57</sup> A O Nwafor op cit note 54 at 599.

<sup>58</sup> *Welman v Marcelle Props 193 CC* 2012 JDR 0408 (GSJ) para 28.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP) at para 19.

<sup>61</sup> *Chetty v Hart* 2015 4 All SA 401 (SCA) at para 28.

<sup>62</sup> *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 2 All SA 433 (GSJ) at para 12.

<sup>63</sup> A O Nwafor op cit note 54 at 597.

The test for whether a company should be placed under business rescue is whether the company is financially distressed. The Companies Act 2008 defines the words financially distressed to mean that it appears to be reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing six months commercial insolvency; or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months factual insolvency.<sup>64</sup> Section 128<sup>65</sup> necessitates saving the company as a going concern, where this is not possible the alternative of this section is to restructure the company to generate a better return for the creditors of the company or its shareholders.<sup>66</sup> From this definition it is clear that there is a two-stage test that the court applies when determining whether the company is financially distressed. The first part of the test is what in the ordinary course of the field is referred to as commercial insolvency.<sup>67</sup>

It has been suggested that the reason for the incorporation of this part of the test was to allow the board of directors of the company to have the opportunity to analyse the books of the company upon financial distress to decide whether they should adopt a resolution placing the company under business rescue or not.<sup>68</sup> The board of directors is required to adopt this resolution within a reasonable time. In *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd & another*<sup>69</sup> the court held that business rescue plan cannot be raised where a company is already insolvent.

---

<sup>64</sup>Section 128(1) (f) of the Companies Act 71 of 2008.

<sup>65</sup> Ibid.

<sup>66</sup> Cassim et al *Contemporary Company Law* 2ed (2012) 864.

<sup>67</sup> Section 345 of Act 61 of 1973 states that a company or body corporate shall be deemed to be unable to pay its debts if- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due- (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or (ii) in the case of anybody corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; it is proved to the satisfaction of the court that the company is unable to pay its debts. (2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the court shall also take into account the contingent and prospective liabilities of the company; see also H Chitimira ‘Some thoughts on the meaning and application of commercial insolvency in winding-up proceedings involving contingent creditors – Absa Bank v Hammerle Group 2015 (5) SA 215 (SCA)’ (2017) 446 – 456.

<sup>68</sup> Meskin et al *Henochsberg on the Companies Act 71 of 2008* 450 – 451; see further E Levenstein *An Appraisal of the new South African Business Rescue Procedure* (LLD thesis, University of Pretoria, 2016) 297.

<sup>69</sup> *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd & another* [2013] ZAGPJHC 109 (10 May 2013) at para 8.

The court held that this is one of the aspects distinguishing business rescue from judicial management as provided for in the Companies Act 1973. The court further held that proceedings can be started six months in advance when the tell-tale signs are starting to appear. For instance, a company that is trading profitably and is cash positive but does not have the means to repay a large debt which will become due and payable within the next six months would qualify to be classified as being financially distressed in terms of the Companies Act 2008, thus being a contender for business rescue.<sup>70</sup> The second part of the definition specifically deals with the reasonable belief by the board of directors that the company should be placed under business rescue.

A company should commence business rescue proceedings at the early stages of it being financially distressed, in terms of the Companies Act 71 of 2008. This will be where the company is financially distressed is and it is reasonably unlikely that a company will be able to pay its debts when they fall due for payment in the immediately ensuing six months or when it is likely that the company will become insolvent in the immediately ensuing six months. There are two ways in which a company can be placed under business rescue proceedings. A company can be placed under business rescue proceedings by means of a resolution by the board whereby the board of directors of a company resolves that the company voluntarily commence business rescue proceedings and that the company be placed under supervision.<sup>71</sup> Furthermore, a company can be placed in business rescue by a court order. A court order is as a result of an affected person applying to the court to place the company under supervision.<sup>72</sup> These two possibilities will be discussed in more details in chapter 4.

Section 133 regulates the institution of legal proceedings against the company and the enforcement of any action against the company during business rescue.<sup>73</sup> This is commonly known as the statutory moratorium on a company from the instant that business rescue proceedings commence. When the company is placed under business rescue proceedings, no legal proceedings including enforcement action against the company or in relation to its property, that belongs to it or which is lawfully in its possession, may be commenced or proceeded with in any forum.<sup>74</sup>

---

<sup>70</sup> Ibid.

<sup>71</sup> Section 129 of Act 71 of 2008.

<sup>72</sup> Section 131 of Act 71 of 2008.

<sup>73</sup> Section 133(1) of Act 71 of 2008.

<sup>74</sup> Ibid.

In *Cloete Murray & another v Firstrand Bank Ltd t/a Wesbank*<sup>75</sup> the court held that it is generally accepted that a moratorium on legal proceedings against a company under business rescue, is of fundamental importance since it provides the crucial breathing space or a period of breather to enable a company to rearrange its affairs and that, it was suitably described that moratorium is a cornerstone of all business rescue procedures. However, there are certain instances in which legal proceedings can be instituted against the company which is placed under business rescue. These will be instances where there is a written consent of the practitioner, with the leave of the court and in accordance with any terms that the court consider suitable, as a set-off against any claim made by the company in any legal proceedings, irrespective as to whether those proceedings commenced before or after the business rescue proceedings began, criminal proceedings against the company or any of its directors or officers; or proceedings concerning any property or right over which the company exercises the powers of a trustee; or proceedings by a regulatory authority in execution of its duties after written notification to the business rescue practitioner.<sup>76</sup>

A business rescue plan is a plan established and, if accepted, implemented by the business rescue practitioner. The plan provides details and the manner in which the business rescue practitioner predicts that the company will be rescued. The business rescue plan must comprise circumstantial including a list of assets, which assets are secured, list of creditors indicating secured, statutory preferment and concurrent creditors in terms of the laws of insolvency, probable dividend should insolvency ensue, list of all holders of the company's securities, a copy of the written agreement concerning the business rescue practitioner's remuneration and a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.<sup>77</sup>

Business rescue practitioner is a person appointed, or two or more persons appointed jointly, in terms of the Companies Act 2008 to oversee a company during business rescue

---

<sup>75</sup> *Cloete Murray & another v Firstrand Bank Ltd t/a Wesbank* [2015] ZASCA 39 (Vol 18 No 5) [2015] PER 71.

<sup>76</sup> H Rajak & J Henning op cit note 43 at 268. In the case of *Investec Bank Ltd v Bruyns* 2011 JDR 1563 (WCC) the court considered the meaning of section 133 and the status of a surety and guarantee provided by the company or by another person or entity in favour of the company, during business rescue. The court held that section 133(2) is unambiguous in that it prohibits a third party from enforcing a suretyship or guarantee, provided by the company, against the company, during business rescue; and the statutory moratorium that arises for the benefit of a company does not automatically arise for the benefit of a surety provided in favour of the company on the basis that the statutory moratorium is a personal defence that arises for the benefit of the principal debtor and not for the benefit of a surety.

<sup>77</sup> C Steenkamp 'What is a clear definition of business rescue plan?' available at [http://www.newdiscoverybs.co.za/index.php?option=com\\_content&view=article&id=725:econopedia&catid=1:latest-news&Itemid=59](http://www.newdiscoverybs.co.za/index.php?option=com_content&view=article&id=725:econopedia&catid=1:latest-news&Itemid=59), accessed on 22 July 2018.

proceedings.<sup>78</sup> Business rescue practitioners are handed over widespread powers to manage the affairs of the company which is placed under business rescue and to deal with assets of such a company.<sup>79</sup> The business rescue practitioner is required, as soon as possible after appointment to investigate the company's affairs, business, property and financial situation, and thereafter consider whether there is any reasonable prospect of rescuing the company.<sup>80</sup>

During business rescue proceedings, the practitioner must notify the company, the court and affected persons that there is no reasonable prospect for the company to be rescued; or no longer reasonable grounds to believe that the company is financially distressed; or evidence, in the dealings of the company before the commencement of business rescue proceedings, of voidable transactions or a failure by the company or any director to perform any material obligation relating to the company and the practitioner must direct the management of the company to take steps to rectify the problem; or reckless trading, fraud or other contravention of any law relating to the company, the practitioner must forward the evidence to the appropriate authority for further investigation and possible prosecution and direct the management to take any necessary steps to rectify the matter including recovering any misappropriated assets of the company.<sup>81</sup>

The business rescue practitioner has several powers conferred to him or her by the Companies Act 2008. The business rescue practitioner has full management and control over the company. He or she may delegate certain functions to a director on the board of the company or to a person who was part of the pre-existing management of the company. The business rescue practitioner may also remove any person who formed part of the pre-existing management of the company from its office or appoint a person as part of the management of a company.<sup>82</sup> The business rescue practitioner may further develop a business rescue plan to be considered by affected persons and implement any business rescue plan that has been adopted.<sup>83</sup>

---

<sup>78</sup> Section 128(1) (d) of Act 71 of 2008.

<sup>79</sup> Cassim et al op cit note 24 at 893.

<sup>80</sup> Section 141(1) of Act 71 of 2008.

<sup>81</sup> Section 141(2) of Act 71 of 2008.

<sup>82</sup> Section 140(1) (a)-(d) of Act 71 of 2008. The powers of the business rescue practitioner also include power to remove any person who formed part of the pre-existing management of the company from its office who does not have any other relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship, or is related to a person who has such a relationship.

<sup>83</sup> Ibid.

A business rescue practitioner may be removed from office either by the order of court in terms of section 130(1) (b) on the basis of an affected person applying to court to set aside the appointment of a business rescue practitioner who has been appointed in terms of the resolution by a board of directors. The practitioner will be removed on the basis that he/she is incompetence or due to a failure to perform duties; failure to exercise the proper degree of care in the performance of the practitioner's functions; engaging in illegal acts or conduct; if the practitioner no longer satisfies the requirements set out in section 138(1); conflict of interest or lack of independence; or the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.<sup>84</sup>

The directors of the company remain the directors. However, their powers and duties are constricted in that the business rescue practitioner has full management control over the company in substitution for the board of the company and its pre-existing management.<sup>85</sup> The directors of the company continue to exercise the functions of a director, subject to the authority of the practitioner. The directors of the company have a duty to exercise any management function within the company in accordance with the expressed instructions or direction of the practitioner, to the extent that it is reasonable to do so. The directors of the company will further remain bound by the requirements concerning the personal financial interests of the directors or related persons.<sup>86</sup> As soon as practically possible after the commencement of business rescue proceedings, the directors of the company must deliver all books and records that relate to the company to the practitioner and which are in the directors' possession. Within five business days after the commencement of business rescue proceedings, or such longer period as the practitioner may allow, the directors must provide the practitioner with a statement of affairs containing certain information.<sup>87</sup>

During business rescue proceedings, an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent that the court, or the business rescue plan, directs otherwise.<sup>88</sup> Employees who were, immediately prior to the institution of business rescue, employees of the company will remain employed by the company on the same terms and conditions on which they were employed prior to the commencement of business rescue

---

<sup>84</sup> Section 139(1) (a) – (f) of Act 71 of 2008.

<sup>85</sup> Section 137(1) of Act 71 of 2008.

<sup>86</sup> Ibid.

<sup>87</sup> Section 142(1) of Act 71 of 2008.

<sup>88</sup> Section 137(1) of Act 71 of 2008.

proceedings except to the extent that changes occur in the ordinary course of attrition or if different terms and conditions are agreed between the employee and the company in accordance with labour laws.<sup>89</sup>

There is now no doubt, if ever there was, that the South African rescue system has moved away from the culture of liquidation to a new rescue system as provided for in chapter six of the new Act.<sup>90</sup> However, there is still an interplay between the new rescue procedure and liquidation because not all companies can be rescued. In instances where liquidation proceedings have already been instituted against an insolvent company, and subsequently, the business rescue application is instituted, the Act provides that the business rescue application will suspend the liquidation proceedings until the court has adjudicated the business rescue application.<sup>91</sup> The Companies Act 2008 further provides that a court may grant an order at any time during the liquidation proceedings placing the company under business rescue proceedings.<sup>92</sup> The Companies Act 2008 further provides that where business rescue proceedings have commenced through an application to court, the company may not thereafter adopt a resolution placing the company under liquidation until business rescue proceedings have been terminated.<sup>93</sup>

Section 132 of the Companies Act 71 of 2008 provides for mechanisms in which the business rescue proceedings may be terminated. In terms of this section the proceedings may be terminated when the court sets aside a resolution or order commencing the proceedings or converts the proceedings to liquidation proceedings.<sup>94</sup> The business rescue proceedings may further be terminated when the practitioner files a notice of termination of the proceedings with the Companies and Intellectual Property Commission (the Commission),<sup>95</sup> a business rescue plan has been proposed and rejected, without action being taken to extend the

---

<sup>89</sup> Section 136(1) of Act 71 of 2008.

<sup>90</sup> In *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd (òKoenÓ)* 2012 (2) SA 378 (WCC) para 14 the court held that 'It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.'

<sup>91</sup> Section 136(6) of Act 71 of 2008.

<sup>92</sup> Section 136(7) of Act 71 of 2008.

<sup>93</sup> Section 136(8) of Act 71 of 2008.

<sup>94</sup> Section 132(2) (a) of Act 71 of 2008.

<sup>95</sup> Section 132(2) (b) of Act 71 of 2008.

proceedings<sup>96</sup> or the plan has been adopted and notice of substantial implementation of the plan has been filed by the practitioner.<sup>97</sup>

---

<sup>96</sup> Section 132(2) (c) (i) of Act 71 of 2008.

<sup>97</sup> Section 132(2) (c) (ii) of Act 71 of 2008.

## CHAPTER FOUR

### I. COMMENCEMENT OF BUSINESS RESCUE PROCEEDINGS IN TERMS OF THE COMPANIES ACT 2008

As it would be discussed in more details herein below, business rescue proceedings may commence in two ways. One is through the adoption of the resolution by the board of directors, and the second one is through an application to court by an affected person. However, difficulty still persists on the issue of when compulsory commencement of business rescue begins as provided in sections 130 and 131. Despite case law attempting to settle this issue there has been no success. The debate revolves on whether the application commences when the application papers are presented to court for issuing in terms of section 131, or whether the proceedings commence on the date the court makes an order of commencement.

### II. COMMENCEMENT OF BUSINESS RESCUE BY A RESOLUTION OF THE BOARD OF DIRECTORS.

The board of directors of the company can adopt a resolution that the company voluntarily commence business rescue proceedings and be placed under the supervision of a business rescue practitioner. The board can adopt this resolution if there are reasonable grounds to believe that the company is financially distressed,<sup>98</sup> and there appears to be a reasonable prospect of rescuing the company.<sup>99</sup> These provisions of the Companies Act 2008 do not provide the meaning of the phrase 'reasonable prospect of rescuing a company'. When adopting the resolution, the board of directors will have to consider the circumstances of the company particularly the financial circumstances.<sup>100</sup> When adopting a resolution there will therefore be a subjective view of the director which relates to the personal views on the current circumstances of the company, and objective view of the director which relates to the views of a reasonable director.<sup>101</sup> On both these views adopted by each director there must be

---

<sup>98</sup> Section 129(1) (a) of Act 71 of 2008.

<sup>99</sup> Section 129(1) (b) of Act 71 Of 2008.

<sup>100</sup> Meskin et al op cit note 68 at 456.

<sup>101</sup> Ibid.

reasonable grounds to believe that the company will be rescued if it is placed under business rescue proceedings.

It is now a norm in practice that the board of directors before they adopt a resolution to adopt business rescue proceedings conduct a pre- assessment with the business rescue practitioner.<sup>102</sup> At the pre-assessment stage the board of directors consult with the business rescue practitioner to establish whether there are reasonable grounds to believe that if the company is placed under business rescue it will be rescued or not.<sup>103</sup> If the board of directors of the company fail to conduct a pre-assessment procedure that might be regarded as a reckless conduct on the part of the directors and the directors may be held liable for losses and damage done to the company for filing an inappropriate resolution to adopt business rescue proceedings.<sup>104</sup> The procedure begins by analysing whether the company is financially distressed as contemplated in the Companies Act 2008. If the company is financially distressed, it will thereafter be considered whether there are any merits supporting the adoption of the resolution.

However, the board of directors may not adopt a resolution contemplated in section 129(1) (a) and (b) if the liquidation proceeding has been initiated against the company.<sup>105</sup> If the board of directors have adopted a resolution placing the company under business rescue proceedings, it may not then adopt a resolution placing the company under liquidation proceedings, unless the resolution to commence business rescue proceeding has lapsed or up until such time the business rescue proceedings have ended or terminated.<sup>106</sup> The resolution by the board of directors will lapse if the board has failed to comply with the provision of section 129(3) or 129(4).<sup>107</sup>

Where a resolution by the board has lapsed and therefore null, the board is allowed to file a further resolution unless the court on good cause shown by the board approves a further filed resolution after the first has lapsed.<sup>108</sup> In *Griessel & another v Lizemore & others*

---

<sup>102</sup> Pre-assessment is a procedure by which the board of directors consult with the business rescue practitioner to establish whether there are any reasonable grounds to believe that if the company is placed under business rescue it will be rescued.

<sup>103</sup> E Levenstein op cit note 68 at 310.

<sup>104</sup> Ibid. In *Griessel & another V Lizemore & others* 2016 (6) SA 236 (GSJ) the court held that the board of directors had to act in good faith in adopting the resolution. The court held that good or bad faith was a significant factor in determining whether it was just and equitable to set aside the resolution under s 130(5) (a) (ii). Good or bad faith was to be inferred from the facts of each case para 82 - 86.

<sup>105</sup> Section 129(2) (a) and (b) of Act 71 of 2008.

<sup>106</sup> Section 129(6) of Act 71 of 2008.

<sup>107</sup> Section 129(5) of Act 71 of 2008.

<sup>108</sup> Ibid.

(*Griessel*)<sup>109</sup> court held that the resolution adopted by the company had lapsed and was therefore null, owing to the company's failure to comply with the time limits in section 129(4) of the Companies Act of 2008. The court held that the resolution had to be set aside on the grounds that there was no reasonable basis to believe the company was financially distressed, the procedural requirements of section 129 had not been complied with, and that it was just and equitable to do so. In *Advanced Technologies & Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS*<sup>110</sup> Fabricus J held that

‘the purpose of section 129(5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with section 129(3) or (4) 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. The requirements contained in the relevant sub-sections were either complied with or they were not. In this case they were not, for the reasons stated herein above’.<sup>111</sup>

However, recent authority shows that a failure by the board to fully comply with the provisions of section 129(5) does not amount to the nullity of the application. In *Panamo Properties (Pty) Ltd & another v Nel N.O. & others*<sup>112</sup> the court held that the language of s 129(5)(a) at first reading might suggest that there is an absolute nullity of the resolution if there is non-compliance with the requirements of section 129(3) and (4). Furthermore, the court then questioned that how then it is supposed to deal with the irregularity that such a reading appears to create?

The court held that the problem falls to be solved by having regard to certain basic principles of statutory interpretation.<sup>113</sup> The court further held that it needs to be satisfied that in the light of all the facts that are presented before, it is just and equitable to set the resolution aside and terminate the business rescue proceedings, not because of the mere failure to comply

---

<sup>109</sup> *Griessel* supra note 104 para 142.

<sup>110</sup> *Advanced Technologies & Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS* (GNP) unreported case no 72522/11.

<sup>111</sup> *Ibid* para 27.

<sup>112</sup> *Panamo* supra note 55 para 25.

<sup>113</sup> *Ibid*. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2013] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 the court held that ‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document.’

with the Act.<sup>114</sup> The court further held that the reason for this approach is that it will avoid the litigants from exploiting technical issues in order to undermine the business rescue process or turn it to their own benefit. The court stated that once it is recognised that the resolution may be set aside, and the business rescue terminated if that is just and equitable, the possibility for raising technical grounds to evade business rescue will be markedly limited even if it does not disappear at all.<sup>115</sup>

The provision of section 129 allows the board to adopt a resolution to commence business rescue proceedings only by a majority vote by the board of directors. The provisions of this section give affect or compliance with section 66(1)<sup>116</sup> of the Companies Act of 2008. Furthermore, the Companies Act 2008 requires that once the board is of the view that the company is in financial distress, they take states to initiate business rescue as soon as possible.<sup>117</sup> The Companies Act 2008 gives this authority to the directors of the company only, the shareholders of the company may not direct the board of directors to adopt a resolution commencing business rescue proceedings.<sup>118</sup> There is no legal duty on the board of directors to consult with the shareholders of the company when they are adopting a resolution placing the company under business rescue proceedings.<sup>119</sup> It is submitted that the non-involvement of the shareholders in adopting business rescue proceedings is an advantage to the company. The advantage about this is that it prevents unnecessary delays and costs of placing the company under business rescue proceedings.

Should the board of directors of the company fail adopt a resolution placing the company under business rescue proceedings even though the board have reasonable grounds to believe that the company is under financial distress in terms of the Companies Act 2008, the board must<sup>120</sup> deliver a written notice to all the affected persons by the business rescue proceedings setting out the principles contained in section 128(1)(f) that are applicable to the company

---

<sup>114</sup> *Southern Palace* supra note 55 para 32.

<sup>115</sup> *Ibid* para 34.

<sup>116</sup> Section 66(1) provides that the business and affairs of the company must be managed by the direction of the board which has the authority to exercise all the powers and perform the functions of the company. In the case of *Kaimowitz V Delahunt & others* 2017 (3) SA 201 (WCC) the court held that the overall supervision of the management of a company resided in its board, which might well delegate such management to a managing director and/or to a committee of the board at para 19 – 21.

<sup>117</sup> In *Advanced Technologies & Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS* para 28 Fabricus J held that the provisions of chapter 6 in the Companies Act 2008 indicate that that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings.

<sup>118</sup> Cassim et al op cit note 24 at 785.

<sup>119</sup> *Ibid*.

<sup>120</sup> Section 129(7) of Act 71 of 2008.

and further state reasons why the board has not or have failed to adopt a resolution.<sup>121</sup> The rationale behind this provision is that it gives the affected persons an opportunity to make an application placing the company under business rescue proceedings.<sup>122</sup> The Companies Act however, does not make any provision relating to the sanctioning of the board of directors should they fail to comply with the provisions of section 129(7).<sup>123</sup>

It has been suggested that the provisions relating to the commencement of business rescue proceedings by the board of directors are problematic. The weakness relating to these provisions is that the directors are given the power to initiate the implementation of business rescue proceedings without having to go through a formal court process for the formal court determination.<sup>124</sup> In many instances, the directors of the company have no real understanding of the financial distress of the company and they also have no enough rescue plan which will assist the company from the financial distress. It is therefore important for the board of directors of the financially distressed company to consider the appointment of a potential business rescue practitioner to consider the pre – commencement assessment of the company before it can be placed under business rescue.<sup>125</sup> In this assessment the practitioner will consider the finances of the distressed company, and the practitioner will have to decline the instruction if he or she is of the view that the company should be placed on liquidation rather than business rescue.<sup>126</sup>

For this reason, there has been a suggested amendment to chapter of 6 of the Companies Act 2008 to make provision for pre-assessment report to be made by the business rescue practitioner who will submit the report to the board for their consideration and the decision to place the company under business rescue. The suggestions made states that these reports should be a pre-requisite before the resolution may be adopted. Furthermore, a failure by the board of directors should be considered as reckless on their part.<sup>127</sup> One of the other reasons why the there is this suggested amendment is that in practice the board often abuse the court system by adopting a resolution when it is clear that there is no reasonable prospect of the company being rescued.<sup>128</sup> The Companies Act 2008 also does not provide for the sanction of

---

<sup>121</sup> Ibid.

<sup>122</sup> Cassim op cit note 24 at 787.

<sup>123</sup> Ibid.

<sup>124</sup> E Levenstein, 'Business rescue in South Africa: Shortcomings, suggestions and possible amendments to Chapter 6 of the 2008 Companies Act' 2018 (2) *CR* 8.

<sup>125</sup> Ibid at 10.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid at 11.

such directors and it is submitted that this is one of the provisions that must be considered when making amendments.

From the above discussion relating to the commencement of business rescue proceedings by the board of directors is twofold. On the first stance the provisions of the Companies Act 2008 refer to commercial insolvency of which is the inability to pay the debts by the company as they become due and payable and not factual insolvency.<sup>129</sup> On the second stance the board will be required to the reasonable prospect. The Companies Act 2008 does not provide the standard of proof required when determining reasonable prospect but merely states that there must be reasonable prospect.<sup>130</sup> The issue of reasonable prospect will be properly discussed below. However, it should be set out from the outset that the approach that need to be decided by the courts when interpreting reasonable prospect is an objective test based on the evidence provided to the court.

### III. COMMENCEMENT OF BUSINESS RESCUE PROCEEDINGS BY AN AFFECTED PERSON

An affected person may at any time after the board of directors have adopted a resolution to commence business rescue proceedings and at any time before the business rescue plan has been adopted, apply to the high court with jurisdiction to set aside the resolution adopted by the board of directors.<sup>131</sup> The affected person applying to court must show to court that there are no reasonable grounds to believe that the company is financially distressed in terms of the Companies Act 2008, prove that there is no reasonable prospect of rescuing the company, and that the company has failed to satisfy the procedural requirements that are incorporated in section 129 of the Companies Act 2008.<sup>132</sup> When the court is considering the application brought by an affected person, it may set aside the resolution on any of the grounds that the court considered to be just and equitable.<sup>133</sup>

The court may also order the business rescue practitioner to be given sufficient time to form an opinion on whether or not the company appears to be financially distressed and also to

---

<sup>129</sup> B Wassman 'Business rescue – Getting it right' (2014) *De Rebus* 36.

<sup>130</sup> *Ibid.*

<sup>131</sup> Section 130(1) (a) (i) - (iii) of Act 71 of 2008.

<sup>132</sup> Section 130(1) (a) of Act 71 of 2008.

<sup>133</sup> Cassim et al op cit note 24 at 787.

formulate an opinion on whether or not there is a reasonable prospect of rescuing a company if it is placed under business rescue proceedings.<sup>134</sup>

A director of the company who voted in favour of the resolution to commence business rescue proceedings is precluded from applying to court to have the resolution set aside in his/her capacity as the affected person.<sup>135</sup> Such director will only be allowed to make such an application if he /she can prove to the court that at the time of supporting the adoption of business rescue proceedings he/she was acting in good faith on the information that that has been subsequently been found to be misleading and false.<sup>136</sup>

Provided that the board of directors have not yet passed a resolution commencing business rescue proceedings, the proceedings may be commenced by way of an application to the high court with jurisdiction for an order and supervision commencing business rescue proceedings.<sup>137</sup> The court will grant the order commencing business rescue on the basis that the company is financially distressed, the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters; or it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company.<sup>138</sup>

The Companies Act 2008 requires that an affected person must serve the company with a copy of the application to commence business rescue proceedings, notify the companies commission and all the other affected person.<sup>139</sup> When affected persons make an application commencing business rescue proceedings after an application to commence liquidation proceedings, the Companies Act 2008 provides that the liquidation proceedings will automatically be suspended by such an application until such time the court has decided whether to place the company under business rescue or not.<sup>140</sup> If the court is of the opinion that an order placing the company under business rescue is just and equitable, the liquidation proceedings will be suspended until business rescue proceedings have ended or until the proceedings have been suspended.<sup>141</sup>

---

<sup>134</sup> Section 130(5) (b) (i) and (ii) of the Companies Act 71 of 2008.

<sup>135</sup> Section 130(2) (a) of the Companies Act of 2008.

<sup>136</sup> Cassim et al op cit note 24 at 788.

<sup>137</sup> Section 131(1) of Act 71 of 2008.

<sup>138</sup> Section 131(4) (a) (i) – (iii) of Act 71 of 2008.

<sup>139</sup> Section 131(2) (a) and (b) of Act 71 of 2008.

<sup>140</sup> Section 131(6) (a) and (b) of Act 71 of 2008.

<sup>141</sup> Cassim et al op cit note 24 at 790.

## CHAPTER FIVE

### I. REASONABLE PROSPECT OF RESCUING A FINANCIALLY DISTRESSED COMPANY IN TERMS OF THE COMPANIES ACT 2008

The Companies Act 2008 states that business rescue proceedings may be instituted if the company is financially distressed and if there is a reasonable prospect that the company will be rescued if placed under business rescue.<sup>142</sup> The Companies Act 2008 provides for the definitions of the phrases relating to business rescue proceedings, however, the phrase reasonable prospect is not defined in the Companies Act of 2008. For this reason, the courts have had a mountain to climb in an attempt to ascertain the meaning of this phrase. However, this difficulty is not new in the South African company law. The Companies Act 1973 also did not provide a meaning for the phrase reasonable probability. In *Noordkaap Lewendhawe Ko-operasie Bpk v Schreude*<sup>143</sup> the court in interpreting reasonable probability held that the difference between the words probable and possible is considerable. The court stated that in legal terminology something that is possible is less sure to happen than something that is probable.<sup>144</sup>

The case of *Swart v Beagles Run Investments 25 (Pty) Ltd*<sup>145</sup> was the first in which our courts considered the requirements of business rescue proceedings. In this case, the Applicant Mr Swart who was also the company's sole director and shareholder brought an urgent application to commence business rescue proceedings. The applicant was seeking a court order placing the company under supervision of a business rescue practitioner as envisaged in section 131(4) of the Companies Act of 2008. The application was brought on the grounds that the company was currently financially distressed and therefore unable to pay its debts as they became due and payable.<sup>146</sup> The Applicant submitted that if the company was placed under supervision of the practitioner and if a business rescue plan was implemented, all the creditors of the company would be fully paid, and the company would be able to continue functioning on solvent basis.<sup>147</sup>

---

<sup>142</sup> Section 129(1) (a) – (b) of Act 71 of 2008.

<sup>143</sup> *Noordkaap Lewendhawe Ko-operasie Bpk v Schreude* 1974 3 SA 102 (A) at 110; see also EP Joubert 'Reasonable probability versus reasonable prospect: Did business rescue succeed in creating a better test?' (2013) 76 *THRHR* 552.

<sup>144</sup> *Ibid* at 110.

<sup>145</sup> *Swart* supra note 60.

<sup>146</sup> *Ibid* para 9 - 10.

<sup>147</sup> *Ibid* para 1 – 7.

At the time of commencement of business rescue proceedings there were four creditors to the company. The creditors of the company were divided as whether they should vote in favour of the business rescue plan or not. One creditor voted in favour of business rescue, while the other three creditors opposed the business rescue proceedings.

The three creditors opposing the application argued that the application was an abuse of the court process and that the applicant was using the business rescue procedure to avoid payment of the debts of the company and prevent the forced sale of its assets. The creditors further argued that the applicant had recklessly allowed the company to continue being on business at the same time as it was insolvent. The creditors also argued also that the applicant had used the company as his alter ego and had operated the company without proper regard for the rights of creditors and the obligations that the company had.<sup>148</sup>

The issues that had to be decided by the court was whether the company was financially distressed in terms of the Companies Act of 2008. If the company was financially distressed, whether the Applicant has made out a sufficient case that there were reasonable prospects of rescuing the company if placed under business rescue.

The court pointed out that business rescue proceedings are novelty brought about by the new Companies Act and there is no precedent to the applications of this nature in South African law especially with regards to case law.<sup>149</sup> The court had to rely on the old Companies Act 61 of 1973 for guidelines despite the judge stating that the new Companies 2008 has repealed the provisions of the old Companies Act 61 of 1973.<sup>150</sup>

The court relying on the provisions of section 427 of the old Act and in *Millman NO v Swartland Huis Meubileerders (Edms) Bpk (Millman)*<sup>151</sup> stated that it had to be shown that it was reasonably probable that the company was viable and capable of ultimate solvency and that it could, within a reasonable time, become a successful concern by providing a better return for creditors. The court held that the creditors were correct where they were of the view that the application was an abuse of the process of the court, that it was simply an attempt on the applicant director's part to prevent the company's assets from being sold. The court further held that the applicant had made false promises to pay the creditors.<sup>152</sup>

---

<sup>148</sup> Ibid para 13.

<sup>149</sup> Ibid para 23.

<sup>150</sup> Ibid.

<sup>151</sup> *Millman NO v Swartland Huis Meubileerders (Edms) Bpk* 1972 1 SA 741 (C) at 774.

<sup>152</sup> Ibid para 31.

The court further looked at the requirements for a business rescue proceeding in terms of the Companies Act of 2008. The court found that the purpose of the provisions is to assist a financially distressed company by means of a business rescue plan to maximise the likelihood of the company remaining as a solvent company or to achieve a better return for its creditors<sup>153</sup>. The court accepted that the company was financially distressed as it was clearly unable to pay its debts as they became due and payable. The court then concluded that there was no prospect of the company carrying on business on a solvent basis again and no case was made out that the creditors will be better off in business rescue than in liquidation and therefore, the business rescue will not be feasible. The court dismissed the application as it found that there was no reasonable prospect of rescuing the company.<sup>154</sup>

It is submitted that this judgment came as unexpected as the from the provisions of the Companies Act it is clear that it attempts to deviate from the heavy burden required by the 1973 Act. This is considered to be a missed opportunity by the court to develop the South African company law as it failed to set a less restrictive approach to require something less from the applicant.

In *Southern Palace Investments 265 (Pty) Ltd V Midnight Storm Investments 386 Ltd*,<sup>155</sup> the court stated that the phrase reasonable probability had been used in the judicial management as envisaged in section 427(1) of the Companies Act 1973 and that the use of dissimilar language in section 131(4) showed that something less was obligatory than that the recovery should be a reasonable probability.<sup>156</sup> [This therefore means that the requirement of a reasonable prospect of recovery of a financially distressed company must mean something less than that the recovery should be for reasonable probability].<sup>157</sup> The court further held the fact that something less is required is a consequence of a different mindset associated with business rescue by the new Act. However, each case must be considered in its own merits and the words reasonable prospects maybe defined by looking at various factors that would indicate the existence of such prospects in a given case.<sup>158</sup>

---

<sup>153</sup> Ibid para 32.

<sup>154</sup> Ibid para 40 – 42,

<sup>155</sup> *Southern Palace* supra note 4.

<sup>156</sup> Ibid para 25.

<sup>157</sup> Own emphasis.

<sup>158</sup> *Koen* supra note 27 para 24.

The court acknowledged different features that maybe dealt with in an application to prove the existence of a reasonable prospect of rescuing a financially distressed company. These features are as follows:

‘(a) the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

(b) the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

(c) the availability of any other necessary resource, such as raw materials and human capital; and (d) the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.’<sup>159</sup>

The court stated that above features must be actual and not mere speculation, as it will not be considered as enough to convince the courts that reasonable prospects do exist and that the company will be rescued.<sup>160</sup> The court held that it would be difficult to conceive of a business rescue plan with a reasonable prospect of success unless such plan addressed the cause of the demise or failure of the company's business and offered a remedy that had a reasonable prospect of sustainability.<sup>161</sup>

In *Koen & another V Wedgewood Village Golf & Country Estate (Pty) Ltd & others*<sup>162</sup> a business rescue application was made after the liquidation proceedings were instituted. This had the effect of suspending the liquidation proceedings to give the court the opportunity to adjudicate the business rescue application terms of section 131(6) of the Companies Act 2008.

One of the issues that had to be determined by the courts was reasonable prospect. The court stated that in order for it to decide whether there is a reasonable prospect, it must be provided with that when considered it will persuade the court to place the company under business rescue rather than liquidation.<sup>163</sup> Further to this the court stated that such evidence must be concrete have ascertainable details which will allow the court to decide on the issue. On this

---

<sup>159</sup> Ibid.

<sup>160</sup> Ibid para 25.

<sup>161</sup> Ibid.

<sup>162</sup> *Koen* supra note 27.

<sup>163</sup> *Koen* supra note 27 para 17.

the court concurred the approach adopted the court in *Southern Palace*.<sup>164</sup> The court further stated that vague and speculative submissions in the application papers will not be enough to provide an appropriate basis for a court to make the required determination that there is a reasonable prospect of rescuing the financially distressed company.<sup>165</sup>

In *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another*<sup>166</sup> a creditor made an application to place the financially distressed company under business rescue. The application was opposed by another creditor of the company. The issue before the court in this case was whether there is a reasonable prospect that the company will be rescue and continue to trade on solvent basis should it be placed under business rescue.

It was common cause that the respondent company was financially distressed as described in the Companies Act 2008. The court accepted the interpretation adopted by Eloff AJ in *Southern Palace* case that the phrase reasonable prospect indicate that something less is required than a reasonable probability as was required by judicial management.<sup>167</sup> The court further acknowledged the interpretation adopted in *Koen & another V Wedgewood Village Golf & Country Estate (Pty) Ltd*<sup>168</sup> & others which were similar remarks as those made in *Southern Palace* case. The court in this case however elected not to accept the two approaches adopted as they placed a heavy burden on the applicant to prove business rescue. In doing so, Van Der Merwe J stated that:

‘There can be no doubt that in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high’.

The court held that in its view, a prospect means nothing more than a mere expectation which may come or not come.<sup>169</sup> The further stated that the possibility of reasonableness in the present matter must be objectively viewed. The court held that in the case before it the applicant failed to prove to the court that there is reasonable prospect that there would be better return for creditors and dismissed the application.<sup>170</sup>

---

<sup>164</sup> Ibid para 19.

<sup>165</sup> Ibid para 20.

<sup>166</sup> *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another* 2013 (1) SA 542 (FB).

<sup>167</sup> Ibid para 8.

<sup>168</sup> *Koen* supra note 27 para 18.

<sup>169</sup> Ibid para 12.

<sup>170</sup> Ibid.

In *Newcity Group v Allan David Pellow NO*<sup>171</sup> the appellant, Newcity Group, was the sole shareholder of Crystal Lagoon which brought application proceedings to have Crystal Lagoon placed under supervision of a business rescue practitioner. The application was brought on the basis that Crystal Lagoon was financially distressed in terms of the Companies Act 2008, it was just and equitable to place the company under business rescue, and that there was a reasonable prospect of rescuing the company by placing it under the supervision of a business rescue.

The high court stated that Crystal Lagoon was financially distressed in terms of the Companies Act 2008. On the issue of whether there was a reasonable prospect for it to be rescued as envisaged in section 129 of the Companies Act 2008,<sup>172</sup> the court found that it was pointless for a business rescue applicant to attach a business rescue plan to its founding affidavit. The court held that the applicant company merely has to substantiate facts that can be advanced into a plan that if such facts are approved, will maximise the likelihood of the company continuing in existence on a solvent basis.

These facts must also prove that it will result in a better return for the creditors of the company or shareholders than would result from the immediate liquidation of such company as contemplated in section 128(1) (b) of the Companies Act 2008. The high court further held that if there was reasonable possibility of either of these events the jurisdictional requirements will be satisfied, and the court may exercise its discretion to grant the relief sought by the applicant. The high court held that on the facts before it the proposed business rescue plan did not create a reasonable prospect that the company could be rescued if placed under business rescue. The court further held that as things stood, the company could be sold as a going concern and a balancing of the parties' rights and interests favoured finality and the granting of a final winding up order.<sup>173</sup>

The main issue before the Supreme Court of Appeal was whether Newcity had shown a reasonable prospect of rescuing Crystal Lagoon. The court found it to be plain from the wording of the provisions of the Companies Act 2008 that a court may not grant an application for business rescue unless there was a reasonable prospect for rescuing the company<sup>174</sup>. In deciding that question, the court held that the court exercised discretion in the

---

<sup>171</sup> *Newcity Group v Allan David Pellow NO* (ZASCA) unreported case no 577/2013 of 01 October 2014.

<sup>172</sup> *Ibid* para 10.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid* para 11.

wide sense, it made a value judgment and if a Court of Appeal should disagree with the conclusion, it was bound to interfere.

On the issue of what reasonable prospect mean, the Supreme Court with reference to *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another(Prospec)*<sup>175</sup> case found that this phrase was properly described as a yardstick higher than a mere prima facie case or an arguable possibility but lesser than a reasonable probability. The court further stated that this phrase visualizes a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings based on all the facts before the court.<sup>176</sup> The court further held that Newcity had failed to establish a prospect based on reasonable grounds that business rescue would return Crystal Lagoon to solvency or provide a better deal for its creditors. The court dismissed the appeal with costs.<sup>177</sup>

In *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd (Solar Spectrum)*<sup>178</sup> the employees made an application to place the company under business rescue proceedings. The application was opposed by Afgri Operations (Pty) Limited, a secured creditor of the second respondent. Afgri Operations (Pty) Limited had brought a conditional application for the liquidation of the first respondent which application was subject to the discharge of the provisional judicial management order issued by the court. The liquidation application was suspended pending the adjudication of the business rescue application.

The court held that the nature of information that is brought before the court by an affected party will rest upon the position of the affected party towards the company under financial distress. The court referred to this as a balancing act. The court further held that what was required is a determination that the future prospects of rescuing the business appear to be reasonable.<sup>179</sup>

The court further held that all effected persons as stakeholders, have a right to institute business proceedings in terms of the Companies Act 2008. Section 128 of the Companies Act

---

<sup>175</sup> *Prospec* supra note 166 para 11 where Van Der Merwe J stated that ‘I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.’

<sup>176</sup> *Newcity* supra note 171 para 16.

<sup>177</sup> *Ibid* para 23.

<sup>178</sup> *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd* [2012] ZAGPPHC 359 (16 May 2012).

<sup>179</sup> *Ibid* para 10.

2008 describes the term effected persons as including a creditor or a shareholder of a company, a registered trade union representing employees of the company and the employees or their representatives if they are not represented by a registered trade union.<sup>180</sup> The court further held that this provision demonstrates a shift from external creditors interests being paramount, to an attempt to balance a wider range of competing interests of the company in financial distress.

In interpreting the phrase reasonable prospect, the court stated that in the business rescue applications it should be noted that the notion of a prospect is barely something that is certain. The court stated that by its very nature a prospect is future observing and reliant on upon a number of variables and embraces a level of jeopardy to the extent that the future is hardly capable of accurate prediction.<sup>181</sup> The court stated that what is essential is not certainty but a determination on the facts and on the evidence presented to the court that the future prospects of rescuing the business appear to be reasonable.<sup>182</sup>

The court considered the facts and evidence presented to it in a different from other cases. The court took into account the experience of the business rescue practitioner, his experience on the field, and his qualification. The court further stated that when taking into account the plan, and if the creditors can act in good faith on what is proposed on the plan there are reasonable prospects for the successful rescue of the second respondent and that the applicant has made out a prima facie case.<sup>183</sup>

In *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd( Zoneska)*,<sup>184</sup> the court defining reasonable prospect referred to the ordinary interpretation and held that the oxford English dictionary defines the phrase ‘prospect’ as both the possibility or likelihood of some future event that will occur. The court further held that the definition of ‘possibility’ refer to something that may happen. The stated further that case ‘likelihood’ is defined as the state or fact of something being likely or probable.<sup>185</sup>

---

<sup>180</sup> Section 128(1) (a) (i) –(iii) of Act 71 of 2008.

<sup>181</sup> *Solar Spectrum* supra note 178 para 33.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Ibid* para 36 - 37.

<sup>184</sup> *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* [2012] 4 All SA 590 (WCC).

<sup>185</sup> *Ibid* para 39.

The court further stated that given the qualification in the section that the prospect must be a reasonable one, in its interpretation it will be the same approach, that being of considering whether there is a reasonable possibility of a greater return being achieved for creditors in terms of the plan if the order granted as sought by the applicants.<sup>186</sup>

As to what reasonable prospect means, the court stated that there must be facts before the court on which if considered in their totality, the court can conclude that there is reason to believe that the company will be rescued if the order is granted.<sup>187</sup> The court further stated that the applicant is required to set out sufficient facts from which a court would be able to assess the prospects of the plan succeeding in meeting this objective before exercising its discretion. The court stated that this would include an assessment of the practical feasibility of the plan provided by the business rescue practitioner.<sup>188</sup> The court after considering all the evidence provided by the applicant held that there is no reasonable prospect that the proposed plan will have the benefit for creditors which is claimed. The application was dismissed by the court.

In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd (Oakdene)*<sup>189</sup> a creditor – the second respondent, Nedbank, which also held shares in the company concerned, namely the first respondent Farm Bothasfontein – obtained summary judgment against the latter and sought a sale in execution. To avoid the sale, another creditor of the company – the first appellant Oakdene, together with a shareholder, the second appellant Educated Risk – applied for an order placing the company under supervision and commencing business rescue proceedings in terms of the provisions of the Companies Act of 2008.

As it was common cause that the company would not be able to continue on a solvent basis, the purpose of the business rescue proceedings was to enable the shareholders and creditors to get a better return than would be the case if a sale in execution proceeded. The business rescue proceedings were opposed by the first and second respondents.

The court fully agreed with the view taken by Eloff AJ in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Limited & others* where the court held that the phrase ‘reasonable prospect’ indicates that ‘something less is required than that the recovery

---

<sup>186</sup> Ibid para 40.

<sup>187</sup> Ibid para 49.

<sup>188</sup> Ibid para 51.

<sup>189</sup> *Oakdene Square Properties* supra note 7.

should be a reasonable probability'.<sup>190</sup> Classen J added on Eloff AJ's view that where the facts indicate a reasonable possibility of a company being rescued, a court may exercise its discretion in favour of granting an order contemplated in section 131 of the Companies Act 2008.<sup>191</sup> The court held that that the intention was to legislate for business rescue as a preferred solution to companies in financial distress. The application for business rescue was dismissed by the court and a provisional liquidation order was granted by the court.

*In Oakdene Square Propertie's (Pty) Ltd & others V Farm Bothasfontein (Kyalami) (Pty) Ltd & others*,<sup>192</sup> the court held that a registered holder of 40 per cent of the shares in a company qualifies as an affected person in terms of the new Companies Act of 2008.<sup>193</sup>

The court held that business rescue means to facilitate rehabilitation which in turn means the achievement of any one of the two goals.<sup>194</sup> The court also found that the focus of the section was on business rather than company rescue and held that this is in line with the modern trend in rescue regimes around the world. The court held that business rescue attempts to secure and balance the opposing interests of creditors, shareholders and employees of the company. The Court further held that it encapsulates a shift from creditors' interests (creditor friendly system) to a broader range of interests. The Court pointed out that the thinking is that to preserve the business coupled with the experience and skill of its employees may in the end prove to be a better option for creditors in securing full recovery from the debtor.<sup>195</sup>

As to the issue of the requirements of business rescue, the court held that business rescue in terms of the wording and provisions of the new Act shows that there is a lesser requirement than the reasonable probability which was the yardstick for placing a company under judicial management in terms of section 427 (1) of the 1973 Companies Act. The court held that in terms of the 1973 Companies Act, it requires more than a mere prima facie case or an arguable possibility. The court further held that business rescue requires greater significance, it must be a reasonable prospect with the emphasis on reasonable which means that it must be a prospect based on reasonable grounds. The court held that a mere speculative suggestion is not enough to prove the requirement of reasonable prospect.<sup>196</sup>

---

<sup>190</sup> *Southern Palace* supra note 4 para 18.

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

<sup>192</sup> *Oakdene Square Properties* supra note 7.

<sup>193</sup> *Ibid* para 6.

<sup>194</sup> *Ibid* para 21 – 23.

<sup>195</sup> *Ibid* para 23.

<sup>196</sup> *Ibid* para 29.

On the issue of the burden of proof the court held that a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved must be placed before the court to enable it to make a proper decision based on the facts provided. The court stated that where there is a reasonable possibility of the company being rescued, a court may exercise its discretion in favour of granting a business rescue order. The court confirmed the lower threshold test and noted that if the facts indicate a reasonable possibility of the company being rescued, a court may exercise its discretion in favour of granting a business rescue order. The court held further that the philosophy underlining the grant of a business rescue order contemplates that the court cannot second guess the rescue plan which will ultimately be approved by the creditors meetings. The court stated that the intention of the Legislature is to prevent the negative impact on economic and social affairs by rescuing companies rather than liquidating companies.<sup>197</sup>

The court held that the power of a business rescue practitioner conferred in terms of section 136(2)(a) of the Companies Act 2008 to entirely, partially or conditionally suspend any obligation of a company under business rescue that arise under an agreement is highly contentious and may lead to cherry-picking where the practitioner selects obligations suited to the company for suspension. The court held that the exercise of this power by a business rescue practitioner may lead to further litigation which may increase costs.<sup>198</sup>

The court confirmed that at the meeting the proposal is put to a vote and will only be approved if supported by the holders of more than seventy five percent of the creditors voting interests plus at least fifty percent of the independent creditors voting interests. The court stated that the proposed business rescue plan is not approved and is rejected, the practitioner shall proceed in terms of section 153 of the Companies Act 2008. The practitioner shall either prepare an amended business rescue plan for submission to and approval of the creditors, alternatively, if approval cannot be attained, the practitioner has to issue a notice terminating the business rescue proceedings.<sup>199</sup>

---

<sup>197</sup> Ibid para 29.

<sup>198</sup> Ibid para 31

<sup>199</sup> Ibid para 32 – 34.

## II. CONCLUSION

To sum up, it is clear from the above discussion that the South African rescue system has its goal on achieving the sustainability of corporate enterprise by providing a breathing space on financially distressed companies. In doing so, the system caters for the society and attempts to develop the economy of the country by preserving the jobs and attracting investors on the ailing companies. The Companies Act 2008 properly sets out the requirements that will need to be met by the applicant when applying to have a financially distressed company placed under business rescue. However, despite that being the case, it is submitted that the failure by the Companies Act 2008 to provide some guidelines on some of the requirements has led to some interpretation strain on the courts.

One of the major difficulties facing our courts when interpreting reasonable prospect for purposes of granting business rescue order is the lack of legal certainty as to the exact meaning of the phrase reasonable prospect.<sup>200</sup>

One of the major causes of this legal uncertainty is the demanding approach laid down by Eloff AJ in *Southern Palace* case.<sup>201</sup> The guidelines as set out in this case seems to be followed by many of the judges where the issue to be discussed by the court is whether there is reasonable prospect of rescuing the company.<sup>202</sup> This case as discussed above, requires a high bar to be proved before that court can grant the order placing the company on business rescue proceedings. However, the courts fail to consider that one of the main reasons for the failure of judicial management was the burden of proof required from the company to be placed under business rescue.<sup>203</sup> In *Oakdene Square Properties* the Supreme Court of Appeal attempted to balance the two borders of the debate when it acknowledged on the one hand that the demands of reasonable prospect are less than that of reasonable probability, on the

---

<sup>200</sup> EP Joubert op cit note 143 at 562.

<sup>201</sup> Meskin op cit note 68 at 450-451. It was explained these as a stringent approach and further cautioned that if the level of proof as stated by Eloff AJ was set as high as the court did when obtaining a compulsory business rescue order 'this will probably sound the death knell for business rescue in South Africa and lead to the procedure becoming as ineffective as its predecessor, judicial management'; see also *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited & another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* [2012] ZAGPPHC 359 (16 May 2012) at para 15.

<sup>202</sup> EP Joubert op cit note 143 at 562.

<sup>203</sup> Ibid; see also A O Nwafor who states that 'the requirement of reasonable prospect of rescuing the company as contained in sections 129(1) and 131(4)(a) of the Companies Act is indeed problematic. Eloff AJ's purposive approach to discovering the demands of that phrase in section 131(4) (a) was destroyed by the stringent prescriptions made by him. The use of such words as concrete and cogent to describe the nature of evidence required to satisfy the needs of those provisions are too weighty. Their impacts on the quantum of evidence would almost certainly elevate the evidential demands in those provisions to reasonable possibility as against reasonable prospect'.

other hand, reasonable prospect requires more than a mere *prima facie* case or an arguable possibility.<sup>204</sup>

Joubert submit that the approach laid down by Van Der Merwe J in the *Propspec* case is the constructive approach which must be followed as it places a less burden of proof on the applicant when placing the company on business rescue.<sup>205</sup> In this case the court stated that even though the court in *Koen* and in *Southern Palace* acknowledged that the Companies Act 2008 requires something less, they nevertheless required too much to prove from the applicants and thereby deviating from what is required by the legislature.<sup>206</sup> In his judgment, Van Der Werwe J stated that the *Koen* and *Southern Palace* judgments are placing the bar too high in that they both lay down a concrete evidence in their approach, and doing that would be tantamount to requiring proof of probability which would invariably tighten the availability of the court to exercise its discretion in granting the business rescue order placing the company under business rescue.<sup>207</sup> In expressing this view, the court held that:

‘In my view a prospect in this context means an expectation. An expectation may come true or it may not. It therefore signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable. In my judgment a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds.’<sup>208</sup>

It is submitted that this view by Van Der Merwe J is indeed the most constructive approach to be followed together with other factors to set out below. Section 131 of the Companies Act 2008 is one of the most significant sections in the Companies Act 2008. Therefore, when the courts are required to interpret the phrase reasonable prospect they are faced with a difficulty of whether they should follow a subjective or an objective approach.<sup>209</sup>

To overcome this difficulty, the courts should adopt a subjective approach. When doing so, the courts must consider the facts provided before it relating to the company to be placed on business rescue. These facts proving that there is a reasonable prospect of rescuing a company must be properly ventilated by the courts objectively before granting an order placing the company on business rescue proceedings. Braatvedt submit that the question

---

<sup>204</sup> A O Nwafor op cit note 54 at 602.

<sup>205</sup> EP Joubert op cit note 143 at 563.

<sup>206</sup> Ibid at 560.

<sup>207</sup> [2012] ZAFSHC 130 para 12.

<sup>208</sup> Ibid.

<sup>209</sup> K J Braatvedt ‘Is the test for reasonable prospect objective or subjective?’ available online at <https://www.tma-sa.com/info-centre/item/223-is-the-test-for-reasonable-prospect-objective-or-subjective.html> , accessed on 04 November 2018.

which need to be asked by the court when considering the test for business rescue is whether ‘a reasonable, experienced businessman in that particular field would conclude that there is a reasonable prospect of success given the objective proved and not disputed facts.’<sup>210</sup>

The leading authority to the issue of reasonable prospect is *Oakdene Square Properties* case decided by the Supreme Court of Appeal. This case does not assist that much in ascertaining the true meaning or steps to be taken when interpreting the phrase reasonable prospect.

The reason for this is because the case did not provide the direction to be followed when ventilating facts relating to the company to be placed under business rescue. Braatvedt submit that the factors that need to be considered by the courts are: the business and ongoing sources of income; availability of post-commencement finance; value of the brand and perception in the market place of the company; total commitment of the current management team and their interaction with affected parties, being creditors and lenders; new markets and products available to the company linked to the availability of new technology; socio-economic factors which must include government spending and the demands of that particular industry; The advantage of the moratorium and the option of cancelling or suspending obligations and the contract.<sup>211</sup>

To add on the above factors, the court can consider whether the company to be placed under business rescue has a business, if there is, then the court would have to consider the nature of the business being conducted by the company. The court will thereafter have to consider the field of that particular business, whether there is a prospect that the business will be rescued within a reasonable time. The other factors which the court can consider are the opportunities of potential likelihood of investors to the business to assist the company that is financially distressed as defined by the Companies Act 2008. After considering this factor the court can thereafter decide whether there is a reasonable prospect or not.

---

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

## BIBLIOGRAPHY

### BOOKS

1. Braatvedt K 'Is the Test for Reasonable Prospect Objective or Subjective?' available at <https://www.tma-sa.com/info-centre/item/223-is-the-test-for-reasonable-prospect-objective-or-subjective.html>, accessed on 04 November 2018.
2. Cassim F, et al *Contemporary Company Law* (2012) Juta; Cape Town.
3. Meskin et al *Henocheberg on the Companies Act 71 of 2008* (2011) Juta ; Cape Town
4. Shrand and Keeton *Company Law and Company Taxation in South Africa* (Juta1974)

### ARTICLES

1. Clarke, T 'The impact of financialisation on international corporate governance: The role of agency theory and maximising shareholder value' (2014) *Law and Financial Markets Review* 39.
2. Joubert EP 'Reasonable probability versus reasonable prospect: Did business rescue succeed in creating a better test?' (2013) *Tydskrif vir Hedendaagse Romeins - Hollandse* 552.
3. Kloppers P 'Judicial management – A corporate rescue mechanism in need of reform' (1999) *Stell LR* 417.
4. Levenstein E 'Business rescue in South Africa: shortcomings, suggestions and possible amendments to Chapter 6 of the 2008 Companies Act' 2018 (2) *CR* 8.
5. Loubser A 'Judicial management as a business rescue procedure in South Africa' (2004) *SA Merc LJ* at 162.
6. Minsky H 'Falling from the period of financial distress into the panic and crash: Reappraisal of the Federal Reserve discount mechanism (1972) 3 97-136, available at: <http://econspeak.blogspot.com/2008/07/falling-from-period-of-financial.htm>, accessed on 08 August 2018.
7. Naidoo T, Patel A, & Padia N 'Exploring various business rescue practices in South Africa' *Southern African Accounting Association Biennial International Conference Proceedings* (2009) 71.
8. Nwafor A 'Exploring the goal of business rescue through the lens of the South African Companies Act 71 of 2008' (2017) *Stell LR* 599.
9. Rajak H & Henning J 'Business rescue for South Africa' (1999) *SALJ* 268.

10. Steenkamp C ‘What is a clear definition of business rescue plan?’ (2013), available at [http://www.newdiscoverybs.co.za/index.php?option=com\\_content&view=article&id=725:econopedia&catid=1:latest-news&Itemid=59](http://www.newdiscoverybs.co.za/index.php?option=com_content&view=article&id=725:econopedia&catid=1:latest-news&Itemid=59), accessed on 17 July 2018.
11. Wassman B ‘Business rescue – getting it right’ (2014) (Jan/Feb) DR 36.

## GOVERNMENT NOTICES

1. Department of Trade and Industry *Guidelines for Corporate Law Reform: South African Company Law Reform for the 21st Century* 14 GN 1183 in GG 264493 of May 2004.

## CASE LAW

1. *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS* (GNP case no 72522/11).
2. *Chetty v Hart* 2015 4 All SA 401 (SCA).
3. *Cloete Murray & another v Firstrand Bank Ltd t/a Wesbank* [2015] ZASCA 39 (Vol 18 No 5) [2015].
4. *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd* [2012] ZAGPPHC 359 (16 May 2012).
5. *Griessel & another v Lizemore & others* 2016 (6) SA 236 (GSJ)
6. *Investec Bank Ltd v Bruyns* 2011 JDR 1563 (WCC).
7. *Kaimowitz V Delahunt & others* 2017 (3) SA 201 (WCC)
8. *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 2 SA 378.
9. *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C).
10. *Makhuva v Lukhoto Bus Service (Pty) Ltd* 1987 3 SA 565.
11. *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies & Engineering Company (Pty) Ltd & another* [2013] ZAGPJHC 109.
12. *Millman NO v Swarland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd intervening* 1972 (1) SA.
13. *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2013] ZASCA 13; 2012 (4) SA 593 (SCA).
14. *Newcity Group v Allan David Pellow NO (577/2013)* [2014] ZASCA 162 (1 OCTOBER 2014).
15. *Noordkaap Levendehave Ko-operaise Bpk v Schreuder en`Ander* 1974 3 SA 102.

16. *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events & Exhibitions (Pty) Ltd & others* [2012] 2 All SA 433 (GSJ).
17. *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2012 (3) SA 273 (GSJ).
18. *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA).
19. *Panamo Properties (Pty) Ltd & another v Nel N.O. & others* [2015] 3 All SA 274 (SCA).
20. *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & another* 2013 (1) SA 542 (FB).
21. *Repp v Ondudu Goldfields Ltd* 1937 CPD.
22. *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* (15155/2011) [2011] ZAWCHC 442; 2012 (2) SA 423 (WCC) (25 November 2011).
23. *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 5 SA 422 (GNP).
24. *Tenenowitz v Tenny Investments* 1979 2 SA 680 (E).
25. *Welman v Marcelle Props* 193 CC 2012 JDR 0408 (GSJ).
26. *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* [2012] 4 All SA 590 (WCC).

## LEGISLATION

1. Companies Act 71 of 2008.

s128

s129

s130

s131

s132

s133

s134

s135

s136

s137

s139

s140

s141

2. Companies Act 61 of 1973.

s357

s424

s427

3. Companies Act 46 of 1926.

THESES

1. Loubser, A *Some Comparative Aspects of Corporate Rescue in South African Company Law* (unpublished PhD thesis university of South Africa, 2010).
2. Levenstein, E *An Appraisal of the new South African Business Rescue Procedure* (unpublished PhD thesis University of Pretoria, 2016).