THE EVOLUTION OF AN EFFECTIVE BUSINESS RESCUE STATUTORY REGIME IN SOUTH AFRICA 1926 – 2021

BY

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ABSTRACT

An embryonic concept of what is now referred to as "business rescue" was enacted as so-called "judicial management" in the then Union of South Africa by the Companies Act 46 of 1926. It had already become clear that companies were substantial drivers of the country's economy and a vital source of employment. It was therefore highly desirable that companies with economic potential should not be wound up and liquidated if they encountered financial difficulties that could, potentially, be relatively quickly overcome with a return to solvency and viability.

The legal process of an attempt to achieve the "rescue" of struggling but potentially viable companies raised many difficulties. How was to be determined whether a company in serious financial difficulty had the potential to return to solvency? What legal process was to be set in train in attempting to achieve that objective? Who was to have *locus standi* to initiate that process? How would a company's admission to a statutory business rescue regime affect the legal rights of creditors who had claims against the company and whose own solvency might be imperilled if payment to them was deferred? Who would be in managerial control of the company whilst it attempted to regain solvency? How long would the attempt in this regard be allowed to last? The thesis traces how these and other issues emerged and how potential answers presented themselves and have been refined.

The judicial management provisions of the Companies Act 1926 were the first substantial attempt to provide answers to such questions, but the initial legislation was sketchy, vague, and, in some respects, contradictory. Early reported judgments revealed difficulties, and weaknesses in the statutory process, and divisions of judicial opinion soon became apparent. After a lengthy debate, a modern business rescue regime was incorporated into the Companies Act 71 of 2008. The lessons learned from the shortcomings of judicial management and the positive and negative aspects of the business rescue regimes of other countries had been considered, and important contributions were made by an international advisory team. The thesis traces the development of South Africa's business rescue regime from its beginnings in the Companies Act of 1926 to the present day and provides a critical review of the present law in this regard with suggestions for improvements and further refinement.

ISIFINGQO

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Umqondo osemusha walokho manje osekubizwa ngokuthi i "*business rescue*" wawushaywe ngokuthi i "*judicial managment*" endaweni ngaleso sikhathi eyayibizwa ngokuthi i-*Union of South Africa* ngokoMthetho Wezinkampani 46 ka-1926. Kwase kusobala ukuthi izinkampani zingabashayeli abakhulu bomnotho wezwe kanye nomthombo obalulekile womsebenzi. Ngakho-ke kwakufiseleka kakhulu ukuthi izinkampani ezinamandla kwezomnotho kwakufanele zingaqedwa uma zihlangabezana nezinkinga zezimali ezazingase, zinqotshwe ngokushesha uma kuqhathaniswa nokubuyela ekukhokheni nasekusebenzeni.

Inqubo yezomthetho yomzamo "wokuhlengwa" kwezinkampani ezazidonsa kanzima kodwa ezazingase zikwazi ukuphumelela yeza nobunzima obuningi. Imibuzo eyavelwa kwabe kungukuthi kwakuzonqunywa kanjani ukuthi inkampani esebunzimeni bezezimaliy yayinalo ithuba lokubuyela kwi-*solvency*? Iyiphi inqubo engokomthetho okwakumelwe imiswe ukuze kuzanywe ukufeza leyo njongo? Ubani owayezoba ne-*locus standi* ukuze aqale leyo nqubo? Ukwamukelwa kwenkampani ohlelweni olusemthethweni lokuhlenga ibhizinisi kwakungabathinta kanjani abanamalungelo asemthethweni futhi abakweletwayo izinkampani uma besengozini yokuthi inkokhelo yabo ihlehliswe? Ubani owayengaba sesikhundleni sokuphatha inkampanini ngenkathi izama ukuhlengwa? Kwakuzothatha isikhathi esingakanani ukuhlenga inkampani? I *thesis* ilandelela ukuthi lezi zinkinga zavela kanjani nokuthi izimpendulo ezingaba khona ziye zavela kanjani futhi zacwengwa kanjani.

Izinhlinzeko zokuphatha kwezobulungiswa zoMthetho Wezinkampani 1926 kwaba umzamo wokuqala omkhulu wokunikeza izimpendulo kuleyomibuzo, kodwa umthetho wokuqala wabe ungacacile, futhi, ngandlela thize, uphikisana. Izahlulelo ezenziwa ngalesenesikhathi zaveza ubunzima, nobuthakathaka enqubweni yomthetho, nokwehlukana kwemibono yenkantolo kwasheshe kwabonakala. Ngemva kwenkulumo mpikiswano ende, uhlelo lwesimanje lokuhlenga ibhizinisi lwafakwa kuMthetho Wezinkampani 71 wezi-2008. Izifundo ezatholwa kumthetho we *judicial management* kanye nezici ezinhle nezimbi zemibuso yokuhlenga amabhizinisi kwamanye amazwe kwase kucatshangiwe, kanye negalelo elibalulekile lethimba labeluleki bamazwe ngamazwe. Le *thesis* ilandelela ukuthuthukiswa kombuso wokuhlenga amabhizinisi aseNingizimu Afrika kusukela ekuqaleni kwawo kuMthetho Wezinkampani ka-1926 kuze kube namuhla futhi inikeza ukubukezwa okubalulekile komthetho wamanje mayelana kanye neziphakamiso zokwenziwa kwentuthuko kanye nokuthuthukiswa okucutshunguliwe.

DEDICATION

To my late mother, I have made it mom. To my family and friends, this is for all the support, love, encouragement and prayers you gave me throughout my studies and research.

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I wish to express my deep gratitude to my supervisor Professor RC Williams of the University of KwaZulu-Natal, who has helped and guided me in completing this thesis. I wish to also thank God and my ancestors for giving me the strength to accomplish my goal.

ABBREVIATIONS

DTI	Department of Trade and Industry
CIPC	Companies and Intellectual Property Commission
BRP	Business Rescue Practitioner
The Bill	Companies Bill
The Act	Companies Act 71 of 2008
The 1973 Act	Companies Act 61 of 1973
The 1926 Act	Companies Act 46 of 1926
SARS	South African Revenue Service

KEY TERMS

Affected Persons, Business Rescue, Business Rescue Practitioner; Business Rescue Plan; Corporate Rescue; Creditors; Employees; Financial Distress; Judicial Management; Judicial Manager; Just and Equitable; Moratorium; Post-Commencement; Proceedings; Reasonable Probability; Reasonable Prospect; Rehabilitation; Resolution; Supervisions

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CHAPTER ONE – INTRODUCTION

1. Background and Overview

1.1. The Importance of Business Rescue

The Companies Act 71 of 2008 ('the Act') has introduced a number of profound changes to company law, and the procedure for business rescue is one of them. The business rescue procedure was introduced in 2011, replacing the earlier procedure named judicial management, and aimed at rescuing financially distressed companies and facilitating the rehabilitation of financially distressed companies by providing for:

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

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

(iii) The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[1]

Section 7(*d*) of the Act adds that the purpose of the Act is to 'reaffirm the concept of the company as a means of achieving economic and social benefits.' If a company is rescued, it saves jobs, and creditors have a better chance of receiving their full claim or having a better return than in the case of the immediate liquidation of the company. Successful business rescue is thus important to sustain economic growth − particularly crucial because of South Africa's high unemployment rate, which has increased yearly. For example, in 2014, the unemployment rate stood at 25%[2]; in 2015 it increased by 0.5% to 25.5%;[3] in 2016 the statistics showed that

[1] Section 128 (1)(b) of the Act.

[2] South Africa's unemployment rate stood at 25% in 2014: Statistics South Africa: *Employment, unemployment, skills and economic growth: An exploration of household survey evidence on skills and unemployment between 1994 and 2014* (2014). Available at *http://www.statssa.gov.za/presentation/ Stats%20SA%20 presentation%20on%20skills%20and%20unemployment_16%20September.pdf* (Accessed: 30 September 2015).

[3] Statistics South Africa 'Unemployment rate increases in the third quarter of 2015'. Available at *http://www.statssa.gov.za/?p=5681&gclid=Cj0KCQjw4cOEBhDMARIsAA3XDRisfR6g9JXV3eleErCyPjCIsdkS0DM-2fY2EQ6F1KLG0gXGw5Ab_AEaAnDIEALw_wcB* (Accessed: 04 May 2021)

the unemployment rate stood at 26.5%;[4] and increased to 27.7% in 2017.[5] In the fourth quarter of 2018, there was a slight decline to 27.1%.[6] Since companies play a vital role as employers in the South African economy, the business rescue procedure[7] can save jobs and benefit creditors, making it important in sustaining economic growth. In *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*,[8] Binns-Ward J held that:

> '[i]t is clear that the legislature has recognised that liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidents of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidation in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or securing a better return to creditors than would probably be achieved in an immediate liquidation.'[9]

While the Act has effected significant change in the procedure available to companies in distress, the overall rescue culture has existed for decades in South Africa, dating back to 1926 when it was introduced as judicial management. Since then the objectives of business rescue have evolved in accordance with local and international experience. The current success of business rescue in South Africa extends far beyond the initial objectives, including the substantive question of whether business rescue addresses the intrinsic difficulties that have come to light with the introduction of rescue culture (judicial management) in South Africa. The policy and conceptual framework of the business rescue regime play an important role in meeting the objectives of business rescue.

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[4] Statistics South Africa 'Media Release' Available at *http://www.statssa.gov.za/?p=9561&gclid=Cj0KCQjw4cOEBhDMARIsAA3XDRgry2ozwPPFnkwIK6ZxWVP0fDs8zTuetj7qg3JgG8n8RH86_RVEyEMaAkTaEALw_wcB* (Accessed: 04 May 2021).

[5] Statistics South Africa 'Quarterly Labour Force Survey', Available at *http://www.statssa.gov.za/?p=10658&gclid=Cj0KCQjw4cOEBhDMARIsAA3XDRjWXYLfrCEB6idMixMQ8ixvSc-Cy5HvwOQP5j-SXn8D9jhWb2424K0aAoAsEALw_wcB* (Accessed: 04 May 20201)

[6] Statistics South Africa 'Unemployment drops in fourth quarter of 2018' (2019). Available at *http://www.statssa.gov.za/?p=11897* (Accessed: 04 April 2019).

[7] *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd* 2014 (6) SA 214 (LP) at 29; *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) at para 10.

[8] 2012 (2) SA 378 (WCC).

[9] Para 14.

1.2. Brief History of Business Rescue Procedure and its Policies

This thesis is titled 'The evolution of an effective business rescue statutory regime in South Africa 1926 – 2021' which makes its history important for understanding its evolution. The recent Supreme Court of Appeal judgment in *Richter v Absa Bank Limited*[10] emphasises the importance of historical perspective in understanding the business rescue regime. The court held that:

> '[a] review of the background to the introduction of the business rescue process into our law gives an insight as to the intention of the legislature in introducing the procedure. Our business rescue regime is adapted from similar concepts in other jurisdictions such as the United States and Great Britain. In South Africa it was introduced against the background of general acceptance that the judicial management process provided for under chapter XV of the 1973 Act was failing the local economy because only few, if any, judicial management orders resulted in the saving of companies experiencing financial difficulties.'[11]

1.2.1. The Introduction of Rescue Culture in the Form of Judicial Management in 1926

When judicial management was introduced, the concept of business rescue was virtually unknown both in South African company law and internationally.[12] Prior to 1926, South African company law did not include any consolidated legislation dealing with companies. Consolidated legislation was introduced in 1926[13] by the Companies Act 46 of 1926 ('the 1926 Act') which included judicial management.[14] The sudden need for a statutory measure regulating rescue culture was reflected in the parliamentary debates when the Bill was introduced. Some doubted that the concept of corporate rescue was practical as the American experience had shown it to be ineffective and costly.[15] Sir Drummond Chaplin – cited by Olver – suggested that 'there should be some special business qualifications insisted upon in the people who were to be appointed; that there should be [a] strict supervision of fees charged; and that the court should be given [the] power to order the final liquidation of the company if

[10] (20181/2014) [2015] ZASCA 100 (01 June 2015).
[11] Para 13.
[12] A Loubser 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16(2) *South African Mercantile Law Journal* 138.
[13] H Rajak and J Henning 'Business rescue for South Africa' (1999) 116(2) *South African Law Journal* 265.
[14] Companies Act 46 of 1926; A Loubser 'Tilting at windmills? The quest for an effective corporate rescue procedure in South Africa' (2013) 25(4) *South African Mercantile Law Journal* 437.
[15] See AH Olver *Judicial Management in South Africa: Its Origin, Development and Present Day Practice and a Comparison with the Australian System of Official Management* (Unpublished LLD thesis, University of Cape Town, 1980) 2.

the supervisor's report so recommended'.[16] The then Minister, Tielman Roos, who piloted the introduction of the Bill in Parliament replied as follows:

> 'In regard to the point made by the honourable member for Peninsula (South) (Sir Drummond Chaplin) . . . these sections are derived from the practice in England and America under which receivers in equity are appointed, in the case of an important concern in regard to which there is some fear that it will go into liquidation; one which can pay its debts and which can be helped by someone officially appointed for this purpose. Powers of that kind would be used sparingly by the courts. To take a hypothetical case. You might have a large wool factory getting into difficulties and which ought to be helped, because it is an institution which helps the country. Then your court could intervene, when it is shown that this concern is solvent, and thus help it through its difficulties. I quite admit that this is a power that would not be used in any country very much, and has not been used much in England or America, but it might be used to save a concern, and it is for such sparing use that it has been inserted in the Bill. The concerns you would like to help with this power are industrial concerns such as factories manufacturing articles in South Africa. You might be able to help a few of these concerns out of the mire at times.'[17]

It is clear from these remarks that the Bill's intention was to assist companies experiencing financial difficulties but that the facility was to be afforded sparingly. It was enacted to enable such companies to become successful business concerns.[18] Olver argues that the object then was to protect vital industries and 'this was considered a very desirable feature in a young country where primary industries and industrial undertakings needed every encouragement'.[19] Despite South Africa being one of the first countries to adopt a corporate[20] rescue model (judicial management),[21] its implementation lagged behind other international business rescue

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[16] Ibid.

[17] House of Assembly Debates vol 6 25 February 1926 col 996-7 cited by Olver supra at 3.

[18] DA Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16(2) *South African Mercantile Law Journal* 246; J Henning 'Judicial Management and Corporate Rescues in South African law' in H Rajak *Insolvency Law: Theory and Practice* (1993) Ch 19 305; PM Meskin *et al* (eds) *Henochsberg on the Companies* Act 4 ed (1985) 753 (*Meskin et al Henochsberg*); JT Pretorius, *et al Hahlos's South African Company Law through the Cases* 5 ed (1991) 735; JTR Gibson *et al South African Mercantile and Company Law* 7 ed (1997) 423; D Shrand *The Law and Practice of Insolvency, Winding-Up of Companies, and Judicial Management* 3 ed (1977) 325; G Wille, JF Coaker & WP Schutz *Wille and Millin's Mercantile Law of South Africa* 16 ed (1967) 626; RD Sharrock, K van der Linde, & A Smith *Hockly's Insolvency Law* 7 ed (2005) 232; HR Hahlo *South African Company Law Through the Cases* supra (1984) 644; JL Van Dorsten *South African Business Entities: A Practical Guide* 3 ed (1993) 327.

[19] Olver supra note 15 at 3. AH Olver 'Judicial management − a case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 84.

[20] The word 'corporate' as opposed to 'business' is used intentionally as judicial management was applied only to companies as distinct from other businesses such as close corporations, partnerships, or trusts.

[21] DA Burdette op cit note 18 at 256; 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* 153; Olver op cit note 19 above at 84. He argues that in 1926 the Companies Act introduced a novel concept that was a complete

systems that were adopted later.[22] Some years later amendments were passed to develop the judicial management system,[23] but judicial management remained unpopular and was widely considered a failure.[24] Courts, academics, and commentators advanced several criticisms against judicial management[25] and a Master of the High Court recommended that judicial management should be abolished on account of its low success rate and abuse.[26] Loubser[27] argued that judicial management was probably ahead of its time as it was introduced during a period when it was believed that troubled companies did not deserve to survive. In practice, judicial management had flaws and was sometimes unrealistic.[28] A company placed under judicial management seldom returned to profitability because the public would lose confidence in it and it became difficult for the company to do business[29]. In *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd,*[30] Josman J held that judicial management had seldom worked since the early days of its adoption. This point was also made by the court in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd (Oakdene).*[31] Claassen J referred to judicial management as a failure because of its low success rate and because it undermined companies' creditworthiness and survival.

Olver recommended that the requirements for the appointment of judicial managers should be changed,[32] while other academics called for the requirement that creditors be paid in full to be

departure in South African law; D Brown *Corporate Rescue: Insolvency Law in Practice* (1996) 819; EP Joubert '"Reasonable Possibility" versus "Reasonable Prospect": Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 551. See also *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 (2) SA 727 (C) at para 37 where Josman J held that when judicial management was not based on English Companies law the "usual source of inspiration for matters relating to companies".

[22] Burdette op cit note 18 at 246; Henning op cit note 18 above at 305.

[23] These will be discussed in Chapter Two.

[24] Loubser op cit note 12 above. at 153; Joubert op cit note 21 at 551; A Smits 'Corporate administration: A proposed model' (1999) 32(1) *De Jure* 85.

[25] These will be discussed in Chapter Two.

[26] D Shrand and AAF Keeton *Company Law and Company Taxation in South Africa* (1974) 305; Burdette op cit note 18 above. 247; P Kloppers 'Judicial management reform – steps to initiate a business rescue' (2001) 13(3) *South African Mercantile Law Journal* 372; Olver supra note 15 at 85 states that only 12 % of the companies placed under judicial management were successful.

[27] A Loubser *Some Comparative Aspects of Business Rescue in South African Company Law* (Unpublished LLD thesis, University of South Africa, 2010) 156.

[28] DA Burdette 'Unified insolvency legislation in South Africa: Obstacles in the path of the unification process' (1999) 32(1) *De Jure* 58; A Smits op cit note 24 above at 82-84.

[29] RC Williams *Concise Corporate and Partnership Law* 2 ed (1997) 311.

[30] 2001 (2) SA 727 (C) 60. This case provides a summary of the problems relating to judicial management in South Africa.

[31] 2012 (3) SA 273 (GSJ) 7. Henning op cit note 18 above at 305 argued that the detrimental effect on the creditworthiness of the company was a serious disadvantage.

[32] See Olver supra note 15 at 87. He argued that 'judicial managers should not be allowed to become liquidators of the company of which they had been judicial managers.'

revisited.[33] Others called for fresh legislation to be drafted for a business rescue regime based on Chapter 11 of the United States' Bankruptcy Code[34] which seemed to have been successful.[35] The failure of judicial management and its policies paved way for the radical change of rescue culture in South Africa. In 1999, different models for business rescue were submitted for consideration but were sent back for further research.[36] In 2000, the Cabinet approved a Draft Insolvency and Business Recovery Bill.[37] In February 2004, a further Business Rescue Bill was drafted.[38] In May 2004 the UNCITRAL Guide on Insolvency Law was released,[39] containing guidelines for business rescue and including minimisation of costs and delays by providing for a permit to commence rescue proceedings through voluntary negotiations around a reorganisation plan without creditors being involved.[40]

1.2.2. The Introduction of Rescue Culture as Business Rescue in 2011

It is clear that before the existence of the Act and in the context of rescuing financially distressed companies, there was a need for company law reform in South Africa. In 2003 a Company Law Reform programme within the Department of Trade and Industry (DTI) was launched.[41] The Minister of the DTI Mandisi Mpahlwa, in publishing the policy paper in 2004, emphasised the crucial importance of company law reform,[42] asserting that South Africa had fundamentally changed since the last review of its company law and the introduction a new constitutional framework which had created a changed political, social and economic environment post-1994. In his report, Mpahlwa said:

> 'Since the Companies Act was enacted in 1973, fundamental legal developments have taken place in South Africa. The most important change was the adoption of the Constitution in 1996. No area of South African law can be analysed or evaluated without recourse to the Constitution, which is the supreme law of the country. The Bill of Rights, as provided for in Chapter 2 of the Constitution, constitutes a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity,

[33] Kloppers 'op cit note 26 above at 373. See also Rajak & Henning op cit note 13 above 269.
[34] Burdette 'op cit note 18 above at 58.
[35] Loubser op cit note 14 above at 439.
[36] Burdette op cit note 18 above.
[37] Loubser op cit note 12 at 140; See also Burdette op cit note 18 above at 242-243.
[38] Ibid at 159.
[39] Burdette op cit note 18 above at 253.
[40] Ibid. See also supra note 27 at 3.
[41] TH Mongalo 'An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008' 2010 *Acta Juridica* xiii at 13.
[42] Department of Trade and Industry 'South African Company Law for the 21st Century Guidelines for Corporate Law Reform' (May 2004). Available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/ 040715 companydraftpolicy.pdf* accessed: 13 August 2018.

> equality and freedom. It also regulates the relationship between economic citizens and thus may have fundamental implications for company law . . . New company law should therefore be consistent not only with the Constitution of South Africa and the principles of equality and fairness that it enshrines, but also with other laws that have been enacted, including the BEE Act, competition law, environmental law and access to information legislation.'[43]

The policy paper intended 'to create a system of corporate rescue appropriate to the needs of a modern South African economy.'[44] Clearly, company law, and particularly business rescue, was about to be aligned with the promotion of the Constitution and the legislative provisions of developed countries. The process of drafting a new Draft Companies Bill ('the Bill') commenced in mid-2005[45] and was finalised and submitted to the Minister and Cabinet in mid-2006,[46] and after due consideration, it was made available for public comment. The Bill was accordingly revised, and in June 2008 the revised Bill (the Companies Bill) was introduced to Parliament for debate.[47] The Bill constituted a radical departure in South African business rescue, setting up a system in which the commencement did not require a court order, and new requirements for commencement of rescue proceedings were provided. An automatic debt moratorium took place. The requirements of a business rescue plan were changed and the effect of rescue proceedings on affected persons was refined. These ideas were encompassed in the 2004 report in which Mpahlwa submitted that US Chapter 11 provisions would be considered to create a system of corporate rescue appropriate to the needs of a modern South African economy.[48] For example, in the United States, a company in financial distress may invoke Chapter 11 of the Bankruptcy Code[49] which provides for the financial affairs of such a company to be restructured with the aim of rehabilitation. The debtor remains in control, allowing the company to retain its management.[50] Chapter 11 rescue proceedings are initiated by a petition filed by the debtor.[51] Companies under Chapter 11 need not be insolvent but should

[43] Ibid at 15.
[44] Ibid at 45.
[45] Mongalo op cit note 41 above at 23.
[46] Ibid.
[47] Ibid at 24.
[48] Department of Trade and Industry 'South African Company Law for the 21st Century Guidelines for Corporate Law Reform' (May 2004) 45. Available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/ 040715 companydraftpolicy.pdf* (Accessed: 13 August 2018).
[49] The discussion on Chapter 11 is merely by way of general background. This thesis compares judicial management and business rescue in South Africa. Reference to the Bankruptcy Code is made to stress that South African business rescue provisions are aligned with those of international jurisdictions.
[50] G Tweedale & R Warren 'Chapter 11 and asbestos: Encouraging private enterprise or conspiring to avoid liability' (2004) 55(1) *Journal of Business Ethics* 31.
[51] G McCormack 'Control and corporate rescue: An Anglo-American evaluation' (2007) 56(3) *International & Comparative Law Quarterly* 517.

demonstrate imminent insolvency.[52] Some academics maintain that the Chapter 11 system balances the rights of both creditors and debtors because either may propose a restructuring plan.[53] In 2009, after a lengthy process, the Bill was signed by the President and gazetted in the *Government Gazette* and it came into force in 2011 as the Companies Act 71 of 2008.

1.3. Outline of the Research Problem, research Questions and Objectives

1.3.1. Research Problem and Objectives of the Thesis

Over the past few years, considerable attention has been paid to the interpretation of the new business rescue regime in South Africa.[54] Academics have drawn attention to the underlying philosophy of business rescue,[55] which is to rescue a company in financial distress. Since business rescue became operative, there has been a decrease in compulsory liquidations because companies are now exercising the option of business rescue.[56] Two years after its adoption, 915 notices for business rescue were filed by companies nationwide.[57] Business rescue can be said to be at the heart of financially struggling companies that need rescue. This is done by providing for:

- The temporary supervision of the company, and of the management of its affairs, business and property;
- A temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- If a moratorium is approved, the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis; or,

[52] Tweedale & Warren op cit note 50. A Annabi, M Breton, & P Francois 'Resolution of financial distress under Chapter 11' (2012) 36(12) *Journal of Economic Dynamics & Control* 1868.

[53] E Tarantino 'Bankruptcy law and corporate investments decisions' (2013) 37(8) *Journal of Banking & Finance* at 2492. He argues that on the one hand, the debtor has a right to stop payments to creditors and devise a restructuring plan, while on the other, creditors can propose an alternative plan and vote on a restructuring plan that rejects the plan made by the debtor.

[54] Academics and the courts have identified the procedure's benefits and shortcomings.

[55] R Bradstreet 'Business rescue proves to be creditor-friendly: Claassen J's analysis of the new business procedure in *Oakdene Square Properties*' (2013) 130 (1) *South African Law Journal* 49-50.

[56] I Le Roux & K Duncan 'The naked truth: Understanding of business rescue: A small business perspective' (2013) 167(6) *The Southern Journal of Entrepreneurship & Small Business Management* 58.

[57] Companies and Intellectual Property Commission (CIPC) *Annual report* 2012/13 (2013) Available at *http://www.cipc.co.za/files/9513/9989/7347/CIPC_ANNUAL_REPORT_2013.pdf* (Accessed: 04 May 2017).

- If it is not possible for the company to continue in existence, to facilitate better returns for the company's creditors or shareholders than would result from the immediate liquidation of the company.

Furthermore, the financially distressed company is given an opportunity to rehabilitate 'in a manner that balances the rights and interests of all relevant stakeholders.'[58] The importance of achieving such balance is acknowledged in various provisions of the Act by allowing affected persons[59] to be involved in business rescue proceedings[60] whose opinions on the operation of the business rescue may emerge. The objectives of business rescue and the provisions of the legislation allow for a more detailed interpretation of the objects of the new business rescue regime. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* the Supreme Court of Appeal held the following with regard to the principles of statutory interpretation:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or [a] contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production . . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'[61]

This thesis, therefore, proposes an interpretation of the Act that gives effect to the objectives of the business rescue regime with regard to what was desired when it was first introduced as a Bill in Parliament. Therefore, the philosophic underpinning and objectives of corporate rescue since its introduction underpin the central objective of this thesis. The conceptual and policy issues (the need for the introduction of rescue culture; why is the current business rescue regime desirable, and what is it trying to achieve?) are examined, closely linked to a critical examination of the procedure and requirements for business rescue *vis a vis* the moratorium;

[58] Section 7(*k*) states that the purpose of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'.
[59] Section 128(1)(*a*) provides that an affected person, in relation to a company, means 'a shareholder or creditor of the company; any registered trade union representing employees of the company; and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives'.
[60] The involvement of affected persons is dealt with in detail in following chapters of the thesis.
[61] 2012 (4) SA 593 (SCA) 18.

the appointment, qualifications, powers, duties, and removal of business rescue practitioners; the concept of the business plan; and the role of affected persons, namely employees and creditors. This examination includes judicial interpretation of the above concepts and how business rescue has operated in practice.

1.3.2. Research Questions

Based on the problem statement above, the following questions will be answered in this thesis:

1. Why did the idea of corporate rescue emerge in South Africa?
2. What are the legal implications of the shift from judicial management to the current business rescue regime?
3. How do the courts interpret the current business rescue provisions and its concepts and how did the previous, narrower principles of statutory interpretation impact on the court's attitude to the business rescue?
4. Are the policies and objectives of the current business rescue regime effective as was envisaged when the Companies Act 71 of 2008 was drafted?
5. What are the challenges that have confronted the current business rescue objectives and policies?

1.4. Research Methodology

This is a desktop-based thesis, focused on the study of primary sources of law, namely relevant statutes and cases, as well as secondary sources of law for commentary, critique and interpretation, provided largely through journal literature. Databases such as Juta, Lexis Nexis, Jstor, and Saflii were used to locate the literature and law. Furthermore, the research methodology included keyword searches *inter alia* of the following terms: economy of South Africa in1926; corporate rescue in South Africa; business rescue in South Africa; judicial management; under business rescue; creditors under judicial management; employees under judicial management; employees under business rescue; judicial manager; business rescue practitioner; post-commencement finance; and affected persons in business rescue.

To trace the evolution of business, the thesis focused on court judgments since the introduction of judicial management in 1926, and after the introduction of the new business rescue system in 2011 until June 2021. The statistics of business rescue were extracted from internet sources that include official websites such as the Companies and Intellectual Property Commission (CIPC) website; Department of Trade and Industry website; as well as reported articles published in newspapers.

1.5.Structure of the thesis

This thesis is divided into six chapters.

Chapter One – This chapter presents an introduction and background to the subject, and outlines the research problem. The research questions and the research methodology also form part of this chapter.

Chapter Two – This chapter provides an overview of the theoretical framework of the corporate rescue mechanism and its policy by dealing with the literature on the concept of 'corporate rescue' and its evolution in South Africa. The chapter covers the meaning of corporate rescue and its operation; the evolution of South African corporate rescue (including its origins and its historical legislative development); the general concept of judicial management and its weaknesses; and the general concept of business rescue.

Chapter Three – This chapter focuses on the procedural requirements for the commencement of business rescue proceedings and the objectives of the process. The chapter presents analyses of sections 129, 130, and 131 of the Act, with reference to court judgments and commentary by academics and legal professionals, all touching on the evolution of rescue proceedings since its introduction in 1926.

Chapter Four – This chapter focuses on the consequences of embarking on business rescue, divided into three parts, namely the moratorium, the business rescue practitioner and the business rescue plan, and includes submissions on how business rescue policies have reformed company law by rescuing ailing companies. Proposals are made for further development.

Chapter Five – This chapter overtakes 'consequences' by dealing with the effects of business rescue proceedings. Of the several stakeholders affected by business rescue proceedings, this chapter confines itself to employees and creditors, both of whom have similar rights of participation in business rescue proceedings. The focus will be on the impact of business rescue on employees and creditors, and how this impact has shaped the running of business rescue proceedings.

Chapter Six – This chapter comments on how the current business rescue has been successful in its operation. Where necessary, recommendations will be made to remedy the weaknesses of this current rescue regime.

CHAPTER TWO

THEORETICAL FRAMEWORK OF CORPORATE RESCUE MECHANISM AND ITS POLICIES

2.1. Introduction

The concept of 'corporate rescue' has long existed in South Africa and other foreign jurisdictions. However, in the past 160 years, South African company law has undergone massive reform − fundamental to South Africa's commercial health and driven both by the new democratic dispensation and the modernisation of the global economy. The legislative corporate rescue mechanism in South Africa has undergone major changes. In 2004 the then Minister of the Department of Trade and Industry (DTI), Mandisi Mpahlwa, commented as follows:

> 'Harmonisation is important for at least two reasons. First, it reduces the costs and increases certainty both for overseas companies and investors, and for our own companies involved in international trade and investment. Secondly, it reduces the costs involved in the application of our company law, by enabling it to develop along the lines and in the light of a great range of judicial precedent, practice and commentary, making it more practicable, minimising uncertainty and costs and reducing the likelihood of litigation.'[62]

This chapter provides an overview of the theoretical framework of the corporate rescue mechanism and its policy by dealing with literature on the 'corporate rescue' concept and its evolution in South Africa. The chapter includes a discussion on the meaning of corporate rescue and its operation; the evolution of corporate rescue, which includes its origins and historical development; the general concept of judicial management and its weaknesses; and the socio-economic concept of business rescue.

[62] Department of Trade and Industry *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (May 2004) 30. Available *at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/040715 companydraftpolicy.pdf* (Accessed: 13 August 2018).

2.2.Concept of Corporate Rescue

2.2.1. Meaning of Corporate Rescue and its Operation

Scholarly literature – both international[63] and national[64] – has dealt so extensively with the meaning of 'corporate rescue', that it has not been easy to elicit a straightforward definition of the term. On one hand, Hammer argues that:

> 'There seems to be some real difficulty in the meaning or definition of "rescue". In an insolvency law context, it is a word of much more recent origin. It has been increasingly used in many jurisdictions. But, one suspects, the word is used loosely and more as a generic description of a variety of differing processes which might effect different results. In some jurisdictions, the rescue process appears to be a near neighbour of the liquidation process; in other jurisdictions, those processes may be at serious odds with one another.'[65]

On the other hand, Brown defines corporate rescue as 'the survival of the company or a substantial part of its business'.[66] Omar, cited by Kloppers, commented on the 'corporate rescue as follows:

> 'Corporate rescue is now associated with what is termed as the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and continued rewarding of capital and investment.'[67]

Kloppers further argues that

> '[t]he emphasis of business rescue came about partly because insolvency law started to take into account the large-scale rise in corporate insolvencies . . . the role of insolvency law of attributing fault to and suitably punishing those who are responsible for financial failure is now complimented by the realisation that if a company has some breathing space to reorganise before facing the storm following the public knowledge of its financial difficulties it would probably survive the storm.'[68]

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[63] RW Hammer 'Comparison of Trends in National Law: The Pacific Rim' (1997) 23 (1) *Brooklyn Journal of International Law* 143-148; M Hunter 'The Nature and Functions of a Rescue Culture' (1999) 104 *Commercial Law Journal* 426.

[64] A Loubser 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 (2) *South African Mercantile Law Journal* 141; P Kloppers 'Judicial management - a corporate rescue mechanism in need of reform' (1999) 10(3) *Stellenbosch Law Review* 417-418.

[65] Hammer op cit note 64 above '.

[66] D Brown *Corporate Rescue: Insolvency Law in Practice* (1996) 3.

[67] Kloppers op cit note 64 above at 418.

[68] Ibid.

Rajak and Henning argue that business rescue

> 'implies something dynamic, with something ailing perhaps, but where there is an expectation of improvement, even of recovery, through the agency of protection from court processes and the healing powers of the dynamism of business and entrepreneurial activity.'[69]

The remarks of these scholars show that the survival of the company has always philosophically underpinned corporate rescue. Survival of the company depends on the interpretation of business rescue and its purpose at the particular time. For example, commentators such as Burdette[70] and Smit[71] maintain that business rescue is successful if it maximises the payment to creditors. This approach attempts to balance the interests of those affected in business rescue. The scholarly questions that are addressed in the literature include, *inter alia*, questions of what constitutes 'corporate rescue' and how the interests of the affected parties should be protected by the process. Rugumamu argues that 'it is now generally accepted that rescuing a corporate entity extends further than merely securing the survival of the company, and should take account of the interests of other affected players.'[72] Rajak and Henning submit that the modern business rescue regimes, both nationally and internationally,[73] *potentially* address the following issues:

- The types of entities eligible to commence rescue proceedings;
- The mechanism aimed at protecting the entity under business rescue;
- The burden of proving the need to commence rescue proceedings by an entity; and
- The control of the entity under business rescue.[74]

[69] H Rajak & J Henning 'Business rescue for South Africa' (1999) 116(2) *South African Law Journal* 268.
[70] See DA Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16 (2) *South African Mercantile Law Journal* 244, as he argues that 'even if the business cannot be restored to a solvent and profitable status, the return to creditors in the long-run will be much higher.'
[71] A Smits 'Corporate administration: A proposed model' (1999) 32(1) *De Jure* 83 & 84 as he argues that 'modern "corporate rescue" and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial bankruptcy procedures, reorganisation seeks to maximise, preserve and possibly even enhance the value of a debtor's business enterprise, in order to maximise payment to the creditors of the distressed debtor . . . success is in the eye of the beholder when it comes to corporate rescue.'
[72] VW Rugumamu Creditors' rights in business rescue proceedings in terms of South Africa's Companies Act 71 of 2008 (Unpublished Thesis, University of KwaZulu-Natal, 2017) 21.
[73] My emphasis.
[74] Rajak & J Henning op cit note 69 at 264.

The concept of 'corporate rescue has always recognised the idea of salvaging the entity that is financially distressed. The meaning of 'salvaging' depends on whether the intention is to restore them to solvency or to maximise returns for creditors.

In South Africa, rescuing a financially distressed company has evolved from a curial to an out-of-court procedure. The rescue procedure was introduced in South Africa in 1926 with the idea that the court's approval should precede rescue proceedings. When the Companies Bill was introduced in parliament for a debate, its provisions 'authorised the court in certain cases where a winding-up order is applied for to make an order for the appointment of a judicial manager'.[75] Remarks by the then Minister of Justice showed that judicial management first had to be ordered by the court before the company could avail itself of it. In his speech the commented as follows:

> 'You might have a large wool factory getting into difficulties and which ought to be helped, because it is an institution which helps the country. Then your court could intervene, when it is shown that this concern is solvent, and thus help it through its difficulties.'[76]

The insistence on the court's intervention continued and was retained in the Companies Act 61 of 1973 ('the 1973 Act'). In terms of this legislation:

> 'when any company, by reason of mismanagement or for any other cause, is unable to pay its debts or is probably unable to meet its obligations; and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the court may, if it appears just and equitable, grant a judicial management order in respect of that company.'[77]

It is the introduction of the Companies Act 71 of 2008 (hereinafter "the Act") that saw another evolution of business rescue in South Africa. The Act provides that

> 'subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that the company is financially distressed; and there appears to be a reasonable prospect of rescuing the company';[78] or 'unless a company has adopted a resolution contemplated in s 129, an affected person may apply to a court at any time for an

[75] AH Olver 'Judicial Management in South Africa: Its Origin, Development and Present Day Practice and a Comparison with the Australian System of Official Management' (Unpublished LLD thesis, University of Cape Town, 1980) 2.
[76] House of Assembly Debates vol 6 25 Feb 1926 col 996-7 cited by Olver supra note 76 at 3.
[77] See s 427(1).
[78] Section 129(1)

> order placing the company under supervision and commencing business rescue proceedings.'[79]

This is a hybrid and flexible approach in which the paramount consideration is the affected persons. Rugumamu argues that

> '[c]reditors always see the liquidation of a company that is unable to pay its debts as an option, in which they can make application to court for the company to be wound up as insolvent and then prove their claims and hope that their claim, or at least part of it, will be paid in the course of the process. By contrast, the company's directors will probably try to persuade the creditors to reschedule or compromise their debts, so that they can continue in office. The employees of the company have a strong incentive to preserve the company's existence and safeguard their jobs and their income. The general public may lose twice from the extinction of a company, first as consumers of its goods or services and secondly as dependants of the company's employees. All these parties will thus gain or lose to varying degrees from the rescue or failure of the company.'[80]

Consequently, business rescue in the modern era is impacted by the conduct of affected persons; creditors and employees have rights to participate in the business rescue proceedings.

2.2.2. Evolution of Corporate Rescue

The evolution of company law in South Africa commenced about 160 years ago. In his report in 2004 then Minister of the Department of Trade and Industry (DTI) Mpahlwa commented:

> 'Company law has existed in South Africa since 1861, beginning with the Joint Stock Companies Limited Liabilities Act No 23 of 1861 of the Cape Colony, which, along with other provincial company legislation, was a carbon copy of equivalent English legislation. The first national company law was introduced in 1926 with the Union Companies Act, which was amended from time to time along the lines of the latest English legislation. The 1926 Act was replaced in 1973 with the Companies Act No 61 of 1973, which, despite efforts to innovate and develop a direction more appropriate for South Africa, remains much in the mould of English law.'[81]

However, the consolidated legislation that regulated companies in South Africa was introduced in 1926 − Companies Act 46 of 1926 ('the 1926 Act').

[79] Section 131(1).
[80] Rugumamu supra note 72 at 26.
[81] Department of Trade and Industry 'South African Company Law for the 21st Century Guidelines for Corporate Law Reform' (May 2004) 13. Available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/040715 companydraftpolicy.pdf* (Accessed: 13 August 2018).

2.2.2.1. Historical Development of Corporate Rescue Legislation in South Africa

2.2.2.1.1. The Companies Act 46 of 1926

The 1926 Act was largely influenced by Transvaal Companies Act 31 of 1909 which in turn was a blueprint of English Companies Act of 1862 as amended. The introduction of the 1926 Act was testimony to increased economic activity and the need to regulate it by Union-wide corporate legislation.[82] The Companies Bill was introduced in 1923 but lapsed later the same year only to be reintroduced in 1924.[83] A report – with the amendments to the Bill – was made and a further debate was planned but did not take place.[84] In early 1926 the Companies Bill re-emerged and the new Minister piloted it through the House of Assembly.

Whilst many issues were raised in the debate, this thesis only covers corporate rescue in accordance with its objective.[85] Sections 195 to 198 of the Bill introduced a concept of judicial management, novel in South African company law. Although many technical details were borrowed from English law, varying opinions on the practicality of judicial management were debated on the 25 February 1926 when Sir Drummond Chaplin commented as follows:

> 'I am informed that this is an entirely new procedure in this country, and it is supposed to be taken from American practice.'[86]

These remarks show that judicial management was not embraced with much enthusiasm. The then Minister of Justice Tielman Roos felt bound to explain to the House why this novel concept was important:

> 'In regard to the point made by the honourable member for Peninsula (South) (Sir Drummond Chaplin) . . . these sections are derived from the practice in England and America under which receivers in equity are appointed, in the case of an important concern in regard to which there is some fear that it will go into liquidation; one which can pay its debts and which can be helped by someone officially appointed for this purpose. Powers of that kind would be used sparingly by the courts. To take a hypothetical case. You might have a large wool factory getting into difficulties and which ought to be helped, because it is an institution which helps the country. Then your court could intervene, when it is shown that this concern is solvent, and thus help it through its difficulties. I quite admit that

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[82] JCS Lancaster *A determination of the origins of the South African Public Accountants' and Auditors' Board – as the Regulator of the Profession – principally through an analysis of the debates and related reports to the House of Assembly of the Parliament of the Union of South Africa in the period 1913–1940* (Unpublished PhD thesis, Rhodes University, 2013) 272.

[83] Ibid.

[84] Ibid at 281.

[85] Issues that were discussed included the location of the companies' registration office and centralised control of the registration system

[86] This is cited by Olver supra note 15 at 2.

> this is a power that would not be used in any country very much, and has not been used much in England or America, but it might be used to save a concern, and it is for such sparing use that it has been inserted in the Bill. The concerns you would like to help with this power are industrial concerns such as factories manufacturing articles in South Africa. You might be able to help a few of these concerns out of the mire at times.'[87]

The Anglo-American model was relied on because 'the English had spent much of the 19th Century experimenting with various companies acts, and their application in a geographically small country was not difficult'.[88] Eventually, the 1926 Act was passed and it became an experiment foisted on South African law as a system on the basis that it had worked in a foreign jurisdiction. It was explained that

> 'the Act of 1926, therefore, made a completely new departure in Company Law. It set up a system of judicial management for companies which were unable to pay their debts or whose affairs were in such a condition that, ordinarily, it would be just and equitable to wind them up. If the Court was of the opinion that there was a reasonable probability that, if the company were placed under proper management, it would be enabled to meet its obligations, it was empowered to grant a judicial management order. The effect of such an order was to keep the company alive but to take it out of the control of directors, who presumably had mismanaged the company's affairs.'[89]

South Africa became one of the first countries to introduce a rescue culture for financially distressed companies in the belief that the 1926 Act would impact positively on economic growth.[90]

2.2.2.1.2. <u>Companies Amendment Act 11 of 1932</u>

South Africa's 'corporate rescue' mechanism did not change until an amendment in the form of a 'moratorium in respect of creditors' claims' was introduced by way of the Companies Amendment Act 11 of 1932 ('the Amendment Act of 1932'), motivated in part by the world economic depression of the 1930s (also known as The Great Depression and lasted for five to six years.).[91] The depression largely affected the agricultural sector, causing huge price declines

[87] House of Assembly Debates vol 6 25 Feb 1926 col 996-7 cited by Olver supra note 76 at 3.
[88] Lancaster supra note 82 at 281.
[89] Olver supra note 15 at 4.
[90] Lancaster supra note 82 at 318.
[91] Olver supra note 15 at 6.

between 1928-1933,[92] leading to the fear that loans to farmers might be recalled.[93] The South African government reacted by amending the Act to introduce the notion of the moratorium. The introduction followed a parliamentary debate addressed by Dr Karl Bremmer who said:

> 'Where these companies have only themselves or a few shareholders to consider, the matter is perhaps not so important, but where it is a case of companies which have lent money to large numbers of farmers and where the shortage of money might put such companies into liquidation, we have to face the position that large number (sic) of farmers may also be suddenly called upon to repay their bonds.'[94]

The Amendment Act of 1932 also provided for the setting aside of impeachable transactions in the judicial management process[95] by empowering the judicial manager to set aside dispositions of the debtor's property where the debtor was insolent.[96]

2.2.2.1.3. Companies Amendment Act 23 of 1939

Seven years later minor amendments were made following the report of the Lansdown Commission[97] chaired by C Lansdown, who expressed himself in favour of judicial management:

> 'The evidence submitted to us tends to show that the provisions of the Companies Act, 1926, as to placing a company in certain circumstances of difficulty under judicial management instead of winding it up have worked satisfactorily and that these provisions, which we believe to be peculiar to the South African Act, fulfil a distinct use.'[98]

Recommendations were, however, made for the improvement of judicial management by recommending that the judicial manager be empowered to manage the company's finances by paying the costs of judicial management and creditors' claims.[99] The commission also found that courts lacked sufficient evidence to make an informed decision on whether or not to grant an application for judicial management,[100] and recommended that 'in every case, an application for judicial management must first be referred to the Master of the Supreme Court for a

[92] See A Minnaar 'The effects of the Great Depression (1929–1934) on South African White agriculture' (1990) 5(2) *South African Journal of Economic History* 83-108; MHI Kaniki 'The Impact of the Great Depression on Northern Rhodesia' (1995) 24 *Transafrican Journal of History* 131-150.
[93] Rajak & Henning supra note 13 at 38-39.
[94] Union of SA House of Assembly Debates vol 18 1932 col 1867 as cited by Olver supra note76 at 6.
[95] Burdette op cit note 18 above at 246.
[96] Rajak & Henning op cit note 13 at 265.
[97] AV Lansdown *Report of the Company Law Commission 1935-1936* (UG 45 of 1936).
[98] Ibid.
[99] Rajak & Henning op cit note 13 above.
[100] Olver supra note 15 at 8.

report.'[101] His report would constitute the evidence required to grant an order for judicial management. The 1926 Act was amended accordingly.

However, difficulties inherent in judicial management persisted. The Master did not have the resources to conduct a proper investigation for the required report,[102] and so the report on which the courts relied could be inherently unreliable.

2.2.2.1.4. Companies Amendment Act 46 of 1952

Further amendments were made in 1952 following the three proposals emanating from the Millin Commission report,[103] namely that

> 'the judicial manager could not sell assets without leave of the court except in the ordinary course of the company's business; to make it a duty to apply for a winding-up order if, at any time, he was of the opinion that the continuance of the judicial management order would not enable the company to pay its debts in full; and that any moneys becoming available during judicial management should be applied first to the payment of costs and in the conduct of the company's business and only thereafter to the payment of pre-judicial management creditors.[104]

The judiciary was given greater power in the judicial management process as the judicial manager had to seek the approval of the court for any disposition of the company's assets. Rajak and Henning argued that these amendments were introduced to tighten judicial control over judicial management

> 'first by preventing disposition of the debtor's assets without the approval of the court, secondly by making it a duty for the judicial manager to apply for a winding-up order where [it was] satisfied that the continuation of the judicial management would not enable the debtor pay its debt in full and, finally, by requiring that any money made available in the judicial management should be applied initially for the costs of the judicial management, then for the conduct of business and, only after that, for the payment of creditors.'[105]

The findings, however, recognised that the propositions in the report raised practical difficulties. The report stated in 1948:

> 'It is evident that Parliament, in creating this system of dealing with companies unable to pay their debts did not anticipate the difficulties which almost

[101] Ibid.
[102] Ibid.
[103] *Verslag van die Kommissie van Ondersoek insake die wysiging van die Maatskappywet* (UG 69 of 1948). The Millin Commission found that the success rate of judicial management was only 13.6%. See JJ Henning 'Judicial management and corporate rescues in South Africa' (1992) 17(1) *Tydskrif vir Regswetenskap* 96.
[104] Olver supra note 15 at 9 and 10.
[105] Rajak & Henning op cit note 13 above.

> immediately arose in practice. The great difficulty was for the Court to know how to decide whether or not there was a reasonable probability that the company, if placed under judicial management, would be enabled to meet its obligations and remove any occasion for winding-up. Where application was made for winding-up and judicial management was proposed as an alternative on behalf of the company, the facts were disputed but the Court had, at any rate, the opportunity of hearing a case against as well as for judicial management. But where a direct application for judicial management was made, creditors seldom appeared to oppose and the information before the Court was largely *ex parte*. The figures to be mentioned in what follows show that in the great majority of cases belief in the probability of rehabilitation under a judicial management order was not justified. The truth is that people discovered very soon that by getting a judicial management order for a company which had come to grief and was in fact incapable of rehabilitation, it was possible to secure a liquidation of the company's assets free from all the controls and safeguards provided in the winding-up provisions of the statute; and it is to be feared that many of the cases in which judicial management orders have been granted in the past twenty years were of this type.[106]

However, the Millin Commission did not recommend that judicial management should be abolished, noting that:

> 'In spite of these unimpressive results of the system of judicial management, we found no witnesses in favour of abolishing it. All witnesses, both official and private, agreed that in the few cases in which judicial management had been successful, the success had been conspicuous and had been of great benefit to both shareholders and creditors. In the early days of our enquiry occurred the judicial management order in the case of the New Union Goldfields Limited. It was generally thought that but for this form of order being available, the company would have had to be wound up with great loss to shareholders and creditors; whereas, under judicial management, there were fair prospects of advantage to both. We therefore recommend that the system be retained, but that it be drastically overhauled.'[107]

2.2.2.1.5. <u>Companies Act 61 of 1973</u>

Despite the amendments that followed the reports of the Lansdown and Millin commissions, judicial management remained unpopular and was widely considered a failure.[108] Many companies under judicial management were ultimately wound up.[109] In 1963 the Van Wyk de

[106] Final Report of the Company Law Amendment Enquiry Commission UG 69 1948 p 93 para 258 as cited by Olver supra note 15 at 4-5.
[107] Ibid at 10.
[108] EP Joubert '"Reasonable Possibility" versus "Reasonable Prospect": Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 551; Smits op cit note 71 above at 85; Loubser op cit note 64 above.
[109] Sharrock, Van Der Linde & Smith *Hockly's Insolvency Law* 7 ed (2005) 232.

Vries Commission of Enquiry[110] chaired by Van Wyk de Vries J commenced its work. The Masters of the High Court submitted to the commission that judicial management be abolished.[111] This was confirmed by Van Wyk de Vries J in the 1970 report:

> 'The Masters of the Supreme Court have all urged the Commission to recommend the abolition of judicial management. They have submitted that the statistics prove that judicial management has been successful in only a small percentage of cases and that in many instances it should never have been resorted to. Furthermore, that the system of judicial management is being abused and that it usually proves to be the first step in an inevitable succession of events leading to the winding-up and ultimate dissolution of the company.'[112]

However, the Commission recommended that judicial management be retained, but only granted where it was reasonably probable that all the company's debts would be paid and that it would become a successful concern.[113] The crux of the problem was that too many orders for judicial management were granted. It recommended that the company should be investigated thoroughly and that the order should only be granted in exceptional circumstances. The Commission seemed to adopt a creditor-friendly approach by recommending that the court seek the opinion of creditors before granting an order:

> 'We believe that the body of creditors, being vitally involved, would produce a dispassionate and balanced opinion as to the possibility of rehabilitating a company. An opinion arrived at by the creditors after thorough investigation of the affairs of the company would in the ordinary course of events be of assistance to the Court. Often creditors would be businessmen and it is not unlikely that they would have knowledge and experience of the type of business conducted by the company. Despite the alleged apathy of creditors in these matters we feel that the Act should provide that their collective view should be made available to the Court before a final order is granted.'[114]

Nothing was said about the debtor company. This approach was criticised because there was a suggestion that the 1926 Act had provided that this was a qualifying requirement.[115]

The 1973 Act repealed and consolidated all previous Companies Amendment legislations. However, its provisions became unpopular and the operation of judicial management continued to be widely criticised by scholars on the grounds that judicial management was applied as an

[110] J Van Wyk de Vries *South African Commission of Enquiry into the Companies Act* (1970).
[111] D Shrand and AAF Keeton *Company Law and Company Taxation in South Africa* (1974) 305; Burdette op cit note 71 above; Kloppers op cit note 65 above.
[112] J Van Wyk de Vries *South African Commission of Enquiry into the Companies Act* (1970).
[113] Kloppers op cit note 64 above at 372; Burdette op cit note 18 above.
[114] J Van Wyk de Vries *South African Commission of Enquiry into the Companies Act* (1970).
[115] Kloppers op cit note 64 above.

extra-ordinary procedure, its provisions failed failure to recognise the diversity of business entities in South Africa, and the disadvantage of the heavy reliance on court proceedings.[116]

2.2.2.1.6. Companies Act 71 of 2008

South Africa's Companies Act 71 of 2008 ('the Act'), which came into force on 1 May 2011, introduced a number of profound changes to company law, including business rescue. It was a response to a clear need for company law reform, driven by the need for South Africa to align itself with international corporate trends.[117] The Minister of DTI Mpahlwa commented as follows on the policy paper that was published by the DTI in May 2004:

> 'The domestic and global environment for enterprises has changed markedly since the 1970s. Corporate structures and financial instruments have undergone significant developments. Many old concepts have been abandoned or modified and new concepts have been developed. We now live in a world of greater globalisation, increased electronic communication, greater sensitivity to social and ethical concerns, fast changing markets, greater competition for capital, goods and services. South Africa cannot afford to be left behind. There is a growing recognition by companies and governments that there is a need for higher standards of corporate governance and ethics and greater interdependence between enterprises and the societies in which they operate. A number of corporate failures in South Africa and other jurisdictions have revealed serious defects in the prevailing standard of corporate governance and the administration of the law and have resulted in investors suffering extensive losses.'[118]

The reform of South African company law was closely handled by the departments of Justice and the DTI. As early as February 2000 the South African Law Reform Commission (under the Department of Justice) published The Draft Insolvency Bill aimed at reforming the insolvency law system.[119] Six months later the University of Pretoria's Centre for Advanced Corporate and Insolvency Law published a Draft Insolvency and Business Recovery Bill that consolidated the provisions in the 1973 Act regulating company insolvency.[120] In March of the following year, the Cabinet approved, in principle, the Draft Insolvency and Recovery Bill.[121] Consequently th,e urgent need for an effective business rescue procedure became paramount as government concern mounted over job losses that resulted from a high number of business

[116] These will be discussed below under subheading 'The concept of judicial management and its weaknesses'.
[117] Joubert op cit note 108 above at 550.
[118] Department of Trade and Industry *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (May 2004) available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/ 040715 companydraftpolicy.pdf* accessed: 13 August 2018.
[119] Loubser op cit note 64 above at 158.
[120] Ibid.
[121] Ibid.

liquidations.[122] In April 2004 the Chief State Law Adviser announced that a Draft Business Rescue Bill would be ready by end of the following month.[123]

The process revealed a possible conflict between the Department of Justice and the DTI because, at the end of May, when the Draft Business Rescue Bill of the Department of Justice was expected, the DTI surprisingly published a policy document for the reform of company law that would result in a new legislation by June 2006.[124] This document included insolvency and corporate rescue as core aspects that would be addressed in liaison with the Department of Justice on the proposed company law reform and the Insolvency and Business Rescue Bill.[125] The drafting of a Draft Companies Bill ('the Bill') endured from mid-2005 until early 2006.[126] In mid-2006 the Bill was submitted to the Minister and Cabinet[127] and thereafter made available for public comment. Thereafter, the Bill was revised and introduced to Parliament as the Companies Bill for debate,[128] whereafter it was approved and signed into law by the State President on 8 April 2009, and gazetted as the Companies Act 71 of 2008 ('the Act') the following day.

A parliamentary debate was then convened on 9 November 2010 when the Companies Amendment Bill was tabled[129] proposing amendments to, correct errors, technical legal issues, and grammatical errors in the Act.[130] After public hearings, the Bill was approved by the Portfolio Committee on Trade and Industry on 10 March 2011. Finally, the Companies Amendment Act 3 of 2011 was assented to by the President and duly gazetted.[131] This Amendment Act was to be read with the Act.

2.3.The General Concept of Judicial Management and its Weaknesses

From its introduction in 1926, judicial management was intended to assist companies experiencing financial difficulties. However, the government had made it clear that judicial

[122] Ibid.
[123] Ibid at 158-159.
[124] Department of Trade and Industry *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (May 2004). Available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/ 040715 companydraftpolicy.pdf* (Accessed on 13 August 2018).
[125] Loubser op cit note 64 above at 44.
[126] TH Mongalo 'An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008' (2010) *Acta Juridica* xiii 23.
[127] Ibid.
[128] Ibid at 24.
[129] *https://www.saica.co.za/Technical/LegalandGovernance/CompaniesAct71of2008/tabid/1581/itemid/1427/language/en-ZA/Default.aspx* (Accessed: 25 May 2021).
[130] Ibid.
[131] Government Gazette Number 34243.

management would be granted only in special circumstances and in favour of strategically vital industries.[132] This is where the problems started to emerge. Criticism of judicial management burgeoned long before the 1973 Act,[133] which IN FACT introduced no changes, leaving the pre-1973 failings and criticisms extant. It did not specifically define judicial management, but only gave the requirements for its commencement, and its purpose was not defined. Its requirements were therefore the core of its purpose. In terms of s 427(1), judicial management could be applied for when, as a result of mismanagement or any other cause, a company found itself in financial difficulties. This section provided that:

> 'When any company, by reason of mismanagement or for any other cause, is unable to pay its debts or is probably unable to meet its obligations; and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the court may, if it appears just and equitable, grant a judicial management order in respect of that company.'

The objective of judicial management was thus to enable the company to avoid liquidation and, under proper management, overcome its difficulties and become a successful concern.[134] This presupposed a temporary setback before applying for judicial management;[135] the intention was to preserve the company and render it viable.[136] More criticisms followed, namely that judicial management was applied as an extraordinary procedure although nothing in the 1973 Act provided that judicial management should only be applied to 'vital companies'. Courts took the conservative approach of treating it as an alternative to liquidation[137] on the assumption that creditors had a right *ex debito justitiae* to liquidate a company. This undermined its purpose, namely to give a company in financial difficulties breathing space to overcome its

[132] House of Assembly Debates vol 6 25 Feb 1926 col 996-7 cited by Olver supra note 76 at 3.
[133] See for example subheading 2.2.1 above and its subheadings on the historical development of the South African corporate rescue legislation.
[134] PM Meskin et al (eds). *Henochsberg on the Companies* Act 4 ed (1985) 753; JT Pretorius *et al Hahlo's South African Company Law Through the Cases* 5 ed (1991) 735; JTR Gibson *et al. South African Mercantile and Company Law* 7 ed (1997) 423; D Shrand *The Law and Practice of Insolvency, Winding-Up of Companies, and Judicial Management* 3 ed (1977) 325; G Wille, JF Coaker & WP Schutz *Wille and Millin's Mercantile Law of South Africa* 16 ed (1967) 626; RD Sharrock, Van Der Linde & Smith *Hockley's Insolvency Law* 7 ed (2005) 232; JT Pretorius *et al* Hahlo's South African Company Law Through the Cases 5 ed (1991) 735135; JL van Dorsten *South African Business Entities: A Practical Guide* 3 ed (1993) 327; Burdette op cit note 18 above; J Henning in: H Rajak *Insolvency Law and Practice* (1993) 305.
[135] ML Benade *et al Entrepreneurial Law* 3 ed. (2003) 387; HS Cilliers, ML Benade *et al Corporate Law* 3 ed (2000) 478.
[136] *Silverman v Doornhoek Mines Ltd* 1935 TPD 353.
[137] Kloppers op cit note 64 above; Burdette op cit note 18 above at 244.

challenges and become a successful concern.[138] Courts refused applications for judicial management on the grounds that creditors were entitled to immediate payment of their debts.[139] The courts only granted orders where there was a reasonable probability that the company would become a successful concern. This led to debate amongst the judiciary and academics as to the test for the grant of a judicial management order. It was not clear what the circumstances should be on the return date to warrant the granting of a final judicial management order. Some courts held that the test should be the same as on the date of granting a provisional judicial management order.[140] However, others argued that the company's circumstances should be more stringently viewed on the return date.[141] Cilliers and Benade[142] asserted as such because the court would then be in a better position to judge the company's prospects of becoming a successful concern. Meskin[143] and Kloppers[144] argued that it was difficult to prove a reasonable probability that the company would be successful. Furthermore, the phrase 'reasonable probability' as opposed to 'reasonable possibility' made it difficult to obtain a judicial management order.[145] In addition, the test of reasonable probability was not

[138] Burdette op cit note 18 above. Loubser op cit note 64 above; Kloppers op cit note 64 above; Smits op cit note 71 above.

[139] See for example *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E); *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V); *Ben-Tovim v Ben-Tovim* 2000 (3) SA 325 (C); *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T); *Silverman v Doornhoek Mines Ltd* 1935 TPD 349.

[140] *Ex parte Onus (Edms) Bpk: Du Plooy NO v Onus (Bpk)* 1980 (4) SA 63 (O) at 66C-D. The court refused to follow *Tenowitz* and held that the test should be the same and there was no need to change it on the return date. This was also accepted by the court in *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T) where it held that "reasonable probability" need not be a "strong probability". This was also supported by the court in *Ladybrand Hotel (Pty) Ltd v Segal* 1975 (2) SA 357 (O) when the court dealt with the factors to be taken into consideration before a provisional order of judicial management order was made final.

[141] *Silverman v Doornhoek Mines Ltd* 1935 TPD 349. The court held that 'reasonable probability' needs to be a 'strong probability'. This was accepted by the court in *Noordkaap Lewende Hawe Ko-Op Bpk v Schreunder* 1974 (3) SA 102 (A) at 110 where the court held that 'reasonable probability' referred to the stringent test to determine whether the company would become a successful concern. In *Tenowitz v Tenny Investments* 1979 (2) SA 680 (E) Smalberger J said that 'the test on the return day, when the court determines whether or not to grant a final judicial management, is, in terms of s 432 of the Act, whether the company will, if placed under judicial management, be enabled to become a successful concern and it is just and equitable that it be placed under judicial management order. The concept of the company becoming a successful concern presupposes that it will be able to pay its debts and meet its obligations. The test to be satisfied before a final judicial management order is granted is therefore a more stringent one than the one applied to the granting of a provisional judicial management order'.

[142] HS Cilliers & ML Benade (eds) *Corporate Law* 3 ed (2000) 481. See also Henning 'Judicial management & corporate rescue in South Africa' (1992) 17(1) *Tydskrif vir Regswetenskap* 93. He points out that a mere reasonable possibility that the company would become a successful business concern is not sufficient.

[143] Meskin *et al Henochsberg on the Companies Act* op cit note 18 above at 755.

[144] Kloppers op cit note 64 above at 82-4.

[145] Burdette op cit note 18 above.; Smits op cit note 71 above.; D Brown *Corporate Rescue: Insolvency Law in Practice* (1996) 820.

the end of the matter because the courts would still have to decide whether it was just and equitable to grant an order.[146]

The second main criticism was that the judicial management procedure seemed to apply only to companies. Loubser[147] argued that section 427(1) specifically provided that only a 'company' as defined in the Act could be placed under judicial management, thereby restricting other businesses from participating. This failed to take into account the diverse entities through which businesses were conducted,[148] including close corporations, partnerships, and trusts.

The third main criticism of judicial management was that it relied on two court orders, the provisional judicial management order and the final judicial management order. Academics claimed that this rendered the process unaffordable for small and medium-sized companies.[149] Such doubt was also expressed by the courts.[150] In *Rustomjee v Rustomjee (Pty) Ltd*,[151] Jansen J held that it was doubtful whether, in law, judicial management proceedings were appropriate for a small private company. In that case, the court refused to grant a judicial management order on the basis that the evidence showed that the company was doomed to die a natural death in the next seven years. In *Tobacco Auctioneers Ltd v AW Hamilton (Pty) Ltd*,[152] the court was faced with a similar issue of deciding whether judicial management was suitable for small companies. Goldin J held:

> 'Doubt has been expressed in several cases whether, in law, judicial management proceedings are really intended to apply to a small company. In my respectful view the fact that a company is a private company with no more than one two or three members or even with few issued shares, is not in itself sufficient reason for holding that section 262 does not apply to it or is not an appropriate relief . . . Its assets and liabilities and nature of its difficulties are all relevant factors in deciding whether section 265 is applicable.'

Goldin J stressed that the size of the company was an important factor in granting a judicial management order. He added that its assets, liabilities, and the nature of the difficulties facing the company should also be considered, stressing that judicial management was not suitable

[146] Kloppers op cit note 64 above. '.
[147] Loubser op cit note 64 above.
[148] Rajak & Henning op cit note 13 above.
[149] Ibid; Smits op cit note 71 above, arguing that the cost of judicial management was too high for small or medium-sized companies.
[150] See *Ronaasen v Ronaseen & Morgan (Pty) Ltd* 1935 CPD 562 where Centlivres AJ expressed doubt that judicial management was suitable for small or medium-sized companies. In his judgment Centlivres AJ held 'I doubt whether section 195 of the Companies Act which provides for the placing of a company under judicial management, was intended to apply to a proprietary company of this description'.
[151] 1960 (2) SA 753 (D) at 758.
[152] 1966 (2) SA 451 (R) at 453.

for small- and medium-sized companies because, if assets and liabilities amounted to less than the costs of judicial management, the company would not adopt this process. In contrast, Kloppers[153] argued that the evidence showed that small and medium-sized companies played an important role in the South African economy and were thus worthy of being saved.

The fourth main criticism was that only the 1973 Act devoted a chapter to judicial management. The 1926 Act included it at the end of the chapter on winding up.[154] This resulted in professional liquidators being appointed as judicial managers of companies under judicial management. This was criticised because the objectives of judicial managers and those of liquidators were different.[155] The judicial manager's objective was to enable the company to become a successful concern while the liquidator sought to stop a company from trading and to sell its assets. Kloppers[156] thus noted that a conflict of interests ensued when a judicial manager might later be appointed as a liquidator. Critics[157] thus called for a new business rescue system.

In practice, judicial management had obvious flaws and was sometimes unrealistic.[158] A company placed under judicial management seldom returned to profitability because the public would lose confidence in it, inhibiting the doing of business[159]. In *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd,*[160] Josman J held that judicial management had seldom worked since the early days of its adoption, a view shared by the court in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd*[161] where Claassen J referred to judicial management as a failure because of its low success rate and because it undermined companies' creditworthiness and chances of survival. Olver recommended that the requirements for the

[153] Kloppers op cit note 65 above.
[154] Companies Act 46 of 1926.
[155] Kloppers op cit note 65 above; Olver supra note 75.'.
[156] Ibid; Ibid.
[157] Loubser op cit note 65 above at 142 and 156.
[158] Burdette op cit note 71 above; Brown op cit note 145 above; Smits op cit note 1=71 above at 82-4.
[159] RC Williams *Concise Corporate and Partnership Law* 2 ed (1997) 311.
[160] 2001 (2) SA 727 (C) at para 60. This case summarises the problems relating to judicial management in South Africa.
[161] 2012 (3) SA 273 (GSJ) at para 7. J Henning 'Judicial Management and Corporate Rescues in South African Law' in H Rajak *Insolvency Law: Theory and Practice* (1993) Ch 19 at 305 argued that the detrimental effect on the creditworthiness of the company was a serious disadvantage.

appointment of judicial managers should be changed[162] while other academics called for the requirement that full payment of debts be made to creditors to be revisited.[163]

2.4 The General Concept of Business Rescue

The underlying philosophy of business rescue is not necessarily to prevent the company from being wound up or liquidated. Even if the company is liquidated, business rescue may still provide for a better return for creditors than they would have received on immediate liquidation. In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[164] Claassen J held:

> 'The general philosophy permeating the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name "business rescue" and not "company rescue". This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors' interests to a broader range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employees, [it] may, in the end prove to be a better option for creditors in securing full recovery from the debtor.'

The court interpreted the philosophy of business rescue with section 7(k) and section 128(1) of the Act in mind. Section 7(k) states that the purpose of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.' On the other hand, section 128(1)(h) provides that rescuing a company means 'achieving goals set out in the definition of business rescue . . . ' The definition is found in s 128(1)(b) which provides that the term 'business rescue' means proceedings that are aimed at facilitating the rehabilitation of a company that is financially distressed by providing for

> 'the temporary supervision of the company, and of the management of its affairs, business and property; a temporary *moratorium* on the rights of claimants against the company or in respect of property in its possession; and the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results

[162] See AH Olver 'Judicial management – a case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 84. He argues that 'judicial managers should not be allowed to become liquidators of the company of which they have been judicial managers.'
[163] Kloppers op cit note 64 above; See also Rajak & Henning op cit note 13 above.
[164] 2012 (3) SA 273 (GSJ) 12.

> in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

This definition constitutes a major evolution of the South African business rescue regime, as it includes a number of new elements of rescue culture. In *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*[165] Binns-Ward J held that:

> 'It is clear that the legislature has recognised that liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidents of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidation in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or securing a better return to creditors than would probably be achieved in an immediate liquidation.'[166]

This definition and purpose of business rescue constitute a leap forward for rescue policy. On commencement of rescue proceedings, temporary supervision is undertaken by a business rescue practitioner[167] with full management control.[168] He/she may be appointed by company resolution within five days of adoption and filing of the resolution, or by court order.[169] Within two days of the appointment of the practitioner, a notice of his/her appointment must be filed and a copy must be served on each affected person within five days of filing.[170] If the appointment is by court order, the court may appoint an interim business rescue practitioner nominated by the applicant.[171] However, the appointment is subject to ratification by a majority vote of independent creditors at the first creditors' meeting.[172]

Once the company has commenced business rescue, the company is protected by the moratorium − one of the most important consequences of the commencement of business rescue. Business rescue proceedings provide for a temporary moratorium on the rights of claimants (creditors) against it or in respect of property in its possession.[173] Therefore, no legal

[165] 2012 (2) SA 378 (WCC).
[166] Para 14.
[167] Section 128(1)(*d*).
[168] Section 140(1)(*a*).
[169] Section 129(3)(*b*).
[170] Section 129(4)(*a*) & (*b*).
[171] Section 131(5).
[172] Ibid.
[173] Section 128(1)(*b*).

proceedings against the company may be commenced or proceed.[174] The purpose is to give the company and the business rescue practitioner space and time to deal with rescuing the company, without having to fight off litigation by creditors.[175]

Another significant evolution of business rescue is apparent on perusal of the third measure in the definition:

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

There are two important aspects to this measure. The development of a business rescue plan is the new requirement aimed at rescuing the company. The plan may be developed and implemented to maximise the likelihood of the company continuing in existence on a solvent basis or, failing that, resulting in a better return for the company's creditors or shareholders than would have been the case on liquidation. The Act does require that there must be a plan that has to be developed and implemented by a business rescue practitioner[176] a provision crucially lacking in judicial management, which had led to the call for the inclusion of a detailed plan that would provide how the company was going to be rescued.[177] The business rescue plan is crucial as it determines how the business rescue practitioner plans to rescue a company, and contains all the information reasonably required to enable affected persons to decide whether it should be accepted or not.[178] Its critical importance to stakeholders and affected persons, and for rescuing the company means that the information contained in the business rescue plan should be precisely worded and easily understandable. This can avoid

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[174] Section 133(1).

[175] *Cloete Murray NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at 14; *Southern Value Consortium v Tresso Trading 102 (Pty)* [2015] JOL 34787 (WCC) at para 34; *Chetty t/a Nationwide Electrical v Hart* 2015 (6) SA 424 (SCA) at paras 28 and 39; *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) at paras 7, 9, and 11; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* [2013] ZAGPJHC 109 (13/12406 10 May 2013) at 4.

[176] Section 140 provides that during a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter 6 of the Act is responsible to develop a business rescue plan to be considered by affected persons; and implement any business rescue plan that has been adopted in accordance with Part D of this Chapter. See also s 150 (1) which provides that the practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of s 151. This thesis is going to deal with the meetings in chapter 5.

[177] Kloppers op cit note 64 above at 427; Henning op cit note 18 above.

[178] Section 150(2).

unnecessary arguments when the relevant parties vote on whether it should be adopted. Pretorius and Rosslyn-Smith[179] argue that a vague and loosely designed plan may undermine stakeholders' confidence and willingness to invest in the business. The plan should contain clear information that enables an interested person to decide on whether it should be accepted or rejected.[180] It should also include all facts and practical assumptions for the rehabilitation of the company.

The second measure has two objectives namely the

> 'restructuring [of the company's] affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

The concept of a 'better return for creditors' has received differing interpretations in the courts. The important aspect is whether or not the two objectives, namely:

- maximisation of the likelihood of a company continuing on solvent basis; and
- a better return for creditors

should be treated as independent of each other. Courts differ over whether 'better return for creditors or shareholders' is an independent objective[181] or not.[182] The question is whether it is sufficient for affected persons to show that business rescue will result in a better return for creditors even if it cannot be shown that the company will be restored to solvency.[183] In *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)*[184] (a few weeks after the coming into force of the Act)[185], the court held that it was clear that the company was hopelessly insolvent and could not meet its immediate financial obligations.[186] The court held further that in deciding whether or not to grant an order for business rescue, the court had to determine

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[179] M Pretorius & W Rosslyn-Smith 'Expectations of a business rescue plan: International directives for Chapter 6 implementation' (2014) 18 (2) *Southern African Business Review* 108-139.
[180] *CSARS v Beginsel NO* 2013 (1) SA 307 (WCC) at 18; *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB).
[181] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA); *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 (3) SA 273 (GSJ); *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013); *CSARS v Beginsel NO* supra note 12.
[182] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd (Marley Pipe Systems (Pty) Ltd)* 2012 (5) SA 515 (GSJ); *Griessel v Lizemore* 2016 (6) SA 236 (GJ) (*AG Petzetakis International Holdings Ltd*).
[183] Y Kleitman & C Masters 'Better returns for creditors – Business rescue' (2013) 13 (7) *Without Prejudice* 34
[184] 2011 (5) SA 422 (GNP).
[185] Companies Act 71 of 2008.
[186] Para 5.

whether a company would be able to carry on business on a solvent basis, or whether granting business rescue would result in a better return for creditors[187] and found in the negative on both grounds.[188] The court viewed 'better return for creditors' as an independent objective from that of 'restoring the company to solvency'.[189] If there had been a possibility of a better return for creditors, it would have granted an order for business rescue. This principle was supported in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd.*[190] However, the court emphasised that mere speculation would be an insufficient basis for a court to grant an order for business rescue.[191]

Nine months after the *Swart* decision, the court in *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd (Marley Pipe Systems (Pty) Ltd*[192] expressed doubt that a 'better return for creditors' alone would be sufficient for an order for business rescue, holding that 'better return for creditors' would lead to more litigation.[193] Two weeks after this decision the court in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[194] accepted that 'better return for creditors' was an alternative and independent objective of business rescue. However, it refused to grant an order because no evidence was placed before the court to show that such an order would result in a better return for creditors.[195] Since then, more courts have accepted that 'better return for creditors' is an alternative objective of business rescue.[196]

Uncertainty around 'better return for creditors' seems to have been clarified by the SCA in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kylalami) (Pty) Ltd (Oakdene)*[197]. The court accepted that 'better return for creditors' was an alternative objective of business rescue. In reaching this decision, Brand J referred to Australian law and held that:

> "In Australia it is accepted, on the other hand, that recourse to the rescue provisions of that country's Corporations Act 50 of 2001 — which are not

[187] Para 37.
[188] Para 42.
[189] E Mbiriri 'Creditors' interests still carry the day in business rescue: *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP)' (2014) 7 (1) *International Journal of Private Law* 82.
[190] 2012 (2) SA 423 (WCC).
[191] Para 25.
[192] 2012 (5) SA 515 (GSJ).
[193] Para 12.
[194] 2012 (3) SA 273 (GSJ) 49.
[195] Ibid.
[196] See for example *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) at 4; *CSARS v Beginsel NO* 2013 (1) SA 307 (WCC) 61-64.
[197] 2013 (4) SA 539 (SCA).

> dissimilar in wording to ours 128(1)(*b*) — need not necessarily be to save the company from liquidation. In *Dallinger v Halcha Holdings (Pty) Ltd* (1996) 14 ACLC 263 ([1995] FCA 1727) para 28, for example, the Federal Court of Australia held that the statutory rescue machinery 'should be available in a case where, although it is not possible for the company to continue in existence, an administration is likely to result in a better return for creditors than would be the case with an immediate winding-up'.'[198]

The court took the view that achievement of either of the objectives of business rescue fulfilled the requirements of s 128.[199] However, it agreed with the court *a quo* that based on the facts before it, the business rescue order should be refused, as the company was hopelessly insolvent.[200] In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd*[201] the court held that 'business rescue is also geared at temporarily protecting a company against the claims of creditors so that its business can thereafter be disposed of (if it could not be saved) for maximum value as a going concern in order to give creditors and shareholders a better return than they would have received had the company been liquated'. If the adoption of a business rescue plan would result in a better return for the company's creditors or shareholders, business rescue proceedings are preferred.

The view of the SCA in *Oakdene* appears correct because s 128(1) of the Act does provide that rescuing a company means achieving the goals set out in the definition of business rescue. Successful rescue may either be restoring the company to solvency or enhancing returns for stakeholders. The inclusion of the secondary objective negates the idea that successful rescue would only be achieved if the company was fully restored to solvency. Brand J held that:

> 'The rhetorical question that arises is: why, as a matter of common sense and policy, should this be so? Why should a company not be temporarily protected against claims of creditors if that will, as in the case of Millman, NO, allow the sale of the business as a going concern at optimum value, in order to give creditors and shareholders a better return than would result from liquidation? Why should the law in these circumstances insist on the requirement that the creditors eventually be paid in full? It has been suggested that this insistence on an eventual return to solvency was one of the reasons why the institution of judicial management turned out to be an 'abject failure' . . . I believe it can be accepted

[198] Para 24.
[199] Para 26.
[200] Para 39.
[201] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Co (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) 4*. See also Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* (5000/2011) [2012] ZAFSHC 130; 2013 (1) SA 542 (FB) (28 June 2012) 7; *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP) 18.

with confidence that the legislature did not intend to repeat the mistakes of the past.'

Judicial management had placed much emphasis on the protection of creditors, to the extent that in many instances where creditors opposed judicial management, the courts would refuse it on the basis that such creditors were entitled to immediate payment.[202] However, business rescue cannot now be refused just because the creditors are entitled to immediate payment. Joubert asserts that '[i]t is clear from the definition of business rescue in section 128(1)(b) that any one of two outcomes of business rescue will be seen as a successful rescue of an ailing company.'[203] Before the Act came into force, Loubser[204] had argued that 'the use of the words 'a better return than . . . immediate liquidation' clearly implies eventual liquidation and payment of a dividend rather than full payment to creditors.' A possible reason for the 'alternative' view is that the legislature intended to persuade creditors or shareholders to inject money into a financially distressed company in the hope of enhancing their return.

2.5 Conclusion

This chapter has dealt with the 'corporate rescue' concept and its evolution in South Africa, and clearly shows that the concept of business rescue has gained broad acceptance in South Africa while the failed experiment with judicial management has been consigned to history. It is apparent that, since its introduction in 1926, there have been debates around its policies and regulations. The parliamentary debates in 1926 and subsequent debates illustrate that the legislative framework of business rescue has always needed to develop. Whilst judicial management proceedings relied heavily on court procedure, the new business rescue regime has made business rescue proceedings financially and practically viable for financially distressed companies since the legislature has simplified the mode of commencement of business rescue. Business rescue provides for commencement either by resolution or court order. The board of directors may resolve that the company should begin business rescue if it has reasonable grounds to believe that the company is financially distressed; and there appears to be a reasonable prospect of rescuing it.[205]

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[202] *Tenowitz v Tenny Investments (Pty) Ltd: Spur Steak Ranches (Pty) Ltd v Tenny Investments* 1979 (2) SA 680 (E); *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V); *Ben-Tovim v Ben-Tovim* 2000 (3) SA 325 (C); *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T).

[203] Joubert op cit note 108 supra.

[204] A Loubser *Some Comparative Aspects of Business Rescue in South African Company Law* (Unpublished LLD thesis, University of South Africa, 2010) 46.

[205] Section 129(1)(*a*) & (*b*) provides that 'subject to subsection (2)(*a*), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the

CHAPTER THREE

BUSINESS RESCUE POLICY ON COMMENCEMENT OF RESCUE PROCEEDINGS

3.1. Introduction

The introduction of a corporate rescue mechanism in 1926 demonstrated that saving businesses was an important policy consideration in South Africa. It was accordingly considered desirable that companies with economic potential should not be liquidated if they encountered financial difficulties that could reasonably be overcome, with the prospect of a return to solvency. However, the legislation (Companies Act 46 of 1926 – 'the 1926 Act') that aimed at rescuing such companies was not well thought through. There were legal doubts over issues such as which entities qualified for rescue proceedings; who had *locus standi* to initiate the process; what legal process was to be followed; how the case was to be determined; the basis on which a struggling company could be found to have the potential to return to solvency; and what had to be proved to enable commencement of rescue proceedings?

At the time of the debates about the new business rescue regime to be introduced by the Companies Act 71 of 2008 ('the Act') lessons had been learned from the shortcomings of judicial management regime. The drafters of the Act had a change of mindset when drafting the Act; and with the benefit of the experience of other statutory regimes of other countries, they were able to develop a modern South African business rescue regime. This chapter aims to determine how the courts and commentators have interpreted the provisions of the Act to give effect to the intention of the legislators. Suggestions on the commencement of business rescue proceedings will also be offered.

3.2. Types of Entities Qualifying for Business Rescue

South Africa's initial intention was to help 'vital' companies. The then Minister of Justice Tielman Roos stated in a 1926 parliamentary debate that judicial management was aimed at 'helping' big companies that were institutions 'which helps the country'.'[206] Olver confirms that the then judicial management regime was intended to protect 'vital' companies.[207] The size

board has reasonable ground to believe that the company is financially distressed; and there appears to be a reasonable prospect of rescuing the company.' *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) at para 13.

[206] House of Assembly Debates vol 6 25 Feb 1926 col 996-7 cited by Olver in 'Judicial Management in South Africa: Its Origin, Development and Present Day Practice and a Comparison with the Australian System of Official Management' (Unpublished LLD thesis, University of Cape Town, 1980) 3.

[207] Olver 'Judicial management - a case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 84. See also *Ronaasen v Ronaseen & Morgan (Pty) Ltd* 1935 CPD 562 where Centlivres AJ expressed doubt

of the company was an essential consideration in deciding whether or not to grant judicial management.[208] The Van Wyk de Vries Commission of Enquiry placed emphasis on the protection of 'vital' companies by judicial management. Lover quotes the assistant registrar, Pietermaritzburg, Mr de Beer, as saying he could

> 'still see the justification for judicial management where the concern serves the required need of the country as a whole, e.g. manufacturers of medical equipment, medicines, steel products, etc but not a second rate proprietary hotel on the South Coast or a little family general dealer's business etc.'[209]

However, years later, Kloppers[210] asserted that small- and medium-sized companies had been shown to play an important role in the South African economy and were thus worthy of being saved. However, the idea of helping 'large' or 'vital' companies was once again emphasised by the courts in interpreting the provisions of the Companies 61 of 1973 ('the 1973 Act'), taking a conservative approach in which judicial management was treated as an alternative to liquidation.[211] This creditor-friendly approach saw the courts refusing to order judicial management on the ground that creditors were entitled to immediate payment of their debts.[212]

However, the introduction of the Act has made business rescue proceedings available to different business entities. Regulation 128(1) of the Act applies a fixed scale for the amount of the business rescue practitioner's remuneration,[213] enabling small, medium, and large companies to all be eligible to commence rescue proceedings. Business rescue is no longer aimed at helping 'large' companies as was the case in 1926 and the following years. The Act answered the criticism that judicial management had failed to take account of the diverse entities that conducted business in South Africa.[214] The introduction of the new business rescue

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that judicial management was suitable for small or medium-sized companies and *Rustomjee v Rustomjee (Pty) Ltd* 1960 (2) SA 753 (D) 758

[208] *Tobacco Auctioneers Ltd v AW Hamilton (Pty) Ltd* 1966 (2) SA 451 (R) at 453.

[209] See Olver op cit note 15 above.

[210] P Kloppers 'Judicial management reform – steps to initiate a business rescue' (2001) 13 (3) *South African Mercantile Law Journal* 425.

[211] Ibid; DA Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16(2) *South African Mercantile Law Journal* 244.

[212] See for example *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) (Tenowitz); *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V); *Ben-Tovim v Ben-Tovim* 2000 (3) SA 325 (C) (*Ben-Tovim*); *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T); *Silverman v Doornhoek Mines Ltd* 1935 TPD 349.

[213] This regulation provides that that 'the basic remuneration of a business rescue practitioner, as contemplated in section 143(1), may not exceed-

a) R 1 250 per hour, to a maximum of R 15 625 per day, (inclusive of VAT) in the case of a small company;
b) R 1 500 per hour, to a maximum of R 18 750 per day, (inclusive of VAT) in the case of a medium company; or
c) R 2 000 per hour, to a maximum of R 25 000 per day, (inclusive of VAT) in the case of a large company, or a state-owned company.'

[214] H Rajak & J Henning 'Business rescue for South Africa' (1999) 116(2) *South African Law Journal* 265.

regime recognised the different entities; since the adoption of the Act, hotels, restaurants, golf clubs, and companies have commenced business rescue proceedings. These include, *inter alia*, Phumelela Gaming and Leisure,[215] Afarak Mogale and Afarak South Africa,[216] South African Airways,[217] Edcon,[218] Comair,[219] SA Express,[220] Moyo Restaurant,[221] Pearl Valley Golf Estate, South Gold Mine, Top TV, Meltz Success, Advanced Technologies & Engineering, and Optimum Coal Mine.[222] The policy of exclusively saving 'large' companies has been done away with.

3.3. Control of a Company During Business Rescue Proceedings

Judicial management and business rescue give both judicial managers and business rescue practitioners powers once they are appointed. Section 140 of the Act gives a business rescue practitioner full management control of the company; power to delegate any power or function to any person who was part of the pre-existing management of the company; and power to remove any person who forms part of management from office or appoint a person to fill the vacancy created.[223] Sections 428(2)(*a*), 430(*a*), 432(2)(*a*), and 433(a) of the 1973 Act[224] gave the judicial manager power to assume official management of the company. The roles differ in

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[215] T Mochiko 'Phumelela files for business rescue: SA's biggest horse-racing group has lost 77.09% of its value since January' *Business Day* 8 May 2020, Available at *https://www.businesslive.co.za/bd/companies/2020-05-08-phumelela-files-for-business-rescue/* accessed: 20 January 2021.

[216] K Decena 'Afarak files for business rescue in South Africa over COVID-19 impact' *S&P Global Market Intelligence* 8 May 2020, Available at *https://www.spglobal.com/marketintelligence/en/news-insights/latest-news headlines/afarak-files-for-business-rescue-in-south-africa-over-covid-19-impact-58533534* accessed: 20 January 2021).

[217] M Pretorius 'South African Airways is in business rescue: what it means, and what next' *The Conversation* 5 December 2019, available at *https://theconversation.com/south-african-airways-is-in-business-rescue-what-it-means-and-what-next-128409* accessed: 10 December 2020.

[218] D Faku 'Edcon to file for business rescue after losing R2bn due to virus' *IOL Business Report* 29 April 2020, Available at *https://www.iol.co.za/business-report/companies/edcon-to-file-for-business-rescue-after-losing-r2bn-due-to-virus-47332090* accessed 23 January 2021.

[219] D Kaminski-Morrow 'South Africa's Comair files for business rescue' *Flight Global* 5 May 2020, Available at *https://www.flightglobal.com/airlines/south-africas-comair-files-for-business-rescue/138231.article* accessed: 23 January 2021).

[220] K Weyers, T Jordaan and S Venter 'SA Express placed in business rescue' *CDH Cliff Dekker Hofmeyr* 6 February 2020, Available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-12-february-sa-express-placed-in-business-rescue.html* accessed: 23 January 2021.

[221] Z Moorad 'Moyo restaurant files for business rescue' *Business Day* 4 October 2013, Available at *https://www.businesslive.co.za/bd/companies/retail-and-consumer/2013-10-04-moyo-restaurant-files-for-business-rescue/* accessed 23 January 2021.

[222] E Levenstein 'Opportunities for investors arising from the South African business rescue process' *Werksmans* 6 May 2020, Available at *https://www.werksmans.com/legal-updates-and-opinions/opportunities-for-investors-arising-from-the-south-african-business-rescue-process/* accessed: 26 January 2021.

[223] Section 140(1)(*a*), (*b*), (*c*).

[224] The reference is made to the 1973 Act because this is the latest legislation prior to the Companies Act 71 of 2008 and it is the legislation that consolidated all the previous legislation since the introduction of the Companies Act 46 of 1926.

that the business rescue practitioner does not require the consent of the court, except when appointing another person to be part of management or as an advisor to the company or to the practitioner.[225] The judicial manager was appointed as an officer of the court[226] and acted under the court's supervision.[227] Once a judicial management order was granted, the judicial manager took control of the company and the directors ceased to hold office.[228] The 1973 Act specifically stated that the judicial manager 'shall . . . assume the management of the company.'[229] without mention of any duties still to be performed by the directors of the company. Thus, directors lost their power and authority to manage the company upon a judicial management order, since all business matters and accounting records were given to the judicial manager. The directors even relinquished their power to issue unissued shares since the courts held that members, and not directors, controlled the company, with the latter only being responsible for managing it.[230] Although the Act did not specifically state that the directors should cease to hold office, it is assumed to be the case. Section 440(2) provided that in cancelling a judicial management order the court could give directions for a general meeting of members to be convened to elect directors. This would seem to mean that a judicial management order had the effect of removing the directors from office.[231] It is submitted however, that this ruling jeopardised the success of judicial management orders. Removing those directors who had a thorough knowledge of the financial status and running of the company would have made it more difficult for the judicial manager to rescue it. It would have been preferable for the directors to have ceased managing the company but to have continued to hold office and work under the supervision of the judicial manager. This failing appears to have been rectified by the Act. Directors continue to exercise their functions subject to the authority of the practitioner;[232] and have a duty to exercise any management function within the company in accordance with the express instructions or direction of the practitioner to the extent that it is reasonable to do so.[233] However, there remain problems.

[225] Section 140(2).
[226] Cilliers & Benade *Corporate Law* 3 ed (2000) 487. JT Pretorius *Hahlo's South African Company Law Through the Cases* 5 ed (1991) 487. *Rennie NO v Holzman* 1989 (3) SA 706 (A) 709-710.
[227] See s 433(*b*).
[228] Section 428(2)(*a*) and 432(3)(*a*).
[229] Ibid.
[230] *Alpha Bank v Registrateur van Banke* 1996 (1) SA 330 (A) 351-352.
[231] Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (Unpublished LLD thesis, University of South Africa, 2010) 40.
[232] Section 137(2)(*a*).
[233] Section 137(2)(*b*).

The phrase 'to the extent that is reasonable to do so' (in s 137(2)*(b*) of the Act) is confusing in that it is unclear whether it refers to what is reasonable with regard to the practitioner or what is reasonable with regard to the directors. A general reading of s 137(2)(*d*) suggests that it refers to what the practitioner views as reasonable, because this section provides that if directors act in accordance with the authority and instructions of the practitioner, they are relieved of their duties as directors as contemplated by s 76, and their liabilities as contemplated by s 77, with the exception of s 77(3)(*a*), (b), and (*c*) which refers to directors' personal liability for a company's reckless and fraudulent trading. In other words, the directors are prohibited from allowing the company to carry on its business recklessly, with gross negligence, with intent to defraud any person, or for fraudulent purposes.[234] In that case, the directors' liability subsists. Section 77(3)(*b*) provides that a director is liable for any loss, damages or costs sustained by the company in consequence of having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by s 22(1).

The question that remains is what recourse the directors have if the practitioner allows the company to act recklessly or fraudulently. The Act offers directors no remedy to avoid liability in that it gives the practitioner powers over directors with full management control in substitution for its board and pre-existing management.[235] As soon as practicable after business rescue proceedings begin, the directors must deliver to the practitioner all the books of account and records that relate to the affairs of the company that are in their possession.[236] The practitioner assumes any powers that a director had,[237] implying that even though the directors are not automatically removed from their positions, they do not retain any management power.

The contradictory provisions in the Act on the division of power between the business rescue practitioner and the directors render directors vulnerable. While they do not have management powers, they are exposed to the risk of personal liability if the company carries on its business recklessly or fraudulently. The uncertainty caused by the phrase 'to the extent that it is reasonable to do so' exacerbates the situation as it is not clear whether the directors should act in accordance with what is reasonable in the practitioner's opinion or what they regard as reasonable. If it is accepted that what is reasonable depends on the views of the practitioner, what happens to a director who views that situation as unreasonable? It is submitted that the Act should have given directors some powers to question the conduct of their practitioner.

[234] Section 22(1).
[235] Section 140(1)(*a*).
[236] Section 142(1).
[237] Section 140(1)(*b*).

Failing this, directors should not be held liable for reckless and fraudulent trading by the company unless it can be proved that they allowed the practitioner to act in that way. The directors should be allowed to act according to what they view as reasonable, especially as they can only act under the authority of the practitioner. Furthermore, the directors are still required to disclose to the board and shareholders any personal financial interest that they acquire in an agreement or other matter in which the company has a personal interest.[238] Therefore, it is only fair that directors are given some powers by the Act.

In any event, although the business rescue practitioner has full management control of the company, some powers may be delegated to a person who was part of pre-existing management.[239] This is new in South African law. Judicial managers were not allowed to delegate powers as they acted under the supervision of the court. However, a distinction should be made between powers and functions. In business rescue, the practitioner may delegate powers to a person who was part of pre-existing management and also appoint another person to be part of management, subject to the court's approval.[240] This could include advisors, valuators, auctioneers, forensic accountants, lawyers, and other experts to assist the practitioner in carrying out his/her plenary functions.[241]

Delegation of powers to a person who was a member of the pre-existing management encourages a good relationship between the practitioner and such members and promotes successful business rescue. If the company is large, it makes sense that the practitioner seeks help from pre-existing management. The members have experience in managing the company while the business rescue practitioner may come up with new ideas to rescue it. The company is thus spared delays caused by the unwillingness of previous members of management to let go of all of their powers.

[238] Section 75(5) & (6).
[239] Section 140(1)(*b*).
[240] Section 140(2).
[241] *Murgatroyd v Van Den Heever NO* 2015 (2) SA 514 (GJ) 17.

3.4. *Locus Standi* to Initiate Business Rescue Proceedings

Under judicial management, rescue proceedings could be initiated by any person who was entitled to make an application in terms of section 346[242] for the winding up of a company.[243] Thus the company itself, creditors, or any member of the company had *locus standi* to apply for judicial management,[244] failing which the court could not grant an order.[245] Academic writers raised the question of whether directors had *locus standi* to apply for judicial management, as this had arisen as a problem in a number of high court judgments in KwaZulu-Natal, Western Cape, and Eastern Cape. In a Durban case, (*Ex parte Russlyn Construction (Pty) Ltd)*[246] Didcott J took the view that an application for winding up should be brought with the consent of a general meeting rather than by a resolution of the directors. In the Western Cape Leveson J in *Ex parte Screen Media Ltd,*[247] held:

> '[t]he fact that the application has been launched pursuant to a resolution of the board of directors caused me to bring to counsel's attention the judgment of Didcott J in the matter of *Ex parte Russlyn Construction (Pty) Ltd* . . . I understand the concept of management to deal primarily with the direction and control of a company's business with a view to producing profits from its assets. A decision to liquidate a company, in my opinion, does not fall within the ambit of that concept. Of course, losses may be incurred in the course of managing the business, but essentially management postulates the continuation in existence of the business, whereas liquidation totally exterminates the company . . . This feature, in my opinion, does not give the directors a power which they do not otherwise enjoy.'[248]

Still in the Western Cape – and 21 years later – Horwitz AJ in *Ex parte New Seasons Auto Holdings (Pty) Ltd*[249] took the view that the board of directors had no power to launch an

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[242] Section 346 provided that a member of a company would not be entitled to present an application for its winding up unless he/she had been registered as a member . . . for a period of at least six months immediately prior to the date of application or the shares he/she held had devolved upon him/her through the death of a former holder and unless the application was on the grounds referred to in section 344 (*b*), (*c*), (*d*), (*e*) or (*h*).

[243] Section 427(2). RD Sharrock, K Van Der Linde and A Smith *Hockley's Insolvency Law* 7 ed (2005) 233; RC Beuthin and SM Luiz *Beuthin's Basic Company Law* 3 ed (2000) 295; JTR Gibson *et al South African Mercantile and Company Law* 7 ed (1997) 424.

[244] Section 427(2) read with s 346. See also PM Meskin *et al* (eds) *Henochsberg on the Companies* Act 4 ed (1985) 754 (Meskin *et al Henochsberg*).

[245] *Graham v R E Fuller & Co (Pty) Ltd t/a Fuller Construction* 1987 (3) SA 71 (D) at 74 where the court 'held that a rule operating as a provisional order could not be extended whether for the purpose of enabling the intervener to present an application for winding-up or for any other purpose, where the original applicant never had *locus standi* to obtain the rule'.

[246] 1987 (1) SA 33 (D) 37D-38C.

[247] 1991 (3) SA 462 (W).

[248] Ibid at 463B-464A.

[249] 2008 (4) SA 341 (W) 345I.

application without a resolution approved by a general meeting of the company − establishing that the liquidation should be authorised by general resolution.

However, still in the Western Cape – and two years after the Leveson J decision and 15 years before the Horwitz AJ decision – the court in *Ex parte Tangent Sheeting (Pty) Ltd,*[250] held that the decision to wind up a company should be authorised by resolution of the directors without having to wait for the members of the company to convene. In the Eastern Cape in *Ex parte Graaff-Reinet Rollermeule (Edms) Bpk,*[251] Leach J held that the directors of a company could validly resolve to seek an order winding up the company.

Assuming the majority view that a resolution of a general meeting was required before the directors could launch an application, the rule that judicial management could be applied for by any person who was entitled to make an application in terms of s 346, became an obstacle for the success of judicial management. There should have been a specific provision that allowed the directors to have *locus standi* to apply for judicial management because judicial management and winding up the company are not the same. Judicial management aimed to give a company a moratorium to enable it to become a successful concern, while winding up is a step towards liquidation. Therefore, these processes should not have been treated the same when it came to *locus standi* in business rescue matters.

The current business rescue procedure has marginally increased the categories of persons who can commence business rescue. As it stands, business rescue can be commenced by the board in terms of section 129(1)(*a*) & (*b*)[252] or by any affected person[253] in terms of s 131(1)[254] (on application to court). These provisions[255] include persons who were not included under the judicial management process. Section 129 has given powers to the directors to initiate business rescue proceedings, placing them in a better position than they were under judicial management for initiating the process of rescuing a company. Employees, or their trade unions or

[250] 1993 (3) SA 488 (W) 489E.
[251] 2000 (4) SA 670 (E) 674G.
[252] This section provides that 'subject to subsection (2)(*a*), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable ground to believe that the company is financially distressed; and there appears to be a reasonable prospect of rescuing the company.'
[253] Section 128(1)(*a*) provides that affected persons include 'a shareholder of the company; any registered trade union representing employees of the company; and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives'.
[254] This section provides that 'unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.'
[255] Sections 129(1) and 131(1).

representatives may also now initiate proceedings. This is new in South African company law and is an important development under the Act. Employees are affected when a company becomes distressed as they risk losing their jobs, and so it makes logical sense that they should have *locus standi* to initiate rescue proceedings if the directors fail to pass a resolution.

3.5. Initiation Procedure

Originally corporate rescue proceedings were initiated by court order, and the rule was retained in the 1973 Act. The court first had to grant a provisional judicial management order[256] followed in due course by a final judicial management order.[257] However, the need for two court orders made it difficult for small- and medium-sized companies to afford the cost of judicial management proceedings. The insistence on two court orders was also criticised by academics. For example, Rajak and Henning argued that:

> 'Heavy reliance of judicial management on court procedures can be seen as a self-defeating. Expenses are high where highly trained professional personnel are necessarily involved, and this is a supreme irony when we recall that the procedure is invoked only where there is too little rather too much or enough money.'[258]

[256] See s 428 (1) which provides that 'the Court may on an application under section 427(2) or (3) grant a provisional judicial management order, stating the return day, or dismiss the application or make any other order that it deems just. Section 428(2) continues to state that 'a provisional judicial management order shall contain directions that the company named therein shall be under the management, subject to the supervision of the Court, of a provisional judicial manager appointed as hereinafter provided, and that any other person vested with the management of the company's affairs shall from the date of the making of the order be divested thereof; and such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders as the Court may consider necessary.'

[257] See s 432 (2) which provides that 'On such return day the Court may after consideration of the opinion and wishes of creditors and members of the company; the report of the provisional judicial manager under section 430; the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims, the report of the Master; and the report of the Registrar, grant a final management order if it appears to the Court that the company will, if placed under judicial management, be enabled to become a successful concern and that it is just and equitable that it be placed under judicial management, or may discharge the provisional order or make any other order it may deem just. Section 432(3) continues to provide that 'A final judicial management order shall contain directions for the vesting of the management of the company, subject to the supervision of the Court, in the final judicial manager, the handing over of all matters and the accounting by the provisional judicial manager to the final judicial manager and the discharge of the provisional judicial manager, where necessary; [and] such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the final judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the Court may consider necessary.'

[258] Rajak & Henning op cit note 13 above.

Kloppers also argued that the requirement of two court orders made the cost of judicial management too high for small or medium-sized companies.[259]

The criticisms were heard by the legislature; the Companies Bill (hereinafter 'the Bill') was introduced, containing provisions for an out-of-court procedure. Section 132(1) provided that

> 'subject to subsection (2)(a), either the shareholders of a company by ordinary resolution, or the board of the company, may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if, in either case, an insolvency event has occurred, or the shareholders or directors, as the case may be, believe that the company is insolvent, or may imminently become insolvent; and there appears to be a reasonable prospect of rescuing the company.'

This showed that South African business rescue was moving towards a debtor-friendly system. Allowing the company to commence rescue proceedings without the court's intervention was a positive development. The Bill was considered and was thereafter publicised for public comment, revised, and in June 2008 came before Parliament for debate. Section 132(1) was an amended provision, meaning that out-of-court rescue proceedings could now be commenced by the board of directors' resolution. The Companies Bill was approved and was signed into law on 8 April 2009 and gazetted a day later as the Companies Act 71 of 2008. Business rescue could either be commenced by the board of the company in terms of section 129 or by court procedure in terms of s 131. The process by which business rescue proceedings are commenced by a board of directors' resolution differs from the commencement by court order. Accordingly, it is imperative to deal with the procedures under section 129 and section 131separately.

3.5.1. Out-of-court procedure

Section 132(1)(*a*)(i) provides that 'business rescue proceedings begin when a company files a resolution to place itself under supervision in terms of section 129(3)'. Although the word 'company' is used in this section, the board of directors passes the resolution to begin the business rescue process. The reason is that the board manages the business of the company and is thus in a better position to determine whether it is financially distressed[260] and whether there is a reasonable prospect of rescuing such a company.[261] However, in passing such a resolution, the directors must do so in good faith.[262] This is different from the case of judicial management

[259] Kloppers op cit note 210 above.' '
[260] *Lazenby v Lazenby Vervoer VV* (M328/2014) [2014] ZANWHC 41 (4 September 2014) at 23; PA Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2012) 454.
[261] Section 129(1)(*a*) & (*b*).
[262] *Griessel v Lizemore* 2016 (6) SA 236 (GJ) 82.

where a company was required to apply to the court for the commencement of judicial management.[263] Under judicial management, the applicant was required to state the extent and scope of the company's business, including its assets and liabilities, and the nature of its difficulties so that the court would be able to ascertain whether there was a reasonable probability that, if placed under judicial management, it would become a successful concern or would be able to pay its debts[264]. However, under business rescue there is no need to apply to the court; the board may pass a resolution if it has reasonable grounds to believe that the company is financially distressed; and there appears to be a reasonable prospect of rescuing it.[265]

This is a major improvement as opposed to judicial management. The fact that it is no longer a requirement that a company obtains the court's approval before it commences business rescue[266] saves both time and money since the court application may be a long process and involve substantial legal fees. As soon as the directors realise that the company is financially distressed, they can pass a resolution for business rescue. This procedure is less expensive and faster, rendering it attractive to companies that are already in dire financial straits. The business rescue proceedings are largely administered by the company under the independent supervision of the business rescue practitioner. This benefits small- and medium-sized businesses that would not have been able to afford the judicial management route.[267]

Once a resolution has been adopted, it has to be filed with the Companies and Intellectual Property Commission ('the CIPC or Commission').[268] A resolution has no force or effect until it has been filed.[269] After adopting and filing a resolution the company must – within five days of the adoption and filing – publish a notice of the resolution and its effective date in a prescribed manner[270] to every affected person and issue a sworn statement setting out the

[263] For critiques of the application for judicial management see H Rajak and J Henning 'Business rescue for South Africa' (1999) 116 (2) *South African Law Journal* 268; P Kloppers 'Judicial management reform – steps to initiate a business rescue' (2001) 13 (3) *South African Mercantile Law Journal* 359. He argued that judicial management was not suitable for small and medium-sized companies because the costs were too high.
[264] *Ladybrand Hotel (Pty) Ltd v Segal* 1975 (2) SA 357 (O) 358-361.
[265] VA Lawack-Davids & L Coetzee 'Impact of failure of a central securities depository participant on finality and irrevocability of settlement of securities' (2009) 30 (3) *Obiter* 642.
[266] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) 12.
[267] For judicial management's unsuitability for small- and medium-sized companies see P Kloppers op cit note 213 above; Olver op cit note 210 at 87; *Tobacco Auctioneers Ltd v AW Hamilton (Pty) Ltd* 1966 (2) SA 451 (R) at 453.
[268] Section 129(1)(*b*) read with s 132(1)(*a*).
[269] Section 129(1)(*b*).
[270] Regulation 123 (2)(*a*) and (*b*) provide that the publication of the notice and resolution is done by delivering a copy of such notice and resolution to every affected person in accordance with regulation 7; and 'conspicuously

grounds for its adoption.[271] Within this five-day period, the company must also appoint a business rescue practitioner who satisfies the requirements of s 138, and who has consented in writing to accept the appointment.[272] Notice of the appointment of the business practitioner must be filed within two days of his/her appointment, and within five days of filing a copy must be published to each affected person.[273] This procedure is much faster than the application for a judicial management order. Failure to comply with this procedure and time period may result in the resolution lapsing and becoming invalid.[274] Notification must be done in the prescribed manner, including a sworn statement by the board stating the grounds on which the resolution was founded.[275] It makes sense to notify affected persons as soon as a resolution is adopted, and this could promote successful business rescue. However, as recommended by Levenstein,[276] a pre-resolution procedure is essential to assist directors to make their sworn statement. Accountants and lawyers could assist in providing accurate information for drafting this statement.

Although the procedure is superficially attractive and progressive, it has its own problems and complications. These include the meaning of initiation of business rescue proceedings; the board of directors' power to pass a resolution commencing business rescue proceedings; the Commission's discretion on business rescue proceedings; notification to affected persons of an adopted resolution; the appointment of a business rescue practitioner;[277] and failure to comply with the procedure.

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displaying a copy of the notice (i) at the registered office of the company, the principal places of conducting the business activities of the company and at any workplace where employees of the company are employed; (ii) on any website that is maintained by the company and intended to be accessible by affected persons; and (iii) if it is a listed company, on any electronic system maintained by the relevant exchange for the communication and inter-change of information by and among companies listed on that exchange.' Regulation 7 on the other hand provides that 'A notice or document to be delivered for any purpose contemplated in the Act or these regulations may be delivered in any manner contemplated in section 6 (10) or (11); or set out in Table CR 3.' Section 6 (10) and (11) regulates the notice delivered electronically while Table CR 3 encompasses both electronic and hand delivery.

[271] Section 129(3)(*a*) sets a prescribed period of five days for affected persons to be notified.

[272] Section 129(3)(*b*) read with s 140(1)(*a*).

[273] Section 129(4)(*a*) & (*b*). Form CoR 132.2 is used as a notice of appointment of a business rescue practitioner. In terms of this form − notice must be published to every affected person within 2 business days after it has been filed, if the company appointed the practitioner; or 5 business days after the court order if the appointment is by court order.

[274] Section 129(5)(*a*) provides that 'if the company fails to comply with any provision of subsection (3) or (4) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity'.

[275] Section 129(3)(*a*).

[276] E Levenstein 'An Appraisal of the New South African Business Rescue Procedure' (Unpublished LLD thesis, University of Pretoria, 2016) 623.

[277] The problems associated with the appointment of a business rescue practitioner will be dealt with in Chapter Four.

The Act clearly states that if liquidation proceedings have been initiated by or against the company, a resolution to voluntarily commence business rescue, may not be adopted.[278] 'Initiated by or against' is not defined in the Act. In *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd*,[279] although the court was dealing with commencement of business rescue, it was argued that the word 'initiated' was intended to have the same meaning as 'commenced' in the applicable sections, and that to conclude otherwise would be to introduce uncertainty where none was justified. At issue was what is meant by 'initiation of liquidation proceedings' in the context of ss 129(2)(*a*). It is not clear whether this relates to the circumstances provided for by s 80, s 81, or even s 82 or any specific circumstances within section 81. For example, s 81(1)(*e*)(i), allows a shareholder to apply, with leave of the court, for an order winding up the company on the grounds that the directors, prescribed officers, or other persons in control are acting in a fraudulent or otherwise illegal manner. The issue is what happens if such an application is still before the court and has not yet been decided. What can the directors do if they want the company to commence business rescue?

Directors are not listed as affected persons who may apply for commencement of business rescue proceedings in terms of s 131. If they are also barred by s 129(2)(*a*) from passing a resolution, a provision should have been made to cater to the directors' position if liquidation proceedings had already been initiated. As it stands, if liquidation proceedings have been initiated, neither s 129 nor section 131 may be used by directors to commence business rescue.

On the issue of directors' involvement in the initiation of business rescue proceedings, only the directors are empowered to pass a resolution as per s 129(1). This means that only the directors can initiate business rescue proceedings without going to court. For example, employees who may be aware of the perilous state of the company's affairs can obtain its financial statements through their trade unions[280] although this has its own problems that need to be addressed.[281] It is clear from this section that employees or any other affected person cannot pass a resolution for the company to voluntarily begin business rescue. They may only apply to the court for an order placing it under supervision and commencement of business rescue. Their only relief is their entitlement to be notified within five business days of the adoption and filing of the

[278] Section 129(2)(*a*).
[279] 2012 (4) SA 266 (KZD) at 17.
[280] Section 31(3) provides that 'trade unions must, through the Commission and under conditions as determined by the Commission, be given access to company financial statements for the purposes of initiating business rescue.'
[281] The problems relating to s 31(3) are addressed later in the chapter.

resolution.[282] They must go the court route.[283] The right to information continues after the commencement of business rescue; if the proceedings have not ended within three months of commencement, or a longer period as per the court's allowance on application by the business rescue practitioner, the practitioner is required to prepare a monthly progress report and deliver it to each affected person.[284]

Disallowing affected persons to decide on voluntary commencement of business rescue might be intended to prevent abuse of the rescue process; in any event commencement of business rescue by resolution aims to protect the company more than any stakeholder. The legislature might have realised that empowering only directors to pass a rescue resolution might have repercussions for affected persons. As a result, section 129(7) requires the directors to provide reasons for not adopting a resolution in circumstances where the board has reasonable grounds to believe that the company is financially distressed. The board must then deliver a written notice to each affected person stating that it appears to be reasonably unlikely that the company will be able to pay its debts as they become due and payable within the immediately ensuing six months; or it appears to be reasonably likely that it will become insolvent within the same period.[285] It is submitted that section 129(7) opens the door for affected persons to apply to court if they have a view different from that of the directors.

Although there is no express provision dealing with the costs incurred by an applicant in proceedings under s 131, an affected person (as applicant) is entitled to the legal costs incurred.[286] However, the costs may be granted against the affected party if the court is satisfied that the application was brought for ulterior motives (abuse of the process).[287] There have been few decided cases in which employees have exercised their rights to apply to the court for

[282] Section 129(3).
[283] Section 131(1).
[284] Section 132(3)(*a*) & (*b*).
[285] Section 129(7) read with s 128(1)(*f*).
[286] See for example *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd (Advantage Project Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) at 6 where Rogers J held 'I cannot discern any reason why the legislature would have wanted to deprive the court of its power to make costs orders in s 131 proceedings. The company through its board would be in a position to avoid such costs by timeously passing a resolution in terms of s 129 commencing voluntary business rescue proceedings. The business rescue provisions in the 2008 Act reflect a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction.'
[287] *Van Staden NNO v Pro-Wiz (Pty) Ltd* (412/2018) [2019] ZASCA 7; 2019 (4) SA 532 (SCA) (8 March 2019) at 15 and 24; *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) 8; *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 (5) SA 422 (GNP) 43; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) 27; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2012 (3) SA 273 (GSJ) 54; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2013 (4) SA 539 (SCA) 40.

business rescue, probably because court proceedings are expensive, and in most cases, they are represented by their unions.[288]

Furthermore, in terms of s 129(3) Commission may extend the time set by the Act for the publication of a resolution notice and the appointment of a business rescue practitioner, adoption, and filing of a resolution on application to the Commission. However, it is not clear what form the application should take: a simple letter or email or formal notification by affidavit for example? This dilemma could result in unnecessary delays in commencing business rescue proceedings. Furthermore, no time is set within which the Commission is required to respond to the application. Furthermore, should the Commission reject the application, the company would have wasted time with no positive outcome. It is thus submitted that this provision should be revisited.

Procedural rules, like setting a time frame for the commencement of business rescue, are important. However, there is a lack of clarity on the status of the company after the lapsing of a resolution, and it is not clear whether it may continue to trade. The Act does not specify whether the company should continue to trade or apply for liquidation. The uncertainty has also been dealt with by the courts. In *Enable Employment (Pty) Ltd v Frese* [289] the court held that:

> 'unless all the stakeholders, e.g. creditors, employees, shareholders, the business practitioner agree that the resolution lapsed and is a nullity, there will always be uncertainty as to the status of the company and the creditor [and] [t]he legislature could not have intended for this uncertainty to persist by enacting section 130 (l)(*a*)(iii).'[290]

In *Panamo Properties (Pty) Ltd v Nel NNO (Panamo Properties)* the court held that 'even if the business rescue resolution has lapsed and annulled in terms of s 129(5)(*a*), the business rescue commenced by that resolution [is] not terminated [and] [b]usiness rescue will only be

[288] See for example, *National Union of Metalworkers of South Africa v Wilro Supplies CC* (J 1440/16) [2020] ZALCJHB 210 (1 September 2020); *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways (SOC) Ltd* (J149/20) [2020] ZALCJHB 43; [2020] 6 BLLR 588 (LC); (2020) 41 *ILJ* 1402 (LC) (14 February 2020); *South African Airways (SOC) Limited (In Business Rescue) v National Union of Metalworkers of South Africa obo Members* (JA32/2020) [2020] ZALAC 34; [2020] 8 BLLR 756 (LAC); (2020) 41 ILJ 2113 (LAC) (9 July 2020)

[289] (73789/2013) [2015] ZAGPPHC 34 (3 February 2015).

[290] Para 23.

terminated when the court sets the resolution aside.'[291] However, the court may only do so where there is an application to set aside the resolution.[292]

There are, however, exceptions to filing a further resolution. Section 129(5)(*b*) provides that:

> 'If the company fails to comply with any provision of subsection (3) or (4), the company may not file a further resolution contemplated in subsection 1 for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution.'

Section 129(5) is clear that failure to comply with the procedure renders the resolution null and void and it therefore lapses.[293] In *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd,*[294] it was held that '[i]t became [a] common cause that the respondents' resolutions did not comply with *inter alia* section 129(3)(*a*) of the Act and that therefore they (the resolutions) [were] irregular, null and void and of no force and effect'.[295] In *Newton Global Trading (Pty) Ltd v De Corte*[296] the court held that the procedure contemplated in section 129 aims to prevent abuse of the business rescue process and to protect the interests of affected persons.[297] The provisions of section 129(4)(*a*) and (*b*), read with section 129(5)(*a*) appear to be peremptory and non-compliance may cause the business rescue proceedings to lapse.[298] However, they are not automatically terminated as the SCA has held that a court order is needed to set aside the resolution.[299]

The Act also does not specify whether this application is different from the application in section 131(1). Any affected person can lodge a section 131(1) application and, as contemplated by section 128(1)(*a*), this does not include directors. Therefore, it is submitted that an application in terms of section 129(5)(*b*) is different from one in terms of 131(1). The fact that section 129(5) provides for an *ex parte* application means that the application need not to be sent to other affected persons. It is therefore arguable that a section 129(5) application is not aimed at commencing new business rescue proceedings but to continue with the proceedings that were already commenced by resolution.

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[291] 2015 (5) SA 63 (SCA) 28.
[292] Section 130(1)(*a*)(iii) read with s 130(1)(*c*)(i).
[293] *Madodza (Pty) Ltd v Absa Bank Ltd* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012) 24 & 25.
[294] (812/2012) [2012] ZAECPEHC 39 (21 June 2012).
[295] Para 12.
[296] 2015 (3) SA 466 (GP) 11.
[297] Ibid at para 12.
[298] *Newton Global Trading (Pty) Ltd v De Corte* 2015 (3) SA 466 (GP) 12.
[299] *Panamo Properties* supra note 291. *Newton Global Trading (Pty) Ltd v Da Corte* (104/15) [2015] ZASCA 199 (2 December 2015) 9.

3.5.2. Court Application Procedure

Both judicial management and business rescue provide for a court application to commence rescue proceedings.[300] The class or type of persons who may make an application is wider under business rescue. In terms of s 131(1) an affected person may apply to the court at any time for an order placing the company under supervision, thus commencing business rescue proceedings, unless a company has adopted a resolution to commence business rescue proceedings. Thus, persons such as shareholders or creditors of the company, any registered trade union representing employees, and any employee not represented by a registered trade union have *locus standi* to apply for business rescue.[301] This contrasts with the judicial management regime that seemed to favour creditors. Section 131(1) empowers any affected person to apply for business rescue proceedings if the board fails to do so. This is a major improvement to modern company law, distinguishing business rescue from judicial management.[302] Allowing different categories of persons to apply for business rescue increases the chances of rescuing a company. If the company is financially distressed and there is a reasonable prospect of rescuing it, employees or shareholders need not wait for a resolution to be passed but may apply for business rescue.

Business rescue requires a specific procedure for commencing rescue proceedings. The applicant must serve a copy of the application to both the company and the Commission and notify each other affected person of the application in the prescribed manner.[303] If the prescribed manner is not adhered to, the court may dismiss the application.[304] This is a positive advance on judicial management. Whilst the 1973 Act did not set out the judicial management's specific procedure for notification, it is likely that it mimicked the section 346 notification requirements for winding up a company.[305]

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[300] See s 427(2) of the 1973 Act and s 131(1) of the Act.

[301] Section 128(1)(*a*).

[302] Under judicial management, the power to institute proceedings was limited to the company, its creditors and members. See section 427(2); *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V).

[303] Section 131(2)(*b*). The prescribed manner is regulated by s 124 read with regulation 7. An applicant must deliver a copy of the court application to each affected person and this must be done in accordance with regulation 7.

[304] *Standard Bank of South Africa Limited v Gas 2 Liquids (Pty) Limited* (45543/2012) [2016] ZAGPJHC 38 (10 March 2016) at para 25*; Kalahari Resources (Pty) Ltd v Arcelor Mittal SA* (12/16192) [2012] ZAGPJHC 130; [2012] 3 All SA 555 (GSJ) (26 June 2012) paras 60-62.

[305] The assumption is based on the fact that a person who could apply for judicial management would be a person entitled to make an application in terms of s 346, it can be assumed that notification of the application would follow the procedure in s 346.

However, problems have lain with the practical enforcement of these provisions. Section 131(1) gives an affected person a right to apply to the court for the commencement of business rescue proceedings, but it is silent on the type of notice of motion that is required. The courts have had to decide whether a long form or short form should be used, but they appear to have settled for the long form.[306] In *Engen Petroleum Ltd v Multi Waste (Pty) Ltd*[307] the employees and the sole shareholder and director of Multi Waste (Pty) Ltd (Multi Waste) and Multi Fleet Logistics (Pty) Ltd (Multi Fleet) brought an application in terms of section 131(1) on an *ex parte* basis. It was not disputed that the applicants' company was insolvent and needed to be liquidated. Multi Crow Logistic (Pty) Ltd (Multi Crow) had effectively taken over the business of Multi Fleet and was in the process of disposing of its assets. Another creditor, Alondra Trading CC (Alondra Trading) also instituted winding-up proceedings against Multi Fleet. At the same time Multi Waste and Multi Fleet, were indebted to Engen Petroleum Ltd (Engen), resulting in it entering the fray as another creditor. Engen claimed that it had not received a proper notice of business rescue application, because it only learned of its existence when its attorney received an incomplete notification. Engen also argued that there had been improper citation in the *ex parte* application since no disclosure was made of Engen's position as an affected party and the involvement of Multi Crow, as well as the pending application for liquidation by Alondra Trading.[308] The court held that the use of the short form notice of motion (*ex parte*) and failure to serve the papers as required by the Act constituted glaring irregularities.[309] Boruchowitz J held that:

> 'The legislature appears to have been cognisant of the distinction between an ex parte application and an application brought using the long form notice of motion. Although in a different context, specific reference is made in s 129 (5) (b) to the use of an ex parte application, [i]t is safe to assume that, had an *ex parte* application been intended in respect of applications brought under s 131 (1), the legislature would have said so.'[310]

Boruchowitz J's decision was confirmed in *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC*,[311] where it was held that an application in terms of s 131 of the Companies Act must be brought in the long form of the notice of motion. This authority that an application in terms

[306] *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 596 (GS) at paras 12, 13, 17; *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC* 2013 (6) SA 141 (KZP) at paras 9 & 10.
[307] Ibid.
[308] Paras 2-7.
[309] Para 10.
[310] Para 16.
[311] *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC* 2013 (6) SA 141 (KZP) at paras 9 & 10 (*Taboo Trading*).

of section 131 cannot be brought *ex parte* but must be in the long form is in accordance with Form 2(a) of the Uniform Rules of the High Court.[312] This is reasonable in that a person likely to be affected by the decision of the court must be informed of the day of the hearing.

The time for service of the application papers is another issue faced by the courts. In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC*[313] the application papers were lodged with and issued by the registrar a day before the hearing of the application and the court accepted that a proper rescue application had been made.[314] In *ABSA Bank Ltd v Summer Lodge (Pty) Ltd*[315] Van der Byl AJ held that 'whether provisional or final – the mere issue and service of a business rescue application would suspend the liquidation process.' In *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*[316] the court held that service occurs when the papers are handed to the affected persons. However, the court failed to consider the fact that the application had been brought to the attention of the creditor's legal representatives an hour or so after it had already been presented in court. In *Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd*[317] business rescue had already been presented to the court prior to service to the Commission; no service had been made on "the company"; and some employees were not notified. The court held that the mere lodgement of papers and the issuing of a case number was insufficient.[318] Service is important in principle, but the fact that some courts overlook the requirements for service and notification shows that there is a need for a specific provision that states when service may be said to have occurred. There is a risk that the issue of service may prove an obstacle in the way of the smooth running of rescue applications.

As stated above, affected persons as per s 128(1)(*a*) do not include directors. The Act's failure to include the company and directors as affected persons has been regarded as a regrettable setback for business rescue.[319] The failure to include directors as persons who may apply for the commencement of business rescue in terms of s 131(1) has been widely challenged. Section 131(1) disallows directors to pass a resolution after liquidation proceedings have

[312] See also Delport et al *Henochsberg on the Companies Act 71 of 2008 (2012)* 479.
[313] *Taboo Trading* supra note 318.
[314] Para 10.
[315] 2014 (3) SA 90 (GP) 19.
[316] 2013 (6) SA 540 (WCC) 29.
[317] *Standard Bank of South Africa Limited v Gas 2 Liquids (Pty)* Limited (45543/2012) [2016] ZAGPJHC 38; 2017 (2) SA 56 (GJ) (10 March 2016).
[318] Para 25.
[319] A Loubser 'The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)' (2010) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 509. E Levenstein 'An Appraisal of the New South African Business Rescue Procedure' (Unpublished LLD thesis, University of Pretoria, 2016) at 335.

commenced, even if there is a reasonable prospect of rescue.[320] Whilst this is the letter of the law, directors are in a better position to conclude whether or not the company needs business rescue before liquidation. There is no reason why they should endure liquidation proceedings and then argue that they should be allowed to apply for business rescue. A second argument is that a director who is outvoted by other directors in passing a resolution to commence business rescue cannot invoke s 131(1) in his/her capacity as a director.[321] This is a major obstacle to business rescue. Such director also runs the risk of being sued for reckless trading if it is proved that the company traded recklessly while it was financially distressed. Section 131(1) should be amended to include directors and the company as persons who may apply for an order placing the company under business rescue.

Furthermore, there remains a problem with the categories of persons included as 'affected persons'. In relation to employees, s 128(1) provides that an affected person means 'any registered trade union representing employees of the company; and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representative'.[322] It is not clear why the employees are defined in this order. Loubser and Joubert argue that it allows trade unions to exercise the rights of employees before the individual rights of employees who are not represented by trade unions.[323] The order should have been reversed. Any business rescue process will affect an employee as an individual; when they unite, they are affected collectively. Therefore, any exercise of business rescue rights should be by an employee as an individual. Those represented by trade unions may then exercise their rights through the unions.

Moreover, assuming that an affected person has made an application and followed the correct procedure, the court still has the power to grant a business rescue order. Section 131(4)(*a*) empowers the court to make an order placing the company under supervision and commencing business rescue proceedings if, after considering an application, it is satisfied that the company is financially distressed; has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract with respect to employment-related matters; or that it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company. If these requirements are not met, the court may dismiss the

[320] Ibid.
[321] Ibid.
[322] Section 128(1)(*a*)(ii) & (iii).
[323] A Loubser & T Joubert 'The role of trade unions in South Africa's business rescue proceedings' (2015) 36 *Industrial Law Journal* 24.

application and make any further necessary and appropriate order including one placing the company in liquidation.[324] Thus, the court has discretion whether to grant a business rescue order; its powers operate as was the case with judicial management.[325].

The court in this context means the High Court that has jurisdiction over the matter; a designated judge of the High Court that has jurisdiction over the matter; or a judge of the High Court that has jurisdiction to hear the particular matter if the Judge President has not designated any judges.[326] Unfortunately, the 'high court that has jurisdiction' is not defined. In terms of the 1973 Act, section 12(1) defined the court with jurisdiction as 'any provincial or local division of the Supreme Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situated.' The Act does not contain any similar or equivalent provision.

The issue of the jurisdiction came before the court in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate*.[327] Briefly, the facts were that on 28 December 2010 the applicant applied to the Western Cape High Court for the winding up of the respondent. However, by agreement between the applicant and respondent the application was provisionally withdrawn on an undertaking by the respondent to settle the applicant's claim in monthly instalments. The respondent failed to pay, and the application was reinstated. Before the hearing, two of the owners who had purchased immovable property in a housing development from the respondent opposed the application for winding up and applied for the respondent to be placed under business rescue in the Eastern Cape High Court. The owners (applicants) contended that the business rescue application suspended the liquidation pending the outcome of the rescue application in terms of section 131(6), arguing that the Eastern Cape High Court had no jurisdiction over the matter because the respondent's registered office was in Cape Town; and that whilst the registered address of the respondent was in Cape Town, the principal place of business at the time of instituting the business rescue application was in Port Elizabeth. The court held that 'jurisdiction in respect of matters arising under the Act . . . falls to be determined on common law grounds unless it can be said that a proper reading of the Act

[324] Section 131(4)(*b*).
[325] See *Millman v Swartland Huis Meubileerders (Edms) Bpk* 1972 (1) SA 741 (C) 748.
[326] Section 128(1)(*e*).
[327] (27956/2010) [2011] ZAWCHC 439 (16 November 2011).

reflects a different intention.'[328] It was concluded that the court with jurisdiction was in Cape Town and the application in Port Elizabeth was dismissed.[329]

It is submitted that s 12 of the 1973 Act or a similar provision should have been retained requiring that

> 'a company must have its name and registration number stated in legible characters in all notices and other official publications of a company, including those in electronic format and in all letters, negotiable instruments, orders for money or goods, and business documents such as delivery notes, invoices, receipts, and letters of credit of the company.'[330]

To deliver such notes, invoices, and letters, one needs a registered office address. Therefore, it makes sense that the court with jurisdiction is the one where the company has its registered office.

3.6. Requirements to Commence Business Rescue Proceedings

3.6.1. Identifying a Financially Distressed Company

Inability of a company to pay its debts has always been a trigger event for commencement of rescue proceedings. When the first Bill was introduced in 1926 Minister Tielman Roos commented that rescue proceedings could be adopted where there was a fear of a company being liquidated when, with assistance, it could pay its debts.[331] However, judicial management did not define 'inability to pay debts or meet obligations'. It was not easy to identify how long a company had been in *mora* before it could be said to be financially distressed. In 1973 the 1973 Act introduced a specific provision which provided that:

> 'When any company by reason of mismanagement or for any other cause is unable to pay its debts or is probably unable to meet its obligations; and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that company.'[332]

The meaning of 'inability to pay debts or meets obligation' remained in the air. This led to an academic debate in which Meskin argued that inability to pay debts meant that the applicant

[328] Para 11.
[329] Paras 27 & 33.
[330] Section 32(4).
[331] See the House of Assembly Debates vol 6 25 Feb 1926 col 996-7 cited by Olver supra note 209 at 3.
[332] Section 427 (1).

had to establish that the company was currently unable to pay its debts[333]. Loubser[334] argued that this referred to insolvency which had to be proved by the applicant. It is submitted that the word 'is' represented the present tense therefore inability to pay debts had to be current at the time of the application.

Legal academics also speculated on circumstances in which a judicial management order might have been granted. Blackman[335] argued that a company was 'probably unable to meet its obligations when it [was] unlikely to be able to meet its existing obligations when they fall due.' Meskin asserted that even if the company was able to pay its debts, a judicial management order could have been granted where it was likely that it would be unable to meet its obligations.[336] This was supported by Loubser's argument that 'the term "obligations" had a wider meaning than mere payment of debts and included contractual obligations which the company foresaw it would be unable to meet.'[337]

While nothing in the 1973 Act referred to future eventualities, it is submitted that this phrase referred to future events. The phrase 'probably unable to meet its obligations' implied future events. However, as Loubser argued, this had to be the immediate or foreseeable future.[338] In *Guttman v Sunlands Township (Pty) Ltd (in liquidation)*[339] the court held that the company may meet its obligations over a reasonable period of time and that such time depended on the facts of each case. This judgment can be interpreted to mean that 'reasonable time' had to be established in order to determine whether the company would 'probably be unable to meet its obligations.'

However, the introduction of the Act in 2011 tackled this problem. Its policy addressed the meaning of 'inability to pay debts or meets obligation' by introducing the term 'financially distressed'. In addition to introducing a new term, the Act introduced the definition of 'financially distressed'. As per the definition, a company is financially distressed if, at any particular point in time, it appears to be reasonably unlikely that a particular company will be able to pay all its debts as they become due and payable within the immediately ensuing six months, or it appears to be reasonably likely that it will become insolvent within the

[333] Meskin, et al (eds) *Henochsberg* op cit note 246 at 15–5 argues that 'a debt is an amount of money which is due and owing'.
[334] Loubser supra note 319 at 143.
[335] MS Blackman, GK Everingham & R Jooste *Commentary on the Companies Act* (2002) 15-5.
[336] Meskin *et al* eds *Henochsberg* op cit note 18 at 755.
[337] Loubser supra note 231 at 235.
[338] Ibid.
[339] 1962 (2) SA 348 (C) 354B-C.

immediately ensuing six months.[340] This is an improvement on judicial management that required that the company must be unable to pay its debts at the time of the application for judicial management order.

Furthermore, the term 'inability to pay its debts as they become due and payable' relates to commercial insolvency. In *Gormley v West City Precinct Properties (Pty) Ltd; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd,*[341] the company was insolvent and Gormley relied on certain valuations of the properties which purportedly showed that they exceeded the value of the liabilities of West City. It was argued that these values can only be achieved if a moratorium of three to five years was granted. The court held that its financial situation could not fall within the definition of 'financially distressed'.[342] In reaching this decision, Traverso DJP held that:

> '[t]he Act envisages a short-term approach to the financial position of the company. This is so for self-evident reasons. There must be a measure of certainty in the commercial world. Creditors cannot be left in a state of flux for an indefinite period. The provisions of the Act make it clear that the concept of business rescue only applies to companies that are financially distressed as defined in the Act. If a company is not so financially distressed the provisions of Chapter 6 of the Act will not apply. It must either be unlikely that the debts can be repaid within 6 months or that there is the likelihood that the company will go insolvent within the ensuing 6 months.'[343]

It is clear from this case that business rescue proceedings cannot be adopted where a company is already factually insolvent. This is one of the measures differentiating business rescue from judicial management. In *Firstrand Bank Ltd v Lodhi 5 Properties Investment* CC[344] the court held that a company or an affected person has to prove that it is unlikely that the company will be able to pay its debts as they become due and payable (not that they are at that stage due and payable) within the next ensuing six months, or that it is reasonably likely that it will become (not is) insolvent within the next ensuing six months. It is submitted that this view was incorrect. An application under s 131 does indeed relate to a company's commercial insolvency. This was also supported by the court in *Redpath Mining South Africa (Pty) Ltd v*

[340] Section 128(1)(*f*). *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC); O*akdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2013 (4) SA 539 (SCA) 6 (*Oakdene Properties* SCA).
[341] *Gormley v West City Precinct Properties (Pty) Ltd; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd* [19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012).
[342] Para 11.
[343] Ibid.
[344] 2013 (3) SA 212 (GNP) 33.

Marsden NO[345] where the court held that a business rescue plan cannot be invoked if the company is already insolvent. The word 'insolvent' in this context appears to mean factual insolvency.[346] If it did not relate to factual insolvency, there would be no need for the alternative requirement of 'inability to pay its debts as they become due and payable.'

It is submitted that this requirement appears to have been drafted carefully and clearly. Unlike judicial management where the courts and academics argued it should be in the near future, business rescue has a specific time. A six-month period appears to be the basis for concluding that the company should commence business rescue. However, Loubser argues that this should be extended to 12 months.[347] Although 12 months appears to be reasonable, it is submitted that different times should be included in the Act. The size of the company, whether it is a big company, medium-sized company, or small company, should be considered when defining 'financially distressed'. There is surely a reason why the legislature chose six months and arguments can be made for an extension.[348] The time is clearly problematic and needs to be reconsidered in order to promote successful business rescue. Rugumamu argues that 'it is the domain of the legislature to craft the statutory provisions governing corporate rescue and to lay down clear and practicable criteria to differentiate between potentially viable companies that should be allowed to attempt corporate rescue and those that fail the threshold criteria in this regard.'[349]

3.6.2. Identifying Reasonable Prospect

Since the introduction of judicial management as a corporate rescue mechanism, the term 'reasonable probability' was used as a requirement to commence rescue proceedings. The 1926 Act set up judicial management as a mechanism that allowed the court to intervene in circumstances where the company experienced financial difficulties 'if the court was of the opinion that there was a reasonable probability that, if the company were placed under proper management, it would be enabled to meet its obligations.'[350] However, the term 'reasonable

[345] *Redpath Mining South Africa (Pty) Ltd v Marsden NO* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013) 47.
[346] In *Gormley v West City Precinct Properties* [19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012). the business rescue application was held to be inappropriate because the company was insolvent and needed a moratorium of three to five years.
[347] Loubser supra note 231 at 337-338.
[348] Perhaps the reason may be that waiting for 'too long' before saying a company is financially distressed has a negative impact on the success of business rescue. If the company waits for too long it may be beyond rescue as there may be no available funds and assets that may be used to turn around the financial status of a company.
[349] VW Rugumamu 'Creditors' rights in business rescue proceedings in terms of South Africa's Companies Act 71 of 2008.' (Unpublished Thesis, University of KwaZulu-Natal, 2017) 30.
[350] Olver supra note 15 at 4.

probability' proved to have difficulties immediately after its introduction. This was emphasised by the Millin Commission report stating that:

> 'It is evident that Parliament, in creating this system of dealing with companies unable to pay their debts did not anticipate the difficulties which almost immediately arose in practice. The great difficulty was for the court to know how to decide whether or not there was a reasonable probability that the company, if placed under judicial management, would be enabled to meet its obligations and remove any occasion for winding-up. Where application was made for winding-up and judicial management was proposed as an alternative on behalf of the company, the facts were disputed but the court had, at any rate, the opportunity of hearing a case against as well as for judicial management. But where a direct application for judicial management was made, creditors seldom appeared to oppose and the information before the court was largely *ex parte*. The figures to be mentioned in what follows show that in the great majority of cases belief in the probability of rehabilitation under a judicial management order was not justified. The truth is that people discovered very soon that by getting a judicial management order for a company which had come to grief and was in fact incapable of rehabilitation, it was possible to secure a liquidation of the company's assets free from all the controls and safeguards provided in the winding-up provisions of the statute; and it is to be feared that many of the cases in which judicial management orders have been granted in the past twenty years were of this type.'[351]

These remarks clearly showed that the courts had difficulties on whether or not to grant judicial management orders. The defect in proving 'reasonable probability' was that the courts – when dealing with the application – often did not have sufficient evidence to be able to decide on the merits of granting an order for judicial management. In 1939 there was an attempt to remedy the above difficulties in the form of the Lansdown Commission, whose chairman, Mr C. Lansdown, reported as follows:

> 'The evidence submitted to us tends to show that the provisions of the Companies Act, 1926, as to placing a company in certain circumstances of difficulty under judicial management instead of winding it up have worked satisfactorily and that these provisions, which we believe to be peculiar to the South African Act, fulfil a distinct use.'[352]

The Commission recommended that judicial management applications be referred to the Master of the Supreme Court before they went to court. The Master would then have to draft a

[351] Final Report of the Company Law Amendment Enquiry Commission UG 69 1948 p 93 para 258 as cited by Olver supra note 209 at 4-5.
[352] AV Lansdown *Report of the Company Law Commission 1935-1936* (UG 45 of 1936).

report that would assist the court to decide on the merits of granting an order for judicial management.

The problems continued even after the introduction of the 1973 Act. When interpreting s 427 of the 1973 Act, the courts applied a narrow approach. Although s 427 did not specifically state this, it seems that the test of a reasonable probability that the company would be able to pay its debts or meet its obligations applied at the stage when a provisional judicial management order was sought.[353]

The applicant had to establish that there was a reasonable probability that if the company was placed under judicial management, it would be able to pay its debts or meet its obligations and become a successful concern.[354] The applicant bore the onus of proving that the relief of judicial management should be granted.[355] The courts held diverse views on whether this requirement placed a heavy burden on the applicant. In *Silverman v Doornhoek Mines Ltd*[356] the court held that there had to be a strong probability that the company would become a successful concern before an order could be granted. Loubser[357] argued that this requirement placed a heavy burden of proof on the applicant as it required reasonable probability and not merely the possibility that the company would be able to pay its debts or meet its obligations and become a successful concern. In *Noordkaap Lewende Hawe Ko-Op Bpk v Schreuder*[358] the requirement of 'reasonable probability' as opposed to 'reasonable possibility' was emphasised and the court held that 'reasonable probability' was included to protect the rights of creditors unable to claim against the company because of its insolvency, as long as the 'probability' was reasonable. This was supported in *Tenowitz v Tenny Investments (Pty) Ltd: Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd*[359] (*Tenowitz*) where the court held that the test was only stringent on the return date. All that had to be proved at commencement was reasonable probability, but

[353] *Tenowitz* supra note 139 *at* 683D.
[354] Blackman *Commentary on the Companies Act* (2002) at 15–7. *Weinberg v Modern Motors (Cape Town) (Pty) Ltd* 1954 (3) SA 998 (T) at 1000A; *Tenowitz* supra note 139; *Ex parte Onus (Edms) Bpk* 1980 (4) SA 63 (O) 66B.
[355] Meskin *et al* (eds) *Henochsberg* op cit note 18 above at 754; *Kotze v Tylryk* 1977 (3) SA 118 (T) at 122; *Tenowitz v Tenny Investments (Pty) Ltd: Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) 685. *Tovim* v *Ben-Tovim 2000 (3) SA* 325 at 331. *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) 615. See also *Irvin & Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) 236H where Reynolds J held: 'As the appointment of a judicial manager will interfere with the rights of creditors to obtain due payment of their debts when legally due, it seems to me that the onus is on the person asking for judicial management to establish his right to obtain that relief'.
[356] *Silverman v Doornhoek Mines Ltd* 1935 TPD 349 at 353.
[357] Loubser supra note 231 at 144.
[358] 1974 (3) SA 102 (A) 110.
[359] *Tenowitz* supra note 139.

it need not be strong proof.[360] In *Millman v Swartland Huis Meubileerders (Edms) Bpk,*[361] the court held that 'reasonable probability' meant that the company must be viable and capable of ultimate solvency. Baker AJ added that:

> 'The basic reason for granting the order must always be the prospect of ultimate survival and total solvency; 20 per cent solvency is not enough. The intention that total solvency is the ultimate objective sought to be achieved is made clear in the Millin Commission Report, para. 257. I have found no reported case dealing with this topic in which anything less than an ultimate total discharge of liabilities has ever been accepted as sufficient compliance with the requirements of sec. 195. In several cases, indeed, it has been indicated in so many words that a full discharge of liabilities was contemplated by the section.'[362]

The interpretation of this requirement meant that most companies in financial difficulties would not apply for judicial management, which undermined the purpose of this system. Requiring a company to show that there was reasonable probability that it would be able to pay its debts when it was placed under judicial management, was difficult and almost impossible to prove. The problem was compounded by the differing interpretations of 'reasonable probability' when an application for a final judicial management order on the return day was made; whether the test under section 432(2) was more stringent than that in section 427(1).[363] In *Tenowitz* Smalberger J found that:

> 'The test on the return day, when the court determines whether or not to grant a final judicial management, is, in terms of s 432 of the Act, whether the company will, if placed under judicial management, be enabled to become a successful concern and it is just and equitable that it be placed under judicial management order. The concept of the company becoming a successful concern presupposes that it will be able to pay its debts and meet its obligations. The test to be satisfied before a final judicial management order is granted is therefore a more stringent one than the one applied to the granting of a provisional judicial management order.'[364]

[360] *Kotze v Tylryk* 1977 (3) SA 118 (T) 122.
[361] 1972 (1) SA 741 (C) at 744F.
[362] Ibid. See also *Weinberg v Modern Motors (Cape Town) (Pty) Ltd* 1954 (3) SA 998 (C) 1000.
[363] *Silverman v Doornhoek Mines Ltd* 1935 TPD 349; *Noordkaap Lewende Hawe Ko-Op Bpk v Schreunder* 1974 (3) SA 102 (A); *Tenowitz* supra note 215; *Ex parte Onus (Edms) Bpk: Du Plooy NO v Onus (Bpk)* 1980 (4) SA 63 (O) 66 (Ex pare onus); *Kotze v Tylryk* 1977 (3) SA 118 (T); Cilliers & Benade op cit note 142 above at227; . JJ Henning 'Judicial management & corporate rescues in South Africa' (1992) 17(1) *Tydskrif vir Regswetenskap* 93. Meskin et al (eds) op cit *Henochsberg* note 18 above.
[364] *Tenowitz* supra note 139 at 683.

The court held that more than 'reasonable probability' should be present for a court to grant a final judicial management order. Cilliers and Benade[365] agreed that a more stringent test had to be applied because, on the return date, the court would be in a better position to judge the company's prospects of becoming a successful concern.

However, in cases such as *Ex parte Onus (Edms) Bpk: Du Plooy NO v Onus (Bpk)*[366], *Kotze v Tylryk*[367], and *Ladybrand Hotel (Pty) Ltd v Segal*[368] the courts held that the test should be the same for provisional and final judicial management orders. Meskin,[369] Kloppers,[370] and Smits[371] concurred. On balance, the 1973 Act seemed to provide for the stringent test on the return day.

The dilemma has largely been resolved by the introduction of the term 'reasonable prospect' in the Act. Whether business rescue commences by resolution or by a court, a 'reasonable prospect' of becoming a successful concern must be proved. As opposed to judicial management[372] the board or affected person needs to have reasonable grounds to believe that there appears to be a reasonable prospect of rescuing a company.[373] When interpreting the term 'reasonable prospect', the courts have leaned towards a flexible or wide approach. Although this term is not defined in the Act, 'reasonable prospect' indicates something less than 'reasonable probability.'[374] The word prospect means 'the possibility or likelihood of some future event occurring.'[375] It may be said that the legislature intended that the onerous test of reasonable probability should be reduced to increase the likelihood of rescuing an ailing

[365] Cilliers & Benade *Corporate Law* op cit note 142 above. See also Henning op cit note 370 at 93; where it is stated that reasonable possibility that the company would become a successful business concern is not sufficient. See also Loubser supra note 231 at 144 as she notes that 'section 432, which contains the requirements for granting of a final judicial management order, seems to place an even more onerous burden of proof on the applicant'.

[366] In *Ex parte Onus* supra note 354 at 66C-D refused to follow *Tenowitz* and held that the test should be the same and that there was no need to change it on the return date.

[367] *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T) 122 the court held that 'reasonable probability' need not be 'strong probability'.

[368] 1975 (2) SA 357 (O).

[369] Meskin *et a*l *Henochsberg* op cit note 18 at 755

[370] Kloppers op cit note 210 above.

[371] Smits 'Corporate administration: A proposed model' (1999) 32 (1) *De Jure* 82-84.

[372] Section 427(1)(*b*). *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* (9831/2011, 7811/2012) [2012] ZAWCHC 163; [2012] 4 All SA 590 (WCC) (28 August 2012) 40.

[373] Section 129(1)(*b*) read with s 131(4).

[374] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) 21 (Southern Palace Investments); *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 (3) SA 273 (GSJ) 18.

[375] *Lexico Oxford UK Dictionary* available at *https://en.oxforddictionaries.com/definition/prospect* (Accessed: 15 February 2017).

business. It is therefore submitted that identifying 'reasonable prospect' for rescuing the company is less stringent that identifying 'reasonable probability' for rescuing the company. In *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd,*[376] the court held that 'reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds.'[377] However, the applicant should not make vague claims that there is a reasonable prospect of rescuing a company[378] in the hopes that the court will grant an order for business rescue, but should provide factual evidence.[379] It is therefore submitted that the term 'reasonable probability' has been done away with. The burden of proof is not as heavy as was under judicial management.

The interpretation of the term 'reasonable prospect' is also fraught. While the flexibility is commendable, the problem rests on the factors that need to be considered when interpreting 'reasonable prospect'. The courts have reached different conclusions. In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd*[380] the court held that 'the court should give due weight to the legislative preference for rescuing ailing companies if such a course is reasonably possible.'[381] The court listed requirements to be met, including

> 'the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business; the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available; the availability of any other necessary resource, such as raw materials and human capital; the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.'[382]

These requirements were confirmed in *Koen v Wedgewood Village & Country Estate (Pty) Ltd*[383] (Binns-Ward J).

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[376] 2013 (1) SA 542 (FB).
[377] Para 12.
[378] *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* supra note 51 at 11.
[379] Ibid. See also *Essa v Bestvest 153 (Pty) Ltd* supra note 18 at para 41; *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* (9831/2011, 7811/2012) [2012] ZAWCHC 163; [2012] 4 All SA 590 (WCC) (28 August 2012) 47.
[380] *Southern Palace Investments* supra note 374.
[381] Para 22.
[382] Para 24.
[383] 2012 (2) SA 378 (WCC).

However, the factors laid down in *Southern Palace* have been criticised for setting an unreasonable standard for proof for 'reasonable prospect'.[384] In *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd,*[385] the court held that 'reasonable prospect' will depend on each case before the court.[386] In assessing whether there is a reasonable prospect of rescuing a company, the court's discretion involves a value judgment rather than narrow discretion.[387]

As mentioned above, the dictionary meaning of 'prospect' is 'the possibility or likelihood of some future event occurring'.[388] 'Possibility' means 'a thing that may happen or be the case' while 'likelihood' means 'the state or fact of something's being likely; probability'.[389] The definition of prospect clearly encompasses both possibility and probability, meaning that the word prospect is confusing. Loubser argues[390] that 'possibility' is preferred. The legislature would not have intended to retain 'probability' as this was criticized for placing an unnecessarily heavy burden of proof under judicial management. It is also not clear why the legislature chose the word 'prospect' instead of 'possibility'. It is therefore submitted that 'prospect' should be amended to be replaced by 'possibility'. This would eliminate any confusion about the proper interpretation of the term 'prospect'.

3.6.3. Identifying Failure to Pay any Amount. . . with Respect to Employment-Related Matters

Section 131(4) (*a*) (ii) has introduced that the following:

> 'The court may make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters.'

[384] Delport et al (eds) *Henochsberg* op cit note 260 at 466.
[385] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) 16.
[386] Ibid. See also *Oakdene Properties* 2013 (4) SA 539 (SCA) 18.
[387] *Firstrand Bank Limited v Normandie Restaurants Investments* (189/2016) [2016] ZASCA 178 (25 November 2016) 14.
[388] *Lexico Oxford Dictionary* available at *https://en.oxforddictionaries.com/definition/prospect* (Accessed: 15 February 2017).
[389] Ibid.
[390] Loubser supra note 231 at 58. E Levenstein An Appraisal of the New South African Business Rescue Procedure (Unpublished LLD thesis, University of Pretoria, 2016) 336-337

'Failure to pay any amount. . . with respect to employment related matters' was not included under judicial management. It appears to be problematic, and many commentators have argued that it has created uncertainty[391] which threatens creditors' interests.[392] The Act does not specify the type of payment that the company must have failed to pay or the number of times the company must have failed to make payments. Loubser argues that the obligations referred to in this section may include payments such as medical aid funds, pension funds, amounts owing to South African Revenue Service (SARS), the Workmen's Compensation Fund and the Unemployment Insurance Fund.[393] Commentators have also questioned whether a single non-payment to employees suffices to initiate business rescue.[394] Loubser further submits that 'non-payment of these accounts should occur over a stipulated minimum period or frequency before it constitutes a ground for rescue proceedings, and at least two consecutive payments should be missed'.[395] Loubser refers to 'extended' obligations in that an employee is only likely to advert to non-payment to SARS (despite the payslip reflecting payment) at the end of that current year of assessment.

Other commentators maintain that 'a single failure to pay over any amount is a valid ground for an application to put the company under business rescue.'[396] The court only requires satisfaction that there is a reasonable prospect for rescuing the company. The inclusion of this subsection impacts strongly on the interests of employees. Academics (local and foreign) have argued that failure to pay an employee is a signal of financial distress of the company. For example, Rosslyn-Smith *et al* compare the South African definition of 'financially distressed' to international definitions and argue that:

> 'The Act defines a firm as financially distressed when it appears reasonably unlikely that the firm will be able to pay its debts within six months of when its debts are due and payable, or when it appears reasonably likely that the firm will become insolvent within six months. This is well aligned with a fairly

[391] Delport et al (eds) *Henochsberg* op cit note 260 above at 462; Levenstein supra note 390 at 336-337.
[392] R Bradstreet 'Business rescue proves to be a creditor-friendly: CJ Claassen J's analysis of the new business procedure in *Oakdene Square Properties'* (2013) 130 (1) *South African Law Journal* 50.
[393] Loubser supra note 231 at 60.
[394] See for example M Zwane *Affected Persons in Business Rescue: Has a Balance been Struck?* (Unpublished LLM thesis, University of Cape Town, 2015) 69 as he argues that 'there is no discernible rationale for enabling a single employee to initiate business rescue proceedings on account of a single payment being skipped by the company. The fact that a court could impose a punitive cost order for vexatious applications (as suggested by Loubser) offers very little comfort. This is so because it is conceivable that the news of a company being involved in business rescue proceedings (even if only at the application stage) could have a palpable impact on its relationship with its creditors.
[395] Ibid at 61.
[396] JG Van der Merwe, RB Appleton, PA Delport, RW Furney, DP Mahony and M Koen *South African Corporate Business Administration* (2013) 14-11

> international definition presented by Wruck as 'a situation where cash flow is insufficient to cover current obligations. These obligations can include unpaid debts to suppliers and employees . . . .'[397]

Default on employee payments appears to be sufficient for employees to apply for business rescue, promising, according to some commentators, a better return for creditors than immediate liquidation. This subsection entitles employees to protect their continuing employment interests which would, at best, be jeopardised on liquidation. Bradstreet argues that 'from the employment perspective, where liquidation will be inevitable, it would in principle be better to allow employees an opportunity to be employed by the company for final few months than out of work immediately.'[398]

In any event, the employee is a creditor to the extent of unpaid remuneration, reimbursement for expenses, or other benefits due and payable prior to the business rescue proceedings.[399] If they are treated as creditors – and the creditors may apply for business rescue when their payments have not been met – it is acceptable this subsection should be treated on the same basis. This confirms the view of Van de Merwe[400] that a single failure to pay an employee amounts to a valid ground for an employee to apply for the commencement of business rescue proceedings.

However, it cannot be ignored that – as it stands – this subsection creates doubt on what was intended by the legislature on the types of payments intended by this section and the number of times defaults have to occur. While it is important that this subsection is retained in the interest of employees, a regulation might settle the uncertainty. Section 131(4)(*a*)(ii) may be read with that regulation.

3.6.4. Identifying Just and Equitable to Grant an Order Commencing Rescue Proceedings

The court's discretion on whether to order the commencement of rescue proceedings has always been accepted as part of the rescue mechanism. In the parliamentary debate of 1926 Minister Tielman Roos mentioned the role of the courts,[401] clearly showing that the court has always been given the power to decide whether or not to grant an order commencing rescue

[397] W NVA De Abreu and M Pretorius 'Exploring the indirect costs of a firm in business rescue' (2020) 34(1) *South African Journal of Accounting Research* 26.
[398] Bradstreet op cit note 392 above at 50.
[399] Section 144 (2) of the Act. See also *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 (5) SA 515 (GSJ) 12.
[400] JG van der Merwe *et al* supra note 396 at 14-11.
[401] House of Assembly Debates vol 6 25 Feb 1926 col 996-7 cited by Olver supra note 209 at 3.

proceedings. The 1973 Act gave the court a discretion to grant an application, dismiss it, or make an order it deemed just,[402] making it purely open to courts' interpretation. Consequently, the courts adopted a strict approach when interpreting this requirement. The use of the concept 'just and equitable' can be traced back to the decision of the court in *Silverman v Doornhoek Mines Ltd*[403] where the court held that judicial management was an extraordinary procedure that could be granted in special circumstances. In deciding when it was just and equitable to grant a judicial management order, the court would consider the interests of both creditors and shareholders.[404] Given that creditors were entitled *ex debitio justitiae* to the winding up of a company, their interests should be considered.[405] Therefore, their insistence that the company be liquidated had to be considered[406] when the courts considered granting a judicial management order. In *Irvin & Johnson Ltd v Oelofse Fisheries Ltd*[407] the court held that

> 'there is a power to affect the rights of a creditor but that that right should not be used, unless completely warranted by the particular facts of the case, against a creditor who has a debt, demands immediate payment, and best knows whether liquidation or judicial management is in his interests.'

This *dictum* was later applied after the introduction of the 1973 Act in *Portestraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd,*[408] where the court held that

> '[it] is clear from an examination of the provisions of s 427 that a Court may grant an order of judicial management only if it appears to the Court that it would be just and equitable to do so. . . [i]t is, in short, a special privilege given in favour of the company and it will only be authorised in very special circumstances.'

However, creditors' insistence on liquidation was sometimes refused. The court would not refuse to grant a judicial management order on the basis that a creditor's payment would be

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[402] See s 427 (1) or s 432 (2). See also Cilliers & Benade *Corporate Law* op cit note 230 above; JT Pretorius et al *Hahlo's South African Company Law Through the Cases* 5 ed (1991) 35. HR Hahlo *South African Company Law Through the Cases* 4 ed (1984) at 644; D Shrand & AAF Keeton *Company Law & Company Taxation in South Africa* (1974) 307; JTR Gibson *et al* op cit note 247 above at 425; RC Beuthin & SM Luiz *Beuthin's Basic Company Law* 3 ed (2000) 296; JL Van Dorsten *South African Business Entities: A Practical Guide* 3 ed (1993) 327; MS Blackman, GK Everingham & R Jooste *Commentary on the Companies Act* (2002) 15–7; K Tsatsawane 'An order for judicial management: When should it be granted' (2000) 8 (4) *Juta's Business Law* 155; Loubser op cit note 326 above 'at 60.

[403] 1935 TPD 349 at 353.

[404] *Samuels v Nicholls* 1948 (2) SA 255 (W) at 257; *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 663; *Tenowitz* supra note 139 at 683D.

[405] This was considered when the court wanted to grant an order

[406] Blackman, Everingham & Jooste op cit note 402 above. 15-8. Meskin *et al* (eds) *Henochsberg* 4 ed op cit note 18 above at 756.

[407] 1954 (1) SA 231 (E) at 237C. This was later considered by the court in *De Jager v Karoo Koeldranke & Roomys (Edms) Bpk* 1956 (3) SA 594 (C) 602.

[408] 2000 (4) SA 598 (C) 615F.

delayed,[409] but a creditor's insistence on liquidation could be refused in the interests of other members and creditors.[410] The court would weigh the creditor's insistence against other creditors' interests and would grant a judicial management order if it were persuaded that such was in the interests of all creditors.[411] If the creditor had not given any thought to the interests of other creditors and shareholders, the court would reject his/her insistence.[412]

The courts would also examine the company's business activities together with its assets and liabilities in order to determine whether it was just and equitable to grant a judicial management order. In *Tobacco Auctions Ltd v AW Hamilton (Pvt) Ltd*[413] the court refused to grant a judicial management order on the application of shareholders in the face of opposition by creditors. The evidence showed that the company had only issued two shares and had disposed of its assets, and so did not appear to be able to embark on new business. The court held that a creditor's insistence on liquidation should be considered, but the postponement of liquidation to the ultimate benefit of creditors and shareholders should also be considered. In reaching this decision, Goldin J found that:

> 'The fact that a company only has a few members is only a factor to be taken into account together with all other relevant facts in deciding whether it should be placed under judicial management. In the case before me, the company has only two issued shares, it has disposed of its assets, it is not anywhere stated that the company could or would embark on new business. For these and the other reasons mentioned relating to the present assets and liabilities of the company, I am of the opinion that the application to place the company under judicial management must be refused.'[414]

The court was unable to find facts that made it just and equitable to postpone the liquidation.

It is clear from the discussion above that "just and equitable to do so" would lean towards creditors' interests. In most cases, it was just and equitable not to grant a judicial management order, unless there were special circumstances. In the result, the 'just and equitable' provision, as an extraordinary measure, has negatively affected the success of the judicial management process.

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[409] Blackman op cit note 410 above; Meskin, et al (eds) *Henochsberg* op cit note 249 at 756.
[410] *Millan v Swartland Huis Meubileerders (Edms) Bpk* 1972 (1) SA 741 (C) at 747-748.
[411] *De Jager v Karoo Koeldranke & Roomys (Edms) Bpk* 1956 (3) SA 594 (C); *Tobacco Auctions Ltd v AW Hamilton (Pvt) Ltd* 1966 (2) SA 451 (R) at 452-453.
[412] Meskin *et al* (eds) *Henochsberg* supra note 18 at 756; Blackman, Everingham & Jooste op cit note 402 above.
[422] *Tobacco Auctions Ltd v AW Hamilton (Pvt)* 1966 (2) SA 451 (R).
[414] Ibid at 453F.

In the Act "just and equitable to do so for financial reasons" is also not defined. Loubser argues that '[the Act] does not provide any definition or explanation of this extremely vague ground and it is not at all clear what circumstances would be required to constitute this ground.'[415] It is submitted that this requirement gives the court a discretion to reach the decision on facts basis. For example, *in Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[416] *court a quo*, and confirmed on appeal, the court dealt with the vagueness of 'it is otherwise just and equitable to do so for financial reasons' is extremely. Claassen J referred to the vagueness of this requirement and held the following:

> 'The immediate question arises: "for financial reasons" of whom, the company, the creditors, shareholders or the employees? Since the company cannot apply to Court for a business order, as it is not an "affected person", one can immediately say that the financial reasons of the company are not referred to. However, that would render this provision absurd as it is primarily the financial health of the company which is at stake. I have little doubt that the Legislature never intended such absurdity. I would, therefore, hold that financial reasons relating to all the stakeholders, except that of the practitioner, contemplated in the business rescue provisions, are to be considered by the Court when applying this provision.'[417]

One may therefore conclude that what constitutes "for financial reasons" will depend on the interpretation given by the courts after it has considered all the facts.

3.6.5. Mismanagement or Any Other Cause

Prior to the 1973 Act, 'mismanagement' on its own was a ground for a judicial management order.[418] However, there was no clear idea on what needed to be proved on this ground. At issue was whether judicial management essentially demanded just the 'careful' management of the company. The phrase 'any other cause' was added when the 1973 Act was introduced.[419] However, even the 1973 Act did not eliminate the problem of the interpretation of 'mismanagement'. While 'any other cause' is wide enough to cover any reason for the company to be placed under judicial management, such cause had to be identified. Meskin argued that directors' lack of skill could be a material factor in deciding whether to appoint a judicial manager.[420] However, this did not resolve the problem of whether a lack of 'careful management' could still warrant a judicial management order.

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[415] Loubser supra note 231 at 61.
[416] 2012 (3) SA 273 (GSJ).
[417] Para 17.
[418] Loubser supra note 231 at 142.
[419] Ibid.
[420] Meskin *et al* (eds) *Henochsberg* op cit note 18 above at 755.

The Act has eliminated the grounds of 'mismanagement or any other cause', positively impacting on business rescue. The courts no longer have to grapple with the meaning of 'mismanagement or any other cause'. As long as the specified elements are present, the court can grant a business rescue order, eliminating the issue of whether judicial management was just to ensure the 'careful' management of the company.

The notion of 'mismanagement or any other cause' would have been problematic under the Act because it had introduced an out-of-court business rescue procedure. The board would have had to be of the view that the company should commence business rescue because of their own mismanagement. Certain directors might have denied mismanagement, creating deadlock between the directors, and negatively affecting the success of business rescue.

3.7. Objections to the Proceedings

There are two types of objections in business rescue namely objection to the adopted resolution[421] and objection to a section 131 application.[422]

3.7.1. Objections to Out of Court Procedure

The out-of-court objection is a new element in the South African rescue mechanism. The life cycle of business rescue proceedings commences with the starting of rescue proceedings and the appointment of a business rescue practitioner. Starting the process with a board resolution is also new, which necessitates an examination of the legislative framework through which objections may be lodged to the resolution. By providing for such objections, the legislature intended to uphold the Act's purpose of balancing the rights of relevant stakeholders. Section 130, which provides for an objection, is a guard against directors abusing their power in passing a resolution. It should be remembered that only the board of directors may pass a resolution to commence business rescue, not affected persons. Therefore, s 130 is a remedy for affected persons where directors abuse their power. However, issues arise over the manner in which it was drafted, making it important to interpret this section and identify potentially problematic provisions that could hamper business rescue.

The Act allows an affected person to object to a resolution by applying to the court for an order to set it aside.[423] Although the company is protected by an automatic moratorium when it

[421] Section 130.
[422] The objection must be made in court by affected persons since they have a right to participate in the hearing of an application for business rescue (s 131(3)).
[423] Section 130(1).

commences business rescue, and at any time after the adoption of a resolution to commence business rescue and until the adoption of a business rescue plan, an affected person may apply to the court for an order setting aside such resolution.[424] The use of the phrase 'at any time after the adoption of a resolution' clearly suggests that although the company is protected by the moratorium on claims after the adoption of a resolution, this does not preclude affected persons from applying for an order setting aside such resolution. Although the company is protected by the moratorium, such *moratorium* has no effect on objection proceedings initiated in terms of s 130 prior to the adoption of the plan. Indeed, the courts have held that the provisions of subsections 130(1) and (5) are not subject to the moratorium provided for in s 133.[425] An affected person has to show that 'there is no reasonable basis for believing that the company is financially distressed;[426] there is no reasonable prospect of rescuing the company[427]; or that the company has failed to satisfy the procedural requirements set out in s 129.'[428] The onus is on the applicant who is opposing the adoption of a resolution.[429] However, even if they are able to show grounds for setting aside the resolution, an affected person may not apply for the setting aside of the resolution or the appointment of a business practitioner if, as a director of a company, he/she voted in favour of that resolution.[430] An exception may be made if that person satisfies the court that, in supporting the resolution, he/she acted in good faith on the basis of information that was subsequently been found to be false or misleading.[431] If a director intentionally condones abuse of business rescue proceedings by supporting a resolution, such director will be held to have been acting in bad faith.[432]

Section 130(2) does not define good faith; it largely depends on the honesty of a director. There is a long-standing principle that directors have a duty to act *bona fide* in what they believe to be in the interests of the company[433] and such duty entails a duty to act for a proper purpose.[434] Therefore, the term 'good faith' in s 130(2) is confusing. Good faith may be in the best interests of the company or of the stakeholders. Acting in the best interests of the company might not

[424] Ibid.
[425] *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers Proprietary Limited* (10862/14) [2015] ZAKZPHC 21 (20 March 2015) at 13 and 15. See also *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP); *Griessel v Lizemore* 2016 (6) SA 236 (GJ).
[426] Section 130(1)(*a*)(i).
[427] Section 130(1)(*a*)(ii).
[428] Section 130(1)(*a*)(iii).
[429] *Finance Factors CC v Jayesem (Pty) Ltd* (5304/2013) [2013] ZAKZDHC 45 (22 August 2013) at para 18.
[430] Section 130(2).
[431] Ibid.
[432] *Griessel v Lizemore* 2016 (6) SA 236 (GJ) 84.
[433] *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306.
[434] Section 76(3)(*a*).

fulfil the purpose of the Act, given that s 7(*k*) requires the balancing of the rights of relevant stakeholders. A problem may nevertheless arise if, in doing so, there is a possibility that the company should never have adopted business rescue. However, if s 130(2) directs that a director should act in the best interests of stakeholders, and if, as an affected person, he/she is allowed to object to business rescue, acting in 'good faith' would mean acting in the best interests of stakeholders. The fact that he/she may be allowed to object to business rescue proceedings if the information provided was misleading, reinforces that interpretation.

The phrase 'reasonable ground to believe' encompasses objective and subjective tests; objective by weighing the conduct against that of a 'reasonable person' in the position of an affected person and subjective in considering the beliefs of an affected person. An issue raised by academics and dealt with by the courts surrounds the use of the present tense in referring to the grounds for setting aside a resolution. The issue is whether the court should consider the grounds at the time the application is made or when the resolution was passed. Commenting on *DH Brothers Industries (Pty) Ltd v Gribnitz NO*[435], Delport[436] doubted the correctness of the *obiter dictum* to the effect that the first two grounds must be at the time of considering the application rather than when the resolution was passed. This would seem to be correct because at the time the resolution was adopted there might have been reasonable grounds to believe that the company was in financial distress and that there was a reasonable prospect of rescuing it, but contrarily, at the time the resolution was passed there might not have been reasonable grounds to believe that the company was financially distressed, nor that there was a reasonable prospect of rescuing it. However, since the adoption of the resolution, circumstances might have occurred that discount that view, in which case the court may not dismiss rescue proceedings because at the time the resolution was adopted the grounds indeed applied. Holding that the grounds (for rescue) may only be tested at the time of application may therefore lead to an untenable position.[437] Loubser[438] argues that the objection should be left with the business rescue practitioner since he/she has the duty to apply to the court for discontinuation of business rescue as soon as he/she acquires information that there is no reasonable prospect of rescuing the company or it is no longer financially distressed.

[435] *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) 12.
[436] Delport *et al* (eds) *Henochsberg* supra note 260 at 471.
[437] Ibid.
[438] Loubser 'The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)' (2010) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 505-506.

If an affected person has grounds to believe that there is no reasonable prospect of rescuing the company, such person may apply to the court for the setting aside of the resolution to commence business rescue.[439] If the objective factors indicate that the company is not financially distressed, a resolution to place the company under business rescue could be held to be *mala fide.*[440] Since 'reasonable prospect' is less stringent than 'reasonable probability'' an affected person may object to the resolution if there is no reasonable possibility that the company will be rescued. What constitutes reasonable prospect may be judged by the court.[441]

An affected person may apply to the court for an order setting aside the resolution if the company fails to satisfy the procedural requirements contemplated in s 129.[442] These requirements (referred in s 130(1)(*a*)(iii)) include a time period for the publication of a notice of a resolution on business rescue; the appointment of business rescue practitioner; filing of a notice of the appointment of business rescue practitioner; and the publication of such notice to affected persons.[443] Setting aside a resolution as contemplated by s 130(1) is a crisper process than the resolution being nullified as contemplated by s 129(5). If the resolution is set aside in terms of section 130(1), the court may order liquidation. In contrast, the Act does not specify the consequences of a resolution being nullified. Delport[444] argues that 'the approach under s 130(1) seems a far more sensible approach in providing clarity regarding the status of the business rescue resolution than the situation catered for under s 129(5)'. Section 130(1) is plain and blunt, offering no room for argument that there was partial compliance; as long as there is non-compliance, business rescue can be opposed. However, the application is not invalidated if the deviation does not reduce the probability that the recipient received the notice.[445]

Lapsing or the annulling of the resolution does not necessarily mean that business rescue is terminated. In *Panamo Properties*[446] the SCA held that '[t]he assumption underpinning the various high court judgments to the effect that the lapsing of the resolution terminates the business rescue process is inconsistent with the specific provisions of the Act.' This suggests that if no application is made, business rescue is not terminated even in the event of non-

[439] Section 130(1)(*a*)(ii).
[440] *Griessel v Lizemore* 2016 (6) SA 236 (GJ) 84.
[441] *Firstrand Bank Limited v Normandie Restaurants Investments* (189/2016) [2016] ZASCA 178 (25 November 2016) 14.
[442] Section 130(1)(*a*)(iii).
[443] See *Panamo Properties* supra note 291 at 24 where Wallis JA held that '[t]he obvious and sensible meaning of the expression "procedural requirements" in s 130(1)(*a*)(iii) is that it refers to the procedural requirements in ss 129(3) and (4)'.
[444] Delport et al (eds) *Henochsberg* op cit note 260 above at 473.
[445] *Ex parte Van den Steen NO (Credit Suisse Group AG Intervening)* 2014 (6) SA 29 (GJ) 16.
[446] *Panamo Properties* supra note 291 at 48.

compliance. An application opposing the passing of a resolution has to be made.[447] The resolution may not terminate automatically simply because it has lapsed or is technically improper.

The court maintains its discretion to grant or not grant an order setting aside a resolution. The court has power in terms of s 130(5)(*a*)(i) and (ii) to set aside the resolution on any of the grounds set out in subsection (1) or if, having regard to all of the evidence, it considers that it is just and equitable to do so. The issue is whether the word 'or' in this section introduces a new ground for setting aside a resolution, or whether it has the same effect as 'and', so that these subsections read conjunctively. In *Panamo Properties,*[448] the SCA decided that the subsections must be read conjunctively. Wallis JA, with Navsa ADP, Majiedt and Zondi JJA and Dambuza AJA concurring, held that:

> 'Where to give the word 'or' a disjunctive meaning would lead to inconsistency between the two subsections it is appropriate to read it conjunctively as if it were 'and'. This has the effect of reconciling s 130(1)(a) and s 130(5)(a) and limiting the grounds upon which an application to set aside a resolution can be brought, whilst conferring on the court in all instances a discretion, to be exercised on the grounds of justice and equity in the light of all the evidence, as to whether the resolution should be set aside.'[449]

The court further interpreted the word 'otherwise' to 'convey that, over and above establishing one or more of the grounds set out in s 130(1)(*a*), the court needs to be satisfied that in the light of all the facts it is just and equitable to set the resolution aside and terminate the business rescue.'[450]

The court may also afford the practitioner sufficient time to decide whether the company is financially distressed; or there is a reasonable prospect of rescuing it.[451] What amounts to sufficient time is determined by the court. The Act should have specified the time period, especially as it affords that the practitioner 10 days post-appointment to convene the first meeting with creditors and employees to inform them whether he/she believes that there is a reasonable prospect of rescuing the company.[452] Although the court has a discretion to give sufficient time, such should therefore be within 10 days, starting on the day the court affords

[447] Para 29.
[448] *Panamo Properties* supra note 291.
[449] Para 31.
[450] Para 32.
[451] Section 130(5)(*b*)(i) & (ii).
[452] See s 147(1)(*a*) & s 148 (1)(*a*).

the practitioner 'sufficient time' to write a report. After receiving a report from the practitioner, the court has discretion to set aside the company's resolution if it concludes that it is not financially distressed, or there is no reasonable prospect of rescuing it.[453]

If the court decides to set aside the resolution, it has the discretion to make a further order, including placing the company in liquidation.[454] If the court finds that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, it can make an order rendering directors who voted in favour of the resolution to commence business rescue personally liable, unless they acted in good faith and on the basis of information that they were entitled to rely upon.[455] The choice of the phrase 'the company would be unlikely to pay all of its debts as they become due and payable' instead of 'financially distressed' is not clear; the phrase 'financially distressed' should have been retained since it is common throughout the Act in the context of business rescue.

3.7.2. Objections to Court Application Procedure

In order to grant a business rescue order, the court must be satisfied that the company is financially distressed; failed to 'pay over any amount in terms of an obligation under or in terms of a public regulation or contract with respect to employment-related matters; or that 'it is just and equitable to do so for financial reasons and there is a reasonable prospect of rescuing the company.'[456] This is similar to the rule in judicial management where the court could grant an order commencing judicial management 'when any company, by reason of mismanagement or for any other cause, is unable to pay its debts or is probably unable to meet its obligations; and has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern'.[457] Both the Act and the 1973 Act empower the court to grant an order if it is just and equitable to do so.[458] This means that opposing the court application may involve arguing that the company does not meet these requirements. In this case, the applicant has to prove that the company meets the requirements

[453] Section 130(5)(*b*)(ii).
[454] Section 130(5)(*c*)(i).
[455] Section 130(5)(*c*)(ii).
[456] Section 131(4)(*a*).
[457] Section 427(1).
[458] See both s 131(4) and s 427(1).

for commencing business rescue proceedings (or commencing judicial management proceedings).[459]

3.8. Conclusion

The discussion above has shown that business rescue regime has evolved since its adoption in the form of judicial management in 1926. The changes in company law have resulted in the changes in the wording of the provisions governing business rescue proceedings. A notable development is that the Act has introduced flexible provisions that have a positive impact on the success of business rescue, particularly when one is dealing with the procedure commencing business rescue proceedings.

This evolution includes an out-of-court procedure for commencing business rescue which again, introduces a more flexible approach to tackling the shortcomings of judicial management. Judicial management proceedings required two court orders (causing delay and great cost to the company in distress) raising doubts about whether judicial management was suitable for small- and medium-sized companies. The Act was passed to make business rescue viable for financially distressed companies. Commencement was simplified by allowing it by resolution or by court order. The board of directors could resolve to commence business rescue in a reasonable belief that the company was financially distressed, but with a reasonable prospect of being rescued.[460] The company could now decide when to start business rescue

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[459] See *Lief v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) at 348D; *Weinberg v Modern Motors (Cape Town) (Pty) Ltd* 1954 (3) SA 998 (C) at 1000C; *Western Bank Ltd v Laurie Fossati Construction (Pty) Ltd* 1974 (4) SA 607 (E) at 611B; *Millman v Swartland Huis Meubileerders (Edms) Bpk* 1972 (1) SA 741 (C) at 745A; *Marais v Leighwood Hospitals (Pty) Ltd* 1950 (3) SA 567 (C); *Irvin & Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 537E; *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T) at 121-122*. Ben-Tovim* supra note 215 at 331; *Bahnemann v Fritzmore Exploration (Pty) Ltd* 1963 (2) SA 249 (T); *Keens Electrical (Jhb) (Edms) Bpk v Lightman Wholesalers (Edms) Bpk* 1979 (4) SA 186 (T*); Ronaasen v Ronaasen & Morgan (Pty) Ltd* 1935 CPD 562 at 563-4; *Rustomjee v Rustomjee (Pty) Ltd* 1960 (2) SA 753 (D) at 757-8; O*akdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2013 (4) SA 539 (SCA); *Gormley v West City Precinct Properties (Pty) Ltd; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd* [19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012); *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); *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2012 (3) SA 273 (GSJ; *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB); *Koen v Wedgewood Village & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC); *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* (9831/2011, 7811/2012) [2012] ZAWCHC 163; [2012] 4 All SA 590 (WCC) (28 August 2012).

[460] Section 129(1)(*a*) & (*b*) provides that 'subject to subsection (2)(*a*), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable ground to believe that the company is financially distressed; and there appears to be a reasonable prospect of rescuing the company.' *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) 13.

proceedings, and the role of the courts has been reduced, in turn lessening the burden of legal costs and making the process more accessible to small- and medium-sized businesses.[461]

Delays in the business rescue process were also addressed, especially those caused by the court having to make provisional and final orders for judicial management. As noted previously, the two court applications required under judicial management were expensive and delayed proceedings.

A resolution has no force or effect until it has been filed[462] with the CIPC,[463] and there were mandatory time periods for adopting and filing the claim.[464] Any affected person could apply to the court to set aside the resolution on the ground that the company had failed to satisfy the procedural requirements demanded by section 129.[465] Against this background, the out-of-court procedure has proved to be a positive development for business rescue. Once the directors reasonably believe that the company is financially distressed and there appears to be a reasonable prospect of rescue, the company may just adopt and file a business rescue resolution.

The categories of persons who can apply for business rescue are now wider than those of judicial management, making the application process simpler and clearer; each affected person has simply to be notified. The judicial management procedure mimicked the cumbrous liquidation procedure. The Act is also fairer to persons affected by business rescue, with less emphasis on the protection of creditors, who could successfully oppose the judicial management application on the ground that they were immediately entitled to payment of their debts.[466] Under the Act, the court must consider the interests of all affected persons.[467] Section 7(*k*) of the Act states that the purpose of the Act is 'to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.' The court considers the interests of employees who might lose

[461] For judicial management's unsuitability for small- and medium-sized companies, see Kloppers op cit note 213 above at 425; Olver op cit note 210 above at 453.
[462] Section 129(1)(*b*).
[463] Section 129(1)(*b*) read with s 132(1)(*a*).
[464] Section 129(5)(*a*) provides that 'if the company fails to comply with any provision of subsection (3) or (4) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity'.
[465] Section 130(1)(*a*)(iii).
[466] *Tenowitz* supra note 215 above; *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V); *Ben-Tovim v Ben-Tovim* 2000 (3) SA 325 (C); *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T); *Silverman v Doornhoek Mines Ltd* 1935 TPD 349.
[467] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) at 21; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2012 (3) SA 273 (GSJ) 18.

their jobs if business rescue is refused.[468] This accords with the purpose of the Act to provide efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.[469]

The basis on which to determine whether a struggling company has the potential to return to solvency and what has to be proved to commence rescue proceedings is embodied in the phrase 'financial distress'. Under judicial management, the onerous requirement of 'inability to pay debts and meet obligations' was applied. A 'reasonable prospect'[470] of a return to solvency replaced the 'reasonable probability' required under judicial management. However, 'reasonable prospect' is also flawed in that the word 'prospect' carries the notion of 'probability' in its meaning. Therefore, the word 'prospect' should be replaced by the word 'possibility'.

The requirement that an order be 'just and equitable for financial reasons' has also been developed. The inclusion of the words 'for financial reasons' serves to add to the number of factors that the court may examine. This appears to give the court wider discretion in interpreting the 'just and equitable' requirement, shifting the focus from protecting creditors' claims to protecting the life of the company.

[468] See for example *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited, In Re: AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012).
[469] Section 7(*k*) of the Act.
[470] See detailed discussion above criticising the use of the word 'prospect'.

CHAPTER FOUR

THE CONSEQUENCES OF PLACING THE COMPANY UNDER BUSINESS RESCUE

4.1. Introduction

The *moratorium*, the appointment of a business rescue practitioner, and the development of a business rescue plan are important consequences of business rescue.[471] A *moratorium* on the rights of claimants against it or in respect of property in its possession is most important.[472] Therefore, during business rescue proceedings, no legal proceedings, including enforcement actions against the company or in relation to any property belonging to it or lawfully in its possession, may commence or proceed.[473] The purpose is to give the company and the business rescue practitioner space and time to deal with rescuing the company, without having to deal with creditor litigation.[474]

The business rescue practitioner, appointed by resolution or by court order, assumes temporary supervision[475] with full management control of the company under business rescue.[476] If the appointment is by resolution, such appointment must be made within five days of the adoption and filing of the resolution.[477] Within two days of the appointment of the practitioner, a notice of his/her appointment must be filed, and a copy given to each affected person within five days of filing.[478] If the appointment is by court order, the court may appoint an interim business rescue practitioner nominated by the applicant.[479] However, the appointment is subject to ratification by a majority vote of independent creditors at the first creditors' meeting.[480]

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[471] There are several other consequences of business rescue but this chapter focuses on these three because they come to pass immediately the company embarks on business rescue.
[472] Section 128(1)(*b*).
[473] Section 133(1).
[474] *Cloete Murray NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at 14; *Southern Value Consortium v Tresso Trading 102 (Pty)* [2015] JOL 34787 (WCC) 34; *Chetty t/a Nationwide Electrical v Hart* 2015 (6) SA 424 (SCA) at paras 28 and 39; *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) at paras 7, 9, and 11; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* [2013] ZAGPJHC 109 (13/12406 10 May 2013) at para 4.
[475] Section 128(1)(*d*).
[476] Section 140(1)(*a*).
[477] Section 129(3)(*b*).
[478] Section 129(4)(*a*) & (*b*).
[479] Section 131(5).
[480] Ibid.

The business rescue practitioner is responsible for developing a business rescue plan.[481] He/she does so in consultation with creditors and other affected persons.[482] The business rescue plan contains all the information reasonably required to enable affected persons to decide whether it should be accepted;[483] it determines whether business rescue proceeds. Since it is the aim and object to rehabilitate the company, formulating and implementing this plan is one of the most important aspects of the proceedings;[484] its development and implementation is one of the prime objectives of the process,[485] building stakeholders' trust and confidence in the prospects of the ailing company.[486]

This chapter, therefore, analyses the above consequences. It is divided into three parts namely the moratorium; the business rescue practitioner; and the business rescue plan, aimed at describing how business rescue policies have reformed company law. Comments are also made for developing business rescue provisions.

4.2. The Statutory *Moratorium*

4.2.1. The Evolution of Moratorium

A *moratorium* in favour of a company undergoing business rescue is a fundamental component of most statutory corporate rescue regimes internationally and is also supported by the United Nations International Commission on Trade Law (UNICTRAL).[487] The *moratorium* was not part of the 'corporate rescue' regime when the regime was introduced in South Africa by the Companies Act 46 of 1926 ('the 1926 Act'), but was introduced years after the introduction of judicial management. .[488] When the moratorium was introduced in 1932 the objective was to

[481] Section 140(1)(*d*)(i).
[482] Section 150(1).
[483] Section 150(2) of the Act.
[484] P Delport *et al* (eds) *Henochsberg on the Companies Act* 71 of 2008 (2012) 516 (Delport *et al Henochsberg)*.
[485] Section 128(1)(*b*)(iii).
[486] M Pretorius & W Rosslyn-Smith 'Expectations of a business rescue plan: International directives for Chapter 6 implementation' (2014) 18 (2) *Southern African Business Review* 129.
[487] The UNCITRAL *Legislative Guide on Insolvency Law* (2005) para 52. Available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf* (Accessed: 09 November 2020). The Guide provides that 'the question of the complexity or simplicity of commencement standards is closely linked to the consequences of commencement and the conduct of the insolvency proceedings. In insolvency laws that apply a stay automatically on commencement of the proceedings, for example, the ability of the business to continue trading and be successfully reorganized can be assessed after commencement (and, where the law permits, the proceedings can be converted to liquidation if reorganization is determined to be inappropriate). In other systems, that information may be needed before an application is made because the choice of reorganization presupposes that it will lead to a greater return for creditors than liquidation.
[488] The moratorium was introduced by the Companies Amendment Act 11 of 1932. See Chapter Two subheading 2.2.1.2 which gives the history of the introduction of the moratorium.

provide a company with a breathing space. The *moratorium* was retained by the Companies Act 61 of 1973 ('the 1973 Act'); in terms of sections 428(1) and 428(2)(c) as they provide that a court order might 'contain directions that while the company is under judicial management, 'all actions, proceedings, the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court'. However, since that rescue regime was more 'creditor-friendly', the institution of the moratorium depended on the court's discretion.[489] In *Western Bank Ltd v Laurie Fossatti Construction (Pty) Ltd*,[490] the court held that in granting an order for a *moratorium*, the court was required to exercise its discretion judicially and not arbitrarily or capriciously, having considered all the salient and material features of the case.

Furthermore, even on the return day for the final judicial management order, it was not clear whether the *moratorium* automatically applied. Section 432(3) was even more concerning. dealing with directions that could include the powers conferred on the final judicial manager subject to the rights of the creditors of the company. Section 423(3)'s failure to include *moratorium* prompted varying academic views on its application. Cilliers and Benade asserted that since s 432(3) was silent on a moratorium, the court could not grant one.[491] Loubser[492] on the other hand argued that the omission of any reference to a moratorium did not mean that it should not be applied and that failure to apply a *moratorium* meant the failure of the judicial management order. It is submitted that Loubser's view is correct. If a moratorium could be granted in a provisional judicial management order, there is to be no compelling reason why it should not be granted in the final judicial management order; logically a moratorium in a final judicial management order should have been automatic, as it would already have been granted in a provisional judicial management order.

Under the current business rescue regime, the provisions regulating the moratorium are flexible; there is no longer confusion about whether the *moratorium* is automatic or not. If a company is under business rescue, such company enjoys an automatic *moratorium*. Section 133(1) of the Act provides that:

> 'During business rescue proceedings, no legal proceeding, including enforcement of action, against the company, or in relation to any property belonging to the

[489] Because of the words "a provisional judicial management order may contain directions" in s 428 (2)(c), the courts did not treat the moratorium as automatic.
[490] 1974 (4) SA 607 (E) 610.
[491] HS Cilliers, ML Benade *et al Corporate Law* 3 ed (2000) 486 (Cilliers & Benade).
[492] A Loubser 'Some Comparative Aspects of Corporate Rescue in South African Company Law' (Unpublished LLD thesis, University of South Africa, 2010) 32.

> company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner; with the leave of the court and in accordance with any terms the court considers suitable; as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began; criminal proceedings against the company or any of its directors or officers; proceedings concerning any property or right over which the company exercises the powers of a trustee; or proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.'

Under s 133(1) the *moratorium* comes into effect automatically when the company commences business rescue − more debtor-friendly than the judicial management process. The current policy is aimed at protecting the debtor company while having regard for the interest of the stakeholders. To prevent abuse, there are exceptions to the rule in s 133 (1); curbing abuse of the moratorium has always been intended by the legislature, previously in a creditor-friendly mode and presently in a debtor-friendly mode.

The Act makes provision for only one court order and removes the need for special applications to be made for a *moratorium.* The court does not need to give any directions on whether or not a *moratorium* should apply when an application is made in terms of s 131.

4.2.2. Conceptual Framework on Statutory Moratorium

4.2.2.1. Legal Proceedings

Both s 428(2)(*c*) and s 133(1) prohibit actions or proceedings against the company if it is under rescue. However, a continuing problem is the failure to define "actions or legal proceedings". Since the 1973 Act, the question has always been whether "actions or proceedings" refers to actions or proceedings instituted before or after the commencement of rescue proceedings or both. Prior to the Act, it came before the court in *Irvin & Johnson Ltd v Oelofse Fisheries*[493] where it was held that the words "all actions" could mean future and pending claims.

The vagueness of s 133(1) has been subject to several conflicting court decisions. In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd*,[494] the court held that s 133(1) protects a company under business rescue from all legal proceedings including enforcement actions.[495] Kgomo J held that:

[493] 1954 (1) SA 231 (E) 237.
[494] (13/12406) [2013] ZAGPJHC 109 (10 May 2013).
[495] Para 16.

> 'Leave of the court' as laid down in section 133(1)(b) cannot be a simple one that can be advanced from the bar. Such leave in my view and finding must be motivated in the same way, just like, for instance, as criteria for departure from the Rules of Court to justify a prayer for urgency. A court being asked for leave to proceed against a company under business rescue, thus during a *moratorium*, must receive a well-motivated application so that it could apply its mind to the facts and the law if necessary and then be in a position to make a ruling in accordance with any terms it may consider suitable in the peculiar circumstances.'[496]

A month later in *Redpath Mining South Africa (Pty) Ltd v Marsden*[497] the same judge endorsed the principle in *Merchant West*.[498] However, in *Moodley v On Digital Media (Pty) Ltd*[499] Meyer J held that 'legal proceedings' in s 133 do not include proceedings arising out of a business rescue plan.[500] In this case, the applicant had argued that s 133(1) proceedings do not encompass proceedings relating to the implementation of an adopted business rescue plan in accordance with the Act.[501] On the other hand, the respondents argued that s 133(1) proceedings encompass any conceivable type of proceeding.[502] Meyer J criticised the decision of the court in *Redpath*,[503] holding that legal proceedings that seek to enforce the implementation of an adopted business rescue plan, strictly in accordance with its terms and the provisions of the Act, are legal proceedings against the business rescue practitioner and the company, rather than against the company and its property or property in its lawful possession and that s 133(1) thus does not apply.[504]

Meyer J's decision was endorsed and followed in a number of subsequent cases.[505] In *Hlumisa Investment Holdings (RF) Ltd v Van der Merwe NO*[506] the dispute between the parties related to the publication of the business rescue plan and the creditors' meeting. The court found that the proceedings in dispute were related to the business rescue practitioner and the company under business rescue.[507] Thobane AJ held that the legal proceedings contemplated in s 133(1)

[496] Para 67.
[497] (18486/2013) [2013] ZAGPJHC 148 (14 June 2013).
[498] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) 55.
[499] 2014 (6) SA 279 (GJ).
[500] Para 10.
[501] Para 4.
[502] Ibid.
[503] Para 11.
[504] Paras 10 & 11.
[505] *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd* (10862/14) [2015] ZAKZPHC 21 (20 March 2015) 11.
[506] (77351/2015) [2015] ZAGPPHC 1055 (14 October 2015).
[507] Para 17.

did not include those that are primarily aimed at interdicting the consideration and adoption of a business rescue plan and disclosure of documents and information related to that plan.[508]

Just when it seemed that the legal proceedings contemplated in s 133(1) did not encompass those arising out of the business rescue plan, a recent decision in *Booysen v Jonkheer Boerewynmakery (Pty) Ltd*[509] parted ways with Meyer J's decision in the *Moodley* case. Sher J held that Meyer J's reasoning and decision were not persuasive and were incorrect.[510] Sher J held that

> '[a]ny plan which is adopted and which needs to be implemented by a company in business rescue, is a plan which belongs to that company and the business rescue practitioner merely seeks to give effect thereto as the manager in charge of the company. To this end, the business rescue practitioner steps into the shoes of the board of the company and its management during the period when it is temporarily under supervision for the purposes of business rescue. But, any proceedings taken in relation to such plan ie to set it aside or to enforce its implementation, are proceedings taken against the company, which is represented by the business rescue practitioner and, to my mind, there is no justification in seeking to distinguish such proceedings or to hold that they are not the kind of proceedings covered by the provisions in question.'[511]

The court held that the distinction made by Meyer J was artificial and 'the use of the words "proceeded with" in s 133(1) require[s] leave to be obtained from a court in respect of proceedings which have a cause of action arising both before as well as after business rescue proceedings have commenced.'[512] It is submitted that Sher J's view is correct. When a company is under business rescue, the business rescue plan is a measure adopted to rescue it, and the practitioner is there to help the company to fulfil the objectives of business rescue. Therefore, one can say that proceedings relating to the business rescue plan are encompassed by se 133(1), and the section should be amended to exclude issues relating to the enforcement of the adopted plan in accordance with the provisions of the Act, where such failure is prejudicial to affected persons. It cannot not be said that legal proceedings contemplated in s 133(1) do not cover those arising out of the business rescue plan.

This conflict of views is not the only issue concerning the interpretation of 'legal proceedings' as contemplated by s 133(1). Courts have also been faced with the conflict between section

[508] Ibid.
[509] (10999/16) [2016] ZAWCHC 192; [2017] 1 All SA 862 (WCC) (15 December 2016).
[510] Para 34.
[511] Para 57.
[512] Para 61.

133(1) and section 130(1). Section 130(1) allows an affected person to make an application in court for an order setting aside the resolution to commence business rescue any time after its adoption, provided such application be made prior to the adoption of the plan. This provision is in conflict with s 133(1) which states that no legal proceedings may be commenced or proceeded with against the company during business rescue proceedings. In interpreting s 130(1), it is clear that the moratorium contemplated in s 133(1) is superseded by s 130(1). The use of the phrase 'at any time after the adoption of the resolution' suggests that although the company is protected by the moratorium after the adoption of a resolution, this does not preclude affected persons from applying for an order setting aside such resolution. Courts have impliedly allowed s 130(1) to supersede s 133(1) by allowing applications in terms of s 130 although the company is under business rescue.[513] It is not clear why the legislature did not expressly prescribe exceptions to s 130 when drafting s 133(1).

It follows that s 133(1) is vague and it should be amended according to the guideline in *Irvin & Johnson Ltd v Oelofse Fisheries*; the exceptions should be made on when moratorium would not apply. Although this judgment was given in a judicial management case, it has an impact on the meaning of 'actions or legal proceedings' because here is a need for a proper definition of 'legal proceedings' as provided for by s 133(1). The legislature did not intend to draft a vague provision; Therefore, to meet the objectives of business rescue regime (to have clear and simple provisions) s 133(1) should be amended.

4.2.2.2. Property Belonging to the Company or in its Lawful Possession

4.2.2.2.1. General

No legal proceedings may be enforced against any property belonging to the company or lawfully in its possession except with the written consent of the practitioner or with the leave of the court.[514] The inclusion of 'property belonging to the company or in its lawful possession' is a new concept in South African business rescue regime. There are two parts to the concept: on one hand, the property must belong to the company or be in its lawful possession. If this is not the case, the moratorium will not apply. In *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd*[515] the court accepted that 'property "belonging to the company" in s 133(1),

[513] See *DH Brothers Industries v Gribnitz NO* 2014 (1) SA 103 (KZP); *LA Sport 4X4 Outdoors CC v Broadsword t/a 20 (Pty) Ltd* (25680/2013) [2015] ZAGPPHC 78 (30 May 2013); *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd* [2015] ZAKZPHC 21 (20 March 2015); *ABSA Bank Ltd v Golden Dividend 339 (Pty) Ltd* 2015 (5) SA 272 (GP); *Griessel v Lizemore* 2016 (6) SCA 236 (GJ).
[514] Section 133(1)(*a*) & (*b*).
[515] (91/2020) [2021] ZASCA 43 (13 April 2021) 31.

sensibly construed, could only mean property belonging in a legally valid sense, such as property owned by the company, which in s 133(1) is expressly distinguished from property "lawfully in its possession".' Thus, property 'belonging to the company' does not include property belonging to the company unlawfully.[516]

The property must be in the lawful possession of the company. Even if the company is in possession of the property, if such possession is unlawful, the moratorium will not apply.[517] Unlawfulness in this context includes civil and criminal unlawfulness.[518] The company may not invoke the moratorium in respect of property that it does not lawfully possess.

Furthermore, the interpretation of the phrase 'legal proceedings and enforcement action thereof' in s 133(1) has effects on contracts that have been entered into by the company and property owners. The UNCITRAL guidelines provide that:

> 'In reorganisation, where the objective of the proceedings is to enable the debtor to survive and continue its affairs to the extent possible, the continuation of contracts that are beneficial or essential to the debtor's business and contribute value to the estate may be crucial to the success of the proceedings. These may include contracts for the supply of essential goods and services or contracts concerning the use of property crucial to the continued operation of the business, including property owned by third parties. Similarly, the prospects of success may be enhanced by allowing the insolvency representative to reject burdensome contracts, such as those contracts where the cost of performance is higher than the benefits to be received or, in the case, for example, of an unexpired lease, the contract rate exceeds the market rate'[519]

This raises the question of how contracts with third parties have been dealt by the courts in relation to the property owned by those third parties.

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[516] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC) 29-30.

[517] In *Madodza (Pty) Ltd v Absa Bank Ltd* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012), it was common cause that the company had been ordered to return the vehicles after the cancellation of the agreement between the parties. The court held that the company failed to prove that it was in lawful possession of the vehicles and therefore did not meet the requirements of s 133.

[518] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448 (KZD) 37.

[519] 'The UNCITRAL Legislative Guide on Insolvency Law Part 2' (2005) 121 para 122 available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf* [Accessed: 07 December 2020].

4.2.2.2.2. Moratorium on Property Owners

When a company commences business rescue proceedings, it is likely to have existing contracts requiring performance − executory contracts where one or all of the obligations remain unfulfilled.[520] However, business rescue – specifically the moratorium – has an effect on those executory contracts. Although the moratorium gives the company breathing space to restructure its affairs, it has far-reaching consequences on other property owners once the company has embarked on business rescue. Property owners may not bring legal proceedings or exercise any right in respect of any property in the lawful possession of the company, irrespective of whether it is owned by the company (except to the extent that the practitioner consents or with leave of the court).[521] It has been argued that this constitutes injustice for the property owner whose claims are stayed while the company enjoys the use of the property.[522] However, although executory contracts are stayed during business rescue, they are not automatically cancelled or terminated. Consequently, s 136(2)(*a*) gives the practitioners powers to entirely, partially or conditionally, cancel obligations of the company arising from agreements 'to which the company was a party at the commencement of the business rescue proceedings; and would otherwise become due during those proceedings.'[523] Levenstein argues that the purpose of s 136(2)(*a*) is to identify which contracts are detrimental or prejudicial to the continued viability of the company in business rescue,[524] with the result that s 136(2) does have an effect on property owners. In terms of both s 133(1) and s 136(2)(*a*), once the company commences business rescue, property owners are faced with a number of consequences, including:

- stay on the enforcement of action or legal proceedings where the company has failed to pay rent and any incidental expenses in relation to lease agreements or instalments in relation to credit agreements; and

[520] S Lawrenson 'Lease agreements and business rescue: In need of rescue' (2018) 3 *Tydskrif vir die Suid-Afrikaanse Reg* at 657.

[521] Section 133 (1)(*a*) read with s 134 (1)(*c*). Since the Act uses the words 'any property', both owners of movable property and owners of immovable property are affected by the moratorium.

[522] MF Cassim 'The effect of the moratorium on property owners during business rescue' (2017) 29(3) *South African Mercantile Law Journal* 422.

[523] This section provides that ''subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and would otherwise become due during those proceedings.'

[524] E Levenstein 'An appraisal of the new South African Business Rescue Procedure' (*Unpublished LLD thesis*, University of Pretoria 2016) 470.

- the partial, whole, or conditional suspension of the company's obligation arising out of executory contracts.

As a result of the competing legal interests and rights, a contest often ensues between the company and the property owners. Due to the importance of executory contracts in the commercial world, the legal certainty of the moratorium and property owners has been tested by the courts. The courts have been called upon to test the balance between the goals of the moratorium against the prejudice caused by the moratorium on property owners. The SCA has held that the moratorium does not prevent a property owner cancelling an agreement with a company under business rescue.[525] The court was tasked to determine whether, once business rescue proceedings have commenced, the creditor of a company under business rescue could unilaterally cancel a contract that it had concluded with the company prior to the company being placed under business rescue. Fourie AJA (Navsa ADP, Ponnan JA, Zondi JA and Schoeman AJA concurring) held that

> '[i]n the context of s 133(1) of the Act it is significant that reference is made to "no legal proceeding, including enforcement action *in any forum"*. (My emphasis.) The inclusion of the term "enforcement action" under the generic phrase "legal proceeding" seems to me to indicate that "enforcement action" is considered to be a species of "legal proceeding" or, at least, is meant to have its origin in legal proceedings. The concepts "enforcement" and "cancellation" are traditionally regarded as mutually exclusive. The term "cancellation" connotes the termination of obligations between parties to an agreement. However, the liquidators contended for a wider meaning to be attributed to the expression "enforcement action", to include the cancellation of an agreement. In so doing I believe that they are doing violence to the wording of s 133(1) of the Act. Cancellation is a unilateral act of a party to an agreement and, save for giving the other party notice of such cancellation, it does not occur in or by means of any process associated with any form of forum . . . . It therefore seems to me that, linguistically, the phrase "enforcement action" in s 133 (1) is unable to bear the meaning of the cancellation of an agreement, as contended for by the liquidators. Contextually it must be understood to refer to enforcement by way of legal proceedings.

A number of commentators and courts have agreed with this judgment and accepted that the moratorium does not affect the cancellation of an executory agreement.[526] However, the court did not dwell on whether the property owner may repossess such property after the cancellation

[525] *Cloete Murray NNO v FirstRand Bank Limited t/a Wesbank* 2015 (3) SA 438 (SCA).

[526] Cassim op cit note 522 above. K Weyers 'Cancellation or suspension of agreements during business rescue' (2015) 15 (4) *Without Prejudice* at 17; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC); *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448 (KZD).

of an agreement. Consequently, the question remains whether property owners are given special power to disregard the *moratorium* and repossess their property when they have cancelled an agreement with a company under business rescue. The courts appear to have eased the application of *moratorium* when dealing with owners' repossession of property,[527] leaning towards favouring the property owners rather than the company in business rescue. Academics such as Cassim have criticised this as misconstruing the *moratorium*.[528]

4.2.2.2.3. Moratorium on Movable Property

Some judgments in KwaZulu-Natal and Gauteng have upheld the right of property owners to repossess movable property after the cancellation of an agreement. In both judgments discussed below, companies had failed to make payments as was required in their agreements with the banks. In both cases the banks had obtained, prior to the companies being placed in business rescue, court orders for the return of motor vehicles in the possession of the companies.

In *Madodza (Pty) Ltd v Absa Bank Ltd*,[529] the company brought an urgent application to prevent the sheriff from removing several vehicles from its possession until such time as the business rescue proceedings came to an end. The company argued that it should be allowed to restructure its affairs in a way to allow it to continue operating, and the business rescue proceedings would fail if the vehicles were to be returned.[530] The bank, however, contended that the vehicles did not form part of the assets of the company, nor was the company in lawful possession of the vehicles. The bank argued that the agreement had been cancelled prior to the commencement of the business rescue. The court ruled in favour of the bank and found that the company was not in lawful possession of the vehicles and therefore applicant was not entitled to rely on s

[527] See for example, *Madodza (Pty) Ltd v Absa Bank Ltd* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012), *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC); *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448 (KZD); *Kythera Court v Le Rendez-Vous Café* CC 2016 (6) SA 63 (GJ)

[528] Cassim op cit note 522 above. In her arguments (at 433) Cassim argues that '[b]y freezing the rights of property owners to bring enforcement actions or legal claims to repossess their property from the company, the moratorium prevents property owners from disturbing the company's possession of the property, interfering in the rescue process, and upsetting the chances of saving the company. The wide application of the moratorium to include hired and leased property, and other property possessed but not owned by the company, thus allows the company to continue in business by restricting creditors from depriving the company of property that is key to its business. Without it, the entire business rescue regime would fall apart. If property owners were freely permitted to divest the company of goods or assets used and enjoyed by it, it would impair the business rescue practitioner's capacity to manage the company and to use those assets in the conduct of the company's business with a view to achieving the goal of the rescue.'

[529] (38906/2012) [2012] ZAGPPHC 165 (15 August 2012). This case was decided before the judgment of the SCA in *Colette Murray NNO v FirstRand Bank Limited t/a Wesbank*.

[530] Para 11.

133(1),[531] holding further that the agreements were cancelled and the company had been ordered to return the vehicles prior to commencing business rescue proceedings.[532] Consequently, the company failed to prove that it was in lawful possession of the vehicles.

The court in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd*[533], agreed with the ratio in *Madodza* to the effect that the company could not rely on s 133(1) because it was not in lawful possession of the vehicle in question.[534] Interestingly the court did acknowledge that the execution or enforcement of an order made prior to the commencement of business rescue would amount to 'enforcement action' as per s 133(1) of the Act.[535] However, from the moment the agreement was cancelled, the company lost lawful possession of the vehicle.[536]

A common thread in both of these cases was that the company's use of vehicles was key to their business and important for the success of business rescue proceedings. However, the courts rejected this argument and focused the meaning of 'lawful possession' of the property. It is submitted that the court should have critically considered the use of vehicles as a key component in rescuing these companies. Whilst the vehicles would have decreased in value with use,[537] the courts should have realised that repossession of such vehicles negatively affected the purpose of business rescue; focusing on the meaning of 'lawful possession' made life more difficult for the companies in their quest for business rescue. The courts appear to

[531] Para 18.
[532] Para 17.
[533] 2016 (6) SA 448 (KZD)
[534] Para 51.
[535] Para 13.
[536] Para 27. In reaching the decision Olsen J held '[i]t seems to me that there are two possible meanings to be ascribed to the word 'lawfully' in s 133(1) of the Act. The first is wider than the second. The first, being the one adopted in *Madodza*, regards the affected company's possession of property as unlawful, and therefore not protected by s 133(1) of the Act, whenever the company lacks the so-called *jus possidendi*, which Professor Silberberg described as 'a right which justifies a person's claim to have a thing in his possession'. A purchaser under a normal bank instalment agreement reserving ownership to the bank acquires a *jus possidendi* when put in possession of the property in terms of the agreement; and loses it if the agreement is cancelled. On this approach the requirement of s 133(1) is that the company's possession should be lawful when judged from any perspective; or if not that, then lawful when judged from the perspective of any claim by a third party to possession of the property. The second possibility involves a distinction not unknown to our law between *iusta* and *iniusta* possession. Professor Silberberg considered this distinction to be one between just and unjust possession. The learned authors of his work (Badenhorst, Pienaar and Mostert, 2006) render the same distinction in English as one between lawful and unlawful possession. In both cases the examples of unjust or unlawful possession immediately dealt with are possession acquired by force or stealth (secretly). The learned authors add as a further example of unlawful possession that which is exercised "on sufferance as against the opponent". They accordingly equate the concept of lawful (or just) possession with possession *nec vi*, *nec clam, nec precario*, as those terms were used in s 2 of the repealed Prescription Act 18 of 1943.'
[537] A bank may therefore argue that if it repossesses the vehicle, it can get a better return than to wait for even just one day the vehicle is in the possession and used by the company.

have favoured property owners by allowing them to cancel the agreements[538] and bypass the moratorium − frustrating the intention of *moratorium*. Cassim's argument that by favouring a wider literal meaning of the phrase 'lawful possession', the courts have undermined the purpose of the legislation,[539] is supported. However, the rights of property owners' should be considered very carefully. In considering these rights and the purpose of *moratorium*, it is necessary to look at the surrounding circumstances. There may be circumstances where the property which is not critical to the 'lawful owner' may threaten the goal of business rescue if repossessed.[540] There may be circumstances in which it is vital for the company to retain possession of the property to continue its commercial services. In such circumstances, the *moratorium* should apply despite the property owner seeking to recover it. In judicial management cases, the courts have emphasised that the circumstances are important in order to determine whether *moratorium* is to be upheld.[541]

4.2.2.2.4. Moratorium on Immovable Property

While the *moratorium* bars the enforcement of action and legal proceedings against the company in business rescue, judgments of KwaZulu-Natal, Western Cape, and Gauteng courts have implications on *moratorium* affecting property owners in lease agreements. In some of the judgments, cancellations were made prior to the company commencing business rescue[542] while in others post-commencement.[543] In *178 Stamfordhill CC v Velvet Star Entertainment CC,*[544] which originated in KwaZulu-Natal, the property owner brought an urgent application for a *declariter* that the lease had been cancelled and sought the eviction of the respondent from the property. The case was founded more on s 136(2) of the Act since the respondent argued

[538] It appears that as long as the agreement was cancelled prior to commencing business rescue, the property owners have a 'special 'power to repossess their property.
[539] Cassim op cit note 522 above at 439.
[540] Depending on the type of business, sometimes vehicles may not be as critical as they were in *Mendoza* and *JVJ Logistics*.
[541] See *Unitrans Botswana (Pty) Ltd v North West Transport Investment (Pty) Ltd* (NW1216/04) [2005] ZANWHC 1 (21 June 2005). Although this case did not concern property in the company's possession, its issue was around the issue of moratorium and surrounding circumstances. Landsman J at 15 held that the absence of a complaint that the judicial management of the company would be prejudiced financially by the claim weighed the heaviest. In both *Mendoza* and JVJ *Logistics* the companies complained that taking of vehicles would prejudice the success of business rescue. Furthermore, in *Samuel Osborn (SA) Ltd v United Stone Crushing Co (Pty) Ltd (Under Judicial Management)* 1938 WLD 229 at 235 the court took the view that the discretion of the court should not be exercised so as to wreck the prospects of the successful issue of the judicial manager's administration, unless it was clear that this administration was doomed to failure.
[542] *Southern Value Consortium v Tress Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC).
[543] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015); *Kythera Court v Le Rendez-Vous Café* CC 2016 (6) SA 63 (GJ).
[544] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015).

the business rescue practitioners had suspended the agreement.[545] The respondent argued that the court's legal proceedings could not be brought in relation to the possession of the property without the leave of the court and that the court should not grant an order for eviction.[546] However, the court held that while s 136(2) had an effect on rental claims due post the commencement of business rescue, this did not apply to rental claims that had been due prior to the commencement of business rescue; therefore the property owner was entitled to cancel the contract,[547] and the respondent was ordered to remove its movables from the applicant's premises.[548]

Although the court did not rely on the fact that the business rescue proceedings were likely to fail, it is submitted this factor should play an important role in such disputes. This was a case of abuse of business rescue and the moratorium against the property owner; the property was no longer needed for effective rescue, and repossession of such property was not going to negatively affect business rescue proceedings.

However, in *Kythera Court v Le Rendez-Vous Café CC* (originating in the Gauteng High Court, per Boruchowitz J) the applicant sought the urgent eviction of the respondent on the grounds that the lease agreement had been cancelled. Although the case was more about the interpretation of s 133(1), the court nevertheless touched on the interpretation of s 136(2) as follows:

> 'The section provides that the business practitioner may — despite any provision of an agreement to the contrary — entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings. By invoking this section, the business practitioner may prevent a landlord from cancelling a lease and from instituting eviction proceedings.'[549]

Significantly, the court accepted that the respondent did not invoke s 136(2) and therefore 'respondent's obligation to pay monthly rentals and municipal utilities had not been suspended prior to applicant's cancellation'.[550] If section 136(2) had been invoked by the respondent, the applicant might have been prevented from cancelling the lease agreement.[551] Cassim has

[545] See para 11 where the court accepted that although the letter suspending the agreement did form part of the papers the court, it appeared that a letter had been sent to the property owner.
[546] Para 21.
[547] Paras 25 and 27.
[548] Para 37.
[549] Para 15.
[550] Para 31.
[551] Ibid.

criticised this interpretation, arguing that a s 136(2) suspension applies only to post-commencement obligations.[552] The argument by Cassim, therefore, supports the *ratio* in *178 Stamfordhill CC*.

The court went further to deal with the application of s 133(1) on lease agreements. Citing the case of *Cloete Murray* v *Firstrand Bank Ltd t/aWesbank*, the court held that the agreement had been validly cancelled.[553] The court went on to deal with the issue of eviction. In this regard, Boruchowitz J held

> '[i]t is trite law that on the termination of a lease (whether by cancellation or the effluxion of time) it is the duty of the lessee to vacate the property subject only to the lessee's right to compensation for improvements. The failure to vacate properties when there is an obligation to do so renders the lessee an unlawful occupier.'[554]

The court viewed the phrase in s 133(1)'in relation to any property belonging to the company, or lawfully in its possession' as inapplicable to legal proceedings or enforcement action in relation to property belonging to persons or entities other than the company in business rescue, or in relation to property that is unlawfully possessed by the company.[555] The court held further that 'vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue would be permissible'.[556] Accordingly, the court found that the leave to eject the company from premises – once the agreement had been validly cancelled – was not necessary[557] and the order of eviction was granted.[558]

In the Western Cape case of *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* (*per* Blignault J)[559] the issue of the moratorium and lease agreements arose. Unlike *178 Stamfordhill CC* and *Kythera Court* cases, the lease agreement was cancelled prior to the commencement of business rescue proceedings. As with *178 Stamfordhill CC* and *Kythera Court*, the company fell into arrears with the payment of rent and other additional charges including operating costs, utilities consumption, and municipal charges. After commencing business rescue proceedings,

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[552] Cassim op cit note 522 above.
[553] 2015 (3) SA 438 (SCA) paras 13 and 28. The court held that 'cancelling the agreement does not constitute enforcement action as contemplated in s 133(1) and that it is permissible for an agreement to be cancelled during business rescue proceedings.'
[554] Para 14.
[555] Para 9.
[556] Ibid.
[557] Para 16.
[558] Para 41.
[559] 2016 (6) SA 501 (WCC).

the company opposed the application for eviction on the grounds that sections 133(1) and 134 (1)(*c*) precluded the property owner from pursuing such claims. Interpreting both sections, the court found in favour of the property owner, holding that the company was not in lawful possession of the property. Blignault J held:

> '[t]he applicant claims to be the lawful owner of the property. The business practitioners did not refute this claim. It follows that the property never belonged to respondent. Following the cancellation of the lease agreement respondent was, furthermore, no longer in lawful possession of the property. The business practitioners can therefore not rely on the provisions of s 133(1) of the Companies Act as a defence to applicant's claim. Similar reasoning applies to the interpretation of s 134(1)(c) of the Companies Act. The key concept is the lawful possession of the company. After the cancellation of the lease agreement respondent was no longer in lawful possession of the property.'[560]

The court added that it could not have been the legislature's intention that the company in business rescue would restructure its affairs by utilising assets to which it has no lawful claim.[561]

4.2.2.2.5. Commentary

In interpreting s 133(1) the cases discussed have leaned towards protecting the property owners once the agreement has been cancelled, irrespective of whether the contract had been cancelled prior or post commencement of business rescue proceedings. Such protection of property owners has been subjected to academic criticism for failing to properly consider the purpose of business rescue and the moratorium, especially eviction or repossession of property once the agreement has been cancelled. Cassim argues that 'in a misguided attempt to protect property owners, the courts have regrettably overlooked the fundamental aim of the moratorium . . . .'[562] Lawrenson argues that it was a practical question of how the company under business rescue could survive if the property owner cancelled the agreement in question, depriving the company of the property in its possession.[563]

The criticisms carry weight, subject to the reservation of potential abuse of the process. The courts have indeed appeared to favour owners and giving little weight to the *moratorium*. The

[560] Paras 31 and 32.
[561] Para 35.
[562] MF Cassim 'The safeguards and protective measures for property owners during business rescue' (2018) 30(1) *South African Mercantile Law Journal* at 40 (Cassim safeguards). See also the same author in MF Cassim 'The effect of the moratorium on property owners during business rescue' (note 522 above) when she cites a judgment to stress the point that the courts have misconstrued the moratorium purpose.
[563] S Lawrenson op cit note 520 above.

decisions in *Madodza* and *JVJ Logistics* disregarded the importance role of the vehicles in rescuing the companies. Refusing repossession would have helped the companies effect efficient[564] rescue proceedings. As mentioned above, the case of *178 Stamfordhill CC* constituted an exception to this proposition because the business rescue had palpably failed and refusal of repossession would have been unfair to the owner. The court should look at the circumstances when interpreting s 133(1), including the protection of property owners. If repossession serves to obstruct the business rescue, it should be refused. This requires the courts to balance the interests of the company under business rescue and those of the property owner. The moratorium is intended to allow the company under business rescue to remain in possession of property vital for its continued commercial activities.[565] Considering that the property owner may argue that the moratorium infringes his property rights to its detriment ie loss of rent. Cassim concedes that that the time period of the moratorium must be capped and the court should limit the time period (about three months) in which the company is allowed to use the property without paying rent or compensation.[566] While this is a good guideline and is supported in principle, the threshold should be determined by the court in the given circumstances. Three months may be too long or too short, depending on the circumstances.

[564] The word efficient is used deliberately in the face of the argument that the companies could have raised further loans to buy new vehicles. However, raising new loans might take time that the company does not have.

[565] Cassim op cit note 533 above). See also Cassim 'Safeguards' op cit note 576 above) where she gives good guidelines for circumstances where the courts are considering whether to grant the property owner leave to exercise his rights. According to Cassim, the court should consider the following factors:

1. Where the property is not required for the rescue of the company, or where the repossession of the property would not obstruct the purpose of the rescue, the court or the business rescue practitioner should lift the moratorium and permit the property owner to enforce its right to reclaim the property.
2. Where the repossession of the property would obstruct the purpose of the rescue, a balancing test must be undertaken by the courts (or the business rescue practitioner) in deciding whether or not to lift the moratorium and to permit the repossession of the property by the owner.
3. Thirdly, where the property owner is refused permission to repossess its property, this, as a general rule, must be on the basis of the continued payment of current rent (or other relevant compensation) to the property owner.

[566] Cassim 'Safeguards' op cit note 562 above. At 51 and 68 she also lists a number of factors that the court should look at when weighing the loss and benefits of the property owner and those of the company. These include '(i) the purposes of business rescue; (ii) the company's circumstances; (iii) the nature of the property and the rights claimed in respect of it; (iv) the financial position of the company; (v) the company's ability to pay ongoing and arrear compensation to the property owner; (vi) whether the grant of leave would be inimical to the object and purpose of business rescue proceedings; (vii) the goal or end result sought by the rescue of the company; (viii) the proposals of the business rescue practitioner; (ix) the prospects of success of the business rescue endeavour; (x) the length of time for which business rescue has already been in force and the expected period for which it is to continue; (xi) the views of the business rescue practitioner; (xii) the effect on the business rescue process if leave is given and the effect on the property owner if leave is refused; (xiii) the likelihood or degree of probability of each of the above factors; (xiv) the history of the business rescue proceedings; and (xv) the conduct of the parties.

The court's discretion would therefore necessarily ensure that neither the company nor the property owner could abuse this guideline.

In the *Cloete Murray* case[567] the court held that 'the effect of s 136(2) of the Act is that a contract concluded prior to the commencement of business rescue proceedings is not suspended or cancelled by virtue of the business rescue but that the practitioner may suspend, or apply to court to cancel, any obligation of the company under the contract'. Cassim submits that when there has been suspension of lease agreements or instalment-sale agreements in terms of s 136 (2)(*a*), the property owner should be permitted to apply to the court to lift the suspension and seek leave of the court to enforce the right to receive payment or repossession of property if this is justifiable.[568] Wyers asserts that if s 136(2) has been invoked prior to the cancellation of an agreement, the creditor needs a business rescue practitioner or leave of the court to enforce cancellation of the agreement.[569] However commentators differ on whether such cancellation has effect on obligations incurred prior to the commencement. Cassim argues that suspension applies only to post-commencement obligations[570] whereas Weyers is of the view that section 136 applies even to pre-commencement obligations.[571] The issue of the cancellation of executory agreements in business rescue is not a clear-cut issue.

Citing the UNCITRAL Model Law and 2007 Companies Bill, Lawrenson adds a further argument that 'a provision similar to section 139(1)(*a*) of the 2007 Companies Bill be inserted into the Act, prohibiting a landlord from cancelling an executory lease agreement; [and] that a business rescue practitioner should be granted the option of continuing with, or cancelling an executory contract without having to obtain a court order − in line with international best practice.'[572] The reasons for suspending the contract in its entirety, partially or with a condition may include onerous obligations in the form of excessive interest of credit agreements or high rentals. Since time is of the essence for business rescue, it may be argued that suspending the contract for those reasons without going to the court may save time and legal costs. However, it is submitted that role of the court may be necessary in certain circumstances. For example, there may be an obligation in which a third party continuously performs a specific task, paid by the company, and the question that arises is whether the company's obligation may be

[567] 2015 (3) SA 438 (SCA) 15.
[568] [568] Cassim 'Safeguards' op cit note 562 above at 59.
[569] K Weyers 'Cancellation or suspension of agreements during business rescue' (2015) 15(4) *Without Prejudice* 17.
[570] Cassim 'Moratorium' op cit note 522 at 447.
[571] Weyers op cit note 569 above.
[572] Lawrenson op cit note 520 above at 662 and 669.

cancelled or suspended while the third party is still obligated. This calls into question the wider issue of contractual liability in which the third party may argue that its obligation ceases when the company stops paying. Such disputes call for the guidance of the courts; in fact the involvement of the courts may play a major role in resolving the issue.

4.2.2.3. Disposal of Property by a Company

Section 133(1) as it deals with property belonging to the company or in its lawful possession is to be read with s 134(1) which deals with the protection of property interests. While under business recue, the company may not dispose or agree to dispose of its property unless such disposal is in the ordinary course of business; such disposal constitutes a *bona fide* transaction at fair value with prior written consent of the practitioner; and it forms part of the business rescue plan.[573] Section 134(1) is intended to protect the interests of parties such as shareholders and creditors from having the property disposed of without any consent. However, a closer analysis of the Act and the 1973 Act demonstrates a considerable difference between business rescue and judicial management on the rules governing the disposal of the company's assets:

1. Under judicial management the judicial manager could dispose of the company's property with the approval of the court,[574] but under business rescue it may be done with the written approval of a practitioner. It is significant to ascertain why judicial management required court approval of disposal of assets. The 1926 Act did not have any provision dealing with the status of assets during judicial management. It was only after the recommendations made by the Millin Commission that the provision was included,[575] prior to which the judicial manager would liquidate the assets of the company and pay its debts without the liquidation order being granted.[576] Two arguments may be advanced on the interpretation of s 434(1) and s 134(1) in this

[573] Section 134(1).

[574] Section 434(1) of the 1973 Act provided that 'a judicial manager shall not without the leave of the court sell or otherwise dispose of any of the company's assets save in the ordinary course of company's business'. *Ex parte Vermaak* 1964 (3) SA 175 (O) 175; *Ex parte Judicial Manager of Bloemfontein Milk Bars (Pty) Ltd* 1943 OPD 5.

[575] AH Olver *Judicial management in South Africa: Its Origin, Development and Present Day Practice and a Comparison with the Australian System of Official Management*' (Unpublished LLD thesis, University of Cape Town, 1980) 127-8. According to Olver at 129 the Millin Commission made two recommendations, namely that the judicial manager 'shall not without the leave of the court sell any of the company's assets save in the ordinary course of business; and to make it his duty to apply to court for a winding up order if at any time he is of the opinion that the continuance of the judicial management order will not enable the company to pay its debts.'

[576] Ibid. Olver cites a number of cases including *Ex parte of Judicial Manger of Bloemfontein Milk Bars (Pty) Ltd* 1943 OPD 5; *Ex parte Judicial Manager of Border & Allan (Pty Ltd* 1942 OPD 182; *In re Virginian Cheese & Food Factory (Pty) Ltd* 1940 GWLD 69.

regard. On one hand, the requiring the judicial manager to approach the court to dispose of assets would lead to the possibility of incurring legal costs – now eliminated by sections 134(1) and 134(2) by allowing the practitioner to give written consent. On the other hand, s 134(2) does not indicate what would constitute reasonable or unreasonable withholding of the consent. Refusal to consent might be reasonable if consenting to the disposal will frustrate the proposed business rescue plan − or that the disposal is not *bona fide*. In this case, a company wishing to dispose of any of its property will be required to prove that such disposal was not going to frustrate a business rescue plan. Furthermore, s 134(2) does not afford the company a remedy should business rescue practitioner have unreasonably withheld the consent. In this situation the company[577] may approach the court for an order declaring that the withholding of the consent is unreasonable.[578] Although the company may end up going to court, the situation is different from judicial management. Going to court must be treated as a last resort; in other words, every attempt should be made for a business rescue practitioner to consent before the matter is referred to court.

2. Section 134(3)(*a*) provides that '[i]f during company's business rescue proceedings, the company wishes to dispose of any property over which another person has security or title interest, 'the company must obtain the prior consent of that person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest'. Although the Act does not define 'security or title interest', it may include a mortgage over immovable property, a notarial bond over movable asset or a cession of rental *in securitatem debiti*.[579] This section is aimed at protecting a person who has a secured interest over the company's property. The word 'must' clearly obliges the company to obtain consent from a security holder before it disposes of that property, subject to the proceeds of the sale covering in full the security interests. This was not provided for under judicial management. Section 434(1) did not require the consent of the company or judicial manager consent, nor the consent of the person who had the security over the property

[577] Delport *et al* (eds) *Henochsberg* op cit note 484 above at462 argue that 'the 'company' in the context of s 134 will be the board of directors'.

[578] The court may test whether such disposal is *bona fide* or whether it frustrates the business rescue plan.

[579] *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* 2019 (3) SA 97 (SCA); *National Union of Metalworkers of SA v VR Laser Services (Pty) Ltd* [2020] 2 All SA 536 (GHC)*; Shoprite Checkers (Pty) Ltd v Berryplum* (47327/2014) [2015] ZAGPPHC (9 March 2015); *Redpath Mining South Africa (Pty) Ltd v Marsden NO* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013). See also Delport *et al Henochsberg* supra note 493 where it is submitted that 'security or title interest' includes any other real right.

before disposal of the property. This might have been because the disposal was to be granted by a court order, or in any event, the person with security or title interest to the property/asset to be disposed of would have opposed the application for judicial management in the first place.[580]

Section 134(3) continues to require that the sale proceeds attributed to that property up to the amount of the company's indebtedness to that person must be paid promptly; or security provided to the satisfaction of that person.[581]

4.2.2.4. Exceptions to a Moratorium[582]

What is common between judicial management and business rescue is that whether or not the *moratorium* is automatic, it is not absolute. There are exceptions to its application. Under judicial management, the exception was given by the court at its discretion, whereas in business rescue the exception can be by a business rescue practitioner's written consent or by leave of the court.

4.2.2.4.1. Written Consent of the Practitioner

Section 133(1) affords the business rescue practitioner (by written consent) power to countenance proceedings against the company or its property or property in its lawful possession. In terms of s 133(1)(*a*) 'during business rescue, no proceeding, including action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner'. This was not the case under judicial management. The judicial manager was not given the power to consent to any proceedings against the company. It is submitted that the practitioner is allowed to consent because business rescue has introduced an out-of-court commencement of rescue proceedings by resolution. That being the case, there is no need to approach the court for leave to institute legal proceedings against the company.[583] Therefore anyone intending to institute action against the company under business rescue proceedings may do so without going to court, unless the practitioner refuses to give a written consent.

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[580] Even though this is the assumption, it would have been a problem if the party opposing the application was not aware that an application had been made for disposal of that specific asset.
[581] *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* 2019 (3) SA 97 (SCA) 23.
[582] Section 133 provides for several exceptions to general moratorium but this thesis focuses on the exceptions that have been subject to court interpretations.
[583] 'Legal proceedings' include both pre- and post-commencement proceedings.

4.2.2.4.2. Leave of the Court

The court's discretion to waive the *moratorium* has existed in both judicial management and business rescue. However, the court requires a proper application.[584] The two issues that have arisen are whether the leave of the court should be granted on *prima facie* case or only in exceptional circumstances; and whether two applications are required.[585] Under judicial management rules, two applications would have been needed, and the court could finally grant the leave to institute legal proceedings in exceptional circumstances.[586] However, the Act is silent on whether leave of the court should be granted in exceptional circumstances or on *prima facie* case.

The lack of specificity on the issue has hindered the progress of business rescue. Instead of resolving these issues speedily, the courts have been required in several cases to interpret and rule on the provisions. On the '*prima facie'* or 'exceptional circumstances' issue, High Courts in Gauteng and KwaZulu-Natal have ruled on the issue. Kgomo J (Gauteng) handed down two judgments holding that a well-motivated application should be made so that the court could properly apply its mind to the case.[587]

However, still in Gauteng, in *Moodley v On Digital Media (Pty) Ltd*[588] Kgomo J's decision in was criticised as being wrongly decided. The *Moodley* decision was followed in KwaZulu-Natal in *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd*[589] where Pillay J held:

> 'Respectfully, I too disagree with the reasoning in *Redpath* that there must be 'exceptional circumstances' for granting an application in terms of s 133. Apart from being vague, the wording 'exceptional circumstances' is not one of the grounds stipulated or foreshadowed in s 133. Nor does the learned Judge give any direction as to what would constitute "exceptional circumstances". There may have been 'a lot of things and circumstances . . . alluded to by . . . the applicant'

[584] See s 428(2)(*c*) and s 133(1)(*b*).
[585] These are an application for the leave of the court to institute legal proceedings and an application instituting those legal proceedings.
[586] See *Western Bank Ltd v Laurie Fossati Plant Hire (under judicial management)* 1974 (4) SA 607 (E) at 611A where the court took the view that the court must consider all the relevant facts of the case.
[587] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Co (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) 67. See also *Redpath Mining South Africa (Pty) Ltd v Marsden NO* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013) 71 where the court held that only in exceptional circumstances may a court permit litigation against the company.
[588] *Moodley v On Digital Media (Pty) Ltd* 2014 (6) SA 279 (GJ) 11.
[589] *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd* [2015] ZAKZPHC 21 (20 March 2015) 269.

> that failed to convince that court that exceptional circumstances existed justifying the granting of the application.'[590]

In other cases, it has been held that a *prima facie* case should be established as a minimum requirement by an applicant seeking to obtain leave under section 133 to sue a company in business rescue.[591]

On the issue of two applications, the SCA in *Chetty t/a Nationwide Electrical v Hart NNO*[592] endorsed the principle that s 133(1)(*a*) is not a shield behind which a company not needing the protection may take refuge to fend off legitimate claims.[593] However, the court was not clear on whether a separate application was required, but simply held that non-compliance with s 133(*a*) did not nullify the proceedings.[594] This has therefore led to different approaches in Gauteng, KwaZulu-Natal, and Western Cape. In KwaZulu-Natal, the court in *Msunduzi Municipality v Uphill Trading 14 (Pty) Ltd*[595] decided that two separate applications are needed. Ploos van Amstel J held that:

> 'The leave of the court is required before the matter may be proceeded with. It is not permissible to proceed without the leave of the court and when the point is taken, apply for such leave from the bar. Such an application must be a substantive one, on affidavits, and the company under business rescue must have a proper opportunity to oppose it. The court will be required to have regard to all the relevant circumstances, including the reasons advanced by both parties as to why leave should or should not be granted.'[596]

The same judge in *Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd*,[597] emphasised the need for separate applications. In this case the applicant sought a mandamus for the respondent to provide certain documents pertaining to their joint venture. Ploos van Amstel J held that 'proceedings come to halt when the company goes into business rescue, and may only proceed with the leave of the court'.[598] The court concluded that s 133(1)(*b*) did not entitle the applicant to commence its application without the leave of the court.[599]

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[590] Para 10.
[591] *Mabote v Van der Merwe NO* (2015/40324) [2016] ZAGPJHC 185 (8 July 2016) 16.
[592] 2015 (6) SA 424 (SCA).
[593] Para 40.
[594] Paras 41 & 42.
[595] (11553/2012) [2014] ZAKZPHC 64 (27 June 2014).
[596] Para 8.
[597] 2015 (4) SA 485 (KZD).
[598] Para 12.
[599] Para 13.

However, in Gauteng the court in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*,[600] granted the application for leave to sue the practitioner in the same application as one for setting aside the approved business rescue plan. Still in Gauteng, *Moodley v On Digital Media (Pty) Ltd*,[601] held that leave of the court was not required after it had ruled that issues arising out of a business rescue plan were not included in the provisions of s 133(1). In KwaZulu-Natal the court in *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd*[602] concurred, after holding that the applicant did not need a separate application to institute proceedings to set aside a resolution.[603]

In the Western Cape Sher AJ in *Booysen v Jonkheer Boerewynmakery (Pty) Ltd*[604] dealt with the constitutionality of s 133(1), deciding that s 133(1) might negatively affect the litigant's constitutional right to access to justice; therefore, the interpretation of s 133(1) should go hand in hand with promoting the spirit, purport and objects of the Constitution.[605] The court held that s 133(1) should be interpreted in a less restrictive manner while protecting affected persons' right to access justice.[606] The court further said that 'when giving effect to the provisions of s 133(1) it was important to strive towards an interpretation which would allow for the speedy, cost-effective and efficient implementation of an adopted rescue plan and the timeous completion of the business rescue process as opposed to an interpretation which would prolong it or drag it out unnecessarily'.[607] The conclusion was that it would be wrong to hold that leave of the court was required in each case.[608] The court further held that each case should be decided on its own merits; the circumstances of each case would determine whether a separate application was required.[609] Sher J held further:

> 'There may be matters where by virtue of the nature of the envisaged proceedings very little is necessary in the way of applying for, or seeking the court's leave. For example, if one has regard for the facts in the *Safari Thatching* matter which concerned a prior application for the liquidation of a company which had been brought before it went into business rescue, and which was automatically stayed when business rescue proceedings commenced, it would surely have been otiose

[600] 2013 (6) SA 471 (GNP). See also *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2015 (5) SA 192 (SCA).
[601] *Moodley v On Digital Media (Pty) Ltd* 2014 (6) SA 279 (GJ) 11.
[602] *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd* [2015] ZAKZPHC 21 (20 March 2015) 269.
[603] Para 15.
[604] *Booysen v Jonkheer Boerewynmakery (Pty) Ltd* (10999/16) [2016] ZAWCHC 192; [2017] 1 All SA 862 (WCC) (15 December 2016).
[605] Para 38.
[606] Para 44.
[607] Para 48.
[608] Para 54.
[609] Ibid.

> and inefficient to require that the leave of the court to proceed therewith should be sought by way of a separate prior application, if the business rescue process had ground to a halt or was otherwise defective [but] [w]here the facts of a particular matter dictate that prior to commencing with certain legal proceedings a court would be required to impose certain terms and conditions, it would obviously be sensible and proper to approach the court for the necessary leave and guidance in this regard, before such proceedings were commenced.'[610]

While all high court decisions have the same hierarchical status, it is submitted that Sher AJ's reasoning and conclusion regarding section 133(1)(*b*) are correct, and Ploos van Amstel J's[611] view that a separate application for leave of the court is required is not the case in every instance. Circumstances determine whether there is a need for a separate application for the leave of the court. Requiring a separate application in each case could negatively impact the affected person's right to access justice, and more importantly, the accompanying financial costs and time obstacles could undermine efforts to rehabilitate companies in business rescue.

This issue also addresses the question whether the court would grant leave only in exceptional circumstances. Circumstances may determine whether leave is granted on *prima facie* evidence or upon a well-motivated application to the court. However, phrase 'exceptional circumstances' used by the court in *Redpath* is vague and may lead to anomalies. It is submitted that the phrase 'well-motivated application' should be used instead of 'exceptional circumstances' The evidence and arguments raised would determine whether leave should be granted. The reasoning in *Western Bank Ltd v Laurie Fossati Plant Hire (under judicial management)* above should have been the guide for drafting s 133(1)(*b*).

4.2.2.4.3. Criminal Proceedings against the Company or its Directors

Another exception to a general moratorium is that criminal proceedings against the company or any of its directors or officers may be commenced or proceeded with.[612] If the company commits a crime, it should be prosecuted. However, the phrase 'or any of its directors or officers' in s 133(1)(*d*) is not necessary. Loubser's[613] recommendation that this phrase should be removed is supported because if legal proceedings are instituted against directors, they may

[610] Paras 54 & 56.
[611] Ploos van Amstel J decided the following cases: *Moodley v On Digital Media (Pty) Ltd* 2014 (6) SA 279 (GJ); *Msunduzi Municipality v Uphill Trading 14 (Pty)* Ltd (11553/2012) [2014] ZAKZPHC 64 (27 June 2014) 287; and *Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) 295.
[612] Section 133(1)(*d*).
[613] Loubser supra note 492 at 356.

personally defend such proceedings. Proceedings against directors cannot be said to be proceedings against the company because the company is a separate legal person.

4.2.2.4.4. Moratorium on Sureties

A company is a separate legal person[614] with all the powers of a person unless its Memorandum of Incorporation provides otherwise.[615] This means that when a company enters into a contract, it does so as a separate legal person and is protected by the moratorium against legal action. No guarantee or surety may be enforced by any person against a company under business rescue, except with the leave of the court in accordance with what the court considers just and equitable under the circumstances.[616] Should the company stand as surety and the debtor fails to pay, the creditor may not act against the company if it is under business rescue. This raises the questof ion whether the same applies if another person stands as surety for a company under business rescue. Although the Act is not specific on the question, it appears that the *moratorium* does not extend to sureties of a company. In a number of decisions, the *moratorium* has been held to be a defence *in personam*; In *Investec Bank Ltd v Bruyns,*[617] the bank argued that the moratorium in favour of a company under business rescue did not extend to the surety but only to the company itself. The court found that the moratorium contained in s 133 was of a personal nature and was available to a company as a defence *in personam.*[618] About two years after the *Investec* case, in *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff,*[619] the same court confirmed *obiter* that the moratorium under s 133 was a defence *in personam* and did not extend to sureties. In *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*[620] the court was again not prepared to accept that s 133 of the Act protects sureties. In reaching the decision, Kathree-Setiloane J held that:

> 'I am of the view that the interests of sureties do not fall within the scope of the objective of the business rescue regime. This is clear from the provisions of s 133(1) of the Act, which provides that during the course of business rescue proceedings no legal proceedings, including enforcement action against the

[614] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL); *Macaura v Northern Assurance Co* Ltd [1925] AC 619 (HL); and *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.
[615] Section 19(1).
[616] Section 133(2).
[617] [2012] JOL 28420 (WCC); 2012 (5) SA 430 (WCC).
[618] Para 18.
[619] (2014) 3 All SA 500 (WCC).
[620] 2013 (6) SA 471 (GNP).

company, or in relation to any property belonging to it or in its possession, may be commenced or proceeded with, except under certain circumstances.'[621]

However, the situation may change where a business rescue plan has been adopted. This plan is defined as a document that contains all the information reasonably required to assist affected persons in deciding whether to accept or reject the plan,[622] prepared by the practitioner[623] who, within 10 business days of publishing the plan, must convene and preside over a meeting of creditors and any other holders with voting interests called for the purposes of considering the plan.[624] If it is implemented, the plan may provide that a creditor who has acceded to the discharge of the whole or part of a debt owing to them will lose the right to enforce the relevant debt or part of it.[625] Furthermore, if the plan is approved and implemented, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process except to the extent provided for in the business rescue plan.[626]

Section 154(1) provides that as long as a creditor has acceded to the discharge of the whole or part of the debt, he/she will not be able to proceed against the company for the debt once the business rescue plan has been approved and implemented unless the plan itself provides otherwise. The plan thus protects the company against creditors. However, s 154 in itself does not address the question of sureties and the issue of whether a surety's liability is affected by the plan remains. It appears that a business rescue plan may affect the liability of sureties. It has been held that if the plan specifies that sureties' liabilities be affected, then this will be the case. The court in *New Port Finance Company (Pty) Ltd v Nedbank Ltd*[627] held, in *obiter*, that a surety's liability would be unaffected by the business rescue plan unless the plan itself made specific provisions about sureties.[628] This settled the longstanding difference in views in High Court decisions on whether the business rescue plan affected the liability of sureties. In the first case, *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*,[629] Kathree-Setiloane J held that:

'The effect of such a provision, in my view, would be drastic as it would deprive a creditor of its rights as against a third party (surety) simply by virtue of the

[621] Para 70.
[622] Section 150(2).
[623] Section 150(1).
[624] Section 151(1).
[625] Section 154(1).
[626] Section 154(2).
[627] [2015] 2 All SA 1 (SCA).
[628] Ibid at 14.
[629] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013 (6) SA 471 (GNP) 71.

> adoption of a business rescue plan for the debtor. If the legislature intended that the adoption of a business rescue plan would have such a far reaching consequence, the legislature would have expressly provided for this consequence.'[630]

A contrary view was advanced by Rogers J in *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff*[631] where it was held that if the statute deals with the matter, whether expressly or implicitly, it applies regardless of what the common law determines. However, if the statute is silent, common law principles should be applied. In this case, neither the plan nor the deed of surety contained provisions on whether a creditor was entitled to proceed against a surety, notwithstanding the fact that the creditor reached a compromise with the principal debtor**.** The cour, therefore,e invoked common law principles of suretyship and found that the obligation of a surety was accessory in nature, and, accordingly, the extinction of the principal obligation extinguishes the obligation of the surety.[632]

In *New Port Finance Company (Pty) Ltd v Nedbank Ltd* (SCA),[633] the deed of suretyship contained two clauses[634] that entitled the creditor to pursue the sureties should the principal debtor default on payments. This resulted in the court finding that the creditor was entitled to recover the balance of the outstanding debt from the sureties, notwithstanding the compromise reached in the adopted business rescue plan. Notwithstanding this decision, Wallis J held, in *obiter*, that s 154 can be construed as only dealing with the ability to sue the principal debtor and not with the existence of the debt itself.[635]

4.3. Business Rescue Practitioner

4.3.1. The Need for a Business Rescue Practitioner and its Evolution

Administration of a business rescue process is inherently difficult to carry out because, both nationally and internationally, the process requires a third party to manage it until completion. In South Africa, this person was introduced as a judicial manager. When the 1926 Act was introduced in parliament for debate, Sir Drummond Chaplin said that people who were to be

[630] Ibid at 68.
[631] *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff* (2014) 3 All SA 500 (WCC) 37.
[632] Ibid at 89.
[633] *New Port Finance Company (Pty) Ltd v Nedbank Ltd* [2015] 2 All SA 1 (SCA) 258.
[634] Clauses 5, 6 and 7 entitled the bank to pursue the sureties, notwithstanding their dealings with the principal debtor and extent of the principal debtor's indebtedness. In other words, any default by the principal debtor entitled the bank to sue the sureties.
[635] Para 14.

appointed to administer the rescue process had to have qualifications,[636] and the idea of a qualified person administering the affairs of a company under business rescue prevailed until the current business rescue regime. The skills and expertise of the business rescue practitioner play an important role in whether the process succeeds because the practitioner takes temporary supervision[637] and full management control of the ailing company.[638]

The appointment of the practitioner has evolved within the framework of having been a legislative procedure. The 1973 Act had no specific provision that dealt with the appointment of both the provisional and final judicial managers, and in consequence, they were appointed by a procedure similar to the appointment of provisional and final liquidators. Thus, professional liquidators were appointed as judicial managers, and their 'liquidation mindset' was a cause of the failure of the judicial management system. Critics pointed out that the objectives of judicial managers were different to those of liquidators.[639] The judicial manager's objective was to save the company while the liquidator's job was to stop a company trading and sell its assets. Kloppers[640] noted the potential conflict of interests as a liquidator might not be concerned to restore the company to financial health.

A business rescue practitioner must follow a specific procedure provided for by the Act. The practitioner is either appointed by the board of the company consequent upon a board resolution,[641] or by nomination by affected persons who apply to court for an order commencing business rescue proceedings.[642] The court may make an order appointing an interim practitioner subject to the ratification by the holders of a majority of the independent creditors' voting interests.[643] The detailed analysis of the appointment, qualifications, duties and removal of a business rescue practitioner as provided for by the Act is provided below.

4.3.2. Appointment by Resolution Procedure

4.3.2.1. Appointment

Section 129(3)(*b*) requires the company to appoint a business rescue practitioner who has consented to and accepted such appointment in writing within five days of the company

[636] Olver 'supra note 575 at 2.
[637] Section 128(1)(*d*).
[638] Section 140(1)(*a*).
[639] P. Kloppers 'Judicial Management – A Corporate Rescue Mechanism in need for Reform?' (1999) 10 (3) *Stellenbosch Law Review* 424. A H Olver 'Judicial Management - A Case for Law Reform' (1986) 84 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 86.
[640] Kloppers op cit note note 639. Olver op cit note 639 at 86.
[641] Section 129 (3).
[642] Section 131 (5).
[643] Ibid.

adopting and filing a resolution. The Act should have allowed for the appointment of a business rescue practitioner at the same time the resolution is passed as this would enable the board to identify a suitable practitioner while holding meetings to pass a resolution. Appointing someone because one is running out of time is different from appointing a practitioner based on an informed decision. It is therefore submitted that s 129 needs to be revisited to allow the appointment of a business rescue practitioner accordingly. This way the practitioner may – as soon as being appointed – start to develop a business rescue plan that maximises the likelihood of the company continuing in existence on a solvent basis or at least results in a better return for the company's creditors or shareholders.

The phrase 'who has consented in writing to accept the appointment' could also cause problems. The Act does not set a time limit for the practitioner to respond after being approached by the company, which could cause delays. This means that the practitioner should be appointed on the adoption and filing of the resolution. A set time period should be specified within which the practitioner must respond. Should he/she decline the appointment the company would still have sufficient time to decide whether to appoint another practitioner. The company should ensure that the practitioner is aware of his/her intended appointment, and should the practitioner fail to respond within the given time such practitioner should face disciplinary action at the hand of the Commission.

Moreover, the Act does not stipulate the form the consent should take, ie an email, formal letter, or an affidavit. However, CIPC Notice 65 of 2018 requires that a consent letter by the business rescue practitioner – reflecting the practitioners' full names and surname, ID number, contact details, and address – must be submitted to the CIPC,[644] clarifying the form of consent required. However, it may be constructive for an affidavit to be submitted by the practitioner. There are two reasons for this submission:

- The first is that in terms of s 129(3)(*a*), the directors must publish a notice of the resolution to affected persons and such notice is to be accompanied by a sworn statement of the facts on which the resolution is based. It would thus make sense that the person to be appointed should file an affidavit stating that he/she is fit to be a business rescue practitioner and meets all the requirements.

[644] Notice 65 of 2018 'Notice of appointment of business rescue practitioner (CoR123.2)' Available at *https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/Notice_65%20of%202018.pdf* (Accessed: 25 November 2020).

- Secondly, such an affidavit would make it easier to avoid objections to the resolution on the ground that the practitioner does not meet the requirements. While an affidavit will not expel doubts that an affected person may have regarding the appointment, it provides a degree of trustworthiness.

An email may perhaps also be a form of consent, as long as the details required by Notice 65 are included in an email with an electronic signature.[645] Section 3 of the Interpretation Act provides that 'in every law, expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.'[646] Therefore, the forms of consent mentioned above may be taken as valid.

4.3.2.2. Filing a Notice of the Practitioner's Appointment

After the appointment of the practitioner, the company is required to file a notice of the appointment[647] within two days of the appointment while no specific time is set within which the resolution should be filed − understandable because, by the time the practitioner is appointed, the resolution is already effective. No time, however, should be wasted in filing the notice of the appointment.

However, s 129(4)(*a*) does not specify whether the practitioner's appointment has an effect before being filed. It can be assumed that it does because s 140(1A) provides that 'the practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings of his or her appointment'. The expression 'as soon as practicable' could mean the day of the appointment − within the period of two days granted to file the notice of appointment.

[645] In terms of 12 and 13 of Electronic Communications and Transactions Act 25 of 2002 online electronic signatures may be accepted. Section 12 provides that 'a requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message; and accessible in a manner usable for subsequent reference.' Section 13(1) provides that 'where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.' Section 13(2) provides that 'subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.' Section 13 (4) provides that 'where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.'

[646] Interpretation Act 33 of 1957.

[647] Section 129(4)(*a*).

Significantly, the practitioner is required to inform the regulatory authority of his/her appointment. The Act defines a regulatory authority as 'an entity established in terms of national or provincial legislation responsible for regulating an industry, or a sector of an industry.'[648] The Commission (defined as 'the Companies and Intellectual Property Commission established by s 185)'[649] is a regulatory body as it is established by national legislation. Therefore s 140(1A) is redundant Whether or not a practitioner informs the Commission, the Commission becomes aware in any event of the appointment at the time notice of such appointment is filed.

4.3.2.3. Notification of Appointment of a Business Rescue Practitioner

As with the adopted resolution, the Act requires the company to serve a copy of the filed notice of appointment of the practitioner on each affected person, within five business days of filing such notice.[650] Although s 129(4)(*b*) does not include the words 'prescribed manner' for the notice of the appointment of a practitioner, the prescribed manner is in fact required.[651]

4.3.3. Appointment by Court Order

In terms of s 131(5):

> 'If the court makes an order [placing the company under supervision and commencing business rescue proceedings], the court may make a further order appointing as an interim practitioner a person who satisfies the requirements of s 138,[652] and who has been nominated by the affected person . . . subject to ratification by holders of a majority of the independent creditors' voting at the first meeting of creditors . . . '.

As with appointment by resolution, there is a prescribed manner for notification of affected persons if such appointment is by court order. The notification must be within five business days after the court order[653] – differing from judicial management procedure where the provisional judicial manager had to inform a Registrar of his appointment by lodging a copy of the letter of appointment within seven days of appointment.[654]

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[648] Section 1.
[649] Ibid.
[650] Section 129(4)(*b*).
[651] See Form CoR 123.2 which requires that the notice must be published to every affected person within two business days after it has been filed, if the company appointed the practitioner.
[652] These requirements are going to be dealt with below.
[653] See Form CoR 123.2 available at *http://www.cipc.co.za/files/8113/9359/7084/CoR123_2.pdf* (Accessed: 02 December 2020).
[654] Section 430(*b*).

Furthermore, the wording of s 131(5) suggests that the court has *discretion* to appoint a business rescue practitioner. Loubser[655] recommends that this should not be the case and that the courts should have an *obligation* to appoint a practitioner (author's emphasis). It is submitted that this recommendation is correct. There is no reason why the court should not be obliged to appoint a business rescue practitioner since he/she plays a crucial role in business rescue proceedings. If the court is granted discretion and does not appoint a business practitioner, nobody will take full management control of the company while it is under business rescue. This defeats the purpose of the process. Therefore, it is submitted that when the courts grant an order commencing business rescue, the practitioner must also be appointed *eodem tempore*.

4.3.4. Qualifications

Unlike the case of judicial management (which set no specific qualifications or requirements for a judicial manager) business rescue requires that a practitioner meet certain requirements. These are that

> 'the person is a member in good standing of a legal, accounting or business management profession accredited by the Commission; has been licensed as such by the Commission in terms of subsection (2); is not subject to an order of probation in terms of section 162 (7); would not be disqualified from acting as a director of the company in terms of section 69 (8); does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and is not related to a person who has a relationship contemplated in paragraph (d).'[656]

4.3.4.1. Respected Person

Section 138 (1) provides that 'a person may be appointed as the business rescue practitioner of a company only if the person is a member in good standing of a legal, accounting or business management profession accredited by the Commission; has been licensed as such by the Commission in terms of subsection (2); is not subject to an order of probation in terms of section 162(7); would not be disqualified from acting as a director of the company in terms of section 69(8); does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and is not related to a person who has a

[655] Loubser supra note 492 at 91.
[656] Section 138(1).

relationship contemplated in paragraph (d).'[657] Although the word person would include a juristic person in the Act,[658] the Act would have specifically mentioned a juristic person as a person capable of being appointed.[659] as the wording is similar to that of the Insolvency Act[660] and Chapter XIV of the 1973 Act[661] in terms of which only a natural person can be appointed as a trustee or liquidator respectively. Although the business rescue practitioner has different duties from trustees and liquidators, he/she is entrusted with taking full control of the management of the company. Only a natural person could fulfil that duty.

4.3.4.2. Member in Good Standing

A business rescue practitioner must be a member in good standing of a profession accredited by the Companies Intellectual Property Commission (CIPC). There has been an increase in professional bodies accredited by the CIPC. In 2016 only three professional bodies were appointed, namely the Turnaround Management Association (TMA); the Institute of Accountants and Commerce (IAC); and the South African Institute of Professional Accountants (SAIPA).[662] In 2018 the list added professional bodies like Southern African Institute for Business Accountants (SAIBA); the Association of Chartered Certified Accountants (South Africa) NPC (ACCA); the South African Institute of Chartered Accountants (SAICA); the Law Society of the Northern Province (LSNP); the Law Society of KwaZulu-Natal (LSKZN); the Cape Law Society (CLS); the Law Society of the Free State (LSFS); the Institute of Business Advisors Southern Africa (IBASA); and the Chartered Institute of Management Accountants (CIMA).[663] The South African Restructuring and Insolvency Practitioners Association NPC (SARIPA) and Legal Practice Counsel (LPC) have also been accredited.[664] The increase in professional bodies has seen an increase in persons

[657] It appears that there was typographical error when this provision was drafted. It refers to paragraph (*d*) instead of paragraph (*e*). This is clearly shown in the Act where the correction is pointed out in the Act itself.
[658] Section 1.
[659] See s 138(1)(*c*) and (*d*) as they provide that a person may be appointed as the business rescue practitioner of a company only if the person is not subject to an order of probation in terms of s 162(7); and would not be disqualified from acting as a director of the company in terms of s 69(8). This is reserved for natural persons as a company cannot be judged on these requirements.
[660] Insolvency Act 24 of 1936.
[661] Companies Act 61 of 1973.
[662] Notice 52 of 2016 available *at http://www.cipc.co.za/files/7714/7703/4676/Notice_52_of_2016.pdf* (Accessed: 11 December 2020).
[663] Notice 5 of 2018 available at *http://www.cipc.co.za/files/3815/1964/2821/Notice_5_of_2018.pdf* (Accessed: 11 December 2020).
[664] There are a number of persons who have been appointed as business rescue practitioners under these accredited bodies. See 'Copy_of_Licensed_Business_Rescue_Practitioners_October_2020.pdf' available at *http://www.cipc.co.za/files/4116/0198/0554/Copy_of_Licensed_Business_Rescue_Practitioners_October_2020.pdf* (Accessed: 11 December 2020).

appointed as business rescue practitioners. As at 13 December 2016, 321 business rescue practitioners had been appointed,[665] while as at 7 October 2020, the number of appointments had increased by 40 to 361.[666]

The person must also be of good standing in his/her profession. For example, a lawyer should not have been struck off the roll. Of concern is that the professional bodies are not associated with or linked to the Commission. For example, there is no provision for the Law Society to inform the Commission that an attorney has been struck off the roll. This means that the Commission would have to conduct a background check on each person.

Although the business rescue procedure was adopted to tackle the shortcomings of judicial management, the procedure does not entirely solve the problem faced by affected persons regarding the appointment of liquidators as judicial managers. The Act does not prohibit the appointment of liquidators as business rescue practitioners as long as such persons meet the requirements provided for in s 138(1). A liquidator may be appointed as a business rescue practitioner if he/she is a member in good standing in his/her profession as accredited by the Commission. Indeed, some liquidators have been appointed as such.[667] The only restriction is that 'if the business rescue process concludes with an order placing the company in liquidation, any person who has acted as [a] practitioner during the business rescue process may not be appointed as liquidator of the company.'[668] This addresses part of the problems experienced under judicial management, where a judicial manager could apply to act as the liquidator if the company went into liquidation.

However, the issue that remains unresolved is the appointment of a liquidator as a business rescue practitioner. Section 140(4) eliminates the difficulty that arises once the company abandons business rescue and opts for liquidation. However, the appointment of a liquidator before the commencement of business rescue proceedings remains a problem. Just as judicial managers and liquidators performed different jobs, so too do business rescue practitioners and liquidators have different functions and focus. It is unfortunate that the legislature did not deal with this issue.

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665 'Licensed Business Rescue Practitioners' Available at *http://www.cipc.co.za/files/8214/8238/8340/Copy_of_Licensed_BRP_Register_13_December_2016.pdf* (Accessed: 15 March 2017).

666 'Licensed Practitioners (Belong to Professional Body)' Available at *http://www.cipc.co.za/files/ 4116/0198/0554/Copy_of_Licensed_Business_Rescue_Practitioners_October_2020.pdf* (Accessed: 11 December 2020).

667 See 'Licensed Business Rescue Practitioners' Available at *http://www.cipc.co.za/files/5114/2364/7533/Licensed_Business_Rescue_Practitioners_11_February_2015.pdf* (Accessed: 20 March 2017).

668 Section 140(4).

4.3.4.3. Licensed by the Commission to be a Practitioner

The business practitioner must also be accredited by the Commission.[669] It is clear from the wording of the Act that it is the only organisation with jurisdiction to deal with the appointment of business rescue practitioners. The Commission is an independent juristic person with jurisdiction throughout the Republic but subject to the Constitution and the law; and any policy statement, directive, or request is issued to it by the Minister.[670] The Minister prescribes the standards and procedures to be followed by the Commission in accrediting a member.[671] The Minister may also pass regulations prescribing the minimum qualifications of a business rescue practitioner, including different qualifications relating to different categories of companies.[672] It is submitted that different categories of companies may refer to the sizes of companies. For example, a big company under business rescue may require a more senior business rescue practitioner. However, the prescribed qualifications of a business rescue practitioner limit the discretion of the board to appoint one. For example, the board may not appoint a business rescue practitioner they deem fit if such a person does not fall into the category prescribed by the Minister. This may result in consequences that were not intended by the legislature; if the board of directors is unhappy with the appointment of a business rescue practitioner, it will be reluctant to go for business rescue. It is thus submitted that this requirement should be revisited.

4.3.4.4. Not Subject to Probation

In terms of s 162(7), a person appointed as a business rescue practitioner must not be subject to an order of probation;[673] that is, they should not have acted in an inappropriate manner while acting as a director. The grounds on which the court may grant an order placing a person under probation include:

(a) While serving as a director, the person failed to vote against a resolution that contravened the statutory solvency and liquidity test;[674] acted in a manner that is contrary to the duties of directors;[675] or acted in a manner or supported the company to act in such manner that is oppressive or prejudicial or abuse of the separate legal personality of a company.[676]

[669] Section 138(1)(*a*).
[670] Section 185(1) & (2).
[671] Section 138(3)(*a*).
[672] Section 138(3)(*b*).
[673] Section 138(1)(*c*).
[674] Section 162(7)(*a*)(i).
[675] Section 162(7)(*a*)(ii).
[676] Section 162(7)(*a*)(ii).

(b) Within any period of 10 years after the effective date of the Companies Act of 2008, the person has been a director in more than one company, or a managing member of more than one close corporation, and during that time two or more of those business entities failed to fully pay all of their creditors or meet all of their obligations except in terms of a business rescue plan resulting from resolution by the board or a compromise with creditors.[677]

Requirement (a) concerns the conduct of a director with regard to the company. For example, the person must not have abused the separate legal personality of the company. This requirement stresses the duties of directors. To avoid abuse of the separate legal personality of a company, the director must act in good faith and in the interests of the company. Therefore, it is submitted that a person who has contravened this requirement should not be appointed as a business rescue practitioner. This is partly because such a person may tend to abuse the separate legal personality of a company under business rescue, and may allow the company to contravene the statutory solvency and liquidity test.

With regard to requirement (b), a person who is unable to manage a company while a director, clearly cannot be trusted to rescue a company. One of the duties of the business rescue practitioner is to take full control of the company; therefore, it would be wrong to appoint someone who has shown a lack of skills required to manage the company. A person who manages a company that fails to pay its creditors also cannot be trusted to control a company that is failing to pay its debts. If a person fails to manage a company that was able or unwilling to pay its debts, there is no likelihood that such person could manage a company that is already financially distressed.

4.3.4.5. Not Disqualified from Acting as a Director

A person who has been disqualified from acting as a director of a company in terms of s 69(8) may not be appointed as a business rescue practitioner.[678] Thus, a business rescue practitioner must also not have been declared to be delinquent by the court; may not be an unrehabilitated insolvent; must not be prohibited in terms of any public regulation from being a director of the company; should not have been removed from the office of a trust on the grounds of misconduct involving dishonesty; and should not have been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount for theft,

[677] Section 162(7)(*b*).
[678] Section 138(*d*).

fraud, forgery, or perjury or an offence involving fraud, misrepresentation or dishonesty in connection with the promotion, formation or management of a company.[679] However, the disqualification expires five years after removal from office or completion of the sentence;[680] or at the end of one or more extensions as determined by the court or on application by the Commission.[681]

4.3.4.6. Does not have a Compromising Relationship with the Company

A person appointed as a business rescue practitioner should not have any relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality, or objectivity of that person is compromised by that relationship.[682] Impartiality and objectivity play a vital role in the informed decisions made by a business rescue practitioner, and if these are compromised, the success of business rescue proceedings may be negatively affected. This is similar to judicial management where impartiality and independence were considered when appointing the final judicial manager,[683] as a person who was free to act independently and impartially[684] as he/she stood in a fiduciary relationship with the company, its members, and creditors.[685]

The 'relationship' contemplated in s 138(1)(*e*) may be defined as one where an individual is directly or indirectly in control of the company under business rescue;[686] or is directly or indirectly in control of the company under business rescue or its subsidiary or both.[687] This protects affected persons in cases where directors attempt to appoint someone who is related to the company. It also protects the company from being abused in circumstances where a person is appointed for personal benefit and abuses the business rescue procedure.

Concerns have been raised 'whether a practitioner who assisted the company in the development of a pre-packaged rescue plan would be disqualified from appointment as the company's business rescue practitioner.'[688] Loubser[689] argues that there is no logic in

[679] Section 69(8)(*b*).
[680] Section 69(9)(*a*).
[681] Section 69(9)(*b*).
[682] Section 138(1)(*e*).
[683] MS Blackman et al (eds) *Commentary on the Companies Act* (2002) at 15-17. PM Meskin et al *Henochsberg on the Companies Act* 4 ed (1985) at 765. *Ex parte Morley & Co: In re Mining Material Merchants Ltd v Miodownik & Co (Pty) Ltd* 1940 WLD 95 at 98-99.
[684] Ibid.
[685] *Ladybrand Hotel (Pty) Ltd v Segal* 1975 (2) SA 357 (O) 361-362.
[686] Section 2(1)(*b*).
[687] Section 2(1)(*c*).
[688] Loubser supra note 492 at 105.
[689] Ibid.

disqualifying a person who has taken the preliminary steps and has been involved in negotiations with major creditors who may support the rescue attempt if such person was appointed as the business rescue practitioner.[690] It is submitted that such a person should not be disqualified. The work done so far would make him/her a valuable person in rescuing the company. After all, the purpose of the procedure is to rescue the company. Delport argues that this requirement should simply state that the business rescue practitioner should be independent and impartial without the inclusion of 'does not have any other relationship with the company . . . compromised by that relationship.'[691]

4.3.4.7. Not Related to a Person who has a Compromising Relationship with the Company

Should a person who seeks to be appointed as a business practitioner be related to another person who has a compromising relationship with the company, that person may not be appointed.[692] It is not clear whether the legislature intended the word 'related' to refer to the relationship provided for in s 2 of the Act,[693] and if so there are problems with this requirement. Section 2 relates to family relations more than anything else. Therefore, if the interpretation of the relationship is per s 2, it follows that a family appointment may be an abuse of the business rescue process. However, a director who is a business partner of another person who directs a company that is not related to the company under business rescue, may appoint such a person as a business rescue practitioner as long as the person to be appointed meets the other requirements in s 138(1). It is submitted that the legislature should have specified the nature of the relationship in the context of business rescue.

4.3.5. Duties

Business rescue and judicial management appear to require similar duties of the business rescue practitioner/ judicial manager. These include the duty to investigate the company's affairs, business, property, and financial situation as soon as practicable after the appointment;[694] investigate the company's affairs; consider whether there is any reasonable prospect of it being rescued.[695] However, there is another duty that is confusing under business rescue – which demands to be revisited. As soon as practicable after the appointment, a business rescue

[690] Ibid.
[691] Delport, et al (ed) *Henochsberg* op cit note 484.
[692] Section 138(1)(*f*).
[693] Section 2(1)(*a*) provides that for the purposes of the Act an individual is related to another individual if they are related by marriage or live together as if they are married; or are separated by no more than two degrees of natural or adopted consanguinity or affinity.
[694] Section 141(1) of the Act and s 433(*a*) of the 1973 Act.
[695] Sections 141(1) and 141(2)(*a*) of the Act and s 433(*l*) of the 1973 Act.

practitioner must inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that it has been placed under business rescue, and of his/her appointment.[696] Regulatory authorities are entities established in terms of national or provincial legislation that are responsible for regulating an industry or sector.[697] They include the CIPC, the Takeover Regulation Panel (TRP), the Companies Tribunal, and the Financial Reporting Standards Council (FRSC). It is unfortunate that having been given such wide powers, there is no prescribed period for the business rescue practitioner to inform the regulatory authorities of his/her appointment. The judicial management process should have been followed. For example, section 430(*b*) of the 1973 Act required the judicial manager to inform the Registrar of the appointment within seven days of such an appointment. This was to be done by lodging a copy of the letter of that appointment. This provision was clear and it should have been adopted by the current Act. 'As soon as practicable' is vague and can lead to delays in rescuing the business. Worse still, this can lead to courts being called upon to interpret 'as soon as practicable', causing unnecessary costs and delays.

4.3.6. Removal

Since the introduction of the corporate rescue mechanism, the court has always had the power to remove the judicial manager/practitioner. A practitioner may be removed by the court either in terms of s 130 or s 139 of the Act.[698] Despite having been appointed by resolution, only the court can remove a business rescue practitioner. This is similar to judicial management, in which s 433(*c*) provided for the removal of a judicial manager who failed to comply with any direction of the court in the final judicial management order. If the judicial manager mismanaged the company, he/she could be replaced.[699] In *Samuels v Nicholls*[700] the court held that even if it was shown that the judicial manager was unsuitable for his/her task, this did not warrant cancellation of the judicial management but simply signified that the judicial manager should be replaced. However, s 433(*c*) did not specify circumstances which would warrant removal, while sections 130 and 139 of the Act specify circumstances. However, the wording of the sections is confusing, having the potential to jeopardise the rescue process.

[696] Section 140(1A).
[697] Section 1.
[698] Section 139(1).
[699] S*amuels v Nicholls* 1948 (2) SA 255 (W) 260.
[700] Ibid.

4.3.6.1. Removal by Section 130

Where a practitioner is appointed by resolution, any affected person may apply to the court for an order setting aside their appointment.[701] Subsection (*b*)(i) provides that the appointment may be set aside on the grounds that the practitioner does not satisfy the requirements of section 138. On the other hand, subsection (*b*)(ii) provides that the appointment can be set aside because the business practitioner is not independent of the company or its management echoing the rule of appointment that such person 'does not have a relationship with the company such as would lead a reasonable person and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship.'[702]

4.3.6.2. Removal by section 139

Either of its own accord or on application by an affected person, the court may remove a business rescue practitioner on any grounds stipulated in s 139(2), which include the incompetence or failure of the practitioner to perform his/her duties; his/her failure to exercise the proper degree of care in the performance of his/her functions; engaging in illegal acts or conduct; if the practitioner no longer satisfies the requirements set out in s 138(1); if there is a conflict of interest or lack of independence by the practitioner; or if the practitioner is incapacitated and unable to perform the functions of that office and is unlikely to regain that capacity within a reasonable time.[703]

4.3.6.2.1. Incompetence or Failure to Perform Duties

The practitioner will be removed if he/she is incompetent or fails to perform his/her duties.[704] The word incompetence is not defined in the Act but it 'is something that the court will decide by looking at all the facts of each case and by judging each case on its own merits.'[705]

4.3.6.2.2. Failure to exercise degree of care

A practitioner may also be removed if he/she fails to exercise a degree of care while performing his/her duties.[706] Whilst there is no guidance in the Act on what this means, it is probably linked to the duty of a director to exercise proper care and skill. The practitioner bears all the responsibilities, duties, and liabilities of a director of a company as contemplated by sections

[701] Section 130(1)(*b*).
[702] Section 138(1)(*e*).
[703] Section 139(2).
[704] Section 139(2)(*a*).
[705] P Delport (eds) *Henochsberg* op cit note 484 at 488.
[706] Section 139(2)(*b*).

75-77,[707] meaning that the practitioner must remain independent when exercising his/her duties. This was emphasised in the case of *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers Proprietary Limited*,[708] where Pillay J held that:

> 'Essentially BRPs [business rescue practitioners], like directors of a company, have non-negotiable fiduciary duties towards the company. Directors are duty bound to exercise an independent discretion. The BRP may not be a dummy or puppet blindly following instructions of a shareholder or anyone else who appointed him. If he does so he commits a breach of his statutory duty. He also has a statutory duty to act bona fide in the best interest of the company irrespective of any contractual obligation he agrees to. Under s 77 the BRP assumes the same liability as directors and prescribed officers of a company. This includes the liabilities arising from his fiduciary duty, loss, damages or costs. The BRP is a facilitator of conflicting and competing claims. To succeed he has to earn the trust of all the stakeholders. Crucial to earning trust he must be demonstrably and impeccably open, independent, impartial, competent and capable. In short, a BRP must be a person of the highest integrity. A BRP who fails to meet these standards may be removed by application to court in terms of s 139.'[709]

Delport argues that the court may look at other grounds to determine whether the practitioner exercised a proper duty of care,[710] while Levenstein submits that it was the intention of the legislature that the appointment of a business rescue practitioner comes with serious responsibilities, was not to be taken lightly.[711] It is therefore submitted that independence and impartial discretion are required from the practitioner.

4.3.6.2.3. Illegal Acts or Conduct

The Act does not define illegal acts or conduct echoing the criticism of the previous ground that deals with duty of care. Illegal conduct may include carrying out the business of a company in a fraudulent manner. However, since the previous ground specifically provides for duty of care, it may be superfluous to assume that illegal conduct encompasses carrying out the business of the company in a fraudulent manner. The Act does not specifically deal with fraudulent conduct as a ground to remove the practitioner. It, therefore, makes sense that this ground should be removed and the previous ground revisited to encompass other duties that

[707] Section 140(3)(*b*).
[708] (10862/14) [2015] ZAKZPHC 21 (20 March 2015).
[709] Paras 55 and 56.
[710] Delport et al (eds) *Henochsberg* note 484 at 488.
[711] E Levenstein *An Appraisal of the New South African Business Rescue Procedure* (Unpublished LLD thesis, University of Pretoria, 2016) 405.

may be grounds for removing a practitioner. Illegal acts or conduct could thus be indirectly dealt with as grounds under the duty of care to remove the practitioner.

4.3.6.2.4. Failure to Satisfy the Requirements set out in Section 138(1)

Although the Act does not specifically provide as such, it is logical to conclude that if the practitioner no longer meets these requirements, his/her licence should automatically be revoked. It would be illogical for the Commission to be required to revoke the licence if the court had made a finding on the same issue; the basis for his continuing as a licensed practitioner no longer exists.[712]

4.3.6.2.5. Conflict of Interest or Lack of Independence

In *African Banking Corporation of Botswana v Kariba Furniture Manufactures,*[713] the court held that the practitioner must be objective and impartial when conducting the business of the company. The legislature intended that the practitioner should be independent to prevent a conflict of interests − without the Act specifying what the conflict of interests would entail. It is submitted that it relates to a conflict of interests concerning the duties of directors; a director is obliged not to use any information obtained while acting in the capacity of a director to knowingly cause harm to the company or its subsidiary.[714] The practitioner should be bound by the same rule. This goes back to the submission that the duties of directors, as opposed to the duty of care *per se*, should be included in the grounds for removal of a practitioner, as the provision implies that a conflict of interests would be ground for removal.

4.3.6.3. Procedure After Removal

Section 139 also sets out the process for the replacement of a business rescue practitioner. If the practitioner dies, resigns, or is removed from office, the company or the creditor who nominated him/her must appoint a new practitioner.[715] However, this is subject to the right of an affected person to bring a fresh application for the removal of the new practitioner.[716] It is not clear whether the legislature intended that other persons should then appoint a new practitioner. As the Act allows any affected person, including employees to apply for business rescue. It is therefore submitted that the use of different wording from 'affected person' in s

[712] Ibid.
[713] *African Banking Corporation of Botswana v Kariba Furniture* Manufactures (228/2014) [ZASCA] 69 (20 May 2015) 38.
[714] Section 76(2)(*a*)(ii).
[715] Section 139(3).
[716] Ibid.

139(3) raises the question of whether the legislature intended that employees should be excluded from the appointment of a new practitioner.

Although the court may remove the practitioner from acting for a specific company, it does not have the power to declare that such practitioner is ineligible to be appointed as a practitioner again. Only the Commission has the power to declare that a person is disqualified from appointment as a business rescue practitioner − by giving notice in writing of the revocation of their license.[717] Whether or not the practitioner is disqualified depends on whether the Commission is aware that he/she has been removed from serving as the practitioner for a company by court order.[718] No provision directs the court to refer its ruling to the Commission.[719]

4.4. Business Rescue Plan

4.4.1. The Evolution of Legislative Framework of a Business Rescue Plan

Since the introduction of judicial management in 1926, no specific provision required a business rescue plan for rescuing ailing companies. The 1973 Act tried to impose some sense of responsibility on the judicial manager by requiring him/her to prepare a report for a company meeting,[720] setting out the general state affairs[721] of the company, including a statement of its assets and liabilities, a complete list of creditors and reasons why the company was unable to pay its debts and was probably unable to meet its obligations or had not become a successful concern.[722]

The report constituted a 'plan' of sorts. The fact that it included the general state of affairs of a company; its assets and liabilities, and the reasons for the company's inability to meet its obligations indicated that a plan was to be formulated to guide the company to operational success. At the meeting, the provisional judicial manager presented the report containing his/her considered opinion as to the prospects of a company becoming a successful concern

[717] Regulation 126 (7).
[718] Loubser supra note 492 above at 107.
[719] Deport et al (Eds) *Henochsberg* op cit note 484 above at 488.
[720] In terms of s 431(2)(*a-d*) the purpose of the meeting was to consider the report by the judicial manager, including the nomination of persons that may be appointed as final judicial managers, and to prove creditors' claims against the company, including the passing of a resolution on their order of preference.
[721] Meskin et al (eds) *Henochsberg* op cit note 683 above at 763 argued that the affairs of the company would include the 'company's income and expenditure and profit and loss, the realisable value of its property, and the nature of any encumbrance on any of its property; the nature of its undertaking, and the resources, financial, material and human, which are available for carrying it on; whether or not it has security of tenure where it occupies premises as a lease; and the state of its accounting records'.
[722] Section 430(i-iv). Cilliers & Benade *Corporate Law* 3 ed (2000) at 484. Loubser supra note 492 at 157.

and that the facts or circumstances that prevented a company from becoming a successful concern could be removed.[723] The overall purpose was for creditors to prove their claims[724] and resolve that all liabilities incurred or to be incurred by the provisional or final judicial manager – in conducting the company's business – would be paid in preference to all other liabilities not already discharged.[725]

The lack of a business rescue plan was a disadvantage that contributed to the failure of judicial management. There was therefore a call for the inclusion of a detailed plan that would rescue the company.[726] The policies of the current business rescue regime are a response to this call. The business rescue practitioner, once appointed, has the responsibility of developing a business rescue plan that has to be considered by the affected persons.[727] To develop this plan, the practitioner must consult the creditors, other affected persons, and the management of the company for possible adoption of such a plan at the next meeting.[728] The business rescue practitioner devises the plan by restructuring the company's affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis, or results in a better return for the company's creditors or shareholders than on immediate liquidation.[729] The business rescue plan should contain the strategy to rehabilitate the company, persuading, in the process, the stakeholders to place their trust and confidence in the prospect of the company being rescued.[730]

Since it is an important document for stakeholders, affected persons and the life of a company, the information contained in this document must be clear and understandable, preventing unnecessary arguments when the parties vote on the plan. Pretorius and Rosslyn-Smith[731] argue that a vague and loosely designed plan may undermine the confidence and willingness of the participants to advance investments in the business. The plan needs to be holistically viable with information that is clear enough for an interested person to decide on whether the plan

[723] Section 430(*c*)(vi).
[724] Section 431(2)(*c*).
[725] Section 431(2)(*d*).
[726] H Rajak and J Henning 'Business rescue for South Africa' (1999) 116(2) *South African Law Journal* 268.
[727] Section 140(1)(*d*)(i).
[728] Section 150(1).
[729] See s 128 (1)(b)
[730] Pretorius & Rosslyn-Smith 'Expectations of a business rescue plan: International directives for Chapter 6 implementation' (2014) 18(2) *Southern African Business Review* 129.
[731] Ibid.

should be accepted or rejected.[732] Clearly expressed speculation is not adequate since the plan is based on feasibility driven by facts and practical assumptions.

4.4.2. The Contents of a Business Rescue Plan

The Act specifically states that the business rescue plan must contain all the information reasonably required to assist affected persons in deciding whether the plan should be accepted.[733] The content of the plan must be divided into three parts, namely background, proposals, and assumptions and conditions.[734]

4.4.2.1. Part A – Background

The background must contain all the information relating to the company, including its assets, the ranking of creditors, dividends to creditors, holders of the company's securities, and the agreement concerning the practitioner's remuneration.[735] In the order prescribed by the Act and for the purposes of the structure of this thesis, the background must include at least the following:

(i) A complete list of all the company's material assets, including an indication of which creditors held assets as security when the business rescue began. The Act specifies the listing of material assets but does not state how to determine such assets. It is submitted that a company's assets, whether 'material' or 'immaterial' are important, especially when it is financially distressed. It is unfortunate that the legislature used the word 'material'. There is no reason why the assets of the company should be categorised as 'material' when listed for the business rescue.

(ii) A complete list of creditors as at the commencement of business rescue proceedings, including their ranking and preference in terms of insolvency law, and which creditors have proved their claims. This subsection mimics judicial management. Section 150(2)(*a*)(ii) echoes s 434(3) and s 435(1) of the 1973 Act. Both s 150(2)(*a*)(ii) and s 443(3) indicate the application of insolvency law in relation to the preference of claims prior to the commencement of rescue proceedings.[736] Furthermore, s 435(1)(*a*) provided that 'the creditors of a company whose claims arose before the granting of a judicial

[732] *CSARS v Beginsel NO* 2013 (1) SA 307 (WCC) 18; *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB) 11.
[733] Section 150(2).
[734] Ibid.
[735] Section 150(2)(*a*).
[736] Section 434 (3) provides that 'the costs of the judicial management and the claims of creditors of the company shall be paid *mutatis mutandis* in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate.

management order in respect of such company may at a meeting convened by the judicial manager or provisional judicial manager for the purpose of this subsection or by the Master in terms of s 429(*b*)(ii), resolve that all liabilities incurred or to be incurred by the judicial manager or provisional judicial manager in the conduct of the company's business shall be paid in preference to all other liabilities not already discharged, exclusive of the costs of the judicial management, and thereupon all claims based upon such first-mentioned liabilities, shall have preference in the order in which they were incurred over all unsecured claims against the company except claims arising out of the costs of the judicial management.'[737] In both s 150(2)(*a*)(ii) and s 435(1)(*a*), consent by creditors whose claims arose before the commencement of rescue proceedings plays an important role. For example, s 150(2)(*a*)(ii) provides for the background information related to the plan that is to be proposed to the creditors. In other words, the content of s 150(2)(*a*)(ii) does not necessarily mean that this preference will indeed be applied to business rescue. At this point, the plan is yet to be proposed and the creditors are still yet to decide whether or not to support the plan.

(iii) The dividend that would probably have been received by creditors in their specific classes, if the company were to go to liquidation. It is submitted that an independent expert would determine the value of the dividends to ensure a fair and reasonable estimate of the returns if the company were to be liquidated.

(iv) A complete list of the company's security holders. In most cases, security holders will not be affected by business rescue, as they are likely to accept it so that the company once again becomes solvent. Requiring a list of security holders imposes unnecessary costs on a company that is already financially distressed. Loubser[738] argues that a summary indicating the number of security holders in a particular type of share/security is sufficient as a company may have many security holders.

(v) A copy of the written agreement concerning the practitioner's remuneration. The Act allows the practitioner to charge for his/her remuneration (including expenses)[739] at a rate to be determined by the Minister.[740] South Africa appears to have employed a time-

[737] Further discussion of ss 434 and 435(1) will be done on the ranking of claims later in thesis.

[738] Loubser supra note 492 at 117.

[739] See s 143(1) which provides that 'the practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).'

[740] See s 143(6) which provides that 'the Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).'

based system while also looking at the nature of the company to be rescued. The scale used by the Minister takes into account the size of the company and the amount to be paid hourly or daily.[741] This is different from judicial management where the Master fixed the rate of the judicial manager's remuneration.[742] In fixing the remuneration, the Master was required to consider the manner in which the provisional judicial manager or judicial manager performed his functions and any members' or creditors' recommendation in relation to such remuneration.[743] No fixed amount was provided by legislation under judicial management. The disadvantage with this was that no fixed amount was equated to the time spent by the provisional judicial manager or judicial manager in performing functions. However, a remedy was available if there was abuse in fixing the remuneration; any complaint about the decision of the Master was subject to a court review.[744]

The practitioner may propose an agreement with the company providing for further remuneration in addition to that contemplated by Regulation 128(1), to be calculated on the contingency fee basis related to the adoption of a business rescue plan.[745] For this agreement

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[741] See Regulation 128(1) which provides that 'the basic remuneration of a business rescue practitioner, as contemplated in section 143(1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed-

d) R 1 250 per hour, to a maximum of R 15 625 per day, (inclusive of VAT) in the case of a small company;
e) R 1 500 per hour, to a maximum of R 18 750 per day, (inclusive of VAT) in the case of a medium company; or
f) R 2 000 per hour, to a maximum of R 25 000 per day,(inclusive of VAT) in the case of a large company, or a state-owned company.'

See also *Absa Bank Limited v Golden Dividend 339 (Pty) Ltd* 2015 (5) SA 272 (GP) at para 66 where it had come to light that the business rescue practitioner was being remunerated on the scale appropriate to a large company while the company in question was a small one.

[742] Section 434A(1) provided that 'the provisional judicial manager or the judicial manager shall be entitled to such remuneration for his service as may be fixed by the Master from time to time.'

[743] Section 434A(1) provided that 'in fixing the remuneration the Master shall take into account the manner in which the provisional judicial manager or judicial manager has performed his functions and any recommendation by the members or creditors of the company relating to such remuneration.'

[744] See s 434A(3) which provided that 'the provisions of ss 151 and 151*bis* of the Insolvency Act, 1936 … shall apply with reference to any fixing of remuneration by the Master under this section.' Section 151 provides that 'subject to the provisions of s 57 any person aggrieved by any decision, ruling, order or taxation by the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the Court and to that end may apply to the Court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the Court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve.' Section 151*bis* provides that 'If the court reviewing any matter referred to in section one hundred and fifty-one confirms any decision, ruling, order or taxation of the Master or officer referred to in that section the costs of the applicant for the review of that matter shall not be paid out of the assets of the estate concerned unless the Court otherwise directs.'

[745] Section 143(2)(*a*).

to be binding, it must be in writing and must be approved by the creditors who hold majority voting interests and are present and vote at the first meeting with creditors.[746] No such provision was provided for under judicial management.

A creditor or shareholder who voted against the proposal for an agreement may apply to the court within 10 business days of the date of its approval for an order setting aside the agreement.[747] The grounds include that the agreement is not just and equitable; or the remuneration provided for is unreasonable having regard to the company's financial circumstances. It is submitted that the provision for further remuneration should not have been included. The tariff in terms of Regulation 128(1) sufficiently remunerates the business rescue practitioner, and the provision for further remuneration increases the costs of business rescue and creates the likelihood of delays if the agreement is opposed.

(vi) A statement on whether the business rescue plan includes an informal proposal made by a creditor. One of the entitlements granted to creditors is that they may informally participate in business rescue proceedings by making proposals for a business rescue plan.[748] Creditors will often make proposals prior to the development of the plan stating whether the company should embark on business rescue. The Act requires the practitioner to first meet with creditors for the purpose of developing a business rescue plan.[749] The plan will then provide whether or not such informal proposals are included.

4.4.2.2. Part B – Proposals

'Proposals' refers to measures that will assist the practitioner to satisfy the purpose of business rescue. Part B deals with measures that will offer the company breathing space for its rehabilitation; the order of preference of creditors and the assets available to pay them in terms of the plan; and the benefits for creditors on business rescue as opposed to liquidation. As prescribed by the Act – and for the purposes of the structure of this thesis – the proposals must at least include the following:

(i) **The nature and duration of the moratorium provided for by the plan**: This is in addition to a general *moratorium* provided for by s 133. It is not clear what such additional *moratorium* will achieve since the company's most important assets are

[746] Section 143(3)(*a*).
[747] Section 143(4).
[748] Section 145(1)(*d*).
[749] Section 147(1)(*a*)(i).

protected by the general *moratorium*.[750] Consequently, the *moratorium* provided for by the business plan will depend on what is specified. The first meeting with creditors will thus play a crucial role in defining what should be included in the *moratorium* in the business rescue plan.

(ii) **The extent to which the company will be released from payments due include the extent to which any debt is to b*e* converted to equity in the company**: This is linked to s 154 which p*r*ovides (in terms of s 154(1)) that a business rescue plan provides that a creditor who has acceded to the discharge of the whole or part of a debt that is owed by the company to that creditor will lose the right to enforce that debt or part of it. The plan must spell out the extent to which the debt is discharged ie discharge of 40% of the creditor's debts, and this must be provided for. The same applies if the creditor acceded to the discharge of the entire debt.

However, s 154(2) seems to disregard the general moratorium in certain circumstances. It provides that af*t*er the approval and implementation of the business rescue plan, a creditor is not entitled to enforce any debt owed immediately prior to the commencement of business rescue proceedings except to the extent provided for by the business rescue plan. Consequently, if the plan allows for the enforcement of the debt, the general *moratorium* will fall away in respect of that debt.

(iii) **The company's ongoing role and the treatment of any existing agreements**: It is not clear what is meant by 'existing agreements' because during business rescue proceedings, the practitioner is given the power to entirely, partially, or conditionally suspend any agreement to which the company was party at the commencement of business rescue, and would otherwise become due during business rescue proceedings.[751] This power is conferred on the practitioner by any subjection to s 150(2)(*b*)(iii). Loubser[752] argues that it should be assumed that existing proceedings in terms of s 150(2)(*b*)(iii) refer to a contract after approval of the plan. This is logical because this section deals with the ongoing role of the company; the agreement thus refers to ongoing agreements after the approval of the plan.

[750] The general moratorium in terms of s 133 protects the company and its property or any property in its lawful possession from legal proceedings including enforcement action during business rescue proceedings.
[751] Section 136(2)(*a*).
[752] Loubser supra note 492 at 150.

(iv) **The company's property that is available to pay creditors' claims**: Although the property that is available or realised to pay creditors may also be used by the company for its business; such property plays two roles, namely to be used by the company for its business or to pay creditors should the business rescue proceedings terminate. Although Loubser[753] argues that this section does not cover the possibility of claims being paid from future earnings, it is submitted that the opposite is true. The proposal must include the company's property that is available to pay creditors. Therefore, nothing stops the company in rescue from acquiring property that could be available to pay creditors. For example, the plan may provide that, 'should the company acquire property that will satisfy claims by creditors, such property will be made available to pay these claims.' In this regard, the possibility of claims on future acquisitions is covered by the business rescue plan.

(v) **The order of preference of creditors for payment of proceeds if the business rescue plan is adopted:** This suggests that the practitioner may draft a business rescue plan specifying the order of preference, in the belief that creditors will agree. However, when drafting that plan, the practitioner should consider s 135.[754]

(vi) **Creditors' benefits from the rescue plan as opposed to those they would receive on liquidation:** From the creditors' perspective, this is a crucial provision that plays a major role in their decision to approve and adopt a business rescue plan. Creditors would obviously want the business rescue plan to put them in a better position than if the company is placed under liquidation. The more attractive the business rescue plan, the more likely creditors are to accept it.

(vii) **The effect of the business rescue plan on the holders of each class of the company's issued securities**: This provision presumably refers to shares, as the practitioner is required to consult with shareholders before developing a business rescue plan. It is submitted that during such consultation, shareholders may raise concerns and issues that assist the practitioner in drafting a proposal for the business rescue plan. It is thus confusing that this provision mentions 'securities' instead of shares.

[753] Ibid.

[754] Section 135 of the Companies Act 71 of 2008. A comparison of s 135 and ss 434 and 435 (1) of the 1973 will be discussed later in the thesis.

4.4.2.3. Part C – Assumptions and Conditions

Part C sets out the assumptions and conditions to be satisfied for the adoption and implementation of the business rescue plan. They must at least include a statement of conditions to be satisfied, the effect of business rescue on employees, circumstances that may result in the ending of business rescue and preparation of a balance sheet including a statement of income and expenses for the ensuing three years.[755] The plan must include:

(i) **A statement of any conditions to be satisfied for the business rescue plan to be operational and fully implemented**: The word 'any' suggests that no specific conditions need to be satisfied. It seems that the practitioner will draw up the list after consulting with employees and creditors. This provision seems to be partly a duplication of the information required in provision (i) of Part B of the plan. It may, for example, provide that the rights of shareholders will not be changed by the plan. If this is the case, the condition will be that implementation of the plan will be deemed to have occurred when the condition relating to shareholders is fulfilled.

(ii) **The effect of business rescue on employees and their terms and conditions of employment**: In cases where employees are not retrenched, the plan will read as follows: 'All employees of the company will remain employed without any change to their terms and conditions being envisaged in this plan.' The Act protects employees by providing that during business rescue, they remain employed on the same terms and conditions, except if an agreement between the company and employees provides otherwise.[756] Any such agreement should thus be included in the business rescue plan.

(iii) **Circumstances to end business rescue:** It is not clear why this was included as the Act itself provides for circumstances that may result in business rescue ending.[757] It is submitted that the information included here would amount to a recital of the provisions of the Act relating to the termination of business rescue proceedings. In most cases, the business rescue plan will provide that the proceedings will end when the court sets aside the resolution or order to commence them or converts those

[755] Section 150(2)(*c*).
[756] Section 136(1).
[757] See s 132(2).

proceedings to liquidation proceedings; the practitioner files a notice with the CIPC for termination of business rescue proceedings; or a plan is proposed and rejected.

(iv) **A projected balance sheet including a statement of income and expenditure for the ensuing three years on the assumption that the proposed plan is adopted:** The inclusion of this provision increases the cost of business rescue. The practitioner will need an accountant's assistance to prepare a balance sheet. Furthermore, it is difficult to project future income and expenditure. This would involve speculation on the part of an accountant or business rescue practitioner. The drafters of this provision do not seem to have considered that such a balance sheet may be unreliable. Drawing up a balance sheet at this stage is premature. For example, there may no evidence as to how much finance will be injected and how many financiers will inject money into the company.

4.4.3. Approval of a Business Rescue Plan

The business rescue plan may be approved on a preliminary or final basis. The business rescue practitioner is required to call for a vote for preliminary approval of the proposed plan (as amended if this is the case) unless the meeting has first been adjourned to amend or revise the proposed plan.[758] The plan will be approved on a preliminary basis if it is supported by 75% of the creditors holding a majority voting interest and if at least 50% of those creditors are independent creditors.[759] However, before a meeting is convened and during the application for an order commencing business rescue – the creditors may declare an intention to oppose a plan if one is eventually developed. If such declaration is made, the court may assess the strategy of the applicant and consider whether it shows a reasonable prospect of rescuing the company. If such strategy is merely an abuse of the process, the court may dismiss business rescue application before the plan is even developed. In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd*,[760] the court held

> '[i]f the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored.

[758] Section 152(1)(*e*).
[759] Section 152(2).
[760] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2013 (4) SA 539 (SCA).

> Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s 132 (2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. However, that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable.'[761]

In *Gormley v West City Precinct Properties (Pty) Ltd; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd*,[762] the proposed strategy by the applicant was that if the company was to be granted a moratorium of three to five years, it would be able to pay its creditors.[763] There was no evidence of how the company was to obtain post-commencement finance, and the court concluded that the application was nothing more than the winding down of the company in a manner which disregarded the rights of creditors.[764]

The business rescue plan is finally approved and adopted if it does not alter the rights of holders of any class of the company's securities.[765] However, such approval is subject to satisfaction of any conditions on which the plan is contingent.[766] It is not clear why the legislature included this proviso as the conditions themselves form part of the business rescue plan; therefore, stating that they must be satisfied before the adoption of the plan is confusing. It is not clear how the conditions can be satisfied if the plan is not adopted. Loubser[767] argues that 'it is not the approval, but the implementation of the approved plan that is contingent on fulfilment of the conditions.' This view appears to be correct.

Once adopted, the business rescue plan creates contractual obligations, binding on the company, each creditor, and every holder of the company's securities.[768] This includes any person present or absent from the meeting irrespective of whether or not they voted for the business rescue plan or whether or not they had proved their claim. A creditor may not argue that he/she was not present at the meeting and so the effects of the plan do not concern him/her. This is distinguishable because from when a plan may be rejected at the meeting, in which event, any affected person who was at the meeting may apply to the court for an order setting

[761] Para 38.
[762] *Gormley v West City Precinct Properties (Pty) Ltd; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd* [19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012).
[763] Ibid paras 11 and 12.
[764] Paras 12 and 14.
[765] Section 152(3)(*b*).
[766] Ibid.
[767] Loubser supra note 492 at 130.
[768] Section 152(4).

aside the result of the vote because it was inappropriate.[769] However, the court will only set it aside if it is also reasonable and just to do so. Delport is of the view that:

> 'It is not clear what is envisaged by the term "inappropriate" in this subsection. If creditors are to be allowed to exercise their votes freely it has to be assumed that they would only do so in supporting the business rescue plan if it would be to their benefit. It is difficult to think of circumstances where the creditors' votes for the rejection of a business rescue plan would be inappropriate; however, [ss] (7) (a)–(c) does provide some insight as to what the Court should take into account when determining whether it would be reasonable and just to set aside the vote on a business rescue plan on the grounds of the vote being 'inappropriate'. The Court can therefore not set the vote aside merely because it is 'inappropriate' but only if it is reasonable and just to do so based on the criteria in [ss] (7) (a)–(c).'[770]

This view was supported by the court in *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC*[771] where Tuchten J held that the court had to determine whether the vote was inappropriate and thereafter proceed to consider whether, taking this into account, it would be reasonable and just to grant an order setting it aside.[772] This was also supported in *Ex parte: Bhidshi Investments CC,*[773] where the court affirmed the approach of Tuchten J.[774] However, it is submitted that the situation was different for a secured creditor who may argue that the effects of the plan do not bind him/her if he/she did not consent, for example, to reducing his/her claim.[775]

If the plan is approved and adopted, it may be implemented. The business rescue practitioner must direct the company to take all necessary steps to satisfy any conditions on which the business rescue is based; and implement the plan as adopted.[776] To the extent necessary for the implementation of the adopted plan, the practitioner may issue authorised securities of the company in accordance with the plan.[777] Furthermore, if the shareholders approve the plan, the practitioner may amend the company's Memorandum of Incorporation (MOI) to authorise and

[769] Section 153(1)(*b*)(i)(*bb*).
[770] Delport *et al* (eds) *Henochsberg* op cit note 484 above at 530.
[771] (47327/2014) [2015] ZAGPPHC 255 (11 March 2015).
[772] Para 40.
[773] (20189/14) [2015] ZAGPPHC 783 (7 October 2015).
[774] Para 12.
[775] Loubser supra note 492 at 131.
[776] Section 152(5).
[777] Section 152(6)(*a*).

determine the preferences, rights, limitations and, other terms of any securities that are not otherwise authorised but are to be issued in terms of the business rescue plan.[778]

The participation of creditors in voting on the adoption of a business rescue plan can hardly be considered without ss 145(4) of the Act, which provides that

> 'in respect of any decision contemplated in Chapter [6 of the Act] that requires the support of the holders of creditors' voting interests, a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company'.

The Act does not define 'secured', 'unsecured', or 'concurrent' creditors, leading some commentators to brand the terminology in s 145(4) unclear and confusing.[779] It is not clear why the legislature referred to 'secured, unsecured, and concurrent creditors' claims. In insolvency law, creditors are categorised as secured and unsecured. Secured creditors hold a security for their claim that may take the form of a special mortgage, pledge or right of retention.[780] On the other hand, unsecured creditors include preferent and concurrent creditors[781] as both do not enjoy a secured claim; they only differ in that that the claims of preferent creditors rank above those of concurrent creditors.[782]

It is therefore difficult to understand why the legislature distinguished between an unsecured creditor (in subsection (4)(*a*)) and a concurrent creditor in subsection (4)(b) who would be subordinated in a liquidation. This anomaly was specifically considered in the Western Cape case of *Commissioner of South African Revenue Services (SARS) v Beginsel NO*.[783] SARS sought – *inter alia* – an order declaring unlawful and invalid the decision taken at the meeting of creditors of the company to approve the ranking aspect of the business rescue plan proposed by the business rescue practitioners. SARS contended that, on the strength of the interpretation of the provisions of sections 145(4)(*a*) and (*b*) of the Act, the decision taken to adopt the

[778] Section 152(6)(*b*).
[779] Delport *et al* (eds) *Henochsberg* op cit note 484 at 508.
[780] R Shamrock et al *Hockley's Insolvency Law* 9 end (2016) 183.
[781] A Boraine & J van Wyk 'Reconsidering the plight of the five foolish maidens: Should the unsecured creditor stake a claim in real security?' (2011) 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 349.
[782] Section 2 of the Insolvency Act 24 of 1936 provides that preference 'in relation to any claim against an insolvent estate, means the right to payment of that claim out of the assets of the estate in preference to other claims; and "preferent" has a corresponding meaning'.
[783] 2013 (1) SA 307 (WCC).

business rescue plan was unlawful and invalid.[784] While SARS accepted that the Act did not oblige the business rescue practitioners to confer SARS preference over unsecured creditors, the Act did not oblige a practitioner to treat SARS as a concurrent creditor.[785] Citing sections 99 and 103(*a*) of the Insolvency Act, SARS further argued that it was entitled to be considered a preferent unsecured creditor under s 145(4)(*a*) of the Act, and to have a voting interest equal to the value of its claim, while the remainder of the non-preferent concurrent creditors who would be subordinated in liquidation as per s 145(4)(*b*), had no voting interest at the meeting because they would receive nothing on liquidation of the company.[786]

The court rejected SARS' claim and viewed that SARS' construction of the provisions of s 145(4) of the Act as not only contrary to the ordinary grammatical meaning of the words used in the section, but also led to an illogical result that failed to balance the rights and interests of all relevant stakeholders, as envisaged in s 7(*k*) of the Act.[787] To support its view, the court held that the provisions of the Act did not create statutory preferences as set out in the Insolvency Act; if it was the intention of the legislature to prefer SARS above other creditors in business rescue proceedings, it would have explicitly said so.[788] On the interpretation of s 145(4)(*a*) Fourie J held further that:

> 'The wording of s 145(4) is clear and unambiguous and leaves no room for the artificial and strained interpretation that SARS wishes to place on it. Section 145(4)(a) refers to secured or unsecured creditors who have a voting interest equal to the value of the amount owed to them by the company. This categorisation of creditors is uncontentious and well known in legal parlance. Secured creditors are those who hold security over the company's property, such as a lien or mortgage bond. Unsecured creditors are those whose claims are not secured, including concurrent creditors. The unsecured creditors are either preferent or concurrent creditors. The term "preferent creditor", used in the wide sense, refers to any creditor who has a right to receive payment before other creditors. To this extent, a secured creditor also qualifies as a preferent creditor. However, the term "preferent creditor" is normally reserved for a creditor whose claim is not secured, but who nevertheless ranks above the claims of concurrent creditors (whose claims are also unsecured). Such preferent creditors are commonly referred to as "unsecured preferent creditors" and are mentioned in sections 96 – 102 of the Insolvency Act. It follows from the aforesaid that our insolvency law in practice recognises unsecured creditors as comprising, inter alia, unsecured preferent creditors and unsecured non-preferent or concurrent creditors. There is,

[784] Para 17.
[785] Para 18.
[786] Para 19.
[787] Para 22.
[788] Para 24.

> accordingly, no reason to interpret the phrase 'unsecured creditor' in s 145 (4)(a) as including only unsecured preferent creditors, but not unsecured non-preferent, or concurrent, creditors. Such an interpretation is clearly contrary to the ordinary meaning of the phrase "unsecured creditor", which according to its ordinary meaning includes all concurrent creditors, whether preferent or non-preferent.'[789]

Accordingly, SARS was to be treated like any other concurrent creditor of the company. The court held that 'a concurrent creditor who would be subordinated in a liquidation, does not attach to all concurrent creditors, but only to those concurrent creditors who have subordinated their claims in a liquidation in terms of a subordination or back-ranking agreement.'[790] In interpreting s 145(4)(*b*) the court rejected Delport's[791] interpretation – which was relied upon by SARS – that the term 'concurrent creditor' refers to concurrent creditors since their claims would upon liquidation be subordinate to the payment of all the other claims.

4.4.4. Failure to Adopt a Business Rescue Plan

If the proposed plan is not approved on a preliminary basis, it is said to be rejected and may be further considered in terms of s 153,[792] which makes provision for further steps to be taken after a failure to adopt a plan on a preliminary basis. This section constitutes a last attempt to determine the future of the company. The practitioner may seek a vote from holders of voting interests to prepare and publish a revised plan.[793] If he/she fails to do so, any affected person present at the meeting may call for a vote of approval from holders of voting interests requiring the practitioner to prepare and publish a revised plan.[794] If the meeting authorises the practitioner to do so, he/she is required to conclude the meeting after that vote and thereafter prepare and publish a new or revised business rescue plan within 10 business days.[795]

Another option available to the practitioner after the rejection of the proposed plan is to advise the meeting of the company's decision to apply for the result of the vote by holders of voting interests or shareholders to be set aside because voting was inappropriate.[796] This option extends to any affected person present at the meeting if the practitioner fails to take such action.[797] The issue of the word 'inappropriate' has been discussed above[798] (whether it is also

[789] Paras 25 and 26.
[790] Para 30.
[791] Delport et al (eds) *Henochsberg* op cit note 484 above at 509.
[792] Section 152(3)(*a*).
[793] Section 153(1)(*a*)(1).
[794] Section 153(1)(*b*)(i)(*aa*).
[795] Section 153(3)(*a*).
[796] Section 153(1)(*a*)(ii).
[797] Section 153(1)(*b*)(i)(*bb*).
[798] See heading 5.3.4.

just and equitable to either grant or refuse the application).[799] If either the practitioner or an affected person informs the meeting of an application be made to the court, the practitioner is required to adjourn the meeting for five days, unless the contemplated application is made to the court during that time; or until the court has disposed of the contemplated application.[800] It is clear that the application is to be brought within five days. If the decision is taken during those five days, it will be binding on the meeting. If not, the meeting may be adjourned.

An affected person or persons may also make a binding offer to purchase the voting interests of one or more persons who opposed the adoption of the business rescue plan.[801] The value of the binding offer is independently and expertly determined, at the request of a practitioner, to be a fair and reasonable estimate of the return of the person or persons to be bound as if the company were to be liquidated.[802] The binding offer is similar to the common law offer except that the offeror may not revoke it until the offeree responds thereto. In terms of the common law, the offer creates obligations once it has been accepted and since it has no obligatory effect, it may generally be revoked at any time by the offeror.[803] However, an offer in terms of s 153 (1)(*b*)(ii) is an offer that is binding once made,[804] until an offeree accepts it.[805] If the offer is made, the practitioner must adjourn the meeting for no more than five business days[806] to afford the practitioner an opportunity to revise the business rescue plan to reflect the results of the offer.[807] The date of the meeting will then be set without any further notice.[808] The plan is then reconsidered as per s 152 of the Act.

4.4.5. Certificate

The proposed business rescue plan must conclude with a practitioner's certificate stating that the information provided is accurate, complete, and up to date; and the projections included in Part C are made in good faith on the basis of the factual information and assumptions set out

[799] *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC* (47327/2014) [2015] ZAGPPHC 255 (11 March 2015); *Ex parte: Bhidshi Investments CC* (20189/14) [2015] ZAGPPHC 783 (7 October 2015).
[800] Section 153(2).
[801] Section 153(1)(*b*)(ii).
[802] Ibid.
[803] S Van der Merwe, et al *Contract: General Principles* 4 ed (2012) 46 & 51.
[804] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013 (6) SA 471 (GNP) 36.
[805] *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) 60. *African Banking Corporation of Botswana v Kariba Furniture Manufactures* (228/2014) [ZASCA] 69 (20 May 2015) 21.
[806] Section 153(4)(*a*).
[807] Ibid.
[808] Section 153(4)(*b*).

in the statement.[809] The certificate thus affirms that the practitioner has complied with the Act in developing the business rescue plan. The company must publish the business rescue within 25 days, or a longer time as may be allowed by the court on application by the company or the creditors holding majority-voting interests.[810]

4.5. Conclusion

The consequences that follow from commencing business rescue proceedings play a significant role in business rescue. For example, the s 133 *moratorium* gives a financially distressed company breathing space. Legal proceedings against a financially distressed company are generally suspended unless they meet exceptions that are provided for by the Act. The Act has thereby made an important development that allows for an automatic *moratorium* and that such *moratorium* extends to the company's property or property in its lawful possession.

A business rescue practitioner is appointed to control a financially distressed company, whose appointment and qualifications are set out in detail by the Act. This again is a major improvement. Unlike judicial management, his appointment and qualifications no longer equated to those of a liquidator.

Moreover, the requirement of a business rescue plan is another important development, the more so because affected persons have a right to participate in the development and implementation of the business rescue. Although the business rescue practitioner has the power to develop a business rescue plan, the plan still needs approval by affected persons. Therefore, the business rescue practitioner does not have the power to develop and implement a business rescue plan on his own accord. Despite the progressive developments, there is still a room for improvement in the current rescue regime. While the detailed provisions o the Act are commendable, certain provisions are problematic and require re-examination – as dealt with in this chapter.

[809] Section 150(4).
[810] Section 150(5).

CHAPTER FIVE

BUSINESS RESCUE POLICY ON THE ROLE OF EMPLOYEES AND CREDITORS

5.1. Introduction

In the previous chapter, the consequences of business rescue were critically analysed. This chapter goes further as it deals with the effects of business rescue proceedings. Although there are several categories of stakeholders who may be affected by business rescue proceedings, this chapter will limit the discussion to employees and creditors. As affected persons, they have similar rights of participation in business rescue proceedings, and can actively participate in the commencement of business rescue proceeding,[811] the appointment of a business rescue practitioner,[812] and the development and implementation of a business rescue plan.[813] They consult with the business rescue practitioner in order to safeguard their interests.

The proceedings have an impact on the rights of both employees and creditors with regard to, *inter alia*, the right to be employed on the same terms and conditions; section 144 rights; suspension of liquidation proceedings; proof of claims; ranking of claims both pre- and post-commencement of business rescue proceedings. This chapter will therefore deal with all these impacts and how they have shaped business rescue proceedings.

5.2. Participation in the Commencement of Business Rescue Proceedings

Affected persons enjoy rights whether the rescue proceedings commenced by resolution or court order. If commencement is by resolution, within five days after the adoption and filing of such resolution, the company must notify all the affected persons of the resolution, the date of its effectiveness, and notice of a sworn statement setting out the grounds for the adoption of the resolution.[814] On the other hand, an affected person may apply to court at any time for an order placing the company under supervision and commencing business rescue proceedings.[815] The applicant must serve a copy of the application on the company and the Commission, and notify every other affected person of the application in the prescribed manner.[816] Affected persons who have received notice or are aware of the resolution can participate in the business rescue proceedings, with the right to object to the resolution in terms of s 130.[817] In cases of a

[811] See Chapter Two.
[812] See Chapter Two.
[813] See Chapter Four.
[814] Section 129(3)(*a*) provides the prescribed period of five days for the affected persons to be notified.
[815] Section 131(1).
[816] Section 131(2).
[817] This has been discussed in Chapter Three.

court application, each affected person has a right to participate in the hearing of an application in terms of section 131(1).[818] Section 131(3) protects shareholders, creditors, and employees by affording them the right to participate in the hearing from the very beginning of a business rescue process − an automatic right without the need to be authorised[819] by seeking leave to intervene[820]. Loubser[821] however, argues that it is unnecessary to give every affected person the opportunity to participate at this early stage as it could cause costly delay.[822] In my submission, it is highly unlikely that the employees would oppose business rescue. Of all the affected people, the employees are usually most in favour of rescue proceedings since they may be well-placed to understand the financial status of a company. In *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd*[823] the court held that

> 'employees, in particular long-standing employees, would have peculiar information of a company's performance being as it were at the centre and at the heart and soul of its operations . . . [t]heir knowledge of the company's history, the highs and lows of its performance, the problems and the solutions identified and their own role in any possible business rescue would be just as relevant.'

Therefore, waiting until a later stage for employees to participate would be pointless since they would weigh heavily in pushing for business rescue proceedings to be granted. Creditors also deserve to participate at the early stage of business rescue because the proceedings may affect their claims and their rankings once the business rescue order has been granted.

5.3. Impact of Business Rescue Proceedings on Employees

5.3.1. Right to Participate in the Business Rescue Plan

When the business rescue plan is developed the employees have a chance to meet the business rescue practitioner to help develop a plan. Employees have the right to meet the practitioner before the development of the business rescue plan. Within 10 days of being appointed, the practitioner must convene a first meeting to inform the employees' representative whether he/she believes that there is a reasonable prospect of rescuing the company.[824] As with

[818] Section 131(3).
[819] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd (Marley Pipe Systems (Pty) Ltd* 2012 (5) SA 515 (GSJ) 4 (*Petzetakis*).
[820] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group* 2011 (5) SA 600 (WCC) 21 (*Cape Point Vineyards*). See also *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 596 (GSJ) 30.
[821] A Loubser 'Some Comparative Aspects of Corporate Rescue in South African Company Law' (*Unpublished LLD thesis*, University of South Africa, 2010) 78.
[822] Ibid.
[823] (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) 17.

[824] Section 148(1)(*a*).

creditors, the employees' representative may determine whether an employees' committee should be appointed,[825] and if this is the case, employees' representatives may appoint the members of the committee[826] by an informal nomination and voting process.

As with creditors, the practitioner must give notice of the meeting to every registered trade union representing employees of the company, and if there are any employees who are not represented by a trade union, to those employees or their representative.[827] However, this provision does include the words 'whose name and address is known to, or can reasonably be obtained by, the practitioner'. Whether or not the omission was intentional, the provision should apply to employees. As with the notice to the creditors, the notice to employees must set out the date, time, and place of the meeting and the agenda.[828]

There is no mention of decisions being made in the first meeting with employees, which necessarily implies that no decisions are taken, raising the question of the purpose of such a meeting. The provision for the meeting with creditors gives direction for decisions taken at the meeting but there is no such provision for the meeting with employees, casting doubt on whether the legislature intended to treat employees differently from creditors. The purpose of the meeting of employees is for the practitioner to inform them whether he/she believes that there is a reasonable prospect of rescuing the company. Employees are crucially affected by business rescue; some employees might be retrenched and others hired under the same conditions of employment. Therefore, their participation in drawing up the business rescue plan is critical, and their views play a significant role in the development of the business rescue plan. In *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd*,[829] the employees and their dependents lived on the farm and the liquidation of the company would have resulted in them losing their homes and jobs.[830]

After the meeting, the practitioner has an opportunity to develop the plan. Once developed, the second meeting is convened at which the practitioner must provide an opportunity for the employees' representatives to address the meeting.[831] Section 152(1)(c), read with s 144 (3)(d),

[825] Section 148(1)(*b*).
[826] Ibid.
[827] Section 148(2).
[828] Section 148(2)(*a*) & (*b*).
[829] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012).
[830] Para 34.
[831] Section 152 (1)(c).

emphasises the right of employees to be consulted and to review a business rescue plan being developed. In addition, s 144(3)(e) provides that 'during a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in s 152(1)(*c*).'

The review of a business rescue plan and the submissions made by employees have an impact on s 136(1)(b)[832] especially if the employees argue that the reorganisation is in effect commencement of a retrenchment process. This was tested in the case of *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways (SOC) Ltd*[833] and on appeal in *South African Airways (SOC) Limited (In Business Rescue) and Others v National Union of Metalworkers of South Africa obo Members*[834] where both judgments held that a business rescue plan is a necessity before any retrenchment processes under the Labour Relations Act 66 of 1995 (during business rescue proceedings) commence. In the court *a quo* Moshoana J held:

> 'As part of the duties of the BRP is the development of a business rescue plan. In the business rescue plan, the BRP may contemplate retrenchment of employees. Section 136 (1) (b) of the Companies Act, obligates the business rescue plan to subject itself to the provisions of section 189 and 189A of the LRA. In other words, if retrenchment is contemplated in the plan published by the BRP, such retrenchment would be subjected to the provisions of the LRA. In this matter, there is no business rescue plan that has been developed suggesting engagement in a retrenchment process. On this basis alone, there is merit in a submission that this application is premature. A company that is under business rescue can only contemplate retrenchment in a statutory document known as a business rescue plan.'[835]

On appeal, the court adopted a similar view. Phatshoane ADJP (with Davis JA and Musi JA concurring) held:

> 'In terms of s 136) (1)(b), employees may be retrenched as contemplated in the company's business rescue plan. The section stipulates that:

[832] This section provides that 'any retrenchment of any employee contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 . . . and other applicable employment related legislation.

[833] (J149/20) [2020] ZALCJHB 43; [2020] 6 BLLR 588 (LC); (2020) 41 ILJ 1402 (LC) (14 February 2020).

[834] (JA32/2020) [2020] ZALAC 34; [2020] 8 BLLR 756 (LAC); (2020) 41 ILJ 2113 (LAC); 2021 (2) SA 260 (LAC) (9 July 2020).

[835] *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways (SOC) Ltd* (J149/20) [2020] ZALCJHB 43; [2020] 6 BLLR 588 (LC); (2020) 41 ILJ 1402 (LC) (14 February 2020) 7.

> 'Despite any provision of an agreement to the contrary . . .any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act 66 of 1995), and other applicable employment related legislation.' The words 'contemplated in the company's business rescue plan,' in my view, signify the existence of a corporate rescue plan which would conceptualise the commercial rationale for the retrenchments of the employees. As I have indicated, the *raison d'être* for the enactment of s 136(1)(b) was to safeguard employees from being subjected to retrenchment without a business rescue plan. Section 150 makes it plain that the lawmaker intended that the rescue plan must precede any retrenchment and puts paid to any suggestion that the retrenchment process may commence without the plan. In terms of s 150(2) the business rescue plan must contain all the necessary information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts: Part A which sets out the background; Part B, proposals; whereas Part C would contain the assumptions and conditions. Under this last rubric the plan must explain, *inter alia*, what its effect will be on the number of employees and their conditions of employment. The proposed retrenchment of any employee would have to be disclosed in this part of the plan.'[836]

It is clear from these judgments that the absence of a business rescue plan contemplating retrenchments renders the issuing of retrenchment notices premature and procedurally unfair. These judgments have positive and negative implications. For employees, the judgments may be applauded for emphasising the protection and participation of employees in the business rescue proceedings. However, the judgments put pressure on the practitioner who may be faced with a complex and large company. The time period of 25 days in which to publish a business rescue plan, as contemplated in s 151(5), does not afford a practitioner much time to perform his duties in accordance with the Act. However, the fact remains that if the dismissals are to be based on operational requirements, the business rescue practitioner is to work swiftly to avoid falling foul of the above judgments.

5.3.2. Right to be Employed on the Same Terms and Conditions

Business rescue has advanced the protection of employees from that of the judicial management era on the rationale that employees have interests in the proceedings as well as its

[836] *South African Airways (SOC) Limited (In Business Rescue) v National Union of Metalworkers of South Africa obo Members* (JA32/2020) [2020] ZALAC 34; [2020] 8 BLLR 756 (LAC); (2020) 41 ILJ 2113 (LAC); 2021 (2) SA 260 (LAC) (9 July 2020) 31 and 32.

outcome. The status of the employees' contract of employment is dealt with in s 136(1)(*a*) which provides that

> 'despite any provision of an agreement to the contrary – during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition; or the employees and the company, in accordance with applicable labour laws, agree different terms and conditions.'

This is a positive advance from judicial management, which did not make provision for the status of employees' contracts of employment. The silence of the judicial management legislation created great uncertainty amongst employees, as the status of their contracts of employment would depend on the terms of a judicial management order, based in all likelihood on the financial status of the company. The protection also contrasts favourably with the consequences of immediate liquidation, where the contracts of service are suspended.[837] Employees earn remuneration for at least a few extra months. However, these advances must be balanced against academic arguments pointing to possible abuse of the process. Loubser cautions that including employees as applicants is excessive, especially in the case of those who are not creditors of the company.[838] Bradstreet[839] agrees that an application for business rescue by employees to negotiate salaries may be abused and that excessive protection of the employees may be counter productive. Joubert, van Eck and Burdette also cautioned against abuse by arguing that

> 'this, added to the vastly improved situation of employees during the period of business rescue when compared to the situation that they would have faced had the company gone for liquidation (their contracts are maintained and not suspended), and a favourable status of claim during business rescue compared to those of the providers of post-commencement finance, suggests that employees or their legal advisors could be tempted to exploit the process for their own gain . . . . Ultimately, the overprotection of employee rights may have the unintended result of being to the detriment of employees and essentially weaken the underlying efficiency of South Africa's new corporate rescue system.'[840]

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[837] See for example s 38(1) of the Insolvency Act 24 of 1936 which provides that the contracts of service of employees – whose employer has been sequestrated – are suspended with effect from the date of the granting of a sequestration order.

[838] A Loubser 'The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)' (2010) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 509.

[839] R Bradstreet 'The new business rescue: Will the creditors sink or swim?' (2011) 128 (2) *South African Law Journal* 358.

[840] T Joubert, S van Eck and D Burdette 'Impact of labour law on South Africa's new corporate rescue mechanism' (2011) 27(1) *The International Journal of Comparative Labour Law and Industrial Relations* 83.

Therefore, while the employees are important during business rescue, a balance must be struck between their rights and the abuse thereof.

On the other hand, Levenstein maintains that employees are the lifeblood of a company especially if it seeks to be rescued.[841] He adds that employees, especially those that are skilled and have management expertise, must be retained in order for the company to survive.[842] While this is true, a decrease in employee morale may negatively affect the productivity of a business. Often when a company is financially distressed retrenchments are inevitable, and those who survive may also have to endure pay cuts. The right to be employed on the same terms and conditions as prior to the commencement of business rescue is not absolute. For example, the terms of employment conditions may be changed to the extent of the ordinary course of attrition; or the employees and the company, in accordance with applicable labour laws, agree different terms and conditions. It is submitted therefore that the threat of job losses and pay cuts could negatively affect employee morale, and key employees are also likely to resign and seek employment with the competitors who take advantage of the situation. The loss of employees, especially key employees may also increase the cost of business rescue, as replacing such employees may be costly. This is supported by Rosslyn-Smith, De Abreu and Pretorius who argue that

> 'when key employees leave, those positions need to be filled and may come with substantial costs. The firm may not be able to find suitable replacements, due firstly to the skill shortage in South Africa and secondly because the firm cannot offer prospective employees job security. As a result, indirect costs may increase as the firm may have to fill the position with people of lesser competence. If the replacement is not available, the firm may need to replace employees with contractors and thereby increase the direct costs of business rescue, as these consultants may charge hourly rates.'[843]

Therefore, it is submitted that a strategy to retain such employees is very important. Moreover, senior management are likely to find themselves in a difficult situation in that other employees may blame the financial distress on 'incompetent' management, prejudicing employee morale even further. Rosslyn-Smith, De Abreu and Pretorius argue that 'during times of change in a distressed firm, stress, paranoia, and lack of trust between employees and management are at an all-time high [therefore] communication with employees is imperative to combat the

[841] E Levenstein *An Appraisal of the New South African Business Rescue Procedure* (Unpublished LLD thesis, University of Pretoria, 2016) 458.
[842] Ibid.
[843] W Rosslyn-Smith, NVA De Abreu and M Pretorius 'Exploring the indirect costs of a firm in business rescue' (2020) 34 (1) *South African Journal of Accounting Research* 38.

decrease in employee morale . . . '[844] It is therefore submitted awareness of the purpose and function of business rescue should be conveyed to employees. The need for a good communication with employees is important.

This discussion focuses on the differing opinions on the effect of business rescue proceedings on employees and the need for thorough analysis of the issues arising.

5.3.3. Further Section 144 Rights

During business rescue proceedings the company (the employer) and the practitioner are urged by the Act to involve employees in what is happening, what the procedures are and what the company plans to achieve. This clearly acknowledges the importance of employees' participation in business rescue proceedings. Subsection (1) provides that

> 'during a company's business rescue proceedings any employees of the company who are represented by a registered trade union may exercise any rights set out in this Chapter collectively through their trade union; and in accordance with applicable labour law; or, if not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.'

For example, as affected persons, employees may approach the court for an order commencing rescue proceedings.[845] The employees may do so either personally or by trade union or a proxy nominated by the organisation or representative. It has been argued that the ability of the trade unions to affect the process should not be underestimated.[846]

Furthermore, subsection (2) provides that

> 'to the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.'

This subsection underlines the remuneration of employees as a priority during business rescue proceedings.[847]

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[844] Ibid at 29.

[845] See for example *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012).

[846] E Levenstein supra note 520 at 464.

[847] This is going to be dealt with in the discussion of s 135 of the Act.

5.4. Impact of Business Rescue Proceedings on Creditors

5.4.1. Right to Participate in the Business Rescue Plan

In financial terms, creditors are most affected if the company opts for liquidation or business rescue, likely to lose more money than any other affected person. Therefore, consulting with creditors before the business rescue plan is developed is necessary to enable them to share their concerns and views on the business rescue proceedings. Delport argues that creditors have the strongest right to consultation on the development of a business rescue plan since they have the most to lose.[848] They have the right to participate in business rescue proceedings; to receive notice of court proceedings, decisions, meetings, or any other matter;[849] to formally participate in the company's rescue proceedings to the extent provided for by the Act;[850] and informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.[851]

Within 10 days of being appointed, the practitioner must convene a first meeting to inform creditors whether he/she believes that there is a reasonable prospect of rescuing the company.[852] At the same meeting, the practitioner may receive proof of claims by creditors.[853] This helps him/her to develop a business rescue plan. Creditors may also determine whether there is a need to appoint a committee of creditors.[854] The Act does not provide for a procedure to form this committee, but does state that those eligible for appointment include an independent creditor, or employee of the company;[855] and an agent, proxy, or attorney of an independent creditor or employee, or other person acting under the general power of attorney,[856] or authorised in writing by an independent creditor or employee to be a member.[857] Members may be appointed at the meeting by nomination and voting of the members present.

Furthermore, the Act requires that the practitioner must give notice of the first meeting of creditors to every creditor of the company whose name and address is known to, or can

[848] PA Delport et al (eds) *Henochsberg on the Companies Act 71 of 2008* (2012) 518.
[849] Section 145(1)(*a*). In *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43 (13 April 2021) 17 the court held that subsection 1(a) is a general notification requirement to creditors of court proceedings, decisions and meetings concerning the business rescue.
[850] Section 145(1)(*c*).
[851] Section 145(1)(*d*).
[852] Section 147(1)(*a*)(i).
[853] Section 147(1)(*a*)(ii).
[854] Section 147(*b*).
[855] Section 149(2)(*a*).
[856] Section 149(2)(*b*).
[857] Section 149(2)(*c*).

reasonably be obtained by, the practitioner.[858] Once appointed, the practitioner must exercise their powers and duties immediately, especially when the company is large with many creditors. The notice must set out the date, time, and place of the meeting and the agenda.[859] A simple majority of independent creditors holding voting interests must support the decisions taken at the meeting.[860] No quorum is required for meetings of creditors.[861]

Once the business rescue plan has been developed, the Act requires meetings to be held to consider it. Within 10 days of publishing a business rescue plan, the practitioner is required to convene and preside over a meeting of creditors and any other holders of a voting interest to consider the plan.[862] He/she must deliver a notice of the meeting to all affected persons five days prior to the meeting.[863] The notice should state the date, time, and place of the meeting; the agenda, and a summary of the rights of affected persons to participate and vote in it.[864] This meeting may be adjourned from time to time if necessary until a decision is taken regarding the company's future.[865]

The practitioner must introduce the proposed plan for consideration by creditors and shareholders;[866] inform the meeting whether he/she continues to believe that there is a reasonable prospect of rescue;[867] and invite discussion or motions for amendment of the proposed plan or for revision of the plan by the business rescue practitioner.[868] The provisions set out in s 152 embrace the final attempt to either accept or reject the plan. At this stage, the practitioner would have already met with creditors, shareholders, and employees for the first time. Creditors should cast their votes carefully since this may determine their eventual return. As mentioned above, Part B of a rescue plan must include a summary of the benefits of adopting the plan as opposed to returns on liquidation. It is thus important that creditors consider the plan very carefully. Creditors must agree by vote on any amendments to the proposed plan as they are in a good position to assess the viability of the plan.[869]

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[858] Section 147(2).
[859] Section 147(2)(*a*) & (*b*).
[860] Section 173.
[861] J Rushworth 'Critical analysis of the business rescue regime in the Companies Act 71 of 2008' 2010 *Acta Juridica* 400.
[862] Section 151(1).
[863] Section 151(2).
[864] Ibid.
[865] Section 151(3).
[866] Section 152(1)(*a*).
[867] Section 152(1)(*b*).
[868] Section 152(1)(*d*).
[869] The approval or the failure to approve of a business rescue plan has been discussed in Chapter Four.

5.4.2. Effect on Creditors' Claims

5.4.2.1. Suspension of Liquidation Proceedings

Even after liquidation proceedings have commenced, an affected person may apply for business rescue and such application will suspend liquidation proceedings until the court has adjudicated on the application, or the business rescue proceedings end.[870] However, s 131(6) does not define what is meant by liquidation proceedings. This raises the interesting question of whether liquidation proceedings may commence with the mere filing of an application at court for a provisional or final liquidation order, or with the formal legal process of winding up the company that gives effect to an order for liquidation. This question is crucial since the effect of business rescue proceedings as envisaged in s 131(6), lies in its proper interpretation. Where there is a possibility of more than one meaning, the sensible one should be preferred.[871]

The courts have held in a number of cases that liquidation proceedings commence with the mere filing of application papers. In the first such case, *Van Staden v Angel Ozone Products CC (In Liquidation)*,[872] the court held that winding up proceedings and liquidation proceedings are intertwined.[873] Legodi J held that while a distinction could be made between liquidation and winding up proceedings, the latter should be seen as a continuation of liquidation proceedings.[874] In this case, the applicant, as the sole member of the respondent, had applied for the liquidation of the respondent and a final liquidation order was granted. However, the court maintained that the respondent be placed under supervision and business rescue, taking the view that If rescue proceedings were a better option than liquidation proceedings, the latter could be converted into supervision and rescue proceedings, irrespective of how far advanced the liquidation or winding up proceedings might be.[875]

The courts have also interpreted s 131(6) in several other cases. In *ABSA Bank Ltd v Summer Lodge (Pty) Ltd*,[876] (where the facts were slightly different from *Van Staden*) the applicant applied for the liquidation of three companies that were hopelessly insolvent. On the day of the hearing, an application to place these companies under business rescue was brought by affected persons in terms of s 131(6). Although the court accepted that s 131(6) meant that once liquidation proceedings had commenced a business rescue application would suspend the

[870] Section 131(6).
[871] *Natal Joint Municipality Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 18.
[872] 2013 (4) SA 630 (GNP).
[873] Para 27.
[874] Para 26.
[875] Para 32.
[876] 2014 (3) SA 90 (GP).

liquidation process,[877] it held that a business rescue application did not suspend the liquidation application. It is submitted that the court misinterpreted the phrase 'liquidation proceedings' as these cannot occur without an application. It thus cannot be correct to conclude that business rescue proceedings suspend the liquidation process and not the liquidation application. The application for liquidation forms part of liquidation proceedings.

The court in *Standard Bank of South Africa v A-Team Trading CC*[878] criticised *Summer Lodge* for having overlooked the fact that liquidation proceedings commence by launching an application. Ploos van Amstel J held that:

> 'If a liquidation application is dismissed the proceedings come to an end [but] [t]hat does not mean that the application did not constitute liquidation proceedings . . . .By way of analogy, eviction proceedings in everyday practice commence with an application for an eviction order and include the process of serving the eviction order and ejecting the unlawful occupant. I do not see why it should be different in the case of liquidation proceedings.'[879]

Accordingly, it was found that the business rescue application had the effect – in terms of s 131 (6) – of suspending the application for the liquidation of the respondent.[880] It is clear from these cases that if liquidation proceedings have already been commenced by or against the company at the time, an application for business rescue is made; this has the effect of suspending liquidation proceedings (s 131(6)). Liquidation proceedings in this context include the application for liquidation. Therefore, if business rescue proceedings suspend liquidation proceedings, this includes the application for the latter.

The second issue is whether business rescue proceedings suspend liquidation proceedings after the final liquidation order is granted. Prior to the SCA decision,[881] high court judgments have reached different conclusions on the interpretation of s 131(6). In *Van Staden*, it was held that business rescue proceedings can suspend liquidation proceedings no matter how far the proceedings have progressed,[882] whereas in *Richter v Bloempro*[883] it was held that s 131(6) did not have the effect of suspending liquidation proceedings after a final liquidation order had

[877] Para 19.
[878] 2016 (1) SA 503 (KZP).
[879] Para 12.
[880] Paras 21, 22.
[881] *Richter v ABSA Bank Limited* (20181/2014) [2015] ZASCA 10 (01 June 2015) (*Richter v ABSA*).
[882] Para 30.
[883] 2014 (6) SA 38 (GP).

already been obtained.[884] However, the SCA authoritatively found that s 131(6) had the effect of suspending liquidation proceedings even after a final liquidation order has been granted.[885]

The decisions of the court *a quo*[886] and the SCA[887] have implications that need to be interpreted. Some academics have argued that, as business rescue proceedings yield a better return for shareholders and creditors, and jobs will be retained, there can be no reason to deny business rescue because the company is in final liquidation.[888] This was supported by the SCA where the court held that '[t]here is no sensible justification for drawing the proverbial 'line in the sand' between pre and post-final liquidation in circumstances where the prospects of success of business rescue exist'.[889] This differs from the decision of the court *a quo* where it was held that business rescue proceedings cannot suspend liquidation proceedings after a final liquidation order has already been obtained,[890] based on the reasoning (supported by Stoop)[891] that suspending liquidation proceedings even after a final liquidation order has already been granted was undesirable and that the finding in *Richter* (supra) was preferable. However, it is submitted that the decision of the SCA is correct. A good example might be where the final liquidation order has been granted and an affected person then applies for business rescue on the basis that a third party is going to invest in the company and such investment would rescue the company. If it can be proved that investment would rescue the company, there is no need not to grant a business rescue order. The evidence given may guide the court on whether or not to grant an order for suspension of liquidation proceedings.[892]

Although it has been established that liquidation proceedings include both court proceedings and the winding-up process, another grey area is who is in control of the company during the business rescue proceedings application when liquidation proceedings have already commenced? In whom is the power to control the company and its assets vested? Under judicial management, it was the court order which gave directions on the moratorium and the appointment of the provisional judicial manager.[893] Section 429(1) provided that the

[884] Paras 19, 20, 21.
[885] *Richter v ABSA* supra note 881.
[886] *Richter v Bloempro CC* 2014 (6) SA 38 (GP).
[887] *Richter v ABSA* supra note 881.
[888] Delport *et a*l (eds) *Henochsberg* op cit note 484 *above*.
[889] Para 17.
[890] Paras 19, 20, 21.
[891] H Stoop 'When does an application for business rescue proceedings suspend liquidation proceedings?' (2014) 47(2) *De Jure* 333.
[892] SP Phungula 'Proceedings over proceedings: How and when are liquidation proceedings suspended by an application for business rescue proceedings?' (2017) 28(3) *Stellenbosch Law Review* 596.
[893] See s 428(2)(*c*).

company's property was deemed to be in the custody of the Master until the provisional judicial manager had been appointed. On the other hand, s 361(1) of the 1973 Act provided that in any winding-up by the court, the company's property was deemed to be in the custody and control of the Master until the provisional liquidator had been appointed and had assumed office. In both these sections[894] it is clear that the custody and control of the company's property was given to the Master if neither the provisional liquidator had been appointed in the case of winding-up nor the provisional judicial manager in the case of judicial management. However, it was not clear who had control and custody of the company's property where judicial management had been applied for when the company had embarked on liquidation proceedings. The property could have been under the control of the liquidator until the court had granted a provisional management order and appointed a provisional judicial manager. The judicial manager would then assume management of the company.[895]

Although the Act and court judgments establish that business rescue proceedings immediately suspend liquidation proceedings,[896] the issue of control and custody of the property has been tested by the courts in both North and South Gauteng. Commencing with *Van Rensburg NO v Cardio-Fitness Properties (Pty) Ltd*,[897] a final liquidation order had been granted and an application for business rescue had been made thereafter (although a 'final' liquidator had not succeeded the joint provisional liquidators.). The business rescue practitioner had also not been appointed since the application to commence business rescue proceedings had been opposed. The court accepted that suspension of liquidation proceedings did not suspend the appointment of the joint liquidators.[898] Kgomo J held that it was not the intention of the legislature to relieve provisional liquidators from control of the company.[899] The court took the view that if it was the intention of the legislature to relieve provisional liquidators this would have been clearly and unambiguously stated.[900]

[894] Sections 429(1) and 36 (1).
[895] Section 430(*a*).
[896] Section 131(6) provides that application for rescue proceedings suspends liquidation proceedings until the court has adjudicated on the application. See *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA) 25: The court accepted that application for business rescue proceedings suspends liquidation proceedings. See also in *PMG Motors Kyalami v First Rand Bank* 2015 (2) SA 634 (SCA) 12 where the court held 'a company in liquidation may be placed under business rescue by a court. Once an application to do so is launched, the liquidation is suspended until it is finalised.'
[897] (46194/13) [2014] ZAGPJHC 40 (4 March 2014).
[898] Para 52.
[899] Ibid.
[900] Ibid.

In *Ex Parte Nell NNO*[901] (per Tutchen J), the board of directors passed a resolution placing the company in business rescue. As required by the Act, they also appointed a business rescue practitioner. A month later the creditors applied to a High Court for an order setting aside the resolution and putting the company into final liquidation. Thlapi J granted the order in favour of creditors, and liquidators were appointed. The practitioner gave notice of an application for leave to appeal against the order by Thlapi J. Tutchen J concluded that because of the delays in hearing the appeal, the assets of the company fell under the control of the liquidators pending the appeal.[902]

In *Maroos v GCC Engineering (Pty) Ltd*[903], the business rescue practitioner had also been appointed. The applicants argued that where liquidation proceedings are suspended, the liquidators cannot act and thus the power to control the company reverts to the directors.[904] Relying on s 361 of the 1973 Act they submitted that the property of the company was therefore deemed to be under the control of the Master.[905] By relying on s 361 the applicants had assumed that the powers of the liquidators had been suspended by business rescue proceedings before the business rescue practitioner filed an application ending such proceedings. By relying on s 361 the applicants assumed that the office of the liquidator had been vacated. The applicants further argued that although the control of the property of the company should vest in the Master, the Master did not have the power to manage the company and to conduct its affairs.[906] Surprisingly the court accepted applicants' argument and concluded that the powers to manage the affairs of the company vested in the directors until the finalisation of a business rescue application.[907]

In the Northern Cape, the court dealt with a similar issue in *Knipe v Noorman*[908]. Although the application commencing business rescue proceedings was not before this court, Mamosebo AJ commented on the role of provisional liquidators where a final liquidation order had been granted and a business rescue application was still pending.[909] The applicants contended that

[901] 2014 (6) SA 545 (GP).
[902] Para 57.
[903] (36777/2017) [2017] ZAGPPHC 297 (15 June 2017).
[904] Para 7.
[905] Ibid.
[906] Para 10.
[907] Para 17.
[908] 2015 (4) SA 338 (NCK).
[909] It is worth mentioning that the application commencing business rescue proceedings was not before this court but before a different court in Bloemfontein and was still pending. Mamosebo AJ entertained the role of liquidators and business rescue solely on the grounds that before the applicants were interdicting the control of liquidators over cattle that were grazing on the farm owned by companies in liquidation.

the provisional liquidators had 'irregularly proceeded with liquidation proceedings by entering into the agreement (AK6) to sell the cattle while the business rescue application was pending and thus contravened s 131(6).'[910] The court disagreed holding that 'the liquidators have a duty and a responsibility to look after the assets and affairs of the companies in liquidation'.[911] Mamosebo AJ held further that since the business rescue practitioner had not yet been appointed 'the provisional liquidators in this matter [could not] be hamstrung by the business rescue application'.[912] It is, however, submitted that the reasoning of the court was based on *Richter v Bloempro* to the effect that s 131(6) does not suspend liquidation proceedings after the final liquidation order has already been granted.[913] As seen above, the decision in *Richter v Bloempro* was overturned by the SCA.[914] It would be interesting to see if Mamosebo AJ would have reached the same conclusion if the case had been decided after the SCA judgment in *Richter v Absa Bank Limited*.

This issue has finally been put to rest by the SCA in *GCC Engineering (Pty) Ltd v Maroos,*[915] where the court was called upon to decide on three issues, namely:

- Whether the appointment and the powers of the duly appointed provisional joint liquidator(s) are suspended in terms of section 131(6);
- Whether the control and management of the property of a company already placed in liquidation by a court order, can validly and legally be re-vested in the directors of the company; and
- Whether the Master has any role to play in business rescue proceedings.[916]

On the first issue, the court found that the appointment, functions, and powers of the provisional liquidators were not suspended by s 131(6). The word 'suspend' in s 131(6) did not mean the termination of the liquidator's office, but what is suspended was the *process* of winding up/liquidation proceedings[917] not the legal consequences of a winding up order.[918] Referring to and affirming the decision from the *Knipe* case, Seriti JA (with Cachalia JA, Molemela JA, Schippers JA and Mothle AJA concurring) held that

[910] Para 19.
[911] Para 21.
[912] Para 24.
[913] Para 19. See also the discussion of *Ritcher v Bloempro* 2014 (6) SA 38 (GP).
[914] See the discussion of the SCA judgment in *Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 10 (01 June 2015).
[915] 2019 (2) SA 379 (SCA).
[916] Para 9.
[917] My emphasis.
[918] Paras 17 and 19.

> '[s]ection 131 (6) of the Act does not change the status of the company in liquidation nor does it suspend the court order that placed the company under liquidation in the hands of the Master in terms of s 141 (2)(a)(ii) of the Act. The appointed provisional joint liquidators must proceed with their duties and functions to protect the assets of the company for the benefit of all the creditors of the company. In terms of s 131 (6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to the various creditors. The winding-up order is still in place; and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors.'[919]

On the second issue, the court held that 'there is no legal provision either statutory or at common law that sanctions the re-vesting of control and management of the company in liquidation in the director of the said company.'[920] The court held that when the winding-up order was granted the directors of the said company ceased to function as directors and they were stripped of their powers to control and manage the company.[921]

On the third issue, the court held that the Master is a creature of the statute and can only perform functions and duties enabled by the legislation. Consequently, it found that the Master had no power over a 'manager' appointed by the court *a quo.*[922] Accordingly, the SCA found that the court *a quo* erred in its decision.

There has been significant uncertainty about the powers over and control of the company's assets under s 131(6). Prior to the SCA judgment, the court decisions had diverged on the interpretation of s 131(6) in relation to the custody and control of the company's property where liquidation proceedings have been suspended by business rescue proceedings. However, the SCA has authoritatively decided that the liquidators take control and custody of the company's property in cases where s 131(6) has been invoked, arguably in line with section 361(1) of the 1973 Act. If the provisional liquidator has been appointed the liquidator, the company's property is in his custody and control. The clarification echoes the principles that might have been in play under the judicial management regime.

[919] Paras 15 and 17.
[920] Para 21.
[921] Ibid.
[922] Para 23.

5.4.2.2. Proof of Claims During Business Rescue Plan Meetings

The purpose of the Act is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.[923] In promoting this purpose, the Act allows creditors to participate in business rescue proceedings. All creditors are entitled to notice of court proceedings, decisions, meetings, or other relevant matters in relation to such proceedings.[924] This section (145(1)(*a*)) reinforces creditors' rights as principal stakeholders in the rescue process.[925] While commentators have viewed this in a favourable light,[926] certain provisions on such participation are confusing and problematic.

Banks, existing creditors, and shareholders often provide post-commencement finance to a financially distressed company, and would thus want to interrogate every step taken during the rescue process,[927] in most cases to determine whether financing the business is promoting its survival.[928] At the first meeting with creditors before preparing a business rescue plan,[929] they are given an opportunity to establish the viability of the company and share their concerns and views. They also provide proof of their claims to the business rescue practitioner.[930] However, the Act has not adequately specified the form such proof should take – which is concerning as there are guidelines that could and should have been taken from judicial management rules. Section 431(2)(*d*) of the 1973 Act provided that the purpose of the meeting was for creditors to prove their claims. Section 431(4) provided that the manner of proof of such claims was to apply *mutatis mutandis* to claims under winding up provisions ie insolvency law applied.[931] This in turn meant that creditors would have to prove their claims by affidavit. In insolvency law, creditors' claims must be proved by an affidavit stating the facts upon which the claim is based and its nature and particulars.[932] The particulars include 'whether the claim was acquired by cession, and if the creditor holds security thereof; the nature and particulars of that security

[923] Section 7(*k*).
[924] Section 145(1)(*a*).
[925] Delport *et al* (eds) *Henochsberg* op cit note 484 at 506.
[926] See Levenstein supra note 520 at 446. He argues that 'creditors have generally "bought" into the business rescue processes.
[927] I Le Roux & K Duncan 'The naked truth: Creditor understanding of business rescue: A small business perspective' (2013) 6 *The South African Journal of Entrepreneurship and Small Business Management* 62.
[928] M Pretorius & W Du Preez 'Constraints on decision making regarding post-commencement finance in business rescue' (2013) 6 *The South African Journal of Entrepreneurship and Small Business Management* 174.
[929] Section 150(1).
[930] Section 147(1)(*a*)(ii).
[931] See s 366(1)(*a*) of the 1973 Act.
[932] Section 44(4) of the Insolvency Act 24 of 1936.

and if he has not realised the security.'[933] It is submitted that a similar detailed provision should be included in the Act.

Delport argues that proof should be to the satisfaction of the practitioner.[934] If this is correct, the issue that remains is whether the claims are proved at the point in time the business rescue practitioner satisfies him/herself of the validity of the claims, or after the meeting? If it is after the meeting, how long does the practitioner have to complete this process? It is submitted that a formal procedure for the submissions of claims should have been included in the Act. For example, claims should be submitted before the first meeting so that the practitioner is able to satisfy himself to some extent of their validity. Before the meeting is convened creditors know who the practitioner is and to whom to submit their claims.[935] Obviously, the nature and amount of the claims help the practitioner to develop the business rescue plan.

5.4.2.3. Ranking of Claims

5.4.2.3.1. Post-Commencement Finance

Before dealing with a ranking of claims, it is important to deal with post-commencement finance as it has an impact on the ranking of claims. Post-commencement finance is funding provided to the company after the commencement of business rescue proceedings, aimed to help the company to restructure its finances to keep it afloat.[936] In any financial rescue regime, additional funding is required to help a sinking business. The inability to secure the necessary funding may scuttle the business rescue process and result in the liquidation of the company. Post-commencement finance thus has been described as a 'fundamental requirement for successful business rescue.'[937] It is critical that a financially distressed company has access to funds that may enable it to become viable.[938] Funding is required to rescue a business in financial distress.[939] Loubser notes that:

> 'Attempting to rescue a business without adequate capital is like trying to drive a car without fuel. [N]o matter how well-designed and strong it is, there is only one way you can go, and that it is downhill. Because rescuing a company requires that the business should continue trading, and that, in turn, requires working capital.

[933] Ibid.
[934] Delport *et al* (eds) *Henochsberg* op cit note 484 above at 513.
[935] It should be remembered that s 129(*a*) & (*b*) provides that, if business rescue is by resolution, a notice of the business practitioner's appointment must be filed and published to affected persons within two days of the appointment. If it was by court order, as per s 131, creditors would have become aware of the identity of the business rescue practitioner during the court proceedings.
[936] Pretorius & Du Preez 'op cit note 928 at 169.
[937] Levenstein supra note 524 at 494.
[938] Pretorius & Du Preez op cit note 928 above.
[939] Bradstreet op cit note 839 above.

> [E]mployees must be paid to prevent them from leaving, suppliers will not deliver unless they are paid in cash and the providers of essential services such as water and electricity have to be paid to ensure uninterrupted services.'[940]

Calitz and Freebody concur:

> 'In order to sustain the business as a going concern, there are certain business activities that will require funding, such as goods and services from suppliers, labour costs, insurance, rent, maintenance of contracts and other operating expenses, along with the cost of maintaining the value of assets and thus it is imperative to obtain a source of finance as soon as possible.'[941]

Section 135(2) provides that in rescue proceedings a company may obtain financing from lenders. 'Such financing may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered.'[942] It is submitted that the legislature intended to protect the company's assets that were used as security for creditors prior to the commencement of business rescue. However, because no detailed regulatory regime is set out to govern post-commencement finance, some sections dealing with such finance contradict each other, particularly when it comes to the ranking of creditors.

5.4.2.3.2. Ranking of Claims During Business Rescue Proceedings

Ranking of claims has always played an important part of the 'corporate rescue' mechanism, because creditors want to be paid and to be treated fairly in the ranking of their claims. Legislation has therefore devoted specific provisions to regulating the ranking of claims in corporate rescue mechanism. Under the judicial management regime, payment of creditors' claims, costs of judicial management, and liabilities pre- and during judicial management proceedings were regulated by s 434(2) and (3) read with s 435(1)(*a*) of the 1973 Act. Section 434 provided that:

> '(2) Any moneys of the company becoming available to the judicial manager[943] shall be applied by him in paying the costs of the judicial management and in the conduct of the company's business in accordance with the judicial management order and so far as the circumstances permit in the payment the claims of creditors which arose before the date of the order.'

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[940] A Loubser 'Post commencement financing and the ranking of claims: A South African perspective' in R Perry (ed) *European Insolvency Law: Current Issues and Prospects for Reform* (2014) 29.

[941] J Calitz & G Freebody 'Is post-commencement finance proving to be thorn in the side of business rescue proceedings under the 2008 Companies Act?' 2016 *De Jure* 270.

[942] Section 135(2)(*a*).

[943] This section − when strictly interpreted − referred to a judicial manager and by definition excluded a provisional judicial manager. However, it is submitted that this omission was not intended by the legislature and this section was intended also apply to a provisional judicial manger.

> '(3) The costs of the judicial management and the claims of creditors of the company shall be paid *mutatis mutandis* in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate.'

Apart from payments of creditors' claims, subsection (2) of s 434 referred to two kinds of payments, namely the costs of judicial management and costs in conducting the company's business. On one hand, the costs for judicial management referred to the costs relating to obtaining the judicial management order and all costs incidental thereto.[944] Costs in conducting business, on the other hand, were said to be costs relating to the expenses or expenditure in running the business eg employees' wages, insurance premiums, costs of transactions (including price of materials to be used by the company), rent, and supply of services such as water and electricity costs[945] as if those were costs of the sequestration of an estate. It is therefore submitted that the payment of costs of judicial management would be made up as follows:

- The sheriff's charges incurred since the judicial management;
- Fees payable to the master in connection with judicial management;
- The taxed costs incurred in connection with application for judicial management;
- The remuneration of the judicial manager including costs incurred as security for his proper administration of judicial management;
- Any expenses incurred by the Master while performing the duties as required by the Act; and
- Any salary or wages of any person who was engaged by the judicial manager in connection with administration.[946]

Furthermore, subsection (3) provided that pre-judicial management creditors' claims were to be paid *mutatis mutandis* in accordance with the law of insolvency as in costs of the sequestration of an estate. This, therefore, meant that claims were to be proved in terms of s

[944] AH Olver *Judicial Management in South Africa: Its Origin, Development and Present Day Practice and a Comparison with the Australian System of Official Management* (Unpublished LLD thesis, University of Cape Town, 1980) 133. Olver maintains that costs incidental thereto could include those related to s 433 (*d*), (*h*), (*i*), (*j*) (*k*), and (*l*). In other words it is submitted that incidental thereto could include the lodging with the Registrar a copy of the judicial management order and of the Master's letter of appointment; the convening of the creditors meeting and its costs including the notices issued the creditors; lodging with the Master copies of all the documents submitted to the creditors' meeting; and examining the commencement process of the judicial management proceedings.

[945] See PM Meskin et al (eds) *Henochsberg on the Companies Act* 4 eds (1985) 775.

[946] This is the order provided for by s 97(2) of the Insolvency Act 24 of 1936 on the costs of sequestration. See also *Cundill v Inkosha Estate (Pty) Ltd* 1967 (1) SA 545 (D*), Cooper v Trustee in Insolvent Estate of Pretorius* 1967 (3) SA 602 (O), *Ex parte Mitchell* 1964 (3) SA 148 (SR), *Brooks v Taxing Master* 1960 (3) SA 225 (N).

44 for liquidated claims; s 48 for conditional claims, and s 95 for secured claims.[947] Olver argued that 'any shortfall in meeting a secured claim out of the proceeds of the encumbered asset would then rank as a concurrent claim.'[948] Although unsecured claims were the last to be paid, such claims could be discharged in conducting the company's business;[949] the courts accepted that there was no *concursus creditorum* in judicial management.[950] It is therefore submitted that in terms of s 434, the judicial manager was obliged to pay post-judicial management creditors in preference to pre-judicial management creditors. In terms of s 435(1)(*a*)

> '[t]he creditors of the company whose claims arose before the granting of a judicial management order in respect of such company may at a meeting convened by the judicial manager or provisional judicial manager for the purpose of this subsection or by the Master in terms of section 429 (b)(ii), resolve that all liabilities incurred or to be incurred by the judicial manager or provisional judicial manager in the conduct of the company's business shall be paid in preference to all other liabilities not already discharged, exclusive of the costs of the judicial management, and thereupon all claims upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the company except arising out of the costs of the judicial management.'

What this provision entailed was that when excluding the costs of judicial management, the resolution could be adopted stating that all liabilities incurred in conducting the company's business should be paid in preference to all other liabilities not discharged. This interpretation of s 435(1) makes it clear that the resolution could change the order of payments referred to in s 434(2) and (3). In simplest form, it appears that this order would be as follows:

- Costs of judicial management;
- Costs in conducting the company's business in order which they were incurred;
- Pre judicial management unsecured claims.

[947] Insolvency Act 24 of 1936.
[948] Olver supra note 575 at 137.
[949] See *CCA Little & Sons v Niven* 1965 (3) SA 157 (SRA).
[950] *Lief v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) at 348D; *Venter v Williams* 1982 (2) SA 310 (N) 315.

The judicial manager would pay post-judicial management claims[951] in preference to pre-judicial management claims, and this preference would remain in force even after the winding up order, with the exception of the costs of the winding up order.[952]

In the current business rescue regime, the ranking of creditors' claims is regulated by s 135 of the Act, which provides for ranking of creditors in respect of their claims post-commencement of business rescue. A number of subsections of s 135 detail how the claims are ranked post-commencement and during business rescue proceedings. For example, subsection (1)(*a*) provides that

> '[t]o the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but it is not paid to the employee – the money is regarded to be post-commencement financing; and will be paid in the order of preference set out in subsection (3)(a).'

Subsection (3)(*a*) provides that

> '[a]fter payment of the practitioners' remuneration and expenses referred to in s 143, and other claims arising out of business rescue proceedings, all claims contemplated in subsection (1) will be treated equally, but will have preference over all claims contemplated in subsection (2), irrespective of whether or not they are secured; and all unsecured claims against the company.'

Subsection (2) provides that

> '[d]uring its business rescue proceedings, the company may obtain financing other than as contemplated in[953] subsection (1), and any such financing may be secured to the lender by utilising assets of the company to [the extent that they] are not otherwise encumbered; and will be paid in the order of preference set out in subsection (3)(*b*).'

Subsection 3(*b*) provides that:

> '[a]fter payment of the practitioners' remuneration and expenses referred to in s 143, and other claims arising out of business rescue proceedings, all claims contemplated in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.'

Comparing sections 135(1), (2) and (3) of the Act with sections 434(2) and (3) of the 1973 Act, there are both similarities and differences between judicial management and business rescue

[951] Except in relation to pre-judicial management secured creditors. Meskin *et al Henochsberg* op cit note 683 at 778 submit that the resolution could not operate to confer a preference over secured pre-judicial management claim.

[952] Section 435(1)(*b*)(i).

[953] The Act uses the word 'is'. It submitted that this appears to be a typographical error.

processes. Both the Act and the 1973 Act state that post-commencement claims are preferred over pre-commencement claims. If one is to interpret s 135(1) and (3) correctly, both these provisions place the remuneration of the business rescue practitioner and other claims arising out the costs of the business proceedings over other claims when the company is in business rescue. This is similar to s 434(2) and (3) of the 1973 Act which also place emphasis on the claims of judicial management and claims in conducting the company's business as claims to be paid first.[954] However, there are differences.

Notably, s 434(2) did not specifically refer to the payments of the judicial manager's costs of judicial management and costs in conducting the company's business in accordance with judicial management order. Section 135(1) read with subsection (3) (of the Act) does not differentiate between costs of business rescue and costs in conducting the business of a company. It only singles out employee claims arising out of business rescue and gives them priority as post-commencement financing over any other claim except the business rescue practitioner's remuneration and expenses and claims arising out of the costs of business rescue. It is not clear how widely the word 'financing' can be interpreted. It was tested in *South African Property Owners Association v Minister of Trade and Industry*[955] in which the applicant argued that 'the rights of a landlord, in respect of rental and other services rendered to property utilised by a legal entity under business rescue, fell within the ambit of either the phrase 'post-commencement financing' or the phrase 'costs arising out of the costs of the business rescue proceedings'.[956] However, the court rejected this argument and held that rental costs and other services rendered to property do not constitute, by any interpretation, costs arising out of the business rescue proceedings or post-commencement financing.[957] To hold as such would elevate an obligation prior to commencement of business rescue proceedings to a preference over other creditors not provided for or contemplated by the provisions of s 135 of the Act.[958] In reaching this decision, Van der Westhuizen AJ held that:

> 'the financing intended in ss (2) of s 135 of the Act relates to the obtaining of financing in order to assist in managing the company out of its financial distress, hence the provision that any asset of the company may be utilised to secure that

[954] See the discussion of the application of s 434(2) and (3) above. Furthermore, although both judicial management and business rescue put costs of proceedings and remuneration of business rescue practitioner and judicial manager as being paid above other claims, judicial management put fees of the Master before other claims. Perhaps this is not included in business rescue because under business rescue the Master is no longer involved.
[955] 2018 (2) SA 523 (GP).
[956] Para 2.
[957] Para 27.
[958] Ibid.

financing to the extent that the asset is not otherwise encumbered. It does not lean to an interpretation that encompasses existing obligations, other than to company employees, of the company that are utilised to assist in managing the company during the business rescue proceedings.'[959]

Cassim argues that it is correct not to afford an automatic right to the lessor to receive post-commencement payments of rent as a 'super-priority'.[960] Ironically, two years after Van der Westhuizen AJ handed down the judgment proposals were made to amend the Act. On 21 September 2018 the following amendment was proposed:

'(19) Section 135 of the principal Act is hereby amended –

(a) by the insertion after subsection (1) of the following subsection:

(1A) To the extent that any amounts due by the company to any owner of the property, including a landlord, in respect of any property of such owner or landlord which is the subject of a contract with a company that is placed in business rescue is not paid to such owner or landlord during business rescue by the company from the date that the company is placed in business rescue proceedings, provided that such amounts do not exceed the aggregate of all disbursements and outgoings, including rates and taxes, electricity and water, paid by such owner or landlord to third parties during the period referred to in this section, the money must be regarded as post-commencement financing that must be paid to such owner in the order set out in subsection (3)(*b*);

(b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

After payment of the practitioner's remuneration and expenses referred to in section 143, post-commencement finance, rental payment and other claims arising out of the costs of the business rescue proceedings, all claims contemplated –; and

(c) by the substitution in subsection (3)(*a*) for the words preceding subparagraph (i) of the following words:

in subsection (1) and subsection (1A) will be treated equally, but will have preference over-.'[961]

[959] Para 22.

[960] MF Cassim 'The safeguards and protective measures for property owners during business rescue' (2018) 30 (1) *South African Mercantile Law Journal* 62-63.

[961] Department of Trade and Industry 'Companies Amendment Bill 2018: Invitation for the public to comment on the draft Companies Amendment Bill' available at *http://www.cipc.co.za/files/7715/ 4149/0472/ Companies_Amendment_Bill_2018.pdf* (Accessed: 11 November 2018).

The amendment would have meant that claims of landlords and owners of property would be elevated to the status of post-commencement financing.[962] Furthermore, section 434(3) read with section 97(2) of the Insolvency Act differentiated between costs of judicial management and remuneration of the judicial manager.[963] Reading s 434(3) with s 97(2) suggests that claims to be paid were costs incurred in connection with application for judicial management; *and*[964] the remuneration of the judicial manager. This differs from subsections (1) and (3) where claims to be paid are remuneration of a practitioner and other claims arising out of the costs of rescue proceedings. This might be because s 135 did not differentiate between costs of business rescue and costs incurred in running the company. Section 135 does not state that the claims of creditors of the company shall be paid *mutatis mutandis* in accordance with the law of insolvency. This is different from the judicial management process, as shown above. This removes any obligation to refer to insolvency law when interpreting s 135. The problem is that although the Act does refer to pre-commencement unsecured creditors, it does deal with pre-commencement secured creditors. This uncertainty is an obstacle to business rescue proceedings.[965]

Academic writers and the courts have expressed different views on the interpretation of s 135(3) and the ranking of claims. In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd*,[966] although the issue was not related to the ranking of creditors, Kgomo J concluded that the ranking should be in the following order:

- 'The practitioner, for remuneration and expenses, and other persons (including legal and other professionals) for the costs of business rescue proceedings;
- Employees for any remuneration which became due and payable after business rescue proceedings began;

[962] Since the proposed amendment specifically refers to owners of property and landlords, it appears that even where the property owner is the owner of movable property, the amendment would still apply.
[963] See discussion above in *5.4.2.3.2*.
[964] My emphasis.
[965] See Principles 2 and 3 of Part A of the 'World Bank Principles of Effective Insolvency and Creditor/Debtor Regimes, Revised 2016' available at *http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf* [Accessed: 09 November 2020] dealing with movable and immovable securities and recommends that a country`s insolvency (including corporate rescue) statutes should have clear provisions governing the hierarchy of creditors' claims. See also 'The UNCITRAL Legislative Guide on Insolvency Law' (2005) 14 para *(h)* available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf* (Accessed: 09 November 2020] where it was recommended that in order to establish and develop an effective insolvency law, existing creditors' rights are to be recognised and the establishment of clear rules for ranking of priority claims is to be considered.
[966] (13/12406) [2013] ZAGPJHC 109 (10 May 2013).

- Secured lenders or other creditors for any loan or supplies provided after business rescue proceedings began ie post-commencement finance;
- Unsecured lenders or other creditors for any loan or supplies provided after business rescue proceedings began, ie post-commencement finance;
- Secured lenders or other creditors for any loan or supplies provided before business rescue proceedings began;
- Employees for any remuneration which became due and payable before business rescue proceedings began; and
- Unsecured lenders or other creditors for any loan or supplies provided before business rescue proceedings began.'[967]

The same judge in *Redpath Mining South Africa (Pty) Ltd v Marsden NO* confirmed this ranking.[968]

However, academics have expressed doubts about the decision in *Merchant West.* Stoop and Hutchinson argue that:

> 'It is questionable whether this interpretation of the Act is sound. The judgement [sic] does not expressly consider the wording of [the section 135 provision], nor the impact of the chosen interpretation, and in fact does not cite the legislation directly but instead relies exclusively on a single secondary source. There might be some contention about whether or not secured post-commencement creditors might outrank pre-commencement secured creditors, but it is highly questionable whether the wording of the Act envisages that unsecured post-commencement creditors should also do so.'[969]

This view is supported by Delport who argues that the ranking contemplated by the court is not in accordance with the wording of s 135, partly because there is no reference in s 135 that provides for ranking in that specific order.[970]

It is unfortunate that there is no analysis in both judgments as to how Kgomo J arrived at these decisions. If this *obiter* is accepted as correct, this means that pre-commencement creditors who hold security rank below post-commencement financiers regardless of whether or not post-commencement financiers hold security. Secured creditors will thus receive payment after post-commencement creditors, whether secured or unsecured. If Kgomo J's interpretation is accepted, secured pre-commencement creditors will have to concede their protection to post-

[967] Para 21.
[968] (18486/2013) [2013] ZAGPJHC 148 (14 June 2013) 60.
[969] H Stoop & A Hutchinson 'Post-commencement finance – domiciled resident or uneasy foreign transplant?' (2017) 20 *Potchefstroom Electronic Law Journa*l at 18. Available from *https://repository.nwu.ac.za/ bitstream/ handle/10394/24851/9%20Stoop.pdf?sequence=1&isAllowed=y* (Accessed: 09 September 2017).
[970] Delport *et al* (eds) *Henochsberg* op cit note 484 above at 482.

commencement creditors, whether secured or unsecured.[971] It is submitted that this is unreasonable because it undermines the protection granted to secured creditors prior to the commencement of business rescue.[972] However, even if secured creditors finance the company and become creditors post-commencement, their claims pre-commencement would still rank below secured and unsecured claims post-commencement of business rescue. This could lead to an absurd situation because secured creditors advanced credit to the company pre-commencement knowing they would be ranked higher than unsecured creditors.

Section 135(3) also fails to deal with the position of pre-commencement secured creditors. This has an impact on other provisions of the Act, especially s 134(3), which prohibits the disposal of any property on which creditors enjoy security, unless with the prior consent of that creditor. It provides that

> 'if, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest.'[973]

This suggests that secured pre-commencement creditors rank higher than post-commencement creditors, whether secured or unsecured. If the company may only dispose of any secured property if it has obtained consent from secured creditors, one can assume that pre-commencement secured creditors are not subordinate to any post-commencement creditors. This is stressed in s 135(2) that provides that finance obtained 'may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered.' Consequently, the claims of secured creditors prior to the commencement of business rescue remain protected. The fact that s 135(2) allows unencumbered assets to be secured to the post-commencement lender seems to suggest that secured pre-commencement creditors rank above any other creditors, including secured post-commencement creditors.

If this interpretation is correct, immediate questions arise. The first is whether the legislature intended to omit the position of secured pre-commencement creditors in s 135(3). Failure to provide proper guidance has resulted in difficulties and contradictory views. On the one hand, there is a provision that provides for the ranking of creditors without mentioning secured claims

[971] Bradstreet op cit note 839 above at 360.
[972] L Barnett & E Levenstein 'Where you stand in the business rescue queue' (2013) 13 (5) *Without Prejudice* 11.
[973] Section 134(3)(*a*).

pre-commencement,[974] and on the other, there is a provision that prohibits the company from disposing of any property in which secured creditors have interests.[975] Therefore, it is not clear how the rights of creditors are balanced as required by the Act. The purpose of the Act is to provide for efficient business rescue in a manner that balances the rights and interests of all relevant stakeholders.[976] The contradictory provisions defeat the purpose of the Act. Furthermore, the Act aimed to address the shortcomings of judicial management, by *inter alia,* eliminating unnecessary court proceedings for the commencement of business rescue. The contradictions in sections 135(2), 135(3) and 124(3) do not promote this purpose but rather invite court intervention − while the courts themselves do not have proper guidance to enable a balanced interpretation of these sections.[977] Creditors play a crucial role in the process of business rescue, and uncertainty about where they stand in the process will undermine the purpose of business rescue. These provisions should thus be amended to provide proper guidelines on the ranking of creditors.

Academic writers have gone further and questioned what would happen if no equity or encumbered assets are available to the company in rescue.[978] This is highly relevant because by the time the company applies for business rescue it would probably have secured all available assets in favour of creditors. How then might it attract post-commencement financiers to lend money to the company? The Act does not provide an answer, and so there is a need for new provisions that encourage lenders to finance the business of a financially distressed company. The second question is whether it is reasonable for employees to be ranked immediately after the business rescue practitioner. Museta argues that allowing post-commencement employment claims to supersede secured claims is problematic as it defeats the purpose of the security.[979] Levenstein agrees that treating employees as priority creditors is an added and unnecessary burden (in the form of salaries and benefit payments) on a distressed company.[980] The question arises: 'Who will be prepared to finance the company to improve its profitability knowing that not only must the money be used to pay employees, rather than to

[974] Section 135(3).
[975] Section 134(3).
[976] Section 7(*k*).
[977] See *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013).
[978] H Stoop & A Hutchinson 'Post-commencement finance – domiciled resident or uneasy foreign transplant?' (2017) 20 *Potchefstroom Electronic Law Journa*l 16. Available from *https://repository.nwu.ac.za/ bitstream/ handle/10394/24851/9%20Stoop.pdf?sequence=1&isAllowed=y* (Accessed: 09 September 2017).
[979] GM Museta 'The Development of Business Rescue in South African Law' (Unpublished LLM thesis, University of Pretoria, 2011) 41.
[980] Levenstein supra note 520 at 478.

improve the health of the company, but should the company end up in liquidation, the employees will retain this preference for their unpaid claims?'[981] Nonetheless, it is submitted that employees are as important as any other stakeholder in a rescued company. Without employees' services, added finance would be meaningless. It is therefore correct to rank employees' claims above those of other creditors. However, proper guidelines should be drafted to direct which claims are to be paid as a priority to employees. For example, salaries should be a priority but other claims for benefits such as bonuses should rank below secured creditors; bonuses and payment for leave should be categorised as unsecured claims post-commencement.

Commentators and academic writers have proposed their own order of ranking. Levenstein argues that in practice, the ranking of claims should be as follows:

- 'The business rescue practitioner's remuneration, expenses and claims arising out of business rescue;
- Employees' remuneration from the date of commencement of business rescue proceedings;
- Secured creditors for any goods and services supplied post-commencement of business rescue proceedings;
- Unsecured creditors for any goods and services supplied post-commencement of business rescue proceedings;
- Secured creditors pre-commencement of business rescue proceedings;
- Employees for any remuneration which became due and payable pre-commencement of business rescue proceedings; and
- Unsecured creditors for any goods and services supplied prior to the commencement of business rescue proceedings.'[982]

The ranking of claims by Levenstein is similar to that proposed *obiter* by Kgomo J, and would only add to the confusion, especially if one considers the criticisms and recommendations of other commentators. Detailed research and analysis reveal that they recommend something quite different. For example, Pretorius and Du Preez interpret the ranking of claims in s 135 as follows:

- 'The business rescue practitioner's remuneration and costs arising from business rescue proceedings;
- All other claims relating to the costs of business rescue proceedings;

[981] A Loubser 'Tilting at windmills: The quest for an effective corporate rescue procedure in South African Law' (2013) 25 (4) *South African Mercantile Law Journal* 451.
[982] Levenstein supra note 820 at 481-482.

- All post-commencement financial claims related to employment once business rescue has commenced;
- Secured creditors pre-business rescue commencement;
- All secured post-commencement claims related to third-party creditors;
- Insolvency Act preferences;
- Unsecured claims by post-commencement financiers or creditors during business rescue in the order in which they were incurred;
- Remuneration of employees which became due and payable before business rescue commenced; and
- All unsecured claims against the company.'[983]

These rankings are completely different from those of Kgomo J and Levenstein's. Secured creditors pre-business rescue commencement rank above unsecured post-commencement financiers. The ranking by Kgomo J and Levenstein is likely to attract post-commencement financiers since they may know that they are ranked above everybody else − other than the practitioner and employees' remuneration. However, pre-commencement secured creditors are likely to view this ranking as unfair, arguing that they caused their loans to be secured so that they would be paid first. Therefore, ranking them below unsecured post-commencement financiers/creditors undermines the whole idea of secured credit.

Prins submits that the ranking of creditors should be as follows:

- 'The practitioner's remuneration and expenses;
- Secured pre-commencement claims;
- Deemed employee post-commencement finance, *pari passu*;
- Secured post-commencement finance;
- Employee (unsecured) claims for remuneration that arose prior to business rescue proceedings commencing, *pari passu*;
- Unsecured post-commencement finance in the order in which they were incurred;
- Other unsecured pre-commencement claims, *pari passu*.'[984]

Prins' ranking affirms that unsecured claims cannot rank before secured claims. It is submitted that this ranking is more convincing. It makes no sense that unsecured claims should get preference over secured claims, irrespective of whether or not they are post-commencement.

[983] Pretorius & Du Preez supra note 928 at 71.
[984] D Prins 'Priority Issues in Business Rescue' (Unpublished Post-Graduate Diploma thesis, University of Cape Town, 2015) 64.

Post-commencement financiers must finance a company as a secured creditor if they wish to enhance their prospect of repayment.

Furthermore, while s 135 does refer to pre-commencement claims – the ranking of these claims can hardly be considered without any mention of s 150(2)(b)(v) of the Act, which provides that the business rescue plan must set out the order of preference of ranking of creditors. What this means is that when a plan is adopted with a specific preferential order, the court can give effect to that order if it was accepted by a business rescue practitioner at meetings with creditors and employees during the process of developing a business rescue. The effect of s 150 (2)(*b*)(v) was outlined by the court in *CSRAS v Beginsel NO*.[985] An issue arose on whether SARS had a right to be considered as a preferent creditor in a business rescue plan drafted by the business rescue practitioner. Prior to the drafting of a business rescue plan, and at all material times when the business plan was negotiated and prepared, the practitioners believed that SARS was a preferent creditor.[986] However, after extended negotiation between the practitioners and creditors – and when it was clear that rescue attempts were unsuccessful – the practitioners told SARS that it was not a preferred creditor in terms of business rescue proceedings,[987] referring to the Insolvency Act 24 of 1936 and arguing that the classification of creditors under this legislation was not applicable to Chapter 6 of the Act.[988] SARS opposed the adoption of the plan in court, arguing that in terms of s 145(4) the decision taken to adopt the business rescue plan by creditors was unlawful and invalid.[989] While SARS accepted that Chapter 6 of the Act did not oblige the practitioners to propose a business rescue plan, nor obliged the practitioners to treat SARS as a concurrent creditor, there was no reason not to specify it as a preferent creditor subject to s 135 of the Act's order of preference.[990] Since its status would be that of a preferent creditor under the Insolvency Act, it had voting interests at the creditors' meeting equal to the value of its claim against the company as per s 145(4)(*a*) of the Act.[991] SARS argued further that the value of its claim would mean that other creditors, as non-preferent creditors, would receive nothing on liquidation of the company, and consequently, they had no voting interest.[992]

[985] 2013 (1) SA 307 (WCC).
[986] Para 8.
[987] Para 11.
[988] Para 13.
[989] Para 20.
[990] Para 18.
[991] Para 19.
[992] Ibid.

The court rejected SARS' argument. Fourie J found SARS's contentions as not only contrary to the grammatical meaning of s 145(4), but were also illogical and failed to 'balance the rights and interests of all relevant stakeholders, as envisaged in section 7(*k*) of the Act.'[993] The court found that s 145(4) was unambiguous and left no room for SARS to place its own interpretation on it. Fourie J held

> 'no statutory preferences are created in Chapter 6 of the Act, such as are contained in sections 96 to 102 of the Insolvency Act. I would have expected that, if it were the intention of the legislature to confer a preference on SARS in business rescue proceedings, it would have made such intention clear. This could easily have been done, but no trace of such an intention on the part of the legislature is found in the Act. In my view, the language of the aforesaid provisions of the Act, read in context, and having regard to the purpose of business rescue proceedings, justifies only one conclusion, namely that SARS is not, by virtue of its preferent status conferred by section 99 of the Insolvency Act, a preferent creditor for purposes of business rescue proceedings under the Act.'[994]

In dismissing SARS' claim, the court held that the phrase 'unsecured creditors' in s 145(4) includes all unsecured creditors whether preferent or non-preferent creditors, and to interpret otherwise was contrary to the ordinary meaning of the phrase 'unsecured creditor'.[995] On the interpretation of s 145(4)(*b*) the court held that a 'concurrent creditor who would be subordinated in a liquidation' refers to a concurrent creditor who agreed that their claims are to be subordinated in liquidation.[996] The court consequently concluded that 'SARS would enjoy no greater voting interest than the other concurrent creditors of the company.'[997]

SARS further contended that the business rescue plan did not comply with certain requirements prescribed by s 150(2) of the Act and therefore the adoption of the business rescue plan was invalid and unlawful.[998] The court dismissed this contention as without merit.[999] The core of the court's ruling was that s 150(2) prescribed the content of a business rescue plan in general terms, and that these general terms should be accepted to allow a case-by-case formulation of the specific contents of a business rescue plan.[1000]

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[993] Para 22.
[994] Para 24.
[995] Para 26.
[996] Para 30.
[997] Para 35.
[998] For the purposes of this thesis, it is not important to discuss the arguments raised by SARS in relation to s 150. The thesis focuses only on the interpretation of s 150 by the court.
[999] Para 50.
[1000] Para 38.

In consequence, s 150(2)(*b*)(v) allows for determining the preferential order of creditors during business rescue. However, the practitioner – while developing a business rescue plan – must have s 135 in mind. As held by the court though, a s 150(2)(*b*)(v) preferential order is general; it does not supersede the s 135 ranking of claims.

5.4.2.3.3. Ranking of Claims where Rescue Proceedings are Superseded by Liquidation

It appears that both judicial management and business rescue proceedings share the same rules when superseded by a liquidation order. Section 435(1)(*b*)(i) of the 1973 Act provided that if a judicial management order was superseded by a winding-up order, the preference made prior to that order was to remain in force except for claims arising out of the costs of the winding-up. On the other hand, s 135(4) of the Act provides that 'if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the liquidation costs.' This suggests that the remuneration and costs of the business rescue practitioner together with any remuneration and expenses due and payable to employees during such rescue, are prioritised over all other secured and unsecured claims in liquidation. An exception is made for claims that arise in relation to liquidation costs; the ranking of claims when business rescue proceedings are superseded by liquidation proceedings changes − immediately after the practitioner has filed for the conversion of business rescue proceedings into liquidation proceedings. Thus, it appears that in liquidation, the ranking is as follows:

- The costs arising out of liquidation;
- Remuneration and expenses of the practitioner, and other persons (including legal and professional) in respect of business rescue proceedings;
- Remuneration of employees that became due and payable after business rescue proceedings began.

The interpretation of s 135(4) and its ranking protocol was confirmed by the Constitutional Court in *Diener NO v Minister of Justice and Correctional Services.*[1001] The issue arose on whether – on the proper interpretation of s 135 – the practitioner's remuneration ranks above liquidation costs. The question was whether a practitioner's claim for remuneration and expenses enjoy a 'super preference' over all creditors, whether secured or unsecured. The issue followed an application made in terms of s 141(2)(*a*) of the Act, which converted the business rescue proceedings into liquidation proceedings. The facts were briefly that two days before

[1001] 2019 (4) SA 374 (CC).

the sale in execution of its movable property (the only assets), JD Bester Labour Brokers CC (JD Bester) commenced business rescue proceedings by resolution and appointed Mr Diener (Diener) as business rescue practitioner. Two months later Diener decided that JD Bester could not be rescued and instructed attorneys to seek a s 141(2)(*a*) order converting business rescue proceedings into liquidation proceedings. Diener then sought preference for his fees and expenses but the liquidator refused to pay, arguing that he had failed to prove a claim in terms of s 44 of the Insolvency Act.[1002] The matter was referred to the Master who found in favour of the liquidator, and Diener then took the matter to court. The court *a quo*[1003] took the view that the remuneration of the business rescue practitioner, and the expenses incurred during business rescue proceedings, may only be paid after the liquidation costs.[1004] The practitioner appealed to the Supreme Court of Appeal (SCA),[1005] arguing that in terms of sections 135(4) and 143(5) of the Act, the business rescue practitioner's remuneration was not a concurrent claim,[1006] but a special class of claim that enjoyed a novel preference over all assets, even above secured claims existing when he took office.[1007] However, the SCA held that s 135 (4) provided 'no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation.'[1008] The court decided that a business rescue practitioner holds a preferential claim in some respects but the claim does not enjoy preference over liquidation costs. Section 143 was not concerned with liquidation but with the business rescue practitioner's right to remuneration during business rescue proceedings.[1009] The matter went on appeal to the Constitutional Court, which considered the plain and purposive language of section 135(4). Diener argued that the SCA was incorrect in interpreting section 135 as only making an exception in respect of liquidation costs, and finding that s 143 was an independent section that had no bearing on s 135.[1010] He argued that s 143 'creates a preference that can rightly be described as a 'super preference',[1011] incorporated into s 135 by reference.[1012] The court accepted that s 135 was ambiguous and that s 143 did grant a preference

[1002] Para 14.
[1003] *Diener NO v Minister of Justice* (30123/2015) [2016] ZAGPPHC 1251.
[1004] Para 60.
[1005] *Diener NO v Minister of Justice* 2018 (2) SA 399 (SCA).
[1006] Para 38.
[1007] Ibid.
[1008] Para 49.
[1009] Para 43.
[1010] Paras 23 and 24.
[1011] Para 24.
[1012] Ibid.

for the claims of a practitioner over secured creditors.[1013] However, the court − after making reference to Insolvency Act 44 of 1936 – concluded that section 143 was not intended to assert the business rescue practitioner's claims over all other claims in liquidation.[1014] On the interpretation of s 135, Khampepe J (with Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Mhlantla J, Petse AJ and Theron J concurring) held:

> '[if] the practitioner's remuneration and expenses rank above secured creditors and can be paid from the proceeds of a secured asset, section 135(4) would then have to be read on the basis that even though 'claims arising out of the costs of liquidation' ranked before the practitioner's remuneration and expenses, if there is no free residue the practitioner's remuneration and expenses will enjoy preference by being paid out of the 'proceeds of a secured asset'. This is despite this claim ranking after 'claims arising out of the costs of liquidation' and in preference to the claims of a secured creditor. This would be in conflict with section 97 of the Insolvency Act and section 135(4) of the Companies Act. The practitioner would then also enjoy this preference over secured creditors even if a court, upon challenge to a directors' resolution to institute business rescue proceedings in terms of section 129(1) of the Companies Act, sets aside that resolution and grants an order placing the company in liquidation. The anomaly that would exist in the event that there is no free residue upon liquidation, is significant and could not have been intended.'[1015]

Although the court held that the practitioner's claim could not be interpreted to mean 'super preference' over all other claims in liquidation, it was still important to comment on the problems raised by s 135(4), which suggested that other claims, whether secured or unsecured, would follow. It was not clear why the legislature opted for such ranking where a company was in business rescue. Business rescue and liquidation proceedings are different and there is no indication as to why the business rescue proceedings take priority over liquidation proceedings when it comes to the ranking of creditors. From the provision in s 135(4), it is clear that liquidation proceedings are undermined by business rescue proceedings. In other words, such ranking in business rescue outweighs the ranking of creditors in liquidation.

This ruling has a major effect on secured creditors. Thus, it is submitted that the ranking of creditors, while the company is under business rescue, should be treated differently from the ranking when the company is in liquidation. If the practitioner fails to rescue the business of the company and it opts for liquidation, unpaid claims of the practitioner and employees must

[1013] Para 47.
[1014] *Diener NO v Minister of Justice and Correctional Services* (CCT03/18) [2018] ZACC 48 (CC) (29 November 2018) 49.
[1015] Para 64.

be considered as unsecured preferent claims. This means that in liquidation, secured creditors will rank higher. This is different from claims in business rescue when the company is still a going concern. Thus, creditors' claims when the company is still under business rescue should be treated differently from those in liquidation proceedings, as in the former instance there is still a chance of the company being rescued and creditors may be ranked in accordance with the order of preference set out in business rescue.

5.5. Conclusion

Business rescue has major effects on employees and creditors. The discussion above demonstrates that the role played by both employees and creditors in commencing rescue proceedings is important. They may object to the commencement of rescue proceedings at meetings for the adoption and implementation of a business rescue plan. While the Act has made positive developments for employees and creditors in the development of a business rescue plan, the effects that rescue proceedings have on employees and creditors demand further attention and amendment to the Act. Some of its provisions are unclear, other provisions are at odds with the existing law, and some sections need attention so that they do not contradict other provisions in the Act.

Some of the new principles and processes as they affect creditors and employees have had a positive effect; and some negative. The commencement provisions of business rescue are a major improvement from judicial management. Employees' and creditors' participation at meetings to consider, adopt and implement a business rescue plan is the most important part of their role. They can express their views either in favour of or against the business rescue plan. Creditors have an opportunity to prove their claims, although judicial management provisions should have been consulted to provide a clear direction on how claims should be proved.

The introduction of post-commencement finance is another positive development, but the consequences thereof create some doubts on the effectiveness of post-commencement finance. The ambiguity of s 135 on the ranking of claims in post-commencement finance is the reason why it may not be as effective as it is intended to be. The Act should undoubtedly be amended to provide proper guidelines on the ranking of creditors, taking guidance from judicial management (as the judicial management order did not create any *concursus creditorum*).[1016]

[1016] *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) 348; *Goode, Durrant & Murray (SA) Ltd v Glen & Wright* 1961 (4) SA 617 (C) 622.

Creditors could be paid in order from the oldest to the newest.[1017] Those whose claims arose before the judicial management order could convene a special meeting and agree on an order of preference.[1018] Such an order remained effective even when the winding up of a company superseded judicial management.[1019] Meskin also submitted that the pre-judicial management creditors retain their status unless such creditors agree on a subordinated[1020] preference. In this regard, some judicial management provisions are relevant and should have been consulted.

[1017] *Transkei Development Corporation Ltd v Oshkosh Africa (Pty) Ltd* 1986 (1) SA 150 (C) 155.
[1018] Section 435(1). See also HS Cilliers & ML Benade *Corporate Law* 5 ed (2000) 489.
[1019] Section 435(1)(*b*).
[1020] Meskin *et al Henochsberg* 4 ed supra note 683 at 759.

CHAPTER SIX

CONCLUSION

6.1. Introduction

Throughout this thesis, there has been a considerable discussion and analysis of the evolution of "corporate rescue" mechanism in South Africa. This has been done through a thorough review of the history and introduction of a rescue procedure aimed at ailing companies in South Africa. The research showed that South Africa was one of the first countries to introduce judicial management to assist companies experiencing financial difficulties with a view to enabling them to regain viability.

However, the South African judicial management process experienced difficulties after its introduction; the thesis dealt chronologically with the developments and setbacks that led to the need to reform judicial management as a rescue mechanism. Judicial management was introduced as a 'corporate rescue' mechanism under the Companies Act 46 of 1926 ('the 1926 Act'). Parliament then debated the need for a distinct statute to regulate rescue culture, as the existing legislation was sketchy and not well thought through. The need for amendments to the 1926 Act was discussed, and the history of these amendments was examined, leading to the Companies Act 61 of 1973 ('the 1973 Act') as the latest statute to regulate the judicial management regime and its policies.

Despite many attempts at reform, judicial management remained problematic and unpopular even after the introduction of the 1973 Act. As result, a new rescue mechanism was introduced − the business rescue regime. As with judicial management, this study dealt with the history of how business rescue regime came about as the procedure aimed at rescuing ailing companies. Although the legislation governing the current business rescue mechanism came into force in 2011, the task of reforming judicial management into business rescue began in 2004. From 2004 to 2009 – when the Business Rescue Bill was introduced to Parliament – several reviews of policy papers were undertaken, leading to the Bill that was introduced to Parliament. In 2009 the Bill became law (the Act) and the legislation came into force in 2011. This legislation introduced a number of policies that have had a major impact on the South African legal rescue culture. The Companies Act 71 of 2008 ('the Act') has included a new procedure for commencement procedure business rescue; the requirements for triggering the commencement of rescue proceedings; the consequences of rescue proceedings; and the effects of business rescue proceedings on affected persons, particularly employees and creditors.

The thesis has therefore covered the evolution of a statutory business rescue statutory regime in South Africa between 1926 and 2021. This concluding chapter comments on how business rescue has been successful in its operation, and, where necessary, recommendations are made on improving its weaknesses.

6.2. Success of Business Rescue

What constitutes a successful business rescue is fiercely debated among academics and practitioners.[1021] For the purposes of this thesis, the success of business rescue does not only refer to the number of cases that have successfully completed business rescue. Success includes developments made by business rescue in eliminating the difficulties that emanated from judicial management. Therefore, this thesis not only cites statistics but also analyses how business rescue has eliminated judicial management shortcomings.

6.2.1. Statistics

From May 2011 to October 2020 approximately 3 818 entities commenced business rescue proceedings.[1022] More detailed statistics reflecting the status of business rescue proceedings are taken from the CIPC Report – as at October 2020 – and set out below:

According to the report, there have 446 liquidation proceedings resulting in court orders in that period. **Table 1** shows that there has been a decrease in the number of liquidation proceedings since the introduction of business rescue. In the 2011-2012 financial year, 58 entities went to liquidation while in the 2020-2021 financial year only two entities went to liquidation. However, in the early days of business rescue, the number of liquidation proceedings actually increased, and it was only in the 2016-2017 financial year that their numbers started to decrease. For example, **Table 1** shows that from the 2011-2012 financial year to the 2012-2013 financial year, the number increased by 5 to 63. From the 2012-2013 to 2013-2014 financial year the number increased by 7 from 63 to 70. The highest number of liquidations was experienced in the 2014-2015 and 2015-2016 financial years as the number stood at 73. A dramatic change was experienced in the 2016-2017 financial year where the number of liquidations decreased by 25 from 73 to 48. Since then the number has continued to decrease. The decrease may be ascribed to the attraction of business rescue. Section 128(1)(iii) of the

[1021] E Levenstein An Appraisal of the New South African Business Rescue Procedure (*Unpublished LLD Thesis*, University of Pretoria, 2016) 614. S Conradie & C Lamprecht 'Business rescue: How can its success be evaluated at company level (2015) 19(3) Southern African Business Review 1 at 6.

[1022] CIPC 'Business Rescue Proceedings Status Report – as at 31 October 2020' [2020]. Available at *http://www.cipc.co.za/files/3616/0490/5024/Status_of_Business_Rescue_Proceedings_in_South_Africa_-_as_at_31_October_2020_v1.0.pdf* (Accessed: 10 December 2020).

Act specifically provides that business rescue means proceedings to 'facilitate the rehabilitation of a company that is financially distressed' by providing for the 'development and implementation, if approved, of a plan to rescue the company by 'restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

The possibility of creditors and shareholders receiving a better return than would result from immediate liquidation is a major influence in institutions opting for business rescue rather than immediate liquidation. If it enables creditors and shareholders to get a better return, there is really no need to liquidate a company. Conradie and Lamprecht argue that

> 'the goal of the legislation, and what can be considered a successful rescue in terms of the legislation, can be seen from the above, namely that a rescue will be considered successful if the company will return to continue in existence (i.e. a going concern), or if the realisation of assets under business rescue will result in a better return for the company's creditors and shareholders than under immediate liquidation.'[1023]

This is different from judicial management where no provision provided for a better return for creditors than on the immediate liquidation of a company. There are a number of reasons that led to the liquidation applications and court orders. **Table 6** shows that out of the 446 liquidations, seven were by dissolution, 270 were final liquidations, 136 were provisional liquidations, 15 were voluntary insolvent liquidations, 17 were voluntary solvent liquidations and one was a voluntary liquidation.

The CIPC report shows that since the introduction of the business rescue regime, 297 business rescue proceedings have been nullified. This means that 7.8% of all commenced business rescue proceedings have become annulled. However, looking at **Table 1** it is clear that there has been a decrease in the number of nullified proceedings when one compares the earliest and latest years of business rescue proceedings. In the 2011-2012 financial year the total number of nullities was 111 whereas in the 2020-2021 financial year not a single nullity has been reported. The number of 111 nullities is the highest number recorded since the introduction of the business rescue regime in South Africa. There are several reasons for business rescue proceedings being nullified.

[1023] Conradie and Lamprecht supra note 1021 at 6 '.

- Failure to appoint a business rescue practitioner has been the biggest contributor to the nullification of business rescue proceedings. Of the 297 nullities, 143 have been the result of no business rescue practitioner being appointed. This accounts for at least 48% of the nullities filed. Although the CIPC report does not specifically state reasons for failure to appoint a business rescue practitioner – reasons probably include the inability to meet the deadlines for such an appointment. The Act provides for strict time limits for the various steps that are required to be taken during business rescue proceedings. For example, if business rescue is commenced by a resolution, s 129(3)(*b*) provides that 'within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission on application by the company, may allow, the company must appoint a business rescue practitioner who satisfies the requirements of s 138, and who has consented in writing to accept the appointment'. If the time limits are not adhered to, the financially distressed company may forfeit its business rescue benefits.

- Failure to ratify the nomination of the practitioner. In terms of s 131(5), if the court makes an order placing the company under business rescue, the court may make a further order appointing an interim practitioner nominated by the affected person who applied for the order of business rescue; subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors. Failure of ratification may result in the annulment of business rescue proceedings.

- Furthermore, sections 129(3)(*b*) and 131(5) mention that the practitioner has to satisfy the s 138 requirements. According to **Table 7** of the report, approximately 24 nullities were a result of the business rescue practitioner failing to meet the requirements. A business rescue practitioner plays a major role in the restructuring and turning around of a business; amongst other powers and duties, section 140 gives the practitioner full management control of the company in substitution for its board and pre-existing management. Therefore, the capacity of the practitioner needs to be seriously considered when appointing him.

- Of the 297 nullities, 99 had no specific reasons; 23 were by notice; 5 preceded liquidation; 2 were because directors did not have authority to pass a resolution; and 1 was because of the lapsing of a resolution. However, in interpreting the table, it is clear that the vicissitudes of business rescue have become familiar to those interested in

commencing the proceedings, illustrated by the fact that in the 2020-2021 financial year only 9 rescues ceased for unspecified reasons.

- Furthermore, the report shows that 28 business rescue proceedings have been set aside since the introduction of the business rescue regime. While the report does not give any reasons for setting aside the proceedings, they may be because the proceedings have been set aside by the courts[1024] and the courts may not have reported back to the CIPC. However, one may assume that proceedings are set aside because

    1. Such proceedings are being abused;
    2. There is no reasonable basis for believing that the company is financially distressed;
    3. There is no reasonable prospect for rescuing the company;
    4. The company has failed to satisfy the procedural requirements set out in s 129;
    5. The court considers that it is otherwise just and equitable to do so.[1025]

The implementation of a business rescue plan plays an important role in restructuring the affairs of the company. **Table 1** shows that since the introduction of business rescue, 675 proceedings have substantially implemented a business rescue plan. Academics and commentators assert that the business rescue plan is the indicator of a successful business rescue.[1026]

Table 1 shows that since the introduction of business rescue, 851 business rescue proceedings have been terminated. Such termination is based on a number of reasons as provided by **Table 4**. The thesis will focus on the main specified reasons for termination.

- A majority of terminated business rescue proceedings have been terminated because the entity is not financially distressed. Of the 851 terminations, 475 have been because the business rescue practitioner has filed for termination for that reason, while two terminations were by court order.[1027]

[1024] See s 132(2)(*a*)(i) which provides that 'business rescue proceedings end when the court sets aside the resolution or order that began those proceedings.'
[1025] See s 130 of the Act.
[1026] See for example Conradie & Lamprecht supra note 1021. See also the discussion of business rescue plan by Levenstein supra note 520 at 576-577 and T Naidoo, A Adnan, N Padia 'Business rescue practices in South Africa: An explorative view' (2018) 11(1) *Journal of Economic and Financial Sciences* 3.
[1027] Section 132(2)(*b*) provides that business rescue proceedings end when the practitioner has filed a notice with the Commission of the termination of business rescue proceedings. Section 141(2)(*b*) provides that 'if, at any time during business rescue proceedings, the practitioner concludes that there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and if the rescue was confirmed by a court order, or initiated by a court application . . .apply to a court for an order terminating the business rescue.

- Of the 851 terminations, 261 were as a result of the business rescue practitioner filing for termination so that the entity could commence liquidation proceedings. One may assume that filing for termination in this regard may be because of the failure of business rescue proceedings or the failure to develop or implement a business rescue plan.
- As many as 29 terminations were either because the business rescue plan was not accepted or was not published. Lamprecht argues that 'the speedy acceptance of a business rescue plan is of the utmost importance.'[1028] A plan is approved if it is supported by the holders of more than 75% of the creditors' voting interests that; and the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests.[1029]

However, as much as business rescue has contributed to the rescue of failing companies, it also has its own problems. Reports by the CIPC illustrate both successes and failures; statistics indicate that despite business rescue being a vast improvement on its predecessor, there is still room for improvement.

6.2.2. Entities Qualifying for Rescue Proceedings

In 2020 alone, approximately 233 business rescue proceedings commenced,[1030] demonstrating the system's popularity and success in comparison with judicial management.[1031] Notably, a diversity of entities commenced business rescue proceedings, including Phumelela Gaming

proceedings; or otherwise, file a notice of termination of the business rescue proceedings.'

[1028] C Lamprecht 'Business rescue replacing judicial management: An assessment of the extent of problems solved' (2008) 22(1) *South African Journal of Accounting Research* 194.

[1029] Section 152 (2). See also *National Union of Metalworkers of SA v VR Laser Services (Pty) Ltd* (19419/19) [2020] ZAGPJHC 47; [2020] 2 All SA 536 (GJ) (10 March 2020) 33.

[1030] Ibid.

[1031] A Loubser 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 (2) *South African Mercantile Law Journal* 153; EP Joubert '"Reasonable Possibility" versus "Reasonable Prospect": Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 555; A Smits 'Corporate administration: A proposed model' (1999) 32 (1) *De Jure* 85.

and Leisure,[1032] Afarak Mogale and Afarak South Africa,[1033] South African Airways,[1034] Edcon,[1035] Comair,[1036] SA Express,[1037] Moyo Restaurant,[1038] Pearl Valley Golf Estate, South Gold Mine, Top TV, Meltz Success, Advanced Technologies & Engineering, and Optimum Coal Mine.[1039] Some have successfully completed business rescue proceedings. For example, 'Pearl Valley Golf Estate (acquired by Standard Bank), Southgold Mine (acquired by Witsgold), Top TV (acquired by a Chinese company Star Sat), Meltz Success (acquired by the Hub), Advanced Technologies & Engineering (Aeronautical) Engineering (acquired by Paramount), Moyo Restaurants (acquired by Fournews), Optimum Coal Mine (acquired by Tegeta) and SA Calcium Carbide (management buy-out)'.[1040]

A number of the mentioned entities are still undergoing business rescue. Therefore, the overall outcome is moot. However, the notion of saving only big companies has been done away with, as several types of entities have commenced rescue proceedings. Judicial management was introduced to be used sparingly and only for big (vital) companies, as demonstrated by the comments by Minister Tielman Roos in the 1926 parliamentary debate and Mr de Beer in evidence to the Van Wyk de Vries Commission of Enquiry.[1041] The commencement of business rescue proceedings by the above entities illustrates that rescue policies are now flexible and

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[1032] T Mochiko 'Phumelela files for business rescue' *Business Day* 8 May 2020, Available at *https://www.businesslive.co.za/bd/companies/2020-05-08-phumelela-files-for-business-rescue/* (Accessed: 20 January 2021).

[1033] K Decena 'Afarak files for business rescue in South Africa over COVID-19 impact' *S&P Global Market Intelligence* 8 May 2020, Available at *https://www.spglobal.com/marketintelligence/en/news-insights/latest-news headlines/afarak-files-for-business-rescue-in-south-africa-over-covid-19-impact-58533534* (Accessed: 20 January 2021).

[1034] M Pretorius 'South African Airways is in business rescue: what it means, and what next' *The Conversation* 5 December 2019, Available at *https://theconversation.com/south-african-airways-is-in-business-rescue-what-it-means-and-what-next-128409* (Accessed: 10 December 2020).

[1035] D Faku 'Edcon to file for business rescue after losing R2bn due to virus' *IOL Business Report* 29 April 2020, Available at *https://www.iol.co.za/business-report/companies/edcon-to-file-for-business-rescue-after-losing-r2bn-due-to-virus-47332090* (Accessed 23 January 2021).

[1036] D Kaminski-Morrow 'South Africa's Comair files for business rescue' *Flight Global* 5 May 2020, Available at *https://www.flightglobal.com/airlines/south-africas-comair-files-for-business-rescue/138231.article* (Accessed: 23 January 2021).

[1037] K Weyers, T Jordaan and S Venter 'SA Express placed in business rescue' *CDH Cliff Dekker Hofmeyr* 6 February 2020, Available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-12-february-sa-express-placed-in-business-rescue.html* (Accessed: 23 January 2021).

[1038] Z Moorad 'Moyo restaurant files for business rescue' *Business Day* 4 October 2013, Available at *https://www.businesslive.co.za/bd/companies/retail-and-consumer/2013-10-04-moyo-restaurant-files-for-business-rescue/* (Accessed 23 January 2021).

[1039] E Levenstein 'Opportunities for investors arising from the South African business rescue process' *Werksmans* 6 May 2020, Available at *https://www.werksmans.com/legal-updates-and-opinions/opportunities-for-investors-arising-from-the-south-african-business-rescue-process/* (Accessed: 26 January 2021).

[1040] Ibid.

[1041] See the discussion in Chapter Three.

wide with regard to the entities that are eligible to commence rescue proceedings. Academic writers had argued that judicial management failed to take into consideration the plight of entities such as trusts, partnerships, and close corporations,[1042] but business rescue has changed this. The CIPC report[1043] has shown that approximately 1125 close corporations have filed for business rescue.[1044]

6.2.3. Purpose of Business Rescue

The tangible or positive outcomes of business rescue depend largely on the interpretation and application of the provisions by the courts. Osode argues that 'the adoption of an interpretive approach that is conservative, largely textual or literal, and purpose-neutral will significantly undermine the prospect of Chapter 6 achieving the public policy goals intended by law and policymakers.'[1045] Such interpretation frustrated the operation of judicial management. Several academics who found fault with judicial management unanimously criticised the conservative judicial approach to the interpretation and application of the provisions of judicial management.[1046] The courts also interpreted the judicial management provisions in a narrower and more literal way, requiring proof that the process would bring total solvency to a financially distressed company.[1047]

However, the new business rescue regime has shifted from a pro-creditor to a pro-debtor approach, reflecting the terms such as 'purpose of business rescue' in s 128(1) of the Act. Commentators and courts have concluded that business rescue proceedings are intended to have both a primary and a secondary objective, namely rehabilitating the company so that it is able to continue to operate on solvent basis, or for the purpose of securing better returns for

[1042] See the discussion in Chapter One.
[1043] Report by CIPC 'Business Rescue Proceedings Status Report – as at 31 October 2020' [2020] Available at *http://www.cipc.co.za/files/3616/0490/5024/Status_of_Business_Rescue_Proceedings_in_South_Africa_-_as_at_31_October_2020_v1.0.pdf* (Accessed:10 December 2020).
[1044] See **Table 2.**
[1045] PC Osode 'Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment' (2015) 4(1) *Penn State Journal of Law & International Affairs* 461.
[1046] DA Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16(2) *South African Mercantile Law Journal* 249; P Kloppers 'Judicial management reform – steps to initiate a business rescue' (2001) 13(3) *South African Mercantile Law Journal* 372; HS Cilliers & ML Benade (ed) *Corporate Law* 3 ed (2000) 481;Henning 'Judicial management & corporate rescue in South Africa' (1992) 17(1) *Tydskrif vir Regswetenskap* 93; PM Meskin et al (eds) *Henochsberg on the Companies Act* 4 ed (1985) 755 (Meskin et al (eds) *Henochsberg*).
[1047] See for example *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E); *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V); *Ben-Tovim v Ben-Tovim* 2000 (3) SA 325 (C); *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T); *Silverman v Doornhoek Mines Ltd* 1935 TPD 349; *Millman v Swartland Huis Meubileerders (Edms) Bpk* 1972 (1) SA 741 (C) 744E.

creditors and shareholders.[1048] This is a wider approach in the interpretation of the purpose of business rescue; a narrow approach would result in business rescue suffering the same fate as judicial management. Limiting the purpose of business rescue to the first goal, restoring it to solvency, would have been viewed with hostility by creditors and shareholders, who both play a major role in the survival of a company.

The dual notions of restoration of solvency and better return for creditors have played a major role in the success of business rescue.[1049] The 2015 report by Deloitte showed that the top indicator for the success of business rescue was where the business continues on a solvent and liquid basis after it has exited business rescue and this is followed closely by a better return for creditors.[1050] Levenstein in his thesis submitted that there were many companies that successfully exited business rescue proceedings using 'better return for creditors' as an objective.[1051] He supported this submission by analysing companies such as Meltz Success, in which dividends of 4 cents in the rand were paid; ATE company paid 10 cents in the rand; and DM 10 cents in the rand.[1052] Even the judiciary has accepted that business rescue can be granted if a better return for creditors than would result than from immediate liquidation.[1053] Business rescue has tackled the shortcoming of judicial management, with the objectives of the rescue of the company as a going concern, and if this is not possible, to obtain a better return for the company's creditors than if the company were liquidated.

6.2.4. Participation in Rescue Proceedings

In the initiation of rescue proceedings (unlike judicial management) employees may apply. Chapter 6 recognises the rights of creditors to be notified of the commencement of business

[1048] E Mbiriri 'Creditors' interests still carry the day in business rescue: *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP)' (2014) 7(1) *International Journal of Private Law* 82. *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2013 (4) SA 539 (SCA).

[1049] See for example a discussion by S Conradie and C Lamprecht 'What are the indicators of a successful business rescue in South Africa? Ask the business rescue practitioners' (2018) 21(1) *South African Journal of Economic and Management Sciences* 1-12.

[1050] Deloitte 'South African Restructuring Outlook Survey Results 2015: Casting light on the industry' Available at *https://www2.deloitte.com/content/dam/Deloitte/za/Documents/finance/ZA_RestructuringOutlookSurveyResults_2015.pdf* (Accessed: 27 January 2021). See also the 2017 report available at *https://www2.deloitte.com/za/en/pages/finance/articles/south-africa-restructuring-survey.html* (Accessed: 27 January 2021.

[1051] Levenstein supra at 609.

[1052] Ibid.

[1053] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 (5) SA 515 (GSJ); *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies & Engineering Company (Pty) Ltd* (13/12406) [2013] ZAGPJHC 109 (10 May 2013); *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2012 (3) SA 273 (GSJ). *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2013 (4) SA 539 (SCA).

rescue and the appointment of a business rescue practitioner;[1054] to be notified of each court proceeding, decision, meeting, or other relevant event concerning the business rescue, and they may participate in any court proceedings arising during the business rescue proceedings,[1055] participate in the development and adoption of a business rescue plan,[1056] and form a creditors' committee.[1057] The employees are afforded similar rights.[1058]

Employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition; or the employees and the company, in accordance with applicable labour laws, agree to different terms and conditions.[1059] Judicial management was silent on its effect on contracts of employment. Therefore, inclusion and protection of employees by Chapter 6 is an advance for business rescue especially because employees play a major role in the success of the process. Although the objectives of business rescue do not include the preservation of jobs, the 2017 report by Deloitte showed that preservation of jobs is an increasing priority in business rescue.[1060] According to the report, preservation of jobs is the second most important objective of restructuring after protecting the business.[1061]

6.2.5. Shift from Creditor-friendly to Debtor-friendly

Prior to the coming into force of the Act in 2011, South Africa's "corporate rescue" mechanism was creditor-friendly, with courts taking a pro-creditor approach. Their interests came first in judicial management. For example, in *Bahnemann v Fritzmore Exploration (Pty) Ltd* the court held that where a company fails to meet its obligations towards a creditor, the only suitable course of action is to liquidate the company, and that judicial management can be considered only if the company produces evidence that the process would enable it to pay all of its creditors in full.[1062] In *De Jager v Karoo KoeldrankeenRoomys (Edms) Bpk*,[32] the court took the view that the court would rarely go against the wishes of creditors who

[1054] Section 129(3).
[1055] Section 145(1).
[1056] Section 145(2).
[1057] Section 145(3)
[1058] See also s 144 in addition to these rights.
[1059] Section 136(1)(*a*).
[1060] Deloitte 'South African Restructuring Outlook Survey 2017: Seeing Through the Fog' Available at *https://www2.deloitte.com/za/en/pages/finance/articles/sa-restructuring-outlook-survey-2017.html* (Accessed: 27 January 2021).
[1061] See **Figure 6** of the report. More specifically, **Figure 12** shows that the success of restructuring is the business continuing on solvent basis followed by better return for creditors and then the preservation of jobs.
[1062] 1963 (2) SA 249 (T).

sought to enforce the immediate payment of their claims.[1063] There was therefore a call for a different approach. For example, Burdette argued that

> 'considering that very few insolvent entities that have already reached the stage where they are so insolvent that they can be liquidated have been saved in the past, it is clear that South Africa should provide for a system of business rescue where the management of the debtor, for example, should seek help long before the entity itself can or should be liquidated (in other words before the entity is hopelessly insolvent)'[1064]

The Act now strives to maintain a balance between affected persons. There is a consensus that business rescue regime has created the profound changes that academics, lawyers, judges, and other professionals have been 'crying for'. Osode states 'beyond the purely economic policy objectives, the 2008 Companies Act was also intended to infuse the regulatory framework of governing companies with the treasured democratic values of equality, non-racialism, and human dignity enshrined in South Africa's post-apartheid Constitution'.[1065] The values mentioned by Osode are found in section 7: section 7(*k*) provides that the purpose of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.' There is now a sense of preserving a balance between all stakeholders involved. In *Absa Bank Limited v Caine NO, In Re; Absa Bank Limited v Caine NO*[1066] Daffue J held:

> 'I am a proponent of supervision and business rescue proceedings and am a firm believer that, if the spirit and purpose of the Act is given effect to, success will be achieved and the proceedings will not become redundant as was the case with judicial management under the 1973 Companies Act. If a purposive approach to interpretation of the Act is undertaken as one should do, there can be little doubt that companies, being vehicles to obtain economic and social well-being, should rather be rescued if at all possible, than "killed" in a winding-up process. However, all stakeholders will have to participate bona fide all the time and within the prescripts of the law.'[1067]

In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd (Advantage Project Manager (Pty) Ltd Intervening)* the court held that where liquidation can be avoided, business rescue [processes] can be exhausted since its objective is to rescue a company.[1068] Rugumamu argued

[1063] 1956 (3) SA 594 (C).
[1064] Burdette op cit note 1046 above at 262.
[1065] PC Osode 'Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment' (2015) 4 (1) *Penn State Journal of Law & International Affairs* 460.
[1066] (3813/2013, 3915/2013) [2014] ZAFSHC 46 (2 April 2014).
[1067] Para 47.
[1068] 2011 (5) SA 600 (WCC) 603 E-F.

that 'corporate rescue regimes that are debtor-oriented stand a better chance of reviving an ailing company than those that are creditor oriented and which consequently resort to liquidation more readily'.[1069] It is therefore submitted that the Act is progressive and consistent with the post-apartheid constitutional era.[1070]

There are several reasons that one may advance to support the view that South African business rescue has shifted from a pro-creditor to a pro-debtor approach, for example, as set out below.

6.2.5.1. Out of Court Commencement

The out-of-court commencement has introduced two positive outcomes to business rescue. First, directors may pass a resolution commencing business rescue, meaning that the directors have the power to resolve that the company commences business rescue if the board has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company.[1071] This underlines the fact that the debtor company may commence rescue proceedings without the need for creditor intervention.[1072] Secondly, the Act has negated the reliance on court proceedings. While judicial management heavily relied on court proceedings for its commencement, business rescue[1073] has done away with court proceedings as the only way to commence rescue proceedings. This saves both money and time desperately needed by a financially distressed company.[1074] The thesis further argues that the out-of-court procedure allows small- and medium-sized entities to file business rescue if they find themselves under financial constraints.[1075] This is another basis on which it is submitted that business rescue has shifted from a pro-creditor to a pro-debtor approach.

6.2.5.2. Less Stringent Test to Commence Rescue Proceedings

The thesis showed that the test for the commencement of judicial management was stringent.[1076] The inclusion of the phrase 'reasonable probability' for repayment of debts and

[1069] V Rugumamu 'Creditors' Rights in Business Rescue Proceedings in Terms of South Africa's Companies Act 71 of 2008.' (Unpublished thesis, University of KwaZulu-Natal, 2017) 118.
[1070] In *Koen and Another v Wedgewood Village Golf and Country Estate Ltd* 2012 (2) SA 378 (WCC) 14 the court held that '[i]t is clear that the Legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations . . . '
[1071] See s 129(1).
[1072] Of course, creditors may be involved/participate once rescue proceedings have commenced.
[1073] See Chapter Two and Chapter Three.
[1074] Ibid.
[1075] Ibid.
[1076] See Chapter Three.

meeting obligations proved to be too cumbersome for entities intending to commence judicial management. This thesis showed that the standard set by this phrase persuaded most companies in financial difficulties not to apply for judicial management, undermining the purpose of this regime.[1077]

However, the provisions of Chapter 6 came with the phrase 'reasonable prospect', a policy change welcomed by the courts as meaning less than 'reasonable probability'. In a shift from pro-creditor to pro-debtor, the courts are willing to grant business rescue where there is a 'reasonable prospect' of rescuing the company. This is not as onerous as in 'reasonable probability' as it was under judicial management. However, the applicant may not make vague claims to support the prospects of the company being rescued[1078] in the hope that the court will afford relief. The grounds must be based on fact.[1079]

6.2.5.3. The *Moratorium*

In both judicial management and business rescue the *moratorium* has been intended to give a financially distressed company some breathing space. As another example of the rescue process being debtor-friendly the *moratorium* is automatic under business rescue, whereas it required a court order under judicial management.[1080] The automatic *moratorium*, immediately when the company is placed under business rescue, strengthens the pro-debtor approach. The company is protected by the *moratorium*, the notion of which has international currency.[1081] While business rescue aligns itself with the international insolvency regime, it does so in a manner that emphasises a pro-debtor approach in South Africa.

Support for the notion of a *moratorium* has been evidenced even when the company is in final liquidation. This thesis demonstrated that the judiciary has now accepted that liquidation proceedings may be suspended even if a final liquidation order had been granted. In *Richter v Absa Bank Limited*[1082] Dambuza AJA (with Mhlantla, Leach, Pillay JJA and Fourie AJA concurring) held:

[1077] Ibid.

[1078] *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB) 11.

[1079] Ibid. See also *Essa v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC) 41; *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* (9831/2011, 7811/2012) [2012] ZAWCHC 163; [2012] 4 All SA 590 (WCC) (28 August 2012) 47.

[1080] See Chapter Four.

[1081] See for example Part Two of the UNCITRAL Guide Available at *https://uncitral.un.org/ sites/ uncitral.un.org/ files/media-documents/uncitral/en/05-80722_ebook.pdf* (Accessed: 28 January 2021).

[1082] [2015] ZASCA 100; 2015 (5) SA 57 (SCA) (1 June 2015).

> 'There is no sensible justification for drawing the proverbial "line in the sand" between pre and post final liquidation in circumstances where the prospects of success of business rescue exist. It takes little to imagine instances developing, after the issue of the final order that could lead to the circumstances of a company improving radically, such that it would become profitable if allowed to trade. It could be awarded a contract for which it had earlier tendered or secure funding for future projects; a major creditor might indicate a willingness to subordinate its claim. Accordingly, in the scheme of things, where, during liquidation, evidence becomes available that business rescue proceedings will yield a better return for shareholders and creditors and jobs will be retained, there could be no reason to deny business rescue only because a company is in final liquidation. Indeed, to allow it to do so would fall into the very scheme of business rescue envisaged by the Act and fulfil the objectives of providing for revival of a financially distressed company with all its attendant social benefits.'

The suspension of liquidation proceedings reflects another pro-debtor approach although in this case the court did emphasise 'better return for creditors' (not return to solvency) as the factor to be considered.

6.2.6. Business Rescue Practitioner

This thesis showed that business rescue practitioners play an important role in the success of rescue proceedings. For example, they determine what can be perceived as the 'best future position' for a financially distressed business.[1083] The statistics of CIPC (mentioned above) show that failure to appoint a business rescue practitioner has been the biggest contributor to the nullifying business rescue proceedings. Of the 297 nullities, 143 had been the result of no business rescue practitioner being appointed.[1084] In comparing business rescue to judicial management the research found that certain positive developments have been introduced in the Act. The research found that judicial management did not have a specific provision dealing with the appointment of judicial managers, and as a result, liquidators were being appointed as judicial managers. This prejudiced judicial management since liquidators have a different role

[1083] Section 150 provides that the practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption. The plan determines the future of business rescue since s 128 (1)(iii) provides that business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

[1084] Report by CIPC 'Business Rescue Proceedings Status Report – as at 31 October 2020' [2020] Available at *http://www.cipc.co.za/files/3616/0490/5024/Status_of_Business_Rescue_Proceedings_in_South_Africa_-_as_at_31_October_2020_v1.0.pdf* (Accessed:10 December 2020).

and function to that of judicial managers.[1085] This state of affairs changed significantly with the appointment of business rescue practitioners under business rescue.

This thesis argued that liquidators – when appointed as judicial managers –did not put much effort into rescuing a financially distressed company since they knew they would be appointed as liquidators when judicial management failed. The Act dedicates a distinct provision outlining the steps and considerations that that must be followed in appointing a business rescue practitioner. In terms of s 140(4) if the business rescue process concludes with an order placing the company in liquidation, any person who has acted as a practitioner during the business rescue process may not be appointed as liquidator of the company. This shows the extent to which business rescue has been positioned for success in providing a lifeline for ailing companies.

6.2.7. Inclusion of a Business Rescue Plan

The literature suggests that the implementation of a business rescue plan plays an important role in restructuring the affairs of the company − one of the indicators of a successful business rescue.[1086] This thesis found that judicial management did not have a provision dealing with the development of a rescue plan, and that this contributed to the failure of companies that embarked on judicial management. The requirement of a business rescue plan under business rescue is another significant departure from judicial management. Business rescue has gradually become more and more successful thanks to the implementation of a business rescue plan. Naidoo et al submitted that from 2011 the success rate increased from 0% to 12% in the period from 2011 to 2014; a 1.6.% increase to 13.6% as at June 2015; and up to 15% as at June 2016.[1087] As at October 2020, 675 of the 3 818 cases have substantially implemented a business rescue plan − approximately 18% of substantially implemented business rescue plans. However, this 18% represents *substantially* implemented plans out of the totality of all commenced rescue plans (author's emphasis). This does not reflect the rate of successful proceedings.

Furthermore, the success of a business rescue plan does not depend only on a good plan; compliance with the provisions of Chapter 6 is also important. The CIPC report shows that as

[1085] See the discussion in Chapter One.
[1086] See for example Conradie & Lamprecht supra note 1021 at 10. See also the discussion of business rescue plan by E Levenstein supra note 524 at 576-577; T Naidoo, A Adnan & N Padia 'Business rescue practices in South Africa: An explorative view' (2018) 11 (1) *Journal of Economic and Financial Sciences* 3.
[1087] Ibid.

at October 2020, 29 of the 851 terminations of business rescue were because either the plan was rejected or not published,[1088] illustrating how the approval and adoption of a business rescue plan plays an important role in the success of business rescue. In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[1089] Brand JA held:

> 'If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings.'[1090]

It is therefore submitted that, while a business rescue plan should be developed, its implementation plays an important role. If the plan is not accepted and implemented, it may lead to the demise of business rescue proceedings, simply because only an approved and adopted business rescue plan is binding on the company, each creditor and every holder of the company's securities.[1091] Loubser[1092] argues that 'it is not the approval, but the implementation of the approved plan that is contingent on fulfilment of the conditions.'

6.2.8. Filing for Liquidation

Since the coming into force of business rescue, there has been a decrease in the number of cases of liquidation. Relying on the CIPC report, this thesis showed from the latest statistics that in the 2020-2021 financial year, only two entities filed for liquidation. Although there was no single system that collated statistics of judicial management, there is no evidence showing that there was a time when only two companies filed for liquidation. According to the statistics compiled by Olver[1093] after studying both the reports of the Millin Commission of Enquiry and the *Van Wyk De Vries* Commission of Enquiry, 807 of the 1 280 of the files researched went

[1088] Report by CIPC 'Business Rescue Proceedings Status Report – as at 31 October 2020' [2020] Available at *http://www.cipc.co.za/files/3616/0490/5024/Status_of_Business_Rescue_Proceedings_in_South_Africa_-_as_at_31_October_2020_v1.0.pdf* (Accessed:10 December 2020).
[1089] 2013 (4) SA 539 (SCA).
[1090] Para 38.
[1091] Section 152(4).
[1092] Loubser 'Some Comparative Aspects of Corporate Rescue in South African Company Law' (*Unpublished LLD thesis*, University of South Africa, 2010) 130.
[1093] AH Olver 'Judicial management in South Africa: Its Origin, Development and Present Day Practice and a Comparison with the Australian System of Official Management' (*Unpublished LLD thesis*, University of Cape Town, 1980) 286.

to liquidation. However, the CIPC report showed that as at October 2020 approximately 446 of the 3 818 entities that commenced business rescue proceedings filed for liquidation proceedings without the proceedings being terminated or a business rescue plan being substantially implemented. This is 11% of the total number of filed business rescue proceedings.

6.3. Weaknesses of Business Rescue and Recommendations

Since the introduction of business rescue – and as at October 2020 – approximately 1 521 of the 3 818 cases were reported as being active. This means that business rescue proceedings may either end successfully or unsuccessfully. The above discussion has shown factors and reasons for the success of business rescue. Set out below is the analysis of the weaknesses of business rescue and recommendations arising therefrom. Perhaps some of the active files and the ones to follow may benefit from both the discussion of the success and weakness of business rescue.

6.3.1. Legislative Awareness

Education and understanding of business rescue legislation play a role in the extent to which business rescue succeeds. It cannot be ignored that of the 3 818 business rescue proceedings that commenced, 297 were nullified.[1094] One of the reasons for this was the failure to appoint a business rescue practitioner, causing the resolution to lapse.[1095] Another reason may be the lack of knowledge of the legislation and its operation. The Act has strict provisions providing for deadlines once the entity has commenced business rescue. Therefore, a lack of knowledge and interpretation of the provisions would negatively affect the success of business rescue. It is recommended that to avoid this state of affairs, more tertiary institutions, in conjunction with the CIPC, should establish a curriculum aimed at creating sound awareness of business rescue proceedings. The curriculum may be presented at events such as conferences, workshops or any continuous development programmes to raise the understanding of business rescue awareness. Tertiary institutions can create qualifications that focus on turnaround management programmes.[1096] These courses (diplomas and certificates) may require the 'student' to have a qualification in fields such as law, accounting, human resources, management or any other

[1094] Report by CIPC 'Business Rescue Proceedings Status Report – as at 31 October 2020' [2020] Available at *http://www.cipc.co.za/files/3616/0490/5024/Status_of_Business_Rescue_Proceedings_in_South_Africa_-_as_at_31_October_2020_v1.0.pdf* (Accessed:10 December 2020).

[1095] See **Table 7**.

[1096] R Rajaram 'Success Factors for Business Rescue in South Africa' (Unpublished PhD thesis, University of KwaZulu- Natal, 2016) 172.

relevant field, failing which a minimum number of years at management level in a company. This would drive awareness of the procedure and stimulate ideas on how entities may be rescued. As argued by Rajaram 'the improved understanding [of the legislation] will result in an increased and more effective utilisation of business rescue legislation to rehabilitate financially distressed business.'[1097]

6.3.2. Timelines

6.3.2.1. Commencing Rescue Proceedings and Compliance with Section 129(7)

It was noted above that the board of directors' resolution route into business rescue has played a role in shifting South Africa's rescue regime from being pro-creditor to pro-debtor. However, a weakness in this regard is the lack of any pre-resolution procedural rules. Levenstein[1098] argues that such a procedure is essential to assist directors in making their sworn statements for adopting a resolution. It is recommended that this should be provided for in the Act. Accountants and lawyers might assist in providing accurate information for writing a sworn statement. The board should consult with other experts in order to make an informed decision.

Furthermore, the Act requires the directors to provide reasons for not adopting a resolution where the board has reasonable grounds to believe that the company is financially distressed.[1099] However, it offers no guidelines on how this must be done and the way forward once the board has provided reasons for not adopting a resolution to commence business rescue proceedings. It is therefore recommended that an independent regulatory body is formed. Such regulatory body may then ensure that there is compliance with section 129(7).[1100] When there has been compliance with section 129(7), the same regulatory body may recommend the way forward.

6.3.2.2. Business Rescue Practitioner and the Plan

Levenstein is his thesis[1101] took a closer look at the timelines for developing and implementing a business rescue plan, arguing that the 25-day period was too short and resulted in business rescue practitioners having to extend the time period to consider the company's financial position and whether there is a reasonable prospect of rescuing the company.[1102] It is submitted that while this is true, perhaps the need to extend time may be avoided by having more than

[1097] Ibid at 168-169.
[1098] Levenstein supra 524 at 623.
[1099] Section 129(7).
[1100] Rajaram supra note 1096 at 169. '
[1101] Levenstein supra note 524.
[1102] Ibid at 594.

one business rescue practitioner appointed, according to the size of the company and its assets. A small-sized company may need more than one business rescue practitioner while a big company may need more than one practitioner. This option should not be forced on entities commencing business rescue, but there must be awareness of such an option.

Levenstein also warns that the business rescue practitioner should not take on too many appointments since because this could result in time-pressure inimical to successful business rescue.[1103] This warning by Levenstein is commended. In addition, the practitioners must be required to disclose their appointments schedule to the entity seeking his/her appointment, enabling the entity to decide whether or not to appoint him/her. Levenstein argues that taking on too many appointments by a business rescue practitioner may result in liquidation of companies.[1104]

Furthermore, extension of deadlines adds to the already high costs of a business rescue practitioner. The extensions of time lead to an escalation of costs. As shown in the thesis, the scale of payment of a practitioner is per hour and per day.[1105] Therefore, an extension caused by the practitioner being over-booked could amount to profiteering by that practitioner. It is submitted therefore that an entity commencing business rescue should be aware of the practitioner's appointments in the early stages rather than suffering consequences at a later stage.

6.3.2.3. Early Warnings

Academics and commentators have always argued that detecting early warning signs is important for the demise or survival of the business.[1106] It is submitted that the definition of 'financially distressed' may assist in indicating problems. A company will be financially distressed if, at any particular time, it appears to be reasonably unlikely that it will be able to pay all of its debts as they become due and payable within the immediate ensuing six months; or it appears to be reasonably likely that it will become insolvent within the ensuing six months (Section 128(1)(*f*))[1107] The time set is a helpful step in the new business rescue procedure − absent in judicial management. It has been recommended that the six-month period should be extended to 12 months;[1108] while 12 months is indeed a reasonable period, the six months

[1103] Ibid at 595.
[1104] Ibid.
[1105] See the discussion Chapter Four.
[1106] M Pretorius & G Holtzhauzen 'Business rescue decision making through verifier determinants - Ask the specialists' (2013) 16(4) *South African Journal of Economic and Management Sciences* 470-471.
[1107] Section 128(1)(*f*).
[1108] Loubser supra note 492 at 337-338.

period should also remain. South Africa is home to small-, medium-, and large-sized companies, and it may be easier for a small-sized company to determine its financial situation within six months, but difficult for a big company. While the 12-month period might suit a large company to determine its financial situation, it might not assist a small-sized company. Requiring a small-sized company to resolve its financial stress over a 12 months period may be a bridge too far for it to be rehabilitated. It is therefore recommended that the time period should cater for different kinds of companies and that the Act should provide for a six months period for small companies, nine months for medium-sized companies, and 12 months for big companies. In this regard, section 128(1)(*f*) should read as follows:

'(f) Financially distressed, in reference to a particular company at any particular time, means that –

(i) it appears to be unreasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months ***for a small-sized company, nine months for a medium-sized company, and twelve months for a big company*****;** or

(ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months ***for a small-sized company, nine months for a medium-sized company, and twelve months for a big company*****.**

There are other factors that indicate early signs of failure of a business. These include 'diminishing resources, poor leadership, strategic issues, operational issues and combinations thereof.'[1109] It is submitted that all these factors constitute inadequate managerial skills, which create problems, especially in managing small businesses.[1110] Academics argue that in the early stages of business rescue there is a danger that the practitioner may fail to consider the complexity of business rescue and the nature and effect of inadequate management.[1111] It is therefore recommended that when the business rescue practitioner immediately assesses the managerial skills of those running the company. Since the Act requires the directors to deliver to the practitioner all books and records that relate to the affairs of the company in that

[1109] Pretorius & Holtzhauzen op cit note 1106 above.
[1110] S Radirepe & L van Scheers 'Investigating whether a lack of marketing and managerial skills is the main of business failure in South Africa' (2005) 8(4) *South African Journal of Economic and Management Sciences* 403.
[1111] Pretorius & Holtzhauzen op cit note 1106 above.

directors' possession,[1112] the practitioner may then and there discern who amongst the managers lacks managerial skills.

6.3.2.4. Duration of the Application of the Moratorium

The length of time that the moratorium should apply was a problem even before the coming into force of the business rescue regime.[1113] It remains a problem. Although the moratorium is not absolute, this thesis showed a number of cases in which a timeline would have been helpful for the moratorium. Property owners, especially, would benefit from knowing how long the moratorium would last in respect of their properties.[1114] The thesis supported the idea that the moratorium must be capped and the court should limit the time period in which the company is allowed to use the property. However, instead of giving a specific time period for capping the moratorium, it is recommended that the time period be determined by the court in the given circumstances.

6.3.3. Involvement of Judiciary

The role and intervention of courts internationally vary from jurisdiction to jurisdiction.[1115] In South Africa, perhaps because the business rescue regime has shifted to a pro-debtor approach, courts' intervention has played an important role in business rescue, particularly. in the field of balancing the rights of all relevant stakeholders. Levenstein argues that 'balancing the competing interests of disgruntled creditors against that of a debtor who wants a fresh start, has moved South Africa into a different rescue mindset which is in line with international principles.'[1116] In the United States for example there is also a high degree of court supervision since their rescue system also allows for a pro-debtor approach.[1117]

The attractiveness of Since South African business rescue to distressed entities has resulted in attempts to abuse the process, to which the courts have not taken kindly.[1118] Such abuse may

[1112] See s 142(1). See also s 137(3) which provides that 'during a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required'.
[1113] See for example DA Burdette op cit note 1046 above.
[1114] See the discussion in Chapter 4.
[1115] A Smits 'Corporate administration: A proposed model' (1999) 32 (1) *De Jure* 90. Levenstein supra note 838 at 567.
[1116] Levenstein supra note 524 at 569.
[1117] Smits op cit note 1115. See also M Maphiri 'The suitability of South Africa's business rescue procedure in the reorganization of small-to-medium-sized enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code' (2018) 8 (1) *Michigan Business & Entrepreneurial Law Review* 101 at 123.
[1118] See for example *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (KYALAMI) (Pty) Ltd* 2013 (4) SA 539 (SCA); *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 (5) SA 422 (GNP); *Gormley v West City Precinct Properties (Pty) Ltd; Anglo Irish Corporation Ltd v West City Precinct Properties (Pty) Ltd* [19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012).

be prevented by the intervention of the courts and recourse to certain remedies provided in the Act; seeking such relief by way of court application is always available to any stakeholder.[1119] In interpreting the Act the judges may look beyond the literal meaning of words and phrases and take account of the broad objectives of business rescue whilst giving effect to the legal rights of all relevant stakeholders.

However, obtaining relief by way of court application is time-consuming and costly, and so there should be another way of obtaining out-of-court relief. There is however peril in making it too easy to reverse a board's resolution, as this may undermine the success of the business rescue proceedings. However, seeking courts' intervention is not attractive to affected persons who may not have the time and money to make an application in court. It is therefore recommended that the same independent regulatory body that was recommended above may oversee and ensure that a resolution commencing business rescue is properly tested should affected persons oppose it. Furthermore, the regulatory body may be required to improve awareness of business rescue legislation by ensuring that the management understands and complies with the letter and the law of business rescue.

Furthermore, there has been an increase in litigation by those opposing a board resolution. Although there are no official statistics on the number of judgments on this aspect of business rescue, it is submitted that the number is high; in 2016 Levenstein argued that there were at least 100 decisions handed down although he did not deal with all of them.[1120] This thesis has cited approximately 95 judgments handed down on business rescue, including ones delivered after Levenstein's thesis. It is therefore submitted there is a need for specialised courts to increase capacity to deal with business rescue proceedings, calling for the formation of special courts. Many of these cases are brought on an urgent basis, reinforcing the need for cases to be dealt with expeditiously by specialised courts even if it constitutes a wing of the high court dedicated to business rescue cases.

6.3.4. Involvement of the CIPC

Levenstein, citing the report by Pretorius,[1121] submitted that it was clear that the CIPC does not fulfil its role as expected, creating the need for an 'Expert Advisory Committee to the CIPC'

[1119] See for example s 130 where the commencement of proceedings is by way of board resolution or s 131 if the commencement of proceedings is by court application.

[1120] Levenstein supra note 524 at 590.

[1121] M Pretorius 'Business rescue status quo report final report' (2015) Available at *https://static.pmg.org.za/151110Business_Rescue.pdf* (Accessed: 31 January 2021). The weaknesses of CIPC in included lack of timeous response in responding to the queries posed by interested parties; lack of resources to

that would assist the CIPC in fulfilling its role.[1122] The author of this thesis has researched the issue and found that such a committee has not been established to deal with the problems identified above. It is submitted that this committee should be formed to improve the effectiveness of the CIPC.

6.3.5. Business Rescue Practitioner

The importance of a competent business rescue practitioner has been emphasised, even before the coming into force of the business rescue regime. For example, Bradstreet argued that 'the appointment of "loose cannon" practitioners, particularly in the initial rescues effected under the Companies Act 2008, would create a risk of fostering an impression of volatility in the Chapter procedure and lead to creditors being unwilling to contribute finance needed to develop the company.'[1123] Since then it has been widely emphasised that 'the business rescue practitioner is the central figure in galvanising the resuscitation of the company in the difficult financial situation',[1124] and is expected to act with integrity and professionally.[1125] If a practitioner lacks necessary expertise and skills, this may result in the failure of business rescue proceedings.

The important role of the practitioner has resulted in attention being paid to how he/she is appointed. It has been argued that the practitioners do not meet the high standards expected and required,[1126] leading to a call for an accrediting body to conduct an accreditation process for business rescue practitioners.[1127] This thesis has shown that the appointment of liquidators as judicial managers was a shortcoming of the judicial management system; and it appears that business rescue does not fully tackle this issue. The requirements set out in section 138(1) do not prohibit liquidators from being appointed as business rescue practitioners. It is not clear whether this was an oversight or was intended. Section 140(4) of the Act, which provides that

maintain the capacity of the CIPC; failure to deal with the matters related to business rescue practitioner ie implementation of rescue plan, terminations and criteria for the appointment of a business rescue practitioner.

[1122] Levenstein supra note 524 at 590-600.

[1123] R Bradstreet 'Leak in the Chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22(2) *South African Mercantile Law Journal* 195 at 212.

[1124] K Mpofu, AO Nwafor & KJ Selala 'Exploring the role of the business rescue practitioner in rescuing a financially distressed company' (2018) 14 (2) *Corporate Board: Role, Duties and Composition* 20.

[1125] See *ABSA Bank Ltd v Caine NO, In re: ABSA Bank Ltd v Caine NO* (3813/2013, 3915/2013) [2014] ZAFSHC 46 (2 April 2014) at para 10; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2015 (5) SA 192 (SCA) at para 35; *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers Proprietary Limited* (10862/14) [2015] ZAKZPHC 21 (20 March 2015) 55 & 58.

[1126] See for example, Levenstein supra note 524 at 593.

[1127] Rajaram supra note 1096 at 149. Levenstein supra note 838 at 593-594. M Pretorius & W Rosslyn-Smith 'Expectations of a business rescue plan: International directives for Chapter 6 implementation' (2014) 18(2) *Southern African Business Review* 108-139.

'if the business rescue process concludes with an order placing the company in liquidation, any person who has acted as a practitioner during business rescue process may not be appointed as liquidator of the company,' makes it clear that the legislature had some grasp of the issue. Under judicial management, a person who acted as a business rescue practitioner may not act as a liquidator if the company goes into liquidation. Consequently, it remains of concern that liquidators may be appointed as business rescue practitioners as their functions and purpose differ markedly. It is therefore recommended that the legislature should revisit the Act on this issue and make the necessary amendments.

6.3.6. Post-commencement Finance and Ranking of Claims

It has been noted above that post-commencement funding is essential for the rescue of a financially distressed company.[1128] Ideally, it should be negotiated before restructuring the company.[1129] However, the studies reveal that paucity of post-commencement finance has contributed to business rescue failure.[1130] Obtaining funding has proved to be a thorn in the side of financially distressed companies,[1131] even before the coming into force of business rescue.[1132] Lenders are unwilling to inject funding because inadequate security is given to post-commencement financiers. Pretorius & Du Preez argue that

> 'traditional funding options (particularly loan funding) for distressed businesses are limited, because existing lenders are attempting to manage their existing risk exposure and do not want to risk more than they have already invested'.[1133]

Commentators such as Rugumamu have argued that the inability to obtain finance is the consequence of the system giving security only on unencumbered assets. Rugumamu, comparing the South African system to the United States system, argued:

[1128] See the discussion in Chapter Five.

[1129] In *Griessel v Lizemore* 2016 (6) SA 236 (GJ) 81 the court held that 'in order to give content to the purpose of business rescue it is necessary to establish, before considering the paying out of creditors or shareholders in the form of a dividend through a business rescue plan, whether the company has access to investor funding that may tide it over or whether creditors are prepared to support the rehabilitation of the company instead of closing it down.' Pretorius & Rosslyn-Smith op cit note 1124 at 132 argued that 'to ensure the continued operation of the distressed entity after the commencement of formal proceedings, it is critical to obtain a source of new finance as soon as possible.'

[1130] R Rajaram supra note 1096 at 165; Levenstein 'supra note 524 at 1058. M Pretorius & W Du Preez 'Constraints on decision making regarding post-commencement finance in business rescue' (2013) 6 *The South African Journal of Entrepreneurships and Small Business Management* 170.

[1131] Ibid.

[1132] See for example Burdette op cit note 1046 at 423 as he argued that 'very few creditors would be keen to lend money to the debtor on an unsecured basis where the debtor is already subject to business rescue. There may also be no unencumbered assets left in the estate, or the encumbered assets may not have sufficient equity with which to secure further creditor.'

[1133] Pretorius & Du Preez 'op cit note 1130 above at 176. See also Levenstein supra note 524 at 618.

> 'A financially distressed company undergoing business rescue is permitted to issue collateral that is not already encumbered. Post-commencement financiers can thus be granted security only in respect of the unencumbered assets of the company; this restriction is an important protection for the company's other creditors and ensures that the secured creditors' rights and interests remain intact. By comparison, in reorganisation proceedings under Chapter 11, a company is allowed to offer security to a post-commencement financier in respect of an encumbered property. There is an argument that, if this is workable in the USA, the same relaxed rule should be included in South Africa's business rescue legislation and perhaps the statutory draftsperson should go back to the drawing board in regard to the rules for post-commencement finance. To be more explicit in this regard: it is submitted that s 135(2)(a) of the Act should be amended to permit the company to offer security to lenders in respect of encumbered assets that are under-secured, as the present prohibition is a barrier to the acquisition of new funds during the business rescue process.'[1134]

Levenstein recommended that

> 'the legislature needs to amend s 135 to provide certainty on the ranking of post-commencement finance and ensure that post-commencement finance ranks higher secured creditors in the payment waterfall under business rescue.'[1135]

It is submitted that what is required is a closer relationship between the potential funders and the financially distressed company, created by specifying how the funders are going to be ranked after the commencement of business rescue proceedings. This thesis has commented on how the courts and commentators have interpreted section 135(3),[1136] noting that judgments and commentators interpret the ranking of creditors differently. In line with the reasoning above in this thesis, it is recommended that ranking should be along the following lines:

- The business rescue practitioner's remuneration and costs arising from business rescue proceedings and other claims from the costs of business rescue proceedings;
- Remuneration solely related to employees' salaries from the date of commencement of business rescue proceedings;
- Secured creditors prior to commencement of business rescue;
- Secured creditors post the commencement of business rescue;
- All other post-commencement financial benefits related to employment after the commencement of business rescue, eg bonuses or leave pay

[1134] Rugumamu supra note 1069 at 100-101.
[1135] Levenstein supra note 524 at 628.
[1136] See the discussion in Chapter Five.

- Unsecured claims by post commencement financiers or creditors during business rescue in the order in which they were incurred;
- Remuneration of employees which became due and payable prior to the commencement of business rescue; and
- All unsecured claims against the company.

6.3.7. Loss of Staff Morale

Business rescue puts a great strain on staff morale as fears and rumours of retrenchment and pay cuts abound, resulting in the loss of employees.[1137] This is associated with lower productivity, inefficiency, lower standards, lack of cooperation, bad attitudes and stress for both practitioner and employees. A good relationship between the business rescue practitioner and employees may contribute to improved staff morale. In South Africa there has been an increase in the number of cases where the employees – through their trade unions – object to decisions of a practitioner,[1138] caused by unfruitful communication between the business rescue practitioner and employees. It is therefore recommended that once the company commences business rescue, the employees must be counselled on the operation of business rescue. This would enhance transparency and good communication between the business rescue practitioner and the management with the employees. Employees are confused by apparently unfair decisions, and frustrated by a disorganised business rescue process. Therefore, employees need to feel a genuine bond between themselves, the business rescue practitioner and management; they need to believe in a shared common purpose and common goals during rescue proceedings. The responsibility rests on the management and the business rescue practitioner to ensure that there is a good relationship between themselves and employees.

6.3.8. Further Recommendations on Some Notable Definitions

6.3.8.1. The Court with Jurisdiction

To hear the application arising from business rescue, the court must have jurisdiction. The issue of which court has jurisdiction has been debated[1139] because section 128(1)(*e*) of the Act does

[1137] See Chapter Five.

[1138] See the latest cases such as *National Union of Metalworkers of South Africa v Wilro Supplies CC* (J 1440/16) [2020] ZALCJHB 210 (1 September 2020); *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways (SOC) Ltd* (J149/20) [2020] ZALCJHB 43; [2020] 6 BLLR 588 (LC); (2020) 41 ILJ 1402 (LC) (14 February 2020); *National Union of Metalworkers of SA v VR Laser Services (Pty) Ltd* (19419/19) [2020] ZAGPJHC 47; [2020] 2 All SA 536 (GJ) (10 March 2020).

[1139] See the discussion in Chapter Three.

not define the meaning of 'the High Court that has jurisdiction'. It is recommended that the Act should include a provision that defines this phrase and reads as follows:

(e) ***'court', depending on the context, means either –***

(i) the High Court that has jurisdiction over the matter which includes any provincial or local division of the High Court of South Africa within the area of jurisdiction where the registered office of the company or other body corporate or the main place of business of the company or other body is located.

The court with jurisdiction would depend on the location of the registered office of the company or its main place of business (or other body).

6.3.8.2. The Meaning of Affected Persons

Section 128(1)(*a*) provides a list of persons considered to be affected persons. However, it suffers from certain limitations,[1140] including the fact that it does not include directors. Directors thus have to use section 131 as an alternative remedy to commence business rescue proceedings. A director who is outvoted by other directors in passing a resolution to commence business rescue cannot use section 131(1) in his/her capacity as a director.[1141]

Furthermore, the list in section 128(1)(*a*) places registered trade unions representing employees above individual employees not represented by such organisations. It is recommended that section 128(1)(*a*) be revisited and amended as follows:

(1) In this Chapter –

(a) 'affected person', in relation to a company, means –

(i) a shareholder or creditor of the company;

(ii) a director of the company;

(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their representatives; and

[1140] See the discussion in Chapter Three.

[1141] Loubser The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)' (2010) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 509.

(iv) any registered trade union representing employees of the company.

Alternatively, section 131(1) may also be amended to read as follows;

(1) Unless a company has adopted a resolution contemplated in section 129, an affected person***, including a director acting in their capacity as a director,*** may apply to court ~~**at any time**~~ for an order placing the company under supervision and commencing business rescue proceedings.

This would give directors the option of approaching the court for an order placing the company under supervision and independently commencing business rescue. Furthermore, it would be clear that employees, as individuals, should exercise their individual rights before trade unions exercise employees' collective rights.

Section 31(3), which deals with access to a company's financial statements, should also be revisited. If individual employees are allowed to exercise their individual rights and approach the court for an order placing the company under business rescue, they may need to see its financial statements. Section 31 of the Act should include individual employees as persons who must be given access to the company's financial statements. It is recommended that this section be amended to read as follows:

31 (3) ***Individual employees, or their representative if not represented by registered trade unions, and*** trade unions must, through the Commission and under conditions determined by the Commission, be given access to company financial statements for purposes of initiating the business rescue process.

As it stands, the Act excludes employees who are not represented by trade unions. There may be several reasons why employees are not members of registered trade unions ie resistance to paying union dues. Limiting their access to the company's financial statements is a disservice to such employees, especially if they are needed to pull the company through business rescue.

6.3.8.3. Reasonable prospect

Although the term 'reasonable prospect' is not defined in the Act and has been held to indicate something less than 'reasonable probability',[1142] it is recommended that this term should be

[1142] See Chapter Three.

changed. It is not clear why the legislature did not use the phrase 'reasonable possibility'. As noted previously,[1143] the word 'prospect' encompasses the possibility or likelihood of the occurrence of a future event. Furthermore, the word 'likelihood' encompasses the word 'probability'. This means that the legislature impliedly retained the word 'probability' which was problematic under judicial management. As a result, the recommendation that 'possibility' should be used instead of 'prospect' is supported. Consequently, s 129(1) should read as follows:

(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that –
   (a) the company is financially distressed; and
   (b) There appears to be a reasonable ***possibility*** of rescuing the company.

The word possibility must also be inserted in section 131(4)(iii).

6.3.8.4. The *Moratorium*

On account of the various issues concerning the moratorium raised in this thesis, it is recommended that section 133 (moratorium) should be amended to read as follows:

(1) During business rescue proceedings, no legal proceedings, including any enforcement action*s*, against the company may be commenced or proceeded with in any forum except –
   (a) if such legal proceedings are s 130 proceedings;
   (b) if such legal proceedings, including enforcement action, relate to any property that is unlawfully in possession of the company and there is a court order stating that such property is not lawfully in the company's possession;
   (c) with the written consent of the practitioner;
   (d) with the leave of the court, ***and depending on the facts of each case,*** ~~***and in accordance with any terms the court considers suitable***~~ ***subject to any requirement that the court may consider suitable*;**

[1143] Ibid.

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

(f) criminal proceedings against the company ~~**or any of its directors or officers;**~~

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

(h) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in a favour of any other person may not be enforced by any person against the company except –

(a) with the written consent of the practitioner; or

(b) with leave of the court.

(3) The protection above does not extend to a third person who stood as a surety in favour of the company.

(4) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

6.3.8.5. Liquidation Proceedings

Section 131(6) of the Act provides for suspension of liquidation proceedings by business rescue. Even if liquidation proceedings have already been commenced by or against the company, application for business rescue proceedings will suspend those liquidation proceedings. However, with the lack of clarity about the meaning of 'liquidation proceedings', courts have been called upon to interpret what is meant by this term. What appears to be a problem is whether 'liquidation proceedings' as provided for by section 131(6) include application for liquidation proceedings or the legal process of winding up a company or both. Even more problematic is whether proceedings suspend liquidation proceedings even after the final liquidation order has been granted.

This uncertainty has led to conflicting decisions by the courts.[1144] As result, it is recommended that section 131(6) should be amended to establish a clear meaning of 'liquidation proceedings'. If this is not possible, section 128(1) should add another subsection that defines 'liquidation proceedings'. It is recommended that section 128(1) should add subsection (j) which reads as follows:

> ***(j) 'liquidation proceedings' means both the application for liquidation process and the legal process after an order has been granted with the inclusion of the winding up process.***

While s 131(6) reads along these lines:

> (6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will include those liquidation proceedings ***regardless of whether or not the final liquidation order has been granted should there be evidence of possibility of rehabilitating a company*** **until–**
>
> (a) the court has adjudicated upon application; or
>
> (b) the business rescue proceedings end, if the court makes an order applied for.

[1144] See the discussion in Chapter 5.

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