The status of the claims for the remuneration and expenses of business rescue practitioners after the conversion of business rescue to liquidation

by

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CHAPTER 1: INTRODUCTION

1.1. BACKGROUND

In *Diener N.O. v Minister of Justice and Correctional Services*,[1] the Constitutional Court dealt with the interpretation of certain provisions of the Companies Act 71 of 2008. The case pertains to the ranking of claims for the remuneration and expenses of business rescue practitioners.[2] The critical question was whether, after conversion of business rescue proceedings to liquidation, the claims of the business rescue practitioner for remuneration and expenses assume a "super preference" over the claims of all other creditors irrespective of whether these are secured or unsecured creditors.[3]

At the heart of this dissertation is the business rescue practitioner's claim for purposes of the distribution of the estate in liquidation. It is always the case that creditors whose claims are secured by real security have some certainty in respect of the settlement of their debts.[4] The unsecured creditors do not have any guarantee of receiving dividends and may be required to make contribution in terms of the Insolvency Act.[5]

As such, the implications are that the business rescue practitioner – like unsecured creditors – will have no claim to the share of the proceeds of the security.[6] However, it is desirable that the business rescue practitioner should have certainty in respect of payment of his claims from the estate in liquidation.[7]

Judge Dambuza, in the case of *Richter v Absa Bank*, described "liquidation" as follows:

> "The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realizing its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue (if

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[1] (2018) ZACC 48, herein referred to as "Diener". It is a Constitutional Court decision that dealt with the main research question. See paras 1, 2, 14, 17 and 18 of the aforesaid judgment.
[2] Diener at para 2.
[3] Ibid.
[4] Idem at para 14.
[5] Ibid.
[6] Idem at para 17.
[7] Ibid.

any) amongst the shareholders of the company in accordance with rights, is known as the winding-up or liquidation of the company."[8]

Liquidation is defined as the process where directors, members or creditors[9] of the company resolve to voluntary winding-up of the company under section 343(1) of the Companies Act 61 of 1973.[10] Section 344(a) of the old Companies Act further stipulates that the company may be wound up by court if members took a special resolution to the effect that winding up must be decided by the court, on the basis that the company is insolvent.[11]

Section 346 of the old Companies Act states that the company or members or creditors may initiate winding-up of the company by filing an application to the court for the purpose of declaring the company insolvent and liquidating it (winding-up).[12] As such, the winding up of a company can either be voluntarily or through a court order.[13]

Undoubtedly, once the final liquidation order has been granted by the court, the company will have to continue existing. However, the authority to control the company's affairs is transferred from the directors to the liquidators.[14] In terms of section 348 of the old Companies Act, the liquidation of a company by the court is considered to commence upon the presentation of the court application for the winding up to the point where the affairs of the company have been entirely wound up and subsequently, the Master of the High Court, having published a certificate in the Government Gazette dissolving the company.[15]

[8] (2018/2014) [2015] ZASCA 100, herein referred to as "Richter". See para 9.

[9] In terms of the old Companies Act, 'Director' includes any person occupying the position of director or alternate director of a company, by whatever name he may be designated. 'Winding-up order' means any order of court whereby a company is wound up and includes any order of court whereby a company is placed under provisional winding-up for so long as such order is in force. S 434 of the old Companies Act states that a company may be wound up by the Court or voluntarily. A voluntary winding-up of a company may be by a creditors' voluntary winding-up or Companies or a members' voluntary winding-up.

[10] S 343(1)(b) to (2)(a)(b) of the Companies Act 61 of 1973, herein referred to as "the old Companies Act".

[11] S 344(1)(a) of the Companies Act 61 of 1973.

[12] S 346(1)(a)(b)(c) of the Companies Act 61 of 1973.

[13] S 79(2) of the Companies Act 71 of 2008.

[14] Richter at para 10.

[15] Ibid.

"Business rescue" means the proceedings aimed at rehabilitating a company which is in financial distress.[16] More importantly, it is a process that places a company under interim supervision and management in regard to its affairs, business, and property.[17] Notably, business rescue suspends payment of claims to creditors and facilitates a debt restructuring process with the purpose of returning the company to a healthy financial state.[18]

The conversion of business rescue proceedings may occur in terms of section 141(1)(2), where the practitioner concludes during the business rescue proceedings that there is no reasonable prospect of rescuing the company.

The practitioner must inform the court, the company, and the affected persons in the prescribed manner, and apply to the court for an order discontinuing the business rescue proceedings and placing the company in liquidation.[19] It is quite intriguing that the word "discontinuing" is used in this section in contrast to the word "terminating", which infers that the proceedings are not ending but rather converted into liquidation proceedings in terms of section 132 of the Companies Act.[20] Van Standen quoted the Oxford dictionary which defines "convert" as "[t]o change the form, character, or function of something"; and stated that "the business rescue proceedings do not end per se, but is transformed into liquidation proceedings".[21] It means the beginning of a new process being liquidation in this context.[22]

However, the business rescue proceedings end when the court sets aside the resolution of the board of directors sanctioning the rescue proceedings or the practitioner has filed a notice of termination with the Companies and Intellectual Property Commission (CIPC) in terms of section 132(2).[23]

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[16] As defined in terms s 128 (1)(b)(i) of the Companies Act 71 of 2008.
[17] S 128(1)(b)(ii) of the Companies Act of 71 2008.
[18] S 128(1)(b)(iii) of the Companies Act.
[19] S 141(2)(a)(i)(ii) of the Companies Act.
[20] Van Standen "The termination of Business rescue proceedings" De Rebus 2013-12-01, available at http://www.derebus.org.za/cutting-lifeline-termination-business-rescue-proceedings/, herein referred to as "Van Standen".
[21] Idem at para 8.
[22] Ibid.
[23] S 132(2)(a)(i)(ii)(b) of the Companies Act.

According to section 129(1) of the Companies Act,[24] business rescue proceedings are intended to relieve the company from financial distress and where expectantly, reasonable prospects exist that the company may be rescued. In Diener, it was argued that the expenses accrued during business rescue proceedings in terms of section 143(5) of the Companies Act, and those that represent unsecured post-commencement finance as encapsulated in section 135(4) of the Companies Act, should be settled prior to settling the claims of secured creditors.[25] Post-commencement finance is referred to as money which is made available to a company after the business rescue process has commenced to ensure that it carries on with its business.[26] Section 135 determines that the employees' remuneration, accrued after the commencement of the business rescue process, are to be treated as expenses recoverable from the pool of post-commencement financing. The aforementioned section provides that remuneration and expenses which are due and payable to employees during business rescue proceedings, but are not paid, will be considered as post-commencement finance and will be paid in order of preference as set out in section 135(3)(a).[27] The wages or salaries of the employees after the commencement of business rescue will be treated as part of the expenses of the business rescue process.[28]

The aforesaid simply means that the cost of employment incurred by the company during business rescue proceedings will be paid from the post commencement financing.[29] Section 135(4) states that any claims arising from the cost of liquidation will, in the instance

[24] S 129(1) of the Companies Act and see also Diener at para 12.
[25] Idem at para 16.
[26] Delport *Henochsberg on the Companies Act 71 of 2008* (2011; last updated: November 2019 – service issue 21) 482(46), herein referred to as "Delport".
[27] Jegel and Lewis "Preferred or not Preferred – the super preferent status of a business rescue practitioner in subsequent liquidation proceedings" Dispute Resolution Alert 2018-05-23, available at www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-23-may-preferred-or-not-preferred-the-super-preferent-status-of-a-business-rescue-practioner-in-subsequent-liquidation-proceedings-.html herein referred to as "Jegel and Lewis".
[28] Delport at 482(47) para 2.
[29] Idem at 482(47) para 3.

where the business rescue proceedings are superseded by liquidation, assume preference.[30] The remuneration and expenses should enjoy preference over the cost of liquidation in terms of section 135(3) and (4) and would be settled before the claims of employees for post-commencement wages.[31]

In line with Diener, the claims of business rescue practitioners will be treated as unsecured claims.[32] The business rescue practitioner will be classified as a creditor within the purview of section 44 of the Insolvency Act 24 of 1936 and would be required to submit and prove his or her claims in respect of remunerations and expenses against the free residue.[33] Section 44 of the Insolvency Act provides that any person who has a liquidated claims against an insolvent estate may, before the final distribution of that estate in terms of section 113 of the Insolvency Act and subject to the provisions of section 104 of the same Act, prove his claim in the prescribed manner.[34]

In terms of the Companies Act, the company may solicit funding from post-commencement finance lenders – using the company's unencumbered assets as security – during the business rescue proceedings and for the purpose of allowing the company to continue trading.[35] After the payment of the remuneration and expenses of the business rescue practitioner, claims arising out of section 135(1) will be treated equally.[36] Such claims will assume preference over all secured claims contemplated in subsection (2).[37]

Section 135 of the Companies Act determines the following:

> "(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee—
>
> (a) the money is regarded to be post-commencement financing; and

[30] S 135(4) of the Companies Act.
[31] Jegel and Lewis at para 4.
[32] Ibid.
[33] Idem at para 5.
[34] S 44(1) of the Insolvency Act 24 of 1936, herein referred to as "the Insolvency Act".
[35] S 135(2)(a) of the Companies Act.
[36] S 135(3)(a) of the Companies Act.
[37] S 135(3)(b) of the Companies Act.

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

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1), and any such financing—

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in the order of preference set out in subsection (3)(b).

(3) After payment of the practitioner's remuneration and costs referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—

(a) in subsection (1) will be treated equally, but will have preference over—

(i) all claims contemplated in subsection (2), irrespective whether or not they are secured; and

(ii) all unsecured claims against the company; or

(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

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

This statutory provision affirms that the claim of the lender for post-commencement financing will only be settled after the business rescue practitioner's remuneration and expenses have been paid.[38] However, in Diener, the court found it implausible that the proceeds of the property secured in favor of someone else should be used to pay the remuneration of the business rescue practitioner as if the remuneration and expenses of the business rescue practitioner were created by the property from which the proceeds derive.[39]

The court had to deal with questions pertaining to the interpretation of sections 135(4) and 143(5) of the Companies Act, read with applicable provisions of the Insolvency Act. Section 135 (4) of the Companies Act, read in tandem with section 97(2) of the Insolvency

[38] Delport at 482(47) para 3.
[39] Diener at para 20.

Act,[40] stipulates that the remuneration of the practitioner and expenses incurred during business rescue proceedings shall be paid after the costs outlined in section 97(2) have been settled.[41]

The court noted anomalies emanating from the interpretation of section 135(a)(ii) which makes reference to "all unsecured claims against the companies". The glaring anomaly appears where the business rescue proceedings are superseded by liquidation proceedings and where there is no free residue.[42]

Section 97(2) of the Insolvency Act reads as follows:

> "Thereafter any balance of the free residue shall be applied in defraying the costs of the sequestration of the estate in question with the exception of the costs mentioned in subsection (l) of section eighty-nine.
>
> (2) The costs of the sequestration shall rank according to the following order of priority;
>
> (a) The sheriff's charges incurred since the sequestration;
>
> (b) fees payable to the Master in connection with the sequestration;
>
> (c) the following costs which shall rank pari passu and abate in equal proportions if necessary, that is to say: the taxed costs of sequestration as defined in subsection (3), the fee mentioned in sub-section (4) of section sixteen, the remuneration of the curator bonis and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, in so far as they are not payable by a particular creditor in terms of sub-section (1) of section eighty-nine, any expenses incurred by the master or by a presiding officer in terms of sub-section (2) of section one hundred and fifty-three and the salary or wages of any person who was engaged by the curator bonis or the trustee in connection with the administration of the insolvent estate.

[40] S 97(2) of the Insolvency Act sets out the ranking of the costs of sequestration in the order of priority which must be settled in the instance where the business rescue proceedings have been superseded by the liquidation proceedings (s 135(4)). S 97 dictates that the claims for the remuneration and expenses of business recue practitioner, salaries or wages due and payable during the company business recue proceedings, and post commencement loan facilities from lenders shall only be paid once the cost of sequestration have been fully settled.
[41] Diener at para 26.
[42] Idem at para 63.

(3) In paragraph (c) of sub-section (2) the expression 'taxed costs of sequestration' means the costs (as taxed by the registrar of the Court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the Court directs that they shall be included."

In the Diener case, the court could not be persuaded to accept the argument from the applicant that the claim for remuneration was not a concurrent claim, but a special class of claims which had to be viewed as claims payable before the claims of the secured creditors.[43] The court arrived at the conclusion that section 135(4) of the Companies Act concerns itself with claims arising out of the cost of liquidation which rank above the moneys deemed to be post-commencement financing, and remunerations and expenses of the business rescue practitioner in terms of section 135(1)(a) and subsection 3 respectively.[44] The court concluded that the claims of practitioners are payable out of the free residue after the settlement of the liquidation costs listed in section 97(2).[45]

Over and above, the objectives of business rescue proceedings is to

"facilitate the rehabilitation of a company that is financially distressed by providing for

(i) the temporary supervision of the company and the management of its affairs, business and property;
(ii) a temporary moratorium on the right 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 affair, business, property, debt and other liabilities equity in a manner that maximizes the livelihood of the company continuing in existence and, results in a better return for the company's creditors and shareholders than would result from immediate liquidation of the company."[46]

[43] Idem at para 17.
[44] Idem at para 18.
[45] Idem at para 16.
[46] S 128(1)(b)(i)(ii)(iii) of the Companies Act.

The business rescue proceedings will benefits and/or serve the interests of all stakeholders including the creditors, whether secured or not, if the implementation of the rescue plan is successful and the company is consequently rehabilitated.[47]

Section 140 of the Companies Act stipulates that during the business rescue proceedings, the practitioner has management control in the affairs of the company in substitution for its board of directors and pre-existing management. More importantly, the practitioner is an officer of the court and report to the court in terms of the applicable rules made by the court.[48] The responsibilities, duties and liabilities of a practitioner are akin to those of a director of the company, as provided for in sections 75 to 77.[49]

The overarching duties of the business rescue practitioner is therefore to rescue the company through restructuring of its affairs, debts, liabilities, and equity in a way that it increases the possibility of the company to continue to exist; or results in better returns for the creditors than they would have received if the traditional liquidation process was followed.[50] Logically, if the company does not plummet into liquidation, all creditors stand to benefit more from the rescue process in that they will receive better returns.[51]

In light of the above, why should the remuneration of the business rescue practitioner not be considered first before any creditor? It has largely been acknowledged that judicial management failed in South Africa and as a result, the state has placed a premium and invested a lot to create a process that will save jobs and ensure that businesses continue to survive.[52]

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[47] Diener at para 54.

[48] Pretorius "Task and activities of the business rescue practitioner: a strategy as practice approach" 2013 SABR 1 at 5, herein referred to as "Pretorius".

[49] Ibid.

[50] Davis et al *Companies and other Business Structures in South Africa* (2013) 236, herein referred to as "Davis et al".

[51] Ibid.

[52] Burdette "Some initial thoughts on the development of a modern and effective business rescue model for South Africa" Part 1 2004 *SA Merc LJ* 241 at 241, herein referred to as "Burdette".

The business rescue regime is an improvement from judicial management as its predecessor and this regime has potentially reduced a number of unnecessary liquidations.[53] The inclusion of the business rescue regime in the Companies Act is critical to the functioning of our economy; hence, the business rescue practitioner is an important person in respect of the existence and continuing success of commercial enterprises.[54] In order to safeguard the process, the business rescue practitioner needs to be prized.

The business rescue practitioner has to be paid for the services rendered, such as the restructuring of the debt and the development of the rescue plan.[55] This court judgment has the propensity to discourage practitioners from taking up the mantle of rescuing businesses because of the risk of not getting paid.[56]

Apart from expenses incurred by the practitioner during the rescue proceedings, he or she must still incur expenses in terms of section 141(2) of the Companies Act. These expenses are in respect of the application to discontinue the rescue proceedings and to place the company in liquidation in the event that it becomes apparent that the company cannot be rescued.[57] Obviously, in launching the application for liquidation, the practitioner will incur legal expenses.[58] Under normal circumstances, the expenses in question will have to be paid from the funds available to pay the general costs of liquidation (in effect, from the free residue) terms of section 97 of the Insolvency Act.[59] This may not be the case where these expenses are deemed to be expenses of the business rescue practitioner.

Section 44 (1) of the insolvency Act provides that any person who has a liquidated claim against an insolvent estate may, prior the final distribution of the estate, in accordance with section 104 of the Insolvency Act, prove the claim. This section makes it mandatory

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[53] Naidoo et al "Business rescue practices in South Africa: An explorative view" 2018 *JEFS*, available at www.jefjournal.org.za/index.php/jef/article/view/188/293, herein referred to as "Naidoo et al".
[54] Naidoo et al para 3.
[55] Idem at para 4.
[56] Diener at para 70.
[57] Van der Merwe and Buitendang "Risky business of a business rescue practitioner" De Rebus 2018-01-05, available at http://www.derebus.org.za/the-risky-business-of-a-business-rescue-practitioner/l, herein referred to as "Van der Merwe and Buitendag".
[58] Idem at para 2.
[59] Ibid; s 97(2) of the Insolvency Act.

for any prospective claimant who wants to claim against an insolvent estate to prove the liquidated claim.[60] In the same context, business rescue practitioners whose expenses were incurred before liquidation may be obliged to prove their claims and make contribution as unsecured non-preferent creditors in terms of section 106 of the insolvency Act.[61]

Section 106 reads as follows;

> "Where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all the expenses, costs and charges mentioned in sections ninety-six and ninety-seven, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non-preferent creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any: Provided that
>
> (a) if all the creditors who have proved claims against the estate are secured creditors who would not have ranked upon the surplus of the free residue, if there had been any, such creditors shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim;
>
> (b) if a creditor has withdrawn his claim, he shall be liable to contribute in respect of any deficiency only so far as is provided in section fifty-one and if a creditor has withdrawn his claim within five days after the date of any resolution of creditors he shall be deemed to have withdrawn the claim before anything was done in pursuant of that resolution;
>
> (c) if all the creditors who would have ranked upon the surplus of the free residue, if there had been any, have withdrawn their claims and, after payment of their contribution in terms of paragraph (b) there is still a deficiency, the remaining creditors whose claims have been proved against the estate shall, notwithstanding the fact that they would not have ranked upon the surplus of the free residue, if there had been any, be liable to make good such deficiency, each in proportion to the amount of his claim."

1.2. PROBLEM STATEMENT AND RESEARCH OBJECTIVE

It is abundantly clear that the judicial management model failed in South Africa and that it necessitated government to undertake legislative reforms in order to come up with a

[60] Ss 44(1) and 104 of the Insolvency Act.
[61] S 106 of the Insolvency Act.

new corporate rescue regime.[62] Each year, numerous of businesses were liquidated notwithstanding the judicial management model. There was a need for effective legislation that offered practical guidance and solutions to ailing companies in need of rescue.[63] The business rescue process – in terms section 128 – was included in the new Companies Act.[64]

It is accepted that business recue is critical for the survival of the economy. The business rescue practitioners are invaluable to sinking commercial enterprises. The judgment in the Diener case has the propensity to discourage practitioners from taking up the responsibility of rescuing businesses because of the risk of not being paid for services rendered and expenses incurred. The court judgment created the impression that the remuneration of the business rescue practitioner is not a priority according to its interpretation of the ranking of claims against an insolvent estate.

The purpose of this dissertation is to analyse specific sections in chapter 6 of the Companies Act 71 of 2008 against the backdrop of the relevant provisions of the Insolvency Act 24 of 1936. The Constitutional Court has decided that the claims for the remuneration and expenses of business rescue practitioners do not enjoy a "super preference"[65] over secured creditors after business rescue is converted to liquidation. However, the realities insofar as the business rescue practitioner is entitled to payment for the services rendered – such as the development of an implementable business rescue plan – and the risks inherent to business rescue, remain.

In summary, the study will ascertain whether this position as it currently stands is desirable or not. The aforementioned assessment will be conducted by way of an analysis of the Diener decision and the possible repercussions thereof; and the interplay between the provisions in the Companies Act pertaining to business rescue and the administration

[62] Bradstreet "The new business rescue: will creditors sink or swim? 2011 *SALJ* 352 at 353, herein referred to as "Bradstreet".
[63] Bradstreet at 355.
[64] Ibid.
[65] Diener at para 2.

provisions in the Insolvency Act applicable to corporate insolvencies. The assessment will include a comparative study of the United Kingdom, Australia, and Canada.

1.3. RESEARCH QUESTIONS

In light of the background to the study, the research questions for the study are as follows:

1. What is the current legal position pertaining to the claims for the remuneration and and expenses of the business rescue practitioner after conversion of business rescue proceedings into liquidation proceedings, insofar as the following is concerned:
    a. Payment of the aforementioned claims from the encumbered asset accounts or the free residue account;
    b. Ranking of claims for payment from the insolvent estate;
    c. Payment of contributions by the business rescue practitioner in the event of insufficient funds in the free residue account to pay the costs of liquidation as per the Insolvency Act.
2. Should the claims for the remuneration and expenses of the business rescue practitioner be payable before the costs of liquidation as per the Insolvency Act become payable in insolvency proceedings?
3. If there is no sufficient free residue, should the remuneration and expenses of the business rescue practitioner payable from the funds yielded by secured assets?
4. How do the positions in South Africa in respect of the above questions compare with the jurisdictions of the United Kingdom, Australia, and Canada?

The above will influence the conclusion to be drawn upon ascertaining the whether remuneration and costs should be paid before the other creditors in insolvency.

1.4. DELINEATIONS AND LIMITATIONS

This contribution considers the remuneration and expenses of the business rescue practitioner. The study provides a brief overview of the judicial management procedure in so far as it relates to the remuneration and expenses of judicial managers in terms of the Companies Act 61 of 1973 as the predecessor to business rescue in South Africa. Only

the basic elements of the previous dispensation are considered, and the contribution will not delve deeper into the judicial management model.

It is true that business rescue is not an old phenomenon in South African's legal context, but it is fair to admit that the business rescue process has now been fully established in South Africa. Nevertheless, there have not been many reported cases in so far as the remuneration of business rescue practitioners is concerned. In the same vein, there are few journal articles written on this subject-matter. As such, the study requires a look at other jurisdictions in order to study, compare, and learn from the corporate rescue systems in these countries. The chosen jurisdictions are the United Kingdom, Australia and Canada because these countries have matured and sophisticated corporate rescue regimes from which South Africa can learn lessons.[66] The Anglo-Pacific regimes are advanced and narrate the procedures of business rescue practitioners carefully.[67] These jurisdictions have been elected as comparative regimes due to the fact that the South African business rescue legislation is closely aligned with those jurisdictions in practice and manner.[68] It is imperative to mention that the business rescue themes in the South African rescue legislation have been drawn from the corporate recovery regimes in those countries.[69]

1.5. SIGNIFICANCE OF THE STUDY

Over and above finding answers to the issues highlighted above and against the backdrop of the Constitutional Court judgment in the Diener case, this study aims to assess how South Africa benchmarks against other jurisdictions insofar as the claims for remuneration and expenses of business rescue practitioners are concerned. The purpose is to show the lessons that can be learned from foreign jurisdictions in order to reinforce South Africa's available legislative mechanism and find solutions to the abovementioned issues.

[66] Levenstein *An Appraisal of the new South African business rescue procedure* LLD Dissertation 2015 University of Pretoria 103.
[67] Ibid.
[68] Ibid.
[69] Ibid.

1.6. KEY TERMS AND DEFINITIONS

The following are the definitions of certain terminology that will be used throughout the dissertation. These definitions are directly derived from the Companies Act 61 of 1973 and the Companies Act 71 of 2008.

"Affected person" means a shareholder or creditor of the company, or any registered trade union representing employees of the company.

"Business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing temporary supervision of the company and of the management of its affairs, business, and properties.

"Business Rescue Practitioner" means a person appointed, or two or more persons jointly appointed, to oversee a company during business rescue proceedings.

"Financially distressed" in reference to a company, means that it appears to be unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing six months.

"Company" means a company incorporated under Chapter IV of the Companies Act of 2008 and includes any entity, which immediately prior to the commencement of the Companies Act of 2008, was deemed a company in terms of any law repealed by the Companies Act of 2008.

"Director" means a member of a board of a company.

"Independent creditor" means a person who is a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2) of the Companies Act of 2008, and is not related to the company, a director or the practitioner, subject to the specific provisions of section 128(2).

"Judicial manager" means the final judicial manager referred to in section 432 of the Companies Act of 1973.

"Liquidator" in relation to a company, means the person appointed under Chapter XIV of the Companies Act of 1973 as liquidator of such company, and includes any co-liquidator and any provisional liquidator so appointed.

"Rescuing a company" means achieving the goals set out in the definition of business rescue.

"Special resolution" in relation to a company means a resolution passed at a general meeting of that company in the manner provided for by section 199 of the Companies Act of 2008.

"Preferential debts" (United Kingdom) are debts of a company on winding-up or of an individual on bankruptcy that have priority over unsecured debts and those secured only by floating charge.

"Remuneration" of a business rescue practitioner refers to the amount that he or she is entitled to be paid in accordance with tariff in terms of section 128 (1) of the Companies Act of 2008.[70]

"Expenses" means the actual costs of any disbursement of expenses incurred by the business rescue practitioner to the extent reasonably necessary to carry out his function and to facilitate the company's business rescue proceedings.[71]

1.7. METHODOLOGY

The research involves desktop-based research presented in the form of critical analyses and literature studies of the relevant primary sources of law (legislation and judicial precedent) as well as secondary sources of law (scholarly books, journals articles and online sources). Though the focus of the research is on the South African position, a similar approach is taken for purposes of the comparative analysis of the positions in the United Kingdom, Australia, and Canada.

[70] Delport at 500(3).
[71] Delport at 500(3)-500(4).

This dissertation will explore judicial management as an alternative to liquidation in terms of the Companies Act 61 of 1973.[72] The qualifications, the appointment and powers of judicial manager will be brought under scrutiny.[73] The duties of judicial manager as well as his entitlement to remuneration in terms of section 434A of the old Companies Act will be dealt under chapter 2.[74] Given the general acceptance that the judicial management model failed in South Africa, this dissertation traverses into development of business rescue as a corporate rescue model that replaced judicial management.[75] Against that backdrop, the study will investigate the process of initiating the business rescue proceedings and the qualifications, appointment, duties and remuneration of the business rescue practitioner.[76]

This dissertation will probe the corporate rescue systems in the United Kingdom, Canada and Australia. The insolvency law reforms in these countries, comparative to South Africa, will be delved into.[77] The qualifications, appointment, duties, and remuneration of the administrator in both the United Kingdom and Australia will be explored.[78] In the same vein, the study will look at the qualifications, appointment, and remuneration of the trustee and monitor as licensed insolvency practitioners in Canada.[79] Central to the investigation of these regimes and the comparative analyses is the quest to answer the question whether or not the Constitutional Court erred in Diener's judgement that the remuneration of the business rescue practitioner cannot be paid in priority to the claims of secured creditors after the business rescue proceedings have been converted into liquidation. Chapter 5 will provide a summation and recommendations in regard to the investigations and analyses undertaken.[80]

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[72] See ch 2, para 2.1.
[73] See ch 2, para 2.2.
[74] See ch 2, para 2.3.
[75] See ch 3, para 3.1.
[76] See ch 3, para 3.2, 3.3, 3.4 and 3,5.
[77] See ch 4, para 4.1.
[78] Ibid.
[79] Ibid.
[80] See chap 5.

CHAPTER 2: THE CORPORATE RESCUE OPTION IN TERMS OF THE COMPANIES ACT 61 OF 1973 – JUDICIAL MANAGEMENT

2.1. INTRODUCTION

Liquidation is an extreme measure which results in the dissolution of a company. It is apparent that the granting of a liquidation order effects the demise of the corporate entity, resultant job losses and the disruption of other businesses.[81] As an alternative to liquidation, the Companies Act 61 of 1973 provided for judicial management as an escape from the dissolution of companies. Judicial management was intended to rescue companies from declining toward liquidation and it assumed a form of judicial reorganization.[82] The majority of companies that made use of the judicial management procedure could not avoid being wound up because judicial management was invariably inclined towards the creditors' interests contrary to rescuing the debtor company from financial hardship.[83]

Section 427 of the old Companies Act set out circumstances under which the company may be placed under judicial management, which included the inability to pay debts and meet other obligations. Any person who was entitled under section 346 of this Act could make an application to court for a judicial management order.[84] If the court granted the provisional judicial management order, the Master had to appoint a provisional judicial manager without delay, and the manager had to assume the management and the custody of all property of the company under section 429 of the old Companies Act. In terms of section 432 of the old Companies Act, the High Court could issue a final judicial management order on a return date which would contain directions as to the vesting of management of the company and the appointment of a final judicial manager.[85] The judicial manager, who had to execute his or her duties outlined under section 433 of the old Companies Act, was entitled to remuneration in terms of section 434A of the Act.

[81] Bradstreet at 352.
[82] Ibid.
[83] Idem at 353.
[84] S 427(1)(a)(2) of the old Companies Act.
[85] S 432(1)(2)(a)(b)(c)(d)(3)(a) of the old Companies Act.

The key purpose of this part of the study is to ascertain as to whether the judicial manager was entitled to remuneration if the judicial management was superseded by a winding up order, and the status of the claims.[86]

2.2. QUALIFICATIONS AND APPOINMENT OF THE JUDICIAL MANAGER

No qualification was set out by the Act or in the policy determined by the Minister for the appointment of a judicial manager.[87] The qualification required for the appointment was that the appointed person had to furnish the master with security for the performance of his duties.[88] In her doctoral thesis, Loubser observed that the fact that judicial managers were not required to have professional training or hold membership of professional body meant that there was no control over their activities.[89] I do not entirely agree with this statement because the judicial manager still had to account to the Master of High Court.

There must have been statutory qualifications required from a person who sought to be appointed as a judicial manager and such qualifications must be implemented gradually to afford the development of judicial management profession.[90] Section 15(1A) of the repealed Companies Act stipulated that the Minister may determine the policy for the appointment of the provisional judicial manager and judicial manager, and the provisional liquidator and liquidator. Once such policy was laid down the appointment had to be made in accordance with the policy.[91] As soon as a provisional judicial management order was granted and subsequent to the appointment of the provisional judicial manager by the Master, section 429(1) provided that the meeting presided over by the Master, or a mag-

[86] S 434A(1)(2)(3) to 435(a)(b)(i)(ii) of the old Companies Act.
[87] Rajak and Henning "Business Rescue for South Africa" 1999 *SALJ* 262 at 264.
[88] Ss 429(b)(i) and 375(1) of the old Companies Act.
[89] Loubser *Some comparative aspects of corporate rescue in South Africa company law* LLD Dissertation 2010 UNISA 37.
[90] Klopper "Judicial management – A corporate rescue mechanism in need of reform?" 1999 *Stell LR* 417 at 430-431.
[91] S 15(1A) of the old Companies Act.

istrate having jurisdiction in the area where the meeting was taking place, had to be convened as prescribed under section 412 in respect of a meeting regarding the winding up of the company.[92]

The purpose of such meeting was to scrutinize the report of the provisional judicial manager with the desire to place the company under final judicial management, considering the prospects of rescuing the company.[93] The critical part of that meeting was to nominate the person or persons, who was or were not disqualified for appointment, and whose names had to be submitted to the Master for appointment as final judicial manager(s).[94] The meeting dealt with the proving of claims by creditors against the company and consequently, the chairman of such meeting had to prepare or lay before the court the report that dealt with the aforesaid issues as discussed at that meeting, including the nominations and appointment of the judicial manager.[95]

2.2. POWERS AND DUTIES OF THE JUDICIAL MANAGER

A judicial manager could not dispose of company assets in the ordinary course of the company's business without the permission of the court.[96] In terms of section 433 of the old Companies Act, a final judicial manager could take over from the provisional judicial manager and assume the management of the company. He or she was required to act in the manner that was the most economic and in the best interests of the members and creditors of the company; comply with any direction of the Court made in the final judicial management order or any variation thereof; keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the company or its directors would have been obliged to keep or prepare if the company had not been placed under judicial management.[97] The judicial manager had to convene the annual general meeting and other meetings of members of the company.[98]

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[92] Delport *Henochsberg on the Companies Act 61 of 1973* (1994; last updated: June 2011 – service issue 33) 983, herein referred to as "Delport 2011".
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Delport 2011 at 950.
[97] S 433(1)(a)-(c) and (f) of the old Companies Act.
[98] S 433(1)(g) of the old Companies Act.

2.3. THE REMUNERATION OF THE PROVISIONAL MANAGER OR THE JUDICIAL MANAGER

Section 434(A) of the old Companies Act provided that the Master of the High Court had to determine the remuneration of a provisional judicial manager or final judicial manager by considering the performance and duties of the manager, and the recommendations of the creditors of the company.[99] Section 428 of the abovementioned Act authorised the Chief Master to publish guidelines for the purpose of assisting the Master with the taxation of the fees of the trustees, liquidators, and judicial managers.[100] It is worth noting that the decision of the Master in respect of the remunerations in terms of section 434(A)(3) could be reviewed under section 151 of the Insolvency Act.[101]

2.4. THE EFFECTS OF JUDICIAL MANAGEMENT PROCEEDINGS

The consequences of a liquidated company were that employees would lose their jobs and creditors were likely to be paid less than what they were owed.[102] It might have been the wishes of every affected party to avoid winding up a company, if there were prospects of making the company solvent and viable again.[103] That could have been done by placing the company under judicial management whose intents and purposes were to give the company the opportunity to overcome its financial difficulties and avert the winding up process.[104] It must be noted that it was only the court that could put the company under judicial management.[105] The effects of such an order was that the company would be under the control of the judicial manager.[106]

The judicial manager was subjected to the overall supervision of the court.[107] All legal actions were suspended once the company was placed under judicial management.[108] The judicial manager had to retain possession of the company's assets and had to

[99] S 434(A)(1) of the old Companies Act.
[100] S 428 of the old Companies Act.
[101] S 434(A)(3) of the old Companies Act.
[102] Williams *Concise Corporate & Partnership Law* (1997) 311.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.

prepare a presentation on the state of affairs of the company to the creditors, members, directors, shareholders, and debenture holders of the company.[109] The manager had to detail the company assets, liabilities, and alternative sources of money that could be made available for the purpose of rescuing the company.[110] The judicial manager had authority over the management and control of the company, subject to the order of the court, and reported to the Master of the High Court.[111]

The creditors whose claims arose before the court could grant a judicial management order could resolve that liabilities incurred by the judicial manager in the conduct of his duties would be paid in preference to all liabilities not yet discharged, except the cost of judicial management.[112] All claims based on such liabilities would have preference – in priority of when they were incurred – over all unsecured claims, except claims arising out of the cost of liquidation.[113]

2.5. CONCLUSION

Judicial management did not fulfill the expectation as an alternative relief measure to liquidation.[114] Courts saw judicial management as an extraordinary measure due to the fact that creditors were entitled to use liquidation in order to recover the payment of their claims.[115] In many instance, the liquidators were appointed as judicial managers, and the practice was problematic because liquidators were trained to liquidate the company and not to save it.[116] It is against that backdrop that judicial management failed to achieve its intended purpose and desired level of success.[117]

Judicial management as a failed model, neccessitated the development of the busines rescue model in South Africa. Chapter 6 of the Companies Act of 2008 represents the

[109] Idem at 313.
[110] Ibid.
[111] S 433 of the old Companies Act.
[112] S 435 of the old Companies Act.
[113] Ibid.
[114] Burdette at 243.
[115] Idem at 248-249.
[116] Ibid.
[117] Idem at 250.

overhaul of former corporate recovery regime in South Africa.[118] The business rescue process, as a significant improvement on judicial management, will be dealt with in the next chapter. This rescue regime recognises the value of business enterprises as going concerns.[119] It is not only concerned about creditors but also all affected parties in order to ensure that divergent interests of the affected parties are balanced equitably within the constraints of the legislation.[120]

[118] Bradstreet at 353.
[119] Idem at 355.
[120] Ibid.

CHAPTER 3: THE CORPORATE RESCUE OPTION IN TERMS OF THE COMPANIES ACT 71 OF 2008 – BUSINESS RESCUE

3.1. INTRODUCTION

It is generally accepted that the judicial management model failed in South Africa.[121] The failure of the model necessitated government to take steps to overhaul the corporate rescue regime.[122] The judicial management as a form of business rescue mechanism was considered an extraordinary measure.[123] When comparing the modern insolvency systems to the South Africa's insolvency regime, it was evident that she was still lagging behind.[124] Ironically, South Africa was one of the first countries to introduce a corporate rescue regime in the form of judicial management.[125]

The Companies Act of 2008 introduced business rescue as a procedure to replace the judicial management model.[126] Business rescue as a corporate rescue model does not imply that the company will automatically be saved by this procedure.[127] The possible outcomes emanating from this procedure may be that the company may be sold as a going concern which will result in employees' jobs saved and creditors of the company will recover the money owed to them by the company.[128] The primary object of the business rescue proceedings is to facilitate the rehabilitation of the company which is in financial distress.[129] This procedure may be commenced by director's resolution or court order.[130] Subsequent to the company being placed under business rescue, the company must, within five business days from the date on which it was placed under the business

[121] Burdette 241.
[122] Ibid.
[123] Idem at 243.
[124] Idem at 246.
[125] Ibid.
[126] Davis et al 234.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Idem at 238.

rescue, appoint a business rescue practitioner to monitor and oversee the company and its rescue proceedings.[131]

The appointment of a business rescue practitioner must be consistent with the requirements set out in section 138 of the Companies Act in terms of which his written consent to this appointment must be filed with the CIPC.[132] The business rescue practitioner must be a member of legal, accounting or business management profession licensed by the CIPC in order to practice as a business rescue practitioner.[133] The business rescue practitioner must, after the appointment and as soon as it is practically possible, investigate the affairs of the company and determine whether the company has good prospects of being rescued.[134] If the business rescue proceedings will not rescue the company, the practitioner must inform the court, the company, and all affected persons, and initiate a court application to terminate the business rescue proceedings and apply for liquidation.[135] In the scenario where the company can be rescued, the business rescue practitioner must develop a business plan for the company and, if the plan is adopted, the practitioner must monitor the implementation.[136] The business rescue practitioner is entitled to be remunerated and paid for the expenses incurred in the course of the execution of this duties as a practitioner.[137]

3.2. THE INITIATION OF BUSINESS RESCUE PROCEEDINGS

Section 129(2)(a) of the Companies Act provides that the board of directors may decide to place the company under voluntary[138] business rescue if there is reasonable grounds to believe that the company is in financial distress and that there exists reasonable prospects of rescuing the company.[139] The board of directors must make a formal decision

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[131] Idem at 240.
[132] Ibid.
[133] Idem at 254.
[134] Idem at 256.
[135] Ibid.
[136] Idem at 257.
[137] Ibid.
[138] "Voluntary Business Rescue" is initiated where the board of a company resolves that the company voluntarily begin business rescue proceeding in fulfilment of s 129(1)(a) of the Companies Act.
[139] S 129(2)(a) of the Companies Act.

to initiate business rescue proceedings by majority vote.[140] It is worth noting that the business rescue resolution comes into effect once it is filed with the CIPC.[141] The CIPC is public entity established in terms of the Companies Act.[142]

Alternatively, the company may be placed under business rescue by way of a court order in terms of section 131(1) of the Companies Act. Any affected person such as a director, creditor, registered trade union representing the employees, representative of employees not belonging to the trade union, or shareholder may apply to court to initiate business rescue proceedings and place the company under supervision.[143] Section 131(2) and (3) stipulates that the applicant must notify affected persons of the application. This will provide the affected or interested parties with the opportunity to participate in the proceedings.[144] Having considered the application, the court may grant an order placing the company under business rescue, if it is content that there are lawful grounds on which the application for business rescue is based.[145]

In certain circumstances, it occurs that the affected parties would wish to apply to court for an order to commence with business rescue after the liquidation proceedings have already commenced. The Act caters for this scenario in that if such an application is brought successfully, it may give rise to the suspension of the liquidation proceedings.[146] Section 131 has been the subject of contention and the crux of the issues is the interpretation of the term "liquidation proceeding"; and whether this refers to proceedings in court (up to the point where a liquidation order has been granted), or whether it includes winding up proceedings after the liquidator has been appointed, or whether it refers to the liquidation order but excludes the proceedings.[147] The Act does not define the term "liquidation proceedings". The Act states that if liquidation proceedings against the company have

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[140] Davis et al 238; s 129(2)(a) of the Companies Act.
[141] Ibid.
[142] The CIPC was established by the Companies Act as a juristic person to function as an organ of state responsible for the registration of companies, co-operatives and maintenance of their intellectual property rights (trademarks patents, designs and copyright).
[143] S 131(1) of the Companies Act.
[144] S 131(2) and (3) of the Companies Act.
[145] S 131(4) of the Companies Act.
[146] Stoop "When does an application for business rescue proceedings suspend liquidation proceedings?" 2014 *De Jure* 329 at 330, herein referred to as "Stoop".
[147] Ibid.

already commenced, a business rescue resolution may not be adopted by the board of directors.[148] This simply means that if the liquidation proceedings have already commenced, the business rescue proceedings can only be initiated by way of a court order.

The court may grant an order on application brought by the affected persons placing company under business rescue if it is satisfied that the company is financially distressed and there are prospects of rescue; or the court may reject the application and place the company in liquidation.[149] Should the court decide to put the company under business rescue, it has the authority to appoint the interim business rescue practitioner.[150]

In the case of *Van Staden v Angel Ozone Products CC (in Liquidation)*,[151] a final liquidation order was granted before 1 May 2011 – which is the date on which the Companies Act of 2008 came into effect. The sole member of the close corporation brought an application, as an affected person and in terms of section 131(4) of the Act, for an order to initiate business rescue.[152] The winding up was at a particular stage but not yet finalized and the close corporation not yet de-registered.[153] The court had to determine the meaning of the term "liquidation proceedings" found in section 131 of the Act.[154]

It was argued on behalf of the respondent that the liquidation proceedings should be equated to winding up proceedings.[155] The judge found that a distinction must be drawn between "liquidation proceedings" and "winding up proceedings".[156] "Liquidation proceedings" refers to a legal process before the court and "winding up" refers to a process overseen by the Master. Winding up proceedings are a continuation of the liquidation proceedings. In other words, the final liquidation order is not granted and immediately executed – the execution is carried out on a confirmed liquidation and distribution account.

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148 Idem at 330.
149 Ibid.
150 Ibid.
151 2013 (4) SA 630 (GNH), herein referred to as "Van Staden".
152 Van Standen at para 2.
153 Idem at para 22.
154 Idem at para 25.
155 Ibid.
156 Idem at para 26.

The winding up process is an integral part of liquidation proceedings – winding up concludes when the Master approves the final liquidation and distribution account. The court would thus be able to convert liquidation proceedings into business rescue proceedings regardless of the process of liquidation and winding up.[157]

Any interested or affected person who has reason to believe that the company is not financially distressed, or that there are no prospects of rescuing the company, or that the company has not complied with the procedures set out in section 129 of the Act, may approach the court to set the resolution, taken to place the company into business rescue, aside.[158] More importantly, affected or interested parties may apply to court to set the appointment of the business rescue practitioner aside if there are grounds to believe that the business rescue practitioner does not have the required skills and qualifications to rescue the company.[159] During the business rescue proceedings, section 133(1) determines that no legal action, including enforcement proceedings, may be taken against the company in relation to any assets of the company and without the written consent of the business rescue practitioner or leave of the court.[160]

3.3. THE APPOINTMENT AND QUALIFICATIONS OF THE BUSINESS RESCUE PRACTITIONER

Section 129 of the Companies Act requires the board of the company, upon taking the resolution to voluntarily place the company under business rescue, to appoint the business rescue practitioner within five days to monitor the company and its rescue proceedings.[161] The person appointed as a business rescue practitioner must fulfill the requirements as set out in section 138 of the Act and consent to the appointment in writing.[162]

[157] Idem at para 27.
[158] Davis et al 241.
[159] Ibid.
[160] S 133(1)(a) and (b) of the Companies Act.
[161] Davis et al 240.
[162] Ibid.

The notice of appointment must be filed with the CIPC by the company.[163] After filing the notice of proceedings within five business days, the affected parties must be served with such notice of appointment.[164]

The appointment of the business rescue practitioner will be null and void if the company fails to comply fully with any requirements within the prescribed period.[165] In the instance of non-compliance, the resolution will automatically lapse and no resolution can be filled within three months after adoption of the lapsed one, unless approved by the court.[166]

In the case of *Madodza (Pty) Ltd v ABSA*,[167] the applicant failed to appoint a business rescue practitioner within five days after the business rescue proceedings commenced as demanded by section 129(3) of the Companies Act. The applicant sought relief based on section 133(1) which provided that, during the business rescue proceedings, no legal proceedings or enforcement action may be commenced, unless there is written consent from the practitioner or the permission of the court is obtained.[168] One of the creditors sought to remove the vehicles acquired through vehicle finance for which the applicant used for his business, which were also critical for the success of the business rescue.[169] The creditor contended that the return of vehicle by the applicant falls outside the suspension of legal proceedings envisaged by section 133 of the Companies Act.[170] Section 135 demands that the assets must either be property or in the lawful possession of the company.[171] The court found that the vehicles were not the assets of the company and the applicant was ordered to return the vehicles after the cancellation of the agreement.[172] The court was convinced that the applicant failed to prove lawful possession and therefore the requirements of section 133 could not be met.[173] Section 129(3) specifies that the company must, after having adopted and published the resolution to commence business

[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] (38906/2012) [2012] ZAGPPHC 165, herein referred to as "Madodza".
[168] Madodza at para 3.
[169] Idem at para 6.
[170] Idem at para 7.
[171] Idem at para 17.
[172] Ibid.
[173] Ibid.

recue, appoint business rescue practitioner within five business days.[174] It was evident that applicant failed to appoint the business rescue practitioner within the prescribed period. [175]

Section 129(5) and (6) of the Companies Act provides:

> "(5) If a company fails to comply with any provision of subsection (3) or (4)-
> (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
> (b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.
> (6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2)."

The applicant argued that business rescue proceedings remain in effect until a court with competent jurisdiction orders otherwise.[176] The court asserted that failure to comply with 129 will result in the business rescue process being null and void.[177] The court concluded that, because the applicant failed to meet the requirements of section 133 and could not comply with section 129(3), the application could not succeed.[178] The court held that the business rescue resolution is void because the business rescue practitioner was not appointed within five days after filing the resolution with the CIPC.[179]

The business rescue practitioner may be appointed by a court order in terms of section 131 of the Companies Act.[180] The court may make an order in terms subsection (4) and

[174] Idem at para 20.
[175] Idem at para 21.
[176] Idem at para 23.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] S 131(1) of the Companies Act.

further appoint an interim practitioner who complies with the conditions laid down in section 138 and who has been nominated by the affected parties pursuant to subsection (1).[181]

Section 138(1)(a) states that any person may be appointed as a business rescue practitioner if such a person is a member in good standing of a legal, accounting, or business management profession accredited by the CIPC. Such a person must also be licensed by the CIPC.[182] Subsection (3) of the same section gives the authority to the Minister of Trade and Industry to make regulations setting out the minimum qualifications for a person to practice as a business rescue practitioner.[183] The business rescue practitioner may not be appointed as the liquidator of the company if the company is subsequently placed into liquidation after the business rescue ends.[184]

Regulation 126 of the Companies Regulations of 2011, issued in terms of section 138(3), stipulates that a person must apply for a licence from the CIPC. The CIPC may grant a licence if the applicant is of good character and integrity, and his or her education and experience are sufficient to equip the applicant to perform the function of a business rescue practitioner[185] Regulation 127 provides that a person who is eligible for appointment as a business rescue practitioner is (i) a senior practitioner who has been actively involved in business turnaround practice for at least ten years; (ii) an experienced practitioner who has been actively involved in business turnaround practice for at least five years; (iii) a junior practitioner who (a) either has not been engaged in business turnaround practice (b) has actively been engaged in business turn around practice for five years.[186] The intention of legislating the payment of the business rescue practitioner and the proclamation of these regulations affirms the view that it is mandatory to pay for the expenses and the remuneration of the business rescue practitioner – a view that was rejected by the Constitutional Court.[187]

[181] S 131(5) of the Companies Act.
[182] S 138(1)(b) of the Companies Act.
[183] S 138(3) of the Companies Act.
[184] Davis et al 256.
[185] Regulation 126(2) of the Companies Regulations 2011.
[186] Regulation 127(2)(c) of the Companies Regulations 2011.
[187] Diener at para 71.

3.4. THE POWERS, DUTIES, AND LIABILITIES OF THE BUSINESS RESCUE PRACTITIONER

Section 140 of the Companies Act sets out the powers and duties of the business rescue practitioner.[188] Subsection (1A) requires the practitioner to inform the regulatory authorities, with authority over the activities of the company, that the company has been placed under business rescue and of his or her appointment.[189] The rescue practitioner must take full management control of the company.[190] After his or her appointment, the practitioner must, as soon as it is practically possible, investigate the company affairs, business, properties and financial situation of the company.[191] The business rescue practitioner is required to develop a business rescue plan for consideration by the affected parties and possible adoption at the meeting held in terms of section 151 of the Companies Act.[192]

The business rescue practitioner, after having taken full control of the company from the board of directors and managers,[193] may delegate his or her power or functions to a director or other members of the management team.[194] The rescue practitioner may remove pre-rescue managers or appoint a new management team.[195]

The practitioner must convene and preside over a meeting of the creditors within ten working days from the date of his appointment.[196] In this meeting, he informs the creditors whether there are prospects of rescuing the company including receiving proof of

[188] Section 40(1) of the Companies Act.
[189] Section 40(1A) of the Companies Act.
[190] Section 40(1)(a) of the Companies Act.
[191] S 141(1) of the Companies Act.
[192] S 150(1) of the Companies Act. The meeting as required by s 151 of the Companies Act must be convened within ten days after publishing the business plan and must be attended by creditors and other holders of a voting interest. S 153 provides that, in the event the business plan is rejected, the practitioner "may approval from the holders of voting interests to prepare and publish a revised plan" and subs 1(b)(ii) permits the binding offer to be made for the purchase of voting interests from those holder of voting interests opposing the adoption of business rescue plan.
[193] "Managers" refers to persons who have been part of management of the company before it was placed under business rescue, and they are referred to as "pre-existing management" – see s 140(a) of the Companies Act.
[194] Ibid.
[195] Ibid.
[196] S 147(1) of the Companies Act.

claims from the creditors.[197] Section 148 mandates the practitioner to convene the meeting of employee representatives informing them whether there are reasonable prospects of rescuing the company.[198]

The business rescue practitioner must inform the court, the company, and all affected parties, when he applies to court for the termination of the business rescue proceedings and for the company to be placed under liquidation as soon as he realises that the company cannot be rescued.[199] The rescue practitioner may terminate the business rescue once he discovers that the company is no longer in financial distress or if the court has ordered the business rescue proceedings to be set aside.[200]

Similarly if, whilst carrying out the investigations into the company affairs, the practitioner discovers that there were voidable transactions or failure by the directors to fulfill their obligations before the business rescue assumed, he must take reasonable steps to remedy the situation.[201] Any evidence of corruption, fraud, and reckless trading must be reported to the law enforcement agencies for further investigation and prosecution.[202]

The duties and responsibilities of the rescue practitioner are akin to those of the directors and, as such, the practitioner is liable for a breach and/or dereliction of duties, unless an act or omission arose in the exercise of his or her powers and performance of his or her duties was executed in good faith.[203] The removal or replacement of practitioner is governed by section 139.[204]

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[197] S 147(1)(a)(i)(ii) of the Companies Act.
[198] S 148(1) of the Companies Act. Such meeting must be convened within ten days from the date of appointment.
[199] S 141(2)(a)-(b) of the Companies Act.
[200] S 141(2)(b) of the Companies Act.
[201] S 141(2)(c) of the Companies Act.
[202] S 141(2)(c)(ii) of the Companies Act.
[203] S 140(3)(b) of the Companies Act.
[204] S 139(1)(a) provides that a practitioner may be removed by order of the court and subs (2) spells out incompetence, misconduct, conflict of interests, incapacity and lack of diligence as grounds for the removal of business rescue practitioner.

3.5. THE REMUNERATION OF THE BUSINESS RESCUE PRACTITIONER

The business rescue practitioner is entitled to payment of remuneration and for expenses in line with the prescribed tariffs in terms of section 143(1) of the Companies Act.[205] Apart from the payment of remuneration, the rescue practitioner may be paid additional fees if the business rescue plan is adopted or if he performed specific duties subject to an agreement which might have been entered into.[206] Such agreement is binding on the company if approved by the majority of the voting creditors at the quorating meeting.[207] The creditors who opposed the approval of the aforementioned agreement may, within ten business days after the date of voting, apply to court to have the agreement declared invalid on the ground that it is not just and equitable, taking into account the financial state of the company.[208]

The business rescue practitioner is entitled to charge an amount to the company for his remuneration and expenses.[209] The fee structure of the liquidator of the insolvent estate – the estate in liquidation – are commission-based fees that are dependent on the proceeds of a specific type of asset in that a percentage of the type of assets sold in the administration becomes due to the liquidator.[210] This arrangement is completely foreign to the business rescue environment.[211] The fees of the business rescue practitioner are time-based, coupled with a daily maximum amount that is dependent on the size of the company.[212] It must be emphasized that the seniority of the practitioner has no effect in this regard.[213]

It is not clear at what stage of the rescue process, the practitioner will become entitled to the payment of remuneration and expenses because the Companies Act is silent in this

[205] S 143(1) of the Companies Act.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] Delport at 500(3).
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.

regard.[214] Apparently, the practitioner will be paid after he has filed a notice of implementation of the business plan and after the plan has been adopted.[215] Where the plan is rejected or the business rescue practitioner terminated the rescue proceedings on valid grounds, he will be paid after filing the notice of termination with the CIPC or after the court has granted an order of termination if the order for business rescue was sanctioned by the court.[216]

In chapter six of the Companies Act – the chapter governing business rescue – no provision is made for the practitioner's basic remuneration, as per the tariffs set out in line with the provisions of section 128 or expenses incurred, to be taxed.[217] There is also no provision for the taxation of the costs, fees and expenses of the rescue practitioner, whereas the cost, fees and expenses of liquidators are subject to taxation.[218] The aforesaid assertion was confirmed in the case of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Khayalami) (Pty) (Ltd) and Others*.[219] In this case, the company defaulted on payment to certain creditors and attempted to commence with business rescue in order to avoid liquidation.[220] The majority of the shareholders, who were creditors that financed the transaction, opposed the application for business rescue.[221] In this case, business rescue was not initiated by board resolution, but by the directors of the company who approached the court to have the company placed under business rescue.[222] Nedbank Limited and Imperial Holdings held thirty percent of the shares and were therefore affected persons as well as creditors of the company.[223] The company did not have employees and thus the court had to deal with the interests of the company and its creditors to determine whether the directors could have access to this procedure.[224] The court

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[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Delport at 500(4).
[218] Ibid.
[219] 2012 (3) SA 273 (SCA) at para 49.7-49.9.
[220] Bradstreet "Business rescue proves to be creditor-friendly: CJ Classen J's analysis of the new business rescue procedure in Oakdene Square Properties" 2013 *SALJ* 44 at 44, herein referred to as "Bradstreet on Oakdene".
[221] Idem at 44-45.
[222] Idem at 45.
[223] Ibid.
[224] Ibid.

refused the application because it was not convinced that the business rescue would be more beneficial to the creditors than liquidation.[225] The court was amenable to granting the liquidation order because liquidators have powers to dispose of the company's immovable assets and have the authority to impeach certain dispositions.[226] However, business rescue practitioners have limited powers to suspend certain obligations under section 132 of the Companies Act.[227]

The court was conscious of the fact that business rescue would result in creditors having to choose what is profitable and beneficial to themselves because in their view liquidation was a viable option.[228] The Court averred that creditors may not realise the benefit of the company being placed under business rescue because there no reasonable prospects of rescuing the company.[229] It came to the conclusion that liquidators would be successful in realising the market value of the property

As an incentive to facilitate the adoption of the business rescue plan, the Companies Act makes provision for a contingency fee to be paid to the practitioner, subject to certain conditions being met.[230] Section 143(2) of the Companies Act provides that, apart from the remuneration that the practitioner is entitled to, the business rescue practitioner may propose an agreement for further remuneration upon the adoption of business plan and the achievement of certain results related to business rescue.[231] Such additional remuneration must be calculated based on a contingency related to the attainment of the aforesaid results.[232] The holders of voting rights and creditors present at the meeting must consent to such a proposed agreement.[233] The proposed agreement in respect of contingency payment must be voted for by the creditors.[234] The creditors who voted against the proposal may approach the court within ten business days from the date on which voting

[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid.
[230] Idem at 51.
[231] Ibid and see s 143(1)(2)(a)(b) of the Companies Act.
[232] Ibid.
[233] Ibid.
[234] Ibid,

took place for an order setting aside the agreement.[235] The application for setting aside the agreement must be on the basis that it is unjust, inequitable and unreasonable given the fact that the company is in a bad financial position.[236]

Section 143(5) provides that, “to the extent that the practitioner’s remuneration and expenses are not fully paid, the practitioner’s claim for the amount will rank in priority before the claim of all other secured and unsecured creditors”. This section implies that the compensation of the business rescue practitioner and expenditure for the proceedings enjoy preference above the secured and unsecured creditors.[237] Delport remarked that subsection five is not clear because it will be practically impossible to expect the rescue plan to be implemented successfully where there is insufficient funds to pay the business rescue practitioner’s fees.[238] The subsection presupposes that, where the fees of the business rescue practitioner which are not paid, they will be paid as a super-preferenced payment in priority to all claims – whether secured or not – against the company after conversion to liquidation, but not over the cost of liquidation.[239] However, the judiciary’s conclusion was that this subsection, read together with section 135(4), does not create super preference in liquidations because of the probability of abuse and of not balancing the interests of the stakeholders, as articulated in the Diener’s case.[240]

Section 135(4) stipulates that “if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claim arising from the cost of liquidation”.[241] Section 135 brought about changes in the hierarchy of payment of secured and unsecured creditors in insolvency proceedings.[242] These rules will further apply when the company goes into liquidation.[243]

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[235] Ibid.
[236] Ibid.
[237] Boraine and Van Wyk “Reconsidering the plight of the five foolish maidens: should the unsecured creditor stake a claim in real security?” 2011 THRHR 347 at 353, herein referred to as “Boraine and Van Wyk”.
[238] Delport at 500(6).
[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] Boraine and Van Wyk at 353.
[243] Ibid.

The payment rules apply in respect of business rescue proceedings.[244] However, the position expressed in the Diener's judgment simply means that the claims for the remuneration and expenses by the practitioner cannot assume "super preference" over the claims of the creditors, whether secured or not, once rescue proceeding are converted to liquidation.[245] Such claims are not deemed to be the costs of administration in terms of the Insolvency Act and this position was affirmed in the Diener-case.[246] Payment in liquidation will therefore occur in a pre-determined manner. Section 89 of the Insolvency Act reads as follows: "[T]he cost of maintaining, conserving and realising any property shall be paid out of the proceeds of that property".[247] However, if the funds are insufficient, the deficiency shall be paid by the creditors, pro rata, who have their claims in priority to other persons.[248] The property in question must be subject to a landlord's hypothec, pledge or right of retention.[249] The creditors must be entitled to payment of their claims out of the proceeds, if sufficient to cover the cost and those claims. [250]

Section 97(2) of the Insolvency Act highlights that the free residue shall be used to defray the costs of sequestration, Sheriff's charges, Master's fees in respect of sequestration remuneration of curator, trustees, and other costs of administration of the insolvent estate.[251]

At the core is the provisions of section 97, which stipulates that the costs of liquidation are paid out of the free residue excluding the costs referred to in section 89 of the Insolvency Act.[252] These costs do not assume preference over the claims of secured creditors because section 89 provides for the costs to which securities are subject.[253] Interestingly,

[244] Ibid.
[245] Ibid.
[246] Ibid.
[247] S 89(1) of the Insolvency Act.
[248] Ibid.
[249] Ibid.
[250] Ibid.
[251] S 97 of the Insolvency Act.
[252] Diener at para 48.
[253] Ibid.

the Constitutional Court pointed out that in liquidation the claims of practitioners are payable out of the free residue, once the costs of liquidation are fully paid.[254]

Section 95(1) of the Insolvency Act stipulates that

> "the proceeds of any property which is subjected to a special mortgage, landlord's legal hypothec, pledge or right of retention, after deduction therefrom of the costs mentioned in subsection (1) of section eighty nine, shall be applied in satisfying the claims secured by the said property, in their order of preference, with interest thereon calculated in manner provided in sun-section one hundred and three from the date of sequestration to the date of payment, but subject to provision of subsection(4) of section ninety six".

It is clear from the Diener-decision that secured creditors are not responsible for a portion of the rescue practitioner's fee carried over from business rescue proceeding to liquidation.[255] The court relied on the wording of section 95(1), read together with section 89(1) of the Insolvency Act, stating that the section does not accommodate the proportionate payment of the rescue practitioner's fees by secured creditors.[256]

Section 98(1) states the fees of the sheriff and messenger in connection with the execution of the judgement shall be defrayed from the free residue.[257]

It is apparent from the above that the claims of the business rescue practitioner do not enjoy preferential treatment and are viewed as unsecured claims. Section 106 of the Act specifies that where there is no free residue, or the free residue is insufficient to cover the expenses and costs in terms of section 97, all creditors[258] with valid claims are obligated to make contributions towards the costs of liquidation proportionate to the amount of their claims. Concurrent creditors are always liable for contribution. More importantly, the secured creditor must contribute in proportion to the amount for which he would have ranked

[254] Ibid.
[255] Diener at para 20.
[256] Ibid.
[257] S 98 of the Insolvency Act.
[258] S 339 of the old Companies Act stipulates that where the company that is unable to pay its debts is wound-up, the provisions of the Insolvency Act shall apply mutatis mutandis in respect to any matter not provided for by the old Companies Act. The provisions of the Insolvency Act regarding contributions by creditors towards any costs shall apply to every winding-up of a company in terms of s 342(2) of the old Companies Act.

upon the surplus of the free residue, if any.[259] The first question in the context of contributions is thus: Is the business rescue practitioner liable for contribution in terms of section 106 of the Insolvency Act in the instance where there is insufficient residue? Section 14 of the Insolvency Act reads as follows.

> "In the event of a contribution by creditors under section 106, the petitioning creditors, whether or not he has proved a claim against the estate in terms of section 44, shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition".

The second question that arises is whether section 14(3) is broad enough to cover the applicant creditor who is not obliged to prove the claim.[260] Further, the section states that the applicant creditor is liable to contribute not less than the amount of the claim stated in his petition.[261] If he proves his claim which in turn amounts to more than the claim stated in his application he will be liable for the larger amount.[262]

It must be borne in mind that section 106 is concerned with circumstances where there is no free residue or there is insufficient free residue to meet the cost of sequestration in terms section 97 of the Insolvency Act.[263] Section 339 of the old Companies Act states that "In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutandis mutandis* in respect of the matter not specifically provided for by this Act."

The sequestration costs entails costs incurred in relation to the sequestration application (i.e. attorney's fees) and such costs are paid out of the free residue, not from the proceeds of the encumbered assets.[264] However, the section 89 costs are set off against the proceeds of the encumbered assets and not from the proceeds of the free residue.[265]

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[259] S 97 of the Insolvency Act.
[260] Roestoff and Joubert "Liability of a body corporate as applicant creditor to contribute towards the cost of sequestration-First National Bank v Master of High Court(Pretoria) (503071/2016) [2018] ZAGPPHC 806 (18 April 2018)" 2019 THRHR 641 at 642, herein referred to as "Roestoff and Joubert" .
[261] Ibid.
[262] Ibid.
[263] Idem at 643.
[264] Ibid.
[265] Ibid.

Section 15(4) of the Sectional Titles Act allows the body corporate to hold out against the transfer of property until all monies owed to it have been paid in full or provision has been made to the satisfaction of the body corporate for the payment thereof.[266] In the case of *First Rand Bank Limited v Master of the High Court*,[267] the applicant submitted that the second respondent (the body corporate) was liable for the payment of contribution whether or not it proved a claim against the estate. The section further indicates that a creditor will be liable to contribute not less than he or she would have contributed if he or she had proved a claim.[268] It was submitted that the levies payable to a body corporate amount to section 89 costs which must be set off against the secured assets.[269]

In case of *Barnard v Regspersoon van Aminie*,[270] the court held that the words "all moneys" in section 15B(3) of the Sectional Titles Act included both the arrear levies and the legal costs incurred in the recovery of the levies prior to sequestration. Such costs and levies amount to administration expenses in terms of section 89 of the insolvency Act.[271] Since the levies and legal costs are regarded as administration expenses, the body corporate is not liable to make contribution if there is a deficiency in the free residue and need not prove a claim against the estate in terms of section 44 of the insolvency Act.[272]

In contrast, section 106 of the insolvency Act determines that all creditors who have proven their claims against the estate may be liable towards the shortfall.[273] The High Court, in case of *FNB v The Master*, accepted the argument of the applicant that the liquidation and distribution account in terms of which the amount owed to body corporate was to be levied pro rata on FNB and Nedbank, be amended.[274] It was further submitted that the Master of the High Court erred in concluding that the sequestration costs, being

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[266] S15(4)(b) of Sectional Tittle Act, provides that the registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him a conveyancer's certificate in the prescribed form, certifying- that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.
[267] (53071/2016) [2018] ZAGPPHC 806 (18 April 2018) at para 21, herein referred to as "FNB v Master".
[268] Ibid.
[269] Roestoff and Joubert at 644.
[270] [2001] 3 All SA 433 at para 18, herein referred to as "Barnard v Regspersoon van Aminie".
[271] Roestoff and Joubert at 644.
[272] Ibid.
[273] Ibid.
[274] Ibid.

the legal costs in respect of the sequestration application, formed part of the realisation costs in terms of section 89 of the Insolvency Act.[275]

The court found that the interplay to be analysed and the statutory interpretation required in this case related to s 14(3), 106, and 89 of the insolvency Act and section 15B(a)(i)(aa) of the Sectional Title Act.[276] The court remarked that reliance by the Master on section 15 of the Sectional Titles Act, which relieves the body corporate from liability, was misplaced.[277] Section 89, read together with section 106, makes it clear that the legal costs expended in the sequestration of the estate are not intrinsically associated with the payment of levies.[278] The sequestration costs have no connection to the recovery of unpaid levies.[279] The master conflated the sequestration costs incurred by the petitioning creditor in terms of section 14(3) of the Insolvency Act and the payment of levies in terms of section 15B(3)(a)(i)(aa) of the Sectional Titles Act.[280] The court held that the body corporate, Nedbank and FNB are pro rata liable to pay the contribution towards the costs of sequestration.[281] The court pointed out that section 14(3) should be interpreted to mean that the applicant is liable for contribution whether or not it has proved its claim.[282]

It can be deducted, based on the court decision in the *FNB v Master*'s case, that section 14 of the Insolvency Act applies to the business rescue practitioner and he or she will therefore be liable to contribute to the cost of sequestration. In terms of section 141 of the Companies Act, where a business rescue practitioner, after investigating the company's affairs, concludes that there is no reasonable prospects of the company to be rescued, a practitioner *must* apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation.[283] The business rescue

[275] Idem at 647.
[276] FNB v Master at para 26.
[277] Idem at para 34.
[278] Idem at para 35.
[279] Ibid.
[280] Idem at para 38.
[281] Idem at para 39.
[282] Roestoff and Joubert at 650.
[283] S 141(1)(2)(a)(ii) of the Companies Act. My emphasis.

practitioner can bring an application for conversion of business rescue proceedings into liquidation.[284]

Section 14 of the Insolvency Act provides that the petitioning creditors shall be liable for contribution irrespective of whether or not he has proved a claim against the estate in terms of section 44.[285] As alluded earlier that a business rescue practitioner must bring an application for the conversion of business rescue to liquidation, and that he has valid claim against the estate, it signifies that he is a "petitioning creditor" in terms of the section 14. The question whether or not a practitioner has valid claim has no material effect on his locus standi to bring an application for liquidation. The court in *FNB v The Master* dismissed the view that a body corporate as a petitioning creditor in the recovery of outstanding levies is not liable for contribution in terms of section 14(3) of the Insolvency Act.[286] When applying correct interpretation of section 14(3) and, similar to the body corporate in this case, the business rescue practitioner does not have to ***"formally"*** prove a claim in terms of section 44 of the Insolvency Act.[287] There is no doubt that the practitioner has a valid claim and is authorised by legislation – therefore he has locus standi to bring the liquidation application. Section 14(3) of the Insolvency Act, makes the petitioning creditor compulsory liable to contribute to the whether he has proved claim.[288]

The court in the case of *FNB v Master* observed that the legal costs incurred for the sequestration application cannot be treated as part of the realisation costs in terms of section 89(1) of the Insolvency Act. Section 14(3) clearly states that the creditor will be liable to contribute not less than he would have contributed if he had proved a claim.[289] The claim must have arisen before sequestration and for the claim to be paid it must be proved against the insolvent estate. [290]

[284] Ibid,
[285] S 14(3) of the Insolvency Act.
[286] FNB v Master at para 21.
[287] Ibid.
[288] Idem at 28
[289] Idem at 20.
[290] Idem at 21.

3.6. POST-COMMENCEMENT FINANCE

As a matter of emphasis, the purpose of business rescue is to provide the opportunity to companies that are financially distressed to reorganise and restructure themselves in order to return to a sustainable solvency status.[291] If there are prospects of rescuing the company, the strategy is to finance the business until such time that the business rescue plan is implemented successfully and assist with same. The availability of post commencement finance is of critical significance for the success of the business rescue proceedings.[292] It becomes difficult for a company to raise capital when it has already been placed under business rescue, as creditors become uncomfortable and conclude that they may not recover their monies or may not see a return on their investment.[293] Section 135(2) of the Companies Act permits the company to utilise its assets as security for post-commencement loans, with the understanding that the assets are first and foremostly free from debts and other financial liabilities.[294] Claims by these lenders will enjoy preference in the order in which the debts were incurred, and will enjoy preference over unsecured claims against the company.[295]

The payments or claims which are due to the employees in the form of remuneration or benefit during the business rescue process must be viewed as post-commencement finance and must be paid before the lenders of post-commencement loans are paid – this will included claims from secured creditors.[296] The remuneration and expenses of the business rescue practitioner, and other cost of the business rescue proceedings, may be paid before those claims of the employees are paid and will have preference over all claims irrespective of whether or not they are secured under section 135(3)(a).[297]

If the business rescue proceedings are replaced by liquidation proceedings, these post-commencement lenders and employees will retain their preferential status and their

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[291] Calitz and Freebody "Is Post Commencement Finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?" 2016 De Jure 265 at 266, herein referred to as "Calitz and Freebody".
[292] Ibid.
[293] Calitz and Freebody at 270.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid.

claims will still enjoy preference.[298] The employment contract cannot be affected by the business rescue proceedings but employees may agree to different terms and conditions.[299] On the other hand, if there are unpaid salaries and employment-related benefits that become due and payable to the employees prior to the initiation of the business rescue proceedings, the employees will become preferred unsecured creditors of the company for purposes of those pre-rescue claims.[300] Section 98A of the Insolvency Act, specifies employees shall be paid their salary or wages in liquidation, for a period not exceeding three months prior to the date of sequestration of the estate and from the balance of free residue.[301] The wages and salaries of the employees are payable subject to the provisions of section 98A.[302] The business rescue practitioner must consult the employees, through their registered unions or employee representative, in all stages of the business rescue.[303] The rescue practitioner must convene a meeting with the employees within ten business days after his appointment.[304] It is in this meeting that the employees may decide whether to establish a committee that will interface with the practitioner from time to time in dealing with issues affecting the employees.[305] Section 189 of the Labor Relations Act (LRA) will not apply in this context.[306]

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[298] Ibid.
[299] Davis et al at 250.
[300] Idem at 251.
[301] S 98A(1)(a)(i) of the Insolvency Act.
[302] S 98A(1) of the Insolvency Act. S 98A(3) Employees are entitled to salaries even though they have not proven their claims in terms of s 44 of the Act, but the trustee may require such employees to submit an affidavit in support of their claim for such salaries or wages. The business rescue procedure contained in ch 6 in the Companies Act is not aligned with the insolvency laws which apply to companies being wound up (Davis et al at 249). However, the intention of the Companies Act is to protect the right of employees in every possible way during the business rescue (Davis et al at 250). S 98A is indicative of the fact that employees will benefit from the balance in the free residue in terms of the Insolvency Act (Davis et al at 251).
[303] Ibid.
[304] Ibid.
[305] Ibid.
[306] S 189A(1) of the Labour Relations Act 66 of 1995 pertains to dismissals based on operational requirements. Initially, as per the proposal, my dissertation intended to ascertain the extent of the applicability of the LRA because the thinking was that employees may lose their jobs due to retrenchment arising from business rescue proceedings (Davis et al 249). In terms of section 135, no employee shall be dismissed during the business rescue process because the post-commencement loan facility will address the remunerations and employee-related benefits that are due and payable while the company is in business rescue (Davis et al at 249 to 250).

3.7 CONCLUSION

The new corporate rescue procedure that came into operation in 2011 as contained in chapter 6 of the Companies Act substituted the judicial management model.[307] Business rescue as a tool for ailing companies is a great improvement in comparison to judicial management.[308] It is accepted that business rescue appears to have made some strides since its inception, however, there are a number of court judgements which cast doubts on some of its provisions. It has been concluded that many provisions of the new procedure have not been drafted well.[309] One such controversial provision relates to the payment of unpaid remuneration of the business rescue practitioner where a business rescue is converted to liquidation in terms of section 135 of the Companies Act.[310] It is evident that section 143(5) of the Companies Act envisaged that remunerations and expenses of the rescue practitioners would be a first priority before the payment of any claim against the company, in both the pre- and post-commencement phases of the business rescue proceedings.[311]

Considering the fact that business rescue may not be successful and be converted into liquidation, the legislature must have intended that the provisions of section 135 should provide for the retention of preferential payment to the practitioner in the instance where business rescue is converted to liquidation.[312] It is evident that there is ambiguity in the interpretation of section 135(5) owing to the manner in which it was drafted.[313] As a matter of emphasis, it must have been the intention of the legislature to have the rescue practitioner retain preferential status in receiving the fees and disbursements in terms of the section 135(5).[314] Having acknowledged firstly, that the intention of the legislature anticipated the failure of business rescue and the conversion of the rescue process into liquidation and secondly, the ambiguity on the interpretation of section 135(5) of the Companies Act, it is logical that the practitioner be paid in priority. In this regard, I opine that the

[307] Jacobs and Burdette at 61.
[308] Ibid.
[309] Ibid.
[310] Ibid.
[311] Idem at 62.
[312] Ibid.
[313] Ibid.
[314] Ibid.

Constitutional Court erred in arriving at the judgement stating that the practitioner does not enjoy preferential status in respect of his payment.

Section 44 of the Insolvency Act comes to the fore in relation to the question of whether the business rescue practitioner must prove his claim as per the dictates of the section.[315] More importantly, the crux of the matter pertains to whether or not the Court was correct to conclude that the remuneration of the practitioner is not a priority above the claims of the secured creditor after conversion of business rescue to liquidation. It is undisputable that the court had determined that the fees of the rescue practitioner are payable out of the free residue of the estate in liquidation, after the payment of the costs of sequestration in terms of section 97 of the Insolvency Act.[316]

Undoubtedly, the company would only be placed under business rescue, if there is a reasonable ground to believe that the company is in financial distress and that there exist reasonable prospects of rescuing the company.[317] Once the aforesaid has been determined, a licensed business rescue practitioner must be appointed. For the CIPC to issue a license to a person to practice as a business rescue practitioner, such person must belong to legal, accounting, or business management profession.[318] The business rescue practitioner is tasked to investigate the affairs of the company and determine whether the company has good prospects of being rescued.[319] Subsequent to the investigation into the company affairs, the business rescue practitioner must develop a business plan for the company.[320] For the mere fact that business rescue practitioner is required to have license and belong to a specified profession, it means that certain qualification and experience is required. And such automatically creates a reasonable basis upon which his payment for remuneration and expenses in priority is justified. More significantly, the business rescue practitioner is expected to execute a critical task of rescuing an ailing company.[321]

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[315] Idem at 63.
[316] Idem at 64.
[317] See ch 3, para 3.1.
[318] See ch 3, para 3.3
[319] See ch 3, para 3.4.
[320] Ibid.
[321] Ibid.

The affected or interested parties expect the business rescue practitioner to have the required skills and qualifications in order to rescue the company.[322] If the person appointed as a business rescue practitioner does not fulfill the requirements as set out in section 138, interested parties may approach the court to set aside the appointment.[323] The Minister of Trade and Industry is permitted to make regulations setting out the minimum qualifications and experience for a person to practice as a business rescue practitioner.[324] The requirements that the business rescue practitioner must meet prior to his appointment must logically inform his remuneration.

The business rescue practitioner may not be appointed as the liquidator of the company if the company is subsequently placed into liquidation after the business rescue ends.[325] It was anticipated that business rescue may fail or end, that the practitioners may not be appointed as liquidator and would have rendered services. It is an error of case law to conclude that such person's payment must not be a priority. The rescue practitioner, once appointed, assume the full control of the company and may remove pre-rescue managers or appoint a new management team.[326] The duties and responsibilities of the rescue practitioner are analogous to those of the directors and, as such, the practitioner is liable for a breach and/or dereliction of duties, unless an act or omission arose in the exercise of his or her powers and performance of his or her duties was executed in good faith.[327] The board of directors would be paid for the execution of their duties.[328] The rescue practitioner should not an exception.

The business rescue practitioner must inform the court, the company, and all affected parties, when he applies to court for the termination of the business rescue proceedings and for the company to be placed under liquidation as soon as he realises that the company cannot be rescued.[329] Section 143 provides that the rescue practitioner is entitled

322 See ch 3, para 3.3.
323 Ibid.
324 Ibid.
325 Ibid.
326 Ibid.
327 Ibid
328 See ch 3, para 3.4.
329 See ch 3, para 3,3.

to payment of remuneration and expenses in line with the prescribed tariffs.[330] Apart from the payment of remuneration, the rescue practitioner may claim additional fees if the business rescue plan is adopted or if he performed specific duties subject to an agreement.[331] Apparently, the practitioner will be paid after he has filed a notice of implementation of the business plan and after the plan has been adopted.[332] It is required by law for the rescue practitioner to be paid upon the adoption of business plan by the creditors. After achieving this milestone, it would be unjust to rank his claims for remuneration and expense with a group of unsecured creditors.

In the same vein, if business rescue is terminated, he will be paid after filing the notice of termination with the CIPC or after the court has granted an order of termination if the order for business rescue was sanctioned by the court.[333]

Section 143(5) provides that, "to the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for the amount will rank in priority before the claim of all other secured and unsecured creditors". This section implies that the compensation of the business rescue practitioner and expenditure for the proceedings enjoy preference above the secured and unsecured creditors.[334] Section 135(4) of the Companies Act, states that if the business rescue is converted into liquidation the preference set out in subsection 3 remain in force.

The free residue shall be used to defray the costs of sequestration, Sheriff's charges, Master's fees in respect of sequestration remuneration of curator, trustees, and other costs of administration of the insolvent estate under section 97(2) of the Insolvency Act.[335] At the core is the provisions of section 97, which stipulates that the costs of liquidation are paid out of the free residue excluding the costs referred to in section 89 of the Insolvency Act.[336] These costs do not assume preference over the claims of secured creditors

[330] See ch3, para 3.5
[331] Ibid
[332] Ibid
[333] Ibid
[334] Ibid
[335] Ibid
[336] Ibid.

because section 89 provides for the costs to which securities are subject.[337] Interestingly, the Constitutional Court pointed out that in liquidation the claims of practitioners are payable out of the free residue, once the costs of liquidation have been paid.

The practitioner may be liable to contribute to the cost of sequestration under section 14 of the Insolvency Act.[338] It must be borne in mind that section 106 is concerned with circumstances where there is no free residue or there is insufficient free residue to meet the cost of sequestration in terms section 97 of the Insolvency Act.[339] This is arguably an unintended consequence of the Constitutional Court's decision.

The payments or claims which are due to the employees in the form of remuneration or benefit during the business rescue process must be viewed as post-commencement finance and must be paid before the lenders of post-commencement loans are paid – this will included claims from secured creditors.[340] The remuneration and expenses of the business rescue practitioner, and other cost of the business rescue proceedings, may be paid before those claims of the employees are paid and will have preference over all claims irrespective of whether or not they are secured under section 135(3)(a).[341] Against the background of the above, the next chapter will explore different corporate rescue regimes in the United Kingdom, Australia and Canada with regard to the "initiation of rescue procedures", "appointment and qualification of", "powers and duties of" and "remuneration of insolvency practitioners" namely business rescue practitioners, administrators, trustees or monitors.

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337 Ibid.
338 Ibid
339 Ibid.
340 Ibid.
341 Ibid

CHAPTER 4: COMPARATIVE STUDY

4.1. INTRODUCTION

United Kingdom began with corporate insolvency law reform in the mid-eighties and followed by Canada and Australia in the early nineties. The reforms resulted in the formulation of new legislative regimes intended to rescue financially troubled companies or parts of their businesses.[342] Presently, the Administration and Company Voluntary Arrangements (CVA), Business Proposals and Administration, and Voluntary Administration are debt relief measures used in the United Kingdom (UK), Australia and Canada to rescue or rehabilitate a company prior to subjecting it to liquidation.[343]

The new rescue mechanism in English law is the procedure providing for the appointment of an administrator in respect of the companies unable to pay their debts.[344] The advent of this regime was brought about by the enactment of the Insolvency Act 1986 (1986 c. 45) which governed the corporate rescue mechanisms in the UK.[345] The administration order is meant for the survival of the company and continuation as a going concern.[346] Prior to promulgation of the Insolvency Act 1986, liquidation and receivership were the only available mechanisms in the UK. The Insolvency Act was amended by the Enterprise Act 2002 (2002 c. 40) which introduced the improved administration regime.[347] The Enterprise Act heralded a rescue regime which is consistent with the global phenomenon of corporate rescue.[348]

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342 Abeyratne *Corporate rescues: A comparative study of the law and procedure in Australia, Canada and England* PHD Dissertation 2010 University of London 2.
343 Ibid.
344 Klopper "Judicial management – A corporate rescue mechanism in need of reform" 1999 Stell LR 417 at 420, herein referred to as "Klopper".
345 Frisby "Of right and rescue: a curious confluence?" 2019 JCLS at para 6, available at https://www.tandfonline.com/doi/abs/10.1080/14735970.2019.1615165.
346 Klopper at 420 to 421.
347 Rajak *Company Rescue and Liquidation* (2013) 1, herein referred to as "Rajak".
348 Rajak at 7.

Canada and Australia have a similar legal genealogy in regard to corporate insolvency.[349] Both countries have enacted legislation to effect credit relief namely, Australia's Corporation Act, through a process called Voluntary Administration (VA) which provides for a debtor's temporary protection and passes corporate governance to an "external administrator".[350] The process of voluntary administration commences with the appointment of an administrator.[351] In Canada, such protection is statutorily provided in the Companies Creditor Arrangement Act (CCAA) and in the Bankruptcy and Insolvency Act (BIA).[352] The Company Voluntary Arrangement (CVA) and Administration in the United Kingdom (UK) and the process of administration in both Australia and Canada have similar objectives with different processes that lead to distinctive results. The CVA is similar to the Administration as provided for in the CCAA and BIA and both involve structural proceedings and advocate for the appointment of an administrator or trustee and monitor to safeguard the interests of the creditors.[353]

The BIA is the principal legislation applicable to insolvencies and governs bankruptcy liquidation and debtor reorganisation.[354] The CCAA is intended to deal with the restructuring of large and complex corporations.[355] In terms of the BIA, a "monitor" is appointed and does not lead to the removal of the company's directors.[356] The assumption is that that the directors will guarantee the protection of the creditors and bring the company to solvency.[357] The VA in terms of the Corporation Act operates without the intervention of the court whereas the administration process of the BIA is court driven.[358] The former is less expensive and the latter allows intervention in the public interest.[359]

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[349] Hunt and Handa "A critical comparison between Australia and Canada creditor protection regimes: voluntary administration and CCAA" 2006 1 at 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=888411, herein referred to as "Hunt and Handa".
[350] Ibid.
[351] Ibid.
[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] Hunt and Handa at 2.
[356] Ibid.
[357] Ibid.
[358] Ibid.
[359] Ibid.

The VA intends to return the corporation to profitability and, if that is not achieved, it must maximize the return to the creditors whereas the CCAA only seeks to return the corporation to solvency.[360]

In Australia, all companies are subject to the same legislation protecting the creditors irrespective of the size and origin of the business, whilst the provisions of the CCAA pay special attention to the foreign proceedings and the assets of foreign companies in Canada.[361] The VA came into operation as an alternative to external administration such as liquidation and receivership.[362] In Canada, the supervisory role of companies falls to a monitor who has judicially conferred powers, whereas in Australia, the equivalent is the administrator who takes control of the company.[363]

The remuneration of insolvency practitioners is a contentious issue throughout the world.[364] In England and Wales, the remuneration and expenses of the former administrator are charged of the property over which he or she has control before the administration could end, and is payable in priority to any security based on a floating charge.[365] The reimbursement of the monitor and administrators are governed by legislation under the CCAA in Canada and the Corporation Act in Australia.[366] The remuneration of administrators in Australia receives a super-priority status, which means that the remuneration receive a high priority when debts are paid out.[367] In contrast, there is no such equivalent to monitors in Canada. Albeit, legislation does not clearly and explicitly demand that the monitor's fee be granted priority, the Senate Committee concluded that, in practice, the remunerations of the monitor has priority over creditors.[368]

[360] Ibid.
[361] Ibid.
[362] Idem at 4.
[363] Idem at 17.
[364] Idem at 61.
[365] Jacobs and Burdette at 62.
[366] Hunt and Handa at 19.
[367] Ibid.
[368] Ibid.

4.2. UNITED KINGDOM

4.2.1. ADMINISTRATION AND THE COMPANY VOLUNTARY ARRANGEMENT

Originally, the UK had separate legislation for personal insolvency and corporate insolvency – the Bankruptcy Act 1914 (1914 c. 59) and the Companies Act 1908 (1908 c. 69) respectively.[369] After the recommendation of the Insolvency Law Review Committee on Insolvency Law and Practice (commonly known as the Cork Report), the Insolvency Act 1986 was enacted.[370] The first part of this statute provides for corporate insolvency and the second part for personal insolvency.[371] Many commentators concluded that this statute failed to harmonise the two procedures and processes.[372] The Cork Report[373] intended to promote good modern insolvency law by recognising the fact that the impact of insolvency law is not limited to the private interests of the insolvent and his creditors but other interests of society are affected by the process.[374] The report provides means for the preservation of viable commercial enterprises capable of contributing meaningfully to the economic life of society.[375] It recommended the appointment of an administrator for the management and reorganization of the company.[376] This recommendation culminated in the introduction of a new formal rescue procedure called the "administration procedure".[377] In the UK, many companies had to be placed in liquidation and under receiver-

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[369] Keay et al "Preferential debts in corporate insolvency: A corporative study" 2001 *Int Insolv Rev* 167 at 169, herein referred to as "Keay et al".
[370] Ibid.
[371] Ibid. See Part 1, ss 1, 2, 3,4,5,6 and 7 of the Insolvency Act. S (1)(1) of the Act stipulates that the directors of a company, except the one which is in administration or being wound up, may make a proposal under this Part to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs which is referred to as a "voluntary arrangement". S (1)(2) further outlines that the proposal under this Part is one which provides for the nominee to act as trustee or insolvency practitioner otherwise for the purpose of supervising its implementation of voluntary arrangement. S 251A(1) provides that an individual who is unable to pay his debts may apply for an order under this Part ("a debt relief order") to be made in respect of his qualifying debts.
[372] Ibid.
[373] *Report of the review committee on insolvency and practice* (Cmnd 8558) (HMSO,1982) paras 198 to 199, herein referred to as "Cork Report".
[374] Cork Report at para 498.
[375]Ibid.
[376] Ibid.
[377] Idem at 199.

ship before the Cork Report was published, because there was no formal corporate rescue procedure. The Cork Report suggested the new rescue establishment called administration.[378] The Act sets out the procedures for corporate insolvency administration that include provisions dealing with preferential debts, namely liquidation, voluntary arrangement, and administrative receivership.[379]

Liquidation is known as winding up, thus preparing the company for dissolution. It is a process whereby the assets of a company are realised in order to meet the debt obligations and liabilities, using the proceeds after paying the cost and expenses of the winding up process.[380] A CVA is set up in an attempt to rescue the company from its insolvent state.[381] The directors of the insolvent company may propose an arrangement with creditors in an effort to deal with the company's debt, such as a scheme of arrangements or a composition on satisfaction of debts.[382] Administrative receivership involves the appointment of an insolvency practitioner by a creditor who holds a floating charge or security over the whole of the assets of company.[383] The practitioner must then manage the affairs of the company.[384]

The UK philosophy behind the corporate rescue regime was captured in the so-called Cork Report as it advocated for the preservation of the commercial enterprises which made a meaningful contribution to the economic life of the country.[385] In UK bankruptcy law, the appointment of an administrator can be equated to the appointment of a business rescue practitioner in South Africa.[386] South Africa does not have corporate insolvency regime of company voluntary arrangements and receiverships. It does have business rescue and the section 155-compromise, which are similar to the VA or administration.[387] South Africa has a dual system for regulation of insolvency administration, similar to what

[378] Idem at 193.
[379] Ibid.
[380] Idem at 170.
[381] Ibid.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Burdette 244.
[386] Idem at 245.
[387] Keay *et al* at 181.

UK had in 1986 prior the enactment of the Enterprise Act of 2002.[388] In South Africa, insolvency processes are regulated by both Companies Act of 2008 and the Insolvency Act of 1936.[389]

According to the Cork Report, an administrator could be appointed to reorganize and manage the company with the aim of restoring the profitability of the company and maintaining employment.[390] More importantly, the administrator established whether the company could be rescued.[391] The insolvency law system in the UK is underpinned by the spirit of creating an environment for ailing companies to be rescued and the exercise is carried out through restructuring and reorganization where the entity has good prospects for turning its fortune around.[392] The future of such a company relies on the corporate rescue plan and for such a rescue plan to succeed there is a need for continued financing – in the UK, this is called "post-petition credit" (post-pétition financing).[393] Post-petition funding is required by the debtor-company to continue trading during the rescue proceedings.[394] This kind of financing is equivalent to post-commencement finance in South Africa.[395] The company administration procedure is set out in the Insolvency Rules of 1986 (1986 No.1925) and the procedure was reformed by the Enterprise Act 2002 with the aim of making it a more accessible.[396]

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[388] Ibid.

[389] Initially, the dual system of insolvency was governed by the Companies Act 61 of 1973 and the Insolvency Act 24 of 1936 prior the enactment of the Companies Act 71 of 2008. S 339 of the old Companies Act states that "[i]n the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutandis mutandis* in respect of the matter not specifically provided for by this Act".

[390] Cork Report at para 498. The statutory scheme of administration in sch B1, para 3 of the Insolvency Act 1986 provides that the administrator of a company must perform his duties with the aim to rescue the company as a going concern, achieve better results for the company creditors and realizing property for the purpose of distribution to secured and preferential creditor.

[391] Ibid.

[392] Aruoriwo "Financing corporate rescue, where does the UK stand?" 2014 IASL 10 at 10, herein referred to as "Aruoriwo".

[393] Aruoriwo at 13.

[394] Ibid.

[395] The availability of post commencement finance is of critical significance for the success of the business rescue proceedings. It becomes difficult for a company to raise capital when it had already been placed under business rescue, as creditors become uncomfortable and conclude that they may not be paid back their money or may not see a return on their investment, see footnotes 85, 86 and 87, in reference to post-commencement finance.

[396] Arouriwo at 10.

The Insolvency Act 1986 was amended by the Enterprise Act of 2002. Paragraph 67 of Schedule B1 of the Insolvency Act empowers the administrator to take control of the company, borrow funds and grant security.[397] Understandably, once a company has gone into administration, the administrator must pay the creditors in priority under schedule 6 of the Insolvency Act. Schedule 6 and sections 175 and 385 of the Insolvency Act provide detailed rules for the order of distribution of assets and repayment of the company's unsecured debts. The statutory hierarchy for repayment of creditors is as follows:

(a) Secured creditors have a "fixed charge" over a specific asset (such as land, a building, or machinery). The secured creditors are repaid out of the proceeds of the secured assets, after the costs of realisation have been deducted.[398]
(b) Preferential creditors are certain unsecured creditors who rank ahead of secured creditors in respect of any security which was created as a "floating charge". Preferential creditors primarily consist of employees for arrears of wages, unpaid contributions to pension schemes.[399]
(c) During the administration, the administrator may enter a contract on behalf of the company with third parties but does not assume personal responsibility. Any liability incurred under a contract will be payable as an expense of the administration. This means that sums due under such contracts are paid from the assets of the company in priority to the administrator's fees and expenses, and distributions to floating charge holders and unsecured creditors.[400]

Although, the administrator is authorised to borrow the funds and ensure that the business is conducted as a going concern,[401] there seems to be no incentives to attract the funding required as evidenced in other jurisdictions such as Canada and the United States of

[397] Sch 1, s 14(3) of the Insolvency Act 1986.
[398] S 175 and para 1-16, sch B1 of the Insolvency Act 1986. A secured creditor is generally a bank that holds a fixed charge over a business asset or assets. When a business becomes insolvent, sale of the specific asset over which security is held provides repayment for this category of creditor.
[399] Item 70, sch B1, Insolvency Act 1986.
[400] Sch 6, S 17 and 385 of the Insolvency Act 1986.
[401] Arouriwo at 10.

America.[402] The Cork Report was further silent in respect of financing of the administration process.[403]

In South Africa, the expenses of liquidation are deemed preferential debts – all monies owed related to the liquidation of the company and which are classified as liquidation expenses must be paid before any preferential debts and unsecured debts.[404] In addition, the liquidation expenses are treated in the same manner as preferential debts.[405] Section12.2 of the Insolvency Rule 1 stipulates that all fees, costs, charges and expenses incurred in the course of winding up are classified as expenses of winding up.[406] Some of the items in the UK that are regarded as liquidation expenses are classified as preferential debts in South Africa.

4.2.2. THE INITIATION OF ADMINISTRATION AND VOLUNTARY ARRANGEMENT

The Cork Report recommended a corporate insolvency procedure designed to rescue the company.[407] The administration order has the effect that the affairs, business, and property of the company are in the custody of the administrator.[408] It must be noted that once the company enters liquidation, the option for administration is lost.[409] This is unlike the position in South Africa, where business rescue remains an option even when the liquidation proceedings have been instituted.[410]

In terms of Schedule B1, Item 2 of the Insolvency Act 1986, a petition for administration can be initiated by way of a resolution taken by company directors, or holders of floating charges, or court order.[411] This is similar to initiation of the business rescue process in South Africa.[412] In the instance where it is the directors who initiate the procedure, the

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[402] Ibid.
[403] Idem at 12.
[404] Ibid; Keay et al 181.
[405] Ibid.
[406] Keay et al 171. See S 12(2) of the Insolvency Rules, 1986 No 1925, herein referred to as "Insolvency Rules".
[407] Milman et al *Corporate Insolvency: Law & Practice* (1999) 32, hereafter referred to as "Milman et al".
[408] Ibid.
[409] Ibid.
[410] Stoop at 330.
[411] Sch B1, s 2(a)(b)(c) of the Insolvency Act 1986.
[412] Davis et al 238.

petition must be based on a board resolution.[413] The Act requires that notification be given to any person who has the right to appoint an administrator or receiver.[414] In the case where the court adjourns the proceedings pertaining to a petition for an administration order, the court may exercise its discretion and appoint an interim administrator pending the finalisation of the administration application.[415]

A CVA involves a company and its creditors reaching an agreement over the payment of debt – to reschedule and/or reduce the amount owed to creditors under Section I of the Insolvency Act. The company directors must draft compromise proposals to be agreed upon with creditors and members. [416] An insolvency practitioner is appointed as an administrator to supervise implementation of the proposal. Although the supervisor has powers and responsibilities under the CVA, the company's directors remain in control of the company.[417]

A CVA is binding on all unsecured creditors if the required majority of creditors vote in favour of the proposal at properly convened meetings of creditors.[418] Rule 1.20 of the Insolvency Rules 1986, read with section 4A of the Insolvency Act, stipulates that the proposal shall be passed if it is approved by 75% in value of all creditors present (in person or by proxy) and voting (to include at least 50% in value of creditors unconnected to the company). The company's shareholders can approve the proposal by a simple majority. Even if they do not approve, the CVA will still be implemented if the creditors approve the proposal with the requisite majority.[419] Once approved, the CVA is presented to the court and come into operation from the date on which it was approved.[420]

A CVA is vulnerable to challenge in court on the grounds of unfair prejudice or material irregularity.[421] This can occur within the first twenty-eight days after the approval was

[413] Ibid.
[414] Sch B1, ss 12(2)(a)(b)(c)(d) and 18(3) of the Insolvency Act 1986.
[415] Sch B1, s 13(1)(2)(3)(4) of the Insolvency Act 1986.
[416] Part I, s 1(1) of the Insolvency Act 1986.
[417] Part I, s 1(2) of the Insolvency Act 1986.
[418] Part I, s 5(2)(b) of the Insolvency Act 1986.
[419] Rule 1.20 of the Insolvency Rules of 1986 and s 4A(2) of the Insolvency Act 1986.
[420] Part I, s 5(2)(a) of the Insolvency Act 1986.
[421] Milman et al 14.

reported to court.[422] A creditor who was not given notice of the relevant creditors' meeting can also challenge the CVA.[423]

There is a twenty-eight-day optional moratorium for small eligible companies while a CVA proposal is being considered.[424] The Act imposes a moratorium which protects the company's assets. The purpose of the moratorium is to allow a "cooling off" period before and after the CVA in order to enable the rescuing efforts.[425] The assets affected by the so-called freeze are those leased and owned by the company.[426]

4.2.3. THE APPOINTMENT AND QUALIFICATIONS OF THE ADMINISTRATOR

All insolvency practitioners must be licenced or authorised in terms of the legislation, as will be discussed below.[427] The profession of insolvency practitioners is now fully established.[428] Where the court is involved in the appointment of the administrator, it follows a rule of practice which determines that the administrator must have a minimum of five years of experience as an essential or basic requirement.[429] Any director who has been disqualified from managing the company is disallowed to act as administrator.[430] Insolvency practitioners are required to hold an Insolvency Licence issued by one of the Insolvency Recognised Professional Bodies in accordance with chapter 2 of the Insolvency Licensing Regulations. The Insolvency Licensing Regulations read as follows.

> "Subject to regulation 2.2 the Licensing Committee may authorise a person to act as an insolvency practitioner only if it is satisfied that the applicant:
> (a) is a fit and proper person to act as an insolvency practitioner; and
> (b) is subject to the rules of the Institute and:
> (1) if a member, holds a current Practising Certificate;

[422] Ibid.
[423] Idem at 14,
[424] Part I, s 1A(1)(2)(a)(b)(c)(d) of the Insolvency Act 1986.
[425] S 1A(1)(2) of the Insolvency Act 1986.
[426] S 252(2)(a)(aa) of the Insolvency Act 1986.
[427] Milman et al 13.
[428] Ibid.
[429] Ibid.
[430] Ibid.

(2) if not a member, has been granted insolvency affiliate status and is deemed fit and proper for the purposes of that application; and

(c) has professional indemnity insurance or other appropriate arrangements as required by the Professional Indemnity Insurance Regulations; and

(d) has acquired a minimum of 600 chargeable hours of recent insolvency experience over three consecutive years, subject to a minimum of 150 chargeable hours in each of those three years; and

(e) either:

(1) has passed the Joint Insolvency Examination Board's examination; or

(2) if, previously authorised by another professional body recognised by the Secretary of State or by a competent authority under the Act or Order provides evidence which satisfies the Licensing Committee that such authorisation has been relinquished, or will be relinquished upon the grant of a licence by the Institute; or

(3) was previously authorised by the Institute within the last five years."[431]

Regulation 2.2 states that applicants must demonstrate to the Licensing Committee that their education, qualifications, professional status, and insolvency experience are sufficient to meet the criteria as set out in regulation 2.1.[432] This is similar to the licencing requirements for business rescue practitioners in South Africa under section 138 of the Companies Act.[433]

As part of the insolvency reform in the UK, the insolvency practitioner such as an administrator is now required to be a member of a recognised professional body or must obtain authorisation in terms of section 393 of Insolvency Act 1986.[434] Once the authorisation is granted, the applicant will receive a certificate from the competent authority.[435] It has been evidenced that setting compulsory qualification standards for insolvency practitioners minimises incompetence and dishonest operations in the field of corporate rescue and liquidation.[436] Milman et al refers to the 1985 case of *Chancery Lane Registrar Affairs* and

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431 Reg 2.1 of the Insolvency Licensing Regulations (GB/NI) 2009. This regulation came as a result of the amendments and modifications of Insolvency Practitioner Regulation 2005 (No 524) and Insolvency Practitioner Regulations (No 35). The regulations were last updated on the 30th September 2016.
432 Reg 2.2 of the Insolvency Licensing Regulations 2009.
433 S 138(2) of the Companies Act.
434 Milman et al 14.
435 Ibid.
436 Idem at 15.

shows that it is indicative of the fact that qualification would not be a panacea to the problems of incompetence and dishonesty.[437] In the aforesaid case, Judge Herman was faced with gross misconduct on the part of liquidators who were qualified accountants. He ruled in favour of their disqualification, forbidding them from acting as receivers or liquidators for a period of 12 years.[438]

Administrators are officers of the court and are regarded as supervisors. The significance of an insolvency practitioner failing into the category of an officer of the court is that he or she has a duty to act in good faith; he must be, and be seen to be, independent and impartial in his management of the company and in his or her dealings with its property.[439] An administrator can (as the company's agent) cause the company to contract with third parties but does not assume personal responsibility. [440] Any liability incurred under a contract agreed whilst the company is in administration will be payable as an expense of the administration.[441]

4.2.4. THE REMUNERATION OF THE ADMINISTRATOR

The remuneration of the administrator should be effected out of the proceeds of sale of the secured assets of the company – custodianship of the assets has been bestowed upon him or her in terms of Rule 2.47 of the Insolvency Rules 1986.[442] Rule 2.47 stipulates that the administrator is entitled to receive remuneration for his services and the remuneration shall be fixed either as a percentage of the value of the property with which he has to deal.[443] Such remuneration must be determined by the credit committee or, if no credit committee, by a resolution of a meeting of creditors.[444] If the remuneration of the administrator is not fixed, It shall, on his application, be fixed by the court.[445]

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[437] Ibid.
[438] Ibid.
[439] Sch B1, s 5 of the Insolvency Act 1986. See also Milman et al at 16.
[440] Milman et al at 16.
[441] Sch 1, s 99(4) of the Insolvency Act 1986.
[442] Insolvency (England and Wales) Rules 2016 (No. 1024), hereafter referred to as the "Insolvency Rules 2016". See also Milman et al at 24.
[443] Rule 2.47(1)(2) of the Insolvency Rules 1986.
[444] Ibid.
[445] Rule 2.47(3)(6) of the Insolvency Rules 1986.

The administrator can apply to the court for the review of the remuneration awarded. It is, however, desirable that the nominee negotiate the issue of fees with the company before the administration procedure or rescue process is approved.[446] He must ensure that the fees payable in terms of the arrangement are approved by the creditors.[447] In South Africa, business rescue practitioners are entitled to remuneration according to the prescribed tariffs published by the Minister of Trade and Industry, which means it is a statutory requirement for the practitioner to be paid.[448] The business rescue practitioner may enter into an agreement with the company to be paid additional fees and such an agreement must be approved by the majority of voting creditors.[449] Comparatively to the UK, the practitioner must negotiate additional fees for the approval of the creditors.[450] As per the Insolvency Rules regulating the ranking of claims, the administrator is classified as a secured creditor because the claim holds priority over any other claim of secured creditors.[451] To juxtapose, section 143(5) of the Companies Act provides that the claim for the remuneration of the business rescue practitioner must rank in priority to the claim of all secured and unsecured creditor.[452] This provision is closely aligned to the aforesaid rule of the Insolvency Rules in the UK.

Rule 3.51 of the Insolvency Rules provides for the following order of priority for payments:

> "(1) Where there is a former administrator, the items in paragraph 99 of Schedule B1 are payable in priority to the expenses in this rule.
>
> (2) Subject to paragraph (1) and to any court order under paragraph (3) the expenses of the administration are payable in the following order of priority—
>
> (a) **expenses** properly incurred by the administrator in performing the administrator's functions;

[446] Milman et al at 24.
[447] Ibid.
[448] Davis et al at 257.
[449] Ibid.
[450] Ibid.
[451] Rule 3.51(1) of the Insolvency Rules 1986.
[452] S 143(5) of the Companies Act. Despite the fact that it was clearly the intention of the legislature to have the payment of claims for remuneration of business rescue practitioner paid in priority to the claims of the secured creditors, the Constitutional Court in Diener's case rejected this position and decided that the remuneration of business rescue practitioner cannot assume "super preference" over the claims of creditors, whether secured or not, once rescue proceeding are converted to liquidation.

(b) the cost of any security provided by the administrator in accordance with the Act or these Rules;

(c) where an administration order was made, the costs of the applicant and any person appearing on the hearing of the application whose costs were allowed by the court;

(d) where the administrator was appointed otherwise than by order of the court—

  (i) the costs and expenses of the appointer in connection with the making of the appointment, and

  (ii) the costs and expenses incurred by any other person in giving notice of intention to appoint an administrator;

(e) any amount payable to a person in respect of assistance in the preparation of a statement of affairs or statement of concurrence;

(f) any allowance made by order of the court in respect of the costs on an application for release from the obligation to submit a statement of affairs or deliver a statement of concurrence;

(g) **any necessary disbursements by the administrator in the course of the administration** (including any expenses incurred by members of the creditors' committee or their representatives and allowed for by the administrator under rule 17.24, but not including any payment of corporation tax in circumstances referred to in sub-paragraph (j) below);

(h) the **remuneration** or **emoluments** of any person who has been employed by the administrator to perform any services for the company, as required or authorised under the Act or these Rules;

(i) the ***administrator's remuneration*** the basis of which has been fixed under Part 18 and unpaid pre-administration costs approved under rule 3.52; and

(j) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company (irrespective of the person by whom the realisation is effected).

(2) If the assets are insufficient to satisfy the liabilities, the court may make an order as to the payment out of the assets of the expenses incurred in the administration in such order of priority as the court thinks just."

The implications of the above are the following: The remuneration of the administrator has been relegated to the bottom in so far as it relates to the order of priority for the payment of claims for expenses incurred during the administration. However, once administrator has completed or executed his duties, the ex-administrator's expense will assume priority. The remuneration may be part of the expenses of the administration.

The interpretation of the following parts of rule 35.1 simply implies that:

> "(1) Where there is a former administrator, the items in paragraph 99 of Schedule B1 are payable in priority to the expenses in this rule.
>
> (2) Subject to paragraph (1) and to any court order under paragraph (3) the expenses of the administration are payable in the following order of priority —
>
> (a) **expenses** properly incurred by the administrator in performing the administrator's functions."

In the case of *Brilliant Independent Media Specialist Limited (In Liquidation)*,[453] the court dealt with an application from former joint administrators of the company who required the court to fix their remuneration pursuant to rule 2.106 of the Insolvency Rules 1986. After their appointment as joint administrators, the creditors approved the proposals and fixed the basis of the remuneration.[454] The creditor committee approved fees from 1st December 2011 to 17 February 2012 and pre-administration costs, and indicated that it would not approve further fees.[455]

The first question was whether, and if so to what extent, the administrators could receive remuneration for work carried out if the credit committee made it clear that the company would be going into liquidation soon and the investigation would be carried out by the liquidator.[456] Thus, whether remuneration should be fixed for work outside the scope of the proposal.[457] The proposal in this present case stated that the company would move

453 [2014] EWHC B11 (CH) at para 1.
454 Idem at 2.
455 Ibid.
456 Idem at 3.
457 Ibid.

from administration to liquidation within six months from the commencement of the administration.[458] Alternatively, the company would move from administration to liquidation earlier, within three months, if, in the opinion of the administrator, the objective of the administration has been achieved.[459]

The second question was whether the remuneration could be fixed for work done after the administration had ended, the company had been placed in liquidation and where the liquidator requested those services from the administrators.[460] The court answered these question in the affirmative, concluding that the remuneration should be fair, reasonable and proportionate.[461]

The creditors required the administrator to finalise his or her work within six months so that the liquidator could be appointed to investigate and ultimately realise the assets for the distribution amongst the creditors.[462] The administrators sought an extension of six months through an application to the court after revision to the proposal was rejected by the creditors.[463] The creditors argued that no work should have been carried out after the expiration of the initial six months, and the company should have been placed in liquidation and therefore the administrators should not be remunerated except for the work necessary for the purpose of transitioning from administration to liquidation.[464] The judge remarked that rule 2.106 applied to the remuneration for the services of the administrator and that it meant services carried out when appointed under schedule B1 of the Rules.[465] The court averred that "[i]t is consistent with the statutory scheme that provides for the 'former administrator's' remuneration and other expenses to be charged upon the assets passed to the liquidators".

The court rejected this argument as an incorrect approach to fixing the remuneration because the court had jurisdiction to determine the remuneration of work performed outside

458 Ibid.
459 Ibid.
460 Ibid.
461 Idem at 59.
462 Idem at 33.
463 Ibid.
464 Ibid.
465 Idem at 42.

the parameters of the proposals.[466] The court accepted the submission that the administrators acted properly by issuing the application for direction in regard to extension.[467] It was reasonable to anticipate that the creditors would approve the revision.[468] The court disagreed with the creditors that there ought not to have been an issue with the six month time limit because the proposal required the company to be placed in liquidation.[469] Rule 83 of the Insolvency Rules provided the procedure for the transformation of administration into liquidation upon filing and registering a notice to the registrar where the administrator thought that the total amount which each secured creditor was likely to receive had been paid or set aside for him or her, and that a distribution would be made to unsecured creditors.[470]

As such, the main difference between the position in the UK and South Africa is that the court in Diener's case concluded that the claims for remuneration were concurrent claims, but not a special class of claims and could therefore not be paid before the claims of the secured creditors.[471] The court rejected the submission that section 143(5) of the Companies Act provides that the claim for the remuneration of the business rescue practitioner must rank in priority to the claim of all secured and unsecured creditors. It held that this subsection, read together with section 135(4), does not create super preference in liquidations.[472]

4.2.5. THE POWER, DUTIES AND LIABILITIES OF THE ADMINISTRATOR

Once the order is granted and the administrator is appointed, the control of the company vests with the administrator and not the directors.[473] However, the directors are not removed from office.[474] The administration order and the notice of appointment of the administrator must be published in the Government Gazette in the terms of rules 3.27(1) of

[466] Idem at 34.
[467] Idem at 36.
[468] Ibid.
[469] Ibid.
[470] Idem at 38.
[471] Diener at para 19.
[472] Idem at 48.
[473] Idem at 40.
[474] Ibid.

the Insolvency Rules. The creditors must be informed within the prescribed period about the details of the appointment.[475]

The administrator must secure control of the assets of the company, prepare the rescue plan for the approval of the creditors, and implement the plan.[476] Rule 2.11 of the Insolvency Rules of 1986 stipulates that if the administrator shall require a statement of the company's affairs to be made out and submitted to him and he or she shall send notice to each of the persons whom he or she considers should be made responsible to prepare and submit the statement. [477] He enjoys the status of an officer of the court, and any attempt to obstruct him from executing his duties amounts to contempt of court.[478] The administrator has the power to sell company property, but the court will disallow the major disposal of the company's assets prior to the approval of the plan by the creditors.[479] He has the authority to override the security and property rights of creditors; and to hire, lease, and convert assets into money.[480]

The administrator is not personally liable for contracts that he enters into.[481] He must pay the contractual debts and liabilities incurred during the administration – this must be paid out of the floating charge-assets and ranks in priority to his own remuneration under section 19(5) of the Insolvency Act.[482]

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[475] Ibid.
[476] Ibid.
[477] Rule 2.11 of the Insolvency Rules 1986.
[478] Ibid.
[479] Idem at 42.
[480] Ibid.
[481] Ibid.
[482] Milman et al at 42.

The termination of the services and/or the removal of the administrator is provided for by the UK Insolvency Rules.[483] The creditors may not merely, on the ground of an administrator's failure to carry out their instructions, sanction for his removal. The administrator is an independent professional and can only be removed by the court on valid grounds.[484]

4.3. AUSTRALIA

4.3.1. ADMINISTRATION

The concepts "corporate rescue" or "business rescue" have been used interchangeably.[485] A reason for this is that, in most cases, corporations are in a wider sense referred to as businesses.[486] Similar to the UK, Australia's insolvency regime has, as a consequence of the Hammer Report, undergone major reforms which culminated in the formulation of the Corporate Law Reform Act, No 210 of 1992.[487] This legislation provides for a new business rescue regime for companies.[488] It is worth noting that England and Australia share membership of the commonwealth with South Africa.[489]

It is undisputable that South African company law have been influenced significantly by the English law. Interestingly, the Australian corporate rescue model comparatively replicated South Africa's judicial management model. It was called "official management" and was designed to rescue companies in financial difficulties and save them from being wound up.[490] This procedure required that all debts be paid in full within the determined

[483] The administrator may be removed in line with the provisions of rule 3.53 of the Insolvency Rules 1986, read with ss 74 and 75 of the insolvency Act 1986.
[484] Sch 1, s 74(1)(a)(b) of the Insolvency Act 1986 outline that a creditor or company member can apply to the court for an order on the basis that the administrator's conduct has unfairly harmed his/her interests, or that the administrator is failing to perform his functions as quickly or efficiently as is reasonably practicable. A creditor can apply to the court under the Insolvency Act 1986 if there is evidence of misfeasance by the administrator. S 75(1)(2)(b)3(c)(d)(4) determines that a creditor can apply to the court under the Insolvency Act 1986 if there is evidence of misfeasance by the administrator and the court can remove the administrator in terms of s 88 of the Insolvency Act but the court will not permit these remedies to be used by creditors who intend to have their claims prioritised above others. Rule 3.65 of the Insolvency Rules 2016 permits the professional body of the insolvency practitioner acting as administrator to subject the practitioner to a disciplinary process if he or she is found to have acted improperly.
[485] Kloppers "Judicial Management – A corporate rescue mechanism in need of reform?" 1999 *Stell LR* 417 at 417, herein reffered to as "Kloppers".
[486] Ibid.
[487] Kloppers at 420.
[488] Ibid.
[489] Ibid.
[490] bid.

period and compliance was a major problem for many insolvent companies.[491] In 1993, the Corporate Law Reform Act was amended, the official management or judicial management was removed from that legislation.[492]

The Corporate Law Reform Act of 1992 was subsequently substituted by the Corporation Act, 50 of 2001.[493] The voluntary administration procedure was incorporated into the Corporation Act.[494] The Australian voluntary administration procedure is presently provided for in the Corporation Act of 2001.[495]

This procedure provides companies and creditors with alternatives to deal with companies' financial affairs and allow the rehabilitation of companies.[496] The object of the voluntary procedure is to ensure that business, property and affairs are administered in a manner that maximises the survival of the company.[497] In Australia, it has become the norm to utilise the voluntary administration procedure despite there being no prospect of the company surviving.[498] More importantly, the outcome of the voluntary procedure is to execute a deed of company arrangement (DOCA).[499]

The Corporation Act provides for a scheme of arrangement to rescue companies in financial distress.[500] Australia does not have separate insolvency statutes but maintains its corporate insolvency provisions in its Corporation Act of 2001.[501]

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[491] Levenstein *South African Business Rescue Procedure* (2017: Last updated November 2019) 5-14, herein referred to as "Levenstein SABRP".
[492] Levenstein SABRP at 5-14.
[493] Idem at 5-13.
[494] Ibid.
[495] Ibid.
[496] Ibid.
[497] Ibid.
[498] Ibid.
[499] Ibid.
[500] Ibid.
[501] Anderson "Viewing the proposed South African business recue provisions from an Australian perspective" 2008 *PELJ* 1 at 3.

The key focus of the administrator is to investigate the affairs of the company and if prospects of rescue exist, generate a rescue plan in order to restore the company as a successful concern.[502] The plan must be presented and accepted by the creditors.[503] Similar to the English procedure, the first meeting of the creditors ought to be convened within five days from the date of the appointment of the administrator and at the meeting, the administrator should either suggest executing the deed of company arrangement (which is a rescue plan) or liquidating the company.[504] The deed of company arrangement binds pre-existing creditors, but the secured creditors may only be bound if they agree or if sanctioned by court order.[505]

4.3.2. THE INITIATION OF ADMINISTRATION/RECEIVERSHIP

The Australian voluntary administration procedure provides for the appointment of an administrator.[506] The procedure is initiated by the resolution of the directors of the company and not the court, and it is also the directors who appoint the administrator if they are of the view that the company is insolvent or is likely to become insolvent.[507] Similarly, the voluntary administration procedure is akin to the business rescue model in South Africa, which may be initiated by a resolution of the board of directors.[508] However, in South Africa's case, business rescue can still be initiated by court order.[509] Directors' powers are suspended during the administration period and shareholders are restricted in the sale of securities.[510]

In the UK, the administrative receiver occupies the most complicated position from a legal perspective.[511] In Australia, the administrator acts on behalf of debenture holders yet he

502 Klopper at 422.
503 Ibid.
504 Ibid.
505 Ibid.
506 Ibid.
507 Ibid.
508 S 129(1) of the Companies Act.
509 S 131(1) of the Companies Act.
510 Belyea "Corporate rescue in Australia: a time for innovation" 30-05-2019 at para 15, available at https://www.claytonutz.com/knowledge/2019/may/corporate-rescue-in-australia-a-time-for-innovation, (this article was first published in the Journal of Corporate Renewal, March 2019), herein referred to as "Belyea".
511 Milman et al 36.

or she is technically appointed as the agent of the company.[512] Primarily, the administrator ought to safeguard the interests of the company as his or her principal under section 437D of the Corporation Act.[513] Voluntary administration is founded on the UK administration order in terms of the UK Insolvency Act 1986 and as such, the model is based on two dimensions: one, that insolvent debtor should transfer his or her property to a qualified insolvent practitioner; and two, he or she must make arrangement with creditor without application to the court for to convene a creditor's meeting and approving the arrangement.[514]

4.3.3. THE APPOINTMENT AND QUALIFICATIONS OF THE ADMINISTRATOR

Section 436A of the Corporation Act stipulates that a company may appoint an administrator if the board thinks that the company is or will become insolvent. Subsection (1) states an administrator may be appointed in writing if the board has resolved that the company is insolvent. The person appointed as the administrator of the company should not hold an appointment as a liquidator (provisional or not) of the company.[515]

An administrator may be appointed by liquidator or provisional liquidator of a company in writing if the liquidator thinks that the company is insolvent, or is likely to become insolvent at some future time.[516] A liquidator or provisional liquidator must not appoint himself or herself; his partner of a partnership or his employee.[517] A director or secretary, or senior manager of the corporation may not be appointed as an administrator unless the company's creditors pass a resolution approving the appointment or the appointment is made with the leave of the court.[518] A person who is entitled to enforce a security interest over

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[512] Keay *Insolvency Personal and corporate: Law and Practice* (3rd Edition) 1998 217 at 217, herein referred to as "Keay".
[513] S 437D(1), (2) and (3) of the Corporation Act No 50 of 2001, herein referred to as "Corporation Act".
[514] Keay at 272.
[515] S 436A(1)(a), (b) and (2) of the Corporation Act.
[516] S 436B(1) of the Corporation Act.
[517] Ibid.
[518] S 436B(1)(2)(a)-(d), (f) and (g) of the Corporation Act.

a company asset may, in writing, appoint an administrator if the security interest has become, and is still, enforceable.[519]

For a person to be appointed as an administrator, the individual must be registered as a liquidator and would have to accept the appointment in writing in terms of section 448.[520] Only third parties registered with the Australian Securities and Investment Commission (ASIC) and who has no commercial interest in the distressed company may act as voluntary administrators.[521] A person may be disqualified from being appointed as an administrator if such person is an officer of the debtor company, mortgagee of the company, an auditor of the company, or a partner or employee of the auditor of the company.[522] A person must not have a conflict of interest.[523]

The court may enquire about the validity of the appointment of a person who is an insolvent in Australia.[524] If the company is in liquidation or in the process of being liquidated, the liquidator or provisional liquidator is not eligible to act as an administrator.[525] The administrator must be independent and objective.[526]

The administration of a company is initiated by the company or liquidator in terms of section 436A, B and C of the Corporation Act through the appointment of the administrator.[527] For purpose of clarity, liquidation is aimed at winding up a company, whereas the purpose of voluntary administration is to assess the company's viability, turn its fortunes around if possible and provide a better return to creditors. A company in liquidation is in its terminal stage and therefore the secured creditor will rely on his or her securities; whereas the

[519] S 436C(1) of the Corporation Act.
[520] S 448(1) and (2) of the Corporation Act.
[521] Belyea at para 19.
[522] Keay at 288.
[523] Ibid.
[524] Idem at 289.
[525] Ibid.
[526] Ibid.
[527] S 436A, B and C of the Corporation Act.

unsecured creditor would be looking to his or her bottom line, including what (if any) retention of title clauses or guarantees he or she might have.[528]

Having indicated that the liquidator (provisional or not) is not eligible to be appointed as an administrator, there is an exception to this rule.[529] If the appointment is done by the company, it must be in writing under the common seal of the company.[530] The decision must be made by the board of directors after having satisfied themselves that the company is insolvent or is likely to become insolvent in the near future, and therefore the administrator must be appointed.[531]

Upon appointment, the administrator must lodge a notice of appointment with ASIC before the end of the next business day after the day of the appointment.[532] He or she must publish a notice of the appointment in a national newspaper or a daily newspaper which circulates in each district where the company is registered or carries on its business.[533] The company must be informed of the appointment before the end of the business day on which appointment was made, if the administrator is appointed by a charge holder.[534]

If the company is already wound up, it cannot appoint an administrator.[535] The administration may end if one of the following events occur: one, where creditors resolve to terminate the administration or decide to wind the company up; or, two, there is a court order ending the administration or court order appointing the provisional liquidator.[536]

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[528] Emmett *et al Law and Practice: Insolvency* (Practical Guide) (2nd Edition) (2019: Last updated 20 November 2019), available at http://practiceguidse.chambers.com/practice-guides/insolvency-2019-second-edition/australia.
[529] S 436B(1) of the Corporation Act. The administrator who wishes to appoint himself or herself or wishes to be appointed, she or he must do so through an application to court. (Keay at 289)
[530] Keay at 289.
[531] Ibid.
[532] Ibid.
[533] Idem at 277.
[534] Ibid.
[535] Ibid.
[536] Idem at 278.

4.3.4. THE POWER, DUTIES AND LIABILITIES OF THE ADMINISTRATOR

Once appointed, the administrator must assume control and management of the company and must further investigate the affairs of the company.[537] Upon completing the investigation in respect of the affairs of the company, he must convene a meeting with creditors within five business days.[538] In that meeting, he must decide if it is in the interest of company to formulate a deed of company arrangements; or terminate the administration or wind the company up in terms of section 438A of the Act.[539] If, at the meeting, it is resolved that the deed of arrangement should be adopted, the administrator must prepare the terms of the deed and put concerted effort into returning the company to its former financial health and stability.[540]

The company business and property falls under the supervision and control of the administrator once the company is placed under administration, and the directors and senior managers lose the right to use their powers.[541] They can only exercise their powers with the written approval of the administrator.[542] It is worth noting that the powers of the directors and senior management are suspended and shareholders are restricted in the sale of shares during the administration period.[543] According to statute, the administrator must complete the corporate rescue process (voluntary administration) within twenty-eight days unless the creditors or the court extends this period.[544] The directors will take over the control of the company after the administration, if corporate rescue became successful.[545] Similar to receivership in the UK, these officers will be able to exercise their powers once the administration has come to an end. As a result of the administration, the legal proceedings, winding-up proceedings, and execution against company property are suspended.[546]

[537] Idem at 279.
[538] Ibid.
[539] Ibid.
[540] Idem at 281.
[541] Idem at 282.
[542] Ibid.
[543] Belyea at para 15.
[544] Idem at para 17.
[545] Idem at para 18.
[546] Keay at 282.

The administrator is personally liable for the debts incurred in the course of the administration process in respect of service rendered, goods procured, and property hired or leased.[547] He or she is personally liable for payment of the rent in respect of which the lease began before the administration and continued to be in force during administration.[548] The administrator is further liable to pay rent owing within seven days from date of his appointment and in terms of which the company continues to occupy the property.[549] The administrator is liable for group tax deductions which are due and payable after 30 June 1993 and may indemnify the assets of the company against such liability.[550] Section 443D of the Corporations Act grants the administrator indemnity from liability in respect of the company assets.[551] His right to indemnity assumes preference over all unsecured creditors and debts secured by floating charge.[552]

4.3.5. THE REMUNERATION OF THE ADMINISTRATOR

The administrator of a company is entitled to receive remuneration for the necessary work properly performed.[553] The amount of remuneration is set under a remuneration determination made by the members; and in other cases, such as member's voluntary winding-up, by the creditors or the committee of inspection.[554] However, if there is no determination of the remuneration, the administrator will be entitled to receive a reasonable amount for the work.[555] The maximum amount that the administrator may receive in this way is $5,000 (exclusive of GST and indexed).[556] GST is an abbreviation of the Goods and Services Tax (GST) and which is a value-added tax levied on most goods and services sold for domestic consumption. The GST is paid by consumers, but it is remitted to the gov-

[547] Ibid.
[548] Ibid.
[549] Ibid.
[550] Ibid.
[551] See footnote 301.
[552] Ibid.
[553] Ibid.
[554] Sch 2, div 60, subdiv A 60-1 of the Insolvency Practice Rules (Corporations) 2016.
[555] Ibid.
[556] Ibid. $5,000 Australian Dollar amounts to 59,550 when it is converted into South African Rand, available at https://transferwise.com/gb/currency-converter/aud-to-zar-rate?amount=5000 (accessed 29 June 2020).

ernment by the businesses selling the goods and services. In effect, GST provides revenue for the government.[557] The court may review the remuneration of the external administrator of a company and may also make orders under Division 90 about remuneration (including ordering repayment of remuneration).[558]

A determination specifying the remuneration that an external administrator of a company (other than an external administrator in a members' voluntary winding up) is entitled to receive for necessary work properly performed in relation to the external administration, may be decided by resolution of the creditors, or a committee of inspection, or by the court.[559] An administrator, ASIC, a person with a financial interest in the external administration, or officers (directors or senior managers) of the company may apply to the court for a review of the determined remuneration.[560] Upon such an application, court may, if it considers it appropriate to do so, review the remuneration determination and ultimately, affirm, vary, or set aside the determination.[561]

The case of *Independent Contractor Services (AUST) Pty Limited (In Liquidation) (No 2)*[562] dealt with a similar transition where business rescue proceedings is converted into liquidation as dealt with in the Diener-case in South Africa. The applicant became the administrator of the company, Independent Contractor Services, upon the resolution of its sole director.[563] Subsequently, it was decided at the meeting of creditors that the company must be liquidated, and the applicant was then appointed as liquidator.[564] When the applicant was appointed as the administrator, the company had $1 212 in its bank account and during the voluntary administration, $150 704 was collected and $29 was received as interest. When the voluntary administration ended, $142 892 was transferred into the liquidation account.[565] The liquidator paid himself the administrator's remunerations and

[557] GST stands for the Good and Services Tax, available at https://www.ato.gov.au/Business/GST/ (accessed 29 June 2020).
[558] Sch 2, div 60, subdiv A 60-1 of the Insolvency Practice Rule (Corporation) 2016.
[559] Sch 2, div 60, subdiv B 60-10 of the Insolvency Practice Rules (Corporations) 2016.
[560] Sch 2, div 60, subdiv B 60-11 of the Insolvency Practice Rules (Corporations) 2016.
[561] Sch 2, div 60, subdiv B 60-11(4)(a)-(c) of the Insolvency Practice Rules (Corporations) 2016.
[562] (In liquidation) (No 2) ACN 119 186 971 at para 1, herein referred to as "ICS".
[563] ICS at para 2.
[564] Ibid.
[565] Idem at 3.

expenses. The balance of $114 181 remained in the liquidation account and a further amount was received when the company was liquidated.[566] The liquidator paid the debt collector lawyers, and tax consultants. The expenditure incurred amounted to $80 000 and that left an amount of $130 980 available for distribution, before allowing for liquidator's remuneration..[567] The total of the claims made by independent contractors (as beneficiaries of the trust) was $232,897 and the Australian Tax Office (ATO) lodged a claim for an amount of $43 765 which included superannuation guarantee charge.[568]

The liquidator made an application seeking the certain relief by filing interlocutory process.[569] He sought, pursuant to section 473 of the Corporation Act, a determination that the applicant (liquidator) is entitled to remuneration in the amount of $49,450 plus GST.[570] A declaration indemnifying him in regard to incurred legal costs to an amount of $2200 and a direction that he is justified to pay such amount.[571] A direction that the applicant is justified to pay the amount owing to ICS and standing to the credit of ICS.[572] A direction that he is justified for having paid any amount to ICS in respect of the services provided by the contractors to the third parties on behalf of ICS.[573] The applicant further sought an order for his appointment as a trustee of the independent contractors trust and direction that the applicant as trustee of the independent contractor trust would be justified in distributing the balance of the funds in the (CBA account) after deduction of the aforementioned amounts.[574] In 2015, the directions sought as mentioned above, were granted through an explanatory circular or notice by the Court and such notice were part of the application for other prayers sought.[575] Despite the notice being given, no contractor or

566 Ibid.
567 Idem at 4.
568 Idem at 5.
569 Idem at 6.
570 Ibid.
571 Ibid.
572 Ibid.
573 Ibid.
574 Idem at 8.
575 Ibid.

creditor appeared.[576] The notice of the application was given to the ATO which indicated that it did not wish to be heard.[577]

The application by the liquidator raised three main issues for consideration by the court: that the remuneration and expenses of the liquidator be approved, the appointment of a replacement trustee and the distribution of the trust assets and whether the liability to the ATO is entitled to priority.[578]

Pursuant to the provisions of section 511 of the Corporation Act, the liquidator applied to court to treat money standing to the credit of the company (money owed to it) as assets of the company.[579] There was a question as to whether the money was part of the property of the company that would be distributed in accordance with section 556 of the Corporation Act. The court ordered that the plaintiff be allowed remuneration in respect of the administration of the Independent Contractor Service company and its trust.[580] It further ordered that the payment in respect of the administration of the trust be paid from the trust assets in the sum of $30, 000.[581] The (creditors) defendant's legal costs also had to be paid out of the trust assets.[582] The liquidator was justified to distribute the assets of the ICS trust in recouping the expenses for legal and tax practitioners as well as his remuneration.[583] The court rejected the application that such funds must be treated as assets of the company or stand to the credit of the bank account of the company.[584]

The court observed that the application in respect of remuneration was brought in terms of section 473 of the Corporation Act.[585] The provisions of section 473 applied to a court-appointed liquidator, and not a voluntary liquidator, by virtue of section 446A(1)(a) who is entitled to remuneration under section 499(3).[586] In this context, the court did not exercise

[576] Ibid.
[577] Ibid.
[578] Idem at 9.
[579] Ibid.
[580] Ibid.
[581] Idem at 57.
[582] Ibid.
[583] Ibid.
[584] Ibid.
[585] Idem at 31.
[586] Ibid.

statutory jurisdiction, but equitable jurisdiction to allow remuneration out of the trust assets for the administration of the fund.[587] In allowing the remuneration of the liquidator, the court treated the work done in administering the trust as an incident of the liquidation and approached the application for remuneration in the same way as one by an official liquidator for the approval of remuneration.[588] The liquidator was entitled to reasonable remuneration in the winding up of the company and bore the onus to establish that the remuneration requested was fair and reasonable.[589]

A similar scenario unfolded in the case of *Eastwood Insulation Pty Ltd (In Liquidation), Macks & Anor & Maka & Anor*,[590] where the court had to determine the remuneration of the joint liquidators, who were initially joint administrators of the company while it was under voluntary administration. Macks's advisories sought remuneration for two periods, the first being for the period that they acted as deed administrators and the second being for the period that they acted as liquidators.[591] The defendant filed objections to the prayers indicating that there was a duplication of work, limited work, and that the amount claimed was excessive. The main objection was that the amount claimed was disproportionate to the amount recovered during these periods.[592] The court concluded that the applicants were entitled to remuneration as joint administrators and joint liquidators respectively. Their remuneration was fair and reasonable and the court was satisfied that the work performed was commensurate to the remuneration required.[593]

In the matter of *AAA Financial Intelligence (in Liquidation) (No 2)*,[594] the court dealt with an application related to the remuneration and expenses of the liquidator for administering

[587] Ibid.
[588] Ibid.
[589] Idem at 32.
[590] [2015] SASC 200 at para 1, herein referred to as "Eastwood".
[591]Eastwood at para 11.
[592] Idem at 12.
[593] Idem at paras 32-35.
[594] [2014] NSWSC 1270 at para 1.

a trust fund. The court determined that the liquidators were entitled to remuneration payable form the trust assets, if it was fair and reasonable.[595] The judge extracted the remark made in the case of *Sakr Nominee (Pty) Ltd* that

> "The remuneration may be by way of commission on assets realised and/or assets distributed or time based. Liquidators will not necessarily be allowed remuneration at their firm's standard hourly rates for time spent particularly small liquidations where questions of proportionality, value and risk loom large and liquidation cannot expect to be rewarded for their time at the same hourly rates as would be justifiable when property is available".[596]

It is apparent from the above that the remuneration of the administrator is decided based on the remuneration determination made by the members of the corporation, or creditors, or the committee of inspection in terms of the legislation. In the absence of determined remuneration, it must be determined by resolution of the creditors, or committee of inspection, or by the order of the court. It can be assumed that if there is a determination or resolution in respect of the remuneration of the administrator, it must be paid in priority as per the legislative provisions set out in schedule 2 of division 60 of the Insolvency Practice Rules.

4.4. CANADA

4.4.1. ADMINISTRATION

The Canadian insolvency law has shifted from a liquidation-oriented model to a rehabilitation model.[597] The Canadian insolvency system is governed by two primary pieces of bankruptcy legislation which regulate the insolvency of individuals and companies, namely the Canadian Bankruptcy and Insolvency Act (BIA) and the Companies' Creditor's Arrangements Act (CCAA).[598] The Winding up and Restructuring Act is another statute in Canada which governs the liquidation and restructuring of certain types of companies,

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[595] Idem at para 55.
[596] Idem at 45. See also [2016] NSWSC 709 at para 14.
[597] Mann "An overview of Canadian bankruptcy and Insolvency law" (date of publication unknown) at 3 and 17, available at https://m.acc.com/education/webcasts/upload/an-overview-of-canadian-insolvency-law.pdf herein referred to as "Mann".
[598] Ibid. see also the Canadian Bankruptcy and Insolvency Act RSC 1985, c. B-3(1) known as the "BIA" and the Companies' Creditor's Arrangements Act RSC 1985 c.C-36 known as the "CCAA".

including banks, insurance companies, and trust companies.[599] The BIA is the principal federal legislation in Canada applicable to insolvencies.[600] It governs both voluntary and involuntary bankruptcy liquidations as well as debtor reorganisations.[601] The CCAA is a specialised statute intended to assist large companies to restructure their affairs and is similar to the United States' Bankruptcy Code.[602] The CCAA is very significant legislation that enables large insolvent companies to reorganise or restructure themselves.[603] It provides for a court supervised process of facilitating the negotiation of compromises and arrangements in relation to a company that is reeling from financial distress.[604] The company has to come up with a survival plan that is also acceptable to the creditors.[605]

The provisions of the BIA in relation to the reorganisation of companies are more comprehensive than those found in the CCAA.[606] Generally speaking, the liquidation of insolvent entities is dealt with by the BIA.[607]

The BIA deals with both individuals and companies and outlines the mechanisms available to financially troubled debtors regarding bankruptcy and the liquidation of assets.[608] The BIA aims to bring about uniformity in the administration and liquidation of bankrupt estates in Canada.[609] It is for the exclusive benefit and interests of the creditors to control the administration of the estate of the company.[610] The BIA provides the hierarchy for the satisfaction of the claims, and further provides for the realisation of the property of the debtor for distribution according to the creditors' claims.[611] The Act sets out a scheme for a commercial proposal whose objective is to allow the insolvent person or bankrupt company an opportunity to restructure itself and become financially viable again.[612]

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599 The Winding up and Restructuring Act RSC 1985 c.W-11.
600 Mann at 3.
601 Ibid.
602 Ibid.
603 Sarra Rescue: The Companies' Creditors Arrangement Act (2007) at 1, herein referred to as "Sarra".
604 Ibid.
605 Ibid.
606 Ibid.
607 Ibid.
608 Idem at 4.
609 Ibid.
610 Ibid.
611 S 124(1)(2) read with s 136(1)(2) of the BIA.
612 Sarra at 4.

In order to protect the interest of the creditors, the BIA provides for the appointment of an official receiver who reports to the superintendent.[613] The superintendent is equivalent to the Master of the High Court in South Africa.[614] Receivership is a mechanism to liquidate insolvent entities. It can be instigated in various forms by the secured lender of the debtor.[615] A private or instrument-appointed receiver is appointed by the lender pursuant to his right under the lender's security.[616] The instrument establishes the rights and powers of the receiver.[617] The second type of receiver is appointed by the court and, once appointed, must be independent and an officer of the court.[618] The Act further provides for the appointment of an interim receiver during the interim period between filing of a bankruptcy petition, or during the ten days period available to secured creditors to enforce their securities, or after notice to file a proposal has been given.[619] The interim receiver is appointed to safeguard the estate and may be vested with the powers that the court considers appropriate.[620]

Section 43 of the BIA stipulates that, once a bankruptcy order has been granted, the court must appoint a licensed trustee as trustee of the property of the bankrupt, taking into the account the wishes of the creditors.[621] The mandate of the trustee is to liquidate the estate and distribute the proceeds of such liquidation amongst the creditors of the estate.[622] Section 31 of the BIA provides that a receiver or trustee may incur obligations, borrow money, and give security on the assets of the debtor with the permission of the court.[623] A receiver or trustee may make the necessary advances, incur obligations, borrow money

[613] Ibid.
[614] In terms of section 12(1), (2) and (3) of the BIA, the governor in council must appoint an official receiver in each bankruptcy division who shall be deemed to be an officer of the court and must perform the duties and responsibilities set out in the Act. The receiver must report to the superintendent in a prescribed format and he must notify him of the increase and decrease in the security filed by the trustee. Note that the person to be appointed as a trustee must provide security to act as trustee and same rules apply to the Monitor.
[615] Mann at 7.
[616] Ibid.
[617] Ibid.
[618] Ibid.
[619] S 46(1) and 47(1) of the BIA.
[620] Mann at 8.
[621] S 43(9) of the BIA.
[622] Mann at 5.
[623] Ibid.

that may be authorized by the court and those advances, obligations and money borrowed must be repaid from the debtor's property before the creditors' claims can be paid in full.[624] The trustee is not obliged to carry on the business of the bankrupt if he is of the opinion that the realisable value of the property of the bankrupt is not sufficient to fully protect him again any possible losses.[625]

Instead of being liquidated, the debtor company may elect to reorganize or restructure its business by way of a proposal. [626] A proposal may be made in terms of section 50 of the BIA. A proposal may not be made with respect to a debtor in respect of whom a consumer proposal has been filed until the administrator under the consumer proposal has been discharged.[627] The proposal must be made to the secured creditors.[628] The proposal provisions of the BIA are normally used for small enterprises.[629]

The CCAA provides for compromises and arrangements which may be proposed by the debtor company to the creditors.[630] "The court may, on such application in a summary way of the company, order a meeting of the creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs."[631] A compromise or arrangement made in respect of a debtor company may include a compromise of claims against the directors of the company that arose prior to the commencement of proceedings.[632] The CCAA requires a debtor company to have liabilities of at least $5 million.[633] The proposal provisions in terms of both

[624] S 31(1) of the BIA.
[625] S 32 of the BIA.
[626] Mann at 8.
[627] S 50(1)(1.1) of the BIA.
[628] S 50(1)(1.2) of the BIA.
[629] Mann at 8.
[630] Ss 4 and 5 of the CCAA.
[631] Ibid.
[632] S 5(5.1) of the CCAA.
[633] Mann at 8. $5 000 000 of Canadian Dollar amounts to 63 250 000 when converted into South African Rand, available at https://www.xe.com/currencyconverter/convert/?Amount=1&From=CAD&To=ZAR (accessed 29 June 2020).

the BIA and CCAA grant the debtor company a moratorium against creditors who intend to enforce their claims.[634]

The secured creditors are first to lay claim to the company's assets where a firm becomes insolvent.[635] The secured creditors are responsible for driving the process of rescuing the company in financial distress.[636] The directors of the company remain in their positions during negotiations and are obliged to act in the best interests of the company.[637]

4.4.2. THE INITIATION OF RESTRUCTURING OR REORGANIZATION OF THE COMPANY

For a proposal to be successful, it must be accepted by the majority of the secured and unsecured creditors.[638] Once the creditors approve the proposal, it must be approved by the court and, subsequently, the proposal will become binding on all creditors.[639] The debtor automatically becomes bankrupt if the creditors reject the proposal or if the court does not approve the proposal under the BIA.[640] Similarly, if the restructuring plan is not accepted by creditors under the CCAA, the company will be liquidated by way of bankruptcy and receivership proceedings.[641]

Section 69 (1) provides that once the debtor files a notice of intention to file a proposal under the BIA, an automatic stay of proceedings is triggered.[642] The stay may be set aside by a court order or lifts if the proposal is rejected by the creditors.[643] The stay of proceeding will further be lifted if the trustee has been discharged or six months have elapsed since the court approval of the proposal or the insolvent person becomes bankrupt.[644] After filing the notice of intention to make a proposal, the company selects the licensed trustee to act as the trustee under the proposal.[645] The trustee is tasked to oversee the

[634] Ibid.
[635] Ibid.
[636] Ibid.
[637] Ibid.
[638] Idem at 8.
[639] Ibid.
[640] Idem at 9.
[641] Ibid.
[642] S 69(1) of the BIA.
[643] Mann at 8.
[644] S 69.1(1) (i)(ii)(iii) of the BIA.
[645] Mann at 8.

debtor's business until a proposal is accepted or the company becomes bankrupt.[646] The debtor's assets will vest with the trustee.[647] The trustee is obliged to notify the creditors of the proceedings and call a meeting within twenty-one days from the date on which the proposal was filed.[648]

Under the CCAA, the process commences through a court application. As indicated, in the BIA, a stay of proceedings is obtained by filing a notice of intention, whilst under the CCAA, a stay must be obtained by seeking a court order.[649] There is no statutory limit for filing a proposal under the CCAA. The CCAA offers flexibility to a debtor company than proceedings under the BIA.[650]

The trustee is appointed to manage the reorganisation of the debtor company in terms of the BIA.[651] The trustee must reassure the creditors and indicate how accurate the cash flow forecast for the company is – as dictated by the rules, and reported to the official receiver.[652]

In terms of the section 11.7 of the CCAA, as amended, it is mandatory to appoint a monitor. The monitor may not perform the same role as the trustee under the proposal provisions of the BIA. The monitor is an insolvency professional who is appointed during CCAA proceedings.[653] The court has the discretion to determine the monitor's scope of work, which can include advising the creditors and debtors whether company has the ability to meet the requirements of a revised business plan.[654] The trustees are tasked to develop a proposal, monitor the implementation thereof and act in an advisory capacity.[655]

4.4.3. THE APPOINTMENT AND QUALIFICATIONS OF THE TRUSTEE / MONITOR

646 Ibid.
647 Idem at 10.
648 Ibid.
649 Ibid.
650 Ibid.
651 Ibid.
652 S 17.1(1) of the CCAA.
653 Ibid.
654 Ibid.
655 Ibid.

The Superintendent of Bankruptcy has the authority, under the BIA, to grant licences to trustees.[656] Before granting a licence, however, the Superintendent must be satisfied that candidates meet certain qualifications, as described in Directive No. 13R6, Trustee Licensing. For instance, he or she must be of good character and reputation, be solvent; successfully completed the Chartered Insolvency and Restructuring Professional Qualification Program; the CIRP National Insolvency Exam and the Insolvency Counsellor's Qualification Course; and passed an Oral Board of Examination.[657] A person seeking a licence must have valid driver's license, sufficient financial resources, and professional liability insurance.[658]

Section 11.7 of the CCAA requires that the person appointed by the court to monitor the business and financial affairs of the debtor company must be a Licensed Insolvency Trustee (LIT) within the meaning of subsection 2 of the BIA.[659] A monitor is a LIT licensed by the Office of the Superintendent of Bankruptcy and who is appointed by the court in the initial order.[660] Under the CCAA proceedings, a monitor is appointed by the court to oversee the debtor during the proceedings. His duties are prescribed by this appointing authority which are similar those of a trustee under the BIA.[661]

Section 14(1) of the BIA determines the following:

> "The creditors may, at any meeting by special resolution, appoint or substitute another licensed trustee for the trustee named in an assignment, a bankruptcy order or a proposal, or otherwise appointed or substituted.
> (1) If, after making or causing to be made an inquiry or investigation into the conduct of a trustee, it appears to the Superintendent that
> i. a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,

[656] S 13(1), (2) and (3) of the BIA.
[657] Ss 5, 7, 8, 9 and 11 of the Directive 13 R6: Trustee Licensing.
[658] S 29 of the Directive 13 R6: Trustee Licensing.
[659] S 11.7(1) of the CCAA read with ss 2(1) of the BIA.
[660] Ibid.
[661] Mann at 10.

ii. a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or any law with regard to the proper administration of any estate, or
iii. it is in the public interest to do so,

the Superintendent may do one or more of the following:

iv. cancel or suspend the licence of the trustee;
v. place such conditions or limitations on the licence as the Superintendent considers appropriate including a requirement that the trustee successfully take an exam or enrol in a proficiency course;
vi. require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result of the trustee's conduct; and
vii. require the trustee to do anything that the Superintendent considers appropriate and that the trustee has agreed to."[662]

Section 13(1) provides that a person who wishes to obtain a licence to act as a trustee must submit an application to the Superintendent in the prescribed form. Subsection two states that the Superintendent, after an investigation concerning a licensing application, may issue the licence if he is satisfied, based on the prescribed criteria, that the applicant is qualified to obtain the licence.[663] The criteria includes: the applicant is not insolvent or has not been found guilty of misconduct, has paid his or her annual licence fee, and is of a character that would not impair the trustee's capacity to perform his or her fiduciary duties.[664] The Superintendent may refuse to issue a licence to an applicant who is insolvent or has been found guilty of an offence that, in his or her opinion, would impair the applicant's capacity to perform his or her fiduciary duties in terms of section 3 of the Act.[665]

4.4.4. THE POWERS, DUTIES AND LIABILITIES OF THE TRUSTEE/MONITOR

4.4.4.1 THE TRUSTEE

Section 16 stipulates that the trustee shall, as soon as he or she is appointed, give security in cash, or by bond, or suretyship acceptable to the official receiver, for the payment

[662] S 14(1)(a) to (f) of the BIA.
[663] Ibid.
[664] S 13(3) and 13.2(1) of the BIA.
[665] S 13(1) to (3) of the BIA.

and the transfer of all property received by the trustee and faithful performance of his or her duties.[666] The trustee shall take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory.[667] He or she is entitled, for the purpose of making inventory, to enter any premises on which the deeds, books, records, documents or property of the bankrupt may be and even if they are in the possession of an executing officer, a secured creditor or other claimant to them.[668] The trustee shall retain the possession of the property of the bankrupt as if he or she is a receiver of the property appointed by the court.[669] No person is permitted to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form. [670]

Any person who is in possession of any property belonging to the bankrupt in terms of which he or she is not entitled to retain shall be obliged to hand over the property to the trustee.[671] The trustee may summarily dispose of property that is perishable or likely to depreciate rapidly in value; and carry on the business of the bankrupt until the date fixed for the first meeting of creditors.[672] The trustee may, before convening the first meeting of creditors, seek legal opinion and take such court proceedings as he may consider necessary for the recovery or protection of the property of the bankrupt.[673] The trustee is not liable to make any return that the bankrupt was required to make more than one year prior to the commencement of the calendar year.[674] The trustee shall at all reasonable times allow any authorised person to inspect the books and papers of the bankrupt in order to prepare or verify returns that the bankrupt was required to file in terms of the relevant tax legislation.[675] The trustee shall not withdraw any funds from the trust account of an estate without the permission in writing of the inspectors or, on application, the court,

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[666] S 16(1) of the BIA.
[667] S 16(3) of the BIA.
[668] Ibid.
[669] S 16(4) of the BIA.
[670] S 16(5) of the BIA.
[671] S 17(1) of the BIA.
[672] S 18(a)(b) of the BIA.
[673] S 19(1) of the BIA.
[674] S 22 of the BIA.
[675] S 23 of the BIA.

except for the payment of dividends and charges incidental to the administration of the estate.[676]

Section 32 of the BIA specifies that the trustee is not obliged to carry on the business of the bankrupt where, in his view, the value of the assets of the bankrupt that can be realised is insufficient to protect him fully against possible loss; and the creditors or inspectors, on demand made by the trustee, omitted or refused to protect him against such possible loss.[677] Section 33 provides that "the court may make an order providing for the sale of any or all of the assets of the estate of the bankrupt, either by tender, private sale or public auction, setting out the terms and conditions of the sale and directing that the proceeds from the sale are to be used for the purpose of reimbursing the trustee in respect of any costs that may be owing to the trustee or of any moneys the trustee may have advanced as disbursements for the benefit of the estate".[678]

4.4.4.2. THE MONITOR

The Monitor must publish, once a week for two consecutive weeks, a notice containing the prescribed information in a newspaper. The notice must be published within five days after the day from the date on which the court order, placing the company under administration, is made.[679]

The order must be made publicly available in the prescribed manner.[680] A notice to all creditors who have a valid claim against the company of more than $1,000 should be to effect that the order is publicly available.[681] He must prepare a list of creditors and amounts of their claims.[682]

The monitor must review the company's cash-flow statements for reasonableness and file a report with the court on the findings.[683] He or she should investigate and determine the accuracy of the state of the company's business and financial affairs and the cause

[676] S 23(1.3) of the BIA.
[677] S 32 of the BIA.
[678] S 33 of the BIA.
[679] S 23(1)(a)(i)(ii) of the CCAA.
[680] S 23(ii)(A) of the CCAA.
[681] S 23(ii)(A)(B) of the CCAA.
[682] Ibid.
[683] S 23(1)(b) of the CCAA.

of its financial difficulties, and file a report with the court on the findings.[684] The monitor's report must contain an opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the BIA do not apply in respect of the compromise or arrangement.[685]

Section 38 of the BIA states that if the trustee, who refuses to execute the request from the creditor, take any proceedings in favour of the estate, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk.[686] Section 95 provides that a transfer of property, a provision of services, a charge on property, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person in favour of the creditor or in preference of one creditor over the other is void.[687]

Section 101(1) stipulates the following:

> "When a corporation that is bankrupt has paid a dividend, other than a stock dividend, redeemed or purchased for cancellation any of the shares of the capital stock of the corporation or has paid termination pay, severance pay or incentive benefits or other benefits to a director, an officer or any person who manages or supervises the management of business and affairs of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent."

The monitor must advise the creditors if he or she is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the BIA.[688] He or she must advise the court on the reasonableness and fairness of

[684] S 23(1)(c) of the CCAA.
[685] S 23(1)(d.1) of the CCAA.
[686] S 38(1) of the BIA.
[687] S 95(1) of the BIA.
[688] S 23(1)(h) of the CCAA.

any compromise or arrangement that is proposed between the company and its creditors.[689] If the monitor acts in good faith and takes reasonable care in preparing the relevant report, the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.[690]

In a nutshell, section 23 read with section 19 of the CCAA affirms the position that the monitor is an officer of the court and his role is to monitor the company's business and financial affairs to ensure compliance with the law, the court orders, and the terms of the proposal. He must provide information to creditors regarding the claims process and creditors' meeting.[691] The monitor or trustee must be exempt from liability for performing their duties in good faith and with diligence. It is important for the creditors to indemnify them because their ultimate objective is to rescue the company from financial difficulties which would be for the benefit of all parties and not just the company rehabilitated.

4.4.5. THE REMUNERATION OF THE TRUSTEE/MONITOR

Section 39(1) of the BIA stipulates that the remuneration of the trustee shall be determined by ordinary resolution at any meeting of creditors.[692] Subsection two states that, in the instance where the remuneration of the trustee has not been determined under subsection one, the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction, a sum not exceeding seven and a half per cent of the amount remaining out of the realisation of the property of the debtor after the claims of the secured creditors have been satisfied. The trustee will include his or her remuneration in his account if it has not been fixed per the demands of section 39(1).[693] It must be noted that section 39 applies to monitors as insolvency practitioners in respect of their remuneration.[694] However, subsection three provides that, where the trustee has executed the business of the debtor, he may be allowed such special remuneration for such services

[689] S 23(i) of the CCAA.
[690] S 23(2) of the CCAA.
[691] S 19(1) and (2) of the CCAA.
[692] S 39(1) of the BIA.
[693] S 39(2) of the BIA.
[694] Ibid.

by resolution of the creditors or the inspectors.[695] In the case of a proposal, such special remuneration as may be agreed to by the debtor, or approved by the court,[696] may authorise special remuneration subject to the approval of the court. Subsection five determines that the court may, on application by the trustee, or a creditor, or the debtor, make an order increasing or reducing the trustee's remuneration.[697]

In the case of *Winalta Inc., Re*,[698] the debtor company, Winalta Group, opposed the application launched by Deloitte for the approval of its fee as a monitor under the CCAA. This application followed CCAA proceedings at the instruction of HSBC Bank as secured creditor and for a period of six months.[699] Deloitte required to be discharged from its position and paid for services rendered as monitor in the aforesaid proceedings.[700] Winalta took offence at the submitted invoice for payment, which amounted to $1 155 206,05, and demanded an adjustment.[701] The debtor company complained about charges for support and professional staff, duplication, a six percent administration fee charged instead of disbursements, mathematical errors and the cost of an internal quality review.[702] Winalta alleged that the monitor breached its fiduciary duties and demanded a reduction of $75 000.00 as punitive damages. It submitted that the monitor prepared and delivered a net realisation value report to the HSBC that led to HSBC refusing to fund its cost to acquire takeout financing.[703] The monitor agreed to reduce the fee for internal quality review but rejected the submission that the fee was unfair and unreasonable. It asserted that its actions were in accordance with the mandate bestow upon it and fulfilment of its fiduciary obligations.[704]

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[695] S 39(3) of the BIA. S 116(1)(2)(3) of the BIA outlines that, at the first meeting of creditors, the creditors shall appoint up to five inspectors (Board of Inspectors) of the estate of the bankrupt or agree not to appoint any inspectors. No person is eligible to be appointed or to act as an inspector if he or she is party to the proceedings by or against the estate of the bankrupt.
[696] S 39(3) of the BIA.
[697] S 39 (5) of the BIA.
[698] 2011 ABQB 399, 2011 2237 at para 1, herein referred to as "Winalta".
[699] Winalta at para 2.
[700] Idem at 4.
[701] Idem at 4.
[702] Ibid.
[703] Idem at 5.
[704] Idem at 6.

The court remarked that there was little judicial commentary in regard to the fees of a court-appointed monitor. This scarcity is attributed to a limited number of opposed applications for payment of their account.[705] The courts had a tendency to rubberstamp the fees in cases where there was no contestation.[706] Such a lack of judicial scrutiny caused discomfort to many debtor companies insisting on a degree of oversight to ensure the legitimacy of the charged fees for the work completed.[707] In the case of *Sask Q.B,*[708] Judge Kyle was concerned about exorbitant fees that could diminish the chances of company survival. He criticised the monitor's useless report and his or her practice of recording time and billing for junior staff.[709] He complained that the monitor's fee were "offside the local practice".[710]

Given the paucity of judicial commentary on the fees of the monitors, the court had to look at the case law in respect of the fees of the receiver and trustee in bankruptcy.[711] Most notably, it is the case of *Belye v Federal Business Development Bank*,[712] where the court asserted that the compensation of the receiver must be measured by fair and reasonable value of service and that a person must be paid sufficiently as receiver in order to encourage professionals to serve as receivers. The considerations to be taken into account in determining the reasonable remuneration should include the nature, extent, and value of the assets, the difficulties and complications, and the degree of assistance required by the debtor company.[713]

Judge Henry, in the case of *Hess*,[714] took several factors into account in taxing the trustee's account in bankruptcy: the trustee must receive fair compensation for the services rendered; the trustee must not be unjustifiably paid to the detriment of the estate and the creditors; and the estate must be efficiently administered. The application for the court's

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[705] Idem at 18.
[706] Idem at 19.
[707] Ibid.
[708] 2005 SKQB 252 at para 5.
[709] Idem at 11.
[710] Idem at 15.
[711] Winalta at 24.
[712] (1983) 46 C.B.R (N.S.) 244 (N.B.C.A) at para 3.
[713] Idem at 9.
[714] (1977) 23 C.B.R. (N.S) 215 (Ont.S.C) at paras 9-13.

approval of the monitor's fees is no different than that in a receivership or bankruptcy. The court must determine whether the fees are fair and reasonable.[715] There must be a balance between the fair compensation of the monitor and the integrity of the CCAA process.[716]

The initial court order directed that the monitor should be paid a reasonable fee and disbursements at standard rates and charges.[717] In this case, the monitor failed to justify the administration charges, which in many instance may be more or less than the actual disbursements of the monitor, given the fact that a flat rate is normally applied.[718] The monitor is an officer of the court and is therefore obligated to perform his duties as mandated by the court.[719] He or she must account to the court and must therefore act independently and fairly to all creditors, debtors, and other stakeholders.[720]

The court pointed out that the onus rests with the monitor to show that his or her fees are fair and reasonable.[721] It concluded that the monitor in this particular case had exceeded statutory and court ordered authority, and failed to act transparently in dealing with the debtor company.[722] The court instructed the monitor to provide evidence regarding the extra charges for clerical and administrative staff, charges relating to the net realisation value report, and instructed the monitor to issue an account for actual disbursements within 60 days.[723] It is apparent that the remuneration of the trustee, receiver, and monitor in terms of the BIA and the CCAA in Canada is not a subject of contest in respect of whether or not it must be paid before the secured creditors and if it has been fixed under section 39 of the BIA. It is mandatory for the monitor to receive his payment irrespective of whether the company is now in liquidation. The monitor is appointed by the court and

[715] Winalta at 30.
[716] Ibid.
[717] Idem at 41.
[718] Idem at 62.
[719] Idem at 67.
[720] Ibid.
[721] Winalta at 125.
[722] Idem at 126.
[723] Idem at 127.

therefore his or her remuneration is not a subject of discussion. What can be a contentious issue is whether the remuneration and expenses are fair and reasonable.

CHAPTER 5: CONCLUSION

This dissertation deals with the significant question as to whether it is a desirable position that, after conversion of business rescue proceedings to liquidation, the claims of the business rescue practitioner for remuneration and expenses should be treated as concurrent claims as per the decision of Constitutional Court in *Diener N.O. v Minister of Justice and Correctional Services*.[724] The conversion of business rescue proceedings occurs in accordance with section 141(1)(2), where the practitioner arrives at the conclusion during the business rescue proceedings that there is no reasonable prospect of rescuing the company.[725] In line with Diener, the claims of business rescue practitioners will be treated as unsecured claims.[726] The court concluded that business rescue practitioners should be considered as concurrent creditors.[727] Consequently, the practitioner may become liable to contribute to the costs of sequestration in the event that here are insufficient funds in the free residue to pay the costs of liquidation.[728] Section 44 of the Insolvency Act requires the creditors to submit and prove their claims. [729] Therefore, the practitioner as a creditor may be obliged to make a contribution in terms of section 14 of the Insolvency Act read in conjunction with section 106 of the Insolvency Act, in the event that there are insufficient funds in the free residue to pay the costs of liquidation.[730]

The Constitutional Court in *Diener N.O v Minister of Justice and Correctional Services* misinterpreted the law and was wrong in deciding that manner. Section 135 categorically states that the remuneration and expenses of the practitioner will rank above claims of the secured creditors. Although, subsection 4 indicates that if the business rescue proceedings are superseded by a liquidation order, the remuneration and expenses referred to in section 143(5) will have preference over secured claims, except any claims arising

[724] See ch 1, para 1.1
[725] Ibid.
[726] Ibid.
[727] Ibid.
[728] Ibid.
[729] Ibid.
[730] Ibid.

out of the costs of liquidation.[731] The claims arising out of the cost of liquidation will rank above the remuneration and expenses of the practitioner, once the business rescue proceedings are converted to liquidation.[732] However, the remuneration and expenses will be paid out of the "proceeds of the secured assets once cost of liquidation have been settled".[733] This is a contradiction because the claims for the remuneration of the practitioner ranks after the claims arising from the cost of liquidation and in preference to the claims from secured creditors. Section 135 of the Companies Act conflicts with section 97 of the Insolvency Act.[734]

The Constitutional Court did not consider the ramifications of branding the claims of the business rescue practitioner as "concurrent". As such, the default position in the Insolvency Act becomes applicable and on these grounds the business rescue practitioner may become liable for contribution.[735] Notably, section 106 deals with circumstances under which there is no free residue or there is insufficient free residue to meet the cost of sequestration.[736] Within that context that the practitioner may be liable to contribute to the cost of sequestration, quite certainly, the Diener's judgement has far-reaching unintended consequences.[737] When reading from the wording of 135 of the Companies Act, it is evident that it was the intention of the legislature to have the payment of claims for remuneration of business rescue practitioner paid in priority to the claims of the secured creditors, the Constitutional Court in Diener's case rejected this position and decided that the remuneration of business rescue practitioner cannot assume "super preference" over the claims of creditors, whether secured or not, once rescue proceedings are converted to liquidation.[738] This decision represents an error in law.

[731] S 135(4) of the Companies Act.
[732] Diener at para 63.
[733] Idem at para 64.
[734] Ibid.
[735] Ibid.
[736] Ibid.
[737] Ibid
[738] See ch 4, para 4.2.4.

Under the Companies Act, the company may solicit funding from post-commencement finance lenders – using the company's unencumbered assets as security – during the business rescue proceedings and for the purpose of allowing the company to continue trading.[739] The post-commencement finance facility would be used to pay remuneration, reimbursement for expenses or other amounts of money relating to employment which have become due and payable.[740] Section 135 states that the remuneration and expenses of the practitioner will rank above claims of the secured creditors. Although, subsection 4 indicates that if the business rescue proceedings are superseded by liquidation order, the remuneration and expenses referred to in section 143 will have preference over secured claims, except any claims arising out of the costs of liquidation.[741] The claims arising out of the costs of liquidation will rank above the remuneration and expenses of the practitioner once the business rescue proceedings are converted to liquidation.[742] The court concluded that the claims of practitioners are payable out of the free residue after the settlement of the liquidation costs listed in section 97(2).[743]

Except for the expenses incurred by the practitioner during the rescue proceedings, he must still incur expenses in terms of section 141(2) of the Companies Act.[744] These expenses are in respect of the application to discontinue the rescue proceedings and to place the company in liquidation in the event that it becomes apparent that the company cannot be rescued.[745] Obviously, in launching the application for liquidation, the practitioner will incur legal expenses.[746] The expenses in question will have to be paid from the funds available to pay the general costs of liquidation terms of section 97 of the Insolvency Act.[747]

[739] Ibid
[740] Ibid.
[741] Ibid.
[742] Ibid.
[743] Ibid.
[744] Ibid.
[745] Ibid.
[746] Ibid.
[747] Ibid.

The failure of judicial management regime necessitated the overhaul of the entire corporate rescue system in South Africa.[748] The Companies Act of 2008 introduced the business rescue model to substitute the judicial management system.[749] The business rescue practitioner is appointed pursuant to the requirements set out in section 138 of the Companies Act.[750] More importantly, affected or interested parties may apply to court to set the appointment of the business rescue practitioner aside if there are grounds to believe that the business rescue practitioner does not have the required skills and qualifications to rescue the company.[751] The person appointed as a business rescue practitioner must comply with the requirements provided for in section 138 of the Act and consent to the appointment in writing.[752]

The business rescue practitioner must inform the court, the company, and all affected parties, when he applies to court for the termination of the business rescue proceedings and for the company to be placed under liquidation as soon as he realises that the company cannot be rescued.[753] The duties and responsibilities of the rescue practitioner are akin to those of the directors and, as such, the practitioner is liable for a breach and/or dereliction of duties, unless an act or omission arose in the exercise of his or her powers and performance of his or her duties was executed in good faith.[754] If the business rescue practitioner terminates the rescue proceedings on valid grounds, he will be paid after filing the notice of termination with the CIPC or after the court has granted an order of termination if the order for business rescue was sanctioned by the court.[755]

Section 97(2) of the Insolvency Act spells out the costs of sequestration mainly the Sheriff's charges, Master's fees in respect of sequestration, the remuneration of the curator, trustees, and other costs of administration of the insolvent estate that will be paid out of the free residue.[756] At the core is the provisions of section 97, which stipulates that the

[748] See ch 3, para 3.1.
[749] Ibid.
[750] Ibid.
[751] Ibid
[752] See chap3, para 3.2.
[753] See ch 3, para 3.3.
[754] Ibid
[755] Ibid
[756] Ibid

costs of liquidation are paid out of the free residue excluding the costs referred to in section 89 of the Insolvency Act.[757] These costs cannot be paid in preference to the claims of secured creditors because section 89 provides for the costs to which securities are subject.[758]

The business rescue practitioner, as a petitioning creditor may be liable to pay the cost of liquidation in terms of section 14 of the Insolvency Act.[759] Section 106 deals with circumstances under which there is no free residue or there is insufficient free residue to meet the cost of sequestration in terms section 97 of the Insolvency Act.[760] The practitioner may be liable to contribute to the expenses, charges and cost mentioned in section 97.[761]

From the jurisdictions explored, evidently, whether it is a business rescue or administration or company voluntary arrangement, receivership, any of these procedures can be initiated by resolution of company directors or by court order.[762] In South Africa, the old Companies Act prescribed no qualification for the appointment of a judicial manager.[763] The judicial manager was merely required to furnish the Master with security for the performance of his duties.[764] In terms of the new Companies Act, the business rescue practitioner must be a member of legal, accounting or business management profession and should be licensed by the CIPC.[765] A person who require a licence to practice must be of good character and integrity.[766] The practitioner must have the required education and experience sufficient to equip the applicant to perform the functions of a business rescue practitioner.[767] The practitioner is an officer of the Court in terms of section 140(3)(a) of the Companies Act.

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757 Ibid.
758 Ibid.
759 Ibid.
760 Ibid.
761 Ibid.
762 See ch 2,3,4 paras 3.2, 4.2.1, 4.2.2, 4.3.2, 4.4.2
763 See ch 2, para 2.2.
764 Ibid.
765 See ch 3, para 3.1.
766 Ibid.
767 Ibid.

In United Kingdom, insolvency practitioners are required to hold a licence issued by Recognised Professional Bodies in accordance with the Insolvency Licensing Regulations.[768] The applicants must demonstrate to the Licensing Committee that they have necessary and required qualifications and experience to practice as practitioners in terms of Regulation 2.1.[769] In Australia, an administrator must be registered as a liquidator in order to be considered for appointment.[770] The person must be registered with ASIC and should have no commercial interest in the distressed company.[771] Similarly, in Canada, the Superintendent of Bankruptcy is the regulatory authority in terms of the BIA to issue licences to trustees, receivers and monitors.[772] Before issuing a licence, however, the candidate must satisfy the superintendent that he or she meets certain qualifications in terms of Directive No. 13R6, Trustee Licensing.[773] It is clear from the above that in all jurisdictions business rescue practitioner, administrators, trustee, monitor and receiver are required to have licences and educational qualifications. Having such qualifications and experience, they would be able to perform their duties diligently and efficiently – which justifies their remuneration.

In England and Wales, the administrator must, upon appointment, take charge of the assets of the company, and prepare the rescue plan for the approval of the creditors, and subsequently, implement the plan.[774] The company must submit a statement of the company's affairs to the administrator.[775] The administrator shall send notice to persons who should prepare and submit the statement.[776] He enjoys the status of an officer of the court, and any attempt to obstruct him will amount amounts to contempt of court.[777] In Australia, once appointed, the administrator must assume control and management of the company and must further investigate the affairs of the company.[778] Upon completing

[768] See ch 4, para 4.2.3
[769] Ibid.
[770] See ch 4, para 4.3.3.
[771] Ibid.
[772] See ch 4, para 4.4.3.
[773] Ibid.
[774] See ch 4, para 4.2.5
[775] Ibid.
[776] Ibid.
[777] Ibid.
[778] See ch 4, para 4.3.4.

the investigation, he must convene a meeting of the creditors.[779] In that meeting, he must decide if it is in the interest of company to formulate a deed of company arrangements, or terminate the administration, or wind the company up in terms of section 438A of the Act. [780]

The Canadian position is that the trustee shall take possession of the documents and all the property of the bankrupt, and draft an inventory.[781] The trustee is empowered, for the purpose of drafting an inventory, to enter any premises on which documents or property of the bankrupt may be.[782] The trustee shall retain possession of the property of the bankrupt unless the court orders otherwise.[783] The monitor is required to investigate the affairs of the company and determine the cause of its financial difficulties, and file a report with the court on the findings.[784] His report must contain the decision to enter into administration if any, including a compromise or arrangement.[785] The evaluation of various jurisdictions demonstrates that the business rescue practitioner or administrator or monitor or trustee has power once appointed to investigate the affairs of the company and develop a rescue plan.

The remuneration of a provisional judicial manager or final judicial manager had to be determined by the Master of High court under section 434(A) of the old Companies Act.[786] The duties of the manager had to be taken into account in making such determination.[787] Under the new Companies Act, the business rescue practitioner is entitled to payment of remuneration and for expenses in line with the prescribed tariffs in terms of section 143(1) of the Companies Act.[788] He is eligible to receive additional payment if the business rescue plan is adopted or upon rendering certain duties in terms of the agreement.[789]

[779] Ibid.
[780] Ibid.
[781] See ch 4, para 4.4.4.1
[782] Ibid.
[783] Ibid.
[784] See ch 4, para 4.4.4.2.
[785] Ibid.
[786] See ch 2, para 2.3.
[787] Ibid.
[788] See chap 3, para 3.5
[789] Ibid

This dissertation had to undertake a comparative study looking at other jurisdictions such as United Kingdom, Australia, and Canada.[790] These countries have been elected precisely because of their similar corporate rescue regimes to South Africa.[791] More importantly, the remuneration of rescue practitioners in these countries enjoy preference over creditors whether secured or unsecured.[792]

The remuneration of the administrator in the UK should be paid out of the proceeds of the secured assets in terms of Rule 2.47 of the Insolvency Rules 1986.[793] The administrator is entitled to receive remuneration for his services and the remuneration shall be fixed as a percentage of the value of the property with which he has to deal with.[794] The meeting of creditors or a credit committee determines the remuneration of the administrator.[795] The administrator is regarded as a secured creditor because his claim holds priority over any other claim of secured creditors in terms of the Insolvency Rule governing the ranking of claims.[796] Putting it differently, the ex-administrator's remuneration and expense assume priority if he has completed his duties.[797] The remuneration is part of the expenses of the administration.[798] The remuneration must be paid out of the assets passed to the liquidators.[799]

Australian's legislation states that the administrator of a company is entitled to receive remuneration for the work he has satisfactorily executed.[800] The remuneration determination made by members or creditors or a committee of creditors set out the amount of remuneration for the administrator.[801] Where there is no determination of the remuneration, the administrator will be entitled to receive a reasonable amount for the work done.[802] The administrator may receive the maxim amount of $5,000 which excludes Goods and

790 See ch 1, para 1.4.
791 Ibid.
792 See ch 4, paras 4.2.4, 4.3.5, 4.4.5.
793 See ch 4, para 4,2,4
794 Ibid.
795 Ibid.
796 Ibid.
797 Ibid.
798 Ibid.
799 Ibid.
800 See ch 4, para 4.3.5.
801 Ibid.
802 Ibid.

Services Tax.[803] In Australia, the court affirmed the position that the administrator must be paid as long as it is fair and reasonable, and the work performed is commensurate to the remuneration required.[804]

The meeting of the creditors determines the remuneration of the trustee by ordinary resolution under section 39(1) of the BIA.[805] Where the remuneration of the trustee has not been determined under subsection one, the trustee may receive his remuneration out of the realisation of the property of the debtor after the claims of the secured creditors have been satisfied.[806] Court asserted that the fees of a court-appointed monitor are not in question.[807] Several courts decided that the compensation of the trustee, monitor and receiver must be measured by fair and reasonable value of service.[808] The person must be paid sufficiently as trustee, monitor and receiver in order to encourage professionals to serve as receivers.[809] The considerations to be taken into account in determining the reasonable remuneration should include the nature, extent, and value of the assets; the difficulties and complications; and the degree of assistance required by the debtor company.[810] A similar observation can be made that in all countries where the subject has been investigated, the business rescue practitioner or administrator or trustee or monitor or receiver is the officer of the court who is entitled to remuneration.

It is beyond doubt that that the failure to give priority to the remuneration of the practitioner has the propensity to erode confidence in the institution of business rescue. The practitioners may choose not take appointments on the grounds that they may not recover their costs and fees and, consequently, the purpose for which chapter 6 of the Companies Act

[803] Ibid.
[804] Ibid.
[805] Ibid.
[806] Ibid.
[807] Ibid.
[808] Ibid.
[809] Ibid.
[810] Ibid.

of 2008 was created will be defeated. The belief that practitioners will still take appointments where there are no prospects of rescuing the company is unconvincing and unreasonable.[811]

As alluded to above, the Constitutional Court erred because it should have considered the option of advanced payment of the business rescue practitioner.[812] Putting it differently, the business rescue practitioner must be paid first in the instance where the business rescue process fails.[813] Considering the purpose of business rescue and assessing the risk where there is no residue from which to pay the practitioner, it was wrong for the court to arrive at a decision of that nature.[814] It is submitted that the court should have accepted the argument that the practitioner takes on the risks associated with the business rescue process and, for this reason, the business rescue practitioner's remuneration must have priority and be payable prior to fees due by virtue of liquidation.[815]

It is also recommended that, for the mere fact that the business rescue practitioners, administrators, trustee, monitor and receivers are required to undergo rigorous competence assessment and meet stringent criteria before being licensed is a reasonable justification that the insolvency practitioner's remuneration must be paid in priority to all secured and unsecured creditors. It can be assumed that it was the intention of the legislature to legislate the licencing and appointment of insolvency practitioners (business rescue practitioner, administrator, monitor, trustee and receiver) in affirmation and recognition of their profession and skills in contributing to economic sustainability. Therefore, claims for remuneration of the monitor or trustee must be paid from the secured assets. The position of the monitor in Canada is akin to the business rescue practitioner as an officer of the court in South Africa in terms of 140(3) of the Companies Act.[816] It is recommended that

[811] Idem at paras 67, 68 and 69.
[812] Anderson "Business rescue practitioner wants to be front of the queue when rescue fails" *Business Day* 2018-09-07, available at https://www.businesslive.co.za/bd/business-and-economy/2018-09-07-business-rescue-practitioner-wants-to-be-front-of-the-queue-when-rescues-fail, herein referred to as "Anderson".
[813] Idem at paras 2 and 3.
[814] Diener at para 70.
[815] Ibid.
[816] 140(3)(a) of the Companies Act.

section 97 of the insolvency Act of 1936 be amended, and subsection 2 must read as follows:

> "Thereafter any balance of the free residue shall be applied in defraying the costs of the **"business rescue proceedings**" including the costs mentioned in subsection (I) of section eighty-nine.

Section 89 of the Insolvency Act must be amended to include the costs of business rescue paid out of the secured assets.

The insolvency Act makes provision for the payment of non-related claims by secured creditors in section 96, which relates to the payment of funeral expenses of the insolvent prior to the submission of the distribution plan in respect of the insolvent estate to the Master in terms of section 91. On this ground, it is recommended that the fee of the business rescue practitioner should be paid in preference to the creditors whether secured or not.

This dissertation recommends that section 135(4) of the Companies Act be amended to the effect that once there is conversion of business proceedings to liquidation, the cost of liquidation must not rank above the claims for the remuneration and expenses of the business rescue practitioner.

Insurance companies offering professional indemnity policies to protect insolvency professionals, directors of companies and key employees against the claims arising from negligent acts, errors, or omissions during the performance of their duties. It is recommended that insurance companies write new special policies to cover the fees, remuneration, and expenses of the business rescue practitioner incurred during the execution of his duties as a business rescue practitioner in case the rescue fails.[817]

It is recommended that South Africa follow both the UK and Australian rescue regimes in so far as these relate to the payment of administrators, who are equivalent to business rescue practitioners in South Africa. The business rescue practitioner in South Africa, like

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[817] Notes of Professional Indemnity Insurance available at https://wwww.marsh.com/uk/services/financial-professional-liability/solution-for-insolvency-practitioners.htm (accessed on 29 June 2020).

administrator in the UK, must be entitled to receive a fixed remuneration in the form of a percentage based on the assets value of the company.[818] Invariably, the creditors must set up the committee that should determine the remuneration of the business rescue practitioner or creditors may, by way of resolution, determine such remuneration.[819] Alternatively, the Australian model can be followed by South Africa in that the amount of remuneration may be determined by the board of directors in consultation with the shareholders and creditors in case of voluntary business rescue, or by the creditors if it is compulsory business rescue.[820] The court may make a determination in this respect.[821]

Like in Canada, the remuneration of the business rescue practitioner in South Africa must be determined by resolution of the board or creditors.[822] Advisably, it must be filed with the Master of High Court or submitted to the Court for approval.[823] The remuneration of the business rescue practitioner must be paid before the claims of the secured creditors and as imposed by law, be fixed similar to the Canadian rescue system under section 39 of the BIA.[824] It must be mandatory for the business rescue practitioner to receive his payment irrespective of whether the business rescue has been converted into liquidation.[825] In Canada, the monitor is entitled to receive his or her remuneration whether or not the company is in liquidation.[826] The monitor is appointed by the court and therefore his or her remuneration is not a subject of discussion. South Africa can follow this trajectory.[827]

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[818] See ch 4, para 4.2.4.
[819] Ibid.
[820] See ch 4, para 4.3.5.
[821] Ibid.
[822] See ch 4, para 4.4.5.
[823] Ibid.
[824] Ibid.
[825] Ibid.
[826] Ibid.
[827] Ibid.

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