LUSANDA REMIND MTHEMBU

217066789

A South African perspective of business rescue abuse: Protecting the sanctity of the business rescue process without losing sight of its purpose.

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Supervisor: Dr D.C Subramanien

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DEDICATION

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"God is within her, she will not fall; God will help her at break of day."

- *Palms 46:5*

ABSTRACT

The current Companies Act 71 of 2008 (the Act) signaled a move away from a creditor-protectionist society and toward a debtor-protectionist business rescue model. As a result, applications have sprung up to take advantage and abuse this new rescue procedure. Unfortunately, this change has led to the widespread misuse and abuse of the business rescue process.

Essentially, business rescue finds refuge in the Companies Act 71 of 2008 Chapter 6 (the Act). It offers a restoration mechanism to companies in financial distress. When done correctly, the business rescue procedure provides a much-needed 'win-win' situation for all parties involved. However, when a company cannot be rehabilitated, the secondary goal of the business rescue procedure is to achieve the best possible outcome for the creditors.

Unfortunately, there are two sides of the coin when it comes to business rescue proceedings. Business rescue is used as a means to frustrate creditors from exercising their rights. Unfortunately, in the economic aftermath of the COVID-19 pandemic, more and more companies will resort to business rescue proceedings as a means to seek refuge from creditors even if the facts do not justify this.

This dissertation raises difficult questions of how the statutory framework governing business rescue procedure is open to abuse and whether it sufficiently protects creditors from exploitation without them having to resort to our courts for recourse. While business rescue envisages noble objectives such as ensuring the continued existence of a financially distressed company, the preservation of valuable jobs, and so on, the abuse of the process often results in creditors being left out of pocket which needs to be addressed by the legislature. Furthermore, this dissertation will provide recommendations on how the Act needs to be rectified to protect it from abuse and preserve its sanctity of the Act.

KEY TERMS

Better return for creditors

Business rescue

Business rescue abuse

Business rescue practitioner

Corporate rescue

Financially distressed

Insolvency

Judicial management

Judicial manager

Liquidation

Moratorium

Reasonable probability

Reasonable prospect

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

It has been thirteen years since the South African legislature created the business rescue provision, a business rehabilitation procedure that, given the current economic context, should be familiar to most businesses.[1] In the difficult economic conditions that South Africa (SA) is experiencing, along with the financial hardship that the international COVID-19 pandemic is placing on most enterprises, most businesses will be forced to seek refuge in business rescue. It is common knowledge that business rescue, as outlined in Chapter 6 of the Companies Act 71 of 2008 (the Act)[2], it is the legal process by which a company that is experiencing financial difficulties is restructured in a manner that it can proceed to operate as a successful going concern, in other words, rescuing the company. When it comes to company rescue processes, however, there are two sides to the coin.

The business rescue procedure is intended to foster recovery so that the business may continue to operate, but it also has the secondary goal of obtaining the best possible result for creditors if recovery is not possible. Section 128 (1)(b) defines business rescue as 'proceedings to facilitate the rehabilitation of a company that is financially distressed.' This procedure has been hailed to be more progressive than its predecessor judicial management.[3]

However, notwithstanding its progressive objectives and growing popularity, the business rescue procedure is frequently exploited, mainly by stakeholders and directors with in-depth knowledge of the company's operations. The directors and stakeholders would be the first to hear about the company's operations. Directors have the right to commence business rescue by submitting a resolution under s 129 of the Act which states the following:[4]

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[1] R Baxter '*The global economic crisis and its impact on South and the country's mining industry*', available at https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/51/Roger+Baxter.pdf, accessed on 15 November 2021 at 112.
[2] Chapter 6 of the Companies Act 71 of 2008.
[3] GM Museta '*The development of business rescue in South African law*' (published LLM thesis, University of Pretoria, 2011) 1.
[4] Section 129 of Act 71 of 2008.

A board of directors of a company can, in terms of section 129 of the Companies Act, resolve to place the company under business rescue if –

(i) the company is financially distressed; and[5]

(ii) there is a reasonable prospect of rescuing the company.[6]

Other than directors, affected persons also have a right to approach the court for an order placing the company under business rescue.[7] Section 131 (1) safeguards and regulates the commencement of business rescue proceedings by an order of a court. Section 131 (1) provides that:[8]

> In terms of section 131 (1), an affected person may apply to the court at any time for an order placing a company under supervision and commencing business rescue.

Similar to the directors, the affected person has the potential of abusing the process. It is therefore imperative that when applying for business rescue proceedings, affected persons must do so bona fide. If the application is made mala fide, this becomes the abuse of the process as a whole. Consequently, this defeats the purpose of business rescue. This dissertation, therefore, deals with instances where the business rescue process has been abused either by s 129 resolution or s 131 application.

1.2 Historical background of the business rescue procedure in South Africa

In any given setting, a region's economic expansion can be successful, or at least controllable, in sustaining its existence. The substantial role played by commercial entities in the stimulation of the economy has become more widespread in recent times and has become more prevalent in this century with the ongoing coronavirus pandemic. Business entities are vital and thus need to be protected and rescued when faced with difficulties in order to protect the economy and the well-being of those employed by the entity. South Africa was one of the first countries to introduce a corporate rescue procedure in the form of judicial management.[9] After encompassing difficulties with the previous procedure it gave rise to the new business rescue procedure in the Companies Act 71 of 2008. These developments will be discussed and the

[5] Section 129(i) of Act 71 of 2008.
[6] Section 129(ii) of Act 71 of 2008.
[7] *Ibid*.
[8] Section 131(1) of Act 71 of 2008.
[9] DA Burdette '*A framework for corporate insolvency law reform in South Africa*' (published LLD thesis, University of Pretoria, 2002) 338.

shortfalls that led to a new and improved business rescue procedure that is also filled with weakness but better than its predecessor.

1.2.1 Companies Act 46 of 1926

Fortunately, there were breakthroughs made to assist businesses that were having financial difficulties, with the goal of avoiding the 'fatal' reality of insolvency. The birth of judicial management in South Africa was one of the first governments to recognize this need and make arrangements for it.[10] The judicial management remedy provided that an application could be made for an ailing company to be placed under judicial management if there was a reasonable probability that the company would be able to pay off all of its debts when they became due and enforceable, and that the company would produce a successful concern.[11]

The purpose and scope of judicial management were to place a company's business in the hands of a judicial manager, who would then come up with a management plan that creditors would accept, stating how the company intends to pay off the creditors' debts in full. This management plan serves as the company's compass for the duration of judicial management; it cannot be changed at any point by the directors or shareholders, even if they disagree with the judicial management style.[12]

The actuality of judicial management, on the other hand, was far from a great, or even a positive, reaction to an urgent call for financially strained businesses. The onus of proof has been to prove a 'reasonable possibility' that the business will stay afloat if and after it has been placed under court control, which has been criticized by writers[13] as being highly onerous and ineffective in its functioning.[14] The meaning of the words 'probable' and 'possible' are material to the application, according to the court in *Noordkaap Bpk v Schreuder*,[15] with the latter referring to something that is less likely to happen, and the former requiring a level of certainty that the business would turn around and return a company to its solvent status.

As it becomes clear that a business cannot demonstrate that judicial management can keep it afloat, the onus is not discharged, and the court will be expected to deny the application. If an

[10] EP Joubert *'"Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?*' (2013) 76 THRHR at 550; A Loubser '*Business rescue in South Africa: A procedure in search of a home*' 2007 XL CILSA at 153.
[11] Section 195 of the Companies Act 46 of 1926.
[12] *Ibid*.
[13] These writers include EP Joubert, Richard Bradstreet and Anneli Loubser.
[14] EP Joubert '*Business rescue in South Africa: a procedure in search of a home*' 2007 XL CILSA at 153.
[15] *Noordkaap Bpk v Schreuder* 1974 (3) SA 102 (A).

application for judicial management is denied, the court implicitly declares that the business is bankrupt, resulting in the liquidation and winding-up of the corporation. The problem that this rule creates in practice raises a few eyebrows as to why the legislature would set a regulation that is neither feasible nor expedient or cost-effective for a failing business.[16]

It is submitted that the legislature's actions were both controversial and unsatisfactory if the exercise of such a remedy will result in the firm's liquidation because this is precisely the situation that the company was attempting to prevent by filing the aforementioned application.

Second, a corporation had to demonstrate that, once placed under judicial management, it would continue to trade and be able to fully pay all of its debts to its creditors. This is yet another irrational barrier erected in front of a company because an insolvent company would seek to discharge and pay off as many debts as possible, and it is my opinion that agreements such as 'set-off and compromise' with creditors would have weighed in the favour of the company because it would be placed under judicial management for a shorter period and would have a better chance of yielding a higher return in profits to inject the much-needed funds into the company.

According to Richard Bradstreet,[17] the judicial management remedy was largely creditor-oriented because it concentrated more on the complete payment of creditors' debts than on keeping the company engaged in the economic arena. Furthermore, the majority of judicial managers were liquidators, implying that a creditor-focused management strategy would certainly result in liquidation, allowing creditors to receive the full amount owed to them. Even while creditors have a remedy in winding up a firm, the operation of a remedy in this manner demonstrates that the company is unimportant and that creditors are the focus.

Furthermore, and somewhat counterintuitively, an order placing a corporation under judicial management can only be issued if the company can demonstrate that it will be a 'successful concern.' The meaning of this expression asks the question, Will the firm be able to carry on business as usual, earn a profit, and pay its liabilities? It is a difficult issue to answer because the remedy necessitates far too much of an ailing organisation. A company seeking judicial management must demonstrate that it will be able to pay off all of its debts in full while still operating profitably. The solution, in my opinion, ignores the fact that a company seeking

[16] A Loubser '*The new business rescue: Will creditors sink or swim?*'(2011) 128 SALJ at 354.
[17] R Bradstreet '*Business rescue proves to be creditor-friendly: C J Claassen J's analysis of the new business rescue procedure in Oakdene Square Properties'* (2013) 130 (1) South African Law Journal at 352-83.

judicial management already has a large number of duties on its plate, and adding more will just push it closer to collapse. Failure to achieve this criterion is clear evidence that the company can no longer operate in the marketplace, resulting in the company's insolvency and eventual closure.

1.2.2 Companies Act 61 of 1973

The legal solution of judicial management has received a lot of criticism because it has not been used to keep any companies afloat and therefore, allowing them to reclaim their solvent position. Through the drafting of the new Companies Act, which would repeal the 1926 Act, the legislature was given the opportunity to correct the financial and legal losses caused by the remedy that had been ineffective for 47 years, nearly five decades of outright failure to assist financially distressed companies. The legislature surprisingly neglected to take into account any of the concerns and recommendations made about judicial management when the Companies Act 61 of 1973 was promulgated; the solution was directly imported into the new Act.[18]

Unfortunately, the 1973 Act's remedy remained ineffectual due to the onerous burden it imposed, with more and more enterprises trying to use it failing to fulfil their obligations and eventually facing insolvency. According to Bradstreet,[19] few companies were still using judicial management in 1980; hence, it is apparent that the remedy automatically led to liquidation, and that the decrease in its use suggested that corporations preferred liquidation as a first alternative when faced with financial difficulties. This is conclusive evidence that the cure has been tried and failed multiple times. Furthermore, by 1980, only about a quarter of the companies effectively placed under judicial management had escaped liquidation, implying that the bulk of defenceless companies were still liquidated.[20]

1.3 Companies Act 71 of 2008

The legislature only recently started making amendments to the remedy once it became clear through international jurisdictions that rescue platforms are and should be available and accessible to companies because of the crucial impact and contribution of companies.[21] The

[18] EP Joubert *op cit* note 10 at 552.
[19] R Bradstreet *op cit* note 17 at 353.
[20] *Ibid*.
[21] A Loubser '*Business rescue in South Africa: a procedure in search of a home*' 2007 XL CILSA at 553.

termination of a company's juristic status through judicial management from as early as 1926 clearly and devastatingly fell on deaf ears for South African company law jurisprudence.[22] Furthermore, rescue solutions have the advantage of quickly resolving a company's prospects and direction.[23]

The main concerns levelled against judicial management were met with recommendations aimed at providing ailing enterprises with a genuine second shot at solvency, one of which was to change the applicant's requirement to establish that there is a 'reasonable probability' to a 'reasonable possibility.'[24] The current Companies Act creates a new remedy in Chapter 6, and sections 129 (1) and 131 (4) (a)[25] contemplate that a financially distressed company can be placed under business rescue if the applicant can show that there are reasonable prospects of recovery of the business or that if the business is placed under business rescue,[26] it will yield a better return for creditors than in a situation where the business is not placed under business rescue.[27]

Furthermore, international jurisdictions influenced the development of the business rescue as a remedy because South African company law urgently required a development that cemented the notion that a business performs better and has a higher value when it is a going concern rather than when it is in liquidation.[28] This development is in line with section 7 (k) of the 2008 Enterprises Act, which states that the statute's goal is to '-ensure the effective rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.'[29]

The courts have preferred and approved of the business rescue procedure over judicial management because the requirement put on the petitioner is less onerous, as 'something less is required,' in comparison to the burdensome standard imposed by judicial management, which rendered the remedy ineffective from the start.[30] The applicant must prove the existence of two components in order to discharge this onus: the company is financially distressed[31] and

[22] R Bradstreet *op cit* note 17 at 353.
[23] M Pretorius & W Rosslyn-Smith '*Expectations of a business rescue plan: international directives for Chapter 6 implementation*' (2014) 18 South African Business Review, 109-39
[24] EP Joubert *op cit* note 10 at 554.
[25] Companies Act 71 of 2008.
[26] The standard of proof for business rescue is captivated in the phrase 'reasonable prospects', and it can be compared to judicial management's 'reasonable probability'.
[27] Section 128 (b) (iii) of Act 71 of 2008.
[28] *Ibid*.
[29] M Pretorius & W Rosslyn-Smith *op cit* note 23 at 109.
[30] *Southern Palace Investments v Midnight Storm Investments.*
[31] Section 129 (1) (a) of Act 71 of 2008.

there appears[32] to be a reasonable hope of saving it.[33] In the case of the former, section 128 defines 'financially distressed' as an appearance of a reasonable unlikelihood that a company will be able to make payments for all of its debts as they become due and enforceable in the next six months,[34] whereas the latter concept is not defined in the Act and is left to the courts to interpret which produces uncertainty.[35]

In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Southern Palace)*[36] held that the remedy is for a struggling business that can be recovered through the ordinary trade of the business under the supervision of a business rescue practitioner in one of the earliest applications for business rescue.[37] The courts have been cautious to place a company under business rescue after it had ceased trading long before it became financially distressed in subsequent applications.[38] In the case of *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd*; in re: *Mabe v Cross Point Trading 215 (Pty) Ltd* (Lidino)[39], the court stated that a company that gained profit through the procurement of tenders and has not traded in several years cannot possibly show a reasonable prospect of recovery because there is nothing to recover and there is no guarantee that a sufficient number of tender deals could be procured for the period that the business was placed under rescue, and thus, the court dismissed the application for lack of merit.[40]

Some high courts across the country have considered the interpretation of Chapter 6, resulting in several significant landmark rulings that have advanced and accelerated South African corporate law jurisprudence. The court in *Swart v Beagles Run Investments* (Swart)[41], in the first-ever recorded case of a business rescue application, regarded business rescue as a new remedy in South African law, in keeping with the purpose of the 2008 Companies Act, but when it came to the application of the requirements for business rescue, the court turned to section 427 of the 1973 Companies Act and dismissed the application on the grounds that the applicant failed to show that there would be a 'significant' increase in profits.[42]

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[32] *Ibid*.
[33] Section 129 (1) (b) of Act 71 of 2008
[34] Section 128 (1) (f) (i) of Act 71 of 2008.
[35] Y Kleitman & C Masters '*Better return for creditors- business rescue*' (2013) 8 Without Prejudice at 32.
[36] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments* 386 Ltd 2012 (2) SA 423 (WCC)
[37] *Ibid* para 23.
[38] *AG Petzetakis International Holdings v Petzetakis Africa*.
[39] *Mabe v Cross Point Trading* 215 (Pty) Ltd (2012) ZAFSHC
[40] *Ibid* para 20-25.
[41] *Swart v Beagles Run Investments* 2011 (5) SA 422 (GNP).
[42] *Ibid* para 40-45.

The court in the *Swart* judgment was heavily criticised for applying a repealed remedy to an application for a new form of relief, particularly the finding in terms of a phrase that is not found in Chapter 6 of the 2008 Companies Act,[43] and as a result, the first-ever proper interpretation of business rescue proceedings was achieved in *Southern Palace* case*[44]*, where it was held that the courts must be cautious of applying a strict standard to applicants brought down.[45] The court imposed certain conditions on the petitioner to establish that the planned rescue plan is not merely speculative in order to show that there are realistic possibilities of recovery.[46] Finally, the court mentioned in passing that if an application is dismissed due to a lack of reasonable prospects, the applicant is not prevented from filing another application after considering the suggested revisions made by the courts.[47]

In *Nedbank Limited v Bestvest 153 (Pty) Ltd*; *Essa & another v Bestvest 153 (Pty) Ltd & others* (Bestvest)[48], Gamble J confirmed the findings of Southern Palace, as well as providing an extensive and thorough explanation of the importance and necessity of business rescue, particularly advancing the opinion that a strong and swift deviation from the interpretation and application of judicial management for business rescue, so that the remedy is valid and operative for businesses.[49]

The court went so far as to define 'reasonable prospects' in this case as if referring to the requirements laid out in the *Southern Palace*.[50] The *Southern Palace's* standards have been criticized for establishing hard and fast rules for what constitutes a 'reasonable prospect,' placing a greater strain on applicants, and this criticism is legitimate because, in most cases where the requirements were implemented, the applicants were denied. The application was turned down. This posed a threat to the remedy as a whole, as it raised the prospect that it may be compared to judicial management.[51]

In *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* (Oakdene),[52] the court stated that, a court must evaluate the relevant evidence and make

[43] EP Joubert *op cit* note 10 at 558.
[44] *Southern Palace supra* note 36 para 28-31
[45] *Ibid* para 2-7.
[46] *Southern Palace supra* note 36 para 24.
[47] *Southern Palace supra* note 36 para 27.
[48] *Nedbank Limited v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC).
[49] *Ibid* para 18.
[50] *Nedbank v Bestvest supra* note 48 para 48.
[51] *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) para 28.
[52] *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA).

a value judgment that is consistent with the purpose of business rescue rather than formulating a checklist approach that leads to the granting of liquidation orders of companies, thereby covertly illustrating that the companies were better off having made no attempt to seek assistance from the courts.[53]

However, subsequent and more recent case law has revealed that courts are deviating from the standards and instead choose to assess the merits of the application. The court commented on 'reasonable prospects'[54] in *Koen v Wedgewood Village & Country Estate & others* (Koen)[55], ruling that rather than speculative or hopeful prospects, there must be compelling proof that a business will return to a condition of solvency where business rescue is allowed. In *Gormley v West City Precinct Properties (Pty) Ltd & another; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd & another* (Gormley)[56], the applicant failed to prove any reasonable chances of business rescue success (an application for business rescue was made solely for the purpose of pausing an application of the liquidation of the company). As a result, the application was denied.[57]

1.4 Importance of business rescue

According to Loubser, an efficient and well-functioning business rescue procedure has clear advantages for every country and every type of economy, but these advantages are even more relevant in developing countries where the preservation of jobs is of primary concern.[58]

The effective rescue of a financially distressed company has some socioeconomic benefits in that it results in transformation by providing conditions that allow the previously excluded black majority to participate more fully in the mainstream. As a result, the procedure aids in the retention and promotion of employment, particularly for previously disadvantaged persons.[59]

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[53] *Ibid* para 18-22.
[54] *Ibid* para 17-20.
[55] *Koen & another v Wedgewood Village & Country Estate & others* 2012 (2) SA 378 (WCC).
[56] *Gormley v West City Precinct Properties (Pty) Ltd & another; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd & another* (2012) ZAWCHC 33.
[57] *Ibid* para 10-15.
[58] A Loubser '*Business rescue in South Africa: A procedure in search of a home?*' 2007 40 (1) Comparative and International Law Journal of Southern Africa.
[59] P.C Osode '*Judicial implementation of South Africa and business rescue model: A preliminary assessment*' (2015) 4 (1) Penn State Journal of Law and International Affairs 460.

Business rescue is a notion with significant economic implications, any loopholes in the doctrine should be avoided, and efforts should be made to enhance the doctrine. The goal of this research is to see if business rescue is accomplishing its goal of assisting in the successful rehabilitation of enterprises in financial distress. This will be accomplished through an examination of the legal, economic, and societal implications of corporate rescue. Furthermore, the issue was chosen to see if there are any roadblocks or setbacks that are preventing the ideology from reaching its full potential with a major focus on how the doctrine is being abused in South Africa. These business rescue procedures should be protected to serve their intended purposes. Thus, this research will look at the legal, economic and social effects of business rescue.

1.5 Purpose of the study

Business rescue is most susceptible to abuse and exploitation by companies when they intend to evade the payment of debts. Companies undergoing restructuring are protected from legal action by third parties. Courts have been grappling with the misuse of the business rescue procedure, where some businesses were searching for a debt holiday. The primary goal of the study is to determine how business entities abuse the business rescue provisions and the reason for such conduct. Furthermore, to determine the remedy's strengths and limitations, as well as to give ideas for how to increase the doctrine's success rate and protect it from abuse. Business rescue is an essential idea that considers both economic and social benefits. As a result, rescue procedures should not be viewed as a last alternative, but rather as a tool that enterprises should use to their maximum potential.

1.6 Research methodology

This will be a desktop based research, based on the purpose of this study, an analytical research methodology is appropriate. The main sources consulted consist of legislation, case law, journal articles, textbooks, reports, and internet references. In addition, hereto, the writings of scholars who contributed to this aspect of the law will be consulted.

1.7 Issues to be examined

This dissertation outlines the abuse of business rescue as a corporate rescue procedure. The requirements under s 129 and s 131 of the 2008 Act and some of the defects and weaknesses experienced with chapter 6 of business rescue provisions are analysed. This will provide the necessary background and understanding of the historical background and current procedure of business rescue which could be blamed for its failure to function as an effective corporate rescue procedure, free from abuse. This is of particular importance as the study will mainly focus on the board resolution and court application in order to commence business rescue proceedings in terms of s 129 and s 131 of the 2008 Act. The main requirements of these sections of the 2008 Act will then be evaluated and weaknesses within the Act will be examined. Furthermore, this dissertation will provide recommendations on how to protect the sanctity of the Act.

Based on the purpose of this dissertation the following questions will be referred to:

- The main defects and weaknesses experienced with Chapter 6 of the business rescue provision
- How is the procedure open to abuse under s 129 and s131?
- Are there any recommendations applicable to improve the effectiveness of business rescue according to s 129 and s 131 of the 2008 Act?

1.8 Limitation of the study

The following study will be concentrated on the main legislative requirements of s 129 and s 131 of the 2008 Act. Evaluating business rescue proceedings as outlined in Chapter 6 of the 2008 Act in its entirety, could potentially be too broad and the study may not be able to deal with all the provisions comprehensively. Therefore, for the purpose of this study, only the main legislative requirements of s 129 and s 131 of the 2008 Act will be evaluated.

1.9 Structure of dissertation

CHAPTER 1: INTRODUCTION

Chapter one of this dissertation provides an introduction and background to the study. It provides a brief overview of the development of corporate rescue mechanisms in South Africa.

It also provides the research questions and objectives, the significance of the study, limitation of the study, research methodology and chapter outline.

CHAPTER 2: THE ABUSE OF BUSINESS RESCUE: COURT APPLICATION

In this chapter, the abuse of s 131 of the business rescue procedure is discussed. This is followed by an analysis of the requirements in terms of s 131 of the 2008 Act and how they are open to abuse. More importantly, reference is made to the problems experienced with business rescue applications through a court order.

CHAPTER 3: THE ABUSE OF BUSINESS RESCUE: ADOPTION OF A RESOLUTION

With regards to this chapter, reference is made to the business rescue procedure as defined in section 129 of the 2008 Act. This is followed by an analysis of the main legislative requirements under section 129 of the 2008 Act. Having considered the main legislative requirements under section 129 of the 2008 Act, it was noted that it may and has led to abuse of the business rescue procedure, which is also evaluated.

CHAPTER 4: RECOMMENDATIONS AND CONCLUSION

However, it is submitted that there are sufficient procedural and substantive measures in place to prevent abuse of the said procedure. This chapter concludes that business rescue provisions of s 129 and s 131 of the 2008 Act have addressed the main problems experienced with judicial management as a corporate rescue procedure. It is, therefore, a welcomed improvement as it allows the board of a company to adopt a resolution to commence business rescue without having to obtain a court's permission. Secondly, it allows for affected persons to apply to a court in order to obtain an order granting business rescue to commence. This chapter proposes recommendations that can be used to improve the practical efficacy of s 129 and s 131 of the 2008 Act and protect it from abuse.

CHAPTER TWO

THE ABUSE OF BUSINESS RESCUE PROCEDURE THROUGH THE COURT PROCESS

2.1 Introduction

Due to the simplicity with which business rescue procedures can be initiated, applicants have frequently done so even when they understand that there is no business to rescue and that a better return for creditors cannot be attained. In numerous cases, corporate rescue resolutions simply attempt to postpone the eventual doom of companies that are manifestly unable to pay their debts, as well as to purchase more time from creditors who are threatening and proposing liquidation.[60]

This chapter is aimed at dealing with instances where the abuse of the business rescue process has been dealt with by the courts. Through case law, the chapter is going to give examples of how such a progressive process can easily be abused and manipulated by parties who intend to use it for their own purpose instead of the purposes contemplated in s 128 (1).

Furthermore, a court application to initiate business rescue proceedings may be filed even after liquidation proceedings have been initiated against the company, and this will result in the liquidation proceedings being suspended until the court has either denied or granted the business rescue application, or until the business rescue proceedings have concluded. An opportunistic debtor business can file a business rescue application for the sole aim of postponing or suspending existing liquidation procedures.[61]

2.2 The moratorium

The instantaneous moratorium on creditors' claims against the company is one of the most dramatic effects of starting business rescue proceedings. Generally, not only may no legal or enforcement action by creditors against the financially distressed corporation be initiated, but

[60] A Loubser '*The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part2)*' 2010 (4) TSAR 501.
[61] A Loubser '*Business rescue in South Africa: A procedure in search of a home*' (2007) 40 (1) Comparative and International Law Journal of Southern Africa at 160.

such efforts may not be continued if they were already ongoing. Section 133 (1)[62] provides that:

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 within 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;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers; or

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee.

The 'general moratorium' is a type of temporary protection offered to companies in rescue proceedings in order to protect their interests. The moratorium is significant because it halts the enforcement of creditor rights against the debtor for the time being.[63]

2.2.1 Investec Bank Ltd v Bruyns[64]

With regards to this matter, the plaintiff sought summary judgment against the defendant for a debt of roughly R 11 million,[65] and the defendant's defence was that the business was placed under business rescue under section 131,[66] which meant that the plaintiff was prevented from bringing legal action against the company.[67] The court had to decide whether business rescue had started because the rescue application had not been decided yet,[68] and Rogers AJ ruled that it had started when the application for business rescue was filed.[69] The moratorium became applicable as a result of this finding, barring the application for summary judgment, but the

[62] Section 133 (1) of Act 71 of 2008.
[63] H Beukes '*Business rescue and the moratorium on legal proceedings*' (2012) De Rebus 34.
[64] *Investec Bank Ltd v Bruyns* (19449/11) [2011] ZAWCHC 423.
[65] *Ibid* para 1.
[66] Section 131 of Act 71 of 2008.
[67] *Bruyns supra* note 64 para 11.
[68] *Bruyns supra* note 64 para 12.
[69] *Ibid*.

rescue application had not been heard at that point, and there was no evidence that the rescue application would be granted, so the moratorium could not be used as a defence against summary judgment.

Cassim states that the automatic or immediate effect of the moratorium also includes legal actions that are already underway at the time the business rescue application is filed, such as liquidation proceedings to wind up the distressed company.[70] This is sometimes difficult for creditors because they are prevented from asserting their rights against the company; nevertheless, the moratorium does not take away the creditor's right against the company; rather, it just suspends the execution of such right until the rescue is completed.[71]

It has also been suggested that caution should be made by courts to prevent granting the moratorium an overabundance of powers that could have unintendedly far-reaching repercussions if it is implemented. According to Dominique Wasso,[72] the legislature [by adopting the rescue remedy] does not aim to amend the existing legislation more than is required in terms of deprivation of rights. Furthermore, Wasso warns against adding restrictive and detrimental responsibilities that the legislature did not expect, highlighting the fact that the legislature is still competent and in possession of law-making powers to expressly enact such measures.[73]

The duties and obligations levied on the business to carry out while placed under business rescue to 'guarantee the continuing existence of the company as a solvent entity' must be considered once the moratorium has been effective. This is critical for South African jurisprudence in terms of providing clear guidelines since it will signal a departure from an utter disregard for judicial management. South Africa, like most worldwide concepts that represent societal changes in a territory or region, has been late to the race of corporate rescue treatments, and hence trails behind the countries that have incorporated this global concept.[74]

It is submitted that moratorium is meant to cause the business rescue plan to be successful, or at least create a platform where the future of the struggling company becomes clear. However, it is seen that business entities in South Africa use this principle in order to escape liability from creditors.

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[70]Cassim FHI '*Contemporary Company Law*' (2012) 2ed Juta: Cape Town at 792
[71] R Bradstreet *op cit* note 17 at 371.
[72] Wasso D '*Business rescue: the position of secured creditors*.' (September 2014): 34 at 35.
[73] Wasso *op cit* note 72 at 36.
[74] Pretorious & Rossyln-Smith *op cit* note 23 at 109.

2.2.2 Gormley v West City Precinct Properties (Pty) Ltd & another; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd & another (Gormley)[75]

With regards to this matter, the respondent had a due and enforceable debt of R 219 million to the applicant as a result of a prior loan agreement between the parties, and the respondent had no cash flow because it ceded any source of income to the applicant, so Anglo Irish Corporation filed an application to liquidate West City Precinct Properties.[76] Gormley then filed an application to place the respondent under business rescue, claiming that the respondent would be solvent if the moratorium against the first applicant (Anglo Irish Corporation) was only in place for three to five years, allowing the respondent to repay the first applicant, the respondent's largest creditor.[77]

The court thus determined that the respondent was not truly financially distressed but rather, it was insolvent and thus the application was dismissed by the court. Furthermore, the court found that, even if the company was in financial distress, the second applicant (Gormley) did not have a business plan in mind that would improve the respondent's financial situation;[78] rather, the rescue application was made solely for the benefit of the moratorium that would prevent the first applicant from initiating liquidation proceedings for an unreasonable period of time.[79] With regards to the five-year moratorium, the court determined and held that Chapter 6 contemplates a short-term strategy for business rescue so that creditors' interests are not unduly hampered.[80]

Furthermore, the court also warned against such a fruitless application because no creditor would agree to such a long moratorium and granting such an application solely for the moratorium would send a message to businesses that business rescue may be used to delay and abuse creditor's rights and escape liquidation. The corporation was placed in provisional liquidation after the application was effectively dismissed.

It is submitted, that the effect of the moratorium, along with the onerous requirement of justifying a company's 'rescue' through a secondary aim, makes the corporate rescue process vulnerable to exploitation and abuse. This is because, by filing a resolution for business rescue,

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[75] *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).
[76] Ibid para 3.
[77] *Gormley supra* note 75 para 4.
[78] *Gormley supra* note 75 paras 10- 11.
[79] *Gormley supra* note 75 paras 12 - 14.
[80] *Gormley supra* note 75 para 5.

directors will be able to use the process to strategically avoid paying the company's creditors (at least for a long time) and avoid the company's liquidation and the consequences that follow, such as insolvency inquiries, the setting aside of voidable dispositions, and directors facing personal liability.

2.3 Instances where the court refused the application made in abuse of business rescue provisions

2.3.1 Maryne Estelle Syme N.O & Others v Southern Sky Hotel and Leisure (Pty) Ltd & Others[81]

The recent case of *Maryne Estelle Syme N.O & Others v Southern Sky Hotel and Leisure (Pty) Ltd & Others*, which was heard in the Limpopo Division of the High Court, Polokwane(Court), demonstrates the abuse of the business rescue procedure. The main issue before the Court was whether the respondent business in liquidation, *Southern Sky Hotel and Leisure (Pty) Ltd* (the company), should be withdrawn from its liquidation proceedings and instead placed into business rescue.

The liquidators of the company opposed the order for business rescue sought by the applicant and an intervening party (the applicants), claiming that there was no chance of saving the company and that the application for business rescue was simply a ruse to halt the liquidation proceedings in order to derail the sale of the company's immovable property (scheduled to take place in the near future). The Court stated that a business rescue applicant must show that he or she has a realistic chance of accomplishing one of the two aims outlined in section 128(1)(b) of the Act.[82] That is, a business rescue plan must strive to either restore the company to a solvent 'going concern' or, at the very least, provide creditors and shareholders with a greater return than a liquidation process would provide.[83]

While the majority of creditors oppose a proposed business rescue program (as in this instance), the Court must take that into account when deciding the case. The Court determined that after reviewing the draft proposed business rescue plan attached to the business rescue application, it is obvious that the plan does not have any reasonable and realistic prospects for the company's recovery. It is completely reliant on speculative and uncertain outcomes. The

[81] *Maryne Estelle Syme N.O & Others v Southern Sky Hotel and Leisure (Pty) Ltd & Others* (7535/2020) [2020] SA 254 (LT).
[82] Section 128(1)(b) of Act 71 of 2008.
[83] *Ibid* para 17.

planned business rescue plan's contents were highly speculative, far-fetched, and fanciful because the company was nearly never in a position to produce profit,[84] according to the Court.

The court noted that since 2013, four different winding-up applications had been filed seeking the company's winding-up.[85] In 2016, a business rescue plan was rejected by creditors, who voted against the plan's acceptance. The applicant creditor was one of these creditors, and he was successful in his application for the company's liquidation. The Court ruled that there is no doubt that in this case, this applicant creditor will vote against the business rescue plan.[86]

The Court determined that, based on the evidence presented, nothing had changed since 2012 in terms of the firm's ability to pay its debts, and that the company was clearly not capable of being saved. A prior attempt at business rescue was made in 2016, but it failed miserably.[87] It only resulted in prolonged litigation at the request of Ms. Rinderknecht (the company's only director and shareholder) and dissatisfied creditors. The application to put the company into business rescue was contrived and done purely for the goal of obstructing the liquidation procedure and prolonging the downfall of an insolvent company, according to the Court. The Court made it clear that business rescue is not intended for terminally ailing businesses or to thwart liquidation processes.[88]

It is submitted that the *Southern Sky* case demonstrates how the company rescue plan can be exploited by opportunistic debtors attempting to take advantage of the benefits and protections of business rescue for illegitimate motives. The judgment makes it plain that business rescue should only be undertaken if there is a genuine endeavour to meet the objectives of business rescue. The case also demonstrates how the court can intervene and protect creditors' rights. Our courts will continue to be on the lookout for overzealous board of director decisions to dump a teetering company into the ostensibly secure Chapter 6 lifeboat.

[84] *Ibid* paras 20-21.
[85] *Ibid* para 28.
[86] *Ibid* para 32.
[87] *Ibid* para 14.
[88] *Ibid* para 29.

2.3.2 *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[89]

With regards to this matter, the courts have been wrestling with the abuse of the business rescue procedure, where some companies have simply been looking for a debt holiday. The abuse of the business rescue procedure was very evident in the case of *Oakdene*, the first SCA case on business rescue. This case raised the important question of where the division lies between the use and abuse of the procedure. The facts of the *Oakdene* case are well known. The court held that it is clear from the definition of 'business rescue' in section 128(1)(b)[90] of the Act that the business rescue plan contemplates a primary and a secondary goal. The term 'business rescue' was held to incorporate not only plans to restore the company to solvency, but also plans that aim solely at securing and facilitating a better return for the creditors or shareholders of the company than would result from immediate liquidation. Business rescue may be harnessed solely to pursue the secondary goal.[91]

It is submitted that, despite the SCA's findings in *Oakdene Square Properties*, the term 'reasonable possibility of rescuing the company' remains controversial. It would have been beneficial if the court could have devised a criteria or criterion for determining when a company is viable enough to be rescued. A corporation's board of directors is frequently unable to assess whether the company has a reasonable chance of being rescued. As a result, as previously stated, the pre-assessment is critical in supporting the board in deciding whether or not to initiate business rescue procedures. It is suggested that the legislature add a provision to s 128 of the Act defining what constitutes a 'reasonable prospect' of saving a corporation. Alternatively, it is suggested that the CIPC create and publish a handbook that establishes minimum requirements and specifies when a reasonable likelihood of a firm being saved is imminent to aid the board of directors.[92]

2.3.3 *Koen & another v Wedgewood Village Golf & Country Estates & others*[93]

In this matter, the financially distressed company was facing liquidation proceedings, which were automatically paused when an application for business rescue was filed, and a separate

[89] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 (27 May 2013).
[90] Section 128(1)(b) of Act 71 of 2008.
[91] *Oakdene supra* note 53.
[92] M Pretorius '*Business rescue status quo report'* available at http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf (accessed on 18 November 2021) 55-56.
[93] *Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd & Others* 2012 (2) SA 378 (WCC).

motion to shift the rescue proceedings from one High Court to another was filed in the meanwhile. When the applicant had to make the case for reasonable chances of recovery, the main point was that an anonymous investor was willing to put money into the company if the liquidation proceedings were dropped.[94]

Furthermore, the application for business rescue was not genuine, according to Binns-Ward J, because the Eastern Cape High Court would have been competent to hear the application if the company had reasonable prospects of recovery, and the transfer of proceedings was essentially a delay tactic to further suspend the liquidation proceedings.[95] Furthermore, the investment of an anonymous individual subject to the abandonment of the liquidation proceedings was found to be not only a needless restriction on the rights of other creditors, but also an attempt to 'twist the court's arm' into allowing the rescue application.[96]

It is submitted that, to be successful in the application, the applicant must be able to present a solid evidence foundation to the court that supports the existence of a reasonable chance that the business rescue objectives can be met. This meant that broad assertions and speculative proposals would not be enough to save a corporation.

2.3.4 Kalahari Resources (Pty) Ltd v Arcelormittal S.A & others (Kalahari)[97]

With regards to this matter, the respondent, who owned 50% of the shares in a company called 'Kgalagadi Manganese (Pty) Ltd,' filed a business rescue application, to which the applicant, who owns 40% of the shares in the same company, filed a counter-application under section 130[98] to oppose the rescue application. The respondent argued that the company was financially distressed and that it would perform much better trading under the guidance and facilitation of a business rescue practitioner,[99] whereas the applicant argued that business rescue was inappropriate because the company's financially distressed status was primarily caused by the respondent, who purposefully withheld its obligations under the shareholder's agreement that had been agreed upon when the company was formed.[100]

Furthermore, following a review of what was presented to the court, the court agreed with the applicant's assertions that the respondent was the cause of the company's financial troubles by

[94] *Ibid* para 9.
[95] *Koen supra* note 93 para 8.
[96] *Koen supra* note 93 paras 9, 10, 17 & 27.
[97] *Kalahari Resources (Pty) Ltd v Arcelormittal S.A & others* 2012 (3) All SA 555 (GSJ)
[98] *Ibid* para 3.
[99] *Kalahari supra* note 97 para 69.
[100] *Kalahari supra* note 97 para 70.

delaying paying its debts to the company,[101] placing the company and its creditors at risk.[102] As a result, the court determined that this failure to perform and seeking relief from the court was an abuse of the court process, and struck the counter-application from the record so that it could rule on the tragic business rescue case.[103]

2.3.5 Absa Bank Ltd v Newcity Group (Proprietary) Ltd; Cohen v Newcity Group (Proprietary) Ltd & another (Newcity)[104]

The applicant (Absa) and the respondent entered into an R30 million loan arrangement on January 20, 2010, so that the respondent could build, own, and operate a hotel.[105] However, the loan was not repaid, and the first applicant filed an application to liquidate the respondent on November 29, 2011.[106] The second petitioner (Cohen) moved for the respondent's business rescue on February 6, 2012, delaying liquidation proceedings until June 12, 2012. The second applicant withdrew the rescue application on June 11, 2012,[107] admitting all of the material facts relating to the respondent's refusal to repay the loan[108] and that the rescue application was only a stalling tactic to allow the respondent to get cash to repay the debt.[109] The interim liquidation order was obtained, and the deadline for returning was set for July 31, 2012.[110]

The second applicant further filed a new rescue application for the respondent on July 30, 2012, with the condition that it be withdrawn if the court discharged the provisional liquidation. The first applicant opposed the rescue application, claiming it was an abuse of the court process.[111] The court determined that the rescue application was not genuine since the second applicant conceded that the first application was a delay strategy, the second application is conditional, and the timing of the rescue applications' launch and withdrawal was suspicious.[112] The court eventually determined that the rescue application lacked validity and consequently denied it.[113]

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[101] *Ibid*.
[102] *Ibid*.
[103] *Kalahari* supra note 237 para 74.
[104] *Absa Bank Ltd v Newcity Group (Proprietary) Ltd; Cohen v Newcity Group (Proprietary) Ltd & another* 2013 (3) All SA 146 (GSJ).
[105] *Ibid* paras 4-5.
[106] *Ibid* par 9.
[107] *Ibid* para 10-12.
[108] *Newcity Group supra* note 253 para 10.
[109] *Ibid*.
[110] *Ibid*.
[111] *Newcity Group supra* note 104 para 15.
[112] *Newcity Group supra* note 104 para 22.
[113] *Newcity Group supra* note 104 para 28.

However, the respondent had made an effort to return the loan, and by the time the second rescue application was heard, 30% of the amount had been paid off.[114] The court determined that, despite the abusive rescue application and ulterior motives, the second applicant genuinely wanted to save the respondent's business, and instead of granting a final liquidation order, the court discharged the provisional liquidation order on the condition that the respondent repays the loan, and that if the respondent defaulted, the first applicant could seek a liquidation order from the court.[115]

2.3.6 Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd, In re: Mabe v Cross Point Trading 215 (Pty) Ltd (Lidino)[116]

The respondent had procured tenders and the applicant was a contractual company that worked with it. The applicant submitted an application to have the respondent liquidated on May 25, 2012,[117] and the respondent's director filed an application for the respondent's business rescue on July 25, 2012, the day before the liquidation hearing.[118] One of the director's claims was that the applicant was attempting to liquidate the respondent because the former owed the latter money for labour done, which the applicant instantly refuted.[119] The court determined that the respondent had no employees and had not recently secured any tenders,[120] and that there was no convincing evidence that the respondent might be saved.[121] The court further informed the respondent that the rescue application was not the best way for the company to pursue the debt that the applicant purportedly owes the respondent, and that the remedy of oppressive or detrimental conduct under section 163 of the 2008 Companies Act[122] would be a better option.[123]

I submit that, the courts exercise caution in their judgment, ensuring that they 'sift the good from the bad' when it comes to business rescue cases, avoiding the practice of 'rubber stamping' applications without evaluating the merits of each one. The courts are strict in ensuring that frivolous applications do not get past the first hurdle, as evidenced by the above-

[114] *Ibid* paras 25-26.
[115] *Lidino supra* note 116 para 6.
[116] *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd , In re: Mabe v Cross Point Trading 215 (Pty) Ltd* (2130/2012) [2012] ZAFSHC 155 (23 August 2012)
[117] *Ibid* para 3.
[118] *Lidino supra* note 116 para 6.
[119] *Lidino supra* note 116 para 13.
[120] *Ibid* para 21.
[121] *Lidino supra* note 116 para 23.
[122] Section 163 of Act 71 of 2008.
[123] *Lidino supra* note 116.

mentioned case law, which states that the courts will not entertain applications that are intended to take advantage and abuse the rescue process, and thus the courts strive to grant applications that contemplate the remedy outlined in Chapter 6 of the Companies Act.[124] Parties seeking business rescue have been advised to avoid assuming constraints that the legislation did not intend.

The courts in *Lidino* and *Newcity* Group have not deviated from enacting more suitable remedies in cases when the court process has been abused. The concept of a moratorium provides several benefits for a business seeking business rescue, such as giving it time to develop a rescue plan that is intended and trusted to quickly transform a company's commercial trajectory.[125] The disadvantage of the flexibility anticipated in section 132 (3)[126] is that there is basically no time limit specified for the moratorium's operation, implying that it may last indefinitely, contradicting the legislature's desire for a quick and efficient method. This is because the moratorium is aimed at businesses, it provides no recourse for those who are affected; it just suspends their rights.

The aforementioned cases indicate the manner in which business rescue procedures can be exploited and abused by opportunistic debtors attempting to take advantage of the benefits and protections of business rescue for ill-founded reasons. The judgments make it clear that a business rescue procedure should only be initiated if it is a genuine attempt to achieve the goals of business rescue, and that pursuing business rescue to achieve a company winding-up to avoid the consequences of liquidation proceedings is not legitimately achieving the goals of business rescue.

These cases indicate how the business rescue principle can be misinterpreted and abused, and how it can be utilized to wind up a company in a more easy and efficient manner. It also suggests that courts will decline to allow corporate rescue applications if the benefits of doing so are exceeded by the costs of liquidation. The *Oakdene* case demonstrates how the court can intervene to protect creditors' interests by thoroughly explaining the conditions for business rescue and how they should be applied, as well as dismissing the application if there has been a procedural error.

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[124] Y Kleitman '*Evolving business rescue' (2014) 7 Without Prejudice at 29; Blair Wassman* 'Business rescue: getting it right' (2014) 2 De Rebus at 37; Alex Elliott & Kylene Weyers 'Hot off the business rescue press' (2015) 7 Without Prejudice 115 at 58.
[125]Wassman B '*Business rescue: Getting it right'* (Jan/ Feb 2014) 36 De Rebus at 37.
[126] Section 132(3) of Act 71 of 2008.

CHAPTER THREE

THE ABUSE OF BUSINESS RESCUE PROVISIONS: SECTION 129 OF THE COMPANIES ACT.

3.1 Introduction

The Companies Act 71 of 2008 section 129 is an innovative provision that sets out the procedure to commence business rescue by passing a board resolution, unfortunately, like s 131 this section is also prone to abuse by companies seeking to evade creditors. In evaluating the abuse of s 129 of the 2008 Act, only the mandatory requirements of this provision will be discussed. This chapter will afford the reader detailed insight into what business rescue abuse entails in respect of s 129. Furthermore, there are certain requirements that must be met when the board of a company voluntarily resolves to commence business rescue proceedings in terms of s 129. In addition, this chapter will provide an overview of the business rescue court cases that have dealt with the abuse of s 129 with reference to well-articulated academic writing relating to the matter.

3.2 Section 129 resolution: Voluntary business rescue application

Chapter 6 of the 2008 Act establishes a new corporate rescue mechanism known as business rescue for businesses in financial trouble. Due to the failure of judicial management as a corporate rescue method under the 1973 Act to achieve the expected outcome that the lawmakers may have envisioned, the business rescue was replaced as a corporate rescue technique.[127] Section 129 of the 2008 Act is a novel provision that lays out the steps for commencing a business rescue through a 'board resolution'. Only the key provisions of s 129 will be covered in this evaluation.

[127] GM Museta '*The development of business rescue in South African law*' (published LLM thesis, University of Pretoria, 2011) 1.

As previously stated, business rescue can be initiated by the company's board of directors[128] or by a court order.[129] The mechanism for initiating business rescue by a board decision is outlined in s 129 of the 2008 Act.[130]

According to section 129(1) of the 2008 Act:[131]

the board of a company may resolve[132] that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe[133] that –

(a) the company is financially distressed;[134] and

(b) there appears to be a reasonable prospect[135] of rescuing the company.[136]

Therefore, all that is required for a company to commence business rescue proceedings is a resolution by the board, which amounts to a resolution adopted by a simple majority.

According to Levenstein,[137] any board of directors faced with the issue of whether or not to vote a resolution placing a business into business rescue must consider the unique factual matrix that the company is confronted with at the time. The board is not given any precise rules or checklists to help them make such a judgment.[138] In practice, when deciding to initiate business rescue proceedings, a company's board of directors is usually cautious.[139] They would usually work with the chosen business rescue practitioner to undertake a pre-assessment of the company to determine whether it is a good candidate for business rescue proceedings.[140]

The reason for a voluntary path is that no one is in a better position to decide whether a firm is financially troubled than its board of directors.[141] As a result, the sooner a company seeks

[128] Section 129 of Act 71 of 2008.
[129] Section131 of Act 71 of 2008.
[130] Section 129 of Act 71 of 2008.
[131] Section 129(1) of Act 71 of 2008.
[132] PM Meskin, PAM Magid & A Boraine (eds) '*et al Insolvency law'* (2016).
[133] P Delport, PM Meskin (ed) & Q Vorster '*et al Henochsberg on the Companies Act 71 of 2008*' (2016) 459.
[134] Section 128(1)(f) of Act 71 of 2008.
[135] Section 131(4) of Act 71 of 2008.
[136] Section 129(1) of Act 71 of 2008.
[137] E Levenstein '*An appraisal of the new South African business rescue procedure*' (published LLD thesis, University of Pretoria, 2015) 308-309.
[138] E Levenstein '*An appraisal of the new South African business rescue procedure*' (published LLD thesis, University of Pretoria, 2015) 308-312.
[139] *Ibid*.
[140] *Ibid*.
[141] *Lazenby v Lazenby Vervoer VV and Others* (M328/2014) [2014] ZANWHC 41 paras 20 - 23.

business rescue aid, the better chance it has of being saved.[142] A business's board of directors may initiate business rescue procedures if they have reasonable grounds to believe the company is in financial trouble and has a reasonable chance of being saved.

Furthermore, it must be noted that, if liquidation proceedings have already been launched by or against the company, a board resolution beginning voluntary business rescue proceedings cannot be enacted.[143] This is to prevent a company's board of directors from blocking a liquidation filing by passing a business rescue resolution. The resolution will have no force or effect until it is lodged with the CIPC after it has been adopted. [144]

Secondly, the board of a company is prohibited from adopting a resolution to place a company under business rescue as a result of the beginning of liquidation proceedings prior to such a resolution being approved under s 129 (2)(a).[145] However, liquidation proceedings can be transformed into business rescue proceedings if an affected individual[146] makes a court application.[147]

According to s 129(5)(a) of the 2008 Act:[148]

If a company fails to comply with any provision of subsection (3) or (4) of 2008 Act-

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity…[149]

This indicates that if the board fails to follow the procedural requirements, the board resolution approved will become null and void. However, due to a lack of clarity and the practical implications of the word 'lapses' and is a nullity, several contradictory decisions were made.[150] The SCA finally resolved this ambiguity in *Panamo Properties (Pty) Ltd and Others v Nel N.O. and Others*[151], holding that non-compliance with procedural requirements does not automatically result in the business rescue proceedings expiring and becoming invalid.[152]

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[142] P Delport, PM Meskin (ed) & Q Vorster et al *'Henochsberg on the Companies Act 71 of 2008'* (2016) 454.
[143] *First Rand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) para 17.
[144] Section 129(2)(b) of Act 71 of 2008.
[145] J Krige '*Frustrating the vultures lunch*' (2013) 13 Without Prejudice 21.
[146] Section 132(1)(b) read with section 131 of the 2008 Companies Act.
[147]*Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA).
[148] Section 129(5) of Act 71 of 2008.
[149] *Ibid*.
[150] *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique Et Technologies Embarquées* SAS Case No: 72522/11 (GNP) para 26 and 27
[151] *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA).
[152] *Ibid*.

3.3 Abuse of section 129 of Act 71 of 2008

During the business rescue procedure, businesses in financial difficulties are afforded several procedural and substantive safeguards and advantages under Chapter 6 of the 2008 Act. The technique has sadly been abused due to the low entrance barriers and alluring array of benefits and protections.[153]

The procedure has been hampered by the unclear phrasing of the regulations regulating business rescue proceedings. This negative influence makes it difficult to comprehend and conduct business rescue procedures. As a result, there is a lot of misunderstanding about what a business rescue was, and it gave litigious parties a lot of room to exploit discrepancies in the Act.[154]

Therefore, this would in turn permit applicants to make technical arguments targeted at slowing down the business rescue process or receiving benefits not covered by the law's wide intent.[155]

However, the Act includes provisions intended to counteract the very real risk of company boards abusing their authority to initiate business rescue proceedings and appoint a business rescue practitioner. The ability to dispute a resolution made by the company's board of directors provides important protection to creditors. Any person who has been harmed by the resolution may petition the court to have it overturned on the grounds that there is no reasonable basis to believe the company is financially distressed, that there is no reasonable prospect that it will be rescued, or that the company has failed to follow the procedural requirements set out in s 129.

The following section to come will refer to cases and judgments which will highlight in what manner business rescue proceedings have been exploited and abused in South Africa. In addition, these instances will illustrate how South African courts have dealt with the abuse of the method.

3.4 Instances where section 129 has been abused

[153] A Elliott '*The abuse of business rescue: Beware the serial debtor'* available at https://www.hoganlovells.com/en/publications/the-abuse-of-business-rescue-beware-the-serialdebtor accessed 20 November 2021.
[154] *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 1.
[155] *Ibid*.

3.4.1 Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd And Others[156]

The applicant (Standard Bank) consented to five facility agreements (collectively referred to as the "Agreement") with C and E Engineering (Pty) Ltd (Company). Standard Bank had a cession of the Company's book debts and a General Notarial Bond over all of the Company's movable property, among other kinds of security. The situation swiftly deteriorated when the Company broke the agreement, resulting in an R44 million debt to Standard Bank.[157]

Standard Bank, therefore, filed for an urgent *ex parte* application for a perfection order, claiming that it was concerned that the Company would resort to business rescue. On July 14, 2020, a perfection order was granted, with a return date set for the order to be verified as final at a later date.[158]

However, it was discovered that Standard Bank was missing an important piece of information: The Company's board of directors had previously voted to initiate business rescue proceedings without acknowledging Standard Bank.[159] The resolution was supported by written statements from the directors stating that the Company was in business rescue as of July 7, 2020. To make matters seemingly unfortunate, the board of directors, realised that the company had reached a dead end, and moved R1.8 million from a Standard Bank overdraft account to specific businesses linked with the directors.[160]

The Court now had to consider two linked and urgent applications: first, the Company's application to have the perfection order obtained by Standard Bank discharged; and second, the Company's application to have the perfection order obtained by Standard Bank released.[161] Second, Standard Bank has filed an action with the court to have the directors' resolution placing the company into business rescue overturned and the business rescue converted to provisional liquidation.[162] The material issues in both cases, according to the Court, first, are the validity of the board resolution placing the company into business rescue and second whether the business rescue procedure started by that resolution should be continued or terminated.

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[156] *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd And Others* [2020] ZAGPJHC 255.
[157] *Ibid* para 1.
[158] *Ibid* para 2.
[159] *Ibid* para 15.
[160] *Ibid* para 12.
[161] *Ibid* para 19.
[162] *Ibid* para 22.

Furthermore, section 130 (5) of the Companies Act of 2008, according to the Court's discretion,[163] is particularly pertinent to the case. This section provides and stipulates when a court might overturn a board resolution placing a company into business rescue. When evaluating this matter, the Court focused on whether it would be just and equitable to do so, taking into account whether the company had a reasonable chance of being rescued and the company's integrity. The Court determined that the company was reliant on the continuous use of the overdraft facility, or its book debts, in order to continue to trade, and more specifically, on Standard Bank's readiness to give additional financial support under the agreement, based on the parties' correspondence.[164]

Standard Bank had previously stated that it would not be willing to issue any additional facilities to the Company, which was general knowledge. As a result, Standard Bank had no intention of providing post-commencement financing. The only other source of funding would be the collection of book debts, which would require Standard Bank's permission, which Standard Bank has declared it will not grant.[165]

The Court also stated that the directors failed to establish in their sworn affidavits that the company had a reasonable chance of being saved, which is a key statutory prerequisite for business rescue. The Court concluded that there was simply no evidence presented to support the judgment that the corporation could be rescued, let alone that such a rescue was even possible.[166]

Furthermore, on the second point, the Court found sufficient evidence that the company's board resolution was not made in good faith. The company and Standard Bank were in continuing negotiations prior to the start of business rescue to come to an agreement on how the company could meet its commitments under the agreement. The company has not followed through on its past promises. Nonetheless, the parties appeared to have discovered some hope of reaching an agreement during their talks. Rather than pursuing it, the Board of Directors of the company accepted the resolution without consulting Standard Bank.[167]

The Court determined that the information presented to it was adequate to find that the directors used a purposeful tactic to secretly approve the resolution in order to block Standard Bank's

[163] *Ibid* para 38.
[164] *Ibid* para 48.
[165] *Ibid* para 51.
[166] *Ibid* para 55.
[167] *Ibid* paras 58 to 61.

exercise of its rights. The fact that the directors failed to notify Standard Bank that the Company was in business rescue, even after becoming aware of Standard Bank's perfection order, bolstered this inference. Furthermore, and perhaps most importantly, after the resolution was passed, the directors moved R1.8 million from the Company's overdraft account, increasing Standard Bank's exposure to the Company.[168]

Therefore, the court decided that setting aside the resolution was just and equitable, effectively ending the company's rescue procedures. The Court also confirmed that the perfection order was final.[169]

It is submitted that; this case raises the question and concerns of whether the statutory structure governing company rescue adequately protects creditors from abuse without requiring them to seek redress via our courts. While the goals of corporate rescue are commendable, such as ensuring the ongoing survival of a financially ailing company and the protection of valuable employees, the procedure is frequently abused, leaving creditors out of money. Legislation must address this issue.

3.4.2 Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others[170]

With regards to the case of *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others* the court held that it became a common cause that the respondent's resolution did not comply with, among other things, s 129(3)(a) of the 2008 Act, and that the resolution was irregular, void, and of no force and effect. The court found that the respondent's resolution, along with the respondent's failure to comply with s 129, showed the respondent's intention to avoid paying the applicant the amounts due and abuse the business rescue procedure.[171]

3.4.3 Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others[172]

The Supreme Court of Appeal (SCA) in this matter dealt with the commencement of business rescue proceedings under s 129 of the Act in *Panamo Properties (Pty) Ltd and Others v Nel*

[168] *Ibid* paras 62 to 65.
[169] *Ibid* para 84.
[170] *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others* (812/2012) [2012] ZAECPEHC 39.
[171] *Ibid* para 26.
[172] *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA)

N.O. and Others.[173] The court made a judgement on the impact of wilful non-compliance with procedural rules on the business rescue procedure.[174] The court dismissed the business rescue proceedings due to the respondent's wilful non-compliance with the procedural requirements. The court further determined that the respondent's filing of business rescue proceedings was exclusively for the purpose of delaying the transfer of a property.[175] The court labelled the respondent's actions as a delay strategy including the unethical use of legal technicalities for personal gain and abuse of the business rescue provision.[176]

It is submitted that, the SCA's decision in *Panamo* is a clear effort by the court to limit the misuse and abuse of business rescue proceedings and to prevent applicants from using technical concerns to undermine the business rescue process. It is obvious that the provisions of the 2008 Act, as well as those under Chapter 6, offer remedies to prevent creditors or those who stand behind the company, in the form of its shareholders and directors, from stifling business rescue operations.[177]

It is submitted that, as a result, some remedies granted in the Act may be used to prevent abuse, as court intervention on the application is always available to any stakeholder. However, whether the costly and time-consuming solution of getting a court order will prove to be an effective weapon against abuse is disputed. Even so, making it too simple to overturn a board's choices will almost certainly jeopardize the business rescue's viability. Affected parties must consequently overcome significant obstacles in order to avoid business rescue actions. The entire business rescue application hinges on the court's discretion, and the court has the authority to dismiss a company rescue application if it feels it is illegal and ill-founded. It is important that the business rescue provision is safeguarded from abuse to protect the sanctity of the Act.

[173] *Ibid* paras 5 and 29.
[174] *Ibid* para 4.
[175] *Ibid* para 5.
[176] *Ibid* para 5.
[177] *Ibid* para 34.

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSION

4.1 Introduction

It is apparent from the preceding analysis that the South African business rescue system aims to ensure the long-term viability of a corporate enterprise by giving financially distressed companies a 'lifeboat'. As a result, the system caters to society while also attempting to build the country's economy by conserving jobs and luring investors to struggling businesses. Business rescue is vital in South Africa as it is important to improve the devasting economy caused by the covid-19 pandemic. When a financially challenged firm applies to be placed under business rescue, the Companies Act 71 of 2008 clearly lays forth the standards that must be completed by the applicant. Despite this, it is claimed that the Companies Act 2008's omission to offer certain instructions on some of the requirements has resulted in some interpretation strain on the courts which has led to the abuse of the provision.[178]

The Companies Act of 2008 was enacted with the primary goal of establishing a functional rescue mechanism. Unlike judicial management, business rescue has equipped the country with an effective rescue mechanism. However, there are still certain flaws in the system that may need to be addressed.[179] The most important flaw has been discussed above, the business rescue procedure is susceptible to abuse by business entities that want to evade creditors and financial liability. Therefore, it is of utmost importance that this dissertation not only focuses on the abuse of the procedure but also to provide recommendations in order to protect the sanctity of the Act.

4.2 What the Act does to safeguard the business rescue provisions

The Act contains provisions intended to counteract the very real risk of corporate boards abusing their authority to initiate business rescue proceedings and appoint a business rescue practitioner.[180] The ability to contest a resolution adopted by the company's board of directors

[178] E Levenstein, '*Business rescue in South Africa: Shortcomings, suggestions and possible amendments to Chapter 6 of the 2008 Companies Act*' 2018 (2) CR 8.
[179] Cassim *et al op cit* note 70 at 785.
[180] Cassim *et al op cit* note 70 at 787.

provides significant protection to creditors. Any person who has been harmed by the resolution may petition the court to have it overturned on the grounds that there is no reasonable basis to believe the company is financially distressed, that there is no reasonable prospect that it will be rescued, or that the company has failed to follow the procedural requirements set out in s 129.

It is submitted that, as a result, various remedies established in the Act may be used to prevent the abuse and exploitation, as court intervention on the application is always available to any stakeholder. However, whether the expensive and time-consuming solution of getting a court order will prove to be an operative weapon against abuse is disputed. Furthermore, making it too simple to overturn a board's choices will almost certainly jeopardize the business rescue's viability. Affected parties must consequently overcome significant obstacles in order to avoid business rescue actions.

Furthermore, the most crucial requirement for commencing business rescue proceedings is that the company has a reasonable prospect of being saved. Courts can determine whether a corporation is honestly striving to fulfil the objectives of business rescue or if it has an ulterior motivation such as abusing the provision based on the justifications supplied.[181] The entire business rescue application lies on the court's discretion, and the court has the jurisdiction and capacity to dismiss a business rescue application if it feels it is illegal, ill-founded and done in order to abuse and exploit the procedure. A court may set aside a business rescue decision for any of the reasons listed in s 130(1)(a) or if the court deems it is 'just and equitable to do so after considering all the facts.[182]

It is submitted that the *Oakdene* case and those mentioned above exemplify how the company rescue plan can be abused and exploited by opportunistic debtors attempting to take advantage of the benefits and protections of business rescue for ill-founded reasons. The judgment from this case and those analysed above make it clear that a business rescue procedure should only be initiated if it is a genuine attempt to achieve the goals of business rescue, and that pursuing business rescue to achieve a company winding-up to avoid the consequences of liquidation proceedings are not legitimately achieving the goals of business rescue.[183]

[181] EP Joubert *op cit* note 10 at 562.
[182] Section 130(1)(a) of Act 71 of 2008.
[183] *Oakdene Square Properties supra* note 52 .

It is submitted that the business rescue provision may be misinterpreted, abused, and how it can be utilized to wind up a company in a more convenient manner. It is also suggested that courts will decline to allow business rescue applications if the benefits of doing so are exceeded by the costs of liquidation or a means to simply abuse the procedure.[184] The *Oakdene* case demonstrates how the court can intervene to protect creditors' interests by thoroughly explaining the conditions for business rescue and how they should be interpreted and applied, as well as dismissing the application if there has been a procedural error.

Without a doubt, the business rescue procedure is a procedure that is here to stay and will continue to play an essential role in insolvency and reforming the business landscape. However, it is essential and critical that legislative safeguards be introduced to protect the rights of creditors and other affected persons who may not have the financial means to resort to the court for the purposes of highlighting and preventing abuse of the business rescue process in order for it to be regarded as a reliable and sustainable method of restructuring and a suitable alternative to simply winding up a company.

4.3 Recommendations

It is submitted that it would be important for the legislature to take cognisance of the practical difficulties and potential avenues of abuse that have happened since the introduction of the notion of business rescue, with a view to creating regulations and or amendments to Chapter 6 whereby:

- A procedure of judicial oversight over the business rescue process should be presented; this can be done through, a pre-assessment report of the company should be conducted by an experienced and duly accredited business rescue practitioner who is senior or knowledgeable in business rescue, according to a recommendation.

  According to the discoveries of the business rescue practitioner, the board would be able to determine whether business rescue is a realistic alternative for the company. The company may then decide whether to voluntarily initiate business rescue procedures based on the results of the business pre-assessment report. This pre-assessment will prevent business entities from solely passing a resolution that is aimed at evading

[184] N Harvey (ed) '*Turnaround management and corporate renewal: A South African perspective*' (2011) 78.

creditors since the pre-assessment will be conducted by an experienced practitioner who is not associated with the entity and has no ulterior motives.

- The business rescue practitioner is an essential requirement according to s 141 (1) of the Act[185] to investigate the company's affairs, including its business operations, property, and overall financial status. If the business rescue practitioner concludes that there is an indication or evidence of voidable transactions, reckless trading, contravention of law, or fraud, the business rescue practitioner is limited to directing management to take appropriate steps or reporting any such activity to the appropriate authorities (in the case of fraud, reckless trading, or contraventions of law).

  Despite these provisions, section 141 is rendered ineffective in the absence of a clear mandate as to what procedural steps management should take in such circumstances, including what the penalties are for non-compliance with these provisions and subsections. Furthermore, it is difficult to imagine how management would take any essential or suitable procedures to repair conditions where the conduct described in these subsections is visible (while a company is in business rescue). Smaller organisations management is typically handled by the directors and stakeholders, who may be held accountable for their actions. Another issue is that the business rescue practitioner is under no obligation to bring any of these illegal acts to the attention of the impacted parties during the company rescue proceedings.

  It is highly recommended that the business rescue practitioners are to be properly instructed and regulated in the method by which they are to assess whether business rescue is appropriate after having had regard to the facts and circumstances in which business rescue is sought to be commenced, including the reasons behind the directors passing a resolution contemplated in s 129.

- Furthermore, it is recommended that s 141 is reconsidered and revised in such a manner to properly safeguard creditors and other affected persons' rights, including bringing to book persons who ought to be held responsible for the unlawful conduct described therein and allowing for any such evidence to be published and brought to the affected persons' attention.

[185] Section 141(1) of Act 71 of 2008.

- In rescue proceedings, the moratorium is a crucial notion. The Corporations Act of 2008, on the other hand, does not provide appropriate safeguards to ensure that companies do not take advantage of the moratorium. The moratorium affects secured and preferential creditor's rights and should only be approved in any case when the proposed rescue plan is viable and backed by key creditors.[186] The stay would prevent a debtor from insolvency and should be lifted as soon as it is no longer necessary to allow the rescue plan to be adopted. As a result, in order to protect the moratorium, the length of the stay on legal proceedings or any enforcement should not exceed four months, but it can be prolonged up to a total of one year.

- Furthermore, appropriate remedies and sanctions are to be introduced against business rescue practitioners, directors and affected persons who abuse business rescue proceedings. There should be fines and possible imprisonment when one is found guilty of abusing and exploiting the business rescue provisions in order to evade creditors. It is submitted that this will deter business entities from passing resolutions or applying to courts in order to abuse the Act.[187]

Incorporating the above recommendations will safeguard the business rescue provisions and restore the sanctity of the Act when a board of a company voluntarily commences business rescue proceedings in terms of s 129 or when an affected party initiates an application to a court to commence business rescue through s 131.[188]

4.4 Conclusion

The business rescue procedure was implemented as a new corporate rescue method in Chapter 6 of the 2008 Act, replacing judicial management. It is apparent that the legislature has recognized the shortcomings of judicial administration and worked to construct a system that is free of these flaws through business rescue.[189] As a result, a standard for restructuring businesses in financial distress has been established by business rescue. To assist ailing

[186] J Bell and J Barnett '*South Africa: Business rescue: Open for abuse?*' available at http://restructuring.bakermckenzie.com/2017/01/11/south-africa-business-rescue-open-for-abuse/, (accessed on 03 December 2021).
[187]M Pretorius '*Business rescue status quo report*' available at http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf (accessed on 31 May 2017) 57.
[188] *Ibid.*
[189] FI Ofwono '*Suggested Reasons for the failure of Judicial Management as a Business Rescue Mechanism in South African Law'* (published Post-Graduate Diploma in Law thesis, University of Cape Town, 2014) 21.

businesses, the claimed approach has combined features of a modern and successful corporate rescue technique.[190]

In essence, business rescue is a procedure that helps businesses in financial difficulties to get back on their feet. When done correctly, business rescue offers a much-needed 'win-win' situation for all parties involved. In the worst-case scenario, as seen above, business rescue is utilized to prevent creditors from exercising their rights. Unfortunately, as a result of the economic fallout from the COVID-19 pandemic, more and more businesses will turn to business rescue actions to avoid creditors, even if the facts do not support this. Business rescue is seen as a shift from a creditor-protectionist society towards a business rescue model that is debtor-protectionist.[191]

This move, which provides a debtor company with a variety of procedural and substantive safeguards and advantages, has unfortunately resulted in widespread abuse of the business rescue method, with courts wrestling with the problem.[192] While many applications for company rescue are well-intentioned, a considerable number of businesses have just been looking for a financial reprieve.

Last, it is an unfortunate situation that the abuse of business rescue is reflected in the number of High Court judgments dismissing applications for business rescue, instead often granting a liquidation order. The fact that business rescue legislation is so debtor-friendly but yet has resulted in so many dismissed applications (and a lot of the time liquidations), makes the abuse of business rescue very apparent. It is of vital importance that our courts continue to scrutinize the merits of each case and that the legislature makes amendments to the provisions open to abuse to ensure that the Act is protected from abuse and its sanctity restored.

[190] C Stein & GK Everingham (eds) '*The new Companies Act unlocked*' (2011) 25.
[191] Povey & Kent '*Rescuing dead horses*' (2017) 8 Without Prejudice at 6
[192] J Bell & J Barnett '*South Africa: Business rescue: Open for abuse*', available at http://restructuring.bakermckenzie.com/2017/01/11/south-africa-business-rescue-open-for-abuse/, accessed on 18 November 2021.

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4. The Constitution of the Republic of South Africa

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Miss Lusanda Remind Mthembu (217066789)
School Of Law
Pietermaritzburg

Dear Miss Lusanda Remind Mthembu,

Protocol reference number: 00012772
Project title: A South African perspective of business rescue abuse: Protecting the sanctity of the business rescue process without losing sight of its purpose.

Exemption from Ethics Review

In response to your application received on 20 July 2021 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]----------

Prof Shannon Joy Bosch
Academic Leader Research
School Of Law