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I. Summary.

Until 2008, company law in South Africa was largely regulated by the Companies Act 61 of 1973 (hereafter “the 1973 Act”).¹ The 1973 Act was amended by the new Companies Act 71 of 2008 (hereafter “the Act”).² The Act basically provides for the incorporation, registration, organisation as well as the management of companies.³ It also identifies and regulates the relationship between a company and its respective shareholders and directors, and it also provides for the efficient rescue of a financially distressed company.⁴ A company is a registered juristic person incorporated in terms of the Act.⁵ Along with the above mentioned amendments, judicial management in terms of the 1973 Act was replaced by a similar, but more practical and modern process of business rescue, which mainly entails the rehabilitation of a financially distressed company.⁶

During the business rescue process, the business rescue practitioner, which is appointed in terms of the Act,⁷ will compile a business rescue plan that sets out exactly how the business rescue proceedings will commence as well as how the business will be rehabilitated.⁸ The affected parties⁹ will have a chance to vote on this proposed business rescue plan at the meeting which the business rescue practitioner has organised¹⁰. These parties will have the chance to vote to either approve the business rescue plan or to reject it.¹¹ It is when the business rescue plan is rejected by the affected parties, that the *inappropriate* vote in terms of section 153(1)(a)(ii) of the Act comes into play.

When a business rescue plan is not accepted, the business rescue proceedings will not be able to commence, as the acceptance and adoption of the business rescue plan sets the business rescue proceedings into motion.¹² The business rescue

¹ Companies Act 61 of 1973 (hereafter “the 1973 Act”).

² Companies Act 71 of 2008 (hereafter “the Act”).

³ See the main purpose of the Act.

⁴ *Supra*.

⁵ The Act, s1.

⁶ The Act, s128(b) & section II point c of this dissertation - “The business rescue practice according to the Companies Act 71 of 2008 and its history in a South African law perspective”.

⁷ The Act, ss138-140.

⁸ The Act, s150.

⁹ The Act, ss128(a) defines who the affected parties are.

¹⁰ The Act, ss147-148 & 151.

¹¹ The Act, s152.

¹² *Supra*.

practitioner will have certain remedies to his or her disposal, such as section 153 of the Act, where he or she will be able to approach a court to set the rejection vote of the affected parties aside, on the grounds that it was *inappropriate*. Alternatively, the affected parties can make use of the *binding offer* in terms of section 153(1)(b)(ii) of the Act. This entails that affected parties, who placed a rejection vote for the business rescue plan, voting interests can be bought out by other affected parties who have voted in favour of the proposed business rescue plan, at a fair and reasonable value, and wish for the business rescue proceedings to commence.¹³

The courts have not yet determined exactly what constitutes an *inappropriate* vote, and the Act is also silent about this definition, but certain criteria has been laid out that has proven useful to the courts to determine exactly what an inappropriate vote is. For a vote against the proposed business rescue plan to be deemed inappropriate, the first task of the court is to determine if the vote is indeed *inappropriate*. If the court finds that the vote is *not inappropriate*, then the application to set the vote aside will have failed. If the court finds that the vote was *indeed inappropriate*, then the court may only set aside the outcome of an inappropriate vote if, in the prevailing circumstances, it is *fair and reasonable* to do so.¹⁴ The court must base its decision on if the information or evidence meets the requirements of the objective of the business rescue plan, whatever it is to allow it to achieve the continued existence of the company on a solvent basis or to be manage for an interim period to allow for better returns for creditors and affected persons than immediate liquidation would.¹⁵ Whatever the objective of the business rescue plan is, it must be proved that the objective has been met. Thus when there is the reasonable prospect of the company being rehabilitated, then business rescue should be granted.¹⁶ The purpose of the Act also plays a vital role in determining whether or not the vote is an *inappropriate* vote.

It can however be argued that the legislator should enact this criteria so that there is a certain line that needs to be crossed for a vote to constitute an *inappropriate* vote.

¹³ The Act, s153(b)(ii).

¹⁴ Swanepoel J & Gopel C. "An Inappropriate Business Rescue Mess" *Without Prejudice* 16 & *Advanced Business Technologies & Engineering Company v Aeronautique et Technologies* 2012 JDR 0345 (GNP).

¹⁵ *Wedgewood Village Golf & Country Estate (Pty) Ltd v Sibakhulu Construction (Pty) Ltd* 2012 (2) SA 378.

¹⁶ *Zoneska Investments v Midnight Storm Investments* 2012 (2) ALL SA 590 (WCC) para [28] [37].

The Act is however clear on the alternative methods available to persons who want to commence the business rescue proceedings.

II. Introduction.

a. Brief introduction of the Companies Act 71 of 2008.

Until the amendment in 2008, the company law in South Africa was largely regulated by the 1973 Act, and it was replaced by the Act, and once again being amended in 2011.¹⁷ For the somewhat thirty seven years the 1973 Act has been enacted, the company law and corporate actions has undergone radical changes, and certain morals of the new company law was not properly represented by the 1973 Act, like proper corporate governance, transparency and accountability. The Act not only introduced these fundamental changes to the South African company law and corporate actions, but also basically provides for the incorporation of these corporate morals as well as the incorporation, registration, organisation as well as the management of companies.¹⁸ It also identifies and regulates the relationship between a company and its respective shareholders and directors,¹⁹ and it also provides for the efficient rescue of a financially distressed company. A company is a registered juristic person incorporated in terms of the Act.²⁰

b. The interpretation and purpose of the Companies Act 71 of 2008.

The Act's interpretation and purpose is set out respectively in sections 5 and 7 of the Act. The Act must be interpreted so that it will give effect to the purposes as set out in section 7 of the Act.²¹ The various purposes are set out in section 7 of the Act, but specifically relating to the business rescue proceedings, is section 7(k) of the Act, that provides for the efficient rescue of a financially distressed company, in a manner that balances the rights and interests of all relevant stakeholders.

¹⁷ The Companies Amendment Act 3 of 2011.

¹⁸ As set out in the main purpose of the Act.

¹⁹ *Supra* & see s128(a) for "affected persons".

²⁰ The Act, s1.

²¹ The Act, s5(a).

c. The business rescue practice according to the Companies Act 71 of 2008 and its history in a South African law perspective.

Since the inception of the company law in South Africa, the company law has made provisions for a formal corporate business rescue procedure, in the form of judicial management.²² Before the 1973 Act was amended, the process of judicial management was available to a company that found itself in financial distress due to either malpractice of the company or a rough economic market, just to name a few.²³ The purpose of judicial management was to save the company from liquidation, make provisions so the company could pay its creditors as well as that the company could go forth with the solvent management of the company,²⁴ all of this to be accomplished within reasonable time.²⁵

Unfortunately, judicial management has never been regarded as a successful corporate rescue procedure, and has been severely criticised on many grounds, often being referred to as “a system which has barely worked since its initiation in 1926”²⁶, and remained unchanged despite incisive academic criticism of the 1973 Act, regarding the absence of practicality, flexibility and effectiveness.²⁷ The department of Trade and Industry’s policy paper²⁸ contained guidelines on its corporate law reform project, and insolvency and corporate rescue were specifically mentioned as areas that needed to be reviewed and improved in a new company law system in South Africa.²⁹ The policy paper stated that judicial management was rarely used and even more rarely led to a successful rescue of a distressed company.

²² The Companies Act of 1926.

²³ The 1973 Act, s428.

²⁴ Pretorius JT (eds) *South Africa’s Company Law through the cases 1999* (ǃuitgawe); *Lief v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W).

²⁵ Pretorius JT (eds) *South Africa’s Company Law through the cases 1999* (ǃuitgawe); *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E); The 1973 Act, s427(1).

²⁶ *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C) [238].

²⁷ Bradstreet R. “The New Business Rescue: Will Creditors Sink or Swim?” *South African Law Journal* 352.

²⁸ “South African Company Law For The 21st Century: Guidelines for Corporate Law Reform” GN 1183 in GG 26493 of 23 June 2004 [The Department of Trade and Industry].

²⁹ “South African Company Law For The 21st Century: Guidelines for Corporate Law Reform” GN 1183 in GG 26493 of 23 June 2004 [The Department of Trade and Industry].

The need for law reform was identified, and the initiatives have led to the enactment of the new Companies Act 71 of 2008, which introduced a new modern business rescue procedure in Chapter 6 to replace the 1973 Act's³⁰ judicial management.

Business rescue in terms of section 128(b) of the Companies Act, reads as follows:³¹

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

- (i) The temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of 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.”

A financially distressed company, in reference to a particular company at any particular time, means that it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months, or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.³²

Business rescue was implemented in the South African company law on the 1st of May 2011, and redefined how legislation can possibly save financially distressed companies from financial distress, and ultimately avoid liquidation proceedings.

³⁰ Companies Act 61 of 1973.

³¹ The Act, s128(1)(b) [own emphasis].

³² The Act, s128(1)(f).

Chapter 6 of the Act³³ will have far more implications on financial institutions, other creditors and all stakeholders in the business world.

It is important to note that the board of a company can resolve that the company voluntarily begin business rescue proceedings³⁴ or a court order can commence the proceedings as well³⁵ when any affected person applies to the court to place the company under supervision.

d. The business rescue plan according to section 150, and other relevant sections of the Companies Act 71 of 2008.

As Part D³⁶ (the development and approval of the business rescue plan) of Chapter 6 of the Act, creates the most critical phase of the business rescue process, it cannot be read in isolation.

In terms of section 150 of the Act, it is the practitioner's duty to prepare a business rescue plan for consideration and possible adoption after he or she has consulted with creditors, other affected persons and the management of the company. Section 150 of the Act sets out the rescue plan and the format that it should be submitted in for consideration by the affected persons after, the business rescue practitioner has consulted with the Creditors, other affected persons and the management of the company.³⁷ The business rescue plan must set out all the information that the affected persons³⁸ will reasonably need to make an informed decision on whether or not to accept or reject the business rescue plan, as prepared by the business rescue practitioner.³⁹ The business rescue plan must be divided into three parts: Part A (Background, such as the material assets, creditors, probable dividends etc.)⁴⁰; Part

³³ "South African Company Law For The 21st Century: Guidelines for Corporate Law Reform" GN 1183 in GG 26493 of 23 June 2004 [The Department of Trade and Industry].

³⁴ The Act, s129.

³⁵ The Act, s131.

³⁶ The Act, ss150-145.

³⁷ The Act, s150(1).

³⁸ As set out in the Act s128(1)(a).

³⁹ The Act, s150(2).

⁴⁰ The Act s150(2)(a).

B (Proposals on how the company will be effected by the business rescue proceedings)⁴¹ and lastly, Part C (Assumptions and conditions).⁴²

It is a requirement of the Act that the business rescue plan be published by the company within 25 business days after the date on which the practitioner was appointed, unless a longer period time is authorized in terms of the Act.⁴³ Thereafter, and within 10 business days after the plan has been published, the practitioner is required to convene and preside over a meeting of creditors and other holders of voting interests so that the proposed plan can be considered.⁴⁴

The plan may be preliminarily approved at this meeting, if it enjoys the support of holders of more than 75% of the creditors' voting interests voted and at least 50% of the independent creditors' voting interests voted.⁴⁵

If the situation should arise where the proposed business rescue plan will alter the rights of a class of holders of the company's securities, the practitioner is required to hold a meeting with that class or classes, and they are entitled to vote in relation to the approval of the plan.⁴⁶ If the majority of voting rights support the plan, the plan is finally adopted.⁴⁷ If the majority opposes the plan's adoption, the plan is rejected.⁴⁸

In terms of section 152 of the Act, the business rescue plan must be considered by the affected persons and voted on.⁴⁹ The business rescue practitioner must inform the persons at the meeting⁵⁰ if he or she is of the reasonable prospect that the company will be rescued.⁵¹ There will also be the opportunity for the persons to address the meeting and invite discussion and conduct a vote for the business rescue practitioner to either amend the business rescue plan or to accept the business rescue plan.⁵² Section 152(3)(c)(ii)(bb) of the Act is clear that should the business rescue plan be rejected, the business rescue plan may only be consider further in terms of section

41 The Act, s150(2)(b).

42 The Act, s150(2)(c).

43 The Act, s150(5).

44 The Act, s151(1).

45 The Act, s152.

46 The Act, s152(3)(c).

47 The Act, s152.

48 *Supra*.

49 The Act, s150(1)(a).

50 As set out in the Act, s151.

51 The Act, s152(1)(b).

52 The Act, S 152(1)(c)-(e).

153 of the Act. It is clear that section 152 and 153 of the Act are linked if the business rescue plan is rejected by the vote of the persons entitled to vote on the rescue plan as indicated in section 152.

e. The affected parties in terms of section 128(1)(a), and other relevant sections of the Companies Act 71 of 2008.

Section 128(1)(a) of the Act defines an affected person, in relation to a company, as a shareholder or creditor of the company, any registered trade union representing employees of the company, and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

f. The impact of the rejection of the business rescue plan on the company.

When a business rescue plan is not accepted,⁵³ section 153 of the Act sets out the practitioner's remedies if there is a failure to adopt a business rescue plan. If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) of the Act, the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan⁵⁴ or advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.⁵⁵ This will cost the company extra time and money as the process of business rescue will be delayed.

It is when the business rescue plan is rejected, that the *inappropriate* vote comes into play.

⁵³ As contemplated in the Act, ss150-152.

⁵⁴ The Act, s153(1)(a)(i).

⁵⁵ The Act, s153(1)(a)(ii).

III. An *inappropriate* vote as set out in section 153(1)(a)(ii) of the Companies Act 71 of 2008.

The Act, as mentioned above,⁵⁶ provides for a new scheme, namely business rescue, in which a business in financial distress can be rehabilitated. According to this process, a business rescue practitioner⁵⁷ will compile a proposed business rescue plan,⁵⁸ which will entail the exact process that needs to be followed for a company to be rehabilitated. At the first meeting, as set out in section 152 of the Act⁵⁹, the business rescue practitioner will introduce the proposed business rescue plan for consideration, after which the parties present⁶⁰ will vote to either accept⁶¹ or to reject⁶² the proposed business rescue plan. Section 152 of the Act requires a majority vote for the proposed business rescue plan to be approved.⁶³ Only when the business rescue plan has been rejected,⁶⁴ the business rescue practitioner can apply to a court to set the vote that has been taken at the meeting aside, on the grounds that the vote was an *inappropriate* vote,⁶⁵ and only if the practitioner is of the reasonable believe that the proposed business rescue plan can indeed provide a process to rescue and rehabilitate the company. Section 153 of the Act broadly deals with the situation when there is a failure to adopt a business rescue plan.

Section 153(1)(a) of the Act provides,⁶⁶

“153 (1) (a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may—

- (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
- (ii) advise the meeting that the company will apply to a court to **set aside the result of the vote** by the holders of voting interests or shareholders, as the case may be, on the grounds that it was **inappropriate.**”

⁵⁶ See chapter 1.

⁵⁷ The Act, s128(1)(d).

⁵⁸ The Act, ss128(1)(c) & 150.

⁵⁹ See chapter 1.

⁶⁰ See chapter 1.

⁶¹ The Act s152(2).

⁶² The Act s152(3).

⁶³ Swanepoel J & Gopel C. “An Inappropriate Business Rescue Mess” *Without Prejudice* 16.

⁶⁴ The Act s153(1)(a).

⁶⁵ The Act, s153(1)(a)(ii).

⁶⁶ The Act, s153(1)(a) [own emphasis].

The word *inappropriate* in terms of section 153(1)(a) is not defined in the Act, and the intention of the legislature is unclear in this regard,⁶⁷ but the general interpretation of the Act⁶⁸ makes it clear that any section of the Act should be interpreted in light, and according to, the purpose of the Act as set out in section 7.⁶⁹ This section⁷⁰ constitutes that there should be an efficient rescue and recovery of distressed companies.⁷¹ Thus, broadly speaking, an *inappropriate* vote will be one that cannot be aligned with section 7. However, in *Shoprite Checkers (Pty) Ltd and Another v Berryplum Retailers CC and Others*⁷² when the court had to determine the meaning of the term *inappropriate*, it gave it its ordinary dictionary meaning of unsuitable, unfitting or improper, which is the definition that was used in other judgments⁷³ as well. The courts will determine the meaning of the word *inappropriate* in every case, as the merits of each case will be different. Although there has been substantial cases regarding business rescue, the courts still do not have a clear view of when a vote is *inappropriate* or is *not inappropriate*. The decision ultimately rests with the court, and hopefully in due time, a clear line will be given that needs to be crossed for a vote to be an *inappropriate* one. If the majority of the creditors and affected persons vote against the proposed plan, it is however unlikely that the court will intrude and declare the vote to be an *inappropriate* one.

A vote will be *inappropriate* in exceptional circumstances. As already stated, the main purpose of business rescue is to rescue and rehabilitate a company that is in financial distress, to avoid liquidation and to give money back to the people who invested in the company or have a peculiar right against it.⁷⁴ These persons can vote against the proposed plan if it infringes on their individual rights. The *inappropriate* vote is put on a three-way libra against the best interests of these persons, the broad best interest of the company and section 7⁷⁵ of the Act.

67 Swanepoel J & Gopel C. "An Inappropriate Business Rescue Mess" *Without Prejudice* 16.

68 The Act, s5.

69 The Act, s5(1).

70 The Act, s7.

71 The Act, s7(k) & chapter 1.

72 (47327/2014) [2015] ZAGPPHC 255 (11 March 2015).

73 *Ex Parte: Traget Shelf 248 CC; Commissioner, South African Revenue Service and Another v Cawood N.O. and Others* (21955/14; 34775/14) [2015] ZAGPPHC 740 (13 October 2015).

74 See chapter 1.

75 See the Act, s5.

The fair and reasonable claim that a person will get from liquidation will also be weighed against what the person will receive when the company goes in business rescue. If the claim that will be received from liquidation will be greater than that of business rescue, a vote against the proposed plan will not be deemed as *inappropriate*.

The jurisdictional facts which must be present, before an application for business rescue may be brought, are that there must be a rejection of the business rescue plan and there must be grounds that satisfy the court that the rejection by the voting interest holder was *inappropriate*.⁷⁶

IV. How the parties present at the meeting in terms of section 152, and other relevant section of the Companies Act 71 of 2008, can exercise an *inappropriate* vote.

a. The creditors' *inappropriate* vote.

The Act constitutes that a creditor is an affected person in terms of section 128(a)(i) of the Act. The creditors' inappropriate vote will be discussed separately, because the bulk of the relevant case law deals specifically with the creditors' *inappropriate* vote. A creditor is defined as a person or a body of persons of a legal nature that has provided a monetary loan to a debtor.⁷⁷ Creditors will be a normal reoccurrence to a company, as it is one of the ways that a company will obtain capital to manage and operate a company.⁷⁸ The creditors will thus be regarded in the business rescue process as they are a stakeholder and have an interest in the company that will be in question.

Within ten business days after publishing a business rescue plan in terms of section 150 of the Act, the business rescue practitioner must preside over a meeting of the creditors to consider the business rescue plan.⁷⁹ The business rescue practitioner will then call for the creditors to vote to approve the proposed business rescue plan, and

⁷⁶ *KJ Foods CC v First National Bank* 2015 75627/2013 (GNP).

⁷⁷ Hornbey AS (et al). *Oxford's Advanced Learner's Dictionary* 2010 (8th Edition) 345.

⁷⁸ Cassim FHI (eds). *The Law of Business Structures* 2013 (1st Edition) 247.

⁷⁹ The Act, ss150(1) & 152(1)(a).

it will be approved if it was supported by the holders of more than 75% of the creditors' voting interest⁸⁰ and the votes in support for the proposed business rescue plan includes at least 50% of the independent creditors' voting interest.⁸¹ If the plan was not approved the plan will be deemed rejected,⁸² and it can be a possibility for the creditor to vote inappropriately when rejecting a proposed business rescue plan.

Chapter 6 of the Act makes it clear that creditors have the strongest right to consultation regarding the development of a business rescue plan. They have the biggest financial interest in the outcome of the proposed business rescue. As such practitioner must prepare a business plan after consultation with the creditors.⁸³

When it comes to business rescue proceedings, the Act envisages a short term approach and this is so for self-evident reasons because there must be a measure of certainty in the commercial world as creditors should not be left in a state of flux for an indefinite period.⁸⁴

When a large group of creditors decides to vote against the proposed business rescue plan, and it will then benefit their own interest, but it leaves a single or small group of creditors in a worse position than the business rescue process would have, that vote can be deemed *inappropriate*, according to the purpose of the Act.⁸⁵ This can be practically illustrated in *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC and Others*⁸⁶ in which the respondent placed the company voluntary under business rescue. Shoprite was the majority creditor, holding more than 50% of the voting rights. Shoprite rejected the proposed business rescue plan,⁸⁷ because the outcome of their securities would be more if the company would be liquidated. It was in this case that the court found that if a creditor votes against the proposed business rescue plan, it would *not be inappropriate* if the creditor votes in their own interests. Thus, a *bona fide*

⁸⁰ The Act s152(2)(a).

⁸¹ The Act s152(2)(b).

⁸² The Act s152(3)(a).

⁸³ *Gormley v West City Precinct Properties (Pty) Ltd and Another; Anglo Irish Bank Corporation Limited v West City Precinct (Ply) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012).

⁸⁴ *Gormley v West City Precinct Properties (Ply) Ltd and Another; Anglo Irish Bank Corporation Limited v West City Precinct (Ply) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012).

⁸⁵ Swanepoel J & Gopel C. "An Inappropriate Business Rescue Mess" *Without Prejudice* 16 & The Act, s7(k).

⁸⁶ 2014 47327/2014 (GNP).

⁸⁷ The Act, s150.

rejection vote from the creditor would not constitute an *inappropriate* vote when they are of the opinion that a rejection vote would improve their interests if the company is not placed under business rescue.

In the *ex parte* application of Target Shelf,⁸⁸ the practitioners, on behalf of the closed corporation, Target Shelf, have approached the court in terms of section 153(1)(a)(ii) of the Act, for an order to set aside Business Partners' vote, the largest creditors of Target Shelf, to refuse to adopt the proposed amended business rescue plan for Target Shelf, on the ground that the vote is *inappropriate*, and ordering that the amended plan be finally adopted.⁸⁹ Mortgage bonds were registered over the property in favor of Business Partners and the South African Revenue Service (hereafter "SARS") became a creditor when Target Shelf failed to submit its tax returns. SARS and Business Partners' seek to have Target Shelf liquidated opposed to being placed in business rescue. Target Shelf is a property owning closed corporation and earns income through the rental of residential and commercial properties and has only one member and director, Mr. Tsakiroglou. In his capacity as sole member and director of Target Shelf, Mr. Tsakiroglou resolved in terms of section 129 of the Act that Target Shelf voluntarily commence business rescue proceedings, on the ground that it is financially distressed and that there are reasonable prospects of it being rescued.

The argument was that Business Partners' and SARS should not have voted against the proposed business rescue plan, and when they exercised a rejection vote that resulted in the rejection of the business rescue plan, their vote could be deemed as *inappropriate*.⁹⁰

The counter argument was that the rejection vote of the proposed business rescue plan was *not inappropriate*, because the best interests of Business Partners and SARS were not reserved in the amended business rescue plan, as well as the fair and reasonable return that was not envisioned in the proposed business rescue plan that would have been implemented in reasonable time.⁹¹ There was also no adequate evidence to support Target Shelf's submission that the provisions made in the

⁸⁸ *Ex Parte: Traget Shelf 248 CC; Commissioner, South African Revenue Service and Another v Cawood N.O. and Others* (21955/14; 34775/14) [2015] ZAGPPHC 740 (13 october 2015).

⁸⁹ *Supra*.

⁹⁰ *Ex Parte: Traget Shelf 248 CC; Commissioner, South African Revenue Service and Another v Cawood N.O. and Others* (21955/14; 34775/14) [2015] ZAGPPHC 740 (13 october 2015).

⁹¹ *Supra*.

proposed business rescue plan with respect to the interests of Business Partners is enough to satisfy Business Partners' claim, or a fair and reasonable estimate of the return to Business Partners, if Target Shelf were to be liquidated.

The court came ultimately to the conclusion that there was *no inappropriate* vote exercised by the creditors of Target Shelf resulting that the closed corporation was to be liquidated, and the application was dismissed.

In *Copper Sunset Trading 220 (Pty) Ltd, t/a Lephale (under Business Rescue) v Spar Group Ltd and Another*⁹² the court found that if the creditor(s) are the only parties to be benefited by the rejection of the proposed plan, that vote would constitute an *inappropriate* vote. In this unreported case, the court granted an application brought by the business rescue practitioner to have the votes that the creditors placed against the business rescue plan, set aside. The court found that it was unreasonable for the creditors to oppose the business rescue plan as they were the only parties that will benefit from liquidation, and the court found the conduct of the creditors were *inappropriate*.⁹³ This contrasts with *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC and Others*⁹⁴ where the court found the opposite. It thus illustrates that the court will determine in every case what will constitute an *inappropriate* vote, as the merits of each case will differ.

Lastly in *Madoza (Pty) Ltd v ABSA Bank Ltd and Others*,⁹⁵ the creditors decided to vote to reject the proposed business rescue plan, as set out in section 152 of the Act. The applicant applied to the court to deem this decision as *inappropriate*. In this case the court did not decide on the matter of what constitutes an inappropriate vote, as the appointment of the business rescue practitioner was in dispute. This case, however illustrates that section 153(1)(a)(ii) of the Act is an available and practical remedy to creditors.

Creditors cannot just vote against a business rescue plan when it suits them, especially when a creditor has nothing to gain from liquidation.⁹⁶ The creditor can also

⁹² 2014 (6) SA 214.

⁹³ <http://www.tma-sa.com/info_centre> accessed on 2016/05/25.

⁹⁴ 2014 47327/2014 (GNP).

⁹⁵ 2012 38906/2012 (GNP).

⁹⁶ <http://www.tma-sa.com/info_centre> accessed on 2016/05/25.

not vote against the business rescue plan if the conduct of the creditor's is "self-serving", and the rights of all the relevant stakeholders should be balanced.⁹⁷

b. The other affected parties, as set out in section 128(1)(a) of the Companies Act 71 of 2008, *inappropriate* vote.

According to the Act in section 128(1)(a), an affected party, in relation to the company, can either be a shareholder or a creditor in the company, any registered trade union representing employees of the company as well as any employee of the company that is not represented by a trade union. Because of this, their vote will have an important part to play when a proposed business rescue plan is on the table, as their interests in the company is at stake.

When voting for a proposed business rescue plan, the shareholders of the company that is in business rescue, can decide to vote in their own best interest, resulting in a vote that is either for or against the business rescue plan, despite the fact that business rescue can benefit the company positively, and bear a better outcome for creditors and employees than liquidation would.⁹⁸ Moreover, if shareholder rights are affected by the proposed plan, the shareholders' approval is required.

In *KJ Foods CC v First National Bank*,⁹⁹ - a company that mainly does business in the distribution and production of bread, the court had to decide if the rejection vote of the affected persons¹⁰⁰ could be seen as an *inapropriate* vote or not. The decline in the production of bread and SARS's payment of liability, ultimately resulted in the financial woes of the company. The court found that if there was the reasonable possibility to foresee that the company could be saved and a better return to the stakeholders of the company could be envisioned that the case would be if the company would have been liquidated, and the affected persons still voted to reject the proposed plan, that vote could be seen as an *inaporprate* vote. This corresponds with the purpose of the Act,¹⁰¹ as well as the decision made in *Wedgewood Village Golf & Country Estate (Pty) Ltd v*

⁹⁷ <<http://www.tma-sa.com/info>>centre accessed on 2016/05/25 at 15:25.

⁹⁸ Swanepoel J & Gopel C. "An Inappropriate Business Rescue Mess" *Without Prejudice* 16.

⁹⁹ 2015 75627/2013 (GNP).

¹⁰⁰ The Act, s128.

¹⁰¹ The Act, s7(k).

*Sibakhulu Construction (Pty) Ltd.*¹⁰² The vote was set aside in this case in terms of section 153(7) of the Act on the grounds that it was *inappropriate* and a revised business rescue plan was to be adopted.

Recently, the Supreme Court of Appeal stated in *FirstRand Bank Ltd v KJ Foods CC (In business rescue)*¹⁰³ the determination of whether a vote by a creditor against the adoption of a proposed business rescue plan was *inappropriate* and ought to be set aside entails a single enquiry. A court will set aside a vote on the ground that its result was inappropriate if it is reasonable and just to do so, thus entailing a value judgment. The effect of the court setting aside the *inappropriate* vote is that once the vote is set aside, the proposed business plan is considered to have been adopted *ex lege* and there is no further vote envisaged by the Act.

In another rather recent case, *Panamo Properties (Pty) Ltd v Nel and Another NNO*,¹⁰⁴ the shareholders of the company, a company that largely dealt with dealings in property, chose to put the company in voluntary business rescue, because they could not repay their loan to First Rand Bank. The business rescue practitioners proposed plan entailed that the property on which the shareholders resided on, will be sold. To stop this sale, the shareholders went to court to declare the business rescue as null and void. The High Court decided in favour of the shareholders and ruled accordingly. However, on appeal in the Supreme Court of Appeal, the court set the ruling made by the High Court aside. This case can be seen as a business rescue debacle, because the court did not decide or look at the shareholders' available remedy in terms of section 153(1)(a)(ii).¹⁰⁵ The appropriate situation would have been that the shareholders reject the business rescue practitioners' proposed business rescue plan at the meeting, as set out in section 152 of the Act, and only then the matter could go to court when the practitioner was of the idea that the vote taken to reject the proposed business rescue plan was *inappropriate*.

When the loss of the livelihood of the company's employees is in dispute, then the issue of whether the company should be permitted an attempt at business rescue has

¹⁰² 2012 (2) SA 378.

¹⁰³ (734/2015) [2015] ZASCA 50(26 April 2017).

¹⁰⁴ *Nel and Another NNO v Panamo Properties (Pty) Ltd* (2013) 56399/2013 (GNP) & *Panamo Properties (Pty) Ltd v Nel and Another NNO* (35/2014) 2015 ZASCA 76 (27 May 2015).

¹⁰⁵ The Act.

a public interest dimension, and ceases to be merely a private issue between the company and an unpaid creditor.

It can also be argued that reference to shareholders in section 1(a) of the Act is incorrect because, any holder of security of the company can vote to accept or reject the practitioner's purposes business rescue plan, as securities include shares, but shares, and thus by implication shareholders, do not include securities.¹⁰⁶

c. The directors of the company's *inappropriate* vote.

The board of a company consist of directors, and the directors of a company are defined as a member of the board of a company, as contemplated in section 66 of the Act, or an alternate director of a company and includes any person occupying the position of a director, by whatever name designated.¹⁰⁷ Directors are thus in control of the management of the company, as opposed to the shareholders that hold an interest in the company.¹⁰⁸

One of the main questions and queries is whether directors can be held responsible for their actions carried out in their duty towards the company. The business of a company must be either managed by the board of directors, or run under the direction of a board, and the board has the authority to perform all its functions as needed unless the Memorandum of Incorporation provides otherwise.¹⁰⁹ They must exercise their power accountably and be responsible for the functioning and affairs of the organisation.¹¹⁰ The board of directors thus has the ability to commence business rescue proceedings¹¹¹ for a company through a resolution that comply with the requirements of the Act.¹¹²

¹⁰⁶ Delport PA (et al). *Henochsberg on the Companies Act 71 of 2008* 2016 (11th Eddition) 530.

¹⁰⁷ The Act, s1.

¹⁰⁸ Delport PA. *New Entrupeneurial Law* 2014 LexisNexis: Durban.

¹⁰⁹ The Act, s66(1).

¹¹⁰ Carciumaru LM. "An Assessment of Corporate Governance Codes and Legislation on Directors and Officers Liability Insurance in South Africa" 2009 *University of the Witwatersrand*.

¹¹¹ The Act, s129.

¹¹² Loubser A. "Judicial Management as a Business Rescue Procedure in South African Corporate Law" *South African Mercantile Law Journal* 162 & *the Act*, ss73-74.

When the board of directors exercise an *inappropriate* vote to reject the proposed business rescue plan, the position is similar to the affected persons.¹¹³ If the board, for example, vote to reject the proposed business rescue plan to the benefit of their own interest and not those of the company, it can be seen as inappropriate. The court will however determine it to the merits of every case.

¹¹³ The Act, s128(a).

V. International Comparison.

a. Introduction

A last question that can be asked is if South Africa's business rescue regime, more importantly, the debacle of an inappropriate vote, compares well with international trends. South Africa's Company Act¹¹⁴ will be compared with the Namibian Companies Act¹¹⁵, India's rather new Companies Act¹¹⁶ and the United States of America's Bankruptcy Code of 1978.

b. Company Law of Namibia.

The Namibian Companies Act came into effect on the 1st of November 2010, to provide for the incorporation, management and liquidation of companies and to provide for incidental matters thereto.¹¹⁷ Chapter 15 of this Act deals with judicial management, like business rescue's predecessor in the 1973 Act. Section 433(1) of the Namibian Companies Act states that (own emphasis):

"a company can be placed under judicial management when any company, because of mismanagement or for any other reason, is unable to pay its debts or is probably unable to meet its obligations and has not become or is prevented from becoming a successful concern and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that company."¹¹⁸

A judicial manager is appointed in terms of section 435(b)(i) of the Namibian Companies Act by the Master and who must then conduct meetings with creditors, members and debenture holders.¹¹⁹ In this meeting, the judicial manager must consider the prospects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern.¹²⁰ Section 437 deals with the purpose of a meeting convened

¹¹⁴ 71 of 2008.

¹¹⁵ 28 of 2004.

¹¹⁶ 14 of 2013

¹¹⁷ Namibian Companies Act 28 of 2004.

¹¹⁸ Section 433(1) of the Namibian Companies Act 28 of 2004.

¹¹⁹ Namibian Companies Act 28 of 2004 S435(b)(ii).

¹²⁰ Namibian Companies Act 28 of 2004 S436(c)(vi).

under section 435(b)(ii). The judicial manager's report must be considered, as well as the desirability or otherwise of placing the company finally under judicial management, taking into account the prospects of the company becoming a successful concern,¹²¹ the proving of claims against the company¹²² and in the case of a meeting of creditors, to consider the passing of a resolution referred to in section 442(1).¹²³

The closest Namibian company law comes to section 153(1)(a)(ii) of the Act is in section 447 regarding the cancellation of the judicial management order, to quote:

“(1) If at any time on application by the judicial manager **or any person having**

an interest in the company it appears to the Court that the purpose of a judicial management order has been fulfilled or that **for any reason it is undesirable that that order should remain in force, the Court may cancel that order** and the judicial manager is divested of his or her functions.

(2) In cancelling a judicial management order the Court must give any directions which are necessary for the resumption of the management and control of the company by the officers of the company, including directions for the convening of a general meeting of members for the purpose of electing directors of the company.”¹²⁴

It is clear from section 447(1) of the above-mentioned Act that when it becomes undesirable that the judicial management order remains in force, it can be cancelled by the court. The Act makes no other mention of when a judicial management order can be cancelled. Namibian company law can thus be distinguished from South Africa's inappropriate vote, even though the cancellation of the order is also brought by the judicial manager or any other person that has an interest in the company, similar to affected person in the companies act.¹²⁵ In my opinion, South Africa provides for that extra step after section 477 of the above-mentioned Act to ensure that the rehabilitation of the company is not frustrated by the judicial manager or any other person that has an interest in the company.

¹²¹ Namibian Companies Act 28 of 2004 S4367(a).

¹²² Namibian Companies Act 28 of 2004 S4367(c).

¹²³ Namibian Companies Act 28 of 2004 S4367(d).

¹²⁴ Namibian Companies Act 28 of 2004 S447 [own emphasis].

¹²⁵ The Act, S128.

c. Company law of India.

Chapter XIX of the Indian Companies Act deal with the revival and rehabilitation of sick companies. Section 253 of this Act states that a sick company is when a company, on a demand by the secured creditors of a company representing fifty per cent or more of its outstanding amount of debt, the company has failed to pay the debt within a period of thirty days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of the creditors, any secured creditor may file an application to the Tribunal¹²⁶ in the prescribed manner along with the relevant evidence for such default, non-repayment or failure to offer security or compound it, for a determination that the company be declared as a sick company.¹²⁷ The administrator (like South Africa's business rescue practitioner) has to compile a scheme of revival and rehabilitation plan in terms of section 261 of the Indian Companies Act and must be placed for approval before the creditors and the Tribunal of the sick company in terms of section 262, where they will sanction the scheme or not. It is interesting to note that it is the Tribunal that can make changes to the proposed scheme. Section 258 states that when the Tribunal considers the report of the interim administrator filed under section 256(1), if the Tribunal is satisfied that the creditors representing three-fourths in value of the amount outstanding against the sick company present and voting have resolved that it is not possible to revive and rehabilitate such company, the Tribunal shall record such opinion and order that the proceedings for the winding up of the company be initiated; or by adopting certain measures the sick company may be revived and rehabilitated, the Tribunal shall appoint a company administrator for the company and cause such administrator to prepare a scheme of revival and rehabilitation of the sick company: provided that the Tribunal may, if it thinks fit, appoint an interim administrator as the company administrator.

It is my opinion that this is quite similar, but also not like the inappropriate vote in terms of South African company law. The Tribunal has taken over the last say in what will go in a scheme and what won't, and maybe this is the answer to the whole inappropriate saga - by placing the final say in what will and won't constitute an effective plan to

¹²⁶ Indian Companies Act S1(90) —Tribunal means the National Company Law Tribunal constituted under section 408;

¹²⁷ *Indian Companies Act S253(1)*.

rehabilitate a company in the hands of people who are more that qualified to say so.¹²⁸ By implementing a tribunal (or something similar) in South Africa, it will not only resolve the debacle of when will a vote and when will it not constitute an inappropriate vote, but also give effect to the purpose of the Act. A tribunal will also be more cost effective and save time.

d. The Bankruptcy Code of 1973 from the United States of America.

Chapter 11 of the Bankruptcy Code deal with bankruptcy and insolvency from which business recue emerged, and this Code also influenced South Africa's business rescue regime.¹²⁹ The Code refers to a plan of reorganization that aim to keep the business alive and pay its creditors over a period of time, similar to South Africa's business rescue. In terms of section 1129(a) of the code, a creditor must approve the reorganization plan (like business rescue's plan) after which the court will confirm.

However, when there is a cramdown¹³⁰, where the courts must approve the reorganization plan, the court applies an objective test to determine if the reorganization plan will succeed in keeping the business alive and that it is in the best interest of the creditors. Many have argued that the cramdown's South African version is section 153(1)(a)(ii). In south Africa however, creditors can exercise their vote to

¹²⁸ Indian Companies Act S409 : Qualification of President and Members of Tribunal.— (1) The President shall be a person who is or has been a Judge of a High Court for five years. (2) A person shall not be qualified for appointment as a Judicial Member unless he— (a) is, or has been, a judge of a High Court; or (b) is, or has been, a District Judge for at least five years; or (c) has, for at least ten years been an advocate of a court & S409(3) A person shall not be qualified for appointment as a Technical Member unless he— (a) has, for at least fifteen years been a member of the Indian Corporate Law Service or Indian Legal Service out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or equivalent or above in that service; or (b) is, or has been, in practice as a chartered accountant for at least fifteen years; or (c) is, or has been, in practice as a cost accountant for at least fifteen years; or (d) is, or has been, in practice as a company secretary for at least fifteen years; or (e) is a person of proven ability, integrity and standing having special knowledge and experience, of not less than fifteen years, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies; or (f) is, or has been, for at least five years, a presiding officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 (14 of 1947).

¹²⁹ Cassim FIH (eds) *South African Company Law* (2016) 654.

¹³⁰ Cramdown is a bankruptcy concept that is often employed to obtain a Chapter 11 bankruptcy reorganization plan while there are still objections from one or more creditors. Cramdown allows the bankruptcy courts to modify loan terms subject to certain conditions to have all parties come out better than they would have without such modifications. The conditions are mainly that the new terms are fair and equitable to all parties involved.

reject a business rescue plan freely, and there is no integration with the court like in America.

VI. Problems concerning section 153(1)(a)(ii) of the Companies Act 71 of 2008.

a. The relationship between the time consuming process of setting aside an *inappropriate* vote and the purpose of the Companies Act 71 of 2008.

The purpose of the Act is clearly set out in section 7 of the Act, but as already stated, section 7(k) is specifically relevant to business rescue. Section 7(k) provides for the efficient rescue and recovery of a financially distressed company in a manner that balances the rights and interest of all relevant stakeholders.¹³¹ This provision captures the essence of the business rescue process.¹³² It can thus be argued that the relationship between the time consuming proses of setting aside an inappropriate vote and the purpose of the Act, will only be one without strain when the rights and interests of the relevant stakeholders are proportionally balanced to the ultimate rescue of the company. It is not just the financially distressed company that is considered when the above mentioned relationship comes into play but also the group that is affected by aftermath, like the shareholders, creditors, directors and the local community.¹³³

In *Nedbank Ltd v Bestvest 153 (Pty) Ltd*¹³⁴ the court found that the provisions of section 153(1)(a) of the Act could also attract additional costs, and lead to the business rescue practitioner becoming embroiled in ongoing litigation, rather than realising the primary goal of rescuing the company. While the courts concerns regarding the absurdity of a notion that a creditor's vote may be *inappropriate*, this position can be resolved by virtue of the imperative contained in section 7(k) of the Act.¹³⁵ Thus the Act would appear to postulate a scenario where the individual interests of specific stakeholders are subsumed to the broader interest of rescuing the business of a company. It must be borne in mind that a vote to accept or reject a business rescue plan comprises, where the interests of security holders are affected, two votes that operate cumulatively.¹³⁶

¹³¹ See chapter 1.

¹³² Cassim FHI (eds). *The Law of Business Structures* 2013 (1st Edition) 458.

¹³³ *Supra*.

¹³⁴ 2012 (5) SA 497 (WCC).

¹³⁵ *Nedbank Limited v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC).

¹³⁶ *Supra*.

b. Liquidation as opposed to business rescue.

One of the major themes of the Act is the creation of a system of corporate rescue that is appropriate to the need of a modern South African economy.¹³⁷ Business rescue is a useful alternative, and not a preliminary step, to the liquidation or winding-up of a company that is in financial distress.¹³⁸ It is important to note that a company will only be placed under business rescue if there is the possibility that the company can manage itself as a successful concern once again and also provide for a better return to the relevant stakeholders that liquidation would have.¹³⁹

Business rescue as a regime is aimed at rescuing the business of a financially distressed company and seeks to avoid the liquidation of the company.¹⁴⁰ As such, it is aimed at enhancing the position of all stakeholders over a liquidation scenario with an emphasis on the position of creditors.¹⁴¹ As such, the Act makes it clear that certain interests may be prejudiced in the service of the broader body of stakeholder interest. Business rescue will thus be preferred to liquidation if it is in the best interest of all the relevant stakeholders.

c. A binding offer as set out in section 153(1)(b)(ii).

Section 153(1)(b) of the Act provides,¹⁴²

“153 (1)(b) If the practitioner does not take any action contemplated in paragraph (a)—

(i) any affected person present at the meeting may—

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

¹³⁷ “South African Company Law For The 21st Century: Guidelines for Corporate Law Reform” GN 1183 in GG 26493 of 23 June 2004 [The Department of Trade and Industry] para 4.6.2.

¹³⁸ Cassim FHI (eds). *The Law of Business Structures* 2013 (1st Edition) 458.

¹³⁹ *Supra*.

¹⁴⁰ *Supra*.

¹⁴¹ *Nedbank Limited v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC).

¹⁴² The Act, s153(1)(b) [own emphasis].

(ii) any affected person, or combination of affected persons, may make a **binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue 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.”

It is clear from the above mentioned that section 153(1)(b)(ii) of the Act provides for an alternative remedy to affected persons who oppose the adoption of the business rescue plan, as such an affected person can make a *binding offer* to purchase the voting rights of any person who opposed the business rescue plan.¹⁴³ The Act does not define what constitutes a *binding offer*, but in terms of section 153(1)(b)(ii), any affected person or a combination of them may, may make a *binding offer* to purchase the voting interests of one or more persons who opposed the adoption of the business plan, at the request of the business rescue practitioner, at a value independently and expertly determined, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.¹⁴⁴ The value of the voting interest will be the value that the person could reasonably have expected to obtain at liquidation, as determined by an independent expert.¹⁴⁵ It can however be argued that once a offer has been made, that the offeree will have no other choice but to accept the offer.¹⁴⁶

In *African Banking Corporation of Botswana LTD v Kariba Furniture Manufacturers (PTY) LTD and Others*,¹⁴⁷ the court had to consider the nature of a *binding offer*¹⁴⁸ and section 7(k) of the Act was once again the beacon which was used to determine what the position regarding a binding offer ultimately was. The court found that the word “binding” that was before “offer” characterised the offer and thus held that it is clear from section 153(1)(b)(ii) that whenever an affected person rejects a business rescue

¹⁴³ *Supra*.

¹⁴⁴ The Act, sec 153(1)(b)(ii) & Blom O & Ledwaba P. “A Binding Offer” *Without Prejudice* 40.

¹⁴⁵ Wesso D. “Business Rescue: The position of Secured Creditors” *De Rebus* 168.

¹⁴⁶ Blom O & Ledwaba P. “A Binding Offer” *Without Prejudice* 40.

¹⁴⁷ 20947/2012 (2013) ZAGPPHC 259.

¹⁴⁸ The Act, s153(1)(b)(ii).

plan, this section will operate to allow another affected person to make a binding offer to acquire the voting interest of the dissenting voter and the court held that, in the circumstances, the binding offer is binding on both the offeror and the offeree.¹⁴⁹ The court held that while a normal contractual offer is made freely and can be withdrawn at any time, an offer made in terms of section 153(1)(b)(ii) of the Act creates a legal obligation that is binding on the offeror and the offeree, and cannot be withdrawn at the insistence of either party.¹⁵⁰ The court held that this interpretation of *binding offer* accords with the purpose¹⁵¹ of the Act and the provisions in Chapter 6 in that it facilitates the adoption of a business rescue plan.

It can be argued that the whole debacle of setting aside an *inappropriate* vote in terms of the Act¹⁵² could be avoided, by instead, making a *binding offer* in terms of section 153(1)(b)(ii) of the Act, as the parties that would then oppose the adoption of the business rescue plan will be taken out of the equation.

VII. When an *inappropriate* vote can be set aside.

The court in *Advanced Business Technologies & Engineering Company v Aeronautique et Technologies*¹⁵³ came to a conclusion on how a court can determine when an *inappropriate* vote can be set aside: For a vote against the proposed business rescue plan to be deemed *inappropriate*, the first task of the court is to determine if the vote is indeed *inappropriate*. If the court finds that the vote is *not inappropriate*, then the application to set the vote aside will have failed. If the court finds that the vote was *indeed inappropriate*, then the court may only set aside the outcome of an *inappropriate* vote if, in the prevailing circumstances, it is *fair and reasonable* to do so.¹⁵⁴ The court must base its decision on if the information or evidence meets the requirements of the objective of the business rescue plan, whatever it is to allow it to

¹⁴⁹ Blom O & Ledwaba P. "A Binding Offer" *Without Prejudice* 40.

¹⁵⁰ Wesso D. "Business Rescue: The position of Secured Creditors" *De Rebus* 2014 (34) 170.

¹⁵¹ The Act, s7(k).

¹⁵² The Act, s153(1)(a)(ii).

¹⁵³ 2012 JDR 0345 (GNP).

¹⁵⁴ Swanepoel J & Gopel C. "An Inappropriate Business Rescue Mess" *Without Prejudice* 16 & *Advanced Business Technologies & Engineering Company v Aeronautique et Technologies* 2012 JDR 0345 (GNP).

achieve the continued existence of the company on a solvent basis or to be managed for an interim period to allow for better returns for creditors and affected persons than immediate liquidation would.¹⁵⁵ Whatever the objective of the business rescue plan is, it must be proved that the objective can be met. Thus when there is the reasonable prospect of the company being saved, then business rescue should be granted.¹⁵⁶

It is important to recall that in terms of section 128(1)(b) of the Act, the primary goal of business rescue is to facilitate the continued existence of the company in a solvent state. A secondary goal, which is provided for in the alternative, that is in the event the achievement of the primary goal proves not to be viable, is to facilitate a better return than would result from immediate liquidation.¹⁵⁷ Consequently, in order to succeed in an application for business rescue, the applicant must establish grounds for a reasonable prospect of achieving one of the two goals mentioned in section 128(1)(b) of the Act.¹⁵⁸

The court will put the vote aside in terms of section 153(7)¹⁵⁹ on the grounds that the voting against the plan was inappropriate, if the court is of the opinion that it is reasonable and just to do so,¹⁶⁰ with regard to the interest represented by the person or persons who voted against the plan,¹⁶¹ the provisions made in respect of the person or persons' interests in the proposed business rescue plan¹⁶² and the fair and reasonable estimated return that the person or persons would receive if the company were to be liquidated.¹⁶³ An alternative is that a revised business rescue plan can also be adopted, in accordance with the Act.¹⁶⁴

¹⁵⁵ *Wedgewood Village Golf & Country Estate (Pty) Ltd v Sibakhulu Construction (Pty) Ltd* 2012 (2) SA 378.

¹⁵⁶ *Zoneska Investments v Midnight Storm Investments* 2012 (2) ALL SA 590 (WCC) para [28] [37].

¹⁵⁷ The Act, s128.

¹⁵⁸ *Ex Parte: Target Shelf 248 CC; Commissioner, South African Revenue Service and Another v Cawood N.O. and Others* (21955/14; 34775/14) [2015] ZAGPPHC 740 (13 October 2015).

¹⁵⁹ The Act.

¹⁶⁰ The Act, s153(7).

¹⁶¹ The Act, s153(7)(a).

¹⁶² The Act, s153(7)(b).

¹⁶³ The Act, s153(7)(c).

¹⁶⁴ *KJ Foods CC v First National Bank* 2015 75627/2013 (GNP).

The court in *Shoprite Checkers (Pty) Ltd and Another v Ne/ N.O. and Others*¹⁶⁵ adopted a two stage approach to be followed by a court when considering an attack on a vote under section 153(7): Firstly, the court must determine whether the vote is *inappropriate*; and secondly, only if it finds that the vote is *inappropriate* can it consider whether, taking this into account, it would be reasonable and just to set the vote aside. However in the *ex parte* application of Target Shelf¹⁶⁶, the court followed the approach where it is enjoined to consider whether it is reasonable and just to set the vote aside, even where it made a finding that the vote is appropriate.

The jurisdictional facts which must be established in order to set aside a vote taken in terms of s 152(1) of the Act are that there must be a rejection of the business rescue plan in terms of section 152(3)(a) of the Act and there must be grounds that satisfy the court that the rejection of the vote was inappropriate in terms of section 153(1)(a)(ii) and the court must be satisfied that it is reasonable and just to set the vote aside in terms of section 153(7) of the Act.¹⁶⁷

¹⁶⁵ (47327/2014) [2015] ZAGPPHC 255 (11 March 2015).

¹⁶⁶ *Ex Parte: Target Shelf 248 CC; Commissioner, South African Revenue Service and Another v Cawood N.O. and Others* (21955/14; 34775/14) [2015] ZAGPPHC 740 (13 October 2015).

¹⁶⁷ *Ex Parte: Target Shelf 248 CC; Commissioner, South African Revenue Service and Another v Cawood N.O. and Others* (21955/14; 34775/14) [2015] ZAGPPHC 740 (13 October 2015).

VIII. Proposed solution to section 153(1)(a)(ii) of the Companies Act 71 of 2008 problem areas.

Section 153(1)(a)(ii) of the Act has, like most other sections in various legislation, problem areas that only appear when it is practically examined. Setting aside an *inappropriate* vote is a very time consuming and money driven process. This could be avoided if the legislator enacted a clear and precise definition of what line needs to be crossed for a vote to be an *inappropriate* one, in other word, a proper definition or certain criteria that needs to be followed.

The obvious solution to section 153(1)(a)(ii) of the Act is the *binding offer* that can be made in terms of section 153(1)(b)(ii) of the Act. If a binding offer was used, the hole inappropriate saga would be avoided. This way all of the relevant stakeholders will get what they want: The parties that want to rehabilitate the company can do so by buying out the parties that do not wish for the company to commence business rescue. The parties that do not want to commence business rescue, and for example want the company to be liquidated, will ultimately get their fair and reasonable return as they would have from liquidation by the other parties *binding offer*.

Although the obvious solution is the binding offer, I am however of the opinion that South Africa should enact a tribunal similar to what India's Company Act provides for. This tribunal, with experts with vast knowlegde in the field of not only company law, but financials, and even labour matters, will ensure that matters that tend to frustrate the comemcement of the business recue proceedings, like determining what constitutes an inappropriate vote, can be resolved before hand. This will not only give effect to the purpose of the Act, as set out in section 7(k), but also save time and money.

IX. Conclusion.

Until the amendment in 2008, the company law in South Africa was largely regulated by the 1973 Act, and it was replaced by the Act.¹⁶⁸ For the somewhat thirty seven years that the 1973 Act has been enacted, the company law has undergone radical changes, and certain morals of the new company law was not properly represented by the 1973 Act. The Act not only introduced these fundamental changes to the South African company law but also provided for the incorporation of these new corporate morals as well other regular modern functions involving the management of companies, like business rescue.¹⁶⁹

The Act's interpretation and purpose is set out respectively in sections 5 and 7 of the Act, but specifically relating to business rescue, is section 7(k) of the Act, that provides for the efficient rescue of a financially distressed company, in a manner that balances the rights and interests of all relevant stakeholders.

Before the amendment, judicial management in the 1973 Act regulated the rehabilitation of a financially distressed company, however in 2011 the business rescue saw the light in the Act's chapter 6. Business rescue is the new modern adaptation of judicial management, and practically insures for better results for a financially distressed company. The business rescue plan according to Part D¹⁷⁰ (the development and approval of the business rescue plan) of Chapter 6 of the Act, creates the most critical phase of the business rescue process. The business rescue plan is the written process of how the company will be managed out of its financial distress, and if this plan is rejected by the affected parties there will be a severe impact on the company.

Neither the Act, nor the courts, have defined what exactly an *inappropriate* vote constitutes, but it can be mainly argued that an *inappropriate* vote is put on a three-way libra against the best interests of the persons who have a peculiar right against the company, the broad best interest of the company to be rehabilitated and section 7¹⁷¹ of the Act.

¹⁶⁸ The Companies Amendment Act 3 of 2011.

¹⁶⁹ As set out in the main purpose of the Act.

¹⁷⁰ The Act, ss150-145.

¹⁷¹ See the Act, s5.

How the affected parties present at the meeting in terms of section 152, exercise an inappropriate vote is different in every case. The creditor's, who has the strongest right regarding the development of the business rescue proceedings, *inappropriate* vote can be largely summed up as when a large group of creditors vote against the proposed business rescue plan, and it will then benefit their own interest, but it leaves a single or small group of creditors in a worse position than the business rescue process would have, that vote can be deemed *inappropriate*, according to the purpose of the Act,¹⁷² however the opposite has also been found to be true.¹⁷³ This illustrates that the court will determine in every case what will constitute an *inappropriate* vote, as the merits of each case will differ. As for the other affected parties when voting for a proposed business rescue plan, the shareholders of the company, can decide to vote in their own best interest, resulting in a vote that is either for or against the business rescue plan, despite the fact that business rescue can benefit the company positively, and bear a better outcome for creditors and employees than liquidation would.¹⁷⁴ This is also the position regarding the directors of the company's *inappropriate* vote.

The problems concerning section 153(1)(a)(ii) of the Act is the relationship between the time consuming process of setting aside an inappropriate vote and the purpose of the Act; a binding offer as set out in section 153(1)(b)(ii) of the Act; liquidation and winding up of a company as opposed to business rescue as well as when an inappropriate vote can be set aside. It has been argued that when the parties present at the meeting cannot reach an agreement, i.e. to commence business rescue proceeding, the parties that do not want the company to commence business rescue proceedings, can be bought out from the other parties by making a *binding offer*. This is an alternative to section 153(1)(a)(ii) of the Act, as the *inappropriate saga* will be avoided.

According to international trends, section 153(1)(a)(ii) of the Act is rather on par. It compares well with similar (albeit not precisely similar) legal systems. South Africa should, in my opinion, take a hint from India's company law, and enact a tribunal to decide on business rescue matters, that will not only give effect to the purpose of the

¹⁷² Swanepoel J & Gopel C. "An Inappropriate Business Rescue Mess" *Without Prejudice* 16 & The Act, s7(k).

¹⁷³ 2014 47327/2014 (GNP).

¹⁷⁴ Swanepoel J & Gopel C. "An Inappropriate Business Rescue Mess" *Without Prejudice* 16.

Act as set out in section 7(k), but will also eliminate the time consuming process and the financial strain that is accompanied with legal proceedings.

To conclude, section 153(1)(a)(ii) of the Act is a practical remedy that the business rescue practitioner has to his or her disposal to apply to a court to ultimately commence the business rescue proceedings. This remedy is however not flawless, as this is a time consuming and money driven process, and other alternatives are available to avoid the setting aside of the *inappropriate* vote. What precisely constitutes an *inappropriate* vote is still unclear, and the definition will be determined in every case to the merits of that case, until a proper definition has been enacted.

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