THE EFFECTS OF SECTIONS 135 AND 136 OF THE COMPANIES ACT 2008 ON BUSINESS RESCUE PROCEEDINGS: (A CRITICAL ANALYSIS)

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DECLARATION

I declare that this research is my own work. It has been submitted in partial fulfillment of the LLM (Insolvency Law) at the University of Pretoria. All sources used and quoted have been indicated.

It has not been submitted before for any degree or any examination to any other University.

Happiness Xolile Mnisi

TABLE OF CONTENTS

ACKNOWLEDGEMENTS **(i)**
DECLARATION **(ii)**
SUMMARY **(iii)**

CHAPTER 1 INTRODUCTION

1. Background of the study 1
2. Research question and objectives 3
3. Importance and benefits of the study 3
4. Research design and methodology 3
5. Scope of the research 4
6. Overview of the chapters 4

CHAPTER 2 SOUTH AFRICA

2.1 The effects of sections 135 and 136 of the Companies Act 2008 on business rescue proceedings 5

CHAPTER 3 UNITED STATES OF AMERICA

3.1. Historical development of debtor -in-possession finance in the United States of America 14

3.2 USA debtor-in-possession finance and Chapter 11 reorganisations 15

3.3 Forms of debtor-in-possession lending 16

CHAPTER 4 UNITED KINGDOM

4.1 Historical development of corporate rescue in the United Kingdom 21

4.2 Administration and post-petition finance 23

4.3 Administration and Employment (TUPE) 246/2006 24

4.4 The Employee Buyout as an option to insolvency 26

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion 29

5.2 Recommendations **31**

6 BIBLIOGRAPHY

6.1 BOOKS **33**

6.2 JOURNAL ARTICLES **34**

6.3 INTERNET RESOURCES **37**

6.5 LEGISLATION **37**

6.6 RULES AND REGULATIONS **38**

6.7 THESES AND DISSERTATIONS **38**

SUMMARY

South African company law has had provisions for the rescue of financially distressed companies, through the Companies Act 1926 and 1973. These pieces of legislation provided for the rescue of financially distressed entities through a process of judicial management. Judicial management inadequately provided any relief for financially distressed companies and resultantly, it was under utilised. The critics of this rescue mechanism advanced many reasons for its outright failure.

South Africa has welcomed a new rescue mechanism for financially distressed companies, called business rescue which is housed in Chapter 6 of the Companies Act 71 of 2008. This study analyses sections 135 and 136 of the Companies Act. The aim is to examine the vast participation rights bestowed upon employees in these two sections, and their effect on the success rate of business rescue as a mechanism of relief for financially distressed companies.

Several loopholes are identified in the legislation, which, if uncorrected will pose a great hindrance to the operation of the whole of the rescue procedure as envisaged by Chapter 6. Recommendations are made to enhance the feasibility of the new business rescue provisions, if any success can be expected from the new legislation.

CHAPTER1
INTRODUCTION

1. Background of the study

A company is an integral part of the community in which it does its business, and it has a direct impact on the economic and thus the social wellbeing of that community through its employees, suppliers and distributors to mention but a few.[1] It follows, therefore, that the collapse of a company does not only affect its directors and employees, but it affects the whole community in which it operates. This having been said, it is clear that the constant existence of a company as a going concern has benefits for the whole community.

One of the advantages of a successful corporate rescue is that it prevents or limits job losses. In a country such as South Africa where unemployment figures are unacceptably high[2] this is even more relevant. A need exists for a rescue mechanism to be in place to limit job losses in the form of a corporate rescue.

South Africa enacted legislation that provides for business rescue, [3]contained in Chapter 6 of the Companies Act 71 of 2008 (the Companies Act). The term "business rescue" is defined in the Companies Act as:

> Proceedings to facilitate the rehabilitation of a company that is financially distressed by "means of three measures;
>
> (i) The temporary supervision of the company, and of management of its affairs, business and property[4]
>
> (ii) A temporary moratorium on the rights of claimants against the company in respect of property in its possession and[5]
>
> (iii) The development and implementation, if approved, of a plan to rescue company by restructuring its affairs, business, property, debts and equities and liabilities in a manner that maximises the likelihood of the company continuing in existence on a solvent basis, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."[6]

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1 Mongalo Tshepo, H "An overview of company law reform in South Africa: From the guidelines of the Companies Act 2008" (2010) *Acta Juridica* at 114.

2 Anderson, C "Viewing the proposed business rescue provisions from an Australian perspective" Vol. 11 *PER 4.* According to the Quarterly Labour Force Survey released by Statistics South Africa on31 October 2017, the unemployment rate is 27.7%.

3 Kloppers, Pieter "Judicial Management – A Corporate Rescue Mechanism In need of Reform." 1999 *Stellenbosch Law Review* 417. The terms 'corporate rescue' and 'business rescue' are often used interchangeably.

4 Section 128(1)*(b)*(i) of the Companies Act.

5 Section 128 (1)*(b)*(ii).

6 Section 128 (1)*(b)*(iii).

Corporate rescue is further defined by Omar[7]as being associated with what is termed the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and the continued rewarding of capital and investment.

Before the enactment of the Companies Act, South Africa had a rescue mechanism in place for companies on the brink of collapse in the form of judicial management. Judicial management is not defined in the Companies Act 61 of 1973 (the 1973 Companies Act).Therefore, one has to rely on the provisions of section 427 of the 1973 Companies Act. An inference from the provisions of section 427 implies that judicial management has to do with the rescue of the company as a whole.[8] However, judicial management has never been regarded as an effective rescue mechanism for companies in financial crisis since its inception in 1926. In the case of *LeRoux Hotel Management*[9]*,* Josman J referred to judicial management as a system that has barely worked since its inception. Furthermore, according to Bradstreet,[10] the South African insolvency system is too creditor friendly to have enabled judicial management to function properly as a rescue mechanism, a view with which I completely concur.

Judicial management has been labelled by legal writers as a dismal failure.[11]There were even calls for it to be abolished. Certain reasons are advanced by Loubser[12]for the failure of judicial management as a rescue mechanism. She lists amongst other things; "the attitude of the courts in judicial management proceedings, the expense of court processes, the lack of an automatic moratorium on the judicial management order and last but not least , the lack of control over the qualification of judicial managers."

It must, however, be mentioned that it is not the primary purpose of this dissertation to discuss judicial management and its shortcomings. The purpose of this dissertation is to examine the effect of sections 135 and 136 of the Companies Act on business rescue proceedings as a rescue mechanism. It will further be attempted to pinpoint that these two sections ought to present great problems in the implementation of the whole of chapter 6 of the Companies Act. Well intended as the business rescue provisions may be, it will not function effectively in practice because banks and other post commencement financers would not be keen to fund the rescue in circumstances as envisaged by sections 135 and 136 of the Companies Act. I submit that it is essential for any rescue to succeed that there be post-commencement financers. It appears from the provisions of sections 135 and 136 that the rescue might only yield a better return for only one class of stakeholder in the event that the company is not able to survive on a solvent basis, only the employees.

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7 Omar, Paul "Thoughts on the Purpose of Corporate Rescue" [1997] 4*JIBL* 127.

8 Loubser, Anneli "Some Comparative Aspects of Corporate Rescue in South African Company Law" Doctoral of Laws, University of South Africa, February 2010 at 17.

9 *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 (2) SA 223 (C).

10 Bradstreet, Richard "The leak in the Chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and growth of the economy" accessed through https://www.researchgate.net/pulication/254942125 on 20 September 2016.

11 Burdette, David "Unified legislation in South Africa" 13 *South African Mercantile Law Journal* 408 (2001).

12 Loubser "Some Comparative Aspects of Corporate Rescue in South African Company Law" See note 8

In my opinion, the business rescue provision is a well thought out mechanism which should achieve better results than its predecessor, judicial management. However, in practice, business rescue might not be able to yield the much expected good results, and may end up being a white elephant and dismal failure like judicial management due to the extensive consultations that are required, and stringent labour legislation that must be complied with.

2. Research question and objectives

The question that this dissertation seeks to answer is whether the enactment of sections 135 and 136 of the Companies Act will improve the outcome of business rescue as a corporate rescue mechanism, and thereby yield better results than its predecessor, judicial management.

In the light of the above, particular detail will be paid to the employment rights conferred on employees and their ultimate effect on the success of business rescue proceedings, and the willingness of post-petition financers to provide funding having regard to the order of preference as envisaged by section 135 (3). The provisions of section 136 in relation to downsizing of the workforce are examined. A comparison is made with other jurisdictions that have some of the corporate rescue mechanisms that are considered to be working well in practice, with a view to make a critical and comparative analysis with South Africa`s own business rescue provisions as provided for in Chapter 6 of the Companies Act.

3. Importance and benefits of the study

The crux of this study is to critically examine the provisions of sections 135 and 136 of the Companies Act and to implore their effects on business rescue proceedings as envisaged by chapter 6 of the Companies Act. The research pinpoints the flaws of these two sections of chapter 6 and their negative effect on business rescue in practice. These factors are examined with regard to the prevailing economic status quo and the practice that has been followed in informal workouts. This research magnifies the negative impact of the enormous powers of control given to employees through the non-cancellation of their employment contracts, pinpointing especially the huge risk of employees holding the rescue proceedings at ransom and plunging the already financially distressed company into deeper financial crisis, defeating the whole purpose of the proceedings.

The research outlines possible techniques employed by other jurisdictions with a high success rate of business rescue as a corporate rescue mechanism.

4. Research design and methodology

The concept of corporate rescue is relatively new to South African company law. It is, therefore, a fact that there is scarce South African authority on the subject since the model is a relatively new to the corporate environment. Reference is made to case law and foreign case law is

referred to for purposes of comparison. In order to achieve the ends of the study, reference is made to books, journals and the internet.

5. Scope of the research

The research ought to cover the Companies Act 1973, Companies Act 2008 as well as the Insolvency Act 24 of 1936 in the following aspects:

(a) Judicial management as a rescue mechanism
(b) Why judicial management failed as a rescue mechanism
(c) Business rescue as a rescue mechanism
(d) Application of insolvency principles to corporate rescue.

6. Overview of chapters

Chapter 1provides the background of the study, paying particular attention to judicial management and business rescue as models of corporate rescue. This chapter further focuses on addressing the research question, outlining the objectives and importance of the study. It further outlines the scope of the research and concludes by outlining an overview of the chapters.

Chapter 2 contains a discussion of business rescue proceedings as provided for by Chapter 6 of the Companies Act. Particular detail is paid to the provisions of sections 135 and 136 of the Companies Act. This chapter focuses on the negative effects of these two these provisions on the practical application of Chapter 6 of the Companies Act as a whole.

Chapter 3 consists of a comparative and critical discussion of corporate rescue mechanisms as employed by other jurisdictions. It seeks to investigate the implementation of corporate rescue in the United States of America. This chapter discerns how the Americans have implemented their corporate rescue mechanisms, shedding light on how South Africa can go about making a success of its own corporate rescue in the areas of post-commencement finance and regulation of employees` rights during business rescue mechanism.
Chapter 4 focuses on the corporate rescue of the United Kingdom as a big role player in the field. It draws lessons for South Africa especially regarding the rights of employees in a corporate rescue.

Chapter 5 contains conclusions drawn from the study of the implementation of corporate rescue provisions concerning post commencement finance and the regulation of employment contracts in these jurisdictions discussed in chapter 3. Recommendations are made which South Africa can adopt to make a success of its own business rescue proceedings as outlined in Chapter 6 of the Companies Act 2008.

CHAPTER 2: SOUTH AFRICA

The effects of sections 135 and 136 of the Companies Act on business rescue proceedings

It must be acknowledged that for any rescue to be successful, the financially distressed company needs funding. It is fundamental for any legislation providing for such rescue to have measures in place to secure funding because the financially distressed company already has a shortfall of resources. Business people correctly comment that no rescue plan can work unless there are proper plans in place for financing the rescue.[13] Banks and institutional lenders who are exposed must make a business decision on whether they will finance or not. The ranking in the event of liquidation is a key factor in making the decision whether to finance a rescue or not. The ranking as envisaged by the provisions of Chapter 6[14] are different from those in an ordinary liquidation. The Companies Act seeks to provide for the protection of employment rights in corporate rescue proceedings.

Sections 135 of the Companies Act provides as follows:

> Any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable to an employee during the companies' business rescue proceedings but is not paid to the employee – the money becomes regarded as post commencement finance and will be paid in the order of preference as set out in subsection 3 (a).

Section 135 (3) provides as follows:

> After payment of the practitioner`s remuneration and expenses referred to in section 143, and other claims arising out of the business rescue proceedings, all claims contemplated-
> *(a)* In subsection (1) will be treated equally, but will have preference over-
> (i) All claims in subsection (2), irrespective whether or not they are secured; and
> (ii) All unsecured claims against the company; or
> *(b)* In subsection (2) will have preference in the order, the preference conferred in terms of this section will remain in force except to the extent of any claims against the company.

It is clear from this order of preference that employees are given a super preference which is not afforded to any other class of creditors. It is well accepted that the purpose of insolvency proceedings is to try and balance the competing interests of all creditors, while there are losers in the process, it is important to strive to keep the balance.

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13 Toggart, Robbin "The Impact and consequences of Business Rescue provisions (Chapter 6) in lending facilities" *Legal City Magazin*e, July 2010, Bowman, Clive and Hurford, Kate "Litigation Funding for Insolvency Claims accessed at www.imf.com.au 2 January 2017) 7.

14 Sections 135 and 144 of the Companies Act 71 of 2008 make provision for the ranking in business rescue provisions.

Section 136 on the other hand deals with the effect of business rescue on employees and contracts.

Section 136(1) *(a)* provides

> Despite any provision of any agreement to the contrary- during 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;
>
> (i) Changes occur in the ordinary course of attrition, or
>
> (ii) The employees and the company, in accordance with the applicable labour laws, agree to different terms and conditions.
>
> *(b)* Any retrenchment of any such employees contemplated in the company`s business rescue proceedings plan is subject to Section 189 and 189A of The Labour Relations Act (Act 66 of 1995) and other employment related legislation....

Section 136(4) provides:

> If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for work performed or compensation for expenses incurred before the business rescue proceedings began.

It is a widely accepted principle that any successful company rescue entails amongst other things the downsizing of the workforce[15]. Having regard to this principle, it is obvious that any rescue cannot be effective without having to reduce the workforce. The legislature has made it difficult or virtually impossible to downsize the workforce having regard to the extensive consultations and stringent labour legislation that must be complied with.

It is my submission that the mechanism of section 38 of the Insolvency Act[16] should have been put in place in the business rescue proceedings as well to give the business rescue practitioner the discretion to terminate employment contracts to deal with any other contract in a manner that will best serve the interests of the company.

This change in ranking[17] has clearly created concern. Personally, I am of the view that a very low business rescue success rate can be expected unless there is a change in the ranking, and the mechanics and practicalities of business rescue in terms of the South African legislation is

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15 Loubser, Anneli "The Interaction Between Corporate Rescue and Labour Legislation: Lessons to be drawn from the South African Experience" *International Insolvency Review , Vol*.14: 57-69 (2005)

16 Act 24 of 1936.

17 Sections 96 to 98 of the Insolvency Act provides for the order of ranking in liquidation.

better understood. Toggart[18] concedes that the South African legislation is extremely detailed and there are huge interpretational problems which can lead to lengthy and costly legislation which could ultimately defeat the object of the provisions.

The Companies Act, section 135[19] provides that any remuneration owing to employees shall be regarded as post commencement finance and shall be paid as a preferred claim. Of particular importance is section135(4) [20] which provides that if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section remains in force, ranking employee claims on any monies due to them but unpaid, after liquidation costs.

The inclusion of trade unions and individual employees; who do not have to be creditors of the company to qualify, in the list of persons who may apply for the order commencing business rescue proceedings seems excessive and has no equivalent in other comparable systems.[21] According to Loubser,[22] this must be seen as part of the protection of "the interests of workers" which is prominently featured as an objective of the new business rescue proceedings.

Loubser further argues that the right to apply for business rescue proceedings to commence grants a very powerful right to a single employee who may be tempted to abuse it because of an unrelated grievance with the company. It may also be used as a bargaining tool by trade unions in wage negotiations: if the company refuses a demand for higher wages because it cannot afford to pay it, the trade union or employees may threaten to use that as proof of inability to pay debts and thus grounds for business rescue proceedings. Even though an unfounded application will be refused by the court, the company's reputation would have been substantially damaged and its credit rating in general, especially as prior notice must be given to all creditors, shareholders and employees of the company.[23]

The Act lists employees as affected persons[24].Being affected persons, employees have a right to participate in the hearing of the business rescue application. Although the sentiments behind

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18 The Insolvency Act 24 of 1938.

19 Section 135(1) provides that" to 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 is not paid to the employee-

(a) The money is regarded to be post- commencement financing and

(b) Will be paid in the order of preference set out in subsection (3) (a)."

20 Section 135(4) provides that If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.

21 In England only creditors, the company and its directors may apply, in the United States of America a petition for a Chap 11 reorganisation under the Bankruptcy Code may be filled only by the debtor company or by its creditors. Bankruptcy Rules 1002*(a)* and 9001(1)-(3).

22 Loubser, "Some Comparative Aspects of Corporate Rescue in South African Company Law" LLD Thesis, University of South Africa, 2010.

23 In terms of s 131(2)*(b)* read with 128(1)*(a)* of the Companies Act.

24 Section 128 defines "affected persons", in relation to a company as:

(i) a shareholder or creditor of the company;

(ii) any registered trade union representing employees of the company; and

(iii)If any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

this provision are laudable, because employees in particular are often the last to know about their company's financial difficulties, it will almost certainly lead to protracted hearings and escalating costs, especially in the case of bigger companies, because of the adversarial nature that now characterises the procedure. I submit that this would plunge the already struggling company 3into further financial difficulty, inevitably yielding the undesirable result of liquidation and therefore defeating the whole purpose of the procedure.

It is my submission in this regard that this provision is likely to blur the objectivity of employees in deciding what is best for the company, in favour of securing their own immediate interests. Employees are likely to move an application to commence business rescue[25], by virtue of them being affected persons[26]even though it is clear that liquidation is the best suited course, having regard to the peculiar circumstances of that particular company. This is so because the employees stand to receive greater benefits if the company undergoes business rescue before being liquidated, which will become very costly for the already financially distressed company. It follows therefore, that it would be even more difficult to sell the company as a going concern[27] if it has incurred the preferential costs of employee benefits in terms of section 135(4)[28]. It is cumbersome enough that in selling the company as a going concern, the provisions of labour law have to be followed.[29] It is my submission that this conflict of interest on the part of employees is bound to defeat the primary object of business rescue proceedings, the saving of jobs and a better return for creditors in the end if the rescue is not successful.[30]

It is interesting to note that the legislature had for all intents and purposes intended to place a super-preference[31] on employee rights, especially the preferential right to payment if the rescue proceedings should not materialise. This is evidenced by the provisions of section 144.[32] Section 144(2) provides that the rights of employees for remuneration are afforded a priority. It is provided by this section that monies owing to employees as remuneration affords the employees the status of preferred unsecured creditor and that claims by SARS are not afforded preferential treatment. It is my submission that this super-preference afforded to employees by this section is absolutely unnecessary. It is a well-known principle of our law that the purpose of insolvency is to try and strike a balance between the competing interests of the various

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25 In terms of section 131 (1) of the Companies Act.

26 In terms of s128 of the Companies Act.

27 *Ellerines Brothers (Pty) Ltd v McCarthy Limited* (245/13) [2014] ZASCA 46, the concept of a going concern is dealt with at length in this case.

28 Section 135(4) provides that if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of the liquidation.

29 Section 197 of the Labour Relations Act 66 of 1995 essentially provides that a contract of employment may not be transferred from one employer to another without the employees' consent subject to certain provisos.

30 *Ellerines Brothers (Pty) Ltd v McCarthy Limited* (245/13) [2014] ZA SCA 46.

31 *Diener v Minister of Justice and Others* (926/2016) ZASCA 180.A super-preference is defined as a preference which translates into a right superior even to that of a secured creditor.

32 Section 144(2) provides that to the extent that any remuneration, reimbursement 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 a company's business rescue proceedings, the employee is a preferred unsecured creditor of the company for purposes of this chapter.

stakeholders. In as much as there are losers in the end, the legislature ought to have tried to find a way to strike a balance between these competing interests. It is clear that the legislature, in enacting Chapter 6 was only concerned with securing the rights of one class of creditors, employees.

Banks are worried that the financing of rescue proceedings can land them into big losses since, if the rescue does not materialise, only employees will benefit and they would even incur the risk of a contribution should there be insufficient assets to defray the costs of the eventual liquidation.[33] This inequality in the treatment of stakeholders is against the spirit and purpose of the Act.[34] The purposes of the Act include provision for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. This imbalance is glaring and leaves a lot to be desired about the actual intention of the legislature. It suffices to conclude in these circumstances, that very few lenders will be willing to be part of such rescue processes where the chance of loss is so great. The ability to raise new cash or loan and also incur new debt in the post petition period is critical to the success of the restructuring process.[35]

In insolvency proceedings as a general rule, employees posses a contractual right to entitlements accrued under their working contract.[36] These entitlements and rights correspond to those of other unsecured creditors holding contractual rights and claims to payments.[37]As a general rule, employees have the same possibility to secure their claims in order to get protection in insolvency procedure as other creditors such as i.e. banks and suppliers.[38] However, reality shows a different picture: employees mostly have little influence or even bargaining power *vis- a- viz* their employer, their position has even been described as the "lost voice" in insolvency. This proposition might have been the basis of the legislature creating a super-preference for employees, but it goes without saying that nevertheless this makes it unlikely for lenders to finance a rescue modeled upon the provisions of Chapter 6 of the South African Companies Act.

Supporters of the super-preference conferred on employee payments argue that the workforce constitutes a major portion of the employers' wealth: while the general return of an investor can *ceteris paribus* be computed as discounted cash flow resulting from the future wages

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33 Section 106 of the Insolvency Act provides that where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all expenses, costs and charges mentioned in section ninety-seven, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non preferent creditors each in proportion to the amount of his claim and the secured each in proportion to the amount for which he would have ranked upon the surplus of the free residue , if there had been any.

34 Section 7*(k)*of the Companies Act.

35 See UNCITRAL *Legislative Guide on Insolvency Law* Part 2 (2005)114.

36 Ferber Michael M "Employee Entitlements in Insolvency;" A comparison between the Australian and German concepts" 10 October 2003. Accessed through www.cimejes.com on 7 September 2016.

37 Johnson, Gordon W, "Insolvency and Social Protection: Employee entitlements in the event of employer insolvency" accessed through http:// www.oecd.org/daf/corporate affairs, on 18 March 2016.

38 See above.

expectations[39], an investor like a bank or a financial provider can consider the risk of a default like an insolvency in their pricing or lending rates, employees are neither in a position to detect the price nor to bargain over the respective risks.[40]Employees are in a particularly vulnerable position since their investment is firm-specific and undiversified.[41] Employers, therefore, could exploit their position and behave opportunistically at the worker's expense.

2.2 The effects of section 136 of the Companies Act on business rescue proceedings

The Companies Act provides that during business rescue proceedings, the business rescue practitioner may cancel, suspend entirely partially or conditionally any provision of an agreement to which the company is a party at the commencement of the proceedings, other than an agreement of employment. These provisions have far reaching consequences for any party to an agreement to which the company undergoing business rescue proceeding is also a party, especially financial institutions.

The negative effects of the legislation are striking and have led to organisations contending that the legislation will drastically affect the sanctity of contracts in South Africa. Section 136(2) of the Act provides that:

> during business rescue proceedings, the business rescue practitioner may cancel or suspend entirely, partially or conditionally any provision of any agreement to which the company is a party at the commencement of the business."

In accordance with the ordinary meaning of section 136(2), the business rescue practitioner can "cherry pick" which provision of a contract will be cancelled and which will remain in force.[42] Banks and secured lenders have emphasised that in terms of section 136(2) the business rescue practitioner can then elect, in a loan agreement, to suspend payments to the bank while leaving intact the provision in terms of which the distressed company has a right to receive and use the loan capital- obviously a real and major concern for financers.

The legislation specifies that that a party to any agreement that has been cancelled can assert a damages claim. However, this claim could only be concurrent.[43]. This is against the general rule of the law of contract, that the terms of a contract must be varied by consent, otherwise the

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39 See note 38 above.

40 Korobkin, Donald, R "Employee Interests in Bankruptcy*," American Bankruptcy Institute Law Review* Vol.4 (1996) at 4.

41 Hansmann, Henry B, "When does worker ownership work?" (1990) 99 *Yale Law Journal* 1749, at 1764-1765.

42 Webber Wentzel Attorneys "Amendments to the new Companies Act: Chapter Six of the Companies Act Reviewed" (November 2010) accessed through www.webberwentzel.com on 12 May 2016; Business environmental specialist "Roundtable discussion of the new Companies Act and its Business Rescue provisions", (July 2010) at 6, accessed through www.sbp.org on 8 June 2016. The ordinary definition of "cherry-pick" in the *Merriam-Webster* dictionary is to select the best or most favourable.

43 Accessed through http://www.routledges.co.za/publications/article/insolvency business rescue/2010/26/259.

contract lapses if one party varies the terms without the consent of the other. This would effectively mean that non variation clauses in contracts will be meaningless.

While the legislation requires that the practitioner exercise the power to cancel or suspend contracts reasonably, it is not clear how "reasonableness" will be determined. According to a paper released by the Business Environmental Specialists (SBP)[44], credit providers are deeply concerned at the practitioner's ability to intervene in established commercial arrangements and agreements, in ways that may materially affect creditor's rights. This section effectively allows for a secured creditor to become unsecured – and for judges to interpret the provisions as they see fit. There are serious concerns that a company could choose to go into business rescue knowing that liquidation is inevitable, while deliberately using the business rescue period to destroy creditors' security before going into liquidation.

A creditor who is adversely affected by any action to cancel or suspend a contract has a right to claim for damages in terms of section 136(3)[45]. However, it is not clear what course of action would establish a claim for damages, given that the business rescue practitioner is acting within the authority provided by legislation. The ability to claim for damages is in any event unlikely to allay the concerns of offshore lending institutions, which require absolute certainty in the security of debt. According to Leveinstein[46] banks would not be keen to fund rescue mechanism under the present chapter 6 legislation. I am in total agreement with his opinion that the only way business rescue would work was if a rescue package was pre-arranged before the plan was begun. He says the current legislation is likely to bring about a new market in "distressed debt".

Commentators[47] have said that the business rescue legislation is very detailed and complex. As one commentator correctly says "the devil lies in the detail". Critics of this legislation say that it is unworkable and that it can take only a judgment of the High Court of South Africa to put paid to business rescue efforts. Academics[48] who are interpreting the legislation have narrowly come up with some starling conclusions and in some instances have declared the legislation to be totally unworkable.

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44 SBP- Business Environmental Specialists "A roundtable discussion on the new Companies Act and its Business Rescue provisions", July 2010 accessed through www.sbp.org on 8 June 2016.

45 Section 136(3) provides that any party to any agreement that has been cancelled or suspended, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.

46 Sanchja, Temkin "Law on business rescue has a fatal flaw" *Business Day*, 4 December 2008 12.

47 Faul,Pippa, "The impact and origin of employee rights in chapter 6 of the Companies Act 71/2008" unpublished LLM Dissertation, University of Kwazulu Natal, accessed through researchspace.ukzn.ac.za, on 3 February 2017;Loubser, Anneli "The interaction between corporate rescue and labour legislation: lessons to be drawn from the South African Experience" (2004) 14 (1) *International Insolvency Law Review* 58.

48 Gwanyanya, M "The South African Companies Act and the realisation of corporate human rights responsibilities" *Potchefstroom Electronic Review* Vol.18 (2015) page 1; Idensohn, Kathy"The regulation of shadow directors" (2010) SA *Mercantile Law Journal* 22at page 32.

Another interesting provision of section 136 is section 136(1)[49]. This subsection provides that during business rescue proceedings, employees of the company continue to be so employed on the same terms and conditions, subject to certain conditions. Arguably, this provision further strengthens the power of employees in the rescue procedure. Section 136(1) *(b)* provides that "any retrenchment of any such employees contemplated in the company's business rescue proceedings plan is subject to section 189[50] and 189A[51] of the Labour Relations Act and any other employment related legislation...."

Any rescue attempt is bound to affect employees. Any effective rescue entails the downsizing of the workforce. I am inclined to agree with Leveinstein[52] that the prospects of a success in rehabilitation may often depend on the ability to enforce contracts, notwithstanding a right of cancellation in the event of insolvency to cancel contracts (including employment contracts) to enable the company to downsize its workforce to an acceptable level or to avoid burdensome contracts. The legislature clearly did not intend to give the business rescue practitioner any powers to downsize the workforce as he sees fit. This is because, before downsizing the workforce there has to be extensive consultations with employee representatives and unions and compliance with strict labour laws. To this end, one may accept that the legislature must have had in mind the primary object of the rescue provisions which include among other things the preservation of jobs and a better return for creditors in case of a liquidation than would result from the immediate liquidation of the company. Furthermore, a failure to adhere to the provisions of section 189 and 189A[53] could result in the employees being deemed to have been dismissed unfairly on operational requirements which would expose the company the liability "for compensation up to an amount equal to the employee's remuneration for 12 months".[54]

It is my submission that a careful examination of the labour laws governing the downsizing of the labour force requires a high degree of consultation and participation. This degree of participation is complex and time consuming. For companies employing more than 50 employees the position is even worse where the intention to downsize can be resisted with a

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49 Section 136(1) provides that:
"despite any provision of any agreement to the contrary-
(a) during 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
(i) that changes occur in the ordinary course of attrition, or
(ii) the employees and the company in accordance with applicable labour law agree to different terms and conditions..."

50 Section 189 of the Labour Relations Act provides that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employers must consult with various employees' representative groups.

51 Section 189A of the Labour Relations Act applies to employers that employ 50 or more employees and intend to retrench 10% of the total number employed, or if the number of employees that the employer intends to retrench, together with the employees that have been retrenched in the 12 months prior to issuing a section 189(3) notice, is equal to or greater than the relevant number specified.

52 Leveinstein "An appraisal of the new South African business rescue procedure" LLD Thesis, University of Pretoria 2015 at 198.

53 Labour Relations Act 66 of 1995

54 Loubser, Anneli "The interaction between corporate rescue and labour legislation: lessons to be drawn from the South African Experience" (2004) 14 (1) *International Insolvency Law Review* 58.

strike action.[55] The delays resulting from this meaningful joint consensus seeking approach, in addition to the further delays in the event of a dispute being declared could, according to Loubser, "have extremely adverse effects on a company already teetering on the brink of collapse."[56]

It is my submission further that the Companies Act goes to greater lengths to protect the interests of creditors and employees rights through the business rescue proceedings and I personally feel that it is unnecessary to complicate the matter at this early stage by affording each and every affected person the opportunity of joining the fray. The purpose of business rescue proceedings is the rehabilitation of the business as a corporate entity or the viable parts thereof, and maximisation of returns for creditors,[57] is not per se the primary concern. It would seem, from the abovementioned scenario, that the converse is true.

It is my submission that the business rescue provisions as envisaged by chapter 6 of the Companies Act are not workable at all and the legislature has to find alternative ways of regulating the rights of employees during the proceedings. Banks and institutional lenders cannot afford to take the risk of financing rescue proceedings if they stand to suffer losses. As earlier stated, funding is essential for any rescue to be successful. There can be no hope of any successful rescue without funding. The legislation must, at least guarantee lenders that they will get a substantial dividend in the event that the rescue is unsuccessful, or at most provide an incentive for affording funding.

55 See Loubser above at page 66.

56 See Loubser above at page 67.

57 Section 128 (1) (b) of the Companies Act.

CHAPTER 3 UNITED STATES OF AMERICA

3.1 Historical Development of Corporate rescue in America

A concept similar to the one envisaged by Chapter 6 of the South African Companies Act is found in Chapter 11 of the United States Bankruptcy Code of 1978 (Chapter 11). The premise of Chapter 11 is that companies are often more valuable to creditors and the economy as a whole as an ongoing business, rather than storehouses of assets waiting for liquidation.[58]

The concept of corporate rescue is a familiar phenomenon in American Bankruptcy Law. Chapter 11[59] regulates corporate rescue in America. The concept of corporate rescue emanated from the US's early history as a country of immigrants eager for a fresh start, with the general optimism about the culture and the potential for the US economy.[60] The US approach of a "fresh start" in bankruptcy has proved extremely influential in the subsequent development of business rescue legislation across the world.[61]

Chapter 11 made significant changes to bankruptcy practice, which had vast effects on the world of corporate rescue. Leveinstein[62] lists the effects:

- It expanded the availability of bankruptcy remedy, by no longer requiring that debtors be insolvent;
- It expanded the exemptions available to individuals seeking relief, thereby improving a debtors chance of a fresh start;
- It consolidated the three different organisation chapters under the Act into one , which allowed both the restructuring of secured debt and continuance of debtor-in-possession.

The introduction of Chapter 11 set about a real reform for the rescue of financially distressed companies.[63] The most prominent feature is the primary focus; the payment of creditors, adoption of a broader-gauge approach. American legislation canvases that, along with paying creditors, the court must also take into account other matters, such as the preservation of jobs, giving the debtor a fresh start, preserving asset value, an equitable division of assets and losses

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58 Casey, Anthony,J "The creditors bargain and option- preservation priority in Chapter 11" *University of Chicago Law Review Vol.* 78(3) (2011) at 759.

59 This Act was preceded by a report of the Commission on Bankruptcy Laws of the US. The Commission, chaired by Harold Marsh Jnr, a member of the Council of the Section of Corporation, Banking and Business Law, focused on the causes and philosophy of bankruptcy. Recommendations in changes to the legislation were made. Subsequent to the Bankruptcy Reform Act becoming Law in 1994, the US President established the National Bankruptcy Review Commission. The Commission's role is to investigate and study issues relating the Bankruptcy Code.

60 For a history of the manner in which traders incurred debt in Roman Law, see Visser " Romeinstregtelike aanknopingspunte van die sekwestrasie proses in die Suid-Afrikaanseinsolvensiereg" (1980) *De Jure* 42.

61 See note above

62 LLD Thesis at 11

63 McCormack, Corporate Rescue Law: An Anglo-American perspective- Corporations and the Law *(*2008), Edward Elgar: Cheltenham, UK. Chapter 3- Fundamental features of the US at 78-117.

among creditors; proper concern for the interests of taxing authorities and the entities charged with maintaining public health and safety.[64]

The American bankruptcy law insists on a holistic protection of all parties who are affected by the debtor's failure, with no single party dominating.[65] I submit that the drafters of the South African business rescue legislation had in mind, a concept similar to the US model in almost every aspect, except for their treatment of creditors.[66] The old order of debt imprisonment in the US Bankruptcy Code gave way to the concept of debt forgiveness and discharge.[67] For this reason, as the 19th century advanced, more and more Americans became more tolerant towards debt and attracted to speculative ventures. Bankruptcy in the US thus became a viable and necessary concept. It suffices to opine, therefore, that the treatment of creditors in a holistic manner, as ensampled by the US model, is significant to the success and acceptance of any corporate rescue model. This is lacking in the South African business rescue model as housed by Chapter 6. It remains to be seen if this non-holistic approach stands to yield any positive results and attract any more participants than the US model.

3.2 Chapter 11 and employment contracts

Section 365 of the US Bankruptcy Code allows the debtor to make a choice whether to breach or perform its obligation under any contract. The purpose of permitting assumption or rejection of these contracts in the US is to allow the trustee or debtor-in-possession to realise the value of transactions that are valuable to the estate and breach claim in burdensome transactions. In general, US employment contracts are treated the same way as any other executory contracts.[68]An employer has the right to reject any long-term employment contract with its employees; the employee will have a pre-petition claim for damages[69]

Leveinstein[70] asserts that the unique contract which plays an important role in any internal restructuring is the contract of employment. The ongoing ability of the company to trade is its ability to secure continued participation of existing employment relationships. I agree that careful consideration must be given to whether or not onerous labour contracts should be terminated to provide cost saving measures in the restructuring process.

The importance of downsizing the workforce cannot be over emphasised. According to Westbrook,[71] most insolvency laws allow the administrator or supervisor to elect to continue or repudiate contracts based on a cost-benefit analysis of what is in the best interest of the

64 Leveinstein LLD Thesis at 111.

65 Rochelle "Lowering the Penalties for Failure: Using the Insolvency law as a tool for spurring economic growth: The American experience and possible uses for South Africa" (1996) *TSAR* 317-318.

66 Sections 136 and 144 of the Companies Act.

67 Firriel and Janger "Understanding Bankruptcy" (2013) 2.

68 Leveinstein LLD thesis at 201.

69 Section 502(b) (7) provides employees with the right to submit pre-petition claims. These claims are entitled to priority under s 507*(a)*(4).

70 Leveinstein LLD Thesis at 196.

71 Westbrook, Booth, Paulos and Rajak (Eds) "A global view of business insolvency systems" (2010) available at http// www.open knowledge.worldbank.org/ bitstream/handle/10986/13522/68428 accessed on 7 March 2017.

creditors. Good bargains are to be accepted and bad ones rejected. The prospect of success of rehabilitation may often depend on the ability to enforce contracts, notwithstanding a right of cancellation in the event of insolvency to cancel contracts (including contracts) to enable to company to downsize its workforce to an acceptable level to avoid burdensome contracts.[72]

3.3 Chapter 11 and post-commencement funding

Chapter 11's post-petition financing guidelines originate from the large-scale corporate reorganisations of the early 19th Century. Corporate reorganisations began with common-law equity receiverships that were used to organise America's troubled railroads.[73] Almost from the beginning, courts promised special priority to lenders who would help finance reorganisation efforts. These loans, known as receiver's certificates, were promissory notes by which the railroad borrowed from investors against the credit of the "whole estate" of the railroad.[74]

Like modern day debtor-in –possession loans, the certificates took priority over all other railroad debt obligations.[75] These certificates also had a very high probability of being repaid.[76] A number of non-railroads eventually began to use these receivership certificates procedures to restructure, slowly leading to the current debtor-in-possession process.

After a century in shadows, post-petition financers have stepped onto centre stage. According to Skeel,[77] the debtor-in-possession has become the single most important governance lever in the majority of Chapter 11 cases. The enactment of the 1978 Bankruptcy Code brought the most dramatic expansion of all. Section 364, which governs debtor-in-possession financing, is a broad-based source of authority for all kinds of post-petition lending (consistent with this breath Section 364 is entitled simply "obtaining credit"). It governs all obtaining credit and incurring debt by the estate.[78] Under section 364, the debtor can borrow without court approval,[79] on an unsecured basis, with the promise of an administrative expense treatment for the lender. If unsecured financing is not likely to be available, the court can give the debtor-in-possession financer priority over all other administrative expenses, or authorise a lien on either encumbered or unencumbered property. The court's most dramatic power is the right to authorise a new priming[80] lien that has priority over an existing lien on the same property.

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72 Leveinstein at 198.

73 Skeel,David A. Jnr, Debt's Dominion: A history of Bankruptcy Law in USA" 5th edition (2003) 48-69.

74 Skeel above 1912.

75 *Ibid* at 1912.

76 *Ibid* at 1905.

77 Skeel,David A "The Past, Present and Future of DIP Financing," 25 *Cardozo Law Review* 1905 (2003-2004)at 1906.

78 Collier on Bankruptcy 15th edition, Matthew Bender, (1987).

79 A lender who extends post-petition lending without court approval runs the risk that in subsequent liquidation or straight bankruptcy as the case may be, its claim on the debtor`s estate will not be given priority along other post-petition lenders or may not be recognized at all. See In Re Avon Dress Co., 78 F.2d 681 (2d Cir. 1935).

80 A priming lien is a lien that attaches in front of prepetition secured creditors as long as the court finds the prior creditors as adequately protected. See s 364*(d)* of US Bankruptcy Code.

I submit that post-petition financing, ever since inception, has largely if not solely been premised on a super-priority status being afforded to the post-petition lender. It goes without saying that financial institutions always calculate the risk and probability of a company being salvaged as a going concern. However, finance providers have always anticipated bankruptcy as a possible eventuality in any reorganisation and consequently, they ensure that their interests are perfectly secured before advancing any post-petition funds. It is my submission further that little reason would exist even nowadays to change the minds of post-petition lenders.

As mentioned, the concept of corporate rescue is quite familiar in the United States of America (USA) and is found in Chapter 11 of their Bankruptcy Code. By filing a petition under Chapter 11 of the Bankruptcy Act, a temporary troubled economic enterprise can place itself under court supervision and negotiate with its creditors for a restructuring of its unsecured debt while avoiding the more drastic step of bankruptcy adjudication.[81] Once the petition has been filed, the debtor faces the problem of obtaining financing for the continuation of its business operations during the negotiation period. Its embarrassing circumstances will make it difficult to obtain such financing unless it can offer potential lenders court approved[82] extra inducements. Special treatment of post-petition lenders can prejudice other creditors; however, the court is faced with the difficult task of balancing the rights of creditors amongst each other as well as against the petitioner's interest in continuing its business. The court may either authorise the debtor to remain in possession and operate the business or appoint a receiver or trustee to do so.[83] In either case, the court must approve any post-petition borrowing; promises of extra ordinary forms of security[84] to potential lenders are without value absent such approval.

The essence of debtor-in-possession financing in the US is found in section 364 of the Bankruptcy Act of 1978. Section 364 provides:

> (a) The court, after notice and hearing, may authorise the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section allowable under section 503(4)(1) of this title. If the trustee is authorised to operate the business of the debtor under sections 721, 1108, 1203,1204,1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b) of this title as an administrative expense.
>
> (b) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and hearing, may authorise the obtaining of credit or incurring of debt-
>
> (1.) With priority over any or all administrative expenses of the kind specified in section 503 (b) or 507 (b) of this title.

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81 "Straight" bankruptcy proceedings, under Chapter I-VII of the Bankruptcy Act, have as their primary purpose the formal adjudication of the debtor as a bankrupt. This results in the liquidation and distribution of the debtor's assets and, a fortiori, the termination of the debtor's business.

82 See note 35 above.

83 Section 364 9a) of the United States Bankruptcy Code of 1978.

84 American Bankruptcy Institute Commission to study the reform of Chap 11. Accessed through https://litigation-essentials.lexisnexis.com/webcd/app?cation on 5 July 2016.

(2.) Secured by a lien on property of the estate that is not otherwise subject of the lien; or
(3) Secured by a junior lien on property of the estate that is subject to a lien.

3 1.The court, after notice and hearing, may authorise the) obtaining of credit or incurring debt by a senior or equal lien on property of the estate that is subject to a lien only if –

(A) The trustee is unable to obtain such credit otherwise, and
(B) There is adequate protection of the interest of the holder of a lien on the property of the estate which senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

The order of priority in cases of bankruptcy is spelt out in section 503 of the Bankruptcy Act of 1978.[85]

Essentially, Chapter 11 provides a voluntary proceeding[86] which furnishes the debtor with time to seek agreement of its creditors to an 'agreement'[87] extending the maturity or reducing pro rata the amount of its unsecured debt. While the debtor is the intended beneficiary of Chapter 11, the mechanism established by the Chapter focuses primary on the protection of creditor's rights.[88]

Once a petition to commence Chapter 11 proceedings has been filed, the court may either authorise the debtor to remain in possession or appoint a receiver [89] to do so. In either case, the court must approve post-petition borrowing; promises of the extraordinary forms of security[90] to potential post-petition lenders are without value absent such approval.[91]

3.1.3 Collateralisation as a form of lending

The Bankruptcy Code brought the most dramatic expansion of all. Debtor-in -possession Financing has changed dramatically. The role of the financers has changed from bankers to powerbrokers. Indeed, debtor-in -possession lenders have wielded significant power in the

85 Section 503.
86 The petition must be filed by the debtor (USC S.72,722(1976).
87 Id s.706 (1).
88 This is consistent with the purpose of the Bankruptcy Act generally, which seeks to ensure the orderly and fair treatment of creditors. See Collier on Bankruptcy 60.01 (14 ed. 1977) herein cited as Collier.
89 Sections 742-43.
90 In the words of the *Texlon* court, 'The lender was apparently willing to come to the debtor's aid but not without as much protection as it did get'. 3 Banker Court Dec at 1014 accessed on 19 March 2016.
91 A lender who extends post-petition creditor to a debtor without court approval runs the risk that in subsequent straight bankruptcy proceedings its claim on the debtor's estate will not be given priority along with the other post-petition claims or may not be recognized at all. In re *Avorn Dress Co*.78 F.2d 681 (2d Cr.1935).

recent past. For example, the bank responsible for debtor-in-possession financing after the United Airlines bankruptcy obtained large wage concessions from unions.[92]

It is my submission that the form of lending has changed since its early development in the 19th century. As a result, debtor-in possession financing, having regard to the latest attitude of lenders, has become evidently scarce. In surveying the landscape of bankruptcy law 25 years after its innovation in 1978, Baird has observed the gradual development of numerous practices in debtor-in-possession financing that do not accord with the plain meaning of the text of the Bankruptcy Code, yet have become deeply engrained and will remain a part of bankruptcy practice as long as no one objects.[93]

This scarcity of debtor-in-possession financing has led to the development of various informal lending devices. The most prominent and frequently used form of out of the court form of debtor-in -possession lending is collateralisation. The Bankruptcy Code, section 363*(c)* provides that the debtor-in-possession may use cash collateral only with (a) creditor consent or (b) a court order. This cash collateral is not easily obtainable as it requires a lot of convincing the creditors and costly court applications to obtain an order. I submit that this is not viable for a company that already has cash flow problems.

In light of this difficulty to obtain cash collateral, the concept of cross-collateralisation developed. Cross-collateralisation enables a lender to guarantee primacy in reimbursement for any previously unsecured claims that arose before filing of the debtor's bankruptcy petition; it controverts the section 507 priority scheme for payment of unsecured creditors in liquidation.

In regulating the affairs of insolvent businesses, the rules governing Chapter 11 reorganisation serve two vital functions. Not only do they provide a debtor an opportunity to repair its fiscal health but also they ensure a fair and equitable distribution of the debtor's assets to its various creditors.[94]Often, in its effort to ensure support for the business' future success, a debtor-in-possession requests such financing from the very creditors who possess claims in the bankruptcy estate. [95] For this reason, creditors wield significant leverage in obtaining concessions from debtor-in-possession desperate to procure monetary resources that the business requires to meet its expenses.
Cross-collateralisation represents one such concession that a creditor may demand from a debtor-in-possession. It convinces a nervous creditor to lend, promotes the rehabilitation of insolvent businesses, so that they might eventually emerge from bankruptcy with a fresh start.

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92 Adams, Marilyn "Low Cost Carriers Plan Trips Up" VAL, *USA Today* (March 14, 2003) at 3B. Accessed through http://cms.maccarrn.com/dsweb/GetRendtion/Document-22-664/html.

93 Baird, D "The New face of Chapter 11, 12 "AM.BANKER.WST. Law Review 6, 97 (2004).Accessed through https://www.researchgate.nrt/publication/246348559 on 12 December 2013.

94 David G. Epstein, David G. *Bankruptcy and Related Law in a Nutshell* 6th ed. (2002)403-405.

95 Ayer John D *et .al* "Obtaining DIP Financing and Using Cash Collateral" 23 SEP *American Bankruptcy Institute Journal* 16 (2004). Accessed through https:www.abi.org/abi-journal/obtaining dip financing and using cash collateral on 18 August 2015.

The Eleventh Circuit Court of Appeal invalidated cross-collateralisation in *Shalpiro v. Saybrook Manufacturing Co*[96] in spite of the overt approval of numerous bankruptcy courts.[97]

[96] *Shalpiro V Saybrook Manufacturing Company [*United States of America Court of Appeals] 1992.

[97] 963 F.2d 1490 (11th cr 1992).

CHAPTER 4 UNITED KINGDOM

4.1 Historical Background of Corporate Rescue in the United Kingdom

The beginnings of a rescue culture can be seen in the 1960's when the preservation of going concerns, and principally the employment generated by them, became a desirable outcome alongside the maximisation of realisations for secured creditors.[98] The medium for such business rescues was receivership under the powers contained in a floating charge usually granted to banks. Such a charge would enable the bank to appoint a receiver and manager who, when appointed, became its agent. The receiver and manager would carry on its business for sale as a going concern or dispose of its assets piecemeal. Such a receivership was not an insolvency process per se but rather the manner in which a creditor holding a floating charge (usually in addition to fixed charges) could enforce its security. Insolvency was not a necessary condition of such appointment-merely the failure to pay the secured lender in accordance with the terms of the borrowing contract. [99]

The Insolvency Act 1986[100] introduced formally the concept of administration as a measure of corporate rescue, doing away with administration receivership. Administration was seen as the main weapon of company rescue[101] since it allows companies a temporary breathing space from pressing creditors by virtue of statutory moratorium.[102] Nevertheless, it could be argued that the statutory regime preceding the Enterprise Act of 2002 undermined the effectiveness of Administration.[103]

No doubt, the statutory regime preceding the Enterprise Act, 2002, arguably weakened the effectiveness of administration as a company rescue device. The Act, however, introduced revolutionary changes to what was a time-consuming, expensive and complex procedure.

Company Voluntary Administration (CVA) was introduced by the Insolvency Act, 1986, is a debtor-in-possession process and is designed to facilitate the rehabilitation of financially troubled but viable enterprise. A CVA is a compromise between the debtor company and its creditors, whereby, for instance, the creditor agree to receive less than the amount due to them

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98 Kastrinou, Alexandra "European Corporate Insolvency Law- An Analysis of the Corporate Rescue Laws of France, Greece and United Kingdom" (Doctoral Thesis), University of Leicester 2009) at 106.

99 The only statutory intervention in the process was after 1869 when Preferential Payments Act required payment of preferential claims in priority to the holder of a floating charge. This was in recognition of the fact that a floating charge receivership was usually (but not always) a precursor to a liquidation company, a procedure in which the Crown would enjoy preferential treatment.

100 The Insolvency Act of 1986 (c45).

101 Campell, A "Company Rescue: The Legal Response to the Potential Rescue of Insolvent Companies" (1994) 5 (1) *ICCLR*, 16-24.

102 Linklater L. "The Enterprise Act: Fulfilling Great Expectations" (2003) 24 (8) Company Law 225-226.

103 Rules 2.2(1), 2.3 and 2.4 of the Insolvency Rules 1986 failed to provide creditors with the ability of taking early action, since this was only possible through a court petition.

in discharge of their claims.[104] There are two types of CVA: firstly, there is the CVA without moratorium, which is governed by Part I of the Insolvency Act, 1986 and secondly, CVA with moratorium, which is governed by the Insolvency Act, 1986 and Insolvency Act, 2000.[105]

Currently, corporate rescue is regulated by the Enterprise Act; 2002.The insolvency laws of the United Kingdom have arguably undergone thorough reforms so as to promote the idea of corporate rescue. The impact of the Enterprise Act, 2002 (c39) on the establishment of a corporate rescue is, arguably, very significant, as it makes provision for the virtual abolition of administrative receivership and also establishes the more administrative procedure as the primary way of achieving a corporate reorganisation. Arguably, the reforms by means of the Enterprise Act, 2002, contribute greatly to affording distressed companies and their management a second chance.

However, it should be noted that the Enterprise Act not only promotes a procedural change, but also a shift of ethos, that is to say, it seeks to remove a traditionally creditor-friendly jurisdiction towards a more debtor-friendly direction. The Enterprise Act, 2002, (C40) substantially replaced those provisions of the Insolvency Act, 1986 regulating the administrative procedure. Administration is regulated by the provisions contained in Schedule B1 of the Insolvency Act, 1986 as inserted by the Enterprise Act, 2002.[106]
For purposes of the Insolvency Act, 1986 (c45), an administrative order of a company is defined in paragraph 1[107] as a person appointed under Schedule B1 of the Act to manage the affairs, business and property of a company. A company is thus in administration while the appointment of an administrator is in force[108] but does not cease to be so because of the vacation of his office by an administrator as a result of death, resignation or otherwise or if he is removed from his office.[109]
The administrative procedure commences with the appointment of an administrator for the particular company.[110] There are three ways in which a person may be appointed as an administrator of a company: by an administrative order of the court under paragraph 10[111] by the holder of a floating change under paragraph 14[112] or by the company or its directors under paragraph 22.

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104 Tribe, John Paul "The reform of United Kingdom Corporate Insolvency Laws: CVA's, the Conservative and Chapter 11"International Accountant, Vol.47, 2009.

105 Insolvency Act of 1986 (c45).

106 Section 248(1) of the Enterprise Act, 2002 substituted Part 11 of the Insolvency Act, 1986 for a new Part 11. Section 248 of the Enterprise Act, shall regulate administrative orders. However, the precious provisions regulating administrative orders (including the original version of Part 2 of the Insolvency Rules, 1986) still apply to petitions for administrative orders presented to court before 15 September 2003 as well as some entities to which the new procedure does not apply.

107 Schedule B 1 of the Insolvency Act, 1986 inserted by the Enterprise Act, 2002.

108 Para 1(2)*(a)*of SchedB1.

109 Para (1)(2)*(d)* of Sched B1.

110 Para (1)(2)*(b)* Sched B1.

111 Schedule B1 of the Insolvency Act, 1986.

112 Schedule B1 of the Insolvency Act, 1986.

4.2 Administration and post-petition finance

Finding probable access to some forms of external finance may prove extremely difficult, once the fact that a company has become insolvent or entered into a rescue regime is made public. Continuing financing is the crucial and troublesome problem bedevilling every corporate reorganisation regime. Without a set of post-petition financing provisions which clearly define n the hierarchy of priorities for potential post-petition lenders, other great efforts to cast an effective rescue may prove fruitless. Representing one of the poles of the so-called market-led 'rescue culture', the UK Administration could be characterised as a creditor-oriented regime.

The possibility of getting new money by offering uncharged assets (or charged assets with sufficient equity) of the company that can be offered as fresh security may prove impractical in the UK because of the prevalence of floating charges.

There is no express provisions in the Enterprise Act, 2002, concerned with continuing financing in the UK but is argued by many academic writers that is authorised by implication. The Administrator may exercise management powers to borrow money and grant security on behalf of the company.[113] The Insolvency Act provides special provisions for the payment of debts and liabilities incurred during the administration under contracts entered into by the administrator.[114] Put all the relevant provisions together and one can see contractual liabilities incurred during the administration by the administrator enjoy priority in the following order that:

(a) loan obligations are payable ahead of the administrator's remuneration and

(b) which in turn are payable ahead of floating charge.

It seems to me that all these commitments are payable out of the same 'pot'-property of which the administrator had custody control immediately before cessation of his appointment.[115]According to Qi[116], these provisions of the Insolvency Act 1986could be read in such a way as to permit new financing arrangements during Administration that would take priority over both the administrator's remuneration and expenses and an existing floating charge. Because Administration is a management displacement[117] device itself, there is no need for the QFCH to bother continuing financing as a control device: he or she appoints an administrator himself or herself out of court or choose somebody in whom he has confidence.[118] UK style post-petition financing arrangements are less likely to be used as a lever of exerting control over management and to transfer value to privileged creditors at the expense of ordinary creditors and shareholders.

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113 Insolvency Act, 1986, Sched 1 para 3.

114 Insolvency Act, 1986, Sched B1, para 99.

115 McCormack "Super-priority New Financing and Corporate Rescue" (2007*) JBL*701, 721. Insolvency Act Schedule B para 99(3), 99(4), Milman and Mond also made similar observation in their *Security and Corporate Rescue* (1999) 27-28.

116 Availability of Continuing Financing in Corporate Reorganizations: the UK and US Perspective 2008/06

117 Dahiya,S ,John,K, Puri,M and Ramirez G "Debtor-in-Possession Financing and Bankruptcy Resolution" *Journal of Finance 69* (2003) 259

118 D-I-P Financing and Bankruptcy Resolution: Empirical Evidence (2003) 69IFE 259, 63.

It is asserted that the floating charge is not a *de facto* priority-based security interest, when taking into account the low recovery on a floating charge.[119]So, the position of ranked before floating charge but behind fixed charges seems not so attractive to new lenders in a lot of circumstances. On the other hand, the bank, as a floating charge holder, is unwilling to allow new finance to be introduced which would rank ahead of his or her own debts. It is unreasonable to believe therefore that the concentrated bank[120] , the floating charge holder in the UK, should be the most possible and suitable post-petition financer, in the context of the current legal framework of this jurisdiction.

The Insolvency Act, 1986, in section 19 and schedule B1 paragraph 99 could be read in such a way as to permit new financing arrangements during administration to take priority over both, the administrator's remuneration and expenses and an existing floating charge. It is said that this approach, which is convenient and flexible, may achieve a fine balance between the protection of existing security holder's interests and the possibility of obtaining continuing financing by the distressed debtor.[121]

While bringing in changes in the insolvency law in what became the Enterprise Act, 2002, the UK government considered amending the legislation and concluded that

> The matter was one of great complexity which required a wider consultation, particularly, if it were intended that the UK courts would have a role in approving the grant of super-priority funding on a case by case basis.[122]

Hence, it is the structure of lending in the UK and, it must be said that market practice during restructurings has prevented the development of debtor-in-possession financing. The UK insolvency law, could, however, without much difficulty, be read in such a way to permit new financing arrangements during administration that would take priority over an existing floating charge.

There is a lot going for this interpretation. It offers the advantages of convenience and flexibility and achieves a necessary reconciliation between the rights of the existing security holders, allowing an ailing company to obtain new financing. A creative judicial interpretation that admits the possibility of super-priority new finance would be sensitive to the balancing of interests required by the statutory framework and also firmly in the tradition of incremental charge.

4.3 Administration and employment

Transfer of undertakings and protection of employment regulations (TUPE) 246/06

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119 If the financing order is stayed, the lender will not finance funds, thus incurs no risk.

120 Schorer,JU and Curry, OS, "Chapter 11 Lending: An Overview of the Process" (1991) 47 (2) the Secured Lender IO.

121 Akpareva,Wendy, A "Business funding in corporate rescue; the UK perspective" LLD Thesis, University of Nottingham. 2014 at 22

122 Taylor, Stephen J "Repair or Recycle? Some Thoughts on DIP Financing and Pre-Packs" (2010) 7 (4) *International Corporate Rescue*, 269-270.

In the UK an employee's rights on the insolvency of his employer principally depend upon whether the business in which he was employed is likely to continue or not. Where there is some element of corporate rescue and a transfer of the business of the insolvent employer (for example, administration), it could well be that the employee's position is unaffected; their employment rights and liabilities being transferred as a matter of law to the new employer pursuant to the transfer of undertakings.[123] It is noteworthy that, considering the requirements to commence administration proceedings,[124], employees are not considered to be affected persons who can initiate administration proceedings.

It should be noted further that, unlike in South Africa, employees are not actively involved in the initiation and the running of the rescue mechanism as a whole.

As already mentioned, the rights of employees only come to the fore when the business of the employer is transferred. The TUPE 2006 Regulations apply where there has been a transfer of an undertaking or business (or part of a business) to another person or where there is a "service provision change".

The effect of a business transfer on employment contracts is not much. The contracts of employment of the transferor's employees are treated as if they had originally been made with the transferee so that the terms and conditions remain the same[125] and the continuity of employment is preserved. The transferor's rights, powers, duties and liabilities under or in connection with the employment contracts are transferred to the transferee.[126]Anything done by the transferor before the transfer is treated as having being done by the transferee.

The employees covered are those employed by the transferor in the business (or part of the business) transferred or who form part of the organised grouping of employees providing the service in a service provision change.[127] This depends on whether the employee is assigned to the part of the business or service being transferred. In principle, it may be possible to terminate the contracts of employment of employees pre-transfer and for the transferee to re-hire those employees on less favourable terms and conditions.

Employees have a right to object to the transfer.[128] The Regulations do not specify when the objection must take place, although in practice the objection would usually occur before the transfer. The Regulations do not operate to transfer the employment of any employee who objects to becoming employed by the transferee. Such an objection is treated as terminating the employee's contract of employment and he is not treated for any purposes as if were dismissed

123 The Transfer of Undertakings (Protection of Employment Regulations) 246 of 2006 (TUPE).
124 Schedule 1 of nterprise Act, 2002.
125 Regulation 4.
126 Regulation 4*(a)* and *(b).*
127 Regulation 3.
128 Regulation 4(7).

by either the transferee or transferor.[129] There is therefore, no general right to compensation if an employee objects to a transfer and loses his employment as a result.

However, the position is different if an employee objects to a transfer[130] because the transferee is planning to make changes to his contract of employment that would amount to a breach of contract or substantial changes to his working conditions that are to his detriment. In either case the employee would be entitled to receive unfair and possibly wrongful dismissal compensation. Transferors and transferees must inform and, in some circumstances consult appropriate representation of affected employees about the transfer.[131]Appropriate representation will be the representation of a recognised trade union if there is no recognised one, elected representation of the employees instead.

In cases where corporate rescue is not possible,[132] the employee may have a claim against the insolvent company for redundancy pay, damages for unfair dismissal and/or arrears of wages. An employee may be either a preferential or an unsecured creditor depending upon a variety of factors, the most important of which is the type of insolvency procedure adopted.

An administrator is not personally liable for any liability arising out of a contract of employment, provided an administrator has not taken a step to adopt the contract of employment. It follows that it can be said that upon commencement of the administration procedure, the administrator has the option of adopting the employment contracts of employees or not. An administrator has fourteen days in which to determine whether or not to adopt a contract of employment and if adopted no liability arises in respect of anything before the adoption of the contract, and the liability is limited to qualifying liabilities. Importantly, the administrator's liability to employees under this section is treated with priority over all other expenses of the administration, including the administrator's remuneration.

An administrator therefore must determine quickly whether employees are needed for the purpose of selling the business as a going concern, or whether costs can be saved by reducing the workforce.

4.4 The Employee Buyout as an option to insolvency

Over the last thirty years the employee buyout has been used as a reactive strategy by workers, trade unions and labour governments in a number of countries to rescue companies, save jobs and preserve communities in economic downturns. In most instances, it has sprung from direct action by workers to prevent plant closure and save their jobs. Insolvency offers the opportunity to restructure the company.

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129 Regulation 4(8).
130 Regulation 4(9).
131 Regulations 13-15.
132 Regulation 8.

The employee buyout is a democratic model that can break the mould of the insolvent, uncompetitive company, generally with a command and control structure, and re-design structures based on cooperation and participation that overcome the inefficiencies and friction involved in the separation of ownership and control in companies of this type. William Mercer[133] believes 90 per cent of British companies are of this type and the employment buyout can therefore offer the potential of significant performance breakthrough.

The employee buyout importantly resolves two intractable issues in insolvency; on one hand, how to address the legal issues concerning employees in the insolvency process; and on the other hand, how to preserve jobs, the enterprise and address the economic and social needs of the employees and the wider community. In so doing, the employment buyout challenges some of the key assumptions on corporate governance and collective bargaining held by the main actors. The employee buyout is an alternative way forward, which will meet the objectives of, and offer incentives to key actors- administrators, banks, creditors and trade unions.

The employee buyout is a vehicle that empowers the employees to enter the contractual bargain model and negotiate with the vendor. The employee buyout goes beyond the most fundamental principle of insolvency of the *pari passu* principle-which is an attempt to balance competing interests where all creditors are in a common pool in proportion to the size of their admitted claims, is unable to address the main intractable social issue of employee jobs and entitlement. In an employee buyout, employees purchasing the business can act to bring about a better result for all creditors.

The International Association of Insolvency Practitioners has voiced their concern, expressing employee's position in insolvency as intractable and unjust. Gordon Brown, UK Chancellor has outlined a vision for employee ownership;

> Employee ownership is world changing. It is the way ahead for the UK in the global economy. It reflects that human capital is becoming more important than physical assets. A company is more and more defined by its skills. It relies more on its creative energies...The global economy will succeed when employees feel a stake in the business.[134]

It is the general view of most academic writers[135] that employee rights in insolvency situations are not secured. Finch,[136] in his writing, particularly leaves out employees as a specific group, including them with creditors. This reflects the reality of the decision-making process-namely that power rests with the banks, the administrator and the key creditor(s).

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133 "In tough times, windows of opportunity are opening outward", accessed through https://www.articles.chicagotribune.com business on 5 May 2017.

134 Gordon Brown at the launch of the Job Ownership report Shared Company in November 28, 2005, accessed through https://www.ft.com on 12 May 2017.

135 See note 24.

136 Finch, V. *Corporate Insolvency Law: Perspectives and Principles* 2ed.(Cambridge University Press, Cambridge) 2002at 542.

Finch states:

> Employees are in some ways the lost souls of insolvency law. Their working contributions are the lifeblood of companies, yet the law does remarkably little to include them in insolvency procedures.[137]

Pinsents, one of UK's largest law firms, commented on these features of the Enterprise Act: "Consideration of the interest of employees of distressed company has therefore never been of greater importance to practitioners."[138]

UK academic lawyers have correctly come to the conclusion that as far as employees are concerned, the law is worthy of little praise.[139]

Insolvency law fails employees for a number of reasons; it shows a lack of coherence as they find themselves at different points in the ranking of preferences. To deal with this issue, which is a complete mixture of company, insolvency and employment law, it is necessary to take the radical position that it is not appropriate that employees are treated as unsecured creditors.

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137 Finch, (2002) 570.

138 Pinsents, "Corporate Recovery Conference," (September 2003, Manchester)116. Accessed through www.readbag.com/efesonline-library-2006-insolvency employee rights.

139 Villiers, Charlotte "Employees' Rights and Entitlements and Insolvency; Regulatory Rationale, Legal Issues and Proposed Solution, "*Company and Securities Law Journal*,(1999) Vol.17,at 22.

CHAPTER 5

5.1 CONCLUSION

In this chapter, I will conclude on the prospects of a successful business rescue culture as housed by Chapter 6 of the Companies Act, 2008. In this chapter, I conclude that the business rescue proceedings, as envisaged by chapter 6 were not well detailed and there are a couple of loopholes in the Act. I make recommendations for the South African regime based on the models the United Kingdom and the United States of America .It is to be noted that one of the problems faced by the drafters of the Companies Act was clearly illustrated by the submissions to the Portfolio Committee,[140] wherein each of the various interest groups focused only on their own interests. The Congress of South African Trade Unions (COSATU), for example, insisted on more rights for employees of companies in financial distress, while other groups saw this as a major impediment to a successful rescue. There is thus a risk that we may lose sight of the bigger picture by trying to establish whether a particular provision is better for employees, creditors, directors or shareholders. There should only be one test, and that is whether a particular provision or measure would increase the chances of a successful rescue of a company, because that will ultimately be to the advantage of everybody.

The drafters of the business rescue provisions lost sight of the fact that using terminology that is not familiar in the South African context is bound to create interpretational problems which would involve the intervention of the courts. The provisions in Chapter 6*, per se,* were supposedly meant to try and rehabilitate a financially distressed company with as little court involvement as possible. The reason for this is clear; court proceedings take a long time and could be expensive for an already financially distressed company. This was not the intended purpose of parliament.

The better part of this dissertation has shown the general attitude of the role players in the business rescue provisions in the Companies Act as individualistic. Unfortunately, like Prof Loubser[141], I also cannot escape the impression that the new business rescue proceedings are often characterised by an unsympathetic attitude to shareholders and a distrust of company management. Many seem to be based on the assumption that shareholders are rich capitalists who do not need any assistance or support when trying to rescue the company, and that only the employee need protection. While this may have been true when judicial management was first introduced in South African law, it is not a true reflection of the current situation.

It is a widely accepted fact that the major providers of capital to South African companies are institutional investors who are investing the pension fund contributions and savings of ordinary workers. If a company fails, many more workers than those who were actively employed by the company could thus lose their livelihood.

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140 See note 25

141 See not 25 above

Academic writers[142]are in agreement that the ranking claims as provided for by section 144 of the Companies Act is less likely to attract post-petition lenders because they stand to lose in the event of liquidation. It is a widely accepted fact that any rescue of a corporate entity hinges upon finance. In the South African context, it is highly unlikely that financial institutions would want to extend any loans without being afforded some kind of preference or incentive as the case may be. Any corporate rescue depends on financing; there can never be any rescue of a corporation without new money.

The South African ranking system is unprecedented because, even in the leading players in the corporate rescue field, like the United Kingdom and United States of America, post-petition lenders are priority lenders. It is without doubt that with the current form of section 144, no post commencement finance can be expected and no rescue can be expected.

The court in the *Redpath Mining*[143]has shed some light regarding the ranking of claims in business rescue proceedings. The court held that post commencement financiers rank in the third place in the order of preference after the practitioner's remuneration and employee claims. The order of ranking as set out in the case law makes it clear that the claims of secured lenders prior to the commencement of business rescue rank after the claims of both secured and unsecured post commencement claims.

Post-commencement financiers can thus seek comfort in that the court has, at least, for now, settled the much debated position of the ranking of creditors who hold security for their claims prior to the commencement of business rescue proceedings. It is our view that until such time as another court pronounces otherwise, the order of ranking as pronounced by Kgomo J in the *Merchant West*[144]must be applied.

The legislature also seems to have forgotten that this is not liquidation of the company and that the company is quite possibly not insolvent or unable to pay its debts, and may not even become so. There is a disturbing and inappropriate confusion and mixing of principles of corporate law and contractual law, on the one hand, and insolvency law on the other. The legislature decided to separate corporate rescue from insolvency law and should remain consistent and true to this principle in the provisions regulating corporate rescue proceedings. If

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142 Section 131 of the Companies Act.

143 *Redpath Mining South Africa (Pty) Ltd V Marsden NO and Others* (18486/2013) [2013] ZAGPJHC 148.

144 *Merchant West Working Capital Solutions (Pty) Ltd V Advanced Technologies and Engineering Company Ltd* [13/12406].The order of preference was set out in this case as :the (1) practitioner, for remuneration and expenses and other persons (including legal and other professionals) for costs of business rescue proceedings; 2) Employees for any remuneration which became due and payable after business rescue proceedings began; 3) Secured lenders or other creditors for any loan or supply made after business rescue proceedings (post commencement finance); 4) Unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began (post commencement finance) 5) Secured lenders or other creditors for any loan or supply made before business rescue proceedings began; 6) Employees for any remuneration which became due and payable before business rescue proceedings began; 7) Unsecured lenders or creditors for any loan or supply made before business rescue proceedings began.

the legislature does not have sufficient confidence in the possibility of successful company or business rescue, then the business rescue proceedings should be removed from the Companies Act and become part of a future Consolidated Insolvency Act.

It is obvious that the business recue regime as provided for in Chapter 6 will encounter grave problems in practice, because of interpretational issues and the adversarial nature of the proceedings. The Companies Act unnecessarily protects the rights of the employees by affording a wide variety of rights in the company rescue. This could yield the result of complicating matters and can be time consuming and costly to the company. The court should be left with the power to decide purely on the basis of whether the company is in financial distress and whether there is a reasonable possibility that it can be rescued without the emotional and subjective elements that employees, shareholders and creditors will bring.

Forcing the court to weigh up all the various interests loses sight of the purpose of this procedure, namely to afford a company with the potential to survive the best chance of doing so. It would be advisable to follow the example of English law where a restriction has been placed on persons who may participate in the hearing to ensure that the court is not flooded with dissenting views based purely on self-interest of the various persons.

5.2 COMMENTS AND RECOMMENDATIONS

It is my submission that business rescue provisions as envisaged by Chapter 6 of the Companies Act were well intended but the nature of the proceedings has turned out to be adversarial. This was not the intention of the legislature.

The position of employees in the hierarchy of preferences in case the rescue does not materialise seems to be the deterrent factor to providers of new money as well as to the current management of a financially distressed company. It is my recommendation that employees and trade unions should be removed from the list of affected persons who can apply for an order commencing business rescue proceedings. This is so because the inclusion of employees seems to me to be excessive and has no equivalent in any other comparable system.

It is recommended that employee interests may be properly safeguarded by enacting legislation similar to the UK TUPE and US Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S.256).

In as much as there is merit to the argument that employees are one of the most valuable assets of the company, downsizing the workforce is but one of the things that must be done in any effective business rescue regime. The South African Companies Act makes it cumbersome to do so. It would be preferable for a section to be inserted into the legislation that allows the business rescue practitioner to be able to downsize the workforce. The section would be similar to section 38 of the Insolvency Act which allows the suspension of employment contracts and limits the company's liability towards employees whose contracts were suspended.

The legislation regulating rescue is to be bedevilled by huge interpretational problems. To reduce these problems, it is suggested that legislation relating to employment rights in

bankruptcy should be separated from the business rescue provisions in Chapter 6 like the TUPE regulations of the United Kingdom and Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) of the United States of America.

It is recommended that uncompleted contracts should be regulated by the ordinary rules of the law of contract or legislation similar to the one applicable in winding up proceedings. If the business rescue practitioner is vested with the wide powers envisaged by section 136 (2) of the Companies Act, the sanctity of contracts are greatly affected and this has the detrimental effect of scaring off offshore investors. The wording of section 136 (2) would have unintended results and requires several drastic amendments. If this is not done, one can only hope that the courts, when faced with this provision, will interpret it according to the accepted principles of the law, in particular our law of contract and not allow what is essentially a unilateral amendment of a contract by the practitioner.

A clear distinction should be drawn, though legislative instruments, between the principles of the law of contract on the one hand and insolvency on the other. The legislature decided to separate corporate rescue from insolvency law and should remain consistent and true to this principle in the provisions regulating corporate rescue proceedings. If the legislature does not have sufficient confidence in the possibility of successful rescue of companies by means of business rescue, the provisions concerning business rescue proceedings should be removed from the Companies Act and more appropriate provisions should be provided for in a future consolidated Insolvency Act.

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