A CRITICAL ANALYSIS OF THE EFFECTIVENESS OF THE BUSINESS RESCUE REGIME AS A MECHANISM FOR CORPORATE RESCUE

BY

ADV. KIREN KESH BAGWANDEEN

209504041

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DECLARATION

I, **Kiren Kesh Bagwandeen**, student number 209504041, do hereby declare that, unless specifically referenced, this dissertation consists of my own work and has not been submitted to any other university in full or in partial fulfilment of the academic requirement of any other degree or qualification.

K.K BAGWANDEEN

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To God, thank you for giving me the patience and determination to complete this dissertation.

Completing this dissertation whilst practicing as an advocate has most certainly not been an easy task, and I have developed a new-found respect for persons working whilst simultaneously completing their studies.

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ABSTRACT

Almost eight years after the enactment of the business rescue regime under the Companies Act 71 of 2008, and a plethora of judgments which have probed and prodded its provisions, it is an opportune time to ascertain whether the business rescue regime is an effective corporate rescue mechanism suitable to the modern day demands of the South African economy.

In the current economic downturn, South Africa can ill afford a repeat show of the failed judicial management system. It requires a modern and effective corporate rescue mechanism that can be utilised in appropriate circumstances as a viable alternative and not merely a precursor to liquidation.

This dissertation seeks to provide a critical analysis of the effectiveness of the business rescue regime to ascertain its worthiness as a corporate rescue mechanism.

DEFINED TERMS

CIPC	Companies and Intellectual Property Commission
CIPC Report	Report by CIPC on the status of business rescue proceedings in South Africa as at March 2018
Companies Bill	The first consolidated companies bill introduced into parliament in 1922
DTI	Department of Trade and Industry
Policy Paper	Policy paper by the DTI titled '*South African Company Law for the 21st Century: Guidelines for Corporate Law Reform'*
SCA	Supreme Court of Appeal
Stats SA	Statistics South Africa
1926 Act	Companies Act 46 of 1926
1939 Amendment Act	Companies Amendment Act 23 of 1939
1952 Amendment Act	Companies Amendment Act 46 of 1952
1973 Act	Companies Act 61 of 1973
2008 Act	Companies Act 71 of 2008

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CHAPTER 1: GENERAL INTRODUCTION

1.1 INTRODUCTION

The business rescue regime contained in Chapter 6[1] of the Companies Act 71 of 2008 ("the **2008 Act**"), sought to redevelop the landscape for financially ailing companies,[2] once destined for the landfill of liquidated companies under the judicial management system[3] of the repealed Companies Act 61 of 1973 ("the **1973 Act**").

The advent of the business rescue regime in the 2008 Act, which came into effect on 1 May 2011, introduced a long overdue system of corporate rescue in line with international standards, and apposite to the modern day demands of the South African economy.[4] It incorporates many features of Chapter 11 of the US Bankruptcy Code[5] and the United Kingdom Enterprise Act of 2002.[6] As eloquently stated by Professor Michael Katz:[7]

> *For the first time in South Africa companies' legislation we have not been rooted to English company law. In fact the New Companies Act is not anchored in the Company law of any foreign jurisdiction. The New Companies Act represents the best of breed, borrowing in each particular concept from the best in the particular jurisdiction. In certain respects we have home-grown innovations. All of this combines to enable South Africa to take its place amongst the best of company law jurisdictions*.

Having replaced judicial management, which was largely considered "an abject failure"[8], business rescue seeks to protect a wider range of interests through the process,[9] and give effect to the purpose[10] of the 2008 Act, in particular, section 7(k)[11] which aims to "provide for the

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1 Titled: Business Rescue and Compromise with Creditors. The business rescue regime is contained in sections 128 – 154 of the Companies Act 71 of 2008 ("the **2008 Act**").

2 J Calitz and G Freebody "Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?" (2016) 49(2) *De Jure* 266.

3 Judicial management was the predecessor to business rescue, contained in sections 427 – 440 of the of the 1973 Act.

4 F HI Cassim … *et al Contemporary Company Law* 2 ed (2012) 861. See also The Department of trade and Industry policy paper entitled 'South African Company Law for the 21st Century: Guidelines for Corporate Law Reform' GN 1183 of 23 June 2004; GG 26493 para 4.6.2.

5 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).

6 Cassim (Note 4 above; 864).

7 *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and others* 2012 (3) SA 273 (GSJ) para 9.

8 C Stein and G Everingham *The new Companies Act Unlocked* (2011) 409.

9 R Bradstreet 'Business rescue prove to be creditor friendly: Classen J's analysis of the new business rescue procedure in Oakdene Square Properties' (2013) 130 *SALJ* 44.

10 Section 5 (1) of the 2008 Act provides that the "[a]ct must be interpreted and applied in a manner that gives effect to the purposes set out in section 7".

11 Section 7(k) of the 2008 Act.

efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders".[12]

The idea is that whilst aiming to provide "a temporary moratorium on the rights of claimants against the company or in respect of property in its possession"[13], the company's issues would be attended to by a business rescue practitioner[14] who would develop and implement, if approved by creditors,[15] "a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing its existence on a solvent basis".[16]

If the ultimate rescue of the company is not possible, the alternative objective is to render a better return for creditors than would otherwise result if the company were to be immediately liquidated.[17]

1.2 THE SUCCESS RATE OF BUSINESS RESCUE

In theory, business rescue was the long-awaited light at the end of the tunnel for many companies on the brink of liquidation, and one could reasonably expect a much higher success rate than was achieved under judicial management of between 15 and 20 percent.[18]

However, some several years after enactment statistics seem to suggest otherwise. The Companies and Intellectual Property Commission ("the **CIPC**"),[19] publishes reports which "provide a statistical overview of the status of business rescue proceedings within South Africa based on applications" submitted to them.[20] In terms of a report by the CIPC on the status of

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12 Business rescue therefore attempts to 'secure and balance the opposing interests of creditors, shareholders and employees'- See R Bradstreet 'The new business rescue: will creditors sink or swim?' (2011) 352 *SALJ* 355.

13 Section 128(b)(ii) of the 2008 Act.

14 R Sharrock, K Van der Linde and A Smith *Hockly's Insolvency Law* 9ed (2016) 275.

15 E Levenstein 'South Africa: Sink or Swim – Business Rescue… The Art of Treading Water?', (7 March 2012) available at http://www.mondaq.com/southafrica/x/167450/Corporate+Company+Law/Sink+Or+Swim+Business+Rescue+The+Art+Of+Treading+Water, accessed on 14 August 2018.

16 Section 128(b)(iii) of the 2008 Act.

17 Ibid. This alternative objective is also shared by similar legislation in Australia, England and Canada – See M Pretorius 'Business Rescue Status Quo Report Final Report' (30 March 2015) *Business Enterprises of University of Pretoria*, available at http://pmg-assets.s3-website-eu-west 1.amazonaws.com/151110Business_Rescue.pdf, accessed on 14 August 2018.

18 A Smits 'Corporate Administration: A Proposed Model' (1999) 32 *De Jure* at 86.

19 The CIPC is established in terms of section 185 of the 2008 Act. The CIPC is the regulator of business rescue - See Sharrock (Note 14 above; 275).

20 'Status of Business Rescue Proceedings in South Africa March 2018', available at http://www.cipc.co.za/files/3915/2639/0127/Business_Rescue_Status_Report_March_2018_v1.0.pdf, accessed on 14 August 2018.

business rescue proceedings as at March 2018 ("the **CIPC Report**"), out of the 2867 cases for which business rescue proceedings were commenced from May 2011[21] to March 2018, 480 proceedings were substantially implemented by way of filing a "Notice of Substantial Implementation of Business Rescue Plan" in terms of section 152(8)[22] of the 2008 Act.[23] This equates to a success rate of approximately 17%. At the end of December 2016, the success rate was approximately 16 %,[24] and at the end of December 2015 approximately 14%.[25] Overall the success rate, although gradually increasing over the years, appears to remain unsatisfactorily low.

Further statistics on the status of business rescue proceedings from the CIPC Report are indicated in the table below.[26]

Operational Business Rescue Proceedings Applications	**Total (1 May 2011 to March 2018)**
Commenced	2867
Ended	1691
Terminated by way of filing a Notice of Termination (CoR125.2)	602
Substantially implemented by way of filing a Notice of Substantial Implementation (CoR125.3)	480
Ended up directly in liquidation	352
Set aside by court order	22
Declared a nullity	235

It is evident from the above table that 352 ended up directly in liquidation, equating to approximately 12% of the 2876 cases for which business rescue proceedings were commenced.

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21 The inception of the 2008 Act.

22 Section 152(8) of the 2008 Act provides that "[w]hen the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan".

23 CIPC (Note 20 above; 3).

24 'Status of Business Rescue Proceedings in South Africa December 2016' available at http://www.cipc.co.za/files/8114/9131/0792/Status_of_Business_Rescue_in_South_Africa_December_2016_version1_0.pdf, accessed on 1 August 2018.

25 'Status of Business Rescue Proceedings in South Africa December 2015' available at http://www.cipc.co.za/files/3114/6133/0825/Status_of_Business_Rescue_in_South_Africa_December_2015_version1_0.pdf, accessed on 1 August 2018.

26 CIPC (Note 20 above; 3).

Furthermore, according to statistics on liquidations and insolvencies as at March 2018, released by Statistics South Africa,[27] there was a 4.8% increase in the total number of liquidations recorded between March 2017 and March 2018,[28] and a 9.4% increase in the first quarter of 2018 when compared to 2017.[29]

1.3 PROBLEM STATEMENT

Business rescue was intended to be a vast improvement on judicial management, providing for the effective rescue of financially distressed companies.

The success rate of approximately 17% of business rescue plans being implemented, appears to suggest that the majority of ailing companies are not achieving the ultimate objective of successful rehabilitation and continued existence as a going concern.[30]

The question that immediately arises is whether business rescue is an effective regime, suitable to the modern day demands of the South African economy, that can be utilised by ailing companies as a viable corporate rescue mechanism and alternative to liquidation?

1.4 RATIONALE FOR THE STUDY

As stated by Binns-Ward J in the case of *Koen and Another v Wedgewood Village Golf & Country Estate:*[31]

> *[T]he 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*

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27 Statistics South Africa ("**Stats SA**") is defined in section 4(1) of the Statistics Act 6 of 1996. The purpose of this act is:

> *To provide for a Statistician-General as head of Statistics South Africa, who is responsible for the collection, production and dissemination of official and other statistics, including the conducting of a census of the population, and for co-ordination among producers of statistics; to establish a Statistics Council and provide for its functions; to repeal certain legislation; and to provide for connected matters.*

In terms of the explanatory note by Stats SA, Stats SA:

> *[C]ollects administrative information on liquidations from Companies and Intellectual Property Commission, Department of Trade and Industry, while information on insolvencies is gathered from Notices of the Master of the Supreme Court that appear in the Government Gazette*.

See 'Statistics of liquidations and insolvencies, March 2018' Statistics South Africa available at http://www.statssa.gov.za/publications/P0043/P0043March2018.pdf.

28 'Statistics of liquidations and insolvencies, March 2018' *Statistics South Africa* available at http://www.statssa.gov.za/publications/P0043/P0043March2018.pdf.

29 Ibid.

30 R Rajaram *Success Factors for Business Rescue in South Africa* (Unpublished LLD thesis, University of KwaZulu-Natal, 2016) 13.

31 2012 (2) SA 378 (WCC) at para 14.

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.

It is therefore imperative in the current economic climate that business rescue can be used as a viable alternative and not merely a precursor to liquidation. For it to be a viable alternative to liquidation the business rescue regime must, therefore, be effective to ensure that those companies capable of being rescued can utilise the regime to do so, hence the title of this study.

1.5 RESEARCH QUESTIONS

In answering the main question of whether business rescue can be utilised as an effective corporate rescue mechanism the following interrelated sub-questions arise, which this study will also seek to answer:

1. Why judicial management was an "abject failure"?
2. Why there was a need for business rescue as a corporate rescue mechanism?
3. Whether business rescue is an improvement on judicial management and a viable alternative to liquidation?
4. Whether business rescue practitioners are adequately qualified and regulated?
5. Whether the key components of the business rescue regime contribute to an effective corporate rescue mechanism?
6. Whether business rescue is susceptible to abuse?
7. Whether there are shortcomings in the business rescue regime, and if so, what can be done to eradicate them?

1.6 LIMITATION OF RESEARCH

In critically analysing the effectiveness of the business rescue regime as a corporate rescue mechanism, the analysis will be limited to the key components of business rescue, which it is submitted include the dual commencement and duration of business rescue proceedings, the moratorium on legal proceedings and the company's property interests, post-commencement-finance, the business rescue practitioner and the business rescue plan.

1.7 RESEARCH METHODOLOGY

The research methodology adopted by this dissertation is a desk-top research. Numerous sources will be utilised in critically analysing the history of corporate rescue in South Africa, followed by a critical analysis of the effectiveness of the business rescue regime as a corporate rescue mechanism. These sources will include South African and international sources, such as textbooks, journal articles, South African and international law reports and statues, theses, articles from the internet, and published reports (in the public domain). This dissertation will also include a limited comparative review by comparing relevant provisions of corporate rescue systems in foreign legal jurisdictions, particularly in the United States of America and the United Kingdom.

1.8 OVERVIEW OF CHAPTERS

This dissertation is structured into five chapters. All the chapters are interrelated and seek to give the reader a holistic view on the effectiveness of the business rescue regime as a corporate rescue mechanism. Following this introductory chapter as Chapter 1, this dissertation consists of the following further chapters:

Chapter 2: Judicial management and the need for law reform in corporate rescue

This chapter provides a critical examination of the historical overview of corporate rescue in South Africa up to the 1973 Act. It examines judicial management under the 1973 Act, the reasons for its failure, and the need for law reform in corporate rescue.

Chapter 3: The inception and meaning of business rescue

This chapter considers the process that culminated in the business rescue regime under Chapter 6 of the 2008 Act. It also examines the definition of 'business rescue' and its associated terminology.

Chapter 4: The key components of the business rescue regime

This chapter critically analyses the key components of the business rescue regime to ascertain its effectiveness as a corporate rescue mechanism. The key components include the dual commencement and duration of business rescue proceedings, the moratorium on legal proceedings and the company's property interests, post-commencement-finance, the business rescue practitioner and the business rescue plan.

Chapter 5: Conclusion and recommendations

This chapter concludes the dissertation with an overview of the preceding chapters and provides recommendations to address any possible shortcomings of the business rescue regime.

CHAPTER 2: JUDICIAL MANAGEMENT AND THE NEED FOR LAW REFORM IN CORPORATE RESCUE

2.1 INTRODUCTION

Before delving into the business rescue regime of the 2008 Act, it is imperative to understand the origins of corporate rescue in South Africa, the mechanism of judicial management that was available prior to the inception of the 2008 Act, and why there was a desperate need for law reform of the South African corporate rescue system.[32]

This chapter will seek to provide a brief historical overview of corporate rescue in South African law prior to business rescue, with a critical focus on judicial management under the 1973 Act and the reasons for its dismal failure.

2.2 HISTORICAL OVERVIEW OF CORPORATE RESCUE IN SOUTH AFRICAN LAW PRIOR TO THE 1973 ACT

2.2.1 The 1926 Companies Act

Prior to 1926, a consolidated companies legislation was non-existent in South African Law as each province was governed by its own Companies Act.[33] In 1922 the very first consolidated Companies Bill ("the **Companies Bill**") had been introduced into Parliament, with the second reading of it taking place in 1923.[34] Sections 195 to 198 of the Companies Bill authorised a court in certain instances, where it had been approached on application for a winding-up order, to order the appointment of a judicial manager.[35] The Companies Bill was later passed into legislation as the Companies Act 46 of 1926 ("the **1926 Act**").[36]

Judicial management had therefore been introduced into South African law as a corporate rescue mechanism for the very first time in the 1926 Act,[37] at a time when the idea of corporate rescue was relatively unheard of in other comparable legal jurisdictions.[38] In fact, the concept of endeavouring to rescue an insolvent company rather than liquidating it was so novel that the

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32 R Bradstreet 'The New Business Rescue: Will Creditors Sink or Swim?' (2011) 128(2) *SALJ* 353.

33 AH Olver *Judicial Management in South Africa* (Unpublished LLD thesis, University of Cape Town, 1980) 1.

34 Ibid.

35 Olver (Note 33 above; 2).

36 Ibid.

37 *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd and Another* 2001 (1) All SA 223 (C) 37.

38 A Loubser 'Judicial Management as a business rescue procedure in South African corporate law' (2004) 16(2) *SA Merc LJ* 139.

Minister of Justice at the time, responsible for directing the "draft legislation through Parliament", had to proffer an explanation as to where the idea had originated from, and how it would be utilised.[39] In doing so he explained that it was:[40]

> *[D]erived from the practice in England and America under which receivers in equity are appointed, in the case of an important concern in regard to which there is some fear that it will go into liquidation; one which can pay its debts and which can be helped by someone officially appointed for this purpose. Powers of that kind would be used sparingly by the courts. To take a hypothetical case. You might have a large wool factory getting into difficulties and which ought to be helped, because it is an institution which helps the country. Then your court could intervene, when it is shown that this concern is solvent, and thus help it through its difficulties. I quite admit that this is a power that would not be used in any country very much, and has not been used much in England or America, but it might be used to save a concern, and it is for such sparing use that it has been inserted in the bill. The concerns you would like to help with this power are industrial concerns such as factories manufacturing articles in South Africa. You might be able to help a few of these concerns out of the mire at times.*[41]

However, as submitted by Loubser[42] the explanation that judicial management was derived from the appointment of receivers in equity in America and England would have most likely left the members of the House of Assembly in the dark, as receivership and equity receivership had never formed and has not formed part of South African law.

Surprisingly, the Minister's unpretentious explanation is "the only official comments on record for the introduction of judicial management into…" the South African legal system.[43] Nonetheless, as submitted by Olver,[44] the Minister made it "quite clear" that judicial management was only to be applied in limited circumstances, namely, to protect vital industry important to the economy. Unfortunately, this was not reflected in the 1926 Act, as there was

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39 A Loubser 'Tilting at Windmills? The Quest for an Effective Corporate Rescue Procedure in South African Law' (2013) 25(4) *SA Merc LJ* 437.
40 Olver (Note 33 above; 2).
41 Hansard House of Assembly Debates 6 25 February 1926 col 996-7. See Olver (Note 33 above; 2-3).
42 Loubser (Note 40 above; 438).
43 Olver (Note 33 above; 3).
44 Ibid.

no limitation as to the size or type of company which could be placed under judicial management.[45]

In one of the first reported cases to grapple with the interpretation of judicial management under the 1926 Act, De Wet J in *Silverman v Doornhoek Limited*[46] considered that the pivotal feature of the new section was that there was an onus on the applicant to:

- demonstrate a reasonable probability that if the company were to be placed under judicial management, the company could overcome its difficulties thereby removing the prospects of winding-up out of the equation; and
- satisfy the court that it was just and equitable for such an order to be granted.[47]

These were therefore seen as two separate requirements.[48] However, De Wet J ultimately adopted a conservative approach and required not only a reasonable probability but a strong probability, [49] as he stated:

> *It seems to me that the object of the section is to obviate a company being placed in liquidation if there is some strong probability that by proper management or by proper conservation of its sources it may be able to surmount its difficulties and carry on. It is a special privilege given in favour of the company and it is to be authorised in very special circumstances.*[50]

The 1926 Act had nonetheless introduced a corporate rescue mechanism in the form of judicial management.[51] A mechanism that had endured minor amendments over the years prior to the 1973 Act, as a direct result of the economy at the time as well as several commissions of enquiries.[52]

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45 A Loubser 'Business Rescue in South Africa: A Procedure in Search of a Home?' (2007) 40(1) *CILSA* at 156.

46 1935 (TPD) 349.

47 *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd and Another supra* at para 40.

48 Ibid.

49 Ibid.

50 *Silverman v Doornhoek Limited supra* at para 353.

51 P Kloppers 'Judicial Management – A Corporate Rescue Mechanism in Need of Reform' (1999) 10 *Stell LR* at 419. At 418 Kloppers quotes the following apt definition of corporate rescue provided by Paul Omar in "Thoughts on the Purpose of Corporate Rescue" 1997 The Company Lawyer 127:

> *Corporate rescue is now associated with what is termed the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and the continued rewarding of capital and investment..*

52 DA Burdette *A Framework for Corporate Insolvency Law Reform in South Africa* (unpublished LLD thesis, University of Pretoria, 2002) 344.

2.2.2 Amendments to the 1926 Act

The Companies Law Amendment Act 11 of 1932 had brought about some vital amendments of the 1926 Act, which was partly as a result of the economic depression at the time.[53] One such vital amendment included the addition of section 196(1), which empowered a court to order the stay of any actions instituted against a company whilst under judicial management.[54] The amendment had, therefore, occasioned the vital introduction of the principle of a moratorium into judicial management.[55] A moratorium on all lawsuits "prevents any further lawsuits being brought against the company, or any pending lawsuits being proceeded with, whilst the company is under judicial management".[56]

Unfortunately, in practice difficulties were encountered and one of the greatest difficulties, as identified by the Milin Commission in its report of 1948, was for the courts to ascertain, due to a lack of sufficient evidence, whether there was a reasonable probability that a company could overcome its difficulties if the court granted an order placing it under judicial management.[57] A problem that had also been identified earlier by the Landsdown Commission[58] in 1936, which suggested that in certain cases it was necessary for a preliminary investigation to be carried out.[59] The Companies Amendment Act 23 of 1939 ("the **1939 Amendment Act**") attempted to address this difficulty with an amendment to section 195 of the 1926 Act, which provided that every judicial management application had to first be referred to the Master of the Supreme Court for an investigation and a report.[60] The amendment proved to be unsuccessful as the Master had inadequate means of carrying out a thorough investigation.[61]

Although not recommended by the Lansdown Commission, the 1939 Amendment Act, unfortunately, substituted a new section 197(B) into the 1926 Act, which required that the costs of judicial management and creditors' claims be paid according to the law of insolvency.[62] The

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53 Olver (Note 33 above; 6).
54 Ibid. See also H Rajak and J Henning 'Business Rescue for South Africa' (1999) 116 *SALJ* 266
55 Ibid.
56 RC Williams *Concise Corporate and Partnership Law* 2ed (2003) at 311.
57 Olver (Note 33 above; 4-5). A concern that was noted by the Lansdown Commission in 1936 – See Report of Company Law Commission UG 45 of 1936 at para 223.
58 Report of Company Law Commission UG 45 of 1936.
59 Olver (Note 33 above; 8).
60 Ibid. See also FI Ofwono *Suggested Reasons for the failure of Judicial Management as a Business Rescue Mechanism in South African Law* (unpublished Post-Graduate Diploma in Law thesis, University of Cape Town, 2014) 2.
61 Ibid.
62 Olver (Note 33 above; 9).

section had, as submitted by Olver,[63] placed an emphasis on the payment of creditors' claims ahead of the rescuing of the company, which encouraged judicial managers to liquidate the company's assets with an aim of paying creditors rather than attempting to save the company's business. This meant that judicial management had transitioned into a process of winding-up without the involvement of the court.[64]

The Millin Commission criticised section 197(B) and made certain important proposals to remedy the position where a judicial manager could himself elect to liquidate the company.[65] Amongst the proposals, included the prohibition of the sale of the company's assets by the judicial manager without leave of the court (unless such sale was in the ordinary course of the company's business), as well as requiring the judicial manager to first apply monies that became available to the continuation of the company's business and to the costs of judicial management.[66] The proposals of the Millin Commission were later embodied in the Companies Amendment Act 46 of 1952 ("the **1952 Amendment Act**").[67]

Despite the aforesaid amendments, the conservative approach by the courts continued, which was clearly illustrated by Judge Trollip sitting in the Appellate Division (as it then was) in the case of *Sammel and others v President Brand Gold Mining Company Limited*[68] when he said:

> *Judicial management is a special or extraordinary procedure, an order for which will generally only be granted if the Court is satisfied that there is, inter alia, 'a reasonable probability' that under such management the company will ultimately be able to pay its debts.*[69]

Even though the dictum was *obiter*, it reinforced the conservative approach and cemented the trend.[70]

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63 Ibid.
64 Ibid.
65 Ibid.
66 Olver (Note 33 above; 9-10).
67 Olver (Note 33 above; 9-11).
68 *Sammel and others v President Brand Gold Mining Company Limited* 1969 (3) SA 629 (AD).
69 *Sammel supra* at para 633 A. See *Le Roux Hotel Management (Pty) Ltd and Another supra* at para 45.
70 *Le Roux Hotel Management (Pty) Ltd and Another supra* at para 45.

2.2.3 The decision to retain judicial management

Despite the low success rate of judicial management, both the Lansdown and Milin Commissions expressed confidence in the system,[71] with the Millin Commission finding no support for its abolition.[72] However, the success rate did not appear to have improved after the 1952 Amendment Act.[73]

By 1961, judicial management had come under vigorous attack, as it was largely viewed as a clandestine liquidation procedure.[74] The van Wyk de Vries Commission, which was appointed in 1963 and reported in 1970, was urged by the Masters of the Supreme Court to abolish judicial management on the basis of its low success rate, and the abuse of the system.[75] The commission deemed it to be "extremely successful in a number of cases"[76] which justified its retention, and that the core criticism was that too many court orders were granted in circumstances where judicial management was not a viable option.[77]

Ultimately, the recommendations of the van Wyk de Vries Commission pertaining to judicial management, aimed at establishing "suitable machinery" to assist the court with a reliable valuation of the prospect of the company being rehabilitated.[78] This ultimately led to judicial management being retained under sections 427 to 440 of the 1973 Act, with the basic principles from the 1926 Act remaining unaltered.[79]

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71 H Rajak and J Henning 'Business Rescue for South Africa' (1999) 116 *SALJ* at 266. See also the Report of the Company Law Commission UG 35 of 1936 at para 223 and the Report of the Company Law Amendment Commission UG 69 of 1948 at para 262.

72 Olver (Note 33 above; 10).

73 Olver (Note 33 above; 11).

74 E Levenstein *An Appraisal of the New South African Business Rescue Procedure* (unpublished LLD thesis, University of Pretoria, 2015) at 55.

75 Main Report of the Companies Act Commission of Enquiry RP 45 1970 chapter XX p145 para 51.02. See also Olver (Note 33 above; 12) and Rajak and Henning (Note 71 above; 266).

76 Loubser (Note 38 above; 139).

77 Olver (Note 33 above; 12). See also Loubser (Note 39 above; 438).

78 Olver (Note 33 above; 13). See also Rajak and Henning (Note 71 above;266).

79 Olver (Note 33 above; 13).

2.3 JUDICIAL MANAGEMENT IN TERMS OF THE 1973 ACT

2.3.1 The requirements for a judicial management order

Section 427(1) of the 1973 Act set out the requirements primarily pertaining to a provisional judicial management order.[80] In terms of the section, the court[81] may on application grant a judicial management order if by reasons of mismanagement or any other cause:

- the 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 placed under judicial management, the company will be enabled to pay its debts or meet its obligations and become a successful concern; and
- it appears just and equitable to the court.[82]

The onus to prove the requirements rested on the applicant,[83] which in terms of section 427(2) could have been any of the persons entitled to apply for a winding-up of a company under section 346 of the 1973 Act, which included the company itself, one or more of its creditors or members or jointly by any or all of them.[84]

2.3.2 Judicial management only applicable to a company

The wording of section 427(1) of the 1973 Act, made it clear that only a 'company'[85] as defined by the 1973 Act could be placed under judicial management, and as such excluded businesses in any other form.

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80 Loubser (Note 38 above; 141 and 143).

81 The Supreme Court having jurisdiction over the company's registered office or main place of business – See PM Meskin … et al *Henochsberg on the Companies Act 61 of 1973* 5ed 2011 (Service issue 33) 927. Furthermore, in terms of section 427(3) of the 1973 Act, when an application for the winding-up of a company was brought under such Act, and it appeared to the court that if the company were to be "placed in judicial management the grounds for its winding-up may be removed and that it will become a successful concern and that the granting of a judicial management order would be just and equitable, the Court may grant such an order in respect of that company".

82 JJ Henning 'Judicial Management and Corporate Rescues in South Africa' (1992) 17(1) *JJS* 96. See also Loubser (Note 38 above; 141-142).

83 PM Meskin. … *et al Henochsberg on the Companies Act 61 of 1973* 5ed (Service issue 33) 2011 at 923. See also *Bahnemann v Fritzmore Exploration (Pty) Ltd* vs 1963 (2) SA 249 (T) at 251 and *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C).

84 Loubser (Note 45 above; 154).

85 Section 1 of the 1973 Act defined a 'company' to mean "a company incorporated under Chapter IV of this Act and includes anybody which immediately prior to the commencement of this Act was a company in terms of any law repealed…" by the 1973 Act.

2.3.3 Mismanagement or for any other cause

The words "mismanagement or for any other cause", as correctly submitted by Olver,[86] were "… so all embracing in meaning that they … [were] superfluous and could … [have] been omitted from section 427(1) without altering its meaning in any way". A variety of causes[87] could have brought about the situation of a company being unable to pay its debts or meet its obligations, not only mismanagement.[88] The courts were, therefore, as submitted by Meskin[89] entitled to grant a judicial management order whatever the cause of the company's difficulty, so long as the cause was identified.[90]

2.3.4 Inability to pay its debts or meet its obligations and failure to become a successful concern

Section 427(1) of the 1973 Act required that the company must have been unable to pay its debts. Accordingly, on the basis that section 345 of the 1973 Act was not made applicable to judicial management, commercial insolvency had to be proved.[91] This is in sharp contrast to Chapter 11 of the US Bankruptcy Code, where no conditions are laid down for the use of the business rescue provisions and which allows the management of the company to utilise such mechanism as a "matter of right".[92]

However, if the company could pay its debts, judicial management could still be pursued on the alternative ground that the company was unable to perform its obligations other than the payment of its creditors. Meskin[93] gives the example of a contractual obligation where a company has undertaken to manufacture and supply something to construct a building.

Section 427(1) of the 1973 Act, further required that the company had not become or was prevented from becoming a successful concern, which appeared superfluous because as

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86 Olver (Note 33 above; 47).

87 In *Lenning and another v Orenstein & Koppel SA Ltd* 1940 WLD 59 a company had been placed under judicial management where it had been proved that the shares of the company had been held by enemy aliens during war and a result the company was prevented from operating effectively - See Olver (Note 33 above; 47).

88 Olver (Note 33 above; 47).

89 Meskin (Note 83 above; 926).

90 See *Ex parte Onus (Edms) Bpk* 1980 (4) SA 63 (O) at 66.

91 Loubser (Note 38 above; 143).

92 P Kloppers '*Judicial Management Reform -Steps to Initiate a Business Rescue*' (2001) 13 *SA Merc at* 375.

93 Meskin (Note 83 above; 926).

submitted by Loubser,[94] a company that was unable to pay its debts or probably unable to meet its obligations was clearly not a successful concern in the first place.

2.3.5 Reasonable probability that the company will be enabled to pay its debts or meet its obligations and become a successful concern

Unlike the view of the court in *Silverman supra*, which required a strong probability that the company could be rescued before an order was granted, section 427(1) of the 1973 Act required that there be a "reasonable probability" that the company would become a successful concern.[95] The burden of proof remained onerous as a "reasonable probability" and not merely a possibility was required.[96] The court in *Noordkaap Lewendehawe Ko-operasie Bpk v Schreuder*[97] held that there was a material difference between the words 'probable' and 'possible', and stated that in terms of legal terminology, something is less sure to happen if it is possible rather than probable.[98]

There had also been divergent views amongst the judiciary as to whether the test to be satisfied upon a final order being granted was more onerous than that required when a provisional order was sought.[99] Smalberger J, in the case of *Tenowitz and another v Tenny Investments (Pty) Ltd*,[100] supported the view that more than a 'reasonable probability' was required on the return day before a court could grant a final order, reiterating the conservative approach of De Wet J in *Silverman* supra.[101] The view of Smalberger J was fortunately departed from by Steyn J in *Ex parte Onus (Edms) Beprek*,[102] as after reviewing the earlier cases of *Kotze' v Tulryk Bpk*[103] and *Ladybrand Hotel (Pty) Ltd v Segal*[104] he concluded that the test for a final judicial management order remained the same when a provisional order was sought.[105]

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94 Loubser (Note 38 above; 143-144).
95 Meskin (Note 83 above; 926). See *Kotze' v Tulryk Bpk* 1977 (3) SA 118 (T) at 122.
96 Loubser (Note 38 above; 143).
97 1974 (3) SA 102 (A).
98 Levenstein (Note 74 above; 57).
99 Kloppers (Note 92 above; 361).
100 1979 (2) SA 608 (E) at 683.
101 Kloppers (Note 92 above; 361-362). Prior to the inception of voluntary administration, Australian courts had also adopted a conservative approach to the use of official management to rescue a company, as the Harmer Report Vol at para 52 stated "the legislative approach to corporate insolvency in Australia is most conservative". - See Burdette (Note 52 above; 347).
102 1980 (4) SA 63 (0) at 66.
103 *Kotze' v Tulryk Bpk* supra note 97.
104 *Ladybrand Hotel (Pty) Ltd v Segal* 1975 (2) SA 357.
105 Kloppers (Note 92 above; 362). See also *Le Roux Hotel Management (Pty) Ltd and Another supra* at para 46.

It was further implied, in the requirement that there must be a 'reasonable probability' that the company would have become a successful concern, that it would be able to meet all its obligations and debts[106] in full.[107] Therefore, what had to be reasonably probable was that the company was viable, capable of ultimate solvency[108] and that it would have become a successful concern within a reasonable[109] time.[110] The requirement of 'reasonable probability' in relation to the full repayment of the company's debts was, however, correctly criticised by Kloppers[111] as being "outdated, unrealistic and often contrary to the wishes of creditors".

2.3.6 Just and equitable

Finally, if the court was satisfied that there was a 'reasonable probability' that the company would be able to recover, it was still required to ascertain whether it was just and equitable to grant a judicial management order.[112]

Although, the 1973 Act did not set out any circumstances that would constitute an order being 'just and equitable', our courts determined this requirement with reference to the rights and interests of shareholders and the creditors in all the circumstances of the case.[113] This was explained by the court in *Tenowitz[114] supra* that a court should take into consideration, where a company is unable to pay its debts, the principle that a creditor is entitled *ex debito justitiae[115]* to have the company placed in liquidation,[116] which reinforced the view that judicial management could only be used in exceptional circumstances.[117] Therefore, any creditor insisting on winding-up could only be overridden if it was proved that it was in the interests of all members and creditors that judicial management should be ordered.[118] In the case of *Marsh*

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106 Not merely some of the debts - See *Millman N.O. v Swartland Huis Meubileerders (Edms) Bpk* 1972 (1) SA 741 (C) at 744.

107 Kloppers (Note 92 above; 362). See also Loubser (Note 39 above; 145).

108 See *Millman N.O. supra* at 744.

109 Unless it occurs within a reasonable time, "the application should fail because its grant would not be just and equitable in relation to creditors" - See *Irvin & Johnson Ltd v Oelofse Fisheries Ltd 1954* (1) SA 231 (E) at 237.

110 Meskin (Note 83 above; 926). See also *Porterstraat 69 Eiendomme (Pty) Ltd supra* at 616.

111 Kloppers (Note 92 above; 362).

112 Kloppers (Note 92 above; 362).

113 Meskin (Note 83 above; 927). See Millman NO *supra* at 747-748; Kotze' *supra* at 122-123 and *De Jager v Karoo Koeldranke & Roomys (Edms) Bpk* 1956 (3) SA 594 (C) at 452 -453.

114 Tenowitz *supra* at 683.

115 The Oxford Dictionary of Law defines *ex debito justitiae* as follows: "[Latin from what is owed] Stated of a remedy that the court has no discretion to refuse. Thus, the applicant has the remedy as of right." – See J Law and E A Martin *Oxford Dictionary of Law* 7ed (2013) at 216.

116 Meskin (Note 83 above; 927).

117 Loubser (Note 38 above; 143).

118 Meskin (Note 83 above; 927). See also *Tobacco Auctions Ltd v Aw Hamilton (Pvt) Ltd* 1966 (2) SA 451 (R) at 452-453.

v Plows (SA) Ltd[119] the court refused an order for judicial management, which was opposed by an execution creditor, where there had been no unanimity amongst the creditors or the members as to whether judicial management or winding-up should ensue, and as such Herbstein J found that it was not just and equitable for the execution creditor "to be delayed in the exercise of his rights on speculations on future possibilities".[120]

Once all the requirements had been met, the court still had a discretion "as to whether or not to grant the order".[121] However, as provided by the court in *Wire Industries Steel Products & Engineering Co (Coastal) Ltd v Surtees N.O. and Heath N.O.*[122] in relation to all aspect of judicial management the Court's powers were those expressly assigned to it by the Act.[123]

2.3.7 Brief chronology of the judicial management procedure

Once a court was satisfied that all the requirements were met, it was entitled to grant a provisional judicial management order with a return date not exceeding 60 days.[124] The provisional order did not include an automatic moratorium and had to be applied for[125] if the company were to have any chance of recovering and becoming viable again.[126]

Once the court had granted a provisional judicial management order, the Master of the High Court appointed a provisional judicial manager.[127] Once appointed, the judicial manager's primary duties were to take over the management of the company, recover the company's assets, and prepare a report detailing the general state of affairs of the company and their opinion on whether the company was capable of being successfully rescued.[128]

The Master of the High Court then convened separate meetings of the creditors, the members and debenture-holders, if any, of the company,[129] to consider the provisional judicial manager's

119 1949 (1) PH E4 (C).
120 Meskin (Note 83 above; 927).
121 *Ben-Tovim v Ben Tovim* 2000 (3) SA 325 (C) at 331.
122 *Wire Industires Steel Products & Engineering Co (Coastal) Ltd v Surtees N.O. and Heath N.O.* 1953 (2) SA 531 (AD) at 539-540.
123 Meskin (Note 83 above; 927).
124 Loubser (Note 45 above; 154). See section 432(1) of the 1973 Act.
125 Loubser (Note 45 above; 154). See section 428(2) of the 1973 Act.
126 Williams (Note 56 above; 314).
127 Loubser (Note 45 above; 155). See section 429(b) of the 1973 Act.
128 Loubser (Note 45 above; 155). See section 430(a) and (c) of the 1973 Act.
129 Section 429(b)(ii) of the 1973 Act.

report, to determine the desirability of obtaining a final judicial management order, and if desirable, the person or persons to be appointed as final judicial manager or managers.[130]

On the return day, the court could have granted a final judicial management order if it appeared that the company would have been enabled to become a successful concern and that it was just and equitable to do so after considering:

- the opinions and wishes of creditors;
- the report of the provisional judicial manager;
- the report of the Master and the Registrar of companies; and
- the number of creditors who did not prove their claim at the first meeting of creditors along with the amount and nature of their claim.[131]

Alternatively, the court could discharge the provisional order or make any order it deemed just.[132]

If the court decided to grant a final judicial management order, it was required to direct that the management of the company, subject to the supervision of the court, vest in the final judicial manager.[133] However, the 1973 Act did not prescribe a time limit for judicial management, and could only be terminated by the court which granted the judicial management order on application by the judicial manager or any person having an interest in the company, if it appeared that the purpose of such order was fulfilled or it was no longer suitable that such order should remain in force.[134] Furthermore, if the final judicial manager believed that the continuation of judicial management would not have enabled the company to become a successful concern, he or she was obliged to apply for the cancellation of judicial management.[135] In those circumstances, the application would usually be accompanied with a plea for the simultaneous order for the winding-up of the company.[136]

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130 Loubser (Note 45 above; 155). See section 431(2). In terms of section 431(2)(c) of the 1973 Act, in the case of any meeting of creditors, each creditor could prove their claim against the company. See also Williams (Note 56 above; 313).

131 Williams (Note 56 above; 314). See section 432(2) of the 1973 Act.

132 Section 432(2) of the 1973 Act.

133 Section 432(3) of the 1973 Act.

134 Section 440(1) of the 1973 Act.

135 Loubser (Note 45 above; 156). See section 433(l) of the 1973 Act.

136 Loubser (Note 45 above; 156). See also MS Blackman … et al *Commentary on the Companies Act* (2002) 3 at 15-43.

2.4 THE FAILURE OF JUDICIAL MANAGEMENT AS A CORPORATE RESCUE SYSTEM

Unfortunately, judicial management was an unsatisfactory alternative to liquidation, which enjoyed very limited success as a corporate rescue system.[137] Apart from being described as an "abject failure", in *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd and Another*[138] Joseman J described judicial management as a system that barely worked since its inception in 1926.[139]

The ultimate shortcomings[140] of judicial management which prohibited it from becoming a successful and viable mechanism were attributed to the following:

- heavy reliance on court procedures for its initiation, which meant that it required the costly involvement of legal practitioners from the outset.[141] This costly exercise was counterintuitive to the aim of rescuing a financially ailing company and made it especially unsuitable for small and medium-sized businesses.[142] Whereas, voluntary administration in Australia was simply commenced by the decision of the relevant party;[143]
- the requirement that there be a 'reasonable probability' that the company would become a successful concern, was an onerous requirement as explained in paragraph 2.3.5 above, and one that was often too difficult to discharge.[144] Burdette[145] submits that the requirement should have been one of 'reasonable possibility' or 'reasonable prospect' as opposed to 'reasonable probability';
- there was a traditional practice to appoint liquidators as judicial managers of companies, whose function as a liquidator was to cease the trading of a business and sell its assets off as quick as possible, and who therefore had no experience in rescuing a financially ailing company.[146] Furthermore, despite the importance of their role, there were no statutory regulations prescribing the minimum qualifications and experience of judicial

137 Levenstein (Note 74 above; 58).
138 [2001] 1 All SA 223 (C).
139 *Le Roux Hotel Management (Pty) Ltd and Another supra* at para 60.
140 See Kloppers for his opinion on the shortcomings of judicial management (Note 92 above; 370-374).
141 Kloppers (Note 92 above; 370).
142 Rajak and Henning (Note 71 above; 268).
143 Kloppers (Note 92 above; 370).
144 Stein and Everingham (Note 8 above; 409).
145 D A Burdette "Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process" (1999) 32 *De Jure* 44 at 58.
146 Kloppers (Note 51 above; 424). See also Olver "Judicial Management: A Case for Law Reform" (1986) *THRHR* 86.

managers.[147] Although the voluntary body of the Association of Insolvency Practitioners of Southern Africa had brought a measure of order to the monitoring of the practice area at the time, membership of such body was only voluntary, and a judicial manager was not required to be a member of a body with licensing and monitoring functions.[148] Therefore, what should have been a regulated niche practice area reserved for persons with high business acumen and skill, was left open to abuse and incompetence;[149]

- South Africa had a liquidation as opposed to a business rescue culture.[150] There was considerable stigma associated with insolvency, and with insolvent debtors being condemned as reckless and dishonest.[151] This attitude lay the foundation for the mistrust of a procedure that was viewed as a mechanism that allowed an insolvent company to avoid the payment of its debts owed to its creditors.[152] As such, courts sought the need to protect the right of creditors to utilise liquidation to obtain payment of their claims from such infringement, by treating judicial management as an extraordinary procedure;[153]
- the requirement that the company be insolvent or near insolvency (as set out in paragraph 2.3.4 above) before judicial management could be utilised, meant that by the time this requirement was satisfied the fate of most companies had already been sealed, and any attempt at rescuing a company was a futile exercise;[154] and
- judicial management was limited in application to companies and no other business structures.

2.5 CONCLUSION

Although South Africa had been one of the first countries to enact a formal corporate rescue procedure in the form of judicial management and had been somewhat of a pioneer in this regard,[155] it proved to be a mechanism that was exceedingly revolutionary for its time and as

147 Rajak and Henning (Note 71 above; 268).
148 Ibid.
149 Ibid.
150 Burdette (Note 145 above; 56).
151 Loubser (Note 39 above; 453-454).
152 Ibid.
153 Loubser (Note 39 above; 454).
154 Burdette (Note 52 above; 349).
155 Loubser (Note 45 above; 153).

such one that was viewed with much scepticism. Unfortunately, it was this scepticism which compelled our courts to view it as an extraordinary procedure. Furthermore, despite judicial management being one of the first corporate rescue systems to be enacted globally, it was a system that had remained largely unchanged,[156] and one that failed to keep abreast with international developments and standards of best practice.

Judicial management ultimately failed as a corporate rescue system, and South Africa was in desperate need of a corporate rescue mechanism that was apposite to the modern day demands of the South African economy,[157] and one that incorporated successful features of corporate rescue from other leading legal jurisdictions such as the USA, the UK and Australia to align itself with international best standards.

156 Ibid.
157 Cassim (Note 4 above; 861).

CHAPTER 3: THE INCEPTION AND MEANING OF BUSINESS RESCUE

3.1 INTRODUCTION

Chapter 6 of the 2008 Act, introduced an entirely new corporate rescue mechanism in the form of business rescue, which finally replaced the failed judicial management system.[158] The business rescue regime whilst aligning itself with international standards on corporate rescue seeks to create a system of corporate rescue apposite to the modern day demands of the South African economy.[159]

This chapter will briefly consider the drafting process that culminated in business rescue under Chapter 6 of the 2008 Act, which will provide some context to understanding the provisions that were enacted. The meaning of 'business rescue' will also be examined, which will reveal not only the objectives of business rescue but also the stages of the business rescue process.[160]

3.2 THE DEVELOPMENT OF BUSINESS RESCUE UNDER CHAPTER 6 OF THE 2008 ACT

The Department of Trade and Industry ("the **DTI**") had been cognisant of the fact that there was a desperate need for the reform of corporate rescue in South Africa, and in 2004 published a policy paper titled "*South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*"[161] ("the **Policy Paper**"). The Policy Paper was gazetted and published to obtain public comment.[162] The Policy Paper had set out the DTI's intended approach to the reform of South African corporate law, which emphasised an intention to develop a corporate rescue regime appropriate to the demands of a modern South African economy.[163]

The DTI acknowledged in the Policy Paper that the provisions of judicial management had changed very little since its inception under the 1926 Act and that judicial management had been "rarely used and even more rarely led to a successful conclusion".[164] It quoted the

158 Cassim (Note 4 above; 861).
159 Ibid.
160 Cassim (Note 4 above; 865).
161 GN 1183 of GG 26493 23/06/2004. See also Levenstein (Note 74 above; 267).
162 Levenstein (Note 74 above; 267).
163 GN 1183 of GG 26493, 23/06/2004; 43. See also H Stoop and A Hutchison 'Post Commencement Finance Domiciled Resident or Uneasy Foreign Transplant?' (2017) 20 *PELJ/PER* 2.
164 GN 1183 of GG 26493, 23/06/2004; 43. Whereas countries such as Australia and Canada had introduced new systems of corporate rescue − See GN 1183 of GG 26493; 23/06/2004; 43.

following by Rajak and Henning[165] on the process by which a debtor should emerge from a rescue regime:

> *All modern corporate-rescue regimes are united on one matter, the absence of which, possibly more than anything else, has helped to bring South Africa's judicial management to its present perceived impotence. This is the recognition that the agreed plan by which the future relations between the debtor and its creditors will be governed may well include the reduction of the debtor's overall indebtedness. To insist, as the South African rescue provision does, that a protective moratorium is available only where 'there is a reasonable probability that if [the debtor] is placed under judicial management, it will be enabled to pay its debts or to meet its obligations' is to ignore the well-nigh universal reality of creditors being prepared, for their own benefit, to forgive part of the debt. It is frequently the case that a creditor will benefit far more from having the debtor back in the marketplace than from suing the debtor into extinction.*
>
> *A radically new rescue provision must provide a mechanism under which a specified majority of creditors can approve a plan under which the debtor may emerge from protection and resume normal commercial dealings.*

The DTI had specifically mentioned in the Policy Paper that the aforesaid recommendation, as well as Chapter 11 of the US Bankruptcy Code,[166] would be considered in creating a corporate rescue system.[167] As Pointed out by Loubser,[168] "Chapter 11 reorganisation had reached cult status" in the international corporate rescue arena, as a vast number of European countries as well as Singapore, Japan and the People's Republic of China utilised Chapter 11 as a blueprint in either designing or redesigning their corporate rescue procedures. Anderson[169] correctly points out, that "it is one matter to have common legislation it is another to have that legislation operate in the same manner given different social conditions and a different commercial environment". Furthermore, although anointed as the "holy grail", Chapter 11, ironically, was

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165 Rajak and Henning (Note 72 above; 286). See also Levenstein (Note 74 above; 268). Chapter 11 of the US Bankruptcy Code refers to the Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).

166 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).

167 GN 1183 of GG 26493; 23/06/2004; 43. See also Stoop and Hutchinson (Note 163 above; 2-3).

168 Loubser (Note 38 above; 439). See also Stoop and Hutchinson (Note 163 above; 3).

169 C Anderson 'Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective' 2008 (1) *PELJ/PER* 2.

not without criticism in the USA, particularly in the way it dealt with the issue of secured credit.[170]

In addition to holding public consultations[171]on the guidelines, the DTI, as required to do so in terms of the legislative process, also "held briefing workshop sessions with the Portfolio Committee on Trade and Industry of the National Parliament of South Africa".[172] Having concluded public and stakeholder consultations the DTI updated the guidelines and in August 2005, the process of legislative drafting had commenced.[173] As indicated by Yeats,[174] "[t]he drafting process which was adopted by the DTI to produce the Act … [was] both interesting and illuminating…", as "an international reference team was appointed" which comprised of "experienced specialist attorneys and academics from the USA, UK and Australia". Furthermore, a Canadian lawyer, Philip Knight, "a proponent of the school of plain-language drafting…", was appointed as chief drafter.[175] It was his brief to draft the provisions in a clear and simple manner, which would easily be understood by "all commercial participants".[176]

The first exposure draft was finalised in April 2006, shortly thereafter the draft Bill had been finalised for submission to the Minister and to Cabinet and was published for public comment on 12 February 2007.[177] The draft Bill introduced business rescue as a corporate rescue mechanism under Chapter 6, which was to replace the failed judicial management system.[178] After lengthy public consultations and stakeholder engagements, the draft Bill was revised and finally adopted on 19 November 2009, as the Companies Bill B61D of 2008, which was later

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170 Stoop and Hutchinson (Note 163 above; 15). Walters summarises the issue as follows:
The narrative is now well-established and oft-repeated. Whereas in the past, firms filing for chapter 11 would come into the bankruptcy process with at least some unencumbered assets, modern firms tend to have capital structures that are entirely consumed by multiple layers of secured debt. And so, according to the prevailing conventional wisdom, chapter 11, in the general run of cases, has become little more than a glorified nationwide foreclosure process through which secured creditors can exit via a quick section 363 sale or an outright liquidation.
See AJ Walters 'Statutory Erosion of Secured Creditors' Rights: Some Insights from the United Kingdom' 2015 (2) *U. III. L. Rev.* 543.

171 "The DTI conducted public consultation sessions in all nine provinces from 24 June to 23 September 2004. At the same time, the department tabled the guidelines within the National Economic Development and Labour Council's … Trade and Industry Chamber as required in terms of the National Economic Development and Labour Council Act" 25 of 1994 - See TH Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines in the Companies Act 2008' 2010 *xiii Acta Juridica xxii.*

172 TH Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines in the Companies Act 2008' 2010 xiii *Acta Juridica* xxii.

173 Mongalo (Note 172 above; xxii - xxiii).

174 J Yeats 'Putting Appraisal Rights into Perspective' (2014) 2 *Stell LR* 329. See also Levenstein (Note 25 above; 271).

175 Ibid.

176 Ibid.

177 Levenstein (Note 74 above; 269). See also TH Mongalo (Note 172 above; xxiii - xxiv).

178 Levenstein (Note 74 above; 270).

assented to by the State President on 8 April 2009.[179] The 2008 Act came into effect on 1 May 2011, in accordance with the expected date of commencement. The preamble specifically sets out as one of the aims of the 2008 Act "to provide for efficient rescue of financially distressed companies".

3.3 THE MEANING OF BUSINESS RESCUE

Section 128(1) contains several definitions exclusive to Chapter 6 of the 2008 Act, with the cornerstone definition being that of 'business rescue'[180], which is further confirmed by the fact that section 128(1)(h)[181] defines 'rescuing the company' as "achieving the goals set out in the definition of 'business rescue' in paragraph (b)". In terms of Section 128(1)(b),[182] 'business rescue' is defined as:

> *proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—*
>
> *(i) the temporary supervision of the company[183], and of the management of its affairs, business and property;*
>
> *(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
>
> *(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.*

179 Mongalo (Note 173 above; xxiv-xxv).
180 Stein and Everingham (Note 8 above; 410).
181 Section 128(1)(h) of the 2008 Act.
182 Section 128(1)(b) of the 2008 Act.
183 This refers to the situation where the board and management are temporarily substituted by the business rescue practitioner. However, the board is not removed and remains in place and can carry out duties and functions but only under the supervision of the business rescue practitioner − See Levenstein (Note 74 above; 284).

It is evident from section 128(b)(iii),[184] that business rescue envisages any one of two outcomes.[185] The primary objective is that the company will return to continue in existence as a going concern,[186] whilst the alternative, secondary objective is a better return for creditors or shareholders than would otherwise result if the company were to be liquidated. [187] Accordingly, unlike judicial management which required that the company be returned to solvency,[188] either one of the two outcomes would be considered a successful rescue in terms of section 128(1)(b) of the 2008 Act.[189] The alternative, secondary objective, however, is far less burdensome on the business rescue practitioner[190] to achieve than the primary objective.[191]

Our courts had not always been *ad idem* on whether business rescue proceedings could be utilised to secure a better return for creditors and shareholders where it is clear from the outset that the company would never be saved from immediate liquidation.[192] In *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others* [193] the court emphasised that in terms of section 131(4)[194] of the 2008 Act, the court may grant an order commencing business rescue if there was a reasonable prospect of it being rescued, and therefore doubted whether the alternative objective could at the outset be relied upon in support of a business rescue application.[195] However, in *Southern Palace Investment 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*[196] Eloff AJ, in acknowledging the alternative objective said that if the aim is merely to secure a better return for creditors:

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184 Section 128(b)(iii) of the 2008 Act.

185 E.P. Joubert 'Reasonable possibility versus reasonable prospect: Did business rescue succeed in creating a better test than judicial management?' 2013 (76) *THRHR* 554. See also Levenstein (Note74 above; 284).

186 Ibid. Like the Australian equivalent (Part 5.3A of the 2001 Australian Corporations Act, as amended in 2007), one of the aims envisaged is to return a company in financial difficulty to commercial viability, thereby avoiding liquidation – See *Southern Palace Investment265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) para 2.

187 W.A. Joubert 'Business Rescue and Compromise with Creditors' (founding ed) *The Law of South Africa* vol 4(1) (2012). Levenstein refers to the secondary objective as "quasi-liquidation" as the company assets are sold off which will ultimately lead to the deregistration of the company - See Levenstein (Note 74 above; 285).

188 Stein and Everingham (Note 8 above; 410).

189 S Conradie and C Lamprecht 'Business rescue: How can its success be evaluated at company level?' (2015) 19 (3) *South African Business Rescue Review* 6.

190 The business rescue practitioner is analysed para 4.6 below.

191 Cassim (note 4 above; 864).

192 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) 23. See also Sharrock (Note 14 above; 276).

193 2012 (5) SA 515 (GSJ) para 17.

194 Section 131(4) of the 2008 Act is analysed in para 4.2.4 below.

195 Sharrock (Note 14 above; 276).

196 *Southern Palace Investment 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) para 25. See also Sharrock (Note 14 above; 276).

> *[O]ne would expect an applicant for business rescue to provide concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available. It is difficult to see how, without such details, a Court will be able to compare the scenario sketched in the application with that which would obtain in an immediate liquidation of the company. Mere speculative suggestions are unlikely to suffice*.

Similarly, in *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and Another, Investec Bank Ltd v Aslo Holdings*[197] Le Grange J, also acknowledged the alternative objective, and pointed out that where the object is to secure a better return, "a reasoned factual basis" would have to be outlined, "vague and speculative averments" would not suffice.

The issue was finally settled in the case of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others,*[198] where the Supreme Court of Appeal ("the **SCA**") noted that:

- recourse to the Australian rescue provision in the Corporations Act 50 of 2001, which was similar in wording to section 128(1)(b) of the 2008 Act, need not only be utilised to save the company from liquidation; and
- in the case of *Dallinger v Halcha Holdings (Pty) Ltd*[199] the Federal Court of Australia held that the statutory rescue machinery "should be available in a case where, although it is not possible for the company to continue in existence, an administration is likely to result in a better return for creditors than would be the case with an immediate winding-up".

Brand JA for the full concurring bench, went on to conclude at paragraph 26 that as he understood the section:

> *[I]t says 'business rescue' means to facilitate 'rehabilitation', which in turn means the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation. This construction would also coincide with the reference in s 128(1)(h) to*

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197 *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and Another, Investec Bank Ltd v Aslo Holdings* (25051/11, 18112/2011) [2012] ZAWCHC 110 (22 February 2012) para 19.

198 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at para 24.

199 *Dallinger v Halcha Holdings (Pty) Ltd* 1995 FCA 1727 para 28.

the achievement of the goals (plural) set out in s 128(1)(b). It follows, as I see it, that the achievement of any one of the two goals referred to in s 128(1)(b) would qualify as 'business rescue' … .

It is evident from the definition of 'business rescue' that for the business rescue process to be triggered,[200] that the company be 'financially distressed'.[201] In terms of section 128(1)(f) of the 2008 Act:

> *Financially distressed, in reference to a particular company at any particular time, means that—*
>
> *(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or*
>
> (ii) *it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months*.

In summary of the threshold requirement, Khan[202] states "[a] company is financially distressed if, looking forward six months, it seems unlikely that it will be able to pay its debts when they fall due, or if it seems likely that the company's liabilities will exceed its assets within the next six months". The former is the liquidity or 'commercial insolvency' test[203] also referred to as the 'cash flow test' in America,[204] whilst the latter is the 'balance sheet insolvency' test.[205]

The 2008 Act, does not define what is meant by either a 'solvent' or 'insolvent company', but as indicated by the SCA in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited:*[206]

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200 Cassim (Note 4 above; 864).

201 Stein and Everingham (Note 8 above; 410).

202 L Khan 'Business Rescues Panacea or Poison Pill' (2010) 1(3) *Business Tax & Company Law Quarterly* 20.

203 Stein explains that it is "similar to the liquidity element of the solvency and liquidity test" found in section 4(1)(b) of the 2008 Act, albeit that section 4(1)(b) refers to 12 months, providing more time to consider the financial position of a company – See Stein and Everingham (Note 8 above; 410). Section 4(1)(b) of the 2008 Act provides that:

> *For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time—*
>
> *…*
>
> *(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of—*
>
> *(i) 12 months after the date on which the test is considered; or*
>
> *(ii) in the case of a distribution contemplated in paragraph (a) of the definition of 'distribution' in section 1, 12 months following that distribution*.

204 Levenstein (Note 74 above; 297).

205 Stein and Everingham (Note 8 above; 411).

206 2014 (2) SA 518 (SCA) at para 14, 16 and 19. See also Levenstein (Note 74 above; 303).

> *For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities).*
>
> *The legislature must have been content that prevailing judicial interpretations of solvency and insolvency respectively should continue to have effect.*

On the basis that either a cash-flow or balance sheet test can be applied to ascertain whether a company is financially distressed, business rescue is clearly intended to be utilised when a company displays signs of impending insolvency and not where a company is insolvent.[207] In *Merchant West Workings Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another*[208] Kgomo J said that:

> *[I]t is clear that a business rescue plan cannot be invoked where a company is already insolvent. This is one of the aspects differentiating business rescue from judicial management. 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 wherewithal 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", thus being a candidate for business rescue.*

It, therefore, follows that where a company is already insolvent, it is not a candidate for business rescue, but rather one for liquidation proceedings.[209]

In addition to 'financially distressed', irrespective of whether business rescue is commenced either by way of a company resolution or by a court order, it is required in both instances that there be a reasonable prospect of rescuing the company.[210] The meaning of a reasonable prospect is discussed under paragraph 4.2.4 below. Accordingly, as Cassim[211] indicates, although the pre-requisites to commence business rescue under each instance are slightly different, "in broad terms, the two prerequisites for business rescue proceedings are that the

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207 P Delport … et al 'Henochsberg on the Companies Act 71 0f 2008' (2016) 452. In *Welman v Marcelle Props 193 CC and Another* [2012] JOL 28714 (GSJ) Tsoka J, at para 28 stated that, "business rescue proceedings are not for the terminally ill … . Nor are they for the chronically ill".

208 (13/12406) [2013] ZAGPJHC 109 (10 May 2013) at para 8.

209 Levenstein (Note 74 above; 302).

210 Cassim (Note 4 above; 864-856).

211 Cassim (Note 4 above; 865).

company must be financially distressed and there must be a 'reasonable prospect' of rescuing the company".

Remarkably, Chapter 11 of the US Bankruptcy Code[212] does not require that the company be in financial distress, and as such "[t]here is no insolvency threshold".[213] So long as "there is a *bona fide* intention to reorganise the company", the corporate rescue regime is available to all companies.[214]

The business rescue regime is not limited in application to companies, in terms of item 6 of Schedule 3 of the 2008 Act, it is also applicable to close corporations.[215] Unfortunately, that is as far as it extends, even though unincorporated associations or an entity such as partnerships or business trusts could also benefit from the regime as much as a company or close corporation would.[216]

3.4 CONCLUSION

It is evident that the DTI through the drafting process intended for the business rescue regime to be aligned with international standards on corporate rescue, in particular, Chapter 11 of the US Bankruptcy Code.[217] It further signified the need for a shift to a more debtor-friendly procedure, and one that was far removed from the judicial management system under the 1973 Act. Whether this transition was achieved will be ascertained in chapter 4 when the key components of the business rescue regime are critically analysed.

The analysis of the cornerstone definition of 'business rescue' further revealed that business rescue can be utilised to obtain a better return for creditors and shareholders than would otherwise result through liquidation. The definition further sets out the three-stage approach to the business rescue regime, which include the temporary supervision of the company, a temporary moratorium on legal proceedings and the development and implementation of a business rescue plan.[218] These form part of the key components of the business rescue regime, and whether there are effective enough to ensure a successful corporate rescue mechanism is ascertained in the next chapter.

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212 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).
213 Ibid.
214 Ibid.
215 Ibid.
216 Ibid.
217 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).
218 Cassim (Note 4 above; 865).

CHAPTER 4: THE KEY COMPONENTS OF THE BUSINESS RESCUE REGIME

4.1 INTRODUCTION

Having replaced the failed judicial management system, the business rescue regime seeks to protect a wider range of interests through the process,[219] and give effect to the purpose[220] of the 2008 Act, in particular, section 7(k)[221] which aims 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".[222] It is therefore imperative that the key components of the business rescue regime create a conducive environment for the rescue of companies teetering on the brink of liquidation.[223] South Africa, in the current economic climate, simply cannot afford a repeat show of judicial management only this time under the heading of 'business rescue'.

This chapter seeks to critically analyse the effectiveness of the key components of the business rescue regime, which it is submitted include the dual commencement and duration of business rescue proceedings, the moratorium on legal proceedings and the company's property interests, post-commencement-finance, the business rescue practitioner and the business rescue plan. In analysing these components, the court's interpretation and the practicality of the associated provisions are considered. In addition, and where relevant, comparative comment has also been made on the provisions of corporate rescue regimes in foreign legal jurisdictions, particularly in the USA and the UK. Ultimately, upon interrogation of the aforesaid key components, one would be able to ascertain whether the business rescue regime has the essential elements of an effective corporate rescue mechanism.

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219 Bradstreet (Note 9 above; 44).

220 Section 5 (1) of the 2008 Act provides that the "Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7".

221 Section 7(k) of the 2008 Act.

222 Business rescue therefore attempts to 'secure and balance the opposing interests of creditors, shareholders and employees' – See Bradstreet (Note 32 above; 355).

223 E Levenstein 'Time to amend the Business Rescue Act?' 15 August 2016 *Go Legal Industry News and Insight* available *at* https://www.golegal.co.za/time-amend-business-rescue-act/, accessed on 17 August 2018.

4.2 THE PROCESSES BY WHICH BUSINESS RESCUE PROCEEDINGS MAY BE COMMENCED

Business rescue proceedings may be commenced either by:

- a resolution passed by the company's board of directors to "voluntarily begin business rescue proceedings and place the company under supervision";[224] or
- a court order,[225] after an "affected person[226] has brought an application to place "the company under supervision" [227] and commence business rescue proceedings.[228]

4.2.1 Business rescue commenced by voluntary board resolution

The company's board of directors may pass a resolution by majority vote[229] to "voluntarily begin business rescue proceedings and place the company under supervision" only if the board has reasonable grounds to believe that:

- the company is financially distressed; and
- there appears to be a reasonable prospect of rescuing the company.[230]

The 2008 Act does not define what is meant by "reasonable grounds to believe". Levenstein[231] submits that directors will have to consider the company's specific circumstances at the time, which will include both subjective (the director's personal view) and objective (a reasonable director's view) elements. The meaning of 'financially distressed' was discussed under paragraph 3.3 above.

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224 Section 129(1)(a) & (b) of the 2008 Act.

225 Sharrock (Note 14 above; 277).

226 In terms of section 128(1)(a) of the 2008 Act an 'affected person' is defined in relation to the company to mean, a shareholder or creditor of the company, a registered trade union representing the employees of the company, and employees of the company who are not represented by a registered trade union, each of those employees or their representatives.

227 Section 128(1)(i) of the 2008 Act defines 'supervision' to mean "the oversight imposed on a company during its business rescue proceedings".

228 Section 131 of the 2008 Act.

229 Majority vote of the board of directors or "by the majority of the board giving written consent" – See J Rushworth 'A critical analysis of the Business Rescue Regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 377. Furthermore, a board that is not properly constituted cannot take a valid board resolution – See Delport (Note 207 above; 459).

230 Section 129(1)(a) & (b) of the 2008 Act.

231 Levenstein (Note 74 above; 308).

In ascertaining whether a company is 'insolvent', Levenstein[232] correctly submits "that the board will have to take advice from its auditors and to establish by way of formal accounting deliberation whether or not such company is in a position of balance sheet insolvency". The meaning of 'reasonable prospect' is discussed under paragraph 4.2.4 below, as it is also pertinent to the commencement of business rescue proceedings by a court order.

In terms of section 129(7) of the 2008 Act, if a company's board of directors "have reasonable grounds to believe that the company is financially distressed", but have not adopted a resolution to commence business rescue proceedings, the board is required to give written notice to each 'affected person', setting out the relevant criteria of financial distress applicable to the company,[233] and its reasons for not adopting the resolution to voluntary commence business rescue proceedings.[234] This, therefore allows an 'affected person' to apply to court to commence business rescue proceedings,[235] and also puts into effect the necessary 'checks and balances'.

The rationale for introducing voluntary commencement of business rescue by a company's board of directors is that the board is best suited to ascertain whether the company is indeed financially distressed.[236] As stated by Gutta J in *Lazenby v Lazenby Vervoer VV and Others*[237] "[a] board of a company bears knowledge that a company is financially distressed and is best equipped to pass a resolution that a company be placed under business rescue and to initiate the business rescue proceedings… ."

Voluntary commencement circumvents the delays and exorbitant costs associated with the court process[238] and ensures that the company receives the assistance of the business rescue mechanism as soon as possible, thereby increasing the prospects of the company being rescued.[239] This self-regulating approach clearly signifies a shift towards a more debtor-friendly procedure, however, it has been criticised for being "too debtor-friendly" and creating too low a threshold for the commencement of business rescue, making the process susceptible

232 Levenstein (Note 74 above; 303).
233 Sharrock (Note 14 above; 278).
234 Rushworth (Note 229 above; 379).
235 Ibid.
236 Delport (Note 207 above; 458).
237 *Lazenby v Lazenby Vervoer VV and Others* (M328/2014) [2014] ZANWHC 41 (4 September 2014) para 23.
238 Cassim (Note 4 above; 866).
239 Delport (Note 207 above; 458).

to abuse.[240] The passing of the resolution is, however, subject to the common law and statutory[241] fiduciary duties of the directors, which if contravened may result in personal liability for those directors in terms of section 77 of the 2008 Act.[242] It is submitted that the severe consequences for directors breaching their fiduciary duties should curb the abuse of the voluntary process to a certain extent.

Like the Australian[243] procedure, the company's shareholders may not resolve to voluntarily place the company under business rescue.[244] Furthermore, shareholders' approval is not required, and as such directors are not required to consult shareholders.[245] Therefore, the wishes of the shareholders should not be a determining factor.[246] Although, as pointed out by the court in *Griessel and Another v Lizemore and Others*[247] a board's decision which is contrary to the wishes of the shareholders would signify *mala fides*.[248]

Restrictions are imposed on the passing of the resolution to commence business rescue proceedings.[249] Firstly in terms of section 129(2)(a) of the 2008 Act the resolution "may not be adopted if liquidation proceedings have been initiated by or against the company", which follows the UK Insolvency Act.[250] Secondly in terms of section 129(2)(b)[251] the resolution to commence business rescue proceedings will have no force and effect until such time that it is filed with the CIPC.

In addition, there are a few stringent time limits enforced by the 2008 Act on filing, publication and the appointment of a business rescue practitioner once the board has passed the resolution, which further reduces delays and the abuse of the process.[252] Within five business days of the

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240 Stein and Everingham (Note 8 above; 412). The low threshold is further reinforced by the fact that at the time of passing the resolution no supporting documentation is required to be filed or published, nor is it necessary to apply to court – See Cassim (Note 4 above; 866) and Stein and Everingham (Note 8 above; 412).

241 See section 76 of the 2008 Act – 'Standards of directors conduct'. Directors should seek professional advice to exclude the possibility of being found personally liable for breaching their fiduciary duties – See Stein and Everingham (Note 8 above; 412).

242 Delport (Note 207 above; 459).

243 See section 436 A (1) Part 5.3A of the Corporations Act 50 of 2001 (Cth).

244 Cassim (Note 4 above; 866).

245 Cassim (Note 4 above; 866).

246 Delport (Note 207 above; 459)

247 *Griessel and Another v Lizemore and Others* 2015 (4) All SA 433 (GJ) para 140.

248 Delport (Note 207 above; 459).

249 Cassim (Note 4 above; 867).

250 Cassim (Note 4 above; 867). Schedule B1 para 25 (a) of the UK Insolvency Act of 1986 provides that an "administrator of a company may not be appointed if—a petition for the winding up of the company has been presented and is not yet disposed of".

251 Section 129(2)(b) of the 2008 Act.

252 Cassim (Note 4 above; 867).

board passing the resolution, or such extended time permitted by the CIPC on application the company must:

- *publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded;*[253] *and*
- *appoint a business rescue practitioner who satisfies the requirements of section 138,*[254]*and who has consented in writing to accept the appointment.*[255]

Within two business days after appointing the business rescue practitioner, the company is required to file a notice of appointment, and within five business days of after filing the notice, to publish a copy of the notice to each 'affected person'.[256]

The publication requirements seek to ensure that directors discharge their fiduciary duties when contemplating passing a resolution to commence business rescue proceedings.[257] Understandably, criticism has been levelled at the board's far-reaching power to appoint a business rescue practitioner, as the board may be the very cause of the financial distress the company finds itself in, which could lead to greater abuse of the process.[258] Stein[259] correctly submits that the board's appointment of the business rescue practitioner should ideally include some form of independent approval, which is addressed to a certain extent by the 2008 Act and its regulations. The pivotal role of the business rescue practitioner is analysed in paragraph 4.6 below.

Should a company fail to either appoint a business rescue practitioner or comply with the requirements for the publication and filing of notices, in terms of section 129(5)(a) of the 2008 Act the resolution to commence business rescue proceedings lapses and becomes a nullity.[260] Only three months after the date on which the lapsed resolution was adopted, may the board

253 Section 129(3)(a) of the 2008 Act. See Regulations 123 (1) - (5) of the 2008 Act which sets out the "[n]otices to be issued by a company concerning its business rescue proceedings" as well as the relevant CoR forms.
254 The requirements of section 138 of the 2008 Act is discussed under para 4.6 below.
255 Section 129(3)(b) of the 2008 Act.
256 Section 129(4)(a) – (b) of the 2008 Act.
257 Stein and Everingham (Note 8 above 413).
258 Ibid.
259 Ibid.
260 Sharrock (Note 14 above; 277).

file another resolution to commence business rescue proceedings, unless the court on good cause shown approves the filing of a further resolution.[261]

4.2.2 The effect of non-compliance with the procedural requirements of section 129 of the 2008 Act

It is clear that the 2008 Act sets out stringent procedural time constraints associated with the voluntary commencement of business rescue proceedings.[262] There have, however, been conflicting judgments as to whether non-compliance with the procedural requirements of section 129[263] (as set out above), results in business rescue proceedings being terminated.[264] In *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies Embarquées SAS & Others*[265] Fabricius J concluded that:

> *It is clear from the relevant sections contained in chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the resolution beginning rescue proceedings. The purpose of s 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 s 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.*

Although not expressly stated, the learned judge appeared to have adopted the view that the inevitable consequence of the lapsed resolution was that the business rescue process would terminate.[266] This approach was followed in several other cases.[267] However, in *Absa Bank*

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261 Section 129(5)(b) of the 2008 Act.

262 B Wassman 'Business Rescue: Getting it Right' (January/February 2014) *De Rebus* 37.

263 Section 129 of the 2008 Act.

264 A Eliott and K Weyers 'Hot off the business rescue press' July 2015 available at *https://www.hoganlovells.com/en/pdfdownload?page=%7b3570E51C-86E8-4C73-BD6A-7A5E1A08077D%7d&p=1* accessed on 24 August 2018.

265 *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies Embarquées SAS & Others* Unreported, GNP (Case 72522/11, 6 June 2012) para 26.

266 *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (5) SA 63 (SCA) para 17.

267 *Panamo Properties (Pty) Ltd and Another supra* para 18. See the following cases that followed the approach in *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) supra*: *Madodza (Pty) Ltd (in business rescue) v ABSA Bank Ltd* [2012] ZAGPPHC 165 at para 24-25; *Homez Trailers and Bodies (Pty) Ltd (under supervision) v Standard Bank of South Africa Ltd* [2013] ZAGPPHC 465 at para 16 & 20; *Absa Bank Ltd v Ikageng Construction (Pty) Ltd; In Re: Absa Bank Ltd v Contrau Projects CC, In Re; Absa Bank Ltd v Wermar Konstruksie CC* [2014] ZAGPPHC 684 at para 11.

Limited v Caine N.O. and Another, In Re; Absa Bank Limited v Caine N.O. and Another,[268] Daffue J correctly pointed out that Fabricius J had failed to give consideration to section 130(1)(a)(iii),[269] as he chose to rely on the "plain and unambiguous wording" of sections 129(3) and (4) of the 2008 Act, and as such his construction led to anomalies as between sections 129 and 130 of the 2008 Act.[270]

The SCA in *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others*[271] identified the observation made by Daffue J as "undoubtedly correct"[272] and went on to definitively settle the contentious issue. The facts of the case were as follows:

- the sole shareholders of Panamo Properties (Pty) Ltd ("**Panamo**") was the Jan Nel Trust ("the **Trust**"), whose trustees were Mr and Mrs Nel ("the **Nels**"), who were also the directors of Panamo. Panamo as a property-owning company owned a large property ("the **Panamo Property**"), which was mortgaged in favour of Firstrand Bank Ltd;
- the Nels' house was situated on a portion of the Panamo Property;
- Panamo fell into arrears, and in addition to monetary judgment being obtained against it, the hypothecated Panamo Property was declared executable;
- to avoid the sale of the Panamo Property the Nels resolved to place Panamo in business rescue on 19 August 2011. Thereafter a business rescue practitioner was appointed, and a business rescue plan was approved. The Panamo Property was later sold by the business rescue practitioner as a result of insufficient funding; and
- when the transfer of the Panamo Property was due to take place, the Trust sought an order on an urgent basis that the resolution to place Panamo in business rescue had lapsed as a result of its failure to comply with the various procedural requirements set out in section 129 of the 2008 Act, and such the entire business rescue process was a nullity.[273]

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268 *Absa Bank Limited v Caine N.O. and Another, In Re; Absa Bank Limited v Caine N.O. and Another* [2014] ZAFSHC 46 at 25.

269 Section 130(1)(a)(iii) of the 2008 Act provides that an effected person may apply to court for an order setting aside the resolution on the ground that "the company has failed to satisfy the procedural requirements set out in section 129".

270 *Panamo Properties (Pty) Ltd and Another supra* at para 18.

271 Ibid.

272 *Panamo Properties (Pty) Ltd and Another supra* at para 19.

273 *Panamo Properties (Pty) Ltd and Another supra* at para 2 - 4. See also Elliot and Weyers (Note 263 above).

In the *court a quo*[274] Khumalo J, despite finding the approach of the Trust as opportunistic and that the Nels had acted to Panamo's detriment,[275] upheld the Trust's argument and issued a declaratory order that the resolution to commence business rescue had lapsed and was a nullity, and further ordered that appointment of the business rescue practitioner to Panamo was void.[276] The learned judge, therefore, adopted the approach of Fabricius J in *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) supra*, that upon the lapsing and nullity of the resolution, business rescue proceedings simultaneously terminated. Khumalo J did, however, grant leave to appeal.

On appeal to the SCA, the issue was whether the approach adopted by Khumalo J was correct.[277] The SCA indicated that the approach of Fabricius J (which was also the approach adopted by the *court a quo*) appeared to leave no room for the operation of section 130(1)(a)(iii),[278] as "[t]here is no point in bringing an application to set aside a resolution on the grounds of non-compliance with the procedural requirements of s 129 if that resolution has already lapsed and been rendered a nullity and the process of business rescue has as a result, come to an end".[279] The SCA further highlighted the provision of section 132 (2)(a)(i) of the 2008 Act, which provides that business rescue proceedings end when the court sets aside the resolution or order that began those proceedings.[280] The SCA ultimately held that:

> *[W]hen a court grants an order in terms of s 130(5)(a) of the Act, the effect of that order is not merely to set the resolution aside, but to terminate the business rescue proceedings. … it follows that until that has occurred, even if the business rescue resolution has lapsed and become a nullity in terms of s 129(5)(a), the business rescue commenced by that resolution has not terminated. Business rescue will only be terminated when the court sets the resolution aside. The assumption underpinning the various high court judgments to the effect that the lapsing of the resolution terminates the business rescue process is inconsistent with the specific provisions of the Act. None of those judgments referred to s 132(2)(a)(i).*

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274 *Nel NO and Another v Panamo Properties (Pty) Ltd and Others* [2013] ZAGPPHC 287.

275 The court even went as far as ordering the applicants (the Nels in the representative capacity as trustees of the Trust) to pay the costs of the application for the declaratory order *de bonis propiis*, (in their personal capacity) jointly and severally − See *Nel NO and Another supra* para 38.4.

276 *Panamo Properties (Pty) Ltd and Another supra* at para 4.

277 *Panamo Properties (Pty) Ltd and Another supra* at para 5.

278 Section 130(1)(a)(iii) of the 2008 Act.

279 *Panamo Properties (Pty) Ltd and Another supra* at para 20.

280 *Panamo Properties (Pty) Ltd and Another supra* at para 28.

> *Once it is appreciated that the fact that non-compliance with the procedural requirements of s 129(3) and (4) might cause the resolution to lapse and become a nullity, but does not terminate the business rescue, the legislative scheme of these sections becomes clear.*[281]

The SCA therefore, thankfully clarified the position, and in doing so upheld the appeal with costs, and set aside and replaced the order of the *court a quo* with an order dismissing the application of the Trust.

4.2.3 Objection to voluntary commencement of business rescue

In order to curb any potential abuse of the voluntary commencement aspect of the business rescue regime, the legislator wisely made provision for 'affected persons' to approach a court in appropriate circumstances to set aside the resolution.[282]

In terms of Chapter 6 of the 2008 Act, a 'court' means "the High Court that has jurisdiction over the matter"[283], or a judge of the High Court that has jurisdiction over the matter and that has been designated[284] by the Judge President,[285] or where no judge has been designated, a judge of the High Court that has jurisdiction over the matter and who has been assigned by the Judge President to hear the matter.[286]

In terms of section 130(1),[287] any time after the adoption of a resolution by the board to commence business rescue and until such time that the business rescue plan is adopted,[288] an 'affected person' may apply to court to set aside the resolution on any one of the following grounds:

- "there is no reasonable basis for believing that the company is financially distressed".[289] Information pertaining to whether a company is financially distressed may not be easily available to prospective applicants, and as such this may be difficult to prove;[290] or

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281 *Panamo Properties (Pty) Ltd and Another supra* at para 28-29.
282 Delport (Note 207 above; 477-478).
283 Section 128(e)(i) of the 2008 Act.
284 In terms of section 128(3) of the 2008 Act, "the Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue". See also Rushworth (Note 229 above; 376-377).
285 Section 128(e)(aa) of the 2008 Act.
286 Section 128(e)(bb) of the 2008 Act.
287 Section 130(1) of the 2008 Act.
288 The adoption of business rescue plan is discussed under paragraph 4.7 below.
289 Section 130(1)(a)(i) of the 2008 Act.
290 Stein and Everingham (Note 8 above; 326).

- "there is no reasonable prospect for rescuing the company".[291] The 2008 Act, unfortunately, does not define what is meant by 'reasonable prospect', and its meaning is analysed in more detail under paragraph 4.2.4 below; or
- "the company has failed to satisfy the procedural requirements" as provided for in section 129.[292]The procedural requirements and the effect of non-compliance are discussed in paragraphs 4.2.1 to 4.2.2 above.

On considering the application to set aside the resolution, in terms of section 130(5)(a),[293] the court may set aside the resolution on any of the three aforesaid grounds,[294] "or … if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so".[295]

In considering section 130(5)(a),[296] the court in *DH Brothers Industries (Pty) Ltd v Gribnitz N.O. and Others,*[297] noted that a court is entitled to grant relief "on a cause of action which cannot be relied upon by the applicant" i.e. on the basis that it is 'just and equitable' for the resolution to be set aside, and as such gives rise to an anomaly. In dealing with the anomaly, which the court identified as a "drafting error"[298], the court highlighted the dictum of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[299] that "[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document". The court then concluded that:

> *The only sensible meaning which avoids the absurdity which would otherwise result is to construe the just and equitable basis as an additional ground to the three listed in s 130(1)(a). This can therefore be relied on as a fourth ground or cause of action for relief in an application brought under that section.*[300]

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291 Section 130(1)(a)(ii) of the 2008 Act.
292 Section 128 of the 2008 Act.
293 Section 130(5)(a) of the 2008 Act.
294 Section 130(5)(a)(i) of the 2008 Act.
295 Section 130(5)(a)(ii) of the 2008 Act.
296 Section 130(5) of the 2008 Act.
297 *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) para 18. See also Delport (Note 207 above; 478 - 479).
298 *DH Brothers Industries (Pty) Ltd supra* at para 18.
299 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.
300 Ibid.

The SCA in *Panamo Properties (Pty) Ltd and Another supra* rejected such approach.[301] Wallis JA for the full concurring bench indicated that:

> *This appears to me to be yet another case in a long line, commencing with Barlin,[302] in which the legislation uses the disjunctive word 'or', where the provisions are to be read conjunctively and the word 'and' would have been more appropriate. Where to give the word 'or' a disjunctive meaning would lead to inconsistency between the two subsections it is appropriate to read it conjunctively as if it were 'and'. This has the effect of reconciling s 130(1)(a) and s 130(5)(a) and limiting the grounds upon which an application to set aside a resolution can be brought, whilst conferring on the court in all instances a discretion, to be exercised on the grounds of justice and equity in the light of all the evidence, as to whether the resolution should be set aside.[303]*
>
> *Insofar as it may be suggested that the use of the word 'otherwise' in s 130(5)(a)(ii) points in favour of this furnishing a separate substantive ground for setting aside the resolution I do not agree. In my view the word is used in this context to convey that, over and above establishing one or more of the grounds set out in s 130(1)(a), the court needs to be satisfied that in the light of all the facts it is just and equitable to set the resolution aside and terminate the business rescue.[304]*

Accordingly, "otherwise just and equitable to do so"[305] must not be understood as an additional ground for setting aside a resolution, but as a further requirement that needs to be satisfied along with one or more of the three grounds relied upon by an 'affected person' in terms of section 130(1)(a),[306] for the resolution to be set aside.[307]

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301 Delport (Note 207 above; 479).

302 *Barlin v Licencing Court for the Cape* 1924 AD 427 at 478.

303 *Panamo Properties (Pty) Ltd and Another supra* at para 31.

304 *Panamo Properties (Pty) Ltd and Another supra* at para 32. The court further indicated at para 34 that a:
[F]urther point in favour of this approach is that it largely precludes litigants, whether shareholders and directors of the company or creditors, from exploiting technical issues in order to subvert the business rescue process or turn it to their own advantage. Once it is recognised that the resolution may be set aside and the business rescue terminated if that is just and equitable, the scope for raising technical grounds to avoid business rescue will be markedly restricted even if it does not vanish altogether. That result is consistent with the injunction in s 5 of the Act that its provisions be interpreted in such a manner as to give effect to the purposes set out in s 7, one of which, as I said at the outset, 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.

305 Section 130(5)(a)(ii) of the 2008 Act.

306 Section 130(1)(a) of the 2008 Act.

307 *Alderbaran (Pty) Ltd and Another v Bouwer and Others* 2018 (5) SA 215 (WCC) at 39. See also *Panamo Properties (Pty) Ltd and Another* at para 32.

Alternatively, in considering the application the court may first afford the practitioner an opportunity to formulate an opinion on whether "the company appears to be financially distressed", or "there is a reasonable prospect of rescuing the company".[308] After the court receives the practitioner's report it may then set aside the resolution if it is satisfied "that the company is not financially distressed" or "there is no reasonable prospect of rescuing the company".[309]

If the court makes an order setting aside the company's resolution, the court may grant any further and necessary order including:

- "placing the company under liquidation".[310] In *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others*[311] the court not only set aside the company's resolution placing it in business rescue, it further made an order placing the company under provisional liquidation as the court was of the view that the company's lack of operating capital and business premises together with a considerable outstanding debt would ultimately cause business rescue to fail.[312] It is important to note that in terms of section 140(4)[313] if the business rescue ends with the company being placed in liquidation, the business rescue practitioner is excluded from being appointed as the liquidator of the company; or
- if the court finds "that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable", the court may grant a cost order against any director who voted in favour of the resolution, unless the court finds that the director acted in good faith and on the basis of relying on information in terms of section 76(4) and (5) of the 2008 Act. Directors should, therefore, be circumspect when voting in favour of a resolution to commence business rescue proceedings.[314]

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308 Section 130(5)(b)(i) and (ii) of the 2008 Act.

309 Section 130(5)(b).

310 Section 130(5)(c)(i) of the 2008 Act.

311 *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ) at para 72-76.

312 Delport (Note 207 above; 480).

313 Section 140(4) of the 2008 Act.

314 Levenstein (Note 74 above; 326). In terms of section 130(2) of the 2008 Act, a director that supported a resolution to commence business rescue, and who is also an 'affected person', may not apply to court to set aside the resolution of the appointment of the practitioner, unless such director can satisfy the court that he or she acted in good in faith on strength of information that was subsequently found to be false or misleading.

Under section 130(1),[315] an 'affected person' is also entitled to apply to court to set aside the appointment of a practitioner on any one of the following grounds:

- the practitioner does not satisfy the requirement of section 138 of the 2008 Act,[316] these requirements are discussed under paragraph 4.6 below; or
- the practitioner is not independent of the company or its management.[317] This ground appears to be superfluous as if it is found to be the case, this would already be covered by the previous ground i.e. the practitioner's failure to comply with section 138 of the 2008 Act;[318] or
- the practitioner lacks the necessary skills, given the company's circumstances.[319] This would likely be the case where the supervision is very complicated or industry-specific i.e. mining.[320]

If the court sets aside the appointment of the practitioner, it is required to appoint an alternative practitioner, who satisfies the requirements of section 138,[321] and who is "recommended by, or acceptable to, the holders of majority of the independent creditors' voting interests who were represented in the hearing before the court".[322]

An 'affected person' is further entitled in terms of section 130(1)(c)[323] to apply to court to require "the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons". The King III practice notes on the 'Guidance on Business Rescue'[324], noted that:

> *Although the form of security is not mentioned in the legislation, it is accepted that the bond of security will be the same as the ones currently provided by liquidators and trustees to the Master of the High Court in liquidations and sequestrations, consisting*

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315 Section 130(1) of the 2008 Act.
316 Section 130(1)(b)(i) of the 2008 Act.
317 Section 130(1)(b)(ii) of the 2008 Act.
318 Delport (Note 207 above; 474).
319 Section 130(b)(iii) of the 2008 Act. Similar to voluntary commencement of business rescue, where business rescue is commenced by court order (compulsory commencement) "[e]very affected person has the right to participate in the hearing of an application in terms of … ." – See section 131(3) of the 2008 Act.
320 Delport (Note 207 above; 474).
321 Section 138 of the 2008 Act.
322 Section 130 (6)(a) of the 2008 Act.
323 Section 130(c) of the 2008 Act.
324 Institute of Directors in Southern Africa *King III Chapter 2 Guidance on Business Rescue (Practice Notes)*, September 2009 available at *https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/24CB4885-33FA-4D34-BB84-E559E336FF4E/KingIII_Ch2_Guidance_on_Business_Rescue_September2009.pdf*, *accessed on 15 August 2018.*

of an undertaking by the practitioner and guaranteed by an acceptable short-term insurance provider.

Interestingly, the practitioner cannot be compelled to furnish security where business rescue is commenced by a court order.[325]

4.2.4 Business rescue commenced by court order

On condition that a resolution to commence business rescue has not been adopted by a company, in terms of section 131(1) of the 2008 Act, an 'affected person' is entitled on application to approach "a court at any time for an order placing the company under supervision and to commence business rescue proceedings".[326] Therefore, a shareholder or creditor of the company, an individual employee of the company or a registered trade union representing the company's employees may bring an application to place the company under business rescue.[327]

The applicant is required to serve the application on the company and the CIPC, and "notify[328] each affected person of the application in the prescribed manner".[329] Every 'affected person' is entitled to participate in the hearing of the application. [330] A differentiating and crucial factor of business rescue being commenced by a court order as opposed to voluntary commencement by a company resolution, is that an application in terms of section 131[331] may be made even if liquidation proceedings have already commenced.[332]

In terms of section 131(6)[333] if an application is brought subsequent to liquidation proceedings having already been commenced by or against the company, such application will have the effect of suspending the liquidation proceedings until such time that the court has dismissed the business rescue application, or where the court grants the order, until business rescue

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325 Cassim (Note 4 above; 871).

326 Section 131(1) of the 2008 Act.

327 Delport (Note 207 above;482).

328 Regulation 124 of the 2008 Act requires that the applicant "deliver a copy of the court application, in accordance with regulation 7, to each effected person known to the applicant".

329 Section 131(2)(a) and (b) of the 2008 Act.

330 Section 131(3) of the 2008 Act. In the case of *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* 2011 (5) SA 600 WCC at para 21 Rogers AJ stated that:

In terms of s 131(3) each affected person has a right to participate in the hearing of an application in terms of s 131. In the circumstances, I do not think the legislature contemplated that an affected party would have to apply for leave to intervene in the proceedings. If the person is an "affected person" such person has a right to participate in the hearing. If the person wishes to file affidavits, the court will obviously need to regulate the procedure to be followed to ensure fairness to all concerned.

See also Levenstein (Note 74 above; 335-336).

331 Section 131 of the 2008 Act.

332 Sharrock (Note 14 above; 279).

333 Section 131(6) of the 2008 Act.

proceedings terminate.[334] This reinforces the fact that business rescue aims at "preserving viable commercial enterprises rather than shutting them down by liquidation"[335], thereby "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".[336] It is therefore, as submitted by Levenstein,[337] regrettable that a board is prohibited from passing a resolution to commence business rescue proceedings after liquidation proceedings have already commenced, as the board may be in the best position to ascertain whether a company can be rescued, but may not do so in such a case even if they are convinced that the company can be rescued.

In terms of section 131(4)(a),[338]a court may after considering an application order that a company be placed under business rescue, if it is satisfied on any of the following three grounds:

- "the company is financially distressed".[339] The meaning of 'financially distressed' was discussed under paragraph 3.3 above; or
- "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".[340] This ground does not exist under voluntary commencement. Public regulation has a broad meaning, in terms of section 1,[341] 'public regulation' means: "any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority". Accordingly, Cassim[342] submits that "a failure to pay income tax deducted from employees or contributions to the Unemployment Insurance Fund or to make payments to a medical aid falls within the scope and ambit of s 131(4)(a)(ii)" of the 2008 Act. Failure to pay any single amount is too broad as technical defaults can be resolved without an 'affected person' resorting to business

334 Sharrock (Note 14 above; 279).
335 Cassim (Note 4 above; 873).
336 *Koen and Another supra* para 14.
337 Levenstein (Note 74 above; 335).
338 Section 131(4)(a) of the 2008 Act.
339 Section 131(4)(a)(i) of the 2008 Act.
340 Section 131(4)(a)(ii) of the 2008 Act.
341 Section 1 of the 2008 Act.
342 Cassim (Note 4 above; 874).

rescue proceedings.[343] This ground, nevertheless, provides an avenue for employees and registered trade unions to apply to court when they may not be in possession of information pertaining to the company's financial circumstances;[344] or

- "it is otherwise just and equitable to do so for financial reasons".[345] It is not clear why the legislature included this as a ground, because 'financial reasons' is already covered on the basis that the company is 'financially distressed'.[346]

In respect of each of the aforesaid grounds, it is further required that there be "a reasonable prospect of rescuing the company".[347] A requirement that also exists under voluntary commencement of business rescue and is, therefore, an essential recovery requirement of the business rescue regime. Regrettably, the 2008 Act does not define 'reasonable prospect' and considering the difficulty that was encountered in interpreting 'reasonable probability' under the 1926 and 1973 Acts,[348] the legislator missed a golden opportunity to give meaning to a phrase that has otherwise generally plagued our courts in the past. It was, therefore, left to the courts[349] to interpret the meaning of 'reasonable prospect'.

One of the very first judges to substantially grapple with the meaning of 'reasonable prospect of rescuing the company', was Eloff AJ in *Southern Palace Investments 265 (Pty) Ltd supra.* The acting judge in contrasting the different use in language with section 427(1) of the 1973 Act, which used the term 'reasonable probability' as a yardstick for placing companies under judicial management,[350] correctly indicated in respect of the recovery requirement that "something less is required than that the recovery should be a reasonable probability".[351]

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343 Ibid.

344 Delport (Note 207 above; 482(1B). See also Levenstein (Note 74 above; 337).

345 Section 131(4)(a)(iii) of the 2008 Act.

346 Delport (Note 207; 428(1C)).

347 Section 131(4)(a)(iii) of the 2008 Act.

348 Joubert (Note 185 above; 553).

349 In *Swart v Beagles Run Investments 25 (Pty) Ltd and Others* 2011 (5) SA 422 (GNP) para 23-25, the first judgment concerning a compulsory business rescue application, Makgoba J unfortunately after acknowledging that business rescue was "a new innovation and without precedent in our law…", looked to section 427 of the 1973 Act for guidance to ascertain whether the company would become a 'successful concern', even though such terminology was not part of the recovery requirement under business rescue – See Joubert (Note 185 above; 555). In this case the applicant, the sole shareholder and director of the respondent, sought to place it under business rescue. The creditors opposed the application on the basis that it was an abuse of the process and an attempt to delay payment of the respondent's debts - See *Swart v Beagles Run Investments 25 (Pty) Ltd and Others supra* para 5 and 12. On the facts of matter, the court viewed the respondent as hopelessly insolvent and that there was no basis for concluding that the creditors would be placed in a better position if the company were to be placed under business rescue rather than in winding-up, and as such the court correctly dismissed the application - See *Swart v Beagles Run Investments 25 (Pty) Ltd and Other supra* para 42 and Cassim (Note 4 above; 875).

350 *Oakdene Square Properties (Pty) Ltd (SCA) supra* para 29.

351 *Southern Palace Investments 265 (Pty) Ltd supra* para 21.

Immediately after emphasising that each case should be considered on its merits, Eloff AJ regrettably then ventured further and in considering the meaning of 'reasonable prospect', outlined the following details about the proposed business rescue plan that needs to be set out in an application to satisfy the court that there is "a reasonable prospect of success of the company continuing on a solvent basis…":[352]

- the cause of the failure of the company;
- a remedy for the failure, and one which would have a "reasonable prospect of being sustainable"; and
- "some concrete objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company".[353]

Eloff AJ, had good intention in setting out some sort of guideline that would assist courts in determining whether there is a 'reasonable prospect of rescuing the company' concerned. However, at the time that an application is brought before court the required information is not only unavailable but would be unattainable to the applicants in a compulsory application for business rescue.[354] Unfortunately, this inflexible approach meant that the bar to hurdle the recovery requirement was set too high, which appeared to backpedal in the direction of judicial management. [355] This unnecessarily stringent approach was followed by certain judges in subsequent cases.[356]

352 *Southern Palace Investments 265 (Pty) Ltd supra* para 24.

353 Ibid. See also Joubert (Note 185 above; 556 - 557). In respect of the secondary objective of the 2008 Act, i.e. a better return for creditors and shareholder than would otherwise result from immediate liquidation, the court indicated at para 25 that "one would expect an applicant for business rescue to provide concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available".

354 Joubert (Note 185 above; 557). See also Deport (Note 207 above; 482(2)).
Delport (Note 207 above; 480(5)).

355 In the case of *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* [2012] 4 All SA 590 (WCC) Stelzner AJ, correctly stated at para 53 that "[t]here cannot be a checklist approach to business rescue applications … ." In *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others (12/45437, 16566/12)* [2013] ZAGPJHC 54 (28 March 2013) at para 12 Van Eeden AJ at para 12 indicated that "the bar [was set] too high". The acing judge further indicated at para 14 that "[t]he test should be flexible and the circumstances of each case will determine whether the available facts give rise to a reasonable prospect or not".

356 See *Koen and Another v Wedgewood Village Golf & Country Estate* 2012 (2) SA 378 (WCC) and *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012).

In *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd,*[357] which concerned a compulsory business rescue application brought by employees, Kollapen J understandably expressed his difficulty in comprehending the factors set out by Eloff JA, especially given "the caveat expressed by … [him] that every case must be considered on its own merits".[358] Kollapen J went on to state that "while a court must be ultimately satisfied that reasonable prospects do exist in the balancing exercise it must have regard to what information the affected party who brings the application is able to present given its own position *vis-a-vis* the company".[359]

In conclusion, the judge stated that "[w]hat is required is not certainty but a determination on the facts and on the evidence presented that the future prospects of rescuing the business appear to be reasonable".[360] This more flexible approach was a welcomed change to the rigid approach set out in *Southern Palace Investments 265 (Pty) Ltd supra*.

In *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another*[361] Van der Merwe J agreed with Eloff JA in *Southern Palace Investments 265 (Pty) Ltd supra,* that vague and speculative assertions would not pass muster, and that the "applicant should place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved".[362] However, he expressed the view that Eloff JA placed too high a burden on applicants to prove the existence of a 'reasonable prospect'.[363] He correctly stated that it is not suitable to set out a "general minimum particulars of what would constitute a reasonable prospect…"[364] as to do so would be "tantamount to requiring proof of a probability and unjustifiably limits the availability of business rescue proceedings"[365], which would be counterintuitive to the objective contained in section 7(k).[366] Van der Merwe J on his interpretation of the term 'reasonable prospect' created a new test for the recovery requirement[367] when he stated that "a reasonable prospect means no more than a possibility

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357 (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012).
358 *Employees of Solar Spectrum Trading 83 (Pty) Limited supra* para 16.
359 Ibid.
360 *Employees of Solar Spectrum Trading 83 (Pty) Limited supra* para 33.
361 2013 (1) SA 542 (FB) at para 11.
362 *Prospec Investments (Pty) Ltd supra* para 11.
363 Ibid.
364 *Prospec Investments (Pty) Ltd supra* para 15
365 Ibid.
366 Section 7(k) of the 2008 Act.
367 Jourbert (Note 185 above; 560).

that rests on an objectively reasonable ground or grounds".[368] The new test departed from any sort of checklist required to prove the recovery requirement and therefore lowered the threshold of proof required.

Finally, the SCA was provided with an opportunity to provide a clear binding interpretation of the term 'reasonable prospect of rescuing the company' in *Oakdene Square Properties (Pty) Ltd and Other (SCA) supra*.[369] As a point of departure, Brand JA for the full concurring bench emphasised that the question as to whether there exists 'a reasonable prospect of rescuing the company' can only be answered with a 'yes' or 'no' answer, which would necessarily involve a value judgment.[370] He rejected the checklist approach adopted by Eloff AJ in *Southern Palace Investments 265 (Pty) Ltd supra*, by stating that it is "neither practical nor prudent…" to prove the existence of a 'reasonable prospect'.[371] Whilst accepting that a 'reasonable prospect' requires something less stringent than a 'reasonable probability', he emphasised that there must be more than an arguable possibility, there must be a "prospect based on reasonable grounds", with the emphasis on reasonable rather than prospect.[372] In this respect Brand JA agreed with Van Der Merwe J in *Propspec Investments (Pty) Ltd supra,* that speculative suggestions would not pass muster and that the "applicant should place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved".[373] Therefore, the applicant is not required to set out a detailed business rescue plan, that "can be left to the business rescue practitioner after a proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b)".[374]

If the SCA had decided to adopt the stringent approach set out in *Southern Palace Investments 265 (Pty) Ltd supra,* as indicated by Delport,[375] it would have "probably sounded the death

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368 *Prospec Investments (Pty) Ltd supra* para 11.
369 2013 (4) SA 539 (SCA).
370 *Oakdene Sqaure Properties (Pty) Ltd and Others (SCA) supra* para 21. Joubert (note 185; 562).
371 *Oakdene Sqaure Properties (Pty) Ltd and Others (SCA) supra* para 30.
372 *Oakdene Sqaure Properties (Pty) Ltd and Others (SCA) supra* para 29.
373 *Oakdene Sqaure Properties (Pty) Ltd and Others (SCA) supra* paras 30-31.
374 *Oakdene Sqaure Properties (Pty) Ltd and Others (SCA) supra* para 31. The SCA in the case of *Newcity Group (Pty) Ltd v Pellow N.O. and Others* (577/2013) [2014] ZASCA 162 (1 October 2014) again confirmed the interpretation of 'reasonable prospect' as enunciated by the SCA in *Oakdene Square Properties (Pty) Ltd and Other (SCA) supra* at para 16 as "a yardstick higher than 'a mere prima facie case or an arguable possibility' but lesser than a 'reasonable probability' – a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings".
375 Delport (Note 207 above; 482(3)-(4)).

knell for business rescue in South Africa and lead to the procedure becoming as ineffective as its predecessor, judicial management".

If the court decides to grant an order placing a company under business rescue, the court may also appoint an interim business rescue practitioner, who meets the requirements of section 138[376] as discussed in paragraph 4.6 below, and who has been nominated by the 'affected persons' who made the application.[377] The interim appointment is subject "to the ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated by section 147"[378] of the 2008 Act. Once a company is placed under business rescue, it is prohibited from adopting a resolution to place itself in liquidation, until such time that business rescue proceedings have ended, and the company is required to notify all 'affected persons' within five days of such order being granted.[379]

Alternatively, if a court is not satisfied that it would be appropriate to commence business rescue proceedings, in terms of section 131(4)(b)[380] the court may in addition to dismissing the application, make "any further and appropriate order, including an order placing the company under liquidation". This should deter would-be applicants from abusing the process to avoid the inevitable.

Section 131(7)[381] also empowers a court to place a company under business rescue and appoint an interim business rescue practitioner as discussed above, "at any time during the course of any liquidation proceeding or proceedings to enforce any security against the company". This again reinforces the need to preserve "viable commercial enterprises rather than shutting them down by liquidation".[382]

4.3 THE COMMENCEMENT AND DURATION OF BUSINESS RESCUE PROCEEDINGS

Provisions relating to when the business rescue proceedings are considered to have commenced and the duration of such proceedings are set out in section 132 of the 2008 Act.[383]

376 Section 138 of the 2008 Act.
377 Section 131(5) of the 2008 Act.
378 Section 131(5) of the 2008 Act and section 147 of the 2008 Act.
379 Section 131 (8)(a) and (b) of the 2008 Act.
380 Section 131(4)(b) of the 2008 Act.
381 Section 137 of the 2008 Act.
382 Cassim (Note 4 above; 873).
383 Cassim (Note 4 above; 876).

4.3.1 The time at which business rescue proceedings commence

Once commenced, the restrictions and consequences alongside the moratorium imposed on legal proceedings take effect,[384] and as such it is important to ascertain when business rescue proceedings actually commence.[385]

Business rescue proceedings commence:

- in respect of voluntary commencement by board resolution, when the company files the resolution with the CIPC.[386] In the event of the resolution lapsing due to the company's failure to comply with the procedural requirements as set out in paragraph 4.2.1 above, and the company applies to court for consent to file a further resolution within three months, the proceedings will commence when the company applies to court to obtain such consent;[387] or
- in respect of compulsory commencement by an 'affected person', when an 'affected person' applies to court to place a company under business rescue.[388] This process was discussed under paragraph 4.2.4 above. In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC*[389] the court held the view that:

> *A business rescue application is … only to be regarded as having been made once the application has been lodged with the Registrar, duly issued, a copy thereof served on the Commission, and each affected person has been properly notified of the application.*

Delport[390] correctly submits that the order commencing business rescue proceedings:

> *[S]hould be retrospective to the time of the presentation to the Court of application. A different interpretation could have the effect that if the business rescue commences upon application to Court, and the application is not*

384 Cassim (Note 4 above; 876).
385 Rushworth (Note 229 above; 382).
386 Section 132(1)(a)(i) of the 2008 Act.
387 Section 132(1)(a)(ii) of the 2008 Act. See also Rushworth (Note 229 above; 382).
388 Section 131(b) of the 2008 Act. The time at which an application is made is not "the mere issue out of court of the notice of motion" – See Delport (Note 207 above; 482(17)). In the case of *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 (GNP) para 16 the court was of the view that the "issue and service of a business rescue application in terms of section 131(1) of the Act would suspend the liquidation process".
389 *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC; Joubert v Pro Wreck Scrap Metal CC* 2013 (6) SA 141 (KZP) para 11.4.
390 Delport (Note 207 above; 482(24)).

successful, the company would have been in business rescue for the interim period.

; or

- when a court, during liquidation proceedings or proceedings to enforce a security interest, places a company under supervision.[391]

4.3.2 Duration of business rescue proceedings

The UK Insolvency Act [392] provides for the automatic termination of administration at "the end of the period of one year" from the date on which it commenced. Provision is also made for the extension of time by the court (on application by an administrator) for a specific period or by creditors for a period not exceeding one year.[393]

In contrast, the 2008 Act does not make provision for the automatic termination of business rescue proceedings, instead, it expressly envisages that the business rescue process would terminate "within three months after the start of those proceedings".[394] This time period may be extended by a court on application by a practitioner.[395]

The practitioner is, therefore, within the space of three months "required to hold a meeting of various stakeholders, consult on the development of a business rescue plan, hold a meeting to decide the future of the company, and implement the business rescue plan if one has been approved".[396] It is submitted that the time frame of three months is practically unrealistic, as once any component of the business rescue process is challenged, there is virtually no prospect of it being completed within three months.[397] In the case of *Oakdene Square Properties (Pty) Ltd and Others supra*[398] Classen J criticised the time frame of three months as being "totally unrealistic in a case such as this where there are numerous court proceedings still pending".[399]

If the business rescue proceedings have not terminated within three months, or within such longer time permitted by a court, the practitioner is required to prepare a report on the progress

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391 Section 131(c) of the 2008 Act.
392 Insolvency Act of 1986 − See Schedule B1, para 76 Insolvency Act, 1986.
393 Cassim (Note 4 above; 877).
394 Section 132(3) of the 2008 Act. See also Cassim (Note 4 above; 877).
395 Section 132(3) of the 2008 Act.
396 Delport (Note 207 above; 482(23)).
397 Khan (Note 202 above; 23).
398 *Oakdene Square Properties (Pty) Ltd and Others supra* para 47.
399 R S Bradstreet 'Business rescue proves to be creditor-friendly: CJ Classen J's analysis of the new business rescue procedure in *Oakdene Square Properties*' (2013) 130 *SALJ* 46.

of the business rescue proceedings and update it at the end of each succeeding month, until such time that proceedings have terminated.[400] The practitioner is further required to deliver the report to each 'affected person' and the court (if proceedings have been the subject of a court order), or the CIPC in any other case.[401] However, as highlighted by the court in *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers Proprietary Limited and Others*[402] the 2008 Act is silent on "what the consequences would be if the … [practitioner] fails or refuses to apply to court for an extension".

4.3.3 Termination of business rescue proceedings

Section 132(2)[403] sets out the instances in which business rescue proceedings come to an end.[404] At the instance of the court, business rescue proceedings are terminated when the court either sets aside the company resolution or court order that commenced those proceedings, or where the court converts business rescue proceedings to liquidation proceedings.[405] As explained by the court in *Ex Parte Nel N.O. and Others*[406] the court's power:

> *[T]o undo the rescue process and place a company in liquidation is an essential counterweight to address the mischief caused by a company, to its creditors particularly, which has no reasonable prospect of being rescued from its financial distress but has achieved an undeserved moratorium by a stroke of the company pen in passing and filing a s 129(1) resolution.*

At the instance of the business rescue practitioner, business rescue proceedings are terminated when the practitioner files a notice of termination with the CIPC.[407] This encompasses two scenarios. The first, where business rescue proceedings were voluntarily commenced, and the practitioner concludes that there are "no longer … reasonable grounds to believe that the company is financially distressed…"[408], requires the practitioner to file a notice of termination with the CIPC.[409] Secondly, where the business rescue plan has been rejected and neither the

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400 Section 132(3)(a) of the 2008 Act.
401 Section 132(3)(b)(i) and (ii) of the 2008 Act. See also Rushworth (Note 229 above; 383).
402 (10862/14) [2015] ZAKZPHC 21 (20 March 2015) para 19. See also Delport (Note 207 above; 482(27)).
403 Section 132(2) of the 2008 Act.
404 Delport (Note 207 above; 482(24)).
405 Section 132(a) of the 2008 Act.
406 2014 (6) SA 545 (GP) at para 38. See also Levenstein (Note 74 above; 372).
407 Section 132(2)(b) of the 2008 Act.
408 Section 141(2)(b)(ii) of the of the 2008 Act.
409 Levenstein (Note 74 above; 369-370). See also Delport (Note 207 above; 482(26)).

practitioner nor any 'affected person' has taken any action set out in section 153(1),[410] the practitioner must file a notice of termination with the CIPC.[411]

The second scenario is, however, also covered by section 132(2)(c)(i)[412] which provides that business rescue proceedings terminate when the business rescue plan is rejected and "no affected person has acted to extend the proceedings…" contemplated by section 153 of the 2008 Act.[413] Accordingly, the second scenario envisaged by section 132(2)(b) and section 132(2)(c)(i) of the 2008 Act, seek to regulate the same scenario but contradict one another, as in terms of the former provision business rescue proceedings are terminated with the filing of a notice of termination with CIPC, whilst in terms of the latter provision such proceedings are terminated by mere inaction of the 'affected persons'.[414]

Lastly, business rescue proceedings are also terminated when a business rescue plan is adopted and the practitioner subsequently files "a notice of substantial implementation of that plan" with the CIPC.[415]

4.4 MORATORIUM AND REGULATION OF THE COMPANY'S PROPERTY INTERESTS

From the moment business rescue proceedings have commenced, the 2008 Act imposes significant restrictions on legal proceedings against the company and on the company's ability to dispose of property in its possession. These restrictions on legal proceedings and on the company's property interests are considered below.

4.4.1 Moratorium on legal proceedings

An essential consequence of the commencement of business rescue proceedings is that it results in a general moratorium on legal proceedings against the company.[416]

Section 133(1) of the 2008 Act provides that:

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410 Section 153(1) of the 2008 Act.

411 A Loubser 'The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2)' (2010) 4 *TSAR* 700. See section 153(5) of the 2008 Act.

412 Section 132(2)(c)(i) of the 2008 Act.

413 Loubser (Note 410 above; 700).

414 Ibid.

415 Section 132(2)(c)(ii) of the 2008 Act.

416 P.J. Veldhuizen 'Regulation and control of business-rescue practitioners: is there a suitable legal framework' (2015) 6(4) *BTCLQ* 28.

During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable.

The UK Insolvency Act,[417] contains a similar moratorium, which applies when a company is in administration. As the SCA explained in the case of *Murray N.O. and Another v Firstrand Bank Ltd t/a Wesbank*[418] a moratorium within the context of business rescue proceedings:

[I]s of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.

This debtor-friendly protection afforded to the company in business rescue, as explained by Bradstreet,[419] prohibits "a rush by creditors seeking to enforce claims that would not only have the potential to deplete what little is left in the company coffers, but would also distract the attention of the business's management team from the rescue at hand".

Furthermore, section 133(3)[420] which makes specific provision relating to sureties and guarantees,[421] provides that a guarantee or suretyship undertaking by a company in favour of another person, may not be enforced against the company without leave of the court, and on such terms that the court considers just and equitable. In distinguishing this provision with the general moratorium set out above, the court in the case of *Investec Bank Ltd v Bruyns*[422] stated that:

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417 UK Insolvency Act of 1986, Schedule B1 para 43(6)(a) and(b). Schedule B1 Paragraph 43(6) provides that:
No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except—
(a) with the consent of the administrator, or
(b) with the permission of the court.

418 2015 (3) SA 438 (SCA) para 14.

419 Bradstreet (Note 32 above; 372).

420 Section 133(2) of the 2008 Act. See also Sharrock (Note 14 above; 281).

421 Delport (Note 207 above; 482(29)).

422 2012 (5) SA 430 at para 16.

The business rescue practitioner is not empowered to consent to the enforcement against the company of claims based on guarantees and suretyships. Section 133(2), as the special provision, would apply to the exclusion of s 133(1) insofar as claims based on guarantees and suretyships are concerned.

The moratorium on legal proceedings is not absolute, and does not apply to the following proceedings:[423]

- legal proceedings instituted against the company which constitutes a set-off "against any claim made by the company in any legal proceeding, irrespective of whether those proceedings commenced before or after the business rescue proceedings began";[424]
- "criminal proceedings against the company or any of its directors or officers";[425]
- "proceedings concerning any property or right over which the company exercises the powers of a trustee";[426] or
- "proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner".[427]

"If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit…", such time limit will be suspended during business rescue proceedings.[428] This ensures that claims do not prescribe, where there may be statutory, contractual or other limitations on time within which claims are to be brought.[429]

4.4.2 Effects on property interests

Section 134 of the 2008 Act, regulates the disposal of property during business rescue to ensure that the interests of both the company and third parties are protected.[430] A company is entitled during business rescue proceedings to dispose of property, alternatively agree to dispose of property, only in:

- "the ordinary course of its business";[431]or

423 Sharrock (Note 14 above; 281).
424 Section 133(1)(c) of the 2008 Act.
425 Section 133(1)(d) of the 2008 Act.
426 Section 133(1)(e) of the 2008 Act.
427 Section 133(1)(f) of the 2008 Act.
428 Section 133(3) of the 2008 Act.
429 Rushworth (Note 229 above; 384).
430 Delport (Note 207 above; 482(41)).
431 Section 134(1)(a)(i) of the 2008 Act.

- "a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the practitioner".[432] This has not been elaborated on by the 2008 Act, but as indicated by Delport, [433] what is envisaged "is that the transaction should not be a simulated one, that there should not be a questionable relationship between the company and the other party to the transaction, and that the purchase price should reflect the fair market value of the property being disposed of"; or
- in a transaction that is undertaken as part of an approved business rescue plan.[434]

In respect of property that is in the lawful possession of the company, irrespective of whether the property is owned by the company, in terms of section 134(1)(c)[435] a person is prohibited from exercising any right in respect of such property, unless otherwise consented to by the business rescue practitioner in writing.[436] Such consent may not be unreasonably withheld by the practitioner, who must have regard to the purposes of business rescue, the relevant circumstances of the company, and the nature of the property in question, together with "the rights claimed in respect of it".[437] Accordingly, as pointed out by Delport[438] if the company is not in lawful possession of the property, where for example such rights were validly cancelled in terms of a contract, section 134(1)(c)[439] would not apply.

To protect third parties who have any security or title interest over property which a company wishes to dispose of during business rescue proceedings, section 134(3)[440] requires the company to:

- obtain the third party's prior consent, unless the proceeds from the disposal of the property would be sufficient to discharge such party's security or title interest;[441] and
- promptly pay the necessary proceeds from the sale to the third party to discharge the company's indebtedness to such party, or "provide security for the amount of those proceeds, to the reasonable satisfaction" of the third party.[442]

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432 Section 134(a)(ii) of the 2008 Act.
433 Delport (Note 207 above; 482(43)).
434 Section 134(a)(iii) of the 2008 Act.
435 Section 134(1)(c) of the 2008 Act.
436 Section 134(1)(c) of the 2008 Act.
437 Section 134(2) of the 2008 Act.
438 Delport (Note 207 above; 482 (43)).
439 Section 134(1)(c) of the 2008 Act.
440 Section 134(3) of the 2008 Act.
441 Section 134(3)(b)(i) of the 2008 Act.
442 Section 134(3)(b)(ii) of the 2008 Act. See also Rushworth (Note 229 above; 385).

4.5 POST-COMMENCEMENT FINANCE

A crucial component of business rescue alongside the moratorium on legal proceedings, and which is also pivotal to a successful rehabilitation of a company is post-commencement finance.[443] Post-commencement finance is the funding that may be made available to a company following the commencement of business rescue proceedings and which would enable such company to continue trading. [444] It is this funding, in any given corporate rescue regime, that ultimately facilitates the rescue of the company.[445]

Ironically, it is often difficult to obtain financing when it is most needed during business rescue proceedings, as lenders are understandably concerned "that they may not see a return on their investment".[446] Therefore, "[w]ithout statutory provisions conferring preferential claims for post-commencement financing …" lenders would not take the risk of financing a company in financial distress.[447]

The importance of post-commencement finance was recognised by the USA, as in terms of section 364 of the US Bankruptcy Code,[448] any credit that may be provided to a company after the commencement of the rescue or reorganisation process will have priority over claims that are unsecured and that were incurred before the rescue process commenced.[449] To further encourage post-commencement finance the super-priority preference afforded remains in place even after the rescue process has failed.[450]

Following the US Bankruptcy Code,[451] Chapter 6 of the 2008 Act, provides the essential statutory mechanism for facilitating post-commencement financing.[452] In terms of section 135(2),[453] the company may, during business rescue proceedings obtain financing which is not related to employment, and which "may be secured to the lender…" by the company's

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443 Calitz (Note 2 above; 266). See also Cassim (Note 4 above; 882). See *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para 33.
444 Delport (Note 207 above; 482(46)).
445 Calitz (Note 2 above; 269).
446 Calitz (Note 2 above; 269-270). See also Du Preez, W and Pretorious, M "Constraints on decision making regarding post-commencement finance in business rescue" (2013) *SAJESBM* 170.
447 Delport (Note 207 above; 482(48)).
448 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).
449 Cassim (Note 4 above; 882).
450 Cassim (Note 4 above; 882-883).
451 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).
452 Calitz (Note 2 above; 270). See also Cassim (Note 4 above; 883).
453 Section 135(2) of the 2008 Act.

unencumbered assets.[454] Such post-commencement financing will have preference as a claim "in the order in which they were incurred over all unsecured claims against the company".[455]

Provision is also made for employee entitlements, such as "any remuneration, reimbursement for expenses or other amount of money relating to employment…", to the extent that they are not paid and become payable by the company to the employee, to be regarded as post-commencement finance.[456]

The ranking of claims arising from post-commencement financing is set out in section 135(3),[457] which provides that such claims are to be paid in the following order:[458]

- the practitioner's remuneration and expenses, which is discussed under paragraph 4.6 below, together with claims related to the costs of the business rescue proceedings;[459]
- unpaid employee entitlements which is regarded as post-commencement finance. These claims have super-priority status,[460] as they are to be paid before all other post-commencement financing notwithstanding the fact that they may be secured claims,[461] and are also to be paid before "all unsecured claims against the company";[462]
- all other post-commencement finance not related to employment, ranking in the order in which they were incurred;[463] and
- "all unsecured claims against the company".[464]

In *Merchant West Workings Capital Solutions (Pty) Ltd supra*[465] Kgomo J, surprisingly in ranking the order of claims in business rescue proceedings, stated that pre-business rescue claims of secured creditors would rank below those creditors that provided post-

454 Cassim (Note 4 above; 883). See also Sharrock (Note 14 above; 289).
455 Section 135(2)(b) read with section 135(3)(b) of the 2008 Act.
456 Section 135(1) of the 2008 Act. Chapter 6 bestows far more benefits upon employees than they would receive under the Insolvency Act 24 of 1936, and therefore opens the system up to potential abuse – See Delport (Note 207 above; 482 (27)-482(28)).
457 Section 135(3) of the 2008 Act.
458 Cassim (Note 4 above; 883-884). See also Calitz (Note 2 above; 271).
459 Ibid.
460 Cassim (Note 4 above; 883).
461 Section 135(3)(a)(i) of the 2008 Act.
462 Section 135(3(a)(ii) of the 2008 Act.
463 Calitz (Note 2 above; 271).
464 Section 135(3)(a)(ii) of the 2008 Act.
465 *Merchant West Workings Capital Solutions (Pty) Ltd supra* at para 21. Such ranking was also followed in the case of *Redpath Mining South Africa (Pty) Ltd v Marsden No and Others* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013) para 60.

commencement financing.[466] Delport[467] indicates that the *dicta* of Kgomo J "were clearly obiter", and correctly highlights that Kgomo J did not take cognisance of the fact that section 135(3)[468] does not mention the claims of secured creditors prior to the commencement of business rescue proceedings, as they are regulated by section 134(3) of the 2008 Act.

Another incentive for post-commencement financing is that the preference of claims set out in section 135(3)[469] remains in force, even "[i]f business rescue proceedings are superseded by a liquidation order … except to the extent of any claims arising out of the costs of liquidation".[470]

An important proposed amendment to section 135 of the 2008 Act by the Companies Amendment Bill 2018, [471] is that any amounts owing "by a company under business rescue to a landlord for rent or services will be regarded as post-commencement financing".[472] If passed this would provide much-needed relief to landlords once a company is placed under business rescue, especially in the retail sector. Following on from the proposed amendment of section 135, it is further proposed that section 145 of the 2008 Act be amended to the effect that "the landlord will have a voting interest in business rescue proceedings to the extent of its claim".[473]

4.6 THE BUSINESS RESCUE PRACTITIONER

Section 128(1)(d) of the 2008 Act defines a 'business rescue practitioner' as a person[474] (or if more than one, persons jointly)[475] appointed to oversee a company during business rescue proceedings.

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466 Calitz (Note 2 above; 271-272).

467 Delport (Note 207 above; 482(48)).

468 Section 135(3) of the 2008 Act.

469 Section 135(3) of the 2008 Act.

470 Section 135(4) of the 2008 Act.

471 GN 969 of GG 41913, 21/09/2018; 16-18. The Companies Amendment Bill 2018 was published for public comment on 21 September 2018, which comments were required to have been submitted within 60 days of publication, by 20 November 2018.

472 S Kennedy-Good 'The South African Companies Amendment Bill 2018' 27 September 2018 available at https://www.financialinstitutionslegalsnapshot.com/2018/09/the-south-african-companies-amendment-bill-2018/ accessed on 20 October 2018.

473 Ibid.

474 The definition of a person in section 1 of the 2008 Act, "includes a juristic person" it is therefore possible that "a company may be appointed as a business rescue practitioner"- See Delport (Note 207 above;483).

475 Despite the definition envisaging the appointment of more than one business rescue practitioner, the provisions of Chapter 6 of the 2008 Act do not appear to cater for this i.e. there is no provision concerning the remuneration of a business rescue practitioner that provides for the distribution of fees if there is more than one business rescue practitioner, or if there is a dispute between the practitioners how this is to be dealt with – See Delport (Note 207 above; 483).

The business rescue practitioner occupies a powerful and pivotal, if not the most pivotal, role in the business rescue process.[476] The practitioner has wide-ranging powers to supervise and manage the affairs of the company,[477] as once appointed the practitioner usurps "full management control of the company in substitution for its board and pre-existing management".[478] This does not mean that the pre-existing management is completely removed, it will continue subject to the business rescue practitioner's authority.[479]

This is in contrast to the 'debtor-in-possession' position found in the Chapter 11 of the US Bankruptcy Code,[480] in which as Levenstein[481] explains the "debtor company is left in control of the business and bankruptcy proceedings except in very limited situations where a trustee may be appointed" only for "cause, including fraud, dishonesty, incompetence, or gross mismanagement".[482]

4.6.1 Circumstances under which a business rescue practitioner may be appointed

A practitioner may be appointed in any one of the following three ways. First, as set out in paragraph 4.2.1 above, by the company's board of directors if business rescue proceedings are commenced by way of a board resolution.[483] Secondly, as set out in paragraph 4.2.4 above, where an application is brought by an 'affected person' to place the company under business rescue, the court may appoint an interim practitioner, nominated by the 'affected person' who brought the application.[484] The interim appointment is, however, "subject to the ratification by the holders of a majority of the independent creditors'[485] voting interests at the first meeting of

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476 Cassim (Note 4 above; 888).

477 Rushworth (Note 229 above; 392). See also Levenstein (Note 74 above; 394) and Cassim (Note 4 above; 889).

478 Section 140(1)(a) of the 2008 Act.

479 Cassim (Note 4 above; 894).

480 Sections 1104(a); 1107 of Chapter 11 of the 1978 US Bankruptcy Code US Bankruptcy Code Act. See P Mindlin 'Comparative Analysis of Chapter 6 of The South African Companies Act, No. 71 OF 2008 (Business Rescue Proceedings)' (1 March 2013) *Wachtell, Lipton, Rosen & Katz* available at *https://www.thedti.gov.za/business_regulation/presentations/symposium1of6.pdf*, accessed on 15 September 2018.

481 Levenstein (Note 74 above; 394).

482 11 U.S.C. section 1104(a).

483 Cassim (Note 4 above; 889).

484 Cassim (Note 4 above; 889).

485 In terms of section 128(g) of the 2008 Act, 'independent creditor' is defined as person who:

(i) is a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2); and

(ii) is not related to the company, a director, or the practitioner, subject to subsection (2).

Section 144(2) of the 2008 Act, provides that:

To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before

creditors, as contemplated by section 147"[486] of the 2008 Act. Lastly, when a court sets aside an appointment of a practitioner appointed by the company, as a result of a successful objection by an 'affected person', the court must appoint an alternative practitioner.[487] The practitioner appointed under these circumstances would be either recommended or acceptable to "the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court".[488]

The fundamental objective of a practitioner is to develop and implement a business rescue plan, if approved, to achieve either one of the two objectives of business rescue as outlined in paragraph 3.3 above.

4.6.2 The qualifications of a business rescue practitioner

A business rescue practitioner's experience, expertise and integrity will determine the fairness and efficiency of the business rescue process, and ultimately its success.[489] It is therefore critical that the practitioner is suitably qualified and experienced in business rescue matters.[490] The practitioner should therefore ideally be a turnaround expert, not a person skilled in liquidating businesses.[491]

The requisite qualifications are, however, not only restricted to turnaround experts.[492] In terms of Section 138(1)(a) - (f) of the 2008 Act, a person is only eligible to be appointed as a business rescue practitioner to a company if the person:

- "is a member in good standing of a legal, accounting or business management profession accredited" by the CIPC;[493]
- "has been licensed as such by the CIPC in terms of" section 138(2)" of the 2008 Act;[494]
- "is not subject to an order of probation in terms of section162(7)" of the 2008 Act;[495]

the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

486 Section 131(5) of the 2008 Act.
487 Cassim (Note 4 above; 889). See section 130(6)(a) of the 2008 Act.
488 Section 130 (6)(a) of the 2008 Act.
489 Bradstreet (Note 32 above; 374). See also Cassim (Note 4 above; 889).
490 Stein and Everingham (Note 8 above; 425).
491 Stein and Everingham (Note 8 above; 425).
492 Cassim (Note 4 above; 890).
493 Section 138(1)(a) of the 2008 Act.
494 Section 138(1)(b) of the 2008 Act.
495 Section 138(1)(c) of the 2008 Act.

- "would not be disqualified from acting as a director of the company in terms of section 69(8)" of the 2008 Act;[496]
- "does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship";[497]and
- "is not related to a person who has a relationship contemplated" by the penultimate prerequisite.[498]

Although the 2008 Act clearly envisaged the appointment of a business rescue practitioner as a member of a "legal, accounting and business management professions" accredited by the CIPC,[499] the CIPC since the 2008 Act came into effect on 1 May 2011, had been licensing practitioners on an individual basis in accordance with section 138(2) of the 2008 Act, without confirming membership to a profession.[500] This was as a direct result of the CIPC not accrediting any professional bodies. Accordingly, the CIPC had issued licences if it was satisfied that the applicant was of good character and integrity, the applicant's education and experience were sufficient to perform the functions of a business rescue practitioner, and was not disqualified from appointment in terms of section 138(1)(c) or (d) of the 2008 Act.[501] This had, unfortunately, created a loophole that diminished the standard and quality of business rescue practitioners in practice. The loophole was addressed by the CIPC in 2017 when it issued a notice requiring practitioners and aspiring practitioners "to belong to a legal, accounting or business management profession recognised by the South African Qualifications Authority".[502]

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496 Section 138(1)(d) of the 2008 Act.

497 Section 138(1)(e) of the 2008 Act.

498 Section 138(1)(f) of the 2008 Act.

499 Delport (Note 207 above; 484).

500 R, Voller '*Notice to Customers (Notice 30 of 2017) Transitional Period of Conditional Licences'* (26 April 2017) CIPC available at *https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/Companies%20Act/Notice_30_of_2017.pdf* accessed on 20 September 2018.

501 Levenstein (Note 74 above; 624-625). See regulation 126(4) of the 2008 Act.

502 Voller (Note 500 above). The following professional bodies have been accredited by the CIPC as at march 2018, Institute of Accounting and Commerce, South African Institute of Professional Accountants, Southern African Institute for Business Accountants, South African Institute of Chartered Accountants, The Association of Chartered Certified Accountants, The Law Society of The Northern Province, The Law Society of Kwazulu-Natal, The Cape Law Society, The Law Society of The Free State, The Institute of Business Advisors NPC, The Chartered Institute of Management Accountants, Turnaround Management Association, and the South African Restructuring and Insolvency Practitioners Association NPC − See R, Voller '*Notice to Customers (Notice 14 of 2018) List of Accredited Professional Bodies whose members are eligible to be licensed as business rescue practitioners as at 28 March 2018'* (28 March 2018) CIPC available at *http://www.cipc.co.za/files/6315/2231/0262/List_of_Accredited_Bodies.pdf* , accessed on 20 September 2018.

The Minister is further vested with the power to make regulations that prescribe:

- the standards and procedures to be adhered to by the CIPC in carrying out its licensing powers and functions;[503] and
- the minimum qualifications for a person to be eligible to practice as a practitioner, together with the minimum qualifications for varying categories of companies.[504]

Regulations relating to the 'Accreditation of professions and licensing of business rescue practitioners',[505] 'Restrictions on practice',[506] and 'Tariff of fees for business rescue practitioners'[507] have been set out in the 2008 Act.

Regulation 127(2)(b) of the 2008 Act, distinguishes between large, medium and small companies undergoing business rescue proceedings in accordance with their classification and most recent public interest score.[508]

4.6.3 The removal of the business rescue practitioner

The 2008 Act is clear, only a court is empowered to remove a business rescue practitioner from office, either in terms of section 130[509] as set out in paragraph 4.2.3 above, or in terms of section 139(2).[510] In terms of the latter section, a court may on application by an 'affected person' or of its own volition remove a practitioner on any of the following grounds:[511]

- "[i]ncompetence or failure to perform the duties of a business rescue practitioner of the particular company";[512]
- "failure to exercise the proper degree of care in the performance of the practitioner's functions"; [513]

503 Section 138(3)(a) of the 2008 Act.
504 Section 138(3)(b) of the 2008 Act.
505 Regulation 126 of the 2008 Act.
506 Regulation 127 of the 2008 Act.
507 Regulations 128 of the 2008 Act.
508 Cassim (Note 4 above; 890).
509 Section 130 of the 2008 Act.
510 Section 139(2) of the 2008 Act.
511 Delport (Note 207 above; 489).
512 Section 139(2)(e) of the 2008 Act.
513 Section 139(2)(b) of the 2008 Act. In terms of section 140(3)(a) of the 2008 Act the business rescue practitioner is considered "an officer of the court", and also has the "responsibilities, duties and liabilities of a director" of a company as set out in sections 75 to 77 of the 2008 Act. A court will therefore look at all these holistically to ascertain whether the practitioner has exercised the proper degree of care in the performing the practitioner's functions − See Delport (Note 207 above; 489).

- "engaging in illegal acts or conduct"; [514]
- "if the practitioner no longer satisfies the requirements" for appointment as a practitioner; [515]
- "conflict of interest or lack of independence"; [516] 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".[517]

If a practitioner dies, resigns or is removed from office, the company or creditors who nominated the practitioner is required to appoint a new practitioner.[518] This is "subject to the right of an affected person to bring a fresh application" to set aside the appointment of the new practitioner in terms of section 130(1)(b) of the 2008 Act.[519]

4.6.4 Remuneration of business rescue practitioners

The remuneration of a business rescue practitioner is of great importance to the business rescue proceedings, as it could impact on the impartiality and independence of a practitioner.[520]

A practitioner appointed to a company is entitled to charge an amount to such company for his or her remuneration and expenses in accordance with a tariff prescribed by the Minister.[521] Regulation 128[522] of the 2008 Act, sets out the tariff of fees for practitioners, which makes provision for a "time-based fee coupled with a daily maximum amount that can be charged by a business rescue practitioner".[523] The tariff of fees chargeable by a practitioner does not depend on the classification of the practitioner i.e. senior, experienced or junior practitioner, but whether the company concerned is classified as a small, medium, large or state-owned company.[524] A practitioner's fee in respect of a small company is R 1250.00 per hour whilst limited to a maximum amount R15 625.00 per day inclusive of VAT,[525] R 1500.00 per hour

514 Section 139(2)(c) of the 2008 Act.
515 Section 139(2)(d) of the 2008 Act.
516 Section 139(2)(e) of the 2008 Act.
517 Section 139(2)(f) of the 2008 Act.
518 Section 139(3) of the 2008 Act.
519 Section 139(3) of the 2008 Act.
520 Cassim (Note 4 above; 891).
521 Section 143(1) and (6) of the 2008 Act. See also Cassim (Note 4 above; 892).
522 Cassim (Note 4 above; 892).
523 Delport (Note 207 above; 500(3)).
524 Cassim (Note 4 above; 892). Regulation 127 of the 2008 Act, differentiates between a large, medium and small company based on the type of company and their public interest score – See (Cassim Note 4 above; 890). Regulation 26(2) of the 2008 Act sets out the process of calculating a company's public interest score.
525 Regulation 128(1)(a) of the 2008 Act.

whilst limited to a maximum amount of R 18 750.00 per day inclusive of VAT in respect of a medium company,[526] and R2000.00 per hour whilst limited to a maximum amount of R 25 000.00 per day inclusive of VAT in respect of a large or state-owned company.[527] In addition to remuneration the practitioner is entitled to be reimbursed for 'expenses', which in terms of regulation 128(3) of the 2008 Act includes "the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings".[528]

Unfortunately, the 2008 Act makes no provisions for the "taxation of a business rescue practitioner's remuneration, disbursements and expenses"[529], to curb any potential abuse by practitioners. In *Oakdene Square Properties (Pty) Ltd and others supra*[530] Classen J stated the following:

> *There is no provision for the taxation of the fees, costs and expenses of a business rescue practitioner, whereas a liquidator's costs are subject to taxation. There is, therefore, independent control over the costs of a liquidation whereas there is currently none in the case of a business rescue procedure. This aspect may be for the Legislature to consider when further amendments to the Act are proposed*.

Meyer J in *Murgatroyd v Van Den Heerver N.O. and Others*[531] agreed with Delport,[532]that:

> *Considering the rather liberal hourly and maximum daily tariff the practitioner is entitled to, it seems unwise not to make provision for the amounts claimed to be scrutinised by an independent party in order to ensure that there is no abuse by practitioners claiming excessive fees.*

The practitioner is furthermore entitled in terms of section 143(2) of the 2008 Act to propose an agreement with the company providing for further remuneration calculated on a contingency basis, in addition, to the remuneration contemplated by the tariff, which is related to:

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526 Regulation 128(1)(b) of the 2008 Act.
527 Regulation 128(1)(c) of the 2008 Act.
528 Regulations 128(3) of the 2008 Act. See also Delport (Note 207 above; 500(3)). See *Dotcom Trading 118 (Pty) Ltd v Hobbs Sinclair Advisory (Pty) Ltd* (6532/2014) [2017] ZAWCHC 144 para 25.
529 *Murgatroyd v Van Den Heerver N.O. and Others* (20456/2014) [2014] ZAGPJHC 142 para 4.
530 *Oakdene Square Properties (Pty) Ltd and others supra* para 49.
531 *Murtgatroyd supra* para 4.
532 Delport (Note 207 above; 500(3)-500(4)).

- "the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan";[533] or
- "the attainment of any particular result or combination of results relating to the business rescue proceedings".[534]

As a precautionary measure against abuse,[535] for a contingency fee agreement to be binding on the company it must be approved at a meeting called for the purpose to consider it by:

- "the holders present and voting of the majority of the independent creditors' voting interests; and
- the holders present and voting of the majority of the voting rights of shares entitling the shareholder to a portion of the residual value of the company on winding-up".[536]

As a further precautionary measure, a creditor or shareholder who voted against a proposed contingency agreement which was approved, may within ten business days after the date of voting on the proposal apply to court to set aside the agreement on the basis that it is unjust and inequitable, or the provision for remuneration in the agreement is unreasonable in light of the company's financial circumstances.[537]

As a safeguard for the proper administration of the business rescue process, section 143(5),[538] provides that a practitioner's claim against a company for remuneration and expenses, to the extent that they have not been fully paid, will rank in priority before the claim of all unsecured and secured creditors. Accordingly, the unpaid remuneration and expenses of a practitioner will enjoy 'super-preference' over all secured and unsecured claims.[539] However, the SCA in *Diener N.O. v Minister of Justice and Others*[540] held that section 143(5),[541] "whether taken individually or in tandem" with 135(4),[542] does not create a 'super-preference' in liquidation.[543]

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533 Section 143(2)(a) of the 2008 Act.
534 Section 143(2)(b) of the 2008 Act.
535 Cassim (Note 4 above; 892).
536 Sharrock (Note 14 above; 285). See section 143(3)(a) and (b).
537 Section 143(3) of the 2008 Act.
538 Section 143(5) of the 2008 Act.
539 Delport (Note 207 above; 500(5)).
540 *Diener N.O. v Minister of Justice and Others* 2018 (1) All SA 317 (SCA) at para 49.
541 Section 143(5) of the 2008 Act.
542 Section 135(4) of the 2008 Act provides that:
If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.
543 Delport (Note 207 above; 500(5)).

4.6.5 The duties, powers, and potential liabilities of the business rescue practitioner

With great power comes great responsibility. As indicated above, the practitioner has wide-ranging powers to supervise and manage the affairs of the company during business rescue proceedings,[544] which include taking over the "full management control of the company in substitution for its board and pre-existing management".[545] As indicated by the court in *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another*,[546] "it is … clear that the legislature intended that the business rescue practitioner should be more than a nominal figurehead responsible for the rehabilitation of the company".

The most important duties of the practitioner are to investigate the affairs of the company and develop and implement a business rescue plan.[547] Once appointed the practitioner has the onerous and necessary duty to immediately investigate the "company's affairs, business, property, and financial situation" to ascertain "whether there is any reasonable prospect of the company being rescued".[548] Should the practitioner at any time during business rescue proceedings conclude that there is no reasonable prospect of rescuing the company, or that the company is no longer 'financially distressed', the practitioner must take the necessary steps to terminate the business rescue proceedings.[549] This ensures that the business rescue process is not prolonged unnecessarily, and that those cases not suitable for business rescue are weeded out.

In terms of section 140(1)(b) of the 2008 Act, the practitioner is also empowered to delegate any power or function "to a person who was part of the board or pre-existing management of the company". This is a practical approach taken by the 2008 Act, as it is realistically

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544 Rushworth (Note 229 above; 392). See also Levenstein (Note 74 above; 394) and Cassim (Note 4 above; 889).

545 Section 140(1)(a) of the 2008 Act. The UK Insolvency Act of 1986 and Schedule B1 specifically prescribes the scope of the administrator's powers.

546 2017 (4) SA 51 (WCC) at para 68. See Delport (Note 207 above; 491).

547 Sharrock (Note 14 above; 284-285). See section 140(d) of the 2008 Act, regarding the practitioner's duty to develop and implement a business rescue plan.

548 Section 141(1) of the 2008 Act. Once appointed the practitioner must immediately "inform all relevant regulatory authorities having authority in respect of the activities of the company" of their appointment to the company that has been placed under business rescue proceeding – See section 140(1A) of the 2008 Act.

549 Section 141(2) of the 2008 Act. See also Delport (Note 207 above; 495) and Rushworth (Note 229 above; 394). If during the practitioner's investigation evidence is uncovered of "voidable transactions or failure by the company or any director to perform any material obligation relating to the company" or "reckless trading, fraud or other contravention of any law relating to the company" that took place before the commencement of business rescue proceedings, the practitioners is required to take the appropriate steps to rectify the matter − See section 141(2)(c) of the 2008 Act.

impossible in most cases for a practitioner to single handily manage the entire company.[550] Conversely, the practitioner may remove "from office any person who forms part of the pre-existing management of the company".[551] In terms of section 137(5),[552] a practitioner may apply to court to remove a director on the ground that the director:

- failed to comply with a requirement of Chapter 6 of the 2008 Act;[553] or
- by act or omission, impeded or is impeding either the performance of the practitioner's powers and functions, or the practitioner's management of the company, or "the development or implementation of a business rescue plan".[554]

Alongside the practitioner's duties and responsibilities set out in Chapter 6 of the 2008 Act, the practitioner also "has the responsibilities, duties and liabilities of a director of the company, as set out in section 75 to 77" of the 2008 Act.[555] Accordingly, this should deter practitioner's from neglecting such duties.

4.6.6 Directors duties to co-operate with and assist the business rescue practitioner

During business rescue proceedings, the directors of the company remain in place, and are required to continue exercising their functions as directors of the company, "subject to the authority of the business rescue practitioner".[556] To this end, directors are required at all times to attend to the practitioner's requests, and furnish the practitioner with "any information about the company's affairs as may reasonably be required".[557] In addition, directors are also required to "exercise any management function within the company in accordance with the express instructions or directions of the practitioner, to the extent that it is reasonable to do so".[558]

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550 Delport (Note 207 above; 491).

551 Section 140(1)(c) of the 2008 Act. As submitted by Delport, where such person is an employee, there should be compliance with the relevant employment-related legislation, i.e. the Labour Relations Act 66 of 1995 - See Delport (Note 207 above; 492).

552 Section 137(5) of the 2008 Act.

553 Section 137(5)(a) of the 2008 Act.

554 Section 137(5)(b) of the 2008 Act.

555 Section 140(3)(b) of the 2008 Act.

556 Section 137(2)(a) of the 2008 Act.

557 Section 137(3) of the 2008 Act.

558 Section 137(2)(b) of the 2008 Act. Section 137(2)(d) of the 2008 Act, provides that if a director of the company acts in accordance with the practitioner's instructions during business rescue proceedings, such director will be "relieved from the duties of a director as set out in section 76, and liabilities set out in section 77, other than section 77 (3)(a), (b) and (c)".

Accordingly, co-operation between the directors of the company and the practitioner is vital to a successful rescue of the company.[559]

Section 137(4) of the 2008 Act further reiterates the duties of directors to act in accordance with the instructions and directions of the practitioner, as it provides that if "the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner…" such action unless approved by the practitioner would be void.

4.7 THE BUSINESS RESCUE PLAN

In terms of section 150(1),[560] the practitioner is required, "after consulting[561] the creditors,[562] other affected persons, and the management of the company", to "prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151".[563]

The business rescue plan is ultimately the epicentre of the process around which the rescue of the company will develop.[564] However, as indicated by Brand JA in *Oakdene Square Properties (Pty) Ltd and Others (SCA) supra:*[565]

> *[T]he development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process.*

559 Cassim (Note 4 above; 887).
560 Section 150(1) of the 2008 Act.
561 In the case of *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) at para 72 the court said that "[a]t a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice".
See also Delport (Note 207 above; 519).
562 This reinforces the fact that in terms of the provisions of Chapter 6 of the 2008 Act, creditors have the strongest right to consultation regarding the development of the business rescue plan, which seems appropriate as they have the most to lose financially − See Delport (Note 207 above; 518).
563 Section 151 of the 2008 Act.
564 Delport (Note 207 above; 517).
565 *Oakdene Square Properties (Pty) Ltd and Others (SCA) supra* para 31.

4.7.1 The contents of a business rescue plan

Section 150(2)[566] creates a framework for the development of the business rescue plan.[567] It requires that the "plan contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan".[568] The section also requires that the plan be divided into three parts. Part A[569] dealing with the background information of the company, Part B[570] dealing with proposals designed to specifically rescue the company and Part C[571] dealing with the assumptions and conditions on which the plan is premised.[572] Section 150(2)(a) - (c) of the 2008 Act further prescribes the minimum information that each of the three parts should contain.[573]

In *Absa Bank Limited v Marotex (Pty) Ltd and Others*[574] the court adopted the view that section 150(2) of the 2008 Act "serves as guidance to what a plan ought to consist of", and the development of a plan structured around Part A, B and C depends on the "specifics of each case". The court highlighted the fact that it has "emerged through the cases that substantial compliance" with the section "is all that is required".[575]

The proposed plan must further be concluded with a certificate of the practitioner stating that the "actual information provided appears to be accurate, complete and up to date"[576], and that

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566 Section 150(2) of the 2008 Act.

567 E Levenstein and L Barnett 'Basics of Business Rescue' *Werksmans Attorneys* available at *https://www.werksmans.com/wp-content/uploads/2013/04/Werksmans-Basics-of-Business-Rescue.pdf*, accessed on 18 August 2018.

568 Section 150(2) of the 2008 Act.

569 Section 150(2)(a) of the 2008 Act.

570 Section 150(2)(b) of the 2008 Act.

571 Section 150(2)(c) of the 2008 Act.

572 Delport (Note 207 above; 517). See also Sharrock (Note 14 above; 290) and Cassim (Note 4 above; 897).

573 Rushworth (Note 229 above; 402).

574 *Absa Bank Limited v Marotex (Pty) Ltd and Others* (1046/15) [2016] ZAGPPHC 1190 (28 October 2016) at para 48. See also *CSARS v Beginsel NO & Others* 2013 (1) SA 307 (WCC) at para 38 where Fourie J made the following comments:

> *A perusal of s 150(2) of the Act shows that the legislature has prescribed the content of a proposed business rescue plan in general terms. The content can, by its very nature, not be exactly and precisely circumscribed since it would differ from case to case, depending on the peculiar circumstances in which the distressed company finds itself. It follows, in my view, that upon a proper construction of s 150(2), substantial compliance with the requirements of the section will suffice. This would in my view, mean that where sufficient information, along the lines envisaged by s 150(2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected, there would have been substantial compliance.*

See also *Absa Bank Ltd v Golden Dividend 339 Ltd and Others* 2015 (5) SA 272 (GP) at para 44.
Absa Bank Limited supra at para 48. This is further reiterated by Delport, who states that "[t]he Act prescribes the content of the proposed business rescue plain in general terms and as the content can, by nature, not be exactly and precisely, substantial compliance with s 150 would suffice" – See Delport (Note 207 above; 517).

576 Section 151(4)(a) of the 2008 Act.

the "projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement".[577]

4.7.2 Publication of the business rescue plan

The business rescue practitioner is required to publish[578] the proposed business rescue plan within a short period of only 25 business days after his or her appointment.[579] However, an extension of time may be granted by a court on application by the company or allowed by the holders of a majority of the creditors' voting interests.

The initial time period of 25 business days is quite opportunistic and would likely be difficult to achieve,[580] especially considering the time frames provided in other legal jurisdictions. In terms of Chapter 11 of the US Bankruptcy Code,[581] "the company and its management has an exclusive right to propose a reorganisation plan for the first 120 days of the business rescue process".[582] In terms of the UK Insolvency Act[583] the administrator's proposal is required to be submitted within eight weeks of the commencement of the administration process.[584]

4.7.3 Consideration and adoption of the business rescue plan

The consideration of the proposed business rescue plan and the voting on it are crucial phases of the business rescue process. It is therefore imperative to examine the relevant provisions of the 2008 Act, to ascertain under what circumstances the plan would either be adopted or rejected.

Within ten business days after the proposed business rescue plan has been published, the practitioner is obligated to "convene and preside over a meeting of creditors and any other holders of a voting interest", to consider the proposed business rescue plan.[585] At least five days before the meeting, the practitioner is required to deliver to all 'affected persons' a notice of the proposed meeting in which the date, time and place of the meeting, the agenda of the

577 Section 151(4)(b) of the 2008 Act.
578 The publication of the proposed business rescue plan must be in accordance with regulation 125(3) of the 2008 Act.
579 Section 150(5) of the 2008 Act.
580 Delport (Note 207 above; 521).
581 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).
582 Cassim (Note 4 above; 897).
583 UK Insolvency Act of 1986 Schedule B1, para 49(5)(b) and para 108.
584 Cassim (Note 4 above; 897).
585 Section 151(1) of the 2008 Act.

meeting, and a summary of the rights of affected persons to participate in and vote at the meeting are set out.[586]

At the convened meeting the practitioner is required to:

- introduce the proposed plan for consideration by creditors and shareholders (if applicable);[587]
- inform the meeting whether he or she "continues to believe that there is a reasonable prospect of the company being rescued".[588] The presentation of the proposed plan by the practitioner at the meeting should, in any event, be an indication that the practitioner still believes that such prospect continues to exist;[589]
- provide the employees' representatives an opportunity to address the meeting.[590] Employees, in their capacity as such, are not afforded the right to vote on whether to accept or reject the plan, and as such the address by the employees' representatives is the only formal opportunity where the employees' view on the proposed plan can be heard;[591]
- invite discussion and hold a vote on any motions seeking to amend the plan in a manner satisfactory to the practitioner, or to direct the practitioner to adjourn the meeting for the plan to be revised for further consideration;[592] and
- "call for a vote for preliminary approval of the proposed plan, as amended if applicable", unless the meeting has been adjourned for the practitioner to revise the plan.[593]

The meeting may, however, in terms of section 151(3) of the 2008 Act be adjourned from time to time, until a decision on the company's future is made i.e. the acceptance or rejection of the plan.[594] The legislators were clearly cognisant of the fact that the process of discussing, revising the plan if need be, and voting can become a long and complicated process.[595]

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586 Section 151(2) of the 2008 Act. Regulations 125(2) of the 2008 Act, sets out how the practitioner is to give notice to 'affected persons'.
587 Section 152(1)(a) of the 2008 Act.
588 Section 152(1)(b) of the 2008 Act.
589 Delport (Note 207 above; 225-226).
590 Section 152(1)(c) of the 2008 Act.
591 Delport (Note 207 above; 526).
592 Section 152(1)(d) of the 2008 Act. See also Sharrock (Note 14 above; 291).
593 Section 152(1)(e) of the 2008 Act.
594 Section 151(3) of the 2008 Act.
595 Delport (Note 207 above; 523).

The proposed plan will be approved on a preliminary basis only if "it was supported by the holders of more than 75% of the creditors' voting interests that were voted"[596], and "the votes in support of the proposed plan included at least 50% of the independent creditor's voting interests, if any, that were voted".[597] Therefore, as explained by Rushworth[598] there is a "double majority requirement, with particular protection for independent creditors who have to approve the plan by at least a simple majority vote if it is to be adopted". Since it is only creditors' voting interests that were actually voted on that are taken into account, the voting interests of creditors that are not present at the meeting or who decide not to vote, are not taken into account in ascertaining whether preliminary approval is obtained.[599]

Chapter 11 of the US Bankruptcy Code[600] requires that the reorganisation plan "be approved by a majority in number and two-thirds in value of each impaired class of creditors who are voting"[601], and ultimately the court.[602] There is no provision in the 2008 Act that requires a court to approve a business rescue plan.[603] The UK requires that the plan be "approved by a majority in value of creditors voting in person or by proxy".[604] It is uncertain whether a creditor's voting interest may be exercised by a proxy in terms of section 152(2) of the 2008 Act.[605]

If the proposed plan is not approved on a preliminary basis, the plan is considered as having been rejected.[606] If, however, the plan "does not alter the rights of the holders of any class of the company's securities", the approval on a preliminary basis will transition into a final adoption of the plan.[607] If it so happens that the proposed plan "does alter the rights of any class of holders of the company's securities", the practitioner is required to immediately hold a meeting of those holders whose rights are affected, and call for a vote by them to approve the proposed plan.[608] If the majority of the holders of affected rights approve the adoption of the

596 Section 152(2)(a) of the 2008 Act.
597 Section 152(2)(b) of the 2008 Act.
598 Rushworth (Note 229 above; 405).
599 Delport (Note 207 above; 526).
600 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).
601 Cassim (Note 4 above; 906).
602 Conradie (Note 189 above; 7).
603 Cassim (Note 4 above; 908).
604 Cassim (Note 4 above; 906).
605 Delport (Note 207 above; 526).
606 Section 152(3)(a) of the 2008 Act.
607 Section 152(3)(b) of the 2008 Act. See also Rushworth (Note 229 above; 405).
608 Section 152(3)(c) of the 2008 Act. See also Sharrock (Note 14 above; 291).

plan, the plan is regarded as having been finally adopted, subject to any suspensive conditions of the plan.[609] However, if they oppose the plan, it is rejected.[610]

Where a proposed plan is rejected, it is not the end of the road, as further recourse may be taken by the practitioner or any 'affected person' in terms of section 153 of the 2008 Act.

4.7.4 The effect of an adopted business rescue plan

Once the plan is finally adopted it becomes binding not only on the company, but also "on each of the creditors of the company and every holder of the company's securities", irrespective of whether they were present at the meeting, voted for the plan to be adopted, or "in case of creditors, had proven their claims against the company".[611] This binding provision is frequently referred to as a 'cramdown' provision in foreign legal jurisdictions,[612] as creditors are forced into accepting the plan irrespective of their opposition.[613]

A 'cramdown' provision is crucial to the implementation of a successful business rescue plan, as it ensures that the business rescue process is not halted by disgruntled resisting creditors "holding out for better treatment".[614] Surprisingly, unlike Chapter 11 of the US Bankruptcy Code and the 2008 Act, no such provision is made in the UK Insolvency Act[615] or Enterprise Act of 2002.

To ensure co-operation, the company is required in terms of section 152(5)[616] to take all steps necessary, under the directions of the practitioner, to attempt to satisfy any contingent conditions of the adopted plan and ensure that it is implemented. The practitioner, to the extent necessary to implement the adopted plan, is further empowered in accordance with the plan to "determine the consideration for, and issue, any authorised securities of the company"[617], which power overrides sections 38 and 40 of the 2008 Act.[618] In the event of the plan being approved by shareholders of the company, "the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations

609 Section 152(3)(c)(ii)(aa) of the 2008 Act. See also Sharrock (Note 14 above; 291).
610 Section 152(3)(c)(ii)(bb) of the 2008 Act.
611 Section 152(4)(a), (b) and (c). Section 152(4) is, however, subject to section 134(3) of the 2008 Act.
612 Delport (Note 207 above; 527)
613 Cassim (Note 4 above; 907).
614 Cassim (Note 4 above; 907).
615 UK Insolvency Act of 1986.
616 Section 152(5) of the 2008 Act.
617 Section 152(6)(a) of the 2008 Act.
618 Cassim (Note 4 above; 907). See also Sharrock (Note 14 above; 291) and Rushworth (Note 229 above; 405)

and other terms of, any securities that are not otherwise authorised, but contemplated" in terms of the plan, notwithstanding sections 16, 36 or 37 of the 2008 Act.[619]

Once the business plan has been 'substantially implemented', the practitioner is required to file a notice of substantial implementation.[620] The term 'substantially implemented' is not defined, however, as submitted by Delport:[621]

> *[T]he plan will have been substantially implemented once the business rescue practitioner has taken all necessary steps to satisfy the conditions on which the business rescue plan is contingent, and has completed all his obligations in terms of the provisions of both Chapter 6 and the approved business rescue plan.*

4.8 CONCLUSION

Overall, it is evident from the above analysis of the key components that the business rescue regime represents a significant improvement on the judicial management system. As summarised by Burdette[622] the business rescue procedure contains:

> *[T]he most important elements of a modern and effective corporate rescue regime. The procedure provides for a dual gateway to access the procedure, a moratorium that can prevent creditors from undermining a genuine attempt at saving the company, post-commencement financing to keep the company afloat during the rescue procedure, and a cram-down provision that can bind dissenting creditors.*

There is a clear and welcomed attempt to foster a corporate rescue culture, which "encapsulates a shift from creditors' interests to a broader range of interests".[623] The voluntary commencement aspect further signifies a transition to a more debtor-friendly approach, making it much easier for companies to utilise the process.[624] The ease at which companies can seamlessly slip into business rescue as a result of voluntary commencement has, however, negatively impacted and skewed the success rate which was outlined in chapter one. As indicated by Levenstein,[625] many companies utilise the voluntary commencement process to

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619 Section 152(6)(b) of the 2008 Act. See also Sharrock (Note 14 above; 291).
620 Section 152(8) of the 2008 Act.
621 Delport (Note 207 above; 529).
622 Burdette "Legislative Framework for the Facilitation of Turnarounds" in Harvey (ed) *Turnaround Management and Corporate Renewal – a South African Perspective* (2011) 140. Cited in Levenstein (Note 74 above; 582).
623 *Oakdene Square Properties (Pty) Ltd and Other Supra* para 12.
624 Levenstein (Note 74 above; 635).
625 Levenstein (Note 74 above; 296).

obtain a temporary respite from creditors' claims, when they were never ideal candidates for rescue at the outset. Importantly business rescue has seen successes in larger companies where much more jobs are at stake, such as in the case of Southgold Exploration and Ellerines.[626]

Ultimately, with an appropriately experienced business rescue practitioner at the helm and the co-operation of all relevant stakeholders, the key components of the business rescue regime create an ideal framework within which the rescue or reorganisation of the company can take place.[627] This does not mean that the business rescue regime is perfect, there are shortcomings which have been identified as a result of critically analysing the key components. These shortcomings are addressed in the concluding chapter by way of recommendations, which will serve to further enhance the effectiveness of the business rescue regime.

626 Levenstein (Note 74 above; 636).
627 Levenstein (Note 74 above; 582).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

It is evident from the discussion in chapter two, that judicial management failed to achieve any meaningful success as a corporate rescue mechanism, which failure was attributed to the reasons set out in paragraph 2.4 above. South Africa desperately required a corporate rescue mechanism that would provide a viable alternative to, and ultimately avoid the 'deleterious consequences'[628] of liquidation.

The business rescue regime enacted under Chapter 6 of the 2008 Act, replaced the failed judicial management system. A critical analysis of the key components of the business rescue regime in chapter four revealed the regime to be an effective corporate rescue mechanism that aligns itself with international standards and core features.[629]

Although, the business rescue regime is an effective corporate rescue mechanism, the analysis in chapter four also revealed that it was not free from imperfection and is susceptible to abuse. The following recommendations would serve to address the shortcomings as well as limit the potential abuse of the process, ultimately enhancing the business rescue regime:

- Levenstein[630] recommends that it should be compulsory for the "potential (nominee) business rescue practitioner", prior to the commencement of business rescue, to conduct "a pre-assessment of the company's prospects of success in the business rescue process" and prepare a report to be disseminated to all relevant stakeholders, which would include the board of directors and creditors. It is submitted that this would be somewhat similar to the purpose of the report that the court could call for from a practitioner when considering an objection to the voluntary commencement of business rescue proceedings in terms of section 130(5)(b) of the 2008 Act, and which was discussed under paragraph 4.2.3 above. Such pre-assessment report would be particularly helpful to directors who are faced with the dilemma of deciding whether to vote in favour of a resolution to commence business rescue proceedings and would also serve to curb the abuse of the voluntary commencement aspect of the business rescue process.

628 *Koen and Another supra* para 14.
629 Levenstein (Note 223 above).
630 Levenstein (Note 74 above; 622).

- As discussed in paragraph 4.2.4 above, it is regrettable that voluntary commencement of business rescue cannot be utilised once liquidation proceedings have already commenced, especially in cases where the board is genuinely convinced that the company can be rescued. Whilst it is acknowledged that the purpose of such prohibition is to "prevent the board thwarting an application to liquidate a company"[631], it is recommended that in such instances the company should be entitled to bring an application in terms of section 131 of the 2008 Act, which application is to be accompanied by the pre-assessment report referred to in the previous paragraph.

- In *Panamo Properties (Pty) Ltd and Another supra,*[632] Wallis JA stated that the "commendable goals" of the business rescue regime are:

> *[U]nfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted. Consequently they have given rise to confusion as to their meaning and provided ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose.*

  In this regard the legislature should clarify precisely when compulsory business rescue proceedings commence.[633] It is submitted in accordance with Delport[634] that it commences retrospectively to the date when the application is made, only after an order is granted placing the company under business rescue, as discussed in paragraph 4.3.1. above.

- Another factor that has also contributed to the uncertainty of provisions causing ample litigation is the failure to define certain important terms such as 'reasonable prospect of rescuing the company', the meaning of which has been a contentious issue and at the centre of several judgments as analysed in paragraph 4.2.4 above. In this regard the

631 *Sulzer Pumps (South Africa) (Pty) Ltd v O & M Engineering CC* [2015] JOL 32825 (GP) para 29. See also Delport (Note 207 above; 462).
632 *Panamo Properties (Pty) Ltd and Another supra* para 1.
633 Levenstein (Note 74 above; 630).
634 Delport (Note 207 above; 482(24)).

legislature should define the term 'reasonable prospect of rescuing the company' in section 128 of the 2008 Act.[635]

- Although the CIPC has eventually accredited professional bodies recognised by the South African Qualifications Authority to which business rescue practitioners are to belong as set out in paragraph 4.6.2 above, it is recommended that there should be standardised examinations and training as pre-requisites for the appointment of prospective and existing business rescue practitioners.[636] This would ensure that a robust minimum standard is set and that all business rescue practitioners are capable of performing the task at hand.

- The analysis of the business rescue practitioner's remuneration in paragraph 4.6.4 above, revealed that "[t]here is no provision for the taxation of the fees, costs and expenses of a business rescue practitioner… ."[637] It is recommended that the business rescue practitioner's fees, costs and expenses must be scrutinised and taxed by an independent party to prevent abuse by practitioners claiming additional fees.[638]

- The obligation on the practitioner to publish the proposed business rescue plan within 25 days after his or her appointment, is simply too short and an application for the extension of time is almost always made.[639] As discussed in paragraph 4.7.2 above, in terms of Chapter 11 of the US Bankruptcy Code[640] "the company and its management has an exclusive right to propose a reorganisation plan for the first 120 days of the business rescue process".[641] In terms of the UK Insolvency Act,[642] the administrator's proposal is required to be submitted within eight weeks of the commencement of the administration process.[643] It is recommended in accordance with Levenstein[644] that different time periods should apply based on the size of the company, and such it is

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635 Levenstein (Note 74 above; 629). Loubser recommends that a "reasonable possibility of rescuing the company" should be used instead – See A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (unpublished LLD thesis, University of South Africa, 2010) 339-340.

636 M Pretorius, '*Business Rescue Status Quo Report Final Report'* 30 March 2015 Business Enterprises of University of Pretoria, available at *http://pmg-assets.s3-website-eu-west 1.amazonaws.com/151110Business_Rescue.pdf*, accessed on 14 August 2018.

637 *Oakdene Square Properties (Pty) Ltd and others supra* para 49.

638 *Murgatroyd supra* para 4.

639 Levenstein (Note 74 above; 625 - 626).

640 Bankruptcy Reform Act of 1978 as amended, codified in title 11 of the United States Code (US).

641 Cassim (Note 4 above; 897).

642 UK Insolvency Act of 1986 Schedule B1, para 49(5)(b) and para 108.

643 Cassim (Note 4 above; 897).

644 Levensetin (Note 74 above; 626).

recommended that the period of 25, 50 and 75 days should apply to small, medium and large companies respectively.

- Chapter 6 of the 2008 Act, expressly envisages that the business rescue process would terminate "within three months after the start of those proceedings".[645] As discussed in paragraph 4.3.2 above and as highlighted by *Oakdene Square Properties (Pty) Ltd and Others supra*[646] the time frame is unrealistic where any component of the business rescue process is challenged. In contrast, the UK Insolvency Act [647] provides for the automatic termination of administration at "the end of the period of one year" from the date on which it commenced. It is recommended that the time period of three months be extended to 6 months in respect of medium companies and 9 months in respect of large companies.[648]

Overall it can be concluded that the business rescue regime is an effective corporate rescue mechanism, that can take its place on the international stage alongside other leading corporate rescue regimes. There is indeed room for improvement as identified by the recommendations outlined above, which would serve to further enhance the process. Through the genuine cooperation of all relevant stakeholders, the regime should grow from strength to strength. Accordingly, although hope springs eternal, it must be emphasised that "business rescue proceedings are not for the terminally ill… . Nor are they for the chronically ill".[649]

645 Section 132(3) of the 2008 Act.
646 *Oakdene Square Properties (Pty) Ltd and Others supra* para 47.
647 Insolvency Act of 1986 - See Schedule B1, para 76 Insolvency Act, 1986.
648 Levenstein (Note 74 above; 626).
649 *Welman v Marcelle Props 193 CC and Another* [2012] ZAGPJHC 32 (24 February 2012) para 28.

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