

**Companies in financial distress during business rescue  
proceedings**

by

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## Declaration

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I declare that this mini-dissertation is my own, unaided work. It is submitted in partial fulfilment of the degree Master of Law for the Mercantile Law Course Work Programme in the Faculty of Law at the University of Pretoria. It has not been submitted before for any degree or examination at any other University.

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## Abstract

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The new Companies Act has recently been introduced in South Africa with specific focus on companies in financial distress and bringing those companies back to their wealth. Prior to the introduction of the new Companies Act, South Africa made use of the judicial management procedure in terms of the Companies Act No. 61 of 1973. This was not a very successful mechanism for distressed companies in South Africa as the Old Act lacked formalised focus on business rescue and mainly focused on terminating the companies through a liquidation process. The fundamental rationality of business rescue proceedings is that a company facing financial difficulty can be rescued which will in the long term result in job preservation, better returns for creditors and higher going concern values for the company, as opposed to simply liquidating the company.

This study is thus meaningful in order to ascertain whether or not the introduction of business rescue proceedings will change the culture and/or overall understanding on the effectiveness of rescuing distressed companies in South Africa. Furthermore, this study will also assess and compare South African legislation pertaining to the business rescue regime as provided for in the Companies Act, with similar regimes in Australia and the United Kingdom.



## Chapter One

### Background and introduction

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This chapter will entail an introduction, a brief background to the problem/thesis statement as well as a statistical overview. The structure of the thesis will also be discussed in this chapter as well as key references, terms and definitions which will be applicable throughout the thesis.

#### 1. Background

“The rescue of a business preserves jobs, provides creditors with a greater return based on higher going concern values of the enterprise, potentially produces a return for owners and obtains for the country the fruits of the rehabilitated enterprise.”<sup>1</sup>

The above quotation is a depiction of what companies in financial difficulties, within South Africa and worldwide, should consider. It is likely that companies with high debts may be exposed to financial risk and as a result lead to unemployment, disrupted income and possibly liquidating the company.

Business rescue therefore provides some breathing space in order to recover from temporary liquidity complications or even more permanent indebtedness, if necessary, by providing the company with an opportunity to restructure the business operations in respect of its creditors. Therefore, business rescue is an effective mechanism which offers financially distressed companies the opportunity for efficient and effective rescue and recovery which results in the restructuring of the company in a manner which restores the company to profitability and avoiding liquidation.

Judicial management<sup>2</sup> has been South Africa’s primary form of business rescue<sup>3</sup>

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<sup>1</sup> The World Bank *Principles for Effective Insolvency and Creditor/Debtor Rights Systems* (Revised 2015). Please see [http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/2015\\_Revised\\_ICR\\_Principles\(3\).pdf](http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/2015_Revised_ICR_Principles(3).pdf) [Date of access 07/10/2015].

<sup>2</sup> In terms of s 427 - 440 of the Companies Act 61 of 1973 (“Old Act”), judicial management is referred to as a vehicle created by the legislator, whereby a company is afforded an opportunity to overcome its financial problems. However, judicial management is no longer made use of in South Africa as it has been replaced by Business Rescue under the Companies Act No. 71 of 2008.



since 1926. As a result of this, liquidations were preferred as the primary insolvency procedure as it provided a quicker and easier method for creditors to receive payment which is due to them. Judicial management was provided for in the Old Act<sup>4</sup>; however it rarely used based on the high threshold of proof required for an order as well as the requirements that creditors' claims were to be paid in full.<sup>5</sup> Josman J in *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* referred to judicial management as “a system which has barely worked since its initiation in 1926.”<sup>6</sup> As a result of the above, judicial management was thus termed “an abject failure”.<sup>7</sup>

The restructuring of companies in financial distress is on the increase globally. South Africa has introduced the Companies Act No. 71 of 2008<sup>8</sup> into South African Law, resulting in business rescue being the primary option available to companies facing financial difficulties. It is clearly that the business rescue provisions contained in the Act are bound to play an important role in the new corporate law regime. It is important to note that the provision of Chapter 6<sup>9</sup> of the Act adopts many aspects of Chapter 11 of the US Bankruptcy Code<sup>10</sup> which applies to financially distressed companies. The Act also borrows much from the United Kingdom Enterprise Act of 2002.<sup>11</sup>

The purpose of business rescue in South Africa is to maximise the likelihood of the company continuing in existence on a solvent basis. The key to business rescue will be the successful development and implementation, if approved by creditors, of a business rescue plan to rescue the company by restructuring its affairs, business, property, debt, other liabilities and equity. In the event that this is not possible, the implementation of a business rescue plan should result in a better return for the

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<sup>3</sup> Judicial management was totally underutilized in South Africa. Many companies that could have been saved were placed in liquidation without even having considered the possibility of judicial management. Judicial management differs principally from liquidation in the sense that liquidation brings about the dissolution of the company whilst judicial management intends to save the company.

<sup>4</sup> S 427 of the Old Act.

<sup>5</sup> Burdette D, “Unified insolvency legislation in South Africa: Obstacles in the path of the unification process” 1999 *De Jure* 58.

<sup>6</sup> [2001] 1 All SA 223 (C) at pg. 238.

<sup>7</sup> Stein C *The New Companies Act Unlocked* (Siber Ink 2011) at pg. 409.

<sup>8</sup> Hereinafter referred to as the “Act”.

<sup>9</sup> S 128 to s 154 of the Act.

<sup>10</sup> Chapter 11 of the US Bankruptcy Code, Bankruptcy Reform Act 11 USC 1978.

<sup>11</sup> Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J and Yeats J *The Law of Business Structures* 1<sup>st</sup> ed (Juta 2013).



company's creditors or shareholders, than would result from an immediate liquidation of the company.<sup>12</sup>

The Act attempts to make it easier for companies faced with financial difficulty to be rescued, to avoid insolvency and consequently winding-up, and to continue as a commercially viable entity.<sup>13</sup>

## 2. Statistics

According to Statistic South Africa<sup>14</sup>, the total number of liquidations recorded in June 2015 decreased by 20.6% (twenty point six percent). Specifically, compulsory liquidations decreased by 60 (sixty) cases whilst voluntary liquidations increased by 19 (nineteen) cases.<sup>15</sup> It is important to note that the June 2015 decrease has been the largest year-on-year decrease in the total liquidations. Moreover, during the first 6 (six) months of 2015, the number of liquidations reflected a year-on-year decrease of 7.8% (seven point eight percent) and liquidations in respect of companies decreased by 6.1% (six point one percent), decreased from 540 (five hundred and forty) cases of liquidations to 507 (five hundred and seven).<sup>16</sup>

Furthermore, the estimated number of insolvencies recorded in May 2015 decreased by 5.7% (five point seven percent).<sup>17</sup> According to Statistics South Africa, a 6.5% (six point five percent) decrease was estimated between March to May 2014

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<sup>12</sup> <http://www.werksmans.com/legal-services-view/business-rescue-insolvency/> [Date of access 19/03/2015].

<sup>13</sup> *Supra* 12.

<sup>14</sup> Statistics South Africa as defined in s 4(1) of the Statistics Act No. 6 of 1999 ("Statistics Act"). S 4(1) of the Statistics Act provides that –

- (1) Statistics South Africa referred to as an organisational component in the first column of Schedule 2 of the Public Service Act No. 103 of 1994 and for the purposes of the application of that Act, in terms of s 7(4)(a) of that Act, regarded to be a department –
  - (a) Continues as such; and
  - (b) Consists of the Statistician-General and the permanent and temporary staff referred to in s 7(3)(a) of this Act.
- (2) Subject to the Minister's duties and power referred to in s 5, no person or organ of state may interfere with the functioning of Statistics South Africa.
- (3) For the purpose of ensuring the effectiveness of Statistics South Africa, all other organs of state must assist it in accordance with the principles of co-operative government and intergovernmental relations contemplated in Chapter 3 of the Constitution.

<sup>15</sup> <http://www.statssa.gov.za/publications/P0043/P0043June2015.pdf> at pg. 2. [Date of access 19/08/2015].

<sup>16</sup> *Supra* 15.

<sup>17</sup> <http://www.statssa.gov.za/publications/P0043/P0043June2015.pdf> at pg. 3. [Date of access 19/08/2015].



and March to May 2015 as well as a 7.8% (seven point eight percent) decrease in the first 5 (five) months of 2015, in comparison to the first 5 (five) months of 2014.<sup>18</sup>

Since the implementation of the Act, business rescue has been widely utilised with some element of difficulty. The Companies and Intellectual Property Commission (“CIPC”) has since reported over 1500 (one thousand five hundred) filings of business rescue over the first 36 (thirty six) months with an annual steady increase.<sup>19</sup> The status of commenced business rescue proceedings in South Africa as at March 2015 is more fully described in the table below.<sup>20</sup>

| <b>Operational Applications</b>            | <b>2011 – 2012</b> | <b>2012 – 2013</b> | <b>2013 – 2014</b> | <b>2014 – 2015</b> | <b>Total</b> |
|--|--------------------|--------------------|--------------------|--------------------|--------------|
| <b>Business Rescue Proceedings Started</b> | 384                | 446                | 411                | 413                | 1654         |
| <b>Invalid filings</b>                     | 59                 | 22                 | 21                 | 40                 | 142          |
| <b>Business Rescue Proceeding Ended</b>    | 282                | 239                | 181                | 69                 | 771          |
| <b>CoR125.2<sup>21</sup></b>               | 65                 | 81                 | 58                 | 22                 | 226          |
| <b>CoR125.3<sup>22</sup></b>               | 61                 | 83                 | 61                 | 6                  | 211          |
| <b>Liquidation</b>                         | 49                 | 44                 | 41                 | 21                 | 155          |
| <b>Court Order to Set Aside Business</b>   | 2                  | 8                  | 2                  | 0                  | 12           |

<sup>18</sup> *Supra* 17.

<sup>19</sup> Pretorius M, Business Enterprises at University of Pretoria (Pty) Ltd *Business Rescue Status Quo Report Final Report* (30 March 2015) (Hereinafter referred to as the “Business Rescue Status Quo Report”) at pg. 10.

<sup>20</sup> [http://www.cipc.co.za/files/1914/3377/1988/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_version1\\_0.pdf](http://www.cipc.co.za/files/1914/3377/1988/Status_of_Business_Rescue_in_South_Africa_version1_0.pdf) at pg. 1. [Date of access 19/08/2015].

<sup>21</sup> Notice of Termination of Business Rescue Proceedings. Please see CIPC website at <http://www.cipc.co.za/index.php/manage-your-business/manage-your-company/private-company/changing-status-your-company/business-rescue/> [Date of access 20/08/2015].

<sup>22</sup> Notice of Substantial Implementation of a Business Rescue Plan. Please see CIPC website at <http://www.cipc.co.za/index.php/manage-your-business/manage-your-company/public-company/changing-status-your-company/business-rescue/> [Date of access 20/08/2015].



|                                   |     |     |     |     |     |
|-----------------------------------|-----|-----|-----|-----|-----|
| <b>Rescue</b>                     |     |     |     |     |     |
| <b>Nullities</b>                  | 105 | 23  | 19  | 20  | 167 |
| <b>Active as at 31 March 2015</b> | 102 | 207 | 230 | 344 | 883 |

As can be seen from the table above, from inception of business rescue to 31 March 2015, 167 (one hundred and sixty seven) cases was declared a nullity, 226 (two hundred and twenty six) cases have been terminated by filling a CoR125.2 form, 211 (two hundred and eleven) cases have been substantially implemented by filling a CoR125.3 form, 155 (one hundred and fifty five) cases have ended up in liquidation, 12 (twelve) cases have been set aside by court, and 883 (eight hundred and eighty three) cases is still currently in business rescue.<sup>23</sup>

Business rescue is mostly utilised by private companies as 63% (sixty three percent) of the entities starting business rescue proceedings as at March 2015 are private companies.

Based on the above, it is important to know what the main reasons for businesses entering into business rescue are. According to the Business Rescue Status Quo Report, the main reasons for businesses entering business rescue includes, *inter alia*, pressure from creditors, lack of management capabilities, lack of corporate governance, lost demand, capacity problems, profitability problems and other unique circumstances.<sup>24</sup>

### 3. Thesis statement and research objectives

The thesis statement is as follows: “Companies in financial distress during business rescue proceedings”.

The research objectives of this study will *inter alia* include, but will not be limited to understanding the basic principles of Business Rescue; critically analysing the interplay between Business Rescue and Liquidations; and evaluating the effects of

<sup>23</sup> *Supra* 22 at pg. 1 and 2.

<sup>24</sup> *Supra* 19 at pg. 22.

non-compliance with Business Rescue proceedings and the ramifications thereof.

#### 4. **Delineations and limitations**

The focus of this study will only be on companies and not close corporations. I will also do a comparative study on business rescue regimes in Australia and the United Kingdom and providing a brief outline of the business rescue provisions of these countries. The purpose thereof is to evaluate whether business rescue as practiced in South Africa and seen in terms of the Act is in harmony globally. The Act will be used to highlight the significant changes and amendments that have been made in order to accommodate the new business rescue provisions. Journal articles, books and case law will provide the foundation and will be the primary source for the majority of the research conducted.

#### 5. **Significance of the study**

This study aims to assess whether companies in financial distress makes use of appropriate mechanisms and legislative structures at their disposal as provided for in terms of the Act in order to facilitate and achieve business rescue.

#### 6. **Structure of thesis**

This thesis is structured in 5 (five) chapters, which include the introduction and conclusion, in order to facilitate a full study of business rescue proceeding of companies in financial distress. The structure of each chapter is set out below.

*Chapter One*, this current chapter, will entail an introduction and background to the thesis statement, research questions and discuss the interpretation of this thesis.

*Chapter Two* is an assessment of the interplay between business rescue and liquidation.

*Chapter Three* is an understanding of the basic principles of business rescues proceedings, non-compliance and the ramifications thereof.

*Chapter Four* entails a comparative study of the business rescue mechanisms utilized in South Africa, Australia and the United Kingdom.

*Chapter Five* will entail a conclusion, accompanied by recommendations in respect



of the thesis statement and research conducted.

## 7. **Key references**

The headings in this thesis are for convenience and shall be disregarded in construing this thesis.

In this thesis, unless the context indicates a contrary intention, any reference to: the singular shall include plural and vice versa; one gender shall include the others; and natural persons shall include juristic persons (whether corporate or not) and the state and *vice versa*.



## Chapter Two

### The interplay between business rescue and liquidations

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The purpose of this chapter is to introduce the concept of business rescue whilst assessing the prior position in the South African context in terms of the Old Act.

In this chapter the following points will be discussed, namely –

Whether liquidations<sup>25</sup> are still an option available to financially distressed companies; the interplay between the different proceedings, namely business rescue proceedings and liquidation proceedings; the difference between the solvency and liquidity test and the test for financially distressed companies; the difference between an insolvency practitioner and a business rescue practitioner and whether or not a business rescue practitioner can be appointed as a liquidator and *vice versa*.

#### 1. Judicial Management in terms of the Old Act

Prior to the Act coming into effect and the commencement of business rescue proceedings, South Africa utilised judicial management as provided for in the Old Act<sup>26</sup>, whereas the object was to save a company from its fate, if there was any possibility or an opportunity that the company may overcome its difficulties under supervision of the court. Judicial management is similar to business rescue as it is achieved by replacing the existing management of the company with a judicial manager who will take over the business of the company with the purposes of being it back to its profitability.<sup>27</sup>

Who may apply for a judicial management order? Section 427(2)<sup>28</sup> provides that an application for a judicial management order may be made by any person who may apply for a winding-up order<sup>29</sup> in terms of the Old Act.<sup>30</sup>

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<sup>25</sup> Liquidation can also be referred to as winding-up.

<sup>26</sup> S 427 to s 440 of the Old Act.

<sup>27</sup> Cilliers ea *Corporate Law* at pg. 478.

<sup>28</sup> S 427(2) of the Old Act.

<sup>29</sup> S 346(1) of the Old Act states that “an application to the Court for the winding-up of a company may, subject to the provisions of this section, be made –

(a) by the company;



The grounds for granting a judicial management order is stipulated in terms of section 427(1)<sup>31</sup>, which provides that –

- (a) If, by reasoning of mismanagement or any other cause –
  - (i) the company is unable to pay its debts or is probably unable to meet its commitments; and
  - (ii) has not become, or is prevented from becoming, a successful business concern; and
- (b) there is a reasonable probability that, if the company is placed under judicial management, it will be in a position to –
  - (i) pay its debts or meet its obligations; and
  - (ii) become a successful business concern,  
then a court may, if it appears just and equitable, grant a judicial management order.

In addition to the above, the court may grant an order of judicial management in respect of any company involved in an application for winding-up, if it appears that it would be just and equitable to do so and possibly result in the grounds for the winding-up being removed, and the company becoming a successful concern<sup>32</sup>.

Once an application for an order of judicial management has been made, the judicial management order has to be granted<sup>33</sup>. The court may grant a provisional judicial management order<sup>34</sup>, which states the return day<sup>35</sup>, or dismissal of the

- 
- (b) by one or more of its creditors (including contingent or prospective creditors);
  - (c) by one or more of its members, or any person referred to in s 103(3), irrespective of whether his name has been entered in the register of members or not;
  - (d) jointly by any or all of the parties mentioned in paragraphs (a), (b) and (c);
  - (e) in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company; or
  - (f) in the case of the discharge of a provisional judicial management order under s 428(3) or s 432(2), the provisional judicial manager of the company.”

<sup>30</sup> S 346 of the Old Act.

<sup>31</sup> S 427(1) of the Old Act.

<sup>32</sup> S 427(3) of the Old Act.

<sup>33</sup> S 427(2) and (3) of the Old Act.

<sup>34</sup> A provisional judicial management order may be granted by the Court on an application made under s 427(2) or s 427(3) of the Old Act.

<sup>35</sup> The return day of the provisional order of judicial management must not be later than 60 (sixty) days after the date of the order and on that day the court is required to consider: the opinion and wishes of creditors, members and the company; the report of the provisional manager; the number of creditors who did not claim at the first meeting and the amounts and nature of their claims; the master’s and the registrar’s report.



application, or make any order it deems just. However, if the court makes a provisional order, the order must contain the following –

- the directions stating that the company will be under management, subject to the supervision of the court, of a provincial judicial manager appointed by the Master, and that any other person vested with the management of the company’s affairs shall be divested thereof from the date of the order; and
- any other directions which the court considers necessary as to the management of the company, which includes the conferring powers on the provisional manager, subject to the rights of creditors in order to raise money without the authority of the members.<sup>36</sup>

The provincial order, may under certain circumstances, also contain the condition that while the company is under judicial management, all legal proceedings as well as the execution of all writs, summonses and any other process against the company be stayed and may not proceed without the leave of the court<sup>37</sup>. It is important to note that the court may vary the terms of the order or discharge it any time on the application of the applicant, a creditor or member, the provisional manager or the Master<sup>38</sup>.

Consequently, after the provisional order has been granted, all of the company’s property is deemed to be in custody of the Master up until a provisional manager has been appointed and assumed office, such appointment being made by the Master of the High Court.<sup>39</sup> The appointee shall hold such office until he or she is discharged of his or her duties by the Court.<sup>40</sup>

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Once the above-mentioned factors have been considered, the court may grant a final judicial management order if it appears that if this is done the company will be enabled to become a successful concern, and that it is just and equitable that it be placed under judicial management; or discharge the provisional order or make any other order it may deem fit.

<sup>36</sup> S 428 of the Old Act.

<sup>37</sup> S 428(2) of the Old Act.

<sup>38</sup> S 428(3) of the Old Act.

<sup>39</sup> S 429 of the Old Act provides that “upon the granting of a provisional judicial management order –

- (a) all the property of the company concerned shall be deemed to be in the custody of the Master until a provisional judicial manager has been appointed and has assumed office;
- (b) the Master shall without delay –
  - (i) appoint, in accordance with the policy determined by the Minister, a provisional judicial manager (who shall not be the auditor of the company or



In considering the provisional manager's report and the desirability of placing the company under final judicial management, the prospects of the company becoming a successful concern; nominations of persons for the appointment as the final judicial managers, their names being submitted to the Master; to prove claims in meetings of creditors; and passing of resolutions as provided for in section 435(1)<sup>41</sup>, should be taken into account during meetings of creditors, members and contributors.

As stipulated above, a provisional manager will be appointed by the Master of the High Court. The duties attached to such appointment will from time to time, include but is not limited to, the provisional manager assuming the management of the company and recover and reduce into possession all the assets of the company; lodging a copy of his or her letter of appointment with the registrar within 7 (seven) days after appointment; preparing and laying before the meetings convened a report which must, *inter alia*, contain an account of the general state of the company's affairs, a statement setting out the reasons why the company is in this position, in terms of which the provisional order is based upon, statements of the company's assets and liabilities, a list of creditors and the amount and nature of the claim of each creditor, the particulars of the sources from which money has been or is to be raised for purposes of carrying on the same business of the company, and the provisional manager's considerations and/or opinions as to the prospects of the company becoming a successful concern and of the removal of circumstances which prevents it from doing same.<sup>42</sup>

The provisional manager or judicial manager is entitled to remuneration for performing such duties and/or services as set out above.<sup>43</sup> The provisional

- 
- (ii) any person disqualified under this Act from being appointed as liquidator in a winding-up) who shall give such security for the proper performance of his or her duties in his capacity as such, as the Master may direct, and who shall hold office until discharged by the Court as provided in s 432(2)(a);  
convene separate meetings of creditors, the members and debenture-holders (if any) of the company for the purposes referred to in s 431."

<sup>40</sup> Meskin *Henochsberg on the Companies Act 61 of 1973 and Commentary* at s 429. For ease of reference please see [file:///C:/Users/o.magardie/Downloads/MyLexisNexis%20-%20Custom%20View%20\(3\).pdf](file:///C:/Users/o.magardie/Downloads/MyLexisNexis%20-%20Custom%20View%20(3).pdf).

<sup>41</sup> S 435(1) of the Old Act.

<sup>42</sup> S 430 of the Old Act.

<sup>43</sup> S 434A(1) of the Old Act.



manger's remuneration may be fixed<sup>44</sup> by the Master from time to time, taking into account the manner in which he or she has performed his or her duties as well as taking into account the recommendations of debtors and creditors.<sup>45</sup>

Once the court is satisfied with the above and all the duties and services have been carried out by the provisional manager, a final order may be granted.<sup>46</sup> This order must contain the directions for the vesting of the management of the company, subject to the supervision of the court, and the handing over of all the matters and accounting by the provisional manager to the final manager, if such manager is not the same person.<sup>47</sup> Then again, if necessary, the court may discharge the provisional order or make any other order it may deem just.<sup>48</sup> In addition to the above, it is important to note that there is a general consensus that "any other order"<sup>49</sup> does not include a winding-up order, even if the court refuses to order judicial management and believes that the company should be put in liquidation.<sup>50</sup> A winding-up order may only be issued if a proper application to wind up the company has been made before the court<sup>51</sup>; otherwise the court should simply discharge the provisional order.<sup>52</sup>

## 2. Business rescue in terms of the Act

At present, the current position in South Africa in terms of the Act includes business rescue proceeding for companies facing financial difficulties. In terms of section 128(1)(b)<sup>53</sup>, business rescue is described as follows –

"Business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

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<sup>44</sup> S 434A(3) of the Old Act provides that the provisions of s 151 and 151*bis* of the Insolvency Act No. 24 of 1936, shall apply with reference to any fixing of remuneration by the Master under this section.

<sup>45</sup> S 434A(2) of the Old Act.

<sup>46</sup> See s 438(2) of the Old Act.

<sup>47</sup> S 432(3)(a) of the Old Act.

<sup>48</sup> S 432(2) of the Act.

<sup>49</sup> "Any other order" as referred to in s 432(2) of the Act.

<sup>50</sup> Loubser A *Some Comparative Aspects of Corporate Rescue in South African Company Law* LLD University of Pretoria (2010) at pg. 29.

<sup>51</sup> S 346(1)(f) of the Old Act.

<sup>52</sup> Meskin *Henochsberg on the Companies Act 61 of 1973 and Commentary* at s 346. For ease of reference please see [file:///C:/Users/o.magardie/Downloads/MyLexisNexis%20-%20Custom%20View%20\(2\).pdf](file:///C:/Users/o.magardie/Downloads/MyLexisNexis%20-%20Custom%20View%20(2).pdf).

<sup>53</sup> S 128(1)(b) of the Act.



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

As can be ascertained from the above definition of business rescue, the aim of business rescue is to restructure the affairs of a company in financial difficulties in a manner that either maximises the likelihood of the company continuing in existence on a solvent basis or which will result in a better return for the creditors of the company that would ordinarily result from the liquidation of the company.

The test for business rescue in terms of which a decision needs to be made on whether or not a company should be placed in business rescue is whether or not the company is financially distressed. A company is considered financially distressed if –

- “it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing 6 (six) months<sup>54</sup>; or
- it appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 (six) months<sup>55</sup>.”<sup>56</sup>

### 3. Liquidations in terms of the Old Act

In comparison to a company being financially distressed, liquidation implies that the company is not able to pay its debts and as a result, the company will cease to

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<sup>54</sup> This refers to commercial insolvency.

<sup>55</sup> This refers to factual insolvency.

<sup>56</sup> S 128(1)(f) of the Act.



operate in the ordinary course of its business, due to its financial difficulties.<sup>57</sup> A company may be liquidated in the following manners, namely –

- (a) by the Court; or
- (b) voluntarily<sup>58,59</sup>

The question then arises on whether liquidation is still an option as business rescue is currently recognised in South Africa and plays an important role in terms of the Act. In terms of section 7(k)<sup>60</sup>, it is stated that among the objectives of the Act is the aim to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”.

As stated above, it is clear that there is now a need for rescuing and a shift from the culture of liquidation, based on the fact that if a company is not capable of being restored to a position of solvency, the next best option is for it to at least achieve a better result for the creditors than would arise from liquidation. Although liquidation is not seen as a ‘success’ option, it does serve as the benchmark against which both better return than in liquidation and compromises are measured. Better return than in liquidation is thus pursued if it is compared favourable to the projected liquidation value of the company in question.<sup>61</sup> Therefore, liquidation is still seen as an option, but will only be used as a last resort as the benchmark associated with liquidation is the minimum benefit alternative.<sup>62</sup>

#### **4. The interplay between business rescue proceedings and liquidation proceedings**

The liquidation process can be broken down in 3 (three) different processes, namely: prior to the liquidation process; during the liquidation process; and after the liquidation process.

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<sup>57</sup> S 339 of the Old Act provides that whilst liquidating a company, the provisions of the law of insolvency shall, in so far as they are applicable, apply mutatis mutandis in respect of any matter not specifically provided for by this Act.

<sup>58</sup> S 343(2) of the Old Act provides that voluntary liquidation of a company may be a creditors’ voluntary liquidation or a members’ voluntary liquidation.

<sup>59</sup> S 343 of the Old Act sets out the modes of liquidation.

<sup>60</sup> S 7(k) of the Act.

<sup>61</sup> *Supra* 19 at pg. 22.

<sup>62</sup> *Supra* 61.



As a point of departure, it needs to be determined whether liquidation is in fact the correct option. The following factors will need to be considered in determining whether this is the correct option, namely: whether the company in question will lose its vendors listing, Black Economic Empowerment status, long term contracts, annuity income and status or presence in the market, etc. A more important factor which needs to be considered will be whether the Directors and/or Shareholders will be held personally liable for the debts of the company and whether sureties might have been signed.<sup>63</sup> These factors relate to instances where the South African Revenue Services is owed money or in respect of reckless trading.<sup>64</sup>

Once the liquidation proceedings have commenced by or against the company at the time an application for an order placing the company under supervision and commencing business rescue proceedings is made, the application will suspend those liquidation proceedings<sup>65</sup> until –

- (a) “the court has adjudicated upon the application; or
- (b) the business rescue proceedings end, if the court makes the order applied for.”<sup>66</sup>

In *Firstrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd*<sup>67</sup> the Court gave a simpler understanding of section 131(6)<sup>68</sup> which provides that if the application for business rescue after adjudication is refused, the suspension of liquidation proceedings is ended. However, if the application is granted, the suspension of liquidation proceedings endures until the business rescue proceedings end, in terms of section 132(2).<sup>69</sup>

Furthermore, in terms of section 131(7)<sup>70</sup>, a the court has the power to grant an order placing a company under business rescue at any time during the course of

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<sup>63</sup> Potgieter B *Liquidation Process* (16 July 2015). Please see <http://daniepotgieterattorneys.co.za/liquidation-process/> [Date of access 03/10/2015].

<sup>64</sup> *Supra* 63.

<sup>65</sup> Meskin *Henochsberg on the Companies Act 71 of 2008 and Commentary* at s 131 provides that the suspension of the liquidation proceedings entails the suspension of the “office of the liquidator” and no collection of, *inter alia*, assets by the liquidator can take place during business rescue proceedings.

<sup>66</sup> S 131(6)(a) and (b) of the Act.

<sup>67</sup> [2012] 2 ALL SA 560 (KZD).

<sup>68</sup> S 131(6) of the Act.

<sup>69</sup> S 132(2) of the Act.

<sup>70</sup> S 131(7) of the Act.



any liquidation proceedings or proceedings to enforce any security against the company.

It is important to note the difference between the test for financial distressed companies from the solvency and liquidity test as provided for in section 4.<sup>71</sup> In terms of section 4<sup>72</sup> a company will satisfy the solvency and liquidity test at a particular point in time if considering all reasonable foreseeable financial circumstances of the company at that time –

- (a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued<sup>73</sup>; and
- (b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of –
  - (i) 12 (twelve) months after the date on which the test is considered; or
  - (ii) in the case of a distribution<sup>74</sup>, 12 (twelve) months following that distribution.<sup>75</sup>

This essential difference between the two tests, namely “financial distress”, as set out above in paragraph 1, and that of “solvency and liquidity” is that the company will be financially distressed if it is either factually or commercially insolvent in the immediately ensuing 6 (six) months as stipulated in section 128(1)(f)<sup>76</sup>, while a company will be said to be solvent and liquid if it satisfies both, factual and commercial solvency as per section 4.<sup>77</sup>

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<sup>71</sup> S 4 of the Act.

<sup>72</sup> *Supra* 71.

<sup>73</sup> This is also referred to as factual insolvency.

<sup>74</sup> Distribution as contemplated in paragraph (a) of the definition of “distribution” in s 1 of the Act. “Distribution” means a direct or indirect –

- (a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, where –
  - (i) in the form of a dividend;
  - (ii) as a payment in lieu of a capitalisation share, as contemplated in s 47;
  - (iii) as consideration for the acquisition –
    - (aa) by the company of any of its shares, as contemplated in s 48; or
    - (bb) by any company within the same group of companies, of any shares of a company within that group of companies; or
  - (iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to s 164(19).

<sup>75</sup> This is also referred to as commercial insolvency.

<sup>76</sup> *Supra* 56.

<sup>77</sup> *Supra* 71.



In addition to the above, a distinction between insolvency practitioners and business rescue practitioner needs to be made. It is important to note that insolvency practitioners and business rescue practitioners are essentially not the same as each one of them are appointed to fulfil and/or carry out different duties. In terms of section 391<sup>78</sup>, an insolvency practitioner is referred to a liquidator in any liquidation proceedings. The liquidator is vested with the following duties, *inter alia*, to recover and reduce into their possession all the assets and property of the company, movable and immovable, and apply the proceeds so far as they extend in satisfaction of the costs of the liquidation of the company and the claims of creditors, and finally to distribute the balance among those who are entitled thereto.<sup>79</sup> In contrast to the duties vested in an insolvency practitioner, a business rescue practitioner<sup>80</sup> is responsible for investigating the company's affairs, business, property and financial situation in order to consider whether there is a reasonable prospect of the company being rescued and becoming a successful concern.<sup>81</sup>

The question then arises as to whether a business rescue practitioner can be appointed as an insolvency practitioner and vice versa. Prior to the promulgation of the Act, there was some debate and uncertainty as to whether business rescue practitioners should take from the existing ranks of insolvency practitioners, or whether a whole new profession should be created.<sup>82</sup> As a result, government opted for a whole new profession. Although there are many insolvency practitioners who qualify for the appointment as business rescue practitioners, only licensed practitioners may be appointed.<sup>83</sup> However, if the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.<sup>84</sup> The Act does not suggest that a liquidator may not be appointed as a business rescue practitioner if a company goes into business rescue subsequent to liquidation. The Act does however create the impression that an

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<sup>78</sup> S 391 of the Old Act.

<sup>79</sup> See <http://www.closedforbusiness.ie/duties-of-a-liquidator/> [Date of access 08/10/2015].

<sup>80</sup> It is important to note that business rescue practitioners also have the responsibilities, duties and liabilities of directors of a company as contemplated in s 75, 76 and 77 of the Act.

<sup>81</sup> S 141(1) of the Act.

<sup>82</sup> Meskin Henochsberg on the Companies Act 71 of 2008 and Commentary at s 138.

<sup>83</sup> *Supra* 82.

<sup>84</sup> S 140(4) of the Act.



insolvency practitioner could take appointment as a business rescue practitioner if he or she satisfies the requirements for qualification as provided for in section 138.<sup>85</sup>

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<sup>85</sup> S 138 of the Act provides that “a person may be appointed as the business rescue practitioner of a company only if the person –

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



## Chapter Three

### Basic principles of business rescue proceedings in terms of the Companies Act No. 71 of 2008

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This chapter will set out the basic principles of business rescue, making specific reference to how a company is placed in business rescue, voluntary business rescue, business rescue resolutions, and the commencement of business rescue by court proceedings as well as when a company should commence business rescue proceedings, the duration of such proceedings and the termination thereof. Emphasis will also be placed on the role of business rescue practitioners and their powers during the proceedings, the process of appointing a business rescue practitioner, whether a business rescue practitioner need to have specific qualifications, removal of practitioners from their office, remuneration and their liabilities.

Further, this chapter will make reference to the contents of a business rescue plan, what it should contain, how it is adopted and the consequences of a business rescue plan being rejected.

#### 1. Overview

Section 128(1)(b) of the Act defines business rescue as set out in chapter two of this study.<sup>86</sup> It is important to note that the main purpose of business rescue is not necessarily to save the business and return it to its former profitable status, but to restructure the affairs of a company in such a manner that either maximises the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company. Taken from an article<sup>87</sup>, Smits provides that –

“Modern ‘corporate rescue’ and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial bankruptcy procedures, reorganisation seeks to maximise, preserve and possibly

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<sup>86</sup> Also see *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 GNP.

<sup>87</sup> Smits A, “Corporate Administration: A Proposed Model” 1999 32 *De Jure* 80 at pg. 83.



even enhance the value of a debtor's business enterprise, in order to maximise payment to the creditors of the distressed debtor."

The definition of business rescue refers to facilitating the rehabilitation of a company that is financially distressed<sup>88</sup>; however this is not the only requirement for the commencement of business rescue proceedings. Once a company is faced with signs of it being financially distressed, business rescue should commence.<sup>89</sup> In the case of *Welman v Marcelle Props*<sup>90</sup> the court stated that "business rescue proceedings are not for terminally ill close corporations. Nor are they for chronically ill. They are for ailing corporations, which given time will be rescued and become solvent."

With reference to the above, rescuing the company means achieving the goals of business rescue<sup>91</sup>, such goals being primarily directed at the prevention of unnecessary liquidations of companies and the consequent loss of its employees' employment.<sup>92</sup>

## 2. Commencement of business rescue proceedings

The process attached to business rescue enables a financially distressed company to be made subject to proceedings, through a voluntary process by directors' resolution or a court process. During these proceedings the company's management will be placed under supervision and a moratorium on the rights of claimants' against the company will operate.<sup>93</sup>

Business rescue proceedings usually commence by directors' or shareholders' resolution or by a creditor, trade union or an employee making an application to the court for an order to place the company facing financial difficulties into supervision

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<sup>88</sup> *Supra* 53.

<sup>89</sup> Also see the case of *Gormley v West City Precinct Properties (Pty) Ltd and another* (19075/11) [2012] ZAWCHC 33. In this case the Court considered the requirements of business rescue proceedings and the meaning of "financially distressed" as provided for in the Act.

<sup>90</sup> 193 CC JDR (GST).

<sup>91</sup> See s 128(1)(h) read together with s 128(1)(b) of the Act.

<sup>92</sup> See *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others, Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and Other* (2011/35199, 2011/24545) [2012] 2 All SA 433 (GSJ) at para 15 pg. 9.

<sup>93</sup> Bradstreet R, "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy" 2010 22 SA Merc LJ at pg. 195.



proceedings.<sup>94</sup> Based on the above, the Act provides for grounds in terms of which an affected person may object to proceedings that are commenced by a company resolution.<sup>95</sup> Further, the Act provides that the Judge President of the High Court may designate any judge of the court<sup>96</sup> as a specialist in order to determine issues relating to commercial matters, commercial insolvencies and business rescue.<sup>97</sup>

## 2.1. Commencement by directors' resolution

The board of directors of the company may pass a resolution by majority vote (or by the majority of the board giving written consent) to commence the business rescue proceedings. The board must therefore have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing it.<sup>98</sup> As previously described in chapter two of this study, in order for the company to be 'financially distressed', the company must appear to be reasonably unlikely to pay its debts as and when they become due and payable, within the immediately preceding 6 (six) months, or it appears to be reasonably likely that the company will become insolvent, within the preceding 6 (six) months.<sup>99</sup>

Based on the above requirements pertaining to the term 'financially distressed', it is evident that the first requirement involves cash-flow insolvency on the basis of the company being unable to pay its debt as and when they become payable and that the second requirement is presumably a balance-sheet test, on the basis that the

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<sup>94</sup> Rushworth J, "A critical analysis of the business rescue regime in the Companies Act 71 of 2008" 2010 *Acta Juridica* at pg. 376.

<sup>95</sup> S 130 of the Act.

<sup>96</sup> In terms of s 128(1)(e) of the Act, court is defined as either –

- (i) the High Court that has jurisdiction over the matter; or
- (ii) either –
  - (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges; or
  - (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges.

<sup>97</sup> S 128(3) of the Act.

<sup>98</sup> Wassman B, "Business rescue – getting it right" January/February 2014 *De Rebus* at pg. 36. Also see the case of *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) in terms of which the Court held that cogent evidential foundation was required to support the existence of a reasonable prospect of rescue.

<sup>99</sup> *Supra* 56.



value of the assets of the company is less than the amount of its liabilities at any particular time.<sup>100</sup> Moreover, the test for financial distress applies on a day-to-day basis, whereas companies would probably not expect to prepare balance sheets on a frequent basis, therefore directors will need to be aware that, if there is concern about the company's viability, balance sheets may need to be prepared on a fairly regular basis.<sup>101</sup>

It is important to be mindful of the restrictions and publicity requirements when commencing business rescue by way of a directors' resolution. Business rescue proceedings may not be adopted if liquidation proceedings have been initiated by or against the company and the resolution to commence such proceedings will therefore have no force or effect until it has been filed at the Companies and Intellectual Property Commission<sup>102</sup>, in the prescribed manner.<sup>103</sup> Within 5 (five) business days of adopting and filing a resolution, or such longer time as CIPC, on application by the company, may allow, the company must publish a notice of the resolution and its effective date to every affected person, with a sworn statement of the facts relevant to the grounds in respect of which the board resolution was founded<sup>104</sup> as well as appoint a qualified business rescue practitioner to supervise the company during these proceedings, subject to his or her written consent to such appointment.<sup>105</sup> After such appointment, the company must file the notice of appointment within 2 (two) business days and publish a copy of such notice to each affected person within 5 (five) business days of filing.<sup>106</sup> It is important to take notice of the fact that if the filing and publicity requirements are not satisfied, the resolution commencing these proceedings will lapse and be of no force and effect, resulting in restrictions on the company commencing further business rescue proceedings for a period of 3 (three) months, unless a court approves the company filing a further resolution.<sup>107</sup>

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<sup>100</sup> *Supra* 94 at pg. 377.

<sup>101</sup> *Supra* 98.

<sup>102</sup> Hereinafter referred to as the "CIPC".

<sup>103</sup> S 129(2) of the Act.

<sup>104</sup> S 129(3)(a) of the Act.

<sup>105</sup> S 129(3)(b) of the Act.

<sup>106</sup> S 129(4) of the Act.

<sup>107</sup> S 129(5) of the Act.



Consequently, a company who has adopted a resolution to commence business rescue proceedings, is also confronted with restrictions on the commencement of liquidation proceedings as the Act provides that a company who has adopted a resolution to commence such proceedings may not adopt a resolution to embark on liquidation proceedings, unless the resolution in respect of business rescue proceedings has lapsed or until such proceedings has been terminated.<sup>108</sup>

Any time after the adoption of a board resolution and until a business rescue plan has been adopted; an affected person may apply to a court for an order setting aside the resolution or the appointment of the business rescue practitioner.<sup>109</sup> A copy of the application to court must be served on the company and the CIPC<sup>110</sup> and each affected person must be notified of the application in the prescribed manner.<sup>111</sup> A few of the grounds for setting aside the resolution may include, but is not limited to, no reasonable prospect for believing that the company is in fact financially distressed or that business rescue will be achieved.<sup>112</sup> In addition, the grounds associated with setting aside the appointment of the practitioner may include the practitioner not being properly qualified and/or independent of the company or its management or lacking the necessary skills, having regard to the company's circumstances.<sup>113</sup> Furthermore, an affected person may also apply to a court in terms of which he or she may require the practitioner to provide security in an amount or on terms and conditions the court considers necessary to secure the interests of the company and any affected persons.<sup>114</sup>

An affected person, who voted in favour of a resolution commencing the proceedings may not apply to a court to set aside that resolution<sup>115</sup> or the appointment of the practitioner<sup>116</sup>, unless otherwise agreed to by the affected person and the court.<sup>117</sup> The court has wide powers when considering the application brought by an affected

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<sup>108</sup> See s 129(6) read together with s 132(2) of the Act.

<sup>109</sup> S 130(1) of the Act.

<sup>110</sup> S 130(3)(a) of the Act.

<sup>111</sup> S 130(3)(b) of the Act.

<sup>112</sup> See further s 130(1)(a) of the Act for additional grounds for setting aside the resolution.

<sup>113</sup> See further s 130(1)(b) of the Act for additional grounds for setting aside the appointment of the business rescue practitioner.

<sup>114</sup> S 130(1)(c) of the Act.

<sup>115</sup> S 130(2)(a) of the Act.

<sup>116</sup> S 130(2)(b) of the Act.

<sup>117</sup> See s 130(2) of the Act for the grounds which needs to be agreed upon in order to depart from this principle.



person and may set aside the company's resolution based on the grounds as contemplated in section 130(5) of the Act. The court may make additional orders when setting aside the commencement resolution, which may include, but is not limited to, the company being placed under liquidation or an order for costs against any directors who voted in favour of the resolution to commence the proceedings, if there were no reasonable grounds for believing that the company would be unable to pay its debts as and when they became due and payable, unless the court is satisfied that the directors acted in good faith.<sup>118</sup> After considering an application for the commencement of business rescue proceeding, as set out above, the court shall make an order setting aside the appointment of a practitioner, appointing an alternate practitioner<sup>119</sup> recommended by, or acceptable to, the holders of a majority of the voting interests of independent creditors' voting interest who were represented at the hearing before the court.<sup>120</sup>

Over and above the information provided for in this paragraph 2.1, if the board of a company reasonably believes that the company is financially distressed, but elects not to adopt a resolution, the board must deliver a written notice to each affected person setting out the relevant aspects of the company's financial condition, as well as their reasons for not adopting the resolution in this regard.<sup>121</sup> This will therefore enable an affected person to apply to the court to alternatively commence business rescue proceedings by way of a court order.<sup>122</sup>

## 2.2. Commencement by court order

In the absence of a company resolution, the court may be approached by an affected person for an order placing the company under supervision and to commence business rescue proceedings.<sup>123</sup> It is important to note that an application to commence business rescue proceedings by way of a court order may not be carried out if the directors of the company have already passed a resolution

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<sup>118</sup> S 130(5)(c) of the Act.

<sup>119</sup> Such alternate practitioner must satisfy the requirements as contemplated in s 138 of the Act.

<sup>120</sup> S 130(6) of the Act.

<sup>121</sup> S 129(7) of the Act.

<sup>122</sup> Commencement of business rescue proceedings by way of a court order is more fully described in para 2.2 of this chapter three.

<sup>123</sup> *Supra* 92 at para 13 pg. 8. Also s 131(1) of the Act.



commencing such proceedings.<sup>124</sup> Prior to obtaining an order from a court in terms of which the court grants an order to proceed with such proceeding, a few requirements have to be met. Firstly, the applicant must serve a copy of the application on the company and the CPIC<sup>125</sup>, followed by a notification by the applicant to each affected person in respect of application, in the prescribed manner.<sup>126</sup>

The court, after considering the application, may make an order to place the company under supervision and to commence the proceedings, if it is satisfied that the company meets the threshold as contemplated in section 128(1)(f) of the Act. If the court makes an order to commence the proceedings, it shall appoint a business rescue practitioner which shall exercise the prescribed statutory functions in order to attain the goals of restructuring the company back to health.<sup>127</sup> The practitioner shall be afforded the management and control of the company in substitution for its board and pre-existing management, subject to the directors being obliged to cooperate and assist the practitioner in exercising these functions.<sup>128</sup> Consequently, this will be subject to ratification by the holders of a majority of the voting interests of independent creditors at the first meeting of creditors.<sup>129</sup> Should the court be dissatisfied with the application, the court may dismiss the application together with any appropriate order, including an order of liquidation.<sup>130</sup>

If liquidation proceedings have already been commenced when an application is made to court for the commencement of business rescue proceedings, the liquidation proceedings will be suspended until the court has adjudicated on the application<sup>131</sup> or, if the court makes the order to begin the business rescue

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<sup>124</sup> *Supra* 123.

<sup>125</sup> S 131(2)(a) of the Act.

<sup>126</sup> S 131(2)(b) of the Act.

<sup>127</sup> *Supra* 92 at para 14 pg. 8.

<sup>128</sup> *Supra* 92 at para 14 pg. 8 and 9.

<sup>129</sup> S 131(5) of the Act.

<sup>130</sup> *Supra* 98 at pg. 37. Also see s 131(4)(1)(b) of the Act.

<sup>131</sup> See the case of *Esais Johannes Jansen van Rensburg No v Cardio-Fitness Properties (Pty) Ltd* (46194/13) at para 4 in terms of which Kgomo J provides that “the effect of the business rescue application when one considers the provisions of s 131(6) of the Act is that the liquidation proceedings as commenced, stand to be suspended until the business rescue application is adjudicated upon, alternatively, until the business rescue proceedings come to an end due to the court granting the order sought by the fourth respondent”.



proceedings, until the proceedings end.<sup>132</sup> In addition to the powers of a court on an application to commence the proceedings, a court may make an order at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.<sup>133</sup>

Based on the above, it is important to note that as soon as a company has been placed under supervision in order to commence business rescue proceedings, it may not adopt a resolution placing itself in liquidation until the proceedings have ended<sup>134</sup>, subject to notifying each affected person of the order within 5 (five) business days after the date in terms of which the order is granted.<sup>135</sup> For that reason, the commencement of business rescue proceedings can override or stay the commencement or continuation of liquidation proceedings.<sup>136</sup> Consequently, this should encourage the likelihood of success of the rehabilitation process through business rescue proceedings.<sup>137</sup>

### 3. Business rescue plan

Amongst other things, one of the major amendments to the new provisions of the Act is the requirement that a rescue plan must be drawn up in order to show how the rescue of the company will be achieved.<sup>138</sup> The Act provides that, the practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan<sup>139</sup> for consideration and possible adoption at a meeting of creditor.<sup>140</sup> In the Supreme Court of Appeal case of *Oakdene Square Properties*, the following comments were made by Brand J:

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<sup>132</sup> *Supra* 94 at pg. 381. Also see s 131(6) of the Act.

<sup>133</sup> S 131(7) of the Act.

<sup>134</sup> S 131(8)(a) of the Act. Also see s 132(2) of the Act in relation to how Business Rescue Proceedings come to an end.

<sup>135</sup> S 131(8)(b) of the Act.

<sup>136</sup> *Supra* 94 at pg. 381.

<sup>137</sup> *Supra* 94 at pg. 382.

<sup>138</sup> *Supra* 50 at pg. 115.

<sup>139</sup> See Snyman-Van Deventer E, Jacobs L, “*Corporate Rescue: The South African Business Plan Examined*” 2014 NIBLeJ 6 at para 3: “The drafting and implementation of a business rescue plan is new to the South African corporate rescue model. Previously, judicial managers were not required to draft a plan for the rehabilitation of the company, and it could be said that they only tried to manage it back to health.”

<sup>140</sup> S 150(1) of the Act. Also see s 151 of the Act.



“All the applicant has to show is that a plan to do so is capable of being developed and implemented, regardless of whether or not it may fail... the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of section 141.”<sup>141</sup>

The Act provides that the plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan.<sup>142</sup> The plan must be divided into three parts, namely: Part A, consisting of the background,<sup>143</sup> Part B, consisting of the proposals<sup>144</sup> and Part C, consisting of the assumptions and conditions.<sup>145</sup>

With regard to Part A, the plan must include a complete list of all material assets of the company, as well as an indication as to which of them were held as security by creditors when the proceedings commenced.<sup>146</sup> Further, a complete list of the creditors of the company when the proceedings commenced, together with an indication as to which creditors would qualify as secured, statutory preference and concurrent in the terms of insolvency law, and such list of creditors should also indicate which creditors have already proved their claims in this regard.<sup>147</sup> In addition, Part A should also include and/or disclose the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation proceedings.<sup>148</sup> Many unpredictable factors may influence the dividend, therefore an expert, such as an accountant or auditor, will have to be approached in order to consider cost implications for the company.<sup>149</sup> A complete list of the holders of the company’s issued securities should also be disclosed,<sup>150</sup> as well as a copy of the written agreement concerning the practitioner’s remuneration<sup>151</sup> and a statement stating whether the business rescue plan includes a proposal made informally by a creditor of the company.<sup>152</sup>

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<sup>141</sup> *Supra* 92.

<sup>142</sup> S 150(2) of the Act.

<sup>143</sup> S 150(2)(a) of the Act.

<sup>144</sup> S 150(2)(b) of the Act.

<sup>145</sup> S 150(2)(c) of the Act.

<sup>146</sup> S 150(2)(a)(i) of the Act.

<sup>147</sup> S 150(2)(a)(ii) of the Act.

<sup>148</sup> S 150(2)(a)(iii) of the Act.

<sup>149</sup> *Supra* 140 at para 26 pg. 110.

<sup>150</sup> S 150(2)(a)(iv) of the Act.

<sup>151</sup> S 150(2)(a)(v) of the Act.

<sup>152</sup> S 150(2)(a)(vi) of the Act.



Part B of the plan must include information concerning the nature and duration of any moratorium for which the plan makes provision,<sup>153</sup> the extent to which the company is to be released from payment of its debts and the extent to which any debt is proposed to be converted into equity in the company or another company.<sup>154</sup> Moreover, Part B should also include information regarding the continuing role of the company and the treatment of any existing agreements;<sup>155</sup> the property of the company that is to be available to pay creditors' claims under the plan;<sup>156</sup> the order of preference in which the proceeds of property will be applied to pay creditors if the plan is adopted;<sup>157</sup> the benefits of adopting the plan, as opposed to the benefits which would be received by creditors if the company were to be placed in liquidation;<sup>158</sup> and the effect that the plan will have on the holders of each class of the company's issued securities.<sup>159</sup>

In respect of the final part of the plan, Part C must include at least a statement of the conditions, if any, that must be satisfied for the plan to come into operation and be fully implemented;<sup>160</sup> the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment;<sup>161</sup> the circumstances in which the plan will terminate;<sup>162</sup> and a projected balance sheet for the company as well as statement of income and expenses for the ensuing 3 (three) years, prepared on the assumption that the proposed plan shall be adopted.<sup>163</sup>

The proposed plan must conclude with a certificate by the practitioner stating that the information provided appears to be accurate, complete and up-to-date<sup>164</sup> and the projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.<sup>165</sup> Further, the

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<sup>153</sup> S 150(2)(b)(i) of the Act.

<sup>154</sup> S 150(2)(b)(ii) of the Act.

<sup>155</sup> S 150(2)(b)(iii) of the Act.

<sup>156</sup> S 150(2)(b)(iv) of the Act.

<sup>157</sup> S 150(2)(b)(v) of the Act.

<sup>158</sup> S 150(2)(b)(vi) of the Act.

<sup>159</sup> S 150(2)(b)(vii) of the Act.

<sup>160</sup> S 150(2)(c)(i) of the Act.

<sup>161</sup> S 150(2)(c)(ii) of the Act.

<sup>162</sup> S 150(2)(c)(iii) of the Act.

<sup>163</sup> S 150(2)(c)(iv) of the Act.

<sup>164</sup> S 150(4)(a) of the Act.

<sup>165</sup> S 150(4)(b) of the Act.



Act provides that the proposed plan must be published by the company within 25 (twenty five) business days after the date of appointment of the business rescue practitioner or such longer period permitted by the court, on the company's application,<sup>166</sup> or the holders of a majority of the creditors' voting interests.<sup>167</sup>

The approval of the proposed plan, as described above, will be on a preliminary basis only if it is supported by the holders of more than 75% (seventy five percent) of the creditors' voting interests that voted and if the votes in support of the proposed plan included at least 50% (fifty percent) of the independent creditors' voting interests that voted, if any.<sup>168</sup>

The Act provides that a business rescue plan which has been adopted shall be binding on the company and on each of the creditors of the company and every holder of the company's securities, whether or not such person was present at the meeting;<sup>169</sup> votes in favour of the adoption of the proposed plan;<sup>170</sup> or in the case of creditors, have proven their claims against the company.<sup>171</sup> These provision of the Act is often referred to as a "cram-down" provision in other jurisdictions, as it binds not only the company to the provisions of the approved plan, but also all the creditors and the holders of the issued securities of the company.<sup>172</sup>

If the company is faced with a situation where the proposed plan is rejected, the practitioner may seek a vote of approval from the holders of voting interests in order to prepare and publish a revised plan or advise the meeting that the company will apply to court to set aside the result of the vote on the grounds that it was inappropriate.<sup>173</sup> However, if the practitioner does not take the aforesaid action, an affected person may take such action, failing which the practitioner must file a notice of termination of the business rescue proceedings.<sup>174</sup> Furthermore, any affected person or combination of affected persons may make a binding offer to

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<sup>166</sup> S 150(5)(a) of the Act.

<sup>167</sup> S 150(5)(b) of the Act.

<sup>168</sup> S 152(2)(a) and (b) of the Act.

<sup>169</sup> S 152(4)(a) of the Act.

<sup>170</sup> S 152(4)(b) of the Act.

<sup>171</sup> S 152(4)(c) of the Act.

<sup>172</sup> See Meskin *Henochsberg on the Companies Act 71 of 2008 and Commentary* at s 152(4).

<sup>173</sup> S 153(1)(a)(i) and (ii) of the Act.

<sup>174</sup> Such notice of termination of the business rescue proceedings will be completed on a COR152.2 form.



purchase the voting interests of 1 (one) or more persons who opposed the adoption of the plan, at a value, independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person or those persons, if the company were to be liquidated.<sup>175</sup>

#### 4. Business rescue practitioners

##### 4.1. Appointment and powers

A business rescue practitioner is appointed to oversee and investigate the company's affairs, business, property and financial situation and thereafter determine and consider whether the company can be brought back to health.<sup>176</sup> Any person appointed as a practitioner must be a member in good standing of a profession which is appropriately regulated<sup>177</sup>, as described in the Act.<sup>178</sup> If, in the opinion of the practitioner, there is no reasonable prospect for the company to be rescued, the practitioner must notify the court, the company and all Affected Persons and thereafter apply to court for an order discontinuing the proceedings and placing the company into liquidation.<sup>179</sup>

The Minister (who is the member of the Cabinet responsible for companies) has the power to designate a person or association to regulate the practice of persons as practitioners under the Act.<sup>180</sup> Such person(s) or association(s) must be committed to achieve the purposes of this part of the Act,<sup>181</sup> function predominantly to promote sound principles and good practice of business turnaround or rescue,<sup>182</sup> and have sufficient resources and adequate administrative procedures and safeguards to enable it to function efficiently and effectively to carry out its

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<sup>175</sup> S 153(1)(b)(ii) of the Act.

<sup>176</sup> <http://www.werksmans.com/wp-content/uploads/2013/04/Werksmans-Basics-of-Business-Rescue1.pdf> at pg. 12. Also see s 141(2) of the Act.

<sup>177</sup> For further information regarding the appointment of a business rescue practitioner, see <http://www.business-rescue.co.za/business-rescue/business-rescue-implementation-and-operational-status.php#.VhfLpfmqqkp> [Date of access 06/10/2015].

<sup>178</sup> S 138(1)(a) of the Act.

<sup>179</sup> S 141(2)(a)(i) and (ii) of the Act.

<sup>180</sup> S 138(2) of the Act.

<sup>181</sup> S 138(2)(a) of the Act.

<sup>182</sup> S 138(2)(b) of the Act.



functions, or present the Minister with a credible plan to acquire or develop these resources.<sup>183</sup>

The Act affords the practitioner a wide range of powers during business rescue proceedings. In terms of the Act, the practitioner has full management and control over the company in rescue proceedings.<sup>184</sup> Such powers also include, but is not limited to delegating any power or function to a person who was part of the board or pre-existing management of the company.<sup>185</sup> In addition, the practitioner has the power to remove from office any person who forms part of the pre-existing management of the company, who does not have any other relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship or is related to a person forming part of such a relationship.<sup>186</sup>

The practitioner has responsibility to develop a business rescue plan for consideration by affected persons<sup>187</sup> and to implement that plan.<sup>188</sup> The practitioner is an officer of the court during the proceedings, and has a duty to report to the court in accordance with any applicable rules of, or orders made by, the court.<sup>189</sup> In addition, the practitioner has the same responsibilities, duties and liabilities of a director of the company, as provided for in section 75 to 77 of the Act.<sup>190</sup> Subjecting a business rescue practitioner to the same duties as directors in this way may seem fairly onerous, as he must also comply with the duties which apply expressly to practitioners.<sup>191</sup> Subject to these responsibilities, duties and liabilities, the Act provides that the practitioner is not liable for any act or omission in good faith in the course of the exercise of his or her powers and the performance of his or her functions as a practitioner.<sup>192</sup>

## 4.2. Qualifications

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<sup>183</sup> *Supra* 94 at pg. 390. Also see s 138(2)(c) of the Act.

<sup>184</sup> S 140(1)(a) of the Act.

<sup>185</sup> S 140(1)(b) of the Act.

<sup>186</sup> *Supra* 85 at pg. 10. Also see s 140(1)(c)(i) of the Act.

<sup>187</sup> S 140(1)(d)(i) of the Act.

<sup>188</sup> S 140(1)(d)(ii) of the Act.

<sup>189</sup> S 140(3)(a) of the Act.

<sup>190</sup> S 140(3)(b) of the Act.

<sup>191</sup> *Supra* 94 at pg. 393.

<sup>192</sup> S 140(3)(c)(i) of the Act.



The qualifications of the business rescue practitioner are regulated by the Act.<sup>193</sup> A person may be appointed as a practitioner of the company only if he or she is a member in good standing of a legal, accounting or business management profession accredited by the CIPC and has been licenced as such.<sup>194</sup> Regulation 126 of the Act provides that a person who is part of an accredited profession need not be licensed by CIPC.<sup>195</sup> Over and above the requirements for qualification as set out above, the practitioner should not be subject to an order of probation and would also not be disqualified from acting as a director of the company.<sup>196</sup>

#### 4.3. Removal of the business rescue practitioner

In terms of the Act, a practitioner may be removed from office by way of a court order, followed by an application by an affected person, after the adoption of a resolution by directors to begin business rescue proceedings.<sup>197</sup> Upon receipt of an application by an affected person, or on its own motion, the court may remove a practitioner from office on the following grounds, namely: that the practitioner is incompetent or fails to perform his or her duties<sup>198</sup>; fail to exercise the proper degree of care in performing his or her functions<sup>199</sup>; engages in illegal acts or conduct<sup>200</sup>; no longer satisfies the appropriate qualification requirements<sup>201</sup>; has a conflict interest or lack of independence<sup>202</sup>; or is incapacitated and unable to perform his or her functions and is unlikely to regain that capacity within a reasonable period.<sup>203</sup>

The company subject to the rescue proceedings or any creditor who nominated the practitioner shall be vested with the responsibility of appointing a new practitioner

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<sup>193</sup> See <http://www.business-rescue.co.za/business-rescue/business-rescue-practitioner-registration.php#.VhfLkfmqqkp> [Date of access 06/10/2015].

<sup>194</sup> S 138(1)(a) and (b) of the Act.

<sup>195</sup> *Supra* 85 at pg. 11. Also see regulation 126(2) of the Act.

<sup>196</sup> S 138(1)(c) and (d) of the Act. Further, the order of probation should be in terms of s 162(7) of the Act and the disqualification from acting as a director should be in terms of s 69(8) of the Act.

<sup>197</sup> *Supra* 94 at pg. 390. Also see s 139(1) of the Act.

<sup>198</sup> S 139(2)(a) of the Act.

<sup>199</sup> S 139(2)(b) of the Act.

<sup>200</sup> S 139(2)(c) of the Act.

<sup>201</sup> S 139(2)(d) of the Act.

<sup>202</sup> S 139(2)(e) of the Act.

<sup>203</sup> S 138(2)(f) of the Act.



if he or she dies, resigns or is removed from such office, subject to the right of an affected person to bring a fresh application to set aside the new appointment.<sup>204</sup>

#### 4.4. Remuneration of the business rescue practitioner

A practitioner may charge a company an amount for his or her remuneration and expenses in accordance with a tariff.<sup>205</sup> The Minister may make regulations prescribing a tariff of fees and expenses for these purposes.<sup>206</sup> The basic remuneration of a practitioner is to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, and may not exceed R1250.00 (one thousand two hundred and fifty rand) per hour with a maximum of R15 625.00 (fifteen thousand six hundred and twenty five rand) per day, including value added tax, for a small company; R1500.00 (one thousand five hundred rand) per hour with a maximum of R18 750.00 (eighteen thousand seven hundred and fifty) per day, including value added tax, for a medium company; R2000.00 (two thousand rand) per hour with a maximum of R25 000.00 (twenty five thousand rand) per day, including value added tax, for a large company or a state-owned company.<sup>207</sup> In addition, the practitioner may conclude a contingency agreement with the company for further remuneration, in addition to that provided for in the tariff.<sup>208</sup> A contingency agreement shall be final and binding on the company if it is approved by the holders of a majority of creditors' voting<sup>209</sup> and the holders of a majority of the voting rights of any shares of the company which entitle the shareholder to a portion of the residual value of the company on winding-up<sup>210</sup>, present and voting at a meeting called for the purpose of considering the proposed agreement. A creditor or shareholder who voted against a proposed contingency agreement in respect of remuneration and expenses may apply to a court within 10 (ten) business days after the date of voting on such a proposal for an order to set aside the agreement.<sup>211</sup> The grounds for setting aside such an application includes

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<sup>204</sup> S 139(3) of the Act.

<sup>205</sup> S 143(1) of the Act.

<sup>206</sup> S 143(6) of the Act.

<sup>207</sup> *Supra* 85 at pg. 15. *Supra* 194.

<sup>208</sup> S 143(2) of the Act.

<sup>209</sup> As described in s 145(4) to (6) of the Act.

<sup>210</sup> S 143(3) of the Act.

<sup>211</sup> S 143(4) of the Act.



the agreement not being just and equitable<sup>212</sup> or that the remuneration set out in the agreement is extremely unreasonable having regard to the financial circumstances of the company.<sup>213</sup> It is important to note that the basic remuneration and expenses of practitioners in carrying out their functions as such will not be subject to any creditor and/or shareholder approval; however any additional remuneration and expenses, based on the attainment of the successful outcome of the proceedings, shall be subject to such approval.

## 5. Duration and termination of business rescue proceedings

The Act contains provisions setting out when business rescue proceedings shall commence and when it shall be terminated, taking into account the requirements as to the duration and/or length of time the proceedings may be pursued.<sup>214</sup>

The time of commencement of the proceedings shall be determined in respect of the manner in which the proceedings have commenced, namely by way of a board resolution or an application to the court. With regard to a board resolution, the proceedings shall commence on the filing at the CIPC of the resolution of the board following its adoption.<sup>215</sup> If the resolution lapses due to certain requirements not being complied with and the company applies to the court for consent to file a further resolution within 3 (three) months, the proceedings shall commence when the company applies to the court for such consent.<sup>216</sup> In respect of proceedings commenced by an order of court, the proceedings shall commence when an affected person applies to court for such an order.<sup>217</sup> Business rescue proceedings shall also commence if the court makes an order placing the company under supervision during liquidation proceedings or proceedings to enforce a security interest.<sup>218</sup>

Business rescue proceedings shall terminate in the following instances, namely: when the court sets aside a resolution or order commencing the proceedings or

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<sup>212</sup> S 143(4)(a) of the Act.

<sup>213</sup> S 143(4)(b) of the Act.

<sup>214</sup> S 132 of the Act.

<sup>215</sup> S 132(1)(a)(i) of the Act.

<sup>216</sup> S 132(1)(a)(ii) of the Act.

<sup>217</sup> S 132(1)(b) of the Act.

<sup>218</sup> S 132(1)(c) of the Act.



converts the proceedings into liquidation proceedings;<sup>219</sup> when the practitioner files a notice of termination of the proceedings with the CIPC;<sup>220</sup> when a business rescue plan has been proposed and rejected, without action being taken to extend the proceedings;<sup>221</sup> or when the proposed plan has been adopted and notice of substantial implementation of the plan has been filed by the practitioner.<sup>222</sup>

It is important to note that the Act imposes restrictions on the duration of the proceedings and provides that if the proceedings have not terminated within 3 (three) months (or longer if the court permits, on the application of the practitioner), the practitioner must prepare a report on the progress of the proceedings, which should include updates each subsequent month.<sup>223</sup> Therefore, the practitioner has the responsibility of delivering the report and each monthly update to each affected person and to the court, if the proceedings were the subject of a court order, or alternatively the CIPC, if the proceedings were not subjected to a court order.<sup>224</sup>

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<sup>219</sup> S 132(2)(a) of the Act.

<sup>220</sup> S 132(2)(b) of the Act.

<sup>221</sup> S 132(2)(c)(i) of the Act.

<sup>222</sup> S 132(c)(ii) of the Act.

<sup>223</sup> S 132(3)(a) of the Act.

<sup>224</sup> S 132(3)(b) of the Act.



## Chapter Four

### Comparative study of business rescue mechanisms utilised in South Africa, Australia and the United Kingdom

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This chapter will entail a brief comparative study of business rescue and/or related mechanisms utilized in countries other than in South Africa, namely: Australia and the United Kingdom.

For purposes of this chapter it is important to note that South African company law is largely taken over from English law. As a result, South Africa generally turns to other comparable legal systems for guidance when confronted with difficulty in respect of South African company law.<sup>225</sup>

#### 1. Australia

The provisions which regulate corporate insolvency and business rescue in Australia are likely the closest to the present rescue mechanism used in South Africa. These provisions are set out in the Corporations Act (Cth) No. 50 of 2001<sup>226</sup>, which also regulates company law in general. It is important to note that Australia does not have a separate insolvency statute, but rather maintains its corporate insolvency provisions within the Corporations Act.<sup>227</sup> The provisions relating to Australia's corporate insolvency and business rescue procedures of voluntary administration are found in Part 5.3A of the Corporations Act and only apply to companies incorporated or taken to be incorporated under the Corporations Act.<sup>228</sup> It is important to take notice of the fact that compulsory liquidation in terms of the Corporations Act, does not only apply to companies but also to certain other bodies, however this is only under certain specified circumstances.<sup>229</sup> Moreover, a partnership, association, or other body<sup>230</sup> that consists of more than 5 (five)

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<sup>225</sup> Loubser A, "Business rescue in South Africa: a procedure in search of a home?" *XL CILSA* 2007 at pg. 163.

<sup>226</sup> Hereinafter referred to as the "Corporations Act".

<sup>227</sup> Anderson C, "Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective" *PER* 2008(1) at pg. 2.

<sup>228</sup> *Supra* 226 at pg. 167.

<sup>229</sup> See Part 5.7 of the Corporations Act.

<sup>230</sup> Such body can be a body corporate.



members, can also be included in this group.<sup>231</sup>

In 1983, the Australian Law Reform Commission<sup>232</sup> was instructed to conduct a comprehensive review of Australia's personal and corporate insolvency law. The ALRC thereafter published its report, the Harmer Report, in 1988.<sup>233</sup> Personal and corporate insolvency thus continue to be regulated by separate legislation, as the Australia's Bankruptcy Act regulates individual insolvency and the Corporations Act regulates corporate insolvency and business rescue.<sup>234</sup>

Based on the above, it is of significance to take notice of the fact that Australia similarly made use of 'Official Management' which was an alternative to liquidation. 'Official Management' was a form of administration, which was borrowed from the South African mechanism of judicial management, in terms of which it allowed for the appointment of an official manager (which in the South African context will be the equivalent of the judicial manager) who would manage take over the affairs of the company and manage the company until it reached a state of financial stability and was able to pay its debts in full. However, a major difficulty and hurdle for insolvent companies arose from this procedure in that it required that all the debts of the company should be paid in full, within a set time.<sup>235</sup> It was therefore noted by the Harmer Report that "official management is rarely attempted".<sup>236</sup>

In spite of the above, the provisions in Part 5.3A of the Corporations Act remained somewhat untouched, prior to the amendments passed in August 2007. In 1998, the Australian government received a comprehensive review of legislation when the legal committee of the Companies and Securities Advisory Committee<sup>237</sup> presented a report on the operation of Corporate Voluntary Administration.<sup>238</sup> One of the important factors which lead to the above was the collapse of the Ansett group of companies<sup>239</sup>. The Ansett case showed difficulty when using Part 5.3A in relation to

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<sup>231</sup> See s 9 of the Corporations Act.

<sup>232</sup> Hereinafter referred to as the "ALRC".

<sup>233</sup> ALRC Harmer Report at <http://www.alrc.gov.au/> [Date of access 15/09/2015].

<sup>234</sup> *Supra* 229.

<sup>235</sup> *Supra* 228 at pg. 4.

<sup>236</sup> *Supra* 236.

<sup>237</sup> Hereinafter referred to as "CASAC".

<sup>238</sup> *Supra* 228 at pg. 5.

<sup>239</sup> See <http://www.ansett.com.au/>.



a larger company, which in turn lead to the said amendments to the Corporations Act.<sup>240</sup>

Notwithstanding the above, the Australian corporate rehabilitation system is regarded as fairly successful, although this has to be understood in the light of their approach that saving the corporation itself is not the main goal. The goal should therefore be seen as an attempt to maximise the value of the business of the corporation and to save employment and markets.<sup>241</sup>

## 2. United Kingdom

The corporate rescue culture in the United Kingdom was urged by the introduction of the Cork Report<sup>242</sup> in terms of which the report placed emphasised that –

“a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.”<sup>243</sup>

The provisions which regulate insolvency procedures in the England can thus be split into those applicable to private individuals or partnerships, which refer to bankruptcy and those related to limited companies, which refer to insolvency.<sup>244</sup> When studying the English business rescue procedures, one cannot escape the impression that, in spite of it being contained in consolidated legislation<sup>245</sup> regulating the insolvency of all debtors, these procedures are nevertheless found in not just separate, but also largely self-contained chapters of such legislation.<sup>246</sup>

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<sup>240</sup> *Supra* 228 at pg. 6.

<sup>241</sup> *Supra* 226 at pg. 168.

<sup>242</sup> *Report of the Review Committee on Insolvency Law and Practice* (1981) Cmnd 8558.

<sup>243</sup> Para 204 of the Cork Report.

<sup>244</sup> Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy *Draft UK Report*.

<sup>245</sup> Examples of consolidated legislation where business rescue procedures are regulated in the same legislation as individual and/or consumer insolvency, are found in the United States Bankruptcy Code, the Insolvency Act of 1986 (c 45) in England, and the *Insolvenzordnung* of 5 October 1994 in Germany.

<sup>246</sup> *Supra* 226.



Several laws within the United Kingdom legislation make provision for reorganisation of companies. The ‘London approach’ or an informal credit workout approach can be accomplished outside a formal court process. Further, the United Kingdom also makes use of an administrative procedure, as the main rescue procedure, which is outlined in Schedule B1 of the Insolvency Act of 1986<sup>247</sup>, and later updated under the promulgated Enterprise Act of 2002<sup>248</sup>. In essence, the administrative procedure allows for an independent licensed insolvency practitioner to take control and perform such functions required to rescue the financially distressed company<sup>249</sup>, under protection of a temporary moratorium against creditor claims.<sup>250</sup> Further, the administrator of the company is responsible in performing his or her duties with the aim of rescuing the financially distressed company as a going concern, achieving a better return for the company’s creditors, or realising property in order to make a distribution to 1 (one) or more secured and/or preferential creditors.<sup>251</sup>

In addition to the above, the Insolvency Act of 1985 (c 65) which regulates individual insolvency, and those provisions of the Companies Act of 1985 (c 6) that dealt with corporate insolvency, including corporate rescues, were consolidated in the Insolvency Act.<sup>252</sup> This gave effect to the recommendation of the Cork Report that 1 (one) consolidated act should regulate insolvency procedures relating to both individual and corporate debtors.<sup>253</sup> Notwithstanding the consolidation, the distinction between corporate and individual insolvency in English law was permitted and as such, the 2 (two) business rescue procedures in English law, administration and company voluntary arrangements, both apply only to companies.<sup>254</sup> However, despite the independent nature of the provisions regulating administration and company voluntary arrangements, the mere fact that they are located in the Insolvency Act of 1986 and thus perceived to be closely connected to

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<sup>247</sup> Hereinafter referred to as the “Insolvency Act”.

<sup>248</sup> Hereinafter referred to as the “Enterprise Act”.

<sup>249</sup> Bezuidenhout PTJ, *A review of business rescue in South Africa since implementation of the Companies Act (71/2008)* Bsc Actuarial Science, BSc (Hons) North-West University (2012) at pg. 16.

<sup>250</sup> Macrow A, *A Comparative Assessment of Employee Rights within South African, United Kingdom and Australian Corporate Rescue Legislation* LLM University of Pretoria (2014) at pg. 33.

<sup>251</sup> *Supra* 251.

<sup>252</sup> *Supra* 226.

<sup>253</sup> *Supra* 226.

<sup>254</sup> *Supra* 226.



insolvency, has been cited as 1 (one) of the reasons as to why both these procedures have not been very successful in the United Kingdom.<sup>255</sup>

One of the benefits of unified legislation is that if a switch from liquidation to corporate rescue, or *vice versa*, is required; it may be easier than in systems where these procedures are regulated by separate legislation. However, this has not fully been materialised in the Insolvency Act 1986.<sup>256</sup> Although an administration application may be treated as a winding-up petition, the converse is not possible: a court may not order administration on a petition for winding-up although the facts should indicate that administration would be more appropriate. Moreover, if an administrator applies to court for termination of the administration procedure for failure to achieve corporate rescue, the court does not have jurisdiction to order the winding-up of the company on the same application, thereby providing the administrator with the responsibility of filing the usual prescribed petition for winding-up of the company.<sup>257</sup>

### 3. Comparison

Based on the above, the United Nations Commission on International Trade Law<sup>258</sup> commissioned an in-depth study on insolvency law in 1999, published in 2005, the Legislative Guide on Insolvency Law, which placed emphasis on encouraging “the adoption of effective national corporate insolvency regimes”.<sup>259</sup>

It is evident that the Australian corporate rescue is fairly well established and is distinct from personal and/or individual insolvency. As can be seen above, Australia’s current business rescue regime is the result of the ALRC, which conducted an intense study of insolvency in Australia.

The ALRC provides that the Australian society has overwhelmingly moved away from a debit society, and is moving towards a credit society. Further, it is important to note that the rate of personal and business insolvency has increased dramatically since the release of the General Insolvency Inquiry report in 1988. This

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<sup>255</sup> *Supra* 226 at pg. 164.

<sup>256</sup> *Supra* 251.

<sup>257</sup> *Supra* 226 at pg. 164 and 165.

<sup>258</sup> Hereinafter referred to as “UNCITRAL”.

<sup>259</sup> UNICITRAL iii.



trend is set to continue and, as such, amendments to the Bankruptcy Act and related legislation are ongoing as bankruptcy touches on many areas of law.<sup>260</sup>

In respect of the United Kingdom, the corporate rescue system has its origin in the Cork Report. Furthermore, there is also a constant attempt to address and rectify inadequacies in the statutory rescue environment.

The main criticism of the United Kingdom's corporate system related to its format and implementation through the Insolvency Acts of 1985 and 1986. However, it is important to note that recent statutory amendments resulted in vital changes to the United Kingdom's corporate rescue environment, namely: it introduced a streamlined system providing 'without court order' routes for administration; corporate rescue is now at the heart of the administrator in terms of which administrators are obliged to attempt to save a company that can be saved; and company voluntary arrangement provisions were amended to provide for directors to enter into such an arrangement without the consent of the court and without a statutory moratorium.

In contrast to South Africa's business rescue procedure, both Australian and the United Kingdom's corporate rescue procedures aim to preserve company value by maximising the likelihood of it continuing to remain in existence on a solvent basis and achieving a better return for its creditors. In addition, all 3 (three) systems make provision for an independent rescue practitioner to take control of an investigation into the affairs of the financially distressed company and supervises such process for a limited period of time, whilst under the protection of a temporary moratorium in place for creditor claims, with the aim of implementing a business rescue plan.

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<sup>260</sup> <http://www.alrc.gov.au/inquiries/insolvency-and-debt-recovery> [Date of access 15-09-2015].



## **Chapter Five**

### **Conclusion and recommendations**

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This chapter will provide recommendations and reasons as to how business rescue can be improved for the better. This chapter will also answer the question of whether financially distressed companies in South Africa are filing for business rescue and/or making applications to court regarding same.

#### **1. Introduction**

This mini-dissertation focused on business rescue, as provided for in the Act, in comparison to judicial management as provided for in the Old Act. Judicial management was the primary form of business rescue in South Africa, having only liquidation as an alternative. As can be seen, judicial management created a platform for business rescue by pointing out the pros and cons related thereto. Business rescue was therefore implemented to rescue companies in financial distress and to bring about transformation within company law.

Business rescue proceedings are more structured than that of judicial management in terms of the Old Act. Business rescue proceedings provide for a comprehensive outline of the background, proposals and assumptions regarding same in the form of a business rescue plan. Furthermore, business rescue proceedings also provided for the introduction of a business rescue practitioner, who has to be qualified in order to practice as a practitioner.

#### **2. Chapter breakdowns**

In chapter one of this study, the thesis statement was highlighted, which was “Companies in financial distress during business rescue proceedings”. This statement was also followed by research objectives which has been dealt with thought-out the study. Further, statistics pertaining to filings of business rescue and liquidation was also provided for in this chapter.

Chapter two of this study was mainly focused on a comparative study in terms of the provisions of the Act and the Old Act, namely: interplay between business rescue and liquidations. This chapter provides and sets out differences and similarities between the two provisions.



Chapter three of this study provides an in-depth focus on business rescue in terms of chapter 6 of the Act. This chapter outlined the basic principles and processes of business rescue.

This study also contained a comparative aspect, in terms of which chapter four of this study addressed and outlined the basic principles and processes of business rescue regimes followed in other countries, in comparison to the process followed in South Africa.

### 3. Recommendations

Based on the above research, it is evident that the intention of the business rescue proceedings is to provide proficient rescue and recovery of financially distressed companies. However, attention should be paid to the following aspects when considering utilising business rescue proceedings, namely<sup>261</sup> –

- 3.1. When companies are facing financial difficulties, they should seek advice at an early stage, rather than leaving it to the last minute. Leaving the problem for a later stage might worsen the problems and it might be more difficult for the company to be rescued and brought back to solvency.
- 3.2. Companies in financial difficulties should only consider business rescue proceedings only when the stakeholders of the company believe that there is a reasonable prospect to rescue the company.
- 3.3. Companies should make sure that when appointing a business rescue practitioner to take over the affairs of the company, the practitioner is qualified as provided for in the Act.
- 3.4. Ensure that all timelines and/or deadlines as complied with as provided for in the Act. Moreover, also comply with the business rescue plan.
- 3.5. It is important to take note of the fact that business rescue proceedings can be expensive as it contains expensive legal proceedings.

### 4. Conclusion

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<sup>261</sup> Please note that the list provided for in para 3 is not limited. This is only a few aspects to be taken into account when opting to utilise business rescue proceedings.

Business rescue, in terms of the Act, has been utilised in South Africa for just over 3 (three) years, however, it is still fairly new to South African company law. Since the implementation of business rescue proceedings, 1654 (one thousand six hundred and fifty four) companies have commenced business rescue proceedings and 771 (seven hundred and seventy one) companies has ended such proceedings.<sup>262</sup>

It is therefore evident that business rescue as provided for in the Act is fairly successful in comparison to judicial management in terms of the Old Act. Financially distressed companies now have the opportunity to reassess their affairs and rescue their businesses, prior to being placed in liquidation proceedings.

The culture of rescuing companies in financial difficulties, not only has positive outcomes for the company in question, but also has positive outcomes for all the stakeholders directly and/or indirectly associated with the company, as the aim of the procedure is also to get better return for all stakeholders.

In terms of the comparative study on Australia and the United Kingdom, it is my view that South Africa's business rescue regime complies with international standards as both Australia and the United Kingdom have several similarities to the South African business rescue regime.

It is therefore my view that South Africa is directed in the right direction, however South Africa should keep our legislation updated in order to improve on the procedures in rescuing companies in financial difficulties. As time progresses, we shall learn more about the industry, which will inevitably result in an increase in the success rate of business rescue and have a positive impact on our economy as a whole.

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<sup>262</sup>[http://www.cipc.co.za/files/1914/3377/1988/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_version1\\_0.pdf](http://www.cipc.co.za/files/1914/3377/1988/Status_of_Business_Rescue_in_South_Africa_version1_0.pdf) at pg. 1. [Date of access 19/08/2015].



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